Chapter 608 Drafting Committee Working Draft Dated ~~January 15, 2009~~July 30, 2011 [1]

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FLORIDA REVISED UNIFORM LIMITED LIABILITY COMPANY ACT

[ARTICLE 1

GENERAL PROVISIONS][2]

SECTION 101.[3] **SHORT TITLE.** This act may be cited as the Florida Revised Uniform Limited Liability Company Act.

SECTION 102. DEFINITIONS.[3] In this act:

(1) "Act" means the Florida Revised Limited Liability Company Act of 20[12], as amended.]

(2) "Authorized representative" means one or more persons authorized by a member of a limited liability company to form a limited liability company by executing and filing its certificate of organization. In the case of an existing limited liability company, the term "authorized representative" means a manager in the case of a manager-managed limited liability company, or a member, in the case of a member-managed limited liability company, who has the authority to file with the Department of State the instrument required by the applicable provisions of this act, or another agent of the limited liability company who has been granted the authority to file the instrument by the managers, in the case of a manager-managed limited liability company, or the members, in the case of a member-managed limited liability company.

(3) "Certificate of organization" means the certificate required by Section 201. The term includes the certificate as amended or restated.

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[1] ~~Reflects comments and actions through November 12, 2008 meeting. We stopped at end of Sec. 110(c).~~Contains changes made by the Committee through at its meeting in Miami on July 23, 2011.

[2] Article and Caption references to be left in draft to assist in navigation. To consider whether captions should be used (as in Chap. 607). (STYLE SUBCOMMITTEE)

[3] These Section and subsection references will be changed to "Florida" statute" style in a final draft. Note that some subsection references in this draft are in Florida style already because they consist of provisions taken from existing Florida statutes. This was done to save effort when converting the entire draft to Florida style at a later time.(STYLE SUBCOMMITTEE)

[3] ~~Lou Conti may have some additional notes and comments on this section.~~

(~~2~~4) ~~[~~"Contribution"~~]~~[4] means ~~[~~any benefit~~]~~[5] provided by a person to a limited liability company:

(A) in order to become a member upon formation of the limited liability company and in accordance with an agreement between or among the persons that have agreed to become the initial members of the limited liability company;

(B) in order to become a member after formation of the company and in accordance with an agreement between the person and the limited liability company; or

(C) in the person's capacity as a member and in accordance with the operating agreement or an agreement between the member and the limited liability company.

~~(3~~[(5) "Day" means a calendar day.][4]

(5) "Debtor in bankruptcy" means a person that is the subject of:

(A) an order for relief under Title 11 of the United States Code or a successor statute of general application; or

(B) a comparable order under federal, state, or foreign law governing insolvency.

(~~4~~6) "Designated office" means:

(A) the office that a limited liability company is required to designate and maintain under Section 113; or

(B) the principal office of a foreign limited liability company.

(~~5~~7) "Distribution", except as otherwise provided in Section 405(~~g~~f), means a transfer of money or other property from a limited liability company to another person on account of a transferable interest ~~[~~in accordance with the ~~limited liability company~~operating agreement or otherwise~~?]~~.[6]

(~~6~~8) "Effective", with respect to a record required or permitted to be delivered to the Department of State for filing under this act, means effective under Section 205(c).

(~~7~~9) "Foreign limited liability company" means an unincorporated entity formed under the law of a jurisdiction other than this state and denominated by that law as a limited liability company.

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[4] ~~Is Sec. 402 inconsistent (since 402 implies it is all-inclusive list of permitted forms of contributions)?~~

[5] ~~To be discussed: is this too broad? (Consider actual loan or guaranty or commitment to make one, as well as giving an option or warrant, conditional contract rights, etc.). Should there be a specific "capital contribution" definition? Depends in part on whether default distribution structure will refer to unreturned capital.~~

[4] Proposed by DOS. Once added renumber subsections.

(~~8~~10) "Limited liability company" [or "company"][5], except in the phrase "foreign limited liability company", means an entity formed under this act. [or which has entity attributes substantially similar to a limited liability company][6]

(~~9~~11) "Manager" means a person that under the operating agreement of a manager-managed limited liability company is responsible, alone or in concert with others, for performing the management functions stated in Section 407(c).

(~~10~~12) "Manager-managed limited liability company" means a limited liability company that qualifies under Section 407(a).

(~~11~~13) "Member" means a person that has become a member of a limited liability company under Section 401 and has not dissociated under Section 602.

(~~12~~14) "Member-managed limited liability company" means a limited liability company that is not a manager-managed limited liability company.

(~~13~~15) "Operating agreement" means the agreement, whether or not referred to as an operating agreement and [whether oral, in a record, implied, or in any combination thereof,][7] of all the members of a limited liability company, including a sole member, concerning the matters described in Section 110(a). The term includes the agreement as amended or restated. [8]

~~(14) "Organizer" means a person that acts under Section 201 to form a limited liability company. (15)~~16) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(~~16~~17) "Principal office" means the principal executive office of a limited liability company or foreign limited liability company, whether or not the office is located in this state.

(~~17~~18) "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.

(~~18~~19) "Sign" means, with the present intent to authenticate or adopt a record:

~~[6] To discuss deleting or adding words "or otherwise". (Consider how used in Sections 404-406).~~

[5] Suggested but not acted upon.

[6] Suggested by Stu Ames but not acted upon yet.

[7] Consider Statute of Frauds issue, ordering rule (written versus oral provisions), enforceability, amendment requirements (see 608.423 of existing law). These should be addressed elsewhere if not here. Also consider whether all "waivable" provisions under Section 110 may be modified by an oral agreement.

[8] Compare Delaware definition of LLC Agreement: should we address enforceability, signing requirements, etc.? If so, these would probably be better addressed as substantive provisions in Section 110.

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(~~19~~20) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(~~20~~21) "Transfer" includes an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, gift, and transfer by operation of law.

(~~21~~22) "Transferable interest" means the right, as originally associated with a person's capacity as a member, to receive distributions from a limited liability company in accordance with the operating agreement, whether or not the person remains a member or continues to own any part of the right.

(~~22~~23) "Transferee" means a person to which all or part of a transferable interest has been transferred, whether or not the transferor is a member.

Uniform Comment[9]

This Section contains definitions for terms used throughout the ~~Act~~act, while Section 1001 contains definitions specific to Article 10's provisions on mergers, conversions [and domestications.][10] Section 405(g) contains an exception to the definition of "distribution," which is specific to Section 405.

Paragraph (1) [Certificate of organization] – The original ULLCA and most other LLC statutes use "articles of organization" rather than "certificate of organization." This ~~Act~~act purposely uses the latter term to signal that: (i) the certificate merely reflects the existence of an LLC (rather than being the locus for important governance rules); and (ii) this document is significantly different from articles of *incorporation*, which have a substantially greater power to affect *inter se* rules for the corporate entity and its owners. For the relationship between the certificate of organization and the operating agreement, see Section 112(d).

Paragraph (2) [Contribution] – This definition serves to distinguish capital contributions from other circumstances under which a member or would-be member might provide benefits to a limited liability company (e.g., providing services to the LLC as an employee or independent contractor, leasing property to the LLC). The definition contemplates three typical situations in which contributions are made, and for each situation establishes two

[9] Change paragraph references to match definitions in later draft. (COMMENT SUBCOMMITTEE)

[10] Any references in comments to domestications need to be deleted (assuming Committee determines to delete this transaction from uniform act). Note that the issue of domestication is to be reconsidered (see Reporter's Note immediately preceding Section 1001. (COMMENT SUBCOMMITTEE)

"markers" to identify capital contributions – the purpose for which the contributor makes the contribution and the agreement that contemplates the contribution:

circumstance	**purpose/cause of providing benefits**	**the relevant agreement**
pre-formation deal among would-be initial members [Paragraph 2(A)]	in order to become initial member(s)	agreement among would-be initial members
deal between an existing LLC and would-be member [Paragraph 2(B)]	in order to become a member	agreement between the LLC and the would-be member
member contribution [Paragraph 2(C)]	in member's capacity as a member	operating agreement or an agreement between the member and the LLC

This definition does not encompass capital raised from transferees, which is sometimes provided for in operating agreements. In such circumstances, the default rules for liquidating distributions should be altered accordingly. *See* Section ~~708~~714(b)(1) ("referring to contributions made by a member and not previously returned").

Paragraph (7) [Foreign limited liability company] – Some statutes have elaborate definitions addressing the question of whether a non-U.S. entity is a "foreign limited liability company." The NY statute, for example, defines a "foreign limited liability company" as:

an unincorporated organization formed under the laws of any jurisdiction, including any foreign country, other than the laws of this state (i) that is not authorized to do business in this state under any other law of this state and (ii) of which some or all of the persons who are entitled (A) to receive a distribution of the assets thereof upon the dissolution of the organization or otherwise or (B) to exercise voting rights with respect to an interest in the organization have, or are entitled or authorized to have, under the laws of such other jurisdiction, limited liability for the contractual obligations or other liabilities of the organization.

N.Y. LIMIT LIAB CO. LAW § 102(k) (McKinney 2006). ULLCA § 101(8) takes a similar but less complex approach ("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"). This ~~Act~~act follows Delaware's still simpler approach. DEL. CODE ANN. tit. 6, § 18-101(4) (2006) ("denominated as such").

Paragraph (8) [Limited liability company] – This definition makes no reference to a limited liability company having members upon formation, but Section 201 does. [For a detailed discussion of the "shelf LLC" issue, see the Comment to Section 201.][11]

Paragraph (9) [Manager] – The ~~Act~~act uses the word "manager" as a term of art, whose applicability is confined to manager-managed LLCs. The phrase "manager-managed" is itself a term of art, referring only to an LLC whose operating agreement refers to the LLC as such. Paragraph 10 (defining "manager-managed limited liability company"). Thus, for purposes of this ~~Act~~act, if the members of a *member*-managed LLC delegate plenipotentiary management authority to one person (whether or not a member), this ~~Act~~act's references to "manager" do not apply to that person.

This approach does have the potential for confusion, but confusion around the term "manager" is common to almost all LLC statutes. The confusion stems from the choice to define "manager" as a term of art in a way that can be at odds with other, common usages of the word. For example, a member-managed LLC might well have an "office manager" or a "property manager." Moreover, in a manager-managed LLC, the "property manager" is not likely to be a manager as the term is used in many LLC statutes. *See, e.g.*, *Brown v. MR Group, LLC*, 278 Wis.2d 760, 768-9, 693 N.W.2d 138, 143 (Wis.App. 2005) (rejecting a party's urging to use the dictionary definition of "manager" in determining coverage of a policy applicable to a limited liability company and its "managers" and relying instead on the meaning of the term under the Wisconsin LLC act).

Under this ~~Act~~act, the category of "person" is not limited to individuals. Therefore, a "manager" need not be a natural person. After a person ceases to be a manager, the term "manager" continues to apply to the person's conduct while a manager. *See* Section 407(c)(7).

Paragraph (10) [Manager-managed] – This ~~Act~~act departs from most LLC statutes (including the original ULLCA) by authorizing a private agreement (the operating agreement) rather than a public document (certificate or articles of organization) to establish an LLC's status as a manager-managed limited liability company. Using the operating agreement makes sense, because under this ~~Act~~act managerial structure creates no statutory power to bind the entity. *See* Section 301 (eliminating statutory apparent authority). The only direct consequences of manager-managed status are *inter se* – principally the triggering of a set of rules concerning management structure, fiduciary duty, and information rights. Sections 407 – 410. The management structure rules are entirely default provisions – subject to change in whole or in part by the operating agreement. The operating agreement can also significantly affect the duty and rights provisions. Section 110.

For pre-existing limited liability companies that eventually become subject to this ~~Act~~act, Section 1104(c) provides that "language in the limited liability company's articles of organization designating the company's management structure will operate as if that language were in the operating agreement." For limited liability companies formed under this ~~Act~~act, the typical method to select manager-managed status will be an explicit provision of the operating

[11] Since shelf filings will not be permitted, references thereto need to be deleted or changed throughout comments. (COMMENT SUBCOMMITTEE)

agreement. However, a reference in the certificate of organization to manager-management might be evidence of the contents of the operating agreement. *See* Comment to Section 112(b).

An LLC that is "manager-managed" under this definition does not cease to be so simply because the members fail to designate anyone to act as a manager. In that situation, absent additional facts, the LLC is manager-managed and the manager position is vacant. Non-manager members who exercise managerial functions during the vacancy (or at any other time) will have duties as determined by other law, most particularly the law of agency.

Paragraph 10(A) and (B) – In these paragraphs, the phrases "manager-managed" and "managed by managers" are "magic words" – i.e., for either subparagraph to apply, the operating agreement must include precisely the required language. However, the word "expressly" does not mean "in writing" or "in a record." This ~~Act~~act permits operating agreements to be oral (in whole or in part), and an oral provision of an operating agreement could contain the magic words. This ~~Act~~act also recognizes that provisions of an operating agreement may be reflected in patterns of conduct.

Oral and implied agreements invite memory problems and "swearing matches." Section 110(a)(4) empowers the operating agreement to determine "the means and conditions for the amending the operating agreement."

Paragraph 10(C) – In contrast to Paragraphs 10(A) and (B), this provision does not contain "magic words" and considers instead all terms of the operating agreement that expressly refer to management by managers.

Paragraph 11 [Member] – After a person has been dissociated as a member, Section 602, the term "member" continues to apply to the person's conduct while a member. *See* Section 603(b).

Paragraph 12 [Member-managed limited liability company] – A limited liability company that does not effectively designate itself a manager-member limited liability company will operate, subject to any contrary provisions in the operating agreement, under statutory rules providing for management by the members. Section 407(a). For a discussion of potential confusion relating to the term "manager", see the Comment to Paragraph 9 (Manager).

Paragraph (13) [Operating Agreement] – This definition must be read in conjunction with Sections 110 through 112, which further describe the operating agreement. An operating agreement is a contract, and therefore all statutory language pertaining to the operating agreement must be understood in the context of the law of contracts.

The definition in Paragraph 13 is very broad and recognizes a wide scope of authority for the operating agreement: "the matters described in Section 110(a)." Those matters include not only all relations *inter se* the members and the limited liability company but also all "activities of the company and the conduct of those activities." Section 110(a)(3). Moreover, the definition puts no limits on the form of the operating agreement. To the contrary, the definition contains the phrase "whether oral, in a record, implied, or in any combination thereof".

This ~~Act~~act states no rule as to whether the statute of frauds applies to an oral operating agreement. Case law suggests that an oral agreement to form a partnership or joint venture with a term exceeding one year is within the statute. *E.g. Abbott v. Hurst*, 643 So.2d 589, 592 (Ala. 1994) ("Partnership agreements, like other contracts, are subject to the Statute of Frauds. A contract of partnership for a term exceeding one year is within the Statute of Frauds and is void unless it is in writing; however, a contract establishing a partnership terminable at the will of any partner is generally held to be capable of performance by its terms within one year of its making and, therefore, to be outside the Statute of Frauds.") (citations omitted); Pemberton *v. Ladue Realty & Const. Co.*, 362 Mo. 768, 770-71, 244 S.W.2d 62, 64 (Mo. 1951) (rejecting plaintiff's contention that mere part performance sufficed to take the oral agreement outside the statute and holding that partnership was therefore at will); *Ebker v. Tan Jay Int'l, Ltd.*, 739 F.2d 812, 827-28 (2d Cir.1984) (same analysis with regard to a joint venture). However, it is not possible to form an LLC without someone signing and delivering to the filing officer a certificate of organization in record form, Section 201(a), and the ~~Act~~act itself then establishes the LLC's duration. Subject to the operating agreement, that duration is perpetual. Section 104(c). An oral provision of an operating agreement calling for performance that extends beyond a year might be within the one-year provision – e.g., an oral agreement that a particular member will serve (and be permitted to serve) as manager for three years.

An oral provision of an operating agreement which involves the transfer of land, whether by or to the LLC, might come within the land provision of the statute of frauds. *Froiseth v. Nowlin*, 156 Wash. 314, 316, 287 P. 55. 56 (Wash. 1930) ("[The land provision] applies to an oral contract to transfer or convey partnership real property, and the interest of the other partners therein, to one partner as an individual, as well as to a parol contract by one of the parties to convey certain land owned by him individually to the partnership, or to another partner, or to put it into the partnership stock.") (quoting 27 CORPUS JURIS 220).").

In contrast, the fact that a limited liability company owns or deals in real property does not bring within the land provision agreements pertaining to the LLC's membership interests. Interests in a limited liability company are personal property and reflect no direct interest in the entity's assets. Re-ULLCA §§ 501 & 102(21). Thus, the real property issues pertaining to the LLC's ownership of land do not "flow through" to the members and membership interests. See, e.g., *Wooten v. Marshall*, 153 F. Supp. 759, 763-764 (S.D. N.Y. 1957) (involving an "oral agreement for a joint venture concerning the purchase, exploitation and eventual disposition of this 160 acre tract" and stating "[t]he real property acquired and dealt with by the venturers takes on the character of personal property as between the partners in the enterprise, and hence is not covered by [the Statute of Frauds]."

The operating agreement may comprise a number of separate documents (or records), however denominated, unless the operating agreement itself provides otherwise. Section 110(a)(4). Absent a contrary provision in the operating agreement, a threshold qualification for status as part of the "operating agreement" is the assent of all the persons then members. An agreement among less than all of the members might well be enforceable among those members as parties, but would not be part of the operating agreement.

An agreement to form an LLC is not itself an operating agreement. The term "operating agreement" presupposes the existence of members, and a person cannot have "member" status until the LLC exists. However, the ~~Act~~act's very broad definition of "operating agreement" means that, as soon as a limited liability company has any members, the limited liability company has an operating agreement. For example, suppose: (i) two persons orally and informally agree to join their activities in some way through the mechanism of an LLC, (ii) they form the LLC or cause it to be formed, and (iii) without further ado or agreement, they become the LLC's initial members. The LLC has an operating agreement. "[A]ll the members" have agreed on who the members are, and that agreement – no matter how informal or rudimentary – is an agreement "concerning the matters described in Section 110(a)." (To the extent the agreement does not provide the *inter se* "rules of the game," this ~~Act~~act "fills in the gaps." Section 110(b).)

The same result follows when a person becomes the sole initial member of an LLC. It is not plausible that the person would lack any understanding or intention with regard to the LLC. That understanding or intention constitutes an "agreement of all the members of the limited liability company, including a sole member."

It may seem oxymoronic to refer an "agreement of . . . a sole member," but this approach is common in LLC statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 29-601 (14)(b) (2006) (defining operating agreement to mean "in the case of a limited liability company that has a single member, any written or oral statement of the member made in good faith"); COLO. REV. STAT. ANN. § 7-80-102 (11)(b)(I) (West 2006) (defining operating agreement to include, in the case of a single member LLC "[a]ny writing, without regard to whether such writing otherwise constitutes an agreement … signed by the sole member"; N.H. REV. STAT. ANN. § 304-c:1 (VI) (2006) (defining limited liability company agreement to include "a document adopted by the sole member"); OR. REV. STAT. ANN. § 63.431(2) (2005) (vesting the "power to adopt, alter, amend or repeal an operating agreement of … a single member limited liability company, in the sole member of the limited liability company"); R.I. GEN. LAWS § 7-16-2 (19) (2005) (stating that the term operating agreement "includes a document adopted by the sole member of a limited liability company that has only one member"); and WASH. REV. CODE ANN. § 25.15.005 (5) (West 2006): (defining limited liability company agreement to include "any written statement of the sole member").

This re-definition of "agreement" is a function of "path dependence." By the time single-member LLCs became widely accepted, almost all LLC statutes were premised on the LLC's key organic document being the operating agreement. Because a key function of the operating agreement is to override statutory default rules, it was necessary to make clear that a sole member could make an operating agreement. Such an agreement may also be of interest to third parties, because the operating agreement binds the LLC. Section 111(a).

In light of Paragraph 13's broad definition, it is possible to argue that any activity involving unanimous consent of the members becomes part of the operating agreement. For example, if pursuant to an operating agreement all the members consent to the redemption of one-half of the managing-member's transferable interest, does that action constitute an addition to the agreement?

Typically, such questions will turn on the practical issue of whether the unanimous consent pertained solely to a single event (now past) or also to future circumstances (now in controversy) rather than on the semantic question of whether the operating agreement has been amended. Occasionally, however, the amendment *vel non* question could have practical import. For example, if the operating agreement entitles a non-member to approve (or veto) amendments, see Section 112(a), the members and the non-member might see the matter quite differently.

Careful drafting of veto provisions can help avoid controversy – e.g., by defining with specificity the type of decisions subject to the veto. On the question of how far a written (or "in a record") operating agreement can go to prevent oral or implied-in-fact terms, see Section 110(a)(4).

If it is necessary for a court to decide whether the contents of a matter approved by unanimous consent have become part of the operating agreement, the court should rely on principles of contract interpretation and look:

- first, at the manifestations of the members, including:
  - the manifestations made to give the unanimous consent; and
  - any terms of the operating agreement (e.g., terms specifying how matters become part of the operating agreement); and
- second, at whether, viewed from the perspective of a reasonable person in the position of the members giving consent, the consent was intended to incorporate the matter into the ongoing "rules of the game" or merely take some particular action as already permitted by those rules.

Of course, if all the members have the same understanding, the reasonableness *vel non* of that understanding is irrelevant and the shared meaning governs. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 201(1) (1981).

Paragraph (14) [Organizer][12] – If an LLC is to have one or more members when the filing officer files the certificate of organization, the organizer: (i) acts on behalf of the person or persons who will become the LLC's initial members, Section 401(a) and (b); and (ii) has no function other than to compose, sign, and deliver to the filing officer for filing the certificate of organization. Section 201(a). If an LLC is to have its first member sometime *after* the filing officer files the certificate of organization, the organizer has the power to admit the initial member or members, Section 401(c), and to sign and deliver for filing the notice of initial membership described in Section 201(e)(1). Whether in this latter category of circumstances the organizer acts on behalf of the initial member or members is determined under ordinary principles of agency law and depends on the facts of each situation.

Paragraph (20) [Transfer] –The reference to "transfer by operation of law" is significant in connection with Section 502 (Transfer of Transferable Interest). That section severely restricts a transferee's rights (absent the consent of the members), and this definition

[12] Note that this term was deleted. Change other paragraph references accordingly.(COMMENT SUBCOMMITTEE)

makes those restrictions applicable, for example, to transfers ordered by a family court as part of a divorce proceeding and transfers resulting from the death of a member. The restrictions also apply to transfers in the context of a member's bankruptcy, except to the extent that bankruptcy law supersedes this ~~Act~~act.

Paragraph (21) [Transferee] – "Transferee" has displaced "assignee" as the Conference's term of art.

SECTION 103. KNOWLEDGE; NOTICE.[9]

(a) A person knows a fact when the person:

(1) has actual knowledge of it; or

(2) is deemed to know it under subsection (d)(1) [or (d)(2)] or law other than this act.

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

(1) has reason to know the fact from all of the facts known to the person at the time in question; or

(2) is deemed to have notice of the fact under subsection [(d)(~~2~~3);]

(c) A person notifies another of a fact 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 that is not a member is deemed:

(1) to know of a limitation on authority to transfer real property as provided in Section 302(g); ~~10~~13

(2) to know of a limitation with respect to the authority of a person holding a company position as provided in Section 302(a)(2), 90 days after a statement of agency filed under Section 302(a)(2) becomes effective, or the authority, or limitations on the authority, of a specific person as provided in Section 302(a)(3), 90 days after a statement of agency filed under Section 302(a)(3) becomes effective; and

(~~2~~3) to have notice of a limited liability company's:

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[9] ~~Lou Conti may have additional notes or comments to report.~~

[10] ~~Discuss broader application to other matters covered by Section 302. Discuss~~[13] Need to further consider and discuss constructive notice provisions of ~~current Florida law regarding management structure and grandfathering of same if we change. Many other states still require management structure to be described in public filing. Consider apparent authority issues (*see e.g.* Section 301)~~existing Florida law regarding changes or addition to statement of agency and effect of filings with county real estate records clerk (See 608.407(5) and (6)).

(A) ~~dissolution, 90 days after a statement of dissolution under Section 702(b)(2)(A) becomes effective;~~ declaration in its certificate of organization that it is "manager-managed" in accordance with Section 201(c); provided that if such a declaration has been added or changed by an amendment or restatement of the certificate of organization, notice of the addition or change shall not become effective until 90 days after the effective date of such amendment or restatement;

(B) ~~termination~~dissolution, 90 days after a ~~statement of termination~~certificate of dissolution filed under Section ~~702(b)(2)(F)~~706 becomes effective; ~~and~~

(C) termination, 90 days after a statement of termination Section 708 becomes effective; and

(D) merger, conversion,[or domestication,][14] 90 days after articles of merger, conversion, [or domestication] under ~~[Article] 10~~ss. 1001 through _____ become effective.

Uniform Comment

This section is substantially slimmer than the corresponding provisions of previous uniform acts pertaining to business organizations (RUPA, ULLCA, and ULPA (2001)). Each of those acts borrowed heavily from the comparable UCC provisions. For the most part, this ~~Act~~act relies instead on generally applicable principles of agency law, and therefore this section is mostly confined to rules specifically tailored to this ~~Act~~act.

Several facets of this section warrant particular note. First, and most fundamentally, because this ~~Act~~act does not provide for "statutory apparent authority," see Section 301, this section contains no special rules for attributing to an LLC information possessed, communicated to, or communicated by a member or manager.

Second, the section contains no generally applicable provisions determining when an organization is charged with knowledge or notice, because those imputation rules: (i) comprise core topics within the law of agency; (ii) are very complicated; (iii) should not have any different content under this ~~Act~~act than in other circumstances; and (iv) are the subject of considerable attention in the new Restatement (Third) of Agency.

Third, this ~~Act~~act does not define "notice" to include "knowledge." Although conceptualizing the latter as giving the former makes logical sense and has a long pedigree, that

[14] To delete?

conceptualization is counter-intuitive for the non-*aficionado*. In ordinary usage, notice has a meaning separate from knowledge. This ~~Act~~act follows ordinary usage and therefore contains some references to "knowledge or notice."

Subsection (a)(2) – In this context, the most important source of "law other than this act" is the common law of agency.

Subsection (b)(1) – The "facts known to the person at the time in question" include facts the person is deemed to know under subsection (a)(2).

[Subsection (d)(~~2~~3)] – Under this ~~Act~~act, the power to bind a limited liability company to a third party is primarily a matter of agency law. Section 301, Comment. The constructive notice provided under this paragraph will be relevant if a third party makes a claim under agency law that someone who purported to act on behalf of a limited liability company had the apparent authority to do so.

SECTION 104. NATURE, PURPOSE, AND DURATION OF LIMITED LIABILITY COMPANY.

(a) A limited liability company is an entity distinct from its members.

(b) A limited liability company may have any lawful purpose, [regardless of whether for profit.][15]

(c) A limited liability company has perpetual duration.

Uniform Comment

Subsection (a) – The "separate entity" characteristic is fundamental to a limited liability company and is inextricably connected to both the liability shield, Section 304, and the charging order provision, Section 503.

Subsection (b) – The phrase "any lawful purpose, regardless of whether for profit" means that: (i) a limited liability company need not have any business purpose; and (ii) the issue of profit *vel non* is irrelevant to the question of whether a limited liability company has been validly formed. Although some LLC statutes continue to require a business purpose, this ~~Act~~act follows the current trend and takes a more expansive approach.

The expansive approach comports both with the original ULLCA and with ULPA (2001). *See* ULLCA §§ 112(a) (captioned with reference to "Nature of Business" and permitting "any lawful purpose, subject to any law of this State governing or regulating business") and 101(3) (defining "Business" as including "every trade, occupation, profession, and other lawful purpose, whether or not carried on for profit"); ULPA (2001) § 104(b) (permitting a limited partnership to

[15] DOS proposes deleting this clause. Stu Ames has suggested this may imply not for profit LLC not permitted (clarify DOS' intention here).

be organized for any "lawful" purpose). *Compare* UPA § 6 (defining a general partnership as organized for profit), RUPA § 101(6) (same), and RULPA (1976/85) § 106 (delineating the "Nature of [a limited partnership's] Business" by linking back to "any business that a partnership without limited partners may carry on").

The subsection does not bar a limited liability company from being organized to carry on charitable activities, and this act does not include any protective provisions pertaining to charitable purposes. Those protections must be (and typically are) found in other law, although sometimes that "other law" appears within a state's non-profit corporation statute. *See, e.g.*, MINN. STAT. § 317A.811 (2006) (providing restrictions on charitable organizations that seek to "dissolve, merge, or consolidate, or to transfer all or substantially all of their assets" but imposing those restrictions only on "corporations," which are elsewhere defined as corporations incorporated under the non-profit corporation act).

Subsection (c) – In this context, the word "perpetual" is a misnomer, albeit one commonplace in LLC statutes. Like all current LLC statutes, this ~~Act~~act provides several consent-based avenues to override perpetuity: a term specified in the operating agreement; an event specified in the operating agreement; member consent. Section 701 (events causing dissolution). In this context, "perpetuity" actually means that the ~~Act~~act does not require a definite term and creates no nexus between the dissociation of a member and the dissolution of the entity. (The dissociation of an LLC's last remaining member does threaten dissolution. Section 701(a)(3) (stating, as a default rule, that a limited liability company dissolves "upon . . . the passage of 90 consecutive days during which the limited liability company has no members").

An operating agreement is not a publicly-filed document, which means that the public record pertaining to a limited liability company will not necessarily reveal whether a limited liability company actually has a perpetual duration. *Accord* ULPA (2001) § 104, comment to subsection (c) ("The partnership agreement has the power to vary this subsection [which provides for perpetual duration], either by stating a definite term or by specifying an event or events which cause dissolution. . . . . [The limited partnership act] also recognizes several other occurrences that cause dissolution. Thus, the public record pertaining to a limited partnership will not necessarily reveal whether the limited partnership actually has a perpetual duration.")

SECTION 105. POWERS. A limited liability company has the powers [rights,][16] and privileges granted by this act, any other law or by its operating agreement to do all things necessary or convenient to carry on its [business,][~~11~~17] affairs or activities, and the capacity to sue and be sued in its own name.

Florida Comment

[16] Stu Ames has pointed out that this is not used in any other Florida statute.

[~~11~~17] There was a comment that using "business" in this context may imply that a LLC could not be used for non-business applications. Note that we use the term in the disjunctive.

The prior corresponding law contained specific illustrations of powers possessed by a limited liability company. That the act does not do so should not imply that a limited liability company does not have any of those powers which were set forth in the prior law.

Uniform Comment

Following ULPA (2001), § 105, this ~~Act~~act omits as unnecessary any detailed list of specific powers. *Compare* ULLCA § 112 (containing a detailed list).

The capacity to sue and be sued is mentioned specifically so that Section 110(c)(1) can prohibit the operating agreement from varying that capacity. An LLC's standing to enforce the operating agreement is a separate matter, which is covered by Section 111(a) (stating, as a default rule, that the limited liability company "may enforce the operating agreement").

SECTION 106. GOVERNING LAW. The law of this state governs:

(1) the internal affairs of a limited liability company; and

(2) the liability of a member as member and a manager as manager for the debts, obligations, or other liabilities of a limited liability company.

Uniform Comment

[**Paragraph (1)** – Like any other legal concept, "internal affairs" may be indeterminate at its edges. However, the concept certainly includes interpretation and enforcement of the operating agreement, relations among the members as members; relations between the limited liability company and a member as a member, relations between a manager-managed limited liability company and a manager, and relations between a manager of a manager-managed limited liability company and the members as members. *Compare* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302, cmt. a (defining "internal affairs" with reference to a corporation as "the relations inter se of the corporation, its shareholders, directors, officers or agents").

The operating agreement cannot alter this provision. Section 110(c)(2). However, an operating agreement may lawfully incorporate by reference the provisions of another state's LLC statute. If done correctly, this incorporation makes the foreign statutory language part of the operating agreement, and the incorporated terms (together with the rest of the operating agreement) then govern the members (and those claiming through the members) to the extent not prohibited by this ~~Act~~act. *See* Section 110. This approach does not switch the limited liability company's governing law to that of another state, but instead takes the provisions of another state's law and incorporates them by reference into the contract among the members.]~~12~~18

~~12~~18 We concluded all or part of this comment should be included in the new law. This brings to mind the broader question of whether we should include all of the NCCUSL comments, as opposed to using a "pick and choose" approach. It appears we included all of the uniform comments in the case of RUPA. Obviously, we would delete those uniform comments that apply to sections we do not use or change significantly (and would need to make clear in an introductory "Florida Comment" that we edited the official version of the NCCUSL comments. (COMMENT SUBCOMMITTEE)

Paragraph (2) – This paragraph certainly encompasses Section 304 (the liability shield) but does not necessarily encompass a claim that a member or manager is liable to a third party for (i) having purported to bind a limited liability company to the third party; or (ii) having committed a tort against the third party while acting on the limited liability company's behalf or in the course of the company's business. That liability is not by status (i.e., not "as member . . . [or] as manager") but rather results from function or conduct. Contrast Section 301(b) (stating that, although this ~~Act~~act does not make a member as member the agent of a limited liability company, other law may make an LLC liable for the conduct of a member).

This paragraph is stated separately from Paragraph (1), because it can be argued that the liability of members and managers to third parties is not an internal affair. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 307 (treating shareholders' liability separately from the internal affairs doctrine). A few cases subsume owner/manager liability into internal affairs, but many do not. *See, e.g., Kalb, Voorhis & Co. v. American Fin. Corp.*, 8 F.3d 130, 132 (2nd Cir. 1993). In any event, the rule stated in this paragraph is correct. All sensible authorities agree that, except in extraordinary circumstances, "shield-related" issues should be determined according to the law of the state of organization.

SECTION 107. RULES OF CONSTRUCTION AND SUPPLEMENTAL PRINCIPLES OF LAW.

(a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.

(b) It is the policy of this ~~[~~act~~]~~ to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements.

(c) Unless displaced by particular provisions of this act, the principles of law and equity supplement this act.

(d) [Determine whether rules of construction regarding gender, titles and captions, etc. should be added][~~13~~19]

SECTION 108. NAME.

(a) The name of a limited liability company:

(1) Must contain the words "limited liability ~~company" or "limited~~ company" or the abbreviation "L.L.C." or "LLC". ~~[Notwithstanding the foregoing, a limited liability company may register under a name that is not otherwise distinguishable on the records of the Department~~

[~~13~~19] One comment was that clause like Del. Code 18-1101(f) might be helpful. Note this is not the approach in case of other business entity statutes.

~~of State with written consent of the owner entity provided the consent is filed with the Department of State at the time of registration of such name].~~[14]

(2) Must be distinguishable in the records of the Department of State from the names of all other entities [and filings?]~~15~~20, except fictitious name registrations pursuant to s. 865.09, organized, registered or reserved under the laws of this state, the names of which are on file with the Department of State.

(3) May not contain language stating or implying that the limited liability company is organized for a purpose other than that permitted in this act and its ~~[articles~~certificate of organization~~]~~.

(4) May not contain language stating or implying that the limited liability company is connected with a state or federal government agency or a corporation or other entity chartered under the laws of the United States.

(b) Subject to Section 805, this section applies to a foreign limited liability company transacting business in this state which has a certificate of authority to transact business in this state or which has applied for a certificate of authority.

(c) In the case of any limited liability company in existence prior to July 1, 2007, and registered with the Department of State, the requirement in this section that the name of a limited liability company be distinguishable from the names of other entities [and filings]~~16~~21 shall not apply except when the limited liability company files documents on or after July 1, 2007, that would otherwise have affected its name.

(d) Any limited liability company in existence prior to the effective date of this ~~Act~~act, which was registered with the Department of State~~, and which abbreviated the word "limited" as "Ltd." in its name, or which abbreviated the word " company" as "Co." in its name,~~ and is using an abbreviation or designation in it name permitted under prior law, shall be permitted to continue using such an abbreviation or designation in its name until it dissolves or amends its name on the records of the Department of State.

(e) The name of the limited liability company shall be filed with the Department of State for public notice only and shall not alone create any presumption of ownership beyond that which is created under the common law.

~~14 This language is in 608.406(2). To be discussed.~~

~~15~~20 This was used in LP ~~Act~~act. Consider whether we should clarify what is meant by "filings."

~~16~~21 Conform when address footnote to 108(a)(1).

Uniform Comment

Subsection (a) is taken verbatim from ULLCA § 105(a). Except for subsection (b)(2), the rest of the section is taken from ULPA (2001) § 108.

Subsection (b)(2) – This language is necessary to protect a name contained in a filed certificate of organization that has not become effective because there are no members. If a statement of membership is not thereafter timely filed, "the certificate lapses and is void," thereby freeing the name. Section 201(e)(1).

[**SECTION 109. INTENTIONALLY OMITTED]**[~~17~~22]

[***Reporter's Note: to determine whether the following section of existing law or parts thereof should be added here or elsewhere***:

608.425 Limited liability company property.

(1)All property originally contributed to the limited liability company or subsequently acquired by a limited liability company by purchase or otherwise is limited liability company property.

(2)Unless otherwise provided in the articles of organization or the operating agreement, property acquired with limited liability company funds is limited liability company property.

(3)Instruments and documents providing for the acquisition, mortgage, or disposition of property of the limited liability company shall be valid and binding upon the limited liability company, if they are executed in accordance with this chapter.][23]

SECTION 110. OPERATING AGREEMENT; SCOPE, FUNCTION, AND LIMITATIONS.

(a) Except as otherwise provided in subsections (b) and (c), the operating agreement governs:

(1) relations among the members as members and between the members and the limited liability company;

(2) the rights and duties under this act of a person in the capacity of manager;

[~~17~~22] NCCUSL version provided for Reservation of Name here. When deleted in later drafts will need to change cross-references.

[23] It was decided REPTL should provide guidance on whether these or similar provisions still desirable. Burt Bruton advised Reporter it should be included in new law.

(3) the [business,][1824] affairs or activities of the company and the conduct of its [business,] affairs or activities; and

[(4) the means and conditions for amending the operating agreement.][1925]

(b) To the extent the operating agreement does not otherwise provide for a matter described in subsection (a), this act governs the matter.

(c) An operating agreement may not:

(1) vary a limited liability company's capacity under Section 105 to sue and be sued in its own name;

(2) [vary the law applicable under Section 106;][2026]

(3) [vary the power of the court under Section 204];[21]

(4) [subject to subsections (d) through (g), eliminate the duty of loyalty, the duty of care, or any other fiduciary duty;][2227]

(5) [subject to subsections (d) through (g), eliminate the contractual obligation of good faith and fair dealing under Section 409(d);][2328]

[1824] See footnote to Sec. 105footnotes to Sections 104 and 105 as well. Should we clarify that non-profit activities are permissible? The term "business" in existing law specifically defined to include not for profit activities.

[1925] To be discussed

[2026] Should an operating agreement be permitted to incorporate laws of other jurisdictions for certain purposes (e.g., standards of performance for officers and managers, matters not directly related to relationship of members to one another or of the members to the LLC {unrelated to internal affairs}), and what about the situation where the operating agreement is implied from other contracts subject to laws of another state.— ? BUT ISN'T THIS ALREADY HANDLED IN THE COMMENT TO 106 (and so maybe better approach is to cross-reference that section in comment to this section - COMMENTS SUBCOMMITTEE)? Also, consider prevalent practice of having jurisdiction and venue stipulated in another state. This would include issue whether another state's series LLC liability law should be respected in Florida (BUT CONSIDER WHETHER SEPARATE RULE WOULD APPLY WITH RESPECT TO THIRD PARTIES DEALING WITH THE LLC -- consider general principle that operating agreement cannot modify the rights of third parties --- only the rights and duties of the members inter se).

[21] Depends on whether Sec. 204 to remain in draft.

[2227] Depends on how we address fiduciary duty issues in subsequent sections. At our meeting on June 22, 2011, we tentatively adopted an approach whereby the uniform act provisions concerning fiduciary duties would be the default approach, but the members would be able to restrict or eliminate the duty of care and loyalty and whatever other fiduciary duties a member or manager may be deemed to have in member-managed or manager-managed limited liability company, respectively. This is the approach taken in the ABA prototype act and in Delaware (see 110(b)(1) and (2) of the ABA prototype act). Some concern was later expressed by certain members of the Committee that this could be deemed too radical a departure from existing law and the Committee decided that we would give the matter further consideration. We decided that there are at least three approaches worthy of our consideration. The first being the one tentatively adopted on June 22, 2011. A second approach would be to incorporate the existing default and "scale back" constructs in Chapter 608. A third approach would be to have the existing Chapter 608 rules govern as the default approach and then add the ABA prototype/Delaware "scale back" provisions. Another approach would be adopt the uniform provisions without change, but most of the Committee found the "uncabined" approach to be problematic because of the additional uncertainty and unpredictability it

(6) unreasonably restrict the duties and rights stated in Section 410;

(7) ~~[~~vary the power of a court to decree dissolution in the circumstances specified in ~~Section 701(a)(4) and (5);]~~[24]Sections 702(b)(1) through (4);[29]

(8) vary the requirement to wind up a limited liability company's business as specified in Section ~~702~~708(a) and (b)(1);

(9) unreasonably restrict the right of a member to maintain an action under ss. ~~_____~~901 through ~~_____~~906 [Article 9][25]30;

(10) [restrict the right to approve a merger, conversion, or domestication under Section 1014 to a member that will have personal liability with respect to a surviving, converted, or domesticated organization; or][26]31

(11) [except as otherwise provided in Section 112(b), restrict the rights under this act of a person other than a member or manager.][27]32

(d) [If not manifestly unreasonable, the operating agreement may~~:~~ {in writing?}]:[33]

(1) restrict or eliminate the duty:

(A) as required in Section 409(b)(1) and (g), to account to the limited liability company and to hold as trustee for it any property, profit, or benefit derived by the

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could cause (some believing that the "manifestly unreasonable" standard under existing Chapter 608 causing enough planning uncertainty).

~~23~~ 28 To be discussed

~~24 To be discussed (whether members may waive~~[29] The comments should probably mention that Sections 702(b)(5) and (6) were expressly excluded from mention in this section to make it clear that judicial dissolution ~~remedy)~~may be waived for circumstances related to deadlock and oppression claims.

~~25~~ 30 To be discussed (whether members may waive derivative action remedy)

~~26~~31 To consider re-wording (note under Sec. 1014 the exception to the default consent right when operating agreement doesn't require unanimous member consent to the transaction (this in effect allows the operating agreement to over-ride the default consent right). If this is an issue, note that the same approach and language is used in LP ~~Act~~act.

~~27~~32 To be discussed further (Sec. 112(b) touches upon charging order remedy and exclusivity issue to be addressed when we discuss charging orders in particular under Sec. 503).

[33] The committee discussed the topics of fiduciary duties under Section 409 and permissible modifications under this Section 110 at length at its November 4, 2009 meeting. Many different views and proposals were presented. Straw polls were taken as to whether a consensus existed for any of the proposals but no concrete action was taken other than to bookmark this provision for further consideration during our weekend drafting session on February 26-27, 2010. Most of the committee members participating in the November 4, 2009 meeting acknowledged that further research and analysis was required, and that the final language for this section was directly dependent on the final approach to be taken under Section 409. For example, if the default standard for duty of care under Section 409 is "ordinary, etc." (versus a gross negligence standard), a greater degree of alteration of that duty under this section should be permitted. Some of the committee members believed that permissible alteration in any situation should include elimination of the default duty entirely (that is, to follow the Delaware approach of permitting of all fiduciary duties and obligations other than obligations of good faith and fair dealing).

member in the conduct or winding up of the company's business, from a use by the member of the company's property, or from the appropriation of a limited liability company opportunity;

(B) as required in Section 409(b)(2) and (g), 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

(C) as required by Section 409(b)(3) and (g), to refrain from competing with the company in the conduct of the company's business before the dissolution of the company;

(2) identify specific types or categories of activities that do not violate the duty of loyalty;

(3) alter the duty of care, except to authorize intentional misconduct or knowing violation of law;

(4) alter any other fiduciary duty, including eliminating particular aspects of that duty; and

(5) prescribe the standards by which to measure the performance of the contractual obligation of good faith and fair dealing under Section 409(d).

(e) The operating agreement may [in writing?] specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one or more disinterested and independent persons after full disclosure of all material facts.

(f) To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of a responsibility that the member would otherwise have under this act and imposes the responsibility on one or more other members, the operating agreement may [in writing?], to the benefit of the member that the operating agreement relieves of the responsibility, also eliminate or limit any fiduciary duty that would have pertained to the responsibility.

(g) [The operating agreement may [in writing?] alter or eliminate the indemnification for a member or manager provided by Section 408(a), and may eliminate or limit a member or manager's liability to the limited liability company and members for money damages, except for:][34]

[34] The Committee found the syntax of this provision troublesome and its relationship with language used in Section 408 worthy of clarification (STYLISTIC COMMITTEE). The Uniform Comment suggests an appropriate

(1) breach of the duty of loyalty;

(2) a financial benefit received by the member or manager to which the member or manager is not entitled;

(3) a breach of a duty under Section 406;

(4) intentional infliction of harm on the company or a member; or

(5) an intentional violation of criminal law.

[(h) The court shall decide any claim under subsection (d) that a term of an operating agreement is manifestly unreasonable. The court:

(1) shall make its determination as of the time the challenged term became part of the operating agreement and by considering only circumstances existing at that time; and

(2) may invalidate the term only if, in light of the purposes and activities of the limited liability company, it is readily apparent that:

(A) the objective of the term is unreasonable; or

(B) the term is an unreasonable means to achieve the provision's objective.][35]

[(i) In addition to any right or remedy under applicable law or this act, an operating agreement may [in writing?] provide for specified consequences of any default under, or breach of, the operating agreement or this act, and such specified consequences may take the form of:

(1) reduction, modification or forfeiture of the person's transferable interest in the limited liability company;

(2) subordinating the defaulting person's transferable interest in the limited liability company to that of the non-defaulting person's transferable interest;

(3) a forced sale of the defaulting person's transferable interest in the limited liability company;

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interpretation (that is, that the list of exceptions applies to the indemnification right and the exculpatory reference, but it would be preferable to restructure this subsection to avoid misinterpretation. It was also suggested that (1) through (5) of this subsection be moved to Section 408 and better integrated with the two existing preconditions in Section 408 for indemnification recited in Section 408(a) (that is, the existing references therein to Sections 405 and 409). Section 408 would then contain the entire default provision pertaining to a member's or manager's indemnification right, and Section 110(g) would deal solely with the permitted degree of modification of those preconditions. A clarification would also seem to be in order for the precondition relating to satisfaction of the performance standards in Section 409 since those standards are themselves subject to permitted alteration in accordance with this Section 110.

[35] Discussed (but not at length) at November 4, 2009 meeting and further analysis to be deferred until February 2010 meeting.

(4) forfeiture of the defaulting person's transferable interest in the limited liability company;

(5) the lending by a non-defaulting person of the amount necessary to satisfy the defaulting person's contribution obligation;

(6) fixing the value of the defaulting person's transferable interest by appraisal or by formula and redemption or sale of the defaulting person's transferable interest at such value; or

(7) other remedies, penalties or consequences, including specific performance.][36]

[(j) Any inconsistency between written and oral operating agreements shall be resolved in favor of the written agreement.][37]

Uniform Comment

The operating agreement is pivotal to a limited liability company, and Sections 110 through 112 are pivotal to this ~~Act~~act. They must be read together, along with Section 102(13) (defining the operating agreement).

One of the most complex questions in the law of unincorporated business organizations is the extent to which an agreement among the organization's owners can affect the law of fiduciary duty. This section gives special attention to that question and is organized as follows:

Subsection (a)	grants broad, *general* authority to the operating agreement
Subsection (b)	establishes this ~~Act~~act as comprising the "default rules" ("gap fillers") for matters within the purview of the operating agreement but not addressed by the operating agreement
Subsection (c)	states restrictions on the power of the operating agreement, especially but not exclusively with regard to fiduciary duties and the contractual obligation of good faith
Subsection (d)	contains *specific* grants of authority for the operating agreement with regard to fiduciary duty and the contractual

[36] This is language in the ABA Prototype. It is also similar to provisions in current law (608.4211(5)). This was discussed but we need to determine whether it should be included. Query whether the reference to "transferable" interest is intended to lead to the interpretation that the defaulting member retains other membership rights, such that it would require an expulsion under 602(4). If that is the case, then we should consider clarification in 602(4) that transfer of entire transferable interest includes a forfeiture of that interest.

[37] This is language in existing 608.423(1). We need to determine whether it should be included.

	obligation of good faith; expressed so as to state restrictions on those specific grants – including the "if not manifestly unreasonable" standard
Subsection (e)	specifically grants the operating agreement the power to provide mechanisms for approving or ratifying conduct that would otherwise violate the duty of loyalty; expressed so as to state restrictions on those mechanism – full disclosure and disinterested and independent decision makers
Subsection (f)	specifically authorizes the operating agreement to divest a member of fiduciary duty with regard to a matter if the operating agreement is also divesting the person of responsibility for the matter (and imposing that responsibility on one or more other members)
Subsection (g)	contains *specific* grants of authority for the operating agreement with regard to indemnification and exculpatory provisions; expressed so as to state restrictions on those specific grants
Subsection (h)	provides rules for applying the "not manifestly unreasonable" standard established by subsection (d)

A limited liability company is as much a creature of contract as of statute, and Section 102(13) delineates a very broad scope for "operating agreement." As a result, once an LLC comes into existence and has a member, the LLC necessarily has an operating agreement. *See* Comment to Section 102(13). Accordingly, this ~~Act~~act refers to "the operating agreement" rather than "an operating agreement."

This phrasing should not, however, be read to require a limited liability company or its members to take any formal action to adopt an operating agreement. *Compare* CAL. CORP. CODE § 17050(a) (West 2006) ("In order to form a limited liability company, one or more persons shall execute and file articles of organization with, and on a form prescribed by, the Secretary of State and, either before or after the filing of articles of organization, the members shall have entered into an operating agreement.")

The operating agreement is the exclusive consensual process for modifying this ~~Act~~act's various default rules pertaining to relationships *inter se* the members and between the members and the limited liability company. Section 110(b). The operating agreement also has power over "the rights and duties under this act of a person in the capacity of manager," subsection (a)(2), and "the obligations of a limited liability company and its members to a person in the person's capacity as a transferee or dissociated member." Section 112(b).

Subsection (a) – This section describes the very broad scope of a limited liability company's operating agreement, which includes all matters constituting "internal affairs." Compare Section 106(1) (using the phrase "internal affairs" in stating a choice of law rule). This broad grant of authority is subject to the restrictions stated in subsection (c), including the broad restriction stated in paragraph (c)(11) (concerning the rights under this ~~Act~~act of third parties).

Subsection (a)(1) – Under this ~~Act~~act, a limited liability company is emphatically an entity, and the members lack the power to alter that characteristic.

Subsection (a)(2) – Under this paragraph, the operating agreement has the power to affect the rights and duties of managers (including non-member managers). Because the term "[o]perating agreement . . . . includes the agreement as amended or restated," Section 102(13), this paragraph gives the members the ongoing power to define the role of an LLC's managers. Power is not the same as right, however, and exercising the power provided by this paragraph might constitute a breach of a separate contract between the LLC and the manager. A non-member manager might also have rights under Section 112(a).

Subsection (a)(4) – If the operating agreement does not address this matter, under subsection (b) this ~~Act~~act provides the rule. The rule appears in Section 407(b)(5) and 407(c)(4)(D) (unanimous consent).

This ~~Act~~act does not specially authorize the operating agreement to limit the sources in which terms of the operating agreement might be found or limit amendments to specified modes (e.g., prohibiting modifications except when consented to in writing). *Compare* UCC § 2-209(2) (authorizing such prohibitions in a "signed agreement" for the sale of goods). However, this Paragraph (a)(4) could be read to encompass such authorization. Also, under Section 107 the parol evidence rule will apply to a written operating agreement containing an appropriate merger provision.

Subsection (c) – If a person claims that a term of the operating agreement violates this subsection, as a matter of ordinary procedural law the burden is on the person making the claim.

Subsection (c)(4) – This limitation is less powerful than might first appear, because subsections (d) through (g) specifically authorize significantly alterations to fiduciary duty. The reference to "or any other fiduciary duty" is necessary because the ~~Act~~act has "un-cabined" fiduciary duty. *See* Comment to Section 409.

Subsection (c)(9) – Arbitration and forum selection provisions are commonplace in business agreements, and this paragraph's restrictions do not reflect any special hostility to or skepticism of such provisions.

Subsection (c)(10) – Under Section 1014:

- each member is protected from being merged, converted, or domesticated "into" the status of an unshielded general partner (or comparable position) without the member having *directly* consented to either:
  - the merger, conversion, or domestication; or
  - an operating agreement provision that permits such transactions to occur with less than unanimous consent of the members; and
- merely consenting to an operating agreement provision that permits amendment of the operating agreement with less than unanimous consent of the members does not qualify as the requisite direct consent.

The sole function of subsection (c)(10) is to protect Section 1014 by denying the operating agreement the power to restrict or otherwise undercut the protections of Section 1014.

Subsection (c)(11) – This limitation pertains only to "the rights under ~~thisact~~this act of" third parties. The extent to which an operating agreement can affect other rights of third parties is a question for other law, particularly the law of contracts.

Subsection (d) – Delaware recently amended its LLC statute to permit an operating agreement to fully "eliminate" fiduciary duty within an LLC. This ~~Act~~act rejects the ultra-contractarian notion that fiduciary duty within a business organization is merely a set of default rule and seeks instead to balance the virtues of "freedom of contract" against the dangers that inescapably exist when some have power over the interests of others. As one source has explained:

The open-ended nature of fiduciary duty reflects the law's long-standing recognition that devious people can smell a loophole a mile away. For centuries, the law has assumed that (1) power creates opportunities for abuse and (2) the devious creativity of those in power may outstrip the prescience of those trying, through ex ante contract drafting, to constrain that combination of power and creativity.

CARTER G. BISHOP AND DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW, ¶ 14.05[4][a][ii]

Subsection (h) contains rules for applying the "not manifestly unreasonable" standard.

Subsection (d)(1) – Subject to the "not manifestly unreasonable" standard, this paragraph empowers the operating agreement to eliminate all aspects of the duty of loyalty listed in Section 409. The contractual obligation of good faith would remain, see subsections(c)(5) and (d)(5), as would any other, uncodified aspects of the duty of loyalty. *See* Comment to Section 409 (explaining the decision to "un-cabin" fiduciary duty). *See also* subsection (d)(4) (empowering

the operating agreement to "alter any other fiduciary duty, including eliminating particular aspects of that duty").

Subsection (d)(3) – The operating agreement's power to affect this ~~Act~~act's duty of care both parallels and differs from the agreement's power to affect this ~~Act~~act's duty of loyalty as well as any other fiduciary duties not codified in the statute. With regard to all fiduciary duties, the operating agreement is subject to the "manifestly unreasonable" standard. The differences concern: (i) the extent of the operating agreement's power to restrict the duty; and (ii) the power of the operating agreement to provide indemnity or exculpation for persons subject to the duty.

duty	**extent of operating agreement's power to restrict the duty (subject to the "manifestly unreasonable" standard) Section 110(d)(1), (3) and (4)**	**power of the operating agreement to provide indemnity or exculpation w/r/t breach of the duty Section 110(g)**
loyalty	restrict or completely eliminate	none
care	alter, but not eliminate; specifically may not authorize intentional misconduct or knowing violation of law	complete
other fiduciary duties, not codified in the statute	restrict or completely eliminate Section 110(4)	complete

Subsection (e) – Section 409(f) states the ~~Act~~act's default rule for authorization or ratification – unanimous consent. This subsection specifically empowers the operating agreement to provide alternate mechanisms but, in doing so, imposes significant restrictions – namely, any alternate mechanism must involve full disclosure to, and the disinterestedness and independence of, the decision makers. These restrictions are consonant with ordinary notions of authorization and ratification.

This ~~Act~~act provides four separate methods through which those with management power in a limited liability company can proceed with conduct that would otherwise violate the duty of loyalty:

Method	**Statutory Authority**
The operating agreement might eliminate the duty or otherwise permit the conduct, without need for further authorization or ratification.	Section 110(d)(1) and (2)
The conduct might be authorized or ratified by all the members after	Section 409(f)

full disclosure.	
The operating agreement might establish a mechanism other than the informed consent for authorizing or ratifying the conduct.	Section 110(e)
In the case of self-dealing the conduct might be successfully defended as being or having been fair to the limited liability company.	Section 409(e)

Subsection (f) – This subsection is intended to make clear that – regardless of the strictures stated elsewhere in this section – in the specified circumstances the operating agreement can entirely strip away the pertinent fiduciary duties.

Subsection (g) – This subsection specifically empowers the operating agreement to address matters of indemnification and exculpation but subjects that power to stated limitations. Those limitations are drawn from the raft of exculpatory provisions that sprung up in corporate statutes in response to *Smith v. Van Gorkum*, 488 A.2d 858 (Del. 1985). Delaware led the response with DEL. CODE ANN. tit. 8, § 102(b)(7) (2006), and a number of LLC statutes have similar provisions. *E.g.* GA. CODE ANN. § 14-11-305(4)(A) (West 2006); IDAHO CODE ANN. § 53-624(1) (2006). For an extreme example, see VA. CODE ANN. § 13.1-1025 (West 2006) (establishing limits of monetary liability as the default rule).

The restrictions stated in paragraphs (1) through (5) apply both to indemnification and exculpation. The power to "alter or eliminate the indemnification provided by Section 408(a)" includes the power to expand or reduce that indemnification.

Subsection (g)(4) – Due to this paragraph, an exculpatory provision cannot shield against a member's claim of oppression. *See* Section 701(a)(5)(B) and (b).

Subsection (h) – The "not manifestly unreasonable standard" became part of uniform business entity statutes when RUPA imported the concept from the Uniform Commercial Code. This subsection provides rules for applying that standard, which are necessary because:

- Determining unreasonableness *inter se* owners of an organization is a different task than doing so in a commercial context, where concepts like "usages of trade" are available to inform the analysis. Each business organization must be understood in its own terms and context.
- If loosely applied, the standard would permit a court to rewrite the members' agreement, which would destroy the balance this ~~Act~~act seeks to establish between freedom of contract and fiduciary duty.
- Case law research indicates that courts have tended to disregard the significance of the word "manifestly."
- Some decisions have considered reasonableness as of the time of the complaint, which means that a prospectively reasonable allocation of risk could be overturned because it functioned as agreed.

If a person claims that a term of the operating agreement in manifestly unreasonable under subsections (d) and (h), as a matter of ordinary procedural law the burden is on the person making the claim.

Subsection (h)(1) – The significance of the phrase "as of the time the term as challenged became part of the operating agreement" is best shown by example.

EXAMPLE: An LLC's operating agreement as initially adopted includes a provision subjecting a matter to "the manager's sole, reasonable discretion." A year later, the agreement is amended to delete the word "reasonable." Later, a member claims that, without the word "reasonable," the provision is manifestly unreasonable. The relevant time under subsection (h)(1) is when the agreement was amended, not when the agreement was initially adopted.

EXAMPLE: When a particular manager-managed LLC comes into existence, its business plan is quite unusual and its success depends on the willingness of a particular individual to serve as the LLC's sole manager. This individual has a rare combination of skills, experiences, and contacts, which are particularly appropriate for the LLC's start-up. In order to induce the individual to accept the position of sole manager, the members are willing to have the operating agreement significantly limit the manager's fiduciary duties. Several years later, when the LLC's operations have turned prosaic and the manager's talents and background are not nearly so crucial, a member challenges the fiduciary duty limitations as manifestly unreasonable. The relevant time under subsection (h)(1) is when the LLC began. Subsequent developments are not relevant, except as they might inferentially bear on the circumstances in existence at the relevant time.

SECTION 111. OPERATING AGREEMENT; EFFECT ON LIMITED LIABILITY COMPANY AND PERSONS BECOMING MEMBERS; PREFORMATION AGREEMENT.

(a) A limited liability company is bound by and may enforce the operating agreement, whether or not the company has itself manifested assent to the operating agreement.

(b) A person that becomes a member of a limited liability company is deemed to assent to, is bound by and may enforce the operating agreement.

(c) Two or more persons intending to become the initial members of a limited liability company may make an agreement providing that upon the formation of the company the agreement will become the operating agreement. One person intending to become the initial member of a limited liability company may assent to terms providing that upon the formation of the company the terms will become the operating agreement.

Uniform Comment[38]

[38] To add a reference in Committee's comment that Section 401 contains general provisions relating to admission of members.

Subsection (a) – This subsection does not consider whether a limited liability company is an indispensable party to a suit concerning the operating agreement. That is a question of procedural law, which can determine whether federal diversity jurisdiction exists.

Subsection (b) – Given the possibility of oral and implied-in-fact components to the operating agreement, see Comment to Section 110(a)(4), a person becoming a member of an existing limited liability company should take precautions to ascertain fully the contents of the operating agreement.

Subsection (c) – The second sentence refers to "assent to terms" rather than "make an agreement" because, under venerable principles of contract law, an agreement presupposes at least two parties. This ~~Act~~act specifically defines the operating agreement to include a sole member, Section 102(13), but a preformation arrangement is not an operating agreement. An operating agreement is among "members," and, under this ~~Act~~act, the earliest a person can become a member is upon the formation of the limited liability company. Section 401.

SECTION 112. OPERATING AGREEMENT; EFFECT ON THIRD PARTIES AND RELATIONSHIP TO RECORDS EFFECTIVE ON BEHALF OF LIMITED LIABILITY COMPANY.

(a) An operating agreement may specify that its amendment requires the approval of a person that is not a party to the operating agreement or the satisfaction of a condition. An amendment is ineffective if its adoption does not include the required approval or satisfy the specified condition.

(b) The obligations of a limited liability company and its members to a person in the person's capacity as a transferee or dissociated member are governed by the operating agreement. [Subject only to any court order issued under Section 503(b)(2) to effectuate a charging order, an amendment to the operating agreement made after a person becomes a transferee or dissociated member is effective with regard to any debt, obligation, or other liability of the limited liability company or its members to the person in the person's capacity as a transferee or dissociated member.][39]

(c) If a record that has been delivered ~~by a limited liability company~~ to the Department of State for filing , and which has become effective under this act, contains a provision that would be ineffective under Section 110(c) if contained in the operating agreement, the provision is likewise ineffective in the record.

[39] This must be conformed with Sec. 503 when latter is finalized.

(d) Subject to subsection (c), if a record that has been delivered ~~by a limited liability company~~ to the Department of State for filing , and which has become effective under this act, conflicts with a provision of the operating agreement:

(1) the operating agreement prevails as to members, dissociated members, transferees, and managers; and

(2) the record prevails as to other persons to the extent they reasonably rely on the record.

Uniform Comment

Subsection (a) – This subsection, derived from DEL. CODE ANN. tit. 6, § 18-302(e), permits a non-member to have veto rights over amendments to the operating agreement. Such veto rights are likely to be sought by lenders but may also be attractive to non-member managers.

EXAMPLE: A non-member manager enters into a management contract with the LLC, and that agreement provides in part that the LLC may remove the manager without cause only with the consent of members holding 2/3 of the profits interests. The operating agreement contains a parallel provision, but the non-member manager is not a party to the operating agreement. Later the LLC members amend the operating agreement to change the quantum to a simple majority and thereafter purport to remove the manager without cause. Although the LLC has undoubtedly breached its contract with the manager and subjected itself to a damage claim, the LLC has the power under Section 110(a)(2) to effect the removal – unless the operating agreement provided the non-member manager a veto right over changes in the quantum provision.

The subsection does not refer to member veto rights because, unless otherwise provided in the operating agreement, the consent of each member is necessary to effect an amendment. Section 407(b)(5) and (c)(4)(D).

Subsection (b) – The law of unincorporated business organizations is only beginning to grapple in a modern way with the tension between the rights of an organization's owners to carry on their activities as they see fit (or have agreed) and the rights of transferees of the organization's economic interests. (Such transferees can include the heirs of business founders as well as former owners who are "locked in" as transferees of their own interests. *See* Section 603(a)(3).).

If the law categorically favors the owners, there is a serious risk of expropriation and other abuse. On the other hand, if the law grants former owners and other transferees the right to seek judicial protection, that specter can "freeze the deal" as of the moment an owner leaves the enterprise or a third party obtains an economic interest.

Bauer v. Blomfield Co./Holden Joint Venture, 849 P2d 1365 (Alaska 1993) illustrates this point nicely. The case arose after all the partners had approved a commission arrangement with a third party and the arrangement dried up all the partnership profits. When an assignee of a

partnership interest objected, the court majority flatly rejected not only the claim but also the assignee's right to assert the claim. A mere assignee "was not entitled to complain about a decision made with the consent of all the partners." *Id.* at 1367. A footnote explained, "We are unwilling to hold that partners owe a duty of good faith and fair dealing to assignees of a partner's interest." *Id.* at 1367, n. 2.

The dissent, invoking the law of contracts, asserted that the majority had turned the statutory protection of the partners' management prerogatives into an instrument for abuse of assignees:

It is a well-settled principle of contract law that an assignee steps into the shoes of an assignor as to the rights assigned. Today, the court summarily dismisses this principle in a footnote and leaves the assignee barefoot….
As interpreted by the court, the [partnership] statute now allows partners to deprive an assignee of profits to which he is entitled by law for whatever outrageous motive or reason. The court's opinion essentially leaves the assignee of a partnership interest without remedy to enforce his right.

Id. at 1367-8 (Matthews, J., dissenting).

The *Bauer* majority is consistent with the limited but long-standing case law in this area (all of it pertaining to partnerships rather than LLCs). This subsection follows the *Bauer* majority and other cases by expressly subjecting transferees and dissociated members to operating agreement amendments made after the transfer or dissociation. *Compare* UPA § 32(2) (permitting an assignee to seek judicial dissolution of an at-will general partnership at any time and of a partnership for a term or undertaking if partnership continues in existence after the completion of the term or undertaking); RUPA § 801(6) (same except adding the requirement that the court determine that dissolution is equitable); ULLCA, § 801(5) (same as RUPA); ULLCA, § 801(4) (permitting a dissociated member to seek dissolution on the grounds *inter alia* of oppressive conduct). *See also* UCC §§ 9-405(a) and (b) and RESTATEMENT (SECOND) OF CONTRACTS § 338 (1981) (recognizing a duty of good faith applicable to the modification of a contract when an assignment of contract is in effect).

The issue of whether, in extreme and sufficiently harsh circumstances, transferees might be able to claim some type of duty or obligation to protect against expropriation, is a question for other law.

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Subsection (d) – A limited liability company is a creature of contract as well as a creature of statute. It will be possible, albeit improvident, for the operating agreement to be inconsistent with the certificate of organization or other public filings pertaining to the limited liability company. For those circumstances, this subsection provides rules for determining which source of information prevails.

For members, managers and transferees, the operating agreement is paramount. For third parties seeking to invoke the public record, actual knowledge of that record is necessary and notice, deemed notice, and deemed knowledge under Section 103 are irrelevant. A third party

wishing to enforce the public record over the operating agreement must show reasonable reliance on the public record, and reliance presupposes knowledge.

The mere fact that a term is present in a publicly-filed record and not in the operating agreement, or *vice versa*, does not automatically establish a conflict. This subsection does not expressly cover a situation in which (i) one of the specified filed records contains information in addition to, but not inconsistent with, the operating agreement, and (ii) a person, other than a member or transferee, reasonably relies on the additional information. However, the policy reflected in this subsection seems equally applicable to that situation.

Section 110(a)(4) might also be relevant to the subject matter of this subsection. Absent a contrary provision in the operating agreement, language in an LLC's certificate of organization might be evidence of the members' agreement and might thereby constitute or at least imply a term of the operating agreement.

This subsection does not apply to records delivered to the Department of State for filing on behalf of persons other than a limited liability company.

SECTION 113. DESIGNATED OFFICE, REGISTERED OFFICE AND REGISTERED AGENT ~~FOR SERVICE OF PROCESS~~.

(a) A limited liability company shall designate and continuously maintain in this state:

(1) ~~an~~a designated office, which need not be a place of its activity in this state; and

(2) ~~an~~a registered agent for service of process upon the limited liability company and a registered office, which shall be the street address of its registered agent.

(b) A foreign limited liability company that has a certificate of authority under Section 802 shall designate and continuously maintain in this state ~~an~~a registered agent for service of process and a registered office, which shall be the address of its registered agent.

(c) ~~An~~A registered agent ~~for service of process~~ of a limited liability company or foreign limited liability company must be an individual who is a resident of this state or other person with authority to transact business in this state.

(d) Each initial registered agent, and each successor registered agent that may be appointed in accordance with this act [pursuant to Section 114 *only*?], must sign and file a statement in writing with the Department of State, in such form and manner as prescribed by the

Department of State, accepting the appointment as registered agent and stating that the registered agent is familiar with, and accepts, the obligations of that position.[40]

Uniform Comment

Source: ULPA (2001), § 114.

SECTION 114. CHANGE OF ~~DESIGNATED OFFICE OR AGENT FOR SERVICE OF PROCESS~~REGISTERED AGENT OR REGISTERED OFFICE.[41]

(a) ~~A~~ In order to change its registered agent or registered office address, a limited liability company or a foreign limited liability company may ~~change its designated office, its agent for service of process, or the address of its agent for service of process by delivering~~deliver to the Department of State for filing a statement of change containing:

(1) the name of the limited liability company or foreign limited liability company;

(2) the ~~street and mailing addresses~~name of its current ~~designated office~~registered agent;

(3) if the ~~current designated office~~registered agent is to be changed, the ~~street and mailing addresses~~name of the new ~~designated office~~registered agent;

(4) the ~~name and~~ street ~~and mailing addresses~~address of its current ~~agent for service of process~~registered office for its registered agent; and

(5) if the ~~current agent for service of process or an~~street address of the ~~agent~~registered office is to be changed, the new ~~information~~street address of the registered office in this state.

(b) ~~Subject to Section 205~~ If the registered agent is to be changed, the written acceptance of the successor registered agent described in Section 113(d) must also be included in or attached to the statement of change. [42]

(c)~~, a~~ A statement of change is effective when filed by the Department of State.[43]

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[40] This subsection was added by the Reporter to accommodate a change by the Committee to Section 203. Also, need to confirm how this applies in the case of change made by annual report.

[41] It was decided that we don't need to include a procedure for changing "designated office" in the manner provided in the uniform version. The DOS is going to advise whether the Committee's comment may describe the informal procedure used by the DOS for changing a designated office. (DOS)

[42] This subsection was added by the Reporter --- see footnote 34 above.

[43] Should there be a clarification to show that this is not subject to usual rule for prior or delayed effective date in 205(c), whether in the act itself or the Committee's comment?

(d) The changes described in this section may also be made on the limited liability company or foreign limited liability company's annual report filed with the Department of State.

Uniform Comment

Source – ULPA (2001) § 115, which is based on ULLCA § 109.

Subsection (a) – This subsection uses "may" rather than "shall" because other avenues exist. A limited liability company may also change the information by amending its certificate of organization, Section 202, or through its annual report. Section 209(e). A foreign limited liability company may use its annual report. Section 209(e). However, neither a limited liability company nor a foreign limited liability company may wait for the annual report if the information described in the public record becomes inaccurate. *See* Sections 207 (imposing liability for false information in record) and 116(b) (providing for substitute service).

SECTION 115. RESIGNATION OF REGISTERED AGENT ~~FOR SERVICE OF PROCESS~~.

(a) To resign as ~~an~~registered agent ~~for service of process~~ of a limited liability company or foreign limited liability company, the agent must deliver to the Department of State for filing a signed statement of resignation containing the ~~company name and stating that the agent is resigning~~name of the limited liability company or foreign limited liability company.

(b) ~~The~~After filing the statement with the Department of State, the registered agent shall ~~file a statement of resignation delivered under subsection (a) and mail or otherwise provide or deliver~~mail a copy to the ~~designated office of the~~ limited liability company's or foreign limited liability company ~~and another copy to the principal office of the company if the mailing addresses of the principal office appears in the records of the Department of State and is different from the mailing address of the designated office~~'s current mailing address.

(c) ~~An agency for service of process terminates~~A registered agent is terminated on the earlier of~~:~~ (1) the 31st day after the Department of State files the statement of resignation~~; —~~, or (2) when a statement of change or other record for designating a new ~~agent for service of process is delivered to~~registered agent under this act has been filed by the Department of State ~~for filing on behalf of the limited liability company and becomes effective~~.

Uniform Comment

Source – ULPA (2001) § 116, which is based on ULLCA §110.

SECTION 116. SERVICE OF PROCESS.[44]

(a) ~~An~~A registered agent ~~for service of process~~ appointed by a limited liability company or 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 on the company.

(b) If a limited liability company or foreign limited liability company does not appoint or maintain ~~an~~a registered agent ~~for service of process~~ in this state or the registered agent ~~for service of process~~ cannot with reasonable diligence be found at the ~~agent's street~~ address of the registered office, the Department of State ~~is~~ shall be an agent of the company upon whom process, notice, or demand may be served.

(c) Service of any process, notice, or demand on the Department of State ~~as agent for a limited liability company or foreign limited liability company~~ may be made by delivering to and leaving with the Department of State duplicate copies of the process, notice, or demand. ~~If a process, notice, or demand is served on the Department of State, the Department of State shall forward one of the copies by registered or certified mail, return receipt requested, to the company at its designated office.~~

(d) Service is effected under subsection (c) ~~at the earliest~~upon the date shown as having been received by the Department of~~:~~ State.

~~(1) the date the limited liability company or foreign limited liability 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 the process, notice, or demand is deposited with the United States Postal Service, if correctly addressed and with sufficient postage.~~

(e) The Department of State shall keep a record of each process, notice, and demand served pursuant to this section and record the time of, and the action taken regarding, the service.

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[44] Existing 608.463(1) provides that service of process on an LLC is to be made in accordance with FS chapter 48 or chapter 49 "as if the limited liability company were a partnership." The Committee has received comments that this provision is problematic and that the LLC act should contain stand-alone provisions specifying how service should be made. We have discussed changing or calling for a change to those chapters as an alternative since they do not currently contain specific provisions relating to an LLC (chap 49, dealing with constructive service, does refer to other business entities, which customarily includes LLCs). This latter course of action would be consistent with approaches taken in 607 (see 607.0504). The current draft contains changes suggested by DOS so make this act's approach on service of process consistent with the LP act (620.1117). In reviewing chapter 49 and 620.1117 again, I question whether the 620.1117 approach is appropriate (there seems to be overlap and perhaps inconsistency) and the Committee needs to further review this issue. Is this addressed by subsection (f) of this section? (LITIGATION SUBCOMMITTEE)

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

Uniform Comment

Source – ULPA (2001) § 117, which is based on ULLCA §111.

[***Reporter's Note: to determine whether any of the following provisions from existing law to be included (see also the footnote to Sec. 116)***:

608.463 Service of process.
(1) Process against a limited liability company may be served:
(a) In accordance with chapter 48 or chapter 49, as if the limited liability company were a partnership.
(b) Upon the registered agent at the agent's street address.
(2) Any notice to or demand on a limited liability company organized pursuant to this chapter may be made:
(a) By delivery to a manager of the limited liability company, if the management of the limited liability company is vested in one or more managers, or by delivery to a member, if the management of the limited liability company is vested in the members.
(b) By mailing a writing, which notice or demand in writing is mailed to the registered office of the limited liability company in this state or to another address in this state which is the principal office of the limited liability company.
(3) Nothing contained in this section shall limit or affect the right to serve, in any other manner now or hereafter permitted by law, any process, notice, or demand required or permitted by law to be served upon a limited liability company.]

[ARTICLE] 2

FORMATION; CERTIFICATE OF ORGANIZATION AND OTHER FILINGS

SECTION 201. FORMATION OF LIMITED LIABILITY COMPANY; CERTIFICATE OF ORGANIZATION.

(a) One or more persons may act as ~~organizers~~authorized representatives to form a limited liability company by signing and delivering to the Department of State for filing a certificate of organization.

(b) A certificate of organization must state:

(1) the name of the limited liability company, which must comply with Section 108; and

(2) the street and mailing addresses of the initial designated office and the name ~~and~~ , street address in this state, and ~~mailing addresses~~written acceptance of the initial registered agent ~~for service of process of the company; and~~ ~~(3) if the company will have no members when the Department of State files the certificate, a statement to that effect~~.

(c) ~~Subject to Section 112(c), a~~The certificate of organization may also ~~contain statements as to matters other than those required by subsection (b).~~declare whether the limited liability company is "manager-managed" for purposes of Section 407 and other relevant provisions of this act. [If the certificate of organization does not declare that the limited liability company is "manager-managed", then it shall be presumed that it is "member-managed" for purposes of Section 407 and other relevant provisions of this act.][45] However, a statement in a certificate of organization is not effective as a statement of ~~authority~~agency.

~~(d) Unless the filed certificate of organization contains the statement as provided in subsection (b)(3), the following rules apply:~~[(d) The certificate of organization may contain the name and address of each manager or managing member; each manager or managing member that is not an individual must be organized or otherwise registered with the Department of State as required by law, must maintain an active status, and must not be dissolved, revoked, or withdrawn.][46]

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[45] Needs to be coordinated with Section 407 and Section 103.

[46] Proposed by DOS. Aside from other issues (including impact on formation efficiencies, lack of uniformity with other states, and uncertainty of consequences of manager or managing member not being registered or falling out of

(~~1~~d) A limited liability company ~~is formed when~~'s existence begins at the date and time the Department of State has filed the certificate of organization ~~and the company has at least one member~~, unless the certificate states a prior or delayed effective date pursuant to Section 205(c).

(~~2~~e) If the certificate states a delayed effective date, a limited liability company is not formed if, before the certificate takes effect, a statement of cancellation is signed and delivered to the Department of State for filing and the Department of State files the certificate.

(~~3~~f) Subject to any delayed effective date and except in a proceeding by this state to dissolve a limited liability company, the filing of the certificate of organization by the Department of State is conclusive proof that the ~~organizer~~authorized representative satisfied all conditions to the formation of a limited liability company.

~~(e) If a filed certificate of organization contains a statement as provided in subsection (b)(3), the following rules apply:~~

~~(1) The certificate lapses and is void unless, within [90] days from the date the Department of State files the certificate, an organizer signs and delivers to the Department of State for filing a notice stating:~~

~~(A) that the limited liability company has at least one member; and~~

~~(B) the date on which a person or persons became the company's initial member or members.~~

~~(2) If an organizer complies with paragraph (1), a limited liability company is deemed formed as of the date of initial membership stated in the notice delivered pursuant to paragraph (1).~~

~~(3) Except in a proceeding by this state to dissolve a limited liability company, the filing of the notice described in paragraph (1) by the Department of State is conclusive proof that the organizer satisfied all conditions to the formation of a limited liability company.~~

~~***Legislative Note:*** *Enacting jurisdictions should consider revising their "name statutes" generally, to protect "the limited liability company name stated in each certificate of organization that contains the statement as provided in Section 201(b)(3)". Section 108(b)(2).*~~

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good standing -- such as validity of transactions approved by such a manager entity not in good standing), consider how this would interact with 103(d)(3)(A) (constructive notice of management structure of the LLC) -- would filers understand the effect of adding the manager's name to the certificate of organization? Also, the advisability of using the term "managing member" in the act is still undergoing our review. If a new subsection added here, renumber the others accordingly.

Uniform Comment[47]

No topic received more attention or generated more debate in the drafting process for this ~~Act~~act than the question of the "shelf LLC" – i.e., an LLC formed without having at least one member upon formation. Reasonable minds differed (occasionally intensely) as to whether the "shelf" approach (i) is necessary to accommodate current business practices; and (ii) somehow does conceptual violence to the partnership antecedents of the limited liability company.

The 2006 Annual Meeting Draft provided for a "limited shelf" – a shelf that lacked capacity to conduct any substantive activities:

a) Except as otherwise provided in subsection (b), a limited liability company has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities.

(b) Until a limited liability company has or has had at least one member, the company lacks the capacity to do any act or carry on any activity except:

(1) delivering to the Department of State for filing a statement of change under Sections 114, an amendment to the certificate under Section 202, a statement of correction under Section 206, an annual report under section 209, and a statement of termination under Section ~~702(b)(2)(F);~~ 708;

(2) admitting a member under section 401; and

(3) dissolving under Section 701.

(c) A limited liability company that has or has had at least one member may ratify an act or activity that occurred when the company lacked capacity under subsection (b).

However, when the Conference considered the 2006 Annual Meeting Draft, the Drafting Committee itself proposed an amendment, and the Conference agreed. A product of intense discussion and compromise with several ABA Advisors, the amendment substituted a double filing and "embryonic certificate" approach. An ~~organizer~~authorized representative may deliver for filing a certificate of organization without the company having any members and the filing officer will file the certificate, but:

- the certificate as delivered to the filing officer must acknowledge that situation, Subsection (a)(3);

- the limited liability company is not formed until and unless the ~~organizer~~authorized representative timely delivers to the filing officer a notice that the company has at least one member, Subsection (e)(1); and

- if the ~~organizer~~authorized representative does not timely deliver the required notice, the certificate lapses and is void. *Id.*

The Conference recommends a 90-day "window" for filing the notice, which must state "the date on which a person or persons became the company's initial member or members."

[47] Needs to be revised to eliminate references to shelf filings. (COMMENT SUBCOMMITTEE)

When the filing officer files that notice, the company is deemed formed as of the date stated in the notice. Subsection (e)(2).

Thus under this ~~Act~~act, the delivery to the filing officer of a certificate of organization has different consequences, depending on whether the certificate contains the "no members" statement as provided by subsection (b)(3).

does the certificate contain the "no members" statement under subsection (b)(3)	**by delivering the certificate for filing, what is the ~~organizer~~authorized representative affirming, per Section 207(c), about members**	**effect of the filing officer filing the certificate**	**logical relationship of the filed certificate to the formation of the LLC**
no	that the LLC will have at least one member upon formation	LLC is formed, subject to any delayed effective date	necessary and sufficient
yes	that the LLC will have no members when the filing officer files the certificate	the document is part of the public record, protects the name, and starts the 90-day clock ticking	necessary but not sufficient

Subsection (b) – This ~~Act~~act does not require the certificate of organization to designate whether the limited liability company is manager-managed or member-managed. Under this ~~Act~~act, those characterizations pertain principally to *inter se* relations, and the ~~Act~~act therefore looks to the operating agreement to make the characterization. *See* Sections 102(10) and (12); 407(a).

Subsection (d) – This subsection states the "pathway" through which a limited liability company is formed if the certificate of organization does not contain a statement as provided in subsection (b)(3) – i.e., if the limited liability company will have at least one member when the filing officer files the certificate.

Subsection (e) – This subsection states the "pathway" through which a limited liability company is formed if the certificate of organization contains a statement as provided in subsection (b)(3) – i.e., if the limited liability company will not have at least one member when the filing officer files the certificate.

This pathway requires a second filing in order to form the limited liability company: "a notice stating (A) that the limited liability company has at least one member; and (B) the date on which a person or persons became the company's initial member or members." Subsection (e)(1).

In this pathway, a certificate of organization may not itself state a delayed effective date, Section 205(c), because:

- the reason to state a delayed effective date in a certificate of organization is to set the date on which the limited liability company is formed, Section 205(c); and

- when a certificate contains a statement as provided in subsection (b)(3), this ~~Act~~act mandates when (if at all) the limited liability company is deemed formed – i.e., "as of the date of initial membership stated in the notice delivered" to the filing officer as the second filing. Subsection (e)(2).

[Reporter's note: to determine whether the following provision from existing law should be included here or elsewhere:

608.4238 Unauthorized assumption of powers.
All persons purporting to act as or on behalf of a limited liability company, having actual knowledge that there was no organization of a limited liability company under this chapter, are jointly and severally liable for all liabilities created while so acting except for any liability to any person who also had actual knowledge that there was no organization of a limited liability company.]

SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF ORGANIZATION.

(a) A certificate of organization may be amended or restated at any time.

(b) To amend its certificate of organization, a limited liability company must deliver to the Department of State for filing ~~an amendment stating~~a document entitled Amendment to Certificate of Organization containing:

(1) the name of the company;

(2) the date of filing of its certificate of organization; ~~and~~

(3) ~~the changes~~ the amendment ~~makes to the certificate as most recently amended or restated~~to the certificate of organization; and

(4) the delayed effective date, pursuant to Section 205(c), if the amendment is not effective on the date the Department of State files the amendment.

(c) To restate its certificate of organization, a limited liability company must deliver to the Department of State for filing a restatement, ~~designated as such in its heading, stating~~which merely integrates into a single instrument all the provisions of its certificate of organization then in effect, entitled Restatement of Certificate of Organization, containing:

(1) in the heading or an introductory paragraph, the company's present name and the date of the filing of the company's initial certificate of organization;

~~(2) if the company's name has been changed at any time since the company's formation, each of the company's former names; and~~

(2) all of the current provisions of its certificate of organization in effect;

(3) a statement that the restatement does not further amend the current provisions of the limited liability company's certificate of organization as theretofore amended or supplemented and there is no discrepancy between the current provisions and the restatement; and

(~~3) the changes the restatement makes to the certificate as most recently amended or restated.~~4) the delayed effective date, pursuant to Section 205(c), if the restatement is not effective on the date the Department of State files the amendment.

(d) To restate and amend the current provisions of its certificate of organization, a limited liability company must deliver to the Department of State a document entitled Amended and Restated Certificate of Organization, containing:

(1) in the heading or an introductory paragraph, the company's present name and the date of the filing of the company's initial certificate of organization;

(2) the document restates and amends one or more of the current provisions of the company's certificate of organization; and

(3) the delayed effective date, pursuant to Section 205(c), if the Amended and Restated Certificate of Organization is not effective on the date the Department of State files the document.

(~~d~~e) Subject to Sections 112(c) and 205(c), ~~an amendment to or restatement of~~ a certificate of amendment, restated certificate of organization , or amended and restated certificate of organization is effective when filed by the Department of State.

(~~e~~f) If a member of a member-managed limited liability company, or a manager of a manager-managed limited liability company, knows that any information in a filed certificate of organization was inaccurate when the certificate was filed or has become inaccurate owing to changed circumstances, the member or manager shall promptly:

(1) cause the certificate to be amended; or

(2) if appropriate, deliver to the Department of State for filing a statement of change under Section 114 or a statement of correction under Section 206.

Uniform Comment

Subsection (e) – This subsection is taken from ULPA (2001) § 202(c), which imposes the responsibility on general partners. The original ULLCA had no comparable provision.

This subsection imposes an obligation directly on the members and managers rather than on the limited liability company. A member or manager's failure to meet the obligation exposes the member or manager to liability to third parties under Section 207(a)(2) and might constitute a breach of the member or manager's duties under Section 409(c) and (g)(1). In addition, an aggrieved person may seek a remedy under Section 204 (Signing and Filing Pursuant to Judicial Order).

Like other provisions of the ~~Act~~act requiring records to be delivered to the filing officer for filing, this section is not subject to change by the operating agreement. *See* Section 110(c)(11) (precluding the operating agreement from "restrict[ing] the rights under this act of a person other than a member or manager").

SECTION 203. SIGNING OF RECORDS TO BE DELIVERED FOR FILING TO ~~Department of State.~~DEPARTMENT OF STATE.[48]

(a) A record delivered to the Department of State for filing pursuant to this act must be signed as follows:

(1) Except as otherwise provided in paragraphs (2) through (~~4), a~~7) of this subsection (a), the record ~~signed on behalf of a limited liability company~~ must be signed by ~~a person authorized by the company~~an authorized representative of the limited liability company or foreign limited liability company, as applicable.

(2) A limited liability company's initial certificate of organization must be signed by at least one person acting as an ~~organizer.~~authorized representative. The certificate or organization must also include or have attached to it a statement signed by its initial registered agent in the form described in Section 113(d).

~~(3) A notice under Section 201(e)(1) must be signed by an organizer.~~

[48] The Committee decided to revisit this section after the changes in this draft were made. Note that the intended revision to subsection (a)(6) of former draft was not made (instead it was deleted) because as revised it would be subsumed in the general rule contained in revised subsection (a)(1). Note that subsection (c) added by DOS was deleted because the uniform act addressed the issue in Section 207(c). Subsection (d), which was added by DOS to last draft, was added to Section 207 as new subsection (d) thereunder.

(3) A record filed on behalf of a dissolved limited liability company that has no members must be signed by the person winding up the company's activities under Section 708(c) or a person appointed under Section 708(d) to wind up those activities.

(4) A ~~record filed on behalf of a dissolved limited liability company that has no members must be signed by the person winding up the company's activities under Section 702(c) or a person appointed under Section 702(d) to wind up those activities. (5) A~~ statement of cancellation under Section 201(~~d)(2~~e) must be signed by each ~~organizer~~authorized representative that signed the initial certificate of organization~~, but a personal representative of a deceased or incompetent organizer may sign in the place of the decedent or incompetent~~.

(~~6~~5) A statement of denial by a person under Section 303 must be signed by that person.

(6) A record changing the registered agent must also include or be accompanied by a statement signed by the successor registered agent in the form described in Section 113(d).

(7) Any other record must be signed by the person on whose behalf the record is delivered to the Department of State.

(b) ~~Any record filed under this act may be signed by an agent.~~ A record may also be signed by a personal representative, guardian, conservator or other authorized representative of a deceased or incompetent individual, or a dissolved or terminated legal entity, or an attorney-in-fact, as applicable, if such a person has been duly appointed and is authorized to sign the record, and the record recites that such person has that authority.

Uniform Comment

Subsection (b) – This subsection does not require that the agent's authority be memorialized in a writing or other record. However, a person signing as an agent "thereby affirms under penalties of perjury that [the assertion of agent status is] . . . accurate." Section 207(c).

SECTION 204. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER.

(a) If a person required by this act to sign a record or deliver a record to the Department of State for filing under ~~[~~this act~~]~~ does not do so, any other person that is aggrieved may petition the ~~[appropriate~~circuit court~~]~~ to order:

(1) the person to sign the record;

(2) the person to deliver the record to the Department of State for filing; or

(3) the Department of State to file the record unsigned.

(b) If a petitioner under subsection (a) is not the limited liability company or foreign limited liability company to which the record pertains, the petitioner shall make the company a party to the action. The petitioner may seek the remedies provided in subsection (a) in the same action in combination or in the alternative.

(c) A record filed unsigned pursuant to this section is effective without being signed.

Uniform Comment

Source – ULPA (2001) § 205, which is based on RULPA § 205, which was the source of ULLCA § 210.

Subsection (a)(3) – A record filed under this paragraph is effective without being signed.

SECTION 205. DELIVERY TO AND FILING OF RECORDS BY ~~Department of State~~DEPARTMENT OF STATE; EFFECTIVE TIME AND DATE.

(a) A record authorized or required to be delivered to the Department of State for filing under this act must be captioned to describe the record's purpose, be in a medium permitted by the Department of State, and be delivered to the Department of State. ~~If the filing fees have been paid, unless~~Unless the Department of State determines that a record does not comply with the filing requirements of this act, and if all filing fees have been paid, the Department of State shall file the record ~~and:~~

~~(1) for a statement of denial under Section 303, send a copy of the filed statement and a receipt for the fees to the person on whose behalf the statement was delivered for filing and to the limited liability company; and~~

~~(2) for all other records, send a copy of the filed record and a receipt for the fees to the person on whose behalf the record was filed~~.

(b) Upon request and payment of the ~~requisite~~applicable fee, the Department of State shall send to the requester a certified copy of ~~a~~the requested record.

(c) Except as otherwise provided in Sections 115 and 206 ~~and except for a certificate of organization that contains a statement as provided in Section 201(b)(3), a record~~any document delivered to the Department of State for filing under this act may specify an effective time and a delayed effective date. In the case of an initial certificate of organization, a prior effective date may be specified in the certificate, provided such date is within 5 business days prior to the date

of filing. Subject to Sections 115, 201(d)~~(1),~~ and 206, a record filed by the Department of State is effective:

(1) if the record does not specify ~~either~~ an effective time and does not specify a prior to or a delayed effective date, on the date and at the time the record is filed as evidenced by the ~~[Secretary~~Department of State's~~]~~ endorsement of the date and time on the record;

(2) if the record specifies an effective time but not a prior to or delayed effective date, on the date the record is filed at the time specified in the record;

(3) if the record specifies a delayed effective date but not an effective time, at 12:01 a.m. on the earlier of:

(A) the specified date; or

(B) the 90th day after the record is filed; or

(4) if the record specifies a date prior to the effective date but no effective time, at 12:01 a.m. on the later of:

(A) the specified date; or

(B) the 5th business day before the record is filed; or

(~~4~~5) if the record specifies an effective time and a delayed effective date, at the specified time on the earlier of:

(A) the specified date; or

(B) the 90th day after the record is filed.

(6) if the record specifies an effective time and a prior effective date, at the specified time on the later of:

(A) the specified date; or

(B) the 5th business day before the record is filed; or

(7) If the Department of State has prescribed a mandatory medium or form for the record being filed, the record must be in the prescribed medium or on the prescribed form.

[ALTERNATE/SUPPLEMENTAL DOS VERSION:

SECTION 205. FILING REQUIREMENTS. [49]

(1) To be filed by the Department of State, a document must satisfy the following requirements, as supplemented or modified by any other section of this chapter:

(a) This chapter must require or permit filing the document by the Department of State.

(b) The document must be executed as required by Section 203.

(c) The document must contain any information required by this chapter and may contain other information the limited liability company elects to include.

(d) The document must be typewritten or printed in ink and must be legible.

(e) The document must be in the English language. A limited liability company name need not be in English if written in English letters or Arabic or Roman numerals, and the certificate of existence required of a foreign limited liability company need not be in English if accompanied by a reasonably authenticated English translation.

(f) If the Department of State has prescribed a mandatory form for the document, the document must be in or on the prescribed form.

(g) The document must be delivered to the Department of State for filing and must be accompanied by the correct filing fee and any other tax or penalty required by this chapter or other law.

(2) The document may be accompanied by one exact or conformed copy.

(3) Any signature on any document authorized to be filed by the Department of State under any provision of this chapter may be a facsimile, a conformed signature, or an electronically transmitted signature.]

Uniform Comment

Source – ULPA (2001) § 206, which was based on ULLCA §206.

This ~~Act~~act uses the concept of "filing" to refer to the official act of the Department of State, which is typically preceded by a person "delivering" some record "to the Department of State for filing."

Subsection (c)(3)(B) and 4(B) – If a person delivers to the Secretary of State for filing a record that contains an over-long delay in the effective date, the Secretary of State: (i) will not reject the record; and (ii) is neither required nor authorized to inform the person that this ~~Act~~act will truncate the period of delay specified in the record.

SECTION 206. CORRECTING FILED RECORD.

[49] Requested by DOS. Will need to be integrated with last version of Section 205.

(a) A limited liability company or foreign limited liability company may deliver to the Department of State for filing a statement of correction to correct a record previously delivered by the company to the Department of State and filed by the Department of State, if at the time of filing the record contained inaccurate information or was defectively signed.

(b) A statement of correction under subsection (a) may not state a delayed effective date and must:

(1) describe the record to be corrected, including its filing date~~, or attach a copy of the record as filed~~;

(2) specify the inaccurate information and the reason it is inaccurate or the manner in which the signing was defective; and

(3) correct the defective signature or inaccurate information.

(c) When filed by the Department of State, a statement of correction ~~under subsection (a)~~ is effective retroactively as of the effective date of the record the statement corrects, but the statement is effective when filed:

(1) for the purposes of Section 103(d); and

(2) as to persons that previously relied on the uncorrected record and would be adversely affected by the retroactive effect.

Uniform Comment

Source – ULPA (2001) § 207, which was based on ULLCA §207.

SECTION 207. LIABILITY FOR INACCURATE INFORMATION IN FILED RECORD.[50]

(a) If a record delivered to the Department of State for filing under this act and filed by the Department of State contains inaccurate information, a person that suffers a loss by reliance on the information may recover damages for the loss from:

(1) a person that signed the record, or caused another to sign it on the person's behalf, and knew the information to be inaccurate at the time the record was signed; and

(2) subject to subsection (b), a member of a member-managed limited liability company or the manager of a manager-managed limited liability company, if:

(A) the record was delivered for filing on behalf of the company; and

(B) the member or manager had notice of the inaccuracy for a reasonably sufficient time before the information was relied upon so that, before the reliance, the member or manager reasonably could have:

(i) effected an amendment under Section 202;

(ii) filed a petition under Section 204; or

(iii) delivered to the Department of State for filing a statement of change under Section 114 or a statement of correction under Section 206.

(b) To the extent that the operating agreement of a member-managed limited liability company expressly relieves a member of responsibility for maintaining the accuracy of information contained in records delivered on behalf of the company to the Department of State for filing under this act and imposes that responsibility on one or more other members, the liability stated in subsection (a)(2) applies to those other members and not to the member that the operating agreement relieves of the responsibility.

(c) An individual who signs a record authorized or required to be filed under this act affirms under penalty of perjury that the information stated in the record is accurate.

(d) If a certificate of organization or any other record authorized or required to be filed under this act contains a false statement, one who suffers loss by reliance on that record 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.[51]

Uniform Comment

Source: ULPA (2001) § 208, which expanded on ULLCA § 209.

Section (a)(2)(B) – This subparagraph implies that doing any of the acts listed in clauses (i) through (iii) will preclude liability arising from subsequent reliance. In this connection, Clause (a)(2)(B)(ii) warrants special attention, because that act (filing a petition in court) can occur without any immediate effect on the records relevant to a limited liability company maintained by the filing officer. The other clauses refer to acts that (assuming no filing backlog) affect that public record immediately.

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[50] The Committee recognized issues that involve calling an annual report a "record" under the act and wanted to flag this issue for further consideration.

[51] Language added by DOS to last draft and moved from Section 203.

SECTION 208. CERTIFICATE OF ~~EXISTENCE~~STATUS OR AUTHORIZATION.

(a) The Department of State, upon request and payment of the requisite fee, shall furnish to any person a certificate of ~~existence~~ status for a limited liability company if the records filed in the ~~[office of the Secretary~~Department of State~~]~~ show that the ~~company has been formed under Section 201 and the~~ Department of State has ~~not filed a statement of termination pertaining to the company~~accepted and filed a certificate of organization. A certificate of ~~existence~~status must state:

(1) the company's name;

(2) that the company was duly formed under the laws of this state and the date of formation;

(3) whether all fees~~, taxes,~~ and penalties due ~~under this act or other law~~ to the Department of State under this act have been paid;

(4) whether the company's most recent annual report required by Section 209 has been filed by the Department of State;

(5) whether the Department of State has administratively dissolved the company or received a record notifying the Department of State that the company has been dissolved by judicial action pursuant to Section 701;

(6) whether the ~~company has delivered to the~~ Department of State ~~for filing a statement~~has filed a certificate of dissolution~~;~~ for the company; and

(7) ~~that a statement of termination has not been filed by~~whether the Department of State~~; and (8) other facts of record in the [office of the Secretary of State] which are specified by the person requesting the certificate~~ has accepted and filed a statement of termination.

(b) The Department of State, upon request and payment of the requisite fee, shall furnish ~~to any person~~ a certificate of ~~authorization~~status for a foreign limited liability company if the records filed in the ~~[office of the Secretary~~Department of State~~]~~ show that the Department of State has filed a certificate of authority~~, has not revoked the certificate of authority, and has not filed a notice of cancellation~~. A certificate of ~~authorization~~status must state:

(1) the company's name and any current alternate name adopted under Section 805(a) for use in this state;

(2) that the company is authorized to transact business in this state;

(3) whether all fees~~, taxes,~~ and penalties due to the Department of State under this act or other law ~~to the Department of State~~ have been paid;

(4) whether the company's most recent annual report required by Section 209 has been filed by the Department of State; and

(5) ~~that~~whether the Department of State has ~~not~~ revoked the company's certificate of authority ~~and has not~~or filed a notice of cancellation~~; and (6) other facts of record in the [office of the Secretary of State] which are specified by the person requesting the certificate~~.

(c) Subject to any qualification stated in the certificate, a certificate of ~~existence or certificate of authorization~~status issued by the Department of State is conclusive evidence that the limited liability company is in existence or the foreign limited liability company is authorized to transact business in this state.

Uniform Comment

Source – ULPA (2001), § 209, which was based on ULLCA, § 208.

The information provided in a certificate of existence or authorization is, of course, current only as of the date of the certificate.

SECTION 209. ANNUAL REPORT FOR ~~Department of State~~DEPARTMENT OF STATE.

(a) A limited liability company or a foreign limited liability company authorized to transact business in this state shall deliver to the Department of State for filing an annual report that states:

(1) the name of the limited liability company or, if a foreign limited liability company, the name under which the foreign limited liability company is registered to transact business in this state;

(2) the street and mailing addresses of the company, the name of its registered agent in this state, and the street address of its registered office in this state;

(3) the name and address of each of its managers, if a it is a manager-managed limited liability company, or each of its members, if it is a member-managed limited liability company;

[(3) the name and address of each manager and managing member, as applicable, or if a foreign limited liability company, the name and address of each of its managers, managing members or equivalent persons; each manager, managing member, or equivalent person that is not an individual must be organized or otherwise registered with the Department of State as required by law, must maintain an active status, and must not be dissolved, revoked, or withdrawn.][52]

(4) the company's Federal Employer Identification Number or, if none, whether one has been applied for; and

(5) Any additional information that is necessary or appropriate to enable the Department of State to carry out the provisions of this act.

(~~a) Each year, a limited liability company or a foreign limited liability company authorized to transact business in this state shall deliver~~b) Information in an annual report must be current as of the date the report is delivered to the Department of State for filing ~~a report that states:~~

~~(1) the name of the company;~~

~~(2) the street and mailing addresses of the company's designated office and the name and street and mailing addresses of its agent for service of process in this state;~~

~~(3) the street and mailing addresses of its principal office; and~~ ~~(4) in the case of a foreign limited liability company, the state or other jurisdiction under whose law the company is formed and any alternate name adopted under Section 805(a)~~.

(~~b) Information in an~~c) The first annual report under this section must be ~~current as of the date the report is~~ delivered to the Department of State ~~for filing.~~ ~~(c) The first annual report under this section must be delivered to the Department of State between [~~between January 1 and ~~April~~May 1~~]~~ of the year following the calendar year in which a limited liability company was

[52] Alternate (3) proposed by DOS. Note that the proposed language is based on an earlier draft when terms "managing member" and "equivalent persons" were in the act. The latter has been removed and usage of the former still under review. ALSO -- see note to DOS' proposed 201(d) as to other issues that should be considered.

formed or a foreign limited liability company was authorized to transact business. ~~A report~~Subsequent annual reports must be delivered to the Department of State between ~~[~~January 1 and ~~April~~May 1~~]~~ of each subsequent calendar year. [If an additional updated report is received, the department shall file the document and make the information contained therein part of the official record. If more than one report is submitted for a calendar year, the department shall file the amended report and make the information contained therein part of the official record.][53]

(d) If an annual report ~~under this section~~ does not contain the information required in subsection (a), the Department 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 Department of State within 30 days after the effective date of the notice, it is timely delivered.

(e) If ~~an~~a filed annual report ~~under this section~~ contains ~~an~~the address of a designated office ~~or the~~, name ~~or address~~ of ~~an~~a registered agent ~~for service of process~~, or registered office which differs from the information shown in the records of the Department of State immediately before the ~~annual report becomes effective~~filing, the differing information in the annual report is considered a statement of change under Section 114.[54]

(f) Proof to the satisfaction of the Department of State that on or before May 1 such report was deposited in the United States mail in a sealed envelope, properly addressed with postage prepaid, shall be deemed timely compliance with this requirement.

(g) Each report shall be executed by an authorized representative or, if the company is under the control of a receiver or trustee, it shall be executed on behalf of the company by such receiver or trustee, and the signing thereof shall have the same legal effect as if made under oath, without the necessity of appending such oath thereto.

[(h) Any limited liability company failing to file an annual report which complies with the requirements of this section shall not be permitted to maintain or defend any action in any court of this state until such report is filed and all fees due under this act are paid and shall be

[53] Proposed by DOS.

[54] Note that this relates to the issue of whether the annual report will be considered a "record." Also, clarify whether Section 113(d) applies to this change.

subject to dissolution or cancellation of its certificate of authority to do business as provided in this act.][55]

[(i) The department shall prescribe the forms, which may be in an electronic format, on which to make the annual report called for in this section and may substitute the uniform business report, pursuant to s.606.06, as a means of satisfying the requirement of this part.][56]

Uniform Comment

Source – ULPA (2001) § 210, which was based on ULLCA § 211.

A limited liability company that fails to comply with this section is subject to administrative dissolution. Section ~~705~~711(a)(2). A foreign limited liability company that fails to comply with this section is subject to having its certificate of authority revoked. Section ~~806~~807(a)(2).

SECTION 210. FILING DUTIES OF DEPARTMENT OF STATE.[57]

(a) The Department of State files a document by stamping or otherwise endorsing the document as "filed," together with the Secretary of State's official title and the date and time of receipt. After filing a document, the Department of State shall deliver an acknowledgment or certified copy of the document to the domestic or foreign limited liability company or its representative.

(b) The Department of State shall return any document the Department refuses to file to the domestic or foreign limited liability company or its representative within 15 days after the document was received for filing, together with a brief, written explanation of the reason for refusal.

(c) If the applicant returns the document with corrections in accordance with the rules of the Department of State within 60 days after it was mailed to the applicant by the Department of State and if at the time of return the applicant so requests in writing, the filing date of the document shall be the filing date that would have been applied had the original document not been deficient, except as to persons who justifiably relied on the record before correction and were adversely affected thereby.

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[55] Proposed by DOS. This issue already addressed by Sections 711 and 807. Perhaps the DOS would like a cross-reference here to those sections?

[56] Proposed by DOS.

(d) The Department of State's duty to file documents under this section is ministerial. Filing or refusing to file a document does not:

(1) Affect the validity or invalidity of the document in whole or part;

(2) Relate to the correctness or incorrectness of information contained in the document;

(3) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect.

(e) If not otherwise provided by law and the provisions of this chapter, the Department of State shall determine, by rule, the appropriate format for, number of copies of, manner of execution of, method of electronic transmission of, and amount of and method of payment of fees for, any document placed under its jurisdiction.

SECTION 211. FEES OF THE DEPARTMENT OF STATE. [58]

The fees of the Department of State under this act are as follows:

(1) For furnishing a certified copy, $30.

(2) For filing original certificate of organization or a foreign limited liability company's application for a certificate of authority to transact business, $100.

(3) For filing a certificate of merger of limited liability companies or other business entities, $25 per constituent party to the merger, unless a specific fee is required for a party in other applicable law.

(4) For filing an annual report, $50, plus the annual fee imposed pursuant to s. 607.193 in the amount of $88.75.

(5) For filing an application for reinstatement after an administrative or judicial dissolution or a revocation of authority to transact business, $100.

(6) For designating a registered agent or changing a registered agent or registered office address, $25.

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[57] This is language from existing 608.4082. Compare to 607.0125

[58] Need to do a final review and analysis of all documents that can be filed under or as the result of this act to make sure all filing fees included here. Remember to add certificates mentioned in Sections 1024 and 1025 (domestications and transfers).

(7) For filing a registered agent's statement of resignation from an active limited liability company, $85.

(8) For filing a registered agent's statement of resignation from a dissolved or revoked limited liability company, $25.

(9) For filing a certificate of conversion of a limited liability company, $25.

(10) For furnishing a certificate of status, $5.

(11) For filing a restated certificate or organization, an amended and restated certificate of organization, or an amendment to a certificate of organization (or an amendment to a restated or an amended and restated certificate of organization), $25.

(12) For filing a statement of cancellation of certificate of authority, $25.

(13) [For filing a statement of dissociation, $25.][59]

(14) For filing a certificate of dissolution [or a statement or termination], $25.

(15) For filing a certificate of revocation of dissolution, $100.

(16) For filing a statement of agency, $25.

(17) For filing a statement of denial, $25.

(18) For filing any other domestic or foreign limited liability company document, $25.

(19) For filing an amended annual report, $50.

SECTION 212. POWERS OF DEPARTMENT OF STATE.[60]

The Department of State shall have the power and authority reasonable necessary to enable it to administer this act efficiently, to perform the duties herein imposed upon it by this act, and to adopt rules pursuant to ss. 120.536(1) and 120.54 or any other applicable statute to implement the provisions of this act or to carry out its duties and functions under this act.

SECTION 213. CERTIFICATES AND CERTIFIED COPIES TO BE RECEIVED IN EVIDENCE.

All certificates issued by the Department of State in accordance with this [chapter], and all copies of records filed in the Department of State in accordance with this [chapter] when certified by the Department of State, shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the facts therein stated. A certificate under the seal of the Department of State, as to the existence or nonexistence of the facts relating to a limited liability company or foreign limited liability company, shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the existence or nonexistence of the facts therein stated.

SECTION 214. EVIDENTIARY EFFECT OF COPY OF FILED DOCUMENT.

A certificate from the Department of State delivered with a copy of a document filed by the Department of State is conclusive evidence that the original document is on file with the Department of State.

[Reporter's note: to determine whether any of the following provisions from existing law should be included:

608.409 Effect of filing and issuance of time and date endorsement on the articles of organization.

(3) The Department of State's filing of the articles of organization is conclusive proof that all conditions precedent to organization have been satisfied except in a proceeding by the state to cancel or revoke the organization or to administratively dissolve the organization.

(4) A limited liability company shall not transact business or incur indebtedness, except that which is incidental to its organization or to obtaining subscriptions for or payment of contributions, until the effective date and time of the commencement of the limited liability company's existence.]

[59] Depends on whether Sec. 407(g) and Sec. 604 stay in the draft.
[60] Requested by DOS.

[ARTICLE] 3

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

SECTION 301. ~~NO AGENCY POWER OF MEMBER AS MEMBER~~POWER TO BIND LIMITED LIABILITY COMPANY. No Person shall have the power to bind the limited liability company, except to the extent:

(a) ~~A member is not an~~ the person is authorized to act as the agent of ~~a~~the limited liability company ~~solely by reason of being a member.~~ under or pursuant to the operating agreement;

(b) ~~A person's status as a member does not prevent or restrict law other than this act from imposing liability on a~~ the person is authorized to act as the agent of the limited liability company ~~because of the person's conduct~~pursuant to section 407;

(c) provided in section 302; or

(d) provided by law other than this Act.

Uniform Comment

Subsection (a) – Most LLC statutes, including the original ULLCA, provide for what might be termed "statutory apparent authority" for members in a member-managed limited liability company and managers in a manager-managed limited liability company. This approach codifies the common law notion of apparent authority by position and dates back at least to the original, 1914 Uniform Partnership ~~Act~~act. UPA, § 9 provided that "the act of every partner … for apparently carrying on in the usual way the business of the partnership … binds the partnership," and that formulation has been essentially followed by RUPA, § 301, ULLCA, § 301, ULPA (2001), § 402, and myriad state LLC statutes.

This ~~Act~~act rejects the statutory apparent authority approach, for reasons summarized in a "Progress Report on the Revised Uniform Limited Liability Company ~~Act~~act," published in the March 2006 issue of the newsletter of the ABA Committee on Partnerships and Unincorporated Business Organizations:

The concept [of statutory apparent authority] still makes sense both for general and limited partnerships. A third party dealing with either type of partnership can know by the formal name of the entity and by a person's status as general or limited partner whether the person has the power to bind the entity.

Most LLC statutes have attempted to use the same approach but with a fundamentally important (and problematic) distinction. An LLC's status as member-managed or manager-managed

determines whether members or managers have the statutory power to bind. But an LLC's status as member- or manager-managed is not apparent from the LLC's name. A third party must check the public record, which may reveal that the LLC is manager-managed, which in turn means a member as member has no power to bind the LLC. As a result, a provision that originated in 1914 as a protection for third parties can, in the LLC context, easily function as a trap for the unwary. The problem is exacerbated by the almost infinite variety of management structures permissible in and used by LLCs.

The new ~~Act~~act cuts through this problem by simply eliminating statutory apparent authority.

PUBOGRAM, Vol. XXIII, no. 2 at 9-10.

Codifying power to bind according to position makes sense only for organizations that have well-defined, well-known, and almost paradigmatic management structures. Because:

- flexibility of management structure is a hallmark of the limited liability company; and
- an LLC's name gives no signal as to the organization's structure,

it makes no sense to:

- require each LLC to publicly select between two statutorily preordained structures (i.e., manager-managed/member-managed); and then
- link a "statutory power to bind" to each of those two structures.

Under this ~~Act~~act, other law – most especially the law of agency – will handle power-to-bind questions. See the Comment to subsection (b).

This subsection does not address the power to bind of a manager in a manager-managed LLC, although this ~~Act~~act does consider a manager's management responsibilities. *See* Section 407(c) (allocating management authority, subject to the operating agreement). For a discussion of how agency law will approach the actual and apparent authority of managers, see Section 407(c), cmt.

Subsection (b) – As the "flip side" to subsection (a), this subsection expressly preserves the power of other law to hold an LLC directly or vicariously liable on account of conduct by a person who happens to be a member. For example, given the proper set of circumstances: (i) a member might have actual or apparent authority to bind an LLC to a contract; (ii) the doctrine of *respondeat superior* might make an LLC liable for the tortious conduct of a member (i.e., in some circumstances a member acts as a "servant" of the LLC); and (iii) an LLC might be liable for negligently supervising a member who is acting on behalf of the LLC. A person's status as a member does not weigh against these or any other relevant theories of law.

Moreover, subsection (a) does not prevent member status from being relevant to one or more elements of an "other law" theory. The most categorical example concerns the authority of a non-manager member of a manager-managed LLC.

EXAMPLE: A vendor knows that an LLC is manager-managed but chooses to accept the signature of a person whom the vendor knows is merely a member of the LLC. Assuring the vendor that the LLC will stand by the member's commitment, the member states, "It's such a simple matter; no one will mind." The member genuinely believes the statement, and the vendor accepts the assurance.

The person's status as a mere member will undermine a claim of apparent authority. RESTATEMENT (THIRD) OF AGENCY § 2.03, cmt. d (2006) (explaining the "reasonable belief" element of a claim of apparent authority, and role played by context, custom, and the supposed agent's position in an organization). Likewise, the member will have no actual authority. Absent additional facts, section 407(c)(1) (vesting all management authority in the managers) renders the member's belief unreasonable. RESTATEMENT (THIRD) OF AGENCY § 2.01, cmt. c (2006) (explaining the "reasonable belief" element of a claim of actual authority).

In general, a member's actual authority to act for an LLC will depend fundamentally on the operating agreement.

EXAMPLE: Rachael and Sam, who have known each other for years, decide to go into business arranging musical tours. They fill out and electronically sign a one page form available on the website of the Secretary of State and become the ~~organizers~~authorized representatives of MMT, LLC. They are the only members of the LLC, and their understanding of who will do what in managing the enterprise is based on several lengthy, late-night conversations that preceded the LLC's formation. Sam is to "get the acts," and Rachael is to manage the tour logistics. There is no written operating agreement.

In the terminology of this ~~Act~~act, MMT, LLC is member-managed, Section 407(a), and the understanding reached in the late night conversations has become part of the LLC's operating agreement. Section 111(c). In agency law terms, the operating agreement constitutes a manifestation by the LLC to Rachael and Sam concerning the scope of their respective authority to act on behalf of the LLC. RESTATEMENT (THIRD) OF AGENCY § 2.01, cmt. c (2006) (explaining that a person's actual authority depends first on some manifestation attributable to the principal and stating: "~~Actual~~actual authority is a consequence of a principal's expressive conduct toward an agent, through which the principal manifests assent to be affected by the agent's action, and the agent's reasonable understanding of the principal's manifestation."

Circumstances outside the operating agreement can also be relevant to determining the scope of a member's actual authority.

EXAMPLE: Homeworks, LLC is a manager-managed LLC with three members. The LLC's written operating agreement:

- specifies in considerable detail the management responsibilities of Margaret, the LLC's manager-member, and also states that Margaret is responsible for "the day-to-day operations" of the company;
- puts Garrett, a non-manager member, in charge of the LLC's transportation department; and
- specifies no management role for Brooksley, the third member.

When the LLC's chief financial officer quits suddenly, Margaret asks Brooksley, a CPA, to "step in until we can hire a replacement."

Under the operating agreement, Margaret's request to Brooksley is within Margaret's actual authority and is a manifestation attributable to the LLC. If Brooksley manifests assent to Margaret's request, Brooksley will have the actual authority to act as the LLC's CFO.

In the unlikely event that two or more people form a member-managed LLC without any understanding of how to allocate management responsibility between or among them, agency law, operating in the context the ~~Act~~act's "gap fillers" on management responsibility, will produce the following result:

A single member of a multi-member, member-managed LLC:

- has no actual authority to commit the LLC to any matter "outside the ordinary course of the activities of the company," section 407(b)(3); and
- has the actual authority to commit the LLC to any matter "in the ordinary course of the activities of the company," section 407(b)(2), unless the member has reason to know that other members might disagree or the member has some other reason to know that consultation with fellow members is appropriate.

For an explanation of this result, see Section 407(c), cmt., which provides a detailed agency law analysis in the context of a multi-manager, manager-managed LLC whose operating agreement is silent on the analogous question.

The common law of agency will also determine the apparent authority of a member of a member-managed LLC, and in that analysis what the particular third party knows or has reason to know about the management structure and business practices of the particular LLC will always be relevant. RESTATEMENT (THIRD) OF AGENCY § 3.03, cmt. b (2006) ("A principal may also make a manifestation by placing an agent in a defined position in an organization …. Third parties who interact with the principal through the agent will naturally and reasonably assume that the agent has authority to do acts consistent with the agent's position … unless they have notice of facts suggesting that this may not be so.")

Under section 301(a), however, the mere fact that a person is a member of a member-managed limited liability company cannot *by itself* establish apparent authority by position. A course of dealing, however, may easily change the analysis:

EXAMPLE: David is a one of two members of DS, LLC, a member-managed LLC. David orders paper clips on behalf of the LLC, signing the purchase agreement, "David, as a member of DS, LLC." The vendor accepts the order, sends an invoice to the LLC's address, and in due course receives a check drawn on the LLC's bank account. When David next places an order with the vendor, the LLC's payment of the first order is a manifestation that the vendor may use in establishing David's apparent authority to place the second order.

SECTION 302. STATEMENT OF ~~AUTHORITY~~AGENCY.

[Reporter's Note: The "knowledge/notice" effect of this Section was discussed during our Committee's CLE session on 2/27/10. The Committee is still struggling with the issue of whether a filing with the DOS should be conclusive evidence that an LLC is "manager-managed" for purposes of dealing with apparent authority and other agency issues. We have made provisional changes to Sec. 103(d). Another approach discussed was to amplify subsection (a)(2) of this Section to broadcast that fact. If that approach is followed, then we would have to decide to what extent this would serve as constructive knowledge of third parties. The same "burn in" time period considerations should apply (as under existing 608.407(5)) if changes are filed with the DOS.]

(a) A limited liability company may ~~deliver to the Department of State for filing~~file a statement of ~~authority~~agency. The statement:

(1) must include the name of the company, as identified in the records of the Department of State, and the street and mailing addresses of its designated office;

(2) with respect to any specified status or position ~~that exists in or with respect to the company,~~in a company (whether as a member, transferee, manager, officer[61] or otherwise), may state the authority, or limitations on the authority, of all persons having such status or holding ~~the~~such position to:

(A) execute an instrument transferring real property held in the name of the company; or

(B) enter into other transactions on behalf of, or otherwise act for or bind, the company; and

(3) may state the authority, or limitations on the authority, of a specific person to:

(A) execute an instrument transferring real property held in the name of the company; or

(B) enter into other transactions on behalf of, or otherwise act for or bind, the company.

(b) To amend or cancel a statement of ~~authority~~agency filed by the Department of State under Section 205(a), a limited liability company must deliver to the Department of State for filing an amendment or cancellation stating:

[61] It has been suggested by Stu Ames that this "officers" should be enabled by the statute, and that this is only reference in the act to them.

(1) the name of the company, as identified in the records of the Department of State;

(2) the street and mailing addresses of the limited liability company's designated office;

(3) the caption of the statement being amended or canceled and the date the statement being affected became effective; and

(4) the contents of the amendment or a declaration that the statement being affected is canceled.

(c) A statement of ~~authority~~agency affects only the power of a person to bind a limited liability company to persons that are not members.

[(d) Subject to subsection (c) and Section 103(d) and except as otherwise provided in subsections (f), (g), and (h), a limitation on the authority of a person or a position contained in an effective statement of ~~authority~~agency is not by itself evidence of knowledge or notice of the limitation by any person.][62]

(e) Subject to subsection (c), a grant of authority not pertaining to transfers of real property and contained in an effective statement of ~~authority~~agency is conclusive in favor of a person that gives value in reliance on the grant, except to the extent that when the person gives value:

(1) the person has knowledge to the contrary;

(2) the statement has been canceled or restrictively amended under subsection (b); or

(3) a limitation on the grant is contained in another statement of ~~authority~~agency that became effective after the statement containing the grant became effective.

(f) Subject to subsection (c), an effective statement of ~~authority~~agency that grants authority to transfer real property held in the name of the limited liability company and that is recorded by certified copy in the office for recording transfers of the real property is conclusive in favor of a person that gives value in reliance on the grant without knowledge to the contrary, except to the extent that when the person gives value:

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[62] In view of our discussions during CLE session at Committee's 2/27/10 meeting, we should readdress this subsection and provisional changes we made to Sec. 103(d). REPTL will also want to consider any provisions that give a DOS filing "knowledge" status under Sec. 103, particularly statements of agency granting authority or limiting person's or position's authority concerning real estate transfers.

(1) the statement has been canceled or restrictively amended under subsection (b) and a certified copy of the cancellation or restrictive amendment has been recorded in the office for recording transfers of the real property; or

(2) a limitation on the grant is contained in another statement of ~~authority~~agency that became effective after the statement containing the grant became effective and a certified copy of the later-effective statement is recorded in the office for recording transfers of the real property.

(g) Subject to subsection (c), if a certified copy of an effective statement containing a limitation on the authority to transfer real property held in the name of a limited liability company is recorded in the office for recording transfers of that real property, all persons are deemed to know of the limitation.[63]

(h) Subject to subsection (i), an effective ~~statement~~certificate of dissolution or termination is a cancellation of any filed statement of ~~authority~~agency for the purposes of subsection (f) and is a limitation on authority for the purposes of subsection (g).

(i) After a ~~statement~~certificate of dissolution becomes effective, a limited liability company may deliver to the Department of State for filing and, if appropriate, may record a statement of ~~authority~~agency in accordance with subsection (a) that is designated as a post-dissolution statement of ~~authority~~agency. The statement operates as provided in subsections (f) and (g).

(j) Unless earlier canceled, an effective statement of ~~authority~~agency is canceled by operation of law five years after the date on which the statement, or its most recent amendment, becomes effective. This cancellation operates without need for any recording under subsection (f) or (g).

(k) An effective statement of denial operates as a restrictive amendment under this section and may be recorded by certified copy for the purposes of subsection (f)(1).

Uniform Comment

This section is derived from and builds on RUPA, § 303, and, like that provision is conceptually divided into two realms: statements pertaining to the power to transfer interests in

[63] See Section 608.407(6) concerning authority to make a real property transfer. We may need to include the same kind of statement here. This section states that a filing with the real estate records suffices, it should probably say that a limitation filed with the DOS is not effective unless the same limitation is filed with the county clerk. Alternatively, that point might be clarified by comment.

the LLC's real property and statements pertaining to other matters. In the latter realm, statements are filed only in the records of the Department of State, operate only to the extent the statements are actually known. Section 302(d) and (e).

As to interests in real property, in contrast, this section: (i) requires double-filing – with the Department of State and in the appropriate land records; and (ii) provides for constructive knowledge of statements limiting authority. Thus, a properly filed and recorded statement can protect the limited liability company, Section 302(g), and, in order for a statement pertaining to real property to be a sword in the hands of a third party, the statement must have been both filed and properly recorded. Section 302(f).

Subsection (a)(2) – This paragraph permits a statement to designate authority by position (or office) rather than by specific person. This type of a statement will enable LLCs to provide evidence of ongoing authority to enter into transactions without having to disclose to third parties the entirety of the operating agreement.

Here and elsewhere in the section, the phrase "real property" includes interests in real property, such as mortgages, easements, etc.

Subsection (b) – For the requirement that the original statement, like any other record, be appropriately captioned, see Section 205(a).

Subsection (c) – This subsection contains a very important limitation – i.e., that this section's rules do not operate *viz a viz* members. The text of RUPA, § 303 makes this very important point only obliquely, but the Comment to that section is unequivocal:

It should be emphasized that Section 303 concerns the authority of partners to bind the partnership to third persons. As among the partners, the authority of a partner to take any action is governed by the partnership agreement, or by the provisions of RUPA governing the relations among partners, and is not affected by the filing or recording of a statement of partnership authority.

RUPA § 303, comment 4.

However, like any other record delivered for filing on behalf of an LLC, a statement of ~~authority~~agency might be some evidence of the contents of the operating agreement. *See* Comment to Section 112(d).

Subsection (d) - The phrase "by itself" is important, because the existence of a limitation could be evidence if, for example, the person in question reviewed the public record at a time when the limitation was of record.

[Subsection (e)(1) – What happens if a statement of ~~authority~~agency conflicts with the contents of an LLC's certificate of organization? The contents of the certificate are not statements of authority, Section 201(c), so the information in the certificate does not directly figure into the operation of this section. However, if the person claiming to rely on a statement

of ~~authority~~agency had read the certificate's conflicting information before giving value, that fact might be evidence that person gave value with "knowledge to the contrary" of the statement.][64]

SECTION 303. STATEMENT OF DENIAL.[65] A person named in a filed statement of ~~authority~~agency granting that person authority may deliver to the Department of State for filing a statement of denial that:

(1) provides the name of the limited liability company ~~and the caption of the statement of authority to which the statement of~~, as identified in the records of the Department of State;

(2) identifies the fact being denied, which may include denial ~~pertains; and(2) denies the grant~~ of a person's authority or status as a member; and

(3) has been signed by the person named in the filed statement of agency.

Uniform Comment

For the effect of a statement of denial, see Section 302(k).

SECTION 304. LIABILITY OF MEMBERS AND MANAGERS.

[(a) The debts, obligations, or other liabilities of a limited liability company, whether arising in contract, tort, or otherwise:

(1) are solely the debts, obligations, or other liabilities of the company; ~~and~~

(2) do not become the debts, obligations, or other liabilities:

(A) of ~~a~~any member ~~or manager~~of any limited liability company solely by reason of ~~the member acting as~~being a member;

(B) of a member in a member-managed limited liability company solely by reason of that person having management rights of a member of that company; or ~~manager acting as a manager.~~

(C) of a manager of a manager-managed limited liability company solely by reason of that person being a manager of that company.][66]

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[64] This will require revision because of the changes we made to Section 103(d).

[65] DOS has made the proposed changes to this section. The committee has not reviewed this section yet.

[66] The committee was reluctant to introduce the term "managing member" because it would require conforming changes throughout the act. This rewrite is the Reporter's attempt to have this section have the same effect as current 608.4227 without using that term. We were searching for a way to clarify that a member of a member-managed limited liability company wears two hats, and that such person does not have liability when acting in a management capacity.

(b) The failure of a limited liability company to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members or managers for the debts, obligations, or other liabilities of the company.

Uniform Comment

Subsection (a)(2) – This paragraph shields members and managers only against the debts, obligations and liabilities of the limited liability company and is irrelevant to claims seeking to hold a member or manager directly liable on account of the member's or manager's own conduct.

EXAMPLE: A manager personally guarantees a debt of a limited liability company. Subsection (a)(2) is irrelevant to the manager's liability as guarantor.

EXAMPLE: A member purports to bind a limited liability company while lacking any agency law power to do so. The limited liability company is not bound, but the member is liable for having breached the "warranty of authority" (an agency law doctrine). Subsection (a)(2) does not apply. The liability is not *for* a "debt[], obligation[], [or] liabilit[y] of a limited liability company," but rather is the member's direct liability resulting because the limited liability company is *not* indebted, obligated or liable. RESTATEMENT (THIRD) OF AGENCY § 6.10 (2006).

EXAMPLE: A manager of a limited liability company defames a third party in circumstances that render the limited liability company vicariously liable under agency law. Under subsection (a)(2), the third party cannot hold the manager accountable for the *company's* liability, but that protection is immaterial. The manager is the tortfeasor and in that role is directly liable to the third party.

Subsection (a)(2) pertains only to claims by third parties and is irrelevant to claims by a limited liability company against a member or manager and *vice versa*. *See e.g.* Sections 408 (pertaining to a limited liability company's obligation to indemnify a member or manager), 409 (pertaining to management duties) and 901 (pertaining to a member's rights to bring a direct claim against a limited liability company).

Subsection (b) – This subsection pertains to the equitable doctrine of "piercing the veil" – i.e., conflating an entity and its owners to hold one liable for the obligations of the other. The doctrine of "piercing the corporate veil" is well-established, and courts regularly (and sometimes almost reflexively) apply that doctrine to limited liability companies. In the corporate realm, "disregard of corporate formalities" is a key factor in the piercing analysis. In the realm of LLCs, that factor is inappropriate, because informality of organization and operation is both common and desired.

This subsection does not preclude consideration of another key piercing factor – disregard by an entity's owners of the entity's economic separateness from the owners.

EXAMPLE: The operating agreement of a three-member, member-managed limited liability company requires formal monthly meetings of the members. Each of the members works in the LLC's business, and they consult each other regularly. They have forgotten or ignore the requirement of monthly meetings. Under subsection (b), that fact is irrelevant to a piercing claim.

EXAMPLE: The sole owner of a limited liability company uses a car titled in the company's name for personal purposes and writes checks on the company's account to pay for personal expenses. These facts are relevant to a piercing claim; they pertain to economic separateness, not subsection (b) formalities.

This subsection has no relevance to a member's claim of oppression under Section [701(a)(5)(B)]. In some circumstances, disregard of agreed-upon formalities can be a "freeze out" mechanism. Likewise, this section has no relevance to a member's claim that the disregard of agreed-upon formalities is a breach of the operating agreement.

Provisions of regulatory law may impose liability by status on a member or manager. *See* CARTER G. BISHOP AND DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW, ¶ 6.04(4) (Statutory Liability).

[ARTICLE] 4

RELATIONS OF MEMBERS TO EACH OTHER AND TO LIMITED LIABILITY COMPANY

SECTION 401. BECOMING MEMBER.

(a) If a limited liability company is to have only one member upon formation, the person becomes a member as agreed by that person and the ~~organizer~~authorized representative of the company. That person and the ~~organizer~~authorized representative may be, but need not be, different persons. If different, the ~~organizer~~authorized representative acts on behalf of the initial member.

(b) If a limited liability company is to have more than one member upon formation, those persons become members as agreed by the persons before the formation of the company. The ~~organizer~~authorized representative acts on behalf of the persons in forming the company and may be, but need not be, one of the persons.

(c~~) If a filed certificate of organization contains the statement required by Section 201(b)(3), a person becomes an initial member of the limited liability company with the consent of a majority of the organizers. The organizers may consent to more than one person simultaneously becoming the company's initial members.~~ (d) After formation of a limited liability company, a person becomes a member:

(1) as provided in the operating agreement;

(2) as the result of a transaction effective under [Article] 10;

(3) with the consent of all the members; or

(4) if, [within 90 consecutive days][67] after the company ceases to have any members:

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[67] The Reporter thinks the Committee should consider whether this period may be changed by operating agreement as currently allowed by 608.441(1)(d). Delaware law is the same (18-801(a)(4)). Like this draft of the LLC act, our LP act makes no reference to the ability to change this time period. Presumably this would be a default provision that could be over-ridden under Sec. 110, but this is unclear. As a matter of public policy should a LLC have the ability to have no members for more than 90 days? What if an operating agreement said that the company could be continued as long as person could be admitted into a "memberless" LLC within 2 years? Or 18 months? A company without members (and potentially managers) could be problematic for many reasons: creditor rights, third party relationships, management authority issues, tax problems, etc. Perhaps this provisions should be

(A) the last person to have been a member, or the [legal representative][68] of that person, designates a person to become a member; and

(B) the designated person consents to become a member.

(~~e~~d) A person may become a member without acquiring a transferable interest and without making or being obligated to make a contribution to the limited liability company.[69]

Uniform Comment

Most LLC statutes address in separate provisions: (i) how an LLC obtains its initial member or members; and (ii) how additional persons might later become members. This ~~Act~~act follows that approach. Subsections (a) and (b) address the most common circumstances under which a limited liability company is formed – with one or more persons becoming members upon formation. Subsection (c~~) addresses how a person becomes the initial member of an LLC whose certificate of organization was filed without there being any members. Subsection (d~~) addresses how persons become members after an LLC has had at least one member.

~~For a discussion of the concept of a "shelf LLC" and this Act's requirement that a limited liability company have at least one member upon formation, see the Comment to Section 201.~~

Subsection (~~d~~c)(4) – The personal representative of the last member may designate her-, him-, or itself as the new member. This subsection is intended to complement Section [701(a)(3)].

Subsection (~~e~~d) – To accommodate business practices and also because a limited liability company need not have a business purpose, this subsection permits so-called "non-economic members." [Neither the definition of "Contribution" in Section 102 nor the {Uniform Comment} pertaining to that definition under that section should be construed as creating a condition that each member is required to make a contribution to the limited liability company in order to become a member.][70]

SECTION 402. FORM OF CONTRIBUTION. A contribution may consist of tangible or intangible property or other benefit to a limited liability company, including money,

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changed to say "within 90 days or a shorter period specified in the operating agreement." Whatever change, if any, is made here will also need to be made in Sec. 701(a)(3).

[68] In our 2/27/10 meeting we discussed whether this term should be expanded by definition to include personal representative, guardian, conservator, or administrator of natural person, and legal representative or legal representative of a person other than a natural person. See existing 608.402(26). Delaware law similar: 18-101(13). In each case the term would expand the list of persons who could continue the company upon the death, dissolution or other withdrawal of a last remaining member (that is, to avoid dissolution). No specific action taken but most seemed to agree this would be a good change.

[69] The Committee agreed that a comment should be added to Section 401 to make it clear that nothing in the definition of "Contribution" under Section 102 should be implied as a requirement that each member make a contribution to the LLC.

[70] See footnote to subsection (d).

services performed, promissory notes, [credit enhancements][71] other agreements to contribute money or property, and contracts for services to be performed.

Uniform Comment

Source – ULPA (2001) § 501, which derived from ULLCA § 401.

SECTION 403. LIABILITY FOR CONTRIBUTIONS.

(a) A promise by a member to contribute to the limited liability company is not enforceable unless it is set out in a record signed by the member.[72]

(b) A person's obligation to make a contribution to a limited liability company is not excused by the person's death, disability, or other inability to perform personally. If a person does not make a required contribution, the person or the person's estate is obligated to contribute money equal to the value of the part of the contribution which has not been made, at the option of the company. [The foregoing option shall be in addition to, and not in lieu of, any other rights, including the right to specific performance, that the limited liability company may have against such member under the certificate of organization or operating agreement or applicable law.][73]

(~~b~~c) A creditor of a limited liability company which extends credit or otherwise acts in reliance on an obligation described in subsection (a) may enforce the obligation.[74]

[(d) *Florida Alternate*: The certificate of organization or operating agreement of a limited liability company may provide that the {interest} of any member who fails to make any contribution that the member is obligated to make shall be subject to specified penalties for, or specified consequences of, such failure. Such penalties or consequences may take the form of reducing the defaulting member's proportionate {membership interest} in the limited liability company, subordinating the defaulting member's interest in the limited liability company to that

[71] Suggested by Stu Ames.

[72] This provision is based on existing Florida law (608.4211(2) and 620.1502(1)), but note that the former uses "writing" and the latter uses "record." Consider this distinction given that the latter can be electronic or other medium, with only condition being that it can be "retrieved in perceivable form." The committee needs to address the effect of Section 1102 of this act on Electronic Signatures, etc. act and how the Florida Statute of Frauds (725.01) would apply to contribution obligations.

[73] This sentence appears in both existing law (608.4211(3)) and Delaware law (18-502(a)). It has been suggested by Stu Ames that this provision and Sec. 403(d) are misplaced (should they be in Sec. 110? Probably so.) and that Committee should consider whether "reasonableness" standards should apply here and Sec. 110(i) (note that existing references like these in Chaps. 608 and LP act do not contain reasonable standards).

[74] If provisional subsection (e) used, then this subsection would be redundant.

of the nondefaulting members, a forced sale of the defaulting member's {membership interest}, the forfeiture of the defaulting member's {membership interest}, the lending by other members of the amount necessary to meet the defaulting member's commitment, a fixing of the value of the defaulting member's {membership interest} by appraisal or by formula and redemption or sale of the defaulting member's membership interest at such value, or other penalties or consequences.][75] [(d) *Delaware Alternate*: A limited liability company agreement may provide that the interest of any member who fails to make any contribution that the member is obligated to make shall be subject to specified penalties for, or specified consequences of, such failure. Such penalty or consequence may take the form of reducing or eliminating the defaulting member's proportionate interest in a limited liability company, subordinating the member's limited liability company interest to that of nondefaulting members, a forced sale of that limited liability company interest, forfeiture of the defaulting member's limited liability company interest, the lending by other members of the amount necessary to meet the defaulting member's commitment, a fixing of the value of the defaulting member's limited liability company interest by appraisal or by formula and redemption or sale of the limited liability company interest at such value, or other penalty or consequence.][76]

[(e) *Delaware/Florida Supplemental Provisions*: Unless otherwise provided in an operating agreement, the obligation of a member to make a contribution or return money or other property paid or distributed in violation of this [act]may be compromised only by consent of all the members. {Notwithstanding the compromise, a creditor of a limited liability company who extends credit, after the entering into of a limited liability company agreement or an amendment thereto which, in either case, reflects the obligation, and before the amendment thereof to reflect the compromise, may enforce the original obligation to the extent that, in extending credit, the creditor reasonably relied on the obligation of a member to make a contribution or return.} A conditional obligation of a member to make a contribution or return money or other property to a limited liability company may not be enforced unless the conditions of the obligation have been

[75] See next footnote. Also, if this alternate is selected, we need to decide upon "interest" reference. Should it be "transferable interest"? This could be too narrow inasmuch as it may be the members' intent in many situations to dilute or cause forfeiture of the member rights associated with the transferable or economic interest.

[76] The committee decided to review both of these approaches for enabling or recognizing the validity of such provisions. Note that the Florida alternate is also used in the LP act (620.1502(4)).

satisfied or waived as to or by such member. Conditional obligations include contributions payable upon a discretionary call of a limited liability company prior to the time the call occurs.][77]

Uniform Comment

Source: ULLCA § 402, which is taken from RULPA § 502(b), which also gave rise to ULPA (2001) § 502.

Subsection (a) – The reference to "perform personally" is not limited to individuals but rather may refer to any legal person (including an entity) that has a non-delegable duty.

SECTION 404. SHARING OF PROFITS, LOSSES AND RIGHT TO DISTRIBUTIONS BEFORE DISSOLUTION.

~~(a) Any distributions made by a~~(a) Profits and losses of a limited liability company shall be allocated among the members in the manner provided in its operating agreement. If the operating agreement does not so provide, then profits and losses shall be allocated on the basis of the agreed value, as stated in the records of the limited liability company, of the contributions made by each member to the extent they have been received by the limited liability company ~~before its dissolution and winding up must be in equal shares among members and dissociated members~~and have not been returned. [78]

(b) Distributions of cash or other assets of a limited liability company shall be allocated among the members in the manner provided in its operating agreement, except to the extent necessary to comply with any transfer effective under Section 502 and any charging order in effect under Section 503. If the operating agreement does not so provide, then, except to the extent necessary to comply with any transfer effective under Section 502 and any charging order in

[77] The Committee wanted to consider further these supplemental provisions. The provision in braces would subsume subsection (b). The language appears in existing law of both Delaware law (18-502(b)) and Florida law (608.4211(4)), except that only Delaware contains the "conditional contribution" provisions in the last two sentences.

[78] The Committee decided on 9/30/10 to not follow the approach used in the LP act (620.1503(1)), and to use the approach under existing Section 608.4261. The Committee felt that the "silent" approach used by NCCUSL for allocating profits and losses was not a realistic default approach.

effect under Section 503, distributions shall be shared by the members on the basis of the agreed value, as stated in the records of the limited liability company, of the contributions made by each member to the extent they have been received by the limited liability company and have not been returned. [79]

(~~b~~c) A person has a right to a distribution before the dissolution and winding up of a limited liability company only if the company decides to make an interim distribution. A person's dissociation does not entitle the person to a distribution.

(~~c~~d) A person does not have a right to demand or receive a distribution from a limited liability company in any form other than money. Except as otherwise provided in Section ~~708~~714(c), a limited liability company may distribute an asset in kind if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person's share of distributions.

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

Uniform Comment

This ~~Act~~act follows both the original ULLCA and ULPA (2001) in omitting any default rule for allocation of losses. The Comment to ULPA (2001), § 503 explains that omission as follows:

This ~~Act~~act has no provision allocating profits and losses among the partners. Instead, the ~~Act~~act directly apportions the right to receive distributions. Nearly all limited partnerships will choose to allocate profits and losses in order to comply with applicable tax, accounting and other regulatory requirements. Those requirements, rather than this ~~Act~~act, are the proper source of guidance for that profit and loss allocation.

Subsection (b) – The second sentence of this subsection accords with Section 603(a)(3) – upon dissociation a person is treated as a mere transferee of its own transferable interest. Like most *inter se* rules in this ~~Act~~act, this one is subject to the operating agreement. *See* Comment to Section 603(a)(3).

[79] The Committee decided on 9/30/10 to not follow the approach used in the LP act (620.1503(2)), and to use the approach under existing Section 608.426(1). The Committee felt that the "equal" approach used by NCCUSL for allocating distributions was not a realistic default approach.

[Reporter's Note: as evidenced by our discussions at the 6/22/11 meeting, the Committee needs to agree upon a uniform policy for purposes of Sections 405(b), 406(a), 408(a), 409(b) and 409(g) with respect to the question of personal liability of a member or manager when an improper distribution is made. The footnotes to those sections provide more detail about the issue and the potential inconsistencies among the sections relating to that liability. The problem is compounded by the fact that the duty of care can be changed by operating agreement, so the applicable standard could be a moving target. From a policy standpoint, this is probably not what NCCUSL intended, in that underlying principle is to prevent members from make distributions in preference to creditors. Perhaps the solution should be have a non-waivable (and non-alterable) default standard apply to the question of whether the member/manager has acted negligently, and then apply that standard uniformly in each of the sections mentioned above.]

SECTION 405. LIMITATIONS ON DISTRIBUTION.

(a) A limited liability company may not make a distribution if after the distribution:

(1) the company would not be able to pay its debts as they become due in the ordinary course of the company's activities; 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 of persons 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 under the circumstances.][80]

[80] In our meeting of 6/22/11 we again discussed the relationship between this subsection(b) and last sentence of Sec. 409(c) in the case of member-managed LLCs (and 409(g) in the case of manager-managed LLCs). We were concerned that this subsection provides a different safe harbor than the one set forth in Sec. 409(c) (and 409(g)). This is unfortunately buttressed by the reference in Sec. 408(a) to the "duties stated in Sections 405 and 409." It would then be unclear to what extent it would be subject to the same contractual modification rules of the act (see Sections 110(c), (d) and (h)), would be confusing (unless we decide to have a default standard for purposes of 406(a)). To address this concern we amended the comment to this subsection (b) for the time being. But see

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

(1) in the case of a distribution by purchase, redemption, or other acquisition of a transferable interest in the company, ~~as~~the earlier of the date money or other property is transferred or ~~debt~~the date that indebtedness is incurred by the company with respect to acquiring the transferable interest;

(2) in the case of any other distribution of indebtedness, as of the date the indebtedness is distributed; and

(~~2~~3) in all other cases, as of the date:

(A) the distribution is authorized, if the payment occurs within 120 days after that date; or

(B) the payment is made, if the payment occurs more than 120 days after the distribution is authorized.

(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) A limited liability company's indebtedness, including indebtedness issued in connection with or as part of a distribution, is not a liability for purposes of subsection (a) if the terms of the indebtedness provide that payment of principal and interest are made only to the extent that a distribution could be made to members under this section. ~~(f)~~ 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 actually made.

(~~g~~f) In subsection (a), "distribution" does not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business under a bona fide retirement plan or other benefits program.

Uniform Comment

Source – ULPA (2001) § 508, which was derived from ULLCA § 406, which was in turn derived from MBCA § 6.40.

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footnote to that particular revised comment below. Also see the reference to Sec. 409 in Sec. 406(a) which strongly suggests that Sec. 409 is the only standard of care that should apply.

[**Subsection (b)** – This subsection ~~appears~~is not intended to ~~involve~~set forth a ~~pure~~ standard of ~~ordinary care, in contrast with the more complicated approach stated~~care different than the one articulated in Section 409(c). Instead, it is an example of the type of opinions, reports, statements or other information referred to in Section 409(c).][81]

Subsection (~~g~~c) - This subsection, along with **subsection (e)**, sets forth measuring dates for determining whether the solvency tests in subsection (a) have been met. For example, in the case of a distribution not involving the acquisition of a transferable interest by the company, the tests are measured as of the date the distributions were authorized if the payment actually occurs within 120 days after the authorization (otherwise the date of payment becomes the measuring date for the tests). If company notes are distributed (or the company otherwise incurs a debt to make a distribution), then irrespective of the financial condition of the company the solvency financial tests must be applied on the date that the notes are distributed (or the indebtedness is incurred), *unless* the terms of the notes (or other evidence of indebtedness) require the validity of each payment of the debt obligation to be measured by the solvency tests when the payment is actually made.

Subsection (d) - [To add comment clarifying that this section is not intended to change the law applicable to secured transactions under UCC Article 9, including priority rules applicable to secured creditors.][82]

Subsection (f) – This exception applies only for the purposes of this section. *See* the Comment to Section 503(b)(2). The exception is derived from existing statutory provisions. *See, e.g.*, DEL. CODE ANN., tit. 6, § 18-607(a) (2006) and VA. CODE ANN. § 13.1-1035(E) (West 2006). *See also In re Tri-River Trading, LLC*, 329 B.R. 252, 266, (8th Cir. BAP 2005), aff'd . 452 F.3d 756 (8th Cir. 2006) ("We know of no principle of law which suggests that a manager of a company is required to give up agreed upon salary to pay creditors when business turns bad.")

SECTION 406. LIABILITY FOR IMPROPER DISTRIBUTIONS.

(a) Except as otherwise provided in subsection (b), if a member of a member-managed limited liability company or manager of a manager-managed limited liability company consents to a distribution made in violation of Section 405 [and in consenting to the distribution fails to comply with Section ~~409,~~409][83], the member or manager is personally liable to the company for

[81] An alternative we discussed was to delete the specific reference in this section to being able to rely upon financial statements or valuation, and amplifying Sec. 409(c) reference to the ability to rely upon certain reports and other materials in discharging duty of care. A comment under this section could then refer to specific reliance upon financial statements or valuation being an example of the reports and other materials referred to in Sec. 409(c). However, note that existing chapters 607 and 608, as well as our LP act, have similar "reliance on statements, etc." reference in the "improper distribution" section itself. This suggests that the comment approach would be preferable to maintain some consistency.

[82] Tom Wells said he would provide it.

[83] Depending on how we permit the operating agreement to restrict or eliminate fiduciary duties, this reference to the appropriate standard of care may need to be changed. If that duty can be eliminated entirely, then it would seem

the amount of the distribution that exceeds the amount that could have been distributed without the violation of Section 405.

(b) To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of the authority and responsibility to consent to distributions and imposes that authority and responsibility on one or more other members, the liability stated in subsection (a) applies to the other members and not the member that the operating agreement relieves of authority and responsibility.

(c) A person that receives a distribution knowing that the distribution to that person was made in violation of Section 405 is personally liable to the limited liability company but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under Section 405.

(d) A person ~~against which an action is commenced because the person is~~ liable under subsection (a) ~~may~~is entitled to contribution from, and may implead in any action concerning that liability:

(1) ~~implead any~~every other person ~~that is~~ subject to liability under subsection (a) ~~and seek to compel contribution from the person~~; and

(2) ~~implead any~~every person ~~that~~who received a distribution in violation of subsection (c) ~~and seek to compel contribution from the person in the amount the person received in violation of subsection (c)~~.

(e) An action under this section is barred if not commenced within two years after the distribution.

Uniform Comment

Source – Same derivation as Section 405.

Liability under this section is not affected by a person ceasing to be a member, manager or transferee after the time that the liability attaches.

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this section should have a baseline standard of care that applies. This is an issue under existing law (608.426(3)), but perhaps the more reasoned interpretation of that section is that the standards under 608.4225 should apply to the determination of whether an improper distribution was made negligently by a manager/managing member, notwithstanding provisions of the operating agreement negating those standards. Therefore, perhaps the appropriate approach in all cases is to provide that the default standards of care and duties of good faith apply for purposes of determining whether the manager/member is liable to the LLC under this section 406(a). In which case, we would make this change irrespective of whether we adopt the ABA prototype/Delaware approach for purposes of section 110.

Subsection (b) – The operating agreement could not accomplish the "switch" in liability provided by this subsection, because the "switch" implicates the rights of third parties under this ~~Act~~act. Section 110(c)(11).

Subsections (c) and (d)(2) – Liability could apply to a person who receives a distribution under a charging order, but only if the person meets the knowledge requirement. That situation is very unlikely unless the person with the charging order is also a member or manager.

Subsection (d) -- [To add comment concerning joint and several liability of managers and members under this section?][84]

SECTION 407. MANAGEMENT OF LIMITED LIABILITY COMPANY.

(a) A limited liability company is a member-managed limited liability company unless the operating agreement: [or certificate of organization][85]

(1) expressly provides that:

(A) the company is or will be "manager-managed";

(B) the company is or will be "managed by managers"; or

(C) management of the company is or will be "vested in managers"; or

(2) includes words of similar import.

(b) In a member-managed limited liability company, the following rules apply:

(1) The management and conduct of the company are vested in the members.

(2) Each member has equal rights in the management and conduct of the company's activities.

(3) A difference arising among members as to a matter in the ordinary course of the activities of the company may be decided by a majority of the members.

(4) An act outside the ordinary course of the activities of the company may be undertaken only with the consent of all members.

(5) The operating agreement may be amended only with the consent of all members.

(6) 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 limited liability

[84] We should discuss the objective of this comment. Does the committee intend to suggest a gloss on common law applicable to contribution rights of defendants who are jointly and severally liable for an obligation? If not, then perhaps the comment should be restricted to saying that other applicable law is intended to apply to enforcement of a person's contribution rights under this section.

company's name, for apparently carrying on in the ordinary course the limited liability company's business or business of the kind carried on by the company binds the limited liability company, unless the member had no authority to act for the limited liability company in the particular matter and the person with whom the member was dealing knew or had notice that the member lacked authority.

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

(c) In a manager-managed limited liability company, the following rules apply:

(1) Except as otherwise expressly provided in this act, any matter relating to the activities of the company is decided exclusively by the managers.

(2) Each manager has equal rights in the management and conduct of the activities of the company.

(3) A difference arising among managers as to a matter in the ordinary course of the activities of the company may be decided by a majority of the managers.

(4) The consent of all members is required to:

(A) sell, lease, exchange, or otherwise dispose of all, or substantially all, of the company's property, with or without the good will, outside the ordinary course of the company's activities;

(B) ~~approve a merger, conversion, or domestication under [Article] 10;~~

~~(C)~~ undertake any other act outside the ordinary course of the company's activities; and

(~~D~~C) amend the operating agreement.

(5) A manager may be chosen at any time by the consent of a majority of the members and remains a manager until a successor has been chosen, unless the manager at an earlier time resigns, is removed, or dies, or, in the case of a manager that is not an individual,

[85] Needs to be coordinated with Section 201(c).

terminates. A manager may be removed at any time by the consent of a majority of the members without notice or cause.

(6) A person need not be a member to be a manager, but the dissociation of a member that is also a manager removes the person as a manager. If a person that is both a manager and a member ceases to be a manager, that cessation does not by itself dissociate the person as a member.

(7) A person's ceasing to be a manager does not discharge any debt, obligation, or other liability to the limited liability company or members which the person incurred while a manager.

(8) A member is not an agent of the limited liability company for the purpose of its business solely by reason of being a member. [86]

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

(10)An act of a manager which is not apparently for carrying on in the ordinary course the limited liability company's business or business of the kind carried on by the limited liability company binds the limited liability company only if the act was authorized [by a majority in interest of the members.]

(d) An action requiring the consent of members under this act may be taken without a meeting, and a member may appoint a proxy or other agent to consent or otherwise act for the member by signing an appointing record, personally or by the member's agent.

(e) The dissolution of a limited liability company does not affect the applicability of this section. However, a person that wrongfully causes dissolution of the company loses the right to participate in management as a member and a manager.

[86] In 608.4235(2)(a) this applies only to manager-managed LLCs. But shouldn't this apply to member-managed LLCs too? NCCUSL thought so (as evidenced by Section 301(a) of the uniform act).

(f) This act does not entitle a member to remuneration for services performed for a member-managed limited liability company, except for reasonable compensation for services rendered in winding up the activities of the company.

[(g) A manager, if a it is a manager-managed limited liability company, or a member, if it is a member-managed limited liability company, may file a statement of dissociation with the Florida Department of State containing:

(1) The name of the limited liability company;

(2) The name and signature of the dissociating manager or member, as applicable;

(3) The date the dissociating manager or member, as applicable, withdrew or will withdraw; and

(4) A statement that the limited liability company has been notified of the dissociation in writing.][87]

[(h) Unless the articles of organization or operating agreement limit the authority of a member, any member of a member-managed company or manager of a manager-managed company may sign and deliver any instrument transferring or affecting the limited liability 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.][88]

Uniform Comment[89]

Subsection (a) – This subsection follows implicitly from the definitions of "manager-managed" and "member-managed" limited liability companies, Section 102(10) and (12), but is included here for the sake of clarity. [Although this ~~Act~~act has eliminated the link between management structure and statutory apparent authority, Section 301, the ~~Act~~act retains the

[87] This was suggested by DOS based upon similar language in LP act. While appropriate for a partnership, probably not for a LLC. Section 604 would apply to a member in a member-managed limited liability company in any event. If we leave this in the act, words other than "dissociation" and "withdraw" should probably be used for describing the resignation of a manager.

[88] This is currently in 608.4235(3). Should this be carried over from that section as well? The provisions of 608.4235(1) and (2) added to subsections (b) and (c), respectively, above, contained a preamble stating that such provisions were subject to this special rule regarding real estate transfers. This may have been an accommodation to the real estate lawyers, bankers and title companies, since the legal principles involved would seem to apply to any *bona fide* purchaser. If we decide to add this provision as well, then we will need to add "subject to" clauses to the language added to subsections (b) and (c) addressing apparent authority or "notwithstanding-type" language to this subsection (the latter not being preferable generally speaking for legislative drafting purposes).

[89] Needs to be revised to conform with our addition of specific "implied" authority provisions taken from 605.4235.

manager-managed and member-managed constructs as options for members to use to structure their *inter se* relationship.][90]

Subsection (b) – The subsection states default rules that, under Section 110, are subject to the operating agreement.

Subsection (c) – Like subsection (b), this subsection states default rules that, under Section 110, are subject to the operating agreement. For example, a limited liability company's operating agreement might state "This company is manager-managed," Section 102(10)(i), while providing that managers must submit specified ordinary matters for review by the members.

The actual authority of an LLC's manager or managers is a question of agency law and depends fundamentally on the contents of the operating agreement and any separate management contract between the LLC and its manager or managers. These agreements are the primary source of the manifestations of the LLC (as principal) from which a manager (as agent) will form the reasonable beliefs that delimit the scope of the manager's actual authority. RESTATEMENT (THIRD) OF AGENCY § 3.01 (2006). *See also* RESTATEMENT (SECOND) OF AGENCY §§ 15, 26.

Other information may be relevant as well, such as the course of dealing within the LLC, unless the operating agreement effectively precludes consideration of that information. See Section 110(a)(4) (stating that the operating agreement governs "the means and conditions for amending the operating agreement") and the comment to that subparagraph, which states that:

[Although this] ~~Act~~act does not specially authorize the operating agreement to limit the sources in which terms of the operating agreement might be found or limit amendments to specified modes … Paragraph (a)(4) could be read to encompass such authorization. Also, under Section 107 the parol evidence rule will apply to a written operating agreement containing an appropriate merger provision.

If the operating agreement and a management contract conflict, the reasonable manager will know that the operating agreement controls the extent of the manager's rightful authority to act for the LLC– despite any contract claims the manager might have. *See* Section 111(a)(2) (stating that the operating agreement governs "the rights and duties under this act of a person in the capacity of manager") and the comment to that paragraph, which states:

Because the term "[o]perating agreement . . . . includes the agreement as amended or restated," Section 102(13), this paragraph gives the members the ongoing power to define the role of an LLC's managers. Power is not the same as right, however, and exercising the power provided by this paragraph might constitute a breach of a separate contract between the LLC and the manager.

See also RESTATEMENT (THIRD) OF AGENCY § 8.13, cmt. b (2006) and RESTATEMENT (SECOND) OF AGENCY, § 432, cmt. b (stating that, when a principal's instructions to an agent contravene a contract between the principal and agent, the agent may have a breach of contract claim but has no right to act contrary to the principal's instructions).

[90] Note that the Committee did not follow this approach.

If (i) an LLC's operating agreement merely states that the LLC is manager-managed and does not further specify the managerial responsibilities, and (ii) the LLC has only one manager, the actual authority analysis is simple. In that situation, this subsection:

- serves as "gap filler" to the operating agreement; and thereby
- constitutes the LLC's manifestation to the manager as to the scope of the manager's authority; and thereby
- delimits the manager's actual authority, subject to whatever subsequent manifestations the LLC may make to the manager (e.g., by a vote of the members, or an amendment of the operating agreement).

If the operating agreement states only that the LLC is manager-managed and the LLC has more than one manager, the question of actual authority has an additional aspect. It is necessary to determine what actual authority any one manager has to act alone.

Paragraphs (c)(2), (3), and (4) combine to provide the answer. A single manager of a multi-manager LLC:

- has no actual authority to commit the LLC to any matter "outside the ordinary course of the activities of the company," paragraph (c)(4)(C), or any matter encompassed in paragraph (c)(4); and
- has the actual authority to commit the LLC to any matter "in the ordinary course of the activities of the company," paragraph (c)(3), unless the manager has reason to know that other managers might disagree or the manager has some other reason to know that consultation with fellow managers is appropriate.

The first point follows self-evidently from the language of paragraphs (c)(3) and (c)(4). In light of that language, no manager could reasonably believe to the contrary (unless the operating agreement provided otherwise).

The second point follows because:

- Subsection (c) serves as the gap-filler manifestation from the LLC to its managers, and subsection (c) does <u>not</u> require managers of a multi-manager LLC to act <u>only</u> in concert or after consultation.
- To the contrary, subject to the operating agreement:
  - paragraph (c)(2) expressly provides that "each manager has equal rights in the management and conduct of the activities of the company," and
  - paragraph (c)(3) suggests that several (as well as joint) activity is appropriate on ordinary matters, so long as the manager acting in the matter has no reason to believe that the matter will be controversial among the managers and therefore requires a decision under paragraph (c)(3).

While the individual members of a corporate board of directors lack actual authority to bind the corporation, 2 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF

CORPORATIONS, § 392 (noting "the overwhelming weight of authority"), subsection (c) does not describe "board" management. Instead, subsection (c) provides management rules derived from those that govern the members of a general partnership and multiple general partners of a limited partnership. RUPA, § 401 and ULPA (2001), § 406.

The common law of agency will also determine the apparent authority of an LLC's manager or managers, and in that analysis what the particular third party knows or has reason to know about the management structure and business practices of the particular LLC will always be relevant. RESTATEMENT (THIRD) OF AGENCY § 3.03 cmt. d (2006) ("The nature of an organization's business or activity is relevant to whether a third party could reasonably believe that a [manager] is authorized to commit the organization to a particular transaction.").

As a general matter, however – i.e., as to the apparent authority of the position of LLC manager under this ~~Act~~act – courts may view the position as clothing its occupants with the apparent authority to take actions that reasonably appear within the ordinary course of the company's business. The actual authority analysis stated above supports that proposition; absent a reason to believe to the contrary, a third party could reasonably believe a manager to possess the authority contemplated by the gap-fillers of the statute. *But see* Section 102(9), cmt. (stating that "confusion around the term 'manager' is common to almost all LLC statutes").

Subsection (c)(5) – Under the default rule stated in this paragraph, dissolution of an entity that is a manager does not end the entity's status as manager. Contrast Section 602(4)(D) (referring to the expulsion of a member that is a partnership or limited liability company and authorizing the other members to expel, by unanimous consent, the dissolved partnership or limited liability company).

An LLC does not cease to be "manager-managed" simply because no managers are in place. In that situation, absent additional facts, the LLC is manager-managed and the manager position is vacant. Non-manager members who exercise managerial functions during the vacancy (or at any other time) will have duties as determined by other law, most particularly the law of agency.

Subsection (c)(7) – The obligation to safeguard trade secrets and other confidential or propriety information is incurred when the person is a manager, and a subsequent cessation does not entitle the person to usurp the information or use it to the prejudice of the LLC after the cessation.

Subsection (e) – Under the default rules of this ~~Act~~act, it is not possible for a person to wrongfully cause dissolution (as distinguished from wrongfully dissociating). Compare Section 701 with Section 601(b). However, the operating agreement might contemplate wrongful dissolution, and this subsection would then apply – unless the operating provides otherwise. Under the second sentence of this subsection, a person might lose the rights to act as a manager without automatically and formally ceasing to be denominated as a manager.

Subsection (f) – This provision traces back to the 1914 Uniform Partnership ~~Act~~act, § 18(f) and is included for fear that its absence might be misinterpreted as implying a contrary rule.

This ~~Act~~act does not provide for remuneration to a manager of a manager-managed LLC. That issue is for the operating agreement, or a separate agreement between the LLC and the manager. A manager seeking compensation will have the burden of proving an agreement. For a case demonstrating how *not* to establish an agreement, see Jandrain v. Lovald, 351B.R. 679 (D. S.D. 2006).

SECTION 408. INDEMNIFICATION AND INSURANCE.[91]

[(a) A limited liability company shall reimburse for any payment made and indemnify for any debt, obligation, or other liability incurred by a member of a member-managed limited liability company or the manager of a manager-managed limited liability company in the course of the member's or manager's activities on behalf of the company, if, in making the payment or incurring the debt, obligation, or other liability, the member or manager complied with the duties stated in Sections 405[92] and 409.][93]

(b) A limited liability company may purchase and maintain insurance on behalf of a member or manager of the company against liability asserted against or incurred by the member or manager in that capacity or arising from that status even if, under Section 110(g), the operating agreement could not eliminate or limit the person's liability to the company for the conduct giving rise to the liability.

Uniform Comment

Subsection (a) – This subsection states a default rule, which corresponds to the default rules on management duties. In the default mode, the correspondence is appropriate, because otherwise the statutory rule on indemnification could undercut or even vitiate the statutory rules on duty. Both this subsection and the rules on duty are subject to the operating agreement.

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[91] This section was discussed and analyzed during our Committee's CLE session on 2/27/10. No specific proposals were made. There is a CD containing the Committee's discussions.

[92] See footnotes to Section 405(b) and comments to that section regarding our discussion at 2/26/10 and 6/22/11 meetings concerning whether Sec. 405(b) should be considered separate duty of care and not subject to same contractual modification rules found in Sec. 110. Also, should the reference in the uniform act been to 405 have been 406(a)?

[93] This subsection was discussed at length in November 4, 2009 meeting, particularly the mandatory nature of this section. Current Florida law (608.4229) governing indemnification calls for "permissive" (or enabling) approach. The Committee decided to defer resolution on final language until finalization of Section 409 default performance standards and permitted alteration thereof under Section 110. It was generally agreed, however, that the current approach (608.4229) should be retained (as is also the use in Delaware). It was also acknowledged that this section should better dovetail with Sections 110(g) and 409 (see for example, the footnote to Section 110(g)). Another observation was that if the right to indemnity is conditional on compliance with Section 409 (whether the right is mandatory by default or required by the operating agreement), and Section 409 contains "uncabined" fiduciary duties, then the right to indemnification would be equally as "uncabined" or obscure.

This subsection does not expressly require a limited liability company to provide advances to cover expenses. However, in some jurisdictions the indemnity obligation might be interpreted to include an obligation to make advances.

This subsection concerns only managers of manager-managed limited liability companies and members of member-managed companies. The definite article in the phrases "the member's" [paragraph (1)] and "the member" [paragraph (2)] refers back to the original phrase "A limited liability company shall reimburse . . . and indemnify . . . a member of a member-managed company . . . ." A limited liability company's obligation, if any, to reimburse or indemnify others (including non-managing members of a manager-managed LLC and LLC employees) is a question for other law, including the law of agency.

Subsection (b) – In contrast to subsection (a), this subsection encompasses all members, not just members in a member-managed LLC.

This subsection's language is very broad and authorizes an LLC to purchase insurance to cover, e.g., a manager's intentional misconduct. It is unlikely that such insurance would be available. For restrictions on the power of an operating agreement to provide for indemnification, see Section 110, particularly subsection (g).

[SECTION 409. STANDARDS OF CONDUCT FOR MEMBERS AND MANAGERS.][94]

[Reporter's Note: Parts of this Section (default duties of managers and members in member-managed LLCs), Section 110 (permitted operating agreement modifications to fiduciary duties and LLC indemnity obligations) and Section 408 (indemnity rights) were discussed in depth during our Committee's CLE session on 2/27/10. No specific proposals were made during that session.

This Section and Section 110 were also discussed at great length in our June 22, 2011 meeting. Please see notes under that section regarding the four different approaches that were considered. It was decided that this is such an important issue that further consideration was necessary before an approach is adopted by the Committee.]

[94] The Committee discussed at length this provision at its November 4, 2009 meeting. It was agreed that this important section and the issues it raises deserves very serious deliberation and further analysis, and should be addressed by other Committee members not attending the November 4, 2009 meeting. It was decided that we would discuss fiduciary duties and permissible modification of the same at length during our February 26-27, 2010 session. The NCCUSL "uncabined" and ordinary negligence standard approaches were contrasted with the purely contractarian and Delaware approaches. The Ribstein article was also discussed to offer a contrasting viewpoint. There was greater consensus among Committee members regarding the duty of loyalty, and using the existing "cabin" approach under Florida law with respect to this duty. The Committee also debated the idea of using the same negligence standard applicable to directors of a Florida corporation under Chapter 607, but the majority of members participating acknowledged that the LLC act should contain its own standard of care because of the unique "duality" of the status and duties of most managers (compared to those of a director).

(a) A member of a member-managed limited liability company owes to the company and, subject to Section 901(b), the other members the fiduciary duties of loyalty and care stated in subsections (b) and (c).

(b) The duty of loyalty of a member in a member-managed limited liability company includes the duties:

(1) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member:

(A) in the conduct or winding up of the company's activities;

(B) from a use by the member of the company's property; or

(C) from the appropriation of a limited liability company opportunity;

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

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

(c) Subject to the business judgment rule, the duty of care of a member of a member-managed limited liability company in the conduct and winding up of the company's activities is to act with the care that a person in a like position would reasonably exercise under similar circumstances and in a manner the member reasonably believes to be in the best interests of the company. In discharging this duty, a member may rely in good faith upon opinions, reports, statements, or other information provided by another person that the member reasonably believes is a competent and reliable source for the information.[95]

(d) A member in a member-managed limited liability company or a manager-managed limited liability company shall discharge the duties under this act or under the operating agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing.

(e) It is a defense to a claim under subsection (b)(2) and any comparable claim in equity or at common law that the transaction was fair to the limited liability company.

[95] Once the Committee reaches a decision on scope of duty of care we should add a comment under this subsection that specifically refers to Section. 405(b) AND Section 406(a) to clarify that the financial statements, valuation and or other methods that may be used to establish that LLC was solvent under those sections are examples of the proper exercise of duty of care under this section and not a separate standard of care.

(f) All of the members of a member-managed limited liability company or a manager-managed limited liability company may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.

(g) In a manager-managed limited liability company, the following rules apply:

(1) Subsections (a), (b), (c), and (e) apply to the manager or managers and not the members.

(2) The duty stated under subsection (b)(3) continues until winding up is completed.

(3) Subsection (d) applies to the members and managers.

(4) Subsection (f) applies only to the members.

(5) A member does not have any fiduciary duty to the company or to any other member solely by reason of being a member.

[(h) A member {or manager} does not violate a duty or obligation under this act or under the operating agreement merely because that person's conduct furthers that person's own interest.][96]

Uniform Comment

This section follows the structure of many LLC acts, first stating the duties of members in a member-managed limited liability company and then using that statement and a "switching" mechanism, subsection (g), to allocate duties in a manager-managed limited liability company. The duties stated in this section are subject to the operating agreement, but Section 110 contains important limitations on the power of the operating agreement to affect fiduciary duties and the obligation of good faith.

This section contains several noteworthy developments in the law of unincorporated business organizations:

- fiduciary duty is "uncabined" – see the Comment to subsections (a) and (b);
- the duty of care is not set at gross negligence – see the Comment to subsection (c); and
- the statutory endorsement of self-interest is omitted – see the Comment to section (e)

[96] See comment to subsection (e) to this section. The Reporter has inserted this proposed subsection (h) solely for discussion when this section is next discussed. Bob Keatinge mentioned at the 2/27/10 meeting that we should consider "reinserting" such a provision. It is like current 608.4225(1)(d), which applies to actions of managers and managing members (should probably have extended to "regular" members too). The same kind of provision is in 620.1408(5) with regard to general partner's actions. SEE comment to subsection (e) to this section.

The standards, duties, and obligations of this Section are subject to delineation, restriction, and, to some extent, elimination by the operating agreement. See Section 110.

Subsections (a) and (b) – Until the promulgation of RUPA, it was almost axiomatic that: (i) fiduciary duties reflect judge-made law; and (ii) statutory formulations can express some of that law but do not exhaustively codify it. The original UPA was a prime example of this approach.

In an effort to respect freedom of contract, bolster predictability, and protect partnership agreements from second-guessing, the Conference decided that RUPA should fence or "cabin in" all fiduciary duties within a statutory formulation. That decision was followed without re-consideration in ULLCA and ULPA (2001).

This ~~Act~~act takes a different approach. After lengthy discussion in the drafting committee and on the floor of the 2006 Annual Meeting, the Conference decided that: (i) the "corral" created by RUPA does not fit in the very complex and variegated world of LLCs; and (ii) it is impracticable to cabin all LLC-related fiduciary duties within a statutory formulation.

As a result, this ~~Act~~act: (i) eschews "only" and "limited to" – the words RUPA used in an effort to exhaustively codify fiduciary duty; (ii) codifies the core of the fiduciary duty of loyalty; but (iii) does not purport to discern every possible category of overreaching. One important consequence is to allow courts to continue to use fiduciary duty concepts to police disclosure obligations in member-to-member and member-LLC transactions.

Subsection (c) – Although ULLCA, § 409(c) followed RUPA, § 404(c) and provided a gross negligence standard of care, at least a plurality of LLC statutes use an ordinary care standard. Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom With the Need For Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV 1609, 1658 (May 2004) (containing two tables characterizing the standard of care under LLC statutes: 21 states with "good faith prudent person" language and 19 states using "gross negligence or willful misconduct" language); Elizabeth S. Miller and Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule in Unincorporated Business Organizations*, 30 DEL. J. CORP. L. 343, 366- 368 (2005) (stating that "[a]pproximately eighteen state LLC statutes parallel language formerly used in the MBCA and require managers and managing members to act in good faith and exercise the care of an ordinarily prudent person in a like position under similar circumstances"). See also William J. Callison, *"The Law Does Not Perfectly Comprehend . . . .": The Inadequacy of the Gross Negligence Duty of Care Standard in Unincorporated Business Organizations*, 94 KY. L.J. 451, 452 (2005-2006) ("examin[ing] the gross negligence standard and find[ing] it wanting, particularly as it has intruded, largely unexamined and by drafting osmosis, into subsequent uniform acts governing limited partnerships and limited liability companies").

In some circumstances, an unadorned standard of ordinary care is appropriate for those in charge of a business organization or similar, non-business enterprise. In others, the proper application of the duty of care must take into account the difficulties inherent in establishing an

enterprise's most fundamental policies, supervising the enterprise's overall activities, or making complex business judgments. Corporate law subdivides circumstances somewhat according to the formal role exercised by the person whose conduct is later challenged (e.g., distinguishing the duties of directors from the duties of officers). LLC law cannot follow that approach, because a hallmark of the LLC entity is its structural flexibility.

This subsection, therefore, seeks "the best of both worlds" – stating a standard of ordinary care but subjecting that standard to the business judgment rule to the extent circumstances warrant. The content and force of the business judgment rule vary across jurisdictions, and therefore the meaning of this subsection may vary from jurisdiction to jurisdiction.

That result is intended. In any jurisdiction, the business judgment rule's application will vary depending on the nature of the challenged conduct. There is, for example, very little (if any) judgment involved when a person with managerial power acts (or fails to act) on an essentially ministerial matter. Moreover, under the law of many jurisdictions, the business judgment rule applies similarly across the range of business organizations. That is, the doctrine is sufficiently broad and conceptual so that the formality of organizational choice is less important in shaping the application of the rule than are the nature of the challenged conduct and the responsibilities and authority of the person whose conduct is being challenged.

This ~~Act~~act seeks therefore to invoke rather than unsettle whatever may be each jurisdiction's approach to the business judgment rule.

Subsection (d) – This subsection refers to the "*contractual* obligation of good faith and fair dealing" to emphasize that the obligation is not an invitation to re-write agreements among the members. As explained in the Comment to ULPA (2001), § 305(b):

The obligation of good faith and fair dealing is not a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a partner from acting in the partner's own self-interest. Courts should not use the obligation to change ex post facto the parties' or this ~~Act~~act's allocation of risk and power. To the contrary, in light of the nature of a limited partnership, the obligation should be used only to protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made…. In sum, the purpose of the obligation of good faith and fair dealing is to protect the arrangement the partners have chosen for themselves, not to restructure that arrangement under the guise of safeguarding it.

At first glance, it may seem strange to apply a contractual obligation to statutory duties and rights – i.e., duties and rights "under this act." However, for the most part those duties and rights apply to relationships *inter se* the members and the LLC and function only to the extent not displaced by the operating agreement. In the contract-based organization that is an LLC, those statutory default rules are intended to function like a contract. Therefore, applying the contractual notion of good faith makes sense.

As to whether the obligation stated in this subsection applies to transferees, see the Comment to Section 112(b).

Subsection (e) – Section 409 omits a noteworthy provision, which, beginning with RUPA, has been standard in the uniform business entity acts. RUPA, ULLCA, ULPA (2001) each placed the following language in the subsection following the formulation of the obligation of good faith:

A member … 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.

This language is inappropriate in the complex and variegated world of LLCs. As a proposition of contract law, the language is axiomatic and therefore unnecessary. In the context of fiduciary duty, the language is at best incomplete, at worst wrong, and in any event confusing.

This ~~Act~~act's subsection (e) takes a very different approach, stating a well-established principle of judge-made law. Despite Section 107, the statement is not surplusage. Given this ~~Act~~act's very detailed treatment of fiduciary duties and especially the ~~Act~~act's very detailed treatment of the power of the operating agreement to modify fiduciary duties, the statement is important because its absence might be confusing. (An *ex post* fairness justification is not the same as an *ex ante* agreement to modify, but the topics are sufficiently close for a danger of the affirmative pregnant.)

This ~~Act~~act also omits, as anachronistic and potentially confusing, any provision resembling ULLCA, § 409(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.") *See also* ULPA (2001), § 112 ("A partner may lend money to and transact other business with the limited partnership and has the same rights and obligations with respect to the loan or other transaction as a person that is not a partner.")

Those provisions originated to combat the notion that debts to partners were categorically inferior to debts to non-partner creditors. That notion has never been part of LLC law, and so a modern uniform LLC act need not include language combating the notion. Moreover, to the uninitiated the language can be confusing, because the words might: (i) seem to undercut the duty of loyalty, which they do not; and (ii) deflect attention from bankruptcy law and the law of fraudulent transfer, which assuredly can look askance at transactions between an entity and an "insider."

Subsection (f) –The operating agreement can provide additional or different methods of authorization or ratification, subject to the strictures of Section 110(e). See the Comment to that subsection.

Subsection (g) – This is the "switching" mechanism, referred to in the introduction to this Comment.

Subsection (g)(2) – On the assumption that the members of a manager-managed LLC are dependent on the manager, this paragraph extends the duty longer than in a member-managed LLC.

Subsection (g)(5) – This paragraph merely negates a claim of fiduciary duty that is exclusively status-based and does not immunize misconduct.

EXAMPLE: Although a limited liability company is manager-managed, one member who is not a manager owns a controlling interest and effectively, albeit indirectly, controls the company's activities. A member owning a minority interest brings an action for dissolution under [Section 701(a)(5)(B)] (oppression by "the managers or those members in control of the company"). The court wishes to understand a claim as one alleging a breach of fiduciary duty by the controlling member. Subsection (g)(5) does not preclude that approach.

[Reporter's Note: we discussed the following section at our 6/22/11 meeting. Some of the members thought this provided a safe harbor or at least a more predictable course of action for persons involved in such transactions. One of the questions we discussed was whether subsections (1)(a) through (c) were intended to be drafted in the disjunctive (given comments made in Ames and Cohn desk book). It was noted that Chap 607 (607.0832) and Del corporate statute (section 144) are written in same disjunctive manner, so it would be reasonable to assume that any one of the three "tests" in subsection (1) would suffice. If that's the case, then subsections 409(e), (f) and (g)(4) would already appear applicable to this issue, and we should consider whether those subsections are adequate for purpose of providing the safe harbor or predictable course of action desired by some of the Committee members. The approach of the uniform act is simpler and subsections (2) and (3) of the existing section below are confusing in the case of an LLC (its language was modeled verbatim on the Chap 607 counterpart when it was added to 608 in 1999 and this may be why it is complex in its application to an LLC).

608.4226 Conflicts of interest.

(1) No contract or other transaction between a limited liability company and one or more of its members, managers, or managing members or any other limited liability company, corporation, firm, association, or entity in which one or more of its members, managers, or managing members are managers, managing members, directors, or officers or are financially interested shall be either void or voidable because of such relationship or interest, because such members, managers, or managing members are present at the meeting of the members, managers, or managing members or a committee thereof which authorizes, approves, or ratifies such contract or transaction, or because their votes are counted for such purpose, if:

(a) The fact of such relationship or interest is disclosed or known to the managers or managing members or committee which authorizes, approves, or ratifies the contract or transaction by a vote or consent sufficient for the purpose without counting the votes or consents of such interested members, managers, or managing members;

(b) The fact of such relationship or interest is disclosed or known to the members entitled to vote and they authorize, approve, or ratify such contract or transaction by vote or written consent; or

(c) The contract or transaction is fair and reasonable as to the limited liability company at the time it is authorized by the managers, managing members, a committee, or the members.

(2) For purposes of paragraph (1)(a) only, a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the managers or managing members, or of the committee, who have no relationship or interest in the transaction described in subsection (1), but a transaction may not be authorized, approved, or ratified under this section by a single manager of a manager-managed company or a single managing member of a member-managed company, unless the company is a single member limited liability company. If a majority of the managers or managing members who have no such relationship or interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a manager or managing member with such relationship or interest in the transaction does not affect the validity of any action taken under paragraph (1)(a) if the transaction is otherwise authorized, approved, or ratified as provided in that subsection, but such presence or vote of those managers or managing members may be counted for purposes of determining whether the transaction is approved under other sections of this chapter.

(3) For purposes of paragraph (1)(b) only, a conflict of interest transaction is authorized, approved, or ratified if it receives the vote of a majority-in-interest of the members entitled to be counted under this subsection. Membership interests owned by or voted under the control of a manager or managing member who has a relationship or interest in the transaction described in subsection (1) may not be counted in a vote of members to determine whether to authorize, approve, or ratify a conflict of interest transaction under paragraph (1)(b). The vote of those membership interests, however, is counted in determining whether the transaction is approved under other sections of this act. A majority-in-interest of the members, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.]

[***Reporter's note: this is NCCUSL VERSION of Section 410 --- See Committee's currently proposed version following this section***]

SECTION 410. RIGHT OF MEMBERS, MANAGERS, AND DISSOCIATED MEMBERS TO INFORMATION.

(a) In a member-managed limited liability company, the following rules apply:

(1) On reasonable notice, a member may inspect and copy during regular business hours, at a reasonable location specified by the company, any record maintained by the company regarding the company's activities, financial condition, and other circumstances, to the extent the information is material to the member's rights and duties under the operating agreement or this act.

(2) The company shall furnish to each member:

(A) without demand, any information concerning the company's activities, financial condition, and other circumstances which the company knows and is material to the proper exercise of the member's rights and duties under the operating agreement or this act, except to the extent the company can establish that it reasonably believes the member already knows the information; and

(B) on demand, any other information concerning the company's activities, financial condition, and other circumstances, except to the extent the demand or information demanded is unreasonable or otherwise improper under the circumstances.

(3) The duty to furnish information under paragraph (2) also applies to each member to the extent the member knows any of the information described in paragraph (2).

(b) In a manager-managed limited liability company, the following rules apply:

(1) The informational rights stated in subsection (a) and the duty stated in subsection (a)(3) apply to the managers and not the members.

(2) During regular business hours and at a reasonable location specified by the company, a member may obtain from the company and inspect and copy full information regarding the activities, financial condition, and other circumstances of the company as is just and reasonable if:

(A) the member seeks the information for a purpose material to the member's interest as a member;

(B) the member makes a demand in a record received by the company, describing with reasonable particularity the information sought and the purpose for seeking the information; and

(C) the information sought is directly connected to the member's purpose.

(3) Within 10 days after receiving a demand pursuant to paragraph (2)(B), the company shall in a record inform the member that made the demand:

(A) of the information that the company will provide in response to the demand and when and where the company will provide the information; and

(B) if the company declines to provide any demanded information, the company's reasons for declining.

(4) Whenever this act or an operating agreement provides for a member to give or withhold consent to a matter, before the consent is given or withheld, the company shall, without

demand, provide the member with all information that is known to the company and is material to the member's decision.

(c) On 10 days' demand made in a record received by a limited liability company, a dissociated member may have access to information to which the person was entitled while a member if the information pertains to the period during which the person was a member, the person seeks the information in good faith, and the person satisfies the requirements imposed on a member by subsection (b)(2). The company shall respond to a demand made pursuant to this subsection in the manner provided in subsection (b)(3).

(d) A limited liability company may charge a person that makes a demand under this section the reasonable costs of copying, limited to the costs of labor and material.

(e) A member or dissociated member may exercise rights under this section through an agent or, in the case of an individual under legal disability, a legal representative. Any restriction or condition imposed by the operating agreement or under subsection (g) applies both to the agent or legal representative and the member or dissociated member.

(f) The rights under this section do not extend to a person as transferee.

(g) In addition to any restriction or condition stated in its operating agreement, a limited liability company, as a matter within the ordinary course of its activities, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the company has the burden of proving reasonableness.

***Proposed Drafting Committee Version of Section 410*:**

SECTION 410. RIGHT OF MEMBERS, MANAGERS, AND DISSOCIATED MEMBERS TO INFORMATION.

(a) On 10 days' demand made in a record [received][97] by a limited liability company, a member of a limited liability company may inspect and copy during regular business hours, at a reasonable location specified by the company, any of the following:

[97] See footnote to subsection (d).

(1) A current list of the full names and last known business, residence, or mailing addresses of all members, managers, [and managing members.][98]

(2) A copy of any then-effective [written][99] operating agreement and all amendments thereto.

(3) A copy of the certificate of organization [any certificates of conversion and merger, and any other documents,][100] and all amendments thereto, concerning the limited liability company that were filed with the Department of State, together with executed copies of any powers of attorney pursuant to which any certificate of organization or such other documents were executed.

(4) Copies of the limited liability company's federal, state, and local income tax returns and reports, if any, for the three most recent years.

(5) Copies of any financial statements of the limited liability company for the three most recent years.

[(6) *Delaware Alternate*: True and full information regarding the amount of cash and a description and statement of the agreed value of any other property or services contributed by each member and which each member has agreed to contribute in the future, and the date on which each became a member.]
[(6) *Florida LP act Alternate*: Unless contained in an operating agreement made in a record, a record stating the amount of cash and a description and statement of the agreed value of the other benefits contributed and agreed to be contributed by each member, and the times at which, or events on the happening of which, any additional contributions agreed to be made by each member are to be made.] [101]

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[98] Does this reference makes sense, inasmuch as all of the members are "managing members" in an LLC that is not "manager-managed"?

[99] Delaware uses the "written" reference and probably makes sense to use it here as well. The Florida LP act refers to any partnership agreement and amendment "made in a record." Perhaps that is the best way to go.

[100] Discuss whether this necessary as this is public information is available from DOS and not all of the documents may have been filed by the LLC. Our LP act also requires certificates ***and plans*** of conversion and merger (620.1111(3)).

[101] While not yet specifically discussed by the committee, it would make sense to have a provision like this, given that the application of the contribution, distribution and allocation provisions in 403 and 404 are dependent on the

(b) On [10] days' demand made in a record [received][102] by a limited liability company, a member of a limited liability company may inspect and copy during regular business hours, at a reasonable location specified by the company, any record maintained by the company regarding the company's activities, financial condition, and other circumstances, to the extent the information is [material to the member's rights and duties under the operating agreement or this act][103], if:

(1) [The member seeks the information for a purpose material to the member's interest as a member][104];

(2) The member makes a demand in a record received by the company, describing with reasonable particularity the information sought and the purpose for seeking the information; and

(3) The information sought is directly connected to the member's purpose.

(c) At the discretion of the limited liability company, copies of the records and other information described in subsections (a) and (b) above may be mailed, electronically transmitted or otherwise delivered to the member at an address specified by the member for that purpose.

(d) Within 10 days after [receiving][105] a demand pursuant to subsection (b) above, the limited liability company shall in a record inform the member that made the demand:

(1) of the information that the company will provide in response to the demand and when and where the company will provide the information, or that the information will be

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this information being available to members. Note that this would be consistent with existing 608.4101(e) and the LP act as well (620.1111(9)).

[102] See footnote to subsection (d).

[103] Should we eliminate the bracketed provision? See next footnote for explanation

[104] At our last meeting we decided upon this syntax for subsection (2), but having both of the bracketed "materiality" standards would be redundant and possibly confusing in this context. Perhaps we should eliminate the first standard as the second one would seem to encompass it. The reliance on a relationship to "rights/duties in the operating agreement or act" could also be construed in a very limited manner by the limited liability company.

[105] This was bracketed to remind the committee to revisit the notice procedure for this section.

provided in the manner described in subsection (c) upon receiving an address from the member for such purpose; and

(2) if the company declines to provide any demanded information, the company's reasons for declining.

(e) The company shall furnish to each member without demand, any information concerning the company's activities, financial condition, and other circumstances which the company knows and is material to the proper exercise of the member's rights and duties under the operating agreement or this act.[106]

(f) Each manager of a "manager-managed" limited liability company shall have the right to examine and receive copies of all of the information described in subsections (a) and (b) above for a purpose reasonably related to his or her position as a manager. The company shall furnish to each manager of a "manager-managed" limited liability company, without demand, any information concerning the company's activities, financial condition, and other circumstances which the company knows and is material to the proper exercise of the manager's rights and duties under the operating agreement or this act. [107]

(g) On 10 days' demand made in a record received by a limited liability company, a dissociated member may have access to information to which the person was entitled while a member if the information pertains to the period during which the person was a member, the person seeks the information in good faith, and the person satisfies the requirements imposed on a member by subsection (b). The company shall respond to a demand made pursuant to this subsection in the manner provided in subsection (d).

[106] This provision is consistent with existing LLC act (608.4101(3)(a)) and LP act (620.1304(9)). Note that Delaware does not have such a provision.

[107] This provision was not specifically discussed in our January 20, 2010 meeting, but it will be required. It is based in part on existing 608.4101(4) and Del act (18-305(b)). The Delaware scope of information is broader and consistent with NCCUSL approach of expanding information that should be available to managers of "manager-managed" LLC. Should there be a 10-day compliance procedure as in case of subsections (a) and (b)? We should probably also expand subsection (c) to include information provided to managers.

(h) A limited liability company may charge a person that makes a demand under this section the reasonable costs of copying, limited to the costs of labor and material.

(i) A member or dissociated member may exercise rights under this section through an agent or, in the case of an individual under legal disability, a legal representative. Any restriction or condition imposed by the operating agreement or under subsection (k) applies both to the agent or legal representative and the member or dissociated member.

(j) The rights under this section do not extend to a person as transferee.

(k) In addition to any restriction or condition stated in its operating agreement, a limited liability company, as a matter within the ordinary course of its activities, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the company has the burden of proving reasonableness.

(l) A limited liability company shall keep at its principal office or another location the records that are subject to inspection and copying in accordance with this section. A record may be maintained in a medium other than written form if the record is [capable of conversion into written form within a reasonable time][retrievable in perceivable form]. [108]

Uniform Comment [109]

This section is derived from ULPA (2001), §§ 304 (rights to information of limited partners and former limited partners) and 407 (same re: general partners and former general partners). The rules stated here are what might be termed "quasi-default rules" – subject to some

[108] The "record" references is based upon Del Code 18-305(d) and existing 608.4101(5). It may be unnecessary given the definition of "Record" under Section 102 states that a record can be in electronic form as long as it is retrievable in perceivable form. ***But*** consider which alternative phrase is appropriate given the distinction between the tangible items of "perceivable form" and "written." Does perceivable form include an electronic reading tablet like an IPad or Kindle?

[109] This will require substantial revision.

change by the operating agreement. Section 110(c)(6) (prohibiting unreasonable restrictions on the information rights stated in this section).

Although the rights and duties stated in this section are extensive, they may not necessarily be exhaustive. In some situations, some courts have seen owners' information rights as reflecting a fiduciary duty of those with management power. This ~~Act~~act's statement of fiduciary duties is not exhaustive. *See* Comment to Section 409 (explaining that this ~~Act~~act does not seek to "cabin in" all fiduciary duties). In contrast, the operating agreement has considerable "cabining in" power of its own. Section 110(d)(4).

Subsection (a) – Paragraph 1 states the rule pertaining to information memorialized in "records maintained by the company". Paragraph 2 applies to information not in such a record. Appropriately, paragraph (2) sets a more demanding standard for those seeking information.

Subsection (a)(2) and (3) – In appropriate circumstances, violation of either or both of these provisions might cause a court to enjoin or even rescind action taken by the LLC, especially when the violation has interfered with an approval or veto mechanism involving member consent. *E.g. Blue Chip Emerald LLC v. Allied Partners Inc.*, 299 A.D.2d 278, 279-280 (N.Y. App. Div. 2002) (invoking partnership law precedent as reflecting a duty of full disclosure and holding that "[a]bsent such full disclosure, the transaction is voidable).

Subsection (a)(2) – Violation of this paragraph could give rise to a claim for damages against a member or manager [see subsection (b)(1)] who breaches the duties stated in Section 409 in causing or suffering the LLC to violate this paragraph.

Subsection (a)(3) – A member's violation of this paragraph is actionable in damages without need to show a violation of a duty stated in Section 409.

Subsection (b)(1) – This is a switching provision. A manager's violation of the duty stated in subsection (a)(3) is actionable in damages without need to show a violation of a duty stated in Section 409.

Subsection (b)(2) – This paragraph refers to "information" rather than "records maintained by the company" – compare subsection (a) – so in some circumstances the company might have an obligation to memorialize information. Such circumstances will likely be rare or at least unusual. Section 410 generally concerns providing existing information, not creating it. In any event, a member does not trigger the company's obligation under this paragraph merely by satisfying subparagraphs (A) through (C). The member must also satisfy the "just and reasonable" requirement.

Subsection (c) – This section does not control the rights of the estate of a member who dissociates by dying. In that circumstance, Section 504 controls.

Subsection (g) – The phrase "as a matter within the ordinary course of its activities" means that a mere majority consent is needed to impose a restriction or condition. *See* Section 407(b)(3) and (c)(3). This approach is necessary, lest a requesting member (or manager-

member) have the power to block imposition of a reasonable restriction or condition needed to prevent the requestor from abusing the LLC.

The burden of proof under this subsection contrasts with the burden of proof when someone claims that a term of an operating agreement violates Section 110(c)(6). Under that subsection, as a matter of ordinary procedural law, the burden is on the person making the claim.

SECTION 411. COURT-ORDERED INSPECTION.

(a) If a limited liability company does not allow a member, manager or other person who complies with [section 410] to inspect and copy any records required by that section to be available for inspection, or otherwise provide such information in accordance with [section 410(c)] the circuit court in the county where the limited liability company's principal office (or, if none in this state, its registered office) is located may summarily order inspection and copying of the records demanded at the limited liability company's expense upon application of such member, manager or other person.

(b) If the court orders inspection or copying of the records demanded, it shall also order the limited liability company to pay the costs, including reasonable attorney's fees, reasonably incurred by the member, manager or other person seeking the records to obtain the order and enforce its rights under this section unless the limited liability company proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the member, manager or such other person to inspect or copy the records demanded.

(c) If the court orders inspection or copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the member, manager or other person demanding them.

[ARTICLE] 5

TRANSFERABLE INTERESTS AND RIGHTS OF TRANSFEREES AND CREDITORS

SECTION 501. NATURE OF TRANSFERABLE INTEREST. A transferable interest is personal property.

Uniform Comment

Source – This Article most directly follows ULPA (2001), Article 7, because ULPA (2001) reflects the Conference's most recent thinking on the issues addressed here. However, ULPA (2001), Article 7 is quite similar in substance to ULLCA, Article 5, and both those Articles derive from Article 5 of RUPA.

Whether a transferable interest pledged as security is governed by Article 8 or 9 of the Uniform Commercial Code depends on the facts and the rules stated in those Articles.

This ~~Act~~act does not include ULLCA § 501(a), which provided: "A member is not a co-owner of, and has no transferable interest in, property of a limited liability company." That language was a vestige of the "aggregate" notion of the law of general partnerships, and in a modern LLC statute would be at least surplusage and perhaps confusing as well.

SECTION 502. TRANSFER OF TRANSFERABLE INTEREST.

(a) A transfer, in whole or in part, of a transferable interest:

(1) is permissible;

(2) does not by itself cause a member's dissociation or a dissolution and winding up of the limited liability company's activities; and

(3) subject to Section 504, does not entitle the transferee to:

(A) participate in the management or conduct of the company's activities; or

(B) except as otherwise provided in subsection (c), have access to records or other information concerning the company's activities.

(b) A transferee has the right to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled.

(c) In a dissolution and winding up of a limited liability company, a transferee is entitled to an account of the company's transactions only from the date of dissolution.

(d) A transferable interest may be evidenced by a certificate of the interest issued by the limited liability company in a record, and, subject to this section, the interest represented by the certificate may be transferred by a transfer of the certificate.

(e) A limited liability company need not give effect to a transferee's rights under this section until the company has notice of the transfer.

(f) A transfer of a transferable interest in violation of a restriction on transfer contained in the operating agreement is ineffective as to a person having notice of the restriction at the time of transfer.

(g) Except as otherwise provided in Section 602(4)(B), when a member transfers a transferable interest, the transferor retains the rights of a member other than the interest in distributions transferred and retains all duties and obligations of a member.

(h) When a member transfers a transferable interest to a person that becomes a member with respect to the transferred interest, the transferee is liable for the member's obligations under Sections 403 and 406(c) known to the transferee when the transferee becomes a member.

Uniform Comment

One of the most fundamental characteristics of LLC law is its fidelity to the "pick your partner" principle. This section is the core of the ~~Act~~act's provisions reflecting and protecting that principle.

A member's rights in a limited liability company are bifurcated into economic rights (the transferable interest) and governance rights (including management rights, consent rights, rights to information, rights to seek judicial intervention). Unless the operating agreement otherwise provides, a member acting without the consent of all other members lacks both the power and the right to: (i) bestow membership on a non-member, Section 401(d); or (ii) transfer to a non-member anything other than some or all of the member's transferable interest. Section 502(a)(3). However, consistent with current law, a member may transfer governance rights to another member without obtaining consent from the other members. Thus, this ~~Act~~act does not itself protect members from control shifts that result from transfers among members (as distinguished from transfers to non-members who seek thereby to become members).

This section applies regardless of whether the transferor is a member, a transferee of a member, a transferee of a transferee, etc. *See* Section 102(21) (defining "transferable interest" in terms of a right "originally associated with a person's capacity as a member" regardless of "whether or not the person remains a member or continues to own any part of the right").

Subsection (a) – The definition of "transfer," Section 102(20), and this subsection's reference to "in whole or in part" combine to mean that this section encompasses not only unconditional, permanent, and complete transfers but also temporary, contingent, and partial ones as well. Thus, for example, a charging order under Section 504 effects a transfer of part of the judgment debtor's transferable interest, as does the pledge of a transferable interest as collateral for a loan and the gift of a life-interest in a member's rights to distribution.

Subsection (a)(2) – Section 602(4)(B) creates a risk of dissociation via expulsion when a member transfers all of the member's transferable interest.

Subsection (a)(3) – Mere transferees have no right to intrude as the members carry on their activities as members. When a member dies, other law may effect a transfer of the member's interest to the member's estate or personal representative. Section 504 contains special rules applicable to that situation.

Subsection (b) – Amounts due under this subsection are of course subject to offset for any amount owed to the limited liability company by the member or dissociated member on whose account the distribution is made. As to whether an LLC may properly offset for claims against a transferor that was never a member is matter for other law, specifically the law of contracts dealing with assignments.

Subsection (d) – The use of certificates can raise issues relating to Articles 8 and 9 of the Uniform Commercial Code.

SECTION 503. CHARGING ORDER.[11] [0]

(a) On application ~~by a~~to a court of competent jurisdiction by any judgment creditor of a member or a transferee, ~~a~~the court may enter a charging order against the transferable interest of the ~~judgment debtor for~~member or the member or transferee for payment of the unsatisfied amount of the judgment with interest. A charging order constitutes a lien ~~on~~upon a judgment debtor's transferable interest and requires the limited liability company to pay over to the ~~person to which the charging order was issued~~judgment creditor any distribution that would otherwise be paid to the judgment debtor.

~~(b) To the extent necessary to effectuate the collection of distributions pursuant to a charging order in effect under subsection (a), the court may:~~

~~(1) appoint a receiver of the distributions subject to the charging order, with the power to make all inquiries the judgment debtor might have made; and~~

~~(2) make all other orders necessary to give effect to the charging order.~~

(~~c) Upon a showing that distributions under a charging order will not pay the judgment debt within a reasonable time, the court may foreclose the lien and order the sale of the transferable interest. The purchaser at the foreclosure sale only obtains the transferable interest, does not thereby become a member, and is subject to Section 502.~~b) ~~(d) At any time before foreclosure under subsection (c), the member or transferee whose transferable interest is subject to a charging order under subsection (a) may extinguish the charging order by satisfying the judgment and filing a certified copy of the satisfaction with the court that issued the charging order.~~

~~(e) At any time before foreclosure under subsection (c), a limited liability company or one or more members whose transferable interests are not subject to the charging order may pay to the judgment creditor the full amount due under the judgment and thereby succeed to the rights of the judgment creditor, including the charging order. (f)~~ This ~~act~~chapter does not

deprive any member or transferee of the benefit of any exemption laws applicable to the ~~member's or transferee's~~ transferable interest~~.~~ of the member or transferee.

~~(g) This section provides the~~

(c) Except as provided in subsections (d) and (e), a charging order is the sole and exclusive remedy by which a ~~person seeking to enforce a judgment against a member or transferee may, in the capacity of judgment creditor, satisfy the~~judgment creditor of a member or member's transferee may satisfy a judgment from the judgment debtor's ~~transferable interest.~~interest in a limited liability company or rights to distributions from the limited liability company.

(d) In the case of a limited liability company having only one member, if a judgment creditor of a member or member's transferee establishes to the satisfaction of a court of competent jurisdiction that distributions under a charging order will not satisfy the judgment within a reasonable time, a charging order is not the sole and exclusive remedy by which the judgment creditor may satisfy the judgment against a judgment debtor who is the sole member of a limited liability company or the transferee of the sole member, and upon such showing, the court may order the sale of that interest in the limited liability company pursuant to a foreclosure sale. A judgment creditor may make a showing to the court that distributions under a charging order will not satisfy the judgment within a reasonable time at any time after the entry of the judgment and may do so at the same time that the judgment creditor applies for the entry of a charging order.

(e) In the case of a limited liability company having only one member, if the court orders foreclosure sale of a judgment debtor's interest in the limited liability company or of a charging order lien against the sole member of the limited liability company pursuant to subsection (e):

(i) The purchaser at the court-ordered foreclosure sale obtains the member's entire limited liability company interest, not merely the rights of a transferee;

(ii) The purchaser at the sale becomes the member of the limited liability company; and

(iii) The person whose limited liability company interest is sold pursuant

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110 The changes to this section contain the same provisions found in the "*Olmstead p*atch amendment" to Section 608.433, as signed into law on May 31, 2011. Note that Committee also needs to conform Section 112(b) with this

to the foreclosure sale or is the subject of the foreclosed charging order ceases to be a member of the limited liability company.

(f) In the case of a limited liability company having more than one member, the remedy of foreclosure on a judgment debtor's interest in such limited liability company or against rights to distribution from such limited liability company is not available to a judgment creditor attempting to satisfy the judgment and may not be ordered by a court.

(g) Nothing in this section shall limit:

(i) The rights of a creditor that has been granted a consensual security interest in a limited liability company interest to pursue the remedies available to such secured creditor under other law applicable to secured creditors;

(ii) The principles of law and equity which affect fraudulent transfers;

(iii) The availability of the equitable principles of alter ego, equitable lien, or constructive trust, or other equitable principles not inconsistent with this section; or

(iv) The continuing jurisdiction of the court to enforce its charging order in a manner consistent with this section.

Uniform Comment[111]

Section.

[111] Conforming changes are required. When the changes are made, to determine whether the following preambles from the 608.433 will be worked into the comment:

"WHEREAS, on June 24, 2010, the Florida Supreme Court held in Olmstead v. Federal Trade Commission (No. SC08-1009), reported at 44 So.3d 76, 2010-1 Trade Cases P 77,079, 35 Fla. L. Weekly S357, that a charging order is not the exclusive remedy available to a creditor holding a judgment against the sole member of a Florida single-member limited liability company (LLC), and

WHEREAS, a charging order represents a lien entitling a judgment creditor to receive distributions from the LLC or the partnership that otherwise would be payable to the member or partner who is the judgment debtor, and
WHEREAS, the dissenting members of the Court in Olmstead expressed a concern that the majority's holding is not limited to a single-member LLC and a desire that the Legislature clarify the law in this area, and

WHEREAS, the Legislature finds that the uncertainty of the breadth of the Court's holding in Olmstead may persuade businesses and investors located in Florida to organize LLCs under the law in other jurisdictions where a charging order is the exclusive remedy available to a judgment creditor of a member of a multimember LLC, and

WHEREAS, the Legislature further finds it necessary to amend s. 608.433, Florida Statutes, to remediate the potential effect of the holding in Olmstead and to clarify that the current law does not extend to a member of a multimember LLC organized under Florida law and to provide procedures for application of the holding in Olmstead to a member of a single-member
LLC organized under Florida law, . . ."

Charging order provisions appear in various forms in UPA, ULPA, RULPA, RUPA, ULLCA, and ULPA (2001). This section builds on those acts, while: (i) modernizing the language: (ii) making explicit certain points that have been at best implicit; and (iii) seeking to delineate more precisely the types of extraordinary circumstances that would have to exist before a court enforcing a charging order would be justified in interfering with an LLC's management or activities.

This section balances the needs of a judgment creditor of a member or transferee with the needs of the limited liability company and the members. The section achieves that balance by allowing the judgment creditor to collect on the judgment through the transferable interest of the judgment debtor while prohibiting interference in the management and activities of the limited liability company.

Under this section, the judgment creditor of a member or transferee is entitled to a charging order against the relevant transferable interest. While in effect, that order entitles the judgment creditor to whatever distributions would otherwise be due to the member or transferee whose interest is subject to the order. However, the judgment creditor has no say in the timing or amount of those distributions. The charging order does not entitle the judgment creditor to accelerate any distributions or to otherwise interfere with the management and activities of the limited liability company.

The operating agreement has no power to alter the provisions of this section to the prejudice of third parties. Section 110(c)(11).

Subsection (a) – The phrase "judgment debtor" encompasses both members and transferees. As a matter of civil procedure and due process, an application for a charging order must be served both on the limited liability company and the member or transferee whose transferable interest is to be charged.

Subsection (b) – Paragraph (2) refers to "other orders" rather than "additional orders". Therefore, given appropriate circumstances, a court may invoke either paragraph (1) or (2) or both.

Subsection (b)(1) – The receiver contemplated here is not a receiver for the limited liability company, but rather a receiver for the distributions. The principal advantage provided by this paragraph is an expanded right to information. However, that right goes no further than "the extent necessary to effectuate the collections of distributions pursuant to a charging order."

Subsection (b)(2) – This paragraph must be understood in the context of the balance described in the introduction to this section's Comment. In particular, the court's power to make orders "that the circumstances may of the case may require" is limited to "giv[ing] effect to the charging order."

Example: A judgment creditor with a charging order believes that the limited liability company should invest less of its surplus in operations, leaving more funds for distributions. The creditor

moves the court for an order directing the limited liability company to restrict re-investment. Subsection (b)(2) does not authorize the court to grant the motion.

Example: A judgment creditor with a judgment for $10,000 against a member obtains a charging order against the member's transferable interest. Having been properly served with the order, the limited liability company nonetheless fails to comply and makes a $3000 distribution to the member. The court has the power to order the limited liability company to pay $3000 to the judgment creditor to "give effect to the charging order."

Under subsection (b)(2), the court also has the power to decide whether a particular payment is a distribution, because that decision determines whether the payment is part of a transferable interest subject to a charging order. To the extent a payment is not a distribution, it is not part of the transferable interest and is not subject to subsection (g). The payment is therefore subject to whatever other creditor remedies may apply.

Section 405(g) states a special exception to the definition of "distribution," but that exception applies only "[f]or purposes of subsection (a)" of Section 405. Therefore, whether a charging order applies to "amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business under a bona fide retirement plan or other benefits program," Section 405(g), is a question determined under this section, without regard to Section 405(g). To date, case law is scant, but there is authority holding that compensation is a distribution. *PB Real Estate, Inc. v. Dem II Properties*, 719 A.2d 73, 75 (Conn. App. Ct. 1998) (rejecting the defendants' claim that the payments at issue were merely compensation for their services to their law firm, which was organized as an LLC; noting that the defendants' characterization was at odds with the firm's business records and tax returns; holding that the payments received were distributions subject to the charging order).

This ~~Act~~act has no specific rules for determining the fate or effect of a charging order when the limited liability company undergoes a merger, conversion, or domestication under [Article] 10. In the proper circumstances, such an organic change might trigger an order under subsection (b)(2).

Subsection (c) –The phrase "that distributions under the charging order will not pay the judgment debt within a reasonable period of time" comes from case law. *See, e.g.*, *Nigri v. Lotz*, 453 S.E.2d 780, 783 (Ga. Ct. App. 1995).

Subsection (e) – This ~~Act~~act jettisons the confusing concept of redemption and substitutes an approach that more closely parallels the modern, real-world possibility of the LLC or its members buying the underlying judgment (and thereby dispensing with any interference the judgment creditor might seek to inflict on the LLC). When possible, buying the judgment remains superior to the mechanism provided by this subsection, because: (i) this subsection requires full satisfaction of the underlying judgment, (ii) while the LLC or the other members might be able to buy the judgment for less than face value. On the other hand, this subsection operates without need for the judgment creditor's consent, so it remains a valuable protection in the event a judgment creditor seeks to do mischief to the LLC.

Whether an LLC's decision to invoke this subsection is "ordinary course" or "outside the ordinary course," Section 407(b)(3) and (4) and (c)(3) and (4)(C), depends on the circumstances. However, the involvement of this subsection does not by itself make the decision "outside the ordinary course."

Subsection (g) – This subsection does not override Article 9, which may provide different remedies for a secured creditor acting in that capacity. A secured creditor with a judgment might decide to proceed under Article 9 alone, under this section alone, or under both Article 9 and this section. In the last-mentioned circumstance, the constraints of this section would apply to the charging order but not to the Article 9 remedies.

This subsection is not intended to prevent a court from effecting a "reverse pierce" where appropriate. In a reverse pierce, the court conflates the entity and its owner to hold the entity liable for a debt of the owner. *Litchfield Asset Mgmt. Corp. v. Howell*, 799 A.2d 298, 312 (Conn. App. Ct. 2002) (approving a reverse pierce where a judgment debtor had established a limited liability company in a patent attempt frustrate the judgment creditor).

SECTION 504. POWER OF PERSONAL REPRESENTATIVE OF DECEASED MEMBER. If a member dies, the deceased member's personal representative or other legal representative may exercise the rights of a transferee provided in Section 502(c) and, for the purposes of settling the estate, the rights of a current member under Section 410.[112]

[Reporter's Note: Committee to consider following provisions in existing law and determine whether any should be added to 504:

608.434. Power of estate of deceased or incompetent member; dissolved or terminated member.—(1)If a member who is an individual dies or if a court of competent jurisdiction adjudges a member who is an individual to be incompetent to manage the member's person or property, the member's executor, administrator, guardian, conservator, or other legal representative may exercise all the member's rights for the purpose of settling the member's estate or administering the member's property, including any power the member had to give an assignee the right to become a member.

(2)If a member is a corporation, limited liability company, trust, or other entity and is dissolved or terminated, the powers of that member may be exercised by its legal representative or successor.]

[112] At 9/30/10 meeting it was suggested that a cross-reference to derivative actions may be appropriate. Should transferees have the right to bring derivative action under 902 (and 903, which requires the plaintiff to be a member)? This is the language from 608.601(1) which was discussed:

"A person may not commence a proceeding in the right of a domestic or foreign limited liability company unless the person was a member of the limited liability company when the transaction complained of occurred or unless the person became a member through transfer by operation of law from one who was a member at that time."

Uniform Comment

Source: ULPA (2001) § 704.

Section 410 pertains only to information rights.

[ARTICLE] 6

MEMBER'S DISSOCIATION

SECTION 601. MEMBER'S POWER TO DISSOCIATE; WRONGFUL DISSOCIATION.

(a) A person has the power to dissociate as a member at any time, rightfully or wrongfully, by withdrawing as a member by express will under Section 602(1).

(b) A person's dissociation from a limited liability company is wrongful only if the dissociation:

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

(2) occurs before the termination of the company and:

(A) the person withdraws as a member by express will;

(B) the person is expelled as a member by judicial order under Section 602(5);

(C) the person is dissociated under Section 602(7)(A) by becoming a debtor in bankruptcy; or

(D) in the case of a person that is not a trust other than a business trust, an estate, or an individual, the person is expelled or otherwise dissociated as a member because it willfully dissolved or terminated.

(c) A person that wrongfully dissociates as a member is liable to the limited liability company and, subject to Section 901, to the other members for damages caused by the dissociation. The liability is in addition to any other debt, obligation, or other liability of the member to the company or the other members.

Uniform Comment

Source – ULPA (2001) § 604, which is based on RUPA Section 602. ULLCA § 602 is functionally identical in some respects but is not a good overall source, because that section presupposes the term/at-will paradigm.

SECTION 602. EVENTS CAUSING DISSOCIATION. A person is dissociated as a member from a limited liability company when:

(1) the company has notice of the person's express will to withdraw as a member, but, if the person specified a withdrawal date later than the date the company had notice, on that later date;

(2) an event stated in the operating agreement as causing the person's dissociation occurs;

(3) the person is expelled as a member pursuant to the operating agreement;

(4) the person is expelled as a member by the unanimous consent of the other members if:

(A) it is unlawful to carry on the company's activities with the person as a member;

(B) there has been a transfer of all of the person's transferable interest in the company, other than:

(i) a transfer for security purposes; or

(ii) a charging order in effect under Section 503 which has not been foreclosed;

(C) the person is a corporation and, within 90 days after the company notifies the person that it will be expelled as a member because the person 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 certificate of dissolution has not been revoked or its charter or right to conduct business has not been reinstated; or

(D) the person is a limited liability company or partnership that has been dissolved and whose business is being wound up;

(5) on application by the company, the person is expelled as a member by judicial order because the person:

(A) has engaged, or is engaging, in wrongful conduct that has adversely and materially affected, or will adversely and materially affect, the company's activities;

(B) has willfully or persistently committed, or is willfully and persistently committing, a material breach of the operating agreement or the person's duties or obligations under Section 409; or

(C) has engaged in, or is engaging, in conduct relating to the company's activities which makes it not reasonably practicable to carry on the activities with the person as a member;

(6) in the case of a person who is an individual:

(A) the person dies; or

(B) in a member-managed limited liability company:

(i) a guardian or general conservator for the person is appointed; or

(ii) there is a judicial order that the person has otherwise become incapable of performing the person's duties as a member under [this act] or the operating agreement;

(7) in a member-managed limited liability company, the person:

(A) becomes a debtor in bankruptcy;

(B) executes an assignment for the benefit of creditors; or

(C) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the person or of all or substantially all of the person's property;

(8) in the case of a person that is a trust or is acting as a member by virtue of being a trustee of a trust, the trust's entire transferable interest in the company is distributed;

(9) in the case of a person that is an estate or is acting as a member by virtue of being a personal representative of an estate, the estate's entire transferable interest in the company is distributed;

(10) in the case of a member that is not an individual, partnership, limited liability company, corporation, trust, or estate, the termination of the member;

(11) the company participates in a merger under [Article] 10, if:

(A) the company is not the surviving entity; or,

(B) otherwise as a result of the merger, the person ceases to be a member;

(12) the company participates in a conversion under [Article] 10;

(13) the company participates in a domestication under [Article] 10, if, as a result of the domestication, the person ceases to be a member; or

(14) the company terminates.

Uniform Comment

Source – ULLCA § 601; RUPA Section 601; ULPA (2001) §§ 601 and 603.

Paragraph (4)(B) –Under this paragraph (unless the operating agreement provides otherwise), a member's transferee can protect itself from the vulnerability of "bare transferee" status by obligating the member/transferor to retain a 1% interest and then to exercise its governance rights (including the right to bring a derivative suit) to protect the transferee's interests.

SECTION 603. EFFECT OF PERSON'S DISSOCIATION AS MEMBER.

(a) When a person is dissociated as a member of a limited liability company:

(1) the person's right to participate as a member in the management and conduct of the company's activities terminates;

(2) if the company is member-managed, the person's fiduciary duties as a member end with regard to matters arising and events occurring after the person's dissociation; and

(3) subject to Section 504 and [Article] 10, any transferable interest owned by the person immediately before dissociation in the person's capacity as a member is owned by the person solely as a transferee.

(b) A person's dissociation as a member of a limited liability company does not of itself discharge the person from any debt, obligation, or other liability to the company or the other members which the person incurred while a member.

Uniform Comment

Source – ULPA (2001) § 605, which was drawn from RUPA Section 603(b).

Subsection (a) – This provision makes no reference to power-to-bind matters, because the ~~Act~~act provides that a member *qua* member has no power to bind the LLC. Section 301.

Subsection (a)(2) – This provision applies only when the limited liability company is member-managed, because in a manager-managed LLC these duties do not apply to a member *qua* member. Section 409(g)(5).

Subsection (a)(3) – This paragraph accords with Section 404(~~b~~c) – dissociation does not entitle a person to any distribution. Like most *inter se* rules in this ~~Act~~act, this one is subject to the operating agreement. For example, the operating agreement has the power to provide for the buy out of a person's transferable interest in connection with the person's dissociation.

Subsection (b) – In a member-managed limited liability company, the obligation to safeguard trade secrets and other confidential or proprietary information is incurred when a person is a member. A subsequent dissociation does not entitle the person to usurp the information or use it to the prejudice of the LLC after the dissociation. (In a manager-managed LLC, any obligations of a non-manager member *viz a viz* proprietary information would be a matter for the operating agreement, the obligation of good faith, or other law.)

[Reporters note: the following section proposed by the DOS has not been considered by the Committee yet:

SECTION 604. STATEMENT OF DISSOCIATION.[113]

(a) A member may file a statement of dissociation with the Florida Department of State containing:

(1) The name of the limited liability company;

(2) The name and signature of the dissociating member;

(3) The date the member withdrew or will withdraw; and

(4) A statement that the company has been notified of the dissociation in writing.

(b) A statement of dissociation is a limitation on the authority of a dissociated member for purposes of Section [302].[114]

(c) For purposes of [*reference to sections applicable to third party notice*] a person who is not [a member] is deemed to have notice of the dissociation 90 days after a statement of dissociation is filed.[115]]]

[113] This is an addition made by the DOS, which was moved from Section 601. Based upon 620.8704. Requires discussion as parts already addressed by other sections of the act.

[114] Needs to be discussed further.

[115] If left in the draft, this needs to be confirmed with Section 103(d).

[ARTICLE] 7

DISSOLUTION AND WINDING UP

SECTION 701. EVENTS CAUSING DISSOLUTION.

~~(a)~~ A limited liability company is dissolved, and its activities must be wound up, upon the occurrence of any of the following:

(~~1~~a) an event or circumstance that the operating agreement states causes dissolution;

(~~2~~b) the consent of all the members; or

(~~3~~c) the passage of 90 consecutive days during which the company has no members~~;~~,[116] or

(~~4) on application by a member,~~d) the entry ~~by [appropriate court] of an order dissolving the company on the grounds that:~~

~~(A) the conduct of all or substantially all of the company's activities is unlawful; or~~

~~(B) it is not reasonably practicable to carry on the company's activities in conformity with the certificate of organization and the operating agreement; or~~

~~(5) on application by a member, the entry by [appropriate court] of an order dissolving the company on the grounds that the managers or those members in control of the company:~~

~~(A) have acted, are acting, or will act in a manner that is illegal or fraudulent; or~~

~~(B) have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant.~~

~~(b) In a proceeding brought under subsection (a)(5), the court may order a remedy other than dissolution.~~of a decree of judicial dissolution in accordance with Sections 702 and 705.

Uniform Comment[117]

[116] See footnotes to Sec. 401(c). It would also make sense to have a statutory cross-reference here to Section 401(c) since the language in Sec. 401(c) has traditionally in Florida and Delaware and other states been in the "dissolution event" provisions of the LLC statute.

[117] Will need to be completely revised.

[Subsection(a)(4) – The standard stated here is conventional, and this subsection (a)(4) is non-waivable. Section 110(c)(7).]

[Subsection (a)(5) – ULLCA § 801(4)(v) contains a comparable provision, although that provision also gives standing to dissociated members. Even in non-ULLCA states, courts have begun to apply close corporation "oppression" doctrine to LLCs.

This provision's reference to "those members in control of the company" implies that such members have a duty to avoid acting oppressively toward fellow members.

Subsection (a)(5) is non-waivable. *See* Section 110(c)(7).]

Subsection (b) – In the close corporation context, many courts have reached this position without express statutory authority, most often with regard to court-ordered buyouts of oppressed shareholders. This subsection saves courts and litigants the trouble of re-inventing that wheel in the LLC context. However, unlike, subsection (a)(4) and (5), subsection (b) can be overridden by the operating agreement. Thus, the members may agree to a restrict or eliminate a court's power to craft a lesser remedy, even to the extent of confining the court (and themselves) to the all-or-nothing remedy of dissolution.

SECTION 702. GROUNDS FOR JUDICIAL DISSOLUTION.

A circuit court may dissolve a limited liability company:

(a) (1) In a proceeding by the Department of Legal Affairs if it is established that:

(A) The limited liability company obtained its articles of organization through fraud; or

(B) The limited liability company has continued to exceed or abuse the authority conferred upon it by law.

(2) The enumeration in paragraph (1) of grounds for involuntary dissolution does not exclude actions or special proceedings by the Department of Legal Affairs or any state official for the annulment or dissolution of a limited liability company for other causes as provided in any other law of this state.

(b) In a proceeding by a manager or member if it is established that:

(1) the limited liability company's assets are being misappropriated or wasted, causing material injury to the limited liability company;

(2) the managers or those members in control of the company have acted, are acting, or are reasonably expected to act in a manner that is illegal or fraudulent;

(3) the conduct of all or substantially all of the company's activities is unlawful;

(4) it is not reasonably practicable to carry on the company's activities in conformity with the certificate of organization and the operating agreement;

(5) the managers or those members in control of the limited liability company are deadlocked in the management of the limited liability company affairs, the members are unable to break the deadlock, and irreparable injury to the limited liability company is threatened or being suffered; or

(6) the managers or those members in control of the company have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful [to the applicant]; [118]

(c) In a proceeding by a creditor if it is established that:

(1) The creditor's claim has been reduced to judgment, the execution on that judgment returned unsatisfied, and the limited liability company is insolvent; or

(2) The limited liability company has admitted in writing that the creditor's claim is due and owing and the limited liability company is insolvent.

(d) In a proceeding by the limited liability company to have its voluntary dissolution continued under court supervision.

SECTION 703. PROCEDURE FOR JUDICIAL DISSOLUTION.

[118] Since we've modified uniform act to permit a manager to initiate this judicial action, the bracketed phrase probably should be changed to refer only to a "member" applicant. The Committee will revisit the issue of whether this basis for judicial dissolution should be waivable for purposes of Section 110.

(a) Venue for a proceeding brought under Section 702 lies in the circuit court of the county where the limited liability company's principal office is or was last located, as shown by the records of the Department of State, or, if none in this state, where its registered office is or was last located.

(b) It is not necessary to make members parties to a proceeding to dissolve a limited liability company unless relief is sought against them individually.

(c) A court in a proceeding brought to dissolve a limited liability company may issue injunctions, appoint a receiver or custodian *pendente lite* with all powers and duties the court directs, take other action required to preserve the limited liability company's assets wherever located, and carry on the business of the limited liability company until a full hearing can be held.

(d) If the court determines that any party has commenced, continued, or participated in a proceeding brought under Section 702 and has acted arbitrarily, frivolously, vexatiously, or not in good faith, the court may, in its discretions, award attorney's fees and other reasonable expenses to the other parties the action.

[(e) In a proceeding brought under Section 702, the court may, upon a showing of sufficient merit to warrant such a remedy:

(1) appoint a receiver or custodian under Section 704;

(2) [order a purchase of a complaining member's transferable interest]; or

(3) order a remedy other than dissolution as in its discretion it may deem appropriate, including any equitable remedy.] [119]

[119] The Committee decided this subsection should be flagged for further discussion. The "purchase" remedy has an analog in 607.1434(3) and 607.1436. No such concept appears in the existing LLC act. If such a purchase remedy is left in the draft, then it is probably necessary to incorporate procedural provisions comparable to 607.1436 to

SECTION 704. RECEIVERSHIP OR CUSTODIANSHIP. [PROVISIONAL MANAGER?][120]

(a) A court in a judicial proceeding brought to dissolve a limited liability company may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage, the business and affairs of the limited liability company. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has exclusive jurisdiction over the limited liability company and all of its property wherever located.

(b) The court may appoint a person authorized to act as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

(c) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time. Among other powers:

(1) The receiver:

(A) May dispose of all or any part of the assets of the limited liability company wherever located, at a public or private sale, if authorized by the court.

(B) May sue and defend in the receiver's own name as receiver of the limited liability company in all courts of this state.

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provide a court with guidance and better reflect the purpose of such provision. The "provisional manager" remedy is also based on a corporate analog (607.1434(2)). The Committee likewise needs to determine whether the procedural provisions relating to the "provisional director"
concept (607.1435) should be incorporated into this draft. Section 704 would be at least one logical place to do this.

[120] In our meeting of June 23, 2010 it was suggested that instead of having a "provisional manager" provision we instead define more specifically the role of a custodian and clarify that a custodian can act in manner comparable to that of a provisional director under the corporate act. Suggested supplemental provisions have been added to

(2) The custodian:[121]

(A) [Shall be an impartial person who is not a member, manager or creditor of the limited liability company or any subsidiary or affiliate of the limited liability company, and whose further qualifications shall be determined by the court.][122]

(B) May exercise all of the powers of the limited liability company, through or in place of its managers or members, to the extent necessary to manage the affairs of the limited liability company in the best interests of its members and creditors.

(C) [Shall not be liable for any action taken or decision made in exercising its powers, except as managers may be liable under ss. 406 and 408.]

(D) [Shall report from time to time to the court concerning the matter complained of, or the status of the deadlock, if any, and the status of the limited liability company's business, as the court shall direct. In addition, the custodian shall submit to the court, if so directed, recommendations as to the appropriate disposition of the action.]

(d) The court during a receivership may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a receiver, if doing so is in the best interests of the limited liability company and its members and creditors.

(e) The court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and the receiver's or custodian's counsel from the assets of the limited liability company or proceeds from the sale of assets.

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subsection (c)(2) of this Section. To discuss whether we should add any other "provisional manager" provisions to this section.

[121] Bracketed provisions are based upon provisions contained in 607.1435. The cross-reference for provisional director standard is to 607.0831 (Liability of Directors), and 406 and 408 are comparable standards for managers under this act.

(f) The court has jurisdiction to appoint an ancillary receiver for the assets and business of a limited liability company. The ancillary receiver shall serve ancillary to a receiver located in any other state, whenever the court deems that circumstances exist requiring the appointment of such a receiver. The court may appoint such an ancillary receiver for a foreign limited liability company even though no receiver has been appointed elsewhere. Such receivership shall be converted into an ancillary receivership when an order entered by a court of competent jurisdiction in the other state provides for a receivership of the limited liability company.

SECTION 705. DECREE OF DISSOLUTION.

(a) If after a hearing the court determines that one or more grounds for judicial dissolution described in Section 702 exist, it may enter a decree dissolving the limited liability company and specifying the effective date of the dissolution, and the clerk of the court shall deliver a certified copy of the decree to the Department of State, which shall file it.

(b) After entering the decree of dissolution, the court shall direct the winding up and liquidation of the limited liability company's business and affairs in accordance with Sections 708 through 710, subject to the provisions of subsection (c) of this Section 705.

(c) In a proceeding for judicial dissolution, the court may require all creditors of the limited liability company to file with the clerk of the court or with the receiver, in such form as the court may prescribe, proofs under oath of their respective claims. If the court requires the filing of claims, it shall fix a date, which shall not be less than 4 months from the date of the order, as the last day for filing of claims. The court shall prescribe the deadline for filing claims that shall be given to creditors and claimants. Prior to the date so fixed, the court may extend the

[122] Discuss whether any of these conditions could conflict with subsection (d) (that is, the ability to serve as a receiver as well).

time for the filing of claims by court order. Creditors and claimants failing to file proofs of claim on or before the date so fixed may be barred, by order of court, from participating in the distribution of the assets of the limited liability company. Nothing in this section affects the enforceability of any recorded mortgage or lien or the perfected security interest or rights of a person in possession of real or personal property.

SECTION 706. CERTIFICATE OF DISSOLUTION; FILING OF CERTIFICATE OF DISSOLUTION. [123]

(a) Upon the occurrence of an event described in subsections 701(a) - (c), the limited liability company shall file a certificate of dissolution as provided in this section.

(b) The certificate of dissolution shall set forth:

(1) The name of the limited liability company.

(2) The effective date of the limited liability company's dissolution.

(3) A description of the occurrence that resulted in the limited liability company's dissolution under [subsections 701(a) - (c).]

(4) If there are no members, the name, address, and signature of the person appointed in accordance with this subsection to wind up the company;

(c) The certificate of dissolution of the limited liability company shall be delivered to the Department of State. If the Department of State finds that such certificate of dissolution conforms to law, it shall, when all fees have been paid as prescribed in this chapter, file the certificate of dissolution.

(d) Upon the filing of such certificate of dissolution, the existence of the limited liability company shall cease, except for the purpose of suits, other proceedings, and appropriate action as provided in this chapter. The manager or managers in office at the time of dissolution, or the survivors of them, or, if none, the members, shall thereafter be trustees for the members and creditors of the dissolved limited liability company; and as such the trustees shall have authority

[123] This was moved from Article 2, and then language added from existing dissolution provisions of Chapters 608 and 620 (LPA). Committee postponed discussion on the "two step" approach for dissolutions. That is, mandatory filing of a certificate of dissolution upon a dissolution event, and then permissive filing of a statement of termination upon completion of winding-up process (as provided in section 704). Subsections (c) and (d) are taken from existing 608.446(1) and (2).

to distribute any property of the limited liability company discovered after dissolution, to convey real estate, and to take such other action as may be necessary on behalf of and in the name of such dissolved limited liability company. [124]

SECTION 707. REVOCATION OF CERTIFICATE OF DISSOLUTION.

(1) A limited liability company that has dissolved as the result of an event described in subsections 701(a) - (c) and filed a certificate of dissolution with the Department of State may revoke its dissolution at any time prior to the expiration of 120 days following the effective date of its certificate of dissolution.

(2) The revocation of the dissolution shall be authorized in the same manner as the dissolution was authorized.

(3) After the revocation of dissolution is authorized, the limited liability company shall deliver a statement of revocation of dissolution to the Department of State for filing, together with a copy of its certificate of dissolution, that sets forth:

(a) The name of the limited liability company;

(b) The effective date of the dissolution that was revoked;

(c) The date that the [certificate of] revocation of dissolution was authorized;

(4) If there has been substantial compliance with subsection (3), subject to section 205, the revocation of dissolution is effective when the Department of State files the statement of revocation of dissolution.

(5) When the revocation of dissolution is effective, the revocation of dissolution relates back to and takes effect as of the effective date of the dissolution, and the limited liability company resumes carrying on its business as if dissolution had never occurred.

SECTION 708. WINDING UP.

(a) A dissolved limited liability company shall wind up its activities, and the company continues after dissolution only for the purpose of winding up.

[124] Discuss whether a provision like that in existing 608.447 is needed (that is, that the certificate of organization will be "cancelled" by the DOS upon the filing of the certificate of dissolution). Also, discuss whether the provisions of existing 608.4431 are needed.

(b) In winding up its activities, a limited liability company:

(1) shall discharge the company's debts, obligations, or other liabilities~~,~~ as provided in Sections 709 and 710, settle and close the company's activities, and marshal and distribute the assets of the company; and

(2) may~~:~~

(A) ~~deliver to the Department of State for filing a statement of dissolution stating the name of~~preserve the company activities and ~~that the company is dissolved;~~

~~(B) preserve the company activities and~~ property as a going concern for a reasonable time;

(~~C~~B) prosecute and defend actions and proceedings, whether civil, criminal, or administrative;

(~~D~~C) transfer the company's property;

(~~E~~D) settle disputes by mediation or arbitration; and

(~~F) deliver to the Department of State for filing a statement of termination stating the name of the company and that the company is terminated; and~~ (~~G~~E) perform other acts necessary or appropriate to the winding up.

(c) If a dissolved limited liability company has no members, the legal representative of the last person to have been a member may wind up the activities of the company. If the person does so, the person has the powers of a sole manager under Section 407(c) and is deemed to be a manager for the purposes of Section 304(a)(2).

(d) If the legal representative under subsection (c) declines or fails to wind up the company's activities, a person may be appointed to do so by the consent of transferees owning a majority of the rights to receive distributions as transferees at the time the consent is to be effective. A person appointed under this subsection~~:~~ ~~(1)~~ has the powers of a sole manager under Section 407(c) and is deemed to be a manager for the purposes of Section 304(a)(2)~~; and~~

~~(2) shall promptly deliver to the Department of State for filing an amendment to the company's certificate of organization to:~~

~~(A) state that the company has no members;~~

~~(B) state that the person has been appointed pursuant to this subsection to wind up the company; and (C) provide the street and mailing addresses of the person~~.

(e) ~~The [appropriate~~A circuit court~~]~~ may order judicial supervision of the winding up of a dissolved limited liability company, including the appointment of a person to wind up the company's activities:

(1) on application of a member, if the applicant establishes [good cause;][125]

(2) on the application of a transferee, if:

(A) the company does not have any members;

(B) the legal representative of the last person to have been a member declines or fails to wind up the company's activities; and

(C) within a reasonable time following the dissolution a person has not been appointed pursuant to subsection (~~c~~d); or

(3) in connection with a proceeding under Section 701(a)(4) or (5).

[(f) A dissolved limited liability company that has completed winding up may deliver to the Department of State for filing a statement of termination that states:

(1) The name of the limited liability company.

(2) The date of filing of its initial certificate of organization.

(3) The limited liability company has completed winding up its affairs and wishes to file a statement of termination.

(4) Any other information as determined by the [manager] [member][126] filing the statement or by a person [authorized to wind up the limited liability company].]

Uniform Comment

Source – ULPA (2001) § 803, which was based on RUPA Sections 802 and 803.

Because under this ~~Act~~act the power to bind a limited liability company to a third party is primarily a matter of agency law, Section 301, Comment, this ~~Act~~act has no need of provisions delineating the effect of dissolution on a member or manager's power to bind.

[125] Should "sufficient merit" standard be used (as in 703(e))? The Committee decided on 9/30/10 that a "Business Litigation Subcommittee" (to be chaired by Mark Nichols) should review this and other issues in the act dealing with judicial standards of review, venue, service of process and judicial procedural questions.

[126] Should this sentence refer simply to an "authorized representative?"

Subsection (b)(2)(A) and (F) – For the constructive notice effect of a ~~statement~~certificate of dissolution or termination, see Section 103[(d)(~~2~~3)](A) and (B).

SECTION ~~703.~~709. KNOWN CLAIMS AGAINST DISSOLVED LIMITED LIABILITY COMPANY.[127]

~~(a) Except as otherwise provided in subsection (d), a~~

(1) A dissolved limited liability company ~~may give notice of a known claim under subsection (b), which has the effect as provided in subsection (c~~or successor entity, as defined in subsection (14), may dispose of the known claims against it by following the procedure described in subsections (2), (3), and (4).

(~~b~~2) A dissolved limited liability company ~~may in a record notify~~or successor entity shall deliver to each of its known claimants written notice of the dissolution.~~ at any time after its effective date.~~ The written notice ~~must~~shall:

~~(1) specify the information required to be included in a claim;~~

(a) Provide a reasonable description of the claim that the claimant may be entitled to assert.

(b) State whether the claim is admitted or not admitted, in whole or in part, and, if admitted:

1. The amount that is admitted, which may be as of a given date.

2. Any interest obligation if fixed by an instrument of indebtedness.

~~(2) provide~~(c) Provide a mailing address to which ~~the~~a claim ~~is to~~may be sent~~;~~.

~~(3) state~~(d) State the deadline ~~for receipt of the claim~~, which may not be ~~less~~fewer than 120 days after the ~~date the notice is received by the claimant; and~~effective date of the written notice, by which confirmation of the claim must be delivered to the dissolved limited liability company or successor entity.

~~(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) if the claim is timely received but rejected by the company:~~

~~(A) the company causes the claimant to receive a notice in a record stating that the claim is rejected and will be barred unless the claimant commences an action against the company to enforce the claim within 90 days after the claimant receives the notice; and~~

~~(B) the claimant does not commence the required action within the 90 days.~~

~~(d) This section does not apply to a claim based on an event occurring after the effective date of dissolution or a liability that on that date is contingent.~~

(e) State that the dissolved limited liability company or successor entity may make distributions thereafter to other claimants and to the members or transferees of the limited liability company or persons interested as having been such without further notice.

(3) A dissolved limited liability company or successor entity may reject, in whole or in part, any claim made by a claimant pursuant to this subsection by mailing notice of such rejection to the claimant within 90 days after receipt of such claim and, in all events, at least 150 days before expiration of 3 years following the effective date of dissolution. A notice sent by the dissolved limited liability company or successor entity pursuant to this subsection shall be accompanied by a copy of this section.

(4)A dissolved limited liability company or successor entity electing to follow the procedures described in subsections (2) and (3) shall also give notice of the dissolution of the limited liability company to persons with known claims, that are contingent upon the occurrence or nonoccurrence of future events or otherwise conditional or unmatured, and request that such persons present such claims in accordance with the terms of such notice. Such notice shall be in substantially the form, and sent in the same manner, as described in subsection (2).

(5) A dissolved limited liability company or successor entity shall offer any claimant whose known claim is contingent, conditional, or unmatured such security as the limited liability company or such entity determines is sufficient to provide compensation to the claimant if the claim matures. The dissolved limited liability company or successor entity shall deliver such

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[127] Based upon 608.4421, 607.1406 and 620.1806.

offer to the claimant within 90 days after receipt of such claim and, in all events, at least 150 days before expiration of 3 years following the effective date of dissolution. If the claimant offered such security does not deliver in writing to the dissolved limited liability company or successor entity a notice rejecting the offer within 120 days after receipt of such offer for security, the claimant is deemed to have accepted such security as the sole source from which to satisfy his or her claim against the limited liability company.

(6) A dissolved limited liability company or successor entity which has given notice in accordance with subsections (2) and (4), [and is seeking the protection offered by subsections (9) and (12),][128] shall petition the circuit court in the county in which the limited liability company's principal office is located or was located at the effective date of dissolution to determine the amount and form of security that will be sufficient to provide compensation to any claimant who has rejected the offer for security made pursuant to subsection (5).

(7) A dissolved limited liability company or successor entity which has given notice in accordance with subsection (2), [and is seeking the protection offered by subsections (9) and (12),][129] shall petition the circuit court in the county in which the limited liability company's principal office is located or was located at the effective date of dissolution to determine the amount and form of security which will be sufficient to provide compensation to claimants whose claims are known to the limited liability company or successor entity but whose identities are unknown. The court shall appoint a guardian ad litem to represent all claimants whose identities are unknown in any proceeding brought under this subsection. The reasonable fees and expenses of such guardian, including all reasonable expert witness fees, shall be paid by the petitioner in such proceeding.

(8) The giving of any notice or making of any offer pursuant to the provisions of this section shall not revive any claim then barred or constitute acknowledgment by the dissolved limited liability company or successor entity that any person to whom such notice is sent is a proper

[128] This part in 620 but not 608.4421.
[129] Ibid

claimant and shall not operate as a waiver of any defense or counterclaim in respect of any claim asserted by any person to whom such notice is sent.

(9) A dissolved limited liability company or successor entity which has followed the procedures described in subsections (2)-(7):
(a) Shall pay the claims admitted or made and not rejected in accordance with subsection (3).
(b) Shall post the security offered and not rejected pursuant to subsection (5).
(c) Shall post any security ordered by the circuit court in any proceeding under subsections (6) and (7).
(d) Shall pay or make provision for all other known obligations of the limited liability company or such successor entity.

If there are sufficient funds, such claims or obligations shall be paid in full, and any such provision for payments shall be made in full. If there are insufficient funds, such claims and obligations shall be paid or provided for according to their priority and, among claims of equal priority, ratably to the extent of funds legally available therefor. Any remaining funds shall be distributed to the members and transferees of the dissolved limited liability company; however, such distribution may not be made before the expiration of 150 days after the date of the last notice of any rejection given pursuant to subsection (3). [In the absence of actual fraud, the judgment of the [managers][members] of the dissolved limited liability company, or other person or persons winding up the limited liability company under [section 708], or the governing persons of such successor entity, as to the provisions made for the payment of all obligations under paragraph (d), is conclusive.]

(10) A dissolved limited liability company or successor entity which has not followed the procedures described in subsections (2) and (3) shall pay or make reasonable provision to pay all known claims and obligations, including all contingent, conditional, or unmatured claims known to the dissolved limited liability company or such successor entity and all claims which are known to the dissolved limited liability company or such successor entity but for which the identity of the claimant is unknown. If there are sufficient funds, such claims shall be paid in full, and any such provision made for payment shall be made in full. If there are insufficient funds,

such claims and obligations shall be paid or provided for according to their priority and, among claims of equal priority, ratably to the extent of funds legally available therefor. Any remaining funds shall be distributed to the members and transferees of the dissolved limited liability company.

(11) A member or transferee of a dissolved limited liability company the assets of which were distributed pursuant to subsection (9) or subsection (10) is not liable for any claim against the limited liability company in an amount in excess of such member's or transferee's pro rata share of the claim or the amount distributed to the member or transferee, whichever is less.

(12) A member or transferee of a dissolved limited liability company, the assets of which were distributed pursuant to subsection (9), is not liable for any claim against the limited liability company which claim is known to the limited liability company or successor entity and on which a proceeding is not begun prior to the expiration of 3 years following the effective date of dissolution.

(13) The aggregate liability of any person for claims against the dissolved limited liability company arising under this section or [section 710] may not exceed the amount distributed to the person in dissolution.

(14) As used in this section or [section 710], the term "successor entity" [130]includes any trust, receivership, or other legal entity governed by the laws of this state to which the remaining assets and liabilities of a dissolved limited liability company are transferred and which exists solely for the purposes of prosecuting and defending suits by or against the dissolved limited liability company, enabling the dissolved limited liability company to settle and close the business of the dissolved limited liability company, to dispose of and convey the property of the dissolved limited liability company, to discharge the liabilities of the dissolved limited liability company, and to distribute to the dissolved limited liability company's members or transferees any remaining assets, but not for the purpose of continuing the business for which the dissolved limited liability company was organized.

Uniform Comment

[to be inserted later]

~~**Source** – ULPA (2001) § 806, which was based on ULLCA § 807, which in turn was based on MBCA § 14.06.~~ **SECTION ~~704.~~710. OTHER CLAIMS AGAINST DISSOLVED LIMITED LIABILITY COMPANY.**[131]

(~~a) A~~1) In addition to filing the certificate of dissolution under [section 706] a dissolved limited liability company ~~may publish notice of its dissolution and~~or successor entity, as defined in [section 709(14)], may also file with the Department of State on the form prescribed by the Department a request that persons ~~having~~with claims against the limited liability company ~~to~~which are not known to the limited liability company or successor entity present them in accordance with the notice.

~~(b) The notice authorized by subsection (a) must:~~(2) The notice must:

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

(~~2~~a) ~~describe~~Describe the information ~~required to~~that must be ~~contained~~included in a claim and provide a mailing address to which the claim ~~is to~~may be sent~~; and~~.

(~~3~~b) ~~state~~State that a claim against the limited liability company ~~is~~will be barred unless ~~an action~~a proceeding to enforce the claim is commenced within ~~five~~4 years after ~~publication~~the filing of the notice.

(~~c~~3) If ~~a~~the dissolved limited liability company ~~publishes a~~or successor entity files the notice in accordance with ~~subsection (b), unless the claimant commences an action~~subsections (1) and (2), the claim of each of the following claimants is barred unless the claimant

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[130] Perhaps this definition should be moved to Section 102 (definitions).

[131] Based upon 607.1407 and 620.1807

commences a proceeding to enforce the claim against the dissolved limited liability company within ~~five~~4 years after the ~~publication date of the notice, the claim of each of the following claimants is barred~~filing date:

(~~1~~a) ~~a~~A claimant ~~that~~who did not receive written notice ~~in a record~~ under ~~Section 703; (2) a claimant~~[section 709(9)] or whose claim was ~~timely sent to the company but not acted on; and (3) a claimant whose~~not provided for under [section 709(10)] , whether such claim is ~~contingent at, or~~ based on an event occurring before or after~~,~~ the effective date of dissolution.[132]

(~~d) A claim not barred under this section~~b) A claimant whose claim was timely sent to the dissolved limited liability company but not acted on.

(4) A claim may be enforced under this section:

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

(~~2~~b) ~~if~~If the assets ~~of the company~~ have been distributed ~~after dissolution~~in liquidation, against a member or transferee of the dissolved limited liability company to the extent of ~~that person's proportionate~~such member's or transferee's pro rata share of the claim or ~~of~~ the limited liability company assets distributed to ~~the~~such member or transferee ~~after dissolution~~in liquidation, whichever is less, ~~but a person's total~~provided the aggregate liability of any person for all claims against the dissolved limited liability company arising under this ~~paragraph does~~section or [section 709] may not exceed the ~~total~~ amount ~~of assets~~ distributed to the person ~~after dissolution~~in liquidation.

Uniform Comment

[to be inserted later]

~~**Source**: ULPA (2001) § 807, which was based on ULLCA § 808, which in turn was based on MBCA § 14.07.~~

[132] These cross-references are based upon 620 but "notice" reference to (9) doesn't seem to make sense.

~~**Subsection (d)(2)** – Liability under this paragraph extends to those who have received distributions under a charging order. *See* Comment to 502(a) (explaining that the beneficiary of a charging order is a transferee). Unlike Section 406(c) (recapture of improper interim distributions), this paragraph contains no "knowledge" element.~~ **SECTION ~~705.~~711. ADMINISTRATIVE DISSOLUTION.**

(a) The Department of State may dissolve a limited liability company administratively if the company does not:

(1) pay~~, within 60 days after the due date,~~ any fee~~, tax,~~ or penalty due to the Department of State under this act ~~or law other than this act~~; or

(2) deliver~~, within 60 days after the due date,~~ its annual report to the Department of State by 5 pm Eastern Time on the third Friday in September;

(3) appoint and maintain a registered agent as required by section 113; or

(4) deliver for filing a statement of change under section 114 within 30 days after a change has occurred in the name of the registered agent or registered office address.

(b) If the Department of State determines that a ground exists for administratively dissolving a limited liability company, the Department of State shall ~~file a record of the determination and serve the company with a copy of the filed record~~ serve notice on the limited liability company of its intent to administratively dissolve the limited liability company. If the limited liability company has provided the Department with an electronic mail address, such notice shall be by electronic transmission. Administrative dissolution for failure to file an annual report shall occur on the fourth Friday in September of each year. The Department of State shall issue a certificate of dissolution to each dissolved limited liability company. Issuance of the certificate of dissolution may be by electronic transmission to any limited liability company that has provided the Department with an electronic mail address.

(c) If within 60 days after ~~service of~~sending the copy pursuant to subsection (b) a limited liability company does not correct each ground for dissolution under Sections 711(a)(1), (3), or (4), or demonstrate to the reasonable satisfaction of the Department of State that each ground determined by the Department of State does not exist, the Department of State shall dissolve the limited liability company administratively ~~by preparing, signing, and filing a declaration~~and issue a certificate of dissolution that states the grounds for dissolution. ~~The Department of State shall serve the company with a copy of the filed declaration.~~Issuance of the certificate of

dissolution may be by electronic transmission to any limited liability company that has provided the Department with an electronic mail address.

(d) A limited liability company that has been administratively dissolved continues in existence but, subject to Section ~~706,~~712, may carry on only activities necessary to wind up its activities and liquidate its assets under Sections ~~702 and~~ 708 and 714 and to notify claimants under Sections ~~703~~709 and ~~704.~~710.

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

Uniform Comment

Source – ULPA (2001) § 809, which was based on ULLCA §§ 809 and 810. *See also* RMBCA §§ 14.20 and 14.21.

SECTION ~~706.~~712. REINSTATEMENT FOLLOWING ADMINISTRATIVE DISSOLUTION.

~~(a~~(1) A limited liability company that has been administratively dissolved may apply to the Department of State for reinstatement ~~within two years~~at any time after the effective date of dissolution. ~~The application must be delivered to the Department of State for filing and state:~~ The company must submit a form of reinstatement prescribed and furnished by the Department of State together with all fees then owed by the company at a rate provided by law at the time the company applies for reinstatement.

(2) As an alternative to submitting the reinstatement referred to in subsection (1), the company may submit a current annual report, signed by its registered agent and a manager or managing member.

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

~~(2) that the grounds for dissolution did not exist or have been eliminated; and~~

~~(3) that the company's name satisfies the requirements of Section 108.~~

(~~b~~3) If the Department of State determines that an application ~~under~~for reinstatement, or current annual report described in subsection (~~a~~2), contains the ~~required~~ information required by subsection (1) and that the information is correct, the Department of State shall ~~prepare a declaration of reinstatement that states this determination, sign and file the original of the declaration of reinstatement, and serve~~reinstate the limited liability company ~~with a copy~~.

(~~c~~4) When a reinstatement becomes effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the limited liability company may resume its activities as if the administrative dissolution had not occurred.

Uniform Comment

Source – ULPA (2001) § 810, which was based on ULLCA § 811. *See also* RMBCA Section 14.22.

SECTION ~~707.~~713. APPEAL FROM REJECTION OF REINSTATEMENT.

(a) If the Department of State ~~rejects~~denies a limited liability company's ~~application~~request for reinstatement following administrative dissolution, the Department of State shall prepare, sign~~,~~ and ~~file~~record a notice that explains the reason for ~~rejection~~denial and serve the company with a copy of the notice.

(b) Within 30 days after service of a notice of ~~rejection~~denial of reinstatement under subsection (a), a limited liability company may appeal from the ~~rejection~~denial by petitioning the ~~[appropriate~~circuit court~~]~~ to set aside the dissolution. The petition must be served on the Department of State and contain a copy of the ~~[~~Secretary of State's~~]~~ declaration of dissolution, the company's application for reinstatement, and the ~~[~~Secretary of State's~~]~~ notice of ~~rejection~~denial.

(c) The court may order the Department of State to reinstate a dissolved limited liability company or take other action the court considers appropriate.

Uniform Comment

Source – ULPA (2001) § 811, which was based on ULLCA § 812.

This section uses "rejection" rather than "denial" (the word used by both ULPA (2001) and ULLCA). The change is to avoid confusion with a "statement of denial" under Section 302.

SECTION ~~708.~~714. DISTRIBUTION OF ASSETS IN WINDING UP LIMITED LIABILITY COMPANY'S ACTIVITIES.

(a) In winding up its activities, a limited liability company must apply its assets to discharge its obligations to creditors, including members that are creditors~~.~~, as provided in Sections 709 and 710.

(b) After a limited liability company complies with subsection (a), any surplus must be distributed ~~in the following order, subject to any charging order in effect under Section 503:~~

~~(1) to each person owning a transferable interest that reflects contributions made by a member and not previously returned, an amount equal to the value of the unreturned contributions; and~~

~~(2) in equal shares~~ among members and dissociated members~~,~~ ~~except to the extent necessary to comply with any transfer effective under Section 502.~~ in the manner provided in Section 404(b).[133]

(c~~) If a limited liability company does not have sufficient surplus to comply with subsection (b)(1), any surplus must be distributed among the owners of transferable interests in proportion to the value of their respective unreturned contributions.(d~~) All distributions made under ~~subsections~~subsection (b~~) and (c~~) must be paid in money.

Uniform Comment

Source: ULLCA § 806, restyled.

Subsection (a) – This section is mostly not a default rule. *See* Section 110(c)(11) (stating that "except as provided in Section 112(b), [the operating agreement may not] restrict the rights under this act of a person other than a member or manager"). However, if the creditors are willing, a dissolved limited liability company may certainly make agreements with them specifying the terms under which the LLC will "discharge its obligations to creditors."

Subsections (b), (c) and (d) – These subsection provide default rules. Distributions under these subsections (or otherwise under the operating agreement) are subject to Section 503 (charging orders).

[133] The two "exceptions" to Sections 502 and 503 contained in the uniform version were not included in this draft because it was felt that the cross-reference here to Section 404(b) would be deemed to include the recital of those two exceptions in that section.

[ARTICLE] 8

FOREIGN LIMITED LIABILITY COMPANIES

SECTION 801. GOVERNING LAW.

(a) The law of the state or other jurisdiction under which a foreign limited liability company is formed governs:

(1) the internal affairs of the company; and

(2) the liability of a member as member and a manager as manager for the debts, obligations, or other liabilities of the company.

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

Uniform Comment

Subsection (a) – This Section parallels the formulation stated in Section 106 for a domestic limited liability company.

Subsection (a)(2) – This provision does not pertain to the "internal shields" of a foreign "series" LLC, because those shields do not concern the liability of members or managers for the obligations of the LLC. Instead, those shields seek to protect specified assets of the LLC (associated with one series) from being available to satisfy specified obligations of the LLC (associated with another series). See the Prefatory Note, *No Provision for "Series" LLCs*.

SECTION 802. APPLICATION FOR CERTIFICATE OF AUTHORITY.

(a) [A foreign limited liability company may not transact business in this state until it obtains a certificate of authority from the Department of State.][134] A foreign limited liability company may apply for a certificate of authority to transact business in this state by delivering an

[134] ***Reporter's note: this sentence was taken from existing 608.501(1) and was inserted for consideration because there is no similar "prohibitive" language in the uniform act. Committee members should read Stu Ames and Stu Cohn commentary to 608.501 when deciding whether this sentence should remain in the draft. Without this sentence it appears that 809 serves as an implied prohibition by reciting the negative consequences of not obtaining a certificate of authority.***

application to the Department of State for filing. Such application shall be made on forms prescribed by the Department of State. The application must ~~state~~contain:

(1) the name of the company and, if the name does not comply with Section 108, an alternate name adopted pursuant to Section 805(a);

(2) the name of the state or other jurisdiction under whose law the company is formed;

(3) the ~~street and mailing addresses of the company's~~ principal office and~~, if the law of the jurisdiction under which the company is formed require the company to maintain an office in that jurisdiction, the street and~~ mailing addresses of the ~~required office; and~~company;

(4) the name and street ~~and mailing addresses of~~address in this state of, and written acceptance by, the company's initial registered agent ~~for service of process~~ in this state~~.~~;; and

(5) the name and principal office and mailing address of each of the company's managers, if a it is a manager-managed limited liability company, or its members, if it is a member-managed limited liability company. [each manager, managing member, or equivalent person that is not an individual must be organized or otherwise registered with the Department of State as required by law, must maintain an active status, and must not be dissolved, revoked, or withdrawn; and][135]

[(6) any such additional information as may be necessary or appropriate in order to enable the Department of State to determine whether such limited liability company is entitled to file an application for authority to transact business in this state and to determine and assess the fees as prescribed in this chapter.][136]

(b) A foreign limited liability company shall deliver with a completed application under subsection (a) a certificate of existence or a record of similar import signed by the Department of State or other official having custody of the company's publicly filed records in the state or other jurisdiction under whose law the company is formed~~.~~, dated not more than 90 days prior to the delivery of the application to the Department of State. [A translation of the

[135] Proposed by DOS. Presents same issues raised in note to Section 201(d) proposed by DOS.
[136] Proposed by DOS.

certificate, under oath of the translator, shall be attached to a certificate which is in a language other than the English language.][137]

[(c) Each cell of a foreign limited liability company series shall be considered a separate business entity for the purposes of complying with the requirements of this act.][138]

Uniform Comment

Source – ULPA (2001) § 902, which was based on ULLCA § 1002.

SECTION 803. ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS.[139]

(~~a) Activities of a foreign limited liability company which~~1) The following activities, among others, do not constitute transacting business ~~in this state~~ within the meaning of ~~this [article] include~~[s. 802(a)]:[140]

~~(1) maintaining~~(a) Maintaining, defending, or settling ~~an action or~~any proceeding~~;~~.

~~(2)~~(b) Holding meetings of the managers or members or carrying on ~~any activity~~other activities concerning ~~its~~ internal company affairs~~, including holding meetings of its members or managers;~~.

~~(3) maintaining~~(c) Maintaining bank accounts ~~in financial institutions;~~.

~~(4) maintaining offices~~(d) Maintaining managers or agencies for the transfer, exchange, and registration of the limited liability company's own securities or maintaining trustees or ~~depositories~~depositaries with respect to those securities~~;~~.

(~~5~~e) ~~selling~~ Selling through independent contractors~~;~~.

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[137] Proposed by DOS.
[138] Proposed by DOS.
[139] The Committee decided to use the same list of "not doing business" descriptions contained in existing law (608.501).
[140] Cross-reference depends on final wording of 802(a).

~~(6) soliciting~~(f) Soliciting or obtaining orders, whether by mail or ~~electronic means or~~ through employees ~~or~~, agents or otherwise, if the orders require acceptance outside this state before they become contracts~~;~~.

(~~7~~g) ~~creating~~Creating or acquiring indebtedness, mortgages, ~~or~~and security interests in real or personal property~~;~~.

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

(i)Transacting business in interstate commerce.

~~(9) conducting~~(j) Conducting an isolated transaction that is completed within 30 days and that is not one in the course of ~~similar~~repeated transactions~~; and~~ of a like nature.

~~(10) transacting business in interstate commerce.~~

(k) Owning and controlling a subsidiary corporation or limited liability company incorporated in or transacting business within this state or voting the stock of any corporation which it has lawfully acquired.

(l) Owning a limited partnership interest in a limited partnership that is doing business within this state, unless such limited partner manages or controls the partnership or exercises the powers and duties of a general partner.

(m) Owning, without more, real or personal property.

(2) The list of activities in subsection (1) is not exhaustive.

~~(b) For purposes of this [article], the~~(3) The ownership in this state of income-producing real property or tangible personal property, other than property excluded under subsection (~~a~~1), constitutes transacting business in this state~~.~~ for purposes of [s. 801(a).][141]

(~~c~~4) 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 law of this state other than this act.

Uniform Comment

Source – ULPA (2001) § 903, which was based on ULLCA § 1003.

SECTION 804. FILING OF CERTIFICATE OF AUTHORITY.

(1) Unless the Department of State determines that an application for a certificate of authority of a foreign limited liability company to transact business in this state does not comply with the filing requirements of this act, the Department of State shall, upon payment of all filing fees, ~~shall file the application of a~~file the certificate of authority.

[(2) A certificate of authority authorizes the foreign limited liability company~~, prepare, sign, and file a certificate of authority~~ to which it is issued to transact business in this state~~, and send a copy of the filed certificate, together with a receipt for the fees, to the company or its representative.~~ subject, however, to the right of the Department of State to suspend or revoke the certificate as provided in this chapter.][142]

Uniform Comment

Source – ULPA (2001) § 904, which was based on ULLCA § 1004 and RULPA § 903.

SECTION 805. NONCOMPLYING NAME OF FOREIGN LIMITED LIABILITY COMPANY.

(a) A foreign limited liability company whose name does not comply with Section 108 may not obtain a certificate of authority until it adopts, for the purpose of transacting business in this state, an alternate name that complies with Section 108. A foreign limited liability company that adopts an alternate name under this subsection and obtains a certificate of authority

[141] Cross-reference depends on final language of 801(a).

[142] Proposed by DOS. Please see note to the proposed additional sentence at the beginning of Section 802(a).

with the alternate name need not comply with ~~[fictitious or assumed name statute].~~s.865.09. After obtaining a certificate of authority with an alternate name, a foreign limited liability company shall transact business in this state under the alternate name unless the company is authorized under ~~[fictitious or assumed name statute]~~s.865.09 to transact business in this state under another name.

(b) If a foreign limited liability company authorized to transact business in this state changes its name to one that does not comply with Section 108, it may not thereafter transact business in this state until it complies with subsection (a) and obtains an amended certificate of authority.

Uniform Comment

Source – ULPA (2001) § 905, which was based on ULLCA § 1005.

SECTION 806. AMENDMENT TO CERTIFICATE OF AUTHORITY.

(1) A foreign limited liability company authorized to transact business in this state shall make application to the Department of State to obtain an amended certificate of authority to:

(a) Change its name on the records of the Department of State;

(b) Amend its State or other jurisdiction;

(c) Change its managers, if a it is a manager-managed limited liability company, or its members, if it is a member-managed limited liability company; or

(d) Amend any false statement contained in its application for certificate of authority.

(2) Such application shall be made within 30 days after the occurrence of any change mentioned in subsection (1), must be signed by at least one member, manager, or authorized representative, and shall set forth:

(a) The name of the foreign limited liability company as it appears on the records of the Department of State.

(b) The jurisdiction of its formation.

(c) The date the foreign limited liability company was authorized to transact business this state.

(d) If the name of the foreign limited liability company has been changed, the name relinquished and its new name.

(e) If the amendment changes the jurisdiction of the foreign limited liability company, a statement of such change.

(f) If the amendment changes the managers, if a it is a manager-managed limited liability company, or its members, if it is a member-managed limited liability company, the name and address of each new manager or member, as applicable. [; each manager, managing member, or equivalent person that is not an individual must be organized or otherwise registered with the Department of State as required by law, must maintain an active status, and must not be dissolved, revoked, or withdrawn.][143]

(g) If the foreign limited liability corrects a false statement, the statement it is correcting and a statement containing the corrected information.

(3) The requirements of section 802(b) for obtaining an original certificate of authority apply to obtaining an amended certificate under this section. [, unless the Department of State or other official having custody of the company's publicly filed records in the state or jurisdiction under which it is formed did not require an amendment to effectuate the change on its records.][144]

SECTION 807. 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 Department of State in the manner provided in subsections (b) and (c) if the company does not:

(1) pay~~, within 60 days after the due date,~~ any fee~~, tax,~~ or penalty due to the Department of State under this act ~~or law other than this act~~;

(2) deliver~~, within 60 days after the due date,~~ its annual report ~~required under Section 209~~to the Department of State by 5 pm Eastern Time on the third Friday in September;

(3) appoint and maintain an agent for service of process as required by Section 113(b); ~~or~~

(4) deliver for filing a statement of a change under Section 114 within 30 days after a change has occurred in the name or address of the agent.

~~(b) To revoke a certificate of authority of a foreign limited liability company, the Department of State must prepare, sign, and file a notice of revocation and send a copy to the company's agent for service of process in this state, or if the company does not appoint and maintain a proper agent in this state, to the company's designated office. The notice must state:~~

[143] Proposed by DOS. Please see notes to DOS proposed 201(d) and 209(a)(3).
[144] Proposed by DOS.

(~~1) the revocation's effective date, which must be at least 60 days after the date~~5) failed to amend its certificate of authority as required by Section 806; or

(6) if the Department of State ~~sends the copy; and~~receives a duly authenticated certificate from the

~~(2) the grounds for revocation under subsection (a).~~

official having custody of records in the jurisdiction under the law of which the foreign limited liability company is organized stating that it has been dissolved or is no longer active on its records.

(~~c~~b) If the Department of State determines that one or more grounds exist under this section for the revocation of a foreign limited liability company's certificate of authority, it shall notify the foreign limited liability company of its intent to revoke the foreign limited liability company's certificate of authority. If the foreign limited liability company has provided the Department with an electronic mail address, such notice shall be by electronic transmission. Revocation for failure to file an annual report shall occur on the fourth Friday in September of each year. The Department of State shall issue a certificate of revocation to each revoked foreign limited liability company. Issuance of the certificate of revocation may be by electronic transmission to any foreign limited liability company that has provided the Department with an electronic mail address.

(c) If within 60 days after sending a notice of intent to revoke, the foreign limited liability company does not correct each ground for revocation under section 807(a)(1), (3), (4), (5), or (6), or demonstrate to the reasonable satisfaction of the Department of State that each ground determined by the Department does not exist, the Department shall revoke the foreign limited liability company's authority to transact business in this state and issue a certificate of revocation that states the grounds for revocation. Issuance of the certificate of revocation may be by electronic transmission to any foreign limited liability company that has provided the Department with an electronic mail address.

(d) The authority of a foreign limited liability company to transact business in this state ceases on the effective date of the ~~notice~~certificate of revocation ~~unless before that date the company cures each ground for revocation stated in the notice filed under subsection (b). If the company cures each ground, the Department of State shall file a record so stating.~~

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Uniform Comment

Source – ULPA (2001) § 906, which was based on ULLCA § 1006.

SECTION ~~807.~~808. CANCELLATION OF CERTIFICATE OF AUTHORITY. To cancel its certificate of authority to transact business in this state, a foreign limited liability company must deliver to the Department of State for filing a notice of cancellation ~~stating the name of the company and that the company desires to cancel~~. The certificate is canceled when the notice becomes effective under Section 205. The notice of cancellation shall be signed by an authorized representative and state the following:

(a) the name of the company as it appears on the records of the Department of State;

(b) the jurisdiction of its formation;

(c) the date the company was authorized to transact business in this state; and

(d) the company is canceling its certificate of authority~~. The certificate is canceled when the notice becomes effective~~ in this state.

SECTION ~~808.~~809. EFFECT OF FAILURE TO HAVE CERTIFICATE OF AUTHORITY.

(a) A foreign limited liability company transacting business in this state [or its successors][145] 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 successor to a foreign limited liability company that transacted business in this state without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this state until the foreign limited liability company or its successor obtains a certificate of authority.

[(c) A court may stay a proceeding commenced by a foreign limited liability company or its successor or assignee until it determines whether the foreign limited liability company or its successor requires a certificate of authority. If it so determines, the court may further stay the proceeding until the foreign limited liability company or its successor obtains the certificate.][146]

[145] To consider whether this clarification is needed.

[146] This subsection and preceding subsection were added at 9/30/10 meeting. Committee decided to bracket this one for further review.

(d) 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 company from defending an action or proceeding in this state.

(~~c~~e) A member or manager of a foreign limited liability company is not liable for the debts, obligations, or other liabilities of the company solely because the company transacted business in this state without a certificate of authority.

(~~d~~f) If a foreign limited liability company transacts business in this state without a certificate of authority or cancels its certificate of authority, it appoints the Department of State as its agent for service of process for rights of action arising out of the transaction of business in this state.

(g) A foreign limited liability company which transacts business in this state without authority to do so shall be liable to this state for the years or parts thereof during which it transacted business in this state without authority in an amount equal to all fees or penalties which would have been imposed by this act or chapter upon such limited liability company had it duly applied for and received authority to transact business in this state as required by this act. In addition to the payments thus prescribed, such limited liability company shall be liable for a civil penalty of not less than $500 or more than $1,000 for each year or part thereof during which it transacts business in this state without a certificate of authority. The Department of State may collect all penalties due under this subsection.

Uniform Comment

Source – ULPA (2001) § 907, which was based on RULPA § 907(d) and ULLCA § 1008.

SECTION ~~809. ACTION BY [ATTORNEY GENERAL]~~810. REINSTATEMENT FOLLOWING REVOCATION OF CERTIFICATE OF AUTHORITY.

(1) A foreign limited liability company whose certificate of authority has been revoked may apply to the Department of State for reinstatement at any time after the effective date of the revocation. The foreign limited liability company must submit a form of reinstatement prescribed and furnished by the Department of State together with all fees then owed by the foreign limited liability company at a rate provided by law at the time the company applies for reinstatement.

(2) As an alternative to submitting the reinstatement referred to in subsection (1), the company may submit a current annual report, signed by an authorized representative.

(3) If the Department of State determines that an application for reinstatement, or current annual report described in subsection (2), contains the information required by subsection (1) and that the information is correct, the Department of State shall cancel the [certificate of revocation][147].

(4) When a reinstatement becomes effective, it relates back to and takes effect as of the effective date of the revocation of authority and the foreign limited liability company may resume its activities in this state as if the revocation of authority had not occurred.

(5) The name of the foreign limited liability company the certificate of authority of which has been revoked is not available for assumption or use by another business entity until 1 year after the effective date of revocation of authority unless the limited liability company provides the Department of State with an affidavit executed as required by Section 203 permitting the immediate assumption or use of its name by another limited liability company.

(6) If the name of the foreign limited liability company has been lawfully assumed in this state by another business entity, the Department of State shall require the foreign limited liability company to comply with Section 108 before accepting its application for reinstatement.

SECTION 811. ACTION BY DEPARTMENT OF LEGAL AFFAIRS. The ~~[Attorney General]~~Department of Legal Affairs may maintain an action to enjoin a foreign limited liability company from transacting business in this state in violation of this ~~[article]~~act.

Uniform Comment

Source – ULPA (2001) § 908, which was based on RULPA § 908 and ULLCA § 1009.

[147] Is this correct reference. See Section 808.

[ARTICLE] 9

ACTIONS BY MEMBERS[148]

SECTION 901. DIRECT ACTION BY MEMBER.

(a) Subject to subsection (b), a member may maintain a direct action against another member, a manager, or the limited liability company to enforce the member's rights and otherwise protect the member's interests, including rights and interests under the operating agreement or this act or arising independently of the membership relationship.

(b) A member maintaining a direct action under this section must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company.

Uniform Comment

Subsection (a) – Source: ULPA (2001) § 1001(a), which was based on RUPA Section 405(b). The subsection has been somewhat re-styled from the ULPA version, and the phrase "for legal or equitable relief" has been deleted as unnecessary. ULPA's reference to "with or without an accounting" has been deleted because the reference: (i) was to the partnership remedy of accounting, which reflected the aggregate nature of a partnership and is inapposite for an *entity* such as an LLC; and (ii) generated some confusion with the equitable claim for an accounting (in the nature of a constructive trust). The "entity-analog" to the partnership-as-aggregate notion of an accounting is the distinction between a direct and derivative claim.

The last phrase of this subsection ("or arising independently . . .") comes from RUPA § 405(b)(3), does not create any new rights, obligations, or remedies, and is included merely to emphasize that a person's membership in an LLC does not preclude the person from enforcing rights existing "independently or the membership relationship."

Subsection (b) – Source: ULPA (2001) § 1001(b). The Comment to that subsection explains:

In ordinary contractual situations it is axiomatic that each party to a contract has standing to sue for breach of that contract. Within a limited partnership, however, different circumstances may exist. A partner does not have a direct claim against another partner merely because the other partner has breached the operating agreement. Likewise a partner's violation of this ~~A~~act does not automatically create a direct claim for every other partner. To have standing in his, her, or its

[148] The Committee decided at the 9/30/10 meeting that a subcommittee or other group comprised of experiences commercial litigators from the Business Law Section should have the responsibility of reviewing this Article and other provisions of the act pertaining to litigation and procedural issues. Mark Wolfson volunteered to spearhead that effort.

own right, a partner plaintiff must be able to show a harm that occurs independently of the harm caused or threatened to be caused to the limited partnership.

SECTION 902. DERIVATIVE ACTION. A member may maintain a derivative action to enforce a right of a limited liability company if:

(1) the member first makes a demand on the other members in a member-managed limited liability company, or the managers of a manager-managed limited liability company, requesting that they cause the company to bring an action to enforce the right, and the managers or other members do not bring the action within a reasonable time; or

(2) a demand under paragraph (1) would be futile.

Uniform Comment

Source – ULPA (2001) § 1002, which was a re-styled version RULPA § 1001.

SECTION 903. PROPER PLAINTIFF.

(a) Except as otherwise provided in subsection (b), a derivative action under Section 902 may be maintained only by a person that is a member at the time the action is commenced and remains a member while the action continues.[149]

(b) If the sole plaintiff in a derivative action dies while the action is pending, the court may permit another member of the limited liability company to be substituted as plaintiff.

Uniform Comment

This section abandons the traditional "contemporaneous ownership" rule, on the theory that the protections of that rule are unnecessary given the closely-held nature of most limited liability companies and the built-in, statutory restrictions on persons becoming members.

Subsection (b) – This subsection will be inapposite if the limited liability company has only two members, one of whom is the derivative plaintiff. In that limited circumstance, the plaintiff's death would cause the derivative action to abate. The "pick your partner" principal enshrined in Section 502 would prevent the decedent's heirs from succeeding to plaintiff status in the derivative action. This ~~Act~~act does not take a position on whether the death of member abates a direct claim against the LLC or a fellow member.

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[149] At 9/30/10 meeting it was suggested that a cross-reference here may be appropriate to include successors in interest to a member under Section 504. Should transferees have the right to bring derivative action under 902 (and 903, which requires the plaintiff to be a member)? The following is the language from existing law (608.601(1)) which was discussed at that meeting:

"A person may not commence a proceeding in the right of a domestic or foreign limited liability company unless the person was a member of the limited liability company when the transaction complained of occurred or unless the person became a member through transfer by operation of law from one who was a member at that time."

SECTION 904. PLEADING. In a derivative action under Section 902, the complaint must state with particularity:

(1) the date and content of plaintiff's demand and the response to the demand by the managers or other members; or

(2) if a demand has not been made, the reasons a demand under Section 902(1) would be futile.

Uniform Comment

Source – ULPA (2001) § 1004, which was a re-styled version RULPA § 1003.

SECTION 905. SPECIAL LITIGATION COMMITTEE.

(a) If a limited liability company is named as or made a party in a derivative proceeding, the company may appoint a special litigation committee to investigate the claims asserted in the proceeding and determine whether pursuing the action is in the best interests of the company. If the company appoints a special litigation committee, on motion by the committee made in the name of the company, except for good cause shown, the court shall stay discovery for the time reasonably necessary to permit the committee to make its investigation. This subsection does not prevent the court from enforcing a person's right to information under Section 410 or, for good cause shown, granting extraordinary relief in the form of a temporary restraining order or preliminary injunction.

(b) A special litigation committee may be composed of one or more disinterested and independent individuals, who may be members.

(c) A special litigation committee may be appointed:

(1) in a member-managed limited liability company:

(A) by the consent of a majority of the members not named as defendants or plaintiffs in the proceeding; and

(B) if all members are named as defendants or plaintiffs in the proceeding, by a majority of the members named as defendants; or

(2) in a manager-managed limited liability company:

(A) by a majority of the managers not named as defendants or plaintiffs in the proceeding; and

(B) if all managers are named as defendants or plaintiffs in the proceeding, by a majority of the managers named as defendants.

(d) After appropriate investigation, a special litigation committee may determine that it is in the best interests of the limited liability company that the proceeding:

(1) continue under the control of the plaintiff;

(2) continue under the control of the committee;

(3) be settled on terms approved by the committee; or

(4) be dismissed.

(e) After making a determination under subsection (d), a special litigation committee shall file with the court a statement of its determination and its report supporting its determination, giving notice to the plaintiff. The court shall determine whether the members of the committee were disinterested and independent and whether the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care, with the committee having the burden of proof. If the court finds that the members of the committee were disinterested and independent and that the committee acted in good faith, independently, and with reasonable care, the court shall enforce the determination of the committee. Otherwise, the court shall dissolve the stay of discovery entered under subsection (a) and allow the action to proceed under the direction of the plaintiff.

Uniform Comment

Although special litigation committees are best known in the corporate field, they are no more inherently corporate than derivative litigation or the notion that an organization is a person distinct from its owners. An "SLC" can serve as an ADR mechanism, help protect an agreed upon arrangement from strike suits, protect the interests of members who are neither plaintiffs nor defendants (if any), and bring to any judicial decision the benefits of a specially tailored business judgment.

This section's approach corresponds to established law in most jurisdictions, modified to fit the typical governance structures of a limited liability company.

Subsection (a) – On the availability of Section 410 remedies pending the SLC's investigation, compare *Kaufman v. Computer Assoc. Int'l., Inc.*, No. Civ.A. 699-N, 2005 WL 3470589 at *1 (Del.Ch. Dec. 21, 2005, as revised) (presenting "the question of whether to stay a books and records action under 8 Del. C. § 220 at the request of a special litigation committee when a derivative action encompassing substantially the same allegations of wrongdoing filed by different plaintiffs is pending in another jurisdiction;" concluding "[f]or reasons that have much to do with the light burden imposed by the plaintiff's demand in this case . . . that the special litigation committee's motion to stay the books and records action should be denied")

Subsection (d) – The standard stated for judicial review of the SLC determination follows *Auerbach v. Bennett*, 47 N.Y.2d 619, 419 N.Y.S.2d 920 (N.Y. 1979) rather than *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), because the latter's reference to a court's business judgment has generally not been followed in other states.

Houle v. Low, 407 Mass. 810, 822, 556 N.E.2d 51, 58 (Mass. 1990) contains an excellent explanation of the court's role in reviewing an SLC decision:

The value of a special litigation committee is coextensive with the extent to which that committee truly exercises business judgment. In order to ensure that special litigation committees do act for the [entity]'s best interest, a good deal of judicial oversight is necessary in each case. At the same time, however, courts must be careful not to usurp the committee's valuable role in exercising business judgment. . . . . [A] special litigation committee must be independent, unbiased, and act in good faith. Moreover, such a committee must conduct a thorough and careful analysis regarding the plaintiff's derivative suit, ... The burden of proving that these procedural requirements have been met must rest, in all fairness, on the party capable of making that proof--the [entity].

For a discussion of how a court should approach the question of independence, *see Einhorn v. Culea*, 612 N.W.2d 78, 91 (Wis.2000).

SECTION 906. PROCEEDS AND EXPENSES.

(a) Except as otherwise provided in subsection (b):

(1) any proceeds or other benefits of a derivative action under Section 902, whether by judgment, compromise, or settlement, belong to the limited liability company and not to the plaintiff; and

(2) if the plaintiff receives any proceeds, the plaintiff shall remit them immediately to the company.

(b) If a derivative action under Section 902 is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees and costs, from the recovery of the limited liability company.

Uniform Comment

Source – ULPA (2001) § 1005, which was a re-styled version RULPA § 1004.

[Reporter's Note: to determine whether the following provisions of the existing law should be added:

608.455 Waiver of notice.

—When, under the provisions of this chapter or under the provisions of the articles of organization or operating agreement of a limited liability company, notice is required to be given to a member of a limited liability company or to a manager of a limited liability company having a manager or managers, a waiver in writing signed by the person or persons entitled to the notice, whether made before or after the time for notice to be given, is equivalent to the giving of notice.

608.461 Jurisdiction of the circuit court.

—The circuit courts shall have jurisdiction to enforce the provisions of this chapter.

608.462 Parties to actions by or against limited liability company.

—A member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except when the object is to enforce a member's right against, or liability to, the limited liability company.]

[ARTICLE] 10

~~MERGER, CONVERSION, AND DOMESTICATION~~

MERGERS AND CONVERSIONS

[Reporter's Note: as discussed at the 9/30/10 meeting the approach for this article was to use the LP Act as a template and make conforming changes and other changes discussed by Committee at that meeting. The appraisal rights provisions, however, are based upon current chapter 608 (which are generally the same as those in the LP act).]

[Reporter's Note: conforming statutory section cross-reference changes will be required in chapters 607, 617 and 620.]

[Reporter's Note: The Committee decided at its July 23, 2011 meeting to include domestication enabling provisions using the Delaware statute as a model. There was also a discussion about using Delaware law as a model for conversions as well, but it was decided we would have further discussion about that approach. The DOS did not participate in the July 23 meeting and it will be asked to provide comments on this issue. The Delaware-type approach has been added to this article as Sections 1024 and 1025 for the time being. We will need to determine whether this article should be organized differently in view of the probability that it will now provided for inbound and outbound domestications (transfers). Another issue the Committee should probably consider (not raised during our July 23 meeting) is whether appraisal remedies will apply to outbound domestications (transfers) since conceptually outcomes similar to those that are possible when a conversion or merger occurs can be achieved (see Sec. 1025(f)). If this happens, then conforming changes will be required in the appraisal provisions as currently proposed in this article.][150]

SECTION 1001. DEFINITIONS. ~~In this [article]:~~

As used in this section and ss. 1002-1023:

(1) "Constituent limited liability company" means a constituent organization that is a limited liability company.

(2) "Constituent organization" means an organization that is party to a merger.

(3) "Converted organization" means the organization into which a converting organization converts pursuant to ~~Sections 1006 through 1009.~~ss. 1002-1005.

(4) "Converting limited liability company" means a converting organization that is a limited liability company.

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[150] See 1010 - 1014 of the uniform act, and 607.1801 and 617.1803 of Florida Statutes. The not for profit version is based upon the model act while the 607 version is not entirely consistent with the model act. The Committee should consider the Ames and Cohn comments on these sections.

(5) "Converting organization" means an organization that converts into another organization pursuant to ~~Section 1006.~~s. 1002.

~~(6) "Domesticated company" means the company that exists after a domesticating foreign limited liability company or limited liability company effects a domestication pursuant to Sections 1010 through 1013.~~

~~(7) "Domesticating company" means the company that effects a domestication pursuant to Sections 1010 through 1013.~~ ~~(8)~~(6) "Governing ~~statute"~~law" of an organization means the ~~statute~~law that governs ~~an~~the organization's internal affairs.

(~~9~~7) "Organization" means a corporation; general partnership, including a limited liability partnership~~,~~; limited partnership, including a limited liability limited partnership~~, limited liability company,~~; limited liability company; common law or business trust~~, corporation, or any other person having a governing statute.~~ or association; real estate investment trust; or any other person organized under a governing statute or other applicable law, provided such term does not include an organization that is not organized for profit unless the not-for-profit organization is the converted organization or the surviving organization in a conversion or a merger governed by this act. The term includes ~~a~~ domestic ~~or~~and foreign ~~organization regardless of whether organized for profit~~organizations.

(~~10~~8) "Organizational documents" means:

(~~A~~a) ~~for~~ For a domestic or foreign general partnership, its partnership agreement~~;~~.

(~~B~~b) ~~for~~ For a limited partnership or foreign limited partnership, its certificate of limited partnership and partnership agreement~~;~~.

(~~C~~c) ~~for~~ For a domestic or foreign limited liability company, its ~~certificate or~~ articles of organization and operating agreement, or comparable records as provided in its governing ~~statute;~~law.

(~~D~~d) ~~for~~ For a business trust, its agreement of trust and declaration of trust~~;~~.

(~~E~~e) ~~for~~ For a domestic or foreign corporation for profit, its articles of incorporation, bylaws, and other agreements among its shareholders which are authorized by its governing ~~statute~~law, or comparable records as provided in its governing ~~statute; and~~law.

(~~F~~f) ~~for~~ For any other organization, the basic records that create the organization and determine its internal governance and the relations among the persons that own ~~it~~such organization, have an interest in ~~it~~the organization, or are members of ~~it~~the organization.

(~~11~~9) "Personal liability" means personal liability for a debt, ~~obligation~~liability, or other ~~liability~~obligation of an organization which is imposed on a person that co-owns, has an interest in, or is a member of the organization:

(~~A~~a) ~~by~~ By the organization's governing ~~statute~~law solely by reason of the person's co-owning, having an interest in, or being a member of the organization; or

(~~B~~b) ~~by~~ By the organization's organizational documents under a provision of the organization's governing ~~statute~~law authorizing those documents to make one or more specified persons liable for all or specified debts, ~~obligations, or other~~ liabilities, and other obligations of the organization solely by reason of the person or persons' co-owning, having an interest in, or being a member of the organization.

(~~12~~10) "Surviving organization" means an organization into which one or more other organizations are merged ~~whether the~~. A surviving organization ~~preexisted~~may preexist the merger or ~~was~~be created by the merger.

~~**Uniform Comment**~~

~~This article is based on Article 11 of ULPA (2001) and differs principally in treating domestications as a separate type of organic transaction rather than as a subset of conversions.~~

SECTION 1002. ~~MERGER~~CONVERSION.

~~(a) A~~(1) An organization other than a limited liability company may ~~merge with one or more other constituent organizations~~convert to a limited liability company, and a limited liability company may convert to another organization, other than an organization which is also a domestic limited liability company governed by this act, pursuant to this section~~, Sections 1003 through 1005, and a plan of merger~~ and ss. 1003-1005 and a plan of conversion, if:

~~(1) the governing statute of each of the other organizations~~

(a) The other organization's governing law authorizes the ~~merger;~~

~~(2) the merger is not prohibited by the law of a~~conversion.

(b) The conversion is permitted by the law of the jurisdiction that enacted ~~any of the governing statutes; and~~the governing law.

(c) The other organization complies with its governing law in effecting the conversion.

[Note: the following subsections (d) through (g) were proposed by DOS:]

[(d) the other organization, if incorporated, formed, or otherwise organized under the laws of this state, is active and current in filing its annual reports on the records of the Department of State through December 31st of the calendar year in which the certificate of conversion is submitted to the Department of State for filing.

(e) the other organization, if incorporated, formed, or otherwise organized under the laws of another jurisdiction and authorized to transact business or conduct its affairs in this state, is active and current in filing its annual reports on the records the Department of State through December 31st of the calendar year in which the certificate of conversion is submitted to the Department of State for filing.

(f) the domestic limited liability company converting to the other organization is active and current in filing its annual reports on the records of the Department of State through December 31st of the calendar year in which the certificate of conversion is submitted to the Department of State for filing.

(g) the other organization, if incorporated, formed, or otherwise organized under the laws of another jurisdiction submits a certificate of existence or a record of similar import signed by the Department of State or other official having custody of the company's publicly filed records in the state or other jurisdiction under whose law the company is formed, dated not more than 90 days prior to the delivery of the application to the Department of State. A translation of the certificate, under oath of the translator, shall be attached to a certificate which is in a language other than the English language.]

(2) A plan of conversion must be in a record and must include:

(a) The name and form of the organization before conversion.

(b) The name and form of the organization after conversion.

(c) The terms and conditions of the conversion, including the manner and basis for converting interests in the converting organization into any combination of money, interests in the converted organization, and other consideration.

(d) The organizational documents of the converted organization that are, or are proposed to be, in a record.

SECTION 1003. ACTION ON PLAN OF CONVERSION BY CONVERTING LIMITED LIABILITY COMPANY.

(1) Subject to s. 1010, a plan of conversion must be consented to by members who own a majority of the rights to receive distributions at the time the consent is effective, provided, if there is more than one class or group of members, the plan of conversion must be consented to by those members or, if there is more than 1 class or group of members, then by each class or group of members, in either case, [by members][151] who own more than 50 percent of the then current percentage or other interest in the profits of the limited liability company owned by all of the members or by the members in each class or group, as appropriate.[152]

(2) Subject to s. 1010 and any contractual rights, after a conversion is approved, and at any time before a filing is made under s. 1004, a converting limited liability company may amend the plan or abandon the planned conversion:

(a) As provided in the plan.

(b) Except as prohibited by the plan, by the same consent as was required to approve the plan.

[***Reporter's Note: the following is the Delaware approach (full text), and Committee to decide if this is better approach***:

"If the limited liability company agreement specifies the manner of authorizing a conversion of the limited liability company, the conversion shall be authorized as specified in the limited liability company agreement. If the limited liability company agreement does not specify the manner of authorizing a conversion of the limited liability company and does not prohibit a conversion of the limited liability company, the conversion shall be authorized in the same manner as is specified in the limited liability company agreement for authorizing a merger or consolidation that involves the limited liability company as a constituent party to the merger or consolidation. If the limited liability company agreement does not specify the manner of authorizing a conversion of the limited liability company or a merger or consolidation that involves the limited liability company as a constituent party and does not prohibit a conversion of the limited liability company, the conversion shall be authorized by the approval by the members or, if there is more than 1 class or group of members, then by each class or group of

[151] To confirm that these words used in Delaware law are redundant and can be eliminated.

[152] The Committee decided to use the Delaware approach as the "majority in interest" threshold under current law (608.4381(1)) is less clear as to what economic interest criteria should be used. The Committee should determine whether the other approval provisions in the Delaware law should apply.

members, in either case, by members who own more than 50 percent of the then current percentage or other interest in the profits of the domestic limited liability company owned by all of the members or by the members in each class or group, as appropriate." (Sec. 18-216(b))]

SECTION 1004. FILINGS REQUIRED FOR CONVERSION; EFFECTIVE DATE.

(1) After a plan of conversion is approved:

(a) A converting limited liability company shall deliver to the Department of State for filing a certificate of conversion, which must be signed as provided in Section 203(a) and must include:

1. A statement that the limited liability company has been converted into another organization.

2. The name and form of the organization and the jurisdiction of its governing law.

3. The date the conversion is effective under the governing law of the converted organization.

4. A statement that the conversion was approved as required by this act.

5. A statement that the conversion was approved as required by the governing law of the converted organization.

6. If the converted organization is a foreign organization not authorized to transact business in this state, the street and mailing address of an office which the Department of State may use for the purposes of s. 1005(3).

(b) If the converting organization is not a converting limited liability company, the converting organization shall deliver to the Department of State for filing:

1. A certificate of organization containing the information required by s. 201, signed as required by s. 203.

2. A certificate of conversion, signed in accordance with s. 203 and by the converting organization as required by applicable law, which certificate of conversion must include:

a. A statement that the limited liability company was converted from another organization.

b. The name and form of the converting organization and the jurisdiction of its governing law.

c. A statement that the conversion was approved as required by this act.

d. A statement that the conversion was approved in a manner that complied with the converting organization's governing law.

(c) A converting limited liability company is not required to file a certificate of conversion pursuant to paragraph (a) if the converting limited liability company files a certificate of conversion that substantially complies with the requirements of this section pursuant to s. 607.1115, s. 620.2104(1), or s. 620.8914(1)(b) and contains the signatures required by this chapter. In such a case, the other certificate of conversion may also be used for purposes of s. 1005(4).

(2) A conversion becomes effective:

(a) If the converted organization is a limited liability company, when the certificate of organization takes effect.

(b) If the converted organization is not a limited liability company, as provided by the governing law of the converted organization.

SECTION 1005. EFFECT OF CONVERSION.

(1) An organization that has been converted pursuant to this act is for all purposes the same entity that existed before the conversion.

(2) When a conversion takes effect:

(a) Title to all real and other property, or any interest in such property, owned by the converting organization at the time of its conversion remains vested in the converted organization without reversion or impairment under this act.

(b) All debts, liabilities, or other obligations of the converting organization continue as debts, liabilities, or other obligations of the converted organization.

(c) An action or proceeding pending by or against the converting organization may be continued as if the conversion had not occurred.

(d) Except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of the converting organization remain vested in the converted organization.

(e) Except as otherwise provided in the plan of conversion, the terms and conditions of the plan of conversion take effect.

(f) Except as otherwise agreed, the conversion does not dissolve a converting limited liability company for the purposes of ss. 701-714.

(3) A converted organization that is a foreign organization consents to the jurisdiction of the courts of this state to enforce any obligation owed by the converting limited liability company, if before the conversion the converting limited liability company was subject to suit in this state on the obligation. A converted organization that is a foreign organization and not authorized to transact business in this state appoints the Department of State as its agent for service of process for purposes of enforcing an obligation under this subsection and any appraisal rights of limited partners under ss. 1011-1022 to the extent applicable to the conversion. Service on the Department of State under this subsection is made in the same manner and with the same consequences as in s. 116(c) and (d).

(4) A copy of the statement of conversion, certified by the Department of State, may be filed in any county of this state in which the converting organization holds an interest in real property.

SECTION 1006. MERGER.

(1) A limited liability company may merge with one or more other constituent organizations pursuant to this section and ss. 1007-1009 and a plan of merger, if:

(a) The governing law of each of the other organizations authorizes the merger.

(b) The merger is permitted by the law of a jurisdiction that enacted each of those governing laws.

~~(3) each~~(c) Each of the other organizations complies with its governing ~~statute~~law in effecting the merger.

[Note: the following subsections (d) and (e) were proposed by the DOS:]

[(d) Each party to the merger incorporated, formed, or otherwise organized under the laws of this state is active and current in filing its annual reports on the records of the

Department of State through December 31st of the calendar year in which the certificate of merger is submitted to the Department of State for filing.

(e) Each party to the merger incorporated, formed, or otherwise organized under the laws of another jurisdiction and authorized to transact business or conduct its affairs in this state is active and current in filing its annual reports on the records of the Department of State through December 31st of the calendar year in which the certificate of merger is submitted to the Department of State for filing.]

(~~b~~2) A plan of merger must be in a record and must include:

~~(1) the~~

(a) The name and form of each constituent organization~~;~~

~~(2) the~~.

(b) The name and form of the surviving organization ~~and, if the surviving organization is to be created by the merger, a statement to that effect;~~.

~~(3) the~~(c) The terms and conditions of the merger, including the manner and basis for converting the interests in each constituent organization into any combination of money, interests in the surviving organization, and other consideration~~;~~.

~~(4) if the surviving organization is to be created by the merger, the surviving organization's organizational documents that are proposed to be in a record; and~~

~~(5) if the surviving organization is not to be created by the merger, any~~(d) Any amendments to be made by the merger to the surviving organization's organizational documents [that are, or are proposed to be, in a record.][153]

SECTION ~~1003.~~ 1007. ACTION ON PLAN OF MERGER BY CONSTITUENT LIMITED LIABILITY COMPANY.

(~~a~~1) Subject to Section 1014, a plan of merger must be consented to by ~~all the members of a constituent~~the members or, if there is more than one class or group of members, then by each class or group of members, in either case, [by members][154] who own more than 50 percent of the then current percentage or other interest in the profits of the limited liability

[153] To discuss why this provision is necessary.

[154] To confirm that these words used in Delaware law are redundant and can be eliminated.

company~~.~~ owned by all of the members or by the members in each class or group, as appropriate.[155]

(~~b~~2) Subject to ~~Section 1014~~s. 1010 and any contractual rights, after a merger is approved, and at any time before ~~articles of merger are delivered to the Department of State for~~a filing is made under ~~Section 1004,~~s. 1008, a constituent limited liability company may amend the plan or abandon the planned merger:

(~~1~~a) ~~as~~ As provided in the plan; ~~or~~and

(~~2~~b) ~~except~~ Except as ~~otherwise~~ prohibited ~~in~~by the plan, with the same consent as was required to approve the plan.

[***Reporter's Note: the corresponding approval provisions of Delaware law follow:***

". . . . Unless otherwise provided in the limited liability company agreement, an agreement of merger or consolidation or a plan of merger shall be approved by each domestic limited liability company which is to merge or consolidate by the members or, if there is more than one class or group of members, then by each class or group of members, in either case, by members who own more than 50 percent of the then current percentage or other interest in the profits of the domestic limited liability company owned by all of the members or by the members in each class or group, as appropriate. In connection with a merger or consolidation hereunder, rights or securities of, or interests in, a domestic limited liability company or other business entity which is a constituent party to the merger or consolidation may be exchanged for or converted into cash, property, rights or securities of, or interests in, the surviving or resulting domestic limited liability company or other business entity or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, a domestic limited liability company or other business entity which is not the surviving or resulting limited liability company or other business entity in the merger or consolidation or may be cancelled. Notwithstanding prior approval, an agreement of merger or consolidation or a plan of merger may be terminated or amended pursuant to a provision for such termination or amendment contained in the agreement of merger or consolidation or plan of merger." (Taken in from Sec. 18-209(b))]

SECTION ~~1004.~~ 1008. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.

(~~a~~1) After each constituent organization has approved a merger, ~~articles~~a certificate of merger must be signed on behalf of:

[155] See footnote to approval provisions regarding conversions. Same issue here.

(1a) each Each constituent limited liability company, as provided in Sectionaccordance with s. 203(a); and.

(2b) each Each other constituent organization, as provided in its governing statute.law [by its authorized representative].[156]

(b) Articles(2) The certificate of merger under this section must include:

(1a) the The name and form of each constituent organization and the jurisdiction of its governing statute;law.

(2b) the The name and form of the surviving organization, the jurisdiction of its governing statutelaw, and, if the surviving organization is created by the merger, a statement to that effect;.

(3c) theThe date the merger is effective under the governing statutelaw of the surviving organization;.

(4) if the surviving organization is to be created by the merger:

(A) if it will be a limited liability company, the company's certificate of organization; or

(B) if it will be an organization other than a limited liability company, the organizational document that creates the organization that is in a public record;

(5) if the surviving organization preexists the merger, any(d) Any amendments provided for in the plan of merger for the organizational document that created the organization [that areis in a public record;][157].

(6e) a A statement as to each constituent organization that the merger was approved as required by the organization's governing statute;law.

(7f) if If the surviving organization is a foreign organization not authorized to transact business in this state, the street and mailing addressesaddress of an office thatwhich the Department of State may use for the purposes of Section 1005(b); ands. 1009(2).

(8g) any Any additional information required by the governing statutelaw of any constituent organization.

[156] Bracketed language is used in the LP Act.

[157] Bracketed language in uniform act but not LP Act.

(~~c~~3) Each constituent limited liability company shall deliver the ~~articles~~certificate of merger for filing in the ~~[office of the Secretary of State]~~Department of State unless the constituent limited liability company is named as a party or constituent organization in articles of merger or a certificate of merger filed for the same merger in accordance with s. 607.1109(1), s. 620.2108(1), s. 617.1108, or s. 620.8918(1) and (2) and such articles of merger or certificate of merger substantially complies with the requirements of this section. In such a case, the other articles of merger or certificate of merger may also be used for purposes of s. 1009(3).

(~~d~~4) A merger becomes effective under this ~~[article]~~act:

(~~1~~a) ~~if~~ If the surviving organization is a limited liability company, upon the later of:

~~(A) compliance~~1. Compliance with subsection (~~c~~3); or

~~(B) subject~~2. Subject to ~~Section 205~~s. 204(c), as specified in the ~~articles~~certificate of merger; or

(~~2~~b) ~~if~~ If the surviving organization is not a limited liability company, as provided by the governing ~~statute~~law of the surviving organization.

SECTION ~~1005.~~ 1009. EFFECT OF MERGER.

(~~a~~1) When a merger becomes effective:

(~~1~~a) ~~the~~ The surviving organization continues ~~or comes into existence;~~.

(~~2~~b) ~~each~~ Each constituent organization that merges into the surviving organization ceases to exist as a separate entity~~;~~.

(~~3~~c) ~~all~~ All property owned by each constituent organization that ceases to exist vests in the surviving organization~~;~~.

(~~4~~d) ~~all~~ All debts, ~~obligations, or other~~ liabilities, or other obligations of each constituent organization that ceases to exist continue as debts, ~~obligations, or other~~ liabilities or other obligations of the surviving organization~~;~~.

(~~5~~e) ~~an~~ An action or proceeding pending by or against any constituent organization that ceases to exist may be continued as if the merger had not occurred~~;~~.

(~~6~~f) ~~except~~ Except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of each constituent organization that ceases to exist vest in the surviving organization~~;~~.

(~~7~~g) ~~except~~ Except as otherwise provided in the plan of merger, the terms and conditions of the plan of merger take effect~~; and~~.

(~~8~~h) ~~except~~ Except as otherwise agreed, if a constituent limited liability company ceases to exist, the merger does not dissolve the limited liability company for the purposes of ~~[Article] 7;~~ss. 701-714.

~~(9) if the surviving organization is created by the merger:~~

~~(A) if it is a limited liability company, the certificate of organization becomes effective; or~~

~~(B) if it is an organization other than a limited liability company, the organizational document that creates the organization becomes effective; and~~ ~~(10) if the surviving organization preexisted the merger, any~~(i) Any amendments provided for in the ~~articles~~certificate of merger for the organizational document that created the organization become effective.

(~~b~~2) A surviving organization that is a foreign organization consents to the jurisdiction of the courts of this state to enforce any ~~debt,~~ obligation~~, or other liability~~ owed by a constituent organization, if before the merger the constituent organization was subject to suit in this state on the ~~debt,~~ obligation~~, or other liability.~~ . A surviving organization that is a foreign organization and not authorized to transact business in this state ~~appoints~~shall appoint the Department of State as its agent for service of process for the purposes of enforcing ~~a debt,~~an obligation~~, or other liability~~ under this subsection~~.~~ and any appraisal rights of members under ss. 1011-1022 to the extent applicable to the merger. Service on the Department of State under this subsection ~~must be~~is made in the same manner and ~~has~~with the same consequences as in ~~Section~~s. 116(c) and (d).

~~SECTION 1006. CONVERSION.~~

~~(a) An organization other than a limited liability company or a foreign limited liability company may convert to a limited liability company, and a limited liability company may convert to an organization other than a foreign limited liability company pursuant to this section, Sections 1007 through 1009, and a plan of conversion, if:~~

(1) the other organization's governing statute authorizes the conversion;

(2) the conversion is not prohibited by the law of the jurisdiction that enacted the other organization's governing statute; and

(3) the other organization complies with its governing statute in effecting the conversion.

(b) A plan of conversion must be in a record and must include:

(1) the name and form of the organization before conversion;

(2) the name and form of the organization after conversion;

(3) the terms and conditions of the conversion, including the manner and basis for converting interests in the converting organization into any combination of money, interests in the converted organization, and other consideration; and

(4) the organizational documents of the converted organization that are, or are proposed to be, in a record.

SECTION 1007. ACTION ON PLAN OF CONVERSION BY CONVERTING LIMITED LIABILITY COMPANY.

(a) Subject to Section 1014, a plan of conversion must be consented to by all the members of a converting limited liability company.

(b) Subject to Section 1014 and any contractual rights, after a conversion is approved, and at any time before articles of conversion are delivered to the Department of State for filing under Section 1008, a converting limited liability company may amend the plan or abandon the conversion:

(1) as provided in the plan; or

(2) except as otherwise prohibited in the plan, by the same consent as was required to approve the plan.

SECTION 1008. FILINGS REQUIRED FOR CONVERSION; EFFECTIVE DATE.

(a) After a plan of conversion is approved:

(1) a converting limited liability company shall deliver to the Department of State for filing articles of conversion, which must be signed as provided in Section 203(a) and must include;

(A) a statement that the limited liability company has been converted into another organization;

(B) the name and form of the organization and the jurisdiction of its governing statute;

(C) the date the conversion is effective under the governing statute of the converted organization;

(D) a statement that the conversion was approved as required by this act;

(E) a statement that the conversion was approved as required by the governing statute of the converted organization; and

(F) if the converted organization is a foreign organization not authorized to transact business in this state, the street and mailing addresses of an office which the Department of State may use for the purposes of Section 1009(c); and

(2) if the converting organization is not a converting limited liability company, the converting organization shall deliver to the Department of State for filing a certificate of organization, which must include, in addition to the information required by Section 201(b):

(A) a statement that the converted organization was converted from another organization;

(B) the name and form of that converting organization and the jurisdiction of its governing statute; and

(C) a statement that the conversion was approved in a manner that complied with the converting organization's governing statute.

(b) A conversion becomes effective:

(1) if the converted organization is a limited liability company, when the certificate of organization takes effect; and

(2) if the converted organization is not a limited liability company, as provided by the governing statute of the converted organization.

SECTION 1009. EFFECT OF CONVERSION.

(a) An organization 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 organization remains vested in the converted organization;

~~(2) all debts, obligations, or other liabilities of the converting organization continue as debts, obligations, or other liabilities of the converted organization;~~

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

~~(4) except as prohibited by law other than this act, all of the rights, privileges, immunities, powers, and purposes of the converting organization remain vested in the converted organization;~~

~~(5) except as otherwise provided in the plan of conversion, the terms and conditions of the plan of conversion take effect; and~~

~~(6) except as otherwise agreed, the conversion does not dissolve a converting limited liability company for the purposes of [Article] 7.~~

~~(c) A converted organization that is a foreign organization consents to the jurisdiction of the courts of this state to enforce any debt, obligation, or other liability for which the converting limited liability company is liable if, before the conversion, the converting limited liability company was subject to suit in this state on the debt, obligation, or other liability. A converted organization that is a foreign organization and not authorized to transact business in this state appoints the Department of State as its agent for service of process for purposes of enforcing a debt, obligation, or other liability under this subsection. Service on the Department of State under this subsection must be made in the same manner and has the same consequences as in Section 116(c) and (d).~~

(3) A copy of the certificate of merger, certified by the Department of State, may be filed in any county of this state in which a constituent organization holds an interest in real property.

SECTION 1010. ~~DOMESTICATION.~~

~~(a) A foreign limited liability company may become a limited liability company pursuant to this section, Sections 1011 through 1013, and a plan of domestication, if:~~

~~(1) the foreign limited liability company's governing statute authorizes the domestication;~~

~~(2) the domestication is not prohibited by the law of the jurisdiction that enacted the governing statute; and~~

(3) the foreign limited liability company complies with its governing statute in effecting the domestication.

(b) A limited liability company may become a foreign limited liability company pursuant to this section, Sections 1011 through 1013, and a plan of domestication, if:

(1) the foreign limited liability company's governing statute authorizes the domestication;

(2) the domestication is not prohibited by the law of the jurisdiction that enacted the governing statute; and

(3) the foreign limited liability company complies with its governing statute in effecting the domestication.

(c) A plan of domestication must be in a record and must include:

(1) the name of the domesticating company before domestication and the jurisdiction of its governing statute;

(2) the name of the domesticated company after domestication and the jurisdiction of its governing statute;

(3) the terms and conditions of the domestication, including the manner and basis for converting interests in the domesticating company into any combination of money, interests in the domesticated company, and other consideration; and

(4) the organizational documents of the domesticated company that are, or are proposed to be, in a record.

SECTION 1011. ACTION ON PLAN OF DOMESTICATION BY DOMESTICATING LIMITED LIABILITY COMPANY.

(a) A plan of domestication must be consented to:

(1) by all the members, subject to Section 1014, if the domesticating company is a limited liability company; and

(2) as provided in the domesticating company's governing statute, if the company is a foreign limited liability company.

(b) Subject to any contractual rights, after a domestication is approved, and at any time before articles of domestication are delivered to the Department of State for filing under Section 1012, a domesticating limited liability company may amend the plan or abandon the domestication:

(1) as provided in the plan; or

(2) except as otherwise prohibited in the plan, by the same consent as was required to approve the plan.

SECTION 1012. FILINGS REQUIRED FOR DOMESTICATION; EFFECTIVE DATE.

(a) After a plan of domestication is approved, a domesticating company shall deliver to the Department of State for filing articles of domestication, which must include:

(1) a statement, as the case may be, that the company has been domesticated from or into another jurisdiction;

(2) the name of the domesticating company and the jurisdiction of its governing statute;

(3) the name of the domesticated company and the jurisdiction of its governing statute;

(4) the date the domestication is effective under the governing statute of the domesticated company;

(5) if the domesticating company was a limited liability company, a statement that the domestication was approved as required by this act;

(6) if the domesticating company was a foreign limited liability company, a statement that the domestication was approved as required by the governing statute of the other jurisdiction; and

(7) if the domesticated company was a foreign limited liability company not authorized to transact business in this state, the street and mailing addresses of an office that the Department of State may use for the purposes of Section 1013(b).

(b) A domestication becomes effective:

(1) when the certificate of organization takes effect, if the domesticated company is a limited liability company; and

(2) according to the governing statute of the domesticated company, if the domesticated organization is a foreign limited liability company.

SECTION 1013. EFFECT OF DOMESTICATION.

(a) When a domestication takes effect:

(1) the domesticated company is for all purposes the company that existed before the domestication;

(2) all property owned by the domesticating company remains vested in the domesticated company;

(3) all debts, obligations, or other liabilities of the domesticating company continue as debts, obligations, or other liabilities of the domesticated company;

(4) an action or proceeding pending by or against a domesticating company may be continued as if the domestication had not occurred;

(5) except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of the domesticating company remain vested in the domesticated company;

(6) except as otherwise provided in the plan of domestication, the terms and conditions of the plan of domestication take effect; and

(7) except as otherwise agreed, the domestication does not dissolve a domesticating limited liability company for the purposes of [Article] 7.

(b) A domesticated company that is a foreign limited liability company consents to the jurisdiction of the courts of this state to enforce any debt, obligation, or other liability owed by the domesticating company, if, before the domestication, the domesticating company was subject to suit in this state on the debt, obligation, or other liability. A domesticated company that is a foreign limited liability company and not authorized to transact business in this state appoints the Department of State as its agent for service of process for purposes of enforcing a debt, obligation, or other liability under this subsection. Service on the Department of State under this subsection must be made in the same manner and has the same consequences as in Section 116(c) and (d).

(c) If a limited liability company has adopted and approved a plan of domestication under Section 1010 providing for the company to be domesticated in a foreign jurisdiction, a statement surrendering the company's certificate of organization must be delivered to the Department of State for filing setting forth:

(1) the name of the company;

(2) a statement that the certificate of organization is being surrendered in connection with the domestication of the company in a foreign jurisdiction;

(3) a statement the domestication was approved as required by this act; and

~~(4) the jurisdiction of formation of the domesticated foreign limited liability company.~~ **~~SECTION 1014.~~ RESTRICTIONS ON APPROVAL OF MERGERS~~,~~ AND CONVERSIONS~~, AND DOMESTICATIONS~~.**

(a) If a member of a constituent~~,~~ or converting~~, or domesticating~~ limited liability company will have personal liability with respect to a surviving~~,~~ or converted~~, or domesticated~~ organization, approval or amendment of a plan of merger~~,~~ or conversion~~, or domestication~~ are ineffective without the consent of the member, unless:

(1) the company's operating agreement provides for approval of a merger~~,~~ or conversion~~, or domestication~~ with the consent of fewer than all the members; and

(2) the member has consented to the provision of the operating agreement.

(b) A member does not give the consent required by subsection (a) merely by consenting to a provision of the operating agreement that permits the operating agreement to be amended with the consent of fewer than all the members.

~~SECTION 1015. [ARTICLE] NOT EXCLUSIVE.~~ ~~This [article] does~~

SECTION 1011. APPRAISAL RIGHTS; DEFINITIONS.

The following definitions apply to this section and ss. 1012-1022:

(1) "Affiliate" means a person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with another person. For purposes of s. 1012(2)(d), a person is deemed to be an affiliate of its senior executives.

(2) "Appraisal event" means an event described in s. 1012(1).

(3) "Beneficial member" means a person who is the beneficial owner of a membership interest held in a voting trust or by a nominee on the beneficial owner's behalf.

(4) "Converted entity" means the other business entity into which a domestic limited liability company converts pursuant to ss. 1002-1005.

(5) "Fair value" means the value of the member's membership interests determined:

(a) Immediately before the effectuation of the appraisal event to which the member objects.

(b) Using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal, excluding any appreciation or depreciation in anticipation of the transaction to which the member objects unless exclusion would be inequitable to the limited liability company and its remaining members.

(c) For a limited liability company with 10 or fewer members, without discounting for lack of marketability or minority status.

(6) "Interest" means interest from the effective date of the appraisal event to which the member objects until the date of payment, at the rate of interest determined for judgments in accordance with s. 55.03, determined as of the effective date of the appraisal event.

(7) "Limited liability company" means the domestic limited liability company that issued the membership interest held by a member demanding appraisal and, for matters covered in ss. 1012-1022, includes the converted entity in a conversion or the surviving entity in a merger.

(8) "Record member" means each person who is identified as a member [in the current list of members maintained for purposes of s. 410(a)(1)][158] by the limited liability company, or to the extent the limited liability company has failed to maintain a current list, each person that is the rightful owner of a membership interest in the limited liability company. A transferee of a membership interest is not a record member.

(9) "Senior executive" means a manager or managing member or the chief executive officer, chief operating officer, chief financial officer, or anyone in charge of a principal business unit or function of a limited liability company or of a manager or managing member of the limited liability company.

(10) "Member" means a record member or a beneficial member.

(11) "Membership interest" [means a member's transferable interest and all other rights as a member of the limited liability company that issued the membership interest, including any voting rights, management rights or any other rights under this chapter or operating agreement of

[158] To conform after final decision made as to whether 410 will require a list of members to be maintained for inspection at all times (as provided under current law).

the limited liability company][159] except, if the appraisal rights of a member under s. 1012 pertain to only a certain class or series of a membership interest, the term "membership interest" means only the membership interest pertaining to such class or series.

(12) "Surviving entity" means the other business entity into which a domestic limited liability company is merged pursuant to ss. 1006-1009.

SECTION 1012. RIGHT OF MEMBERS TO APPRAISAL.

(1) A member of a domestic limited liability company is entitled to appraisal rights, and to obtain payment of the fair value of that member's membership interest, in the following events:

(a) Consummation of a merger of such limited liability company pursuant to this act [chapter] and the member possessed the right to vote upon the merger; or

(b) Consummation of a conversion of such limited liability company pursuant to this act [chapter] and the member possessed the right to vote upon the conversion.

(2) Notwithstanding subsection (1), the availability of appraisal rights shall be limited in accordance with the following provisions:

(a) Appraisal rights shall not be available for membership interests which are:

1. Listed on the New York Stock Exchange or the American Stock Exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc.; or

2. Not listed or designated as provided in subparagraph 1. but are issued by a limited liability company that has at least 500 members and all membership interests of the limited liability company, including membership interests that are limited to a right to receive distributions, have a market value of at least $10 million, exclusive of the value of any such interests held by its managing members, managers, and other senior executives owning more than 10 percent of the rights to receive distributions from the limited liability company.

[159] This definition based upon current law definition of "membership interest" as there is no corresponding definition in the uniform act.

(b) The applicability of paragraph (a) shall be determined as of the date fixed to determine the members entitled to receive notice of, and to vote upon, the appraisal event.

(c) Paragraph (a) shall not apply, and appraisal rights shall be available pursuant to subsection (1), for any members who are required by the appraisal event to accept for their membership interests anything other than cash or a proprietary interest of an entity that satisfies the standards set forth in paragraph (a) at the time the appraisal event becomes effective.

(d) Paragraph (a) shall not apply, and appraisal rights shall be available pursuant to subsection (1), for the holders of a membership interest if:

1. Any of the members' interests in the limited liability company or the limited liability company's assets are being acquired or converted, whether by merger, conversion, or otherwise, pursuant to the appraisal event by a person, or by an affiliate of a person, who:

a. Is, or at any time in the 1-year period immediately preceding approval of the appraisal event was, the beneficial owner of 20 percent or more of those interests in the limited liability company entitled to vote on the appraisal event, excluding any such interests acquired pursuant to an offer for all interests having such voting rights if such offer was made within 1 year prior to the appraisal event for consideration of the same kind and of a value equal to or less than that paid in connection with the appraisal event; or

b. Directly or indirectly has, or at any time in the 1-year period immediately preceding approval of the appraisal event had, the power, contractually or otherwise, to cause the appointment or election of any senior executives; or

2. Any of the members' interests in the limited liability company or the limited liability company's assets are being acquired or converted, whether by merger, conversion, or otherwise, pursuant to the appraisal event by a person, or by an affiliate of a person, who is, or at any time in the 1-year period immediately preceding approval of the appraisal event was, a senior executive of the limited liability company or a senior executive of any affiliate of the limited liability company, and that senior executive will receive, as a result of the limited liability company action, a financial benefit not generally available to members, other than:

a. Employment, consulting, retirement, or similar benefits established separately and not as part of or in contemplation of the appraisal event;

b. Employment, consulting, retirement, or similar benefits established in contemplation of, or as part of, the appraisal event that are not more favorable than those existing before the appraisal event or, if more favorable, that have been approved by the limited liability company; or

c. In the case of a managing member or manager of the limited liability company who will, during or as the result of the appraisal event, become a managing member, manager, general partner, or director of the surviving or converted entity or one of its affiliates, those rights and benefits as a managing member, manager, general partner, or director that are provided on the same basis as those afforded by the surviving or converted entity generally to other managing members, managers, general partners, or directors of the surviving or converted entity or its affiliate.

(e) For the purposes of sub-subparagraph (d)1.a. only, the term "beneficial owner" means any person who, directly or indirectly, through any contract, arrangement, or understanding, other than a revocable proxy, has or shares the right to vote, or to direct the voting of, an interest in a limited liability company with respect to approval of the appraisal event, provided a member of a national securities exchange shall not be deemed to be a beneficial owner of an interest in a limited liability company held directly or indirectly by it on behalf of another person solely because such member is the record holder of interests in the limited liability company if the member is precluded by the rules of such exchange from voting without instruction on contested matters or matters that may affect substantially the rights or privileges of the holders of the interests in the limited liability company to be voted. When two or more persons agree to act together for the purpose of voting such interests, each member of the group formed thereby shall be deemed to have acquired beneficial ownership, as of the date of such agreement, of all voting interests in the limited liability company beneficially owned by any member of the group.

(3) A member entitled to appraisal rights under this section and ss. 1013-1022 may not challenge a completed appraisal event unless the appraisal event:

(a) Was not effectuated in accordance with the applicable provisions of this section and ss. 1013-1022, or the limited liability company's articles of organization or operating agreement; or

(b) Was procured as a result of fraud or material misrepresentation.

(4) A limited liability company may modify, restrict, or eliminate the appraisal rights provided in this section and ss. 1013-1022 in its operating agreement.

SECTION 1013. ASSERTION OF RIGHTS BY NOMINEES AND BENEFICIAL OWNERS.

(1) A record member may assert appraisal rights as to fewer than all the membership interests registered in the record member's name which are owned by a beneficial member only if the record member objects with respect to all membership interests of the class or series owned by that beneficial member and notifies the limited liability company in writing of the name and address of each beneficial member on whose behalf appraisal rights are being asserted. The rights of a record member who asserts appraisal rights for only part of the membership interests of the class or series held of record in the record member's name under this subsection shall be determined as if the membership interests to which the record member objects and the record member's other membership interests were registered in the names of different record members.

(2) A beneficial member may assert appraisal rights as to a membership interest held on behalf of the member only if such beneficial member:

(a) Submits to the limited liability company the record member's written consent to the assertion of such rights no later than the date referred to in s. 1016(2)(b)2.

(b) Does so with respect to all membership interests of the class or series that are beneficially owned by the beneficial member.

SECTION 1014. NOTICE OF APPRAISAL RIGHTS.

(1) If a proposed appraisal event is to be submitted to a vote at a members' meeting, the meeting notice must state that the limited liability company has concluded that members are, are not, or may be entitled to assert appraisal rights under this act.

(2) If the limited liability company concludes that appraisal rights are or may be available, a copy of ss. 1011-1022 must accompany the meeting notice sent to those record members entitled to exercise appraisal rights.

(3) If the appraisal event is to be approved other than by a members' meeting, the notice referred to in subsection (1) must be sent to all members at the time that consents are first solicited, whether or not consents are solicited from all members, [and include the materials described in s. 1016.][160]

SECTION 1015. NOTICE OF INTENT TO DEMAND PAYMENT.

(1) If a proposed appraisal event is submitted to a vote at a members' meeting, or is submitted to a member pursuant to a consent vote, a member who is entitled to and who wishes to assert appraisal rights with respect to any class or series of membership interests:

(a) Must deliver to a manager or managing member of the limited liability company before the vote is taken, or within 20 days after receiving the notice pursuant to s. [1014(3)] if action is to be taken without a member meeting, written notice of such person's intent to demand payment if the proposed appraisal event is effectuated.

(b) Must not vote, or cause or permit to be voted, any membership interests of such class or series in favor of the appraisal event.

(2) A person who may otherwise be entitled to appraisal rights, but who does not satisfy the requirements of subsection (1), is not entitled to payment under ss. 1011-1022.

SECTION 1016. APPRAISAL NOTICE AND FORM.[161]

(1) If the proposed appraisal event becomes effective, the limited liability company must deliver a written appraisal notice and form required by paragraph (2)(a) to all members who satisfied the requirements of s. 1015.

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[160] To discuss whether this should be clarified. If the form of demand under 1016(2)(a) is meant to be included in this description of "other materials" then information for that form may not yet be available to the company. Also the 40 - 60 day limiters for submitting the form may not correspond (which may be the fix to 1016 that Gary Teblum mentioned at the 9/30/10 meeting).

[161] Gary Teblum mentioned at 9/30/10 meeting he would provide changes to clarify or fix notice and response period requirements.

(2) The appraisal notice must be sent no earlier than the date the appraisal event became effective and no later than 10 days after such date and must:

(a) Supply a form that specifies the date that the appraisal event became effective and that provides for the member to state:

1. The member's name and address.

2. The number, classes, and series of membership interests as to which the member asserts appraisal rights.

3. That the member did not vote for the transaction.

4. Whether the member accepts the limited liability company's offer as stated in subparagraph (b)4.

5. If the offer is not accepted, the member's estimated fair value of the membership interests and a demand for payment of the member's estimated value plus interest.

(b) State:

1. Where the form described in paragraph (a) must be sent.

2. A date by which the limited liability company must receive the form, which date may not be fewer than 40 nor more than 60 days after the date the appraisal notice and form described in this subsection are sent, and that the member shall have waived the right to demand appraisal with respect to the membership interests unless the form is received by the limited liability company by such specified date.

3. In the case of membership interests represented by a certificate, the location at which certificates for such certificated membership interests must be deposited, if that action is required by the limited liability company, and the date by which those certificates must be deposited, which date may not be earlier than the date for receiving the required form under subparagraph 2.

4. The limited liability company's estimate of the fair value of the membership interests.

5. An offer to each member who is entitled to appraisal rights to pay the limited liability company's estimate of fair value set forth in subparagraph 4.

6. That, if requested in writing, the limited liability company will provide to the member so requesting, within 10 days after the date specified in subparagraph 2., the number of members who return the forms by the specified date and the total number of membership interests owned by them.

7. The date by which the notice to withdraw under s. 1017 must be received, which date must be within 20 days after the date specified in subparagraph 2.

(c) Be accompanied by:

1. Financial statements of the limited liability company that issued the membership interests to be appraised, consisting of a balance sheet as of the end of the fiscal year ending not more than 15 months prior to the date of the limited liability company's appraisal notice, an income statement for that year, a cash flow statement for that year, and the latest available interim financial statements, if any.

2. A copy of ss. 1011-1022.

SECTION 1017. PERFECTION OF RIGHTS; RIGHT TO WITHDRAW.

(1) A member who wishes to exercise appraisal rights must execute and return the form received pursuant to s. 1016(1) and, in the case of certificated membership interests and if the limited liability company so requires, deposit the member's certificates in accordance with the terms of the notice by the date referred to in the notice pursuant to s. 1016(2)(b)2. Once a member deposits that member's certificates or, in the case of uncertificated membership interests, returns the executed form described in s. 1016(2), the member loses all rights as a member, unless the member withdraws pursuant to subsection (3). Upon receiving a demand for payment from a member who holds an uncertificated membership interest, the limited liability company shall make an appropriate notation of the demand for payment in its records.

(2) The limited liability company may restrict the transfer of such membership interests from the date the member delivers the items required by subsection (1).

(3) A member who has complied with subsection (1) may nevertheless decline to exercise appraisal rights and withdraw from the appraisal process by so notifying the limited liability company in writing by the date set forth in the appraisal notice pursuant to s.

1016(2)(b)7. A member who fails to so withdraw from the appraisal process may not thereafter withdraw without the limited liability company's written consent.[162]

(4) A member who does not execute and return the form and, in the case of certificated membership interests, deposit that member's certificates, if so required by the limited liability company, each by the date set forth in the notice described in subsection (2), shall not be entitled to payment under this chapter.

(5) If the member's right to receive fair value is terminated other than by the purchase of the membership interest by the limited liability company, all rights of the member, with respect to such membership interest, shall be reinstated effective as of the date the member delivered the items required by subsection (1), including the right to receive any intervening payment or other distribution with respect to such membership interest, or, if any such rights have expired or any such distribution other than a cash payment has been completed, in lieu thereof at the election of the limited liability company, the fair value thereof in cash as determined by the limited liability company as of the time of such expiration or completion, but without prejudice otherwise to any action or proceeding of the limited liability company that may have been taken by the limited liability company on or after the date the member delivered the items required by subsection (1).

SECTION 1018. MEMBER'S ACCEPTANCE OF LIMITED LIABILITY COMPANY'S OFFER.

(1) If the member states on the form provided in s. 1016(1) that the member accepts the offer of the limited liability company to pay the limited liability company's estimated fair value for the membership interest, the limited liability company shall make such payment to the member within 90 days after the limited liability company's receipt of the items required by s. 1017(1).

(2) Upon payment of the agreed value, the member shall cease to have any interest in the membership interest.

[162] To consider clarification that if the withdrawal from the process occurs may still approve the plan of merger or conversion if the time period for approval is not closed. Certain rights may be available to approving members that are not available to non-approving members (such as the right to continue in the company in the case of a cash-out merger).

SECTION 1019. PROCEDURE IF MEMBER IS DISSATISFIED WITH OFFER.

(1) A member who is dissatisfied with the limited liability company's offer as set forth pursuant to s. 1016(2)(b)5. must notify the limited liability company on the form provided pursuant to s. 1016(1) of the member's estimate of the fair value of the membership interest and demand payment of that estimate plus interest.

(2) A member who fails to notify the limited liability company in writing of the member's demand to be paid the member's estimate of the fair value plus interest under subsection (1) within the timeframe set forth in s. 1016(2)(b)5. waives the right to demand payment under this section and shall be entitled only to the payment offered by the limited liability company pursuant to s. 1016(2)(b)5.

SECTION 1020. COURT ACTION.

(1) If a member makes demand for payment under s. 1019 which remains unsettled, the limited liability company shall commence a proceeding within 60 days after receiving the payment demand and petition the court to determine the fair value of the membership interest and accrued interest. If the limited liability company does not commence the proceeding within the 60-day period, any member who has made a demand pursuant to s. 1019 may commence the proceeding in the name of the limited liability company.

(2) The proceeding shall be commenced in the appropriate court of the county in which the limited liability company's principal office in this state is located or, if none, the county in which its registered agent is located. If the limited liability company is a foreign limited liability company without a registered agent in this state, the proceeding shall be commenced in the county in this state in which the principal office or registered agent of the domestic limited liability company was located at the time of the appraisal event.

(3) All members, whether or not residents of this state, whose demands remain unsettled shall be made parties to the proceeding as in an action against their membership interests. The limited liability company shall serve a copy of the initial pleading in such proceeding upon each member party who is a resident of this state in the manner provided by law for the service of a summons and complaint and upon each nonresident member party by registered or certified mail or by publication as provided by law.

(4) The jurisdiction of the court in which the proceeding is commenced under subsection (2) is plenary and exclusive. If it so elects, the court may appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have the powers described in the order appointing them or in any amendment to the order. The members demanding appraisal rights are entitled to the same discovery rights as parties in other civil proceedings. There shall be no right to a jury trial.

(5) Each member made a party to the proceeding is entitled to judgment for the amount of the fair value of such member's membership interests, plus interest, as found by the court.

(6) The limited liability company shall pay each such member the amount found to be due within 10 days after final determination of the proceedings. Upon payment of the judgment, the member shall cease to have any interest in the membership interests.

SECTION 1021. COURT COSTS AND COUNSEL FEES.

(1) The court in an appraisal proceeding shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against the limited liability company, except that the court may assess costs against all or some of the members demanding appraisal, in amounts the court finds equitable, to the extent the court finds such members acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this chapter.

(2) The court in an appraisal proceeding may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

(a) Against the limited liability company and in favor of any or all members demanding appraisal if the court finds the limited liability company did not substantially comply with ss. 1013 and 1016; or

(b) Against either the limited liability company or a member demanding appraisal, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this chapter.

(3) If the court in an appraisal proceeding finds that the services of counsel for any member were of substantial benefit to other members similarly situated, and that the fees for

those services should not be assessed against the limited liability company, the court may award to such counsel reasonable fees to be paid out of the amounts awarded the members who were benefited.

(4) To the extent the limited liability company fails to make a required payment pursuant to s. 1018, the member may sue directly for the amount owed and, to the extent successful, shall be entitled to recover from the limited liability company all costs and expenses of the suit, including attorney's fees.

SECTION 1022. LIMITATION ON LIMITED LIABILITY COMPANY PAYMENT.

(1) No payment shall be made to a member seeking appraisal rights if, at the time of payment, the limited liability company is unable to meet the distribution standards of s. 405. In such event, the member shall, at the member's option:

(a) Withdraw the notice of intent to assert appraisal rights, which shall in such event be deemed withdrawn with the consent of the limited liability company; or

(b) Retain the status as a claimant against the limited liability company and, if the limited liability company is liquidated, be subordinated to the rights of creditors of the limited liability company but have rights superior to the members not asserting appraisal rights and, if it is not liquidated, retain the right to be paid for the membership interest, which right the limited liability company shall be obliged to satisfy when the restrictions of this section do not apply.

(2) The member shall exercise the option under paragraph (1)(a) or paragraph (1)(b) by written notice filed with the limited liability company within 30 days after the limited liability company has given written notice that the payment for the membership interests cannot be made because of the restrictions of this section. If the member fails to exercise the option, the member shall be deemed to have withdrawn the notice of intent to assert appraisal rights.

SECTION 1023. APPLICATION OF OTHER LAWS TO PROVISIONS GOVERNING CONVERSIONS AND MERGERS.

(1) The provisions of ss. 1001-1022 do not preclude an entity from being ~~merged, converted, or domesticated under law other than this act.~~

converted or merged under other law.

(2) The provisions of ss. 1001-1022 do not authorize any act prohibited by other applicable law or change the requirements of any law or rule regulating a specific organization or industry, such as a not-for-profit organization, insurance, banking or investment establishment, or other regulated business or activity.

SECTION 1024. DOMESTICATION OF NON-UNITED STATES ENTITIES

(a) As used in this section [and in Section 203][163], "non-United States entity" means a foreign limited liability company (other than one formed under the laws of a state) or a corporation, a statutory trust, a business trust, an association, a real estate investment trust, a common-law trust or any other unincorporated business or entity, including a partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)) formed, incorporated, created or that otherwise came into being under the laws of any foreign country or other foreign jurisdiction (other than any state).

(b) Any non-United States entity may become domesticated as a limited liability company in the State of Florida by complying with subsection (g) of this section and filing with the Department of State in accordance with Section 205 the following:

(1) A [certificate of limited liability company domestication] [164] that has been executed in accordance with Section 203; and

(2) A certificate of organization that complies with Section 201 and has been executed by one or more authorized representatives in accordance with Section 203 of this title.

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[163] Conforming change probably needed in that section and elsewhere? Delaware cross reference is to Sec. 18-204(a): "Each certificate required by this sub[chapter] to be filed in the office of the Secretary of State shall be executed by 1 or more authorized representatives or, in the case of a certificate of conversion to limited liability company or certificate of limited liability company domestication, by any person authorized to execute such certificate on behalf of the other entity ***or non-United States entity***, respectively, except that a certificate of merger or consolidation filed by a surviving or resulting other business entity shall be executed by any person authorized to execute such certificate on behalf of such other business entity. "

[164] Will need to add conforming provisions to fees (and filing?) section/s.

Each of the certificates required by this subsection (b) shall be filed simultaneously with the Department of State and, if such certificates are not to become effective upon their filing as permitted by section 205, then each such certificate shall provide for the same effective date or time [in accordance with section 205?].

(c) The certificate of limited liability company domestication shall state:

(1) The date on which and jurisdiction where the non-United States entity was first formed, incorporated, created or otherwise came into being;

(2) The name of the non-United States entity immediately prior to the filing of the certificate of limited liability company domestication;

(3) The name of the limited liability company as set forth in the certificate of organization filed in accordance with subsection (b) of this section;

(4) The future effective date or time (which shall be a date or time certain) of the domestication as a limited liability company if it is not to be effective upon the filing of the certificate of limited liability company domestication and the certificate of organization;

(5) The jurisdiction that constituted the seat, siege social, or principal place of business or central administration of the non-United States entity, or any other equivalent thereto under applicable law, immediately prior to the filing of the certificate of limited liability company domestication; and

(6) That the domestication has been approved in the manner provided for by the document, instrument, agreement or other writing, as the case may be, governing the internal affairs of the non-United States entity and the conduct of its business or by applicable non-Florida law, as appropriate.

(d) Upon the filing with the Department of State the certificate of limited liability company domestication and the certificate of organization or upon the future effective date or time of the certificate of limited liability company domestication and the certificate of organization, the non-United States entity shall be domesticated as a limited liability company in the State of Florida

and the limited liability company shall thereafter be subject to all of the provisions of this [chapter], except that notwithstanding Section 201, the existence of the limited liability company shall be deemed to have commenced on the date the non-United States entity commenced its existence in the jurisdiction in which the non-United States entity was first formed, incorporated, created or otherwise came into being.

(e) The domestication of any non-United States entity as a limited liability company in the State of Florida shall not be deemed to affect any obligations or liabilities of the non-United States entity incurred prior to its domestication as a limited liability company in the State of Florida, or the personal liability of any person for those obligations or liabilities.

(f) The filing of a certificate of limited liability company domestication shall not affect the choice of law applicable to the non-United States entity, except that from the effective date or time of the domestication, the law of the State of Florida, including the provisions of this [chapter], shall apply to the non-United States entity to the same extent as if the non-United States entity had been formed as a limited liability company on that date.

(g) Prior to the filing of a certificate of limited liability company domestication with the Department of State, the domestication shall be approved in the manner provided for by the document, instrument, agreement or other writing, as the case may be, governing the internal affairs of the non-United States entity and the conduct of its business or by applicable non-Florida law, as appropriate, and a operating agreement shall be approved by the same authorization required to approve the domestication.

(h) When any domestication shall have become effective under this section, for all purposes of the laws of the State of Florida, all of the rights, privileges and powers of the non-United States entity that has been domesticated, and all property, real, personal and mixed, and all debts due to such non-United States entity, as well as all other things and causes of action belonging to such non-United States entity, shall remain vested in the limited liability company to which such non-United States entity has been domesticated (and also in the non-United States entity, if and for so long as the non-United States entity continues its existence in the foreign jurisdiction in which it was existing immediately prior to the domestication) and shall be the property of such

limited liability company (and also of the non-United States entity, if and for so long as the non-United States entity continues its existence in the foreign jurisdiction in which it was existing immediately prior to the domestication), and the title to any real property vested by deed or otherwise in such non-United States entity shall not revert or be in any way impaired by reason of this [chapter]; but all rights of creditors and all liens upon any property of such non-United States entity shall be preserved unimpaired, and all debts, liabilities and duties of the non-United States entity that has been domesticated shall remain attached to the limited liability company to which such non-United States entity has been domesticated (and also to the non-United States entity, if and for so long as the non-United States entity continues its existence in the foreign jurisdiction in which it was existing immediately prior to the domestication), and may be enforced against it to the same extent as if said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as a limited liability company. The rights, privileges, powers and interests in property of the non-United States entity, as well as the debts, liabilities and duties of the non-United States entity, shall not be deemed, as a consequence of the domestication, to have been transferred to the limited liability company to which such non-United States entity has domesticated for any purpose of the laws of the State of Florida.

(i) When a non-United States entity has become domesticated as a limited liability company pursuant to this section, for all purposes of the laws of the State of Florida, the limited liability company shall be deemed to be the same entity as the domesticating non-United States entity and the domestication shall constitute a continuation of the existence of the domesticating non-United States entity in the form of a limited liability company. Unless otherwise agreed, for all purposes of the laws of the State of Florida, the domesticating non-United States entity shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and the domestication shall not be deemed to constitute a dissolution of such non-United States entity. If, following domestication, a non-United States entity that has become domesticated as a limited liability company continues its existence in the foreign country or other foreign jurisdiction in which it was existing immediately prior to domestication, the limited liability company and such non-United States entity shall, for all purposes of the laws of the State of Florida, constitute a single entity formed, incorporated, created or otherwise having come into being, as applicable,

and existing under the laws of the State of Florida and the laws of such foreign country or other foreign jurisdiction.

(j) In connection with a domestication hereunder, rights or securities of, or interests in, the non-United States entity that is to be domesticated as a limited liability company may be exchanged for or converted into cash, property, rights or securities of, or interests in, such limited liability company or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, another limited liability company or other entity or may be cancelled.

SECTION 1025. TRANSFER OR CONTINUANCE OF LIMITED LIABILITY COMPANIES.

(a) Upon compliance with this section, any limited liability company may transfer to or domesticate or continue in any jurisdiction, other than any state, and, in connection therewith, may elect to continue its existence as a limited liability company in the State of Florida.

(b) If the operating agreement specifies the manner of authorizing a transfer or domestication or continuance described in subsection (a) of this section, the transfer or domestication or continuance shall be authorized as specified in the operating agreement. If the operating agreement does not specify the manner of authorizing a transfer or domestication or continuance described in subsection (a) of this section and does not prohibit such a transfer or domestication or continuance, the transfer or domestication or continuance shall be authorized in the same manner as is specified in the operating agreement for authorizing a merger or consolidation that involves the limited liability company as a constituent party to the merger or consolidation. If the operating agreement does not specify the manner of authorizing a transfer or domestication or continuance described in subsection (a) of this section or a merger or consolidation that involves the limited liability company as a constituent party and does not prohibit such a transfer or domestication or continuance, the transfer or domestication or continuance shall be authorized by the approval by the members or, if there is more than one class or group of members, then by each class or group of members, in either case, [by the members who own more than 50% of the then current percentage or other interest in the profits of the limited liability company owned by

all of the members or by the members in each class or group, as appropriate.][165] If a transfer or domestication or continuance described in subsection (a) of this section shall be authorized as provided in this subsection (b), a [certificate of transfer][166] if the limited liability company's existence as a limited liability company of the State of Florida is to cease, or a [certificate of transfer and domestic continuance][167] if the limited liability company's existence as a limited liability company in the State of Florida is to continue, executed in accordance with Section 203, shall be filed with the Department of State in accordance with Section 205. The certificate of transfer or the certificate of transfer and domestic continuance shall state:

(1) The name of the limited liability company and, if it has been changed, the name under which its certificate of organization was originally filed;

(2) The date of the filing of its original certificate of organization with the Department of State;

(3) The jurisdiction to which the limited liability company shall be transferred or in which it shall be domesticated or continued and the name of the entity or business form formed, incorporated, created or that otherwise comes into being as a consequence of the transfer of the limited liability company to, or its domestication or continuance in, such foreign jurisdiction;

(4) The future effective date or time (which shall be a date or time certain) of the transfer to or domestication or continuance in the jurisdiction specified in paragraph (b)(3) of this section if it is not to be effective upon the filing of the certificate of transfer or the certificate of transfer and domestic continuance;

(5) That the transfer or domestication or continuance of the limited liability company has been approved in accordance with this section;

(6) In the case of a certificate of transfer, (i) that the existence of the limited liability company as a limited liability company of the State of Florida shall cease when the certificate of

[165] Discuss conforming to approval construct used for mergers and conversions.
[166] Conform fee (and filing?) section/s.
[167] Conform fee (and filing?) section/s.

transfer becomes effective, and (ii) the agreement of the limited liability company that it may be served with process in the State of Florida in any action, suit or proceeding for enforcement of any obligation of the limited liability company arising while it was a limited liability company of the State of Florida, and that it irrevocably appoints the Department of State as its agent to accept service of process in any such action, suit or proceeding;

(7) The address to which a copy of the process referred to in paragraph (b)(6) of this section shall be mailed to it by the Department of State. Process may be served upon the Department of State under paragraph (b)(6) of this section by means of electronic transmission but only as prescribed by the Department of State. [The Department of State is authorized to issue such rules and regulations with respect to such service as the Department of State deems necessary or appropriate.] In the event of service hereunder upon the Department of State, the procedures set forth in [§ 18-911(c) of this title][168] shall be applicable, except that the plaintiff in any such action, suit or proceeding shall furnish the Department of State with the address specified in this subsection and any other address that the plaintiff may elect to furnish, together with copies of such process as required by the Department of State, and the Department of State shall notify the limited liability company that has transferred or domesticated or continued out of the State of Florida at all such addresses furnished by the plaintiff in accordance with the procedures set forth in [§ 18-911(c) of this title][169]; and

(8) In the case of a certificate of transfer and domestic continuance, that the limited liability company will continue to exist as a limited liability company of the State of Florida after the certificate of transfer and domestic continuance becomes effective.

(c) Upon the filing with the Department of State the certificate of transfer or upon the future effective date or time of the certificate of transfer and payment to the Department of State of all fees prescribed in this [chapter], the Department of State shall certify that the limited liability company has filed all documents and paid all fees required by this [chapter], and thereupon the limited liability company shall cease to exist as a limited liability company of the State of

[168] Conform; see Sections 116 and 809(f)
[169] Conform; see Sections 116 and 809(f)

Florida. Such certificate of the Department of State shall be prima facie evidence of the transfer or domestication or continuance by such limited liability company out of the State of Florida.

(d) The transfer or domestication or continuance of a limited liability company out of the State of Florida in accordance with this section and the resulting cessation of its existence as a limited liability company of the State of Florida pursuant to a certificate of transfer shall not be deemed to affect any obligations or liabilities of the limited liability company incurred prior to such transfer or domestication or continuance or the personal liability of any person incurred prior to such transfer or domestication or continuance, nor shall it be deemed to affect the choice of law applicable to the limited liability company with respect to matters arising prior to such transfer or domestication or continuance. Unless otherwise agreed, the transfer or domestication or continuance of a limited liability company out of the State of Florida in accordance with this section shall not be deemed to constitute a dissolution of that limited liability company and shall not require it to wind up its affairs or pay its liabilities and distribute its assets under [Sections 708, 709 or 710].

(e) If a limited liability company files a certificate of transfer and domestic continuance, after the time the certificate of transfer and domestic continuance becomes effective, the limited liability company shall continue to exist as a limited liability company of the State of Florida, and the laws of the State of Florida, including this [chapter], shall apply to the limited liability company to the same extent as prior to such time. So long as a limited liability company continues to exist as a limited liability company of the State of Florida following the filing of a certificate of transfer and domestic continuance, the continuing limited liability company and the entity or business form formed, incorporated, created or that otherwise came into being as a consequence of the transfer of the limited liability company to, or its domestication or continuance in, a foreign country or other foreign jurisdiction shall, for all purposes of the laws of the State of Florida, constitute a single entity formed, incorporated, created or otherwise having come into being, as applicable, and existing under the laws of the State and the laws of such foreign country or other foreign jurisdiction.

(f) In connection with a transfer or domestication or continuance of a limited liability company to or in another jurisdiction pursuant to subsection (a) of this section, rights or

securities of, or interests in, such limited liability company may be exchanged for or converted into cash, property, rights or securities of, or interests in, the entity or business form in which the limited liability company will exist in such other jurisdiction as a consequence of the transfer or domestication or continuance or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, another entity or business form or may be cancelled. [170]

(g) When a limited liability company has transferred or domesticated or continued out of the State of Florida pursuant to this section, the transferred or domesticated or continued entity or business form shall, for all purposes of the laws of the State of Florida, be deemed to be the same entity as the limited liability company and shall constitute a continuation of the existence of such limited liability company in the form of the transferred or domesticated or continued entity or business form. When any transfer or domestication or continuance of a limited liability company out of the State of Florida shall have become effective under this section, for all purposes of the laws of the State of Florida, all of the rights, privileges and powers of the limited liability company that has transferred or domesticated or continued, and all property, real, personal and mixed, and all debts due to such limited liability company, as well as all other things and causes of action belonging to such limited liability company, shall remain vested in the transferred or domesticated or continued entity or business form (and also in the limited liability company that has transferred, domesticated or continued, if and for so long as such limited liability company continues its existence as a limited liability company) and shall be the property of such transferred or domesticated or continued entity or business form (and also of the limited liability company that has transferred, domesticated or continued, if and for so long as such limited liability company continues its existence as a limited liability company), and the title to any real property vested by deed or otherwise in such limited liability company shall not revert or be in any way impaired by reason of this [chapter]; but all rights of creditors and all liens upon any property of such limited liability company shall be preserved unimpaired, and all debts, liabilities and duties of the limited liability company that has transferred or domesticated or continued shall remain attached to the transferred or domesticated or continued entity or business form (and also to the limited liability company that has transferred, domesticated or continued, if and for so long

[170] This section illustrates why some would claim that appraisal rights should apply to this kind of transaction.

as such limited liability company continues its existence as a limited liability company), and may be enforced against it to the same extent as if said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as the transferred or domesticated or continued entity or business form. The rights, privileges, powers and interests in property of the limited liability company that has transferred or domesticated or continued, as well as the debts, liabilities and duties of such limited liability company, shall not be deemed, as a consequence of the transfer or domestication or continuance out of the State of Florida, to have been transferred to the transferred or domesticated or continued entity or business form for any purpose of the laws of the State of Florida.

(h) A operating agreement may provide that a limited liability company shall not have the power to transfer, domesticate or continue as set forth in this section.

[ARTICLE] 11

MISCELLANEOUS PROVISIONS

SECTION 1101. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 1102. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This act modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce ~~Act~~act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b)~~.~~ [, except to the extent permitted pursuant to ss. 15.16, 116.34, and 668.50 of such act.][171]

[171] The Committee decided to defer action on this section. It was going to be analyzed by a former Committee member, but that didn't happen so somebody else needs to volunteer to do it. The bracketed "exception" is in the LP Act, which contains a glitch because of the reference "of such act" -- in the 608 bill, we may want to fix this

SECTION 1103. TAX EXEMPTION ON INCOME OF CERTAIN LIMITED LIABILITY COMPANIES.

(1) A limited liability company classified as a partnership for federal income tax purposes, or a single member limited liability company which is disregarded as an entity separate from its owner for federal income tax purposes, and organized pursuant to this chapter or qualified to do business in this state as a foreign limited liability company is not an "artificial entity" within the purview of s. 220.02 and is not subject to the tax imposed under chapter 220. If a single member limited liability company is disregarded as an entity separate from its owner for federal income tax purposes, its activities are, for purposes of taxation under chapter 220, treated in the same manner as a sole proprietorship, branch, or division of the owner.

(2) For purposes of taxation under chapter 220, a limited liability company formed in this state or authorized to transact business in this state as a foreign limited liability company shall be classified as a partnership, or a limited liability company which has only one member shall be disregarded as an entity separate from its owner for federal income tax purposes, unless classified otherwise for federal income tax purposes, in which case the limited liability company shall be classified identically to its classification for federal income tax purposes. For purposes of taxation under chapter 220, a member or an transferee of a member of a limited liability company formed in this state or qualified to do business in this state as a foreign limited liability company shall be treated as a resident or nonresident partner unless classified otherwise for federal income tax purposes, in which case the member or transferee of a member shall have the same status as such member or transferee of a member has for federal income tax purposes.

(3) Single-member limited liability companies and other entities that are disregarded for federal income tax purposes must be treated as separate legal entities for all non-income-tax purposes. The Department of Revenue shall adopt rules to take into account that single-member disregarded entities such as limited liability companies and qualified subchapter S corporations may be disregarded as separate entities for federal tax purposes and therefore may report and

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glitch to show that those are references to Florida statutes. Note that ABA prototype does not contain the exception. Also, the DOS inquired as to what effect this section would have on its current policy concerning electronic filings and notices, and note their requested additions in the language added at the end of Section 1106 of the the July 30, 2011.

account for income, employment, and other taxes under the taxpayer identification number of the owner of the single-member entity.

SECTION 1104. APPLICATION OF CORPORATION CASE LAW TO SET ASIDE LIMITED LIABILITY.

In any case in which a party seeks to hold the members of a limited liability company personally responsible for the liabilities or alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under the law of this state.

SECTION 1105. INTERROGATORIES BY DEPARTMENT OF STATE; OTHER POWERS OF DEPARTMENT OF STATE.

(1) The Department of State may direct to any limited liability company or foreign limited liability company subject to this chapter, and to any member or manager of any limited liability company or foreign limited liability company subject to this chapter, any interrogatories reasonably necessary and proper to enable the Department of State to ascertain whether the limited liability company or foreign limited liability company has complied with all of the provisions of this chapter applicable to the limited liability company or foreign limited liability company. The interrogatories shall be answered within 30 days after the date of mailing, or within such additional time as fixed by the Department of State. The answers to the interrogatories shall be full and complete and shall be made in writing and under oath. If the interrogatories are directed to an individual, they shall be answered by the individual, and if directed to a limited liability company or foreign limited liability company, they shall be answered by a manager of a manager-managed company, a member of a member-managed company, or a fiduciary if the company is in the hands of a receiver, trustee, or other court-appointed fiduciary.

(2) The Department of State need not file any record in a court of competent jurisdiction to which the interrogatories relate until the interrogatories are answered as provided in this chapter, and not then if the answers thereto disclose that the record is not in conformity with the requirements of this chapter or if the Department of State has determined that the parties

to such document have not paid all fees, taxes, and penalties due and owing this state. The Department of State shall certify to the Department of Legal Affairs, for such action as the Department of Legal Affairs may deem appropriate, all interrogatories and answers which disclose a violation of this chapter.

(3) The Department of State may, based upon its findings hereunder or as provided in s. 213.053(15), bring an action in circuit court to collect any penalties, fees, or taxes determined to be due and owing the state and to compel any filing, qualification, or registration required by law. In connection with such proceeding, the department may, without prior approval by the court, file a *lis pendens* against any property owned by the limited liability company and may further certify any findings to the Department of Legal Affairs for the initiation of any action permitted pursuant to this chapter which the Department of Legal Affairs may deem appropriate.

(4) The Department of State shall have the power and authority reasonably necessary to enable it to administer this chapter efficiently, to perform the duties herein imposed upon it, and to adopt reasonable rules necessary to carry out its duties and functions under this chapter.

SECTION 1106. [RESERVED] [reserved for DOS "loop hole" prevention provisions][172]

[**SECTION 1106. ELECTRONIC TRANSMISSION OF NOTICES AND RECORDS**.

(1) The Department of State may use electronic transmissions for the purposes of notice and communication in the performance of its duties and may require filers and registrants to furnish email addresses when presenting a document for filing.

(2) The department may prescribe the forms, which may be in an electronic format, on which to comply with the provisions of this act.

(3) The manner of execution of any document submitted in accordance with the provisions of this act may include any symbol, manual, facsimile, conformed, or electronic signature adopted by a person with the present intent to authenticate a document.][173]

[172] To prevent companies from avoiding late fee by merger or conversion. DOS indicated at 9/30/10 meeting it would provide language to the effect that late filing status (annual reports) of company must be corrected before undergoing merger or conversion. Discuss whether this should go under Article 10 instead.

SECTION 1107. RESERVATION OF POWER TO AMEND OR REPEAL.

The Legislature has the power to amend or repeal all or part of this chapter at any time, and all domestic and foreign limited liability companies subject to this chapter shall be governed by the amendment or repeal.

SECTION 1108. SAVINGS CLAUSE. ~~This act does not affect an action commenced, proceeding brought, or right accrued before this act takes effect.~~[174]

(1) Except as provided in subsection (2), the repeal of a statute by this chapter does not affect:

(a) The operation of the statute or any action taken under it before its repeal, including, without limiting the generality of the foregoing, the continuing validity of any provision of the articles of organization, regulations, or operating agreements of a limited liability company authorized by the statute at the time of its adoption;

(b) Any ratification, right, remedy, privilege, obligation, or liability acquired, accrued, or incurred under the statute before its repeal;

(c) Any violation of the statute, or any penalty, forfeiture, or punishment incurred because of the violation, before its repeal;

(d) Any proceeding, merger, sale of assets, reorganization, or dissolution commenced under the statute before its repeal, and the proceeding, merger, sale of assets, reorganization, or dissolution may be completed in accordance with the statute as if it had not been repealed.

(2) If a penalty or punishment imposed for violation of a statute is reduced by this chapter, the penalty or punishment if not already imposed shall be imposed in accordance with this chapter.

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[173] This new section proposed by DOS. Consider whether some of this should instead be covered in section 205 (note also the supplemental 205 language following that section). Should we also incorporate section 1102 by cross-reference (seems redundant in part).

[174] The language below has been taken from existing chapter 608 and is the same as the ABA prototype act (but for the clause starting with "including" in subsection (a)). The uniform act and the LP act provide "This act does not affect an action commenced, proceeding brought, or right accrued before this act takes effect." To determine whether this language should be added to this section as well to avoid construction inconsistencies.

SECTION ~~1104.~~1109. APPLICATION TO EXISTING RELATIONSHIPS.

(a) Before [~~all-inclusive date~~January 1, 2014], this act governs only:

(1) a limited liability company formed on or after [~~the effective date of this act~~January 1, 2013]; and

(2) except as otherwise provided in subsection (c), a limited liability company formed before [~~the effective date of this act~~January 1, 2013] which elects, in the manner provided in its operating agreement or by law for amending the operating agreement, to be subject to this act.

(b) Except as otherwise provided in subsection (c), on and after [all-inclusive date] this act governs all limited liability companies.

(c) For the purposes applying this act to a limited liability company formed before [~~the effective date of this act~~January 1, 2013]:

(1) the company's articles of organization are deemed to be the company's certificate of organization; and

(2) for the purposes of applying Section 102(10) and subject to Section 112(d), language in the company's articles of organization designating the company's management structure operates as if that language were in the operating agreement.

(d) [All documents submitted to the Department of State on or after [January 1, 2013] must comply with the filing requirements stipulated by this act.][175]

Legislative Note: *It is recommended that the "all-inclusive" date should be at least one year after the date of enactment but no longer than two years.*

Each enacting jurisdiction should consider whether: (i) this ~~Act~~act makes material changes to the "default" (or "gap filler") rules of jurisdiction's predecessor statute; and (ii) if so, whether subsection (c) should carry forward any of those rules for pre-existing limited liability companies. In this assessment, the focus is on pre-existing limited liability companies that have left default rules in place, whether advisedly or not. The central question is whether, for such limited liability companies, expanding subsection (c) is necessary to prevent material changes to the members' "deal."

For an example of this type of analysis in the context of another business entity act, see the Uniform Limited Partnership ~~Act~~act (2001), § 1206(c).

[175] Instead of using this general reference, the DOS said at the 9/30/10 meeting it would provide a specific list of filings that must comply with this requirement.

Section 301 (de-codifying statutory apparent authority) does not require any special transition provisions, because: (i) applying the law of agency, as explained in the Comments to Sections 301 and 407, will produce appropriate results; and (ii) the notion of "lingering apparent authority" will protect any third party that has previously relied on the statutory apparent authority of a member of a particular member-managed LLC or a manager of a particular manager-managed LLC. RESTATEMENT (THIRD) OF AGENCY § 3.11, cmt. c (2006).

It is unnecessary to expand subsection (c) of this ~~Act~~act if the state's predecessor act is the original Uniform Limited Liability Company ~~Act~~act, revised to provide for perpetual duration.

Uniform Comment

Subsection (c) – When a pre-existing limited liability company becomes subject to this ~~Act~~act, the company ceases to be governed by the predecessor act, including whatever requirements that act might have imposed for the contents of the articles of organization.

SECTION ~~1105.~~1110. REPEALS. Effective [~~all-inclusive date~~January 1, 2014], the following acts and parts of acts are repealed: [the ~~state limited liability company act,~~Florida Limited Liability Company Act, ss. 608.401 - 608.705, as amended, and in effect immediately before the effective date of this act].

SECTION ~~1106.~~1111. EFFECTIVE DATE. This act takes effect on [January 1, 2013]. ~~. . .~~

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