

Part 4

Relations of Members to Each Other and to Limited Liability Company

48-3a-401 Becoming a member.

- (1) If a limited liability company is to have only one member upon formation, the person becomes a member as agreed by that person and the organizer of the limited liability company. That person and the organizer may be, but need not be, different persons. If different, the organizer acts on behalf of the initial member.
- (2) If a limited liability company is to have more than one member upon formation, those persons become members as agreed by the persons before the formation of the limited liability company. The organizer acts on behalf of the persons in forming the limited liability company and may be, but need not be, one of the persons.
- (3) After formation of a limited liability company, a person becomes a member:
 - (a) as provided in the operating agreement;
 - (b) as the result of a transaction effective under Part 10, Merger, Interest Exchange, Conversion, and Domestication;
 - (c) with the consent of all the members; or
 - (d) as provided in Subsection 48-3a-701(3).
- (4) A person may become a member without:
 - (a) acquiring a transferable interest; or
 - (b) making or being obligated to make a contribution to the limited liability company.

Enacted by Chapter 412, 2013 General Session

48-3a-402 Form of contribution.

A contribution may consist of property transferred to, services performed for, or another benefit provided to the limited liability company or an agreement to transfer property to, perform services for, or provide another benefit to the company.

Enacted by Chapter 412, 2013 General Session

48-3a-403 Liability for contributions.

- (1) A person's obligation to make a contribution to a limited liability company is not excused by the person's death, disability, or other inability to perform personally.
- (2) If a person does not fulfill an obligation to make a contribution other than money, the person is obligated at the option of the limited liability company to contribute money equal to the value of the part of the contribution which has not been made.
- (3) The obligation of a person to make a contribution may be compromised only by consent of all members. If a creditor of a limited liability company extends credit or otherwise acts in reliance on an obligation described in Subsection (1) without notice of a compromise under this Subsection (3), the creditor may enforce the obligation.

Enacted by Chapter 412, 2013 General Session

48-3a-404 Sharing of and right to distributions before dissolution.

- (1) Any distributions made by a limited liability company before its dissolution and winding up must be in equal shares among members and persons dissociated as members, except to the extent

necessary to comply with a transfer effective under Section 48-3a-502 or charging order in effect under Section 48-3a-503.

- (2) A person has a right to a distribution before the dissolution and winding up of a limited liability company only if the limited liability company decides to make an interim distribution. A person's dissociation does not entitle the person to a distribution.
- (3) A person does not have a right to demand or receive a distribution from a limited liability company in any form other than money. Except as otherwise provided in Subsection 48-3a-711(4), a limited liability company may distribute an asset in kind only if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person's share of distributions.
- (4) If a member or transferee becomes entitled to receive a distribution, the member or transferee has the status of, and is entitled to all remedies available to, a creditor of the limited liability company with respect to the distribution. However, the limited liability company's obligation to make a distribution is subject to offset for any amount owed to the limited liability company by the member or a person dissociated as a member on whose account the distribution is made.

Enacted by Chapter 412, 2013 General Session

48-3a-405 Limitation on distributions.

- (1) A limited liability company may not make a distribution, including a distribution under Section 48-3a-711, if after the distribution:
 - (a) the limited liability company would not be able to pay its debts as they become due in the ordinary course of the limited liability company's activities and affairs; or
 - (b) the limited liability company's total assets would be less than the sum of its total liabilities plus, unless the operating agreement permits otherwise, the amount that would be needed, if the limited liability company were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of members and transferees whose preferential rights are superior to those of persons receiving the distribution.
- (2) A limited liability company may base a determination that a distribution is not prohibited under Subsection (1) on:
 - (a) financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances; or
 - (b) a fair valuation or other method that is reasonable under the circumstances.
- (3) Except as otherwise provided in Subsection (5), the effect of a distribution under Subsection (1) is measured:
 - (a) in the case of a distribution as defined in Subsection 48-3a-102(4)(a), as of the earlier of:
 - (i) the date money or other property is transferred or debt is incurred by the limited liability company; or
 - (ii) the date the person entitled to the distribution ceases to own the interest or right being acquired by the limited liability company in return for the distribution;
 - (b) in the case of any other distribution of indebtedness, as of the date the indebtedness is distributed; and
 - (c) in all other cases, as of the date:
 - (i) the distribution is authorized, if the payment occurs not later than 120 days after that date; or
 - (ii) the payment is made, if the payment occurs more than 120 days after the distribution is authorized.
- (4) A limited liability company's indebtedness to a member or transferee incurred by reason of a distribution made in accordance with this section is at parity with the limited liability

company's indebtedness to its general, unsecured creditors, except to the extent subordinated by agreement.

- (5) A limited liability company's indebtedness, including indebtedness issued as a distribution, is not a liability for purposes of Subsection (1) if the terms of the indebtedness provide that payment of principal and interest is made only if and to the extent that payment of a distribution could then be made under this section. If the indebtedness is issued as a distribution, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is made.
- (6) In measuring the effect of a distribution under Section 48-3a-711, the liabilities of a dissolved limited liability company do not include any claim that has been disposed of under Section 48-3a-705, 48-3a-706, or 48-3a-707.

Enacted by Chapter 412, 2013 General Session

48-3a-406 Liability for improper distributions.

- (1) Except as otherwise provided in Subsection (2), if a member of a member-managed limited liability company or manager of a manager-managed limited liability company consents to a distribution made in violation of Section 48-3a-405 and in consenting to the distribution fails to comply with Section 48-3a-409, the member or manager is personally liable to the limited liability company for the amount of the distribution which exceeds the amount that could have been distributed without the violation of Section 48-3a-405.
- (2) To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of the authority and responsibility to consent to distributions and imposes that authority and responsibility on one or more other members, the liability stated in Subsection (1) applies to the other members and not the member that the operating agreement relieves of authority and responsibility.
- (3) A person that receives a distribution knowing that the distribution violated Section 48-3a-405 is personally liable to the limited liability company but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under Section 48-3a-405.
- (4) A person against which an action is commenced because the person is liable under Subsection (1) may:
 - (a) implead any other person that is liable under Subsection (1) and seek to enforce a right of contribution from the person; and
 - (b) implead any person that received a distribution in violation of Subsection (3) and seek to enforce a right of contribution from the person in the amount the person received in violation of Subsection (3).
- (5) An action under this section is barred unless commenced not later than two years after the distribution.

Enacted by Chapter 412, 2013 General Session

48-3a-407 Management of limited liability company.

- (1) A limited liability company is a member-managed limited liability company unless the operating agreement:
 - (a) expressly provides that:
 - (i) the limited liability company is or will be "manager-managed";
 - (ii) the limited liability company is or will be "managed by managers"; or

- (iii) management of the limited liability company is or will be "vested in managers"; or
 - (b) includes words of similar import.
- (2) In a member-managed limited liability company, the following rules apply:
- (a) Except as otherwise provided in this chapter, the management and conduct of the limited liability company are vested in the members.
 - (b) Each member has equal rights in the management and conduct of the limited liability company's activities and affairs.
 - (c) A difference arising among members as to a matter in the ordinary course of the activities of the limited liability company shall be decided by a majority of the members.
 - (d) An act outside the ordinary course of the activities and affairs of the limited liability company may be undertaken only with the affirmative vote or consent of all members.
 - (e) The affirmative vote or consent of all members is required to approve a transaction under Part 10, Merger, Interest Exchange, Conversion, and Domestication.
 - (f) The operating agreement may be amended only with the affirmative vote or consent of all members.
- (3) In a manager-managed limited liability company, the following rules apply:
- (a) Except as expressly provided in this chapter, any matter relating to the activities and affairs of the limited liability company is decided exclusively by the manager, or, if there is more than one manager, by a majority of the managers.
 - (b) Each manager has equal rights in the management and conduct of the limited liability company's activities and affairs.
 - (c) The affirmative vote or consent of all members is required to:
 - (i) approve a transaction under Part 10, Merger, Interest Exchange, Conversion, and Domestication;
 - (ii) undertake any act outside the ordinary course of the limited liability company's activities and affairs; or
 - (iii) amend the operating agreement.
 - (d) A manager may be chosen at any time by the consent of a majority of the members and remains a manager until a successor has been chosen, unless the manager at an earlier time resigns, is removed, or dies, or, in the case of a manager that is not an individual, terminates. A manager may be removed at any time by the consent of a majority of the members without notice or cause.
 - (e) A person need not be a member to be a manager, but the dissociation of a member that is also a manager removes the person as a manager. If a person that is both a manager and a member ceases to be a manager, that cessation does not by itself dissociate the person as a member.
 - (f) A person's ceasing to be a manager does not discharge any debt, obligation, or other liability to the limited liability company or members which the person incurred while a manager.
- (4) An action requiring the vote or consent of members under this chapter may be taken without a meeting, and a member may appoint a proxy or other agent to vote, consent, or otherwise act for the member by signing an appointing record, personally or by the member's agent.
- (5) The dissolution of a limited liability company does not affect the applicability of this section. However, a person that wrongfully causes dissolution of the limited liability company loses the right to participate in management as a member and a manager.
- (6) A limited liability company shall reimburse a member for an advance to the limited liability company beyond the amount of capital the member agreed to contribute.

- (7) A payment or advance made by a member which gives rise to an obligation of the limited liability company under Subsection (6) or Subsection 48-3a-408(1) constitutes a loan to the limited liability company which accrues interest from the date of the payment or advance.
- (8) A member is not entitled to remuneration for services performed for a member-managed limited liability company, except for reasonable compensation for services rendered in winding up the activities of the limited liability company.

Enacted by Chapter 412, 2013 General Session

48-3a-408 Reimbursement, indemnification, advancement, and insurance.

- (1) A limited liability company shall reimburse a member of a member-managed limited liability company or the manager of a manager-managed limited liability company for any payment made by the member or manager in the course of the member's or manager's activities on behalf of the limited liability company, if the member or manager complied with Sections 48-3a-407 and 48-3a-409 in making the payment.
- (2) A limited liability company shall indemnify and hold harmless a person with respect to any claim or demand against the person and any debt, obligation, or other liability incurred by the person by reason of the person's former or present capacity as a member or manager, if the claim, demand, debt, obligation, or other liability does not arise from the person's breach of Section 48-3a-405, 48-3a-407, or 48-3a-409.
- (3) In the ordinary course of its activities and affairs, a limited liability company may advance reasonable expenses, including attorney's fees and costs, incurred by a person in connection with a claim or demand against the person by reason of the person's former or present capacity as a member or manager, if the person promises to repay the limited liability company if the person ultimately is determined not to be entitled to be indemnified under Subsection (2).
- (4) A limited liability company may purchase and maintain insurance on behalf of a member or manager of the limited liability company against liability asserted against or incurred by the member or manager in that capacity or arising from that status even if, under Subsection 48-3a-112(3)(g), the operating agreement could not eliminate or limit the person's liability to the limited liability company for the conduct giving rise to the liability.

Enacted by Chapter 412, 2013 General Session

48-3a-409 Standards of conduct for members and managers.

- (1) A member of a member-managed limited liability company owes to the limited liability company and, subject to Subsection 48-3a-801(1), the other members the duties of loyalty and care stated in Subsections (2) and (3).
- (2) The duty of loyalty of a member in a member-managed limited liability company includes the duties:
 - (a) to account to the limited liability company and to hold as trustee for it any property, profit, or benefit derived by the member:
 - (i) in the conduct or winding up of the limited liability company's activities and affairs;
 - (ii) from a use by the member of the limited liability company's property; or
 - (iii) from the appropriation of a limited liability company opportunity;
 - (b) to refrain from dealing with the limited liability company in the conduct or winding up of the limited liability company's activities and affairs as or on behalf of a person having an interest adverse to the limited liability company; and

- (c) to refrain from competing with the limited liability company in the conduct of the company's activities and affairs before the dissolution of the limited liability company.
- (3) The duty of care of a member of a member-managed limited liability company in the conduct or winding up of the limited liability company's activities and affairs is to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.
- (4) A member shall discharge the duties and obligations under this chapter or under the operating agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing.
- (5) A member does not violate a duty or obligation under this chapter or under the operating agreement solely because the member's conduct furthers the member's own interest.
- (6) All the members of a member-managed limited liability company or a manager-managed limited liability company may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.
- (7) It is a defense to a claim under Subsection (2)(b) and any comparable claim in equity or at common law that the transaction was fair to the limited liability company.
- (8) If, as permitted by Subsection (6) or (9)(f) or the operating agreement, a member enters into a transaction with the limited liability company which otherwise would be prohibited by Subsection (2)(b), the member's rights and obligations arising from the transaction are the same as those of a person that is not a member.
- (9) In a manager-managed limited liability company, the following rules apply:
 - (a) Subsections (1), (2), (3), and (7) apply to the manager or managers and not the members.
 - (b) The duty stated under Subsection (2)(c) continues until winding up is completed.
 - (c) Subsection (4) applies to managers and members.
 - (d) Subsection (5) applies only to members.
 - (e) The power to ratify under Subsection (6) applies only to the members.
 - (f) Subject to Subsection (4), a member does not have any duty to the limited liability company or to any other member solely by reason of being a member.

Enacted by Chapter 412, 2013 General Session

48-3a-410 Rights of member, manager, and person dissociated as member to information.

- (1) In a member-managed limited liability company, the following rules apply:
 - (a) On reasonable notice, a member may inspect and copy during regular business hours, at a reasonable location specified by the limited liability company, any record maintained by the limited liability company regarding the limited liability company's activities, affairs, financial condition, and other circumstances, to the extent the information is material to the member's rights and duties under the operating agreement or this chapter.
 - (b) The limited liability company shall furnish to each member:
 - (i) without demand, any information concerning the limited liability company's activities, affairs, financial condition, and other circumstances which the limited liability company knows and is material to the proper exercise of the member's rights and duties under the operating agreement or this chapter, except to the extent the limited liability company can establish that it reasonably believes the member already knows the information; and
 - (ii) on demand, any other information concerning the limited liability company's activities, affairs, financial condition, and other circumstances, except to the extent the demand or information demanded is unreasonable or otherwise improper under the circumstances.
 - (c) The duty to furnish information under Subsection (1)(b) also applies to each member to the extent the member knows any of the information described in Subsection (1)(b).

- (2) In a manager-managed limited liability company, the following rules apply:
 - (a) The informational rights stated in Subsection (1) and the duty stated in Subsection (1)(c) apply to the managers and not the members.
 - (b) During regular business hours and at a reasonable location specified by the limited liability company, a member may inspect and copy full information regarding the activities, affairs, financial condition, and other circumstances of the limited liability company as is just and reasonable if:
 - (i) the member seeks the information for a purpose reasonably related to the member's interest as a member;
 - (ii) the member makes a demand in a record received by the limited liability company, describing with reasonable particularity the information sought and the purpose for seeking the information; and
 - (iii) the information sought is directly connected to the member's purpose.
 - (c) Not later than 10 days after receiving a demand pursuant to Subsection (2)(b)(ii), the limited liability company shall in a record inform the member that made the demand of:
 - (i) the information that the limited liability company will provide in response to the demand and when and where the limited liability company will provide the information; and
 - (ii) the limited liability company's reasons for declining, if the limited liability company declines to provide any demanded information.
 - (d) Whenever this chapter or an operating agreement provides for a member to give or withhold consent to a matter, before the consent is given or withheld, the limited liability company shall, without demand, provide the member with all information that is known to the limited liability company and is material to the member's decision.
- (3) Subject to Subsection (9), on 10 days' demand made in a record received by a limited liability company, a person dissociated as a member may have access to information to which the person was entitled while a member if:
 - (a) the information pertains to the period during which the person was a member;
 - (b) the person seeks the information in good faith; and
 - (c) the person satisfies the requirements imposed on a member by Subsection (2)(b).
- (4) A limited liability company shall respond to a demand made pursuant to Subsection (3) in the manner provided in Subsection (2)(c).
- (5) A limited liability company may charge a person that makes a demand under this section the reasonable costs of copying, limited to the costs of labor and material.
- (6) A member or person dissociated as a member may exercise rights under this section through an agent or, in the case of an individual under legal disability, a legal representative. Any restriction or condition imposed by the operating agreement or under Subsection (9) applies both to the agent or legal representative and the member or person dissociated as a member.
- (7) Subject to Subsection (9), the rights under this section do not extend to a person as transferee.
- (8) If a member dies, Section 48-3a-504 applies.
- (9) In addition to any restriction or condition stated in the operating agreement, a limited liability company, as a matter within the ordinary course of its activities and affairs, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this Subsection (9), the limited liability company has the burden of proving reasonableness.

Enacted by Chapter 412, 2013 General Session

