COMMITTEE REPORT

March 13, 2018

**S. 189**

Introduced by Senator Goldfinch

S. Printed 3/13/18--S.

Read the first time January 10, 2017.

**THE COMMITTEE ON**

**LABOR, COMMERCE AND INDUSTRY**

To whom was referred a Bill (S. 189) to amend the Code of Laws of South Carolina, 1976, by adding Chapter 43 to Title 33 so as to enact the “Uniform Limited Liability Company Act of 2017”, etc., respectfully

**REPORT:**

That they have duly and carefully considered the same and recommend that the same do pass:

THOMAS C. ALEXANDER for Committee.

**STATEMENT OF ESTIMATED FISCAL IMPACT**

**Explanation of Fiscal Impact**

**Introduced on January 10, 2017**

**State Expenditure**

This bill repeals the Uniform Limited Liability Company (LLC) Act of 1996 and replaces it with the Uniform LLC Act of 2017. This bill provides for the manner in which limited liability companies are organized, operated, regulated, dissolved, and transferred. The bill also states that an LLC operating agreement may restrict or eliminate statutory fiduciary duties, a LLC member cannot be held liable for the malfeasance of an LLC by virtue of his membership alone, and a nonprofit LLC may be formed in South Carolina.

**Secretary of State.** The agency indicates this bill will have no expenditure impact on the general fund, other funds, or federal funds. The agency will have to create additional forms and would have to modify their online filing and document retrieval system. These changes can be accomplished without additional resources.

**State Revenue**

The Secretary of State indicates this bill will raise the filing fee for a Statement of Correction from $2 to $25. In 2015, 150 Statements of Correction were filed. At this service level, fee revenue would increase $3,450 at the new $25 fee. The bill also creates a Statement of Dissolution and a Statement of Termination, each with a $10 filing fee. A Statement of Termination was previously named an Article of Termination. A Statement of Dissolution may be filed prior to filing a Statement of Termination. In FY 2015-16, 3,500 Articles of Termination were filed, each with a $10 filing fee. An LLC may file a Statement of Dissolution and/or a Statement of Termination, but is not required to do so. Since the filing fee remains $10, the only increase in revenue would be for filing both a Statement of Dissolution and a Statement of Termination. The maximum revenue based upon 3,500 filings would be $35,000 if every entity files both. However, the actual amount may be less, depending upon an unknown demand for this service.

Frank A. Rainwater, Executive Director

Revenue and Fiscal Affairs Office

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 43 TO TITLE 33 SO AS TO ENACT THE “UNIFORM LIMITED LIABILITY COMPANY ACT OF 2017”, TO PROVIDE FOR THE MANNER IN AND REQUIREMENTS UNDER WHICH LIMITED LIABILITY COMPANIES ARE ORGANIZED, OPERATED, REGULATED, DISSOLVED, TRANSFERRED, AND CONVERTED; AND TO REPEAL CHAPTER 44, TITLE 33 RELATING TO THE “UNIFORM LIMITED LIABILITY COMPANY ACT OF 1996”.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. (A) The General Assembly finds that by Act 343 of 1996, the General Assembly enacted the South Carolina Uniform Limited Liability Company Act as contained in Chapter 44, Title 33. In 2006, the Uniform Law Commission, on which South Carolina has four participating commissioners, developed and submitted to the various states for enactment the 2006 Revised Uniform Limited Liability Company Act. Recently, a drafting committee was formed in South Carolina and charged with reviewing the 2006 Revised Uniform Limited Liability Company Act for adoption in South Carolina. The committee was asked to review the 2006 Uniform Act and suggest any needed modifications to make it fit with South Carolina practice or needs. The drafting committee’s work and suggested changes to the 2006 Uniform Act are reflected in particular code sections, and in some cases in the Reporter’s Comments as well.

The members of the committee were: Scott Barnes, Rob Bethea, Tom Brumgardt, Jim Burkhard, Joe Clark, Frank Cureton, Jones DuBose, Melissa Dunlap, Todd Ellis, Jay Henning, Maurice Holloway, Ben Means, David Merline, Jr., George Morrison, Graham Newman, and Shannon Wiley. Justin Dixon, a third year law student, provided invaluable assistance to the committee by preparing comparison reports and notes of the meetings. The General Assembly expresses its thanks to each of these fine individuals and attorneys for their diligence and professionalism in developing and preparing these suggested revisions and comments, and has chosen to enact these provisions as a new Chapter 43 of Title 33.

(B) The General Assembly further provides that the South Carolina version of the Uniform Limited Liability Company Act of 2017 differs in some respects from the 2006 Revised Uniform Limited Liability Company Act adopted by the Uniform Law Commission and recommended to the states for adoption. As a result, South Carolina Reporter’s Comments as prepared by the drafting committee referenced in subsection (A) appear after certain code sections with the intent of aiding the user in understanding the provisions of that section and in some cases how the South Carolina version may differ from the ULC’s version. The official comments prepared by the ULC are not included in this act but interested users may access these comments at the Uniform Law Commission’s depository website: http://uniformlaws.org.

SECTION 2. Title 33 of the 1976 Code is amended by adding:

“CHAPTER 43

Uniform Limited Liability Company Act of 2017

Article 1

General Provisions

Section 33‑43‑101. This chapter may be cited as the ‘Uniform Limited Liability Company Act of 2017’.

Section 33‑43‑102. As used in this chapter:

(1) ‘Certificate of organization’ means the certificate required by Section 33‑43‑201. The term includes the certificate as amended or restated.

(2) ‘Contribution’ means any benefit provided by a person to a limited liability company:

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

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

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

(3) ‘Debtor in bankruptcy’ means a person that is the subject of:

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

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

(4) ‘Distribution’, except as otherwise provided in Section 33‑43‑405(g), means a transfer of money or other property from a limited liability company to another person on account of a transferable interest.

(5) ‘Effective’, with respect to a record required or permitted to be delivered to the Secretary of State for filing under this chapter, means effective under Section 33‑43‑205(c).

(6) ‘Foreign limited liability company’ means an unincorporated entity formed under the law of a jurisdiction other than this State and denominated by that law as a limited liability company.

(7) ‘Limited liability company’, except in the phrase ‘foreign limited liability company’, means an entity formed under this chapter.

(8) ‘Manager’ means a person that under the operating agreement of a manager‑managed limited liability company is responsible, alone or in concert with others, for performing the management functions stated in Section 33‑43‑407(c).

(9) ‘Manager‑managed limited liability company’ means a limited liability company that qualifies under Section 33‑43‑407(a).

(10) ‘Member’ means a person that has become a member of a limited liability company under Section 33‑43‑401 and has not dissociated under Section 33‑43‑602.

(11) ‘Member‑managed limited liability company’ means a limited liability company that is not a manager‑managed limited liability company.

(12) ‘Operating agreement’ means the agreement, whether or not referred to as an operating agreement and whether oral, in a record, implied, or in any combination thereof, of all the members of a limited liability company, including a sole member, concerning the matters described in Section 33‑43‑110(a). The term includes the agreement as amended or restated.

(13) ‘Organizer’ means a person that acts under Section 33‑43‑201 to form a limited liability company.

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

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

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

(17) ‘Sign’ means, with the present intent to authenticate or adopt a record:

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

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

(18) ‘State’ means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(19) ‘Transfer’ includes an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, gift, and transfer by operation of law.

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

(21) ‘Transferee’ means a person to which all or part of a transferable interest has been transferred, whether or not the transferor is a member.

Section 33‑43‑103. (a) A person knows a fact when the person:

(1) has actual knowledge of it; or

(2) is deemed to know it under subsection (e) or law other than this chapter.

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

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

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

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

(d) A person that is not a member is deemed to have notice of a limited liability company’s:

(1) dissolution, ninety days after a statement of dissolution under Section 33‑43‑702(b)(2)(A) becomes effective;

(2) termination, ninety days after a statement of termination Section 33‑43‑702(b)(3) becomes effective; and

(3) merger, conversion, or domestication, ninety days after articles of merger, conversion, or domestication under Article 10 become effective.

(e) Members, managers, and persons not members are deemed to know of an effective statement of authority to transfer real property as provided in Section 33‑43‑302(f) and also any limitation on authority to transfer real property as provided in Section 33‑43‑302(g).

**South Carolina Reporter**’**s Comment**

Former Section 102 provided in subsection (e) when an “entity” was deemed to know, had notice, or received a notification of a fact. This subsection does not appear in this act. However, the omission of the prior subsection is not deemed to be a legislative determination that the concepts included in the prior subsection (e) could not be applied by a South Carolina court to determine that an entity is deemed to know, has notice, or has received a notification of a fact.

Section 33‑43‑104. (a) A limited liability company is an entity distinct from its members.

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

(c) A limited liability company has perpetual duration.

**South Carolina Reporter**’**s Comment**

Section 33‑43‑104(b) now provides that a nonprofit LLC may be formed in South Carolina.

Subsection (c) provides that unless modified in the operating agreement, all LLCs will have perpetual duration. Those LLCs that wish to have a limited duration need to so provide in their operating agreements.

Existing LLCs are now governed by this act and need to specifically consider (1) that when a member now withdraws from what was an “at will” LLC, the statute no longer entitles the withdrawing member to have her interest redeemed, as was true under prior law, and (2) likewise, a member who withdraws from what formally was a “term” LLC will no longer be entitled to have her interest redeemed at the end of the term (as was true under the former statute). Existing LLCs should consider whether to provide in their operating agreements that withdrawing members will be entitled to have their interests redeemed by the LLC. If the provisions of this new act are not modified by the operating agreement, a member who withdraws will not receive anything for her interest until the LLC is dissolved (see Section 33‑43‑708).

Section 33‑43‑105. A limited liability company has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient not inconsistent with law to carry on its activities.

Section 33‑43‑106. The law of this State governs:

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

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

Section 33‑43‑107. Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.

Section 33‑43‑108. (a) The name of a limited liability company must contain the words ‘limited liability company’ or ‘limited company’ or the abbreviation ‘L.L.C.’, ‘LLC’, ‘L.C.’, or ‘LC’. ‘Limited’ may be abbreviated as ‘Ltd.’, and ‘company’ may be abbreviated as ‘Co.’.

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

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

(2) each name reserved under Section 33‑43‑109.

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

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

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

(d) Subject to Section 33‑43‑805, this section applies to a foreign limited liability company transacting business in this State which has a certificate of authority to transact business in this State or which has applied for a certificate of authority.

Section 33‑43‑109. (a) A person may reserve the exclusive use of the name of a limited liability company, including a fictitious or assumed name for a foreign limited liability company whose name is not available, by delivering an application to the Secretary of State for filing. The application must state the name and address of the applicant and the name proposed to be reserved. If the Secretary of State finds that the name applied for is available, it must be reserved for the applicant’s exclusive use for a nonrenewable one hundred twenty‑day period.

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

Section 33‑43‑110. (a) Except as otherwise provided in subsections (b) and (c), the operating agreement governs:

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

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

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

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

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

(c) An operating agreement may not:

(1) vary a limited liability company’s capacity under Section 33‑43‑105 to sue and be sued in its own name;

(2) vary the law applicable under Section 33‑43‑106;

(3) vary the power of the court under Section 33‑43‑204;

(4)vary the limitations imposed by Section 33‑43‑405, or limit the liabilities imposed by Section 33‑43‑406.

(5) unreasonably restrict the duties and rights stated in Section 33‑43‑410;

(6) vary the power of a court to decree dissolution in the circumstances specified in Section 33‑43‑701(a)(4) and (5);

(7) vary the requirement to wind up a limited liability company’s business as specified in Section 33‑43‑702(a) and (b)(1);

(8) restrict the right of a member to maintain an action under Article 9;

(9) restrict the right to approve a merger, conversion, or domestication under Section 33‑43‑1017 to a member that will have personal liability with respect to a surviving, converted, or domesticated organization; or

(10) except as otherwise provided in Section 33‑43‑112(b), restrict the rights under this chapter of a person other than a member or manager.

(d) A written operating agreement may expand, restrict, or eliminate the member’s or manager’s or other person’s duties and rights stated in Section 33‑43‑409; provided however an operating agreement may not eliminate the contractual obligation of good faith and fair dealing under Section 33‑43‑409(d).

(e) The operating agreement may alter or eliminate the indemnification for a member or manager provided by Section 33‑43‑408(a).

**South Carolina Reporter**’**s Comment**

The LLC’s operating agreement controls the LLC’s operations. The statute recognizes the fundamental concept of freedom of contract. Similar to former South Carolina law, Section 33‑43‑409 imposes specified fiduciary duties on members and managers (which are the only ones unless expanded by the operating agreement). However, different from former law, all the statutory fiduciary duties may be restricted or eliminated if so provided in the operating agreement. Although all operating agreements may be either oral or in writing, if the operating agreement either expands, restricts, or eliminates any fiduciary duties, such provision must be in writing ‑ it cannot be orally imposed. The drafters recognize that throughout the country there are many claims that members or managers have breached fiduciary duties and there often are questions as to what duties are imposed. In order to help minimize any questions as to what fiduciary duties exist, any change to the statutory duties must be in writing.

The predecessor statute, the Act of 1996, also permitted, as does this act, the operating agreement to be oral. However, members and managers should be aware that decisions in other states have applied the Statute of Frauds to invalidate provisions of oral operating agreements. Thus, the better practice is to always utilize a written operating agreement. See, Olson v. Halvorsen, 986 A.2d 1150 (Del. Sup. Ct. 2009).

Section 33‑43‑111. (a) A limited liability company is bound by and may enforce the operating agreement, whether or not the company has itself manifested assent to the operating agreement.

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

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

Section 33‑43‑112. (a) An operating agreement may specify that its amendment requires the approval of a person that is not a party to the operating agreement or the satisfaction of a condition. An amendment is ineffective if its adoption does not include the required approval or satisfy the specified condition.

(b) The obligations of a limited liability company and its members to a person in the person’s capacity as a transferee or dissociated member are governed by the operating agreement. Subject only to any court order issued under Section 33‑43‑503(b)(2) to effectuate a charging order, an amendment to the operating agreement made after a person becomes a transferee or dissociated member is effective with regard to any debt, obligation, or other liability of the limited liability company or its members to the person in the person’s capacity as a transferee or dissociated member.

(c) If a record that has been delivered by a limited liability company to the Secretary of State for filing and has become effective under this chapter contains a provision that would be ineffective under Section 33‑43‑110(c) or (d) if contained in the operating agreement, the provision is likewise ineffective in the record.

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

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

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

**South Carolina Reporter**’**s Comment**

Section 33‑43‑112(b) confirms that the rights of a transferee and dissociated member are controlled by the operating agreement. The operating agreement may be amended after a member leaves the LLC or becomes a transferee. As such, the person will have only those rights which are agreed to by the remaining members. The remaining members can thus amend (if necessary) the operating agreement to limit or eliminate rights that the former member might have previously enjoyed. To the extent the former member might have been owed fiduciary duties, these can be eliminated by the amendment or modification of the operating agreement. It is very important that members understand the impact of this section and provide by contract or other arrangement, if needed, methods to protect themselves.

Section 33‑43‑113. (a) A limited liability company shall designate and continuously maintain in this State a registered agent.

(b) A foreign limited liability company that has a certificate of authority under Section 33‑43‑802 shall designate and continuously maintain in this State a registered agent.

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

Section 33‑43‑114. (a) A limited liability company or foreign limited liability company may change its registered agent, or the address of its registered agent by delivering to the Secretary of State for filing a statement of change containing:

(1) the name of the company;

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

(3) if the current registered agent or an address of the agent is to be changed, the new information.

(b) If the limited liability company or foreign limited liability company authorized to do business changes its principal office, or required office of a foreign limited liability company, it shall within sixty days of such change deliver to the Secretary of State a statement of change containing both the old and new address.

(c) Subject to Section 33‑43‑205(c), a statement of change is effective when filed by the Secretary of State.

Section 33‑43‑115. (a) A registered agent may resign as agent for a limited liability company or registered foreign limited liability company by delivering to the Secretary of State for filing a statement of resignation that states:

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

(2) the name of the agent;

(3) that the agent resigns from serving as registered agent for the company or foreign company; and

(4) the address of the company or foreign company to which the agent will send the notice required by subsection (c).

(b) A statement of resignation takes effect on the earlier of:

(1) the thirty‑first day after the day on which it is filed by the secretary of State; or

(2) the designation of a new registered agent for the limited liability company or registered foreign limited liability company.

(c) A registered agent promptly shall furnish to the limited liability company or authorized foreign limited liability company notice in a record of the date on which a statement of resignation was filed.

(d) When a statement of resignation takes effect, the registered agent ceases to have responsibility under this chapter for any matter thereafter tendered to it as agent for the limited liability company or registered foreign limited liability company. The resignation does not affect any contractual rights the company or foreign company has against the agent or that the agent has against the company or foreign company.

(e) A registered agent may resign with respect to a limited liability company or authorized foreign limited liability company whether or not the company or foreign company is in good standing.

Section 33‑43‑116. (a) A registered agent appointed by a limited liability company or foreign limited liability company is an agent of the company for service of any process, notice, or demand required or permitted by law to be served on the company.

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

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

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

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

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

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

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

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

Article 2

Formation, Certificate of Organization and Other Filings

Section 33‑43‑201. (a) One or more persons may act as organizers to form a limited liability company by signing and delivering to the Secretary of State for filing a certificate of organization.

(b) A certificate of organization must state:

(1) the name of the limited liability company, which must comply with Section 33‑43‑108;

(2) the street and mailing address of the company’s principal office;

(3) the name and street and mailing address in this State of the company’s registered agent.

(c) A certificate of organization may contain statements as to matters other than those required in subsection (b), but may not vary or otherwise affect the provisions specified in Sections 33‑43‑110(c) and (d) in a manner inconsistent with those sections, nor may it contain a certificate of authority provided for in Section 33‑43‑302.

(d) A limited liability company is formed when the company’s certificate of organization becomes effective.

Section 33‑43‑202. (a) A certificate of organization may be amended or restated at any time.

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

(1) the name of the company;

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

(3) the changes the amendment makes to the certificate as most recently amended or restated.

(c) To restate its certificate of organization, a limited liability company must deliver to the Secretary of State for filing a restatement, designated as such in its heading, stating:

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

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

(3) the changes the restatement makes to the certificate as most recently amended or restated.

(d) Subject to Sections 33‑43‑112(c) and 33‑43‑205(c), an amendment to or restatement of a certificate of organization is effective when filed by the Secretary of State.

Section 33‑43‑203. (a) A record delivered to the Secretary of State for filing under this chapter must be signed as follows:

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

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

(3) A record filed on behalf of a dissolved limited liability company that has no members must be signed by the person winding up the company’s activities under Section 33‑43‑702(c) or a person appointed under Section 33‑43‑702(d) to wind up those activities.

(4) A statement of denial by a person under Section 33‑43‑303 must be signed by that person.

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

(b) Any record filed under this chapter may be signed by an agent.

Section 33‑43‑204. (a) If a person required by this chapter to sign a record or deliver a record to the Secretary of State for filing under this chapter does not do so, any other person that is aggrieved may petition the appropriate court to order:

(1) the person to sign the record;

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

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

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

Section 33‑43‑205. (a) A record authorized or required to be delivered to the Secretary of State for filing under this chapter must be captioned to describe the record’s purpose, be in a medium permitted by the Secretary of State, and be delivered to the Secretary of State. If the filing fees have been paid, unless the Secretary of State determines that a record does not comply with the filing requirements of this chapter, the Secretary of State shall file the record and:

(1) for a statement of denial under Section 33‑43‑303, send a copy of the filed statement and a receipt for the fees to the person on whose behalf the statement was delivered for filing and to the limited liability company; and

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

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

(c) Except as otherwise provided in Sections 33‑43‑115 and 33‑43‑206, a record delivered to the Secretary of State for filing under this chapter may specify an effective time and a delayed effective date. Subject to Sections 33‑43‑115 and 33‑43‑206, a record filed by the Secretary of State is effective:

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

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

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

(A) the specified date; or

(B) the ninetieth day after the record is filed; or

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

(A) the specified date; or

(B) the ninetieth day after the record is filed.

Section 33‑43‑206. (a) A limited liability company or foreign limited liability company may deliver to the Secretary of State for filing a statement of correction to correct a record previously delivered by the company to the Secretary of State and filed by the Secretary of State, if at the time of filing the record contained inaccurate information or was defectively signed.

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

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

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

(3) correct the defective signature or inaccurate information.

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

(1) for the purposes of Section 33‑43‑103(d); and

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

Section 33‑43‑207. (a) If a record delivered to the Secretary of State for filing under this chapter and filed by the Secretary of State contains inaccurate information, a person that suffers a loss by reliance on the information may recover damages for the loss from a person that signed the record, or caused another to sign it on the person’s behalf, and knew the information to be inaccurate at the time the record was signed.

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

Section 33‑43‑208. (a) The Secretary of State, upon request and payment of the requisite fee, shall furnish to any person a certificate of existence for a limited liability company if the records filed in the office of the Secretary of State show that the company has been formed under Section 33‑43‑201 and the Secretary of State has not filed a statement of termination pertaining to the company. A certificate of existence must state:

(1) the company’s name;

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

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

(4) whether the Secretary of State has administratively dissolved the company;

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

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

(7) other facts of record in the office of the Secretary of State which are specified by the person requesting the certificate.

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

(1) the company’s name and any alternate name adopted under Section 33‑43‑805(a) for use in this State;

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

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

(4) that the Secretary of State has not revoked the company’s certificate of authority and has not filed a notice of cancellation; and

(5) other facts of record in the office of the Secretary of State which are specified by the person requesting the certificate.

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

Article 3

Relations of Members and Managers

to Persons Dealing With a Limited Liability Company

Section 33‑43‑301. (a) A member is not an agent of a limited liability company solely by reason of being a member.

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

Section 33‑43‑302. (a) A limited liability company may deliver to the Secretary of State for filing a statement of authority which may not be incorporated as part of the certificate of organization. The statement:

(1) must include the name of the company and the street and mailing addresses of its principal office;

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

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

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

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

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

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

(b) To amend or cancel a statement of authority filed by the Secretary of State under Section 33‑43‑205(a), a limited liability company must deliver to the Secretary of State for filing an amendment or cancellation stating:

(1) the name of the company;

(2) the street and mailing addresses of the company’s principal office;

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

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

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

(d) Subject to subsection (c) and Section 33‑43‑103(d) and except as otherwise provided in subsections (f), (g), and (h), a limitation on the authority of a person or a position contained in an effective statement of authority is not by itself evidence of knowledge or notice of the limitation by any person.

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

(1) the person has knowledge to the contrary;

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

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

(f) Subject to subsection (c), an effective statement of authority that grants authority to transfer real property held in the name of the limited liability company may be recorded by certified copy in the office of register of deeds of the county in South Carolina in which the real property is located. If there is no office in that county, a certified copy may be filed in the clerk of court of the county in which that real property is located. Such recorded certified statement of authority is conclusive in favor of a person that gives value in reliance on the grant without knowledge to the contrary, except to the extent that when the person gives value:

(1) the statement has been canceled or restrictively amended under subsection (b) and a certified copy of the cancellation or restrictive amendment has been recorded in the register of deeds or clerk of court; or

(2) a limitation on the grant is contained in another statement of authority that became effective after the statement containing the grant became effective and a certified copy of the later‑effective statement is recorded in the register of deeds or clerk of court.

(g) If a certified copy of an effective statement containing a limitation on the authority to transfer real property held in the name of a limited liability company is recorded in the register of deeds or clerk of court for that real property, all persons are deemed to know of the limitation.

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

(i) After a statement of dissolution becomes effective, a limited liability company may deliver to the Secretary of State for filing and, if appropriate, may record a statement of authority that is designated as a post‑dissolution statement of authority. The statement operates as provided in subsections (f) and (g).

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

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

(l) The limited liability company shall deliver to each member and manager a record of each statement of authority, amendment, or cancellation filed with the Secretary of State.

**South Carolina Reporter**’**s Comment**

The primary purpose of Section 33‑43‑302 is to permit third parties dealing with LLCs to rely on the authority of persons identified in a recorded statement of authority. Likewise, the LLC can protect itself by recording a statement that identifies any limitation of authority to transfer LLC real property. The mere filing of a statement of authority with the Secretary of State is not notice to third parties; recording is necessary. (Members and managers are assumed to know who is authorized to act on behalf of the LLC by virtue of the terms of any operating agreement and the certificate of organization.)

It is assumed that statements of authority will be primarily used where the LLC is making normal or routine transfers of real property, and as such will primarily be of benefit to title examiners who are evaluating routine transfers. For example, if the LLC is in the business of developing and selling condominium units, a recorded statement of authority will be beneficial to those handling the routine closings.

If the LLC is engaged in a significant transaction, counsel dealing with the LLC will likely not rely solely on a recorded statement of authority, but will follow typical due diligence routines including: examination of the certificate of organization and the terms of any operating agreement, obtaining certified minutes of either the members or managers, obtaining a Certificate of Existence, determination of compliance with tax and other governmental requirements, review of court house and other governmental records regarding pending litigation and other matters, along with other pertinent investigation deemed appropriate.

It should be noted that any statement of authority is only effective for five years. The South Carolina statute requires the LLC to furnish to each member and manager a copy of each statement of authority, amendment, or cancellation.

Section 33‑43‑303. A person named in a filed statement of authority granting that person authority may deliver to the Secretary of State for filing a statement of denial that:

(1) provides the name of the limited liability company and the caption of the statement of authority to which the statement of denial pertains; and

(2) denies the grant of authority.

Section 33‑43‑304. (a) The debts, obligations, or other liabilities of a limited liability company, whether arising in contract, tort, or otherwise:

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

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

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

**South Carolina Reporter**’**s Comment**

The liability shield provided by Section 33‑43‑304 to both members and managers protects them “solely” in their status as members or managers. Webster’s Third New International Dictionary defines “solely” to mean “to the exclusion of alternate or competing things....” A limited liability company member cannot be held liable for the malfeasance of a limited liability company by virtue of his membership in the limited liability company alone; in other words, he must do more than merely be a member in order to be liable personally for an obligation of the limited liability company. The statute thus does not preclude individual liability for members (or managers) of a limited liability company if that liability is not based simply on the member’s affiliation with the company. The shield provides no protection when a member engages in actionable conduct. “A tort is no less a tort for being committed in the service of a separate legal person. A tortfeasor is no less a tortfeasor when the tortious conduct occurs as part of an enterprise.” Bishop & Kleinberger, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW, & paragraph 6.04(2)(a) (2012). Section 33‑43‑304 also provides no protection where the member’s conduct injures another member or the LLC. If the member is liable, it is not because of her status as a member, but rather because she has breached a duty or obligation owed to the injured party. There also may be statutes, such as S.C. Code Section 41‑10‑10 et. seq. that may impose personal liability on a member (here for a failure to pay wages), and as such, Section 33‑43‑304 provides no protection to the member. On the other hand, in most circumstances, a member of an LLC will not be liable on a contract made by the member on behalf of the LLC. LLC members and managers who disclose that they are contracting on an LLC’s behalf are not liable for a breach because they are not parties to the contractBonly the LLC itself is. See, Restatement (Third) or Agency Section 6.01, “When an agent acting with actual or apparent authority makes a contract on behalf of a disclosed principal, (1) the principal and the third party are parties to the contract; and (2) the agent is not a party to the contract unless the agent and third party agree otherwise.” South Carolina Section 33‑43‑304 is very similar to statutes in many other states, and the Bishop & Kleinberger text noted above is an excellent source when analyzing the complexities of this section.

Article 4

Relations of Members to Each Other and

to a Limited Liability Company

Section 33‑43‑401. (a) If a limited liability company is to have only one member upon formation, the person becomes a member as agreed by that person and the organizer of the company. That person and the organizer may be, but need not be, different persons. If different, the organizer acts on behalf of the initial member.

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

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

(1) as provided in the operating agreement;

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

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

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

(A) the last person to have been a member, or the legal representative of that person, designates one or more persons to become a member or members; and

(B) the designated person, or at least one of the designated persons if more than one are designated, consents to become a member.

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

**South Carolina Reporter**’**s Comment**

Section 33‑43‑401 does not require those persons who will be LLC members to enter into a formal agreement prior to the filing of articles of organization. Subsections (a) and (b) merely require the person (if a single member LLC is planned) or one or more of the persons who will be members of a multi‑person LLC, to instruct a person (who may be one of the future members) to file the articles of organization. The person forming a single‑member LLC can state to her lawyer or the anticipated organizer that she would like the LLC formed. If the organizer will be the sole member, the sole member may simply file the articles. Similarly, if there will be multiple members of the new LLC, one or more of the persons who will become members may instruct their lawyer or any person that they wish the LLC to be organized. An oral agreement or nonwritten informal understanding among those who will be the initial members is all that is required by subsection (b). Nothing in this section causes a person to become a member of the LLC prior to its formation by virtue of such understanding that an LLC will be formed and who will be the members upon filing the articles of organization. Although not required by this or any other section, the better practice upon formation of the LLC is for the member (in a single member LLC) or all the initial members of a multi‑member LLC to enter into a written operating agreement confirming in writing their prior understanding to form the LLC and be its members upon organization.

The Uniform LLC Act and other similar business acts (ULPA) provide for a ninety consecutive‑day period. Ninety consecutive days is sufficient time to either wrap up the business of the LLC or to utilize subitem (A) or (B) in connection with there being an on‑going member to coordinate a liquidation.

Section 33‑43‑402. A contribution may consist of tangible or intangible property or other benefit to a limited liability company, including money, services performed, promissory notes, other agreements to contribute money or property, and contracts for services to be performed.

Section 33‑43‑403. (a) A person’s obligation to make a contribution to a limited liability company is not excused by the person’s death, disability, or other inability to perform personally. If a person does not make a required contribution, the person or the person’s estate is obligated to contribute money equal to the value of the part of the contribution which has not been made, at the option of the company.

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

Section 33‑43‑404. (a) Any distributions made by a limited liability company before its dissolution and winding up must be in equal shares among members and dissociated members, except to the extent necessary to comply with any transfer effective under Section 33‑43‑502 and any charging order in effect under Section 33‑43‑503.

(b) A person has a right to a distribution before the dissolution and winding up of a limited liability company only if the company decides to make an interim distribution. A person’s dissociation does not entitle the person to a distribution in that a member’s disassociation does not in of itself give the former member the right to have his or her interests in the limited liability company redeemed.

(c) A person does not have a right to demand or receive a distribution from a limited liability company in any form other than money. Except as otherwise provided in Section 33‑43‑708(c), a limited liability company may distribute an asset in kind if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person’s share of distributions.

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

**South Carolina Reporter**’**s Comment**

Subsection (a) of this Section 33‑43‑404 provides that distributions shall be made equally among members and dissociated members. This is merely the default provision and the members may change this by an appropriate provision in the operating agreement. As an additional reminder, almost all provisions of the operating agreement may be orally agreed to; there is no statutory requirement that operating agreement must be in writing (other than modification of Section 33‑43‑409 fiduciary duties which must be in writing).

Section 33‑43‑405. (a) A limited liability company may not make a distribution if after the distribution:

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

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

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

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

(1) in the case of a distribution by purchase, redemption, or other acquisition of a transferable interest in the company, as 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:

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

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

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

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

(f) If 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.

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

Section 33‑43‑406. (a) Except as otherwise provided in subsection (b), if a member of a member‑managed limited liability company or manager of a manager‑managed limited liability company consents to a distribution made in violation of Section 33‑43‑405 and in consenting to the distribution fails to comply with Section 33‑43‑409, as may be modified by Section 33‑43‑110(d), the member or manager is personally liable to the company for the amount of the distribution that exceeds the amount that could have been distributed without the violation of Section 33‑43‑405.

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

(c) A person that receives a distribution knowing that the distribution to that person was made in violation of Section 33‑43‑405 is personally liable to the limited liability company but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under Section 33‑43‑405.

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

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

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

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

Section 33‑43‑407. (a) A limited liability company is a member‑managed limited liability company unless the operating agreement:

(1) expressly provides that:

(A) the company is or will be ‘manager‑managed’;

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

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

(2) includes words of similar import.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(D) amend the operating agreement.

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

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

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

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

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

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

Section 33‑43‑408. (a) A limited liability company shall reimburse for any payment made and indemnify for any debt, obligation, or other liability incurred by a member of a member‑managed company or the manager of a manager‑managed company in the course of the member’s or manager’s activities on behalf of the company, if, in making the payment or incurring the debt, obligation, or other liability, the member or manager complied with the duties stated in Sections 33‑43‑405 and 33‑43‑409, as may be modified by Section 33‑43‑110(d).

(b) A limited liability company may purchase and maintain insurance on behalf of a member or manager of the company against liability asserted against or incurred by the member or manager in that capacity or arising from that status even if, under Section 33‑43‑110(g), the operating agreement could not eliminate or limit the person’s liability to the company for the conduct giving rise to the liability.

Section 33‑43‑409. (a) Subject to the provisions of Section 33‑43‑110(d), a member of a member‑managed limited liability company owes to the company and the other members only the fiduciary duties of loyalty and care stated in subsections (b) and (c).

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

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

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

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

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

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

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

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

(d) A member in a member‑managed limited liability company or a manager‑managed limited liability company shall discharge the duties under this chapter or under the operating agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing.

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

(f) All of the members of a member‑managed limited liability company or a manager‑managed limited liability company may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.

(g) In a manager‑managed limited liability company, the following rules apply:

(1) Subsections (a), (b), (c), and (e) apply to the manager or managers and not the members.

(2) The duty stated under subsection (b)(3) continues until winding up is completed.

(3) Subsection (d) applies to the members and managers.

(4) Subsection (f) applies only to the members.

(5) A member does not have any fiduciary duty to the company or to any other member solely by reason of being a member.

**South Carolina Reporter**’**s Comment**

The fiduciary duties listed in Section 33‑43‑409 are the exclusive fiduciary duties that are imposed on members or managers. Unless a written operating agreement specifically includes additional fiduciary duties, the fiduciary duties provided in this section are the only ones that affect members or managers; judges should not impose any additional fiduciary duties. Section 33‑43‑110(d) provides that a written operating agreement may “expand, restrict, or eliminate, the member’s or, manager’s or other person’s duties.” However, because the parties to a long‑term, relational contract cannot anticipate or reduce all important terms to well‑defined obligations, the contractual duty of good faith and fair dealing imposed by Section 33‑43‑409(d) is mandatory and provides judges with the equitable power to sanction opportunistic conduct. Thus, the duty of good faith and fair dealing fills in gaps in the parties’ operating agreement and limits their ability to exploit control provisions in unforeseen circumstances. For further elaboration, see Benjamin Means, A Contractual Approach to Shareholder Oppression Law, 79 Fordham L. Rev.1161 (2010).

Section 33‑43‑410. (a) In a member‑managed limited liability company, the following rules apply:

(1) On reasonable notice, a member may inspect and copy during regular business hours, at a reasonable location specified by the company, any record maintained by the company regarding the company’s activities, financial condition, and other circumstances, to the extent the information is material to the member’s rights and duties under the operating agreement or this chapter.

(2) The company shall furnish to each member:

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

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

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

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

(1) The informational rights stated in subsection (a) and the duty stated in subsection (a)(3) apply to the managers and not the members.

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

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

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

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

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

(A) of the information that the company will provide in response to the demand and when and where the company will provide the information; and

(B) if the company declines to provide any demanded information, the company’s reasons for declining.

(4) Whenever this chapter or an operating agreement provides for a member to give or withhold consent to a matter, before the consent is given or withheld, the company shall, without demand, provide the member with all information that is known to the company and is material to the member’s decision.

(c) On ten days’ demand made in a record received by a limited liability company, a dissociated member may have access to information to which the person was entitled while a member if the information pertains to the period during which the person was a member, the person seeks the information in good faith, and the person satisfies the requirements imposed on a member by subsection (b)(2). The company shall respond to a demand made pursuant to this subsection in the manner provided in subsection (b)(3). (d) A limited liability company may charge a person that makes a demand under this section the reasonable costs of copying, limited to the costs of labor and material.

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

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

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

Article 5

Transferable Interests and Rights of Transferees and Creditors

Section 33‑43‑501. A transferable interest is personal property.

Section 33‑43‑502. (a) A transfer, in whole or in part, of a transferable interest:

(1) is permissible;

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

(3) subject to Section 33‑43‑504, does not entitle the transferee to:

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

(B) except as otherwise provided in subsection (c), have access to records or other information concerning the company’s activities.

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

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

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

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

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

(g) Except as otherwise provided in Section 33‑43‑602(4)(B), when a member transfers a transferable interest, the transferor retains the rights of a member other than the interest in distributions transferred and retains all duties and obligations of a member.

(h) When a member transfers a transferable interest to a person that becomes a member with respect to the transferred interest, the transferee is liable for the member’s obligations under Sections 33‑43‑403 and 33‑43‑406(c) known to the transferee when the transferee becomes a member.

Section 33‑43‑503. (a) On application by a judgment creditor of a member or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment. A charging order constitutes a lien on a judgment debtor’s transferable interest and requires the limited liability company to pay over to the person to which the charging order was issued any distribution that would otherwise be paid to the judgment debtor.

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

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

(2) make all other orders necessary to give effect to the charging order.

(c) The court may foreclose the lien and order the sale of the transferable interest. The purchaser at the foreclosure sale obtains only the transferable interest, does not thereby become a member, and is subject to Section 33‑43‑502.

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

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

(f) This chapter does not deprive any member or transferee of the benefit of any exemption laws applicable to the member’s or transferee’s transferable interest.

(g) This section provides the exclusive remedy pursuant to this chapter by which a person seeking to enforce a judgment against a member or transferee may, in the capacity of judgment creditor, satisfy the judgment from the judgment debtor’s transferable interest; however, nothing in this section shall limit or preclude other remedies provided to creditors of a member or as to the rights and powers of a trustee in bankruptcy or court appointed receiver as to a member.

**South Carolina Reporter**’**s Comment**

Identical to former South Carolina law, this Section 33‑43‑503 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 transferrable interest in a limited liability company. However, as stated in the last phrase of subsection (g), the charging order remedy is limited to those remedies as set forth within Chapter 44, Title 33 and should not alter or change other statutory remedies such as a court appointed receiver or bankruptcy trustee. This phrase, which is not in the Uniform Act, is intended to clarify that the reference to exclusive remedy refers only to the remedies as set forth in Chapter 44, Title 33 and that any and all remedies provided to creditors of a member or as to the rights and powers of a bankruptcy trustee or court appointed receiver as to a member are preserved and will continue.

Section 33‑43‑504. If a member dies, the deceased member’s personal representative or other legal representative may exercise the rights of a transferee provided in Section 33‑43‑502(c) and, for the purposes of settling the estate, the rights of a current member under Section 33‑43‑410.

Article 6

Member’s Dissociation

Section 33‑43‑601. (a) A person has the power to dissociate as a member at any time, rightfully or wrongfully, by withdrawing as a member by express will under Section 33‑43‑602(1).

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

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

(2) occurs before the termination of the company and:

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

(B) the person is expelled as a member by judicial order under Section 33‑43‑602(5);

(C) the person is dissociated under Section 33‑43‑602(7)(A) by becoming a debtor in bankruptcy; or

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

(c) A person that wrongfully dissociates as a member is liable to the limited liability company and, subject to Section 33‑43‑901, to the other members for damages caused by the dissociation. The liability is in addition to any other debt, obligation, or other liability of the member to the company or the other members.

**South Carolina Reporter**’**s Comment**

Unless modified by the operating agreement, if a member withdraws from the LLC the withdrawal will be “wrongful” and subject the withdrawing member to damages. In some instances the amount of damages may be nominal since the withdrawal may not seriously injure the LLC or its operations.

Different from the former law, all LLCs (unless modified by the operating agreement) will have perpetual life. Therefore, if a member withdraws from the LLC, unless otherwise provided in the operating agreement, he or she will not be entitled to have his or her membership interest redeemed by the LLC. Under former law a member withdrawing from an “at will” LLC was entitled to have her membership then redeemed, and if withdrawing from a “term” LLC, to have her membership redeemed at the end of the term. This is no longer true. Existing LLCs, formed under the former law, should consider whether to provide in their operating agreements that withdrawing members will be entitled to have their interests redeemed by the LLC. If the provisions of the new act are not modified by the operating agreement, a member who withdraws will not receive anything for her interest until the LLC is dissolved.

Section 33‑43‑602. A person is dissociated as a member from a limited liability company when:

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

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

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

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

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

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

(i) a transfer for security purposes; or

(ii) a charging order in effect under Section 33‑43‑503 which has not been foreclosed;

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

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

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

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

(B) has willfully or persistently committed, or is willfully and persistently committing, a material breach of the operating agreement or the person’s existing duties or obligations under Section 33‑43‑409; or

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

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

(A) the person dies; or

(B) in a member‑managed limited liability company:

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

(ii) there is a judicial order that the person has otherwise become incapable of performing the person’s duties as a member under this chapter or the operating agreement;

(7) in a member‑managed limited liability company, the person executes an assignment for the benefit of creditors;

(8) in the case of a person that is a trust or is acting as a member by virtue of being a trustee of a trust, the trust’s entire transferable interest in the company is distributed;

(9) in the case of a person that is an estate or is acting as a member by virtue of being a personal representative of an estate, the estate’s entire transferable interest in the company is distributed;

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

(11) the company participates in a merger under Article 10, if:

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

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

(12) the company participates in a conversion under Article 10;

(13) the company participates in a domestication under Article 10, if, as a result of the domestication, the person ceases to be a member; or

(14) the company terminates.

Section 33‑43‑603. (a) When a person is dissociated as a member of a limited liability company:

(1) the person’s right to participate as a member in the management and conduct of the company’s activities terminates;

(2) if the company is member‑managed, the person’s fiduciary duties as a member end with regard to matters arising and events occurring after the person’s dissociation; and

(3) subject to Section 33‑43‑504 and Article 10, any transferable interest owned by the person immediately before dissociation in the person’s capacity as a member is owned by the person solely as a transferee.

(b) A person’s dissociation as a member of a limited liability company does not of itself discharge the person from any debt, obligation, or other liability to the company or the other members which the person incurred while a member.

Article 7

Dissolution and Winding Up

Section 33‑43‑701. (a) A limited liability company is dissolved, and its activities must be wound up, upon the occurrence of any of the following:

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

(2) the consent of all the members;

(3) the passage of three hundred sixty‑five consecutive days during which the company has no members;

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

(A) the conduct of all or substantially all of the company’s activities is unlawful; or

(B) it is not reasonably practicable to carry on the company’s activities in conformity with the certificate of organization and the operating agreement; or

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

(A) have acted, are acting, or will act in a manner that is unlawful or fraudulent; or

(B) have acted or are acting in a manner that, taking into account among other factors the reasonable expectations of the applicant, is oppressive or unfairly prejudicial either to the applicant or the limited liability company, and was, is, or will be directly harmful to the applicant or the limited liability company.

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

Section 33‑43‑702. (a) A dissolved limited liability company shall wind up its activities, and the company continues after dissolution only for the purpose of winding up.

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

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

(2) may:

(A) deliver to the Secretary of State for filing a statement of dissolution stating the name of the company and that the company is dissolved;

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

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

(D) transfer the company’s property;

(E) settle disputes by mediation or arbitration; and

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

(3) may deliver to the Secretary of State for filing a statement of termination stating the name of the company and that the company is terminated.

(c) If a dissolved limited liability company has no members, the legal representative of the last person to have been a member may wind up the activities of the company. If the person does so, the person has the powers of a sole manager under Section 33‑43‑407(c) and is deemed to be a manager for the purposes of Section 33‑43‑304(a)(2).

(d) If the legal representative under subsection (c) declines or fails to wind up the company’s activities, a person may be appointed to do so by the consent of transferees owning a majority of the rights to receive distributions as transferees at the time the consent is to be effective. A person appointed under this subsection:

(1) has the powers of a sole manager under Section 33‑43‑407(c) and is deemed to be a manager for the purposes of Section 33‑43‑304(a)(2); and

(2) shall promptly deliver to the Secretary of State for filing an amendment to the company’s certificate of organization to:

(A) state that the company has no members;

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

(C) provide the street and mailing addresses of the person.

(e) The appropriate court may order judicial supervision of the winding up of a dissolved limited liability company, including the appointment of a person to wind up the company’s activities:

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

(2) on the application of a transferee, if:

(A) the company does not have any members;

(B) the legal representative of the last person to have been a member declines or fails to wind up the company’s activities; and

(C) within a reasonable time following the dissolution a person has not been appointed pursuant to subsection (d); or

(3) in connection with a proceeding under Section 33‑43‑701(a)(4) or (5).

Section 33‑43‑703. (a) Except as otherwise provided in subsection (d), a dissolved limited liability company may give notice of a known claim under subsection (b), which has the effect as provided in

subsection (c).

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

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

(2) provide a mailing address to which 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 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) if the claim is timely received but rejected by the company:

(A) the company causes the claimant to receive a notice in a record stating that the claim is rejected and will be barred unless the claimant commences an action against the company to enforce the claim within ninety days after the claimant receives the notice; and

(B) the claimant does not commence the required action within the ninety days.

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

**South Carolina Reporter**’**s Comment**

The LLC may give the notice provided for in subsection (b) by usual mailing or other physical delivery of a written notice, or may provide the notice by email since the term “record” as defined in Section 33‑43‑102(16) 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.”

Section 33‑43‑704. (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 authorized by subsection (a) must:

(1) be published at least once in a newspaper of general circulation in the county in this State in which the dissolved limited liability company’s principal office is located or, if it has none in this State, in the county in which the company’s registered agent was last located;

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

(3) state that a claim against the company is barred unless an action 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), unless the claimant commences an action to enforce the claim against the company within five years after the publication date of the notice, the claim of each of the following claimants is barred:

(1) a claimant that did not receive notice in a record under Section 33‑43‑703;

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

(3) a claimant whose claim is contingent at, 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 a dissolved limited liability company, to the extent of its undistributed assets; and

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

Section 33‑43‑705. (a) The Secretary of State may dissolve a limited liability company administratively if:

(1) the company does not pay, within sixty days after the due date, any fee, tax, or penalty due under this chapter or law other than this chapter.

(2) the company does not have a registered agent in this State for sixty consecutive days, or

(3) a misrepresentation has been made of a material matter on any application, report, affidavit, or other record submitted by the company pursuant to this chapter.

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

(c) If within sixty days after service of the copy pursuant to subsection (b) a limited liability 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, the Secretary of State shall dissolve the company administratively by preparing, signing, and filing a declaration of dissolution that states the grounds for dissolution. The Secretary of State shall serve the company with a copy of the filed declaration.

(d) A limited liability company that has been administratively dissolved continues in existence but, subject to Section 33‑43‑706, may carry on only activities necessary to wind up its activities and liquidate its assets under Sections 33‑43‑702 and 33‑43‑708 and to notify claimants under Sections 33‑43‑703 and 33‑43‑704.

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

Section 33‑43‑706. (a) A limited liability company that has been administratively dissolved may apply to the Secretary of State for reinstatement within two years after the effective date of dissolution. The application must be delivered to the Secretary of State for filing and state:

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

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

(3) that the company’s name satisfies the requirements of Section 33‑43‑108.

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

(c) When a reinstatement becomes effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the limited liability company may resume its activities as if the dissolution had not occurred.

Section 33‑43‑707. (a) If the Secretary of State rejects a limited liability company’s application for reinstatement following administrative dissolution, the Secretary of State shall prepare, sign, and file a notice that explains the reason for rejection and serve the company with a copy of the notice.

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

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

Section 33‑43‑708. (a) In winding up its activities, a limited liability company must apply its assets to discharge its obligations to creditors, including members that are creditors.

(b) After a limited liability company complies with subsection (a), any surplus must be distributed in the following order, subject to any charging order in effect under Section 33‑43‑503:

(1) to each person owning a transferable interest that reflects contributions made by a member and not previously returned, an amount equal to the value of the unreturned contributions; and

(2) in equal shares among members and dissociated members, except to the extent necessary to comply with any transfer effective under Section 33‑43‑502.

(c) If a limited liability company does not have sufficient surplus to comply with subsection (b)(1), any surplus must be distributed among the owners of transferable interests in proportion to the value of their respective unreturned contributions.

(d) All distributions made under subsections (b) and (c) must be paid in money.

Article 8

Foreign Limited Liability Companies

Section 33‑43‑801. (a) Except as provided in Section 12‑2‑25 for single‑member limited liability companies, the law of the state or other jurisdiction under which a foreign limited liability company is formed governs:

(1) the internal affairs of the company; and

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

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

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

Section 33‑43‑802. (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 state:

(1) the name of the company and, if the name does not comply with Section 33‑43‑108, an alternate name adopted pursuant to Section 33‑43‑805(a);

(2) the name of the state or other jurisdiction under whose law the company is formed;

(3) the street and mailing addresses of the company’s principal office and, if the law of the jurisdiction under which the company is formed requires the company to maintain an office in that jurisdiction, the street and mailing addresses of the required office; and

(4) the name and street and mailing addresses of the company’s initial agent for service of process in this State.

(b) A foreign limited liability company shall deliver with a completed application under subsection (a) a certificate of existence or a record of similar import signed by the Secretary of State or other official having custody of the company’s publicly filed records in the state or other jurisdiction under whose law the company is formed.

(c) By applying for a certificate of authority to transact business in this State, the foreign limited liability company agrees to be subject to the jurisdiction of the Department of Revenue and Taxation and the South Carolina courts to determine its South Carolina tax liability, including withholding and estimated taxes, together with any related interest and penalties, if any. Applying for a certificate of authority is not an admission of tax liability.

Section 33‑43‑803. (a) Activities of a foreign limited liability company which 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) carrying on any activity concerning its internal affairs, including holding meetings of its members or managers;

(3) maintaining accounts in financial institutions;

(4) maintaining offices or agencies for the transfer, exchange, and registration of the 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 electronic means 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, or maintaining property so acquired;

(9) conducting an isolated transaction that is completed within thirty days and is not in the course of similar transactions;

(10) transacting business in interstate commerce; and

(11) owing without more, an interest in a limited liability company organized or transacting business in this State.

(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 law of this State other than this chapter.

Section 33‑43‑804. Unless the Secretary of State determines that an application for a certificate of authority does not comply with the filing requirements of this chapter, the Secretary of State, upon payment of all filing fees, shall file the application of a foreign limited liability company, prepare, sign, and file a certificate of authority to transact business in this State, and send a copy of the filed certificate, together with a receipt for the fees, to the company or its representative.

Section 33‑43‑805. (a) A foreign limited liability company whose name does not comply with Section 33‑43‑108 may not obtain a certificate of authority until it adopts, for the purpose of transacting business in this State, an alternate name that complies with Section 33‑43‑108. After obtaining a certificate of authority with an alternate name, a foreign limited liability company shall transact business in this State under the alternate name.

(b) If a foreign limited liability company authorized to transact business in this State changes its name to one that does not comply with Section 33‑43‑108, it may not thereafter transact business in this State until it complies with subsection (a) and obtains an amended certificate of authority.

Section 33‑43‑806. (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 subsections (b) and (c) if:

(1) the company does not pay, within sixty days after the due date, any fee, tax, or penalty due under this chapter or law other than this chapter; or

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

(3) the company does not have a registered agent in this State for sixty consecutive days.

(b) To revoke a certificate of authority of a foreign limited liability company, the Secretary of State must prepare, sign, and file a notice of revocation and send a copy to the company’s agent for service of process in this State, or if the company does not appoint and maintain a proper agent in this State, to the company’s principal office. The notice must state:

(1) the revocation’s effective date, which must be at least sixty days after the date the Secretary of State sends the copy; and

(2) the grounds for revocation under subsection (a).

(c) The authority of a foreign limited liability company to transact business in this State ceases on the effective date of the notice of revocation unless before that date the company cures each ground for revocation stated in the notice filed under subsection (b). If the company cures each ground, the Secretary of State shall file a record so stating.

Section 33‑43‑807. To cancel its certificate of authority to transact business in this State, a foreign limited liability company must deliver to the Secretary of State for filing a notice of cancellation stating the name of the company and that the company desires to cancel its certificate of authority. The certificate is canceled when the notice becomes effective.

Section 33‑43‑808. (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 company from defending an action or proceeding in this State.

(c) A member or manager of a foreign limited liability company is not liable for the debts, obligations, or other liabilities of the company solely because the company transacted business in this State without a certificate of authority.

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

Section 33‑43‑809. The Attorney General may maintain an action to enjoin a foreign limited liability company from transacting business in this State in violation of this article.

Article 9

Actions by Members

Section 33‑43‑901. (a) A member may maintain an action against a limited liability company or another member or manager 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 chapter; 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) A member may maintain a direct action to enforce a right of a limited liability company if all members at the time of the suit are parties to the action.

Section 33‑43‑902. A member may maintain a derivative action to enforce a right of a limited liability company if:

(1) the member first makes a demand on the other members in a member‑managed limited liability company, or the managers of a manager‑managed limited liability company, requesting that they cause the company to bring an action to enforce the right, and the managers or other members do not bring the action within a reasonable time; or

(2) a demand under paragraph (1) would be futile.

Section 33‑43‑903. (a) Except as otherwise provided in subsection (b), a derivative action under Section 33‑43‑902 may be maintained only by a person that is a member at the time the action is commenced and remains a member while the action continues.

(b) If the sole plaintiff in a derivative action dies while the action is pending, the court may permit another member of the limited liability company to be substituted as plaintiff.

Section 33‑43‑904. In a derivative action under Section 33‑43‑902, the complaint must state with particularity:

(1) the date and content of the plaintiff’s demand and the response to the demand by the managers or other members; or

(2) if a demand has not been made, the reasons a demand under Section 33‑43‑902(1) would be futile.

Section 33‑43‑905. (a) If a limited liability company is named as or made a party in a derivative proceeding, the company may appoint a special litigation committee to investigate the claims asserted in the proceeding and determine whether pursuing the action is in the best interests of the company. If the company appoints a special litigation committee, on motion by the committee made in the name of the company, except for good cause shown, the court shall stay discovery for the time reasonably necessary to permit the committee to make its investigation. This subsection does not prevent the court from enforcing a person’s right to information under Section 33‑43‑410 or, for good cause shown, granting extraordinary relief in the form of a temporary restraining order or preliminary injunction.

(b) A special litigation committee may be composed of one or more disinterested and independent individuals, who may be members.

(c) A special litigation committee may be appointed:

(1) in a member‑managed limited liability company:

(A) by the consent of a majority of the members not named as defendants or plaintiffs in the proceeding; and

(B) if all members are named as defendants or plaintiffs in the proceeding, by a majority of the members named as defendants; or

(2) in a manager‑managed limited liability company:

(A) by a majority of the managers not named as defendants or plaintiffs in the proceeding; and

(B) if all managers are named as defendants or plaintiffs in the proceeding, by a majority of the managers named as defendants.

(d) After appropriate investigation, a special litigation committee may determine that it is in the best interests of the limited liability company that the proceeding:

(1) continue under the control of the plaintiff;

(2) continue under the control of the committee;

(3) be settled on terms approved by the committee; or

(4) be dismissed.

(e) After making a determination under subsection (d), a special litigation committee shall file with the court a statement of its determination and its report supporting its determination, giving notice to the plaintiff. The court shall determine whether the members of the committee were disinterested and independent and whether the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care, with the committee having the burden of proof. If the court finds that the members of the committee were disinterested and independent and that the committee acted in good faith, independently, and with reasonable care, the court shall enforce the determination of the committee. Otherwise, the court shall dissolve the stay of discovery entered under subsection (a) and allow the action to proceed under the direction of the plaintiff.

Section 33‑43‑906. (a) Except as otherwise provided in subsection (b):

(1) any proceeds or other benefits of a derivative action under Section 33‑43‑902, whether by judgment, compromise, or settlement, belong to the limited liability company and not to the plaintiff; and

(2) if the plaintiff receives any proceeds, the plaintiff shall remit them immediately to the company.

(b) If a derivative action under Section 33‑43‑902 is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney’s fees and costs, from the recovery of the limited liability company.

Article 10

Merger, Conversion, and Domestication

Section 33‑43‑1001. In this article:

(1) ‘Corporation’ means a corporation organized under this title, 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 liability company’ means a limited liability company organized under this title, a predecessor law, or comparable law of another jurisdiction.

(4) ‘Limited partner’ means a limited partner in a limited partnership.

(5) ‘Limited partnership’ means a limited partnership created under the Uniform Limited Partnership Act, Chapter 42 of this title, a predecessor law, or comparable law of another jurisdiction.

(6) ‘Partner’ includes a general partner and a limited partner.

(7) ‘Partnership’ means a general partnership under the Uniform Partnership Act, Chapter 41 of this title, a predecessor law, or comparable law of another jurisdiction.

(8) ‘Partnership agreement’ means an agreement among the partners concerning the partnership or limited partnership.

(9) ‘Shareholder’ means a shareholder in a corporation.

**South Carolina Reporter**’**s Comment**

Conversion Information

Almost all South Carolina entities may be converted into another form:

(1) Partnership or limited partnership converted into an LLC (Section 33‑43‑1002);

(2) LLC converted into a corporation (Section 33‑43‑1004);

(3) LLC converted into a limited partnership (Section 33‑43‑1006); and,

(4) LLC converted into a general partnership (Section 33‑43‑1008).

Other Titles provide for other conversions:

(5) Corporation converted into an LLC (Section 33‑11‑113);

(6) Corporation converted into a partnership (Section 33‑11‑113);

(7) Corporation converted into a limited partnership (Section 33‑11‑113);

(8) Corporation converted into a nonprofit corporation (Section 33‑10‑110) only into Public and Mutual Benefit;

(9) Partnership converted to a corporation (Section 33‑11‑109); and,

(10) Limited partnership converted to a corporation (Section 33‑11‑109).

Note that nonprofit corporations are not authorized by statute to convert into any other type of entity.

Operating Agreement May Provide a Right to Dissent

An operating agreement of a limited liability company may contain a provision giving a member the right to dissent from, and obtain payment of the fair value of his membership in the event the limit liability company is converted into another entity, is merged, or is domesticated. South Carolina Revised Code 33‑13‑101 et. seq. includes provisions that could be adapted to provide dissenters’ rights for limited liability company members.

Section 33‑43‑1002. (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, subject to Section 33‑43‑1017, 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 a certificate of organization in the office of the Secretary of State which satisfy the requirements of Section 33‑43‑201 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 certificate of organization is filed in the office of the Secretary of State or at any later date specified in the certificate 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 33‑43‑1003. (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 33‑43‑1002(c), all of the partners of the converting partnership continue as members of the limited liability company.

(c)(1) If an entity that owns real property in South Carolina is converted to a limited liability company the newly‑named limited liability company shall file a notice of that name change in the office of the register of deeds of the county in South Carolina in which the real property is located. If there is no office in that county, a notice of name change must be filed with the clerk of court of the county in which that real property is located.

(2) The filing must be by:

(i) affidavit executed in accordance with the provisions of Section 33‑1‑200 and containing the old and new names of the limited liability company and describing the real property owned by that limited liability company; or

(ii) filing a certified copy of the certificate of organization including a description of the real property; or

(iii) a duly recorded deed of conveyance to the newly‑named limited liability company.

(3) The affidavit, filed articles, or deed must be duly indexed in both the grantor and grantee indices to deeds in the index of deeds.

(4) The purpose of this subitem is to establish record notice pursuant to Chapter 7, Title 30. Failure to make the required filing of a limited liability company name change does not affect the legality, force, effect, or enforceability as between the parties of any conveyance or other transaction involving the real estate owned by the affected limited liability company that is made after the change in name.

Section 33‑43‑1004. (a) A limited liability company may be converted to a corporation pursuant to this section.

(b) The terms and conditions of a conversion of a limited liability company to a corporation must be approved by all the members or, subject to Section 33‑43‑1017, by the number or percentage of the members required for conversion in the limited liability company agreement.

(c) An agreement of conversion must include the terms and conditions of the conversion of the interests of members of a limited liability company into interests in the converted corporation or the cash or other consideration to be paid or delivered as a result of the conversion of the interest of the members, or both.

(d) After a conversion is approved pursuant to subsection (b), the limited liability company shall file with the Secretary of State articles of incorporation that satisfy the requirements of Section 33‑2‑102 and contain:

(1) a statement that the limited liability company was converted to a corporation from a limited liability company;

(2) its former name;

(3) a statement of the number of votes cast by the members 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 pursuant to subsection (b); and

(4) a statement that the certificate of organization is cancelled as of the date the conversion takes effect.

(e) A conversion takes effect when the articles of incorporation are filed in the Office of the Secretary of State or at a later date specified in the articles of incorporation.

(f) A member who becomes a shareholder of a corporation as a result of a conversion remains liable as a member for an obligation incurred by the limited liability company before the conversion takes effect and for which a member would be personally liable.

Section 33‑43‑1005. (a) A limited liability company that is converted to a corporation 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 limited liability company vests in the corporation;

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

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

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

(5) except as otherwise provided in the agreement of conversion pursuant to Section 33‑43‑1004(c), all the members of the converting limited liability company continue as shareholders of the corporation; and

(6) a member’s liability for all obligations of the corporation incurred after the conversion takes effect is that of a shareholders of the corporation.

(c)(1) If a limited liability company that owns real property in South Carolina is converted to a corporation, the newly‑named corporation must file a notice of that name change in the office of the register of deeds of the county in South Carolina in which the real property is located. If there is no office in that county, a notice of name change must be filed with the clerk of court of the county in which that real property is located.

(2) The filing must be by:

(i) affidavit executed in accordance with the provisions of Section 33‑1‑200 and containing the old name of the limited liability company and new name of the corporation and describing the real property owned by that corporation; or

(ii) filing a certified copy of the articles of incorporation including a description of the real property; or

(iii) by a duly recorded deed of conveyance to the newly‑named corporation.

(3) The affidavit, filed articles, or deed must be duly indexed in both the grantor and grantee indices to deeds in the index of deeds.

(4) The purpose of this subitem is to establish record notice pursuant to Chapter 7, Title 30. Failure to make the required filing of a limited liability company name change does not affect the legality, force, effect, or enforceability as between the parties of any conveyance or other transaction involving the real estate owned by the affected corporation that is made after the change in name.

Section 33‑43‑1006. (a) A limited liability company may be converted to a limited partnership pursuant to this section.

(b) The terms and conditions of a conversion of a limited liability company to a limited partnership must be approved by all the members or, subject to Section 33‑43‑1017, by the number or percentage of the members required for conversion in the operating agreement.

(c) An agreement of conversion must include the terms and conditions of the conversion of the interests of members of a limited liability company into interests in the converted limited partnership or the cash or other consideration to be paid or delivered as a result of the conversion of the interest of the members, or both.

(d) After a conversion is approved pursuant to subsection (b), the limited liability company shall file with the Secretary of State a certificate of limited partnership that satisfies the requirements of Section 33‑42‑210 and contains:

(1) a statement that the limited liability company was converted to a limited partnership from a limited liability company;

(2) its former name;

(3) a statement of the number of votes cast by the members 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 pursuant to subsection (b); and

(4) a statement that the certificate of organization is cancelled as of the date the conversion takes effect.

(e) The filing of a certificate of limited partnership pursuant to subsection (d) cancels the certificate of organization of the limited liability company as of the date the conversion takes effect.

(f) A conversion takes effect when the certificate of limited partnership is filed with the Secretary of State or at a later date specified in the certificate of limited partnership.

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

Section 33‑43‑1007. (a) A limited liability company that is converted to a limited partnership 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 limited liability company vests in the limited partnership;

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

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

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

(5) except as otherwise provided in the agreement of conversion pursuant to Section 33‑43‑1006(c), all the members of the converting limited liability company continue as general partners or limited partners of the limited partnership in accord with the agreement of conversion.

(c)(1) If a limited liability company that owns real property in South Carolina is converted to a limited partnership, the newly named limited partnership must file a notice of that name change in the office of the register of deeds of the county in South Carolina in which the real property is located. If there is no office in that county, a notice of name change must be filed with the clerk of court of the county in which that real property is located.

(2) The filing must be by:

(i) affidavit executed in accordance with the provisions of Section 33‑1‑200 and containing the old name of the limited liability company and new name of the limited partnership and describing the real property owned by that corporation; or

(ii) filing a certified copy of the certificate of limited partnership including a description of the real property; or

(iii) by a duly recorded deed of conveyance to the newly‑named limited partnership.

(3) The affidavit, filed articles, or deed must be duly indexed in both the grantor and grantee indices to deeds in the index of deeds.

(4) The purpose of this subitem is to establish record notice pursuant to Chapter 7, Title 30. Failure to make the required filing of a limited partnership name change does not affect the legality, force, effect, or enforceability as between the parties of any conveyance or other transaction involving the real estate owned by the affected limited partnership that is made after the change in name.

Section 33‑43‑1008. (a) A limited liability company may be converted to a partnership pursuant to this section.

(b) The terms and conditions of a conversion of a limited liability company to a partnership must be approved by all the members or, subject to Section 33‑43‑1017, by the number or percentage of the members required for conversion in the operating agreement.

(c) An agreement of conversion must include the terms and conditions of the conversion of the interests of members of a limited liability company into interests in the converted partnership or the cash or other consideration to be paid or delivered as a result of the conversion of the interest of the members, or both.

(d) After a conversion is approved pursuant to subsection (b), the limited liability company shall file with the Secretary of State articles of conversion that contain:

(1) a statement that the limited liability company was converted to a partnership from a limited liability company;

(2) its former name;

(3) a statement of the number of votes cast by the members 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 pursuant to subsection (b); and

(4) a statement that the certificate of organization is cancelled as of the date the conversion takes effect.

(e) A conversion takes effect when the articles of conversion are filed with the Secretary of State or at a later date specified in the articles of conversion.

(f) A member who becomes a partner of a partnership as a result of a conversion remains liable as a member for the existing debts and obligation of the former limited liability company, only to the extent the member was liable for an obligation incurred by the limited liability company before the conversion takes effect and for which a member would be personally liable.

Section 33‑43‑1009. (a) A limited liability company that is converted to a partnership 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 limited liability company vests in the partnership;

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

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

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

(5) except as otherwise provided in the agreement of conversion pursuant to Section 33‑43‑1008(c), all the members of the converting limited liability company continue as general partners of the partnership in accord with the agreement of conversion.

(c)(1) If a limited liability company that owns real property in South Carolina is converted to a partnership, the newly‑named partnership must file a notice of that name change in the office of the register of deeds of the county in South Carolina in which the real property is located. If there is no office in that county, a notice of name change must be filed with the clerk of court of the county in which that

real property is located.

(2) The filing must be by:

(i) affidavit containing the old name of the limited liability company and new name of the partnership and describing the real property owned by that limited liability company; or

(ii) filing a certified copy of the articles of conversion including a description of the real property; or

(iii) by a duly recorded deed of conveyance to the newly‑named partnership.

(3) The affidavit, filed articles, or deed must be duly indexed in both the grantor and grantee indices to deeds in the index of deeds.

(4) The purpose of this subitem is to establish record notice pursuant to Chapter 7, Title 30. Failure to make the required filing of a limited liability company name change does not affect the legality, force, effect, or enforceability as between the parties of any conveyance or other transaction involving the real estate owned by the affected partnership that is made after the change in name.

Section 33‑43‑1010. (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, subject to Section 33‑43‑1017, 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 33‑43‑1002; 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 33‑43‑1011. (a) After approval of the plan of merger under Section 33‑43‑1010(c), unless the merger is abandoned under Section 33‑43‑1010(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 certificate of organization was 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 certificate 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 or certificate 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 chapter, 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 certificate of organization.

Section 33‑43‑1012. (a) When a merger takes effect:

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

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

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

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

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

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

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

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

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

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

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

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

Section 33‑43‑1013. (a) A foreign limited liability company may become a South Carolina limited liability company pursuant to this section, Sections 33‑43‑1014 through 33‑43‑1017, and a plan of domestication, if:

(1) the foreign limited liability company’s governing statute authorizes the domestication;

(2) the domestication is not prohibited by the law of the jurisdiction that enacted the governing statute; and

(3) the foreign limited liability company complies with its governing statute in effecting the domestication.

(b) A South Carolina limited liability company may become a foreign limited liability company pursuant to this section, Sections 33‑43‑1014 through 33‑43‑1017, and a plan of domestication, if:

(1) the foreign limited liability company’s governing statute authorizes the domestication;

(2) the South Carolina limited liability company complies with the foreign limited liability governing statute.

(c) A plan of domestication must be in a record and must include:

(1) the name of the domesticating company before domestication and the jurisdiction of its governing statute;

(2) the name of the domesticated company after domestication and the jurisdiction of its governing statute;

(3) the terms and conditions of the domestication, including the manner and basis for converting interests in the domesticating company into any combination of money, interests in the domesticated company, and other consideration; and

(4) the organizational documents of the domesticated company that are, or are proposed to be, in a record.

Section 33‑43‑1014. (a) A plan of domestication must be consented to:

(1) by all the members, subject to Section 33‑43‑1017, if the domesticating company is a South Carolina limited liability company; and

(2) as provided in the domesticating company’s governing statute, if the company is a foreign limited liability company.

(b) Subject to any contractual rights, after a domestication is approved, and at any time before articles of domestication are delivered to the Secretary of State for filing under Section 33‑43‑1015, a domesticating limited liability company may amend the plan or abandon the domestication:

(1) as provided in the plan; or

(2) except as otherwise prohibited in the plan, by the same consent as was required to approve the plan.

**South Carolina Reporter**’**s Comment**

If a South Carolina LLC plans to domesticate in a different jurisdiction, Section 33‑43‑1014(a)(1) provides as a default rule that all members must approve the domestication. This unanimous vote requirement may be changed by a specific provision in the operating agreement, subject however to the limitations found in Section 33‑43‑1017, which generally gives a member a veto right if the domestication (or merger or conversion) would in of itself impose personal liability on the member.

Section 33‑43‑1015. (a) After a plan of domestication is approved, the domesticating company, the company that effects a domestication pursuant to Sections 33‑43‑1013 through 33‑43‑1017, shall deliver to the Secretary of State for filing articles of domestication, which must include:

(1) a statement, as the case may be, that the company has been domesticated from or into another jurisdiction;

(2) the name of the domesticating company and the jurisdiction of its original governing statute;

(3) the name of the resulting domesticated company and the jurisdiction of its governing statute;

(4) the date the domestication is effective under the governing statute of the resulting domesticated company;

(5) if the domesticating company was a South Carolina limited liability company, a statement that the resulting domestication was approved as required by this chapter;

(6) if the domesticating company was a foreign limited liability company, a statement that the domestication was approved as required by the governing statute of the other jurisdiction; and

(7) if the resulting domesticated company is a foreign limited liability company not authorized to transact business in this State, the street and mailing addresses of an office that the Secretary of State may use for the purposes of Section 33‑43‑1016(b).

(b) A domestication becomes effective:

(1) when the certificate of organization takes effect, if the domesticated company becomes a South Carolina limited liability company; and

(2) according to the governing statute of the domesticated company, if the domesticated organization becomes a foreign limited liability company.

Section 33‑43‑1016. (a) When a domestication takes effect:

(1) the domesticated company is for all purposes the company that existed before the domestication;

(2) all property owned by the domesticating company remains vested in the domesticated company;

(3) all debts, obligations, or other liabilities of the domesticating company continue as debts, obligations, or other liabilities of the domesticated company;

(4) an action or proceeding pending by or against a domesticating company may be continued as if the domestication had not occurred;

(5) except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of the domesticating company remain vested in the domesticated company;

(6) except as otherwise provided in the plan of domestication, the terms and conditions of the plan of domestication take effect; and

(7) except as otherwise agreed, the domestication does not dissolve a domesticating limited liability company for the purposes of Article 7.

(b) A South Carolina limited liability company that becomes a foreign limited liability company consents to the jurisdiction of the courts of this State to enforce any debt, obligation, or other liability owed by the domesticating company, if, before the domestication, the domesticating company was subject to suit in this State on the debt, obligation, or other liability. A South Carolina limited liability company that becomes a foreign limited liability company and not authorized to transact business in this State appoints the Secretary of State as its agent for service of process for purposes of enforcing a debt, obligation, or other liability under this subsection. Service on the Secretary of State under this subsection must be made in the same manner and has the same consequences as in Section 33‑43‑116(c) and (d).

(c) If a South Carolina limited liability company has adopted and approved a plan of domestication under Section 33‑43‑1013(b) providing for the company to be domesticated in a foreign jurisdiction, a statement surrendering the company’s certificate of organization must be delivered to the Secretary of State for filing setting forth:

(1) the name of the company;

(2) a statement that the certificate of organization is being surrendered in connection with the domestication of the company in a foreign jurisdiction;

(3) a statement the domestication was approved as required by this chapter; and

(4) the jurisdiction of formation of the domesticated foreign limited liability company.

Section 33‑43‑1017. (a) If a member of a merging, converting, or domesticating limited liability company will have personal liability with respect to a surviving, converted, or domesticated organization, approval or amendment of a plan of merger, conversion, or domestication is ineffective without the consent of the member, unless:

(1) the company’s operating agreement provides for approval of a merger, conversion, or domestication with the consent of fewer than all the members; and

(2) the member has consented to the provision of the operating agreement.

(b) A member does not give the consent required by subsection (a) merely by consenting to a provision of the operating agreement that permits the operating agreement to be amended with the consent of fewer than all the members.

(c) ‘Personal liability’ means liability for a debt, obligation, or other liability of an organization that is imposed on a person that co‑owns, has an interest in, or is a member of the organization:

(1) by the governing statute solely by reason of the person co‑owning, having an interest in, or being a member of the organization; or

(2) by the organization’s organizational documents under a provision of the governing statute authorizing those documents to make one or more specified persons liable for all or specified debts, obligations, or other liabilities of the organization solely by reason of the person or persons co‑owning, having an interest in, or being a member of the organization.

Section 33‑43‑1018. This article does not preclude an entity from being merged, converted, or domesticated under law other than this chapter.

Article 11

Miscellaneous Provisions

Section 33‑43‑1101. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Section 33‑43‑1102. This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 33‑43‑7001 et seq., but does not modify, limit, or supersede Section 33‑43‑101(c) of that act, 15 U.S.C. Section 33‑43‑7001(c), or authorize electronic delivery of any of the notices described in Section 33‑43‑103(b) of that act, 15 U.S.C. Section 33‑43‑7003(b).

Section 33‑43‑1103. This chapter does not affect an action commenced, proceeding brought, or right accrued before this chapter takes effect.

Section 33‑43‑1104. (a) Before the effective date of this chapter, this chapter governs only:

(1) a limited liability company formed on or after the effective date of this chapter; and

(2) except as otherwise provided in subsection (c), a limited liability company formed before the effective date of this chapter which elects, in the manner provided in its operating agreement or by law for amending the operating agreement, to be subject to this chapter.

(b) Except as otherwise provided in subsection (c), two years after the effective of this chapter, this chapter governs all limited liability companies.

(c) For the purposes applying this chapter to a limited liability company formed before the effective date of this chapter:

(1) the company’s articles of organization are deemed to be the company’s certificate of organization; and

(2) for the purposes of applying Section 33‑43‑102(9) and subject to Section 33‑43‑112(d), language in the company’s articles of organization designating the company’s management structure operates as if that language were in the operating agreement.

Section 33‑43‑1105. Reserved

Section 33‑43‑1106. Reserved

Section 33‑43‑1107. Reserved

Section 33‑43‑1108. Except (1) as otherwise required by the context, (2) inconsistent with the provisions of this chapter, and (3) for this chapter, Chapters 41 and 42 of Title 33, and Title 12, the term ‘partnership’ or ‘general partnership’ when used in any other statute or in any regulation, includes and also means ‘limited liability company’.

Section 33‑43‑1109. A foreign corporation is not required to qualify to do business in South Carolina merely because it is a member of a manager‑run limited liability company, or because it is a member in a limited liability company but does not take part in the management of the limited liability company.

Section 33‑43‑1110. (a) Unless otherwise specifically provided by law for a different filing fee, the Secretary of State shall collect the following fees when the following documents described in this subsection are delivered to him for filing:

(1) Application to use noncomplying name by foreign limited liability company (Section 33‑43‑108): $25.00

(2) Application to Reserve Name (Section 33‑43‑109): $25.00.

(3) Notice of transfer of Reserved Name (Section 33‑43‑109(b)): $10.00

(4) Change of Registered Agent, Change of Address of Agent (Section 33‑43‑114): $10.00.

(5) Change of Principal Office, or Required Office of a foreign corporation, (Section 33‑43‑114(b)): $10.00

(6) Resignation of Registered Agent (Section 33‑43‑115): $10.00.

(7) Certificate of Organization (Section 33‑43‑201): $110.00.

(8) Amended Certificate of Organization (Section 33‑43‑201): $110.00.

(9) Certified copy of any Record (Section 33‑43‑205): $3.00 for the first page and fifty cents for each additional page.

(10) Statement of Correction (Section 33‑43‑206): $25.00.

(11) Certificate of Existence (Section 33‑43‑208): $10.00.

(12) Certificate of Authorization (foreign LLC) (Section 33‑43‑208): $10.00.

(13) Statement of Authority (Section 33‑43‑302): $10.00.

(14) Amendment or Cancellation of Certificate of Authority (Section 33‑43‑302): $10.00.

(15) Statement of Denial (Section 33‑43‑303): $10.00.

(16) Statement of Dissolution (Section 33‑43‑702): $10.00.

(17) Statement of Termination (Section 33‑43‑702): $10.00.

(18) Application for Reinstatement (Section 33‑43‑706): $25.00.

(19) Application Certificate of Authority, Foreign LLC (Section 33‑43‑802): $110.00.

(20) Application for Amended Certificate of Authority (Section 33‑43‑805): $110.00.

(21) Notice to Cancel Certificate of Authority (Section 33‑43‑807): $10.00.

(22) Certificate of Organization of Partnership or Limited Partnership Converting into a Limited Liability Company (Section 33‑43‑1002): $110.00.

(23) Articles of Incorporation of Limited Liability Company that Converts into a Corporation (Section 33‑43‑1004): $110.00 plus $25.00 for CL‑1; total of $135.00

(24) Certificate of Limited Partnership of a Limited Liability Company that Converts into a Limited Partnership (Section 33‑43‑1006): $10.00.

(25) Articles of Conversion of a Limited Liability Company that Converts into a Partnership (Section 33‑43‑1008): $10.00.

(26) Articles of Merger (Section 33‑43‑1011): $110.00.

(27) Articles of Domestication (Section 33‑43‑1015): $110.00.

(b) The Secretary of State shall collect a fee of $10.00 each time process is served on him pursuant to Section 33‑43‑116. The party to a proceeding causing service of process is entitled to recover this fee as costs if he prevails in the proceeding.

(c) The Secretary of State shall collect the following fees for copying and certifying the copy of any filed document related to a domestic or foreign limited liability company:

(1) for copying, one dollar for the first page and fifty cents for each additional page; and

(2) for a certified copy, three dollars for the first page and fifty cents for each additional page.”

SECTION 3. The South Carolina Reporter’s Comments contained in Chapter 43, Title 33, as added by the provisions of Section 2, are not considered part of the 1976 Code sections which immediately precede the Reporter’s Comments.

SECTION 4. Chapter 44, Title 33 of the 1976 Code is repealed.

SECTION 5. This act takes effect July 1, 2018.

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