

**ARTICLES OF ORGANIZATION AND OPERATING AGREEMENT PROVISIONS
MODIFYING DEFAULT PROVISIONS OF
NEW YORK LIMITED LIABILITY COMPANY LAW**

By Karen J. Orlin*

Limited liability companies, like corporations and unlike general partnerships and trusts, are “creatures of statute” because they did not exist at common law and they derive their powers, authority and other characteristics from the statutes enacted in the respective jurisdictions under which they are formed. Each state or other jurisdiction that has authorized a limited liability company, or “LLC,” has done so by enacting a statute governing LLCs that is unique to that jurisdiction and distinct from the statute effective in that jurisdiction governing corporations.

Forms of the principal organizational documents for an LLC, the articles of organization and the operating agreement, vary from jurisdiction to jurisdiction, therefore. Not only provisions required to be included in these documents but also additional, optional provisions of these documents modifying the rules generally governing the management, financial affairs (capital contributions, allocation of profits and losses, and distributions), governance, operations, major transactions and existence of LLCs (known as the “default” provisions) vary from jurisdiction to jurisdiction. One size does not fit all.

Most online purveyors of “canned” business contracts and other documents, including, for example, articles of organization and operating agreements, though purporting to provide forms customized to particular jurisdictions, do so incorrectly: The devil is in the details.

This article outlines the default provisions of the New York Limited Liability Company Law the substance of which can be modified, in the discretion of the founders of an LLC to be formed under New York Law, by, and only by, provisions of the articles of organization (the “Articles”) or the operating agreement (the “Agreement”) of that LLC that are authorized by that statute.

It is intended to assist those founders to use the services of their attorneys and accountants effectively to form an LLC having as many as possible of the characteristics that they intend, and as few as possible of the characteristics that they do not intend. It is also intended to demonstrate the inadequacies and probable adverse unintended consequences of their relying on online and other “canned” business contracts and other documents without consulting with a competent corporate, limited liability company and business transactions attorney licensed to practice law in the jurisdiction in which those founders reside or intend to form their business entity.

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Section (“Sec.”) references below refer to sections, and Article 12 (“Art. 12”) references below refer to Article 12, of the New York Limited Liability Company Law as in effect as of February 2, 2013 (the “NYLLC Law”).

Default Provisions that Can Be Modified Only in the Articles of Organization of the LLC

- LLC having the powers enumerated under Sec. 202, including among others the following unless the Articles provide otherwise under Sec. 203: engaging in litigation; purchasing, leasing or otherwise acquiring and dealing in or with any interest in property, securities or obligations of other persons; selling, encumbering or otherwise disposing of property or assets; entering into contracts; incurring liabilities as borrower and, subject to the restrictions stated in Sec. 202, as guarantor or surety; granting security interests in the LLC’s property; lending or investing funds and holding security for repayment; conducting the LLC’s business; maintaining one or more offices; electing or appointing and defining duties and fixing compensation of managers, employees and agents of the LLC; assisting, lending to and transacting business with a member, manager, agent or employee of the LLC; making and altering the Agreement; indemnifying a member, manager or other person; paying pensions and establishing pension, profit-sharing and other incentive plans; making donations; being an owner, associate or manager of any other entity or enterprise; ceasing its activities; dissolving; and all other powers not inconsistent with law necessary or convenient to effect any or all of the purposes for which the LLC is formed to the extent that those additional powers are enumerated either in the NYLLC Law or the Articles.
- LLC being formed at the time of filing the initial Articles under Sec. 203 or at any later time specified in the Articles not to exceed 60 days from the date of such filing under Sec. 203.
- LLC being dissolved only under the circumstances set forth in Sec. 701 unless the Articles provide the latest date for that dissolution under Secs. 203 and 701 or the Agreement specifies the time for that dissolution under Sec. 701.
- LLC not having a registered agent upon which process against the LLC may be served in addition to service upon the New York Secretary of State (the “SOS”) designated under Sec. 301 unless the Articles state the name and address in New York of that other registered agent (a natural person residing or having a business address in New York State, an LLC formed or authorized to do business in New York State under the NYLLC, or a corporation incorporated or authorized to do business in New York State under the New York Business Corporation Law or other New York statute) and a statement that the registered agent is to be the agent of the LLC upon which process against the LLC may be served under Secs. 203 and 302.
- Except as provided in Sec. 1205 for professional service LLCs, LLC members not being liable in their capacity as LLC members for debts, obligations or liabilities of the LLC unless the Articles contain specifically a statement, under Sec. 203, that all or specified LLC members are liable in that capacity for all or specified debts, obligations or liabilities of the LLC in accordance with Sec. 609, which also requires that any such member so liable must have specifically consented in writing to the adoption of such provisions or to be bound by such provision or specifically voted for the adoption of such provision of the Articles, and which also provides that the absence of either such

statement in the Articles or such consent or vote of any such member shall in no way affect or impair the ability of a member to act as a guarantor or a surety for, provide collateral for or otherwise be liable for the debts, obligations or liabilities of an LLC as authorized pursuant to Sec. 611 (regarding interested transactions between the LLC and its members).

- LLC having any lawful business purpose or purposes except to do in New York State any business for which another statute specifically requires some other business entity or natural person to be formed or used for such business under Sec. 201, unless the Articles set forth a business purpose under Sec. 203, *including, as applicable, the profession or professions in which a professional service LLC intends to engage under Sec. 1206*, including attorney and counselor-at-law, licensed physician and other professions designated in Title 8 of the New York Education Law: physician assistant, specialist assistant, chiropractor, dentist, dental hygienist, veterinarian, animal health technologist, physical therapist, physical therapist assistant, pharmacist, nurse, professional midwife, podiatrist, optometrist, ophthalmologist, engineer, land surveyor, architect, landscape architect, public accountant, shorthand reporter, psychologist, social worker, massage therapist, occupational therapist, dietician, nutritionist, speech-language pathologist, audiologist, acupuncturist, interior designer, athletic trainer, mental health practitioner, respiratory therapist, respiratory therapist technician, clinical laboratory technician and medical physicist. Sec. 1213 states that the *NYLLC Law applies to New York professional service LLCs except to the extent that the provisions of the NYLLC Law conflict with Article 12 of that statute.*
- LCC members being of one class unless the Articles provide for classes or groups of LLC members or provide for the future creation, in the manner provided in the Agreement, of additional classes of LLC members having such relative rights, powers, preferences and limitations as the Agreement may provide or as may from time to time be established pursuant to the Agreement, including rights, powers, preferences, limitations and duties senior to existing classes of LLC members, under Secs. 203 and 418.
- Management of the LLC being vested in the LLC members and the LLC members having authority to bind the LLC *subject to any provisions in the Articles, the Agreement or Sec. 418 granting or withholding the management powers or responsibilities of one or more LLC members or classes of LLC members, or provisions in the Articles vesting the management of the LLC in a manager or managers or a class or classes of managers*, under Secs. 203, 401, 408 and 412.
- *If and only if the Articles so provide, management of the LLC being vested in a manager or managers or a class or classes of managers and the managers or a class or classes of managers having authority to bind the LLC, subject to any provisions in the Articles, the Agreement or Sec. 419 granting or withholding the management powers or responsibilities of one or more managers or class or classes of managers*, under Secs. 203, 401, 408, 412 and 419.
- Managers of the LLC, if any are provided by the Articles, being of one class unless the Articles provide for classes or groups of managers, or provide for the future creation, in the manner provided in the Agreement, of additional classes of managers having such relative rights, powers, preferences and limitations as Agreement may provide or as may from time to time be established pursuant to the Agreement, including rights, powers,

preferences, limitations and duties senior to existing classes of managers, under Secs. 203 and 419.

The most common modifications of default provisions by provisions of the Articles are statements of the profession in which a professional service LLC intends to engage and designation of an LLC as manager-managed instead of member managed.

The form of Articles available on the SOS website (<http://www.dos.ny.gov>), DOS-1335 (Rev. 2/12/), does not invite or include space for any modifications of default provisions. The Note to that form states “The Department of State recommends that legal documents be prepared under the guidance of an attorney.”

Default Provisions that Can Be Modified Only in the Articles of Organization or Operating Agreement of the LLC

The Agreement generally serves for an LLC the functions that a shareholders agreement and bylaws serve for a corporation. Any provision that is required or permitted to be included in the Agreement pursuant to Sec. 417 may be included in the Articles instead of or in addition to the provision in the Agreement under Sec. 203. Unlike the LLC statutes adopted in certain other jurisdictions (*e.g.*, Florida), Sec. 417 mandates an Agreement effective on or after the date of formation of the LLC, and, unlike those other statutes, requires that the Agreement be in writing.

Management

- Unless provisions of the Articles vest the management of the LLC in a manager or managers or a class or classes of managers, management of the LLC being vested in the LLC members, subject to any provisions in the Articles, the Agreement or Sec. 418 granting or withholding the management powers or responsibilities of one or more LLC members or classes of LLC members under Secs. 203, 401, 408 and 412.
- As stated above, LCC members being of one class unless the Articles provide for classes or groups of LLC members or provide for the future creation, in the manner provided in the Agreement, of additional classes of LLC members having such relative rights, powers, preferences and limitations as the Agreement may provide or as may from time to time be established pursuant to the Agreement, including rights, powers, preferences, limitations and duties senior to existing classes of LLC members, under Secs. 203 and 418.
- LLC members voting as a single class in proportion to their share of current profits of the LLC in accordance with Sec. 503 (as distinguished from their voting on the basis of the ratio of their capital contributions, capital commitments or capital accounts or on a *per capita*, class or other basis) except as provided in the Agreement under Secs. 402 and 418.
- Except as provided in Sec. 1207 for professional service LLCs, LLC members voting in person or by proxy except as provided in the Agreement under Secs. 402 and 418.
- The vote of a majority in interest of LLC members entitled to vote on the matter being required, regardless whether the LLC is member-managed or manager-managed under the Articles, to (1) admit a person as a member and issue such person a membership

interest in the LLC, (2) approve the incurrence of indebtedness by the LLC other than in the ordinary course of its business, (3) adopt, amend, restate or revoke the Articles or the Agreement, subject to certain limitations set forth in Sec. 402(e) (restricting amendment of any provision for vote or consent of a percentage in interest of LLC members), Sec. 609(b) (regarding liability of all or specified LLC members) and Sec. 417(b) (restricting amendment of the Agreement), (4) approve the dissolution of the LLC in accordance with Sec. 701, (5) approve the sale, exchange, lease, mortgage, pledge or other transfer of all or substantially all of the assets of the LLC, or (6) approve a merger or consolidation of the LLC with or into another LLC or foreign LLC except as provided in the Agreement under Secs. 402 and 418.

- The vote of a majority in interest of LLC members the votes of whom or which are cast at a meeting of LLC members by LLC members or such class of LLC members entitled to vote on the matter being required to authorize any action by the LLC members or a class of LLC members not described in the last preceding bullet paragraph except as otherwise required or specified by the NYLLC Law, the Articles or the Agreement as permitted by the NYLLC Law, under Secs. 203, 402 and 418.
- Meetings of LLC members being held annually except as provided in the Agreement under Secs. 403 and 418.
- Meetings of LLC members being held at the office of the LLC unless the Agreement fixes or provides for another place within or outside New York State under Secs. 403 and 418.
- LLC members being permitted to participate in a meeting, and being deemed present in person at the meeting if participating, by conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other except as provided in the Agreement under Secs. 403 and 418.
- A majority in interest of LLC members entitled to vote constituting a quorum at a meeting of LLC members for the transaction of any business, and a majority in interest of LLC members of any class entitled to vote constituting a quorum at a meeting of LLC members for the transaction of a specified item of business required to be voted on by a class of LLC members voting as a class, except as provided in the Agreement under Secs. 404 and 418; provided, however, that any lesser quorum provided in the Agreement shall not be less than one third (1/3) in interest of the LLC members entitled to vote.
- Written notice of the place, date and hour of each meeting of LLC members, indicating that it is being issued by or at the direction of the person or persons calling the meeting and, in the case of a special meeting of LLC members, stating the purpose or purposes for which the meeting is called being required except as provided in the Agreement under Secs. 405 and 418.
- Delivery of a copy of that written notice of each meeting of LLC members, personally or by first class mail not less than ten (10) nor more than 60 days before the date of the meeting, or by third class mail not less than 24 nor more than 60 days before the date of the meeting, to each LLC member entitled to vote at such meeting, being required except as provided in the Agreement under Secs. 405 and 418.
- Notice of adjournment to another time or place of a meeting of LLC members not being required if the time and place to which the meeting is adjourned are announced at the meeting at which the adjournment is taken except as provided in the Agreement under Secs. 405 and 418.

- Notice of a meeting of LLC members not being required to be given to an LLC member that submits a signed waiver of notice, in person or by proxy, before or after the meeting except as provided in the Agreement under Secs. 406 and 418.
- No record date for meetings of or any other action by LLC members (*e.g.*, authorization of distributions by the LLC) and no other matter with respect to the exercise of any right of LLC members to vote not stated in this summary being prescribed except as provided in the NYLLC Law or the Agreement under Sec. 418.
- LLC members being permitted to take action without a meeting of LLC members, without prior notice and without a vote by consent in writing, setting forth the action so taken, signed by the LLC members holding voting interests having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all of the LLC members entitled to vote at the meeting were present and voted, in accordance with the procedures stated in Sec. 407, including, among other procedures, prompt notice of the taking of action without a meeting by less than unanimous written consent being given to those LLC members that have not consented in writing to that action but that would have been entitled to vote on that action had such action been taken at a meeting of LLC members, except as provided in the Agreement under Secs. 407 and 418.
- Managers of the LLC, if any are provided by the Articles, having no specified offices or responsibilities except as provided in the Agreement under Secs. 408 and 413.
- The affirmative vote of a majority of the managers of the LLC, if any are provided by the Articles, voting in person as a single class (as distinguished from one or more classes of managers voting on a *per capita*, class or other basis) being required to authorize any action required to be approved by the managers except as provided in the Agreement and in accordance with Sec. 419, under Secs. 408 and 419.
- Managers of the LLC, if any are provided by the Articles, being permitted to take action without a vote of managers or a class of managers by consent in writing signed by all of the managers or all of the managers of such class in accordance with the procedures stated in Sec. 408 except as provided in the Agreement under Secs. 408 and 419.
- Managers of the LLC, if any are provided by the Articles, being permitted to participate in a meeting, and being deemed present in person at the meeting if participating, by conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other except as otherwise provided in the Agreement under Sec. 408.
- Managers of the LLC, if any are provided by the Articles, being in only one class except as the Articles may provide for classes of managers, and except as the Agreement may provide for classification of managers within classes of managers for the purpose of determining the terms of office of such managers, under Secs. 408 and 419.
- Managers of the LLC, if any are provided by the Articles, being permitted but not required to be LLC members unless otherwise provided in the Agreement under Sec. 410.
- Managers of the LLC, if any are provided by the Articles, having no prescribed qualifications except as provided in the Agreement under Sec. 410.
- No contract or other transaction between an LLC, on one hand, and one or more of its managers, if any are provided by the Articles, or any other business entity in which one or more of its managers are managers, directors or officers, or have a substantial financial

interest, being void, voidable, or avoidable by the LLC for this reason alone or by reason alone that such manager or managers are present at the meeting of the managers, or of a class of managers, which approves such contract or transaction or that such manager's or managers' votes are counted for such purpose if (1) the contract or transaction are approved, after good faith disclosure or actual knowledge of the LLC members entitled to vote on that approval, managers or class of managers approving it, in accordance with Sec. 411, or (2) the parties to that contract or transaction establish affirmatively that the contract or transaction was fair and reasonable as to the LLC at the time it was approved by the managers, a class of managers or the LLC members, except to the extent, if any, that the Agreement contains additional restrictions on contracts or transactions between an LLC and its managers and provides that contracts or transactions in violation of those additional restrictions shall be void or voidable by the LLC under Sec. 411. (See discussion below of interested transactions between the LLC and its members under Sec. 611.)

- Managers of the LLC, if any are provided by the Articles, having authority to fix the compensation of managers for services in any capacity unless otherwise provided in the Agreement under Sec. 411.
- If the Articles provide that management shall be vested in one or more managers of the LLC, no LLC member, solely by reason of being a member, being an agent of the LLC for the purpose of the LLC's business except to the extent that authority has been delegated to such member by the manager or managers or by the provisions of the Agreement under Sec. 412.
- If the Articles provide that management shall be vested in one or more managers of the LLC, the vote of LLC members in accordance with Sec. 402 being required to designate or elect annually the manager or managers of the LLC except as provided in the Agreement under Sec. 413.
- Initial managers of the LLC, if any are provided by the Articles, holding office until the first annual meeting of LLC members and until their successors have been elected and qualified except as provided in the Agreement under Sec. 413, and all managers of the LLC, if any are provided by the Articles, holding office until their successors have been elected and qualified or until their earlier resignation or removal.
- The number of managers of the LLC, if any are provided by the Articles, being fixed as stated in the Agreement except as that number may be increased or decreased by amendment to and in the manner provided in the Agreement under Sec. 413.
- Managers of the LLC, if any are provided by the Articles, being subject to removal or replacement with or without cause by a vote of a majority in interest of the LLC members entitled to vote on the removal or replacement except as provided in the Agreement under Sec. 414.
- Managers of the LLC, if any are provided by the Articles, being permitted to resign at any time by giving written notice to the LLC except as provided in the Agreement under Sec. 415; provided, however, that if the resignation violates any provision of the Agreement or any agreement between the manager and the LLC, the LLC may recover from such manager damages for such breach as provided by the Agreement, the other agreement or law under Sec. 415. Sec. 415 provides that the election of a manager not of itself creating contract rights.

- Vacancies among managers of the LLC, if any are provided by the Articles, whether resulting from removal, replacement or resignation of one or more managers or from an increase in the number of managers, being permitted to be filled by vote of a majority in interest of the LLC members entitled to vote to fill such vacancies except as provided in the Agreement under Sec. 416.
- A manager, if any are provided by the Articles, chosen to fill a vacancy serving the unexpired term of that manager's predecessor as manager or, in the case of a vacancy resulting from an increase in the number of managers, holding office until the next annual meeting of LLC members or until a successor has been elected and qualified, in each case except as provided in the Agreement under Sec. 416.
- Managers of the LLC, if any are provided by the Articles, being liable to the LLC or LLC members for damages for any breach of duty as managers or as LLC members of any class of managers (*i.e.*, under Sec. 409, the duty to perform each manager's duties as a manager, including the manager's duties as a member of any class of managers, in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances) *unless (1) the Agreement sets forth a provision under Sec. 417 eliminating or limiting the personal liability of managers to the LLC or LLC members for damages for any breach of duty in such capacity after the date that such provision was adopted and (2) no judgment or other final adjudication adverse to the respective managers establishes that the respective managers' acts or omissions were in bad faith or involved intentional misconduct or a knowing violation of law or that the respective managers personally gained in fact a financial profit or other advantage to which the respective managers were not legally entitled or that with respect to a distribution the subject of Sec. 508(a) the respective managers' acts were not performed in accordance with Sec. 409.*
- No notice of the time, place or purpose of any meeting at which any matter is to be voted on by any managers, if any are provided by the Articles, no waiver of any such notice, no record date for meetings of or any other action by such managers (*e.g.*, authorization of distributions by the LLC), no quorum requirements for meetings of such managers, no provisions for voting by such managers in person or by proxy, and no other matter with respect to the exercise of any right of such managers to vote not stated in this summary being prescribed except as provided in the Agreement under Sec. 419.
- LLC having the power to indemnify and hold harmless, and advance expenses to, any LLC member, manager, if any are provided by the Articles, or other person, or any testator or intestate of such LLC member, manager or other person, from and against any and all claims and demands whatsoever unless a judgment or other final adjudication adverse to such LLC member, manager or other person establishes (a) that his or her acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated or (b) that he or she personally gained in fact a financial profit or other advantage to which he or she was not legally entitled, subject to the standards and restrictions, if any, set forth in the Agreement under Sec. 420.

Contributions

- LLC members being obligated to the LLC to perform any promise to contribute cash or property or to perform services that is otherwise enforceable in accordance with applicable law even if the respective LLC members are unable to perform because of death, disability or any other reason (*e.g., force majeure*) except as provided in the Agreement under Sec. 502.
- LLC members not making any required contribution of property or services being obligated at the option of the LLC to contribute cash equal to that portion of the value, as stated in the records of the LLC, if so stated, of the contribution that the respective LLC members have not made except as provided in the Agreement under Sec. 502, which option would be in addition to and not in lieu of any other rights, including the right to specific performance, that the LLC may have against the respective LLC members under the Agreement or applicable law.
- The obligation of LLC members to make a contribution or to return money or other property paid or distributed in violation of the NYLLC Law being subject to compromise only by consent of all the LLC members unless otherwise provided in the Agreement under Sec. 502 and except as provided in Sec. 605 with respect to assignees of LLC membership interests.
- No specified consequences to an membership interest of any LLC member that fails to make any required contribution except as provided in the Agreement under Sec. 502, which consequences under Sec. 502 may include, but are not limited to, reduction or elimination of the defaulting LLC member's interest, subordination of the defaulting LLC member's interest to that of nondefaulting LLC members, a forced sale of the defaulting LLC member's interest, forfeiture of the defaulting LLC member's interest, the lending by the other LLC members of the amount necessary to meet the defaulting LLC member's commitment, a fixing of the value of the defaulting LLC member's interest by appraisal or by formula and redemption or sale of such LLC member's interest at such value, or other consequences permitted by applicable law.

Profits and Losses

- Profits or losses of the LLC being allocated among LLC members, and among the classes of LLC members, if any, on the basis of the value, as stated in the records of the LLC if so stated, of the contributions of each member, but not including defaulted obligations to make contributions, to the extent they have been received by or promised to the LLC and have not been returned to any such member except as the Agreement allocates profits and losses among the LLC members, and among the classes of LLC members, if any, in a different manner under Sec. 503.

Distributions

- Distributions of the LLC being allocated among LLC members, and among classes of LLC members, if any, on the basis of the value, as stated in the records of the LLC if so stated, of the contributions of each member, but not including defaulted obligations to make contributions, to the extent they have been received by or promised to the LLC and

have not been returned to any such member except as the Agreement allocates distributions among the LLC members, and among classes of LLC members, if any, in a different manner under Sec. 504.

- LLC members, regardless of the nature of their respective contribution to the LLC, having no right to demand and receive any distribution from the LLC in any form other than cash except as provided in the Agreement under Sec. 505.
- LLC members not being subject to being compelled to accept a distribution of any asset in kind from an LLC to the extent that the percentage of the asset distributed to the respective LLC members exceeds a percentage of that asset that is equal to the percentage in which the respective LLC members share in distributions from the LLC except as provided in the Agreement under Sec. 505.
- LLC members *not being entitled to receive distributions from an LLC before the respective LLC members withdraw from the LLC and before the dissolution and winding up of the LLC* except to the extent and at the times or upon the happening of events specified in the Agreement under Sec. 507, subject to other provisions of the NYLLC Law.
- *LLC members not being liable* for the amount of any distribution made to the respective LLC members albeit at the time of the distribution, after giving effect to the distribution, all liabilities of the LLC, other than liabilities to the LLC members on account of their LLC membership interests and liabilities for which recourse of creditors is limited to specified property of the LLC, exceed the fair market value of the assets of the LLC, calculated by including in assets of the LLC for this purpose any property that is subject to a liability for which the recourse of creditors is limited only to the extent that the fair value of such property exceeds such liability (a “wrongful distribution” sometimes referenced as a distribution when the LLC is “insolvent in the equity sense”) *if the respective LLC members receiving the wrongful distribution did not know at the time of the wrongful distribution that the LLC then was insolvent in the equity sense* except to the extent that the Agreement or other applicable law creates an obligation or liability of the respective LLC members to repay the amount of that distribution under Sec. 508.
- *LLC members not being liable* for the amount of any wrongful distribution made to the respective LLC members at the time that the LLC was insolvent in the equity sense, *regardless whether the respective LLC members receiving the wrongful distribution knew at the time of the wrongful distribution that the LLC then was insolvent in the equity sense, after the expiration of three (3) years from the date of the wrongful distribution* unless otherwise agreed in the Agreement or another agreement under Sec. 508.
- LLC members being entitled to receive, within a reasonable time after withdrawal as LLC members, the fair value of the respective LLC members’ membership interest in the LLC as of the date of withdrawal based upon the respective LLC members’ right to share in distributions from the LLC except as provided in the NYLLC Law and except as otherwise provided in the Agreement under Sec. 509.

Admission, Withdrawal, and Liability of and Transactions with LLC Members; Assignment of LLC Membership Interests; Powers of Estates of LLC Members

- Subject to provisions of Art. 12 for professional service LLCs, persons becoming initial LLC members on the later of the effective date of the initial Articles or the date stated in

the records of the LLC unless a date after that effective date as of which the respective persons become LLC members pursuant to Sec. 602 or the Agreement is ascertainable.

- Subject to provisions of Art. 12 for professional service LLCs, after the effective date of the initial Articles, persons acquiring a membership interest in the LLC directly from the LLC being eligible to be admitted as LLC members upon the vote or written consent of a majority in interest of the LLC members except as the Agreement prescribes a different requirement or procedure under Sec. 602.
- Subject to provisions of Art. 12 for professional service LLCs, after the effective date of the initial Articles, persons acquiring a membership interest in the LLC by assignment from LLC members being eligible to be admitted as LLC members only upon the vote or written consent of at least a majority in interest of the LLC members other than the LLC member that assigned or proposes to assign such LLC membership interest except as provided in the Agreement under Sec. 604 or Sec. 1211, except that, to the extent that the Agreement provides for the power of the assigning LLC members to grant their assignees the right to become LLC members, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the power under Secs. 602 and 608 (regarding powers of the estate of a deceased or incompetent LLC member to exercise the LLC member's rights including any power under the Agreement of an assignee to become an LLC member).
- Subject to provisions of Art. 12 for professional service LLCs, after the effective date of the Articles, persons acquiring a membership interest in a surviving or resulting LLC pursuant to a merger or consolidation approved in accordance with Sec. 1001(b) not being admitted as LLC members of the surviving or resulting LLC except at the time provided in and upon compliance with the Agreement of the surviving or resulting LLC unless otherwise provided in the agreement of merger or consolidation or the Agreement of the surviving or resulting LLC under Sec. 602.
- Except as provided in Secs. 1209, 1210 and 1211 for professional service LLCs, LLC members' LLC membership interests being assignable in whole or in part, assignment of an LLC membership interest not dissolving the LLC or entitling the assignee to participate in the management and affairs of the LLC or to become or to exercise any rights or powers of an LLC member, *the only effect of an assignment of an LLC membership interest being to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses to which the assignor would be entitled, and an LLC member ceasing to be a member and to have the power to exercise any rights or powers of an LLC member upon assignment of all of the LLC member's LLC membership interest* except as provided in the Agreement under Secs. 603 and 606 (Sec. 606 authorizes the Agreement to provide that an LLC membership interest may not be assigned prior to the dissolution and winding up of the LLC).
- Pledging or granting a security interest, lien or other encumbrance in or against any or all of the LLC membership interest of an LLC member not causing the LLC member to cease to be a member or to cease to have the power to exercise any rights or powers of an LLC member unless otherwise provided in the Agreement under Sec. 603.
- Members' interests in an LLC not being evidenced by a certificate issued by the LLC except as provided in the Agreement under Sec. 603. Sec. 603 provides that, if an LLC member's interest is evidenced by a certificate, no interest represented by the certificate may be assigned or transferred except as provided in the Agreement, the existence of the

restrictions on the sale or transfer of an LLC membership interest as contained in the NYLLC Law (including without limitation Sec. 1211 for professional service LLCs) and, if applicable, in the Agreement, shall be noted conspicuously on the certificate, and any sale or transfer in violation of those restrictions shall be void.

- Except to the extent assumed by agreement, until the time, if any, that an assignee of a membership interest in an LLC becomes an LLC member, the assignee having no liability as a member solely as a result of the assignment unless otherwise provided in the Agreement under Sec. 603.
- An assignee of a membership interest in an LLC that becomes an LLC member being liable for the obligations of the assignee's assignor to make contributions as provided in Sec. 502 (regarding liability for contributions) but not for the obligations of that assignor under Secs. 508 (regarding limitations on distributions) and 606 (regarding withdrawal of an LLC member) unless otherwise provided in the Agreement under Sec. 604, except that an assignee of an LLC membership interest that becomes an LLC member is not obligated for (1) liabilities, including the obligations of that assignor to make contributions as provided in Sec. 502, unknown to the assignee at the time the assignee becomes an LLC member and that could not be ascertained from the Agreement, or (2) any accrued liabilities of that assignor at the time of assignment unless the assignee specifically assumes such liabilities.
- Whether or not an assignee of a membership interest in an LLC becomes an LLC member, the assignor of that membership interest not being released from any liability under the NYLLC Law or the Agreement except liabilities that arise after the effectiveness of the assignment and are pursuant to Sec. 210 (regarding false statements in the Articles or any certificates filed with SOS), pursuant to Sec. 508 (regarding limitations on distributions) or, in the event the assignee becomes an LLC member, unless otherwise provided in the Agreement under Sec. 605, pursuant to Sec. 502 (regarding liability for contributions).
- *Except as provided in Secs. 1209, 1210 and 1211 for professional service LLCs, LLC members being prohibited from withdrawing from the LLC prior to the dissolution and winding up of the LLC unless the Agreement provides otherwise, and LLC members being permitted to withdraw as LLC members only at the time or upon the happening of events specified in the Agreement and in accordance with the Agreement under Sec. 606 (Sec. 606 authorizes the Agreement to provide that an LLC membership interest may not be assigned prior to the dissolution and winding up of the LLC).*
- LLC members being permitted to lend money to, borrow money from, act as guarantor or surety for, provide collateral for the obligations of and transact other business with the LLC and, subject to other applicable law, having the same rights and obligations with respect to these transactions as a person who is not an LLC member, except as may be provided in the Agreement under Sec. 611. (See discussion above of interested transactions between the LLC and its managers under Sec. 411.)

Dissolution and Related Distribution

- LLC being dissolved only under the circumstances set forth in Sec. 701, and the LLC having "a perpetual existence," unless the Articles provide the latest date for that dissolution under Secs. 203 and 701 or the Agreement specifies the time for that

dissolution under Sec. 701, those circumstances set forth in Sec. 701 being the following: the happening of events specified in the Agreement; the vote or written consent of at least a majority in interest of the LLC members or, if there is more than one class or group of LLC members, then by [*sic.*] at least a majority in interest of each class or group of LLC members subject to any requirement in the Agreement requiring approval by any greater or lesser percentage in interest of the LLC members or class or classes or group or groups of LLC members; at any time there are no LLC members, provided that, unless otherwise provided in the Agreement, the LLC is not dissolved and is not required to be wound up if, within 180 days or such other period as is provided for in the Agreement after the occurrence of the event that terminated the continued LLC membership of the last remaining LLC member, the legal representative of the last remaining LLC member agrees in writing to continue the LLC and to the admission of the legal representative of that LLC member or that LLC member's assignee to the LLC as an LLC member effective as of the occurrence of the event that terminated the continued LLC membership of the last remaining LLC member; the entry of a decree of judicial dissolution under Sec. 702.

- The death, retirement, resignation, expulsion, bankruptcy or dissolution of any LLC member or the occurrence of any other event that terminates the continued LLC membership of any LLC member not causing the LLC to be dissolved or its affairs to be wound up unless within 180 days following the occurrence of such event, a majority in interest of all of the remaining LLC members or, if there is more than one class or group of LLC members, then by [*sic.*] a majority in interest of all the remaining LLC members of each class or group of LLC members, vote or agree in writing to dissolve the LLC, in either event unless otherwise provided in the Agreement under Sec. 701.
- In the event of a dissolution of the LLC, except for a dissolution pursuant to Sec. 702 (regarding judicial dissolution), the LLC members being authorized to wind up the LLC's affairs unless otherwise provided in the Agreement under Sec. 703.
- Upon the winding up of the LLC, the assets of the LLC being required to be distributed (1) to creditors, including LLC members that are creditors, to the extent permitted by law, in satisfaction of liabilities of the LLC, whether by payment or by establishment of adequate reserves, other than liabilities for distributions to LLC members and former LLC members under Sec. 507 (regarding distributions to LLC members before the respective LLC members withdraw from the LLC and before the dissolution and winding up of the LLC) or Sec. 509 (regarding distributions to LLC members within a reasonable time after their withdrawal as members of the LLC), (2) to LLC members and former LLC members in satisfaction of liabilities for distributions under Sec. 507 or Sec. 509 except as provided in the Agreement under Sec. 704, and (3) to LLC members first for the return of their contributions, to the extent not previously returned, and second respecting their membership interests in the LLC, in the proportions in which the LLC members share in distributions in accordance with Sec. 504 except as provided in the Agreement under Sec. 704.

Mergers and Consolidations

- An agreement of merger or consolidation being required to be submitted to the members of each New York LLC that are entitled to vote with respect to the merger or

consolidation at a meeting called on 20 days' notice unless the Agreement requires greater notice under Sec. 1002.

- The agreement of merger or consolidation of a New York LLC being required to be approved on behalf of that New York LLC by the members of that New York LLC representing at least a majority in interest of the New York LLC members subject to any requirement in the Agreement requiring approval by any greater or lesser percentage in interest of the New York LLC members that are entitled to vote with respect to the merger or consolidation, which may not be less than a majority in interest of the New York LLC members that are so entitled to vote under Sec. 1002(c).
- The provision described below in this bullet paragraph being effective only to the extent that, under Sec. 1004(e) the Agreement contains a specific reference to Sec. 1004(e) and includes a provision to the effect that the agreement of merger or consolidation approved in accordance with Sec. 1002(c) may (1) effect any amendment to the Agreement or (2) effect the adoption of a new Agreement for a New York LLC if it is the surviving or resulting New York LLC in the merger or consolidation, in each instance effective at the effective time or date of the merger or consolidation. Sec. 1004(e) states that it shall not be construed to limit the accomplishment of a merger or of any of the matters referred to in the NYLLC Law by any other means provided for in the Agreement or any other agreement or as otherwise permitted by law, including that the Agreement of any New York LLC that is a party to the merger or consolidation (including any New York LLC formed for the purpose of consummating a merger or consolidation) shall be the Agreement of the surviving or resulting New York LLC.

Records

- Any LLC member being entitled to inspect and copy at the LLC member's own expense, for any purpose reasonably related to the LLC member's interest as an LLC member, the records of the LLC described in Sec. 1102(a) (consisting of (1) a current alphabetical list of the full names and last known mailing addresses of the managers of the LLC, if any are provided by the Articles, (2) a current alphabetical list of the full names, last known mailing addresses, contributions and shares of profits and losses of the respective LLC members or information from which such shares can be readily derived, (3) a copy of the Articles, all amendments or restatements of the Articles, and executed copies of any powers of attorney pursuant to which any certificate or amendment has been executed, (4) a copy of the Agreement, any amendments to the Agreement and any amended and restated Agreement, and (5) a copy of the LLC's federal, state and local income tax or information returns and reports, if any, for the three (3) most recent fiscal years), any financial statements maintained by the LLC for the three (3) most recent fiscal years and other information regarding the affairs of the LLC as is just and reasonable subject to reasonable standards as may be set forth in, or pursuant to, the Agreement under Sec. 1102.
- LLC members and managers not having the right to keep confidential from other LLC members any information required to be furnished to those LLC members under Sec. 1102 except that, if provided in the Agreement under Sec. 1102, certain LLC members or managers have the right to keep confidential from other LLC members, for such period of time as such certain LLC members or the managers deem reasonable, any information

which such certain LLC members or the managers reasonably believe to be in the nature of trade secrets or other information the disclosure of which such certain LLC members or the managers in good faith believe is not in the best interest of the LLC or its business or which the LLC is required by law or by agreement with a third party to keep confidential.