

THE INDIANA BUSINESS FLEXIBILITY ACT (LIMITED LIABILITY COMPANIES)

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INTRODUCTION

The limited liability company (LLC) movement spread rapidly and throughout the United States. With the enactment of the Indiana Business Flexibility Act (the Act),¹ Indiana joined the majority of other jurisdictions in authorizing LLCs as a new form of business association. As recently as 1989, only two United States jurisdictions authorized LLCs. As of this writing, thirty-eight additional states have enacted statutes authorizing LLCs.

The LLC represents an alternative to the corporation and partnership. In some respects, the LLC may be viewed as a hybrid of the two. One commentator has described the LLC as an entity possessing the corporate characteristic of limited liability, but with the added ability to conduct its affairs as a partnership.² More to the point, it is the unique combination of limited liability for owners with the LLC's ability to be classified as a partnership for federal income tax treatment³ that is the primary reason for the proliferation of LLCs.⁴

The purpose of this Article is to provide background information on LLCs, explain key issues involved in determining whether an LLC will be classified as a partnership for tax purposes, review substantive provisions of the Act, and comment on the possible uses of LLCs.

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1. IND. CODE ANN. §§ 23-18-1-1 to -13-1 (West 1994).

2. Richard Johnson, Comment, *The Limited Liability Company Act*, 11 FLA. ST. U. L. REV. 387, 387 (1983).

3. The LLC joins the partnership and S corporation as a "pass-through" entity for federal income tax purposes.

4. See Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 378 (1992); James W. Lovely, *Agency Costs, Liquidity, and the Limited Liability Company as An Alternative to the Close Corporation*, 21 STETSON L. REV. 377 (1992).

I. BACKGROUND OF LLCs

A. History of LLCs

Several commentators have traced the history of business associations similar to LLCs under a variety of laws outside of the United States. These LLC analogues include the English "private company," the French "SARL," the South American "limitada," and the German "GmbH."⁵

In the United States, LLCs find their genesis in the 1977 Wyoming Limited Liability Company Act.⁶ Florida's 1982⁷ statute is similar to Wyoming's. Following publication in 1988 of a revenue ruling by the Internal Revenue Service (IRS) that a Wyoming LLC would be classified as a partnership for federal income tax purposes,⁸ numerous other jurisdictions adopted their version of an LLC statute. The total number of states with LLC statutes is forty.⁹

B. Common Traits of LLCs

Although there are significant differences among the various state LLC statutes, there are certain general traits that mark this emerging form of business association. Fundamentally, an LLC is a non-corporate entity whose owners (typically termed "members") are generally not personally liable for the entity's debts or obligations. This shorthand description touches two important bases. First, the LLC is not a corporation. An LLC resembles a partnership in many respects, including such matters as formalities of organization, governance,

5. See *Lovely*, *supra* note 4, at 536; *Keatinge*, *supra* note 4, at 378.

6. 1992 WYO. SESS. LAWS 512.

7. FLA. STAT. ANN. § 608.401-77 (West Supp. 1991).

8. Rev. Rul. 88-76, 1988-2 C.B. 360.

9. ALA. CODE §§ 10-12-1 to 10-12-61 (1993); ARIZ. REV. STAT. ANN. §§ 29-601 to 29-857 (1992); ARK. CODE ANN. §§ 4-32-101 to 4-32-1318 (Michie Supp. 1993); COLO. REV. STAT. §§ 7-80-101 to 7-80-913 (1992); 1993 CONN. LEGIS. SERV. P.A. NO. 93-267; DEL. CODE ANN. title 6, §§ 18-101 to 18-1107; FLA. STAT. ANN. §§ 608.401-608.471 (1993); GA. CODE ANN. § 14-11-100 to 14-11-1109 (1993); IDAHO CODE § 53-601 to 53-672 (1993); ILL. REV. STAT. §§ 1-1 to 55-10 (1992); IND. CODE ANN. §§ 23-18-1-1 to 23-18-13-1 (West 1994); IOWA CODE §§ 490 A.100 to 490 A.1601 (1992); KAN. STAT. ANN. § 17-7601 to 17-7650 (1993); KY. S.B. 184 (1994); LA. REV. STAT. ANN. §§ 1301 to 1369 (1992); P.L. 718, 116th Leg., 2d Reg. Sess. 1994 Maine; MD. CODE ANN. §§ 4A.101 to 4A.1103 (1992); MICH. COMP. LAWS § 450.4101 to 450.5200 (1993); MINN. STAT. §§ 322B.01 to 372B.95 (1992); MISS. CODE ANN. § 79-6-1 (1993); MO. REV. STAT., S.B. 66 and 20 (1993); MONT. CODE ANN. Ch. 120, §§ 1-78 (1993); NEB. REV. STAT. § 121 § 1-45 (1993); NEV. REV. STAT. §§ 86.011 to § 86.571 (1992); N.H. REV. STAT. ANN. § 304-C:1 - § 510.13 (1993); N.J. STAT. §§ 42:213-1 to 42:213-70; N.M. STAT. ANN. § 53-19-1 to 53-19-74 (1993); N.C. GEN. STAT. § 57C-1-01 (1993); N.D. CENT. CODE § 10-32-01 to 10-32-155; Sub. S.B. 74, 120th Gen. Ass. 1993-94 Reg. Sess. Ohio; OKLA. STAT., tit. 18, §§ 2000-2060 (1992); OR. REV. STAT. Ch. 63.001 (1993); R.I. GEN LAWS § 7-16-1 to 7-16-75 (1992); S.D. CODIFIED LAWS §§ 47-34-1 to 47-34-53 (1993); TEX. REV. CIV. STAT. art. 1528 n. arts. 1.01-9.02 (1992); UTAH CODE ANN. §§ 48-2b-101 to 48-2b-157 (1992); VA. CODE ANN. §§ 13.1-1000 to 13.1-1073 (1993); W.VA. CODE § 31-1A-1 to 31-1A-69 (1992); WIS. STAT. ANN. § 820 (1993); and WYO. STAT. §§ 17-15-101 to 17-15-136 (1992).

capital structure and events requiring dissolution of the entity. As a non-corporate entity, the LLC stands outside of the extensive body of statutory and judicial law regulating corporations. Second, the feature of limited liability places considerable distance between the LLC and the partnership. In an LLC, both the members and other persons, if any, managing the LLC (managers) are not personally liable for the LLC's debts and obligations. A fundamental aspect of partnerships—both general and limited—is that at least one partner must be personally liable for the partnership's debts and obligations.¹⁰

However, these distinctions do not explain why so many states have adopted statutes authorizing LLCs. The LLC movement is largely tax-driven. An LLC can qualify for classification as a partnership for federal income tax purposes. As a "pass-through" entity, the LLC itself, like a partnership, is not subject to federal income tax. Rather, all items of income, losses, credits and deductions pass through and are reported by the entity's owners. The 1986 adoption of lower rates for individuals and the repeal of the *General Utilities* doctrine are believed to have enhanced the attractiveness of a pass-through entity for business planning purposes.¹¹

In most contexts, the LLC represents a better pass-through entity than the more traditional alternatives: the general partnership, the limited partnership, and the S corporation. There are two major advantages of LLCs over partnerships. First, unlike general partners of a general or a limited partnership, the members and managers of an LLC possess limited liability. Second, investors in an LLC can actively participate in the management of the firm without losing this protection unlike a limited partner who participates in the "control" of a limited partnership.¹²

There are many advantages that an LLC has in comparison to an S corporation. Unlike an S corporation, an LLC is not subject to restrictions with respect to the number and the type of its owners. Generally, an S corporation may have no more than thirty-five owners, all of whom must be individuals, estates, or certain qualified trusts.¹³ An LLC may have the same flexible capital structure as a partnership. Special allocations of profits and losses are possible, subject to the "substantial economic effect" tests of the Internal Revenue Code.¹⁴ In contrast, an S corporation may have only a single class of stock (although two classes of stock whose only difference is that one has voting rights is permissible).¹⁵ Another difference is that a member of an LLC may

10. *E.g.*, IND. CODE ANN. §§ 23-4-1-15; -16-5-3 (West 1994).

11. Keatinge et al., *supra* note 4, at 380.

12. *E.g.*, IND. CODE ANN. § 23-16-4-3(a)(2) (West 1994).

13. I.R.C. § 1361(b)(1)(B) (1993).

14. *Id.* § 704(b). An explanation of the situations in which special allocations will have substantial economic effect is beyond the scope of this Article. See LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES at § 17.07 (1992).

15. I.R.C. §§ 1361(b)(1)(B); (c)(4) (1993).

increase the tax basis of his or her ownership interest for the entity's liabilities, while a shareholder of an S corporation cannot.¹⁶ Finally, an LLC, unlike an S corporation, may own more than eighty percent of corporate subsidiaries.¹⁷

These advantages suggest that the LLC may well become the "entity of choice" in business planning contexts that favor a pass-through entity.

II. CLASSIFICATION OF LLCS FOR TAX PURPOSES

A. Classification Analysis

In Revenue Ruling 88-76,¹⁸ the IRS extended the traditional analysis used to determine whether an unincorporated organization is taxed as a partnership or corporation to a Wyoming LLC. This analysis focused on the presence of four relevant characteristics to determine corporate status: (a) continuity of life; (b) free transferability of interests; (c) centralized management; and (d) limited liability.¹⁹ Under this analysis, an entity with more than two of these characteristics cannot be classified as a partnership. An LLC will have the corporate characteristic of limited liability. Accordingly, to qualify as a partnership for federal tax purposes, an LLC must not have more than one of the three remaining corporate characteristics.

In Revenue Ruling 88-76, an LLC formed under the Wyoming statute was found to lack continuity of life and free transferability of interests and, therefore, was classified as a partnership. This analysis has also been applied in a number of subsequent revenue rulings addressing other state LLC laws.²⁰ In regulations, published rulings, and a number of private letter rulings, the IRS has addressed classification and other LLC-related issues at length. Although the IRS has not yet publicly addressed the Act,²¹ the same analysis contained in Revenue Ruling 88-76 should apply to an LLC created under the Act, with one reservation. Unlike the Wyoming, Florida, and other "first generation" or

16. *Id.* § 752.

17. *Id.* §§ 1361(b)(2)(A); 1504(a).

18. 1988-2 C.B. 360.

19. *See* Treas. Reg. § 301.7701-2(a)(1) (1993). Two other characteristics—"associates" and an "objective to carry on a business and divide the gains"—are shared by partnerships and corporations and, accordingly, are not considered for classification purposes.

20. Rev. Rul. 94-6, 1994-3 I.R.B. 11 (Alabama); Rev. Rul. 93-93, 1993-42 I.R.B. 13 (Arizona); Rev. Rul. 93-6, 1993-1 C.B. 229 (Colorado); Rev. Rul. 93-38, 1993-1 C.B. 233 (Delaware); Rev. Rul. 93-53, 1993-26 I.R.B. 7 (Florida); Rev. Rul. 93-49, 1993-25 I.R.B. 11 (Illinois); Rev. Rul. 94-5, 1994-2 I.R.B. 21 (Louisiana); Rev. Rul. 93-30, 1993-1 C.B. 231 (Nevada); Rev. Rul. 93-92, 1993-42 I.R.B. 11 (Oklahoma); Rev. Rul. 93-81, 1993-38 I.R.B. 5 (Rhode Island); Rev. Rul. 93-5, 1993-1 C.B. 227 (Virginia); Rev. Rul. 93-50, 1993-25 I.R.B. 13 (West Virginia).

21. The IRS issued an as yet unreleased Private Letter Ruling in March 1994 confirming that an LLC to be formed under the Act would be classified as a partnership. In 1993, Theodore J. Esping of the Indianapolis law firm of Baker & Daniels requested a revenue ruling addressing the classification of LLCs formed under the Act.

“bullet-proof” LLC statutes, the Act, along with other more recent statutes such as Delaware’s, is considered a “flexible” statute. This means that the LLC’s organizational documents can vary “default rules” contained in the Act that would otherwise preclude the corporate characteristics from being present. This flexibility has two applications. First, it allows the organizer of an LLC to choose which, if any, of the three corporate characteristics will be present. For example, in one context it may be important for the entity to avoid dissolution upon the death or withdrawal of a specified member. In such a case, the operating agreement could be drafted in such a way that the LLC would not be dissolved upon such an event. Even though the LLC may then have the corporate characteristic of continuity of life, as long as it does not have either of the other two corporate characteristics, it could still be classified as a partnership. Second, the organizer can use the Act’s flexibility to take advantage of less restrictive interpretations of the corporate characteristics that the IRS has employed in a number of recent Private Letter Rulings. Before turning to the Act itself, a brief summary of the IRS’s position on how the classification analysis applies to LLCs is in order.

B. Continuity of Life

An unincorporated organization lacks the corporate characteristic of continuity of life if it is dissolved upon death, withdraw, retirement, or other termination of ownership status, unless *all* of the remaining owners consent to continue the business.²² Revenue Ruling 88-76 found that the Wyoming statute, which required the unanimous consent of the remaining members to continue business upon the occurrence of certain events affecting the status of any member, precluded the corporate characteristic of continuity of life. The Act contains a similar unanimous consent requirement to continue business after an “event of dissociation,” but, because it is expressed as a default rule, it can be varied by agreement.²³ This flexibility is important because, even if the entity has relatively few owners, unanimity may be difficult to obtain. Private Letter Rulings suggest that the flexibility of the Act can be used to minimize the risk of an unwanted dissolution in a number of ways short of the traditional requirement of unanimity. The default rule could be varied to: (a) lower the consent requirement from unanimity to the holders of a majority of the remaining interests;²⁴ (b) limit the types of events triggering the consent requirements; or (c) limit the consent requirement only to triggering events that affect certain members.

22. Treas. Reg. § 301.7701-2(b)(2) (1993).

23. IND. CODE ANN. § 23-18-9-1 (West 1994).

24. See, e.g., Priv. Ltr. Rul. 9325039 (March 26, 1993); Priv. Ltr. Rul. 9333032 (May 24, 1993).

LLCs formed under the Act may have a definite term or be perpetual until dissolved.²⁵ Earlier laws, such as Wyoming's, required a definite term.²⁶ Although it may appear reasonable to assume that an LLC with a stated term would be deemed lacking the corporate characteristic of continuity of life, that is not the case. The specification of a definite term for an LLC is simply not relevant to the issue of partnership classification.²⁷

C. Free Transferability of Interests

An unincorporated organization will have the corporate characteristic of free transferability of interests if an owner can, without the consent of other owners, transfer *all* attributes of ownership to another person.²⁸ The regulations provide that this characteristic does not exist if owners can only assign their right to share in the profits of an entity, and not their right to participate in the management of the entity.

An LLC formed under the Act that does not vary the Act's default rule should lack the corporate characteristic of free transferability of interests. The Act provides that an assignee of an interest in an LLC may become a member only if the other members unanimously consent.²⁹ As with the provision relating to dissolution upon dissociation of a member, this default rule can be varied by agreement. Based upon private letter rulings involving LLCs, there is reason to believe that the IRS will treat an LLC as lacking free transferability of interests if the members agree that an assignee may be admitted as a substitute member with the consent of a majority in interest of the remaining members.³⁰

D. Centralized Management

The final corporate characteristic—centralized management—has been more difficult for many LLCs to avoid. In Revenue Ruling 88-76, the Wyoming LLC was found to have this characteristic because three of its twenty-five members were designated as managers.³¹ An LLC formed under the Colorado statute, which requires appointment of a “manager,” was also found to have centralized management.³²

The regulations speak of centralized management as “a concentration of continuing exclusive authority to make management decisions.”³³ However, the

25. IND. CODE ANN. § 23-18-2-4(b)(3) (West 1994).

26. WYO. STAT. § 17-15-107 (Supp. 1993).

27. See RIBSTEIN & KEATINGE, *supra* note 4, at § 16.12.

28. Treas. Reg. § 301.7701-2(e) (1993).

29. IND. CODE ANN. § 23-18-6-4(a) (West 1994).

30. See Priv. Ltr. Rul. 9210019 (Dec. 6, 1991) (a Texas LLC prohibited transfers without consent of manager or if manager was not a member, a majority in interest of members).

31. Rev. Rul. 88-76, 1988-2 C.B. 360, 361.

32. Rev. Rul. 93-6, 1993-1 C.B. 229.

33. Treas. Reg. § 301.701-3(c)(3) (1993).

regulations also point out that the existence of a “mutual agency relationship” among owners, that is, each owner’s ability to bind all partners while acting within the scope of the entity’s business, would preclude the corporate characteristic of centralized management.³⁴ The existence of such a mutual agency relationship should also preclude centralized management even if the owners agree among themselves that management powers will be limited to only a specified few.³⁵

This distinction—the presence or absence of a mutual agency relationship among owners—forms the basis of the Act’s default rule on centralized management. The Act provides that each member is an agent of the LLC and can act to bind the entity unless the articles of organization provide for one or more managers.³⁶ The Act effectively creates two types of LLCs, “member-managed” and “manager-managed.” In general, a member-managed LLC should lack the corporate characteristic of centralized management even if the members have delegated some policy-making authority to one or more members (e.g., functioning as a “management committee”).³⁷ On the other hand, an LLC that appoints managers probably will have the corporate characteristic of centralized management, even if the members choose to elect themselves as managers.³⁸

E. Indiana Tax Treatment

It was the Indiana Department of Revenue’s position, prior to the adoption of the Act, that foreign LLCs that are classified as partnerships for federal income tax purposes would also be treated as a partnership for purposes of the Indiana gross income and adjusted gross income taxes.³⁹ As part of the legislation that included the Act, the definition of partnership for Indiana tax purposes was amended specifically to include LLCs treated as partnerships for federal tax purposes.⁴⁰

III. SOURCES OF THE ACT

A task force operating under the auspices of the Indiana Corporate Law Survey Commission largely was responsible for drafting the Act. The task force had several models available to it during 1992 when the Act was formulated. These included other state LLC statutes, notably Wyoming, Colorado, Maryland, and Delaware. The Act also draws upon several aspects of the “Prototype Limited Liability Company Act” prepared by a working group of the Subcommit-

34. Treas. Reg. § 301.7701-2(c)(4) (1993).

35. *See id.*

36. IND. CODE ANN. § 23-18-3-1 (West 1994).

37. *See Priv. Ltr. Rul.* 9321047 (Feb. 25, 1993).

38. *See supra* note 32.

39. Indiana Department of Revenue Policy Directive No. 2 (May 1992).

40. IND. CODE ANN. § 6-3-1-19(a) (West Supp. 1993).

tee on Limited Liability Companies of the American Bar Association's Section of Business Law.⁴¹

No single source can be cited as the sole basis for the Act because it departs from each of these sources in a number of respects. Many of the departures were intended to parallel provisions of Indiana statutes governing other entities, primarily the Indiana Business Corporation Law⁴² ("IBCL") and the Indiana Revised Uniform Limited Partnership Act⁴³ ("INRULPA"). Unlike the IBCL, however, the Act has no official comments that courts may consult to determine the underlying reasons, purposes and policies of the law. This lack of commentary may be addressed by the Indiana Corporate Law Survey Commission. It is also possible, as discussed below, that Indiana ultimately may adopt a uniform LLC act, which currently is in the process of development.

IV. SUBSTANTIVE PROVISIONS OF THE ACT

A. *Definitions and General Provisions*

The definitions used in the Act are drawn from the same sources used in drafting the Act itself. The first definition of note is that of a limited liability company. A "[l]imited liability company' or 'domestic limited liability company' means an entity that is an unincorporated association organized under this article."⁴⁴ The Act defines the organizational documents of the entity, including the document that creates the LLC, the "articles of organization."⁴⁵ A "member," the owner of the LLC, is defined as a person, "admitted to membership . . . and as to whom an event of dissociation has not occurred."⁴⁶ A "majority in interest of the members" is defined as, "members who have made more than fifty percent (50%) of the agreed value, as stated in the records of the limited liability company, of the total contributions made by all members, to the extent that the contributions have not been previously returned."⁴⁷ This definition is significant in that a "majority in interest" is used throughout the Act as the threshold for approving many matters.

An LLC may be organized for "any lawful purpose," unless a more limited purpose is stated in the articles of organization.⁴⁸ An LLC has very broad powers, similar to those of a corporation that, for example, permit an LLC to sue

41. See RIBSTEIN & KEATINGE, *supra* note 14, for a reprint of the final draft Prototype Limited Liability Company Act dated Nov. 19, 1993.

42. IND. CODE ANN. §§ 23-1-17-1 to -54-3 (West 1989 & West Supp. 1993).

43. IND. CODE ANN. §§ 23-16-1-1 to -12-6 (West 1994).

44. *Id.* § 23-18-1-11.

45. *Id.* § 23-18-1-3.

46. *Id.* § 23-18-1-15.

47. *Id.* § 23-18-1-13.

48. *Id.* § 23-18-2-1.

or be sued, complain and defend in its own name.⁴⁹ In addition, LLCs may own and convey property, make contracts and guarantees, and render professional services, to the extent permitted by a profession's licensing authority.⁵⁰ The powers and purposes provisions of the Act are very similar to those of the IBCL.⁵¹ An LLC that operates a business subject to regulation under any statute (e.g., insurance) must also comply with such laws.⁵² This requirement is identical to the IBCL.⁵³

B. Formation and Articles of Organization

One or more persons can form an LLC by filing articles of organization with the Indiana Secretary of State.⁵⁴ Because the Act does not require that an LLC have two or more members, it raises the question of whether a one-member LLC can be treated as a partnership for tax purposes. According to commentators, even though such an entity may not be classified as a partnership for tax purposes, it may not automatically be precluded from treatment as a pass-through entity similar to a sole proprietorship that conducts business through an agent.⁵⁵ The classification issue ultimately may depend upon the absence of the corporate characteristics discussed above.

The organizer need not be a member of the LLC and serves a role similar to an incorporator of a corporation. Only minimal information need be disclosed in the articles of organization—even less information than would be required in a certificate of limited partnership or articles of incorporation of a business corporation.⁵⁶ Articles of organization function as a “notice” filing to the public and are required to contain only: (a) the name of the LLC; (b) the street addresses of its registered agent and registered office; (c) the date, if any, the LLC is to dissolve or a statement that the duration of the LLC is perpetual; and (d) if the LLC has managers, a statement to that effect.⁵⁷ The articles of organization may also include, “any other matters, not inconsistent with this article that the members agree to include, including any matters that are required to be or may be included in an operating agreement.”⁵⁸

49. *Id.*

50. *Id.* § 23-18-2-2.

51. *See* IND. CODE ANN. §§ 23-1-22-1; -2 (West 1989 & Supp. 1993).

52. IND. CODE ANN. § 23-18-2-1(b) (West 1994).

53. IND. CODE ANN. § 23-1-22-1(b) (West 1989).

54. IND. CODE ANN. § 23-18-2-4(a) (West 1994). *Compare* IND. CODE ANN. § 23-4-1-6(1) (West 1989) which defines a partnership as being formed by two or more persons.

55. *See* RIBSTEIN & KEATINGE, *supra* note 14, at § 16.19.

56. *Compare* IND. CODE ANN. § 23-18-2-4 (West 1994) with *id.* § 23-16-3-2; and IND. CODE ANN. § 23-1-21-2 (West 1989).

57. IND. CODE ANN. § 23-18-2-4(b) (West 1994).

58. *Id.*

The name of the LLC must include the words "limited liability company" or the abbreviations "L.L.C." or "LLC."⁵⁹ The name of an LLC must be distinguishable from the names of other LLCs on file with the Secretary of State.⁶⁰ Under the current policy of the Secretary of State's office, LLC names are not cross-checked against the names of corporations or limited partnerships. This practice is consistent with the policy adopted when INRULPA was enacted in 1988 of not cross-checking corporation and limited partnership names.⁶¹ LLCs may do business under an assumed name. The filing requirements for assumed names are similar to those for corporations and limited partnerships.⁶² Articles of organization may be amended only by the members of the LLC.⁶³ In addition, the Act permits limited liability companies to restate their articles of organization entirely.⁶⁴

C. Operating Agreement

Members of the LLC may enter into an "operating agreement," which functions much like the partnership agreement of a general or limited partnership.⁶⁵ The Act does not require an operating agreement, nor must it be in writing. However, a written operating agreement is necessary if the members of an LLC wish to vary the Act's default rules. An operating agreement need not be filed with the Secretary of State and, in general, is not a public record. It is the document that generally would determine matters such as contributions of the members; the manner in which members share in the distributions of assets, profits, and losses of the LLC; restrictions on transfer of members' interests; management rights; events requiring dissolution and other matters. The operating agreement will generally determine whether an LLC will have the corporate characteristics of continuity of life and free transferability of interests for partnership classification purposes.

The Act provides that unless otherwise stated in the written operating agreement, "[a] member or manager is not liable for damages to the limited liability company or to the members of the limited liability company for any action taken or failure to act on behalf of the limited liability company, unless the act or omission constitutes willful misconduct or recklessness."⁶⁶ The operating agreement may "[e]liminate or limit the personal liability of a member or manager for monetary damages for breach of a duty" provided for in the

59. *Id.* § 23-18-2-4(a).

60. *Id.* § 23-18-2-8.

61. *Id.* § 23-15-1-1(a)(6); (7).

62. *Id.* § 23-15-1-1.

63. *Id.* § 23-18-2-5.

64. *Id.* § 23-18-2-6.

65. *Id.* § 23-18-4-5.

66. *Id.* § 23-18-4-2(a). This is comparable to the standard applicable to directors of a corporation formed under the IBCL. IND. CODE ANN. § 23-1-35-1(e) (West 1993).

operating agreement or the Act.⁶⁷ In addition, a written operating . . . agreement may provide “[i]ndemnification of a member or manager for judgments, settlements, penalties, fines, or expenses incurred in a proceeding to which a person is a party because the person is or was a member or manager.”⁶⁸

The initial operating agreement must be adopted or agreed to by all persons who are members of the LLC at the time the initial agreement is agreed to or adopted.⁶⁹ The Act does not specifically require members of an LLC having a written operating agreement to sign that agreement. As a practical matter, it is advisable to have all members sign a written operating agreement at the time the agreement is adopted. If, for example, the operating agreement is amended later to add new members, all members should sign the amended agreement. An amendment to a written operating agreement must be in writing and, unless otherwise provided in the operating agreement, be approved by the unanimous consent of all members.⁷⁰ The Act requires that a copy of any written amendment to the operating agreement be delivered to each member who did not agree to the amendment and each assignee of a member’s interest who has not been admitted as a member.⁷¹

“A court may enforce an operating agreement by injunction or by granting other relief that the court in its discretion determines to be fair and appropriate in the circumstances.”⁷² In addition, a court has the power to order the dissolution of an LLC as an alternative to injunctive or other equitable relief if it is not “[r]easonably practicable to carry on the business in conformity with the articles of organization or operating agreement.”⁷³

D. Member-Managed and Manager-Managed LLCs

As previously discussed, the Act is flexible in the sense that it allows members to choose how the LLC is governed. If the management duties are placed with one or more managers, a statement to that effect must be included in the articles of organization.⁷⁴ Unless such a statement is contained in the articles of organization, the LLC will be managed by its members.⁷⁵

In a member-managed LLC, each member is an agent for the purpose of the LLC’s business or affairs.⁷⁶ As a result, the act of any member, including those appearing to third parties as carrying on the business or affairs of the LLC in the

67. IND. CODE ANN. § 23-18-4-4(1) (West 1994).

68. *Id.* § 23-18-4-4(2).

69. *Id.* § 23-18-4-6(a).

70. *Id.* § 23-18-4-6(c).

71. *Id.* § 23-18-4-6(d).

72. *Id.* § 23-18-4-7(a).

73. *Id.* § 23-18-9-2.

74. *Id.* § 23-18-4-1(a).

75. *Id.*

76. *Id.* § 23-18-3-1(a).

usual course, binds the LLC, unless the member does not have the authority to act on behalf of the LLC in that manner and the person with whom the member is dealing has knowledge of the member's lack of authority.⁷⁷

In a manager-managed LLC, a member acting solely in the capacity as a member is not an agent of the limited liability company.⁷⁸ Each manager is an agent of the LLC for the purpose of its business or affairs and the act of any manager would bind the LLC, unless the manager is acting outside the scope of his other authority and the person with whom the manager is dealing has knowledge of that fact.⁷⁹ The Act provides that the manager's agency authority may be limited or otherwise modified by stating the limitation or modification in the articles of organization.⁸⁰ In general, an act of a manager or member that is not apparently for carrying on the business of the LLC in the usual way does not bind the LLC, unless it is authorized in accordance with a written operating agreement or by the unanimous consent of all members.⁸¹

The Act addresses what constitutes notice to the LLC by providing that, in general, in a member-managed LLC, notice to any member of a matter relating to the business or affairs of the LLC is notice to the entity.⁸² In a manager-managed LLC, notice to a manager of a matter relating to the business or affairs of the LLC would constitute notice to the LLC, except in the case of a fraud on the LLC committed by or with the consent of that manager.⁸³ Notice to or knowledge of any member of a manager-managed LLC while the member is acting solely in the capacity of a member is not considered notice to the LLC.⁸⁴

Regardless of how the LLC is managed,

[a] member, a manager, an agent, or an employee of a limited liability company is not personally liable for the debts, obligations, or liabilities of the limited liability company, whether arising in contract, tort, or otherwise, or for the acts or omissions of any other member, manager, agent, or employee of the limited liability company.⁸⁵

77. *Id.*

78. *Id.* § 23-18-3-1(b).

79. *Id.*

80. *Id.* It remains to be determined whether such a limitation on a manager's authority would preclude a third party from relying on a manager's apparent authority. See RIBSTEIN & KEATINGE, *supra* note 14, at § 8.08.

81. IND. CODE ANN. § 23-18-3-1(c) (West 1994).

82. *Id.* § 23-18-3-2(a).

83. *Id.* § 23-18-3-2(b).

84. *Id.*

85. *Id.* § 23-18-3-3(a).

Those persons may, however, be held personally liable for their own acts or omissions.⁸⁶ This limit on liability is comparable to that of shareholders, directors, agents, or employees of a corporation.⁸⁷ The Act also provides:

[The Act] [a]nd Indiana law exclusively govern any conflict between Indiana law and the laws of another state with regard to the liability of a member, a manager, an agent, or an employee of a limited liability company organized and existing under this article for the debts, obligations, or liabilities of the limited liability company, or for the acts or omissions of other members, managers, agents, or employees of the limited liability company.⁸⁸

The Act permits the inclusion of penalties in a written operating agreement for a manager who does not perform or comply with the terms and conditions of the operating agreement.⁸⁹ A manager may resign according to provisions specified in an operating agreement.⁹⁰ A written operating agreement may provide that a manager does not have the right to resign. Notwithstanding such a provision, a manager may resign at any time by giving written notice to the members and other managers.⁹¹ However, if a manager's resignation violates the operating agreement, the LLC may recover damages for breach of the operating agreement and offset the damages against any amount payable to the resigning manager. These remedies are in addition to any remedies otherwise available under applicable law.⁹²

E. Rights and Duties of Members and Managers

As previously discussed, unless the articles of organization provide for managers, it is deemed managed by its members. In this situation, "members have the right and authority to manage the affairs and make all of the decisions of the limited liability company," unless the operating agreement or the Act provides otherwise.⁹³ If the articles of organization provide for managers, then, except to the extent such authority is reserved in the operating agreement, the managers have the authority to manage the business or affairs of the LLC.⁹⁴ According to the Act, managers must be selected, elected, removed, or replaced by a vote, consent, or approval of a majority in interest of the members.⁹⁵ The

86. *Id.*

87. *See* IND. CODE ANN. § 23-1-26-3 (West 1989).

88. IND. CODE ANN. § 23-18-3-3(b) (West 1994).

89. *Id.* § 23-18-4-9.

90. *Id.* § 23-18-4-11(a).

91. *Id.*

92. *Id.*

93. *Id.* § 23-18-4-1(a).

94. *Id.* § 23-18-4-1(b).

95. *Id.* § 23-18-4-1(b)(1); *see also id.* § 23-18-1-13 (defining "majority in interest of the

Act provides that managers of the LLC need not be members or natural persons.⁹⁶ Managers continue to serve until their successors have been elected and qualified much in the same manner as directors of a corporation are elected and qualified.⁹⁷ As with other provisions of the Act, the rights and duties of members and managers can be varied by agreement.

Voting rights of members or managers may be limited or enhanced in the operating agreement. In general, unless the operating agreement or the Act otherwise requires a different vote, "the affirmative vote, approval, or consent of a majority in interest of the members is required to decide a matter connected with the business or affairs of the limited liability company."⁹⁸

Much in the manner that shareholders and officers of corporations are permitted to rely in good faith upon the records of corporations and on the information, opinions, reports, and statements presented to it by others, members or managers of an LLC are not liable when relying on similar records, reports, or information.⁹⁹ The member or manager must reasonably believe such matters are within the other person's professional or expert competence and the person must have been selected with reasonable care by or on behalf of the LLC.¹⁰⁰

F. Financing and Membership

A member may contribute cash or property, or may make an enforceable promise to perform services to an LLC.¹⁰¹ A promise by a member to make a contribution is not enforceable unless the promise is in writing and signed by the member.¹⁰² A member will be required "to perform any enforceable promise to contribute cash or property or to perform services, even if the member is unable to perform for any reason, including death or disability," unless otherwise provided in a written operating agreement.¹⁰³ If a member has pledged to contribute property or services and does not make the required contribution, the member may be required to contribute cash equal to the value of the contribution that has not been made.¹⁰⁴ The operating agreement also

members").

96. *Id.* § 23-18-4-1(b)(2).

97. *Id.* § 12-18-4-1(b)(3).

98. *Id.* § 23-18-4-3(a).

99. *Id.* § 23-18-4-10. *See also* IND. CODE ANN. § 23-1-35-1(b) (West Supp. 1993) (containing comparable IBCL provisions).

100. *Id.*

101. IND. CODE ANN. § 23-18-5-1 (West 1994). Although the IBCL permits shares to be issued for a similarly broad range of consideration, the provisions are not identical. IND. CODE ANN. § 23-1-26-2(b) (West 1989). A corporation that issues shares for promissory notes or promises of future services must also notify its shareholders of the fact. *Id.* § 23-1-53-2(b).

102. IND. CODE ANN. § 23-18-5-1(a) (West 1994).

103. *Id.* § 23-18-5-1(b).

104. *Id.* § 23-18-5-1(c).

may provide that a member who fails to make a capital contribution or other payment that the member is required to make will be subject to remedies specified in the operating agreement or must suffer specific consequences.¹⁰⁵ The remedy or consequence imposed on the defaulting member may include the following: reducing the member's interest in the LLC; subordinating the member's interest in the LLC to that of the nondefaulting members; a forced sale of the member's interest in the LLC; forfeiture of the member's interest in the LLC; a loan by the nondefaulting members in the amount necessary to meet the commitment; and a determination of the value of the member's interest in the LLC and subsequent sale of the member's interest in the LLC at that value.¹⁰⁶ The LLC may compromise the obligation of a member to make a capital contribution or to return distributions made in violation of the Act only if the action complies with a written operating agreement or, if the written operating agreement does not contain such provisions, with the unanimous consent of all members.¹⁰⁷ Such a compromise would not affect the rights of a creditor who extended credit before the compromise in reliance on a writing signed by the member that reflects the obligation.¹⁰⁸

The Act's default rules address the allocation of profits and losses and distribution of cash and other assets. It provides:

Unless otherwise provided in the operating agreement, profits and losses must be allocated on the basis of the agreed value, as stated in the records of the limited liability company, of the contributions made by each member to the extent the contributions have been received by the limited liability company and not previously returned.¹⁰⁹

Distribution of cash and other assets, with the exception of distributions to a dissociating member and distributions upon the dissolution of the LLC, must be shared among the members and among the classes of members, if any, in the manner provided in the operating agreement.¹¹⁰

If a member dissociates from the LLC and it does not cause dissolution, that member is entitled to receive a distribution pursuant to the Act or the operating agreement.¹¹¹ Unless otherwise provided in the operating agreement, the dissociating member is entitled to receive the fair value of the member's interest in the LLC as of the date of dissociation based upon the member's right to share in the distributions from the LLC.¹¹²

105. *Id.* § 23-18-5-2(c).

106. *Id.* § 23-18-5-2(c).

107. *Id.* § 23-18-5-2(a).

108. *Id.* § 23-18-5-2(b).

109. *Id.* § 23-18-5-3.

110. *Id.* § 23-18-5-4.

111. *Id.* § 23-18-5-5.

112. *Id.*

The Act limits distributions in a similar manner as the IBCL limits corporate distributions.¹¹³ In general, a distribution may not be made if the LLC “[w]ould not be able to pay its debts as they become due in the usual course of business” or its assets would be less than the sum of its total liabilities plus, the amount that would be needed to satisfy any preferential rights superior to members’ rights to distributions if the LLC’s affairs were wound up at the time of the distribution.¹¹⁴ In addition, members or managers approving a distribution in violation of the operating agreement or the statutory limit are personally liable to the LLC for the amount of the distribution exceeding the amount that could have been distributed without violation.¹¹⁵ If a member or manager is held liable for an unlawful distribution, the member or manager is entitled to contribution from each other member or manager who could be held liable for the unlawful distribution and from each member for the amount the member received knowing that the distribution exceeded the limits of the operating agreement or the Act.¹¹⁶

A member does not have the right to demand and receive a distribution from an LLC in a form other than cash, unless the operating agreement provides otherwise.¹¹⁷ In addition, “[a] member may not be compelled to accept a distribution in kind from a limited liability company to the extent that the member’s percentage interest in the assets being distributed in kind exceeds the percentage of distributions that the member is entitled to receive under section 4 of this chapter.”¹¹⁸ At the time a member becomes entitled to receive a distribution, the member has the status of, and is entitled to, all remedies available to a creditor of the LLC regarding the distribution.¹¹⁹

“The interest of a member in a limited liability company is personal property.”¹²⁰ A person may become a member of the LLC upon compliance with the terms of the operating agreement, or if the operating agreement is not in writing, upon the written consent of all members.¹²¹ If a new member is an assignee of an interest, the assignee may become a member only if the other members unanimously consent, unless otherwise provided in the operating agreement.¹²² As discussed above in Part III.C., the question of how assignees may be admitted as new members is relevant to determining whether an LLC has

113. *Id.* § 23-18-5-6(a). *See also* IND. CODE ANN. § 23-1-28-3 (West 1989) (containing comparable IBCL provision).

114. Unless the operating agreement permits otherwise. IND. CODE ANN. § 23-18-5-6(a) (West 1994).

115. *Id.* § 23-18-5-7(a).

116. *Id.* § 23-18-5-7(b).

117. *Id.* § 23-18-5-8.

118. *Id.* § 23-18-5-8(b).

119. *Id.* § 23-18-5-9.

120. *Id.* § 23-18-6-2.

121. *Id.* § 23-18-6-1(a).

122. *Id.* §§ 23-18-6-1; -4.

the corporate characteristic of free transferability of interests. Any limitations or restrictions on the transferability of interests must be included in the operating agreement. If they are not, the default rules of the Act would apply.

An interest in an LLC is assignable in whole or in part and assignment will not, in and of itself, dissolve the LLC or entitle the assignee to participate in the management and affairs of the LLC or to become or exercise any rights of a member.¹²³ The assignment must be coupled with the unanimous vote in writing of all other members of the LLC in order to transfer the economic and management rights (or voting rights) of the assignor.¹²⁴

The Act contains a list of events that terminate a person's status as a member. These include withdrawal from the LLC; assignment of a member's entire interest in the LLC; removal or death of a member; and, if a member is a business entity, its dissolution.¹²⁵ In addition, a written operating agreement may vary the events causing termination of membership and provide for other events resulting in a person ceasing to be a member, including insolvency, bankruptcy, and adjudicated incompetency.¹²⁶

The Act provides for voluntary withdrawal of a member by giving thirty days written notice to the other members or other notice required under the operating agreement, unless the written operating agreement restricts the power of the member to withdraw voluntarily from the LLC.¹²⁷ If a member's withdrawal results in a violation of the operating agreement or the withdrawal is the result of wrongful conduct of the member, the LLC may recover damages for breach of the operating agreement. These damages include the reasonable cost of obtaining the replacement of services that the withdrawing member was obligated to perform.¹²⁸ The LLC may offset the damages against amounts otherwise distributable to the member in addition to pursuing any remedies provided for in the operating agreement or applicable law.¹²⁹ If the LLC has been established for a definite term or a particular undertaking, withdrawal by a member before the expiration of the term or the completion of the undertaking is considered a breach of the operating agreement, unless otherwise provided in a written operating agreement.¹³⁰

G. Professional Limited Liability Companies

The Act does not specifically permit professionals to practice in the form of an LLC. Rather, the Act permits professionals to practice as LLCs to the extent

123. *Id.* § 23-18-6-3.

124. *Id.* § 23-18-6-4.

125. *Id.* § 23-18-6-5.

126. *Id.* § 23-18-6-5(b).

127. *Id.* § 23-18-6-6(a).

128. *Id.*

129. *Id.*

130. *Id.* § 23-18-6-6.

the applicable licensing authority permits such practice. The Act provides:

Except for the prohibitions in this article concerning the personal liability of members, managers, employees, and agents of a limited liability company organized under this article, nothing in this article is intended to restrict or limit in any manner the authority and duty of any licensing authority (as defined in IC 23-1.5-1-9) or to regulate the provision of professional services (as defined in IC 23-1.5-1-11) within Indiana, notwithstanding that the member, manager, or employee of a limited liability company is providing professional services or engaging in the practice of a profession through the limited liability company.¹³¹

Effective January 1, 1994, certified public accountants may be organized as LLCs.¹³² In addition, the Indiana Health Professions Bureau is in the process of surveying the various boards that regulate health professionals in the State of Indiana. The Medical Licensing Board, the Board of Pharmacy, the State Psychology Board, the State Board of Dental Examiners, and the Board of Chiropractic Examiners have determined that physicians, pharmacists, psychologists, dentists, and chiropractors may be organized as limited liability companies without changes to the statutes or regulations governing those professions.¹³³ It is expected that other professions may seek statutory or regulatory authorization to practice as LLCs.

The use of an LLC does not insulate a professional from liability for his or her own conduct. The Act specifically provides that it does not “[a]lter any law applicable to the relationship between a person rendering professional services and a person receiving professional services, including liability arising out of the professional services.”¹³⁴ In addition, the Act provides: “A person rendering professional services as a member, a manager, an employee, or an agent of a limited liability company is personally liable for the consequences of the person’s acts or omissions to the extent provided by Indiana law or the laws of another state where the person is considered responsible.”¹³⁵ However, the LLC form would offer protection against the vicarious liability that a partner would have otherwise, merely by reason of his status as an owner. For example, an owner of a certified public accounting firm organized as an LLC would not be personally liable for the professional liability of another owner merely because he or she is a member of the LLC.¹³⁶ The provisions regarding professionals

131. *Id.* § 23-18-2-3.

132. IND. CODE ANN. §§ 25-2.1-1-7 (West Supp. 1993).

133. The Indiana Health Professions Bureau has communicated the decision of the various boards regulating health professions to permit the use of the LLC form through memoranda sent to the Indiana Secretary of State.

134. IND. CODE ANN. § 23-18-3-4(a) (West 1994).

135. *Id.* § 23-18-3-4(b).

136. *See id.* § 23-18-3-3(a). In the case of attorneys, only individual professionals, not “firms,” are currently licensed to practice. The Indiana Rules of Professional Conduct do not

using the LLC form are far from uniform throughout the United States. Many LLC statutes do not permit LLCs to be used by professionals or the laws regulating such professions do not expressly permit the use of LLCs.

H. Dissolution

An LLC may be dissolved voluntarily “[a]t the time or on the occurrence of the events specified in writing in the articles of organization or operating agreement.”¹³⁷ In addition, an LLC may be dissolved by the written consent of all members.¹³⁸ Also, an LLC is dissolved when an event of dissociation occurs regarding a member, unless the business of the LLC is continued by the consent of all the remaining members within 90 days, or as otherwise provided in the articles of organization or a written operating agreement.¹³⁹ Finally, an LLC may be dissolved by the entry of a decree of judicial dissolution.¹⁴⁰ As noted previously, the criteria for an “event of dissociation” may be modified by the terms of the articles of organization or by a written operating agreement. Again, this is relevant to determining whether the LLC will have the corporate characteristic of continuity of life.

An LLC may file articles of dissolution with the secretary of state after it dissolves. The articles of dissolution must contain the LLC’s name, the date on which its articles of organization were filed, its principal office address, the date on which the dissolution occurred, and other information the members or managers deem appropriate.¹⁴¹ The distribution of assets and disposition of claims of a dissolved LLC closely parallel similar provisions regarding dissolved corporations in the IBCL.¹⁴² Also similar to the IBCL, a dissolved LLC may publish notice of its dissolution and request that persons with claims against the company present them pursuant to the notice.¹⁴³

The secretary of state may dissolve an LLC administratively if: it fails to deliver an annual report within sixty days after the report is due; it is without a registered agent or office in Indiana for at least sixty days; it does not notify the secretary of state within sixty days after its registered agent or office has

currently recognize LLCs in its provisions regarding law firms and other associations. However, even if an Indiana law firm could operate as an LLC, its members may not benefit from the limited liability provisions of the Act if LLCs are treated the same as professional corporations. Rule 27(c) of the Indiana Rules of Admission to the Bar and Discipline of Attorneys states that the use of a professional corporation “[s]hall not modify the . . . liability of each for all . . . as existed in a partnership for the practice of law.”

137. IND. CODE ANN. § 23-18-9-1 (West 1994).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* § 23-18-9-7.

142. *Id.* §§ 23-18-9-6, -8; *see also* IND. CODE ANN. § 23-1-45-6 (West 1989).

143. IND. CODE ANN. § 23-18-9-9 (West 1994); *see also* IND. CODE ANN. § 23-1-45-7 (West Supp. 1993).

changed, its registered agent has resigned, its registered office has been discontinued; or the period of duration stated in the LLC's articles of organization expires.¹⁴⁴ The procedures for administrative dissolution, including those permitting reinstatement and the appeal of denial of reinstatement, are based upon the IBCL.¹⁴⁵

I. Foreign Limited Liability Companies

At the time of adoption of the Act, the INRULPA provisions permitting foreign LLCs to transact business in Indiana were repealed and a chapter was included in the Act to permit foreign LLCs to transact business in Indiana.¹⁴⁶ This chapter is similar to comparable provisions of the IBCL and INRULPA.¹⁴⁷ For example, the Act defines what activities do not constitute transacting business in Indiana by a foreign LLC.¹⁴⁸ The list at this subsection is identical to the list found in the IBCL and INRULPA.¹⁴⁹ Other provisions follow the IBCL or the INRULPA regarding the change of registered office or agent, service of process, certificate of withdraw of a foreign limited liability company, grounds for revoking a certificate of authority of a limited liability company, and so forth. A few jurisdictions that have adopted LLC acts do not permit foreign limited liability companies to be registered in their states. In addition, several foreign LLC acts only allow the admission of foreign LLCs and do not authorize the creation of limited liability companies in that jurisdiction.

J. Miscellaneous Provisions

1. *Merger.*—Unlike some other LLC acts, the Act does not permit other types of business entities to merge into LLCs.¹⁵⁰ Only an LLC may merge into another LLC.¹⁵¹ The provisions of the Act permitting mergers of limited liability companies were based largely upon the IBCL.¹⁵² A plan of merger must be in writing and must be approved by the unanimous consent of the members, unless the operating agreement provides otherwise.¹⁵³ After a plan of merger has been approved by an LLC, the surviving LLC is required to file

144. IND. CODE ANN. § 23-18-10-1 (West 1994).

145. Compare *Id.* §§ 23-18-10-1 to -5 and IND. CODE ANN. §§ 23-1-46-1 to -4 (West 1989 & Supp. 1993).

146. IND. CODE ANN. §§ 23-18-11-1 to -18 (West 1994).

147. See IND. CODE ANN. §§ 23-1-49-1 to -10 (West 1989); IND. CODE ANN. §§ 23-16-10-1 to -9 (West 1994).

148. IND. CODE ANN. § 23-18-11-2 (West 1994).

149. IND. CODE ANN. §§ 23-1-49-1 to -10 (West 1989); IND. CODE ANN. § 23-16-10 (West 1994).

150. See, e.g., ARIZ. REV. STAT. ANN. § 29-751 (1992); DEL. CODE tit. 18, § 209 (1992).

151. IND. CODE ANN. § 23-18-7-1 (West 1994).

152. See IND. CODE ANN. §§ 23-1-40-1 to -7 (West 1989).

153. IND. CODE ANN. §§ 23-18-7-2, -3 (West 1993).

articles of merger with the secretary of state.¹⁵⁴ It is necessary to include a copy of the plan of merger with this filing.¹⁵⁵

2. *Suits By and Against Limited Liability Companies.*—A suit may be brought in the name of an LLC by a member, regardless of whether the articles of organization provide for a manager or managers.¹⁵⁶ A member is authorized to file suit by an affirmative vote of a majority in interest of the members, unless the Act requires the vote of all members.¹⁵⁷ The Act provides that a member interested in the outcome of a suit that is adverse to the interest of the LLC may not vote on whether to file suit.¹⁵⁸ If the LLC is managed by a manager or managers, a manager who is authorized to do so by the articles of organization, the operating agreement, or a vote of a majority of the managers may file suit.¹⁵⁹ The vote of a manager who has an interest in the outcome of the suit that is adverse to the interest of the LLC must be excluded.¹⁶⁰ A member may not be made a party to a proceeding by or against an LLC solely because he or she is a member of the LLC, except when the proceeding is brought to enforce a member's right against or a liability to an LLC or in an action brought on behalf of the LLC under section 23-18-8-1 of the Act.¹⁶¹

3. *Administrative Provisions.*—The administrative provisions of the Act closely parallel the IBCL and INRULPA.¹⁶² For example, the requirements for document execution and filing with the secretary of state are identical to those acts.¹⁶³ The fee schedule for limited liability companies is the same as for corporations or limited partnerships.¹⁶⁴ Annual reports are required of domestic and foreign LLCs and the secretary of state may prescribe and furnish those forms.¹⁶⁵ In addition, the secretary of state may prescribe and furnish a form for a foreign LLC's application for a certificate of authority to transact business in Indiana or a form for a certificate to withdraw.¹⁶⁶ At the present time, the secretary of state's office has decided not to create forms for LLCs. This is consistent with that office's policy not to provide limited partnership forms when INRULPA was adopted in 1988.

154. *Id.* § 23-18-7-4.

155. *Id.* § 23-18-7-4(a)(2).

156. *Id.* § 23-18-8-1.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* § 23-18-3-5.

162. *See id.* §§ 23-16-12-1 to -6; 23-18-12-1 to -11; IND. CODE ANN. §§ 23-1-18-1 to -10 (West 1989).

163. *See* IND. CODE ANN. § 23-18-12-1 (West 1994).

164. *See id.* § 23-18-12-3.

165. *Id.* § 23-18-12-2.

166. *Id.*

The Act permits documents to be filed with a delayed effective date of up to ninety days after the date the document is filed.¹⁶⁷ A certificate of correction may be filed to remedy incorrect statements or a document that was defectively executed.¹⁶⁸ The secretary of state will issue a certificate of existence for domestic LLCs and a certificate of authority for foreign LLCs.¹⁶⁹ Finally, the Act contains a unique provision, which states that "All provisions of the Constitution of the United States, the Constitution of the State of Indiana, and IC 1-1 apply to this article."¹⁷⁰ This was added in response to some concern that the reservation of powers clause would not apply to this Act and there has been some confusion, particularly at the trial court level, about savings clause issues relating to business entities.

V. CONCLUSION

The Act represents a continuation of Indiana's efforts to modernize its laws governing business associations. Following the major changes effected by the adoption of the IBCL in 1985, INRULPA in 1988, and the Indiana Nonprofit Corporation Act of 1991, the Act permits Indiana businesses another alternative in choosing an appropriate structure.

The LLC is likely to prove to be an attractive alternative to other traditional forms, particularly in instances in which a "pass-through" entity is desirable for tax purposes. This would include many situations in which a partnership, limited partnership, or S corporation otherwise would be used.

There will be many situations in which an LLC will not be the best alternative. Not all states authorize LLCs and there currently are significant differences among the state laws. These factors limit the usefulness of the LLC form to businesses that must operate on a multi-state basis. The number of owners that an LLC may have and still qualify as a partnership for tax purposes will also limit its appeal. Federal income tax restrictions would deny pass-through tax treatment to an LLC that has "publicly-traded" securities.¹⁷¹ S corporations will continue to have appeal in several situations, in particular, when an entity has only one owner. There will probably be some transactional cost advantages to using an S corporation because less time and expense typically would be involved in drafting organizational documents for an S corporation. Drafting the documents for an LLC, like drafting partnership documents, may take longer than corporate documents because so many key issues such as capital contributions, allocations of profits and losses, and managerial structure are determined by agreement of the parties for an LLC or partnership, rather than by

167. *Id.* § 23-18-12-4.

168. *Id.* § 23-18-12-5.

169. *Id.* § 23-18-12-9.

170. *Id.* § 23-18-13-1.

171. I.R.C. § 7704 (1993).

reference to the statute. Thus, the flexibility available in the LLC structure comes at some cost.

Although the Act may represent the "latest word" in Indiana business associations, it does not represent the "last word." Changes to the Act may be considered to incorporate features of other state's LLC acts¹⁷² or to address shortcomings that will come to light in practice. Ultimately, it may make most sense for Indiana and other states with LLC statutes to adopt a uniform act, such as that being developed by the National Conference of Commissioners on Uniform State Laws,¹⁷³ to realize the full potential of this newest species of business association, the limited liability company.

172. One provision that is worthy of consideration is a statutory method for converting a partnership or limited partnership to an LLC. Both Virginia and West Virginia provide a mechanism that avoids the need to transfer assets from the converting entity to the LLC. *See* VA. CODE ANN. § 13.1-1010.0(B) (Michie 1992); W.VA. CODE § 31-1A-47(c) (1992).

173. A discussion draft of a Uniform Limited Liability Company Act was circulated in connection with the 1993 annual meeting of the National Conference of Commissioners on Uniform State Laws.

