

D R A F T

FOR APPROVAL

**REVISED UNIFORM LIMITED LIABILITY
COMPANY ACT**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-FIFTEENTH YEAR
HILTON HEAD, SOUTH CAROLINA
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**REVISED UNIFORM LIMITED LIABILITY
COMPANY ACT**

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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COMPANY ACT**

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REVISED UNIFORM LIMITED LIABILITY COMPANY ACT

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REVISED UNIFORM LIMITED LIABILITY COMPANY ACT

PREFATORY NOTE

*Background to this Act:
Developments Since the Conference Considered and Approved the Original
Uniform Limited Liability Company Act (ULLCA)*

The Uniform Limited Liability Company Act (“ULLCA”) was conceived in 1992 and first adopted by the Conference in 1994. By that time nearly every state had adopted an LLC statute, and those statutes varied considerably in both form and substance. Many of those early statutes were based on the first version of the ABA Model Prototype LLC Act.

ULLCA’s drafting relied substantially on the then recently adopted Revised Uniform Partnership Act (“RUPA”), and this reliance was especially heavy with regard to member-managed LLCs. ULLCA’s provisions for manager-managed LLCs comprised an amalgam fashioned from the 1985 Revised Uniform Limited Partnership Act (“RULPA”) and the Model Business Corporation Act (“MBCA”). ULLCA’s provisions were also significantly influenced by the then-applicable federal tax classification regulations, which classified an unincorporated organization as a corporation if the organization more nearly resembled a corporation than a partnership. Those same regulations also made the tax classification of single-member LLCs problematic.

Much has changed. All states and the District of Columbia have adopted LLC statutes, and many LLC statutes have been substantially amended several times. LLC filings are significant in every U.S. jurisdiction, and in many states new LLC filings approach or even outnumber new corporate filings on an annual basis. Manager-managed LLCs have become a significant factor in non-publicly-traded capital markets, and increasing numbers of states provide for mergers and conversions involving LLCs and other unincorporated entities.

In 1997, the tax classification context changed radically, when the IRS’ “check-the-box” regulations became effective. Under these regulations, an “unincorporated” business entity is taxed either as a partnership or disregarded entity (depending upon the number of owners) unless it elects to be taxed as a corporation. Exceptions exist (e.g., entities whose interests are publicly-traded), but, in general, tax classification concerns no longer constrain the structure of LLCs and the content of LLC statutes. Single-member LLCs, once suspect because novel and of uncertain tax status, are now popular both for sole proprietorships and as corporate subsidiaries.

In 1995, the Conference amended RUPA to add “full-shield” LLP provisions, and today every state has some form of LLP legislation (either through a RUPA adoption or similar revisions to a UPA-based statute). While some states still provide only a “partial shield” for LLPs, many states have adopted “full shield” LLP provisions. In full-shield jurisdictions, LLPs and member-managed LLCs offer entrepreneurs very similar attributes and, in the case of professional service organizations, LLPs may dominate the field.

ULLCA was revised in 1996 in anticipation of the “check the box” regulations and has been adopted in a number of states. In many non-ULLCA states, the LLC statute includes RUPA-like provisions. However, state LLC laws are far from uniform.

Eighteen years have passed since the IRS issued its gate-opening Revenue Ruling 88-76, declaring that a Wyoming LLC would be taxed as a partnership despite the entity’s corporate-like liability shield. More than eight years have passed since the IRS opened the gate still further with the “check the box” regulations. It is an opportune moment to identify the best elements of the myriad “first generation” LLC statutes and to infuse those elements into a new, “second generation” uniform act.

The Revised Uniform Limited Company Act is drafted to replace a state’s current LLC statute, whether or not that statute is based on ULLCA. The new Act’s noteworthy provisions include

[[[insert description of major points]]]

The new Act also has a very noteworthy omission; it does not authorize “series LLCs.” A a “Progress Report on the Revised Uniform Limited Liability Company Act,” published in the March 2006 issue of the newsletter of the ABA Committee on Partnerships and Unincorporated Business Organizations, contained the following explanation for this decision:

A series LLC “authorizes an extraordinary type of membership interest -- one that neither pertains to nor partakes of an entire LLC but rather is associated with and segregated to a compartmentalized set of assets, profits, losses, and liabilities.” An LLC statute that authorizes series LLCs permits “an LLC to compartmentalize its operations and create ‘internal’ shields to protect assets associated with one aspect of the business from claims pertaining to others. Under [a series provision], an LLC may associate specified assets and operations with a particular series of membership interests and limit claims and obligations pertaining to those interests and operations to the specified assets.”

Originally devised by sophisticated Delaware lawyers for their “funds” clients, series are now being (mis)used to subdivide assets of operating businesses and to provide unwarranted hopes of low cost “asset protection.” No one quite knows what will happen under bankruptcy law when a series becomes insolvent. Nor does anyone know whether the courts of a non-series state will respect the “internal shields” of a series LLC. Most LLC statutes provide that “foreign law governs” the liability of members of a foreign LLC. However, those provisions are irrelevant [to a foreign series LLC] because they pertain to the liability of a member for the obligations of the LLC. For a series LLC, the pivotal question is

entirely different – namely, whether some assets of an LLC should be immune from some of the creditors of the LLC.

What’s good for Delaware and highly sophisticated deals is not necessarily good for the LLC law of other states. A philosophy that works wonders for “high end” transactions may be bad medicine for the thousands of more prosaic but nonetheless important closely held businesses that choose to house themselves within LLCs.

PUBOGRAM, Vol. XXIII, no. 2 at 7, 8-9 (citations omitted).

1 **REVISED UNIFORM LIMITED LIABILITY COMPANY ACT**
2

3 **[ARTICLE] 1**

4 **GENERAL PROVISIONS**

5
6 **SECTION 101. SHORT TITLE.** This [act] may be cited as the Revised Uniform
7 Limited Liability Company Act.

8 **Comment**
9

10 This Act is drafted to replace a state’s current LLC statute, whether or not that statute is
11 based on the original Uniform Limited Liability Company Act. Section 1104 contains transition
12 provisions.
13

14 **SECTION 102. DEFINITIONS.** In this [act]:

15 (1) “Certificate of organization” means the certificate required by Section 201. The term
16 includes the certificate as amended or restated.

17 (2) “Contribution” means any benefit provided by a person to a limited liability company:

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

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

23 (C) in the person’s capacity as a member and in accordance with the operating
24 agreement or an agreement between the member and the company.

25 (3) “Debtor in bankruptcy” means a person that is the subject of:

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

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

4 (4) “Designated office” means:

5 (A) with respect to a limited liability company, the office that it is required to
6 designate and maintain under Section 113; or

7 (B) with respect to a foreign limited liability company, its principal office.

8 (5) “Distribution” means, except as otherwise provided in Section 405(g), a transfer of
9 money or other property from a limited liability company to another person on account of a
10 transferable interest.

11 (6) “Effective”, with regard to a record required or permitted to be delivered to the
12 [Secretary of State] for filing under this [act], means effective under Section 205(c).

13 (7) “Foreign limited liability company” means an unincorporated entity formed under the
14 law of a jurisdiction other than this state and denominated by that law as a limited liability
15 company.

16 (8) “Limited liability company”, except in the phrase “foreign limited liability company”,
17 means an entity formed under this [act].

18 (9) “Manager” means a person who under the operating agreement of a manager-
19 managed limited liability company is responsible, alone or in concert with others, for performing
20 the management functions stated in Section 407(b).

21 (10) “Manager-managed limited liability company” means a limited liability company
22 whose operating agreement expressly provides that:

1 (A) the limited liability company is “manager-managed”;

2 (B) the limited liability company is or will be “managed by managers”; or

3 (C) management of the limited liability company is or will be vested in managers.

4 (11) “Member” means a person that has become a member of a limited liability company
5 under Section 401 and has not been dissociated under Section 602.

6 (12) “Member-managed limited liability company” means a limited liability company
7 that is not a manager-managed limited liability company.

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

12 (14) “Organizer” means a person that acts under Section 201 to form a limited liability
13 company.

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

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

19 (17) “Record” means information that is inscribed on a tangible medium or that is stored
20 in an electronic or other medium and is retrievable in perceivable form.

21 (18) “Sign” means, with the present intent to authenticate or adopt a record:

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

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

3 (19) “State” means a state of the United States, the District of Columbia, Puerto Rico, the
4 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
5 the United States.

6 (20) “Transfer” includes an assignment, conveyance, deed, bill of sale, lease, mortgage,
7 security interest, encumbrance, gift, and transfer by operation of law.

8 (21) “Transferable interest” means the right, as originally associated with a person’s
9 capacity as a member, to receive distributions from a limited liability company in accordance
10 with the operating agreement. The term applies whether or not the person remains a member or
11 continues to own any part of the right.

12 (22) “Transferee” means a person to which all or part of a transferable interest has been
13 transferred, whether or not the transferor is a member.

14 **Comment**

15 This Section article contains definitions for terms used throughout the Act, while Section
16 1001 contains definitions specific to Article 10’s provisions on mergers, conversions and
17 domestications.

18
19 **Paragraph (1) [Certificate of organization]** – The original ULLCA and most other
20 LLC statutes use “articles of organization” rather than “certificate of organization.” This Act
21 purposely uses the latter term to signal that: (i) the certificate merely reflects the existence of an
22 LLC (rather than being the locus for important governance rules); and (ii) this document is
23 significantly different from articles of *incorporation*, which have a substantially greater power to
24 affect *inter se* rules for the corporate entity and its owners. For the relationship between the
25 certificate of organization and the operating agreement, see Section 112(d).

26
27 **Paragraph (2) [Contribution]** – This definition serves to distinguish capital
28 contributions from other circumstances under which a member or would-be member might
29 provide benefits to a limited liability company (e.g., providing services to the LLC as an
30 employee or independent contractor, leasing property to the LLC). The definition contemplates

1 three typical situations in which contributions are made, and for each situation establishes two
 2 “markers” to identify capital contributions – the purpose for which the contributor makes the
 3 contribution and the agreement that contemplates the contribution:
 4
 5

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

6
 7
 8 **Paragraph (7) [Foreign limited liability company]** – Some statutes have elaborate
 9 definitions addressing the question of whether a non-U.S. entity is a “foreign limited liability
 10 company.” The NY statute, for example, defines a “foreign limited liability company” as:

11
 12 an unincorporated organization formed under the laws of any jurisdiction,
 13 including any foreign country, other than the laws of this state (i) that is not
 14 authorized to do business in this state under any other law of this state and (ii) of
 15 which some or all of the persons who are entitled (A) to receive a distribution of
 16 the assets thereof upon the dissolution of the organization or otherwise or (B) to
 17 exercise voting rights with respect to an interest in the organization have, or are
 18 entitled or authorized to have, under the laws of such other jurisdiction, limited
 19 liability for the contractual obligations or other liabilities of the organization.
 20

21 NY CLS LLC § 102. ULLCA § 101(8) takes a similar but less complex approach (“an
 22 unincorporated entity organized under laws other than the laws of this State which afford limited
 23 liability to its owners comparable to the liability under Section 303 and is not required to obtain a
 24 certificate of authority to transact business under any law of this State other than this [Act]”).
 25 This Act follows Delaware’s still simpler approach. Del. Code Ann. tit. 6, § 18-101(4)
 26 (“denominated as such”).
 27

28 **Paragraph (8) [Limited liability company]** – This definition makes no reference to a
 29 limited liability company having members upon formation. Other provisions of the Act
 30 expressly provide for “shelf LLCs,” although severely restricting their powers and longevity.
 31 See Sections 105(b), 401(c), and 701(a)(3). For a detailed discussion of the “shelf” issue, see the

1 Comment to Section 401.
2

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

11 This approach does have the potential for confusion, but confusion around the term
12 “manager” is common to almost all LLC statutes. The confusion stems from the choice to define
13 “manager” as a term of art in a way that can be at odds with other, common usages of the word.
14 For example, a member-managed LLC might well have an “office manager” or a “property
15 manager.” Moreover, in a manager-managed LLC, the “property manager” is not likely to be a
16 manager as the term is used in many LLC statutes. *See, e.g., Brown v. MR Group, LLC*, 278
17 Wis.2d 760, 768-9, 693 N.W.2d 138, 143 (Wis.App. 2005) (rejected a party’s urging to use the
18 dictionary definition of “manager” in determining coverage of a policy applicable to a limited
19 liability company and its “managers” and relying instead on the mean of the term under the
20 Wisconsin LLC act).
21

22 After a person ceases to be a manager, the term “manager” continues to apply to the
23 person’s conduct while a manager. See Section 407(c)(7).
24

25 **Paragraph (10) [Manager-managed]** – This Act departs from most LLC statutes
26 (including the original ULLCA) by authorizing a private agreement (the operating agreement)
27 rather than a public document (certificate or articles of organization) to establish an LLC’s status
28 as a manager-managed limited liability company. Using the operating agreement makes sense,
29 because under this Act managerial structure creates no statutory power to bind the entity. See
30 Section 301 (eliminating statutory apparent authority). The only direct consequences of manager-
31 managed status are *inter se* – principally the triggering of a set of rules concerning management
32 structure, fiduciary duty, and information rights. Sections 407 – 410. The management structure
33 rules are entirely default provisions – subject to change in whole or in part by the operating
34 agreement. The operating agreement can also significantly affect the duty and rights provisions.
35 Section 110.
36

37 For pre-existing limited liability companies that eventually become subject to this Act,
38 Section 1104(c) provides that “language in the limited liability company’s articles of
39 organization designating the company’s management structure will operate as if that language
40 were in the operating agreement.” For limited liability companies formed under this Act, the
41 typical method to select manager-managed status will be an explicit provision of the operating
42 agreement. However, a reference in the certificate of organization to manager-management
43 might be evidence of the contents of the operating agreement. See Comment to Section 112(b).
44

1 **Paragraph 10(A)** – In this context, the phrase “manager-managed” comprises “magic
2 words” – i.e., for this provision to apply the operating agreement must include precisely this
3 phrase.
4

5 **Paragraph 10(A) and (B)** – In these paragraphs, the phrases “manager-managed” and
6 “managed by managers” are “magic words.”
7

8 **Paragraph 10(C)** – In contrast to Paragraphs 10(A) and (B), this provision does not
9 contain “magic words” and considers instead all terms of the operating agreement that expressly
10 refer to management by managers.
11

12 **Paragraph 11 [Member]** – After a person has been dissociated as a member, Section
13 602, the term “member” continues to apply to the person’s conduct while a member. See Section
14 603(b).
15

16 **Paragraph 12 [Member-managed limited liability company]** – A limited liability
17 company that does not effectively designate itself a manager-member limited liability company
18 will operate, subject to any contrary provisions in the operating agreement, under statutory rules
19 providing for management by the members. Section 407(a). For a discussion of potential
20 confusion relating to the term “manager”, see the Comment to Paragraph 9 (Manager).
21

22 **Paragraph (13) [Operating Agreement]** – This definition must be read in conjunction
23 with Sections 110 through 112, which further describe the operating agreement.
24

25 This definition is very broad. It recognizes a wide scope of authority for the operating
26 agreement: “the matters described in Section 110(a).” Those matters include not only all
27 relations *inter se* the members and the limited liability company but also all “activities of the
28 company and the conduct of those activities.” Section 110(a)(3). Moreover, the definition puts
29 no limits on the form of the operating agreement. To the contrary, the definition contains the
30 phrase “whether oral, in a record, implied, or in any combination thereof”.
31

32 Given this broad definition, it might be possible to argue that any activity involving
33 unanimous consent of the members becomes part of the operating agreement. For example, if
34 pursuant to an operating agreement all the members consent to the redemption of one-half of the
35 managing-member’s transferable interest, does that action constitute an addition to the
36 agreement?
37

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

1
2 Careful drafting of veto provisions can help avoid controversy – e.g., by defining with
3 specificity the type of decisions subject to the veto. On the question of how far a written (or “in
4 a record”) operating agreement can go to prevent oral or implied-in-fact terms, see Section
5 110(a)(4).
6

7 If is necessary to for a court to decide whether the contents of a matter approved by
8 unanimous consent have become part of the operating agreement, the court should look:
9

- 10 • first, at the manifestations of the members, including:
11 ○ the manifestations made to give the unanimous consent; and
12 ○ any terms of the operating agreement (e.g., terms specifying how matters become
13 part of the operating agreement); and
14 • second, at whether, viewed from the perspective of a reasonable person in the position of
15 the members giving consent, the consent was intended to incorporate the matter into the
16 ongoing “rules of the game” or merely take some particular action as already permitted
17 by those rules.
18

19 What certainly is true is that the “operating agreement” as defined and contemplated by
20 this Act may comprise a number of separate documents (or records), however denominated, and
21 that (absent a contrary provision in the operating agreement itself) a threshold qualification for
22 status as part of the “operating agreement” is the assent of all the persons then members. An
23 agreement among less than all of the members might well be enforceable among them, but would
24 not be part of the operating agreement.
25

26 An agreement to form an LLC is not itself an operating agreement. The term “operating
27 agreement” presupposes the existence of members, and a person cannot have “member” status
28 until the LLC exists. However, the Act’s very broad definition of “operating agreement” means
29 that, as soon as a limited liability company has any members, the limited liability company has
30 an operating agreement. For example, suppose: (i) two persons orally and informally agree to
31 join their activities in some way through the mechanism of an LLC, (ii) they form the LLC or
32 cause it to be formed, and (iii) without further ado or agreement, they become the LLC’s initial
33 members. The LLC has an operating agreement. “[A]ll the members” have agreed on who the
34 members are, and that agreement – no matter how informal or rudimentary – is an agreement
35 “concerning the matters described in Section 110(a).”
36

37 The same result follows when a person becomes the sole initial member of an LLC. It is
38 not plausible that the person would lack any understanding or intention with regard to the LLC.
39 That understanding or intention constitutes an “agreement of all the members of the limited
40 liability company, including a sole member.”
41

42 It may seem oxymoronic to refer an “agreement of . . . a sole member,” but this approach
43 is common in LLC statutes. By the time single-member LLCs became widely accepted, almost
44 LLC statutes were premised on the LLC’s key organic document being the operating agreement.

1 Because a key function of the operating agreement is to override statutory default rules, it was
2 necessary to make clear that a sole member could make an operating agreement. *See e.g.* [[[final
3 version of Comment will cite to several examples]]]
4

5 **Paragraph (14) [Organizer]** – Except in the case of an LLC being formed without any
6 members (a so-called “shelf LLC”), an organizer acts on behalf of the person or persons who
7 will become the LLC’s initial members, Section 401(a) and (b), and has no function other than to
8 compose, sign, and deliver to the [Secretary of State] for filing the certificate of organization.
9 Section 201(a). Even in a shelf LLC, the organizer has a very restricted role. Sections 105(b)
10 (limiting the capacity of a shelf LLC to merely ministerial acts) and 401(c) (organizer’s power
11 to admit initial member or members).
12

13 **Paragraph (20) [Transfer]** –The reference to “transfer by operation of law” is
14 significant in connection with Section 502 (Transfer of Transferable Interest). That section
15 severely restricts a transferee’s rights (absent the consent of the members), and this definition
16 makes those restrictions applicable, for example, to transfers ordered by a family court as part of
17 a divorce proceeding and transfers resulting from the death of a member. The restrictions also
18 apply to transfers in the context of a member’s bankruptcy, except to the extent that bankruptcy
19 law supersedes this Act.
20

21 **Paragraph (21) [Transferee]** – “Transferee” has displaced “assignee” as the
22 Conference’s term of art.
23

24 **SECTION 103. KNOWLEDGE; NOTICE.**

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

26 (1) has actual knowledge of it; or

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

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

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

31 (2) is deemed to have notice of the fact under subsection (d)(2);

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

1 (d) A person that is not a member is deemed:

2 (1) to know of a limitation on authority to transfer real property as provided in
3 Section 302(g); and

4 (2) to have notice of:

5 (A) a limited liability company's dissolution, 90 days after a statement of
6 dissolution under Section 702(b)(2)(A) becomes effective;

7 (B) a limited liability company's termination, 90 days after a statement of
8 termination Section 702(b)(2)(F) becomes effective; and

9 (C) a limited liability company's merger, conversion, or domestication, 90
10 days after a statement of merger, conversion, or domestication under [Article] 10 becomes
11 effective.

12 **Comment**

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

18
19 Several facets of this section warrant particular note. First, and most fundamentally,
20 because this Act does not provide for "statutory apparent authority," see Section 301, this section
21 contains no special rules for attributing to an LLC information possessed or communicated by a
22 member or manager.

23
24 Second, the section contains no generally applicable provisions determining when an
25 organization is charged with knowledge or notice, because those imputation rules: (i) comprise
26 core topics within the law of agency; (ii) are very complicated; (iii) should not have any different
27 content under this Act than in other circumstances; and (iv) are the subject of considerable
28 attention in the new Restatement (Third) of Agency.

29
30 Third, this Act does not define "notice" to include "knowledge." Although
31 conceptualizing the latter as giving the former makes logical sense and has a long pedigree, that
32 conceptualization is counter-intuitive for the non-*aficionado*. In ordinary usage, notice has a

1 meaning separate from knowledge. This Act follows ordinary usage and therefore contains some
2 references to “knowledge or notice.”

3
4 **Subsection (a)(2)** – In this context, the most important source of “law other than this
5 [act]” is the common law of agency.

6
7 **Subsection (b)(1)** – The “facts known to the person at the time in question” include facts
8 the person is deemed to know under subsection (a)(2).

9
10 **Subsection (d)(2)** – Under this Act, the power to bind a limited liability company to a
11 third party is primarily a matter of agency law. Section 301, Comment. The constructive notice
12 provided under this paragraph will be relevant if a third party makes a claim under agency law
13 that someone who purported to act on behalf of a limited liability company had the apparent
14 authority to do so.
15

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

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

19 (b) A limited liability company may have any lawful purpose, regardless of whether for
20 profit.

21 (c) A limited liability company has perpetual duration.

22 **Legislative Note:** *In light of the Comment to subsection (b), enacting jurisdictions should*
23 *consider whether to amend statutes protecting the public interest in organizations formed for*
24 *charitable or similar purposes.*

25
26 **Comment**

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

30
31 **Subsection (b)** – The phrase “any lawful purpose, regardless of whether for profit”
32 means that: (i) a limited liability company need not have any business purpose; and (ii) the issue
33 of profit *vel non* is irrelevant to the question of whether a limited liability company has been
34 validly formed. Although some LLC statutes continue to require a business purpose, this Act
35 follows the current trend and takes a more expansive approach.
36

1 The expansive approach comports both with the original ULLCA and with ULPA (2001).
2 See ULLCA §§ 112(a) (captioned with reference to “Nature of Business” and permitting “any
3 lawful purpose, subject to any law of this State governing or regulating business”) and 101(3)
4 (defining “Business” as including “every trade, occupation, profession, and other lawful purpose,
5 whether or not carried on for profit”); ULPA (2001) § 104(b) (permitting a limited partnership to
6 be organized for any “lawful” purpose). *Compare* UPA § 6 (defining a general partnership as
7 organized for profit), RUPA § 101(6) (same), and RULPA (1976/85) § 106 (delineating the
8 “Nature of [a limited partnership’s] Business” by linking back to “any business that a partnership
9 without limited partners may carry on”).

10
11 The subsection does not bar a limited liability company from being organized to carry on
12 charitable activities, and this act does not include any protective provisions pertaining to
13 charitable purposes. Those protections must be (and typically are) found in other law, although
14 sometimes that “other law” appears within a state’s non-profit corporation statute. *See, e.g.,*
15 Minn. Stat. § 317A.811 (providing restrictions on charitable organizations that seek to “dissolve,
16 merge, or consolidate, or to transfer all or substantially all of their assets” but imposing those
17 restrictions only on “corporations,” which are elsewhere defined as corporations incorporated
18 under the non-profit corporation act).

19
20 **Subsection (c)** – In this context, the word “perpetual” is a misnomer, albeit one
21 commonplace in LLC statutes. Like all current LLC statutes, this Act provides several consent-
22 based avenues to override perpetuity: a term specified in the operating agreement; an event
23 specified in the operating agreement; member consent. Section 701 (events causing dissolution).
24 In this context, “perpetuity” actually means that the Act does not require a definite term and
25 creates no nexus between the dissociation of a member and the dissolution of the entity.

26
27 An operating agreement is not a publicly-filed document, when means that the public
28 record pertaining to a limited liability company will not necessarily reveal whether a limited
29 liability company actually has a perpetual duration. *Accord* ULPA (2001) § 103, comment to
30 subsection (c) (“The partnership agreement has the power to vary this subsection [which
31 provides for perpetual duration], either by stating a definite term or by specifying an event or
32 events which cause dissolution. . . . [The limited partnership act] also recognizes several other
33 occurrences that cause dissolution. Thus, the public record pertaining to a limited partnership
34 will not necessarily reveal whether the limited partnership actually has a perpetual duration.”)
35

36 **SECTION 105. POWERS.**

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

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

3 (1) delivering to the [Secretary of State] for filing a statement of change under
4 Sections 114, an amendment to the certificate under Section 202, a statement of correction under
5 Section 206, an annual report under section 209, and a statement of termination under Section
6 702(b)(2)(F);

7 (2) admitting a member under section 401; and

8 (3) dissolving under Section 701.

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

11 **Comment**

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

14
15 **Subsection (a)** – The capacity to be sued is mentioned specifically so that Section
16 110(c)(1) can prohibit the operating agreement from varying that capacity. An LLC’s standing
17 to enforce the operating agreement is a separate matter, which is covered by Section 111(b)
18 (stating, as a default rule, that the limited liability company “may enforce the operating
19 agreement”).

20
21 **Subsection (b)** – This subsection pertains to the so-called “shelf LLC” (an LLC formed
22 without having any members upon formation) and is intended to keep such an entity “on the
23 shelf” until it has had at least one member. This subsection does not apply to an LLC that has
24 had one or more members and then, through member dissociation, becomes member-less. In that
25 situation, Sections 401(d)(4) (power of legal representative of last member to consent to a person
26 becoming a member) and 701(a)(3) (dissolution after 90 consecutive days with no members)
27 apply. The concept of a shelf LLC is discussed in detail in the Comment to Section 401.

28
29 **Subsection (c)** – This subsection follows the Restatement (Third) of Agency rather than
30 the Restatement (Second) and permits a limited liability company to ratify an act or other activity
31 even though when the act or activity occurred the company lacked the capacity to do the act or
32 engage in the activity. See Restatement (Third) of Agency, § 4.01, cmt. b (T.D. No. 3) (“Earlier
33 statements of ratification doctrine were more stringent on this score, requiring that the principal

1 have had capacity at the time of the original act as well as at the time of ratification.”) (citing
2 Restatement Second, Agency § 84(1)).
3

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

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

6 (2) the liability of a member as member and a manager as manager.

7 **Comment**

8 **Paragraph (1)** – Like any other legal concept, “internal affairs” may be indeterminate at
9 its edges. However, the concept certainly includes interpretation and enforcement of the
10 operating agreement, relations among the members as members; relations between the limited
11 liability company and a member as a member, relations between a manager-managed limited
12 liability company and a manager, and relations between a manager of a manager-managed
13 limited liability company and the members as members. *Compare* Restatement (Second) of
14 Conflict of Laws § 302, cmt. a (defining “internal affairs” (with reference to a corporation) as
15 “the relations inter se of the corporation, its shareholders, directors, officers or agents”).
16

17 The operating agreement cannot alter this provision. Section 110(c)(2). However, an
18 operating agreement may lawfully incorporate by reference the provisions of another state’s LLC
19 statute. If done correctly, this incorporation would make the foreign statutory language part of
20 the contract among the members, and those contract terms would govern the members (and those
21 claiming through the members) to the extent not prohibited by this Act. See Section 110.
22

23 **Paragraph (2)** – This paragraph certainly encompasses Section 304 (the liability shield)
24 but does not necessarily encompass a claim that a member or manager is liable to a third party
25 for (i) having purported to bind a limited liability company to the third party; or (ii) having
26 committed a tort against the third party while acting on the limited liability company’s behalf or
27 in the course of the company’s business. That liability is not by status (i.e., not “as member . . .
28 [or] as manager”) but rather results from function or conduct. Contrast Section 301(b) (stating
29 that, although this Act does not make a member as member the agent of a limited liability
30 company, other law may make an LLC liable for the conduct of a member).
31

32 This paragraph is stated separately from Paragraph (1), because, arguably at least, the
33 liability of members and managers to third parties is not an internal affair. *See, e.g.,* Restatement
34 (Second) of Conflict of Laws, § 307 (treating shareholders’ liability separately from the internal
35 affairs doctrine). A few cases subsume owner/manager liability into internal affairs, but many do
36 not. *See, e.g., Kalb, Voorhis & Co. v. American Financial Corp.*, 8 F.3d 130, 132 (2nd Cir.
37 1993). In any event, the rule stated in this paragraph is correct. All sensible authorities agree
38 that, except in extraordinary circumstances, “shield-related” issues should be determined
39 according to the law of the state of organization.

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SECTION 107. SUPPLEMENTAL PRINCIPLES OF LAW. Unless displaced by

particular provisions of this [act], the principles of law and equity supplement this [act].

SECTION 108. NAME.

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

(b) Unless authorized by subsection (c), the name of a limited liability company must be distinguishable in the records of the [Secretary of State] from:

(1) the name of each person, other than an individual, incorporated, organized, or authorized to transact business in this state; and

(2) each name reserved under Section 109 and [cite other state laws allowing the reservation or registration of business names, including fictitious or assumed name statutes].

(c) A limited liability company may apply to the [Secretary of State] for authorization to use a name that does not comply with subsection (b). The [Secretary of State] shall authorize use of the name applied for if, as to each conflicting name:

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

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

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

4 **Comment**

5 Subsection (a) is taken verbatim from ULLCA § 105(a). The rest of the section is taken
6 from ULPA (2001) § 108.
7

8 **SECTION 109. RESERVATION OF NAME.**

9 (a) A person may reserve the exclusive use of the name of a limited liability company,
10 including a fictitious or assumed name for a foreign company whose name is not available, by
11 delivering an application to the [Secretary of State] for filing. The application must set forth the
12 name and address of the applicant and the name proposed to be reserved. If the [Secretary of
13 State] finds that the name applied for is available, it must be reserved for the applicant's
14 exclusive use for a 120-day period.

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

18 **Comment**

19 **Source:** ULLCA, § 106.
20

21 **Subsection (a)** – Although 120-day reservation period is non-renewable, this subsection
22 permits a person to seek successive 120-day periods of reservation.
23

24

25

1 **SECTION 110. OPERATING AGREEMENT; SCOPE, FUNCTION AND**
2 **LIMITATIONS.**

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

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

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

8 (3) the activities of the company and the conduct of those activities; and

9 (4) the means and conditions for amending the operating agreement.

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

12 (c) An operating agreement may not:

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

15 (2) vary the law applicable under Section 106;

16 (3) vary the power of the court under Section 204;

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

19 (5) subject to subsection (d) through (g), eliminate the contractual obligation of
20 good faith and fair dealing under Section 409(d);

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

22 (7) vary the power of a court to decree dissolution in the circumstances specified

1 in Section 701(a)(4) and (5);

2 (8) vary the requirement to wind up a limited liability company's business as
3 specified in Section 702;

4 (9) unreasonably restrict the right of a member to maintain an action under
5 [Article] 9;

6 (10) restrict the right of a member under Section 1014 to approve a merger,
7 conversion, or domestication; or

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

10 (d) If not manifestly unreasonable, the operating agreement may:

11 (1) eliminate the duty:

12 (A) to account, as required in Section 409(b)(1) and (g), to the limited
13 liability company and to hold as trustee for it any property, profit, or benefit derived by the
14 member in the conduct or winding up of the company's business, from a use by the member of
15 the company's property, or from the appropriation of a limited liability company opportunity;

16 (B) to refrain, as required in Section 409(b)(2) and (g), from dealing with
17 the company in the conduct or winding up of the company's business as or on behalf of a party
18 having an interest adverse to the company; and

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

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

1 loyalty;

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

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

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

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

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

16 (g) The operating agreement may alter the indemnification for a member or manager
17 provided by Section 408(a) and may eliminate or limit a member or manager's liability to the
18 limited liability company and members for money damages, except for:

19 (1) breach of the duty of loyalty;

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

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

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

2 (5) an intentional violation of criminal law.

3 (h) The court shall decide any claim under subsection (d)(1) that a term of an operating
4 agreement is manifestly unreasonable. The court:

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

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

9 (A) the objective of the provision is unreasonable; or

10 (B) the provision is an unreasonable means to achieve the provision's
11 objective.

12 **Comment**

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

17
18 One of the most complex questions in the law of unincorporated business organizations is
19 the extent to which an agreement among the organization's owners can affect the law of
20 fiduciary duty. This section gives special attention to that question and is organized as follows:
21

Subsection (a)	grants broad, <i>general</i> authority to the operating agreement
Subsection (b)	establishes this 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 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)

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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 refers to “the operating agreement” rather than “an operating agreement.”

1 This phrasing should not, however, be read to require a limited liability company or its
2 members to take any formal action to adopt an operating agreement. *Compare* Cal. Corp. Code
3 § 17050(a) (“In order to form a limited liability company, one or more persons shall execute and
4 file articles of organization with, and on a form prescribed by, the Secretary of State and, either
5 before or after the filing of articles of organization, the members shall have entered into an
6 operating agreement.”)
7

8 The operating agreement is the exclusive consensual process for modifying this Act’s
9 various default rules pertaining to relationships *inter se* the members and between the members
10 and the limited liability company. Section 110(b). The operating agreement also has power over
11 “the rights and duties under this [act] of a person in the capacity of manager,” subsection (a)(2),
12 and “the obligations of a limited liability company and its members to a person in the person’s
13 capacity as a transferee or dissociated member.” Section 112(b).
14

15 **Subsection (a)** – This section describes the very broad scope of a limited liability
16 company’s operating agreement, which includes all matters constituting “internal affairs.”
17 *Compare* Section 106(1) (using the phrase “internal affairs” in stating a choice of law rule).
18

19 **Subsection (a)(1)** – It is not necessary to protect Section 105(b) from alteration by the
20 operating agreement, because a “shelf LLC” (i.e., an LLC that has and has had no members)
21 cannot have an operating agreement. See Comment to Section 401.
22

23 **Subsection (a)(2)** – Under this paragraph, the operating agreement has the power to
24 affect the rights and duties of managers (including non-member managers). Because the term
25 “[o]perating agreement . . . includes the agreement as amended or restated,” Section 102(13),
26 this paragraph gives the members the ongoing power to define the role of an LLC’s managers.
27 Power is not the same as right, however, and exercising the power provided by this paragraph
28 might constitute a breach of a separate contract between the LLC and the manager. A non-
29 member manager might also have rights under Section 112(a).
30

31 **Subsection (a)(4)** – If the operating agreement does not address this matter, under
32 subsection (b) this Act provides the rule. The rule appears in Section 407(b)(5) and 407(c)(4)(D)
33 (unanimous consent).
34

35 This Act does not specially authorize the operating agreement to limit the sources in
36 which terms of the operating agreement might be found or limit amendments to specified modes
37 (e.g., prohibiting modifications except when consented to in writing). *Compare* UCC § 2-209(2)
38 (authorizing such prohibitions in a “signed agreement” for the sale of goods). However, this
39 Paragraph (a)(4) could be read to encompass such authorization. Also, under Section 107 the
40 parol evidence rule will apply to a written operating agreement containing an appropriate merger
41 provision.
42

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

1
2 **Subsection (c)(4)** – This limitation is less powerful than might first appear, because
3 subsections (d) through (g) specifically authorize significant alterations to fiduciary duty. The
4 reference to “or any other fiduciary duty” is necessary because the Act has “un-cabined”
5 fiduciary duty. See Comment to Section 409.
6

7 **Subsection (d)** – Delaware recently amended its LLC statute to permit an operating
8 agreement to fully “eliminate” fiduciary duty within an LLC. This Act rejects the ultra-
9 contractarian notion that fiduciary duty within a business organization is merely a set of default
10 rule and seeks instead to balance the virtues of “freedom of contract” against the dangers that
11 inescapably exist when some have power over the interests of others. As one source has
12 explained:
13

14 The open-ended nature of fiduciary duty reflects the law's long-standing recognition that
15 devious people can smell a loophole a mile away. For centuries, the law has assumed that
16 (1) power creates opportunities for abuse and (2) the devious creativity of those in power
17 may outstrip the prescience of those trying, through ex ante contract drafting, to constrain
18 that combination of power and creativity. ¶ 14.05[4][a][ii]
19

20 Subsection (h) contains rules for applying the “not manifestly unreasonable” standard.
21

22 **Subsection (d)(1)** – Subject to the “not manifestly unreasonable” standard, this paragraph
23 empowers the operating agreement to eliminate all aspects of the duty of loyalty listed in Section
24 409. The contractual obligation of good faith would remain, see subsections(c)(5) and (d)(5), as
25 would any other, uncodified aspects of the duty of loyalty. See Comment to Section 409
26 (explaining the decision to “un-cabin” fiduciary duty). See also subsection (d)(4) (empowering
27 the operating agreement to “alter any other fiduciary duty, including eliminating particular
28 aspects of that duty”).
29

30 **Subsection (e)** – Section 409(f) states the Act’s default rule for authorization or
31 ratification – unanimous consent. This subsection specifically empowers the operating
32 agreement to provide alternate mechanisms but, in doing so, imposes significant restrictions –
33 namely, any alternate mechanism must involve full disclosure to, and the disinterestedness and
34 independence of, the decision makers. These restrictions are consonant with ordinary notions of
35 authorization and ratification.
36

37 This Act provides four separate channels through which those with management power in
38 a limited liability company can proceed with conduct that would otherwise violate the duty of
39 loyalty: (i) the operating agreement might permit the conduct, without need for further
40 authorization or ratification, under subsection (d)(1) and (2); (ii) the conduct might be sanctioned
41 by all the members after full disclosure, under Section 409(f); (iii) the conduct might be
42 sanctioned by a mechanism established under this subsection, involving other than the informed
43 consent of all the members; and (iv) in the case of self-dealing, the conduct might be
44 successfully defended as being or having been fair to the limited liability company. Section

1 409(e).

2
3 **Subsection (f)** – This subsection is intended to make clear that – regardless of the
4 strictures stated elsewhere in this section – in the specified circumstances the operating
5 agreement can entirely strip away the pertinent fiduciary duties.
6

7 **Subsection (g)** – This subsection specifically empowers the operating agreement to
8 address matters of indemnification and exculpation but subjects that power to stated limitations.
9 Those limitations are drawn from the raft of exculpatory provisions that sprung up in corporate
10 statutes in response to Smith v. Van Gorkum, 488 A.2d 858 (Del. 1985). Delaware led the
11 response with DEL. CODE ANN. tit. 8, § 102(b)(7), and a number of LLC statutes have similar
12 provisions. **[[[final version will cite examples from LLC statutes]]]**
13

14 **Subsection (g)(4)** – Due to this paragraph, an exculpatory provision cannot shield against
15 a member’s claim of oppression. See Section 701(a)(5)(B) and (b).
16

17 **Subsection (h)** – The “not manifestly unreasonable standard” became part of uniform
18 business entity statutes when RUPA imported the concept from the Uniform Commercial Code.
19 This subsection provides rules for applying that standard, which are necessary because:
20

- 21 • Determining unreasonableness *inter se* owners of an organization is a different task than
22 doing so in a commercial context, where concepts like “usages of trade” are available to
23 inform the analysis. Each business organization must be understood in its own terms and
24 context.
- 25 • If loosely applied, the standard would permit a court to rewrite the members’ agreement,
26 which would destroy the balance this Act seeks to establish between freedom of contract
27 and fiduciary duty.
- 28 • Case law research indicates that courts have tended to disregard the significance of the
29 word “manifestly.”
- 30 • Some decisions have considered reasonableness as of the time of the complaint, which
31 means that a prospectively reasonable allocation of risk could be overturned because it
32 functioned as agreed.
33

34 If a person claims that a term of the operating agreement is manifestly unreasonable
35 under subsections (d) and (h), as a matter of ordinary procedural law the burden is on the person
36 making the claim.
37

38 **Subsection (h)(1)** – The significance of the phrase “as of the time the term as challenged
39 became part of the operating agreement” is best shown by example.
40

41 EXAMPLE: An LLC’s operating agreement as initially adopted includes the term: “The
42 quick brown fox jumped over the lazy dog.” A year later, the agreement is amended to
43 delete the word “lazy.” Later, a member claims that without the word “lazy” the term is
44 manifestly unreasonable. The relevant time under subsection (h)(1) is when the

1 agreement was amended, not when the agreement was initially adopted.

2
3 **EXAMPLE:** When a particular manager-managed LLC comes into existence, its
4 business plan is quite unusual and its success depends on the willingness of a particular
5 individual to serve as the LLC's sole manager. This individual has a rare combination of
6 skills, experiences, and contacts, which are particularly appropriate for the LLC's start-
7 up. In order to induce the individual to accept the position of sole manager, the members
8 are willing to have the operating agreement significantly limit the manager's fiduciary
9 duties. Several years later, when the LLC's operations have turned prosaic and the
10 manager's talents and background are not nearly so crucial, a member challenges the
11 fiduciary duty limitations as manifestly unreasonable. The relevant time under
12 subsection (h)(1) is when the LLC began. Subsequent developments are not relevant,
13 except as they might inferentially bear on the circumstances in existence at the relevant
14 time.
15

16 **SECTION 111. OPERATING AGREEMENT; EFFECT ON LIMITED**

17 **LIABILITY COMPANY AND PERSONS BECOMING MEMBERS.**

18 (a) A person or persons intending to become the initial member or members of a limited
19 liability company may make an agreement providing that upon the formation of the company the
20 agreement will become the operating agreement.

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

23 (c) A person that becomes a member of a limited liability company is deemed to assent to
24 the operating agreement.

25 **Comment**

26
27 **Subsection (b)** – This subsection does not consider whether a limited liability company
28 is an indispensable party to a suit concerning the operating agreement. That is a question of
29 procedural law, which can determine whether federal diversity jurisdiction exists.
30

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

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

(a) The 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 liability of the limited liability company or its members to the person in the person’s capacity as a transferee or dissociated member.

(c) If a record that has been delivered by a limited liability company to the [Secretary of State] for filing and 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.

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

- 1 (1) the operating agreement prevails as to members, dissociated members,
2 transferees, and managers; and
- 3 (2) the record prevails as to other persons to the extent they reasonably rely on the
4 record.

5 **Comment**

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

10
11 **EXAMPLE:** A non-member manager enters into a management contract with the LLC,
12 and that agreement provides in part that the LLC may remove the manager without cause
13 only with the consent of members holding 2/3 of the profits interests. The operating
14 agreement contains a parallel provision, but the non-member manager is not a party to the
15 operating agreement. Later the LLC members amend the operating agreement to change
16 the quantum to a simple majority and thereafter purport to remove the manager without
17 cause. Although the LLC has undoubtedly breached its contract with the manager and
18 subjected itself to a damage claim, the LLC has the power under Section 110(a)(2) to
19 effect the removal – unless the operating agreement provided the non-member manager a
20 veto right over changes in the quantum provision.

21
22 The subsection does not refer to member veto rights because, unless otherwise provided
23 in the operating agreement, the consent of each member is necessary to effect an amendment.
24 Section 407(b)(5) and (c)(4)(D).

25
26 **Subsection (b)** – The law of unincorporated business organizations is only beginning to
27 grapple in a modern way with the tension between the rights of an organization’s owners to carry
28 on their activities as they see fit (or have agreed) and the rights of transferees of the
29 organization’s economic interests. (Such transferees can include the heirs of business founders
30 as well as former owners who are “locked in” as transferees of their own interests. See Section
31 603(a)(3).).

32
33 If the law categorically favors the owners, there is a serious risk of expropriation and
34 other abuse. On the other hand, if the law grants former owners and other transferees the right to
35 seek judicial protection, that specter can “freeze the deal” as of the moment an owner leaves the
36 enterprise or a third party obtains an economic interest.

37
38 *Bauer v. Blomfield Co./Holden Joint Venture*, 849 P2d 1365 (Alaska 1993) illustrates this
39 point nicely. The case arose after all the partners had approved a commission arrangement with

1 a third party and the arrangement dried up all the partnership profits. When an assignee of a
2 partnership interest objected, the court majority flatly rejected not only the claim but also the
3 assignee’s right to assert the claim. A mere assignee “was not entitled to complain about a
4 decision made with the consent of all the partners.” *Id.* at 1367. A footnote explained, “We are
5 unwilling to hold that partners owe a duty of good faith and fair dealing to assignees of a
6 partner’s interest.” *Id.* at 1367, n. 2.

7
8 The dissent, invoking the law of contracts, asserted that the majority had turned the
9 statutory protection of the partners’ management prerogatives into an instrument for abuse of
10 assignees:

11
12 It is a well-settled principle of contract law that an assignee steps into the shoes of
13 an assignor as to the rights assigned. Today, the court summarily dismisses this
14 principle in a footnote and leaves the assignee barefoot....

15 As interpreted by the court, the [partnership] statute now allows partners to
16 deprive an assignee of profits to which he is entitled by law for whatever
17 outrageous motive or reason. The court’s opinion essentially leaves the assignee
18 of a partnership interest without remedy to enforce his right.

19
20 *Id.* at 1367-8 (Matthews, J., dissenting).

21
22 The *Bauer* majority is consistent with the limited but long-standing case law in this area
23 (all of it pertaining to partnerships rather than LLCs). This Act does not address the question of
24 whether, in extreme circumstances, transferees might be able to claim some type of duty or
25 obligation to protect against expropriation. However, this subsection follows the *Bauer* majority
26 and other cases by expressly subjecting transferees and dissociated members to operating
27 agreement amendments made after the transfer or dissociation. *Compare* UPA § 32(2)
28 (permitting an assignee to seek judicial dissolution of an at-will general partnership at any time
29 and of a partnership for a term or undertaking if partnership continues in existence after the
30 completion of the term or undertaking); RUPA § 801(6) (same except adding the requirement
31 that the court determine that dissolution is equitable); ULLCA, § 801(5) (same as RUPA);
32 ULLCA, § 801(4) (permitting a dissociated member to seek dissolution on the grounds *inter alia*
33 of oppressive conduct). See also UCC §§ 9-405(a) and (b) and Restatement (Second) of
34 Contracts; § 338 (recognizing a duty of good faith applicable to the modification of a contract
35 when an assignment of contract is in effect).

36
37 **Subsection (d)** – A limited liability company is a creature of contract as well as a
38 creature of statute. It will be possible, albeit improvident, for the operating agreement to be
39 inconsistent with the certificate of organization or other public filings pertaining to the limited
40 liability company. For those circumstances, this subsection provides rules for determining which
41 source of information prevails.

42
43 For members, managers and transferees, the operating agreement is paramount. For third
44 parties seeking to invoke the public record, actual knowledge of that record is necessary and

1 notice, deemed notice, and deemed knowledge under Section 103 are irrelevant. A third party
2 wishing to enforce the public record over the operating agreement must show reasonable reliance
3 on the public record, and reliance presupposes knowledge.
4

5 The mere fact that a term is present in a publicly-filed record and not in the operating
6 agreement, or *vice versa*, does not automatically establish a conflict. This subsection does not
7 expressly cover a situation in which (i) one of the specified filed records contains information in
8 addition to, but not inconsistent with, the operating agreement, and (ii) a person, other than a
9 member or transferee, reasonably relies on the additional information. However, the policy
10 reflected in this subsection seems equally applicable to that situation.
11

12 Section 110(a)(4) might also be relevant to the subject matter of this subsection. Absent
13 a contrary provision in the operating agreement, language in an LLC's certificate of organization
14 might be evidence of the members' agreement and might thereby constitute or at least imply a
15 term of the operating agreement.
16

17 This subsection does not apply to records delivered to the [Secretary of State] for filing
18 on behalf of persons other than a limited liability company.
19

20 **SECTION 113. OFFICE AND AGENT FOR SERVICE OF PROCESS.**

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

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

23 (2) an agent for service of process.

24 (b) A foreign limited liability company that has a certificate of authority under Section
25 802 shall designate and continuously maintain in this state an agent for service of process.

26 (c) An agent for service of process of a limited liability company or foreign limited
27 liability company must be an individual who is a resident of this state or other person authorized
28 to do business in this state.

29 **Comment**

30 Source: ULPA (2001), § 114.
31
32

1 agent of the company upon whom process, notice, or demand may be served.

2 (c) Service of any process, notice, or demand on the [Secretary of State] may be made by
3 delivering to and leaving with the [Secretary of State] duplicate copies of the process, notice, or
4 demand. If a process, notice, or demand is served on the [Secretary of State], the [Secretary of
5 State] shall forward one of the copies by registered or certified mail, return receipt requested, to
6 the limited liability company or foreign limited liability company at its designated office.

7 (d) Service is effected under subsection (c) at the earliest of:

8 (1) the date the limited liability company or foreign limited liability company
9 receives the process, notice, or demand;

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

11 (3) five days after the process, notice, or demand is deposited with the United
12 States Postal Service, if correctly addressed and with sufficient postage.

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

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

17 **Comment**

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

1 [ARTICLE] 2

2 FORMATION; CERTIFICATE OF ORGANIZATION AND OTHER FILINGS

3
4 SECTION 201. FORMATION OF LIMITED LIABILITY COMPANY;
5 CERTIFICATE OF ORGANIZATION.

6 (a) One or more persons may act as organizers to form a limited liability company by
7 signing and delivering to the [Secretary of State] for filing a certificate of organization.

8 (b) A certificate of organization must state:

9 (1) the name of the limited liability company, which must comply with Section
10 108; and

11 (2) the street and mailing address of the initial designated office and the name and
12 street and mailing address of the initial agent for service of process of the company.

13 (c) Subject to Section 112(c), a certificate of organization may also contain statements as
14 to matters other than those required by subsection (a). However, a statement in a certificate of
15 organization is not effective as a statement of authority.

16 (d) A limited liability company is formed when the [Secretary of State] files the
17 certificate of organization, unless the certificate states a delayed effective date pursuant to
18 Section 205(c). If the certificate states a delayed effective date, a limited liability company is not
19 formed if, before the certificate takes effect, a statement of cancellation is signed and delivered
20 to the [Secretary of State] for filing and the [Secretary of State] files the certificate.

21 (e) Subject to any delayed effective date and except in a proceeding by this state to
22 dissolve a limited liability company, the filing of the certificate of organization by the [Secretary

1 of State] is conclusive proof that the organizer satisfied all conditions to the formation of a
2 limited liability company. The formation of a limited liability company does not by itself cause
3 any person to become a member. However, this [act] does not preclude an agreement, made
4 before or after formation of a limited liability company, which provides that one or more persons
5 will become members, or acknowledging that one or more persons became members, upon or
6 otherwise in connection with the formation of the limited liability company.

7 **Comment**

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

12
13 **Subsection (d)** – A limited liability company comes into existence when its filed
14 certificate of organization takes effect, regardless of whether at that moment the company has
15 any members. For a discussion of this “shelf LLC” issue, see the Comment to Section 401.
16

17 **SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF**
18 **ORGANIZATION.**

19 (a) To amend its certificate of organization, a limited liability company must deliver to
20 the [Secretary of State] for filing an amendment stating:

- 21 (1) the name of the company;
- 22 (2) the date of filing of its certificate of organization; and
- 23 (3) the changes the amendment makes to the certificate as most recently amended
24 or restated.

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

26 (c) A restated certificate of organization may be delivered to the [Secretary of State] for

1 filing in the same manner as an amendment. A restated certificate of organization must be
2 designated as such in the heading and state in the heading or in an introductory paragraph the
3 limited liability company's present name and, if it has been changed, all of its former names and
4 the date of the filing of its initial certificate of organization.

5 (d) Subject to Sections 112(c) and 205(c), an amendment to or restatement of a certificate
6 of organization is effective when filed by the [Secretary of State].

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

11 (1) cause the certificate to be amended; or

12 (2) if appropriate, deliver to the [Secretary of State] for filing a statement of
13 change under Section 113 or a statement of correction under Section 206.

14 **Comment**

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

17
18 This subsection imposes an obligation directly on the members and managers rather than
19 on the limited liability company. A member or manager's failure to meet the obligation exposes
20 the member or manager to liability to third parties under Section 207(a)(2) and might constitute a
21 breach of the member or manager's duties under Section 409(c) and (g)(1). In addition, an
22 aggrieved person may seek a remedy under Section 204 (Signing and Filing Pursuant to Judicial
23 Order).

24

25 **SECTION 203. SIGNING OF RECORDS TO BE DELIVERED FOR FILING TO**
26 **[SECRETARY OF STATE].**

27 (a) A record delivered to the [Secretary of State] for filing pursuant to this [act] must be

1 signed as follows:

2 (1) Except as otherwise provided in paragraphs (2) through (4), a record signed on
3 behalf of an limited liability company must be signed by a person authorized by the limited
4 liability company.

5 (2) A limited liability company's initial certificate of organization must be signed
6 by at least one person acting as an organizer.

7 (3) A record signed on behalf of a limited liability company that has been formed
8 but has admitted no members must be signed by an organizer.

9 (4) A record filed on behalf of a dissolved limited liability company that has no
10 members must be signed by the person winding up the company's activities under Section 702(b)
11 or a person appointed under Section 702(c) to wind up those activities.

12 (5) A statement of cancellation under Section 201(c) must be signed by each
13 organizer that signed the initial certificate of organization, except that a personal representative
14 of a decedent or incompetent organizer may sign in the place of the decedent or incompetent.

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

17 (7) Any other record must be signed by the person on whose behalf the record is
18 delivered to the [Secretary of State].

19 (b) Any record to be filed under this [act] may be signed by an agent.

20 **SECTION 204. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER.**

21 (a) If a person required by this [act] to sign a record or deliver a record to the [Secretary
22 of State] for filing under [this act] does not do so, any other person that is aggrieved may petition

1 the [appropriate court] to order:

2 (1) the person to sign the record;

3 (2) the person to deliver the record to the [Secretary of State] for filing; or

4 (3) the [Secretary of State] to file the record unsigned.

5 (b) If the petitioner under subsection (a) is not the limited liability company or foreign
6 limited liability company to which the record pertains, the petitioner shall make the company a
7 party to the action.

8 **Comment**

9 **Source** – ULPA (2001) § 205, which is based on RULPA § 205, which was the source of
10 ULLCA § 209.

11
12 **Subsection (a)(3)** – A record filed under this paragraph is effective without being signed.

13
14
15 **SECTION 205. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY**
16 **OF STATE]; EFFECTIVE TIME AND DATE.**

17 (a) A record authorized or required to be delivered to the [Secretary of State] for filing
18 under this [act] must be captioned to describe the record’s purpose, be in a medium permitted by
19 the [Secretary of State], and be delivered to the [Secretary of State]. If the filing fees have been
20 paid, unless the [Secretary of State] determines that a record does not comply with the filing
21 requirements of this [act], the [Secretary of State] shall file the record and:

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

25 (2) for all other records, send a copy of the filed record and a receipt for the fees

1 to the person on whose behalf the record was filed.

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

4 (c) Except as otherwise provided in Sections 114 and 206, a record delivered to the
5 [Secretary of State] for filing under this [act] may specify an effective time and a delayed
6 effective date. Subject to Sections 114, 201(c), and 206, a record filed by the [Secretary of State]
7 is effective:

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

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

13 (3) if the record specifies a delayed effective date but not an effective time, at
14 12:01 a.m. on the earlier of:

15 (A) the specified date; or

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

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

19 (A) the specified date; or

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

21 **Comment**

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

23

1 This Act uses the concept of “filing” to refer to the official act of the [Secretary of State],
2 which is typically preceded by a person “delivering” some record “to the [Secretary of State] for
3 filing.”
4

5 **Subsection (c)(3)(B) and 4(B)** – If a person delivers to the Secretary of State for filing a
6 record that contains an over-long delay in the effective date, the Secretary of State: (i) will not
7 reject the record; and (ii) is neither required nor authorized to inform the person that this Act will
8 truncate the period of delay specified in the record.
9

10 **SECTION 206. CORRECTING FILED RECORD.**

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

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

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

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

21 (3) correct the defective signature or inaccurate information.

22 (c) When filed by the [Secretary of State], a statement of correction under subsection (a)
23 is effective retroactively as of the effective date of the record the statement corrects, but the
24 statement is effective when filed:

25 (1) for the purposes of Section 103(c); and

26 (2) as to persons that previously relied on the uncorrected record and would be

1 adversely affected by the retroactive effect.

2 **Comment**

3 **Source** – ULPA (2001) § 207, which was based on ULLCA §207.
4

5 **SECTION 207. LIABILITY FOR INACCURATE INFORMATION IN FILED**
6 **RECORD.**

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

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

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

14 (A) the record was delivered for filing on behalf of the limited liability
15 company; and

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

19 (i) effected an amendment under Section 202;

20 (ii) filed a petition under Section 204; or

21 (iii) or delivered to the [Secretary of State] for filing a statement of
22 change under Section 113 or a statement of correction under Section 206.

23 (b) To the extent that the operating agreement of a member-managed limited liability

1 company expressly relieves a member of responsibility for maintaining the accuracy of
2 information contained in records delivered on behalf of a limited liability company to the
3 [secretary of state] for filing under this [act] and imposes that responsibility on one or more other
4 members, the liability stated in subsection (a)(2) applies to those other members and not to the
5 member whom the operating agreement relieves of the responsibility.

6 (c) A person who signs a record authorized or required to be filed under this [act] thereby
7 affirms under the penalties of perjury that the facts stated in the record are accurate.

8 **Comment**

9
10 Source: ULPA (2001) § 207, which expanded on ULLCA § 209.

11 **Section (a)(2)(B)** – This subparagraph implies that doing any of the acts listed in clauses
12 (i) through (iii) will preclude liability arising from subsequent reliance. In this connection,
13 Clause (a)(2)(B)(ii) warrants special attention, because that act (filing a petition in court) can
14 occur without any immediate effect on the records relevant to a limited liability company
15 maintained by the filing officer. The other clauses refer to acts that (assuming no filing backlog)
16 affect that public record immediately.
17

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

19 (a) The [Secretary of State], upon request and payment of the requisite fee, shall furnish
20 to any person a certificate of existence for a limited liability company if the records filed in the
21 [office of the Secretary of State] show that the [Secretary of State] has filed a certificate of
22 organization and has not filed a statement of termination. A certificate of existence must state:

23 (1) the company’s name;

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

26 (3) whether all fees, taxes, and penalties due under this [act] or other law to the
27 [Secretary of State] have been paid;

1 (4) whether the company’s most recent annual report required by Section 209 has
2 been filed by the [Secretary of State];

3 (5) whether the [Secretary of State] has administratively dissolved the company;

4 (6) whether the company has delivered to the [Secretary of State] for filing a
5 statement of dissolution;

6 (7) that a statement of termination has not been filed by the [Secretary of State];

7 and

8 (8) other facts of record in the [office of the Secretary of State] which are
9 specified by the person requesting the certificate.

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

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

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

18 (3) whether all fees, taxes, and penalties due under this [act] or other law to the
19 [Secretary of State] have been paid;

20 (4) whether the foreign limited liability company’s most recent annual report
21 required by Section 209 has been filed by the [Secretary of State];

22 (5) that the [Secretary of State] has not revoked the company’s certificate of

1 authority and has not filed a notice of cancellation; and

2 (6) other facts of record in the [office of the Secretary of State] which are
3 specified by the person requesting the certificate.

4 (c) Subject to any qualification stated in the certificate, a certificate of existence or
5 certificate of authorization issued by the [Secretary of State] is conclusive evidence that the
6 limited liability company or foreign limited liability company is in existence or is authorized to
7 transact business in this state.

8 **Comment**

9 **Source** – ULPA (2001), § 209, which was based on ULLCA, § 208.
10

11 **SECTION 209. ANNUAL REPORT FOR [SECRETARY OF STATE].**

12 (a) Each year a limited liability company or a foreign limited liability company
13 authorized to transact business in this state shall deliver to the [Secretary of State] for filing a
14 report that states:

15 (1) the name of the company;

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

18 (3) the street and mailing address of its principal office; and

19 (4) in the case of a foreign limited liability company, the state or other jurisdiction
20 under whose law the company is formed and any alternate name adopted under Section 805(a).

21 (b) Information in an annual report under this section must be current as of the date the
22 report is delivered to the [Secretary of State] for filing.

23 (c) The first annual report under this section must be delivered to the [Secretary of State]

1 between [January 1 and April 1] of the year following the calendar year in which a limited
2 liability company was formed or a foreign limited liability company was authorized to transact
3 business. A report must be delivered to the [Secretary of State] between [January 1 and April 1]
4 of each subsequent calendar year.

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

10 (e) If a filed annual report under this section contains an address of a designated office or
11 the name or address of an agent for service of process which differs from the information shown
12 in the records of the [Secretary of State] immediately before the filing, the differing information
13 in the annual report is considered a statement of change under Section 113.

14 **Comment**

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

1 [ARTICLE] 3

2 RELATIONS OF MEMBERS AND MANAGERS

3 TO PERSONS DEALING WITH LIMITED LIABILITY COMPANY

4
5 SECTION 301. NO AGENCY POWER OF MEMBER AS MEMBER.

6 (a) A member is not an agent of a limited liability company solely by reason of being a
7 member.

8 (b) A person’s status as a member does not prevent or restrict other law from imposing
9 liability on a limited liability company on account of the person’s conduct.

10 Comment

11
12 **Subsection (a)** – Most LLC statutes, including the original ULLCA, provide for what
13 might be termed “statutory apparent authority” for members in a member-managed limited
14 liability company and managers in a manager-managed limited liability company. This approach
15 codifies the common law notion of apparent authority by position and dates back at least to the
16 original, 1914 Uniform Partnership Act. UPA, § 9 provided that “the act of every partner ... for
17 apparently carrying on in the usual way the business of the partnership ... binds the partnership,”
18 and that formulation has been essentially followed by RUPA, § 301, ULLCA, § 301, ULPA
19 (2001), § 402, and myriad state LLC statutes.

20
21 This Act rejects the statutory apparent authority approach, for reasons summarized in a
22 “Progress Report on the Revised Uniform Limited Liability Company Act,” published in the
23 March 2006 issue of the newsletter of the ABA Committee on Partnerships and Unincorporated
24 Business Organizations:

25
26 The concept [of statutory apparent authority] still makes sense both for general
27 and limited partnerships. A third party dealing with either type of partnership can
28 know by the formal name of the entity and by a person’s status as general or
29 limited partner whether the person has the power to bind the entity

30
31 Most LLC statutes have attempted to use the same approach but with a
32 fundamentally important (and problematic) distinction. An LLC’s status as
33 member-managed or manager-managed determines whether members or
34 managers have the statutory power to bind. But an LLC’s status as member- or
35 manager-managed is not apparent from the LLC’s name. A third party must check

1 the public record, which may reveal that the LLC is manager-managed, which in
2 turn means a member as member has no power to bind the LLC. As a result, a
3 provision that originated in 1914 as a protection for third parties can, in the LLC
4 context, easily function as a trap for the unwary. The problem is exacerbated by
5 the almost infinite variety of management structures permissible in and used by
6 LLCs.

7
8 The new Act cuts through this problem by simply eliminating statutory apparent
9 authority.

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

12
13 Codifying power to bind according to position makes sense only for organizations that
14 have well-defined, well-known, and almost paradigmatic management structures. Because:

- 15
16 • flexibility of management structure is a hallmark of the limited liability company; and
17 • an LLC’s name gives no signal as to the organization’s structure,

18
19 it makes no sense to:

- 20
21 • require each LLC to publicly select between two statutorily preordained structures (i.e.,
22 manager-managed/member-managed); and then
23 • link a “statutory power to bind” to each of those two structures.

24
25 Under this Act, other law – most especially the law of agency – will handle power-to-
26 bind questions. In that context, management structure may well be relevant to a member’s
27 power to bind a limited liability company, because an LLC’s actual practices will have
28 implications for participants’ actual and apparent authority under agency law. The power of an
29 enterprise’s participants to bind the enterprise receives considerable attention in the new
30 Restatement (Third) of Agency.

31
32 This subsection does not address the power to bind of a manager in a manager-managed
33 LLC, and this Act considers only the *actual* authority of such a manager. See Section 407(c)
34 (allocating management authority, subject to the operating agreement). On this issue also, the
35 common law of agency will supply the rules, including apparent authority by position and the
36 inherent authority of a general agent. *E.g.* Restatement (Second) of Agency, §§ 8 (apparent
37 authority) and 161 (inherent authority of a general agent).

38
39 **Subsection (b)** – As the “flip side” to subsection (a), this subsection expressly preserves
40 the power of other law to hold an LLC directly or vicariously liable on account of conduct by a
41 person who happens to be a member. For example, given the proper set of circumstances: (i) a
42 member might have actual or apparent authority to bind an LLC to a contract; (ii) the doctrine of
43 *respondeat superior* might make an LLC liable for the tortious conduct of a member (i.e., in
44 some circumstances a member acts as a “servant” of the LLC); and (iii) an LLC might be liable

1 for negligently supervising a member who is acting on behalf of the LLC.
2

3 A person's status as a member does not weigh against any of these theories. Moreover,
4 subsection (a) does not prevent member status from being relevant to one or more elements of an
5 "other law" theory. For example, under the common law of agency a person has actual authority
6 to do an act if, based on the principal's manifestation, the person has a reasonable belief that he,
7 she or it is authorized to do that act on the principal's behalf. A person's status as a member of a
8 member-managed LLC constitutes a manifestation by the LLC and might well pertain to the
9 reasonableness of the person's belief that she was authorized to act for the LLC in some
10 particular matter. Similarly, a person's status as a non-manager member in a manager-managed
11 LLC might cut against the reasonableness element.
12

13 SECTION 302. STATEMENT OF AUTHORITY.

14 (a) A limited liability company may deliver to the [Secretary of State] for filing a
15 statement of authority. The statement:

16 (1) must include the name of the company and the street and mailing address of
17 its designated office;

18 (2) may, with respect to any position that exists in or with respect to the company,
19 state the authority, or limitations on the authority, of all persons holding the position to:

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

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

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

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

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

1 (b) To amend or cancel a statement of authority filed by the [Secretary of State] under
2 Section 205(a), a limited liability company must deliver to the [Secretary of State] for filing an
3 amendment or cancellation stating:

4 (1) the name of the company;

5 (2) the street and mailing address of the company's designated office;

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

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

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

12 (d) Subject to subsection (c) and Section 103(e) and except as otherwise provided in
13 subsections (f), (g) and (h), a limitation on the authority of a person or a position contained in an
14 effective statement of authority is not by itself knowledge or notice of the limitation by any
15 person.

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

19 (1) the person has knowledge to the contrary;

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

21 or

22 (3) a limitation on the grant is contained in another statement of authority that

1 became effective after the statement containing the grant became effective.

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

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

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

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

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

20 (i) After a statement of dissolution becomes effective, a limited liability company may
21 deliver to the [Secretary of State] for filing and, if appropriate, may record a statement of
22 authority that is designated as a post-dissolution statement of authority. The statement operates

1 as provided in subsections (f) and (g).

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

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

8 **Comment**

9
10 This section is derived from and builds on RUPA, § 303, and, like that provision is
11 conceptually divided into two realms: statements pertaining to the power to transfer the LLC's
12 real property and statements pertaining to other matters. In the latter realm, statements are filed
13 only in the records of the [Secretary of State], operate only to the extent the statements are
14 actually known. Section 302(d) and (e).

15
16 As to the real property, in contrast, this section: (i) requires double-filing – with the
17 [Secretary of State] and in the appropriate land records; and (ii) provides for constructive
18 knowledge of statements limiting authority. Thus, a properly filed and recorded statement can
19 protect the limited liability company, Section 302(g), and, in order for a statement pertaining to
20 real property to be a sword in the hands of a third party, the statement must have been both filed
21 and properly recorded. Section 302(f).

22
23 **Subsection (a)(2)** – This paragraph permits a statement to designate authority by position
24 (or office) rather than by specific person. This type of a statement will enable LLCs to provide
25 evidence of ongoing authority to enter into transactions without having to disclose to third parties
26 the entirety of the operating agreement.

27
28 **Subsection (b)** – For the requirement that the original statement, like any other record, be
29 appropriately captioned, see Section 205(a).

30
31 **Subsection (c)** – This subsection contains a very important limitation – i.e., that this
32 section's rules do not operate *viz a viz* members. The text of RUPA, § 303 makes this very
33 important point only obliquely, but the Comment to that section is unequivocal:

34
35 It should be emphasized that Section 303 concerns the authority of partners to
36 bind the partnership to third persons. As among the partners, the authority of a
37 partner to take any action is governed by the partnership agreement, or by the

1 provisions of RUPA governing the relations among partners, and is not affected
2 by the filing or recording of a statement of partnership authority.

3
4 RUPA § 303, comment 4.
5

6 However, like any other record delivered for filing on behalf of an LLC, a statement of
7 authority might be some evidence of the contents of the operating agreement. See Comment to
8 Section 112(d).
9

10 **Subsection (e)(1)** – What happens if a statement of authority conflicts with the contents
11 of an LLC’s certificate of organization? The contents of the certificate are not statements of
12 authority, section 201(c), so the information in the certificate does not directly figure into the
13 operation of this section. However, if the person claiming to rely on a statement of authority had
14 read the certificate’s conflicting information before giving value, that fact might be evidence that
15 person gave value with “knowledge to the contrary” of the statement.
16

17 **SECTION 303. STATEMENT OF DENIAL.** A person named in a filed statement of
18 authority granting that person authority may deliver to the [Secretary of State] for filing a
19 statement of denial that:

20 (1) provides the name of the limited liability company and the caption of the statement;

21 and

22 (2) denies the grant of authority.

23 **Comment**

24 For the effect of a statement of denial, see Section 302(k).
25
26

27 **SECTION 304. LIABILITY OF MEMBERS AND MANAGERS.**

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

30 (1) are solely the debts, obligations, and liabilities of the limited liability
31 company; and

1 (2) do not become the debts, obligations, and liabilities of a member or manager
2 solely by reason of the member or manager acting as member or manager.

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

7 **Comment**

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

12
13 **EXAMPLE:** A manager personally guarantees a debt of a limited liability company.
14 Subsection (a)(2) is irrelevant to the manager’s liability as guarantor.

15
16 **EXAMPLE:** A member purports to bind a limited liability company while lacking any
17 agency law power to do so. The limited liability company is not bound, but the member
18 is liable for having breached the “warranty of authority” (an agency law doctrine).
19 Subsection (a)(2) does not apply. The liability is not *for* a “debt[, obligation[, [or]
20 liability] of a limited liability company,” but rather because the limited liability company
21 is *not* indebted, obligated or liable.

22
23 **EXAMPLE:** A manager of a limited liability company defames a third party in
24 circumstances that render the limited liability company vicariously liable under agency
25 law. Under subsection (a)(2), the third party cannot hold the manager accountable for the
26 *company’s* liability, but that protection is immaterial. The manager is the tortfeasor and
27 in that role is directly liable to the third party.

28
29 Subsection (a)(2) pertains only to claims by third parties and is irrelevant to claims by a
30 limited liability company against a member or manager and *vice versa*. See e.g. Sections 408
31 (pertaining to a limited liability company’s obligation to indemnify a member or manager), 409
32 (pertaining to management duties) and 901 (pertaining to a member’s rights to bring a direct
33 claim against a limited liability company).

34
35 **Subsection (b)** – This subsection pertains to the equitable doctrine of “piercing the veil”
36 – i.e., conflating an entity and its owners to hold one liable for the obligations of the other. The
37 doctrine of “piercing the corporate veil” is well-established, and courts regularly (and sometimes

1 almost reflexively) apply that doctrine to limited liability companies. In the corporate realm,
2 “disregard of corporate formalities” is a key factor in the piercing analysis. In the realm of
3 LLCs, that factor is in appropriate, because informality of organization and operation is both
4 common and desired.

5
6 This subsection does not preclude consideration of another key piercing factor –
7 disregard by an entity’s owners of the entity’s economic separateness from the owners.

8
9 EXAMPLE: The operating agreement of a three-member, member-managed limited
10 liability company requires formal monthly meetings of the members. Each of the
11 members works in the LLC’s business, and they consult each other regularly. They have
12 forgotten or ignore the requirement of monthly meetings. Under subsection (b), that fact
13 is irrelevant to a piercing claim.

14
15 EXAMPLE: The sole owner of a limited liability company uses a car titled in the
16 company’s name for personal purposes and writes checks on the company’s account to
17 pay for personal expenses. These facts are relevant to a piercing claim; they pertain to
18 economic separateness, not subsection (b) formalities.

19
20 This subsection has no relevance to a member’s claim of oppression under Section
21 701(a)(5)(B). In some circumstances, disregard of agreed-upon formalities can be a “freeze out”
22 mechanism. Likewise, this section has no relevance to a member’s claim that the disregard of
23 agreed-upon formalities is a breach of the operating agreement.

1 [ARTICLE] 4

2 RELATIONS OF MEMBERS TO EACH OTHER AND
3 TO LIMITED LIABILITY COMPANY
4

5 SECTION 401. BECOMING A MEMBER.

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

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

14 (c) If a limited liability company is to have no members upon formation, a person
15 becomes the initial member with the consent of a majority of the organizers. The organizers may
16 consent to more than one person becoming simultaneously the company's initial members.

17 (d) After a limited liability company has or has had at least one member, a person
18 becomes a member:

19 (1) as provided in the operating agreement;

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

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

22 (4) if within 90 consecutive days after the company ceases to have any members,

1 the legal representative of the last person to have been a member consents to have the person
2 become a member and the person consents to become a member.

3 (e) A person may become a member without acquiring a transferable interest and without
4 making or being obligated to make a contribution to the limited liability company.

5 **Comment**

6 No issue roiled the drafting process to this Act more than the question of “shelf LLCs” –
7 i.e., whether this Act would permit a limited liability company to be formed without the
8 company having at least one member at the moment of formation. The final answer was yes, for
9 reasons summarized in a “Progress Report on the Revised Uniform Limited Liability Company
10 Act,” published in the March 2006 issue of the newsletter of the ABA Committee on
11 Partnerships and Unincorporated Business Organizations

12
13 The “Shelf LLC” – To some, the notion that an LLC might exist without having at
14 least one member is conceptual betrayal. According to this point of view, an LLC
15 is a partnership with perpetual duration and a full shield, and forming an LLC
16 without a member should be verboten. Utah law, for example, takes this point
17 very seriously. According to U.C.A. 1953 § 48-2c-401(2)(a)(i): “The signing of
18 the articles of organization constitutes an affirmation by the organizers that . . . (i)
19 the company has one or more members.”

20
21 There are, however, two fundamental flaws with this point of the view. One is
22 theoretical. The LLC abandoned its partnership parentage when single-member
23 LLCs became possible. Today, SMLLCs are among the most important
24 applications of the LLC form, and there is nothing more axiomatic about a
25 partnership than the requirement that it have at least two owners. The other
26 problem is practical and overwhelming. Clients sometimes want the ability to
27 have the entity formed before the initial membership is determined, and
28 practitioners are accommodating this need. The [Committee on Partnerships and
29 Unincorporated Business Organizations] itself has overwhelmingly endorsed the
30 concept of a shelf LLC.

31
32 PUBOGRAM, Vol. XXIII, no. 2 at 7, 11 (footnote inserted into text).

33
34 This Act accordingly permits shelf LLCs, but Section 105(b) mandates that an initially
35 member-less LLC “sit on the shelf” until the LLC has had at least one member. In addition,
36 Section 701(a)(3) limits “the shelf life” to 90 days, by providing that an LLC dissolves upon “the
37 passage of 90 consecutive days during which the limited liability company has no member.” The
38 provision is a default rule, subject to change by the operating agreement, but a shelf LLC cannot
39 have an operating agreement. Section 102(13) defines “operating agreement” as “the agreement

1 ... of all the members”.

2
3 Most LLC statutes address in separate provisions: (i) how an LLC obtains its initial
4 member or members; and (ii) how additional persons might later become members. This Act
5 follows that approach. Subsections (a) and (b) address the most common circumstances under
6 which a limited liability company is formed – with one or more persons becoming members
7 upon formation. Subsection (c) addresses how a person becomes the initial member of a shelf
8 LLC. Subsection (d) addresses how persons become members after an LLC has had at least one
9 member.

10
11 **Subsection (e)** – This subsection permits so-called “non-economic members.”
12

13 **SECTION 402. FORM OF CONTRIBUTION.** A contribution may consist of
14 tangible or intangible property or other benefit to a limited liability company, including money,
15 services performed, promissory notes, other agreements to contribute cash or property, and
16 contracts for services to be performed.

17 **Comment**

18 **Source** – ULPA (2001) § 501, which derived from ULLCA § 401.
19

20 **SECTION 403. LIABILITY FOR CONTRIBUTIONS.**

21 (a) A person’s obligation to make a contribution to a limited liability company is not
22 excused by the person’s death, disability, or other inability to perform personally. If a person
23 does not make a required contribution, the person or the person’s estate is obligated, at the option
24 of the company, to contribute money equal to the value of the part of the contribution which has
25 not been made.

26 (b) A creditor of a limited liability company which extends credit or otherwise acts in
27 reliance on an obligation described in subsection (a) may enforce the obligation.

28 **Comment**

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

3
4 **SECTION 404. SHARING OF AND RIGHT TO DISTRIBUTIONS BEFORE**
5 **DISSOLUTION.**

6 (a) Any distributions made by a limited liability company before its dissolution and
7 winding up must be in equal shares among members and dissociated members, except to the
8 extent necessary to comply with any transfer effective under Section 502 and any charging order
9 in effect under Section 503.

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

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

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

21 **Comment**
22

23 This Act follows both the original ULLCA and ULPA (2001) in omitting any default rule
24 for allocation of losses. The Comment to ULPA (2001), § 503 explains that omission as follows:
25

26 This Act has no provision allocating profits and losses among the partners.

1 Instead, the Act directly apportions the right to receive distributions. Nearly all
2 limited partnerships will choose to allocate profits and losses in order to comply
3 with applicable tax, accounting and other regulatory requirements. Those
4 requirements, rather than this Act, are the proper source of guidance for that profit
5 and loss allocation.
6

7 **Subsection (b)** – The second sentence of this subsection accords with Section 603(a)(3) –
8 upon dissociation a person is treated as a mere transferee of its own transferable interest. Like
9 most *inter se* rules in this Act, this one is subject to the operating agreement. See Comment to
10 Section 603(a)(3).
11

12 **SECTION 405. LIMITATIONS ON DISTRIBUTION.**

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

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

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

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

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

27 (1) in the case of distribution by purchase, redemption, or other acquisition of a

1 transferable interest in the company, as of the date money or other property is transferred or debt
2 incurred by the company; and

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

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

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

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

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

15 (f) If indebtedness is issued as a distribution, each payment of principal or interest on the
16 indebtedness is treated as a distribution, the effect of which is measured on the date the payment
17 is made.

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

21 **Comment**

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

1
2 **Subsection (b)** – This subsection appears to involve a pure standard of ordinary care, in
3 contrast with the more complicated approach stated in Section 409(c).
4

5 **SECTION 406. LIABILITY FOR IMPROPER DISTRIBUTIONS.**

6 (a) Except as provided in subsection (b), if a member of a member-managed limited
7 liability company or manager of a manager-managed limited liability company consents to a
8 distribution made in violation of Section 405 and in consenting to the distribution fails to comply
9 with Section 409, the member or manager is personally liable to the company for the amount of
10 the distribution which exceeds the amount that could have been distributed without the violation
11 of Section 405.

12 (b) To the extent the operating agreement of a member-managed limited liability
13 company expressly relieves a member of a responsibility that the member would otherwise have
14 under subsection (a) and imposes that responsibility on one or more other members, the liability
15 stated in subsection (a) applies to the other members and not the member which the operating
16 agreement relieves of responsibility.

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

21 (d) A person against which an action is commenced under subsection (a) may:

22 (1) implead in the action any other person that is subject to liability under
23 subsection (a) and compel contribution from the person; and

24 (2) implead in the action any person that received a distribution in violation of

1 subsection (c) and compel contribution from the person in the amount the person received in
2 violation of subsection (c).

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

5 **Comment**

6 **Source** – Same derivation as Section 405.

7
8 Liability under this section is not affected by a person ceasing to be a member, manager
9 or transferee after the time that the liability attaches.

10
11 **Subsections (c) and (d)(2)** – Liability could apply to a person who receives a distribution
12 under a charging order, but only in the unlikely event of the person meeting the knowledge
13 requirement.
14

15 **SECTION 407. MANAGEMENT OF LIMITED LIABILITY COMPANY.**

16 (a) A limited liability company is a member-managed limited liability company unless
17 the company qualifies as a manager-managed limited liability company under Section 110(10).

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

19 (1) The management and conduct of the limited liability company is vested in the
20 members collectively.

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

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

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

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

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

4 (1) Except as otherwise expressly provided in this [act], any matter relating to the
5 activities of the company may be exclusively decided by the managers.

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

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

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

11 (A) sell, lease, exchange, or otherwise dispose of all, or substantially all,
12 of the company's property, with or without the good will, other than in the usual and regular
13 course of the company's activities;

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

15 (C) undertake any other act outside the ordinary course of activities of the
16 company; and

17 (D) amend the operating agreement.

18 (5) A manager may be chosen at any time by the consent of a majority of the
19 members and remains a manager until a successor has been chosen, unless the manager sooner
20 resigns, is removed, dies, or, in the case of a manager that is not an individual, terminates. A
21 manager may be removed at any time by the consent of a majority of the members without notice
22 or cause.

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

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

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

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

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

16 **Comment**

17
18 **Subsection (a)** – This subsection follows implicitly from the definitions of “manager-
19 managed” and “member-managed” limited liability companies, Section 102(10) and (12), but is
20 included here to the sake of clarity. Although this Act has eliminated the link between
21 management structure and statutory apparent authority, Section 301, the Act retains the manager-
22 managed and member-managed constructs as options for members to use to structure their *inter*
23 *se* relationship.

24
25 **Subsection (b)** – The subsection states default rules that, under Section 110, are subject
26 to the operating agreement.

27
28 **Subsection (c)** – Like subsection (b), this subsection states default rules that, under
29 Section 110, are subject to the operating agreement. For example, a limited liability company’s

1 operating agreement might state “This company is manager-managed,” Section 102(10)(i), while
2 providing that managers must submit specified ordinary matters for review by the members.
3

4 **Subsection (c)(5)** – Under the default rule stated in this paragraph, dissolution of an
5 entity that a manager does not end the entity’s status as manager. Contrast Section 602(4)(D)
6 (referring to the expulsion of a member that is a partnership or limited liability company and
7 authorizing the other members to expel, by unanimous consent, the dissolved partnership or
8 limited liability company).
9

10 **Subsection (c)(7)** – The obligation to safeguard trade secrets and other confidential or
11 propriety information is incurred when the person is a manager, and a subsequent cessation does
12 not entitle the person to usurp the information or use it to the prejudice of the LLC after the
13 cessation.
14

15 **Subsection (e)** – Under the second sentence of this subsection, a person might lose the
16 rights to act as a manager without automatically and formally ceasing to be denominated as a
17 manager.
18

19 **Subsection (f)** – This provision traces back to the 1914 Uniform Partnership Act, § 18(f)
20 and is included for fear that its absence might be misinterpreted as implying a contrary rule.
21

22 **SECTION 408. INDEMNIFICATION AND INSURANCE.**

23
24 (a) A member-managed limited liability company shall reimburse a member, and a
25 manager-managed limited liability company shall reimburse a manager, for any payment made
26 and indemnify the member or manager for any debt, obligation, or liability incurred in the course
27 of the member’s or manager’s activities on behalf of the company, if in making the payment or
28 incurring the debt, obligation, or liability the member or manager complied with the duties stated
29 in Sections 406 and 409.

30 (b) A limited liability company may purchase and maintain insurance on behalf of a
31 member or manager against liability asserted against or incurred by the member or manager in
32 that capacity or arising from that status whether or not the operating agreement is permitted to
33 provide for the member or manager to be indemnified against the liability.

1 **Comment**

2
3 This section refers only to members and managers and does not address a limited liability
4 company's obligation, if any, to indemnify others and its power to provide insurance for others.
5

6 **Subsection (a)** – This subsection states a default rule, which corresponds to the default
7 rules on management duties. In the default mode, the correspondence is appropriate, because
8 otherwise the statutory rule on indemnification could undercut or even vitiate the statutory rules
9 on duty.
10

11 This subsection does not expressly require a limited liability company to provide
12 advances to cover expenses. However, in some jurisdictions the indemnity obligation might be
13 interpreted to include an obligation to make advances. Both this subsection and the rules on duty
14 are subject to the operating agreement.
15

16 **Subsection (b)** – This language authorizes an LLC to purchase insurance to cover, e.g., a
17 manager's intentional misconduct. It is unlikely that such insurance would be available.
18

19 **SECTION 409. STANDARDS OF CONDUCT FOR MEMBERS AND**
20 **MANAGERS.**

21 (a) A member of a member-managed limited liability company owes to the limited
22 liability company and, subject to Section 901(b), the other members the fiduciary duties of
23 loyalty and care stated in subsections (b) and (c).

24 (b) The duty of loyalty of a member in a member-managed limited liability company
25 includes the duties:

26 (1) to account to the company and to hold as trustee for it any property, profit, or
27 benefit derived by the member:

28 (A) in the conduct or winding up of the company's activities;

29 (B) from a use by the member of the company's property; or

30 (C) from the appropriation of a limited liability company opportunity;

31 (2) to refrain from dealing with the company in the conduct or winding up of the

1 company's activities as or on behalf of a party having an interest adverse to the company; and

2 (3) to refrain from competing with the company in the conduct of the company's
3 activities before the dissolution of the limited liability company.

4 (c) Subject to the business judgment rule, the duty of care of a member of a member-
5 managed limited liability company in the conduct and winding up of the company's activities is
6 to act with the care that a person in a like position would reasonably exercise under similar
7 circumstances and in a manner the member reasonably believes to be in the best interests of the
8 company. In discharging duties under this subsection, a member may rely in good faith upon
9 opinions, reports, statements, or other information provided by another person that the member
10 reasonably believes is a competent and reliable source for the information.

11 (d) A member shall discharge the duties under this [act] or under the operating agreement
12 and exercise any rights consistently with the contractual obligation of good faith and fair dealing.

13 (e) It is a defense to a claim under subsection (b)(2) and any comparable claim in equity
14 or at common law that the transaction was fair to the limited liability company.

15 (f) All of the members may authorize or ratify after full disclosure of all material facts a
16 specific act or transaction that otherwise would violate the duty of loyalty.

17 (g) In a manager-managed limited liability company:

18 (1) subsections (a), (b), (c) and (e) apply to the manager or managers and not the
19 members;

20 (2) the duty stated under subsection (b)(3) continues until winding up is
21 completed;

22 (3) subsection (d) applies both to members and managers;

1 (4) subsection (f) applies only to members; and

2 (5) A member of a manager-managed limited liability company does not have any
3 fiduciary duty to the limited liability company or to any other member solely by reason of being
4 a member.

5 **Comment**

6
7 This section follows the structure of many LLC acts, first stating the duties of members in
8 a member-managed limited liability company and then using that statement and a “switching”
9 mechanism, subsection (g), to allocate duties in a manager-managed company. The duties stated
10 in this section are subject to the operating agreement, but Section 110 contains important
11 limitations on the power of the operating agreement to affect fiduciary duties and the obligation
12 of good faith.

13
14 *All Comments in this Annual Meeting draft are provisional, but the following history to*
15 *this section is even more so. The history is included to help inform discussion at the annual*
16 *meeting but is unlikely to be preserved in any detail in the Comment’s final version.*

17
18 This section’s history was conceptually tumultuous. For some time, the uncertainty
19 pertained to the appropriate standard for the duty of care. At its November, 2003 meeting, at the
20 urging of Commissioner Blackburn, the Drafting Committee decided to try to (i) eschew the
21 “gross negligence” standard of care first promulgated in RUPA and afterwards followed in
22 ULLCA and ULP (2001); and (ii) incorporate something like the standard of care/standard of
23 liability dichotomy recently adopted in MBCA §§ 8.30 and 8.31. Under the MBCA, that
24 dichotomy exists principally for directors and not for officers, *cf.* MBCA 8.42(c) (stating that
25 director standard of liability principles apply to officers if they “have relevance), and those
26 positions reflect categorically different kinds of responsibilities.

27
28 In response, the co-reporters drafted and the Committee considered a version of this
29 section and a companion section, Section 410, that together attempted to parallel *functionally* the
30 MBCA’s *positional* distinction by using the defined terms “governance responsibility” and
31 “operational responsibilities.” (The draft also differed from the MBCA approach by leaving
32 unaffected the traditional rules for duty of loyalty violations.)

33
34 At its April 2004 meeting, the Drafting Committee discussed the proposal at length and
35 with good-natured intensity. When the dust cleared, no one had moved to change any language.
36 However, there was considerable sentiment expressed in favor of collapsing the two sections into
37 one provision and somehow reinstating the gross negligence standard in combination with a
38 business judgment rule formulation.

39
40 The chair of the Committee then directed the co-reporters to draft a single section, which

1 was presented to and adopted by the Committee during a teleconference. That single section was
2 distributed to the 2004 Annual Meeting as a supplement to the Act and was read in place of the
3 Sections 409 and 410 included in the Annual Meeting draft. At its October, 2004 meeting, the
4 Drafting Committee again vigorously debated the topic of fiduciary duty, but no changes were
5 moved.

6
7 At its February, 2005 meeting, the Committee considered at length a different and
8 perhaps even more important issue -- the decision, made first in RUPA and followed without re-
9 consideration in ULLCA and ULPA (2001), to “cabin in” all fiduciary duties within a statutory
10 formulation. After lengthy discussion, the Committee decided that, in the very complex and
11 variegated world of LLCs, it was impracticable to cabin all fiduciary duties within the “fence”
12 created by RUPA.

13
14 As a result, this Act: (i) eschews “only” and “limited to” – the words RUPA used in an
15 effort to exhaustively codify fiduciary duty; (ii) codifies the core of the fiduciary duty of loyalty;
16 but (iii) does not purport to discern every possible category of overreaching. One important
17 consequence is to allow courts to continue to use fiduciary duty concepts to police disclosure
18 obligations in member-to-member and member-LLC transactions.

19
20 At its February, 2006 meeting, the Committee returned again to the vexing question of
21 the appropriate standard of care and reached a compromise – maintaining an ordinary negligence
22 standard but expressly superimposing the business judgment rule. See the Comment, below, to
23 subsection (c).

24
25 **Subsection (c)** – In some circumstances, an unadorned standard of ordinary care is
26 appropriate. In others, the proper application of the duty of care must take into account the
27 difficulties inherent in establishing an enterprise’s most fundamental policies, supervising the
28 enterprise’s overall activities, or making complex business judgments. Corporate law subdivides
29 circumstances somewhat according to the formal role exercised by the person whose conduct is
30 later challenged (e.g., distinguishing the duties of directors from the duties of officers). LLC law
31 cannot follow that approach, because a hallmark of the LLC entity is its structural flexibility.

32
33 This subsection, therefore, seeks “the best of both worlds” – stating a standard of
34 ordinary care but subjecting that standard to the business judgment rule to the extent
35 circumstances warrant. The content and force of the business judgment rule vary across
36 jurisdictions, and therefore the meaning of this subsection may vary from jurisdiction to
37 jurisdiction.

38
39 That result is intended. In any jurisdiction, the business judgment rule’s application will
40 vary depending on the nature of the challenged conduct. There is, for example, very little (if
41 any) judgment involved when a person with managerial power acts (or fails to act) on an
42 essentially ministerial matter. Moreover, under the law of many jurisdictions, the business
43 judgment rule applies similarly across the range of business organizations. That is, the doctrine
44 is sufficiently broad and conceptual so that the formality of organizational choice is less

1 important in shaping the application of the rule than are the nature of the challenged conduct and
2 the responsibilities and authority of the person whose conduct is being challenged.

3
4 This Act seeks therefore to invoke rather than unsettle whatever may be each
5 jurisdiction's approach to the business judgment rule.

6
7 **Subsection (d)** – This subsection refers to the “*contractual* obligation of good faith and
8 fair dealing” to emphasize that the obligation is not an invitation to re-write agreements among
9 the members. As explained in the Comment to ULPA (2001), § 305(b):

10
11 The obligation of good faith and fair dealing is not a fiduciary duty, does not
12 command altruism or self-abnegation, and does not prevent a partner from acting
13 in the partner's own self-interest. Courts should not use the obligation to change
14 ex post facto the parties' or this Act's allocation of risk and power. To the
15 contrary, in light of the nature of a limited partnership, the obligation should be
16 used only to protect agreed-upon arrangements from conduct that is manifestly
17 beyond what a reasonable person could have contemplated when the
18 arrangements were made.... In sum, the purpose of the obligation of good faith
19 and fair dealing is to protect the arrangement the partners have chosen for
20 themselves, not to restructure that arrangement under the guise of safeguarding it.

21
22 At first glance, it may seem strange to apply a contractual obligation to statutory duties
23 and rights – i.e., duties and rights “under this [act].” However, for the most part those duties and
24 rights apply to relationships *inter se* the members and the LLC and function only to the extent
25 not displaced by the operating agreement. In the contract-based organization that is an LLC,
26 those statutory default rules are intended to function like a contract. Therefore, applying the
27 contractual notion of good faith makes sense.

28
29 As to whether the obligation stated in this subsection applies to transferees, see the
30 Comment to Section 112(b).

31
32 **Subsection (e)** – Section 409 omits a noteworthy provision, which, beginning with
33 RUPA, has been standard in the uniform business entity acts. RUPA, ULLCA, ULPA (2001)
34 each placed the following language in the subsection following the formulation of the obligation
35 of good faith:

36
37 A member of does not violate a duty or obligation under this [act] or under the
38 operating agreement merely because the member's conduct furthers the member's
39 own interest.

40
41 This language is inappropriate in the complex and variegated world of LLCs. As a
42 proposition of contract law, the language is axiomatic and therefore unnecessary. In the context
43 of fiduciary duty, the language is at best incomplete, at worst wrong, and in any event confusing.
44

1 This Act’s subsection (e) takes a very different approach, stating a well-established
2 principle of judge-made law. Despite Section 107, the statement is not surplus. Given this Act’s
3 very detailed treatment of fiduciary duties and especially the Act’s very detailed treatment of the
4 power of the operating agreement to modify fiduciary duties, the statement is important because
5 its absence might be confusing. (An *ex post* fairness justification is not the same as an *ex ante*
6 agreement to modify, but the topics are sufficiently close for a danger of the affirmative
7 pregnant.)
8

9 This Act also omits, as anachronistic and potentially confusing, any provision resembling
10 ULLCA, § 409(f) (“A member of a member-managed company may lend money to and transact
11 other business with the company. As to each loan or transaction, the rights and obligations of the
12 member are the same as those of a person who is not a member, subject to other applicable
13 law.”) See also ULPA (2001), § 112 (“A partner may lend money to and transact other business
14 with the limited partnership and has the same rights and obligations with respect to the loan or
15 other transaction as a person that is not a partner.”)
16

17 Such provisions originated to combat the notion that debts to partners were categorically
18 inferior to debts to non-partner creditors. That notion has never been part of LLC law, and so a
19 modern uniform LLC act need not include language combating the notion. Moreover, to the
20 uninitiated the language can be confusing, because the words might: (i) seem to undercut the
21 duty of loyalty, which they do not; and (ii) deflect attention from bankruptcy law and the law of
22 fraudulent transfer, which assuredly can look askance at transactions between an entity and an
23 “insider.”
24

25 **Subsection (f)** –The operating can provide additional or different methods of
26 authorization or ratification, subject to the strictures of Section 110(e). See the Comment to that
27 subsection.
28

29 **Subsection (g)** – This is the “switching” mechanism, referred to in the introduction to
30 this Comment.
31

32 **Subsection (g)(2)** – On the assumption that the members of a manager-managed LLC are
33 dependent on the manager, this paragraph extends the duty longer than in a member-managed
34 LLC.
35

36 **Subsection (g)(5)** – This paragraph merely negates a claim of fiduciary duty that is
37 exclusively status-based and does not immunize misconduct.
38

39 **EXAMPLE:** Although a limited liability company is manager-managed, one member
40 who is not a manager owns a controlling interest and effectively, albeit indirectly,
41 controls the company’s activities. A member owning a minority interest brings an action
42 for dissolution under Section 701(a)(5)(B) (oppression by “the managers or those
43 members in control of the company”). The court wishes to understand a claim as one
44 alleging a breach of fiduciary duty by the controlling member. Subsection (g)(5) does

1 not preclude that approach.
2

3 **SECTION 410. RIGHT OF MEMBERS, MANAGERS, AND DISSOCIATED**
4 **MEMBERS TO INFORMATION.**

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

6 (1) On reasonable notice, a member may inspect and copy during regular business
7 hours, at a reasonable location specified by the company, any records maintained by the
8 company regarding the company's activities, financial condition, and other circumstances, to the
9 extent the information is material to the member's rights and duties under the operating
10 agreement or this [act].

11 (2) The limited liability company shall furnish to each member:

12 (A) without demand, any information concerning the company's activities,
13 financial condition, and other circumstances which the company knows and is material to proper
14 exercise of the member's rights and duties under the operating agreement or this [act], except to
15 the extent the company can establish that it reasonably believes the member already knows the
16 information; and

17 (B) on demand, any other information concerning the company's
18 activities, financial condition, and other circumstances, except to the extent the demand or
19 information demanded is unreasonable or otherwise improper under the circumstances.

20 (3) The duty to furnish information under paragraph (2) also applies to each
21 member to the extent the member knows any of the information described in paragraph (2).

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

23 (1) The informational rights and obligations stated in subsection (a) apply to the

1 managers instead of the members.

2 (2) During regular business hours and at a reasonable location specified by the
3 limited liability company, a member may obtain from the company and inspect and copy true
4 and full information regarding the activities, financial condition, and other circumstances of the
5 company as is just and reasonable if:

6 (A) the member seeks the information for a purpose material to the
7 member's interest as a member;

8 (B) the member makes a demand in a record received by the company,
9 describing with reasonable particularity the information sought and the purpose for seeking the
10 information; and

11 (C) the information sought is directly connected to the member's purpose.

12 (3) Within 10 days after receiving a demand pursuant to paragraph (2)(B), the
13 limited liability company shall in a record inform the member that made the demand:

14 (A) of the information that the company will provide in response to the
15 demand;

16 (B) when and where the company will provide the information; and

17 (C) if the company declines to provide any demanded information, the
18 company's reasons for declining.

19 (4) Whenever this [act] or an operating agreement provides for a member to give
20 or withhold consent to a matter, before the consent is given or withheld, the limited liability
21 company shall, without demand, provide the member with all information that is known to the
22 company and is material to the member's decision.

1 (c) On 10 days' demand made in a record received by the limited liability company, a
2 dissociated member may have access to whatever information the person was entitled to while a
3 member if the information pertains to the period during which the person was a member, the
4 person seeks the information in good faith, and the person satisfies the requirements imposed on
5 a member by subsection (b)(2). The company shall respond to a demand made pursuant to this
6 subsection in the same manner as provided in subsection (b)(3).

7 (d) A limited liability company may charge a person that makes a demand under this
8 section the reasonable costs of copying, limited to the costs of labor and material.

9 (e) A member or dissociated member may exercise rights under this section through an
10 agent or, in the case of an individual under legal disability, a legal representative. Any
11 restriction or condition imposed by the operating agreement or under subsection (g) applies both
12 to the agent or legal representative and the member or dissociated member.

13 (f) The rights provided in this section do not extend to a person as transferee.

14 (g) In addition to any restriction or condition stated in its operating agreement, a limited
15 liability company may, as a matter within the ordinary course of its activities, impose reasonable
16 restrictions and conditions on access to and use of information to be furnished under this section,
17 including designating information confidential and imposing nondisclosure and safeguarding
18 obligations on the recipient. In a dispute concerning the reasonableness of a restriction under
19 this subsection, the company has the burden of proving reasonableness.

20 **Comment**

21
22 This section is derived from ULPA (2001), §§ 304 (rights to information of limited
23 partners and former limited partners) and 407 (same re: general partners and former general
24 partners). The rules stated here are what might be termed “quasi-default rules” – subject to some
25 change by the operating agreement. Section 110(c)(6) (prohibiting unreasonable restrictions on

1 the information rights stated in this section).
2

3 Although the rights and duties stated in section are extensive, they may not necessarily be
4 exhaustive. In some situations, some courts have seen owners' information rights as reflecting a
5 fiduciary duty of those with management power. This Act's statement of fiduciary duties is not
6 exhaustive. See Comment to Section 409 (explaining that this Act does not seek to "cabin in" all
7 fiduciary duties). In contrast, the operating agreement has considerable "cabining in" power of
8 its own. Section 110(d)(4).
9

10 **Subsection (b)(2)** – Satisfying subparagraphs (A) through (C) will not by itself trigger
11 the company's obligation under Paragraph (2). The person requesting the information must also
12 satisfy the "just and reasonable" requirement.
13

14 **Subsection (c)** – This section does not control the rights of the estate of a member who
15 dissociates by dying. In that circumstance, Section 504 controls.
16

17 **Subsection (g)** – The phrase "as a matter within the ordinary course of its activities"
18 means that a mere majority consent is needed to impose a restriction or condition. See Section
19 407(b)(3) and (c)(3). This approach is necessary, lest a requesting member (or manager-
20 member) have the power to block imposition of a reasonable restriction or condition needed to
21 prevent the requestor from abusing the LLC.
22

23 The burden of proof under this subsection contrasts with the burden of proof when
24 someone claims that a term of an operating agreement violates Section 110(c)(6). Under that
25 subsection, as a matter of ordinary procedural law, the burden is on the person making the claim.

1 [ARTICLE] 5

2 TRANSFERABLE INTERESTS AND RIGHTS OF TRANSFEREES AND CREDITORS

3
4 SECTION 501. MEMBER’S TRANSFERABLE INTEREST. A transferable interest
5 in a limited liability company is personal property.

6 Comment

7 Source – This Article most directly follows ULPA (2001), Article 7, because ULPA
8 (2001) reflects the Conference’s most recent thinking on the issues addressed here. However,
9 ULPA (2001), Article 7 is quite similar in substance to ULLCA, Article 5, and both those
10 Articles derive from Article 5 of RUPA.

11
12 Whether a transferable interest pledged as security is governed by Article 8 or 9 of the
13 Uniform Commercial Code depends on the facts and the rules stated in those Articles.

14
15 This Act does not include ULLCA § 501(a), which provided: “A member is not a co-
16 owner of, and has no transferable interest in, property of a limited liability company.” That
17 language was a vestige of the “aggregate” notion of the law of general partnerships, and in a
18 modern LLC statute would be at least surplus and perhaps confusing as well.

19
20 SECTION 502. TRANSFER OF TRANSFERABLE INTEREST.

21 (a) A transfer, in whole or in part, of a transferable interest:

22 (1) is permissible;

23 (2) does not by itself cause a member’s dissociation or a dissolution and winding
24 up of the limited liability company’s activities; and

25 (3) subject to Section 504, does not entitle the transferee to:

26 (A) participate in the management or conduct of the company’s activities;

27 or

28 (B) except as otherwise provided in subsection (c), have access to records

1 or other information concerning the company’s activities.

2 (b) A transferee has the right to receive, in accordance with the transfer, distributions to
3 which the transferor would otherwise be entitled.

4 (c) In a dissolution and winding up of a limited liability company, a transferee is entitled
5 to an account of the company’s transactions only from the date of dissolution.

6 (d) A transferable interest may be evidenced by a certificate of the interest issued by the
7 limited liability company in a record, and, subject to this section, the interest represented by the
8 certificate may be transferred by a transfer of the certificate.

9 (e) A limited liability company need not give effect to a transferee’s rights under this
10 section until the company has notice of the transfer.

11 (f) A transfer of a transferable interest in a limited liability company in violation of a
12 restriction on transfer contained in the operating agreement is ineffective as to a person having
13 notice of the restriction at the time of transfer.

14 (g) Except as otherwise provided in Section 602(4)(B), when a member transfers a
15 transferable interest, the transferor retains the rights of a member other than the interest in
16 distributions transferred and retains all duties and obligations of a member.

17 (h) When a member transfers a transferable interest to a person that becomes a member
18 with respect to the transferred interest, the transferee is liable for the member’s obligations under
19 Sections 403 and 406(c) known to the transferee when the transferee becomes a member.

20 **Comment**

21 One of the most fundamental characteristics of LLC law is its fidelity to the “pick your
22 partner” principle. This section is the core of the Act’s provisions reflecting and protecting that
23 principle.
24

1 A member’s rights in a limited liability company are bifurcated into economic rights (the
2 transferable interest) and governance rights (including management rights, consent rights, rights
3 to information, rights to seek judicial intervention). Unless the operating agreement otherwise
4 provides, a member acting without the consent of all other members lacks both the power and the
5 right to: (i) bestow membership on a non-member, Section 401(d); or (ii) transfer to a non-
6 member anything other than some or all of the member’s transferable interest. Section 502(a)(3).
7 However, consistent with current law, a member may transfer governance rights to another
8 member without obtaining consent from the other members. Thus, this Act does not itself
9 protect members from control shifts that result from transfers among members (as distinguished
10 from transfers to non-members who seek thereby to become members).

11
12 This section applies regardless of whether the transferor is a member, a transferee of a
13 member, a transferee of a transferee, etc. See Section 102(21) (defining “transferable interest” in
14 terms of a right “originally associated with a person’s capacity as a member” regardless of
15 “whether or not the person remains a member or continues to own any part of the right”).

16
17 **Subsection (a)** – The definition of “transfer,” Section 102(20), and this subsection’s
18 reference to “in whole or in part” combine to mean that this section encompasses not only
19 unconditional, permanent, and complete transfers but also temporary, contingent, and partial
20 ones as well. Thus, for example, a charging order under Section 504 effects a transfer of a the
21 judgment debtor’s transferable interest, as does the pledge of a transferable interest as collateral
22 for a loan and the gift of a life-interest in a member’s rights to distribution.

23
24 **Subsection (a)(2)** – Section 602(4)(B) creates a risk of dissociation via expulsion when a
25 member transfers all of the member’s transferable interest.

26
27 **Subsection (a)(3)** – Mere transferees have no right to intrude as the members carry on
28 their activities as members. When a member dies, other law may effect a transfer of the
29 member’s interest to the member’s estate or personal representative. Section 504 contains
30 special rules applicable to that situation.

31
32 **Subsection (b)** – Amounts due under this subsection are of course subject to offset for
33 any amount owed to the limited liability company by the member or dissociated member on
34 whose account the distribution is made. As to whether an LLC may properly offset for claims
35 against a transferor that was never a member is matter for other law, specifically the law of
36 contracts dealing with assignments.

37
38 **Subsection (d)** – The use of certificates can raises issues relating to Articles 8 and 9 of
39 the Uniform Commercial Code.

40 41 **SECTION 503. CHARGING ORDER.**

42 (a) On application by a judgment creditor of a member or transferee, a court may enter a

1 charging order against the transferable interest of the judgment debtor for the unsatisfied amount
2 of the judgment. A charging order constitutes a lien on a judgment debtor's transferable interest
3 and requires the limited liability company to pay over to the person to which the charging order
4 was issued any distribution that would otherwise be paid to the judgment debtor.

5 (b) To the extent necessary to effectuate the collection of distributions pursuant to a
6 charging order in effect under subsection (a), the court may:

7 (1) appoint a receiver of the distributions subject to the charging order, with the
8 power to make all inquiries the judgment debtor might have made; and

9 (2) make all other orders that the circumstances of the case may require to give
10 effect to the charging order.

11 (c) Upon a showing that distributions under a charging order will not pay the judgment
12 debt within a reasonable time, the court may foreclose the lien and order the sale of the
13 transferable interest. The purchaser at the foreclosure sale obtains only the transferable interest,
14 does not thereby become a member, and is subject to Section 502.

15 (d) At any time before foreclosure, the member or transferee whose transferable interest
16 is subject to a charging order under subsection (a) may extinguish the charging order by
17 satisfying the judgment and filing a certified copy of the satisfaction with the court that issued
18 the charging order.

19 (e) At any time before foreclosure, a limited liability company or one or more members
20 whose transferable interests are not subject to the charging order may pay to the judgment
21 creditor the full amount due under the judgment and thereby succeed to the rights of the
22 judgment creditor, including the charging order.

1 (f) This [act] does not deprive any member or transferee of the benefit of any exemption
2 laws applicable to the member's or transferee's transferable interest.

3 (g) This section provides the exclusive remedy by which a person seeking to enforce a
4 judgment against a member or transferee may, in the capacity of judgment creditor, satisfy the
5 judgment out of the judgment debtor's transferable interest.

6 **Comment**

7 Charging order provisions appear in various forms in UPA, ULPA, RULPA, RUPA,
8 ULLCA, and ULPA (2001). This section builds on those acts, while: (i) modernizing the
9 language; (ii) making explicit certain points that have been at best implicit; and (iii) seeking to
10 delineate more precisely the types of extraordinary circumstances that would have to exist before
11 a court enforcing a charging order would be justified in interfering with an LLC's management
12 or activities.

13
14 This section balances the needs of a judgment creditor of a member or transferee with the
15 needs of the limited liability company and the members. The section achieves that balance by
16 allowing the judgment creditor to collect on the judgment through the transferable interest of the
17 judgment debtor while prohibiting interference in the management and activities of the limited
18 liability company.

19
20 Under this section, the judgment creditor of a member or transferee is entitled to a
21 charging order against the relevant transferable interest. While in effect, that order entitles the
22 judgment creditor to whatever distributions would otherwise be due to the member or transferee
23 whose interest is subject to the order. However, the judgment creditor has no say in the timing or
24 amount of those distributions. The charging order does not entitle the judgment creditor to
25 accelerate any distributions or to otherwise interfere with the management and activities of the
26 limited liability company.

27
28 **Subsection (a)** – The phrase “judgment debtor” encompasses both members and
29 transferees. As a matter of civil procedure and due process, an application for a charging order
30 must be served both on the limited liability company and the member or transferee whose
31 transferable interest is to be charged.

32
33 **Subsection (b)(1)** – The receiver contemplated here is not a receiver for the limited
34 liability company, but rather a receiver for the distributions. The principal advantage provided
35 by this paragraph is an expanded right to information. However, that right goes no further than
36 “the extent necessary to effectuate the collections of distributions pursuant to a charging order.”
37

1 **Subsection (b)(2)** – This paragraph must be understood in the context of the balance
2 described in the introduction to this section’s Comment. In particular, the court’s power to make
3 orders “that the circumstances may of the case may require” is limited to “giv[ing] effect to the
4 charging order.”
5

6 **Example:** A judgment creditor with a charging order believes that the limited liability
7 company should invest less of its surplus in operations, leaving more funds for distributions.
8 The creditor moves the court for an order directing the limited liability company to restrict
9 re-investment. Subsection (b)(2) does not authorize the court to grant the motion.
10

11 **Example:** A judgment creditor with a judgment for \$10,000 against a member obtains a
12 charging order against the member’s transferable interest. Having been properly served with
13 the order, the limited liability company nonetheless fails to comply and makes a \$3000
14 distribution to the partner. The court has the power to order the limited liability company to
15 pay \$3000 to the judgment creditor to “give effect to the charging order.”
16

17 Under subsection (b)(2), the court also has the power to decide whether a particular
18 payment is a distribution, because that decision determines whether the payment is part of a
19 transferable interest subject to a charging order. (To the extent a payment is not a distribution, it
20 is not part of the transferable interest and is not subject to subsection (g). The payment is
21 therefore subject to whatever other creditor remedies may apply.)
22

23 This Act has no specific rules for determining the fate or effect of a charging order when
24 the limited liability company undergoes a merger, conversion, or domestication under [Article]
25 10. In the proper circumstances, such an organic change might trigger an order under subsection
26 (b)(2).
27

28 **Subsection (c)** –The phrase “that distributions under the charging order will not pay the
29 judgment debt within a reasonable period of time” comes from case law. *See, e.g., Nigri v. Lotz*,
30 453 S.E.2d 780, 783 (Ga. Ct. App. 1995).
31

32 **Subsection (e)** – This Act to jettisons the confusing concept of redemption and
33 substitutes an approach that more closely parallels the modern, real-world possibility of the LLC
34 or its members buying the underlying judgment (and thereby dispensing with any interference
35 the judgment creditor might seek to inflict on the LLC). When possible, buying the judgment
36 remains superior to the mechanism provided by this subsection, because: (i) this subsection
37 requires full satisfaction of the underlying judgment, (ii) while the LLC or the other members
38 might be able to buy the judgment for less than face value. On the other hand, this subsection
39 operates without need for the judgment creditor’s consent, so it remains a valuable protection in
40 the event a judgment creditor seeks to do mischief to the LLC.
41

42 Whether an LLC’s decision to invoke this subsection is “ordinary course” or “outside the
43 ordinary course,” Section 407(b)(3) and (4) and (c)(3) and (4)(C), depends on the circumstances.
44 However, the involvement of this subsection does not by itself make the decision “outside the

1 ordinary course.”

2

3 **Subsection (g)** – This subsection does not override Article 9, which may provide
4 different remedies for a secured creditor acting in that capacity. This subsection is not intended
5 to prevent a court from effecting a “reverse pierce” where appropriate.

6

7 **SECTION 504. POWER OF PERSONAL REPRESENTATIVE OF DECEASED**

8 **MEMBER.** If a member dies, the deceased member’s personal representative or other legal

9 representative may exercise the rights of a transferee provided in Section 502(c) and, for the

10 purposes of settling the estate, the rights of a current member under Section 410.

11

Comment

12

13 **Source:** ULPA (2001) § 704.

1 [ARTICLE] 6

2 MEMBER'S DISSOCIATION

3
4 SECTION 601. MEMBER'S POWER TO DISSOCIATE; WRONGFUL
5 DISSOCIATION.

6 (a) A person has the power to dissociate as a member at any time, rightfully or
7 wrongfully, by express will under Section 602(1).

8 (b) A person's dissociation from a limited liability company is wrongful only if:

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

10 (2) it occurs before the termination of the limited liability company and:

11 (A) the person withdraws as a member by express will;

12 (B) the person is expelled as a member by judicial determination under
13 Section 602(5);

14 (C) the person is dissociated under Section 602(7)(A) by becoming a
15 debtor in bankruptcy; or

16 (D) in the case of a person that is not an individual, trust other than a
17 business trust, or estate, the person is expelled or otherwise dissociated as a member because it
18 willfully dissolved or terminated.

19 (c) A person that wrongfully dissociates as a member is liable to the limited liability
20 company and, subject to Section 901, to the other members for damages caused by the
21 dissociation. The liability is in addition to any other debt, obligation, or liability of the member
22 to the limited liability company or the other members.

1 **Comment**

2 **Source** – ULPA (2001) § 603, which is based on RUPA Section 602. ULLCA § 602 is
3 functionally identical in some respects but is not a good overall source, because that section
4 presupposes the term/at-will paradigm.
5

6 **SECTION 602. EVENTS CAUSING DISSOCIATION.** A person is dissociated as a
7 member from a limited liability company when:

8 (1) the company has notice of the person’s express will to withdraw as a member, except
9 that, if the person specified a withdrawal date later than the date the company had notice, on that
10 later date;

11 (2) an event stated in the operating agreement as causing the person’s dissociation occurs;

12 (3) the person is expelled as a member pursuant to the operating agreement;

13 (4) the person is expelled as a member by the unanimous consent of the other members if:

14 (A) it is unlawful to carry on the company’s activities with the person as a
15 member;

16 (B) there has been a transfer of all of the person’s transferable interest in the
17 limited liability company, other than:

18 (i) a transfer for security purposes; or

19 (ii) a charging order in effect under Section 503 which has not been
20 foreclosed;

21 (C) the person is a corporation and, within 90 days after the company notifies the
22 person that it will be expelled as a member because the person has filed a certificate of
23 dissolution or the equivalent, its charter has been revoked, or its right to conduct business has
24 been suspended by the jurisdiction of its incorporation, the certificate of dissolution has not been

1 revoked or its charter or right to conduct business has not been reinstated; or

2 (D) the person is a limited liability company or partnership that has been
3 dissolved and whose business is being wound up;

4 (5) on application by the company, the person is expelled as a member by judicial order
5 because the person:

6 (A) has engaged, or is engaging, in wrongful conduct that has adversely and
7 materially affected, or will adversely and materially affect, the company's activities;

8 (B) has willfully or persistently committed, or is willfully and persistently
9 committing, a material breach of the operating agreement or the person's duties or obligations
10 under Section 409; or

11 (C) has engaged in, or is engaging, in conduct relating to the company's activities
12 which makes it not reasonably practicable to carry on the activities with the person as a member;

13 (6) in the case of a person who is an individual:

14 (A) the person dies;

15 (B) in a member-managed limited liability company:

16 (i) a guardian or general conservator for the person is appointed; or

17 (ii) there is a judicial determination that the person has otherwise become
18 incapable of performing the person's duties as a member under [this act] or the operating
19 agreement;

20 (7) in a member-managed limited liability company, the person:

21 (A) became a debtor in bankruptcy;

22 (B) executed an assignment for the benefit of creditors;

1 (C) sought, consented to, or acquiesced in the appointment of a trustee, receiver,
2 or liquidator of the person or of all or substantially all of the person's property;

3 (8) in the case of a person that is a trust or is acting as a member by virtue of being a
4 trustee of a trust, the trust's entire transferable interest in the company is distributed, but not
5 solely by reason of the substitution of a successor trustee;

6 (9) in the case of a person that is an estate or is acting as a member by virtue of being a
7 personal representative of an estate, the estate's entire transferable interest in the company is
8 distributed, but not solely by reason of the substitution of a successor personal representative;

9 (10) in the case of a member that is not an individual, partnership, limited liability
10 company, corporation, trust, or estate, the termination of the member;

11 (11) the company participates in a merger or conversion under [Article] 10, if:

12 (A) the company is not the surviving or converted entity; or

13 (B) otherwise as a result of the merger or conversion, the person ceases to be a
14 member;

15 (12) the company's participation in a domestication under [Article] 10, if as a result of
16 the domestication the person ceases to be a member; or

17 (13) the company terminates.

18 **Comment**

19 **Source** – ULLCA § 601; RUPA Section 601; ULPA (2001) §§ 601 and 603.

20
21 **Paragraph (4)(B)** –Under this paragraph (unless the operating agreement provides
22 others), a member's transferee can protect itself from the vulnerability of "bare transferee" status
23 by obligating the member/transferor to retain a 1% interest and then to exercise its governance
24 rights (including the right to bring a derivative suit) to protect the transferee's interests.
25

- 1 LLC, any obligations of a non-manager member *viz a viz* proprietary information would be a
- 2 matter for the operating agreement, the obligation of good faith, or other law.)

1 [ARTICLE] 7

2 DISSOLUTION AND WINDING UP

3
4 SECTION 701. EVENTS CAUSING DISSOLUTION.

5 (a) A limited liability company is dissolved, and its business must be wound up, upon the
6 occurrence of any of the following:

7 (1) an event or circumstance that the operating agreement states causes
8 dissolution;

9 (2) the consent of all the members;

10 (3) the passage of 90 consecutive days during which the limited liability company
11 has no members;

12 (4) on application by a member, the entry by [appropriate court] of an order
13 dissolving the company on the grounds that:

14 (A) the conduct of all or substantially all of the company's activities is
15 unlawful; or

16 (B) it is not reasonably practicable to carry on the limited liability
17 company's activities in conformity with the certificate of organization and the operating
18 agreement; or

19 (5) on application by a member, the entry by [appropriate court] of an order
20 dissolving the company on the grounds that the managers or those members in control of the
21 company:

22 (A) have acted, are acting, or will act in a manner that is illegal or

1 fraudulent; or

2 (B) have acted or are acting in a manner that is oppressive and was, is, or
3 will be directly harmful to the applicant.

4 (b) In a proceeding brought under subsection (a)(5), the court may order a remedy other
5 than dissolution.

6 **Comment**

7
8 **Subsection (a)(3)** – This paragraph applies both to a shelf LLC and to an LLC that has
9 lost its last remaining member. The stated rule is subject to the operating agreement. However, as
10 explained in the Comment to Section 401, a shelf LLC has no power to alter the default rule
11 because a shelf LLC cannot have an operating agreement.

12
13 **Subsection(a)(4)** – The standard stated here is conventional, and this subsection (a)(4) is
14 non-waivable. Section 110(c)(7).

15
16 **Subsection (a)(5)** – ULLCA § 801(4)(v) contains a comparable provision, and, even
17 without aid of that provision, courts have begun to apply close corporation “oppression” doctrine
18 to LLCs. The reference to “those members in control of company” implies that such members
19 have a duty to avoid acting oppressively toward fellow members.

20
21 At its April, 2004 meeting, the Drafting Committee deleted language that would have
22 cabined somewhat the vague term “oppressive.” The deleted language provided that:

23
24 oppressive conduct has occurred only if the conduct complained of has directly
25 harmed the applicant and:

26 (1) constitutes a material, uncured breach of the operating agreement or of
27 the obligation of good faith and fair dealing stated in Section 409(d); or

28 (2) although not constituting a material, uncured breach under paragraph
29 (1), has substantially defeated an expectation of the applicant which is entitled to
30 protection because the expectation:

31 (A) is not contradicted by any term of the operating agreement nor
32 by the reasonable implication of any term of that agreement;

33 (B) was central to the applicant’s decision to become a member of
34 the limited liability company or for a substantial time has been centrally important
35 in the member’s continuing membership;

36 (C) was known to other members, which expressly or impliedly
37 acquiesced in it;

38 (D) is consistent with the reasonable expectations of all the
39 members; and

1 (E) is otherwise reasonable under the circumstances.

2
3 Subsection (a)(5) is non-waivable. See Section 110(c)(7).

4
5 **Subsection (b)** – In the close corporation context, many courts have reached this position
6 without express statutory authority, most often with regard to court-ordered buyouts of oppressed
7 shareholders. This subsection saves courts and litigants the trouble of re-inventing that wheel in
8 the LLC context. However, unlike, subsection (a)(4) and (5), subsection (b) can be overridden
9 by the operating agreement. Thus, the members may agree to a restrict or eliminate a court’s
10 power to craft a lesser remedy, even to the extent of confining the court (and themselves) to the
11 all-or-nothing remedy of dissolution.

12
13 **SECTION 702. WINDING UP.**

14 (a) A limited liability company continues after dissolution only for the purpose of
15 winding up its activities.

16 (b) In winding up its activities, a limited liability company:

17 (1) shall discharge the company’s debts, obligations, and liabilities, settle and
18 close the company’s activities, and marshal and distribute the assets of the company; and

19 (2) may:

20 (A) file a statement of dissolution stating the name of the company and
21 that the company is dissolved;

22 (B) preserve the company activities and property as a going concern for a
23 reasonable time;

24 (C) prosecute and defend actions and proceedings, whether civil, criminal,
25 or administrative;

26 (D) transfer the limited liability company’s property;

27 (E) settle disputes by mediation or arbitration;

28 (F) file a statement of termination stating the name of the company and

1 that the company is terminated; and

2 (G) perform other acts necessary or appropriate to the winding up.

3 (c) If a dissolved limited liability company has no members, the legal representative of
4 the last person to have been a member may wind up the activities of the company and has the
5 powers of a sole manager under Section 407(b). If the legal representative declines or fails to
6 wind up the company's activities, a person may be appointed to do so by the consent of
7 transferees owning a majority of the rights to receive distributions as transferees at the time the
8 consent is to be effective. A person appointed under this subsection:

9 (1) has the powers of a sole manager under Section 407(b); and

10 (2) shall promptly amend the limited liability company's certificate of
11 organization to:

12 (A) state that the company has no members;

13 (B) state that the person has been appointed pursuant to this subsection to
14 wind up the company; and

15 (C) provide the street and mailing address of the person appointed.

16 (d) The [appropriate court] may order judicial supervision of the winding up of a
17 dissolved limited liability company, including the appointment of a person to wind up the
18 company's activities:

19 (1) on application of a member, if the applicant establishes good cause;

20 (2) on the application of a transferee, if the company does not have any members,
21 the legal representative of the last person to have been a member declines or fails to wind up the
22 company's activities, and within a reasonable time following the dissolution no person has been

1 appointed pursuant to subsection (c); or

2 (3) in connection with a proceeding under Section 701(a)(4) or (5).

3 **Comment**

4
5 **Source** – ULPA (2001) § 803, which was based on RUPA Sections 802 and 803.

6
7 Because under this Act the power to bind a limited liability company to a third party is
8 primarily a matter of agency law, Section 301, Comment, this Act has no need of provisions
9 delineating the effect of dissolution on a member or manager’s power to bind.

10
11 **Subsection (b)(2)(A) and (F)** – For the constructive notice effect of a statement of
12 dissolution or termination, see Section 103(d)(2)(A) and (B).

13
14 **SECTION 703. KNOWN CLAIMS AGAINST DISSOLVED LIMITED**

15 **LIABILITY COMPANY.**

16 (a) Except as otherwise provided in subsection (d), a dissolved limited liability company
17 may dispose of the known claims against it by following the procedure described in subsection
18 (b).

19 (b) A dissolved limited liability company may in a record notify its known claimants of
20 the dissolution. The notice must:

21 (1) specify the information required to be included in a claim;

22 (2) provide a mailing address to which the claim is to be sent;

23 (3) state the deadline for receipt of the claim, which may not be less than 120 days
24 after the date the notice is received by the claimant; and

25 (4) state that the claim will be barred if not received by the deadline.

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

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

5 (d) This section does not apply to a claim based on an event occurring after the effective
6 date of dissolution or a liability that is contingent on that date.

7 **Comment**

8 **Source** – ULPA (2001) § 806, which was based on ULLCA § 807, which in turn was
9 based on MBCA § 14.06.
10

11 **SECTION 704. OTHER CLAIMS AGAINST DISSOLVED LIMITED LIABILITY**
12 **COMPANY.**

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

16 (b) The notice authorized by subsection (a) must:

17 (1) be published at least once in a newspaper of general circulation in the [county]
18 in which the dissolved limited liability company’s principal office is located or, if it has none in
19 this state, in the [county] in which company’s designated office is or was last located;

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

22 (3) state that a claim against the company is barred unless an action to enforce the
23 claim is commenced within five years after publication of the notice.

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

5 (1) a claimant that did not receive notice in a record under Section 703;

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

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

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

10 (1) against a dissolved limited liability company, to the extent of its undistributed
11 assets; and

12 (2) if assets of the company have been distributed after dissolution, against a
13 member or transferee to the extent of that person's proportionate share of the claim or of the
14 assets distributed to the member or transferee after dissolution, whichever is less, but a person's
15 total liability for all claims under this paragraph does not exceed the total amount of assets
16 distributed to the person after dissolution.

17 **Comment**

18
19 **Source** – ULPA (2001) § 807, which was based on ULLCA § 808, which in turn was
20 based on MBCA § 14.07.

21
22 **Subsection (d)(2)** – Liability under this paragraph extends to those who have received
23 distributions under a charging order. See Comment to 502(a) (explaining that the beneficiary of
24 a charging order is a transferee). Unlike Section 406(c) (recapture of improper interim
25 distributions), this paragraph contains no “knowledge” element.
26

27

1 **Source** – ULPA (2001) § 809, which was based on ULLCA §§ 809 and 810. See also
2 RMBCA §§ 14.20 and 14.21.
3

4 **SECTION 706. REINSTATEMENT FOLLOWING ADMINISTRATIVE**
5 **DISSOLUTION.**

6 (a) A limited liability company that has been administratively dissolved may apply to the
7 [Secretary of State] for reinstatement within two years after the effective date of dissolution. The
8 application must be delivered to the [Secretary of State] for filing and state:

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

11 (2) that the grounds for dissolution did not exist or have been eliminated; and

12 (3) that the company’s name satisfies the requirements of Section 108.

13 (b) If the [Secretary of State] determines that an application contains the information
14 required by subsection (a) and that the information is correct, the [Secretary of State] shall
15 prepare a declaration of reinstatement that states this determination, sign, and file the original of
16 the declaration of reinstatement and serve the limited liability company with a copy.

17 (c) When reinstatement becomes effective, it relates back to and takes effect as of the
18 effective date of the administrative dissolution and the limited liability company may resume its
19 activities as if the administrative dissolution had never occurred.

20 **Comment**

21
22 **Source** – ULPA (2001) § 810, which was based on ULLCA § 811. See also RMBCA
23 Section 14.22.
24

1 **SECTION 707. APPEAL FROM REJECTION OF REINSTATEMENT.**

2 (a) If the [Secretary of State] rejects a limited liability company’s application for
3 reinstatement following administrative dissolution, the [Secretary of State] shall prepare, sign,
4 and file a notice that explains the reason or reasons for rejection and serve the company with a
5 copy of the notice.

6 (b) Within 30 days after service of a notice of rejection, the limited liability company
7 may appeal from the rejection of reinstatement by petitioning the [appropriate court] to set aside
8 the dissolution. The petition must be served on the [Secretary of State] and contain a copy of the
9 [Secretary of State’s] declaration of dissolution, the company’s application for reinstatement, and
10 the [Secretary of State’s] notice of rejection.

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

13 **Comment**

14 **Source** – ULPA (2001) § 811, which was based on ULLCA § 812.

15
16 This section uses “rejection” rather than “denial” (the word used by both ULPA (2001)
17 and ULLCA). The change is to avoid confusion with a “statement of denial” under Section 302.
18

19 **SECTION 708. DISTRIBUTION OF ASSETS IN WINDING UP LIMITED**
20 **LIABILITY COMPANY’S BUSINESS.**

21 (a) In winding up a limited liability company’s business, the assets of the company must
22 be applied to discharge its obligations to creditors, including members that are creditors.

23 (b) Any surplus remaining after a limited liability company complies with subsection (a)
24 must be distributed, subject to any charging order in effect under Section 503:

1 [ARTICLE] 8

2 FOREIGN LIMITED LIABILITY COMPANIES

3
4 SECTION 801. GOVERNING LAW.

5 (a) The laws of the state or other jurisdiction under which a foreign limited liability
6 company is formed govern:

7 (1) the internal affairs of the company; and

8 (2) the liability of a member as member and a manager as manager.

9 (b) A foreign limited liability company may not be denied a certificate of authority by
10 reason of any difference between the laws of the jurisdiction under which the company is formed
11 and the laws of this state.

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

15 **Comment**

16 **Subsection (a)** -- This Section parallels the formulation stated in Section 106 for a
17 domestic limited liability company.
18

19 SECTION 802. APPLICATION FOR CERTIFICATE OF AUTHORITY.

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

23 (1) the name of the company and, if the name does not comply with Section 108,

1 an alternate name adopted pursuant to Section 805(a);

2 (2) the name of the state or other jurisdiction under whose law the company is
3 formed;

4 (3) the street and mailing address of the company's principal office and, if the
5 laws of the jurisdiction under which the company is formed require the foreign company to
6 maintain an office in that jurisdiction, the street and mailing address of the required office; and

7 (4) the name and street and mailing address of the company's initial agent for
8 service of process in this state.

9 (b) A foreign limited liability company shall deliver with the completed application a
10 certificate of existence or a record of similar import signed by the [Secretary of State] or other
11 official having custody of the company's publicly filed records in the state or other jurisdiction
12 under whose law the company is formed.

13 **Comment**

14 **Source** – ULPA (2001) § 902, which was based on ULLCA § 1002.
15

16 **SECTION 803. ACTIVITIES NOT CONSTITUTING TRANSACTING**
17 **BUSINESS.**

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

20 (1) maintaining, defending, and settling an action or proceeding;

21 (2) carrying on any activity concerning its internal affairs, including holding
22 meetings of its members or managers;

23 (3) maintaining accounts in financial institutions;

1 (4) maintaining offices or agencies for the transfer, exchange, and registration of
2 the company's own securities or maintaining trustees or depositories with respect to those
3 securities;

4 (5) selling through independent contractors;

5 (6) soliciting or obtaining orders, whether by mail or electronic means or through
6 employees or agents or otherwise, if the orders require acceptance outside this state before they
7 become contracts;

8 (7) creating or acquiring indebtedness, mortgages, or security interests in real or
9 personal property;

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

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

14 (10) transacting business in interstate commerce.

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

18 (c) This section does not apply in determining the contacts or activities that may subject a
19 foreign limited liability company to service of process, taxation, or regulation under law of this
20 state other than this [act].

21 **Comment**

22 **Source** – ULPA (2001) § 903, which was based on ULLCA § 1003.
23

1 **SECTION 804. FILING OF CERTIFICATE OF AUTHORITY.** Unless the
2 [Secretary of State] determines that an application for a certificate of authority does not comply
3 with the filing requirements of this [act], the [Secretary of State], upon payment of all filing fees,
4 shall file the application of a foreign limited liability company, prepare, sign, and file a
5 certificate of authority to transact business in this state, and send a copy of the filed certificate,
6 together with a receipt for the fees, to the company or its representative.

7 **Comment**

8 **Source** – ULPA (2001) § 904, which was based on ULLCA § 1004 and RULPA § 903.
9

10 **SECTION 805. NONCOMPLYING NAME OF FOREIGN LIMITED LIABILITY**
11 **COMPANY.**

12 (a) A foreign limited liability company whose name does not comply with Section 108
13 may not obtain a certificate of authority until it adopts, for the purpose of transacting business in
14 this state, an alternate name that complies with Section 108. A foreign limited liability company
15 that adopts an alternate name under this subsection and then obtains a certificate of authority
16 with the alternate name need not comply with [fictitious or assumed name statute]. After
17 obtaining a certificate of authority with an alternate name, a foreign limited liability company
18 shall transact business in this state under the alternate name unless the company is authorized
19 under [fictitious name statute] to transact business in this state under another name.

20 (b) If a foreign limited liability company authorized to transact business in this state
21 changes its name to one that does not comply with Section 108, it may not thereafter transact
22 business in this state until it complies with subsection (a) and obtains an amended certificate of
23 authority.

1 **Comment**

2 **Source** – ULPA (2001) § 905, which was based on ULLCA § 1005.
3

4 **SECTION 806. REVOCATION OF CERTIFICATE OF AUTHORITY.**

5 (a) A certificate of authority of a foreign limited liability company to transact business in
6 this state may be revoked by the [Secretary of State] in the manner provided in subsections (b)
7 and (c) if the company does not:

8 (1) pay, within 60 days after the due date, any fee, tax, or penalty due under this
9 [act] or other law to the [Secretary of State];

10 (2) deliver, within 60 days after the due date, its annual report required under
11 Section 209;

12 (3) appoint and maintain an agent for service of process as required by Section
13 113(b); or

14 (4) deliver for filing a statement of a change under Section 114 within 30 days
15 after a change has occurred in the name or address of the agent.

16 (b) In order to revoke a certificate of authority of a foreign limited liability company, the
17 [Secretary of State] shall prepare, sign, and file a notice of revocation and send a copy to the
18 company’s agent for service of process in this state, or if the company does not appoint and
19 maintain a proper agent in this state, to the company’s designated office. The notice must state:

20 (1) the revocation’s effective date, which must be at least 60 days after the date
21 the [Secretary of State] sends the copy; and

22 (2) the grounds for revocation under subsection (a).

23 (c) The authority of a foreign limited liability company to transact business in this state

1 ceases on the effective date of the notice of revocation unless before that date the company cures
2 each ground for revocation stated in the notice. If the company cures each ground, the [Secretary
3 of State] shall so indicate on the notice filed under subsection (b).

4 **Comment**

5 **Source** – ULPA (2001) § 906, which was based on ULLCA § 1006.
6

7 **SECTION 807. CANCELLATION OF CERTIFICATE OF AUTHORITY.** To
8 cancel its certificate of authority to transact business in this state, a foreign limited liability
9 company must deliver to the [Secretary of State] for filing a notice of cancellation. The
10 certificate is canceled when the notice becomes effective.

11 **SECTION 808. EFFECT OF FAILURE TO HAVE CERTIFICATE OF**
12 **AUTHORITY.**

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

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

19 (c) A member or manager of a foreign limited liability company is not liable for the
20 debts, obligations, or liabilities of the foreign limited liability company solely because the
21 company transacted business in this state without a certificate of authority.

22 (d) If a foreign limited liability company transacts business in this state without a
23 certificate of authority or cancels its certificate of authority, it appoints the [Secretary of State] as

1 its agent for service of process for rights of action arising out of the transaction of business in
2 this state.

3 **Comment**

4 **Source** – ULPA (2001) § 907, which was based on RULPA § 907(d) and ULLCA §
5 1008.
6

7 **SECTION 809. ACTION BY [ATTORNEY GENERAL].** The [Attorney General]
8 may maintain an action to restrain a foreign limited liability company from transacting business
9 in this state in violation of this [article].

10 **Comment**

11 **Source** – ULPA (2001) § 908, which was based on RULPA § 908 and ULLCA § 1009.

1 [ARTICLE] 9

2 ACTIONS BY MEMBERS

3
4 SECTION 901. DIRECT ACTION BY MEMBER.

5 (a) Subject to subsection (b), a member may maintain a direct action against another
6 member, a manager, or the limited liability company to enforce the member’s rights and
7 otherwise protect the member’s interests, including rights and interests under the operating
8 agreement or this [act] or arising independently of the membership relationship.

9 (b) A member maintaining a direct action under this section must plead and prove an
10 actual or threatened injury that is not solely the result of an injury suffered or threatened to be
11 suffered by the limited liability company.

12 Comment

13 Subsection (a) – Source: ULPA (2001) § 1001(a), which was based on RUPA Section
14 405(b). The subsection has been somewhat re-styled from the ULPA version, and the phrase
15 “for legal or equitable relief” has been deleted as unnecessary. ULPA’s reference to “with or
16 without an accounting” has been deleted because the reference: (i) was to the partnership remedy
17 of accounting, which reflected the aggregate nature of a partnership and is inapposite for an
18 entity such as an LLC; and (ii) generated some confusion with the equitable claim for an
19 accounting (in the nature of a constructive trust). The “entity-analog” to the partnership-as-
20 aggregate notion of an accounting is the distinction between a direct and derivative claim.

21
22 Subsection (b) – Source: ULPA (2001) § 1001(b). The Comment to that subsection
23 explains:

24
25 In ordinary contractual situations it is axiomatic that each party to a contract has
26 standing to sue for breach of that contract. Within a limited liability company,
27 however, different circumstances may exist. A partner does not have a direct
28 claim against another partner merely because the other partner has breached the
29 operating agreement. Likewise a partner’s violation of this Act does not
30 automatically create a direct claim for every other partner. To have standing in
31 his, her, or its own right, a partner plaintiff must be able to show a harm that
32 occurs independently of the harm caused or threatened to be caused to the limited

1 partnership.
2

3 **SECTION 902. DERIVATIVE ACTION.** A member may maintain a derivative action
4 to enforce a right of a limited liability company if:

5 (1) the member first makes a demand on the other members in a member-managed
6 limited liability company, or the managers of a manager-managed limited liability company,
7 requesting that they cause the company to bring an action to enforce the right, and the managers
8 or other members do not bring the action within a reasonable time; or

9 (2) a demand under paragraph (1) would be futile.

10 **Comment**

11 **Source** – ULPA (2001) § 1002, which was a re-styled version RULPA § 1001.
12

13 **SECTION 903. PROPER PLAINTIFF.**

14 (a) Except as provided in subsection (b), a derivative action may be maintained only by a
15 person that is a member at the time the action is commenced and remains a member while the
16 action continues.

17 (b) If the sole plaintiff in a derivative action dies while the action is pending, the court
18 may permit another member of the limited liability company to be substituted as plaintiff.

19 **Comment**

20 This section abandons the traditional “contemporaneous ownership” rule, on the theory
21 that the protections of that rule are unnecessary given the closely-held nature of most limited
22 liability companies and the built-in, statutory restrictions on persons becoming members.
23

24 **SECTION 904. PLEADING.** In a derivative action, the complaint must state with
25 particularity:

1 (1) the date and content of plaintiff’s demand and the response to the demand by the
2 managers or other members; or

3 (2) the reasons the demand should be excused as futile.

4 **Comment**

5 **Source** – ULPA (2001) § 1004, which was a re-styled version RULPA § 1003.
6

7 **SECTION 905. SPECIAL LITIGATION COMMITTEE.**

8 (a) If a limited liability company is named as or made a party in a derivative proceeding,
9 the company may appoint a special litigation committee to investigate claims asserted in the
10 proceeding and determine whether pursuing the action is in the best interests of the company. If
11 the company appoints a special litigation committee, on motion by the committee made in the
12 name of the company, the court shall stay discovery for the time reasonably necessary to permit
13 the committee to make its investigation. This subsection does not prevent the court from
14 enforcing a person’s rights to information under Section 410 or, for good cause shown, granting
15 extraordinary relief in the form of a temporary restraining order or preliminary injunction.

16 (b) A special litigation committee may be composed of one or more disinterested and
17 independent persons, who may, but need not be, members.

18 (c) A special litigation committee may be appointed:

19 (1) in a member-managed limited liability company, by:

20 (A) the consent of a majority of those members that are not named as
21 defendants or plaintiffs in the proceeding; and

22 (B) if there are none, by a majority of members that are not named as
23 plaintiffs; or

1 (2) in a manager-managed limited liability company, by:

2 (A) a majority of those managers that are not named as defendants or
3 plaintiffs in the proceeding; and

4 (B) if there are none, by a majority of the managers that are not named as
5 plaintiffs in the proceeding.

6 (c) After appropriate investigation, a special litigation committee may determine that it is
7 in the best interests of the limited liability company that the proceeding:

8 (1) continue under the control of the plaintiff;

9 (2) continue under the control of the committee;

10 (3) be settled on terms approved by the committee; or

11 (4) be dismissed.

12 (d) After making a determination under subsection (d), a special litigation committee
13 shall file with the court a statement of its determination and its report supporting its
14 determination, giving notice to the plaintiff. The court shall determine whether the members of
15 the committee were disinterested and independent and whether the committee conducted its
16 investigation and made its recommendation in good faith, independently and with reasonable
17 care, with the committee having the burden of proof. If the court finds that the members of the
18 committee were disinterested and independent and that the committee acted in good faith,
19 independently and with reasonable care, the court shall adopt and enforce the determination of
20 the committee. Otherwise, the court shall dissolve the stay of discovery entered under subsection
21 (a) and allow the action to proceed under the direction of the plaintiff.

22 **Comment**

1 [ARTICLE] 10

2 MERGER, CONVERSION, AND DOMESTICATION

3
4 SECTION 1001. DEFINITIONS. In this [article]:

5 (1) “Constituent limited liability company” means a constituent organization that is a
6 limited liability company.

7 (2) “Constituent organization” means an organization that is party to a merger.

8 (3) “Converted organization” means the organization into which a converting
9 organization converts pursuant to Sections 1006 through 1009.

10 (4) “Converting limited liability company” means a converting organization that is a
11 limited liability company.

12 (5) “Converting organization” means an organization that converts into another
13 organization pursuant to Section 1006.

14 (6) “Domesticated limited liability company” means the limited liability company or
15 foreign limited liability company into which a domesticating limited liability company
16 domesticates pursuant to Sections 1010 through 1013.

17 (7) “Domesticating limited liability company” means the limited liability company or
18 foreign limited liability company that domesticates into a domesticated limited liability company
19 pursuant to Sections 1010 through 1013.

20 (8) “Governing statute” of an organization means the statute that governs the
21 organization’s internal affairs.

22 (9) “Organization” means a general partnership, including a limited liability partnership;

1 limited partnership, including a limited liability limited partnership; limited liability company;
2 business trust; corporation; or any other person having a governing statute. The term includes a
3 domestic or foreign organization whether or not organized for profit.

4 (10) “Organizational documents” means:

5 (A) for a domestic or foreign general partnership, its partnership agreement;

6 (B) for a limited partnership or foreign limited partnership, its certificate of
7 limited partnership and partnership agreement;

8 (C) for a domestic or foreign limited liability company, its articles of organization
9 and operating agreement, or comparable records as provided in its governing statute;

10 (D) for a business trust, its agreement of trust and declaration of trust;

11 (E) for a domestic or foreign corporation for profit, its articles of incorporation,
12 bylaws, and other agreements among its shareholders which are authorized by its governing
13 statute, or comparable records as provided in its governing statute; and

14 (F) for any other organization, the basic records that create the organization and
15 determine its internal governance and the relations among the persons that own it, have an
16 interest in it, or are members of it.

17 (11) “Personal liability” means liability for a debt, obligation, or liability of an
18 organization which is imposed on a person that co-owns, has an interest in, or is a member of the
19 organization:

20 (A) by the organization’s governing statute solely by reason of the person co-
21 owning, having an interest in, or being a member of the organization; or

22 (B) by the organization’s organizational documents under a provision of the

1 organization’s governing statute authorizing those documents to make one or more specified
2 persons liable for all or specified debts, obligations, or liabilities of the organization solely by
3 reason of the person or persons co-owning, having an interest in, or being a member of the
4 organization.

5 (12) “Surviving organization” means an organization into which one or more other
6 organizations are merged. A surviving organization may preexist the merger or be created by the
7 merger.

8 **Comment**
9

10 This article is based on Article 11 of ULPA (2001) and differs principally in treating
11 domestications as a separate type of organic transaction rather than as a subset of conversions.
12

13 **SECTION 1002. MERGER.**

14 (a) A limited liability company may merge with one or more other constituent
15 organizations pursuant to this section, Sections 1003 through 1005, and a plan of merger, if:

16 (1) the governing statute of each the other organizations authorizes the merger;

17 (2) the merger is not prohibited by the law of a jurisdiction that enacted any of
18 those governing statutes; and

19 (3) each of the other organizations complies with its governing statute in effecting
20 the merger.

21 (b) A plan of merger must be in a record and must include:

22 (1) the name and form of each constituent organization;

23 (2) the name and form of the surviving organization and, if the surviving
24 organization is to be created by the merger, a statement to that effect;

1 (3) the terms and conditions of the merger, including the manner and basis for
2 converting the interests in each constituent organization into any combination of money, interests
3 in the surviving organization, and other consideration;

4 (4) if the surviving organization is to be created by the merger, the surviving
5 organization's organizational documents that are proposed to be in a record; and

6 (5) if the surviving organization is not to be created by the merger, any
7 amendments to be made by the merger to the surviving organization's organizational documents
8 that are, or are proposed to be, in a record.

9 **SECTION 1003. ACTION ON PLAN OF MERGER BY CONSTITUENT**
10 **LIMITED LIABILITY COMPANY.**

11 (a) Subject to Section 1014, a plan of merger must be consented to by all the members of
12 a constituent limited liability company.

13 (b) Subject to Section 1014 and any contractual rights, after a merger is approved, and at
14 any time before a filing is made under Section 1004, a constituent limited liability company may
15 amend the plan or abandon the planned merger:

16 (1) as provided in the plan; or

17 (2) except as otherwise prohibited in the plan, with the same consent as was
18 required to approve the plan.

19 **SECTION 1004. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.**

20 (a) After each constituent organization has approved a merger, articles of merger must be
21 signed on behalf of:

22 (1) each preexisting constituent limited liability company, as provided in Section

1 203(a)(3); and

2 (2) each other preexisting constituent organization, as provided in its governing
3 statute.

4 (b) The articles of merger must include:

5 (1) the name and form of each constituent organization and the jurisdiction of its
6 governing statute;

7 (2) the name and form of the surviving organization, the jurisdiction of its
8 governing statute, and, if the surviving organization is created by the merger, a statement to that
9 effect;

10 (3) the date the merger is effective under the governing statute of the surviving
11 organization;

12 (4) if the surviving organization is to be created by the merger:

13 (A) if it will be a limited liability company, the company's certificate of
14 organization; or

15 (B) if it will be an organization other than a limited liability company, the
16 organizational document that creates the organization that are in a public record;

17 (5) if the surviving organization preexists the merger, any amendments provided
18 for in the plan of merger for the organizational document that created the organization that are in
19 a public record;

20 (6) a statement as to each constituent organization that the merger was approved
21 as required by the organization's governing statute;

22 (7) if the surviving organization is a foreign organization not authorized to

1 transact business in this state, the street and mailing address of an office which the [Secretary of
2 State] may use for the purposes of Section 1005(b); and

3 (8) any additional information required by the governing statute of any constituent
4 organization.

5 (c) Each constituent limited liability company shall deliver the articles of merger for
6 filing in the [office of the Secretary of State].

7 (d) A merger becomes effective under this [article]:

8 (1) if the surviving organization is a limited liability company, upon the later of:

9 (A) compliance with subsection (c); or

10 (B) subject to Section 201(c), as specified in the articles of merger; or

11 (2) if the surviving organization is not a limited liability company, as provided by
12 the governing statute of the surviving organization.

13 **SECTION 1005. EFFECT OF MERGER.**

14 (a) When a merger becomes effective:

15 (1) the surviving organization continues or comes into existence;

16 (2) each constituent organization that merges into the surviving organization
17 ceases to exist as a separate entity;

18 (3) all property owned by each constituent organization that ceases to exist vests
19 in the surviving organization;

20 (4) all debts, obligations, and liabilities of each constituent organization that
21 ceases to exist continue as obligations of the surviving organization;

22 (5) an action or proceeding pending by or against any constituent organization

1 that ceases to exist may be continued as if the merger had not occurred;

2 (6) except as prohibited by other law, all of the rights, privileges, immunities,
3 powers, and purposes of each constituent organization that ceases to exist vest in the surviving
4 organization;

5 (7) except as otherwise provided in the plan of merger, the terms and conditions
6 of the plan of merger take effect; and

7 (8) except as otherwise agreed, if a constituent limited liability company ceases to
8 exist, the merger does not dissolve the limited liability company for the purposes of [Article] 7;

9 (9) if the surviving organization is created by the merger:

10 (A) if it is a limited liability company, the articles of organization becomes
11 effective; or

12 (B) if it is an organization other than a limited liability company, the
13 organizational document that creates the organization becomes effective; and

14 (10) if the surviving organization preexists the merger, any amendments provided
15 for in the articles of merger for the organizational document that created the organization become
16 effective.

17 (b) A surviving organization that is a foreign organization consents to the jurisdiction of
18 the courts of this state to enforce any debt, obligation, or liability owed by a constituent
19 organization, if before the merger the constituent organization was subject to suit in this state on
20 the debt, obligation, or liability. A surviving organization that is a foreign organization and not
21 authorized to transact business in this state appoints the [Secretary of State] as its agent for
22 service of process for the purposes of enforcing an debt, obligation, or liability under this

1 subsection. Service on the [Secretary of State] under this subsection must be made in the same
2 manner and has the same consequences as in Section 116(c) and (d).

3 **SECTION 1006. CONVERSION.**

4 (a) An organization other than a limited liability company or a foreign limited liability
5 company may convert to a limited liability company, and a limited liability company may
6 convert to another organization other than a foreign limited liability company pursuant to this
7 section, Sections 1007 through 1009, and a plan of conversion, if:

8 (1) the other organization’s governing statute authorizes the conversion;

9 (2) the conversion is not prohibited by the law of the jurisdiction that enacted the
10 governing statute; and

11 (3) the other organization complies with its governing statute in effecting the
12 conversion.

13 (b) A plan of conversion must be in a record and must include:

14 (1) the name and form of the organization before conversion;

15 (2) the name and form of the organization after conversion;

16 (3) the terms and conditions of the conversion, including the manner and basis for
17 converting interests in the converting organization into any combination of money, interests in
18 the converted organization, and other consideration; and

19 (4) the organizational documents of the converted organization that are, or are
20 proposed to be, in a record.

21

22

1 **SECTION 1007. ACTION ON PLAN OF CONVERSION BY CONVERTING**
2 **LIMITED LIABILITY COMPANY.**

3 (a) Subject to Section 1014, a plan of conversion must be consented to by all the
4 members of a converting limited liability company.

5 (b) Subject to Section 1014 and any contractual rights, after a conversion is approved,
6 and at any time before a filing is made under Section 1008, a converting limited liability
7 company may amend the plan or abandon the planned conversion:

8 (1) as provided in the plan; or

9 (2) except as otherwise prohibited in the plan, by the same consent as was
10 required to approve the plan.

11 **SECTION 1008. FILINGS REQUIRED FOR CONVERSION; EFFECTIVE**
12 **DATE.**

13 (a) After a plan of conversion is approved:

14 (1) a converting limited liability company shall deliver to the [Secretary of State]
15 for filing articles of conversion, which must be signed as provided in Section 203(a)(3) and must
16 include;

17 (A) a statement that the limited liability company has been converted into
18 another organization;

19 (B) the name and form of the organization and the jurisdiction of its
20 governing statute;

21 (C) the date the conversion is effective under the governing statute of the
22 converted organization;

1 (D) a statement that the conversion was approved as required by this [act];

2 (E) a statement that the conversion was approved as required by the
3 governing statute of the converted organization; and

4 (F) if the converted organization is a foreign organization not authorized
5 to transact business in this state, the street and mailing address of an office which the [Secretary
6 of State] may use for the purposes of Section 1009(c); and

7 (2) if the converting organization is not a converting limited liability company,
8 the converting organization shall deliver to the [Secretary of State] for filing articles of
9 organization, which must include, in addition to the information required by Section 201(b):

10 (A) a statement that the company was converted from another
11 organization;

12 (B) the name and form of the organization and the jurisdiction of its
13 governing statute; and

14 (C) a statement that the conversion was approved in a manner that
15 complied with the organization's governing statute.

16 (b) A conversion becomes effective:

17 (1) if the converted organization is a limited liability company, when the articles
18 of organization take effect; and

19 (2) if the converted organization is not a limited liability company, as provided by
20 the governing statute of the converted organization.

21 **SECTION 1009. EFFECT OF CONVERSION.**

22 (a) An organization that has been converted pursuant to this [article] is for all purposes

1 the same entity that existed before the conversion.

2 (b) When a conversion takes effect:

3 (1) all property owned by the converting organization remains vested in the
4 converted organization;

5 (2) all debts, obligations, and liabilities of the converting organization continue as
6 obligations of the converted organization;

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

9 (4) except as prohibited by other law, all of the rights, privileges, immunities,
10 powers, and purposes of the converting organization remain vested in the converted
11 organization;

12 (5) except as otherwise provided in the plan of conversion, the terms and
13 conditions of the plan of conversion take effect; and

14 (6) except as otherwise agreed, the conversion does not dissolve a converting
15 limited liability company for the purposes of [Article] 7.

16 (c) A converted organization that is a foreign organization consents to the jurisdiction of
17 the courts of this state to enforce any obligation owed by the converting limited liability
18 company, if before the conversion the converting limited liability company was subject to suit in
19 this state on the debt, obligation, or liability. A converted organization that is a foreign
20 organization and not authorized to transact business in this state appoints the [Secretary of State]
21 as its agent for service of process for purposes of enforcing an debt, obligation, or liability under
22 this subsection. Service on the [Secretary of State] under this subsection must be made in the

1 same manner and has the same consequences as in Section 116(c) and (d).

2 **SECTION 1010. DOMESTICATION.**

3 (a) A foreign limited liability company may become a domestic limited liability
4 company, and a domestic limited liability company may become a foreign limited liability
5 company pursuant to this section, Sections 1011 through 1013, and a plan of domestication, if:

6 (1) the foreign limited liability company's governing statute authorizes the
7 domestication;

8 (2) the domestication is not prohibited by the law of the jurisdiction that enacted
9 the governing statute; and

10 (3) the foreign limited liability company complies with its governing statute in
11 effecting the domestication.

12 (b) A plan of domestication must be in a record and must include:

13 (1) the name of the domesticating limited liability company before domestication
14 and the jurisdiction of its governing statute;

15 (2) the name of the domesticated limited liability company after domestication
16 and the jurisdiction of its governing statute;

17 (3) the terms and conditions of the domestication, including the manner and basis
18 for converting interests in the domesticating limited liability company or foreign limited liability
19 company into any combination of money, interests in the domesticated limited liability company,
20 and other consideration; and

21 (4) the organizational documents of the domesticated limited liability company
22 that are, or are proposed to be, in a record.

1 **SECTION 1011. ACTION ON PLAN OF DOMESTICATION BY**
2 **DOMESTICATING LIMITED LIABILITY COMPANY.**

3 (a) Subject to Section 1014, a plan of domestication must be consented to:

4 (1) by all the members of a domesticating limited liability company that is a
5 limited liability company; and

6 (2) as provided in the governing statute of a domesticating limited liability
7 company that is a foreign limited liability company.

8 (b) Subject to any contractual rights, after a domestication is approved, and at any time
9 before a filing is made under Section 1012, a domesticating limited liability company that is a
10 limited liability company may amend the plan or abandon the planned domestication:

11 (1) as provided in the plan; or

12 (2) except as otherwise prohibited in the plan, by the same consent as was
13 required to approve the plan.

14 **SECTION 1012. FILINGS REQUIRED FOR DOMESTICATION; EFFECTIVE**
15 **DATE.**

16 (a) After a plan of domestication is approved, a domesticating limited liability company
17 shall deliver to the [Secretary of State] for filing articles of domestication, which must include:

18 (1) a statement that the company has been domesticated from or into another
19 jurisdiction;

20 (2) the name of the domesticating company and the jurisdiction of its governing
21 statute;

22 (3) the name of the domesticated company and the jurisdiction of its governing

1 statute;

2 (4) the date the domestication is effective under the governing statute of the
3 domesticated company;

4 (5) a statement that the domestication was approved as required by this [act];

5 (6) a statement that the domestication was approved as required by the governing
6 statute of the other jurisdiction; and

7 (7) if the domesticated is a foreign limited liability company not authorized to
8 transact business in this state, the street and mailing address of an office which the [Secretary of
9 State] may use for the purposes of Section 1013(c).

10 (b) A domestication becomes effective:

11 (1) when the certificate of organization takes effect, if the domesticated company
12 is a limited liability company; and

13 (2) according to the governing statute of the domesticated company, if the
14 domesticated is a foreign limited liability company.

15 **SECTION 1013. EFFECT OF DOMESTICATION.**

16 (a) A domesticated limited liability company that has been domesticated pursuant to this
17 [article] is for all purposes the same domesticating limited liability company that existed before
18 the domestication.

19 (b) When a domestication takes effect:

20 (1) all property owned by the domesticating limited liability company remains
21 vested in the domesticated limited liability company;

22 (2) all debts, obligations, and liabilities of the domesticating limited liability

1 company continue as obligations of the domesticated limited liability company;

2 (3) an action or proceeding pending by or against the domesticating limited
3 liability company may be continued as if the domestication had not occurred;

4 (4) except as prohibited by other law, all of the rights, privileges, immunities,
5 powers, and purposes of the domesticating limited liability company remain vested in the
6 domesticated limited liability company;

7 (5) except as otherwise provided in the plan of domestication, the terms and
8 conditions of the plan of domestication take effect; and

9 (6) except as otherwise agreed, the domestication does not dissolve a
10 domesticating limited liability company for the purposes of [Article] 7.

11 (c) A domesticated limited liability company that is a foreign limited liability company
12 consents to the jurisdiction of the courts of this state to enforce any debt, obligation, or liability
13 owed by the domesticating limited liability company, if before the domestication the
14 domesticating limited liability company was subject to suit in this state on the debt, obligation, or
15 liability. A domesticated limited liability company that is a foreign limited liability company
16 and not authorized to transact business in this state appoints the [Secretary of State] as its agent
17 for service of process for purposes of enforcing an debt, obligation, or liability under this
18 subsection. Service on the [Secretary of State] under this subsection must be made in the same
19 manner and has the same consequences as in Section 116(c) and (d).

20 (d) If a limited liability company has adopted and approved a Section 1010 plan of
21 domestication providing for the company to be domesticated in a foreign jurisdiction, a
22 certificate of organization surrender must be delivered to the [Secretary of State] for filing setting

1 forth:

2 (1) the name of the limited liability company;

3 (2) a statement that the certificate of organization surrender is being filed in
4 connection with the domestication of the limited liability company in a foreign jurisdiction;

5 (3) a statement the domestication was duly adopted and approved; and

6 (4) the jurisdiction of formation of the domesticated limited liability company.

7 **SECTION 1014. RESTRICTIONS ON APPROVAL OF MERGERS,**
8 **CONVERSIONS, AND DOMESTICATIONS.**

9 (a) If a member of a constituent, converting, or domesticating limited liability company
10 will have personal liability with respect to a surviving, converted or domesticated organization,
11 approval and amendment of a plan of merger, conversion, or domestication are ineffective
12 without the consent of the member, unless:

13 (1) the company's operating agreement provides for the approval of the merger,
14 conversion or domestication with the consent of fewer than all the members; and

15 (2) the member has consented to the provision of the operating agreement.

16 (b) A member does not give the consent required by subsection (a) merely by consenting
17 to a provision of the operating agreement which permits the operating agreement to be amended
18 with the consent of fewer than all the members.

19 **SECTION 1015. [ARTICLE] NOT EXCLUSIVE.** This [article] does not preclude an
20 entity from being merged, converted or domesticated under other law.

1 [ARTICLE] 11

2 MISCELLANEOUS PROVISIONS

3
4 **SECTION 1101. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
5 applying and construing this uniform act, consideration must be given to the need to promote
6 uniformity of the law with respect to its subject matter among states that enact it.

7 **SECTION 1102. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**
8 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal
9 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but
10 does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
11 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
12 U.S.C. Section 7003(b).

13 **SECTION 1103. SAVINGS CLAUSE.** This [act] does not affect an action
14 commenced, proceeding brought, or right accrued before this [act] takes effect.

15 **SECTION 1104. APPLICATION TO EXISTING RELATIONSHIPS.**

16 (a) Before [all-inclusive date], this [act] governs only:

17 (1) a limited liability company formed on or after [the effective date of this [act]];

18 and

19 (2) except as otherwise provided in subsection (c), a limited liability company
20 formed before [the effective date of this [act]] which elects, in the manner provided in its
21 operating agreement or by law for amending the operating agreement, to be subject to this [act].

22 (b) Except as otherwise provided in subsection (c), on and after [all-inclusive date] this

1 [act] governs all limited liability companies.

2 (c) For the purposes applying Section 102(10) to a limited liability company formed
3 before [the effective date of this [act]], and subject to Section 112(d), language in the limited
4 liability company’s articles of organization designating the company’s management structure
5 will operate as if that language were in the operating agreement.

6 **Legislative Note:** *Each enacting state should consider whether: (i) this Act makes material*
7 *changes to the “default” (or “gap filler”) rules of state’s predecessor statute; and (ii) if so,*
8 *whether subsection (c) should carry forward any of those rules for pre-existing limited liability*
9 *companies. In this assessment, the focus is on pre-existing limited liability companies that have*
10 *left default rules in place, whether advisedly or not. The central question is whether, for such*
11 *limited liability companies, expanding subsection (c) is necessary to prevent material changes to*
12 *the members’ “deal.”*

13

14 *For an example of this type of analysis in the context of another business entity act, see*
15 *the Uniform Limited Partnership Act (2001), § 1206(c).*

16

17 *In the judgment of the Conference, it is unnecessary to expand subsection (c) of this Act if*
18 *the state’s predecessor act is the original Uniform Limited Liability Company Act.*

19

20 **SECTION 1105. REPEALS.** Effective [all-inclusive date], the following acts and parts
21 of acts are repealed: [the state limited liability company Act as amended and in effect
22 immediately before the effective date of this [act]].

23 **SECTION 1106. EFFECTIVE DATE.** This [act] takes effect on [effective date].