

MEMORADUM FIXING THE SHELF?

TO: Drafting Committee on the Harmonization of Business Entity Statutes
FROM: Daniel S. Kleinberger, Co-Reporter
DATE: September 22, 2010

This memo provides:

- general background as to question of whether an LLC must have at least one member upon formation, including:
 - an overview of Re-ULLCA's "dual filing" approach (with Appendix A containing the relevant statutory provision and comment), and
 - a description of three alternative approaches the Drafting Committee might consider (with the first being "leave well enough alone");
- specific background as to the second and third alternative approaches; and
- Appendices B and C, containing language to implement respectively the second and third alternative approaches.

General Background

During the Re-ULLCA drafting process, "[n]o topic received more attention or generated more debate ... than the question of the 'shelf LLC' – i.e., an LLC formed without having at least one member upon formation."¹ The 2006 Annual Meeting draft included "a 'limited shelf' – a shelf that lacked capacity to conduct any substantive activities."² However, at the 11th hour, the Drafting Committee adopted a dual filing approach and the Conference subsequently adopted that approach.

In consequence, Re-ULLCA provides that "if the [limited liability] company will have no members when the [Secretary of State] files the certificate [of organization]," the certificate must contain "a statement to that effect."³ If a certificate contains such a statement, "[t]he certificate lapses and is void unless, within [90] days from the date the [Secretary of State] files the certificate, an organizer signs and delivers to the [Secretary of State] for filing a notice stating: (A) that the limited liability company has at least one member; and (B) the date on which a person or persons became the company's initial member or members."⁴ If the second filing is properly done, "the limited liability company is deemed formed as of the date of initial membership stated in the notice [i.e., in the second filing]...."⁵

¹ Re-ULLCA, § 201, Comment.

² *Id.*

³ Re-ULLCA, § 201(b)(3).

⁴ Re-ULLCA, § 201(e)(1).

⁵ Re-ULLCA, § 201(e)(2).

Appendix A contains Re-ULLCA, § 201, which establishes the dual filing approach, and the Official Comment, which further explain the approach.

At least one enacting state (Iowa) has jettisoned the dual filing approach, and another potential enacting state (Minnesota) is certain to do so. With regard to the shelf, this Drafting Committee has at least three alternatives:

- 1) leave HULLCA as is;
- 2) adopt a “limited shelf” approach, reverting to the 2006 Annual Meeting language;
- 3) adopt a “quasi-shelf” approach:
 - ~ not requiring that an LLC have a member when the certificate of formation is delivered to the filing official; but
 - ~ providing that an LLC is formed only when both of two conditions are met: the filing officer has filed the certificate of formation and the LLC has at least one member.

Specific Background on the Second and Third Alternatives

Language for the “limited shelf” is attached as Appendix B. Language for the “quasi-shelf” is attached as Appendix C. In each instance, the revisions are to the relevant portions of the current draft of HULLCA.⁶

Understanding the “Limited Shelf”

In the 2006 Annual meeting draft of Re-ULLCA, the “limited shelf” was explained as follows:

No issue roiled the drafting process to this Act more than the question of “shelf LLCs” – i.e., whether this Act would permit a limited liability company to be formed without the company having at least one member at the moment of formation. The final answer was yes, for reasons summarized in 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

The “Shelf LLC” – To some, the notion that an LLC might exist without having at least one member is conceptual betrayal.

⁶ The language in Appendix C is largely courtesy of Bill Clark and apparently is under consideration by the ABA’s Committee on Limited Liability Companies, Partnerships and Unincorporated Entities (LLCPUE), in connection with LLCPUE’s Prototype LLC Act.

According to this point of view, an LLC is a partnership with perpetual duration and a full shield, and forming an LLC without a member should be verboten. Utah law, for example, takes this point very seriously. According to U.C.A. 1953 § 48-2c-401(2)(a)(i): “The signing of the articles of organization constitutes an affirmation by the organizers that . . . (i) the company has one or more members.”

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

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

This Act accordingly permits shelf LLCs, but Section 105(b) mandates that an initially member-less LLC “sit on the shelf” until the LLC has had at least one member. In addition, Section 701(a)(3) limits “the shelf life” to 90 days, by providing that an LLC dissolves upon “the passage of 90 consecutive days during which the limited liability company has no member.” The provision is a default rule, subject to change by the operating agreement, but a shelf LLC cannot have an operating agreement. Section 102(13) defines “operating agreement” as “the agreement . . . of all the members”.⁷

Some Implications of the Quasi-Shelf

The quasi-shelf approach:

- reflects the ongoing opposition of some members of LLCPUe to what they see as a corporate characteristic;

⁷ 2006 Annual Meeting Draft, § 401, Comment.

- would allow an organizer to have a certificate of formation filed before knowing the identity of any member;
- in some circumstances would result in an entity appearing in a state's public record before the entity actually exists; and
- in all circumstances would make it impossible to determine from the public record when (and indeed whether) an LLC was actually formed.

Appendix A – Re-ULLCA, § 201 and Comment

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

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

(b) A certificate of organization must state:

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

(2) the street and mailing addresses of the initial designated office and the name and street and mailing addresses of the initial agent for service of process of the company; and

(3) if the company will have no members when the [Secretary of State] files the certificate, a statement to that effect.

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

(d) Unless the filed certificate of organization contains the statement as provided in subsection (b)(3), the following rules apply:

(1) A limited liability company is formed when the [Secretary of State] has filed the certificate of organization and the company has at least one member, unless the certificate states a delayed effective date pursuant to Section 205(c).

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

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

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

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

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

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

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

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

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

Comment

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

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

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

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

(1) delivering to the [Secretary of State] for filing a statement of

change under Sections 114, an amendment to the certificate under Section 202, a statement of correction under Section 206, an annual report under section 209, and a statement of termination under Section 702(b)(2)(F);

(2) admitting a member under section 401; and

(3) dissolving under Section 701.

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

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

- the certificate as delivered to the filing officer must acknowledge that situation, Subsection (a)(3);
- the limited liability company is not formed until and unless the organizer timely delivers to the filing officer a notice that the company has at least one member, Subsection (e)(1); and
- if the organizer does not timely deliver the required notice, the certificate lapses and is void. *Id.*

The Conference recommends a 90-day “window” for filing the notice, which must state “the date on which a person or persons became the company’s initial member or members.” When the filing officer files that notice, the company is deemed formed as of the date stated in the notice. Subsection (e)(2).

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

does the certificate contain the “no members” statement under subsection (b)(3)	by delivering the certificate for filing, what is the organizer affirming, per Section 207(c), about members	effect of the filing officer filing the certificate	logical relationship of the filed certificate to the formation of the LLC
no	that the LLC will have	LLC is formed,	necessary and

	at least one member upon formation	subject to any delayed effective date	sufficient
yes	that the LLC will have no members when the filing officer files the certificate	the document is part of the public record, protects the name, and starts the 90-day clock ticking	necessary but not sufficient

Appendix B – Language to Implement a Limited Shelf

cross references are not yet corrected

*changes being made for other reasons in the September draft are highlighted in grey
changes made to implement a limited shelf are in blue (additions) and ~~red (deletions)~~*

SECTION 105. POWERS.

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

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

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

(2) admitting a member under section 401; and

(3) dissolving under Section 701.

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

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~~ Except as otherwise provided in ~~by subsection (e)~~ subsections (c) and (d), the name of a limited liability company must be distinguishable ~~in~~ on the records of the [Secretary of State] from ~~any~~:

(1) ~~the~~ name of ~~each~~ a person that is not an individual and that is incorporated, organized, or authorized to transact business in this state;

(2) ~~the limited liability company name stated in each certificate of organization that contains the statement as provided in Section 201(b)(3) and that has not lapsed; and~~

~~(3)~~ each name reserved under Section 109; and

~~(4)~~ (3) assumed name registered under [this state’s assumed name statute]. ~~either other state laws allowing the reservation or registration of business names, including fictitious or assumed name statutes].~~

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

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

(b) A certificate of organization must state:

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

(2) ~~the street and mailing addresses of the initial designated office and the street and mailing address of the company's principal office and~~ the name and street and mailing addresses ~~within this state~~ of the initial ~~registered~~ agent ~~for service of process of the company;~~
~~and~~

~~(3) if the company will have no members when the [Secretary of State] files the certificate, a statement to that effect.~~

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

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

~~(1)~~ A limited liability company is formed when the [Secretary of State] ~~has filed~~ ~~files~~ the certificate of organization ~~and the company has at least one member~~, unless the certificate states a delayed effective date pursuant to Section ~~205(e)~~206.

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

~~(3)~~ (e) Subject to any delayed effective date and except in a proceeding by this state to dissolve a limited liability company, the filing of the certificate of organization by the [Secretary of State] is conclusive proof that the organizer satisfied all conditions to the formation of a limited liability company. The formation of a limited liability company does not by itself

cause any person to become a member. However, this [act] does not preclude an agreement, made before or after formation of a limited liability company, which provides that one or more persons will become members, or acknowledging that one or more persons became members, upon or otherwise in connection with the formation of the limited liability company.

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

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

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

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

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

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

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

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

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

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

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

Renumber accordingly.

SECTION 401. BECOMING MEMBER.

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

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

(c) ~~If a filed certificate of organization contains the statement required by Section 201(b)(3), a person becomes an initial member of the limited liability company with the consent of a majority of the organizers.~~ If a limited liability company is to have no members upon formation, a person becomes the initial member with the consent of a majority of the organizers.

The organizers may consent to more than one person simultaneously becoming the company's initial members.

(d) After ~~formation of~~ a limited liability company has or has had at least one member, a person becomes a member:

- (1) as provided in the operating agreement;
- (2) as the result of a transaction effective under [Article] 10;
- (3) with the consent of all the members; or
- (4) if, within 90 consecutive days after the company ceases to have any members:

(A) consent to admit at least one specified person as a member is given by transferees owning the rights to receive a majority of distributions as transferees at the time the consent is to be effective; and

(B) at least one person becomes a member in accordance with the consent. the last person to have been a member, or the legal representative of that person, designates a person to become a member; and

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

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

Appendix C – Language to Implement a Quasi-Shelf

cross references are not yet corrected

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changes made to implement a limited shelf are in blue (additions) and ~~red (deletions)~~*

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~~ Except as otherwise provided in ~~by subsection (e) subsections (c) and (d),~~ the name of a limited liability company must be distinguishable ~~in on~~ the records of the [Secretary of State] from any:

(1) ~~the~~ name of ~~each~~ a person that is not an individual and that is incorporated, organized, or authorized to transact business in this state;

(2) ~~the limited liability company name stated in each certificate of organization that contains the statement as provided in Section 201(b)(3) and that has not lapsed; and~~

~~(3)~~ each name reserved under Section 109; and

~~(4)~~ (3) assumed name registered under [this state’s assumed name statute]. ~~[cite other state laws allowing the reservation or registration of business names, including fictitious or assumed name statutes].~~

**SECTION 201. FORMATION OF LIMITED LIABILITY COMPANY;
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(a) One or more persons may act as organizers to form a limited liability company by signing and delivering to the [Secretary of State] for filing a certificate of organization.

(b) A certificate of organization must state:

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

(2) ~~the street and mailing addresses of the initial designated office and the street and mailing address of the company's principal office and~~ the name and street and mailing addresses within this state of the initial registered agent ~~for service of process of the company;~~
~~and~~

~~(3) if the company will have no members when the [Secretary of State] files the certificate, a statement to that effect.~~

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

~~(1)~~ A limited liability company is formed when the [Secretary of State] has filed the certificate of organization and the company has at least one member, unless the certificate states a delayed effective date pursuant to Section ~~205(e)~~206.

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

~~(3)~~ (e) Subject to any delayed effective date and except in a proceeding by this state to dissolve a limited liability company, the filing of the certificate of organization by the [Secretary of State] is conclusive proof that the organizer satisfied all conditions to the formation of a limited liability company except the condition that the company have at least one member .

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

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

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

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

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

Renumber accordingly.

SECTION 401. BECOMING MEMBER.

(a) If a limited liability company is to have only one member upon formation, the person becomes a member as agreed by that person and the organizer of the company. That person and

the organizer may be, but need not be, different persons. If different, the organizer acts on behalf of the initial member.

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

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

~~(d)~~ After formation of a limited liability company, a person becomes a member:

- (1) as provided in the operating agreement;
- (2) as the result of a transaction effective under [Article] 10;
- (3) with the consent of all the members; or
- (4) if, within 90 consecutive days after the company ceases to have any members:

(A) consent to admit at least one specified person as a member is given by transferees owning the rights to receive a majority of distributions as transferees at the time the consent is to be effective; and

(B) at least one person becomes a member in accordance with the consent. the last person to have been a member, or the legal representative of that person, designates a person to become a member; and

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

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