

CHAPTER 2

FORMATION AND OPERATION

2.1 OVERVIEW

2.101 In General. Since the adoption of the Virginia Limited Liability Company Act¹ (the Act) in 1991, the Virginia LLC has proved a flexible yet easy-to-use entity for owning and operating a business. Over time, various amendments to the Act have increased the Virginia LLC's ownership and operating flexibility.

This chapter gives an overview of the LLC from cradle to grave: its formation, organization, ownership, operation, and dissolution. It focuses on the specific provisions of the Act concerning these subjects; issues arising under income and estate tax law, securities law, and other areas of law are covered in depth in other chapters. In addition, this chapter concentrates on the non-professional LLC formed under Virginia law. Issues relating to the use of the professional LLC, as well as those concerning the operations in Virginia of LLCs organized in other jurisdictions, are covered in Chapters 8 and 9 of this book.

In 1997, the Internal Revenue Service (IRS) adopted final regulations regarding the classification of unincorporated entities as either partnerships or corporations for federal income tax purposes.² These “check-the-box” regulations, which replaced the long-standing *Kintner*³ regulations, allow unincorporated entities to simply elect their federal income tax classification, rather than having to meet certain tests in order to achieve partnership or corporation classification. Accordingly, the care and strategies that previously were exercised in structuring the operating provisions of an LLC are no longer needed merely to obtain a certain income tax classification. Of course, proper planning must still be used in structuring and customizing an LLC, in order to achieve the parties' wishes.

¹ Va. Code § 13.1-1000 *et seq.*

² Treas. Reg. § 301.7701-1 *et seq.*

³ *United States v. Kintner*, 216 F.2d 418 (9th Cir. 1954).

2.102 Default Rules. Any discussion of ownership and operational issues relating to the Virginia LLC should be prefaced by an explanation of default rules. A “default rule” is an express statutory provision in the Act that, by its terms, is optional rather than mandatory. Under the Act, a particular default rule will apply to an LLC unless its members expressly agree otherwise in the LLC’s articles of organization or operating agreement, both of which are discussed in paragraph 2.2 of this chapter.⁴ Often, the Act requires this agreement to be in writing. The Act achieves much of its flexibility through the use of default rules. Throughout this chapter, the applicable default rules are explained, and suggestions for departures from these default rules are given.

2.2 FORMATION OF AN LLC

2.201 Articles of Organization.

A. Filing. An LLC is formed by delivering articles of organization to the Virginia State Corporation Commission (SCC) for filing.⁵ Articles of organization may be delivered by presenting hardcopies to the SCC or may be submitted electronically to the SCC through the online Clerk’s Information System (CIS).⁶ However, expedited formation services may be obtained only by submitting articles of organization electronically to the SCC through CIS. The existence of the LLC begins upon the issuance of a certificate of organization by the SCC.⁷ The Act permits one or more persons to sign and deliver the articles of organization but does not require that these persons be members of

⁴ See *Advanced Training Grp. Worldwide, Inc. v. Proactive Techs., Inc.*, Case No. 1:19-cv-505 (PTG/WEF), 2022 U.S. Dist. LEXIS 155658, at *40-41, 2022 WL 3718494 (E.D. Va. Aug. 29, 2022) (since the method by which a member of a joint venture could be terminated was not described in the memorandum of understanding, the Virginia LLC Act governed termination of defendant) (citing *Han v. Yancey (In re Min Sik Kang)*, No. 1:15-CV-00953 (LMB/IDD), 2014 U.S. Dist. LEXIS 133858, 2015 WL 5786692, at *5 (E.D. Va. Sept. 30, 2015), *aff’d sub nom. In re Kang*, 664 Fed. Appx. 336 (4th Cir. 2016) (“[w]here the operating agreement is silent, resort must be had to the statute”). The Virginia LLC Act provides that “any action required or permitted to be taken by the members of a limited liability company may be taken upon a majority vote of the members.” Va. Code § 13.1-1022(C). Terminating a member of the joint venture fell under “any action” as contemplated in Virginia Code section 13.1-1022(C).

⁵ Va. Code § 13.1-1010; see Appendices 2-1 (sample articles of organization converting limited partnership to LLC), 2-2 (SCC Form—Articles of Organization). SCC forms may be downloaded from the Commission’s website at www.scc.virginia.gov/pages/Forms-and-Fees. Many forms may also be electronically filed. See cis.scc.virginia.gov.

⁶ Additional information regarding CIS may be obtained from the SCC website at www.scc.virginia.gov/pages/CIS-Help.

⁷ Va. Code § 13.1-1004(B). Limited partnerships, by comparison, are formed at the time of the filing of the certificate with the SCC. Va. Code § 50-73.11(C).

the LLC after it is formed.⁸ Many attorneys who organize LLCs themselves sign the articles of organization as organizers. The Act does not require a Virginia LLC to have any members at the time of formation, so a Virginia LLC can be organized and kept “on the shelf” before beginning operations. While there is no express statutory provision in the Act providing for a “shelf” LLC, this conclusion is based on the deletion of the requirement for members from the definition and dissolution provisions of the Act and the inclusion of a number of provisions addressing how action is taken in an LLC that has no members.⁹

Some forms, such as standard articles of organization using the SCC’s form, may be processed in real time by using CIS. Review and processing of most LLC documents presented to the SCC using CIS for filing can be expedited for an additional fee. Generally, for a \$100 fee, an expedited document received by the SCC by 2:00 p.m. will be reviewed, processed, and filed by 4:00 p.m. on the next business day. For a \$200 fee, same-day service is available for certain documents received by 10:00 a.m. To use expedited service, a filer must select expedited service on CIS. Expedited service is generally no longer available for hardcopy filings delivered to the SCC.¹⁰

B. Required Contents.

1. In General. There are several elements that must be included in the articles of organization in order for the SCC to accept them. These elements are discussed below.

2. Name. The articles of organization must state the name of the LLC being organized. There are a number of restrictions involving the name of an LLC. First, its name must contain one of the following phrases or abbreviations to designate that the business is operated as an LLC: “Limited Company,” “Limited Liability Company,” “L.C.,” “L.L.C.,” “LC,” or “LLC.”¹¹ Conversely, the LLC’s name may not contain the words “Corporation,” “Incorporated,” “Limited Partnership,” or the abbreviations “Corp.,” “Inc.,” or

⁸ Va. Code § 13.1-1010.

⁹ For example, section 13.1-1003(F)(2) of the Virginia Code provides for signing of documents filed with the Commission by an LLC with no members.

¹⁰ SCC forms may be downloaded from the SCC website at www.scc.virginia.gov/pages/Forms-and-Fees.

¹¹ Va. Code § 13.1-1012(A). Many other states do not allow use of the terms “L.C.” or “LC” to designate an LLC. When registering in one of these states, a Virginia LLC with one of these designating terms in its name must select another designating term.

“L.P.,” or any other word or phrase the use of which is prohibited by law or implies that the LLC is another type of entity.¹²

The Act also requires that an LLC’s name be distinguishable on the records of the SCC from the name of any other Virginia LLC, corporation, business trust, limited partnership, any entity organized in another jurisdiction and registered with the SCC to do business in Virginia, or any name that has been properly reserved pending the filing of the organizing documents with the SCC.¹³ This requirement does not mean that if an LLC name is approved by the SCC, the LLC is protected from suits by third parties for trademark or trade name infringement associated with the LLC name. Trademark and trade name infringement are governed by entirely different bodies of law. In order to avoid trademark and trade name claims relating to an LLC’s name, the best practice is to obtain a trademark and trade name search report of the name to ensure that it is free for commercial use by the LLC.

3. Registered Office and Agent. The articles of organization must include the post office address, including the street and number, if any, of the LLC’s initial registered office.¹⁴ The address of the registered office must be in Virginia, and the articles of organization are required to include an express statement of the city or county in Virginia in which this address is located.¹⁵

The articles of organization must also include the LLC’s initial registered agent at that office.¹⁶ The registered agent of an LLC must be an individual who is a resident of Virginia and one of the following: (i) a member or manager of the LLC; (ii) an authorized representative of an entity (a member or manager of an LLC, officer or director of a corporation, general partner of a general or limited partnership, or trustee of a trust that is a member or manager of the LLC) that is a member or manager of the organizing LLC; (iii) a member of the Virginia State Bar; or an entity that is a domestic or foreign corporation, LLC, or registered limited liability partnership authorized to

¹² Va. Code § 13.1-1012(B).

¹³ Va. Code § 13.1-1012(C); *see* Appendix 2-3 (Form SSC631—Application for Reservation or Renewal of Reservation of a Business Entity Name). However, the name of an LLC need not be distinguishable from the name of a limited liability partnership (LLP).

¹⁴ Va. Code § 13.1-1011(A)(2).

¹⁵ *Id.*

¹⁶ *Id.*

transact business in Virginia, the business office of which is identical to the registered office. In the latter case, this entity cannot be its own registered agent and must designate in a notarized instrument one or more individuals at the office upon whom process may be served.¹⁷ A Virginia resident who is an officer of the LLC may be its registered agent. For this purpose, “officer” includes any employee of the LLC, other than a member or manager. Often, an attorney is chosen as the registered agent to avoid lawsuits being served at the LLC’s place of business and to facilitate the attorney’s maintenance of a minute book for the LLC. An LLC may change its registered office or registered agent at any time by filing with the SCC a statement of change on a form prescribed and furnished by the SCC.¹⁸ An LLC’s registered agent and registered office can also be changed by making an electronic filing with the SCC through CIS.

4. Principal Office. The articles of organization must set forth the post office address, including the street and number, if any, of the LLC’s principal office.¹⁹ Although the principal office of an LLC may be the same as the LLC’s registered office,²⁰ it is not required to be the same as the registered office, and in fact the principal office may be outside Virginia.²¹ Information that must be maintained at the LLC’s principal office is discussed in more detail in paragraph 2.307 of this chapter. After organization, an LLC’s principal office may be changed by filing with the SCC a statement of change on a form supplied by the SCC.²² An LLC’s principal office may also be changed by making an electronic filing with the SCC through CIS. A statement of change is also required whenever the principal office ceases to be the office at which the LLC’s principal executive offices are located.²³

C. Additional Elements. In addition to the required contents, the articles of organization may include any matters that are permitted to be

¹⁷ Va. Code § 13.1-1015(A)(2).

¹⁸ Va. Code § 13.1-1016; *see* Appendices 2-4 (SCC Form—Statement of Change of Registered Agent/Registered Office) and 2-5 (SCC Form—Statement of Resignation of Registered Agent). The statement of change filing is the exclusive method to change an LLC’s registered office and agent after its organization. A change of an LLC’s registered agent or office cannot be accomplished by amending its articles of organization; in fact, if an LLC’s articles of organization are restated, the provisions regarding its registered agent and office should be eliminated if there has been an intervening change. Va. Code §§ 13.1-1014, 13.1-1014.1.

¹⁹ Va. Code § 13.1-1011(A)(3).

²⁰ *Id.*

²¹ *Id.*

²² Va. Code § 13.1-1018.1(A).

²³ Va. Code § 13.1-1010(B).

included in the LLC's operating agreement.²⁴ But for reasons of business confidentiality, many LLCs choose to address their internal affairs through the operating agreement, because the articles of organization are a public record document available to anyone.²⁵

Finally, the apparent authority of members to execute documents and otherwise act on behalf of an LLC may be curtailed or eliminated through the articles of organization by including a provision designating the LLC as a "manager-managed limited liability company."²⁶

D. Limiting Provisions. Several limiting provisions justify special note. First, if any member, manager, or other agent of an LLC, solely by reason of this status or capacity and regardless of whether the LLC has a single member or multiple members, is to have personal liability for an LLC's obligations, a special provision setting forth this arrangement must be included in the articles of organization.²⁷ Such a provision is unusual and should not be viewed as a substitute for an express guaranty to a specific creditor, since it has the potential for much broader application.

Second, if the parties forming an LLC wish to reduce the possibility of a claim that an oral operating agreement has been established among them, the articles of organization should include a provision stating that any operating agreement, or any amendment thereto, must be in writing in order to be valid and enforceable.²⁸ An oral modification supported by sufficient

²⁴ Va. Code § 13.1-1011(B); see *infra* ¶ 2.203 (discussion of operating agreement).

²⁵ Including permitted, as distinguished from required, items in an LLC's articles of organization may imply that there is constructive notice to third parties of the included provisions. *Cf.* Del. Code Ann. tit. 6, § 18-207 (notice only of matters required to be included).

Some practitioners choose to include permitted items (such as management indemnification rights) in the articles of organization rather than the operating agreement to make the provisions more difficult to amend or eliminate or claim to have been amended or eliminated.

²⁶ See Va. Code § 13.1-1021.1(B).

²⁷ Va. Code § 13.1-1019. As to personal liability of directors, officers, and managers, see also *Mid Atlantic Eng'g Tech. Servs., Inc. v. Miller Hardman Designs, LLC*, 86 Va. Cir. 337 (Chesapeake 2013), in which the court concluded that the limited liability shield of the LLC could be disregarded if justified by the particular facts and circumstances, using the same veil-piercing analysis that applies to Virginia corporations.

²⁸ See Va. Code § 13.1-1023(B)(1). *But see Coral Reef Drive Land Dev., LLC v. Duke Realty Ltd. P'ship*, 45 So. 3d 897 (Fla. 3d DCA 2010) (court held under Florida law that an oral modification of loan documents could be enforceable, despite a provision in the loan documents requiring that all amendments be in writing, if the oral modification was supported by additional consideration furnished by one party and accepted by the other).

As to written or oral operating agreements, see also paragraph 2.203(C).