

AN ACT

ENTITLED, An Act to provide for proper recording of corporate names, to provide for a Limited Liability Company Act, and to declare an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

SECTION 101. Terms used in this Act:

- (1) "Articles of organization" means initial, amended, and restated articles of organization and articles of merger. In the case of a foreign limited liability company, the term includes all records serving a similar function required to be filed in the Office of the Secretary of State or other official having custody of company records in the state or country under whose law it is organized;
- (2) "Business" includes every trade, occupation, profession, and other lawful purpose, whether or not carried on for profit;
- (3) "Debtor in bankruptcy" means a person who is the subject of an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application or a comparable order under federal, state, or foreign law governing insolvency;
- (4) "Distribution" means a transfer of money, property, or other benefit from a limited liability company to a member in the member's capacity as a member or to a transferee of the member's distributional interest;
- (5) "Distributional interest" means all of a member's interest in distributions by the limited liability company;
- (6) "Entity" means a person other than an individual;
- (7) "Foreign limited liability company" means an unincorporated entity organized under laws other than the laws of this state which afford limited liability to its owners comparable to the liability under section 303 and is not required to obtain a certificate of authority to

transact business under any law of this state other than this Act;

- (8) "Limited liability company" means a limited liability company organized under this Act;
- (9) "Manager" means a person, whether or not a member of a manager-managed company, who is vested with authority under section 301;
- (10) "Manager-managed company" means a limited liability company which is so designated in its articles of organization;
- (11) "Member-managed company" means a limited liability company other than a manager-managed company;
- (12) "Operating agreement" means any valid agreement, either written or oral, under section 103 concerning the relations among the members, managers, and limited liability company. The term includes amendments to the agreement. It shall be styled a "Declaration" if the company has a single member;
- (13) "Person" means an individual, corporation, business trust, cooperative corporation, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity;
- (14) "Principal office" means the office, whether or not in this state, where the principal executive office of a domestic or foreign limited liability company is located;
- (15) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;
- (16) "Sign" means to identify a record by means of a signature, mark, or other symbol, with intent to authenticate it;
- (17) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States;

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

SECTION 103. (a.) Except as otherwise provided in subsection (b), all members of a limited liability company may enter into an operating agreement, which need not be in writing, to regulate the affairs of the company and the conduct of its business, and to govern relations among the members, managers, and company. To the extent the operating agreement does not otherwise provide, this Act governs relations among the members, managers, and company.

(b) The operating agreement may not:

- (1) Unreasonably restrict a right to information or access to records under section 408;
- (2) Eliminate the duty of loyalty under section 409(b) or 603(b)(3), but the agreement may:
 - (i) Identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and
 - (ii) Specify the number or percentage of members or disinterested managers that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;
- (3) Unreasonably reduce the duty of care under section 409(c) or 603(b)(3);
- (4) Eliminate the obligation of good faith and fair dealing under section 409(d), but the operating agreement may determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;
- (5) Vary the right to expel a member in an event specified in section 601(6);
- (6) Vary the requirement to wind up the limited liability company's business in a case specified in section 801(3) or (4); or
- (7) Restrict rights of a person, other than a manager, member, and transferee of a member's distributional interest, under this Act.

SECTION 104. (a) Unless displaced by particular provisions of this Act the principles of law and

equity supplement this Act.

(b) If an obligation to pay interest arises under this Act and the rate is not specified, the rate is that specified in subdivision 54-3-16(1).

SECTION 105. (a) The name of a limited liability company must contain, limited liability company, or limited company, or the abbreviation, L.L.C., LLC, L.C., or LC. Limited may be abbreviated as Ltd. and company may be abbreviated as Co.

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

- (1) The name of any corporation, limited partnership, or company incorporated, organized or authorized to transact business, in this state;
- (2) A name reserved or registered under section 106 or 107;
- (3) A fictitious name approved under section 1005 for a foreign company authorized to transact business in this state because its real name is unavailable.

(c) A limited liability company may apply to the secretary of state for authorization to use a name that is not distinguishable upon the records of the secretary of state from one or more of the names described in subsection (b). The secretary of state shall authorize use of the name applied for if:

- (1) The present user, registrant, or owner of a reserved name consents to the use in a record and submits an undertaking in form satisfactory to the secretary of state to change the name to a name that is distinguishable upon the records of the secretary of state from the name applied for; or
- (2) The applicant delivers to the secretary of state a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this state.

(d) A limited liability company may use the name, including a fictitious name, of another domestic or foreign company which is used in this state if the other company is organized or authorized to

transact business in this state and the company proposing to use the name has:

- (1) Merged with the other company;
- (2) Been formed by reorganization with the other company; or
- (3) Acquired substantially all of the assets, including the name, of the other company.

SECTION 106. The exclusive right to the use of a name may be reserved by:

- (1) Any person intending to organize a limited liability company under this Act and to adopt that name;
- (2) Any domestic limited liability company or any foreign limited liability company registered in this state which, in either case, intends to adopt that name;
- (3) Any foreign limited liability company intending to register in this state and adopt that name; and
- (4) Any person intending to organize a foreign limited liability company and intending to have it registered in this state and adopt that name.

The reservation shall be made by filing with the secretary of state an application, executed by the applicant, to reserve a specified name. If the secretary of state finds that the name is available for use by a domestic or foreign limited liability company, the secretary of state shall reserve the name for the exclusive use of the applicant for a period of one hundred twenty days. Once having so reserved a name, the same applicant may not again reserve the same name until more than sixty days after the expiration of the last one hundred twenty day period for which that applicant reserved that name. The right to the exclusive use of a reserved name may be transferred to any other person by filing in the office of the secretary of state a notice of the transfer, executed by the applicant for whom the name was reserved and specifying the name and address of the transferee.

SECTION 107. (a) A foreign limited liability company may register its name subject to the requirements of section 1005, if the name is distinguishable upon the records of the secretary of state from names that are not available under section 105(b).

(b) A foreign limited liability company registers its name, or its name with any addition required by section 1005, by delivering to the secretary of state for filing an application:

- (1) Setting forth its name, or its name with any addition required by section 1005, the state or country and date of its organization, and a brief description of the nature of the business in which it is engaged; and
- (2) Accompanied by a certificate of existence, or a record of similar import, from the state or country of organization.

(c) A foreign limited liability company whose registration is effective may renew it for successive years by delivering for filing in the office of the secretary of state a renewal application complying with subsection (b) between October first and December thirty-first of the preceding year. The renewal application renews the registration for the following calendar year.

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

SECTION 108. Each limited liability company shall have, and continuously maintain in this state, a registered office which may be, but need not be, the same as its place of business, and a registered agent, which agent may be either an individual resident in this state whose business office is identical with such registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this state, having a business office identical with such registered office.

SECTION 109. A limited liability company may change its registered office or agent, or both, upon filing in the Office of the Secretary of State a statement setting forth:

- (1) The name of the limited liability company;

- (2) The current address of its registered office;
- (3) If there is a change of address of its registered office, the now address of the registered office;
- (4) The name of its registered agent;
- (5) If there is a change of its registered agent, the name of its successor registered agent;
- (6) That the address of its registered office and the address of the business office of its registered agent, as changed, will be identical;
- (7) That the change was authorized by affirmative vote of a majority of the members of the limited liability company.

The statement shall be verified by one or more of its managers if management of the limited liability company has been vested by the members in a manager or managers or if management of the limited liability company is retained by the members, then by any member and delivered to the secretary of state. If the secretary of state finds that the statement conforms to the provisions of this Act, the secretary of state shall file the statement, and upon filing, the change of address of the registered office or the appointment of a new registered agent, or both, is effective.

SECTION 110. Any registered agent of a limited liability company may resign as agent upon filing a written notice of resignation, executed with the secretary of state, who shall forthwith mail a copy of the resignation to the limited liability company at its registered office by certified mail, return receipt requested. The appointment of the agent shall terminate upon the expiration of thirty days after receipt of notice by the secretary of state.

SECTION 111. (a) The registered agent appointed by a limited liability company or a foreign limited liability company shall be an agent of the limited liability company upon whom any process, notice, or demand required or permitted by law to be served upon the limited liability company may be served.

- (b) If a limited liability company fails to appoint or maintain a registered agent in this state, or

if its registered agent cannot be found at its registered office, the secretary of state shall be an agent of the company upon whom any process, notice or demand may be served. Service on the secretary of state of any process, notice or demand shall be made by delivering to the secretary of state or any clerk having charge of the limited liability department an original and one exact or conforming copy of the process, notice, or demand.

(c) If any process, notice, or demand is served on the secretary of state, the secretary of state shall send the copy by certified or registered mail to the company at its registered office.

The secretary of state shall keep a record of all processes, notices and demands served upon the secretary of state under this section and shall record the time of service and the response.

(d) Nothing contained in this section shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a limited liability company in any other manner now or hereafter permitted by law.

SECTION 112. (a) A limited liability company may be organized under this Act for any lawful purpose, subject to any law of this state governing or regulating business including regulation of professional service firms. Limited liability companies may not engage in activities proscribed by chapter 47-9A unless the ownership restrictions are met by the membership of the limited liability company by substitution of members for shareholders in that chapter.

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

- (1) Sue and be sued, and defend in its name;
- (2) Purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with real or personal property, or any legal or equitable interest in property, wherever located;
- (3) Sell, convey, mortgage, grant a security interest in, lease, exchange, and otherwise

encumber or dispose of all or any part of its property;

- (4) Purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, grant a security interest in, or otherwise dispose of and deal in and with, shares or other interests in or obligations of any other entity;
- (5) Make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations, which may be convertible into or include the option to purchase other securities of the limited liability company, and secure any of its obligations by a mortgage on or a security interest in any of its property, franchises, or income;
- (6) Lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;
- (7) Be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity including but not limited to limited partnerships and limited liability companies;
- (8) Conduct its business, locate offices, and exercise the powers granted by this Act within or without this state;
- (9) Elect managers and appoint officers, employees, and agents of the limited liability company, define their duties, fix their compensation, and lend them money and credit, or otherwise assist its members;
- (10) Pay pensions and establish pension plans, pension trusts, profit sharing plans, bonus plans, option plans, and benefit or incentive plans for any or all of its current or former members, managers, officers, employees, and agents;
- (11) Make donations for the public welfare or for charitable, scientific, or educational purposes; and
- (12) Make payments or donations, or do any other act, not inconsistent with law, that furthers the business of the limited liability company.

SECTION 201. A limited liability company is a legal entity distinct from its members. A member of a limited liability company is not a proper party to proceedings by or against a limited liability company.

SECTION 202A. (a) One or more persons may organize a limited liability company, consisting of one or more members, by delivering articles of organization to the Office of the Secretary of State for filing.

(b) Unless a delayed effective date is specified in accordance with section 206(d), the existence of a limited liability company begins when the articles of organization and the first annual report as required in section 211(c) are filed.

(c) The original and one exact or conforming copy of the articles of organization and the first annual report shall be delivered to the secretary of state. If the secretary of state finds that the articles of organization and the annual report conform to law, the secretary of state shall, when all fees have been paid as prescribed:

- (1) Endorse both the original and the exact or conforming copy with the word, Filed, and the month, date, and year of the filing;
- (2) File the original;
- (3) Issue a certificate of organization and affix to the certificate, the exact or conforming copy.

The certificate of organization, together with the exact or conforming copy of the articles of organization affixed to it by the secretary of state, shall be returned to the principal office of the limited liability company or to its representative.

SECTION 202B. Upon the issuance of the certificate of organization, the limited liability company shall be considered organized, and such certificate of organization shall be conclusive evidence that all conditions precedent required to be performed by the members have been complied with and that the limited liability company has been legally organized under this Act, except as against this state in a proceeding to cancel or revoke the certificate of organization or for involuntary

dissolution of the limited liability company.

No limited liability company may transact business or incur indebtedness, except that which is incidental to its organization, or except for obtaining subscriptions for or payment of contributions, until the secretary of state has issued a certificate of organization.

SECTION 203. (a) Articles of organization of a limited liability company must set forth:

- (1) The name of the company;
- (2) The address of the initial designated office;
- (3) The name and street address of the initial agent for service of process;
- (4) The name and address of each organizer;
- (5) The duration of the company if other than perpetual;
- (6) Whether the company is to be manager-managed, and, if so, the name and address for each initial manager; and
- (7) Whether one or more of the members of the company are to be liable for its debts and obligations under section 303(c).

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

- (1) Provisions permitted to be set forth in an operating agreement; or
- (2) Other matters not inconsistent with law.

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

- (1) The operating agreement controls as to managers, members, and members' transferees; and
- (2) The articles of organization control as to persons, other than managers, members and their transferees, who reasonably rely on the articles to their detriment.

SECTION 204. (a) Articles of organization of a limited liability company may be amended at any time by delivering articles of amendment to the secretary of state for filing. The articles of amendment

must set forth the:

- (1) Name of the limited liability company;
- (2) Date of filing of the articles of organization; and
- (3) Amendment to the articles.

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

SECTION 205. (a) Except as otherwise provided in this Act a record to be filed by or on behalf of a limited liability company in the Office of the Secretary of State must be signed in the name of the company by a:

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

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

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

SECTION 206. (a) Articles of organization or any other record authorized to be filed under this Act must be in a medium permitted by the secretary of state and must be delivered to the Office of

the Secretary of State. Unless the secretary of state determines that a record fails to comply as to form with the filing requirements of this Act, and if all filing fees have been paid, the secretary of state shall file the record and send a receipt for the record and the fees to the limited liability company or its representative.

(b) Upon request and payment of a fee, the secretary of state shall send to the requester a certified copy of the requested record.

(c) Except as otherwise provided in subsection (d), sections 202A and 202B, and subsection 207(c), a record accepted for filing by the secretary of state is effective:

- (1) At the time of filing on the date it is filed, as evidenced by the secretary of state's date and time endorsement on the original record; or
- (2) At the time specified in the record as its effective time on the date it is filed.

(d) A record, including the articles of organization, may specify a delayed effective time and date, and if it does so the record becomes effective at the time and date specified subject to the other requirements of this Act. If a delayed effective date but no time is specified, the record is effective at the close of business on that date. If a delayed effective date is later than the ninetieth day after the record is filed, the record is effective on the ninetieth day.

SECTION 207. (a) A limited liability company or foreign limited liability company may correct a record filed by the secretary of state if the record contains a false or erroneous statement or was defectively signed.

(b) A record is corrected:

- (1) By preparing articles of correction that:
 - (i) Describe the record, including its filing date, or attach a copy of it to the articles of correction;
 - (ii) Specify the incorrect statement and the reason it is incorrect or the manner in which the signing was defective; and

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

(2) By delivering the corrected record to the secretary of state for filing.

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

SECTION 208. (a) Any person may request the secretary of state to furnish a certificate of existence for a limited liability company or a certificate of authorization for a foreign limited liability company.

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

(1) The company's name;

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

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

(4) Whether its most recent annual report required by section 211 has been filed with the secretary of state;

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

(6) Other facts of record in the Office of the Secretary of State which may be requested by the applicant.

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

(1) The company's name used in this state;

(2) That it is authorized to transact business in this state;

(3) If payment is reflected in the records of the secretary of state and if nonpayment affects the authorization of the company, that all fees, taxes, and penalties owed to this state have

been paid;

- (4) Whether its most recent annual report required by section 211 has been filed with the secretary of state;
- (5) That a certificate of cancellation has not been filed; and
- (6) Other facts of record in the Office of the Secretary of State which may be requested by the applicant.

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

SECTION 210. If a person required by section 205 to sign any record fails or refuses to do so, any other person who is adversely affected by the failure or refusal may petition the state circuit court to direct the signing of the record. If the court finds that it is proper for the record to be signed and that a person so designated has failed or refused to sign the record, it shall order the secretary of state to sign and file an appropriate record.

SECTION 211. (a) A limited liability company, and a foreign limited liability company authorized to transact business in this state, shall deliver to the secretary of state for filing an annual report that sets forth:

- (1) The name of the company and the state or country under whose law it is organized;
- (2) The address of its registered office and the name and address of its registered agent for service of process in this state;
- (3) The address of its principal office;
- (4) The names and business addresses of any managers;
- (5) The dollar amount of the total agreed contributions to the limited liability company.

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

(c) The first annual report must be delivered to the secretary of state concurrent with the filing of the articles of organization. Subsequent annual reports must be delivered to the secretary of state before the first day of the second month following the anniversary month of the filing date.

(d) If an annual report does not contain the information required in subsection (a) or the fees required by section 212, the secretary of state shall promptly notify the reporting limited liability company or foreign limited liability company and return the report to it for correction. If the report is corrected to contain the information required in subsection (a) or the fees required by section 212 and delivered to the secretary of state within thirty days after the effective date of the notice, it is timely filed.

SECTION 212. The secretary of state shall charge and collect for:

(a) Filing the first annual report if the total agreed contribution of the limited liability company are:

Agreed Contribution	Fee
Not in excess of \$50,000	\$ 90
\$50,001, to \$100,000	\$150
In excess of \$100,000	\$150 for first \$100,000, plus \$.50 for each additional \$1,000

The maximum amount charged under this subsection together with any subsequent payments under subsection (b) may not exceed sixteen thousand dollars.

(b) Filing any subsequent annual report that reflects additional contribution in excess of those stated in the last prior report, any additional fee necessary to make the cumulative fee match the cumulative agreed contributions as provided in subsection (a); above the agreed contributions as set forth in the last previous annual report consistent with subsection (a).

(c) A reporting fee of fifty dollars, due and payable with the filing of all annual report, after the

first annual report required in section 211(c).

SECTION 301. (a) Subject to subsections (b) and (c):

- (1) Each member is an agent of the limited liability company for the purpose of its business, and an act of a member, including the signing of an instrument in the company's name, for apparently carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company, unless the member had no authority to act for the company in the particular matter and the person with whom the member was dealing knew or had notice that the member lacked authority.
- (2) An act of a member which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized by the other members.

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

- (1) A member is not an agent of the company for the purpose of its business solely by reason of being a member. Each manager is an agent of the company for the purpose of its business, and an act of a manager, including the signing of an instrument in the company's name, for apparently carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company, unless the manager had no authority to act for the company in the particular matter and the person with whom the manager was dealing knew or had notice that the manager lacked authority.
- (2) An act of a manager which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized under section 404A.

(c) Unless the articles of organization limit their authority, any member of a member-managed company or manager of a manager-managed company may sign and deliver any instrument transferring or affecting the company's interest in real property. The instrument is conclusive in favor

of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument.

SECTION 302. A limited liability company is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a member or manager acting in the ordinary course of business of the company or with authority of the company.

SECTION 303. (a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

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

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

- (1) A provision to that effect is contained in the articles of organization; and
- (2) A member so liable has consented in writing to the adoption of the provision or to be bound by the provision.

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

SECTION 402. (a) A member's obligation to contribute money, property, or other benefit to, or to perform services for, a limited liability company is not excused by the member's death, disability,

or other inability to perform personally. If a member does not make the required contribution of property or services, the member is obligated at the option of the company to contribute money equal to the value of that portion of the stated contribution which has not been made.

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

SECTION 403. (a) A limited liability company shall reimburse a member or manager for payments made and indemnify a member or manager for liabilities incurred by the member or manager in the ordinary course of the business of the company or for the preservation of its business or property.

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

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

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

SECTION 404A. (a) In a member-managed company:

- (1) Each member has equal rights in the management and conduct of the company's business;
and
- (2) Except as otherwise provided in subsection (c), any matter relating to the business of the company may be decided by a majority of the members.

(b) In a manager-managed company:

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

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

(3) A manager:

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

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

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

(1) The amendment of the operating agreement under section 103;

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

(3) An amendment to the articles of organization under section 204;

(4) The compromise of an obligation to make a contribution under section 402(b);

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

(6) The making of interim distributions under section 405(a), including the redemption of an interest;

(7) The admission of a new member;

(8) The use of the company's property to redeem an interest subject to a charging order;

(9) The consent to dissolve the company under section 801(a)(2);

(10) A waiver of the right to have the company's business wound up and the company terminated under section 802(b);

(11) The consent of members to merge with another entity under section 904(c)(1); and

(12) The sale, lease, exchange, or other disposal of all, or substantially all, of the company's property with or without goodwill.

(d) Action requiring the consent of members or managers under this Act may be taken without a meeting.

(e) A member or manager may appoint a proxy to vote or otherwise act for the member or manager by signing an appointment instrument, either personally or by the member's or manager's attorney-in-fact.

SECTION 404B. Nothing in this Act prohibits the articles of organization from establishing classes or groups of one or more members having certain expressed relative rights, powers, or duties, including voting rights and the articles of organization may provide for the future creation, in the manner provided in the articles of organization, of additional classes or groups of members having certain relative rights, powers, or duties, including voting rights, expressed either in the regulations or at the time of creation. The rights, powers, or duties of a class or group may be senior to those of one or more existing classes or groups of members.

SECTION 405. (a) Any distributions made by a limited liability company before its dissolution and winding up must be in equal shares.

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

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

SECTION 406. (a) A distribution may not be made if:

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

(2) The company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be dissolved, wound up, and

terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up, and termination of members whose preferential rights are superior to those receiving the distribution.

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

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

- (1) In the case of distribution by purchase, redemption, or other acquisition of a distributional interest in a limited liability company, as of the date money or other property is transferred or debt incurred by the company; and
- (2) In all other cases, as of the date the:
 - (i) Distribution is authorized if the payment occurs within one hundred twenty days after the date of authorization; or
 - (ii) Payment is made if it occurs more than one hundred twenty days after the date of authorization.

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

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

treated as a distribution, the effect of which is measured on the date the payment is made.

SECTION 407. (a) Any member of a member-managed company or a member or manager of a manager-managed company who votes for or assents to a distribution made in violation of section 406, the articles of organization, or the operating agreement is personally liable to the company for the amount of the distribution which exceeds the amount that could have been distributed without violating section 406, the articles of organization, or the operating agreement if it is established that the member or manager did not perform the member's or manager's duties in compliance with section 409.

(b) A member of a manager-managed company who knew a distribution was made in violation of section 406, the articles of organization, or the operating agreement is personally liable to the company, but only to the extent that the distribution received by the member exceeded the amount that could have been properly paid under section 406.

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

- (1) Other members or managers who voted for or assented to the distribution in violation of subsection (a) and may compel contribution from them; and
- (2) Members who received a distribution in violation of subsection (b) and may compel contribution from the member in the amount received in violation of subsection (b).

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

SECTION 408. (a) A limited liability company shall provide members and their agents and attorneys access for proper purposes to its records, if any, at the company's principal office or other reasonable locations specified in the operating agreement. The company shall provide former members and their agents and attorneys access for proper purposes to records pertaining to the period during which they were members. The right of access provides the opportunity to inspect and copy

records during ordinary business hours. The company may impose a reasonable charge, limited to the costs of labor and material, for copies of records furnished.

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

- (1) Without demand, information concerning the company's business or affairs reasonably required for the proper exercise of the member's rights and performance of the member's duties under the operating agreement or this Act; and
- (2) On demand, other information concerning the company's business or affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

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

SECTION 409. (a) The only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and the duty of care imposed by subsections (b) and (c).

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

- (1) To account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity;
- (2) To refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and
- (3) To refrain from competing with the company in the conduct of the company's business before the dissolution of the company.

(c) A member's duty of care to a member-managed company and its other members in the

conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

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

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

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

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

(h) In a manager-managed company:

- (1) A member who is not also a manager owes no duties to the company or to the other members solely by reason of being a member;
- (2) A manager is held to the same standards of conduct prescribed for members in subsections (b) through (f);
- (3) A member who pursuant to the operating agreement exercises some or all of the rights of a manager in the management and conduct of the company's business is held to the standards of conduct in subsections (b) through (f) to the extent that the member exercises the managerial authority vested in a manager by this Act; and
- (4) A manager is relieved of liability imposed by law for violation of the standards prescribed by subsections (b) through (f) to the extent of the managerial authority delegated to the members by the operating agreement.

SECTION 410. (a) A member may maintain an action against a limited liability company or another member for legal or equitable relief, with or without an accounting as to the company's business, to enforce:

- (1) The member's rights under the operating agreement;
- (2) The member's rights under this Act; and
- (3) The rights and otherwise protect the interests of the member, including rights and interests arising independently of the member's relationship to the company.

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

SECTION 501. (a) A member is not a co-owner of, and has no transferable interest in, property of a limited liability company.

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

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

SECTION 502. A transfer of a distributional interest does not entitle the transferee to become or to exercise any rights of a member. A transfer entitles the transferee to receive, to the extent transferred, only the distributions to which the transferor would be entitled.

SECTION 503. (a) A transferee of a distributional interest may become a member of a limited liability company if and to the extent that the transferor gives the transferee the right in accordance with authority described in the operating agreement or all other members consent.

(b) A transferee who has become a member, to the extent transferred, has the rights and powers, and is subject to the restrictions and liabilities, of a member under the operating agreement of a

limited liability company and this Act. A transferee who becomes a member also is liable for the transferor member's obligations to make contributions under section 402 and for obligations under section 407 to return unlawful distributions, but the transferee is not obligated for the transferor member's liabilities unknown to the transferee at the time the transferee becomes a member.

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

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

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

- (1) Receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled;
- (2) Receive, upon dissolution and winding up of the limited liability company's business:
 - (i) In accordance with the transfer, the net amount otherwise distributable to the transferor;
 - (ii) A statement of account only from the date of the latest statement of account agreed to by all the members;
- (3) Seek under section 801(a)(5) a judicial determination that it is equitable to dissolve and wind up the company's business.

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

SECTION 504. (a) On application by a judgment creditor of a member of a limited liability company or of a member's transferee, a court having jurisdiction may charge the distributional interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor and make all other orders, directions,

accounts, and inquiries the judgment debtor might have made or which the circumstances may require to give effect to the charging order.

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

A purchaser at the foreclosure sale has the rights of a transferee.

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

- (1) By the judgment debtor;
- (2) With property other than the company's property, by one or more of the other members;
or
- (3) With the company's property, but only if permitted by the operating agreement.

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

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

SECTION 601. A member is dissociated from a limited liability company upon the occurrence of any of the following events:

- (1) The company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member;
- (2) An event agreed to in the operating agreement as causing the member's dissociation;
- (3) Upon transfer of all of a member's distributional interest, other than a transfer for security purposes or a court order charging the member's distributional interest which has not been foreclosed;
- (4) The member's expulsion pursuant to the operating agreement;

- (5) The member's expulsion by unanimous vote of the other members if:
- (i) It is unlawful to carry on the company's business with the member;
 - (ii) There has been a transfer of substantially all of the member's distributional interest, other than a transfer for security purposes or a court order charging the member's distributional interest which has not been foreclosed;
 - (iii) Within ninety days after the company notifies a corporate member that it will be expelled because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, the member fails to obtain a revocation of the certificate of dissolution or a reinstatement of its charter or its right to conduct business; or
 - (iv) A partnership or a limited liability company that is a member has been dissolved and its business is being wound up;
- (6) On application by the company or another member, the member's expulsion by judicial determination because the member:
- (i) Engaged in wrongful conduct that adversely and materially affected the company's business;
 - (ii) Willfully or persistently committed a material breach of the operating agreement or of a duty owed to the company or the other members under section 409; or
 - (iii) Engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member;
- (7) The member's:
- (i) Becoming a debtor in bankruptcy;
 - (ii) Executing an assignment for the benefit of creditors;
 - (iii) Seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or

- liquidator of the member or of all or substantially all of the member's property; or
- (iv) Failing, within ninety days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the member's property obtained without the member's consent or acquiescence, or failing within ninety days after the expiration of a stay to have the appointment vacated;
- (8) In the case of a member who is an individual:
 - (i) The member's death;
 - (ii) The appointment of a guardian or general conservator for the member; or
 - (iii) A judicial determination that the member has otherwise become incapable of performing the member's duties under the operating agreement;
 - (9) In the case of a member that is a trust or is acting as a member by virtue of being a trustee of a trust, distribution of the trust's entire rights to receive distributions from the company, but not merely by reason of the substitution of a successor trustee;
 - (10) In the case of a member that is an estate or is acting as a member by virtue of being a personal representative of an estate, distribution of the estate's entire rights to receive distributions from the company, but not merely the substitution of a successor personal representative; or
 - (11) Termination of the existence of a member if the member is not an individual, estate, or trust other than a business trust.

SECTION 602. (a) Unless otherwise provided in the operating agreement, a member has the power to dissociate from a limited liability company at any time, rightfully or wrongfully, by express will pursuant to section 601(1).

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

- (1) It is in breach of an express provision of the agreement; or
- (2) Before the expiration of the term specified in the articles of organization if any:
 - (i) The member withdraws by express will;
 - (ii) The member is expelled by judicial determination under section 601(6);
 - (iii) The member is dissociated by becoming a debtor in bankruptcy; or
 - (iv) In the case of a member who is not an individual, trust other than a business trust, or estate, the member is expelled or otherwise dissociated because it willfully dissolved or terminated its existence.

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

SECTION 603. (a) A limited liability company does not dissolve and wind up its business as result of a member's dissociation.

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

- (1) The member's right to participate in the management and conduct of the company's business terminates, except as otherwise provided in section 803, and the member ceases to be a member and is treated the same as a transferee of a member;
- (2) The member's duty of loyalty under section 409(b)(3) terminates; and
- (3) The member's duty of loyalty under section 409(b)(1) and (2) and duty of care under section 409(c) continue only with regard to matters arising and events occurring before the member's dissociation.

SECTION 604. For two years after a member dissociates without the dissociation resulting in a dissolution and winding up of a limited liability company's business, the company, including a surviving company under Article 9, is bound by an act of the dissociated member which would have bound the company under section 301 before dissociation only if at the time of entering into the

transaction the other party:

- (1) Reasonably believed that the dissociated member was then a member;
- (2) Did not have notice of the member's dissociation; and
- (3) Is not deemed to have had notice under section 605.

SECTION 605. (a) A dissociated member or a limited liability company may file in the office of the secretary of state a statement of dissociation stating the name of the company and that the member is dissociated from the company. If the statement is filed by a dissociated member a copy of the statement must also be delivered to the company by the dissociated member.

(b) For the purposes of sections 301 and 604, a person not a member is deemed to have notice of the dissociation ninety days after the statement of dissociation is filed.

SECTION 801. (a) A limited liability company is dissolved, and its business must be wound up, upon the occurrence of any of the following events:

- (1) An event specified in the operating agreement;
- (2) Consent of the number or percentage of members specified in the operating agreement;
- (3) An event that makes it unlawful for all or substantially all of the business of the company to be continued, but any cure of illegality within ninety days after notice to the company of the event is effective retroactively to the date of the event for purposes of this section;
- (4) On application by a member or a dissociated member, upon entry of a judicial decree that:
 - (i) The economic purpose of the company is likely to be unreasonably frustrated;
 - (ii) Another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the company's business with that member;
 - (iii) It is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement; or
 - (iv) The managers or members in control of the company have acted, are acting, or will

act in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial to the petitioner; or

- (5) On application by a transferee of a member's interest, a judicial determination that it is equitable to wind up the company's business after the expiration of a specified duration or event, if the company was for a specified duration at the time the applicant became a transferee by member dissociation, transfer, or entry of a charging order that gave rise to the transfer.

SECTION 802. (a) Subject to subsection (b), a limited liability company continues after dissolution only for the purpose of winding up its business.

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

- (1) The limited liability company resumes carrying on its business as if dissolution had never occurred and any liability incurred by the company or a member after the dissolution and before the waiver is determined as if the dissolution had never occurred; and
- (2) The rights of a third party accruing as a result of the dissolution, under section 804(a), or arising out of conduct in reliance on the dissolution before the third party knew or received a notification of the waiver are not adversely affected.

SECTION 803. (a) After dissolution, a member who has not wrongfully dissociated may participate in winding up a limited liability company's business, but on application of any member, member's legal representative, or transferee, the circuit court, for good cause shown, may order judicial supervision of the winding up.

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

(c) A person winding up a limited liability company's business may preserve the company's

business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the company's business, dispose of and transfer the company's property, discharge the company's liabilities, distribute the assets of the company pursuant to section 806, settle disputes by mediation or arbitration, and perform other necessary acts.

SECTION 804. (a) A limited liability company is bound by a member's or manager's act after dissolution that:

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

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

SECTION 805. (a) At any time after dissolution and winding up, a limited liability company may terminate its existence by filing with the secretary of state articles of termination stating:

- (1) The name of the company;
- (2) The date of the dissolution; and
- (3) That the company's business has been wound up and the legal existence of the company has been terminated.

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

SECTION 806. (a) In winding up a limited liability company's business, the assets of the company must be applied to discharge its obligations to creditors, including members who are creditors. Any surplus must be applied to pay in money the net amount distributable to members in accordance with their right to distributions under subsection (b).

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

SECTION 807. (a) A dissolved limited liability company may dispose of the known claims against it by following the procedure described in this section.

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

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

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

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

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

SECTION 808. (a) A dissolved limited liability company may publish notice of its dissolution and request persons having claims against the company to present them in accordance with the notice.

(b) The notice must:

- (1) Be published at least once in a newspaper of general circulation in the county in which the dissolved limited liability company's principal office is located or, if none in this state, in

which its registered office is or was last located;

- (2) Describe the information required to be contained in a claim and provide a mailing address where the claim is to be sent; and
- (3) State that a claim against the limited liability company is barred unless a proceeding to enforce the claim is commenced within five years after publication of the notice.

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

- (1) A claimant who did not receive written notice under section 807;
- (2) A claimant whose claim was timely sent to the dissolved company but not acted on; and
- (3) A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

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

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

SECTION 809. The secretary of state may commence a proceeding to dissolve a limited liability company administratively if the company does not:

- (1) Pay any fees, taxes, or penalties imposed by this Act or other law within sixty days after they are due; or
- (2) Deliver its annual report to the secretary of state within sixty days after it is due.

SECTION 810. (a) If the secretary of state determines that a ground exists for administratively dissolving a limited liability company, the secretary of state shall enter a record of the determination and serve the company with a copy of the record.

(b) If the company does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the secretary of state that each ground determined by the secretary of state does not exist within sixty days after service of the notice, the secretary of state shall administratively dissolve the company by signing a certification of the dissolution that recites the ground for dissolution and its effective date. The secretary of state shall file the original of the certificate and serve the company with a copy of the certificate.

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

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

SECTION 811. (a) A limited liability company administratively dissolved may apply to the secretary of state for reinstatement after the effective date of dissolution. The application must:

- (1) Recite the name of the company and the effective date of its administrative dissolution;
- (2) State that the ground for dissolution either did not exist or have been eliminated;
- (3) State that the company's name satisfies the requirements of section 105; and
- (4) Contain a certificate from the appropriate state authority reciting that all taxes owed by the company have been paid.

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

certificate.

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

SECTION 812. (a) If the secretary of state denies a limited liability company's application for reinstatement following administrative dissolution, the secretary of state shall serve the company with a record that explains the reason or reasons for denial.

(b) The company may appeal the denial of reinstatement to the state circuit court within thirty days after service of the notice of denial is perfected. The company appeals by petitioning the court to set aside the dissolution and attaching to the petition copies of the secretary of state's certificate of dissolution, the company's application for reinstatement, and the secretary of state's notice of denial.

(c) The court may summarily order the secretary of state to reinstate the dissolved company or may take other action the court considers appropriate.

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

SECTION 901. Terms used in this article:

- (1) "Corporation" means a corporation under State Dakota Business Act, a predecessor law, or comparable law of another jurisdiction;
- (2) "General partner" means a partner in a partnership and a general partner in a limited partnership;
- (3) "Limited partner" means a limited partner in a limited partnership;
- (4) "Limited partnership" means a limited partnership created under chapter 48-7, a predecessor law, or comparable law of another jurisdiction;
- (5) "Partner" includes a general partner and a limited partner;
- (6) "Partnership" means a general partnership under chapters 48-1 to 48-5, inclusive, a

predecessor law, or comparable law of another jurisdiction;

(7) "Partnership agreement" means an agreement among the partners concerning the partnership or limited partnership;

(8) "Shareholder" means a shareholder in a corporation.

SECTION 902. (a) A partnership or limited partnership may be converted to a limited liability company pursuant to this section.

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

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

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

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

(2) Its former name;

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

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

(e) In the case of a limited partnership, the filing of articles of organization under subsection (d)

cancels its certificate of limited partnership as of the date the conversion took effect.

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

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

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

SECTION 903. (a) A partnership or limited partnership that has been converted pursuant to this article is for all purposes the same entity that existed before the conversion.

(b) When a conversion takes effect:

- (1) All property owned by the converting partnership or limited partnership vests in the limited liability company;
- (2) All debts, liabilities, and other obligations of the converting partnership or limited partnership continue as obligations of the limited liability company;
- (3) An action or proceeding pending by or against the converting partnership or limited partnership may be continued as if the conversion had not occurred;
- (4) Except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of the converting partnership or limited partnership vest in the limited liability company; and
- (5) Except as otherwise provided in the agreement of conversion under section 902(c), all of the partners of the converting partnership continue as members of the limited liability company.

SECTION 904. (a) Pursuant to a plan of merger approved under subsection (c), a limited liability company may be merged with or into one or more limited liability companies, foreign limited liability companies, corporations, foreign corporations, partnerships, foreign partnerships, limited partnerships, foreign limited partnerships, or other domestic or foreign entities.

(b) A plan of merger must set forth:

- (1) The name of each entity that is a party to the merger;
- (2) The name of the surviving entity into which the other entities will merge;
- (3) The type of organization of the surviving entity;
- (4) The terms and conditions of the merger;
- (5) The manner and basis for converting the interests of each party to the merger into interests or obligations of the surviving entity, or into money or other property in whole or in part;
and
- (6) The street address of the surviving entity's principal place of business.

(c) A plan of merger must be approved:

- (1) In the case of a limited liability company that is a party to the merger, by all of the members or by a number or percentage of members specified in the operating agreement;
- (2) In the case of a foreign limited liability company that is a party to the merger, by the vote required for approval of a merger by the law of the state or foreign jurisdiction in which the foreign limited liability company is organized;
- (3) In the case of a partnership or domestic limited partnership that is a party to the merger, by the vote required for approval of a conversion under section 902(b); and
- (4) In the case of any other entities that are parties to the merger, by the vote required for approval of a merger by the law of this state or of the state or foreign jurisdiction in which the entity is organized and, in the absence of such a requirement, by all the owners of interests in the entity.

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

(e) The merger is effective upon the filing of the articles of merger with the secretary of state, or at such later date as the articles may provide.

SECTION 905. (a) After approval of the plan of merger under section 904(c), unless the merger is abandoned under section 904(d), articles of merger must be signed on behalf of each limited liability company and other entity that is a party to the merger and delivered to the secretary of state for filing.

The articles must set forth:

- (1) The name and jurisdiction of formation or organization of each of the limited liability companies and other entities that are parties to the merger;
- (2) For each limited liability company that is to merge, the date its articles of organization were filed with the secretary of state;
- (3) That a plan of merger has been approved and signed by each limited liability company and other entity that is to merge;
- (4) The name and address of the surviving limited liability company or other surviving entity;
- (5) The effective date of the merger;
- (6) If a limited liability company is the surviving entity, such changes in its articles of organization as are necessary by reason of the merger;
- (7) If a party to a merger is a foreign limited liability company, the jurisdiction and date of filing of its initial articles of organization and the date when its application for authority was filed by the secretary of state or, if an application has not been filed, a statement to that effect; and
- (8) If the surviving entity is not a limited liability company, an agreement that the surviving entity may be served with process in this state and is subject to liability in any action or proceeding for the enforcement of any liability or obligation of any limited liability

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

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

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

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

SECTION 906. (a) When a merger takes effect:

- (1) The separate existence of each limited liability company and other entity that is a party to the merger, other than the surviving entity, terminates;
- (2) All property owned by each of the limited liability companies and other entities that are party to the merger vests in the surviving entity;
- (3) All debts, liabilities, and other obligations of each limited liability company and other entity that is party to the merger become the obligations of the surviving entity;
- (4) An action or proceeding pending by or against a limited liability company or other party to a merger may be continued as if the merger had not occurred or the surviving entity may be substituted as a party to the action or proceeding; and
- (5) Except as prohibited by other law, all the rights, privileges, immunities, powers, and purposes of every limited liability company and other entity that is a party to a merger vest in the surviving entity.

(b) The secretary of state is an agent for service of process in an action or proceeding against the surviving foreign entity to enforce an obligation of any party to a merger if the surviving foreign entity

fails to appoint or maintain a registered agent designated for service of process in this state or the agent for service of process cannot with reasonable diligence be found at the registered office. Upon receipt of process, the secretary of state shall send a copy of the process by registered or certified mail, return receipt requested, to the surviving entity at the address set forth in the articles of merger.

Service is effected under this subsection at the earliest of:

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

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

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

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

SECTION 907. This article does not preclude an entity from being converted or merged under other law.

SECTION 1001. (a) The laws of the state or other jurisdiction under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its managers, members, and their transferees.

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

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

this state.

SECTION 1002. (a) A foreign limited liability company may apply for a certificate of authority to transact business in this state by delivering an application to the secretary of state for filing. The application must set forth:

- (1) The name of the foreign company or, if its name is unavailable for use in this state, a name that satisfies the requirements of section 1005;
- (2) The name of the state or country under whose law it is organized;
- (3) The street address of its principal office;
- (4) The address of its initial designated office in this state;
- (5) The name and street address of its initial agent for service of process in this state;
- (6) Whether the duration of the company is for a specified term and, if so, the period specified;
- (7) Whether the company is manager-managed, and, if so, the name and address of each initial manager; and
- (8) Whether the members of the company are to be liable for its debts and obligations under a provision similar to section 303(c).

(b) A foreign limited liability company shall deliver with the completed application a certificate of existence or a record of similar import authenticated by the secretary of state or other official having custody of company records in the state or country under whose law it is organized together with the annual report required by section 211, the fees required by section 212, and all other fees.

SECTION 1003. (a) Activities of a foreign limited liability company that do not constitute transacting business in this state within the meaning of this article include:

- (1) Maintaining, defending, or settling an action or proceeding;
- (2) Holding meetings of its members or managers or carrying on any other activity concerning its internal affairs;
- (3) Maintaining bank accounts;

- (4) Maintaining offices or agencies for the transfer, exchange, and registration of the foreign company's own securities or maintaining trustees or depositories with respect to those securities;
- (5) Selling through independent contractors;
- (6) Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts;
- (7) Creating or acquiring indebtedness, mortgages, or security interests in real or personal property;
- (8) Securing or collecting debts or enforcing mortgages or other security interests in property securing the debts, and holding, protecting, and maintaining property so acquired;
- (9) Conducting an isolated transaction that is completed within 30 days and is not one in the course of similar transactions of a like manner; and
- (10) Transacting business in interstate commerce.

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

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

SECTION 1004. Unless the secretary of state determines that an application for a certificate of authority fails to comply as to form with the filing requirements of this Act, the secretary of state, upon payment of all filing fees, shall file the application and send a receipt for it and the fees to the limited liability company or its representative.

SECTION 1005. (a) If the name of a foreign limited liability company does not satisfy the requirements of section 105, the company, to obtain or maintain a certificate of authority to transact

business in this state, must use a fictitious name to transact business in this state if its real name is unavailable and it delivers to the secretary of state for filing a copy of the resolution of its managers, in the case of a manager-managed company, or of its members, in the case of a member-managed company, adopting the fictitious name.

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

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

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

- (1) The present user, registrant, or owner of a reserved name consents to the use in a record and submits an undertaking in form satisfactory to the secretary of state to change its name to a name that is distinguishable upon the records of the secretary of state from the name of the foreign applying limited liability company; or
- (2) The applicant delivers to the secretary of state a certified copy of a final judgment of a court establishing the applicant's right to use the name applied for in this state.

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

- (1) Has merged with the other entity;

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

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

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

SECTION 1006. (a) A certificate of authority of a foreign limited liability company to transact business in this state may be revoked by the secretary of state in the manner provided in subsection (b) if:

(1) The company fails to:

(i) Pay any fees, taxes, and penalties owed to this state;

(ii) Deliver its annual report required under section 211 to the secretary of state within sixty days after it is due;

(iii) Appoint and maintain an agent for service of process as required by this article; or

(iv) File a statement of a change in the name or business address of the agent as required by this article; or

(2) A misrepresentation has been made of any material matter in any application, report, affidavit, or other record submitted by the company pursuant to this article.

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

the failure before that date.

SECTION 1007. A foreign limited liability company may cancel its authority to transact business in this state by filing in the Office of the Secretary of State a certificate of cancellation. Cancellation does not terminate the authority of the secretary of state to accept service of process on the company for claims for relief arising out of the transactions of business in this state.

SECTION 1008. (a) A foreign limited liability company transacting business in this state may not maintain an action or proceeding in this state unless it has a certificate of authority to transact business in this state.

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

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

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

SECTION 1009. The attorney general may maintain an action to restrain a foreign limited liability company from transacting business in this state in violation of this article.

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

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

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

or

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

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

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

SECTION 1201. This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

SECTION 1202. This Act may be cited as the South Dakota Limited Liability Company Act.

SECTION 1204. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval.

SECTION 1205. (a) Before January 1, 1999, this Act governs only a limited liability company organized:

- (1) After the effective date of this Act, unless the company is continuing the business of a dissolved limited liability company.;
- (2) Before the effective date of this Act, which elects, as provided by subsection (c), to be governed by this Act.

(b) Before January 1, 2004, a limited liability company existing before the effective date of this

Act may voluntarily elect, in the manner provided in its operating agreement or by law for amending the operating agreement, to be governed by this Act.

(c) On and after January 1, 2004, this Act governs all limited liability companies.

SECTION 1206. The secretary of state may charge the following fees:

(a) For amending or restating the articles of organization in the case of a domestic limited liability company or amending the registration in the case of a foreign limited liability company, a filing fee of ten dollars;

(b) For filing articles of termination, ten dollars;

(c) For filing articles of merger, ten dollars;

(d) For filing a statement of dissociation, ten dollars;

(e) For filing an application to reserve a name, fifteen dollars;

(f) For issuing a certificate of existence, ten dollars;

(g) For filing an application for registration of name, one dollar for each month, or fraction thereof, between the date of filing such application and December thirty-first of the calendar year in which such application is filed;

(h) For filing an annual renewal of registration, a limited liability company which has in effect a registration of its name, may renew such registration from year to year by annually filing an application for renewal setting forth the facts required to be set forth in an original application for registration and a certificate of good standing as required for the original registration and by paying a fee of ten dollars. A renewal application may be filed between the first day of October and the thirty-first day of December in each year, and shall extend the registration for the following year;

(i) For acting as agent for service of process the secretary of state shall charge and collect at the time of such service five dollars which may be recoverable as taxable costs by the party to the suit or action causing the service to be made if the party prevails in the suit or action.

SECTION 1207. This Act does not affect an action or proceeding commenced or right accrued

before the effective date of this Act.

SECTION 1300. That § 47-2-38 be amended to read as follows:

47-2-38. In order to protect the public against confusion between corporations, or between corporations and limited partnerships, and to guard against unfair competition, the name of any corporation:

- (1) Must be distinguishable upon the records of the secretary of state from the name of any other corporation, whether for profit or not for profit, organized under the laws of this state; the name of any foreign corporation, whether for profit or not for profit, authorized to engage in any business in this state; or any corporate name reserved or registered as permitted by the laws of this state; or the name of any limited partnership certified or registered in this state; or the name of any limited liability company. Corporate names or limited partnership names already in use, with generic, proper, geographical or descriptive terms which have acquired a secondary meaning shall be protected. This subdivision does not apply if the applicant files with the secretary of state either:
 - (a) The written consent signed by the president or a vice-president and by the secretary or an assistant secretary of the other corporation; by a holder of a reserved or registered name; or by a general partner of a limited partnership to use the same or a distinguishable name;
 - (b) A certified copy of a final decree of a court of competent jurisdiction establishing the prior right of the applicant to the use of such name in this state; or
 - (c) In the case of a foreign corporation if the corporate name is not available for use, a resolution of its board of directors adopting an assumed name for use in transacting business in this state, which assumed name is not distinguishable from the name of any domestic corporation, any foreign corporation authorized to engage in any business in this state, or any corporate name reserved or registered

as permitted by the laws of this state, or the name of any limited partnership certified or registered in this state or any other assumed name filed with the secretary of state by a foreign corporation authorized to transact business in this state.

- (2) Shall be transliterated into letters of the English alphabet, if it is not in English.

A corporation with which another corporation, domestic or foreign, is merged, or which is formed by the reorganization or consolidation of one or more domestic or foreign corporations or upon a sale, lease or other disposition to or exchange with, a domestic corporation of all or substantially all the assets of another corporation, domestic or foreign, including its name, may have the same name as that used in this state by any of such corporations if the other corporation was organized under the laws of, or is authorized to transact business in this state.

SECTION 1301. That § 47-22-8.1 be amended to read as follows:

47-22-8.1. In order to protect the public against confusion between corporations or between corporations and limited partnerships, the name of any nonprofit corporation:

- (1) May not be the same as or must be distinguishable upon the records of the secretary of state from the name of any other corporation, whether for profit or not for profit, organized under the laws of this state; or the name of any foreign corporation, whether for profit or not for profit, authorized to engage in any business in this state; or any corporate name reserved or registered as permitted by the laws of this state; or the name of any limited partnership certified or registered in this state. Corporate names or limited partnership names already in use, with generic, proper, geographical or descriptive terms which have acquired a secondary meaning shall be protected. This subdivision does not apply if the applicant files with the secretary of state either:

- (a) The written consent signed by the president or a vice-president and by the secretary or an assistant secretary of the other corporation; by a holder of a reserved or

registered name; or by a general partner of a limited partnership to use the same or a distinguishable name;

- (b) A certified copy of a final decree of a court of competent jurisdiction establishing the prior right of the applicant to the use of such name in this state; or
- (c) In the case of a foreign corporation if the corporate name is not available for use, a resolution of its board of directors adopting an assumed name for use in transacting business in this state, which assumed name is not deceptively similar to the name of any domestic corporation, any foreign corporation authorized to engage in any business in this state, or any corporate name reserved or registered as permitted by the laws of this state, or the name of any limited partnership certified or registered in this state, or any other assumed name filed with the secretary of state by a foreign corporation authorized to transact business in this state.

- (2) Shall be transliterated into letters of the English alphabet, if it is not in English.

SECTION 1302. That § 48-7-102 be amended to read as follows:

48-7-102. The name of a limited partnership as set forth in its certificate of limited partnership:

- (1) Shall contain without abbreviation the words "limited partnership";
- (2) May not contain the name of a limited partner unless:
 - (a) It is also the name of a general partner or the corporate name of a corporate general partner; or
 - (b) The business of the limited partnership had been carried on under that name before the admission of that limited partner;
- (3) Must be distinguishable upon the records of the secretary of state from, the name of any corporation, whether for profit or not for profit, or limited partnership organized under the laws of South Dakota or licensed or registered as a foreign corporation, whether for profit

or not for profit, or limited partnership in this state; and

- (4) May not contain any word or phrase indicating or implying that it is organized other than for a purpose stated in its certificate of limited partnership.

An Act to provide for proper recording of corporate names, to provide for a Limited Liability Company Act, and to declare an emergency.

=====

I certify that the attached Act
originated in the

SENATE as Bill No. 218

Secretary of the Senate
=====

President of the Senate

Attest:

Secretary of the Senate

Speaker of the House

Attest:

Chief Clerk

Senate Bill No. 218
File No. _____
Chapter No. _____

=====

Received at this Executive Office
this ____ day of _____ ,

19__ at ____ M.

By _____
for the Governor
=====

The attached Act is hereby
approved this _____ day of
_____, A.D., 19__

Governor
=====

STATE OF SOUTH DAKOTA,
ss.
Office of the Secretary of State

Filed _____, 19__
at _____ o'clock __ M.

Secretary of State

By _____
Asst. Secretary of State