

State of Alabama



Alabama Law Institute

Part 1: Alabama Partnership Law

Part 2: Conforming Changes to Chapter 1 (HUB)

Part 3: Conforming Changes to Chapter 5A (Limited Liability Companies)

Part 4: Conforming Changes to Chapter 9A (Alabama Limited Partnership Law)

Part 5: Conforming Changes to Chapter 17 (Unincorporated Nonprofit Association)

March 2017

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Part 1:

ALABAMA PARTNERSHIP ACT

CHAPTER 8A

Article 1

General Provisions

- § 10A-8A-1.01. Short title.**
- § 10A-8A-1.02. Definitions.**
- § 10A-8A-1.03. Knowledge and notice.**
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§ 10A-8A-1.01. Short title.

This chapter and the provisions of Chapter 1 to the extent applicable to partnerships, shall be known and may be cited as the Alabama Partnership Law.

Comment

This Section is derived from Section 10A-9A-1.01 of the Alabama Limited Partnership Law and Section 10-5A-1.01 of the Alabama Limited Liability Company Law.

This Chapter updates Alabama's partnership law in a manner that provides for greater alignment with the Alabama Limited Partnership Law and the Alabama Limited Liability Company Law. This Chapter is not based on a single source, but rather has borrowed concepts and provisions from a variety of sources.

A summary of significant features of this Chapter are:

(a) Contractual Nature. *This Chapter focuses on the contractual nature of the partnership. There are few mandatory provisions in this Chapter; most features of a partnership can be modified by the parties to suit their needs. This Chapter includes many default provisions that apply if the partners do not modify those default provision in the partnership agreement.*

(b) Mandatory Safeguards. *Despite the emphasis on allowing the parties to make their own contract, this Chapter provides that certain obligations, such as the implied contractual covenant of good faith and fair dealing, cannot be modified.*

(c) Notice Filing. *Normally a filing is not required to form a partnership. Rather, a partnership is the least formal of Alabama's ~~unincorporated entity Laws~~ entities, and thus the partners and third parties must look to the partnership agreement to determine many aspects of a partnership. However, this Law does permit or under certain circumstances require notice filings normally referred to in the Law as "statements," such as (i) a statement of partnership, (ii) a statement of not for profit partnership, (iii) a statement of limited liability partnership, (iv) a statement of authority, (v) a statement of dissolution, (vi) a statement of conversion, (vii) a statement of merger, and (viii) a certificate of reinstatement. These statements are designed to notify the State and third parties that the partnership exists and how to contact it. The details about the conduct of the partnership will generally be contained in the partnership agreement.*

(d) Not for Profit Partnerships. *In addition, a new feature allows a partnership to conduct not for profit activities. Prior to this Law, partnerships were by definition only "for profit" entities. The main difference is that formation of a "for profit" partnership requires little formality and can be accomplished with or without an intention to do so. However, in order to form a not for profit partnership, the partners must intend to do so, and must file a statement of not for profit partnership with the Secretary of State.*

(~~e~~) Agency. *Unlike a limited liability company, but similar to a limited partnership, agency of a partnership is set by statute, and is vested in the partners.*

Reference in the commentary to the "Prior Partnership Law" refers to Chapter 1 (to the extent applicable to limited partnerships) and Chapter 8 of the Alabama Business and Nonprofit Entity Code, which is the partnership law in effect immediately before this new Chapter 8A; ~~reference~~ reference to the Alabama Limited Liability Company Law refers to Chapter 1 (to the extent applicable to limited liability companies) and Chapter 5A of the Alabama Business and Nonprofit Entity Code; Reference in the commentary to the Alabama Limited Partnership Law ~~refer~~ refers to Chapter 1 (to the extent applicable to limited partnerships) and Chapter 9A of the Alabama Business and Nonprofit Entity Code.

~~Reference~~ Reference in the commentary to "RUPA" refers to the Revised Uniform Partnership Act (1997); ~~reference~~ reference in the commentary to HRUPA refers to the Uniform Partnership Act (1997) last amended 2013, and dated August 19, 2015; reference to "RULPA" refers to the Revised Uniform Limited Partnership Act (1985); reference to "ULPA" refers to the

Uniform Limited Partnership Act (2001); reference to “RULLCA” refers to the Revised Uniform Limited Liability Company Act (2006); ~~reference~~reference to “RPLLCA” refers to the Revised Prototype Limited Liability Company Act (2011); reference to “RMBCA” refers to the Revised Model Business Corporation Act (2007); reference to “Delaware, § ” refers to a Section in the Delaware Revised Uniform Partnership Act (6 Del. C. § 15-101, et. seq.); reference in the commentary to “Colorado, § _____” refers to a Section in the Colorado Limited Liability Company Act (Colo. Rev. Stat. § 7-80-101, et. seq.) or the Colorado Corporations and Associations Act (Colo. Rev. Stat. § 7-90-101, et. seq.); and reference in the comment Sections to “Texas, § _____” refers to a Section in the Texas Business Organizations Code (Tex. Bus. Orgs. Code § 1.001, et. seq.).

§ 10A-8A-1.02. Definitions.

Notwithstanding Section 10A-1-1.03, as used in this chapter, unless the context otherwise requires, the following terms mean:

(1) ~~“Activity” includes every undertaking not for profit.~~

(2) “Business” includes every trade, occupation, and profession for profit.

(3) “Disqualified person” means any person who is not a qualified person.

(4) “Distribution” except as otherwise provided in Section 10A-8A-4.09(f),

means a transfer of money or other property from a partnership to another person on account of a transferable interest.

(5) “Foreign limited liability partnership” means a foreign partnership whose partners have limited liability for the debts, obligations, or other liabilities of the foreign partnership under a provision similar to Section 10A-8A-3.06(c).

(6) “Foreign partnership” means a partnership governed by the laws of a jurisdiction other than this state which would be a partnership if governed by the laws of this state. The term includes a foreign limited liability partnership.

(7) “Limited liability partnership”, except in the phrase “foreign limited liability partnership”, means a partnership that has filed a statement of limited liability partnership

under Section 10A-8A-10.01, and does not have a similar statement in effect in any other jurisdiction.

(7) “Not for profit activity” includes every undertaking not for profit.

(8) “Partner” means a person that:

(A) has become a partner in a partnership under Section 10A-8A-4.02 or was a partner in a partnership when the partnership became subject to this chapter; and

(B) has not dissociated as a partner under Section 10A-8A-6.01.

(9) “Partnership” means an association of two or more persons formed under Section 10A-8A-2.01, predecessor statute, or comparable law of another jurisdiction or becomes subject to the laws of this state pursuant to Section 10A-8A-1.06, to carry on any business or not for profit activity, and includes, for all purposes of the laws of this state, a limited liability partnership.

(10) “Partnership agreement” means any agreement (whether referred to as a partnership agreement or otherwise), written, oral or implied, of the partners as to the business or not for profit activity of a partnership. The partnership agreement includes any amendments to the partnership agreement.

(11) “Partnership at will” means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.

(12) “Person dissociated as a partner” means a person dissociated as a partner of a partnership.

(13) “Qualified person,” with respect to a partnership rendering professional services in this state, means a person authorized by this state or a regulatory authority of this state to own a transferrable interest in that partnership.

(14) “Required information” means the information that a partnership is required to maintain under Section 10A-8A-1.11.

(15) “Statement” means a statement of partnership under Section 10A-8A-2.02, a statement of not for profit partnership under Section 10A-8A-2.02, a statement of authority under Section 10A-8A-3.03, a statement of denial under Section 10A-8A-3.04, a statement of dissociation under Section 10A-8A-7.04, a statement of dissolution under Section 10A-8A-8.02 or under Section 10A-8A-8.03, a certificate of reinstatement under Section 10A-8A-8.11, a statement of limited liability partnership under Section 10A-8A-10.01, a statement of cancellation under Section 10A-8A-10.01, or any other document required or permitted to be delivered to the Secretary of State for filing under this Chapter, or an amendment or cancellation of any of the foregoing.

(16) “Transfer” means an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, gift, or transfer by operation of law.

(17) “Transferable interest” means a partner's right to receive distributions from a partnership.

(18) “Transferee” means a person to which all or part of a transferable interest has been transferred, whether or not the transferor is a partner.

Comment

The definitions of specific words and phrases used in this Chapter have been modified to conform with the Alabama Limited Partnership Law and the Alabama Limited Liability Company Law. Each word or phrase which is defined in this Section for use throughout this Chapter is intended to override and supersede that same specific word's or phrase's definition in Chapter 1 of this Title (the "Hub") for purposes of this Chapter and the partnership law. Other words not defined in this Chapter may be defined in the Hub. Words and phrases that were deleted from the definitions in this Section were deemed to be appropriately defined in the Hub or unnecessary.

~~**Activity** is a new term and is used to indicate a not for profit endeavor. A not for profit activity could include the ownership of a hospital by two nonprofit entities, or the mere holding of property by individuals who do not intend to hold the property for profit. The thought of a not for profit partnership was derived from Delaware § 15-202(a)(ii).~~

Business is used to indicate a for profit endeavor. This definition has been modified from the Prior Partnership Law to differentiate a for profit endeavor from a not for profit endeavor.

Disqualified person was derived from Section 10A-5A-1.02(g) of the Alabama Limited Liability Company Law and is utilized in the professional limited liability partnership setting—Sections 10A-8A-10.02 and 10A-8A-10.03.

Distribution was derived from Section 10A-9A-5.08(f) of the Alabama Limited Partnership Law and Section 10A-5A-4.06(e) of the Alabama Limited Liability Company Law.

Foreign limited liability partnership was derived from Section 10A-9A-1.02(3) Alabama Limited Partnership Law.

Foreign partnership was derived from Section 10A-9A-1.02(4) Alabama Limited Partnership Law.

Limited liability partnership was derived from Section 102(9) of HRUPA.

Not for profit activity is a new term and is used to indicate a not for profit endeavor. A not for profit activity could include the ownership of a hospital by two nonprofit entities, or the mere holding of property by individuals who do not intend to hold the property for profit. The concept of a not for profit partnership was derived from Delaware § 15-202(a)(ii).

Partner was derived from Section 102(10) of HRUPA.

Partnership was derived from Delaware § 15-101(11) and is defined as domestic only. This definition is an example of why it is important in this Chapter to override certain definitions in Chapter 1. The definition of "partnership" in Chapter 1 includes not only domestic and foreign partnerships, but also domestic and foreign limited partnerships, which of course would not work in this Chapter.

The definition of "partnership" in this Chapter encompasses: (i) partnerships originally formed under this Chapter; (ii) partnerships formed or becoming subject to this Chapter; and (iii) preexisting partnerships formed under a predecessor statute. It should be noted that Prior Partnership Law specifically excluded partnerships in existence prior to Alabama's partnership

law being codified in 1972; however, this Chapter does not need to specifically exclude any such partnerships, if any exist, as by definition, those partnerships were not formed under a predecessor statute, but rather were formed under common law. To the extent any such partnerships still exist, those partnerships would be governed by the common law unless they elected to be governed by, or became subject to, a predecessor statute prior to this enactment of this Chapter or this Chapter after its enactment. Since common law partnerships dissolve and became new partnerships if a new or different partner is admitted or if a partner leaves the partnership, most common law partnership would have, by now, become subject to a predecessor statute, and thus will no longer be common law partnerships.

The definition of “partnership” in this Chapter ~~contains two substantive requirements.~~ ~~First, it is of the essence of~~defines a partnership ~~to have~~as having at least two partners. Generally, Section 10A-8A-8.01 describes the events of dissolution, but two new sections, Section 10A-8A-8.01(6) and (7) were added. Section 10A-8A-8.01(6) is derived from Section 801(6) of HRUPA and Section 10A-9A-8.01(c) of the Alabama Limited Partnership Law and provides that a partnership dissolves if the partnership does not have at least 2 partners for 90 consecutive days, but if there is one remaining partner that remaining partner may continue the partnership by admitting another partner ~~with in~~within that 90 day period, or the partnership may be continued by the admittance of an additional partners in accordance with the partnership agreement. Section 10A-8A-8.01(7) is derived from Section 10A-9A-8.01(e) of the Alabama Limited Partnership Law and provides that a partnership dissolves if the partnership does not have at least 2 partners for 90 consecutive days, and if there is no remaining partner, then the holders of all of the transferable interests may continue the partnership by appointing two partners within that 90 day period or the partnership may be continued by the admittance of 2 additional partners in accordance with the partnership agreement. Although those sections are default rules, in light of this definition, a partnership may not indefinitely delay “having at least two partners.”

Partnership agreement was derived from Section 10A-9A-1.02(10) of the Alabama Limited Partnership Law and Section 10A-5A-1.02(k) of the Alabama Limited Liability Company Law.

Partnership at will has the same meaning as it did under Prior Partnership Law. It is defined in the negative (i.e., by stating what the defined term is not). A partnership is “at will” if the partners’ agreement does not obligate them to remain in the partnership until the passage of a specified time (a term) or the completion of a specified task, job, project, etc. (an undertaking).

“Partnership at will” is thus the default mode under this ~~act~~Chapter; that is, a partnership is “at will” unless the partners have agreed otherwise. Absent such agreement, a partner may rightfully leave the partnership at any time (dissociate), Sections 10A-8A-6.01(1), 10A-8A-6.02(b)(2), and rightfully cause or seek the winding up of the partnership and its business or not for profit activity (dissolution), Section 10A-8A-8.01(1); see Fleming v. Hagen Estate, 702 N.W.2d 786, 789 (Minn. Ct. App. 2005) (rejecting “the [appellant] estate’s assertion that the district court erred by not concluding that [a partner’s] counterclaim unilaterally dissolved the agreement pursuant to [Minnesota Statutes Section 323A.0801]”; noting that “section 323A.0801(1) is applicable only to an at-will partnership”).

This Chapter does not directly define “partnership for a term” and “partnership for an undertaking,” but their respective meanings are clear from this paragraph’s wording and the case law. E.g., Girard Bank v. Haley, 332 A.2d 443, 447 (Pa. 1975) (“A ‘particular undertaking’ under the statute must be capable of accomplishment at some time, although the exact time may be unknown and unascertainable at the date of the agreement.”). This paragraph thus suggests that a partnership under this act will fit into one of three conveniently labeled categories: at-will, for a term, for an undertaking. However, hybrid structures are possible.

EXAMPLE: *The partnership agreement of a partnership:*

- *states a minimum term of ten years;*
- *permits one particular partner to leave the partnership at any time upon thirty days advance written notice; and*
- *provides that that person’s dissociation as a partner will neither cause the partnership to dissolve nor entitle any other person to dissociate.*

Hybrid structures cause no trouble, if the partnership agreement: (i) clearly and completely details the partners’ understanding as to dissociation and dissolution; and (ii) does not confuse matters by inaccurately labeling the partnership as if it were a pure form of one of the three categories.

Qualified person *was derived from Section 10A-5A-1.02(o) of the Alabama Limited Liability Company Law and is utilized in the professional limited liability partnership setting—Sections 10A-8A-10.02 and 10A-8A-10.03.*

Statement *is a new term and intended to encompass all of the filings with the Secretary of State under this Chapter.*

Transfer *was derived from Section 10A-9A-1.02(13) of the Alabama Limited Partnership Law and Section 10A-5A-1.02(q) of the Alabama Limited Liability Company Law.*

Transferable interest *was derived from Section 10A-9A-1.02(14) of the Alabama Limited Partnership Law and Section 10A-5A-1.02(s) of the Alabama Limited Liability Company Law.*

Transferee *was derived from Section 10A-9A-1.02(15) of the Alabama Limited Partnership Law and Section 10A-5A-1.02(r) of the Alabama Limited Liability Company Law.*

*The term “**sign**” as used in this Chapter is defined by way of the definition of “signature” in Section 10A-1-1.03 and the operative provisions of Section 10A-1-1.07.*

§ 10A-8A-1.03. Knowledge and notice.

- (a) A person knows a fact when the person:

- (1) has actual knowledge of it; or
 - (2) is deemed to know it under law other than this chapter.
- (b) A person has notice of a fact when the person:
- (1) knows of it;
 - (2) receives notice of it;
 - (3) has reason to know the fact from all of the facts known to the person at the time in question; or
 - (4) is deemed to have notice of the fact under subsection (d).
- (c) A person notifies or gives notice to another person by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person knows the fact.
- (d) A person is deemed to have notice of a partnership's:
- (1) statement of partnership, 90 days after a statement of partnership under Section 10A-8A-2.02 becomes effective;
 - (2) statement of not for profit partnership, 90 days after a statement of not for profit partnership under Section 10A-8A-2.02 becomes effective;
 - (3) statement of authority, with respect to (i) authority not involving property and (ii) property other than real property, 90 days after a statement of authority under Section 10A-8A-3.03 becomes effective; and with respect to real property in accordance with Section 10A-8A-3.03(g);
 - (4) statement of denial, with respect to property other than real property, 90 days after a statement of denial under Section 10A-8A-3.04 becomes effective;

- (5) dissociation, 90 days after a statement of dissociation under Section 10A-9A-7.04 becomes effective;
- (6) dissolution, 90 days after a statement of dissolution under Section 10A-9A-8.02 or Section 10A-9A-8.03 becomes effective;
- (7) reinstatement, 90 days after a certificate of reinstatement under Section 10A-9A-8.11 becomes effective;
- (8) merger or conversion under Article 9 or under Article 8 of Chapter 1, 90 days after the statement of merger or conversion becomes effective;
- (9) statement of limited liability partnership, 90 days after a statement of limited liability partnership under Section 10A-8A-10.01 becomes effective; or
- (10) statement of cancellation, 90 days after a statement of cancellation under Section 10A-8A-10.01 becomes effective.

(e) A partner's knowledge, notice, or receipt of notice of a fact relating to the partnership is effective immediately as knowledge of, notice to, or receipt of notice by the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

Comment

This Section was derived from Section 10A-9A-1.03 of the Alabama Limited Partnership Law and Section 10A-5A-1.03 of the Alabama Limited Liability Company Law. The concepts of a statement of partnership and a statement of not for profit partnership have been added to align with Section 10A-8A-2.02.

Subsections (b), (c), and (d) provide separate and independent avenues through which a person can have notice of a fact. A person has notice of a fact as soon as any of the avenues applies. For example, a partnership dissolves and files a statement of dissolution. The statement of dissolution is effective on March 1. On March 15, Person #1 has reason to know of the dissolution and therefore has “notice” of the dissolution under Subsection (b)(3) even though

Subsection (d)(6) does not yet apply. Person #2 does not have actual knowledge of the dissolution until June 15. Nonetheless, under Subsection (d)(6) Person #2 is deemed to have “notice” of the dissolution on May 30.

Subsection (d) provides what is commonly called constructive notice and works in conjunction with other sections of this Chapter to curtail the power to bind and personal liability of partners and persons dissociated as partners. The constructive notice begins 90 days after the effective date of the filed document. For the Chapter’s rules on delayed effective dates, see Division B of Article 4 of Chapter 1. The 90-day delay applies only to the constructive notice and not to the event described in the filed record. For example, on March 15, X dissociates as a partner from XYZ Partnership by giving notice to XYZ. See Section 10A-8A-6.01(1). On March 20, XYZ files a statement of dissociation stating that X has dissociated. See Section 10A-8A-7.04(a). X’s dissociation is effective March 15. If on March 16, X purports to be a partner of XYZ and under Section 10A-8A-7.03 binds XYZ to some obligation, X will be liable under Section 10A-8A-7.03 as a “person dissociated as a partner.” On June 13 (90 days after March 15), the world has constructive notice of X’s dissociation as a partner. Beginning on that date, X will lack the power to bind XYZ. See Section 10A-8A-7.03(b). Constructive notice under this Subsection applies to all persons, including, but not limited to, partners, dissociated partners, transferees, and third parties.

Subsection (e) provides that if information is possessed by a person that is a partner that information is attributable to the partnership, except in cases of fraud on the partnership committed by or with the consent of that partner.

§ 10A-8A-1.04. Nature and purpose.

(a) A partnership is a separate legal entity. A partnership’s status for tax purposes shall not affect its status as a separate legal entity formed under this chapter. A partnership is the same entity regardless of whether the partnership has a statement of limited liability partnership under Section 10A-8A-10.01 stating that the partnership is a limited liability partnership. A partner has no interest in any specific property of a partnership.

(b) A partnership may carry on any lawful business and may carry on any lawful not for profit activity if it complies with Section 10A-8A-2.02(b).

Comment

This Section was derived from Section 10A-9A-1.04 of the Alabama Limited Partnership Law and Section 10A-5A-1.04 of the Alabama Limited Liability Company Law.

The first sentence of Subsection (a) was modified to conform with the Alabama Limited Partnership Law and the Alabama Limited Liability Company Law. No substantive change was made--a partnership is a separate legal entity and since it is a separate legal entity it is distinct from its partners. The second sentence of Section (a) was added to conform with the Alabama Limited Partnership Law and the Alabama Limited Liability Company Law. The third sentence of Subsection (a) confirms that acquiring or relinquishing an LLP shield changes only the rules governing a partner's liability for subsequently incurred obligations of the partnership--the underlying entity is unaffected. The last sentence of Subsection (a) is simply a statement of current law, as the partnership is an entity. In that regard, this sentence takes the place of Section 10A-8-5.01 of the Prior Partnership Law. Section 10A-8-5.01 of the Prior Partnership Law was removed as being surplusage, as there is no substantive difference between the two provisions.

Subsection (b) was modified to reflect that this Chapter allows a partnership to participate in not for profit undertakings, but the partnership must comply with Section 10A-8A-2.02(b) to do so. If a partnership is formed or later elects to become a not for profit partnership, the partners should carefully review this Chapter's default rules and override those default rules as necessary via the partnership agreement—see generally, the definition of transferable interest as the right to receive distributions, Article 4 regarding contributions and distributions, and Section 10A-8A-8.09 regarding distribution of assets upon dissolution.

§ 10A-8A-1.05. Powers; indemnification.

(a) A partnership shall possess and may exercise all the powers and privileges granted and enumerated by Chapter 1 or by any other law or by its partnership agreement, together with any powers incidental thereto, including those powers and privileges necessary or convenient to the conduct, promotion, or attainment of the business or not for profit activity of the partnership and including the power to sue, be sued, and defend in its own name and to maintain an action against a partner for harm caused to the partnership by a breach of the partnership agreement or violation of a duty to the partnership.

(b) A partnership may indemnify and hold harmless a partner or other person, pay in advance or reimburse expenses incurred by a partner or other person, and purchase and maintain insurance on behalf of a partner or other person.

Comment

This Section has been modified to conform with the Alabama Limited Partnership Law, the Alabama Limited Liability Company Law and the Hub. It should be noted that the “power to sue, be sued, and defend in its own name” is mentioned specifically so that Section 10A-8A-1.08(c)(2) can prohibit the partnership agreement from varying that power. The power to maintain an action against a partner is mentioned specifically to establish that the partnership itself has standing to enforce the partnership agreement. Subsection (b) was derived from Section 10A-9A-1.05 of the Alabama Limited Partnership Law and Section 10A-5A-4.10 of the Alabama Limited Liability Company Law, which is intended to provide more flexibility than is provided in Article 6 of Chapter 1.

§ 10A-8A-1.06. Governing law.

(a) Except as otherwise provided in subsections (b), (c), and (d) of this section, the law of the jurisdiction in which the partnership has its principal office governs the partnership agreement and the relations among the partners and between the partners and the partnership.

(b) The law of this state governs the (i) internal affairs of a limited liability partnership, including the relations among the partners and between the partners and the partnership, (ii) the liability of a partner as a partner for the debts, obligations, or other liabilities of a limited liability partnership, and (iii) the authority of the partners of a limited liability partnership.

(c) The law of the jurisdiction in which a foreign limited liability partnership has filed its statement of limited liability partnership or similar writing governs the (i) internal affairs of that foreign limited liability partnership, including the relations among the partners and between the partners and the partnership, (ii) the liability of a partner as a partner for the debts, obligations,

or other liabilities of a foreign limited liability partnership, and (iii) the authority of the partners of a foreign limited liability partnership.

(d) If (i) a partnership agreement provides for the application of the laws of this state, and (ii) the partnership delivers to the Secretary of State for filing a statement of partnership in accordance with Section 10A-8A-2.02(a), a statement of not for profit partnership in accordance with Section 10A-8A-2.02(b), or a statement of limited liability partnership in accordance with Section 10A-8A-10.01, then the partnership agreement shall be governed by and construed under the laws of this state.

Comment

This Section is derived from Delaware §15-106 with changes to reflect the general provision of Section 10A-9A-1.06 of the Alabama Limited Partnership Law and Section 10A-5A-1.06 of the Alabama Limited Liability Company Law.

§ 10A-8A-1.07. Supplemental principles of law; rate of interest.

(a) It is the policy of this chapter and this state to give maximum effect to the principles of freedom of contract and to the enforceability of partnership agreements.

(b) Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.

(c) If an obligation to pay interest arises under this chapter and the rate is not specified, the rate is the applicable federal rate as determined from time to time by the United States Treasury pursuant to 26 U.S.C. § 1274(d) or any successor law.

(d) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.

(e) The use of any gender shall be applicable to all genders. The captions contained in this chapter are for purposes of convenience only and shall not control or affect the construction of this chapter.

(f) Sections 7-9A-406 and 7-9A-408 of the Uniform Commercial Code, and all successor statutes thereto, do not apply to any interest in a partnership, including all rights, powers, and interests arising under a partnership agreement or this chapter. This provision prevails over Sections 7-9A-406 and 7-9A-408 of the Uniform Commercial Code, and all successor statutes thereto, and is expressly intended to permit the enforcement of the provisions of a partnership agreement that would otherwise be ineffective under Sections 7-9A-406 and 7-9A-408 of the Uniform Commercial Code, and all successor statutes thereto.

(g) Division E of Article 3 of Chapter 1 shall have no application to this chapter.

(h) The terms “President,” “Vice-President,” “Secretary,” and “Treasurer” as defined in Chapter 1 shall have no application to this chapter.

(i) Section 10A-1-2.13(c) shall have no application to this chapter.

Comment

Subsections (a) through (i) are similar to Section 10A-9A-1.07 of the Alabama Limited Partnership Law and Section 10A-5A-1.06 of the Alabama Limited Liability Company Law. Subsection (f) is substantially the same as Section 10A-9A-1.07(f) of the Alabama Limited Partnership Law and Section 10A-5A-1.06(e) of the Alabama Limited Company Law. Subsection (g) was added to clarify that the provisions of Chapter 1 (Sections 10A-1-3.41 through 10A-1-3.45) regarding certificates shall not apply to partnerships. If the partners of the partnership wish to issue certificates, such certificates may be issued in accordance with the partnership agreement. In addition, to the extent that the partners desire to have Article 8 of the UCC apply, Article 8 has specific requirements regarding such certificates. Subsection (h) was added to prevent the application of the definitions of “President,” “Vice-President,” “Secretary” and “Treasurer” to partnerships. Subsection (i) was added to avoid the creation of certain presumptions and certain statutory causes of action regarding guarantees in the partnership context. These matters seem best left to current remedies and to the parties to the partnership agreement. ~~As to subsection (b),~~

A court should not assume that a case concerning a limited partnership is automatically relevant to a partnership governed by this Chapter. A limited partnership case may be relevant by analogy, especially if (1) the issue in dispute involves a provision of this Chapter for which a comparable provision exists under the law of limited partnerships; and (2) the fundamental differences between a partnership and limited partnership are immaterial to the disputed issue. Because of the effort to conform this Chapter with the Alabama Limited Liability Company Law, a case involving an Alabama limited liability company may be relevant by analogy, especially if (1) the issue in dispute involves a provision of this Chapter for which a comparable provision exists under the Alabama Limited Liability Company Law; and (2) the fundamental differences between a limited liability company and partnership are immaterial to the disputed issue.

§ 10A-8A-1.08. Effect of partnership agreement; nonwaivable provisions.

- (a) Except as otherwise provided in Subsections (b) and (c):
 - (1) the partnership agreement governs relations among the partners as partners and between the partners and the partnership; and
 - (2) to the extent the partnership agreement does not otherwise provide for a matter described in Subsection (a)(1), this chapter governs the matter.
- (b) (1) To the extent that, at law or in equity, a partner or other person has duties, including fiduciary duties, to a partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement, the partner's or other person's duties may be expanded or restricted or eliminated by provisions in a written partnership agreement, but the implied contractual covenant of good faith and fair dealing may not be eliminated.
- (2) A written partnership agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties, including fiduciary duties, of a partner or other person to a partnership or to another partner or to another person that is a party to or is

otherwise bound by a partnership agreement, but a partnership agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

- (3) A partner or other person shall not be liable to a partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement for breach of fiduciary duty for the partner's or other person's good faith reliance on the partnership agreement.
- (4) A partnership agreement may provide that:
 - (A) a partner or transferee who fails to perform in accordance with, or to comply with the terms and conditions of, the partnership agreement shall be subject to specified penalties or specified consequences; and
 - (B) at the time or upon the happening of events specified in the partnership agreement, a partner or transferee may be subject to specified penalties or specified consequences.
- (5) A penalty or consequence that may be specified under paragraph (4) of this subsection may include and take the form of reducing or eliminating the defaulting partner's or transferee's proportionate transferable interest in a partnership, subordinating the partner's or transferee's transferable interest to that of non-defaulting partners or transferees, forcing a sale of that transferable interest, forfeiting the defaulting partner's or transferee's transferable interest, the lending by other partners or transferees of the

amount necessary to meet the defaulting partner's or transferee's commitment, a fixing of the value of the defaulting partner's or transferee's transferable interest by appraisal or by formula and redemption or sale of the transferable interest at that value, or other penalty or consequence.

(6) A written partnership agreement may supersede, in whole or in part, the provisions of Division C and Division D of Article 3 of Chapter 1.

(c) A partnership agreement may not:

(1) vary the nature of the partnership as a separate legal entity under Section 10A-8A-1.04(a);

(2) vary a partnership's power under Section 10A-8A-1.05 to sue, be sued, and defend in its own name;

(3) vary the law applicable to a limited liability partnership under Section 10A-8A-1.06;

(4) restrict rights under this chapter of a person other than a partner, a dissociated partner, or a transferee;

(5) vary the requirements of Section 10A-8A-2.03;

(6) unreasonably restrict the right of access to books and records under Section 10A-8A-4.10, but the partnership agreement may impose reasonable restrictions on the availability and use of information obtained under those sections and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use;

(7) eliminate the implied contractual covenant of good faith and fair dealing as provided under Section 10A-8A-1.08(b)(1);

- (8) eliminate or limit the liability of a partner or other person for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing as provided under Section 10A-8A-1.08(b)(2);
- (9) waive the requirements of Section 10A-8A-4.04(e);
- (10) reduce the limitations period specified under Section 10A-8A-4.09(e) for an action commenced under other applicable law;
- (11) waive the prohibition on issuance of a certificate of a transferable interest in bearer form under Section 10A-8A-5.02(c);
- (12) vary the power of a person to dissociate as a partner under Section 10A-8A-6.02(a) except that the partnership agreement may require that the notice under Section 10A-8A-6.01(1) be in a writing or in a specific form thereof;
- (13) vary the right of a court to expel a partner in the events specified in Section 10A-8A-6.01 (5);
- (14) vary the power of a court to decree dissolution in the circumstances specified in Section 10A-9A-8.01(4) or (5);
- (15) vary the requirement to wind up the partnership's business or not for profit activity as specified in Section 10A-8A-8.01(4), (5), (6), or (7);
- (16) vary the right of a partner to approve or consent to the cancellation of a statement of limited liability partnership as specified in Section 10A-8A-10.01(m); or
- (17) vary the rights of a partner under Section 10A-8A-9.10.

Comment

This Section was derived from Section 10A-9A-1.08 of the Alabama Limited Partnership Law and 10A-5A-1.08 of the Alabama Limited Liability Company Law. Subsections (a) and (b) are substantially similar to Sections 10A-9A-1.08(a) and (b) of the Alabama Limited Partnership Law and Sections 10A-5A-1.08(a) and (b) of the Alabama Limited Liability Company Law.

Subsections (b)(1) and (c)(8) make clear that the implied contractual covenant of good faith and fair dealing may not be eliminated. The term “implied contractual covenant of good faith and fair dealing” as used in this Chapter is the same as that set forth in Delaware §15-1101 (b)(3), as that term was interpreted by the Delaware Supreme Court in Gerber v. Enterprise Products Holdings, LLC, 67 A.3d 400 (2013). The Alabama Supreme Court recognized this concept in Sellers v. Head, 73 So.2d 747 (Ala. 1954) (This implied covenant provides that if a contract fails to specify all of the duties and obligations intended to be assumed, “the law will imply an agreement to do those things according to reason and justice the parties should do in order to carry out the purpose for which the contract was made.”) Section 7-1-304, and cases construing the section such as, Tanner v. Church’s Fried Chicken, Inc., 582 So.2d 449, 452 (Ala. 1991) and Government Street Lumber Co., Inc. v. AmSouth Bank, NA, 553 So.2d 68 (1989) should not be utilized in interpreting the term “implied contractual covenant of good faith and fair dealing.” Consistent with the Alabama Supreme Court holding in Peninsular Life Ins. Co. v. Blackmon, 476 So.2d 87, 89 (Ala. 1985) the term “implied contractual covenant of good faith and fair dealing” does not create any new cause of action in tort for bad faith or any other tort. See also changes to Section 10A-8A-4.11 which expand the default duties by changing the word “only” to “includes.” This change allows for a finding of other duties and places this Chapter in a position that it was prior to the 1996 enactment of the Prior Partnership Law.

Subsection (b)(6) makes clear that a partnership agreement may supersede, in whole or in part, Sections 10A-1-3.21, 10A-1-3.22, 10A-1-3.23, 10A-1-3.24, 10A-1-3.31, 10A-1-3.32, and 10A-1-3.33.

Subsection (c)(9) affirms the requirement that all contribution obligations must be set forth in writing and that requirement may not be waived by a partnership agreement.

Subsection (c)(11) affirms the requirement that a partnership may not issue certificate of a transferable interest in bearer form.

Subsection (c)(12) allows the partnership agreement to require that the notice of dissociation of a partner be in a specific form of writing.

Subsection (c)(14) should not be read to limit a partnership agreement’s power to provide for arbitration. For example, an agreement to arbitrate all disputes – including dissolution disputes – is enforceable. Any other interpretation would put this Chapter at odds with federal law. See Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding that the Federal Arbitration Act preempts state statutes that seek to invalidate agreements to arbitrate) and Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995) (same). This provision does prohibit any narrowing of the substantive grounds for judicial dissolution as stated in Section 10A-8A-8.01(f). For example,

a provision of a partnership agreement that states that no partner may obtain judicial dissolution without showing that a partner is in material breach of the partnership agreement is ineffective to prevent a court from ordering dissolution under Sections 10A-9A-8.01(4) or (5).

Subsection (c)(17) restricts a partnership agreement from varying the rights under Section 10A-8A-9.10 which provides special consent requirements with regard to transactions that might make a partner personally liable for entity debts.

§ 10A-8A-1.09. Partnership agreement; effect on partnership and persons admitted as partners.

(a) A partnership is bound by and may enforce the partnership agreement, whether or not the partnership has itself manifested assent to the partnership agreement.

(b) A person that is admitted as a partner of a partnership becomes a party to and assents to the partnership agreement except as provided in Section 10A-8A-5.02(g).

(c) Two or more persons intending to be the initial partners of a partnership may make an agreement providing that upon the formation of the partnership, the agreement will become the partnership agreement.

Comment

This Section is derived from Section 10A-9A-1.09 of the Alabama Limited Partnership Law and Section 10A-5A-1.09 of the Alabama Limited Liability Company Law. The language specifying that a person is deemed to become a party to the partnership agreement upon admission as a partner is intended to make clear that the partner is bound by and may enforce the partnership agreement.

§ 10A-8A-1.10. Partnership agreement; effect on third parties and relationship to writings effective on behalf of partnership.

(a) If a partnership agreement provides for the manner in which it may be amended, including by requiring the approval of a person who is not a party to the partnership agreement or the satisfaction of conditions, it may be amended only in that manner or as otherwise permitted by law, except that the approval of any person may be waived by that person and any conditions may

be waived by all persons for whose benefit those conditions were intended.

(b) A partnership agreement may provide rights to any person, including a person who is not a party to the partnership agreement, to the extent set forth in the partnership agreement.

(c) The obligations of a partnership and its partners to a person in the person's capacity as a transferee or dissociated partner are governed by the partnership agreement. A transferee and a dissociated partner are bound by the partnership agreement.

(d) If a writing that has been delivered by a partnership for filing in accordance with Chapter 1 and has become effective conflicts with a provision of the partnership agreement:

- (1) the partnership agreement prevails as to partners, dissociated partners, and transferees; and
- (2) the writing prevails as to other persons to the extent they reasonably rely on the writing.

Comment

This Section was derived from Section 10A-9A-1.10 of the Alabama Limited Partnership Law and Section 10A-5A-1.10 of the Alabama Limited Liability Company Law.

§ 10A-8A-1.11. Required information.

A partnership shall maintain the following information:

- (1) A current list of the full name and last known street and mailing address of each partner, in alphabetical order.
- (2) Copies of any filed statement.
- (3) Copies of the partnership's federal, state, and local income tax returns and reports, if any, for the three most recent years.

- (4) Copies of the then effective partnership agreement and any amendment thereto, in each case to the extent made in a writing.
- (5) Copies of any financial statement of the partnership for the three most recent years.
- ~~(6) Copies of any writing made by the partnership during the past three years of any approval or consent given by or taken of any partner pursuant to this chapter or the partnership agreement.~~
- (7) Unless contained in a partnership agreement made in a writing, a writing stating:
 - (A) the amount of cash, and a description and statement of the agreed value of the other benefits, contributed and agreed to be contributed by each partner;
 - (B) the times at which, or events on the happening of which, any additional contributions agreed to be made by each partner are to be made; and
 - (C) any events upon the happening of which the partnership is to be dissolved and its business or not for profit activity wound up.

Comment

This Section was derived from Section 10A-9A-1.11 of the Alabama Limited Partnership Law. It is appropriate to require a partnership to maintain the records listed in Section 10A-8A-1.11, however, those records may be located at various locations. For example, the financial statements and tax returns might be maintained at the office of a partnership's accountant, while the various statements and partnership agreement might be maintained at the offices of the partnership's attorney. Section 10A-8A-4.10 govern access to the information required by this Section, as well as to other information pertaining to a partnership.

~~Subparagraph (6) does not require a partnership to make a writing of approvals or consents given. However, if the partnership has made such a writing, this paragraph requires that the partnership maintain the writing for three years. The requirement applies to any writing made by the partnership, not just to writings made contemporaneously with the giving of approval or consent.~~

Subparagraph (76) states that information is “contained in a partnership agreement made in a “writing” only to the extent that the information is “integrated” into a writing and, in that memorialized form, has been consented to as part of the partnership agreement. This subparagraph is not a statute of frauds provision. For example, failure to comply with paragraph (76)(A) or (B) does not render unenforceable an oral promise to make a contribution—but see Section 10A-8A-4.04(e). Likewise, failure to comply with paragraph (76)(C) does not invalidate an oral term of the partnership specifying “events upon the happening of which the partnership is to be dissolved and its business or not for profit activity wound up.” See also Section 10A-8A-8.01(3). However, the mere fact that a partnership maintains a record in purported compliance with paragraph (76)(A) or (B) does not prove that a person has actually promised to make a contribution. Likewise, the mere fact that a partnership maintains a record in purported compliance with paragraph (76)(C) does not prove that the partnership agreement actually includes the specified events as causes of dissolution. Consistent with the partnership agreement’s plenary power to structure and regulate the relations of the partners *inter se*, a partnership agreement can impose “made in a writing” requirements which render unenforceable oral promises to make contributions or oral understandings as to “events upon the happening of which the partnership is to be dissolved.”

§ 10A-8A-1.12. Transactions of partner with partnership.

A partner may lend money to and transact other business or not for profit activity with the partnership and has the same rights and obligations with respect to the loan or other transaction as a person that is not a partner.

Comment

This Section was derived from Section 10A-9A-1.12 of the Alabama Limited Partnership Law. This Section has no impact on a partner’s duty under Section 10A-8A-4.11(b)(2) (duty of loyalty includes refraining from acting as or for an adverse party) and means rather that this Chapter does not discriminate against a creditor of a partnership that happens also to be a partner. See, e.g., BT-I v. Equitable Life Assurance Society of the United States, 75 Cal. App. 4th 1406, 1415, 89 Cal. Rptr. 2d 811, 814 (Cal. App. 4 Dist. 1999). and SEC v. DuPont, Homsey & Co., 204 F. Supp. 944, 946 (D. Mass. 1962), vacated and remanded on other grounds, 334 F.2d 704 (1st Cir. 1964). This Section does not, however, override other law, such as fraudulent transfer or conveyance acts.

§ 10A-8A-1.13. Consent and proxies of partners.

Action requiring the consent of partners under this chapter may be taken without a meeting, and a partner may appoint a proxy to consent or otherwise act for the partner by signing a writing of appointment, either personally or by the partner's attorney in fact.

Comment

This Section was derived from Section 10A-9A-1.14 of the Alabama Limited Partnership Law and Section 10A-5A-4.07(c) of the Alabama Limited Liability Company Law. This Chapter imposes no meeting requirement and does not distinguish among oral, ~~writing~~written, express, and tacit approval or consent. The partnership agreement may establish such requirements and make such distinctions.

Article 2

Formation of Partnership; Property

- § 10A-8A-2.01. Formation of partnership.
- § 10A-8A-2.02. Statement of partnership; statement of not for profit partnership
- § 10A-8A-2.03. Execution, filing, and recording of statements.
- § 10A-8A-2.04. Partnership property.
- § 10A-8A-2.05. When property is partnership property.

§ 10A-8A-2.01. Formation of partnership.

(a) Except as otherwise provided in subsection (b), the association of two or more persons:

- (i) to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership; ~~and~~ or
- (ii) to carry on any ~~activity~~ activity not for profit activity, forms a partnership when (A) the persons intend to form a partnership and (B) the persons deliver to the Secretary of State for filing a statement of not for profit partnership in accordance with Section 10A-8A-2.02(b) setting forth their intention to form a partnership to carry on a not for profit activity.

(b) An association formed under a statute other than this chapter, a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this chapter.

(c) In determining whether a partnership is formed under Section 10A-8A-2.01(a)(i), the following rules apply:

- (1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a

partnership, even if the co-owners share profits made by the use of the property.

- (2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.
- (3) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment:
 - (i) of a debt by installments or otherwise;
 - (ii) for services as an independent contractor or of wages or other compensation to an employee;
 - (iii) of rent;
 - (iv) of an annuity or other retirement or health benefit to a beneficiary, representative, or designee of a deceased or retired partner;
 - (v) of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or
 - (vi) for the sale of the goodwill of a business or other property by installments or otherwise.

Comment

This Section was generally derived from Prior Partnership Law. Subsection (a)(i) sets forth the general rules for forming a partnership for a business which are generally informal requirements which do not require intent. Subsection (a)(ii) was derived from Del §15-202(a)(ii) and anticipates that practitioners may wish to use a partnership structure in not for profit settings. In this event, a more formalistic requirement is set forth requiring not only intent but also the filing of a statement of not for profit partnership as set forth in Section 10A-8A-2.02.

This Section deletes the ~~former~~ Prior Partnership Law's statement that excluded "any association existing in Alabama prior to January 1, 1972," since it was determined that those partnerships, if they still exist, were formed under common law and not under this statute or any predecessor statute, and thus the language was confusing and surplusage.

§ 10A-8A-2.02. Statement of partnership; statement of not for profit partnership.

(a) A partnership other than a partnership that has an effective statement of not for profit partnership or an effective statement of limited liability partnership on file with the Secretary of State may deliver to the Secretary of State for filing a statement of partnership for the purpose of having its partnership agreement governed by the laws of this state in accordance with Section 10A-8A-1.06(d) and providing notice of its existence in accordance with Section 10A-8A-1.03(d)(1). A statement of partnership must contain all of the following:

- (1) the name of the partnership which name must comply with Article 5 of Chapter 1;
- (2) the date that the partnership was formed pursuant to, or became governed by, the laws of this state;
- (3) the street, and mailing, ~~if different,~~ address of its principal office;
- (4) the street and mailing address of a registered office and the name of the registered agent at that office for service of process in this state which the partnership shall be required to maintain;
- (5) a statement that the partnership was formed for the purpose of carrying out a for profit business;
- (6) a statement that the partnership has two or more partners; ~~and the names, street and mailing addresses of at least two partners;~~
- (7) ~~a brief description of the for profit business to be carried on by the~~

~~partnership; and~~

- (87) a statement that the partnership agreement is governed by the laws of this state, and if the partnership agreement is a written partnership agreement, a declaration that the written partnership agreement has a provision stating that the partnership agreement is governed by the laws of this state.

(b) A partnership other than a partnership that has an effective statement of partnership or an effective statement of limited liability partnership on file with the Secretary of State may deliver to the Secretary of State for filing a statement of not for profit partnership for the purpose of setting forth the partners' intention to form a partnership to carry on a not for profit activity in accordance with Section 10A-8A-2.01(a)(ii), having its partnership agreement governed by the laws of this state in accordance with Section 10A-8A-1.06(d), and providing notice of its existence in accordance with Section 10A-8A-1.03(d)(2). A statement of not for profit partnership must contain all of the following:

- (1) the name of the partnership which name must comply with Article 5 of Chapter 1;
- (2) the date that the partnership was formed pursuant to, or became governed by, the laws of this state;
- (3) the street, and mailing, ~~if different,~~ address of its principal office;
- (4) the street and mailing address of a registered office and the name of the registered agent at that office for service of process in this state which the partnership shall be required to maintain;
- (5) a statement that the partnership was formed for the purpose of carrying out a not for profit activity in accordance with Section 10A-8A-2.01(a)(ii);

- (6) a statement that the partnership has two or more partners; ~~and the names, street and mailing addresses of at least two partners;~~
- ~~(7) a brief description of the not for profit activity to be carried on by the partnership; and~~
- (87) a statement that the partnership agreement is governed by the laws of this state, and if the partnership agreement is a written partnership agreement, a declaration that the written partnership agreement has a provision stating that the partnership agreement is governed by the laws of this state.

(c) A statement of partnership and a statement of not for profit partnership may be amended or restated from time to time in accordance with Section 10A-1-4.26.

(d) A statement of partnership and a statement of not for profit partnership shall be executed by two or more partners authorized to execute the statement of partnership or statement of not for profit partnership.

(e) A statement of partnership and a statement of not for profit partnership shall be accompanied by a fee for the Secretary of State in the amount prescribed by Section 10A-1-4.31.

(f) If a partnership complies with this Section, the Secretary of State shall file the statement of partnership or the statement of not for profit partnership, as applicable.

(g) A statement of partnership or a statement of not for profit partnership, as applicable, take effect as determined under Article 4 of Chapter 1.

(h) A partnership that has filed a statement of partnership ~~or a statement of not for profit partnership, as applicable,~~ is for all purposes the same entity that existed before the statement of partnership ~~or statement of not for profit partnership, as applicable,~~ was filed and continues to be a partnership under the laws of this state.

(i) ~~The Secretary of State may provide a form statement of partnership and a statement of not for profit partnership.~~

(j) A statement of partnership and a statement of not for profit partnership are filing instruments for the purposes of Chapter 1.

Comment

This Section is new and provides the mechanisms to allow partnerships to file statements with the Secretary of State declaring either a business partnership or a not for profit partnership. While the statement of partnership is purely voluntary, the statement of not for profit is a mandatory filing. Prior to this section, it was not possible for a partnership to have its existence known to the Secretary of State, which has made conversions and mergers of partnerships difficult. Thus, prior to any conversion or merger, under this Chapter, a statement of partnership, statement of not for profit partnership or a statement of limited liability partnership must be on file with the Secretary of State. Chapter 1 was modified to provide name requirements for partnerships filing a statement of partnership or a statement of not for profit partnership. Chapter 1 already had a name requirement for limited liability partnerships.

§ 10A-8A-2.03. Execution, filing, and recording of statements.

(a) A statement may be delivered to the Secretary of State for filing. A certified copy of a statement of authority that was filed by the Secretary of State may be delivered to a judge of probate for filing in accordance with Section 10A-8A-3.03(f) and (g). A certified copy of a statement that is filed in an office in another jurisdiction may be delivered to the Secretary of State for filing, and once filed by the Secretary of State, may, in the case of a statement of authority which is intended to have a similar effect to that of a statement of authority under Section 10A-8A-3.03(f) or (g), be delivered to the judge of probate for filing in accordance with Section 10A-8A-3.03(f) or (g). Either filing has the effect provided in this chapter with respect to partnership property located in or transactions that occur in this state.

(b) A certified copy of statement of authority filed in the office of the Secretary of State and delivered to the judge of probate for filing in the county or counties in which the

partnership has real property shall, without more, have the effect of a recorded statement under this chapter with respect to real property located in that county or those counties. Any statement of authority recorded under the preceding sentence that is not a certified copy of a statement of authority filed in the office of the Secretary of State does not have the effect provided for recorded statements of authority in this chapter.

(c) Except as specifically provided otherwise in this chapter, a statement filed by a partnership must be executed by at least two partners. Other statements must be executed by a partner or other person authorized by this chapter. An individual who executes a statement as, or on behalf of, a partner or other person named as a partner in a statement shall personally declare under penalty of perjury that the contents of the statement are accurate.

(d) Except as specifically provided otherwise in this chapter, a person authorized by this chapter to file a statement may amend or cancel the statement by filing an amendment or cancellation that names the partnership, identifies the statement, and states the substance of the amendment or cancellation.

(e) A person who files a statement pursuant to this section shall promptly send a copy of the statement to every ~~nonfiling~~ partner and to any other person named as ~~a partner~~ in the statement. Failure to send a copy of a statement to a partner or other person does not limit the effectiveness of the statement as to a person not a partner.

(f) The Secretary of State may collect a fee for filing or providing a certified copy of a statement in the amount prescribed in Section 10A-1-4.31. The office of the judge of probate may collect a fee for recording a certified copy of statement in the amount prescribed in Section 10A-1-4.31.

(g) Each statement permitted or required under this chapter to be delivered for filing to the Secretary of State or judge of probate is a filing instrument.

Comment

One of the innovations of this Chapter is the provision of a mechanism for filing various partnership “statements” to be filed with the Secretary of State consistent with the practice in most states. This works well due to the fact that most of the statements allowed in this Chapter are not local in nature and are intended to be notice to all instead.

§ 10A-8A-2.04. Partnership property.

Property acquired by a partnership is property of the partnership and not of the partners individually.

Comment

All property acquired by a partnership, by transfer or otherwise, becomes partnership property and belongs to the partnership as an entity, rather than to the individual partners. This Section does not address when property is “acquired by” the partnership. That issue is dealt with in Section 10A-8A-2.05. It should be noted that the definition of “property” is found in Section 10A-1-1.03, which states that ~~that~~ “property” includes all property, whether real, personal, or mixed, or tangible or intangible, or any right or interest therein.

The rights of exemptions, allowances, or rights of a partner’s spouse, heirs, or next of kin inure to the property of the partners, and not to partnership property, as no partner, partner’s spouse, heirs or next of kin have any right to the property of the partnership itself. Rather, the only interest that a partner has that is transferable is that partner’s transferable interest. As an example, under a predecessor of this Section, the court ruled that a former husband had no individual interest in property owned by his partnership, and it thus never became marital property; as the partnership deeded an interest in the property solely to his former wife, it became her separate property under the parties’ antenuptial agreement, regardless of the source of funds she used to acquire it. Peden v. Peden, 972 So. 2d 106, 2007 Ala. Civ. App. LEXIS 307 (Ala. Civ. App. 2007).

§ 10A-8A-2.05. When property is partnership property.

- (a) Property is partnership property if acquired in the name of:
 - (1) the partnership; or

(2) one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership but without an indication of the name of the partnership.

(b) Property is acquired in the name of the partnership by a transfer to:

(1) the partnership in its name; or

(2) one or more partners in their capacity as partners in the partnership, if the name of the partnership is indicated in the instrument transferring title to the property.

(c) Property is presumed to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership or of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership.

(d) Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property, even if used for partnership purposes.

Comment

This Section sets forth the rules for determining whether property is owned by the partnership or by an individual partner, and for determining when property is acquired by the partnership and hence becomes partnership property. The rules govern the acquisition of personal as well as real property.

Subsection (a) governs when property is "partnership property," and Subsection (b) clarifies when property is acquired "in the name of the partnership." The concept of record title is emphasized, although the term itself is not used. Titled personal property, as well as all transferable interests in real property acquired in the name of the partnership, are covered by this section.

Property becomes partnership property if acquired (1) in the name of the partnership or (2) in the name of one or more of the partners with an indication in the instrument transferring title of either (i) their capacity as partners or (ii) of the existence of a partnership, even if the name of the partnership is not indicated. Property acquired “in the name of the partnership” includes property acquired in the name of one or more partners in their capacity as partners, but only if the name of the partnership is indicated in the instrument transferring title.

Property transferred to a partner is partnership property, even though the name of the partnership is not indicated, if the instrument transferring title indicates either (i) the partner’s capacity as a partner or (ii) the existence of a partnership. This is consistent with the entity theory of partnership and resolves the troublesome issue of a conveyance to fewer than all the partners but which nevertheless indicates their partner status.

Ultimately, it is the intention of the partners that controls whether property belongs to the partnership or to one or more of the partners in their individual capacities, at least as among the partners themselves. This Section sets forth two rebuttable presumptions that apply when the partners have failed to express their intent.

First, under Subsection (c), property purchased with partnership funds is presumed to be partnership property, notwithstanding the name in which title is held. The presumption is intended to apply if partnership credit is used to obtain financing, as well as the use of partnership cash or property for payment. Unlike the rule in Subsection (b), under which property is deemed to be partnership property if the partnership’s name or the partner’s capacity as a partner is disclosed in the instrument of conveyance, Subsection (c) raises only a presumption that the property is partnership property if it is purchased with partnership assets.

That presumption is also subject to an important caveat. Under Section 10A-8A-3.02(b), partnership property held in the name of individual partners, without an indication of their capacity as partners or of the existence of a partnership, that is transferred by the partners in whose name title is held to a purchaser without knowledge that it is partnership property is free of any claims of the partnership.

Second, under Subsection (d), property acquired in the name of one or more of the partners, without an indication of their capacity as partners and without use of partnership funds or credit, is presumed to be the partners’ separate property, even if used for partnership purposes. In effect, it is presumed in that case that only the use of the property is contributed to the partnership.

Generally, under this Chapter, partners and third parties dealing with partnerships will be able to rely on the record to determine whether property is owned by the partnership. The exception is property purchased with partnership funds without any reference to the partnership in the title documents. The inference concerning the partners’ intent from the use of partnership funds outweighs any inference from the state of the title, subject to the overriding reliance interest in the case of a purchaser without notice of the partnership’s interest. This allocation of risk should encourage the partnership to eliminate doubt about ownership by putting title in the partnership.

Article 3

Relations of Partners to Persons Dealing with Partnership

- § 10A-8A-3.01. Partner agent of partnership.
- § 10A-8A-3.02. Transfer of partnership property.
- § 10A-8A-3.03. Statement of authority.
- § 10A-8A-3.04. Statement of denial.
- § 10A-8A-3.05. Partnership liable for partner's actionable conduct.
- § 10A-8A-3.06. Partner's liability.
- § 10A-8A-3.07. Actions by and against partnership and partners.
- § 10A-8A-3.08. Liability of purported partner.

§ 10A-8A-3.01. Partner agent of partnership.

Subject to the effect of a statement of authority under Section 10A-8A-3.03:

- (1) Each partner is an agent of the partnership for the purpose of its business or not for profit activity. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or not for profit activity, or business or not for profit activity of the kind carried on by the partnership, binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had notice ~~of~~ that the partner lacked authority.
- (2) An act of a partner which is not apparently for carrying on in the ordinary course the partnership business or not for profit activity, or business or not for profit activity of the kind carried on by the partnership, binds the partnership only if the act was authorized by the other partners.

Comment

This Section sets forth a partner's power, as an agent of the ~~firm~~partnership, to bind the partnership entity to third parties. The rights of the partners among themselves, including the right to restrict a partner's authority, are governed by the partnership agreement and by Section 10A-8A-4.01.

The agency rules set forth in this Section are subject to an important qualification. They may be affected by the filing or recording of a statement of authority. The legal effect of filing or recording a statement of authority is set forth in Section 10A-8A-3.03.

Subsection (1) declares that each partner is an agent of the partnership and that, by virtue of partnership status, each partner has apparent authority to bind the partnership in ordinary course transactions. The effect of Subsection (1) is to characterize a partner as a general managerial agent having both actual and apparent authority co-extensive in scope with the firm's ordinary business or not for profit activity, at least in the absence of a contrary partnership agreement.

Subsection (1) clarifies that a partner's apparent authority includes acts for carrying on in the ordinary course the "business or not for profit activity of the kind carried on by the partnership," ~~not just the business or activity of the particular partnership in question.~~ Further, Subsection (1) provides that a person who has received notice of a partner's lack of authority is also bound. The meaning of "notice" is explained in Section 10A-8A-1.03. Thus, the partnership may protect itself from unauthorized acts by giving notice of a restriction on a partner's authority to a person dealing with that partner. Notice may be effective upon delivery, whether or not it actually comes to the other person's attention. To that extent, the risk of lack of authority is shifted to those dealing with partners.

Subsection (2) makes it clear that the partnership is bound by a partner's actual authority, even if the partner has no apparent authority. Section 10A-8A-4.01(i) requires the unanimous consent of the partners for a grant of authority outside the ordinary course of business or not for profit activity, unless the partnership agreement provides otherwise. Under general agency principles, the partners can subsequently ratify a partner's unauthorized act.

§ 10A-8A-3.02. Transfer of partnership property.

- (a) Partnership property may be transferred as follows:
 - (1) Subject to the effect of a statement of authority under Section 10A-8A-3.03, partnership property held in the name of the partnership may be

transferred by an instrument of transfer executed by a partner in the partnership name.

- (2) Partnership property held in the name of one or more partners with an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, but without an indication of the name of the partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.
- (3) Partnership property held in the name of one or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.

(b) A partnership may recover partnership property from a transferee only if it proves that execution of the instrument of initial transfer did not bind the partnership under Section 10A-8A-3.01 and:

- (1) as to a subsequent transferee who gave value for property transferred under subsection (a)(1) and (2), proves that the subsequent transferee knew or had received notice that the person who executed the instrument of initial transfer lacked authority to bind the partnership; or
- (2) as to a transferee who gave value for property transferred under subsection (a)(3), proves that the transferee knew or had notice that the property was

partnership property and that the person who executed the instrument of initial transfer lacked authority to bind the partnership.

(c) A partnership may not recover partnership property from a subsequent transferee if the partnership would not have been entitled to recover the property, under subsection (b), from any earlier transferee of the property.

Comment

This Section provides rules for the transfer and recovery of partnership property. The language is adapted in part from Section 14-8-10 of the Georgia partnership statute.

Subsection (a)(1) deals with the transfer of partnership property held in the name of the partnership and Subsection (a)(2) with property held in the name of one or more of the partners with an indication either of their capacity as partners or of the existence of a partnership. Subsection (a)(3) deals with partnership property held in the name of one or more of the partners without an indication of their capacity as partners or of the existence of a partnership. Like the general agency rules in Section 10A-8A-3.01, the power of a partner to transfer partnership property under Subsection (a)(1) is subject to the effect under Section 10A-8A-3.03 of the filing or recording of a statement of authority. These rules are intended to foster reliance on record title.

Subsection (b) deals with the right of the partnership to recover partnership property transferred by a partner without authority. Subsection (b)(1) deals with the recovery of property held in either the name of the partnership or the name of one or more of the partners with an indication of their capacity as partners or of the existence of a partnership, while Subsection (b)(2) deals with the recovery of property held in the name of one or more persons without an indication of their capacity as partners or of the existence of a partnership.

In either case, a transfer of partnership property may be avoided only if the partnership proves that it was not bound under Section 10A-8A-3.01 by the execution of the instrument of initial transfer. Under Section 10A-8A-3.01, the partnership is bound by a transfer in the ordinary course of business or not for profit activity, unless the transferee actually knew or had notice of the partner's lack of authority. See Section 10A-8A-1.03. The reference to Section 10A-8A-3.01, rather than Section 10A-8A-3.01(1), is intended to clarify that a partner's actual authority is not revoked by Section 10A-8A-3.02.

The burden of proof is on the partnership to prove the partner's lack of authority and, in the case of a subsequent transferee, the transferee's knowledge or notice thereof. Thus, even if the transfer to the initial transferee could be avoided, the partnership may not recover the property from a subsequent purchaser or other transferee for value unless it also proves that the subsequent transferee knew or had notice of the partner's lack of authority with respect to the initial transfer. Since knowledge is required, rather than notice, a remote purchaser has no duty

to inquire as to the authority for the initial transfer, even if ~~hesuch~~ purchaser knows it was partnership property.

The burden of proof is on the transferee to show that value was given. Value, as used in this context, is synonymous with valuable consideration and means any consideration sufficient to support a simple contract.

The burden of proof on all other issues is allocated to the partnership because it is generally in a better position than the transferee to produce the evidence. Moreover, the partnership may protect itself against unauthorized transfers by ensuring that partnership real property is held in the name of the partnership and that a statement of authority is recorded specifying any limitations on the partners' authority to convey real property.

Subsection (b)(2) provides that partners who hold partnership property in their own names, without an indication in the record of their capacity as partners or of the existence of a partnership, may transfer good title to a transferee for value without knowledge or notice that it was partnership property. To recover the property under this subsection, the partnership has the burden of proving that the transferee knew or had notice of the partnership's interest in the property, as well as of the partner's lack of authority for the initial transfer.

Subsection (c) provides that property may not be recovered by the partnership from a remote transferee if any intermediate transferee of the property would have prevailed against the partnership.

§ 10A-8A-3.03. Statement of partnership Authority.

(a) A partnership may deliver to the Secretary of State for filing a statement of authority, which:

(1) must include the name of the partnership and:

(A) if the partnership has not filed a statement of partnership, a statement of not for profit partnership, or a statement of limited liability partnership, (i) the street and mailing addresses of its principal office and (ii) if the Secretary of State has assigned a unique identifying number or other designation to the partnership, that number or designation; or

(B) if the partnership has filed a statement of partnership, a statement of

not for profit partnership, or a statement of limited liability partnership, ~~the name and~~(i) the street address and mailing ~~addresses~~address of its principal office, (ii) the name, street address, and mailing address of its registered agent, and (iii) the unique identifying number or other designation assigned to the partnership by the Secretary of State.

- (2) with respect to any position that exists in or with respect to the partnership, may state the authority, or limitations on the authority, of all persons holding the position to:
 - (A) sign an instrument transferring real property held in the name of the partnership; or
 - (B) enter into other transactions on behalf of, or otherwise act for or bind, the partnership; and
- (3) may state the authority, or limitations on the authority, of a specific person to:
 - (A) sign an instrument transferring real property held in the name of the partnership; or
 - (B) enter into other transactions on behalf of, or otherwise act for or bind, the partnership.

(b) To amend or cancel a statement of authority filed by the Secretary of State, a partnership must deliver to the Secretary of State for filing an amendment or cancellation stating:

- (1) the name of the partnership;
- (2) if the partnership has not filed a statement of partnership, a statement of not

for profit partnership, or a statement of limited liability partnership, the street and mailing addresses of the partnership's principal office;

- (3) if the partnership has filed a statement of partnership, a statement of not for profit partnership, or a statement of limited liability partnership, the name and street and mailing addresses of its registered agent;
- (4) the date the statement of authority being affected became effective; and
- (5) the contents of the amendment or a declaration that the statement of authority is canceled.

(c) A statement of authority affects only the power of a person to bind a partnership to persons that are not partners.

(d) Subject to subsection (c) and Section 10A-8A-1.03(d)(3) and except as otherwise provided in subsections (f), (g), and (h), a limitation on the authority of a person or a position contained in an effective statement of authority is not by itself evidence of any person's knowledge or notice of the limitation.

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

- (1) the person has knowledge to the contrary;
- (2) the statement of authority has been canceled or restrictively amended under subsection (b); or
- (3) a limitation on the grant is contained in another statement of authority that became effective after the statement of authority containing the grant became effective.

(f) Subject to subsection (c), an effective statement of authority that grants authority to transfer real property held in the name of the partnership, a certified copy of which statement of authority is recorded in the office of the judge of probate in the county in which the real property is located, is conclusive in favor of a person that gives value in reliance on the grant without knowledge to the contrary, except to the extent that when the person gives value:

- (1) the statement of authority has been canceled or restrictively amended under subsection (b), and a certified copy of the cancellation or restrictive amendment has been recorded in the office of the judge of probate in the county in which the real property is located; or
- (2) a limitation on the grant is contained in another statement of authority that became effective after the statement of authority containing the grant became effective, and a certified copy of the later-effective statement is recorded in the office of the judge of probate in the county in which the real property is located.

(g) Subject to subsection (c), if a certified copy of an effective statement of authority containing a limitation on the authority to transfer real property held in the name of a partnership is recorded in the office of the judge of probate in the county in which the real property is located, all persons are deemed to know of the limitation with respect to the real property located in that county.

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

(i) After a statement of dissolution becomes effective, a partnership may deliver to the

Secretary of State for filing and, if appropriate, may record a statement of authority that is designated as a post-dissolution statement of authority. The statement operates as provided in subsections (f) and (g).

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

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

Comment

This Section is divided into two parts: (i) statements pertaining to the power to transfer interests in the partnership real property; and (ii) statements pertaining to other matters. In the latter part, statements are filed only in the records of the Secretary of State and operate only to the extent the statements are actually known and relied on by a third party.

As to interests in real property, in contrast, this section: (i) requires double filing—with the Secretary of State and in the appropriate office of judge of probate; and (ii) provides for constructive knowledge of ~~statements~~statement's limiting authority. Thus, a properly filed and recorded statement can protect the partnership. Experience suggests that statements of authority will most often be used in connection with transactions in real estate.

By its terms, this Section applies only to domestic partnerships. ~~The section refers throughout to “partnership,” which means a domestic partnership.~~

Subsection (a)(2) permits a statement to designate authority by position (or office) rather than by specific person, thus avoiding the need to file anew whenever a new person assumes the position or the office. This type of a statement will enable partnerships to provide evidence of ongoing power to enter into transactions without having to disclose to third parties the entirety of the partnership agreement.

Here and elsewhere in the section, the phrase “real property” includes all types of interests in real property, such as mortgages, easements, etc.

Subsection (a)(2)(A) and (a)(3)(A) state that the authority to “sign” an instrument includes the authority to commit the partnership to the transfer reflected in the agreement. See Subsection (f) (referring not merely to signing but also to “an effective statement of authority that grants authority to transfer real property”).

Subsection (c) expresses a very important limitation – i.e., that this section’s rules do not operate ~~viz a viz~~ á vis partners. For partners, the partnership agreement is controlling. However, like any other record delivered for filing on behalf of a partnership, a statement of authority might be some evidence of the contents of the partnership agreement.

The phrase “by itself” in Subsection (d) is important because the existence of a limitation of authority could be evidence if, for example, the person in question reviewed the public record at a time when the limitation was of record.

Subsection (e)(2) by its terms does not affect a claim of lingering apparent authority. A person could: (i) assert knowledge of a statement of authority as the statement existed before a cancellation or restrictive amendment; and (ii) characterize the original statement as a manifestation of authority traceable to the partnership. RESTATEMENT (THIRD) OF AGENCY § 3.03, cmt. b (2006) (“Apparent authority is present only when a third party’s belief is traceable to manifestations of the principal.”).

However, for apparent authority to exist, the purported agent must reasonably appear to be authorized. RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006) (stating that apparent authority can only exist when “a third party reasonably believes the actor has authority to act on behalf of the principal”). Given the possibility of cancellation or restrictive amendment, how reasonable can it be for a person to know of a statement of authority, let time pass, and then rely on the statement without re-checking the public record?

Subsections (f) through (h): (i) pertain to transactions in real property; (ii) provide a mechanism by which authority to transfer a partnership’s real property can be made to appear in the real estate records; and (iii) thus address the principal concerns (raised by real estate lawyers).

Subsection (f) provides a sword for a vendee of real property. If the vendee has “give[n] value in reliance on the grant without knowledge to the contrary,” the statement of authority protects the vendee against claims that contradict the grant.

Subsection (g) provides a shield for the partnership as alleged vendor. If a vendee’s claim contradicts the stated limitation, constructive notice knowledge (“deemed to know”) defeats the claim even if the vendee gave value and lacked actual knowledge.

Subsection (h) integrates statements of dissolution, Sections 10-8A-8.02 and 10A-8A-8.03, into the operation of this section.

Subsection (i) permits a partnership to use statements of authority during winding up. As an additional protection for third parties, a statement must be “designated as a post-dissolution statement of authority” to be effective under this provision.

§ 10A-8A-3.04. Statement of denial.

A person named in a filed statement of authority granting that person authority may deliver to the Secretary of State for filing a statement of denial that:

- (1) provides the name of the partnership and the caption of the statement of authority to which the statement of denial pertains; and
- (2) denies the grant of authority.

A statement of denial is a limitation on authority as provided in Section 10A-8A-3.03.

Comment

A person whose powers are delineated in the public record by another person should have the right to dissent from that delineation. This Section takes an “all or nothing” approach; a person may not deny in part and confirm in part. Section 10A-8A-3.08(c) makes clear that a person does not become a partner solely because he is named as a partner in a statement of authority filed by another person.

§ 10A-8A-3.05. Partnership liable for partner’s actionable conduct.

(a) A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business or not for profit activity of the partnership or with authority of the partnership.

(b) If, in the ordinary course of business or not for profit activity of the partnership’s business or not for profit activity, or while acting with authority of the partnership, a partner receives or causes the partnership to receive money or property of a person not a partner, and the money or property is misapplied by a partner, the partnership is liable for the loss.

Comment

Subsection (a) imposes liability on the partnership for the wrongful acts of a partner acting in the ordinary course of the partnership’s business or not for profit activity or otherwise within the partner’s authority. This is intended to permit a partner to sue the partnership on a tort

or other theory during the term of the partnership, rather than being limited to the remedies of dissolution and an accounting. ~~The~~ Subsection (a) covers no-fault torts by the phrase, “or other actionable conduct.”

The partnership is liable for the actionable conduct or omission of a partner acting in the ordinary course of its business or not for profit activity or “with the authority of the partnership.” This is intended to include a partner’s apparent, as well as actual, authority.

Subsection (b) makes it clear that under the circumstances described in that subsection, in the absence of actual authority, liability of the partnership attaches for money or property received from a third person by a partner and misapplied only if the ~~activity~~ action of the partner was within the ordinary course of business or not for profit activity of the partnership.

§ 10A-8A-3.06. Partner’s liability.

(a) Except as otherwise provided in subsection (b) or subsection (c), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

(b) A person admitted as a partner into an existing partnership is not personally liable for any partnership obligation incurred before the person’s admission as a partner.

(c) Except as set forth in subsection (b) of Section 10A-8A-10.02, a debt, obligation, or other liability of a partnership incurred while the partnership is a limited liability partnership is solely the debt, obligation, or other liability of the limited liability partnership. Except as set forth in subsection (b) of Section 10A-8A-10.02, a partner in a limited liability partnership is not personally liable or accountable, directly or indirectly, including by way of indemnification, contribution, assessment, or otherwise, for debts, obligations, and liabilities of, or chargeable to, the limited liability partnership, or another partner or partners, whether arising in tort, contract, or otherwise, solely by reason of being such a partner or acting, or omitting to act, in such capacity, which such debts, obligations and liabilities occur, are incurred or are assumed while the partnership is a limited liability partnership. This subsection applies (1) despite anything

inconsistent in the partnership agreement that existed immediately before the partnership becomes a limited liability partnership and (2) regardless of the dissolution of the limited liability partnership.

(d) Subsection (c) of this section shall not affect the liability of a limited liability partnership to the extent of partnership assets for partnership debts, obligations and liabilities.

(e) A partner in a limited liability partnership is not a necessary or proper party to a proceeding by or against a limited liability partnership, the object of which is to recover any debts, obligations, or liabilities of, or chargeable to, the limited liability partnership, unless the partner is personally liable therefor under subsection (b) of Section 10A-8A-10.02.

Comment

In a partnership other than a limited liability partnership, all partners are personally liable for the debts, liabilities and other obligations of the partnership, merely on account of their status as partners.

The limited liability partnership (“LLP”) provisions beginning with Subsection (c) creates a liability shield that severs the connection between partner status and personal liability for partnership debts, obligations and liabilities. The LLP shield is identical to the shield created by state law for Alabama limited liability companies with two differences. First, the LLP shield arises upon the filing of a statement of limited liability partnership under Section 10A-8A-10.01 which could occur after the partnership had been in operation for some time, and disappears if that statement is canceled. However, this Chapter has removed the problems of the LLP shield lapsing on account of a mere technicality that could occur under the Prior Partnership Law. In addition, this Chapter now authorizes the formation of an LLP rather than requiring a partnership to be in existence prior to filing the statement of limited liability partnership. Second, the LLP shield does not necessarily cover all claims made against partners on account of their enterprise. The LLP shield applies only to claims that occur or are incurred while the partnership had a statement of limited liability partnership in effect. A statement of limited liability partnership therefore cannot protect against claims already extant when the statement is filed or that come into existence after the statement is cancelled.

It is the intent of the LLP provisions that if a contract is entered into prior to the partnership filing its statement of limited liability partnership, the liability of the partners shall be determined without regard to the subsequent filing of the statement of limited liability partnership. Similarly, if a tort occurs prior to the partnership’s statement of limited liability partnership, the liability of the partners shall be determined without regard to the subsequent statement of limited liability partnership. On the other hand, if a contract is entered into when a partnership has a

statement of limited liability partnership in effect or a tort occurs while a partnership has a statement of limited liability partnership in effect, the subsequent cancellation of the statement of limited liability partnership shall not affect the LLP shield, but rather the LLP shield shall remain effective as to such contract or such tort.

Subsection (d) of the Prior Partnership Law was deleted as it was surplusage in that notwithstanding the provisions of Subsection (c), a partner may, under Section 10A-8A-1.08 agree to be personally liable, directly or indirectly, by way of indemnification, contribution, assessment, or otherwise for any or all of the debts, obligations, or liabilities of a limited liability partnership incurred while the partnership is a limited liability partnership.

Subsection (d) makes it clear that assets of a limited liability partnership shall stand for the partnership's debts, obligations and liabilities.

Subsection (e) clarifies the necessary parties in any proceeding against a limited liability partnership. The proper party will generally be the partnership unless a partner is personally liable under Subsection (c) or under Subsection (b) of Section 10A-8A-10.02.

§ 10A-8A-3.07. Actions by and against partnership and partners.

- (a) A partnership may sue and be sued in the name of the partnership.
- (b) An action may be brought against the partnership and, except as provided in Section 10A-8A-3.06, against any or all of the partners in the same action or in separate actions.
- (c) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner.
- (d) A judgment creditor of a partner may not levy execution against the assets of the partner to satisfy a judgment based on a claim against the partnership unless the claim is for a debt, obligation, or liability for which the partner is personally liable as provided in Section 10A-8A-3.06 and either:
 - (1) a judgment based on the same claim has been obtained against the partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part;

- (2) the partnership is a debtor in bankruptcy;
- (3) the partner has agreed that the creditor need not exhaust partnership assets;
- (4) a court grants permission to the judgment creditor to levy execution against the assets of a partner based on a finding that partnership assets subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of partnership assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers; or
- (5) liability is imposed on the partner by law or contract independent of the existence of the partnership.

(e) This section applies to any partnership liability or obligation resulting from a representation by a partner or purported partner under Section 10A-8A-3.08.

Comment

References to Section 10A-8A-3.06 have been added in subsections (b) and (d) of this section, reflecting that under the limited liability partnership provisions of Section 10A-8A-3.06, a partner in an LLP would not be a party against whom an action could be brought under Subsection (b) or whose assets would be subject to levy under Subsection (d), if the partner is protected by the LLP limited liability shield.

Subsection (a) provides that a partnership may sue and be sued in the partnership name. That entity approach is designed to simplify suits by and against a partnership.

Subsection (b) provides that suit may be brought against the partnership and any or all of the partners in the same action or in separate actions. It is intended to clarify that the partners need not be named in an action against the partnership. In particular, in an action against a partnership, it is not necessary to name a partner individually in addition to the partnership. This will simplify and reduce the cost of litigation, especially in cases of small claims where there are known to be significant partnership assets and thus no necessity to collect the judgment out of the partners' assets.

Subsection (c) provides that a judgment against the partnership is not, standing alone, a judgment against the partners, and it cannot be satisfied from a partner's personal assets unless there is a judgment against the partner. Thus, a partner must be individually named and served, either in the action against the partnership or in a later suit, before ~~his~~that partner's personal assets may be subject to levy for a claim against the partnership.

Subsection (d) requires partnership creditors to exhaust the partnership's assets before levying on a judgment debtor partner's individual property. That rule respects the concept of the partnership as an entity.

As a general rule, a final judgment against a partner cannot be enforced by a creditor against the partner's separate assets unless a writ of execution against the partnership has been returned unsatisfied. Under Subsection (d), however, a creditor may proceed directly against the partner's assets if (i) the partnership is a debtor in bankruptcy; (ii) the partner has consented; or (iii) the liability is imposed on the partner independently of the partnership. For example, a judgment creditor may proceed directly against the assets of a partner who is liable independently as the primary tortfeasor, but must exhaust the partnership's assets before proceeding against the separate assets of the other partners who are liable only as partners.

There is also a judicial override provision in Subsection (d)(4). A court may authorize execution against the partner's assets on the grounds that (i) the partnership's assets are clearly insufficient; (ii) exhaustion of the partnership's assets would be excessively burdensome; or (iii) it is otherwise equitable to do so. For example, if the partners who are parties to the action have assets located in the forum State, but the partnership does not, a court might find that exhaustion of the partnership's assets would be excessively burdensome.

Although Subsection (d) is silent with respect to pre-judgment remedies, the law of pre-judgment remedies already adequately embodies the principle that partnership assets should be exhausted before partners' assets are attached or garnished. Attachment, for example, typically requires a showing that the partnership's assets are being secreted or fraudulently transferred or are otherwise inadequate to satisfy the plaintiff's claim. A showing of some exigent circumstance may also be required to satisfy due process. See Connecticut v. Doe, 501 U.S. 1, 16 (1991).

Subsection (e) clarifies that actions against the partnership under Section 10A-8A-3.08, involving representations by partners or purported partners, are subject to Section 10A-8A-3.07.

§ 10A-8A-3.08. Liability of purported partner.

Except as provided in Section 10A-8A-3.06:

(a) If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported

partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly and severally with any other person consenting to the representation.

(b) If a person is thus represented to be a partner in an existing partnership, or with one or more persons not partners, the purported partner is an agent of persons consenting to the representation to bind them to the same extent and in the same manner as if the purported partner were a partner, with respect to persons who enter into transactions in reliance upon the representation. If all of the partners of the existing partnership consent to the representation, a partnership act or obligation results. If fewer than all of the partners of the existing partnership consent to the representation, the person acting and the partners consenting to the representation are jointly and severally liable.

(c) A person is not liable as a partner merely because the person is named by another in a statement of authority.

(d) A person does not continue to be liable as a partner merely because of a failure to file a statement of dissociation or to amend a statement of authority to indicate the partner's dissociation from the partnership.

(e) Except as otherwise provided in subsections (a) and (b), persons who are not partners as to each other are not liable as partners to other persons.

Comment

This Section continues the basic principles of partnership by estoppel.

Subsection (a) continues the distinction between representations made to specific persons and those made in a public manner. It is the exclusive basis for imposing liability as a partner on persons who are not partners in fact. There is no duty of denial, and thus a person held out by another as a partner is not liable unless ~~he~~that person actually consents to the representation. Also see Subsection (c) (no duty to file statement of denial) and Subsection (d) (no duty to file statement of dissociation or to amend statement of authority).

Subsection (b) emphasizes that the persons being protected by this Section are those who enter into transactions in reliance upon a representation. If all of the partners of an existing partnership consent to the representation, a partnership obligation results. Apart from this Section, the ~~firm~~partnership may be bound in other situations under general principles of apparent authority or ratification.

If a partnership liability results under this Section, the creditor must exhaust the partnership's assets before seeking to satisfy the claim from the partners. See Section 10A-8A-3.07.

Subsections (c) and (d) deal with potential negative inferences to be drawn from a failure to correct inaccurate or outdated filed statements. Subsection (c) makes clear that an otherwise innocent person is not liable as a partner for failing to deny ~~his~~that person's partnership status as asserted by a third person in a statement of authority. Under Subsection (d), a partner's liability as a partner does not continue after dissociation solely because of a failure to file a statement of dissociation.

Subsection (e) provides that only those persons who are partners as among themselves are liable as partners to third parties for the obligations of the partnership, except for liabilities incurred by purported partners under this section.

Article 4

Relations of Partners to Each Other and to Partnership

- § 10A-8A-4.01. Partner's rights and duties.
- § 10A-8A-4.02. Admission of partner.
- § 10A-8A-4.03. Form of contribution.
- § 10A-8A-4.04. Liability for contribution.
- § 10A-8A-4.05. Sharing of distributions before dissolution.
- § 10A-8A-4.06. Interim distributions.
- § 10A-8A-4.07. Distribution in kind.
- § 10A-8A-4.08. Right to distribution.
- § 10A-8A-4.09. Limitations on distribution and liability for improper distributions.
- § 10A-8A-4.10. Right of partner and former partner to information.
- § 10A-8A-4.11. General standards of partner's conduct.
- § 10A-8A-4.12. Reliance on reports and information.
- § 10A-8A-4.13. Actions by partnership and partners.
- § 10A-8A-4.14. Continuation of partnership beyond definite term or particular undertaking.

§ 10A-8A-4.01. Partner's rights and duties.

- (a) Each partner is deemed to have an account that is:
 - (1) credited with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner's share of the partnership profits; and
 - (2) charged with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses provided that a partner shall not be charged with any share of partnership loss attributable to a debt, obligation or liability for which the partner is not personally liable under Section 10A-8A-3.06 unless the loss is satisfied out of partnership assets.

(b) Each partner is entitled to an equal share of the partnership profits and, subject to the limitations in subsection (a)(2) of this section, is chargeable with a share of the partnership losses in proportion to the partner's share of the profits.

(c) A partnership shall reimburse a partner for payments made and indemnify a partner for liabilities incurred by the partner in the ordinary course of the business or not for profit activity of the partnership or for the preservation of its business or not for profit activity or property; provided, however, no partner in a limited liability partnership shall be required as a consequence of the indemnification to make any payment on behalf of the limited liability partnership to any other partners to the extent that the payment would be inconsistent with Sections 10A-8A-3.06, 10A-8A-8.06, or 10A-8A-8.07.

(d) A partnership shall reimburse a partner for an advance beyond the amount of capital the partner agreed to contribute.

(e) A payment or advance made by a partner which gives rise to a partnership obligation under subsection (c) or (d) constitutes a loan to the partnership which accrues interest from the date of the payment or advance.

(f) Each partner has equal rights in the management and conduct of the partnership business or not for profit activity.

(g) A partner may use or possess partnership property only on behalf of the partnership.

(h) A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business or not for profit activity of the partnership.

(i) A difference arising as to a matter in the ordinary course of business or not for profit activity of a partnership may be decided by a majority of the partners. An act outside the ordinary course of business or not for profit activity of a partnership and an amendment to the partnership agreement may be undertaken only with the consent of all of the partners.

(j) This section does not affect the obligations of a partnership to other persons under Section 10A-8A-3.01.

Comment

This Section establishes many of the default rules that govern the relations among partners. All of these rules are, however, subject to contrary agreement of the partners as provided in Section 10A-8A-1.08.

The provisos in Subsection (a)(2) (which is cross-referenced in Subsection (b)) and in Subsection (c) ~~reflecting~~ reflect the fact that under the limited liability partnership provisions of this Chapter, partners in such partnerships may be shielded from liability for partnership losses and from indemnification liabilities.

Subsection (a) provides that each partner is deemed to have an account that is credited with the partner's contributions and share of the partnership profits and charged with distributions to the partner and the partner's share of partnership losses. In the absence of another system of partnership accounts, these rules establish a rudimentary system of accounts for the partnership. The rules regarding the settlement of the partners' accounts upon the dissolution and winding up of the partnership business or not for profit activity are found in Section 10A-8A-8.09.

Subsection (b) establishes the default rules for the sharing of partnership profits and losses. Under the default rule, partners share profits per capita and not in proportion to capital contribution.

If partners agree to share profits other than equally, losses will be shared similarly to profits, absent agreement to do otherwise. That rule is predicated on the assumption that partners would likely agree to share losses on the same basis as profits, but may fail to say so. Of course, by agreement, they may share losses on a different basis from profits.

The default rules apply where one or more of the partners contribute no capital, although there is case law to the contrary. See, e.g., Kovacik v. Reed, 49 Cal. 2d 166, 315 P.2d 314 (1957); Becker v. Killarney, 177 Ill. App. 3d 793, 523 N.E.2d 467 (1988). It may seem unfair that the contributor of services, who contributes little or no capital, should be obligated to contribute toward the capital loss of the large contributor who contributed no services. In entering a partnership with such a capital structure, the partners should foresee that application of the

default rule may bring about unusual results and take advantage of their power to vary by agreement the allocation of capital losses.

Subsection (b) provides that each partner “is chargeable” with a share of the losses. Losses are charged to each partner’s account as provided in Subsection (a)(2). It is intended to make clear that a partner is not obligated to contribute to partnership losses before ~~his withdrawal or the liquidation~~ that partner’s dissociation or the dissolution of the partnership, unless the partners agree otherwise. In effect, a partner’s negative account represents a debt to the partnership unless the partners agree to the contrary. Similarly, each partner’s share of the profits is credited to ~~his~~ each partner’s respective account under Subsection (a)(1). Absent an agreement to the contrary, however, a partner does not have a right to receive a current distribution of the profits credited to ~~his~~ that partner’s account, the interim distribution of profits being a matter arising in the ordinary course of business or not for profit activity to be decided by majority vote of the partners.

Subsection (c) provides that the partnership shall reimburse partners for payments made and indemnify ~~them~~ the partners for liabilities incurred in the ordinary course of the partnership’s business or not for profit activity or for the preservation of its business or not for profit activity ~~or property~~. Reimbursement and indemnification is an obligation of the partnership. Indemnification may create a loss toward which the partners must contribute. Although the right to indemnification is usually enforced in the settlement of accounts among partners upon dissolution and winding up of the partnership business or not for profit activity, the right accrues when the liability is incurred and thus may be enforced during the term of the partnership in an appropriate case.

Subsection (d) makes explicit that the partnership must reimburse a partner for an advance of funds beyond the amount of the partner’s agreed capital contribution, thereby treating the advance as a loan.

Subsection (e) characterizes the partnership’s obligation under subsections (c) or (d) as a loan to the partnership which accrues interest from the date of the payment or advance. See Section 10A-8A-1.07 (default rate of interest).

Under Subsection (f), each partner has equal rights in the management and conduct of the business or not for profit activity, which has been interpreted broadly to mean that, absent contrary agreement, each partner has a continuing right to participate in the management of the partnership and to be informed about the partnership business or not for profit activity, even if his assent to partnership business or not for profit activity decisions is not required.

Subsection (g) provides that partners may use or possess partnership property only for partnership purposes.

Subsection (h) states the default rule that a partner is not entitled to remuneration for services performed, except in winding up the partnership. That means any partner winding up the business or not for profit activity is entitled to compensation. The exception is not intended to apply in the hypothetical winding up that takes place if there is a buyout under Article 7.

Subsection (i) provides the default rule that matters arising in the ordinary course of the business or not for profit activity may be decided by a majority of the partners, and amendments to the partnership agreement and matters outside the ordinary course of the partnership business or not for profit activity require unanimous consent of the partners. Regarding extraordinary matters, courts have generally required the consent of all partners for those matters. See, e.g., Paciaroni v. Crane, 408 A.2d 946 (Del. Ch. 1989); Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989); Duell v. Hancock, 83 A.D.2d 762, 443 N.Y.S.2d 490 (1981).

It is not intended that Subsection (i) embrace a claim for an objection to a partnership decision that is not discovered until after the fact. There is no cause of action based on that after-the-fact second-guessing.

Subsection (j) makes it clear that Section 10A-8A-3.01 governs partners' agency power to bind the partnership to third persons, while this Section governs partners' rights among themselves.

§ 10A-8A-4.02. Admission of partner.

(a) The initial partners of a partnership are admitted as partners upon the formation of the partnership.

(b) After formation, a person is admitted as a partner of the partnership:

- (1) as provided in the partnership agreement;
- (2) as the result of a transaction effective under Article 9 of this chapter or Article 8 of Chapter 1;
- (3) with the consent of all the partners; or
- (4) as provided in Section 10A-8A-8.01(6) or 10A-8A-8.01(7).

(c) Each person to be admitted as a partner to a partnership formed under either Section 10A-8A-2.01(a)(i) or 10A-8A-2.01(a)(ii) may be admitted as a partner without:

- (1) acquiring a transferable interest; or
- (2) making or being obligated to make a contribution to the partnership.

Comment

This Section was derived from and has been modified to conform with Section 10A-9A-3.01 of the Alabama Limited Partnership Law and Section 10A-5A-4.01 of the Alabama Limited Liability Company Law. Subparagraph (b)(2) refers to the mergers and conversion provisions under this Chapter as well as under Chapter 1 of this Title in recognition that partners may be admitted pursuant to a merger or conversion under this Chapter or the provisions contained in the Chapter 1 of this Title.

§ 10A-8A-4.03. Form of contribution.

A contribution by a partner may be made to a partnership as agreed by the partners.

Comment

This Section incorporates the more expansive definition of "contribution" as set forth in Section 10A-1-1.03(11). It recognizes the partners must agree to the contributions to be made to the partnership. This Section was derived from Section 10A-9A-5.01 of the Alabama Limited Partnership Law and Section 10A-5A-4.03 of the Alabama Limited Liability Company Law.

§ 10A-8A-4.04. Liability for contribution.

(a) A partner's obligation to make a contribution to a partnership is not excused by the partner's death, disability, or other inability to perform personally.

(b) If a partner does not make a contribution required by an enforceable promise, the partner or the partner's estate is obligated, at the election of the partnership, to contribute money equal to the value of the portion of the contribution that has not been made. The foregoing election shall be in addition to, and not in lieu of, any other rights, including the right to specific performance, that the partnership may have under the partnership agreement or applicable law.

(c) The obligation of a partner to make a contribution to a partnership may be compromised only by consent of all partners. A conditional obligation of a partner to make a contribution to a partnership may not be enforced unless the conditions of the obligation have been satisfied or waived as to or by that partner. Conditional obligations include contributions payable upon a discretionary call of a partnership before the time the call occurs.

(d) A creditor of a limited liability partnership which extends credit or otherwise acts in reliance on an obligation described in subsection (a), without notice of any compromise under this subsection, may enforce the original obligation.

(e) A promise by a partner to make a contribution to a partnership is not enforceable unless set forth in a writing signed by the partner.

Comment

This Section was derived from Section 10A-9A-5.02 of the Alabama Limited Partnership Law and Section 10A-5A-4.04 of the Alabama Limited Liability Company Law.

Subsection (a) – Under common law principles of impracticability, an individual’s death or incapacity will sometimes discharge a duty to render performance. Restatement (Second) of Contracts, Sections 261 and 262. This Subsection overrides those principles.

Subsection (b) – This Subsection is a statutory liquidated damage provision, exercisable at the option of the partnership, with the damage amount set according to the value of the promised, non-monetary contribution as stated in the required information.

Example: *In order to become a partner, a person promises to contribute to the partnership various assets which the partnership agreement values at \$150,000. In return for the person’s promise, and in light of the agreed value, the partnership admits the person as a partner with a right to receive 25% of the partnership’s distributions.*

The promised assets are subject to a security agreement, but the partner promises to contribute them “free and clear.” Before the partner can contribute the assets, the secured party forecloses on the security interest and sells the assets at a public sale for \$75,000. Even if the \$75,000 reflects the actual fair market value of the assets, under this Subsection the partnership has a claim against the partner for “the value, as stated in the required information, of the stated contribution which has not been made” – i.e., \$150,000.

This Section applies “at the option of the partnership” and does not affect other ~~remedies~~remedie which the partnership may have under other law.

Example: *Same facts as the previous example, except that the public sale brings \$225,000. The partnership is not obliged to invoke this Subsection and may instead sue for breach of the promise to make the contribution, asserting the \$225,000 figure as evidence of the actual loss suffered as a result of the breach.*

~~Subsection (e) — The first sentence of this subsection applies not only to promised contributions but also to improper distributions. See Section 10A-8A-4.09. The second sentence, pertaining to creditor's rights, applies only to promised contributions.~~

Subsection (e) requires promises to make contributions to be in a writing. Pursuant to Section 10A-8A-1.08(c)(9), a partnership agreement may not waive the requirement of Subsection (e).

§ 10A-8A-4.05. Sharing of distributions before dissolution.

All partners shall share equally in any distributions made by a partnership before its dissolution and winding up.

Comment

This Section is derived from Section 10A-9A-5.03 of the Alabama Limited Partnership Law and Section 10A-5A-4.05(a)(1) of the Alabama Limited Liability Company Law. Since partnerships may be taxed in a variety of manners, it was determined to be inappropriate to address profits and losses. Thus, the focus is on distributions, which are, as a default rule, shared equally among the partners.

This Section's rule for sharing distributions is subject to change under Section 10A-8A-1.08. A partnership that does vary the rule should be careful to consider not only the tax and accounting consequences but also the "ripple" effect on other provisions of this Chapter. See, e.g., Section 10A-8A-8.01 (provide equal consent power).

§ 10A-8A-4.06. Interim distributions.

Subject to Section 10A-8A-7.01, a partner has a right to a distribution before the dissolution and winding up of a partnership as provided in the partnership agreement. A decision to make a distribution before the dissolution and winding up of the partnership is a decision in the ordinary course of the business or not for profit activity of the partnership.

Comment

This Section is derived from Section 10A-9A-5.04 of the Alabama Limited Partnership Law and Section 10A-5A-4.05(a)(2) of the Alabama Limited Liability Company Law. The second sentence of this Section clarifies that the decision to make a distribution before dissolution is a decision in the ordinary course. Under Section 10A-8A-4.01(f), the partners make this decision for the partnership. Distributions made pursuant to this Section are subject to outstanding charging orders under Section 10A-8A-5.03.

§ 10A-8A-4.07. Distribution in kind.

A partner does not have a right to demand and receive a distribution from a partnership in any form other than money. Except as otherwise provided in Section 10A-8A-8.07, a partnership may distribute an asset in kind if each partner receives a percentage of the asset in proportion to the partner's share of distributions.

Comment

This Section is derived from Section 10A-9A-5.06 of the Alabama Limited Partnership Law and Section 10A-5A-4.05(a)(3) of the Alabama Limited Liability Company Law.

§ 10A-8A-4.08. Right to distribution.

If a partner becomes entitled to receive a distribution, the partner has the status of, and is entitled to all remedies available to, a creditor of the partnership with respect to the distribution. However, the partnership's obligation to make a distribution is subject to offset for any amount owed to the partnership by the partner or dissociated partner on whose account the distribution is made.

Comment

This Section has had a few minor changes to conform to Section 10A-9A-5.07 of the Alabama Limited Partnership Law and Section 10A-5A-4.05(a)(4) of the Alabama Limited Liability Company Law. This Section's first sentence refers to distributions generally. The reference in the second sentence to "dissociated partner" encompasses circumstances in which the partner is gone and the dissociated partner's transferable interest is all that remains.

§ 10A-8A-4.09. Limitations on distribution and liability for improper distributions.

(a) A limited liability partnership shall not make a distribution to a partner to the extent that at the time of the distribution, after giving effect to the distribution, all liabilities of the limited liability partnership, other than liabilities to partners on account of their transferable interests and liabilities for which the recourse of creditors is limited to specific property of the

limited liability partnership, exceed the fair value of the assets of the limited liability partnership, except that the fair value of the property that is subject to a liability for which recourse of creditors is limited shall be included in the assets of the limited liability partnership only to the extent that the fair value of the property exceeds that liability.

(b) A partner who consents to a distribution in violation of subsection (a) or the partnership agreement, and who knew at the time of the distribution that the distribution violated subsection (a) or the partnership agreement, shall be liable to the limited liability partnership for the amount of that distribution.

(c) A partner who receives a distribution in violation of subsection (a) or the partnership agreement, and who knew at the time of the distribution that the distribution violated subsection (a) or the partnership agreement, shall be liable to the limited liability partnership for the amount of the distribution received by that partner. A partner who receives a distribution in violation of subsection (a) or the partnership agreement, and who did not know at the time of the distribution that the distribution violated subsection (a) or the partnership agreement, shall not be liable for the amount of the distribution received by that partner.

(d) Except as provided in subsection (e), this section shall not affect any obligation or liability of a partner under other applicable law for the amount of a distribution.

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

(f) For purposes of subsection (a), “distribution” does not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of the limited liability partnership’s business or not for profit activity under a bona fide retirement plan or other benefits program.

(g) This section shall not apply to distributions made in accordance with Section 10A-8A-8.09.

Comment

This Section is derived from Section 10A-9A-5.08 of the Alabama Limited Partnership Law Section 10A-5A-4.06 of the Alabama Limited Liability Company Law, and is substantially similar to Delaware §15-309. ~~This Section does not refer to imposing liability based on authorization or consent to a distribution, as that is a determination of whether the partner properly exercised and discharged its duties in conformance with the partnership agreement and/or this chapter.~~ This Section (with the exception of Subsection (e)) does not alter fraudulent transfer statutes and other applicable laws. Subsection (e) provides for a statute of limitations that applies to a claw-back under this Section or "other applicable law," e.g., fraudulent transfer statutes. Conflict of laws principles may impact a court's analysis of the applicable statute of limitations in a fraudulent transfer action. See In re Heritage Org., LLC, 413 B.R. 438 (Bankr. N.D. Tex. 2009). Subsection (g) is derived from RMBCA § 6.40(h).

§ 10A-8A-4.10. Right of partner and former partner to information.

Notwithstanding Sections 10A-1-3.32 and 10A-1-3.33:

- (a) Subject to subsection (f), a partner, without having any particular purpose for seeking the information, may inspect and copy during regular ~~business or activity~~ hours at a reasonable location specified by the partnership, required information and any other records maintained by the partnership regarding the partnership's business or not for profit activity and financial condition.
- (b) Subject to subsection (f), each partner and the partnership shall furnish to a partner:
 - (1) without demand, any information concerning the partnership's business or not for profit activity reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this chapter;
and

- (2) on demand, any other information concerning the partnership's business or not for profit activity, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.
- (c) Subject to subsections (e) and (f), on 10 days' demand made in a writing received by the partnership, a person dissociated as a partner may have access to the information and records described in subsection (a) at the location specified in subsection (a) if:
- (1) the information or writing pertains to the period during which the person was a partner;
 - (2) the person seeks the information or record in good faith; and
 - (3) it is determined that:
 - (i) the person seeks the information for a purpose reasonably related to the person's interest as a partner;
 - (ii) the person's demand describes with reasonable particularity the information sought and the purpose for seeking the information; and
 - (iii) the information sought is directly connected to the person's purpose.
- (d) Within 10 days after receiving a demand pursuant to subsection (c), the partnership in a writing shall inform the person that made the demand:
- (1) what information the partnership will provide in response to the demand;
 - (2) when and where the partnership will provide the information;

- (3) if the partnership declines to provide any demanded information, the partnership's reasons for declining; and
 - (4) what, if any, restrictions will be imposed pursuant to the partnership agreement or subsection (f).
- (e) If a partner dies, Section 10A-8A-5.04 applies.
- (f) In addition to any restriction or condition stated in its partnership agreement, a partnership, as to a matter within the ordinary course of its business or not for profit activity, may:
- (1) 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; and
 - (2) keep confidential from the partners and any other person, for such period of time as the partnership deems reasonable, any information that the partnership reasonably believes to be in the nature of trade secrets or other information the disclosure of which the partnership in good faith believes is not in the best interest of the partnership or could damage the partnership or its business or not for profit activity, or that the partnership is required by law or by agreement with a third party to keep confidential.

In any dispute concerning the reasonableness of a restriction under this subsection, the partnership has the burden of proving reasonableness.

- (g) A partnership may charge a person that makes a demand under this section reasonable costs of copying, limited to the costs of labor and material.

- (h) A partner or person dissociated as a partner may exercise the rights under this section through an attorney or other agent. Any restriction imposed under subsection (f) or by the partnership agreement applies both to the attorney or other agent and to the partner or person dissociated as a partner.
- (i) The rights under this section do not extend to a person as transferee, but the rights under subsection (c) of a person dissociated as a partner may be exercised by the legal representative of an individual who dissociated as a partner under Section 10A-8A-6.01(6).
- (j) Any partner who, without reasonable cause, refuses to allow any partner or person dissociated as a partner, or their agent or attorney to inspect or copy any records of the partnership to which such partner or person disassociated as a partner is entitled under this section, shall be personally liable to the partner or person dissociated as a partner for a penalty in an amount not to exceed 10 percent of the fair market value of the transferable interest of the partner or person dissociated as a partner, in addition to any other damages or remedy.

Comment

This provision supersedes Sections 10A-1-3.32 and 10A-1-3.33 with respect to the right of partners and former partners to obtain information from a partnership in accordance with Section 10A-1-1.02(c).

This Section was derived from Section 10A-9A-3.04 of the Alabama Limited Partnership Law and Section 10A-5A-4.09 of the Alabama Limited Liability Company Law.

Subsection (b)(1) – If a particular item of material information is apparent in the partnership’s records, whether a partner is obliged to disseminate that information to fellow partners depends on the circumstances.

Example: *A partnership has ~~four~~two partners: each of which is regularly engaged in conducting the partnership’s business or not for profit activity; both of which are aware of and have regular access to all significant*

partnership records; and neither of which has special responsibility for or knowledge about any particular aspect of the partnership records pertaining to any particular aspect of the partnership. Most likely, neither partner is obliged to draw the other partner's attention to information apparent in the partnership's records.

Example: Although a partnership has three partners, one is the managing partner with day-to-day responsibility for running the partnership's business or not for profit activity. The other two meet periodically with the managing partner. Most likely, the managing partner has a duty to draw the attention of the other partners to important information, even if that information would be apparent from a review of the partnership's records.

In all events under Subsection (b)(1), the question is whether the disclosure by one partner is "reasonably required for the proper exercise" of the other partner's rights and duties.

Subsection (f) – was derived from Section 10A-9A-4.07(f) of the Alabama Limited Partnership Law and Section 10A-5A-4.09 of the Alabama Limited Liability Company Law to provide the right to allow a partnership to utilize reasonable restrictions and conditions on access to and use of information to be furnished under this Section, and to keep certain information confidential from the partners.

Subsection (g) – Although the partnership is entitled to charge a person under this Section, an acting partner would most likely be entitled to reimbursement under Section 10A-8A-4.01(c).

Subsection (j) – was added to provide for personal liability for refusal to produce information as required by this Chapter. Cf., summary judgment was inappropriate where plaintiff/partner presented evidence that (1) the defendant/partner refused her access to the partnership's books when she sought an accounting; (2) there was no accord and satisfaction when she cashed a \$17,617.84 check which defendant claimed was payment in full; and (3) he did not act in good faith in paying her what he said was her share of the partnership's profits. Hylton v. Meztista, 845 So. 2d 792, 2000 Ala. Civ. App. LEXIS 286 (Ala. Civ. App. 2000).

§ 10A-8A-4.11. General standards of partner's conduct.

(a) The duties that a partner has to the partnership and to the other partners include the duty of loyalty and the duty of care as described in subsections (b) and (c).

(b) A partner's duty of loyalty to the partnership and to the other partners includes each of the following:

- (1) to account to the partnership and to hold as trustee for it any property, profit, or benefit derived by the partner in the conduct or winding up of the partnership's business or not for profit activity or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;
- (2) to refrain from dealing with the partnership in the conduct or winding up of the partnership's business or not for profit activity as or on behalf of a party having an interest adverse to the partnership; and
- (3) to refrain from competing with the partnership in the conduct or winding up of the partnership's business or not for profit activity.

(c) A partner's duty of care to the partnership and to the other partners in the conduct or winding up of the partnership's business or not for profit activity includes refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A partner shall discharge the duties to the partnership and to the other partners under this chapter and under the partnership agreement and exercise any rights consistently with the implied contractual covenant of good faith and fair dealing.

(e) A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.

Comment

This Section is derived from Section 10A-9A-4.08 of the Alabama Limited Partnership Law and Section 10A-5A-4.08 of the Alabama Limited Liability Company Law. Section (a) was modified by deleting the words “only” and “limited” and inserting the word “include” in order to allow for the broader modification rule of Section 10A-8A-1.08(b)(1). Thus, additional duties (fiduciary and otherwise) may exist with respect to a partner and the modification, expansion, restriction, or elimination of duties should be carefully addressed in the partnership agreement.

This Section does not prevent a partner from delegating one or more duties, but delegation does not discharge the duty. If the partnership agreement removes a particular responsibility from a partner, that partner's duty must be judged according to the rights and powers the partner retains. For example, if the partnership agreement denies a partner the right to act in a particular matter, the partner's compliance with the partnership agreement cannot be a breach of duty. However, the partner may still have a duty to provide advice with regard to the matter. That duty could arise from the duty of care under Section 10A-8A-4.11(c) and the duty to provide information under Section 10A-8A-4.10(b).

§ 10A-8A-4.12. Reliance on reports and information.

A partner of a partnership shall be fully protected in relying in good faith upon the records of the partnership and upon information, opinions, reports, or statements presented by another partner or agent of the partnership, or by any other person as to matters the partner reasonably believes are within that other person's professional or expert competence, including information, opinions, reports, or statements as to the value and amount of the assets, liabilities, profits, or losses of the partnership, or the value and amount of assets or reserves or contracts, agreements, or other undertakings that would be sufficient to pay claims and obligations of the partnership, or to make reasonable provision to pay those claims and obligations, or any other facts pertinent to the existence and amount of assets from which distributions to partners or creditors might properly be paid.

Comment

This Section is derived from Section 10A-9A-4.09 of the Alabama Limited Partnership Law and Section 10A-5A-4.11 of the Alabama Limited Liability Company Law, and Delaware, § 15-409(b) and (c), and more closely aligns the reliance provisions with the default standards set forth in Section 10A-8A-4.08 in comparison to the provisions of Division C of Article 3 of Chapter 1, which, in accordance with Section 10A-8A-1.08(b)(6), may be superseded by the partnership agreement. However, it should be noted that unless the partnership agreement supersedes Division C of Article 3 of Chapter 1, this Section and Division C of Article 3 of Chapter 1 will apply.

§ 10A-8A-4.13. Actions by partnership and partners.

(a) Except as provided in Sections 10A-8A-3.06, 10A-8A-8.06, or 10A-8A-8.07, a partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership.

(b) Except as provided in Sections 10A-8A-3.06, 10A-8A-8.06, or 10A-8A-8.07, a partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business or not for profit activity, to:

- (1) enforce the partner's rights under the partnership agreement;
- (2) enforce the partner's rights under this chapter, including:
 - (i) the partner's rights under Sections 10A-8A-4.01, 10A-8A-4.03, or 10A-8A-4.04;
 - (ii) the partner's right on dissociation to have the partner's transferable interest in the partnership purchased pursuant to Section 10A-8A-7.01 or enforce any other right under Article 6 or 7; or
 - (iii) the partner's right to compel a dissolution and winding up of the partnership's business or not for profit activity under Section 10A-8A-8.01 or enforce any other right under Article 8; or
- (3) enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

(c) The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

Comment

This Chapter makes the operative provisions of Subsections (a) and (b) subject to the exception to partnership liability available for partners in limited liability partnerships under Section 10A-8A-3.06.

Subsection (a) reflects the entity theory. It provides that the partnership itself may maintain an action against a partner for any breach of the partnership agreement or for the violation of any duty owed to the partnership, such as a breach of fiduciary duty.

~~Section 405~~Subsection (b) provides that partners may maintain a variety of actions, including an action for an accounting, during the term of the partnership, as well as a final action for an accounting upon dissolution and winding up. It reflects a new policy choice that partners should have access to the courts during the term of the partnership to resolve claims against the partnership and the other partners, leaving broad judicial discretion to fashion appropriate remedies.

Under this Chapter an accounting is not a prerequisite to the availability of the other remedies a partner may have against the partnership or the other partners. That rule reflects the increased willingness courts have shown over the past 75 years to grant relief without the requirement of an accounting, in derogation of the so-called “exclusivity rule.” See, e.g., Farney v. Hauser, 109 Kan. 75, 79, 198 Pac. 178, 180 (1921) (“[For] all practical purposes a partnership may be considered as a business entity”); Auld v. Estridge, 86 Misc. 2d 895, 901, 382 N.Y.S.2d 897, 901 (1976) (“No purpose of justice is served by delaying the resolution here on empty procedural grounds”).

Under Subsection (b), a partner may bring a direct suit against the partnership or another partner for almost any cause of action arising out of the conduct of the partnership business or not for profit activity. That eliminates the present procedural barriers to suits between partners filed independently of an accounting action. In addition to a formal account, the court may grant any other appropriate legal or equitable remedy. Since partners are not passive investors like limited partners, this Chapter does not expressly authorize derivative actions. Cf., Article 9 of the Alabama Limited Partnership Law and Article 9 of the Alabama Limited Liability Company Law.

Subsection (b)(3) makes it clear that a partner may recover against the partnership and the other partners for personal injuries or damage to the property of the partner caused by another partner. See, e.g., Duffy v. Piazza Construction Co., 815 P.2d 267 (Wash. App. 1991); Smith v. Hensley, 354 S.W.2d 744 (Ky. App.). One partner’s negligence is not imputed to bar another partner’s action. See, e.g., Reeves v. Harmon, 475 P.2d 400 (Okla. 1970); Eagle Star Ins. Co. v. Bean, 134 F.2d 755 (9th Cir. 1943) (fire insurance company not subrogated to claim against partners who negligently caused fire that damaged partnership property).

Subsection (c) provides that other (i.e., non-partnership) law governs the accrual of a cause of action for which Subsection (b) provides a remedy. The statute of limitations on such claims is also governed by other law, and claims barred by a statute of limitations are not revived by reason of the partner’s right to an accounting upon dissolution. The effect of those rules is to

compel partners to litigate their claims during the life of the partnership or risk losing them. Because an accounting is an equitable proceeding, it may also be barred by laches where there is an undue delay in bringing the action. Under general law, the limitations periods may be tolled by a partner's fraud.

§ 10A-8A-4.14. Continuation of partnership beyond definite term or particular undertaking.

(a) If a partnership for a definite term or particular undertaking is continued, without an express agreement, after the expiration of the term or completion of the undertaking, the rights and duties of the partners remain the same as they were at the expiration or completion, so far as is consistent with a partnership at will.

(b) If the partners, or those of them who habitually acted in the business or not for profit activity during the term or undertaking, continue the business or not for profit activity without any settlement or liquidation of the partnership, they are presumed to have agreed that the partnership will continue.

Comment

Subsection (a)— — Continuation beyond an agreed term or undertaking results in a partnership at will, not an automatic renewal of the term or extension of the undertaking.

Subsection (b)— — In general, a pattern of conduct can imply a term in a partnership agreement. In particular, this Subsection creates a presumption that by their conduct the partners have agreed to continue the business or not for profit activity. The presumption shifts the burden of persuasion to the person claiming that the partnership is dissolved.

Article 5

Transferees and Creditors of Partners

- § 10A-8A-5.01. Partner's transferable interest in partnership.
- § 10A-8A-5.02. Transfer of partner's transferable interest.
- § 10A-8A-5.03. Rights of creditor of partner or transferee.
- § 10A-8A-5.04. Power of personal representative of deceased partner.

§ 10A-8A-5.01. Partner's transferable interest in partnership.

The only interest of a partner which is transferable is the partner's transferable interest. A transferable interest is personal property.

Comment

This Section was derived from Section 10A-9A-7.01 of the Alabama Limited Partnership Law and Section 10A-5A-5.01 of the Alabama Limited Liability Company Law. Like those statutes and all other partnership statutes, this Chapter dichotomizes each partner's rights into economic rights and other rights. The former are freely transferable, as provided in Section 10A-9A-7.02. The latter are not transferable at all, unless the partnership agreement so provides.

Although a partner or transferee owns a transferable interest as a present right, that right only entitles the owner to distributions if and when made. See Section 10A-9A-5.04 (subject to any contrary provision in the partnership agreement, no right to interim distribution unless the partnership decides to make an interim distribution).

§ 10A-8A-5.02. Transfer of partner's transferable interest.

- (a) A transfer, in whole or in part, of a partner's transferable interest:
 - (1) is permissible;
 - (2) does not by itself cause the partner's dissociation;
 - (3) does not by itself cause a dissolution and winding up of the partnership;
 - and
 - (4) subject to Section 10A-8A-5.05, does not entitle the transferee to:
 - (A) participate in the management or conduct of the partnership's

business or not for profit activity; or

(B) except as otherwise provided in subsection (d), have access to required information, records, or other information concerning the partnership's business or not for profit activity.

(b) A transferee has a right:

(1) to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled;

(2) to receive upon the dissolution and winding up of the partnership, in accordance with the transfer, the net amount otherwise distributable to the transferor; and

(3) to seek under Section 10A-8A-8.01 (5) a judicial determination that it is equitable to wind up the partnership business ~~and~~ not for profit activity.

(c) A transferable interest may be evidenced by a certificate of transferable interest issued by the partnership. A partnership agreement may provide for the transfer of the transferable interest represented by the certificate and make other provisions with respect to the certificate. No certificate of transferable interest shall be issued in bearer form.

(d) In a dissolution and winding up, a transferee is entitled to an account of the partnership's transactions only from the date of dissolution.

(e) Except as otherwise provided in Sections 10A-8A-6.01(4), 10A-8A-6.01(11), and 10A-9A-6.01(12), when a partner transfers a transferable interest, the transferor retains the rights of a partner other than the right to distributions transferred and retains all duties and obligations of a partner.

(f) A partnership need not give effect to a transferee's rights under this section until

the partnership has notice of the transfer.

(g) When a partner transfers a transferable interest to a person that is admitted as a partner with respect to the transferred interest, the transferee is liable for the partner's obligations under Sections 10A-8A-4.04 and 10A-8A-4.09 to the extent that the obligations are known to the transferee when the transferee voluntarily accepts admission as a partner.

Comment

This Section was derived from Section 10A-9A-7.02 of the Alabama Limited Partnership Law and Section 10A-5A-5.02 of the Alabama Limited Liability Company Law.

Subsection (a)(2) — The phrase “by itself” is significant. A transfer of all of a person’s transferable interest could lead to dissociation via expulsion. Section 10A-8A-6.01(4)(b).

Subsection (a)(3) — Mere transferees have no right to intrude as the partners carry on their business or not for profit activity as partners. Moreover, a partner’s implied contractual covenant of good faith and fair dealing under Section 10A-8A-4.11(d) is framed in reference to “the partnership and the other partners.”

§ 10A-8A-5.03. Rights of creditor of partner or transferee.

(a) On application to a court of competent jurisdiction by any judgment creditor of a partner or transferee, the court may charge the transferable interest of the judgment debtor with payment of the unsatisfied amount of the judgment with interest. To the extent so charged and after the partnership has been served with the charging order, the judgment creditor has only the right to receive any distribution or distributions to which the judgment debtor would otherwise be entitled in respect of the transferable interest.

(b) The partnership, after being served with a charging order and its terms, shall be entitled to pay or deposit any distribution or distributions to which the judgment debtor would otherwise be entitled in respect of the charged transferable interest into the hands of the clerk of the court so issuing the charging order, and the payment or deposit shall discharge the partnership

and the judgment debtor from liability for the amount so paid or deposited and any interest that might accrue thereon. Upon receipt of the payment or deposit, the clerk of the court shall notify the judgment creditor of the receipt of the payment or deposit. The judgment creditor shall, after any payment or deposit into the court, petition the court for payment of so much of the amount paid or deposited as is held by the court as may be necessary to pay the judgment creditor's judgment. To the extent the court has excess amounts paid or deposited on hand after the payment to the judgment creditor, the excess amounts paid or deposited shall be distributed to the judgment debtor and the charging order shall be extinguished. The court, may in its discretion, order the clerk to deposit, pending the judgment creditor's petition, any money paid or deposited with the clerk, in an interest bearing account at a bank authorized to receive deposits of public funds.

(c) A charging order constitutes a lien on the judgment debtor's transferable interest.

(d) Subject to subsection (c):

(1) a judgment debtor that is a partner retains the rights of a partner and remains subject to all duties and obligations of a partner; and

(2) a judgment debtor that is a transferee retains the rights of a transferee and remains subject to all duties and obligations of a transferee.

(e) This chapter does not deprive any partner or transferee of the benefit of any exemption laws applicable to the partner's or transferee's transferable interest.

(f) This section provides the exclusive remedy by which a judgment creditor of a partner or transferee may satisfy a judgment out of the judgment debtor's transferable interest and the judgment creditor shall have no right to foreclose, under this chapter or any other law, upon the charging order, the charging order lien, or the judgment debtor's transferable interest. A

judgment creditor of a partner or transferee shall have no right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of a partnership. Court orders for actions or requests for accounts and inquiries that the judgment debtor might have made, are not available to the judgment creditor attempting to satisfy the judgment out of the judgment debtor's transferable interest and may not be ordered by a court.

Comment

This Section was derived from Section 10A-9A-7.03 of the Alabama Limited Partnership Law and Section 10A-5A-5.03 of the Alabama Limited Liability Company Law.

This Section provides that unsecured creditors can obtain from a court a “charging order,” which is similar to an attachment or garnishment, against the partner’s transferable interest. Under this Section, the charging order is available to judgment creditors of partners or transferees. A charging order is not available to a party with rights against a partner or transferee other than as a judgment creditor. The phrase “judgment debtor” encompasses both partners and transferees. This Section attempts to balance the needs of the judgment creditor, the judgment debtor, and the partnership. ~~The~~This Section achieves that balance by allowing the judgment creditor to collect on the judgment through the transferable interest of the judgment debtor while prohibiting interference in the management of the business or not for profit activity of the partnership. Further, this Section provides for a payment mechanism that is intended to protect all parties.

Subsection (a). This Subsection provides the judgment creditor with one specific right. That right is the right to receive any distribution that the judgment debtor would have received, but only after the partnership has been served with the charging order. This change was made in an effort to define what the judgment creditor was entitled to receive from the partnership and to protect the partnership from unknown charging orders.

Subsection (b). This provision provides a method for the partnership to pay a distribution that is subject to a charging order to the court. A payment pursuant to this Subsection discharges the partnership and the judgment debtor to the extent of the payment. Because the judgment creditor may have a number of sources for the payment of its judgment, this Subsection provides a mechanism to protect the partnership, the judgment debtor, and the judgment creditor in the event a distribution exceeds the amount then owed to the judgment creditor. The judgment creditor has no say in the timing or amount of the distributions. The charging order does not entitle the judgment creditor to accelerate any distributions or otherwise to interfere with the management of the business or not for profit activity of the partnership.

Subsection (c). This provision provides the judgment creditor with a lien for purposes of the Uniform Commercial Code, the Bankruptcy Code, and general creditor rights laws; however, the lien may not be foreclosed upon. This lien is also important in the context of a merger,

conversion, reorganization, or other transfers of transferable interests.

The priority of the lien as to other creditors will be determined under applicable law and is not addressed in this Chapter. The lien cannot be foreclosed upon as other liens. The limited scope of the remedy provided under this Chapter eliminates a significant number of issues presented by other statutes that attempt to provide rights of redemption and other pre- and post-foreclosure remedies. Those rights were seen as clumsy and ineffective in assisting the collection of the debt while potentially posing the threat that a judgment creditor might obtain an overly broad court order interfering with the day-to-day business or not for profit activity of the partnership. The inability to foreclose is expressly stated in Subsection (f).

Subsection (d). This provision clarifies that a partner or transferee whose transferable interest has been charged does not lose any of the partner's or transferee's rights, other than the right to receive distributions from the partnership to the extent of the charging order.

Subsection (e). This provision gives the judgment debtor the benefit of any exemptions applicable under state law with respect to the transferable interest.

Subsection (f). The first two sentences of this provision are derived from Texas, § 101.112 (c), (d), and (f). This provision attempts to eliminate the problems encountered by overly broad court orders. The provision was not intended, nor should it be interpreted, to prevent a court from enforcing its charging order against the person who violates the charging order.

§ 10A-8A-5.04. Power of personal representative of deceased partner.

If a partner dies, the deceased partner's personal representative or other legal representative may:

(a) for the period of time that the deceased partner's personal representative or other legal representative holds the deceased partner's transferable interest:

- (1) exercise the rights of a holder of transferable interests under this chapter;
- (2) exercise the rights of a transferee under Section 10A-8A-5.02; and
- (3) for purposes of settling the estate, exercise the rights of a current partner under Section 10A-8A-4.10; and

(b) for the period of time that the deceased partner's personal representative or other legal representative does not hold the deceased partner's transferable interest, for purposes of

settling the estate, exercise the rights of a person dissociated as a partner under Section 10A-8A-4.10.

Comment

This Section was derived from Section 10A-9A-7.04 of the Alabama Limited Partnership Law and Section 10A-5A-5.04 of the Alabama Limited Liability Company Law.

Section 10A-8A-5.02 strictly limits the rights of transferees. In particular, a transferee has no right to participate in management in any way, no voting rights and, except following dissolution, no information rights. Even after dissolution, a transferee's information rights are limited. See Section 10A-8A-5.02(d).

This Section provides special informational rights for a deceased partner's legal representative for the purposes of settling the estate. Subsection (a) provides that for the period of time that the deceased partner's personal representative or other legal representative holds the deceased partner's transferable interest, the personal representative or legal representative may, for purposes of settling the estate, exercise the informational rights of a current partner under Section 10A-8A-4.10. Subsection (b) provides that for the period of time that the deceased partner's personal representative or other legal representative does not hold the deceased partner's transferable interest, the personal representative or legal representative may, for purposes of settling the estate, exercise the informational rights of a person dissociated as a limited partner under Section 10A-8A-4.10. Those rights are of course subject to the limitations and obligations stated in that section, as well as any generally applicable limitations stated in the partnership agreement.

This Section was modified to clarify that the holding in L.B. Whitfield, III Family LLC v. Virginia Ann Whitfield et al., 150 So.3d 171 (Ala 2014) should not apply to the default powers of a deceased partner's personal representative or other legal representative so long as that personal representative or other legal representative holds the deceased partner's transferable interests. The default of this Section is that upon the death of an individual, that individual's transferable interests are then held by that individual's personal representative or other legal representative to be distributed in accordance with that individual's will, or in the event there is no will, distributed in accordance with the applicable intestate statute. Since the policy of this Chapter and this State is to give maximum effect to the principles of freedom of contract and to the enforceability of a partnership agreement, it would appear that transferable interests could be held jointly with rights of survivorship, and thus, upon the death of a partner, the transferable interest would vest in the joint owner, and would not be subject to the default powers of the deceased partner's personal representative or other legal representative. In addition, it would appear that a partnership agreement could provide other means of transferring the transferable interest outside of the probate estate and appointing partners outside of the probate estate. See Section 10A-8A-8.01(6) and (7). See generally, Williams v. Williams, 438 So2d. 735 (Ala. 1983); Cowin v. Salmon, 13 So.2d 190, 244 Ala. 285 (1943); More v. Carnes, 309 Ky. 41, 214 S.W. 2d 984 (1948); and Blechman v. Blechman, 160 So.3d 152 (Fla. 2015).

Article 6

Partner's Dissociation

§ 10A-8A-6.01. Events causing partner's dissociation.

§ 10A-8A-6.02. Partner's power to dissociate; wrongful dissociation.

§ 10A-8A-6.03. Effect of partner's dissociation.

§ 10A-8A-6.01. Events causing partner's dissociation.

A person is dissociated from a partnership as a partner upon the occurrence of any of the following events:

- (1) the partnership has notice of the person's express will to dissociate as a partner, except that if the person specifies a dissociation date later than the date the partnership had notice, then the person is dissociated as a partner on that later date;
- (2) an event stated in the partnership agreement as causing the person's dissociation as a partner occurs;
- (3) the person is expelled as a partner pursuant to the partnership agreement;
- (4) the person is expelled as a partner by the unanimous consent of the other partners if:
 - (A) it is unlawful to carry on the partnership's business or not for profit activity with the person as a partner;
 - (B) there has been a transfer of all of the person's transferable interest in the partnership, other than a transfer for security purposes;
 - (C) the person is an organization and, within 90 days after the partnership notifies the person that it will be expelled as a partner

- because it has filed a statement of dissolution or the equivalent, or its right to conduct business or not for profit activity has been suspended by its jurisdiction of formation, the statement of dissolution or the equivalent has not been revoked or its right to conduct business or not for profit activity has not been reinstated; or
- (D) the person is an organization and, within 90 days after the partnership notifies the person that it will be expelled as a partner because the person has been dissolved and its business or not for profit activity is being wound up, the organization has not been reinstated or the dissolution and winding up have not been revoked or cancelled;
- (5) on application by the partnership, the person is expelled as a partner by judicial order because the person:
- (A) has engaged, or is engaging, in wrongful conduct that has adversely and materially affected, or will adversely and materially affect, the partnership's business or not for profit activity;
- (B) has willfully or persistently committed, or is willfully or persistently committing, a material breach of the partnership agreement or the person's duty or obligation under this chapter or other applicable law; or
- (C) has engaged, or is engaging, in conduct relating to the business or not for profit activity of the partnership that

makes it not reasonably practicable to carry on the business
or not for profit activity with the person as partner;

- (6) in the case of a person who is an individual, the person dies, there is appointed a guardian or general conservator for the person or there is a judicial determination that the person has otherwise become incapable of performing the person's duties as a partner under this chapter or the partnership agreement;
- (7) the person becomes a debtor in bankruptcy, executes an assignment for the benefit of creditors, or seeks, consents, or acquiesces to the appointment of a trustee, receiver, or liquidator of the person or of all or substantially all of the person's property;
- (8) in the case of a person that is a trust or is acting as a partner by virtue of being a trustee of a trust, the trust's entire transferable interest in the partnership is distributed, but not solely by reason of the substitution of a successor trustee;
- (9) in the case of a person that is an estate or is acting as a partner by virtue of being a personal representative of an estate, the estate's entire transferable interest in the partnership is distributed, but not solely by reason of the substitution of a successor personal representative;
- (10) in the case of a person that is not an individual, the legal existence of the person otherwise terminates;
- (11) the transfer of a partner's entire remaining transferable interest to another partner;

- (12) the transfer of a partner's entire remaining transferable interest to a transferee upon the transferee's becoming a partner; or
- (13) the partnership's participation in a conversion or merger under Article 9, or Article 8 of Chapter 1 of this title if the partnership:
 - (A) is not the converted or surviving entity; or
 - (B) is the converted or surviving entity but, as a result of the conversion or merger, the person ceases to be a partner.

Comment

This Section was derived from Section 10A-9A-8.01 of the Alabama Limited Partnership Law and Section 10A-5A-6.02 of the Alabama Limited Liability Company Law.

§ 10A-8A-6.02. Partner's power to dissociate; wrongful dissociation.

- (a) A person has the power to dissociate as a partner at any time, rightfully or wrongfully, by express will pursuant to Section 10A-8A-6.01(1).
- (b) A person's dissociation is wrongful only if:
 - (1) it is in breach of an express provision of the partnership agreement; or
 - (2) in the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking if any of the following apply:
 - (A) the person dissociates as a partner by express will, unless the dissociation follows not later than 90 days after another person's dissociation by death or otherwise under Section 10A-8A-6.01(6) through (10) or wrongful dissociation under this subsection;

- (B) the person is expelled as a partner by judicial order under Section 10A-8A-6.01(5);
- (C) the person is dissociated under Section 10A-8A-6.01(7); or
- (D) in the case of a person that is not a trust other than a business trust, an estate, or an individual, the person is expelled or otherwise dissociated because it willfully dissolved or terminated.

(c) A person that wrongfully dissociates as a partner is liable to the partnership and to the other partners for damages caused by the dissociation. The liability is in addition to any debt, obligation, or other liability of the partner to the partnership or the other partners.

Comment

This Section was derived from §602 of HRUPA and Delaware §15-602.

Subsection (a) states explicitly that a partner has the power to dissociate at any time by expressing a will to ~~withdraw~~ dissociate, even in contravention of the partnership agreement. The phrase “rightfully or wrongfully” reflects the distinction between a partner’s power to ~~withdraw~~ dissociate in contravention of the partnership agreement and a partner’s right to do so. In this context, although a partner cannot be enjoined from exercising the power to dissociate, the dissociation may be wrongful under Subsection (b).

Subsection (b) provides that a partner’s dissociation is wrongful only if it results from one of the enumerated events. The significance of a wrongful dissociation is that it may give rise to damages under Subsection (c) and, if it results in the dissolution of the partnership, the wrongfully dissociating partner is not entitled to participate in winding up the business or not for profit activity under Section 10A-8A-8.03.

Under Subsection (b), a partner’s dissociation is wrongful if (1) it breaches an express provision of the partnership agreement or (2) in a term partnership, before the expiration of the term or the completion of the undertaking (i) the partner voluntarily ~~withdraws~~ dissociates by express will, except a ~~withdrawal~~ dissociation following another partner’s wrongful dissociation or dissociation by death or otherwise under Section 10A-8A-601(6) through (10); (ii) the partner is expelled for misconduct under Section 10A-8A-601(5); (iii) the partner becomes a debtor in bankruptcy (see ~~Section 101(2)~~ definitions under Chapter 1 of this Title); or (iv) a partner that is an entity (other than a trust or estate) is expelled or otherwise dissociated because its dissolution or termination was willful. Since Subsection (b) is merely a default rule, the partnership agreement may eliminate or expand the dissociations that are wrongful or modify the effects of wrongful dissociation.

The exception in Subsection (b)(2)(A) is intended to protect a partner's reactive ~~withdrawal~~dissociation from a term partnership after the premature departure of another partner, such as the partnership's rainmaker or main supplier of capital.

Subsection (c) provides that a wrongfully dissociating partner is liable to the partnership and to the other partners for any damages caused by the wrongful nature of the dissociation. That liability is in addition to any other obligation of the partner to the partnership or to the other partners. For example, the partner would be liable for any damage caused by breach of the partnership agreement or other misconduct. The partnership might also incur substantial expenses resulting from a partner's premature ~~withdrawal~~dissociation from a term partnership, such as replacing the partner's expertise or obtaining new financing. The wrongfully dissociating partner would be liable to the partnership for those and all other expenses and damages that are causally related to the wrongful dissociation.

Section 10A-8A-7.01(c) provides that any damages for wrongful dissociation may be offset against the amount of the buyout price due to the partner under Section 10A-8A-7.01(a).

§ 10A-8A-6.03. Effect of partner's dissociation.

(a) If a person's dissociation results in a dissolution and winding up of the partnership business or not for profit activity, Article 8 applies; otherwise, Article 7 applies.

(b) Upon a person's dissociation as a partner:

- (1) the person's right to participate in the management and conduct of the partnership business or not for profit activity terminates, except as provided in Section 10A-8A-8.03;
- (2) the person's duty of loyalty under Section 10A-8A-4.11 (b)(3) terminates; and
- (3) the person's duty of loyalty under Section 10A-8A-4.11 (b)(1) and (2) and duty of care under Section 10A-8A-4.11 (c) continue only with regard to matters arising and events occurring before the person's dissociation, unless the partner participates in winding up the partnership's business or not for profit activity pursuant to Section 10A-8A-8.03.

Comment

Subsection (a) is a “switching” provision. It provides that, after a partner’s dissociation, the partner’s interest in the partnership must be purchased pursuant to the buyout rules in Article 7 unless there is a dissolution and winding up of the partnership business or not for profit activity under Article 8. Thus, as a default rule, a partner’s dissociation will always result in either a buyout of the dissociated partner’s interest or a dissolution and winding up of the business or not for profit activity.

Subsection (b) ~~with~~identifies some of the internal effects of a partner’s dissociation. Subsection (b)(1) makes it clear that one of the consequences of a partner’s dissociation is the immediate loss of the right to participate in the management of the business or not for profit activity, unless it results in a dissolution and winding up of the business or not for profit activity. In that case, Section 10A-8A-8.03(a) provides that all of the partners who have not wrongfully dissociated may participate in winding up the business or not for profit activity.

Subsection (b)(2) and (3) clarify a partner’s fiduciary duties upon dissociation. With respect to the duty of loyalty, the duty not to compete terminates upon dissociation, and the dissociated partner is free immediately to engage in a competitive business or not for profit activity, without any further consent. With respect to the partner’s remaining loyalty duties and duty of care ~~under~~, a dissociating partner has a continuing duty after dissociation, but it is limited to matters that arose or events that occurred before the partner dissociated. For example, a partner who leaves a brokerage firm may immediately compete with the firm for new clients, but must exercise care in completing on-going client transactions and must account to the firm for any fees received from the old clients on account of those transactions. As the last clause makes clear, there is no contraction of a dissociated partner’s duties under Subsection (b)(3) if the partner thereafter participates in the dissolution and winding up the partnership’s business or not for profit activity.

Article 7

Person's Dissociation as a Partner when Business or Not for Profit Activity Not Wound up

- § 10A-8A-7.01. Purchase of transferable interest of a person dissociated as a partner.
- § 10A-8A-7.02. Power to bind and liability of person dissociated as a partner.
- § 10A-8A-7.03. Liability of person dissociated as a partner to other persons.
- § 10A-8A-7.04. Statement of dissociation.
- § 10A-8A-7.05. Continued use of partnership name.

§ 10A-8A-7.01. Purchase of transferable interest of a person dissociated as a partner.

(a) If a person is dissociated as a partner from a partnership without resulting in a dissolution and winding up of the partnership business or not for profit activity under Section 10A-8A-8.01, the partnership shall cause that person's transferable interest in the partnership owned by that person at the time of dissociation to be purchased for a buyout price determined pursuant to subsection (b).

(b) The buyout price of the transferable interest owned by the person at the time of dissociation as a partner is an amount equal to the fair value of that person's transferable interest as of the date of dissociation. Interest on the buy-out price must be paid from the date of dissociation to the date of payment.

(c) Damages for wrongful dissociation under Sections 10A-8A-6.02(b) and (c), and all other amounts owing, whether or not presently due, from the person dissociated as a partner to the partnership, must be offset against the buyout price. Interest on damages for wrongful dissociation must be paid from the date of the wrongful dissociation to the date of payment. Interest on all other amounts, whether or not presently due, must be paid from the date the amount owed becomes due to the date of payment.

(d) A partnership shall indemnify a person dissociated as a partner whose transferable interest is being purchased against all partnership liabilities, whether incurred before or after the dissociation, except liabilities incurred by an act of the person dissociated as a partner under Section 10A-8A-7.02.

(e) If no agreement for the purchase of the transferable interests of a person dissociated as a partner is reached within 120 days after a written demand for payment, the partnership shall pay, or cause to be paid, in cash to the person dissociated as a partner the amount the partnership estimates to be the buyout price and accrued interest, reduced by any offsets and accrued interest under subsection (c).

(f) If a deferred payment is authorized under subsection (h), the partnership may tender a written offer to pay the amount it estimates to be the buyout price and accrued interest, reduced by any offsets under subsection (c), stating the time of payment, the amount and type of security for payment, and the other terms and conditions of the obligation.

(g) The payment or tender required by subsection (e) or (f) must be accompanied by the following:

- (1) a written statement of partnership assets and liabilities as of the date of dissociation;
- (2) the latest available partnership balance sheet and income statement, if any;
- (3) a written explanation of how the estimated amount of the payment was calculated; and
- (4) written notice which shall state that the payment is in full satisfaction of the obligation to purchase unless, within 120 days after the written notice, the person dissociated as a partner commences an action to determine the

buyout price of that person's transferable interest, any offsets under subsection (c), or other terms of the obligation to purchase.

(h) A person that wrongfully dissociates as a partner before the expiration of a definite term or the completion of a particular undertaking is not entitled to payment of any portion of the buyout price until the expiration of the term or completion of the undertaking, unless the person establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business or not for profit activity of the partnership. A deferred payment under this subsection must bear interest and, to the extent it would not cause undue hardship to the business or not for profit activity of the partnership, be adequately secured.

(i) A person dissociated as a partner may maintain an action against the partnership, pursuant to Section 10A-8A-4.13(b)(2)(ii), to determine the buyout price of that person's transferable interest under subsection (b), any offsets under subsection (c), or other terms of the obligation to purchase. The action must be commenced within 120 days after the partnership has tendered payment or an offer to pay or within one year after written demand for payment if no payment or offer to pay is tendered. The court shall determine the buyout price of that person's transferable interest under subsection (b), any offset due under subsection (c), and accrued interest, and enter judgment for any additional payment or refund. If deferred payment is authorized under subsection (h), the court shall also determine the security, if any, for payment and other terms of the obligation to purchase. The court may assess reasonable attorney's fees and the fees and expenses of appraisers or other experts for a party to the action, in amounts the court finds equitable, against a party that the court finds acted arbitrarily, vexatiously, or not in good faith. The finding may be based on the partnership's failure to tender payment or an offer to pay or to comply with subsection (g).

Comment

This Section would not normally apply to the case in which a partner transfers all of that partner's remaining transferable interest to another partner, or in the case in which the transferee of that partner becomes a partner since normally in those cases value has already been paid to the transferring partner. In addition, this Section only applies to the transferable interest owned by a person dissociated as a partner which transferable interest is owned at the time of the dissociation. Thus, previously transferred transferable interests of that person are not included in the calculation of the buy-out price—only those transferable interest which are actually owned by that person at the time of the dissociation and at the time of the calculation of the buy-out price are subject to the calculation of the buy-out price.

This Chapter uses the "fair value of the dissociated partner's transferable interest" as the buyout price under Subsection (b). The use of the term "Fair Value" should be viewed in light of Ex parte Baron Services, Inc., 874 So.2d 545 (Ala. 2003). Although, Baron Services involved the interpretation of the term "Fair Value" in the corporate context, it is the intent of this Chapter that the term "Fair Value" should be given the same meaning and that the courts should interpret the term "Fair Value" as used in this Chapter in the same manner as it was interpreted in the Baron Services case.

It should be noted that implicit in the use of a tender or demand to trigger the running of the time periods under Subsection (i) is that the person making the tender or demand be able to prove receipt of the tender or demand.

Subsection (c) provides that the partnership may offset against the buyout price all amounts owing by the dissociated partner to the partnership, whether or not presently due, including any damages for wrongful dissociation under Section 10A-8A-6.02(b) and (c). This has the effect of accelerating payment of amounts not yet due from the departing partner to the partnership, including a long-term loan by the partnership to the dissociated partner. Where appropriate, the amounts not yet due should be discounted to present value. A dissociating partner, on the other hand, is not entitled to an add-on for amounts owing to him by the partnership. Thus, a departing partner who has made a long-term loan to the partnership must wait for repayment, unless the terms of the loan agreement provide for acceleration upon dissociation.

It is not intended that the partnership's right of setoff be construed to limit the amount of the damages for the partner's wrongful dissociation and any other amounts owing to the partnership to the value of the dissociated partner's interest. Those amounts may result in a net sum due to the partnership from the dissociated partner.

Subsection (d) provides that the partnership must indemnify a dissociated partner against all partnership liabilities, whether incurred before or after the dissociation, except those incurred by the dissociated partner under Section 10A-8A-7.02.

Subsection (e) provides that, if no agreement for the purchase of the dissociated partner's interest is reached within 120 days after the dissociated partner's written demand for payment,

the partnership must pay, or cause to be paid, in cash the amount it estimates to be the buyout price, adjusted for any offsets allowed and accrued interest. Thus, the dissociating partner will receive in cash within 120 days of dissociation the undisputed minimum value of the partner's partnership interest. If the dissociated partner claims that the buyout price should be higher, suit may thereafter be brought as provided in Subsection (i) to have the amount of the buyout price determined by the court.

Subsection (f) provides that, when deferred payment is authorized in the case of a wrongfully dissociating partner, a written offer stating the amount the partnership estimates to be the purchase price should be tendered within the 120-day period, even though actual payment of the amount may be deferred, possibly for many years. The dissociated partner is entitled to know at the time of dissociation what amount the remaining partners think is due, including the estimated amount of any damages allegedly caused by the partner's wrongful dissociation that may be offset against the buyout price.

Subsection (g) provides that the payment of the estimated price (or tender of a written offer under Subsection (f)) by the partnership must be accompanied by (1) a written statement of the partnership's assets and liabilities as of the date of the partner's dissociation; (2) the latest available balance sheet and income statement, if the partnership maintains such financial statements; (3) a written explanation of how the estimated amount of the payment was calculated; and (4) a written notice that the payment will be in full satisfaction of the partnership's buyout obligation unless the dissociated partner commences an action to determine the price within 120 days of the notice.

Those disclosures should serve to identify and narrow substantially the items of dispute between the dissociated partner and the partnership over the valuation of the partnership interest. They will also serve to pin down the parties as to their claims of partnership assets and values and as to the existence and amount of all known liabilities. Lastly, it will force the remaining partners to consider thoughtfully the difficult and important questions as to the appropriate method of valuation under the circumstances, and in particular, whether they should use going concern or liquidation value. Simply getting that information on the record in a timely fashion should increase the likelihood of a negotiated resolution of the parties' differences during the 120-day period within which the dissociated partner must bring suit.

Subsection (h) provides a somewhat different rule for payment to a partner whose dissociation before the expiration of a definite term or the completion of a particular undertaking is wrongful. Under Subsection (h), a wrongfully dissociating partner is not entitled to receive any portion of the buyout price before the expiration of the term or completion of the undertaking, unless the dissociated partner establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business or not for profit activity of the partnership.

Subsection (i) provides that a dissociated partner may maintain an action against the partnership to determine the buyout price, any offsets, or other terms of the purchase obligation. The action must be commenced within 120 days after the partnership tenders payment of the amount it estimates to be due or, if deferred payment is authorized, its written offer. This provision creates a 120-day "cooling off" period. It also allows the parties an opportunity to

negotiate their differences after disclosure by the partnership of its financial statements and other required information.

If the partnership fails to tender payment of the estimated amount due (or a written offer, if deferred payment is authorized), the dissociated partner has one year after written demand for payment in which to commence suit.

If the parties fail to reach agreement, the court must determine the buyout price of the partner's interest, any offsets, including damages for wrongful dissociation, and the amount of interest accrued. If payment to a wrongfully dissociated partner is deferred, the court may also require security for payment and determine the other terms of the obligation.

Under Subsection (i), attorney's fees and other costs may be assessed against any party found to have acted arbitrarily, vexatiously, or not in good faith in connection with the valuation dispute, including the partnership's failure to tender payment of the estimated price or to make the required disclosures.

§ 10A-8A-7.02. Power to bind and liability of person dissociated as a partner.

(a) For one year after a person dissociates as a partner without resulting in a dissolution and winding up of the partnership business or not for profit activity, the partnership, including a surviving partnership or other surviving entity under Article 9 of this Chapter and Article 8 of Chapter 1, is bound by an act of the person dissociated as a partner which would have bound the partnership under Section 10A-8A-3.01 before dissociation only if at the time of entering into the transaction the other party:

- (1) reasonably believed that the person dissociated as a partner was then a partner and reasonably relied on such belief in entering into the transaction;
- (2) did not have notice of the person's dissociation as a partner; and
- (3) is not deemed to have had knowledge or notice under Section 10A-8A-1.03.

(b) A person dissociated as a partner is liable to the partnership for any damage caused to the partnership arising from an obligation incurred by the person dissociated as a partner after dissociation for which the partnership is liable under subsection (a).

Comment

This Section deals with a dissociated partner's lingering apparent authority to bind the partnership in ordinary course partnership transactions, and the partner's liability to the partnership for any loss caused thereby. The time period under this Section has been changed from two years to one year ~~to reflect~~ which is consistent with Delaware §15-702.

A dissociated partner has no actual authority to act for the partnership. Nevertheless, in order to protect innocent third parties, Subsection (a) provides that the partnership remains bound, for one year after a partner's dissociation, by that partner's acts which would, before ~~his~~ such partner's dissociation, have bound the partnership under Section 10A-8A-3.01 if, and only if, the other party to the transaction reasonably believed that ~~he~~ the dissociated partner was still a partner and did not have notice of the partner's dissociation and is not deemed to have had knowledge of the dissociation under Section 10A-8A-1.03.

Under Section 10A-8A-3.01, every partner has apparent authority to bind the partnership by any act for carrying on the partnership business or not for profit activity in the usual way, unless the other party knows that the partner has no actual authority to act for the partnership or has received notice of the partner's lack of authority. Section 10A-8A-7.02(a) continues that general rule for one year after a partner's dissociation, subject to certain modifications.

After a partner's dissociation, the general rule is modified, first, by requiring the other party to show reasonable reliance on the partner's status as a partner. Section 10A-8A-3.01 has no explicit reliance requirement, although the partnership is bound only if the partner purports to act on its behalf. Thus, the other party will normally be aware of the partnership and presumably the partner's status as such.

The second modification of the general apparent authority rule under Subsection (a) involves the effect of a statement of dissociation. Section 10A-8A-1.03 provides that third parties are deemed to have notice of a partner's dissociation 90 days after the filing of a statement of dissociation. Thus, the filing of a statement of dissociation operates as constructive notice of the dissociated partner's lack of authority after 90 days, conclusively terminating the dissociated partner's apparent authority under this Section.

§ 10A-8A-7.03. Liability of person dissociated as a partner to other persons.

(a) A person's dissociation as a partner does not of itself discharge that person's liability for a partnership obligation incurred before dissociation. A person dissociated as a

partner is not liable for a partnership obligation incurred after dissociation, except as provided in subsection (b).

(b) A person that dissociates as a partner without resulting in a dissolution and winding up of the partnership business or not for profit activity is liable as a partner to the other party in a transaction entered into by the partnership, or a surviving partnership or other surviving entity under Article 9 of this Chapter or Article 8 of Chapter 1, within one year after the partner's dissociation, only if the partner is liable for the obligation under Section 10A-8A-3.06 and at the time of entering into the transaction the other party:

- (1) reasonably believed that the person dissociated as a partner was then a partner and reasonably relied on such belief in entering into the transaction;
- (2) did not have notice of the person's dissociation; and
- (3) is not deemed to have had knowledge or notice under Section 10A-8A-1.03 of the person's dissociation.

(c) By agreement with the partnership creditor and the partners continuing the business or not for profit activity, a person dissociated as a partner may be released from liability for a partnership obligation.

(d) A person dissociated as a partner is released from liability for a partnership obligation if a partnership creditor, with notice of the person's dissociation but without the person's consent, agrees to a material alteration in the nature or time of payment of a partnership obligation.

Comment

This Section continues the basic rule that the departure of a partner does not of itself discharge the partner's liability to third parties for any partnership obligation incurred before dissociation. The word "obligation" is used instead of "liability" and is intended to include broadly both tort and contract liability incurred before dissociation. The second sentence states

affirmatively that a dissociating partner is not liable for any partnership obligation incurred after dissociation except as expressly provided in Subsection (b).

Subsection (b) recognizes that the liability of a dissociated partner hereunder is limited to obligations for which such partner would be personally liable under Section 10A-8A-3.06; If there would be no liability by virtue of the application of the limited liability partnership shield of Section 10A-8A-3.06(c), then none would be created by this Subsection (b).

Subsection (b) also deals with the problem of protecting third parties who extend credit to the partnership after a partner's dissociation, believing that ~~he~~such person is still a partner. It provides that the dissociated partner remains liable as a partner for transactions entered into by the partnership within one year after his departure, if the other party does not have notice of the partner's dissociation and reasonably believes when entering the transaction that the dissociated partner is still a partner. The dissociated partner is not personally liable, however, if the other party knows or has notice under Section 10A-8A-1.03 of the dissociation.

Subsection (b) operates similarly to Section 10A-8A-7.02(a) in that it requires reliance on the departed partner's continued partnership status, as well as lack of notice. Under Section 10A-8A-1.03, a statement of dissociation operates conclusively as constructive notice 90 days after filing.

Subsection (d) continues the rule that a dissociated partner is released from liability for a partnership obligation if the creditor, with notice of the partner's departure, agrees to a material alteration in the nature or time of payment, without that partner's consent. This rule covers all partner dissociations and is not limited to situations in which a third party "agrees to assume the existing obligations of a dissolved partnership."

§ 10A-8A-7.04. Statement of dissociation.

(a) A person dissociated as a partner or the partnership may file a statement of dissociation stating the name of the partnership and that the person is dissociated as a partner from the partnership.

(b) A statement of dissociation is a limitation on the authority of a person dissociated as a partner for the purposes of Section 10A-8A-3.03.

Comment

This Section provides for a statement of dissociation and its effects. Subsection (a) authorizes either a dissociated partner or the partnership to file a statement of dissociation. Like many other filings under this Chapter, the statement of dissociation is voluntary. Both the

partnership and the departing partner have an incentive to file, however, and it is anticipated that those filings will become routine upon a partner's dissociation.

§ 10A-8A-7.05. Continued use of partnership name.

Continued use of a partnership name, or a person's name that is dissociated as a partner as part thereof, by partners continuing the business or not for profit activity does not of itself make the person dissociated as a partner liable for an obligation of the partners or the partnership continuing the business or not for profit activity.

Comment

This Section provides that a dissociated partner is not liable for the debts of the continuing partnership simply because of continued use of the partnership name or the dissociated partner's name as a part thereof. ~~That~~This rule prevents forcing the partnership to forego the ~~good will~~goodwill associated with its name.

Article 8

Dissolution and Winding-Up

- § 10A-8A-8.01. Events of dissolution.
- § 10A-8A-8.02. Effect of dissolution.
- § 10A-8A-8.03. Right to wind up business or not for profit activity.
- § 10A-8A-8.04. Power of partner and person dissociated as partner to bind partnership after dissolution.
- § 10A-8A-8.05. Liability after dissolution of partner and person dissociated as partner to partnership; other partners, and persons dissociated as partner.
- § 10A-8A-8.06. Known claims against dissolved partnership.
- § 10A-8A-8.07. Other claims against dissolved partnership.
- § 10A-8A-8.08. Liability of partner and person dissociated as partner when claim against partnership.
- § 10A-8A-8.09. Disposition of assets; when contributions required.
- § 10A-8A-8.10. Reinstatement after dissolution.
- § 10A-8A-8.11. Certificate of reinstatement.
- § 10A-8A-8.12. Partnership name upon reinstatement.
- § 10A-8A-8.13. Effect of reinstatement.

§ 10A-8A-8.01. Events of dissolution.

A partnership is dissolved, and its business or not for profit activity must be wound up, upon the occurrence of the first of the following events:

(1) in a partnership at will, the ~~partnership's having notice from~~ partnership knows or has notice of a person's express will to dissociate as a partner, other than a partner ~~who is~~ that has dissociated under Section 10A-8A-6.01 (2) through (10), of that partner's express will to dissociate as a partner, on a later date specified by the partner in the notice or, if no later date is specified, then upon receipt of notice; but, if the person has specified a dissociation date later than the date the partnership knew or had notice, on the later date;

(2) in a partnership for a definite term or particular undertaking:

- (i) within 90 days after a partner's dissociation by death or otherwise under Section 10A-8A-6.01 (6) through (10), or a partner's wrongful dissociation

under Section 10A-8A-6.02 (b), at least half of the remaining partners affirmatively consent to dissolve the partnership and wind up the partnership business or not for profit activity, for which purpose a partner's rightful dissociation pursuant to Section 10A-8A-6.02 (b)(2)(A) constitutes the expression of that partner's will to wind up the business or not for profit activity of the partnership;

(ii) the consent of all of the partners to dissolve and wind up the partnership's business or not for profit activity; or

(iii) the expiration of the term or the completion of the undertaking;

(3) an event or circumstance that the partnership agreement states causes dissolution;

(4) on application by a partner, the entry of an order by a court of competent jurisdiction dissolving the partnership on the grounds that it is not reasonably practicable to carry on the partnership's business or not for profit activity in conformity with the partnership agreement;

(5) on application by a transferee of a partner's transferable interest, a judicial determination that it is equitable to wind up the partnership business or not for profit activity:

(i) after the expiration of the term or completion of the undertaking, if the partnership was for a definite term or particular undertaking at the time of the transfer; or

(ii) at any time, if the partnership was a partnership at will at the time of the transfer;

(6) the passage of 90 consecutive days during which the partnership does not have at least two partners, unless either of the following applies:

- (i) The remaining partner agrees in writing within 90 days after the dissociation of the last partner, to continue the business or not for profit activity of the partnership and to admit one or more new partners; or
 - (ii) The business or not for profit activity of the partnership is continued and one or more new partners are admitted in the manner stated in the partnership agreement; or
- (7) the passage of 90 consecutive days during which the partnership does not have any remaining partners, unless either of the following applies:
- (i) The holders of all of the transferable interests in the partnership agree in writing, within 90 days after the dissociation of the last partner, to continue the business or not for profit activity of the partnership and to admit two or more new partners; or
 - (ii) The business or not for profit activity of the partnership is continued and two or more new partners are admitted in the manner stated in the partnership agreement.

Comment

This Section is substantially similar to Section 10A-9A-8.01 of the Alabama Limited Partnership Law and Section 10A-5A-7.01 of the Alabama Limited Liability Company Law.

This Chapter continues the entity theory treatment of partnerships in an effort to prevent technical dissolutions or their consequences. The basic rule is that a partnership is dissolved, and its business or not for profit activity must be wound up, only upon the occurrence of one of the events listed in this Section. All other dissociations result in a buyout of the partner's interest under Article 7 and a continuation of the partnership entity and its business or not for profit activity by the remaining partners.

Except for Subsections (4), (5), (6), and (7) this Section's rules are default rules and may by agreement be varied or eliminated as grounds for dissolution.

Under this Chapter, as with most of Alabama’s entities, “dissolution” is merely the commencement of the winding up process. The partnership continues for the limited purpose of winding up the business or not for profit activity. In effect, that means the scope of the partnership business or not for profit activity contracts to completing work in process and taking such other actions as may be necessary to wind up the business or not for profit activity. Winding up the partnership business or not for profit activity entails selling its assets, paying its debts, and distributing the net balance, if any, to the partners in cash according to their interests or in such other manner as may be required by the partnership agreement. The partnership entity continues, and the partners are associated in the winding up of the business or not for profit activity until winding up is completed.

§ 10A-8A-8.02. Effect of dissolution.

Notwithstanding Section 10A-1-9.12:

- (a) A dissolved partnership continues its existence as a partnership but may not carry on any business or not for profit activity except as is appropriate to wind up and liquidate its business or not for profit activity, including:
 - (1) collecting its assets;
 - (2) disposing of its properties that will not be distributed in kind to persons owning transferable interests;
 - (3) discharging or making provisions for discharging its liabilities;
 - (4) distributing its remaining property in accordance with Section 10A-8A-8.09; and
 - (5) doing every other act necessary to wind up and liquidate its business or not for profit activity.
- (b) In winding up its business or not for profit activity, a partnership may:
 - (1) deliver to the Secretary of State for filing a statement of dissolution setting forth:
 - (A) The name of the partnership;

- (B) If the partnership has filed a statement of partnership, a statement of not for profit partnership, a statement of authority, or a statement of limited liability partnership, the date of filing its statement of partnership, statement of not for profit partnership, statement of authority, or statement of limited liability partnership, and all amendments and restatements thereof, and the office or offices where filed;
 - (C) That the partnership has dissolved;
 - (D) The name~~—and~~, street address, and mailing address of the partner who will be winding up the business or not for profit activity of the partnership pursuant to Section 10A-8A-8.03(a), and if none, the name~~—and~~, street address, and mailing address of the person appointed pursuant to Section 10A-8A-8.03(b) or (c) to wind up the business or not for profit activity of the partnership;
 - (E) If the partnership has filed a statement of partnership, a statement of not for profit partnership, ~~a statement of authority~~, or a statement of limited liability partnership, the name~~—and~~, street address, and mailing address of the partnership's registered agent; and
 - (F) Any other information the partnership deems appropriate;
- (2) preserve the partnership's business or not for profit activity as a going concern for a reasonable time;
 - (3) prosecute, defend, or settle actions or proceedings whether civil, criminal or administrative;

- (4) transfer the partnership's assets;
 - (5) resolve disputes by mediation or arbitration; and
 - (6) merge or convert in accordance with Article 9 of this chapter or Article 8 of Chapter 1.
- (c) The dissolution of a partnership does not:
- (1) transfer title to the partnership's property;
 - (2) prevent the commencement of a proceeding by or against the partnership in its partnership name;
 - (3) terminate, abate or suspend a proceeding pending by or against the partnership on the effective date of dissolution;
 - (4) terminate the authority of its registered agent; or
 - (5) abate, suspend or otherwise alter the application of Section 10A-8A-3.06.
- (d) A statement of dissolution is a filing instrument under Chapter 1.

Comment

This Section is derived from Section 10A-9A-8.02 of the Alabama Limited Partnership Law and Section 10A-5A-7.02 of the Alabama Limited Liability Company Law. This Section provides for a statement of dissolution, but the filing of such a statement is optional if the partnership has a partner that will conduct the winding up of the partnership; however, if a person is appointed pursuant to Section 10A-8A-8.03, the filing of the statement of dissolution is mandatory in order to provide that person with the protections of Section 10A-8A-8.03. The statement of dissolution, much like prior law, provides notice to third parties about the person who will be winding up the business or not for profit activity of the partnership. See Section 10A-8A-1.03. In that regard, a statement of dissolution is not the end of the dissolution and winding up process, but rather is notice of that process. If the partnership either elects not to file, or because of circumstances does not file, a statement of dissolution, third parties without knowledge or notice of the dissolution may continue to rely upon the partnership agreement and any filed statements as if the partnership was not dissolved. This Section acknowledges that a statement of dissolution may be filed at any time in that process (unless it is required under Section 10A-8A-8.03), and that even though the partnership may be "dissolved," the partnership nonetheless remains in existence (See Section 10A-8A-8.02(a)) as a partnership and has the powers and authorities provided in this Chapter, but its business or not for profit activity are limited to those appropriate to winding up as set forth in this Article 8. This Section also acknowledges that the

dissolution and winding up process may take some time to complete, and thus, the partnership's status as a partnership continues throughout that process.

~~Section~~ Subsection (d) was added to clarify that a statement of dissolution is, for purposes of Chapter 1, a "filing instrument" (defined as any document that must or may be filed). Although Chapter 1 appears to cover where the statement of dissolution should be filed and what the filing fees should be in Sections 10A-1-4.02(a)(5) and 4.31(a), this provision is intended to clarify that treatment. ~~Subsection (e) was added to reflect the filing requirements of Section 10A-1-4.02(e)(4).~~ Because a statement of dissolution is a "filing instrument," the effective date of a statement of dissolution is governed by Article 4 of Chapter 1.

§ 10A-8A-8.03. Right to wind up business or not for profit activity.

(a) If a dissolved partnership has a partner or partners that have not dissociated, that partner or those partners shall wind up the business or not for profit activity of the partnership and shall have the powers set forth in Section 10A-8A-8.04. A person whose dissociation as a partner resulted in the dissolution of the partnership may participate in the winding up as if still a partner, unless the dissociation was wrongful.

(b) If a dissolved partnership does not have a partner and no person has the right to participate in winding up under subsection (a), the personal or legal representative of the last person to have been a partner may wind up the partnership's business or not for profit activity. If the representative does not exercise that right, a person to wind up the partnership's business or not for profit activity may be appointed by the affirmative vote or consent of transferees owning a majority of the transferable interests at the time the consent is to be effective.

(c) A court of competent jurisdiction may order judicial supervision of the winding up of a dissolved partnership, including the appointment of a person to wind up the partnership's business or not for profit activity:

- (1) on application of a partner or any person entitled under the last sentence of subsection (a) to participate in the winding up of the dissolved partnership,

- if the applicant establishes good cause;
- (2) on application of a transferee, if the partnership does not have a partner and within a reasonable time following the dissolution no person having the authority to wind up the business or not for profit activity of the partnership has been appointed pursuant to subsection (b);
 - (3) on application of a transferee, if the partnership does not have a partner and within a reasonable time following the dissolution the person appointed pursuant to subsection (b) is not winding up the business or not for profit activity of the partnership; or
 - (4) in connection with a proceeding under Section 10A-8A-8.01(4) or (5).
- (d) A person appointed under subsection (b) or (c) is not a partner but:
- (1) has the powers of a partner under Section 10A-8A-8.04 but is not liable for the debts, liabilities, and other obligations of the partnership solely by reason of having or exercising those powers or otherwise acting to wind up the business or not for profit activity of the dissolved partnership; and
 - (2) shall promptly deliver to the Secretary of State for filing a statement of dissolution setting forth the items listed in Section 10A-8A-8.02(b)(1) and the following:
 - (A) that the partnership does not have a partner;
 - (B) the name ~~and~~, street address, and mailing address of each person that has been appointed to wind up the business or not for profit activity of the partnership;
 - (C) that each person has been appointed pursuant to subsection (b) or

(c), as applicable, to wind up the business or not for profit activity of the partnership; and

(D) pursuant to this Section, that each person has the powers of a partner under Section 10A-8A-8.04 but is not liable for the debts, liabilities, and other obligations of the partnership solely by reason of having or exercising those powers or otherwise acting to wind up the business or not for profit activity of the dissolved partnership.

Comment

This Section was derived from Section 10A-9A-8.03 of the Alabama Limited Partnership Law and Section 10A-5A-7.03 of the Alabama Limited Liability Company Law. A person appointed under Subsection (b) is not a partner and therefore is not subject to the standards of a partner such as Section 10A-9A-4.11.

Subsection (d) provides for a statement of dissolution, but the filing of such a statement is mandatory if a person is appointed pursuant to Section 10A-8A-8.03(b) or (c) in order to provide that person with the protections of Section 10A-8A-8.03(d). The statement of dissolution provides notice to third parties about the person who will be winding up the business or not for profit activity of the partnership. See Section 10A-8A-1.03. In that regard, a statement of dissolution is not the end of the dissolution and winding up process, but rather is notice of that process.

§ 10A-8A-8.04. Power to bind partnership after dissolution.

(a) After dissolution, a partnership is bound by the act of a partner or by the act of a dissociated partner acting as a partner under Section 10A-8A-8.03(a) which:

- (1) is appropriate for winding up the partnership's business or not for profit activity; or
- (2) would have bound the partnership under Section 10A-8A-3.01 before dissolution, if, at the time the other party enters into the transaction, the other party does not have notice of the dissolution.

(b) Subject to subsection (a), a person dissociated as a partner binds a partnership

through an act occurring after dissolution only if:

- (1) at the time the other party enters into the transaction the other party does not have notice of the dissociation and reasonably believes that the person is a partner; and
- (2) the act:
 - (A) is appropriate for winding up the partnership's business or not for profit activity; or
 - (B) would have bound the partnership under Section 10A-8A-3.01 before dissolution and at the time the other party enters into the transaction the other party does not have notice of the dissolution.

Comment

This Section was derived from Section 10A-9A-8.04 of the Alabama Limited Partnership Law. "only" was added in Subsection (b) to assure that this is the only situation in which a dissociated partner can bind the partnership.

This Section does not provide a time limit as to the dissociated partner's power as it is more important to protect persons dealing with a dissociated partner than it is to protect the dissociated partner or the partnership. Thus, the partnership should be proactive upon the dissociation of a partner to place third parties on notice. The dissociated partner can obtain protection by filing a notice of dissociation under Section 10A-8A-7.04 which serves as notice that the person has dissociated as a partner in accordance with Section 10A-8A-1.03.

§ 10A-8A-8.05. Liability after dissolution of partner and person dissociated as partner; other partners, and persons dissociated as partners.

(a) If a partner having knowledge of the dissolution causes a partnership to incur an obligation under Section 10A-8A-8.04(a) by an act that is not appropriate for winding up the partnership's business or not for profit activity, the partner is liable:

- (1) to the partnership for any damage caused to the partnership arising from the obligation; and

- (2) if another partner or a person dissociated as a partner is liable for the obligation, to that other partner or person for any damage caused to that other partner or person arising from the liability.

(b) If a person dissociated as a partner causes a partnership to incur an obligation under Section 10A-8A-8.04(b), the person is liable:

- (1) to the partnership for any damage caused to the partnership arising from the obligation; and
- (2) if a partner or another person dissociated as a partner is liable for the obligation, to the partner or other person for any damage caused to the partner or other person arising from the liability.

(c) A person dissociated as a partner is not liable under subsection (b) if:

- (1) the last sentence of Section 10A-8A-8.03(a) permits the person to participate in winding up; and
- (2) the act that causes the partnership to be bound under Section 10A-8A-8.04(b) is appropriate for winding up the partnership's business or not for profit activity.

Comment

This Section was derived from Section 10A-9A-8.05 of the Alabama Limited Partnership Law. It is possible for more than one person to be liable under this Section on account of the same partnership obligation. This Section does not provide any rule for apportioning liability in that circumstance.

§ 10A-8A-8.06. Known claims against dissolved partnership.

Notwithstanding Sections 10A-1-9.01 and 10A-1-9.21:

- (a) A dissolved partnership may dispose of any known claims against it by following the procedures described in subsection (b) at any time after the effective date of the

dissolution of the partnership.

- (b) A dissolved partnership may give notice of the dissolution in writing to the holder of any known claim. The notice must:
 - (1) identify the dissolved partnership;
 - (2) describe the information required to be included in a claim;
 - (3) provide a mailing address to which the claim is to be sent;
 - (4) state the deadline, which may not be fewer than 120 days from the effective date of the notice, by which the dissolved partnership must receive the claim;
 - (5) state that if not sooner barred, the claim will be barred if not received by the deadline; and
 - (6) unless the partnership has been throughout its existence a limited liability partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any partner or person dissociated as a partner which is based on Section 10A-8A-3.06.
- (c) Unless sooner barred by any other statute limiting actions, a claim against a dissolved partnership is barred:
 - (1) if a claimant who was given notice under subsection (b) does not deliver the claim to the dissolved partnership by the deadline; or
 - (2) if a claimant whose claim was rejected by the dissolved partnership, does not commence a proceeding to enforce the claim within 90 days from the effective date of the rejection notice.
- (d) For purposes of this section, “known claim” or “claim” includes unliquidated

claims, but does not include a contingent liability that has not matured so that there is no immediate right to bring suit or a claim based on an event occurring after the effective date of dissolution.

- (e) Nothing in this section shall be deemed to extend any otherwise applicable statute of limitations.

Comment

This Section was derived from Section 10A-9A-8.06 of the Alabama Limited Partnership Law and Section 10A-5A-7.04 of the Alabama Limited Liability Company Law. The decision to include this provision and to override Sections 10A-1-9.01 and Section 10A-1-9.21 was based on the desire to have similar actions taken with regard to a partnership as are taken with a limited partnership and a limited liability company.

Sections 10A-8A-8.06 and 10A-8A-8.07 provide a simplified system for handling known and unknown claims against a dissolved partnership, including claims based on events that occur after the dissolution of the partnership. Section 10A-8A-8.06 deals solely with known claims while Section 10A-8A-8.07 deals with unknown or subsequently arising claims. A claim can be a “known” claim even if it is unliquidated; a claim that is contingent or has not yet matured or in certain cases has matured but has not been asserted is not a “known” claim (see Section 10A-8A-8.06(d)). For example, an unmatured liability under a guarantee, a potential default under a lease, or an unasserted claim based upon a defective product manufactured by the dissolved partnership would not be a “known” claim.

Known claims are handled in Section 10A-8A-8.06 through a process of written notice to claimants; the written notice must contain the information described in Section 10A-8A-8.06(b). Section 10A-8A-8.06(c) then provides fixed deadlines by which claims are barred under various circumstances, as follows:

- (1) *If a claimant was given effective written notice satisfying Section 10A-8A-8.06(b) but fails to file the claim by the deadline specified by the dissolved partnership, the claim is barred by Section 10A-8A-8.06(c)(1). (See Section 10A-8A-1.03 as to the effectiveness of notice. In that regard, it should be noted, that while a person may have notice of the dissolution by way of the filing of the statement of dissolution, that notice will not be sufficient to comply with the notice required under Section 10A-8A-8.06.)*
- (2) *If a claimant receives written notice satisfying Section 10A-8A-8.06(b) and files the claim as required:*
 - (i) *but the dissolve partnership rejects the claim, the claimant must commence a proceeding to enforce the claim within 90 days of the rejection or the*

claim is barred by Section 10A-8A-8.06(c)(2); or

- (ii) if the dissolved partnership does not act on the claim or fails to notify the claimant of the rejection, the claimant is not barred by Section 10A-8A-8.06(c) until the dissolved partnership notifies the claimant.*
- (3) If the dissolved partnership publishes notice under Section 10A-8A-8.07, a claimant who was not notified in writing is barred unless a proceeding is commenced to enforce the claim within two years after publication of the notice.*
- (4) If the dissolved partnership does not publish notice, a claimant who was not notified in writing is not barred by Section 10A-8A-8.06(c) from pursuing the claim.*

These principles, it should be emphasized, do not lengthen statutes of limitation applicable under general state law. Thus, claims that are not barred under the foregoing rules—for example, if the dissolved partnership does not act on a claim—will nevertheless be subject to the general statute of limitations applicable to claims of that type.

The person or persons designated to wind up the dissolved partnership (See Section 10A-8A-8.03), must discharge or make provision for discharging the partnership's liabilities before distributing the remaining assets to the owners of the transferable interests (See Section 10A-8A-8.09(a)).

§ 10A-8A-8.07. Other claims against dissolved partnership.

Notwithstanding Sections 10A-1-9.01 and 10A-1-9.22:

- (a) A dissolved partnership may publish notice of its dissolution and request that persons with claims against the dissolved partnership present them in accordance with the notice.
- (b) The notice authorized by subsection (a) must:
 - (1) be published at least one time in a newspaper of general circulation in the county in which the dissolved partnership's principal place of business or not for profit activity in this state is located, and if none, was last located;
 - (2) describe the information that must be included in a claim and provide a

- mailing address to which the claim is to be sent;
- (3) state that if not sooner barred, a claim against the dissolved partnership will be barred unless a proceeding to enforce the claim is commenced within two years after the publication of the notice; and
 - (4) unless the partnership has been throughout its existence a limited liability partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any partner or person dissociated as a partner which is based on Section 10A-8A-3.06.
- (c) If a dissolved partnership publishes a newspaper notice in accordance with subsection (b), unless sooner barred by any other statute limiting actions, the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved partnership within two years after the publication date of the newspaper notice:
- (1) a claimant who was not given notice under Section 10A-8A-8.06;
 - (2) a claimant whose claim was timely sent to the dissolved partnership but not acted on by the dissolved partnership; and
 - (3) a claimant whose claim is contingent at the effective date of the dissolution of the partnership, or is based on an event occurring after the effective date of the dissolution of the partnership.
- (d) A claim that is not barred under this section, any other statute limiting actions, or Section 10A-8A-8.06 may be enforced:
- (1) against a partnership, to the extent of its undistributed assets;
 - (2) except as provided in subsection (h), if the assets of a dissolved partnership

have been distributed after dissolution, against the person or persons owning the transferable interests to the extent of that person's proportionate share of the claim or of the assets distributed to that person after dissolution, whichever is less, but a person's total liability for all claims under subsection (d) may not exceed the total amount of assets distributed to that person after dissolution of the partnership; or

- (3) against any person liable on the claim under Section 10A-8A-3.06, 10A-8A-7.03 and 10A-8A-8.05.
- (e) A dissolved partnership that published a notice under this section may file an application with a court of competent jurisdiction for a determination of the amount and form of security to be provided for payment of claims that are contingent or have not been made known to the dissolved partnership or that are based on an event occurring after the effective date of the dissolution of the partnership but that, based on the facts known to the dissolved partnership, are reasonably estimated to arise after the effective date of the dissolution of the partnership. Provision need not be made for any claim that is or is reasonably anticipated to be barred under subsection (c).
 - (f) Within ten days after the filing of the application provided for in subsection (e), notice of the proceeding shall be given by the dissolved partnership to each potential claimant as described in subsection (e).
 - (g) The court under subsection (e) may appoint a guardian ad litem to represent all claimants whose identities are unknown in any proceeding brought under this section. The reasonable fees and expenses of the guardian, including all reasonable

expert witness fees, shall be paid by the dissolved partnership.

- (h) Provision by the dissolved partnership for security in the amount and the form ordered by the court under subsection (e) shall satisfy the dissolved partnership's obligation with respect to claims that are contingent, have not been made known to the dissolved partnership, or are based on an event occurring after the effective date of the dissolution of the partnership, and those claims may not be enforced against a person owning a transferable interest to whom assets have been distributed by the dissolved partnership after the effective date of the dissolution of the partnership.
- (i) Nothing in this section shall be deemed to extend any otherwise applicable statute of limitations.
- (j) If a claim has been satisfied, disposed of, or barred under Section 10A-8A-8.06, this section, or other law, the person or persons designated to wind up the business or not for profit activity of a partnership, and the owners of the transferable interests receiving assets from the partnership, shall not be liable for that claim.

Comment

This Section is derived from Section 10A-9A-8.07 of the Alabama Limited Partnership Law and Section 10A-5A-7.05 of the Alabama Limited Liability Company Law. The decision to include this provision and to override Sections 10A-1-9.01 and 10A-1-9.22 was based on the desire to have similar actions taken with regard to partnerships, limited partnerships, and limited liability companies.

This Section addresses the serious problem created by possible claims that might arise long after the dissolution process is completed and the assets are distributed. Most of these claims are based on personal injuries occurring after dissolution but caused by allegedly defective products sold before dissolution. The problems raised by these claims are intractable: on the one hand, the application of a mechanical limitation period to a claim for injury that occurs after the period has expired involves obvious injustice to the plaintiff. On the other hand, to permit these suits generally makes it impossible ever to complete the winding up process, make suitable provision for creditors, and distribute the balance of the assets. Evolving legal rules make

estimating future liability for personal injury claims difficult. In some circumstances successor liability theories have been applied to allow plaintiff s incurring post-dissolution injuries to bring suit against the person that acquired the assets.

Some courts have refused to broaden these doctrines, particularly when the purchaser of the assets has not continued the business or not for profit activity. In these cases, the remedy of the plaintiff is limited to claims against the dissolved partnership and the owners of the transferable interests receiving assets pursuant to the dissolution.

The solution adopted in this Section is to continue the liability of a dissolved partnership for subsequent claims for a period of two years after the dissolved partnership publishes notice of dissolution. It is recognized that a two year cut-off is itself arbitrary, but it is believed that the bulk of post-dissolution claims that can be estimated will arise during this period. This provision is therefore believed to be a reasonable compromise between the competing considerations of providing a remedy to injured ~~plaintiff~~ plaintiffs and providing a basis for the person or persons designated to wind up the business or not for profit activity of the partnership to estimate liabilities so that dissolved partnership may distribute remaining assets free of all claims and the owners of the transferable interests may receive them secure in the knowledge that they may not be reclaimed. The period of two years for asserting claims is the same period adopted by the Alabama Limited Partnership Law and the Alabama Limited Liability Company Law.

The person or persons designated to wind up the business or not for profit activity of the partnership must generally discharge or make provision for discharging the partnership's liabilities before distributing the remaining assets to the owners of the transferable interest. Many claims covered by this Section are of a type for which provision may be made by the purchase of insurance or by the setting aside of a portion of the assets, thereby permitting prompt distributions in liquidation. Claimants, of course, may have recourse to the remaining assets of the dissolved partnership (see Subsection (d)(1)).

Further, where unbarred claims arise after distributions have been made to the owners of the transferable interests in liquidation, Subsection (d)(2) authorizes recovery against the owners of the transferable interests receiving the earlier distributions. The recovery, however, is limited to the smaller of the recipient owners of the transferable interests' pro rata share of the claim or the total amount of assets received as liquidating distributions by the owners of the transferable interests from the partnership. The provision ensures that claimants seeking to recover distributions from owners of the transferable interests will try to recover from the entire class of owners of the transferable interests rather than concentrating only on the larger owners of the transferable interests and protects the limited liability of owners of the transferable interests.

This Section adds a provision which is not in Chapter 1 (Section 10A-1-9.22) allowing a dissolved partnership to initiate a proceeding to establish the provision that should be made for unknown or contingent claims before a distribution in liquidation is made to owners of the transferable interests. This provision is intended to remove the risk of the person or persons designated to wind up the business or not for profit activity of the partnership and the owners of the transferable interests of liability for inadequate provision for claims.

Subsection (e) authorizes the proceeding and specifies that provision for unknown and contingent claims can only be for those claims that are estimated to arise after dissolution that are not expected to be barred by Section 10A-8A-8.06 or by Subsection (c). As a result, estimates for unknown or contingent claims, such as product liability injury claims that might arise after dissolution, need only be made for those claims that the court determines are reasonably anticipated to be asserted within two years after dissolution. Such estimates might reasonably be based on the claims experience of the partnership prior to its dissolution.

Subsection (f) provides that if the dissolved partnership elects to initiate a proceeding, it must give notice of the proceeding within 10 days after filing the court application to each holder of a claim described in Subsection (e). Notice to holders of guarantees made by the partnership typically would be required under this Subsection.

Subsection (g) allows the court to appoint a guardian ad litem for unknown claimants but does not make the appointment mandatory. Reasonable fees and expenses of the guardian ad litem are to be paid by the dissolved partnership.

If the proceeding is completed, Subsection (h) establishes that the dissolved partnership is deemed to have satisfied its obligation to discharge or make provision for discharging its liabilities.

Subsection (j) clarifies that with respect to claims that have been satisfied, disposed of or barred under Sections 10A-8A-8.06 and 10A-8A-8.07, or other law, the person or persons designated to wind up the business or not for profit activity of the partnership and the owners of the transferable interests receiving assets from the partnership are not liable for those claims.

§ 10A-8A-8.08. Liability of partner and person dissociated as partner when claim against partnership.

If a claim against a dissolved partnership is barred under Section 10A-8A-8.06 or 10A-8A-8.07, any corresponding claim under Section 10A-8A-3.06, 10A-8A-7.03 and 10A-8A-8.05 is also barred.

Comment

This Section was derived from Section 10A-9A-8.08 of the Alabama Limited Partnership Law.

§ 10A-8A-8.09. Disposition of assets, when contributions required.

Notwithstanding Section 10A-1-9.12, upon the winding up of a partnership, the assets of

the partnership, including any obligation under Section 10A-8A-4.03, 10A-8A-4.04, and 10A-8A-4.09, and any contribution required by this section, shall be applied as follows:

- (a) Payment, or adequate provision for payment, shall be made to creditors, including, to the extent permitted by law, partners who are creditors, in satisfaction of liabilities of the partnership.
- (b) After a partnership complies with subsection (a), any surplus must be distributed:
 - (1) first, to each person owning a transferable interest that reflects contributions made on account of the transferable interest and not previously returned, an amount equal to the value of the person's unreturned contributions; and
 - (2) then to each person owning a transferable interest in the proportions in which the owners of transferable interests share in distributions before dissolution.
- (c) If the partnership does not have sufficient surplus to comply with subsection (b)(1), any surplus must be distributed among the owners of transferable interests in proportion to the value of their respective unreturned contributions.
- (d) If a partnership's assets are insufficient to satisfy all of its obligations under subsection (a), with respect to each unsatisfied obligation incurred when the partnership was not a limited liability partnership, the following rules apply:
 - (1) Each person that was a partner when the obligation was incurred and that has not been released from the obligation under Section 10A-8A-7.03(c) and (d) shall contribute to the partnership for the purpose of enabling the partnership to satisfy the obligation. The contribution due from each of

those persons is in proportion to the right to receive distributions in the capacity of partner in effect for each of those persons when the obligation was incurred.

- (2) If a person does not contribute the full amount required under paragraph (1) with respect to an unsatisfied obligation of the partnership, the other persons required to contribute by paragraph (1) on account of the obligation shall contribute the additional amount necessary to discharge the obligation. The additional contribution due from each of those other persons is in proportion to the right to receive distributions in the capacity of partner in effect for each of those other persons when the obligation was incurred.
 - (3) If a person does not make the additional contribution required by paragraph (2), further additional contributions are determined and due in the same manner as provided in that paragraph.
- (e) A person that makes an additional contribution under subsection (d)(2) or (3) may recover from any person whose failure to contribute under subsection (d)(1) or (2) necessitated the additional contribution. A person may not recover under this subsection more than the amount additionally contributed. A person's liability under this subsection may not exceed the amount the person failed to contribute.
 - (f) The estate of a deceased individual is liable for the person's obligations under this section.
 - (g) An assignee for the benefit of creditors of a partnership or a partner, or a person appointed by a court to represent creditors of a partnership or a partner, may

enforce a person's obligation to contribute under subsection (d).

Comment

This Section was derived from Section 10A-9A-8.09 of the Alabama Limited Partnership Law and Section 10A-5A-7.06 of the Alabama Limited Liability Company Act.

Subsection (d)(2) provides that if one or more of the persons liable to contribute to the dissolving partnership to allow it to satisfy its obligations does not do so, the remaining persons that are liable to contribute to the partnership to allow it to satisfy its obligations must contribute the amount of the unsatisfied obligation. Subsection (d)(2) provides that the obligation of each person obligated to make up the unsatisfied obligation shall be in proportion to the right of the person to receive distributions as a partner at the time the obligation was incurred. The operation of this rule can be illustrated by the following example:

Example: *There are three equal partners, A, B, and C at the time an obligation for \$300 is incurred. When the partnership dissolves and is wound up, the obligation is not satisfied. Although A, B, and C are each obligated to contribute \$100 to satisfy the obligation, C does not do so. Under the rule of Subsection (d)(2), A and B are obligated to contribute the additional \$100 needed to satisfy the obligation. They must do so in the proportion to their rights to receive distributions as partners, disregarding any rights of the person that failed to contribute. Thus A and B, disregarding C, each have rights to receive half the distributions made to partners and each must contribute \$50 to satisfy the obligation.*

Subsection (d)(3) provides that the above rule shall be applied to successive failures to contribute. Continuing the above example, if B fails to contribute \$50, A will be liable to contribute \$100 to satisfy the obligation because A, disregarding B and C, has the right to receive all the distributions made to partners.

In addition to the obligations under Subsection (d), partners may have an obligation to contribute under Section 10A-8A-4.04 which has not yet been accomplished, or to return distributions made prior to dissolution which are required to be returned to the partnership under Section 10A-8A-4.09, unless otherwise barred by this Chapter or other applicable law. It should be noted that distributions under this Section 10A-8A-8.09 are not subject to the provisions of Section 10A-8A-4.09. See Section 10A-8A-4.09(g).

In no circumstances does this Chapter require a partner to make a payment for the purpose of equalizing or otherwise reallocating capital losses incurred by partners.

§ 10A-8A-8.10. Reinstatement after dissolution.

Notwithstanding Sections 10A-1-9.31 and 10A-1-9.32, a partnership that has been dissolved may be reinstated upon compliance with the following conditions:

- (a) the consent shall have been obtained from the partners or other persons entitled to consent at the time that is:
 - (1) required for reinstatement under the partnership agreement; or
 - (2) if the partnership agreement does not state the consent required for reinstatement, sufficient for dissolution under the partnership agreement; or
 - (3) if the partnership agreement neither states the consent required for reinstatement nor for dissolution, sufficient for dissolution under this chapter;
- (b) in the case of a written objection to reinstatement having been delivered to the partnership before or at the time of the consent required by subsection (a) by the partners or other persons having authority under the partnership agreement to bring about or prevent dissolution of the partnership, those partners or persons withdrawing that written objection effective at the time of the consent required by subsection (a);
- (c) in the case of a partnership dissolved in a judicial proceeding initiated by one or more of the partners pursuant to Section 10A-8A-8.01(4), the consent of each of those partners shall have been obtained and shall be included in the consent required by subsection (a);
- (d) in the case of a partnership dissolved in a judicial proceeding initiated by one or more of transferees pursuant to Section 10A-8A-8.01(5), the consent of each of those transferees shall have been obtained and shall be included in the consent required by subsection (a); and

- (e) in the case of a partnership that has filed a statement of dissolution, the filing of a certificate of reinstatement in accordance with Section 10A-8A-8.11.

Comment

This Section was derived from Section 10A-9A-8.10 of the Alabama Limited Partnership Law and from Section 10A-5A-7.07 of the Alabama Limited Liability Company Law which is derived from RPLCA § 712, which was derived from Colorado, § 7-90-1002.

This Section acknowledges partnerships, much like other unincorporated entities, may be unintentionally dissolved or intentionally dissolved, which dissolution which may occur with or without the knowledge of the partners or third parties. This Section allows the partners to reinstate a partnership with the effect of placing the partnership in a position of being treated as if it had never been dissolved. Such treatment would normally be effective retroactively to the date of dissolution, subject to the rights of third parties set forth in Section 10A-8A-8.13. This Section clearly contemplates that persons other than partners may have a right to consent on the issue of reinstatement. It is important to understand that all conditions (Subsections (a), (b), (c) and (d)) of this Section must be met in order to reinstate the partnership.

Subsection (a) provides for the general hierarchy of the consent required for reinstatement, beginning first with the consent required for reinstatement by the partnership agreement, and absent a provision in the partnership agreement, then second with the consent required for dissolution by the partnership agreement, and absent either of those consents being set forth in the partnership agreement, then third with the consent of the persons necessary under this Chapter for dissolution. Thus, if the partnership agreement addresses reinstatement and provides the persons entitled to consent on reinstatement and the necessary consent required therefor, then those provisions shall control and it shall not be necessary to proceed with the other provisions of Subsection (a). Likewise, if the partnership agreement is silent on the issue of reinstatement and dissolution, then the consent necessary shall be as set forth in this Chapter for dissolution.

Subsection (b) contemplates that a person with the authority under the partnership agreement to prevent or cause the dissolution of the partnership may file a written objection to the reinstatement with the partnership which may effectively block reinstatement of the partnership. This provision is intended to protect those persons who successfully dissolved the partnership. The persons may want this protection to make sure that the assets of the partnership are distributed in accordance with Section 10A-8A-8.09 or for other reasons. In the event the persons filing the written objection change their minds, Subsection (b) allows for such and thus, the reinstatement could proceed if the written objection is withdrawn.

Subsection (c) provides that if the partnership was dissolved in a judicial proceeding initiated by one or more of the partners, the consent of each of those partners shall have been obtained and shall be included in the consent required by Subsection (a). This provision is intended to protect those partners that successfully dissolved the partnership by way of judicial

proceeding. The partners may want this protection to make sure that the assets of the partnership are distributed in accordance with Section 10A-8A-8.09 or for other reasons.

§ 10A-8A-8.11. Certificate of reinstatement.

A partnership that has dissolved, has filed a statement of dissolution, and is seeking to reinstate in accordance with Section 10A-8A-8.10, shall deliver to the Secretary of State for filing a certificate of reinstatement in accordance with the following:

- (a) A certificate of reinstatement shall be delivered to the Secretary of State for filing.

The certificate of reinstatement shall state:

- (1) the name of the partnership before reinstatement;
- (2) the name of the partnership following reinstatement, which partnership name shall comply with Section 10A-8A-8.12;
- (3) the date of formation of the partnership;
- (4) the date of filing its statement of dissolution, and all amendments and restatements thereof, and the office or offices where filed;
- (5) if the partnership has filed a statement of partnership, a statement of not for profit partnership, a statement of authority, or a statement of limited liability partnership, the date of filing its statement of partnership, statement of not for profit partnership, statement of authority, or statement of limited liability partnership, and all amendments and restatements thereof, and the office or offices where filed;
- (6) the date of dissolution of the partnership, if known;
- (7) a statement that all applicable conditions of Section 10A-8A-8.10 have been satisfied; and

- (8) the address of the registered office and the name of the registered agent at that address in compliance with Article 5 of Chapter 1.
- (b) A partnership shall ~~be required have delivered~~ deliver to the Secretary of State for filing a statement of dissolution prior to or simultaneously with the certificate of reinstatement. If a partnership has not filed a statement of partnership, a statement of not for profit partnership, or a statement of limited liability partnership prior to filing its statement of dissolution, the partnership must also deliver to the Secretary of State for filing a statement of partnership, a statement of not for profit partnership, or a statement of limited liability partnership, simultaneously with the certificate of reinstatement.
- (c) A certificate of reinstatement is a filing instrument under Chapter 1.

Comment

This Section was derived from Section 10A-9A-8.11 of the Alabama Limited Partnership Law and Section 10A-5A-7.08 of the Alabama Limited Liability Company Law which is derived from RPLCA § 713 which was derived from Colorado, § 7-90-1003.

The certificate of reinstatement is required in order to obtain the benefit of the retroactive effect from Section 10A-8A-8.13. The certificate of reinstatement also provides notice to third parties that the partnership is no longer dissolved.

Subsection (b) was added to clarify that partnership must deliver to the Secretary of State for filing a statement of dissolution in order for the partnership to file a certificate of reinstatement.

Subsection (c) was added to clarify that a certificate of reinstatement is, for purposes of Chapter 1, a “filing instrument” (defined as any document that must or may be filed). Although Chapter 1 provisions appear to cover where the statement of dissolution should be filed and what the filing fees should be in Sections 10A-1-4.02 and 4.31 this provision is intended to clarify that treatment.

Subsection (d) was added to reflect the filing requirements of Section 10A-1-4.02.

§ 10A-8A-8.12. Partnership name upon reinstatement.

The name of a partnership following the filing of a certificate of reinstatement shall be determined as follows:

- (a) if the partnership is listed in the Secretary of State's records as a partnership that has been dissolved, then the name of a partnership following reinstatement shall be that partnership name at the time of reinstatement if that partnership name complies with Article 5 of Chapter 1 at the time of reinstatement; and
- (b) if that partnership name does not comply with Article 5 of Chapter 1, the name of the partnership following reinstatement shall be that partnership name followed by the word “reinstated.”

Comment

This Section was derived from Section 10A-9A-8.12 of the Alabama Limited Partnership Law and Section 10A-5A-7.09 of the Alabama Limited Liability Company Law which is derived from RPLLC § 714 which was derived from Colorado, § 7-90-1004.

This Section anticipates that the dissolved partnership may be operating and acting as if it were not dissolved and thus, the name would normally be available to the partnership since that name would normally not have been forfeited by the partnership. This Section also anticipates that the partnership may have forfeited its name, in which case there are two possibilities: the name has not been claimed by another organization and the name has been claimed by another organization. If the name has not been claimed by another organization, the reinstated partnership can use the same name. If the name has been claimed by another organization, the partnership can be reinstated under the name with the word “reinstated” following its name, e.g., ABC, LLC, Reinstated.

§ 10A-8A-8.13. Effect of reinstatement.

(a) Subject to subsection (b), upon reinstatement, the partnership shall be deemed for all purposes to have continued its business or not for profit activity as if dissolution had never occurred; and each right inuring to, and each debt, obligation, and liability incurred by, the partnership after the dissolution shall be determined as if the dissolution had never occurred.

(b) The rights of persons acting in reliance on the dissolution before those persons had notice of the reinstatement shall not be adversely affected by the reinstatement.

Comment

This Section was derived from Section 10A-9A-8.13 of the Alabama Limited Partnership Law and Section 10A-5A-7.10 of the Alabama Limited Liability Company Law which is derived from RPLLC § 715 which is derived from Colorado, § 7-90-1005. Under Subsection (b) of this Section, a person must take an affirmative action in reliance upon the dissolution in order for the reinstatement not to be effective as set forth in Subsection (a). Thus, even if the underlying contract provides for a default or termination upon the dissolution of the partnership, if the other party to the contract does not attempt to exercise its rights upon such default, and the reinstatement occurs before any action taken by the other party in reliance upon the default, the contract would continue as if no dissolution ever occurred. On the other hand, if the other party to the contract takes an affirmative action, such as calling a loan as a result of the dissolution, then the calling of the loan would be an affirmative action taken in reliance on the dissolution and cannot be adversely affected by the reinstatement.

Since the effect of reinstatement is to return the partnership to a state of not being dissolved, and since Section 10A-8A-8.13(a) clearly states that a dissolved partnership continues its existence as a partnership, the reinstated partnership is for all purposes (including the Secretary of State's respective records and numbering systems) the same entity.

ARTICLE 9

Conversions and Mergers

- § 10A-8A-9.01. **Definitions.**
- § 10A-8A-9.02. **Conversion.**
- § 10A-8A-9.03. **Action on plan of conversion by converting partnership.**
- § 10A-8A-9.04. **Filings required for conversion; effective date.**
- § 10A-8A-9.05. **Effect of conversion.**
- § 10A-8A-9.06. **Merger.**
- § 10A-8A-9.07. **Action on plan of merger by constituent partnership.**
- § 10A-8A-9.08. **Filings required for merger; effective date.**
- § 10A-8A-9.09. **Effect of merger.**
- § 10A-8A-9.10. **Restrictions on approval of mergers, conversions and on relinquishing llp status.**
- § 10A-8A-9.11. **Liability of partner after conversion or merger.**
- § 10A-8A-9.12. **Power of partners and persons dissociated as partners to bind organization after conversion or merger.**
- § 10A-8A-9.13. **Article not exclusive.**

§ 10A-8A-9.01. **Definitions.**

Notwithstanding Section 10A-1-1.03, as used in this article, unless the context otherwise requires, the following terms mean:

- (1) “Constituent partnership” means a constituent organization that is a partnership.
- (2) “Constituent organization” means an organization that is party to a merger under this article.
- (3) “Converted organization” means the organization into which a converting organization converts pursuant to this article.
- (4) “Converting partnership” means a converting organization that is a partnership.
- (5) “Converting organization” means an organization that converts into another organization pursuant to this article.
- (6) “Governing statute” of an organization means the statute that governs the

organization's internal affairs.

(7) "Organization" means a partnership, including a limited liability partnership; limited partnership, including a limited liability limited partnership; limited liability company; business trust; corporation; nonprofit corporation; professional corporation; or any other person having a governing statute. The term includes domestic and foreign organizations whether or not organized for profit.

(8) "Organizational documents" means:

- (A) (i) for a partnership, its partnership agreement and, if applicable, its statement of partnership, statement of not for profit partnership, or statement of limited liability partnership;
- (ii) for a foreign partnership, its partnership agreement and, if applicable, its statement of foreign limited liability partnership;
- (B) for a limited partnership or foreign limited partnership, its certificate of formation and partnership agreement, or comparable writings as provided in its governing statute;
- (C) for a limited liability company or foreign limited liability company, its certificate of formation and limited liability company agreement, or comparable writings as provided in its governing statute;
- (D) for a business or statutory trust or foreign business or statutory trust its agreement of trust and declaration of trust, or comparable writings as provided in its governing statute;
- (E) for a corporation for profit or foreign corporation for profit, its certificate of formation, bylaws, and other agreements among its shareholders that are

authorized by its governing statute, or comparable writings as provided in its governing statute;

- (F) for a nonprofit corporation or foreign nonprofit corporation, its certificate of formation, bylaws, and other agreements that are authorized by its governing statute, or comparable writings as provided in its governing statute;
- (G) for a professional corporation or foreign professional corporation, its certificate of formation, bylaws, and other agreements among its shareholders that are authorized by its governing statute, or comparable writings as provided in its governing statute; and
- (H) for any other organization, the basic writings that create the organization and determine its internal governance and the relations among the persons that own it, have an interest in it, or are members of it.

(9) “Surviving organization” means an organization into which one or more other organizations are merged under this article, whether the organization pre-existed the merger or was created pursuant to the merger.

Comment

It is important to remember Article 1 of this Chapter as well as Chapter 1 of this title contain a number of definitions that are applicable to this Article; however, the definitions set forth in Article 1 of this Chapter and the definitions set forth in this Article are intended to override the definitions in Chapter 1 for purposes of this Chapter and the Alabama Partnership Law. The definitions in this Section were modified to conform with the Alabama Limited Partnership Law and the Alabama Limited Liability Company Law.

§ 10A-8A-9.02. Conversion.

- (a) An organization other than a partnership may convert to a partnership, and a

partnership may convert to an organization other than a partnership pursuant to this section, Sections 10A-8A-9.03 through 10A-8A-9.05, and a plan of conversion, if:

- (1) the governing statute of the organization that is not a partnership authorizes the conversion;
- (2) the law of the jurisdiction governing the converting organization and the converted organization does not prohibit the conversion; and
- (3) the converting organization and the converted organization each comply with the governing statute and organizational documents applicable to that organization in effecting the conversion.

(b) A plan of conversion must be in writing and must include:

- (1) the name, type of organization, and mailing address of the principal office of the converting organization before conversion;
- (2) the name, type of organization, and mailing address of the principal office of the converted organization after conversion;
- (3) the terms and conditions of the conversion, including the manner and basis for converting interests in the converting organization into any combination of money, interests in the converted organization, and other consideration allowed in Section 10A-8A-9.02(c); and
- (4) the organizational documents of the converted organization.

(c) In connection with a conversion, rights or securities of or interests in the converting organization may be exchanged for or converted into cash, property, or rights or securities of or interests in the converted organization, or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, or rights or securities of or interests in another

organization or may be cancelled.

(d) If a partnership is the converting organization and that partnership does not have an effective statement of partnership, statement of not for profit partnership, or statement of limited liability partnership on file with the Secretary of State, then that partnership must, before proceeding with a conversion deliver to the Secretary of State for filing, a statement of partnership, statement of not for profit partnership, or statement of limited liability partnership simultaneously with the delivery to the Secretary of State for filing, of a statement of conversion.

(e) If an organization is converting to a partnership, the converting organization must deliver to the Secretary of State for filing a statement of partnership, statement of not for profit partnership, or a statement of limited liability partnership in accordance with Section 10A-8A-9.04.

Comment

This Section is substantially similar to Section 10A-9A-10.02 of the Alabama Limited Partnership Law and Section 10A-5A-10.01 of the Alabama Limited Liability Company Law. Subsection (c) is derived from Delaware § 18-216(d). Subsections (d) and (e) have been added to assure that the Secretary of State has a record of the partnership if it is the organization which is converting or is the organization to which it is being converted.

In a statutory conversion, an existing entity changes its type of organization, the jurisdiction of its governing statute or both. For example, a partnership formed under, or its internal affairs are governed by, the laws of one jurisdiction might convert to (i) a corporation (or other type of organization) formed under, or its internal affairs are governed by, the laws of the same jurisdiction, (ii) a limited liability company (or other type of organization) formed under, or its internal affairs are governed by, the laws of another jurisdiction, or (iii) a partnership (or other type of organization) formed under, or its internal affairs are governed by, the laws of the another jurisdiction (referred to in some statutes as “domestication”). Note, that in the third example, this Section anticipates an Alabama partnership converting into a partnership to be formed under, or its internal affairs governed by the laws of another jurisdiction, and it also anticipates a partnership formed under, or its internal affairs are governed by, the laws of another jurisdiction converting into an Alabama partnership. The definition of “partnership” under Section 10A-8A-1.02(9) clearly indicates a partnership formed or becoming subject to the laws of this state pursuant to Section 10A-8A-1.06, and thus Subsection (a) provides the necessary flexibility to allow for the conversion illustrated by the third example, and the immediately preceding sentence.

In contrast to a merger, which involves at least two entities, a conversion involves only one entity. The converting and converted organization are the same entity. The theory being that the underlying entity is only changing its entity clothing.

For this Chapter to apply to a conversion, either the converting or converted organization must be a partnership subject to this Chapter. It should be noted that a plan of conversion may include other matters than those listed above, including, but not limited to, the provision of appraisal rights. In addition, the partnership agreement could provide procedures for the authorization of a conversion or it could provide provisions that explicitly deny the right to convert. Since this Chapter is designed to promote the freedom of contract and allow the partners to determine their destiny, the partnership agreement may have many provisions which are not provided for in the default provisions of this Chapter, subject to the constraints of Section 10A-8A-1.08.

§ 10A-8A-9.03. Action on plan of conversion by converting partnership.

(a) Subject to Section 10A-8A-9.10, a plan of conversion must be consented to by all the partners of a converting partnership.

(b) Subject to Section 10A-8A-9.10 and any contractual rights, after a conversion is approved, and at any time before a filing is made under Section 10A-8A-9.04, a converting partnership may amend the plan or abandon the planned conversion:

- (1) as provided in the plan; and
- (2) except as prohibited by the plan, by the same consent as was required to approve the plan.

Comment

This Section is substantially similar to Section 10A-9A-10.03 of the Alabama Limited Partnership Law and Section 10A-5A-10.02 of the Alabama Limited Liability Company Law.

§ 10A-8A-9.04. Filings required for conversion; effective date.

- (a) After a plan of conversion is approved:
- (1) if the converting organization is an organization formed under, or its internal affairs are governed by, the laws of this state, the converting organization shall file a statement of conversion in accordance with

subsection (c), which statement of conversion must be signed in accordance with Section 10A-8A-2.03 and which must include:

- (A) the name of the converting organization;
 - (B) the date of the filing of the certificate of formation of the converting organization, if any, and all prior amendments and the filing office or offices, if any, where such is filed;
 - (C) a statement that the converting organization has been converted into the converted organization;
 - (D) the name and type of organization of the converted organization and the jurisdiction of its governing statute;
 - (E) the street and mailing address of the principal office of the converted organization;
 - (F) the date the conversion is effective under the governing statute of the converted organization;
 - (G) a statement that the conversion was approved as required by this chapter;
 - (H) a statement that the conversion was approved as required by the governing statute of the converted organization; and
 - (I) if the converted organization is a foreign organization not authorized to conduct business or not for profit activity in this state, the street and mailing address of an office for the purposes of Section 10A-8A-9.05(b); and
- (2) if the converted organization is a partnership, the converting organization

shall deliver to the Secretary of State for filing a statement of partnership, statement of not for profit partnership, or statement of limited liability partnership, as applicable, which statement of partnership, statement of not for profit partnership, or statement of limited liability partnership must include, in addition to the information required by Section 10A-8A-2.02 or Section 10A-8A-10.01, as applicable:

- (A) a statement that the partnership was converted from the converting organization;
 - (B) the name and type of organization of the converting organization and the jurisdiction of the converting organization's governing statute; and
 - (C) a statement that the conversion was approved in a manner that complied with the converting organization's governing statute.
- (3) if the converting organization is a partnership and that partnership does not have an effective statement of partnership, statement of not for profit partnership, or statement of limited liability partnership on file with the Secretary of State, then the converting organization must deliver to the Secretary of State for filing, a statement of partnership, statement of not for profit partnership, or statement of limited liability partnership simultaneously with the delivery to the Secretary of State for filing, of a statement of conversion.
- (b) A conversion becomes effective:
- (1) if the converted organization is a partnership, when the statement of

partnership, statement of not for profit partnership, or statement of limited liability partnership takes effect; and

(2) if the converted organization is not a partnership, as provided by the governing statute of the converted organization.

(c) If the converting organization is an organization formed under, or its internal affairs are governed by, the laws of this state, then the converting organization shall file the statement of conversion required under subsection (a)(1) and the statement, if any, required under subsection (a)(3) with the Secretary of State in accordance with Section 10A-1-4.02(c)(1).

(d) If the converted organization is a partnership, then, notwithstanding Section 10A-1-4.02(b), the converting organization shall file a statement of partnership, statement of not for profit partnership, or statement of limited liability partnership required under subsection (a)(2) with the Secretary of State in accordance with Section 10A-1-4.02(c)(5), along with the fees specified in Section 10A-1-4.31 subject to subsections (f)(3) and (f)(4).

(e) If the converting organization is required to file a statement of conversion and a statement of partnership, statement of not for profit partnership, or statement of limited liability partnership with the Secretary of State, then the converting organization shall file the statement of conversion and the statement of partnership, statement of not for profit partnership, or statement of limited liability partnership with the Secretary of State simultaneously.

(f) In the case of a statement of conversion that is to be filed with the Secretary of State pursuant to subsections (c):

(1) if the converting organization has a certificate of formation filed with the judge of probate, the Secretary of State shall within 10 days transmit a certified copy of the statement of conversion to the office of the judge of

probate in the county in which the certificate of formation for such converting organization was filed along with the proper fee for the judge of probate.

- (2) if the converting organization did not file its certificate of formation with the judge of probate, but rather in accordance with this title filed its certificate of formation with the Secretary of State, the Secretary of State shall not transmit a certified copy of the statement of conversion to the office of the judge of probate and shall not collect any fee for the judge of probate.
- (3) if the converting organization is, immediately prior to the conversion becoming effective, an organization described in Section 10A-1-4.02(c)(4), but is not required under this title to file its organizational documents with the judge of probate, the Secretary of State shall not transmit a certified copy of the statement of the statement of conversion to the office of the judge of probate and shall not collect any fee for the judge of probate.
- (4) if the converting organization is a partnership, the Secretary of State shall not transmit a certified copy of the statement of conversion to the office of the judge of probate and shall not collect any fee for the judge of probate.

(g) In the case of a statement of partnership, statement of not for profit partnership, or statement of limited liability partnership that is to be filed with the Secretary of State pursuant to subsection (d), the Secretary of State shall not transmit a certified copy of the statement of partnership, statement of not for profit partnership, or statement of limited liability partnership to the office of the judge of probate and shall not collect any fee for the judge of probate, but shall

collect the fee provided for the Secretary of State in Section 10A-1-4.31(a)(1).

(h) After a conversion becomes effective, if the converted organization is a partnership, then all filing instruments required to be filed under this title regarding that converted organization shall be filed with the Secretary of State.

(i) If:

- (1) the converting organization is a filing entity, a partnership with an effective statement of partnership, statement of not for profit partnership, or statement of limited liability partnership on file with the Secretary of State, a foreign filing entity registered to conduct business or not for profit activity in this state or a qualified foreign limited liability partnership;
- (2) the converted organization will be a filing entity, a partnership with an effective statement of partnership, statement of not for profit partnership, or statement of limited liability partnership on file with the Secretary of State, a foreign filing entity registered to conduct business or not for profit activity in this state or a qualified foreign limited liability partnership;
- (3) the name of the converting organization and the converted organization are to be the same, other than words, phrases or abbreviations indicating the type of entity; and
- (4) the name of the converted organization complies with Division A of Article 5 of Chapter 1 or Section 10A-1-7.07, as the case may be; then notwithstanding Division B of Article 5 of Chapter 1, no name reservation shall be required and the converted organization shall for all purpose of this title be entitled to utilize the name of the converting organization without

any further action by the converting organization or the converted organization.

(j) A certified copy of any document required to be filed under this section may be filed in the real estate records in the office of the judge of probate in any county in which the converting organization owned real property, without payment and without collection by the judge of probate of any deed or other transfer tax or fee. The judge of probate shall, however, be entitled to collect a filing fee of five dollars (\$5). Any such filing shall evidence chain of title, but lack of filing shall not affect the converted organization's title to such real property.

(k) A statement of conversion is a filing instrument under Chapter 1.

(l) Except as set forth in subsections (f)(2) (f)(3), and (f)(4), the filing fees for a statement of conversion shall be the same fee as provided in Section 10A-1-4.31(a)(5).

Comment

This Section is substantially similar to Section 10A-9A-10.04 of the Alabama Limited Partnership Law and Section 10A-5A-10.03 of the Alabama Limited Liability Company Law.

It is important to keep in mind that only converting organizations that have been formed under, or its internal affairs are governed by, the laws of this state are required to file the statement of conversion. Thus, the statement of conversion would not be filed by a converting organization that was not formed under, or its internal affairs were not governed by, the laws of this state. It is also important to keep in mind that either the converting or the converted organization must be a partnership, as defined in Section 10A-8A-1.02(9). Thus, the filing requirement of the converting organization that has been formed under, or its internal affairs are governed by, the laws of this state seems reasonable as the conversion is touching upon the transaction of a partnership either as the converting organization or as the converted organization.

Subsection (d) overrides and supersedes Section 10A-1-4.02(b) in the context of a conversion, and provides for the statement of partnership, statement of not for profit partnership, or statement of limited liability partnership to be filed with the Secretary of State.

Subsection (e) clarifies that if a converting organization is required to file a statement of conversion and a statement of partnership, statement of not for profit partnership, or statement of limited liability partnership, those two statements are to be filed with the Secretary of State at the same time.

Subsection (h) was added to clarify the rule of Section 10A-1-4.02(c)(4).

Subsection (i) was added to clarify the current practice in conversions when a filing entity (see Section 10A-1-1.03(27)) a foreign filing entity (See Section 10A-1-1.03(31)) that is registered to conduct business or not for profit activity in this state, a partnership with an effective statement of partnership, statement of not for profit partnership, or statement of limited liability partnership on file with the Secretary of State, or a qualified foreign limited liability partnership converts into a filing entity, a foreign filing entity that is registered to conduct business or not for profit activity in this state, a partnership with an effective statement of partnership, statement of not for profit partnership, or statement of limited liability partnership on file with the Secretary of State, or a qualified foreign limited liability partnership. Since the converted organization is, immediately after the conversion, for all purposes the same entity as the converting organization was immediately before the conversion, it only makes sense that the mere change in the identifier of the type of organization that the converting organization and converted organization utilize (without more) should not require the converting organization to reserve its own name with a different identifier. To hold otherwise would lead to the unusual result that the same organization would have to provide permission to itself to use its name. This rule does not apply in the circumstance of a converting organization that does not have a name on the records of the Secretary of State or in the circumstance of a converted organization's name not complying with the rules under Division A of Article 5 of Chapter 1 of Title 10A or Section 10A-1-7.07, as the case may be.

Subsection (j) was added to allow for the filing of certified copies of the documents required to be filed under this Section in the local probate judge's office in which the converting organization owned, and in which the converted organization owns, real property in order to clear any questions regarding the title to such real property.

Subsection (h) makes it clear that lack of such filing will not affect converted organization's title to the real property.

Subsection (k) was added to clarify that a statement of conversion ~~was~~ is a filing instrument for purposes of Chapter 1 of this Title.

Subsection (l) was added to set forth the filing fees of the statement of conversion which is to be the same as articles of merger, etc., as set forth in Section 10A-1-4.31(a)(5), with the exceptions set forth in Subsection (f) where no fee is to be collected for the probate judge.

§ 10A-8A-9.05. Effect of conversion.

- (a) When a conversion takes effect:
 - (1) all property owned by the converting organization remains vested in the converted organization without reservation or impairment and the title to any property vested by deed or otherwise in the converting organization shall not revert or be in any way impaired by reason of the conversion;

- (2) all debts, obligations, or other liabilities of the converting organization continue as debts, obligations, or other liabilities of the converted organization and neither the rights of creditors, nor the liens upon the property of the converting organization shall be impaired by the conversion;
- (3) an action or proceeding pending by or against the converting organization continues as if the conversion had not occurred;
- (4) except as prohibited by law other than this chapter, all of the rights, privileges, immunities, powers, and purposes of the converting organization remain vested in the converted organization;
- (5) except as otherwise provided in the plan of conversion, the terms and conditions of the plan of conversion take effect;
- (6) except as otherwise agreed, for all purposes of the laws of this state, the converting organization shall not be required to wind up its business or not for profit activity or pay its liabilities and distribute its assets, and the conversion shall not be deemed to constitute a dissolution of the converting organization;
- (7) for all purposes of the laws of this state, the rights, privileges, powers, interests in property, debts, liabilities and duties of the converting organization, shall be the rights, privileges, powers, interests in property, debts, liabilities and duties of the converted organization, and shall not be deemed as a consequence of the conversion, to have been transferred to the converted organization;

- (8) if the converted organization is a partnership, for all purposes of the laws of this state, the partnership shall be deemed to be the same organization as the converting organization, and the conversion shall constitute a continuation of the existence of the converting organization in the form of a partnership;
- (9) if the converted organization is a partnership, the existence of the partnership shall be deemed to have commenced on the date the converting organization commenced its existence in the jurisdiction in which the converting organization was first created, formed, organized, incorporated, or otherwise came into being;
- (10) the conversion shall not affect the choice of law applicable to matters arising prior to conversion; and
- (11) If the Secretary of State has assigned a unique identifying number or other designation to the converting organization and (i) the converted organization is formed pursuant to, or governed by, the laws of this State or (ii) the converted organization is, within 30 days after the effective date of the conversion, registered to transact business in this State, then that unique identifying number or other designation shall continue to be assigned to the converted organization.

(b) A converted organization that is a foreign entity consents to the jurisdiction of the courts of this state to enforce any debt, obligation or other liability for which the converting partnership is liable if, before the conversion, the converting partnership was subject to suit in this state on the debt, obligation or other liability. If a converted organization that is a foreign entity

fails to designate or maintain a registered agent, or the designated registered agent cannot with reasonable diligence be served, then service of process on that converted organization for the purposes of enforcing a debt, obligation, or other liability under this subsection may be made in the same manner and has the same consequences as provided in Section 10A-1-5.35.

Comment

This Section is substantially similar to Section 10A-9A-10.05 of the Alabama Limited Partnership Law and Section 10A-5A-10.04 of the Alabama Limited Liability Company Law.

§ 10A-8A-9.06. Merger.

(a) A partnership may merge with one or more other constituent organizations pursuant to this section, Sections 10A-8A-9.07 through 10A-8A-9.09, and a plan of merger, if:

- (1) the governing statute of each of the other organizations authorizes the merger;
- (2) the merger is not prohibited by the law of a jurisdiction that enacted any of those governing statutes; and
- (3) each of the other organizations complies with its governing statute in effecting the merger.

(b) A plan of merger must be in writing and must include:

- (1) the name, type of organization, and mailing address of the principal office of each constituent organization;
- (2) the name, type of organization, and mailing address of the principal office of the surviving organization and, if the surviving organization is to be created pursuant to the merger, a statement to that effect;
- (3) the terms and conditions of the merger, including the manner and basis for

converting the interests in each constituent organization into any combination of money, interests in the surviving organization, and other consideration as allowed by subsection (c);

- (4) if the surviving organization is to be created pursuant to the merger, the surviving organization's organizational documents; and
- (5) if the surviving organization is not to be created pursuant to the merger, any amendments to be made by the merger to the surviving organization's organizational documents.

(c) In connection with a merger, rights or securities of or interests in a constituent organization may be exchanged for or converted into cash, property, or rights or securities of or interests in the surviving organization, or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, or rights or securities of or interests in another organization or may be cancelled.

Comment

This Section is substantially similar to Section 10A-9A-10.06 of the Alabama Limited Partnership Law and Section 10A-5A-10.05 of the Alabama Limited Liability Company Law.

§ 10A-8A-9.07. Action on plan of merger by constituent partnership.

(a) Subject to Section 10A-8A-9.10, a plan of merger must be consented to by all the partners of a constituent partnership.

(b) Subject to Section 10A-8A-9.10 and any contractual rights, after a merger is approved, and at any time before a filing is made under Section 10A-8A-9.08, a constituent partnership may amend the plan or abandon the merger:

- (1) as provided in the plan; and

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

Comment

This Section is substantially similar to Section 10A-9A-10.07 of the Alabama Limited Partnership Law and Section 10A-5A-10.06 of the Alabama Limited Liability Company Law.

§ 10A-8A-9.08. Filings required for merger; effective date.

(a) After each constituent organization has approved the plan of merger, a statement of merger must be signed on behalf of:

- (1) each constituent partnership, as provided in Section 10A-8A-2.03(a); and
- (2) each other constituent organization, as provided by its governing statute.

(b) A statement of merger under this section must include:

- (1) the name, type of organization, and mailing address of the principal office of each constituent organization and the jurisdiction of its governing statute;
- (2) the name, type of organization, and mailing address of the principal office of the surviving organization, the jurisdiction of its governing statute, and, if the surviving organization is created pursuant to the merger, a statement to that effect;
- (3) the date of the filing of the certificate of formation, if any, and all prior amendments and the filing office or offices, if any, and where such is filed of each constituent organization which was formed under the laws of this state;
- (4) the date of the filing of the statement of partnership, statement of not for

- profit partnership, or statement of limited liability partnership, if any, and all prior amendments and the filing office or offices, if any, and where such is filed of each constituent organization which is a partnership;
- (5) the date the merger is effective under the governing statute of the surviving organization;
 - (6) if the surviving organization is to be created pursuant to the merger:
 - (A) if it will be a partnership, the partnership's statement of partnership, statement of not for profit partnership, or statement of limited liability partnership; or
 - (B) if it will be an organization other than a partnership, any organizational document that creates the organization that is required to be in a public writing;
 - (7) if the surviving organization exists before the merger, any amendments provided for in the plan of merger for the organizational document that are required to be in a public writing;
 - (8) a statement as to each constituent organization that the merger was approved as required by the organization's governing statute;
 - (9) if the surviving organization is a foreign organization not authorized to conduct business or not for profit activity in this state, the street and mailing address of an office for the purposes of Section 10A-8A-9.09(b);
and
 - (10) any additional information required by the governing statute of any constituent organization.

(c) Prior to the statement of merger being delivered for filing to the Secretary of State in accordance subsection (d), all constituent organizations that are partnerships, other than a partnership that is created pursuant to the merger, must have on file with the Secretary of State a statement of partnership, statement of not for profit partnership, or statement of limited liability partnership.

(d) The statement of merger shall be delivered for filing to the Secretary of State in accordance with Section 10A-1-4.02(c)(1), along with the fees specified in Section 10A-1-4.31, subject to the last two sentences of this subsection (d). For each constituent organization which is formed under the laws of this state pursuant to a certificate of formation and which is not, immediately prior to the merger becoming effective, an organization described in Section 10A-1-4.02(c)(4), the Secretary of State shall within 10 days transmit a certified copy of the statement of merger to the office of the judge of probate in the county in which the certificate of formation for each such constituent organization was filed along with the proper fee for the judge of probate. For each constituent organization which is formed under the laws of this state pursuant to a certificate of formation, which is, immediately prior to the merger becoming effective, an organization described in Section 10A-1-4.02(c)(4), but which has a certificate of formation filed with the judge of probate, the Secretary of State shall transmit a certified copy of the statement of merger to the office of the judge of probate in the county in which the certificate of formation for each such constituent organization was filed along with the proper fee for the judge of probate. For each constituent organization which (1) is formed under the laws of this state pursuant to a certificate of formation, (2) is, immediately prior to the merger becoming effective, an organization described in Section 10A-1-4.02(c)(4), and (3) did not file its certificate of formation with the judge of probate, but rather in accordance with this title filed its certificate of formation

with the Secretary of State, the Secretary of State shall not transmit a certified copy of the statement of merger to the office of the judge of probate and shall not collect any fee for the judge of probate. For each constituent organization which is a partnership, the Secretary of State shall not transmit a certified copy of the statement of merger to the office of the judge of probate and shall not collect any fee for the judge of probate.

(e) A merger becomes effective under this article:

(1) if the surviving organization is a partnership, upon the later of:

(A) the filing of the statement of merger with the Secretary of State; or

(B) as specified in the statement of merger; or

(2) if the surviving organization is not a partnership, as provided by the governing statute of the surviving organization.

(f) After a merger becomes effective, if the surviving organization is a partnership, then all filing instruments required to be filed under this title regarding that surviving organization shall be filed with the Secretary of State.

(g) A certified copy of the statement of merger required to be filed under this section may be filed in the real estate records in the office of the judge of probate in any county in which any constituent organization owned real property, without payment and without collection by the judge of probate of any deed or other transfer tax or fee. The judge of probate, however, shall be entitled to collect the filing fee of five dollars (\$5). Any such filing shall evidence chain of title, but lack of filing shall not affect the surviving organization's title to such real property.

(h) A statement of merger is a filing instrument under Chapter 1.

(i) Except as provided in the last two sentences of subsection (d), the filing fees for a statement of merger shall be the same fees as provided in Section 10A-1-4.31(a)(5).

Comment

This Section is substantially similar to Section 10A-9A-10.08 of the Alabama Limited Partnership Law and Section 10A-5A-10.07 of the Alabama Limited Liability Company Law.

Subsection (d) was added to clarify the responsibility of the Secretary of State regarding the forwarding of a statement of merger to the appropriate probate judge. In the case of an organization which has its certificate of formation filed with a probate judge, the normal rules of collecting a fee and forwarding a certified copy of the statement of merger would apply. However, in the case of an organization which has filed its certificate of formation solely with the Secretary of State because of the rules provided in Section 10A-1-4.02(c)(4) and has not filed a certificate of formation with a probate judge, then the Secretary of State shall not transmit a certificated copy of the statement of merger to a probate judge and shall not collect a fee for the probate judge. The same rule applies to partnerships since all statements of partnership, statements of not for profit partnership and statements of limited liability partnership are filed with the Secretary of State and not with the probate judge. Without the clarification provided for in Subsection (d), the statement of merger might be required to be forwarded to a probate judge, the location of which is not determinable.

Subsection (g) was added to allow for the filing of certified copies of the documents required to be filed under this Section in the local probate judge's office in which the constituent organization owned, or in which the surviving organization owns, real property in order to clear any questions regarding the title to such real property.

Subsection (h) was added to clarify that a statement of merger is a filing instrument for purposes of Chapter 1 of this Title.

Subsection (i) was added to set forth the filing fees of the statement of merger which is to be the same as articles of merger, etc., as set forth in Section 10A-1-4.31(a)(5). The only exception to this rule is when no fee is to be collected for the probate judge in the circumstance set forth in the last two sentences of Subsection (d).

§ 10A-8A-9.09. Effect of merger.

- (a) When a merger becomes effective:
 - (1) the surviving organization continues or, in the case of a surviving organization created pursuant to the merger, comes into existence;
 - (2) each constituent organization that merges into the surviving organization ceases to exist as a separate entity;
 - (3) all property owned by each constituent organization that ceases to exist

vests in the surviving organization without reservation or impairment and the title to any property vested by deed or otherwise in the surviving organization shall not revert or be in any way impaired by reason of the merger;

- (4) all debts, obligations or other liabilities of each constituent organization that ceases to exist continue as debts, obligations or other liabilities of the surviving organization and neither the rights of creditors, nor any liens upon the property of any constituent organization, shall be impaired by the merger;
- (5) an action or proceeding pending by or against any constituent organization continues as if the merger had not occurred;
- (6) except as prohibited by law other than this chapter, all of the rights, privileges, immunities, powers, and purposes of each constituent organization vest in the surviving organization;
- (7) except as otherwise provided in the plan of merger, the terms and conditions of the plan of merger take effect;
- (8) except as otherwise agreed, if a constituent partnership ceases to exist, the merger does not dissolve the partnership;
- (9) if the surviving organization is created pursuant to the merger:
 - (A) if it is a partnership, the statement of partnership, statement of not for profit partnership or statement of limited liability partnership becomes effective; or
 - (B) if it is an organization other than a partnership, the organizational

document that creates the organization becomes effective; and

- (10) if the surviving organization existed before the merger, any amendments provided for in the statement of merger for the organizational document of that organization become effective.

(b) A surviving organization that is a foreign entity consents to the jurisdiction of this state to enforce any debt, obligation, or other liability owed by a constituent organization, if before the merger the constituent organization was subject to suit in this state on the debt, obligation, or other liability. If a surviving organization that is a foreign entity fails to designate or maintain a registered agent, or the designated registered agent cannot with reasonable diligence be served, then the service of process on that surviving organization for the purposes of enforcing a debt, obligation, or other liability under this subsection may be made in the same manner and has the same consequences as provided in Section 10A-1-5.35.

Comment

This Section is substantially similar to Section 10A-5A-10.09 to the Alabama Limited Partnership Law and Section 10A-5A-10.08 to the Alabama Limited Liability Company Law.

§ 10A-8A-9.10. Restrictions on approval of mergers, conversions and on relinquishing LLP status.

(a) If a partner of a converting or constituent partnership will have personal liability with respect to a converted or surviving organization, approval and amendment of a plan of conversion or plan of merger are ineffective without that partner's consent to the plan.

(b) A statement of cancellation of the statement of limited liability partnership filed in connection with a conversion or merger is ineffective without each partner's written consent to such amendment.

(c) A partner does not give the consent required by subsection (a) or (b) merely by

consenting to a provision of the partnership agreement that permits the partnership agreement to be amended with the consent of fewer than all the partners.

Comment

This Section is substantially similar to Section 10A-9A-10.10 of the Alabama Limited Partnership Law and Section 10A-5A-10.09 to the Alabama Limited Liability Company Law.

§ 10A-8A-9.11. Liability of partner after conversion or merger.

(a) A conversion or merger under this article does not discharge any liability under Sections 10A-8A-3.06, 10A-8A-7.02, or 10A-8A-7.03 of a person that was a partner in or dissociated as a partner from a converting or constituent partnership, but:

- (1) the provisions of this chapter pertaining to the collection or discharge of the liability continue to apply to the liability;
- (2) for the purposes of applying those provisions, the converted or surviving organization is deemed to be the converting or constituent partnership; and
- (3) if a person is required to pay any amount under this subsection:
 - (A) the person has a right of contribution from each other person that was liable as a partner under Section 10A-8A-3.06 when the obligation was incurred and has not been released from the obligation under Sections 10A-8A-7.02 or 10A-8A-7.03; and
 - (B) the contribution due from each of those persons is in proportion to the right to receive distributions in the capacity of partner in effect for each of those persons when the obligation was incurred.

(b) In addition to any other liability provided by law:

- (1) a person that immediately before a conversion or merger became effective

was a partner in a converting or constituent partnership that was not a limited liability partnership is personally liable for each obligation of the converted or surviving organization arising from a transaction with a third party after the conversion or merger becomes effective, if, at the time the third party enters into the transaction, the third party:

(A) does not have notice of the conversion or merger; and

(B) reasonably believes that:

(i) the converted or surviving business is the converting or constituent partnership;

(ii) the converting or constituent partnership is not a limited liability partnership; and

(iii) the person is a partner in the converting or constituent partnership; and

(2) a person that was dissociated as a partner from a converting or constituent partnership before the conversion or merger became effective is personally liable for each obligation of the converted or surviving organization arising from a transaction with a third party after the conversion or merger becomes effective, if:

(A) immediately before the conversion or merger became effective the converting or surviving partnership was not a limited liability partnership; and

(B) at the time the third party enters into the transaction the third party:

(i) does not have notice of the dissociation;

- (ii) does not have notice of the conversion or merger; and
- (iii) reasonably believes that the converted or surviving organization is the converting or constituent partnership, the converting or constituent partnership is not a limited liability partnership, and the person is a partner in the converting or constituent partnership.

Comment

This Section is substantially similar to Section 10A-9A-10.11 of the Alabama Limited Partnership Law.

This Chapter does not place a time limit on the liability of a partner which has disassociated. The partner and the partnership are in the best position to resolve this issue by appropriate filing of a statement of dissociation.

This Section uses the approach of Section 10A-8A-7.02 into the context of a conversion or merger involving a partnership.

Subsection (a) pertains to partner liability for obligations which a partnership incurred before a conversion or merger. This Chapter leaves to other law the question of when a partnership obligation is incurred.

If the converting or constituent partnership was a limited liability partnership at all times before the conversion or merger, this Subsection will not apply because no person will have any liability under Sections 10A-8A-3.06, 10A-8A-7.02, or 10A-8A-7.03.

Subsection (b) pertains to entity obligations incurred after a conversion or merger and creates lingering exposure to personal liability for partners and persons previously dissociated as partners. In contrast to Subsection (a)(3), this Subsection does not provide for contribution among persons personally liable under this Section for the same entity obligation. That issue is left for other law.

Subsection (b)(1) provides that if the converting or constituent partnership was a limited liability partnership immediately before the conversion or merger, there is no lingering exposure to personal liability under this subsection.

Subsections (b)(1) and (b)(2) provide that a person might have notice under Section 10A-8A-1.03.

§ 10A-8A-9.12. Power of partners and persons dissociated as partners to bind organization after conversion or merger.

(a) An act of a person that immediately before a conversion or merger became effective was a partner in a converting or constituent partnership binds the converted or surviving organization after the conversion or merger becomes effective, if:

- (1) before the conversion or merger became effective, the act would have bound the converting or constituent partnership under Section 10A-8A-3.01; and
- (2) at the time the third party enters into the transaction, the third party:
 - (A) does not have notice of the conversion or merger; and
 - (B) reasonably believes that the converted or surviving organization is the converting or constituent partnership and that the person is a partner in the converting or constituent partnership.

(b) An act of a person that before a conversion or merger became effective was dissociated as a partner from a converting or constituent partnership binds the converted or surviving organization after the conversion or merger becomes effective, if:

- (1) before the conversion or merger became effective, the act would have bound the converting or constituent partnership under Section 10A-8A-3.01 if the person had been a partner; and
- (2) at the time the third party enters into the transaction, the third party:
 - (A) does not have notice of the dissociation;
 - (B) does not have notice of the conversion or merger; and
 - (C) reasonably believes that the converted or surviving organization is the converting or constituent partnership and that the person is a

partner in the converting or constituent partnership.

(c) If a person having knowledge of the conversion or merger causes a converted or surviving organization to incur an obligation under subsection (a) or (b), the person is liable:

- (1) to the converted or surviving organization for any damage caused to the organization arising from the obligation; and
- (2) if another person is liable for the obligation, to that other person for any damage caused to that other person arising from the liability.

Comment

This Section is substantially similar to Section 10A-9A-10.12 of the Alabama Limited Partnership Law. This Section uses the approach of Section 10A-8A-7.02 into the context of a conversion or merger involving a partnership. The notice referred to in this Section is notice under Section 10A-8A-1.03.

§ 10A-8A-9.13. Article not exclusive.

This article is not exclusive. This article does not preclude an entity from being converted or merged under law other than this chapter.

Comment

This Section is substantially similar to Section 10A-9A-10.11 to the Alabama Limited Partnership Law and Section 10A-5A-10.10 to the Alabama Limited Liability Company Law. This Section clarifies that a partnership or other organization utilizing this Article 10 of this Chapter, may do so without using Article 8 of Chapter 1, or may elect to use Article 8 of Chapter 1 without using Article 10 of this Chapter.

Article 10

Limited Liability Partnership

§ 10A-8A-10.01. Limited liability partnerships; statements; cancellations.

§ 10A-8A-10.02. Special rules for limited liability partnerships performing professional services.

§ 10A-8A-10.03. Death or disqualification of partner.

§ 10A-8A-10.01. Limited liability partnerships; statements; cancellations.

(a) A partnership may be formed as, or may become, a limited liability partnership pursuant to this section.

(b) In order to form a limited liability partnership, the original partnership agreement of the partnership shall state that the partnership is formed as a limited liability partnership, and the partnership shall deliver to the Secretary of State for filing a statement of limited liability partnership in accordance with subsection (d) of this section.

(c) In order for an existing partnership to become a limited liability partnership, the terms and conditions on which the partnership becomes a limited liability partnership must be approved by the affirmative approval necessary to amend the partnership agreement and, in the case of a partnership agreement that expressly considers obligations to contribute to the partnership, also the affirmative approval necessary to amend those provisions, and after such approval, the partnership shall deliver to Secretary of State for filing a statement of limited liability partnership in accordance with subsection (d) of this section.

(d) A statement of limited liability partnership must contain all of the following:

- (1) the name of the limited liability partnership which must comply with Article 5 of Chapter 1;
- (2) the street, and mailing, if different, address of its principal office.

- (3) the street and mailing address of a registered office and the name of the registered agent at that office for service of process in this state which the partnership shall be required to maintain;
- (4) a statement that the partnership was formed as a limited liability partnership in accordance with subsection (b) or a statement that the statement of limited liability partnership was approved in accordance with section (c); and
- (5) a statement that the partnership is a limited liability partnership.

(e) A statement of limited liability partnership may be amended or restated from time to time in accordance with Section 10A-1-4.26.

(f) The statement of limited liability partnership shall be executed by one or more partners authorized to execute the statement of limited liability partnership.

(g) The statement of limited liability partnership shall be accompanied by a fee for the Secretary of State in the respective amounts prescribed by Section 10A-1-4.31.

(h) The Secretary of State shall file the statement of limited liability partnership of any partnership as a limited liability partnership that submits a completed statement of limited liability partnership with the required fees. The filing by the Secretary of State of a statement of limited liability partnership is conclusive evidence that the partnership has satisfied all conditions required to be a limited liability partnership.

(i) The statement of limited liability partnership is effective, and a partnership becomes a limited liability partnership, immediately on the date the statement of limited liability partnership is filed with the Secretary of State or at any later date or time specified in the statement of limited liability partnership in compliance with Article 4 of Chapter 1. The status as

a limited liability partnership remains effective, regardless of changes in the partnership, and partnership continues as a limited liability partnership until a statement of cancellation is voluntarily filed in accordance with subsection (m).

(j) The fact that a statement of limited liability partnership is on file with the Secretary of State is notice that the partnership is a limited liability partnership and as notice of the facts required to be set forth in the statement of limited liability partnership.

(k) A partnership that has filed a statement of limited liability partnership as a limited liability partnership is for all purposes, except as provided in Section 10A-8-3.06, the same entity that existed before the statement of limited liability partnership was filed and continues to be a partnership under the laws of this state subject to the limited liability partnership provisions of this chapter. If a limited liability partnership dissolves and its business or not for profit activity, or a portion of its business or not for profit activity is continued without the complete winding up of partnership's business or not for profit activity, a partnership which is a successor to the limited liability partnership shall not be required to file a new statement of limited liability partnership.

(l) The status of the partnership as a limited liability partnership and the liability of a partner of the limited liability partnership shall not be adversely affected by error or subsequent changes in the information stated in the statement of limited liability partnership under subsection (d).

(m) The decision to file a statement of cancellation shall require the approval of all of the partners of the partnership. The statement of cancellation must be delivered for filing to the Secretary of State and must contain the following:

- (1) the name of the limited liability partnership;

- (2) the date and office or office in which it filed its statement of limited liability partnership, and all amendments and restatements thereof;
- (3) the street and mailing address of its principal office.
- (4) the street and mailing address of its registered office and the name of the registered agent at that office for service of process in this state which the partnership was required to maintain; and
- (5) a statement that statement of cancellation was approved in accordance with this subsection; and
- (6) and any other information that the partners determine to include.

(n) A statement of cancellation must be executed by one or more partners authorized to execute the statement of cancellation.

(o) The statement of cancellation is effective, and a partnership ceases to be a limited liability partnership, immediately on the date the statement of cancellation is delivered to the Secretary of State for filing or at any later date or time specified in the statement of cancellation in compliance with Article 4 of Chapter 1. The statement of cancellation shall not cause the dissolution of the partnership.

(p) The filing of a statement of cancellation of a limited liability partnership does not affect the limited liability of partners for debts, obligations or liabilities of the partnership which occur or were incurred prior to the filing of the statement of cancellation.

(q) A dissolved limited liability partnership shall continue its status as a limited liability partnership unless a statement of cancellation is voluntarily filed in accordance with subsection (m).

(†) ~~The Secretary of State may provide a form of statement of limited liability partnership and a statement of cancellation of limited liability partnership.~~

(sr) The statement of limited liability partnership and the statement of cancellation are filing instruments for the purposes of Chapter 1.

Comment

This Section establishes the procedures and conditions for forming or becoming a limited liability partnership.

Subsection (a) makes clear that limited liability partnership may either be formed as a limited liability partnership or may later elect to be a limited liability partnership.

Subsection (b) specifies that in order to form a limited liability partnership, the original partnership agreement must state that it is being formed as a limited liability partnership and a statement of limited liability partnership must be filed.

Subsection (c) provides the mechanism for an existing partnership to become a limited liability partnership, and sets forth the approval necessary as being the approval necessary to amend the partnership agreement.

Subsection (d) sets forth the requirements for a statement of limited liability partnership. One of these requirements is to comply with the name provisions of Article 5 of Chapter 1. If a partnership is both a not for profit partnership and a limited liability partnership, the name should reflect both name requirements under Article 5 of Chapter 1. Thus, XYZ, NGP, LLP would be an appropriate name.

Subsection (i) provides the effectiveness of a statement of limited liability partnership. Once filed, the partnership remains a limited liability partnership until a statement of cancellation is voluntarily filed. The requirement of an annual filing of a statement has been removed. This is a significant change in the law and is intended to remove a potential trap for limited liability partnerships.

Subsection (j) provides that a registration or notice which is on file with the Secretary of State is notice that the partnership is a limited liability partnership and is notice of all other facts set forth in the statement of limited liability partnership.

Subsection (l) provides that the status of a limited liability partnership and the liability of a partner of the limited liability partnership is not adversely affected by an erroneous statement in the statement of limited liability partnership or any changes in the information in the statement of limited liability partnership.

Subsection (m) provides that all of the partners must agree to file a statement of cancellation while the partnership agreement approval seems appropriate for approving the filing of a statement of limited liability partnership, the cancellation of that statement imposes substantial risks on each partner, and thus unanimous consent is accordingly appropriate. See Section 10A-8A-1.08(c)(16) which does not allow a partnership agreement to vary this requirement.

Subsection (q) provides that upon dissolution of a limited liability partnership does not affect the liability shield unless and until a statement of cancellation is voluntarily filed.

§ 10A-8A-10.02. Special rules for limited liability partnerships performing professional services.

(a) A limited liability partnership shall have the power to render professional services if it complies with the rules of the licensing authority for such profession.

(b) Every individual who renders professional services as a partner or as an employee of a limited liability partnership shall be liable for any negligent or wrongful act or omission in which the individual personally participates to the same extent the individual would be liable if the individual rendered the services as a sole practitioner.

(c) Except as otherwise provided in Subsection (b), the personal liability of a partner of any limited liability partnership engaged in providing professional services shall be governed by Section 10A-8A-3.06.

(d) The personal liability of a partner or employee of a foreign limited liability partnership engaged in providing professional services shall be determined under the law of the jurisdiction which governs the foreign limited liability partnership.

(e) Nothing in this article shall restrict or limit in any manner the authority or duty of a licensing authority with respect to individuals rendering a professional service within the jurisdiction of the licensing authority. Nothing in this article shall restrict or limit any law, rule, or regulation pertaining to standards of professional conduct.

(f) Nothing in this article shall limit the authority of a licensing authority to impose requirements in addition to those stated in this chapter on any limited liability partnership or foreign limited liability partnership rendering professional services within the jurisdiction of the licensing authority.

(g) A partner's transferrable interest in a limited liability partnership organized to render professional services may be voluntarily transferred only to a qualified person.

Comment

This Section has been changed to conform with Section 10A-5A-8.01 of the Alabama Limited Liability Company Law; however, this Section and Section 10A-8A-10.3 are substantially similar to the Prior Law, §10A-8-10.10. While some of the provisions, because of terminology differences, had to be addressed differently, it is the intent that limited liability partnerships rendering professional services be treated similarly to professional corporations. Subsections (a)-(d) are similar to § 10A-4-3.03 of the Alabama Professional Corporation Law. Subsections (e) and (f) are similar to § 10A-4-5.07 of the Alabama Professional Corporation Law. Subsection (g) is similar to § 10A-4-3.01(c) of the Alabama Professional Corporation Law.

§ 10A-8A-10.03. Death or disqualification of partner.

(a) In the case of a limited liability partnership performing professional services, upon the death of a partner, upon a partner becoming a disqualified person, or upon a transferable interest being transferred by operation of law or court decree to a disqualified person, the transferable interest of the deceased partner or of the disqualified person may be transferred to a qualified person and, if not so transferred, subject to Section 10A-8A-4.09, shall be purchased by the limited liability partnership as provided in this section.

(b) If the price of the transferable interest is not fixed by the partnership agreement, the limited liability partnership, within six months after the death or 30 days after the disqualification or transfer, as the case may be, shall make a written offer to pay to the holder of the transferable interest a specified price deemed by the limited liability partnership to be the fair

value of the transferable interest as of the date of the death, disqualification or transfer. The offer shall be given to the personal representative of the estate of the deceased partner, the disqualified person, or the transferee, as the case may be, and shall be accompanied by a balance sheet of the limited liability partnership, as of the latest available date and not more than 12 months prior to the making of the offer, and a profit and loss statement of the limited liability partnership for the 12 months' period ended on the date of the balance sheet.

(c) If within 30 days after the date of the written offer from the limited liability partnership the fair value of the transferable interest is agreed upon between the personal representative of the estate of the deceased partner, the disqualified person, or the transferee, as the case may be, and the limited liability partnership, payment therefor shall be made within 90 days, or such other period as the parties may agree, after the date of the offer. Upon payment of the agreed value, the personal representative of the estate of the deceased partner, the disqualified person, or the transferee, as the case may, be shall cease to have any interest in, or claim to, the transferable interest.

(d) If within 30 days from the date of the written offer from the limited liability partnership, the personal representative of the estate of the deceased partner, the disqualified person, or the transferee, as the case may be, and the limited liability partnership do not so agree as to the fair value of the transferable interest, then either party may commence a civil action in the circuit court in the county in which the limited liability partnership's principal place of business or not for profit activity within this state is located, and if the limited liability partnership does not have a principal place of business or not for profit activity within this state, then the circuit court for the county in which the limited liability partnership's most recent registered office is located requesting that the fair value of the transferrable interest be found and

determined. The personal representative of the estate of the deceased partner, the disqualified person, or the transferee, as the case may be, wherever residing, shall be made a party to the proceeding as an action against that person's transferable interest quasi in rem. Service shall be made in accordance with the rules of civil procedure. The personal representative of the estate of the deceased partner, the disqualified person, or the transferee, as the case may be, shall be entitled to a judgment against the limited liability partnership for the amount of the fair value of that person's transferable interest as of the date of death, disqualification, or transfer. The court may, in its discretion, order that the judgment be paid in installments and with interest and on terms as the court may determine. The court may, if it so elects, appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have the power and authority as shall be specified in the order of their appointment or an amendment thereof.

(e) The judgment shall include an allowance for interest at the rate the court finds to be fair and equitable in all the circumstances, from the date of death, disqualification, or transfer.

(f) The costs and expenses of any proceeding shall be determined by the court and shall be assessed against the parties in a manner the court deems equitable.

(g) The expenses shall include reasonable compensation for and reasonable expenses of the appraisers and a reasonable attorney's fee but shall exclude the fees and expenses of counsel for and of experts employed by any party; but: (1) if the fair value of the transferable interest as determined materially exceeds the amount which the limited liability partnership offered to pay therefor, or if no offer was made by the limited liability partnership, the court in its discretion may award to the personal representative of the estate of the deceased partner, the disqualified person, or the transferee, as the case may be, the sum the court determines to be

reasonable compensation to any expert or experts employed by the personal representative of the estate of the deceased partner, the disqualified person, or the transferee, as the case may be, in the proceeding; and (2) if the offer of the limited liability partnership for the transferable interest materially exceeds the amount of the fair value of the transferable interest as determined, the court in its discretion may award to the limited liability partnership the sum the court determines to be reasonable compensation to any expert or experts employed by the limited liability partnership, in the proceeding.

(h) If the purchase or transfer of the transferable interest of a deceased partner, a disqualified person or a transferee is not completed within 12 months after the death of the deceased partner or 12 months after the disqualification or transfer, as the case may be, the limited liability partnership shall forthwith cancel the transferable interest on its books and the personal representative of the estate of the deceased partner, the disqualified person, or the transferee, as the case may be, shall have no further interest in the transferable interest other than that person's right to payment for the transferable interest under this section.

(i) This section shall not require a limited liability partnership to purchase a transferable interest of a disqualified person if the disqualification is for less than 12 months from the date of disqualification. A limited liability partnership may require the disqualified person to sell the disqualified person's transferable interest to the limited liability partnership upon any disqualification.

(j) Any provision of a partnership agreement regarding the purchase or transfer of a transferable interest of a limited liability partnership performing professional services shall be specifically enforceable in the courts of Alabama.

(k) Nothing in this section shall prevent or relieve a limited liability partnership from paying pension benefits or other deferred compensation.

Comment

This Section was derived from Section 10A-5A-8.02 of the Alabama Limited Liability Company Law. This Section and Section 10A-8A-10.02 are merely an expansion of the Prior Law § 10A-8-10.10, and substantially reflects § 10A-4-3.02 of the Alabama Professional Corporation Law. The use of the term “Fair Value” should be viewed in light of Ex parte Baron Services, Inc., 874 So.2d 545 (Ala. 2003). Although, Baron Services involved the interpretation of the term “Fair Value” in the corporate context, it is the intent of this Chapter that the term “Fair Value” should be given the same meaning and that the courts should interpret the term “Fair Value” as used in this Chapter in the same manner as it was interpreted in the Baron Services case.

Article 11

Transition Rules/Miscellaneous Provisions

- § 10A-8A-11.01. **Application to existing relationships.**
- § 10A-8A-11.02. **Severability clause.**
- § 10A-8A-11.03. **Relation to electronic signatures in global and national commerce act.**
- § 10A-8A-11.04. **Effective date.**
- § 10A-8A-11.05. **Repeals.**
- § 10A-8A-11.06. **Savings clause.**
- § 10A-8A-11.07. **Composite returns.**
- § 10A-8A-11.08. **Taxation of limited liability partnership.**
- § 10A-8A-11.09. **Reserved power of the state to alter or repeal chapter.**
- § 10A-8A-11.10. **Interstate application.**

§ 10A-8A-11.01. Application to existing relationships.

(a) Beginning January 1, 2018, this chapter governs all partnerships and all foreign partnerships.

(b) With respect to a partnership formed before January 1, 2018 and governed by the laws of this state, the following rules apply:

(1) a registration of a limited liability partnership which is current and effective as of ~~January 1~~December 31, 2018~~2017~~, shall remain effective without further action on the part of the limited liability partnership, and a partnership having the status of a limited liability partnership, under predecessor law, shall have the status of a limited liability partnership under this chapter and to the extent such partnership has not filed a statement of limited liability partnership pursuant to this chapter, the registration or latest annual notice filed by such partnership under predecessor law shall constitute a statement of limited liability partnership filed under this chapter;

(2) a partnership's partnership agreement ~~is existing as of December 31, 2017,~~ shall be deemed to be that partnership's partnership agreement under this chapter;

(3) a statement of partnership authority is deemed to be a statement of authority; and each statement of partnership authority existing as of December 31, 2017, shall remain effective without further action on the part of the partnership for the remainder of the period of time authorized under predecessor law, unless earlier amended, in which case, such statement of partnership authority shall comply with Section 10A-8A-3.03;

(4) a statement of denial, statement of dissociation, and statement of dissolution existing as of December 31, 2017 shall be deemed to a statement of denial, statement of dissociation, and statement of dissolution under this chapter respectively;

(5) a registration of a foreign limited liability partnership which is current and effective as of ~~January 1~~December 31, 2018~~2017~~, shall remain effective without further action on the part of the foreign limited liability partnership, and a foreign limited liability partnership having the status of a qualified foreign limited liability partnership, under predecessor law, shall have the status of a qualified foreign limited liability partnership under this chapter and to the extent such partnership has not filed a statement of foreign limited liability partnership pursuant to this chapter, the registration or latest annual notice filed by such partnership under predecessor law shall constitute a statement of foreign limited liability partnership filed under this chapter; and

(6) if a limited liability partnership or foreign limited liability partnership is using the phrase “registered limited liability partnership” or the abbreviation “RLLP” or “R.L.L.P., in its name as of ~~January 1~~December 31, 2018~~2017~~, such phrase or abbreviation shall continue to comply with Article 5 of Chapter 1 unless and until it changes or amends, by whatever means, its name on or after January 1, 2018, at which point it may only use the term “limited liability partnership” or the abbreviation “LLP” or “L.L.P., in its name in compliance

with Article 5 of Chapter 1. No limited liability partnership which is formed or elects to become a limited liability partnership on or after January 1, 2018, and no foreign limited liability partnership which delivers to the Secretary of State of filing, a statement of foreign limited liability partnership, may use the phrase “registered limited liability partnership” or the abbreviation “RLLP” or “R.L.L.P., in its name.

Comment

Subsection (a) provides for the general rule that all partnerships and foreign partnership shall be governed by this Chapter effective January 1, 2018. Subsection (b) specifies six transitional rules in an effort to allow certain provisions of the Prior Law to continue in effect.

§ 10A-8A-11.02. Severability clause.

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

§ 10A-8A-11.03. Relation to electronic signatures in global and national commerce act.

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

§ 10A-8A-11.04. Effective date.

This chapter takes effect January 1, 2018.

§ 10A-8A-11.05. Repeals.

Effective January 1, 2018, the following parts of the Code of Alabama (1975) are

repealed: Sections 10A-8-1.01 to 10A-8-11.04, inclusive, as amended and in effect immediately before the effective date of this Act.

§ 10A-8A-11.06. Savings clause.

(a) Except as provided in subsection (b), the repeal of a statute by this chapter does not affect:

- (1) the operation of the statute or any action taken under it before its repeal;
- (2) any ratification, right, remedy, privilege, obligation, or liability acquired, accrued, or incurred under the statute before its repeal;
- (3) any violation of the statute, or any penalty, forfeiture, or punishment incurred because of the violation, before its repeal; or
- (4) any proceeding, reorganization, or dissolution commenced under the statute before its repeal, and the proceeding, reorganization, or dissolution may be completed in accordance with the statute as if it had not been repealed.

(b) If a penalty or punishment imposed for violation of a statute repealed by this chapter is reduced by this chapter, the penalty or punishment if not already imposed shall be imposed in accordance with this chapter.

Comment

The Section is derived from Section §10A-5A-12.04 of the Alabama Limited Liability Company Law and the RMBCA § 17.03, and generally continues the Prior Law after the effective date of the Act with respect to a pending action or proceeding or a right accrued. Since courts generally apply the law that exists at the time an action is commenced, but for this section, the new law of this Act would displace the old law in many circumstances. Pending “action” refers to a judicial proceeding, while “proceeding” is broader and includes administrative proceedings. Although it is not always clear whether a right has “accrued,” the term generally means that a cause of action has matured and is ripe for legal redress. See, e.g., Estate of Hoover v. Iowa Dept. of Social Services, 299 Iowa 702, 251 N.W.2d 529 (1977); Nielsen v. State of Wisconsin, 258 Wis. 1110, 141 N.W.2d 194 (1966). An inchoate right is not enough, and thus, for example, there is no accrued right under a contract until it is breached. Subsection (b) makes it clear that any penalty or punishment which is reduced by this Chapter should be imposed in accordance

with this chapter.

§ 10A-8A-11.07. Composite returns.

The Alabama Department of Revenue shall promulgate rules and regulations similar to those provided under Section 40-18-176, relating to Alabama S corporations, to permit the filing of annual composite income tax returns for one or more nonresident partners, who are individuals, of a partnership, limited liability partnership or foreign limited liability partnership with an effective statement of foreign limited liability partnership on file with the Secretary of State, as well as one or more nonresident members, who are individuals, of a limited liability company or foreign limited liability company and one or more nonresident beneficiaries, who are individuals, of a business trust, organized under or recognized by the laws of this state.

Comment

This Section was derived from prior Section 10A-8-11.03, without change.

§ 10A-8A-11.08 Taxation of limited liability partnership.

A limited liability partnership and a foreign limited liability partnership shall be taxed as a partnership in accordance with Section 40-18-24, as amended from time to time, will file partnership returns as required by Section 40-18-28, as amended from time to time, and shall for all other tax purposes be taxed as a partnership, all being subject to the limited liability partnership and a foreign limited liability partnership maintaining its status as a partnership under federal income tax law.

Comment

This Section was derived from prior Section 10A-8-11.04 without substantive change.

§ 10A-8A-11.09. Reserved power of the state to alter or repeal chapter.

All provisions of this chapter may be altered from time to time or repealed and all rights of ~~members~~partners, partnerships, and agents are subject to this reservation. Unless expressly stated

to the contrary in this chapter, all amendments of this chapter shall apply to ~~limited liability companies and members~~partners, partnerships, and agents whether or not existing as such at the time of the enactment of any such amendment.

Comment

This Section is derived from Section 10A-5A-12.05 of the Alabama Limited Liability Company Law and from Delaware, § 18-1106. The genesis of those provisions is Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518 (1819), which held that the United States Constitution prohibits the application of newly enacted statutes to existing corporations, while suggesting the efficacy of a reservation of power provision. Its purpose is to avoid any possible argument that a legal entity created pursuant to statute or its members have a contractual or vested right in any specific statutory provision and to ensure that the state may in the future modify its enabling statute as it deems appropriate and require existing entities to comply with the statutes as modified.

§ 10A-8A-11.10. Interstate application.

A limited liability partnership governed by this chapter may conduct its business or not for profit activity, carry on its operations, and have and exercise the powers granted by this chapter in any state, foreign country, or other jurisdiction.

Comment

This Section is derived Section 10A-8-10.09(a) of Prior Law, Section 10A-5A-12.03 of the Alabama Limited Liability Company Law, RPLLC § 1307. Although the provisions are not necessarily binding on other states, they may be helpful for purposes of applying choice of law and constitutional principles in establishing the legislature's intent that the law be applied extraterritorially.

Part 2:

CHAPTER 1 AMENDMENTS

Article 1

Definitions and Other General Provisions

Division A

Definitions, Applicability, and Purpose

- § 10A-1-1.01. Short title.
- § 10A-1-1.02. Applicability of chapter.
- § 10A-1-1.03. Definitions.
- § 10A-1-1.04. Disinterested person.
- § 10A-1-1.05. Conspicuous information.
- § 10A-1-1.06. Synonymous terms.
- § 10A-1-1.07. Signing of document or other writing.
- § 10A-1-1.08. Short titles.
- § 10A-1-1.09. Reference in law to statute revised by title.

Division B

Determination of Applicable Law

- § 10A-1-1.11. Law governing filing entities.
- § 10A-1-1.12. Entities not formed by filing instrument.
- § 10A-1-1.13. Internal affairs.

Division A

Definitions, Applicability, and Purpose

- § 10A-1-1.01. Short title.

This title shall be known and may be cited as the “Alabama Business and Nonprofit Entity Code.”

Comment

This Section parallels the short title for the Uniform Commercial Code, UCC Section 1-101.

§ 10A-1-1.02. Applicability of chapter.

- (a) All provisions of this chapter shall apply to all entities formed under or governed by Chapters 2 to 11, inclusive, except to the extent, if any, that any provision of this chapter is inconsistent with or as otherwise provided by the provisions of this title or other statutory or constitutional provisions specifically applicable to the entity.
- (b) The provisions of this chapter shall apply to entities formed under or governed by Chapter 16, Chapter 17, Chapter 20, and Chapter 30 only as provided therein or expressly provided in this chapter.
- (c) If a provision of this chapter conflicts with a provision in another chapter of this title, the provision of the other chapter, to the extent of the conflict, supersedes the provision of this chapter.

Comment

This Section parallels the scope Section of the Uniform Commercial Code, UCC Section 1-102, but is more elaborate.

§ 10A-1-1.03. Definitions.

As used in this title, unless the context otherwise requires, the following terms mean:

- (1) Affiliate. A person who controls, is controlled by, or is under common control with another person. An affiliate of an individual includes the spouse, or a parent or sibling thereof, of the individual, or a child, grandchild, sibling, parent, or spouse of any thereof, of the individual, or an individual having the same home as the individual, or a trust or estate of which an individual specified in this sentence is a substantial beneficiary; a trust, estate, incompetent, conservatee, protected

person, or minor of which the individual is a fiduciary; or an entity of which the individual is director, general partner, agent, employee or the governing authority or member of the governing authority.

- (2) Associate. When used to indicate a relationship with:
 - (A) a domestic or foreign entity or organization for which the person is:
 - (i) an officer or governing person; or
 - (ii) a beneficial owner of 10 percent or more of a class of voting ownership interests or similar securities of the entity or organization;
 - (B) a trust or estate in which the person has a substantial beneficial interest or for which the person serves as trustee or in a similar fiduciary capacity;
 - (C) the person's spouse or a relative of the person related by consanguinity or affinity within the fifth degree who resides with the person; or
 - (D) a governing person or an affiliate or officer of the person.
- (3) Association. Includes, but is not limited to, an unincorporated nonprofit association as defined in ~~Section 10A-Chapter 17-1.02(2)~~ and an unincorporated professional association as defined in ~~Section 10A-Article 1 of Chapter 30-1.01(2)~~.
- (4) Business corporation. A domestic or foreign corporation ~~within the meaning of Section 10A-2-1.40(3) or Section 10A-2-1.40(9)~~ as defined in Chapter 2.
- (5) Business trust. A business trust ~~within the meaning of Section 10A-~~ as defined in

Chapter 16-1.01.

- (5)(A6) Certificate of dissolution. Any document such as a certificate of dissolution, statement of dissolution, or articles of dissolution, required or permitted to be filed publicly with respect to an entity's dissolution and winding up of its business, activity, activities, not for profit activity, or affairs.
- (67) Certificate of formation.
- (A) the document required to be filed publicly under Article 3, Chapters 5A, or Chapter 9A to form a filing entity; and
- (B) if appropriate, a restated certificate of formation and all amendments of an original or restated certificate of formation.
- (78) Certificate of ownership. An instrument evidencing an ownership interest or membership interest in an entity.
- (8) **Reserved.**
- (9) Certificated ownership interest. An ownership interest of a domestic entity represented by a certificate.
- (10) Certification. Duly authenticated by the proper officer or filing officer of the jurisdiction the laws of which govern the internal affairs of an entity.
- (11) Contribution. A tangible or intangible benefit that a person transfers to an entity in consideration for an ownership interest in the entity or otherwise in the person's capacity as an owner or a member. A benefit that may constitute a contribution

transferred in exchange for an ownership interest or transferred in the transferor's capacity as an owner or member may include cash, property, services rendered, a contract for services to be performed, a promissory note or other obligation of a person to pay cash or transfer property to the entity, or securities or other interests in or obligations of an entity. In either case, the benefit does not include cash or property received by the entity:

- (A) with respect to a promissory note or other obligation to the extent that the agreed value of the note or obligation has previously been included as a contribution; or
- (B) that the person intends to be a loan to the entity.

(12) Conversion.

- (A) the continuance of a domestic entity as a foreign entity of any type;
- (B) the continuance of a foreign entity as a domestic entity of any type; or
- (C) the continuance of a domestic entity of one type as a domestic entity of another type.

(13) Converted entity. An entity resulting from a conversion.

(14) Converting entity. An entity as the entity existed before the entity's conversion.

(15) Cooperative. Includes an employee cooperative ~~within the meaning of Section 40A~~ as defined in Chapter 11-1.02(2).

(16) Corporation. Includes a domestic or foreign business corporation ~~within the~~

~~meaning of Section 10A-2-1.40(3) or Section 10A-2-1.40(9), as defined in Chapter 2, a domestic or foreign nonprofit corporation within the meaning of Section 10A-3-1.02(7) or Section 10A-3-1.02(4), as defined in Chapter 3, a domestic or foreign professional corporation within the meaning of Section 10A-4-1.03(3) or Section 10A-4-1.03(4) as defined in Chapter 4, and those entities specified in Chapter 20 as corporate.~~

- (17) Court. Every court and judge having jurisdiction in a case.
- (18) Day. When used in the computation of time excludes the first day and includes the last day of the period so computed, unless the last day is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time to be computed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded.
- (19) Debtor in bankruptcy. A person who is the subject of:
 - (A) an order for relief under the United States bankruptcy laws, Title 11, United States Code, or comparable order under a successor statute of general application; or
 - (B) a comparable order under federal, state, or foreign law governing insolvency.
- (20) Director. An individual who serves on the board of directors, by whatever name known, of a foreign or domestic corporation.

- (21) Distribution. A transfer of property, including cash, from an entity to an owner or member of the entity in the owner's or member's capacity as an owner or member. The term includes a dividend, a redemption or purchase of an ownership interest, or a liquidating distribution.
- (22) Domestic. With respect to an entity, that the entity is formed and exists under this title.
- (23) Domestic entity. An organization formed and existing under this title.
- (24) Effective date of this title. January 1, 2011.
- (25) Electronic signature. An electronic signature as that term is defined in the Alabama Electronic Transactions Act, Chapter 1A of Title 8, or any successor statute.
- (26) Entity. A domestic entity or foreign entity.
- (27) Filing entity. A domestic entity that is a corporation, limited partnership (including a limited liability limited partnership), limited liability company, professional association, employee cooperative corporation, or real estate investment trust.
- (28) Filing instrument. An instrument, document, or statement that is required or authorized by this title to be filed by or for an entity with the filing officer in accordance with Article 4.
- (29) Filing officer. The officer with whom a filing instrument is required or permitted to be filed under Article 4 or under any other provision of this title.

- (30) Foreign. With respect to an entity, that the entity is formed and existing under the laws of a jurisdiction other than this state.
- (31) Foreign entity. An organization formed and existing under the laws of a jurisdiction other than this state.
- (32) Foreign filing entity. A foreign entity that registers or is required to register as a foreign entity under ~~Section 10A-1-7.01(e)~~Article 7.
- (33) Foreign governmental authority. A governmental official, agency, or instrumentality of a jurisdiction other than this state.
- (34)~~(A)~~ Foreign limited liability limited partnership. A foreign limited liability limited partnership ~~within the meaning of Section 10A-1-7.01(e)~~as defined in Chapter 9A-1.02(3)A.
- ~~(34)~~~~(B)~~ Foreign limited liability partnership. A foreign limited liability partnership ~~within the meaning of Section 10A-1-7.01(e)~~as defined in Chapter 8A-1.02(5)A.
- ~~(34)~~~~(C)~~~~(36)~~ Foreign limited partnership. A foreign limited partnership ~~within the meaning of Section 10A-1-7.01(e)~~as defined in Chapter 9A-1.02(4)A.
- ~~(35)~~~~(37)~~ Foreign nonfiling entity. A foreign entity that is not a foreign filing entity.
- ~~(36)~~~~(38)~~ Fundamental business transaction. A merger, interest exchange, conversion, or sale of all or substantially all of an entity's assets.
- ~~(37)~~~~(39)~~ General partner.
- (A) each partner in a general partnership; or

(B) a person who is admitted to a limited partnership as a general partner in accordance with the governing documents of the limited partnership.

(~~3840~~) General partnership. A partnership ~~within the meaning of Section 10A as defined in Chapter 8A-1.02(9)A.~~ The term includes a limited liability partnership ~~within the meaning of Section 10A as defined in Chapter 8A-1.02(7)A.~~

(~~3941~~) Governing authority. A person or group of persons who are entitled to manage and direct the affairs of an entity under this title and the governing documents of the entity, except that if the governing documents of the entity or this title divide the authority to manage and direct the affairs of the entity among different persons or groups of persons according to different matters, governing authority means the person or group of persons entitled to manage and direct the affairs of the entity with respect to a matter under the governing documents of the entity or this title. The term includes the board of directors of a corporation, by whatever name known, or other persons authorized to perform the functions of the board of directors of a corporation, the general partners of a general partnership or limited partnership, the persons who have direction and oversight of a limited liability company, and the trust managers of a real estate investment trust. The term does not include an officer who is acting in the capacity of an officer.

(~~4042~~) Governing documents.

(A) in the case of a domestic entity:

(i) the certificate of formation for a domestic filing entity or the document or agreement under which a domestic nonfiling entity is

formed; and

(ii) the other documents or agreements, including bylaws, partnership agreements of partnerships, limited liability company agreements of limited liability companies, or similar documents, adopted by the entity under this title to govern the formation or the internal affairs of the entity; or

(B) in the case of a foreign entity, the instruments, documents, or agreements adopted under the law of its jurisdiction of formation to govern the formation or the internal affairs of the entity.

(4143) Governing person. A person serving as part of the governing authority of an entity.

(4244) Individual. A natural person and the estate of an incompetent or deceased natural person.

(4345) Insolvency. The inability of a person to pay the person's debts as they become due in the usual course of business or affairs.

(4446) Insolvent. A person who is unable to pay the person's debts as they become due in the usual course of business or affairs.

(4547) Judge of probate. The judge of probate of the county in which a domestic entity's certificate of formation is filed, or, with respect to a statement of authority under ~~section 10A-Chapter 8A-3.03(f) or (g)~~A which is to be filed in the real property records of a particular county, the judge of probate of the county in which that

statement is filed.

(4648) Jurisdiction of formation.

- (A) in the case of a domestic filing entity, this state;
- (B) in the case of a foreign ~~filing~~ entity, the jurisdiction in which the entity's certificate of formation or similar organizational instrument is filed, or if no certificate of formation or similar organizational instrument is filed, then the jurisdiction the laws of which govern the initial affairs of the foreign entity;
- (C) in the case of a general partnership which has filed a statement of partnership ~~in accordance with Section 10A-8A-2.02~~, a statement of not for profit partnership ~~in accordance with Section 10A-8A-2.02~~, or a statement of limited liability partnership in accordance with ~~Section 10A-Chapter 8A-10.01A~~, this state;
- (D) in the case of a foreign limited liability partnership, the jurisdiction the laws of which govern the filing of the foreign limited liability partnership's statement of limited liability partnership or such similar filing in that jurisdiction; and
- (E) in the case of a foreign or domestic nonfiling entity other than those entities described in subsections (C) or (D):
 - (i) the jurisdiction the laws of which are chosen in the entity's governing documents to govern its internal affairs if that

jurisdiction bears a reasonable relation to the owners or members or to the domestic or foreign nonfiling entity's business and affairs under the principles of this state that otherwise would apply to a contract among the owners or members; or

- (ii) if subparagraph (i) does not apply, the jurisdiction in which the entity has its principal place of business.

(4749) Law. Unless the context requires otherwise, both statutory and common law.

(4850) License. A license, certificate of registration, or other legal authorization.

(4951) Licensing authority. The state court, state regulatory licensing board, or other like agency which has the power to issue a license or other legal authorization to render professional services.

(5052) Limited liability company. A limited liability company ~~within the meaning of~~ defined in Chapter 5A.

(5053)(A) Limited liability limited partnership. A limited liability limited partnership ~~within the meaning of Section 10A- as defined in Chapter 9A-1.02(6)A.~~

(5054)(B) Limited liability partnership. A limited liability partnership ~~within the meaning of Section 10A- as defined in Chapter 8A-1.02(7)A.~~

(5155) Limited partner. A person who has been admitted to a limited partnership as a limited partner as provided by:

- (A) in the case of a domestic limited partnership, ~~Section 10A- Chapter 9A-~~

~~3.01A~~; or

(B) in the case of a foreign limited partnership, the laws of its jurisdiction of formation.

~~(5256)~~ Limited partnership. A limited partnership ~~within the meaning of Section 10A as defined in Chapter 9A-1.02(8)A.~~ The term includes a limited liability limited partnership ~~within the meaning of Section 10A as defined in Chapter 9A-1.02(6)A.~~

~~(5357)~~ Managerial official. An officer or a governing person.

~~(5458)~~ Member.

(A) a person defined as a member under Chapter 5A;

(B) in the case of a nonprofit corporation governed by ~~Article~~Chapter 3, a person having membership rights in a corporation in accordance with its governing documents as provided in ~~Section 10A-Chapter 3-1.02(5);~~

(C) in the case of an employee cooperative corporation governed by Chapter 11, a natural person who, as provided in ~~Section 10A-Chapter 11-1.02(5),~~ has been accepted for membership in and owns a membership share in an employee cooperative;

(D) in the case of a nonprofit association, a person who, as provided in ~~Section 10A-Chapter 17-1.02(1),~~ may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of its policy.

~~(55)~~ Merger.

~~(A) the division of a domestic entity into two or more new domestic entities or other organizations or into a surviving domestic entity and one or more new domestic or foreign entities or non-code organizations; or~~

(B59) Merger. The combination of one or more domestic entities with one or more domestic entities or non-code organizations resulting in:

(iA) one or more surviving domestic entities or non-code organizations;

(iiB) the creation of one or more new domestic entities or non-code organizations, or one or more surviving domestic entities or non-code organizations; or

(iiiC) one or more surviving domestic entities or non-code organizations and the creation of one or more new domestic entities or non-code organizations.

(5660) Non-code organization. An organization other than a domestic entity.

(5761) Nonfiling entity. A domestic entity that is not a filing entity. The term includes a domestic general partnership, a limited liability partnership, and a nonprofit association.

(5862) Nonprofit association. An unincorporated nonprofit association ~~within the meaning of Section 10A as defined in Chapter 17-1.02(2)~~. The term does not include a general partnership which has filed a statement of not for profit partnership in accordance with ~~Section 10A Chapter~~ 8A-2.02;A, a limited partnership which is carrying on a not for profit purpose, or a limited liability company which is carrying on a not for profit purpose.

- (~~59~~63) Nonprofit corporation. A domestic or foreign nonprofit corporation ~~within the meaning of Section 10A-3-1.02(7) or Section 10A-3-1.02(4)~~ as defined in Chapter 3.
- (~~60~~64) Nonprofit entity. An entity that is a nonprofit corporation, nonprofit association, or other entity that is organized solely for one or more nonprofit purposes.
- (~~61~~65) Officer. An individual elected, appointed, or designated as an officer of an entity by the entity's governing authority or under the entity's governing documents.
- (~~62~~66) Organization. A corporation, limited partnership, general partnership, limited liability company, business trust, real estate investment trust, joint venture, joint stock company, cooperative, association, bank, insurance company, credit union, savings and loan association, or other organization, regardless of whether the organization is for profit, not for profit, nonprofit, domestic, or foreign.
- (~~63~~67) Organizer. A person, who need not be an owner or member of the entity, who, having the capacity to contract, is authorized to execute documents in connection with the formation of the entity.
- (~~64~~68) Owner.
- (A) with respect to a foreign or domestic business corporation or real estate investment trust, a shareholder;
 - (B) with respect to a foreign or domestic partnership, a partner;
 - (C) with respect to a foreign or domestic limited liability company or association, a member; and

(D) with respect to another foreign or domestic entity, an owner of an equity interest in that entity.

(~~65~~69) Ownership interest. An owner's interest in an entity. The term includes the owner's share of profits and losses or similar items and the right to receive distributions. The term does not include an owner's right to participate in management or participate in the direction or oversight of the entity. An ownership interest is personal property.

(~~66~~70) Parent entity or parent organization. An entity or organization that:

(A) owns at least 50 percent of the ownership or membership interest of a subsidiary; or

(B) possesses at least 50 percent of the voting power of the owners or members of a subsidiary.

(~~67~~71) Partner. A limited partner or general partner.

(~~68~~72) Partnership. Includes a general partnership, a limited liability partnership, a foreign limited liability partnership, a limited partnership, a foreign limited partnership, a limited liability limited partnership, and a foreign limited liability limited partnership.

(~~69~~73) Partnership agreement. Any agreement (whether referred to as a partnership agreement or otherwise), written, oral or implied, of the partners as to the activities and affairs of a general partnership or a limited partnership. The partnership agreement includes any amendments to the partnership agreement. In the case of

limited partnerships formed prior to October 1, 1998, partnership agreement includes the certificate of partnership.

~~(70)~~ **Reserved.**

~~(71)~~74) Party to the merger. A domestic entity or non-code organization that under a plan of merger is ~~divided or~~ combined by a merger. The term does not include a domestic entity or non-code organization that is not to be ~~divided or~~ combined into or with one or more domestic entities or non-code organizations, regardless of whether ownership interests of the entity are to be issued under the plan of merger.

~~(72)~~75) Person. An individual or an organization, whether created by the laws of this state or another state or foreign country, including, without limitation, a general partnership, limited liability partnership, limited partnership, limited liability limited partnership, limited liability company, corporation, professional corporation, professional association, trustee, personal representative, fiduciary, as defined in Section 19-3-150 or person performing in any similar capacity, business trust, estate, trust, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

~~(73)~~76) President.

(A) the individual designated as president of an entity under the entity's governing documents; or

(B) the officer or committee of persons authorized to perform the functions of the principal executive officer of an entity without regard to the designated

name of the officer or committee.

(~~74~~77) Professional association. A professional association ~~within the meaning of Section 10A-4-1.01~~ as defined in Chapter 30-1-04.

(~~75~~78) Professional corporation. A domestic or foreign professional corporation ~~within the meaning of Section 10A-4-1.03(2) or Section 10A-4-1.03(3)~~ as defined in Chapter 4.

(~~76~~79) Professional entity. A professional association and a professional corporation.

(~~77~~80) Professional service. Any type of service that may lawfully be performed only pursuant to a license issued by a state court, state regulatory licensing board, or other like agency pursuant to state laws.

(~~78~~81) Property. Includes all property, whether real, personal, or mixed, or tangible or intangible, or any right or interest therein.

(~~79~~82) Real estate investment trust. An unincorporated trust, association, or other entity ~~within the meaning of Section 10A-10-1.02(1)~~ as defined in Chapter 10A-10-1-02(1).

(~~80~~) **Reserved.**

(~~81~~83) Secretary.

(A) the individual designated as secretary of an entity under the entity's governing documents; or

(B) the officer or committee of persons authorized to perform the functions of secretary of an entity without regard to the designated name of the officer

or committee.

(~~82~~84) Secretary of State. The Secretary of State of the State of Alabama.

(~~83~~85) Signature. Any symbol executed or adopted by a person with present intention to authenticate a writing. Unless the context requires otherwise, the term includes an electronic signature and a facsimile of a signature.

(~~84~~86) State. Includes, when referring to a part of the United States, a state or commonwealth, and its agencies and governmental subdivisions, and a territory or possession, and its agencies and governmental subdivisions, of the United States.

(~~85~~87) Subscriber. A person who agrees with or makes an offer to an entity to purchase by subscription an ownership interest in the entity.

(~~86~~88) Subscription. An agreement between a subscriber and an entity, or a written offer made by a subscriber to an entity before or after the entity's formation, in which the subscriber agrees or offers to purchase a specified ownership interest in the entity.

(~~87~~89) Subsidiary. An entity or organization at least 50 percent of:

(A) the ownership or membership interest of which is owned by a parent entity or parent organization; or

(B) the voting power of which is possessed by a parent entity or parent organization.

(~~88~~90) Treasurer.

- (A) the individual designated as treasurer of an entity under the entity's governing documents; or
- (B) the officer or committee of persons authorized to perform the functions of treasurer of an entity without regard to the designated name of the officer or committee.

(~~899~~91) Trustee. A person who serves as a trustee of a trust, including a real estate investment trust.

(~~909~~92) Uncertificated ownership interest. An ownership interest in a domestic entity that is not represented by a certificate.

(~~949~~93) Vice president.

- (A) the individual designated as vice president of an entity under the governing documents of the entity; or
- (B) the officer or committee of persons authorized to perform the functions of the president of the entity on the death, absence, or resignation of the president or on the inability of the president to perform the functions of office without regard to the designated name of the officer or committee.

(~~929~~94) Writing or written. Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

§ 10A-1-1.04. Disinterested person.

(a) For purposes of this title, a person is disinterested with respect to the approval of a contract, transaction, or other matter or to the consideration of the disposition of a claim or

challenge relating to a contract, transaction, or particular conduct, if the person or the person's associate:

- (1) is not a party to the contract or transaction or materially involved in the conduct that is the subject of the claim or challenge; and
- (2) does not have a material financial interest in the outcome of the contract or transaction or the disposition of the claim or challenge.

(b) For purposes of subsection (a), a person is not materially involved in the conduct that is the subject of a claim or challenge and does not have a material financial interest in the outcome of a contract or transaction or the disposition of a claim or challenge solely because:

- (1) the person was nominated or elected as a governing person by a person who is:
 - (A) interested in the contract or transaction; or
 - (B) alleged to have engaged in the conduct that is the subject of the claim or challenge;
- (2) the person receives normal fees or customary compensation, reimbursement for expenses, or benefits as a governing person of the entity;
- (3) the person has a direct or indirect equity interest in the entity;
- (4) the entity has, or its subsidiaries have, an interest in the contract or transaction or was affected by the alleged conduct;
- (5) the person or an associate of the person receives ordinary and reasonable compensation for reviewing, making recommendations regarding, or deciding on the disposition of the claim or challenge; or

- (6) in the case of a review by the person of the alleged conduct that is the subject of the claim or challenge:
- (A) the person is named as a defendant in the derivative proceeding regarding the matter or as a person who engaged in the alleged conduct; or
 - (B) the person, acting as a governing person, approved, voted for, or acquiesced in the act being challenged if the act did not result in a material personal or financial benefit to the person and the challenging party fails to allege particular facts that, if true, raise a significant prospect that the governing person would be held liable to the entity or its owners or members as a result of the conduct.

Comment

This Section is a more elaborate statement of the principles found in prior Section 10-2B-8.62(b) of the Alabama Business Corporation Act, without substantial change.

§ 10A-1-1.05. Conspicuous information.

In this title, required information is conspicuous if the information is placed in a manner or displayed using a font that provides or is intended to provide notice to a reasonable person affected by the information. Required information in a document is conspicuous if the font used for the information is capitalized, boldfaced, italicized, or underlined or larger or of a different color than the remainder of the document.

Comment

This Section was drawn from prior Section 10-2B-1.40(3) of the Alabama Business Corporation Act, without substantial change.

§ 10A-1-1.06. Synonymous terms.

To the extent not inconsistent with the Constitution of Alabama of 1901, and other statutes of this state wherein the terms may be found, and as the context requires, in this title or any other statute of this state:

- (1) a reference to certificate of formation includes, in the case of a corporation, articles of incorporation, certificate of incorporation, and charter; in the case of limited partnership, a certificate of limited partnership and a certificate of formation; in the case of a limited liability company, certificate of formation and articles of organization; and in the case of a business trust or a real estate investment trust, declaration of trust and, similarly, a reference to articles of incorporation, certificate of incorporation, charter, certificate of limited partnership, or articles of organization includes a certificate of formation;
- (2) a reference to articles of dissolution includes statement of dissolution and certificate of dissolution, and similarly a reference to statement of dissolution includes articles of dissolution and certificate of dissolution, and similarly, a reference to certificate of dissolution includes articles of dissolution and statement of dissolution;
- (3) a reference to certificate of merger includes articles of merger and statement of merger and similarly, a reference to articles of merger includes certificate of merger and statement of merger, and similarly, a reference to statement of merger includes certificate of merger and articles of merger;
- (4) a reference to authorized capital stock includes authorized shares;
- (5) a reference to capital stock includes authorized and issued shares, issued shares, and stated capital;

- (6) a reference to a certificate of registration, certificate of authority, statement of foreign limited liability partnership, and permit to transact business includes registration;
- (7) a reference to stock and shares of stock includes shares;
- (8) a reference to stockholder includes shareholder; and
- (9) a reference to no par stock includes shares without par value.

Comment

This Section is necessary for purposes of accommodating the generic nomenclature of this Title with the more traditional terminology. It made no substantive change and while the generic nomenclature is useful for uniformity throughout this Title, it is not intended that all filings must be named in this manner in order to be effective.

§ 10A-1-1.07. Signing of document or other writing.

For purposes of this title, a writing has been signed by a person when the writing includes the person's signature. A transmission or reproduction of a writing signed by a person is considered signed by that person for purposes of this title.

Comment

This procedural Section was new with this title. It made no substantive change to prior Alabama law.

§ 10A-1-1.08. Short titles.

- (a) The provisions of this title as described by this section may be cited as provided by this section.
- (b) Chapter 2 and the provisions of Chapter 1 to the extent applicable to business corporations may be cited as the Alabama Business Corporation Law.
- (c) Chapter 3 and the provisions of Chapter 1 to the extent applicable to nonprofit corporations may be cited as the Alabama Nonprofit Corporation Law.

- (d) Chapter 4 and the provisions of Chapter 1 to the extent applicable to professional corporations may be cited as the Alabama Professional Corporation Law.
- (e) Chapter 5A and the provisions of Chapter 1 to the extent applicable to limited liability companies may be cited as the Alabama Limited Liability Company Law.
- (f) Chapter 8A and the provisions of Chapter 1 to the extent applicable to general partnerships may be cited as the Alabama Partnership Law.
- (g) Chapter 9A and the provisions of Chapter 1 to the extent applicable to limited partnerships may be cited as the Alabama Limited Partnership Law.
- (h) Chapter 10 and the provisions of Chapter 1 to the extent applicable to real estate investment trusts may be cited as the Alabama Real Estate Investment Trust Law.
- (i) Chapter 11 and the provisions of Chapter 1 and Chapter 2 to the extent applicable to employee cooperative corporations may be cited as the Alabama Employee Cooperative Corporations Law.
- (j) Chapter 17 may be cited as the Alabama Unincorporated Nonprofit Association Law.

§ 10A-1-1.09. Reference in law to statute revised by title.

A reference in a law to a statute or a part of a statute revised by this title is considered to be a reference to the part of this title that revises that statute or part of that statute.

Comment

This Section states, in simplified, generic language, the same principle of reference stated in prior Section 10-2B-17.03(c) of the Alabama Business Corporation Act. It makes no substantive change to prior Alabama Law.

***Division B
Determination of Applicable Law***

§ 10A-1-1.11. Law governing filing entities.

(a) The law of this state governs the formation and internal affairs of an entity if the entity's formation occurs when a certificate of formation filed in accordance with Article 4 takes effect.

(b) If the formation of an entity occurs when a certificate of formation or similar instrument filed with a foreign governmental authority takes effect, the laws of the state or other jurisdiction in which that foreign governmental authority is located governs the formation and internal affairs of the entity, and the liability of its members.

Comment

Subsection (b) was derived, without substantive change, from prior Section 10-12-46(a) of the Alabama Limited Liability Company Act and prior Section 10-9-901(a) of the Alabama Limited Partnership Act. Subsection (a) simply states expressly the reverse of the principle stated in Subsection (b).

§ 10A-1-1.12. Entities not formed by filing instrument.

For entities other than general partnerships, if the formation of an entity does not occur when a certificate of formation or similar instrument filed with the Secretary of State or the judge of probate, as the case may be, or with a foreign governmental authority takes effect, the law governing the entity's formation and internal affairs is the law of the entity's jurisdiction of formation.

Comment

This Section addresses the question of what law governs unincorporated entities. General partnerships are excluded from this Section since that issue is addressed in Chapter 8A.

§ 10A-1-1.13. Internal affairs.

For purposes of this title, the internal affairs of an entity include:

(1) the rights, powers, and duties of its governing authority, governing persons,

officers, owners, and members; and

- (2) matters relating to its membership or ownership interests, other than the right of members or owners to inspect entity records.

Comment

This Section sets out expressly, without substantive change, what is the law of Alabama was at the time this title was codified.

Article 2

Purposes and Powers of Domestic Entity

Division A

Purposes of Domestic Entity

- § 10A-1-2.01. General scope of permissible purposes.
- § 10A-1-2.02. Prohibited purposes.
- § 10A-1-2.03. Limitations on purposes of professional entity.
- § 10A-1-2.04. Limitation in governing documents.

Division B

Purposes of Domestic Entity

- § 10A-1-2.11. General powers.
- § 10A-1-2.12. Consideration for indebtedness.
- § 10A-1-2.13. Power to make guaranties.
- § 10A-1-2.14. Stated powers in division sufficient.
- § 10A-1-2.15. Limitation on powers.
- § 10A-1-2.16. Certificated indebtedness; manner of issuance; signature and seal.
- § 10A-1-2.17. Business transactions of owner with entity.

Division A

Purposes of Domestic Entity

§ 10A-1-2.01. General scope of permissible purposes.

A domestic entity may have any lawful purpose or purposes, unless otherwise provided by this title. If the purpose for which it is organized or its form makes it subject to a special provision of law or limitation of purpose, the entity shall also comply with that provision or conform to that limitation.

Comment

This Section was derived from prior Section 10-2B-3.01, without substantive change. The second sentence of this Section also refers to any limitations which may be placed upon professional entities by any other Section in this Title or elsewhere in Alabama Law.

Comment to former Section 10-2B-3.01

1. Section 10-2B-3.01(a) of this Act is derived without modification from the second sentence of Section 10-2A-1 of the former Alabama Act. The continuation of the present provision of Alabama law was recommended, rather than the provisions of RMBCA Section 3.01.

2. RMBCA Section 3.01(a) provides that every corporation automatically (without the necessity of any statement in its articles) has the purpose of engaging in any lawful business, unless a more limited purpose is stated in the articles. However, it was believed to be important to require a purpose clause in the articles of every corporation in view of Section 233 of the Alabama Constitution, which provides that “No corporation shall engage in any business other than that expressly authorized in its charter or articles of incorporation.” Accordingly Section 3.01(a) of the RMBCA, was regarded as inappropriate. See Section 10-2B-2.02(a)(6) of this Act, which requires that the articles of incorporation include the purpose or purposes for which the corporation is organized, which may be stated to be any lawful purpose, and the Reporters’ Note as to changes accompanying Section 10-2B-2.02 of this Act.

3. RMBCA Section 3.01(b) deals with corporations subject to regulation under another statute of this state — a phrase meant to include banking, insurance, and other special purpose corporations. Because Section 10-2B-1.01(b) of this act deals with the applicability of this act to special purpose corporations, RMBCA Section 3.01(b) has been omitted.

§ 10A-1-2.02. Prohibited purposes.

A domestic entity may not engage in a business~~or~~, activity, not for profit activity, or any other activity, whether or not for profit, that:

- (A) is expressly unlawful or prohibited by a law of this state;
- (B) cannot lawfully be engaged in by that entity under a law of this state; or
- (C) may not be engaged in by an entity without first obtaining a license under the laws of this state to engage in that business~~or~~, activity, not for profit activity, or any other activity, whether or not for profit, and a license cannot lawfully be granted to the entity.

Comment

This Section sets forth expressly the principles implicit in provisions such as prior Section 10-12-3 of the Alabama Limited Liability Company Act, without substantive change.

§ 10A-1-2.03. Limitation on purposes of professional entity.

Except as provided in the chapter of this title applicable to the entity, a professional entity may engage in only:

- (1) one type of professional service, unless the entity is expressly authorized to provide more than one type of professional service under state law regulating the professional services; and
- (2) services ancillary to that type of professional service.

Comment

This Section was derived from prior Section 10-4-383, without substantive change.

§ 10A-1-2.04. Limitation in governing documents.

The governing documents of a domestic entity may contain limitations on the entity's purposes.

Comment

This Section sets forth expressly what was implicit in prior Section 10-2B-2.02(a)(6) of the Alabama Business Corporation Act.

***Division B
Powers of Domestic Entity***

§ 10A-1-2.11. General powers.

Except as otherwise provided by this title, and whether or not expressly stated in its governing documents, a domestic entity has the same powers as an individual to take action necessary or convenient to carry out its business and affairs. Except as otherwise provided by this title or the governing documents of the entity, the powers of a domestic entity include the power to:

- (1) sue, be sued, complain and defend suit in its entity name;
- (2) have and alter a seal and use the seal or a facsimile of it by impressing, affixing, or reproducing it;
- (3) purchase, lease, or otherwise acquire, receive, own, hold, improve, use, and deal in and with property or an interest in property;
- (4) sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of property;
- (5) make contracts and guaranties;
- (6) incur liabilities, borrow money, issue notes, bonds, and other obligations which may be convertible into or include the option to purchase other securities or ownership interests in the entity, and secure any obligations, or the obligations of others for whom it can make guarantees, whether or not a guarantee is made, by mortgaging or pledging its property, franchises, or income;
- (7) lend money, invest its funds, and receive and hold property as security for repayment;
- (8) acquire its own bonds, debentures, or other evidences of indebtedness or obligations;
- (9) acquire its own ownership interests, regardless of whether redeemable, and hold the ownership interests as treasury ownership interests or cancel or dispose of the ownership interests;
- (10) be a promoter, organizer, owner, partner, member, associate, or manager of an organization;
- (11) acquire, receive, own, hold, vote, use, pledge, and dispose of ownership interests in or securities issued by another person;

- (12) conduct its business, locate its offices, and exercise the powers granted by this title to further its purposes, in or out of this state;
- (13) lend money to, and otherwise assist, its managerial officials, owners, members, or employees as necessary or appropriate, provided, however, a nonprofit entity shall not have the power to lend money to its officers or directors;
- (14) elect or appoint officers, and agents of the entity, establish the length of their terms, define their duties, and fix their compensation;
- (15) pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, and incentive plans for managerial officials, owners, members, or employees or former managerial officials, owners, members, or employees;
- (16) indemnify and maintain liability insurance for managerial officials, owners, members, employees, and agents of the entity or the entity's affiliate;
- (17) adopt and amend governing documents for managing the affairs of the entity subject to applicable law;
- (18) make donations for the public welfare or for charitable, scientific, or educational purposes;
- (19) voluntarily wind up its business and activities and terminate its existence;
- (20) transact business or take action that will aid governmental policy; and
- (21) take other action necessary or appropriate to further the purposes of the entity.

Comment

This Section was derived from prior Section 10-2B-3.02, without substantive change.

Comment to former Section 10-2B-3.02

1. Section 10-2B-3.02 of this Act is derived from RMBCA Section 3.02. The corresponding provision of the former Alabama Act was Section 10-2A-20.

2. Certain language has been added to Section 3.09 that appears in Section 10-2A-20(16), the corresponding provision of the former Alabama Act. The terms “incorporator” and “trustee” have been added as well as the language “domestic or foreign corporation.” This language from the former Alabama Act has been retained to preclude any argument that the effect of this Act is to reduce the powers enjoyed by corporations under the former Alabama Act. Similarly there has been added to Section 10-2B-3.02(7) the term “indemnity agreements” along with the phrase “or creation of security agreements,” language which appears in the Section 10-2A-20(8), the corresponding provision of the former Alabama Act. Once again, the reason for this addition to the RMBCA language is to assure that this Act in no way reduces the powers conferred on corporations by the former Alabama Act. In the interest of making this power as comprehensive as possible, the term “suretyship contracts” was also added.

3. A slight change has been made in Section 10-2B-3.02(12) by inserting “or other welfare” since the various plans listed in the beginning of the Subsection are also welfare, benefit or incentive plans and the term “future” has been inserted between “current” and “or former” in reference to directors, officers, employees.

4. The most significant departure of this Act from the RMBCA Section 3.02 is in Section 10-2B-3.02(7). The concern here is authorization of accommodation guarantees and, even in the absence of a guarantee, accommodation mortgages and security interests on behalf of affiliates. While “downstream” accommodation arrangements (i.e., those made by a parent corporation on behalf of one of its subsidiaries) would seem definitely to be within the general power to make guarantees or other accommodation arrangements because it is clear that such an arrangement furthers the interests of the parent. However, questions have sometimes been raised as to whether “upstream” (guarantees or other accommodation arrangements undertaken by a subsidiary on behalf of a parent corporation or other owner entity) or “cross-stream” arrangements (accommodation arrangements made by one corporation on behalf of another that is part of the same affiliated group) are within the power of the guarantor corporation.

The addition to Section 10-2B-3.02(7) of subsections (a)-(b), which is derived from the Delaware statute, as well as the insertion of the language “(or the obligations of others for whom it can make guarantees, whether or not a guarantee is made)” is intended to resolve the issue of whether a corporation possesses the power to make “upstream” or “cross-stream” accommodation arrangements.

5. It should be noted that the exercise by a corporation of the powers conferred by Section 10-2B-3.02, including those conferred by Section 10-2B-3.02(7), are subject to the provisions of the Alabama Constitution, including in particular Section 233, which provides that “[n]o corporation shall engage in any business other than that expressly authorized in its charter or articles of incorporation” and Section 234, dealing with the issuance of stocks and bonds and increases of indebtedness.

6. The term “business and affairs” of a corporation in the prefatory clause and elsewhere in Section 10-2B-3.02 is intended as synonymous with the corporation’s “purposes” as used in Section 10-2B-3.01 of this Act and in Section 10-2A-20 of the former Alabama Act. Thus,

a narrow purpose clause may restrict a corporation's powers.

§ 10A-1-2.12. Consideration for indebtedness.

(a) Unless otherwise provided by its governing documents or this title a domestic entity may create indebtedness for any consideration the entity considers appropriate, including:

- (1) cash;
- (2) property;
- (3) a contract to receive property;
- (4) a debt or other obligation of the entity or of another person;
- (5) services performed or a contract for services to be performed; or
- (6) a direct or indirect benefit realized by the entity.

(b) In the absence of fraud in the transaction, the judgment of the governing authority of a domestic entity as to the value of the consideration received by the entity for indebtedness is conclusive.

(c) For purposes of establishing the receipt of consideration under this section, a domestic entity is treated as part of the entity creating indebtedness if the domestic entity is directly or indirectly or wholly or partly owned by that entity.

Comment

Subsection (a) as to the nature of permissible consideration parallels the provisions of prior Section 10-9B-501 of the Alabama Limited Partnership Act as to the permissible form of a partner's contribution to a limited partnership. Subsection (b) as to the conclusiveness of the governing authority's determination parallels Section 10-2B-6.21(d) of the Alabama Business Corporation Act as to the conclusiveness of the board of director's determination that the consideration for the issuance of corporate shares is adequate.

§ 10A-1-2.13. Power to make guaranties.

(a) In this section, "guaranty" means a mortgage, pledge, security agreement, or other

agreement making the domestic entity or its assets secondarily liable for another person's contract, security, or other obligation.

(b) Unless otherwise provided by its governing documents or this title, a domestic entity may:

- (1) make a guaranty on behalf of a parent, subsidiary, or affiliate of the entity;
or
- (2) make a guaranty of the indebtedness of another person if the guaranty may reasonably be expected directly or indirectly to benefit the entity.

(c) For purposes of subsection (b)(2), a decision by the governing authority of the domestic entity that a guaranty may reasonably be expected to benefit the entity is conclusive and not subject to attack by any person, except:

- (1) a guaranty may not be enforced by a person who participated in a fraud on the domestic entity resulting in the making of the guaranty or by a person who had notice of that fraud at the time the person acquired rights under the guaranty;
- (2) a proposed guaranty may be enjoined at the request of an owner of the domestic entity on the ground that the guaranty cannot reasonably be expected to benefit the domestic entity; or
- (3) the domestic entity, whether acting directly or through a receiver, trustee, or other legal representative, or through an owner on behalf of the domestic entity, may bring suit for damages against the managerial officials, owners, or members who authorized the guaranty on the ground that the guaranty

could not reasonably be expected to benefit the domestic entity.

Comment

This Section is a more elaborate statement, without substantive change, of the provisions of prior Section 10-2B-3.02 of the Alabama Business Corporation Act.

§ 10A-1-2.14. Stated powers in division sufficient.

A domestic entity is not required to state in its governing documents any of the powers provided to the entity by this division.

Comment

This Section is a more generic statement, without substantive change, of prior Section 10-2B-2.01(c), Alabama Business Corporation Act.

§ 10A-1-2.15. Limitation on powers.

This division does not authorize a domestic entity or a managerial official of a domestic entity to exercise a power in a manner inconsistent with a limitation on the purposes or powers of the entity contained in its governing documents, this title, or other law of this state.

Comment

This Section re-states, without substantive change, the rule implicit in the phrase “[u]nless its articles of incorporation provide otherwise” in prior Section 10-2B-3.02 of the Alabama Business Corporation Act.

§ 10A-1-2.16. Certificated indebtedness; manner of issuance; signature and seal.

(a) Except as otherwise provided by the governing documents of the domestic entity, this title, or other law, on the issuance by a domestic entity of a bond, debenture, or other evidence of indebtedness in certificated form, the seal of the entity, if the entity has adopted a seal, may be a facsimile that may be engraved or printed on the certificate.

(b) Except as otherwise provided by the governing documents of the domestic entity,

this title, or other law, if a security described by subsection (a) is authenticated with the manual signature of an authorized officer of the domestic entity or an authorized officer or representative, to the extent permitted by law, of a transfer agent or trustee appointed or named by an indenture of trust or other agreement under which the security is issued, the signature of any officer of the domestic entity may be a facsimile signature.

(c) A security described by subsection (a) that contains the manual or facsimile signature of a person who is no longer an officer when the security is delivered by the entity may be adopted, issued, and delivered by the entity in the same manner and to the same extent as if the person had remained an officer of the entity.

Comment

This Section performs the same function for the form and content of certificated indebtedness as prior Section 10-2B-6.25 of the Alabama Business Corporation Act did for the form and content of certificated corporate shares of stock.

§ 10A-1-2.17. Business transactions of owner with entity.

Except as otherwise provided in the governing documents or in the specific article that applies to that entity, an owner may lend money to and transact any lawful business with the entity and, subject to other applicable law, have the same rights and obligations with respect thereto as a person who is not an owner.

Comment

This Section was derived without change from prior Section 10-12-19 of the Alabama Limited Liability Company Act. It covers the same subject matter as prior Section 10-9B-107 of the Alabama Uniform Partnership Act.

Article 3

Formation and Governance

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Division A
Formation, Existence, and Certificate

§ 10A-1-3.01. **Formation and existence of filing entities.**

(a) To form a filing entity, a certificate of formation complying with Sections 10A-1-3.03, 10A-1-3.04, and 10A-1-3.05 must be filed in accordance with Article 4.

(b) The filing of a certificate of formation described by subsection (a) may be included in a filing under Article 8.

(c) The existence of a filing entity commences when the filing of the certificate of formation takes effect as provided by Article 4.

(d) Except in a proceeding by the state to terminate the existence of a filing entity, the filing of a certificate of formation by the filing officer is conclusive evidence of:

- (1) the formation and existence of the filing entity;
- (2) the satisfaction of all conditions precedent to the formation of the filing entity; and
- (3) the authority of the filing entity to transact business in this state.

Comment

Subsections (a) and (d) are simply cross-reference provisions. Subsections (c) and (d) state generically, without substantive change, the rules previously set forth in the Alabama Business Corporation Act at prior Section 10-2B-2.03.

§ 10A-1-3.02. Formation and existence of nonfiling entities.

The requirements for the formation of and the determination of the existence of a nonfiling entity are governed by the chapter of this title which applies to that entity.

Comment

This Section defers to the appropriate provision of the entity specific chapter.

§ 10A-1-3.03. Duration.

A domestic filing entity exists perpetually unless otherwise provided in the governing documents of the entity. A domestic entity may be terminated in accordance with this title.

Comment

This subject was derived from prior Section 10-2B-3.02. There was no substantive change in the restatement of this principle here.

§ 10A-1-3.04. Execution of certificate of formation.

One or more organizers of a filing entity must sign the certificate of formation of the filing entity, except that each general partner must sign the certificate of formation of a domestic limited partnership.

Comment

This Section was derived from prior Section 10-9B-204(a)(1), without substantive change.

§ 10A-1-3.05. Certificate of formation.

- (a) The certificate of formation must state:
 - (1) the name of the filing entity being formed;

- (2) the type of filing entity being formed;
 - (3) for filing entities other than limited partnerships, the purpose or purposes for which the filing entity is formed, which may be stated to be or include any lawful purpose for that type of entity;
 - (4) the period of duration, if the entity is not formed to exist perpetually;
 - (5) the street address and, if different, the mailing address of the initial registered office of the filing entity and the name of the initial registered agent of the filing entity at the office;
 - (6) the name and address of each:
 - (A) organizer for the filing entity, unless the entity is formed under a plan of conversion or merger; or
 - (B) general partner, if the filing entity is a limited partnership;
 - (7) if the filing entity is formed under a plan of conversion or merger, a statement to that effect and, if formed under a plan of conversion, the name, address, date of formation, prior form of organization, and jurisdiction of formation of the converting entity; and
 - (8) any other information required by this title including, without limitation, any information required by the specific chapter of this title governing the filing entity or by Article 8 to be included in the certificate of formation for the filing entity.
- (b) The certificate of formation may contain other provisions not inconsistent with law relating to the organization, ownership, governance, business, or affairs of the

filing entity.

- (c) Except as provided by *Section 10A-1-3.04*, Article 4 governs the signing and filing of a certificate of formation for a domestic entity.

Comment

This Section was derived from prior Section 10-3A-61 of the Alabama Nonprofit Corporation Act. It was re-written to cover filing entities generally. It covers the same subject matter as prior Section 10-2B-2.02 of the Alabama Business Corporation Act, prior Section 10-12-10 of the Alabama Limited Liability Company Act, prior Section 10-9B-201 of the Alabama Limited Partnership Act, and prior Section 10-13-6 of the Alabama Employee Cooperative Act.

§ 10A-1-3.06. Filings in case of merger or conversion.

The formation and existence of a domestic entity that is a converted entity in a conversion or that is to be created under a plan of merger takes effect and commences on the effectiveness of the conversion or merger, as appropriate.

Comment

This Section was derived from the Alabama Business Entity Merger and Conversion Act.

Division B Amendments and Restatements of Certificate of Formation

§ 10A-1-3.11. Right to amend certificate of formation.

- (a) A filing entity may amend its certificate of formation.
- (b) An amended certificate of formation may contain only provisions that:
 - (1) would be permitted at the time of the amendment if the amended certificate of formation were a newly filed original certificate of formation; or
 - (2) effect a change, exchange, reclassification, or cancellation in the membership or ownership interests or the rights of owners or members of

the filing entity.

Comment

This Section was derived from prior Section 10-3A-80, without substantive change.

Comment to former Section 10-3A-80

This Section was derived from former Section 10-3-40 of the Code of Alabama and is substantially the same as Section 33 of the ABA Model Nonprofit Corporation Act.

§ 10A-1-3.12. Procedures to amend certificate of formation.

(a) The procedure to adopt an amendment to the certificate of formation is as provided by the chapter of this title which applies to the entity, provided that unless the governing documents of the entity or the chapter of this title which applies to the entity provide otherwise, the governing authorities of the entity shall have the power, without owner or member action, to adopt one or more amendments to the entity's certificate of formation:

- (1) to delete the name and address of organizers or persons listed in the original certificate of formation as initial governing persons, other than the name and address of each general partner of a limited partnership;
- (2) to delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the Secretary of State;
- (3) to change the entity name by adding, deleting, or changing a geographical attribution in the name, or by substituting:
 - a. in the case of a corporation, the word "corporation" or "incorporated" or an abbreviation of one of the words for a similar word or abbreviation;
 - b. in the case of a professional corporation, the words "professional

corporation” for the abbreviation thereof, or the abbreviation for the words;

- c. in the case of a professional association in existence on December 31, 1983, the words “professional association” for the abbreviation thereof, or the abbreviation for the words;
- d. in the case of a limited partnership, the word “limited” or “limited partnership” or an abbreviation of one of the words for a similar word or abbreviation;
- e. in the case of a limited liability company, the words “limited liability company” for the abbreviation thereof, or the abbreviation for the words; or

(4) to make any other change to the certificate of formation expressly permitted by this title to be made without owner or member action.

(b) A filing entity that amends its certificate of formation shall sign and file, in the manner required by Article 4, a certificate of amendment complying with Section 10A-1-3.13 or a restated certificate of formation complying with Section 10A-1-3.17.

Comment

This Section states generically the principle of previously set forth in Section 10-2B-10.02 of the Alabama Business Corporation Act, expanded to deal with entities other than business corporation.

§ 10A-1-3.13. Certificate of amendment.

A certificate of amendment for a filing entity must state:

- (1) the name of the filing entity;
- (2) the type of the filing entity;

- (3) the date of filing of the certificate of formation, and of all prior amendments and the filing office or offices where filed;
- (4) for each provision of the certificate of formation that is added, altered, or deleted, an identification by reference or description of the added, altered, or deleted provision and, if the provision is added or altered, a statement of the text of the amended or added provision;
- (5) that the amendment or amendments have been approved in the manner required by this title and the governing documents of the entity; and
- (6) all other information required by the provisions of this title applicable to the filing entity to be in the certificate of amendment.

Comment

This Section was derived from prior Section 10-9B-202(a) of the Alabama Limited Partnership Act, with additional provisions inserted so as to apply generically to multiple entities.

§ 10A-1-3.14. Effect of filing certificate of amendment.

- (a) An amendment to a certificate of formation takes effect when the filing of the certificate of amendment takes effect as provided by Article 4.
- (b) An amendment to a certificate of formation does not affect:
 - (1) an existing cause of action in favor of or against the entity for which the certificate of amendment is sought;
 - (2) a pending suit to which the entity is a party; or
 - (3) an existing right of a person other than an existing owner.
- (c) If the name of an entity is changed by amendment, an action brought by or against

the entity in the former name of the entity does not abate because of the name change.

Comment

This Section states generically the principles of prior Section 10-2B-10.09 of the Alabama Business Corporation Act.

§ 10A-1-3.15. Right to restate certificate of formation.

(a) A filing entity may restate its certificate of formation.

(b) An amendment effected by a restated certificate of formation must comply with Section 10A-1-3.11(b).

Comment

This Section was derived from Section 10-2B-10.07(a) of the Alabama Business Corporation Law, re-written to make this procedure available to filing entities generally. See also prior Section 10-9B-209(a) of the Alabama Limited Partnership Act.

§ 10A-1-3.16. Procedures to restate certificate of formation.

(a) The procedure to adopt a restated certificate of formation is governed by the chapter of this title which applies to the entity.

(b) A filing entity that restates its certificate of formation shall sign and file, in the manner required by Article 4, a restated certificate of formation and accompanying statements complying with Section 10A-1-3.17.

Comment

This Section simply cross references to other applicable provisions.

§ 10A-1-3.17. Restated certificate of formation.

(a) A restated certificate of formation must accurately state the text of the previous certificate of formation, regardless of whether the certificate of formation is an original, corrected, or restated certificate, and include:

- (1) each previous amendment to the certificate being restated that is carried forward; and
 - (2) each new amendment to the certificate being restated.
- (b) A restated certificate of formation may omit:
- (1) the name and address of each organizer other than the name and address of each general partner of a limited partnership; and
 - (2) any other information that may be omitted under the provisions of this title applicable to the filing entity.
- (c) A restated certificate of formation that does not make new amendments requiring owner approval to the certificate of formation being restated must be accompanied by:
- (1) a statement that (i) the restated certificate of formation accurately states the text of the certificate of formation being restated, as amended, restated, and corrected, except for information omitted under subsection (b), (ii) the restated certificate does not make new amendments requiring owner approval, and (iii) the governing persons have adopted the restatement in the manner required by this title and the governing documents of the entity; and
 - (2) any other information required by other provisions of this title applicable to the filing entity.
- (d) A restated certificate of formation that makes new amendments requiring owner approval to the certificate of formation being restated must:

- (1) be accompanied by a statement that each new amendment has been made in accordance with this title;
- (2) identify by reference or description each added, altered, or deleted provision;
- (3) be accompanied by a statement that each amendment has been approved in the manner required by this title and the governing documents of the entity, including any information required by this article to be set forth in an amendment to the certificate of formation as to the owner approval of the amendment;
- (4) be accompanied by a statement that the restated certificate of formation:
 - (A) accurately states the text of the certificate of formation being restated and each amendment to the certificate of formation being restated that is in effect, as further amended by the restated certificate of formation; and
 - (B) does not contain any other change in the certificate of formation being restated except for information omitted under subsection (b);
and
- (5) include any other information required by the chapter of this title applicable to the entity.

Comment

This Section was derived from Section 10-2B-10.07(d) of the Alabama Business Corporation Act, but was substantially expanded. See also prior Section 10-9B-209(c) of the Alabama Limited

Partnership Act. This allows for a restatement to be filed which removes all portions of prior articles which have been properly amended out as of the time of the restatement.

§ 10A-1-3.18. Effect of filing of restated certificate of formation.

(a) A restated certificate of formation takes effect when the filing of the restated certificate of formation takes effect as provided by Article 4.

(b) On the date the restated certificate of formation takes effect, the original certificate of formation and each prior amendment or restatement of the certificate of formation is superseded and the restated certificate of formation is the effective certificate of formation.

(c) Section 10A-1-3.14(b) and (c) apply to an amendment effected by a restated certificate of formation.

Comment

This Section was derived from prior Section 10-2B-10.07(e) of the Alabama Business Corporation Act, without substantive change. See also Section 10-9B-209(d) of the Alabama Limited Partnership Act.

***Division C
Governing Persons and Officers***

§ 10A-1-3.21. Rights of governing persons in certain cases.

(a) In discharging a duty or exercising a power, a governing person, including a governing person who is a member of a committee, in good faith and with ordinary care, may rely on information, opinions, reports, or statements, including financial statements and other financial data, concerning a domestic entity or another person and prepared or presented by:

- (1) an officer or employee of the entity;
- (2) legal counsel;
- (3) a public accountant or certified public accountant;

- (4) an investment banker;
- (5) a person who the governing person reasonably believes possesses professional expertise in the matter; or
- (6) a committee of the governing authority of which the governing person is not a member.

(b) A governing person may not in good faith rely on the information described by subsection (a) if the governing person has knowledge of a matter that makes the reliance unwarranted.

(c) A governing person held liable on a claim is entitled to contribution from each of the other governing persons held liable on the same claim, as appropriate to achieve equity.

Comment

The reliance concept of subsections (a) and (b) was derived from prior Section 10-2B-8.30(b) of the Alabama Business Corporation Act. Subsection (c) extends the contribution concept previously set forth in Section 10-2B-8.33(b)(1) of the Alabama Business Corporation Act as to the entitlement to contribution of a director held liable for an unlawful distribution. Subsection (c) was grounded on the principle of partnership law previously set forth in the Alabama Uniform Partnership Act at prior Section 10-8A-306(a) that general partners are jointly and severally liable for the obligations of the partnership; under that principle a partner who meets a partnership obligation is entitled to contribution from the other partners.

§ 10A-1-3.22. Officers.

(a) Officers of a domestic entity may be elected or appointed in accordance with the governing documents of the entity or by the governing authority of the entity unless prohibited by the governing documents.

(b) An officer of an entity shall perform the duties in the management of the entity and has the authority as provided by the governing documents of the entity or by the governing authority that elects or appoints the officer.

(c) A person may simultaneously hold any two or more offices of an entity unless prohibited by this title or the governing documents of the entity.

Comment

This Section was derived from the Alabama Business Corporation Act previously codified at Section 10-2B-8.40.

§ 10A-1-3.23. Removal of officers.

(a) Unless otherwise provided by the governing documents of a domestic entity, an officer may be removed for or without cause by the governing authority or as provided by the governing documents of the entity. The removal of an officer does not prejudice any contract rights of the person removed.

(b) Election or appointment of an officer does not by itself create contract rights.

Comment

This Section was derived from prior Sections 10-2B-8.43 and 8.44 of the Alabama Business Corporation Act.

§ 10A-1-3.24. Rights of officers in certain cases.

(a) In discharging a duty or exercising a power, an officer of a domestic entity, in good faith and ordinary care, may rely on information, opinions, reports, or statements, including financial statements and other financial data, concerning the entity or another person and prepared or presented by:

- (1) another officer or an employee of the entity;
- (2) legal counsel;
- (3) a public accountant or certified public accountant;
- (4) an investment banker; or
- (5) a person who the officer reasonably believes possesses professional

expertise in the matter.

- (b) An officer may not in good faith rely on the information described by subsection (a) if the officer has knowledge of a matter that makes the reliance unwarranted.

Comment

This Section was derived from prior Section 10-2B-8.42(b).

***Division D
Recordkeeping***

§ 10A-1-3.31. Books and records for domestic entities.

Each domestic entity covered shall keep the records as required by its governing documents or the chapter of this title applicable to the entity.

Comment

This Section is derived from Section 10-3A-43 of the Alabama Nonprofit Corporation Act. See also Section 10-2B-16.01(a) of the Alabama Business Corporation Act, Section 10-8A-403(a) of the Alabama Uniform Partnership Act, Section 10-9B-105(a) of the Alabama Limited Partnership Act, and Section 10-12-16(a) of the Alabama Limited Liability Company Act. This Section is expressed generically, leaving to the governing documents and the entity specific chapters the specific designation of books and records required to be maintained.

§ 10A-1-3.32. Right of examination by owner or member of an entity other than a corporation, professional corporation, limited liability company, limited partnership, partnership, or real estate investment trust.

(a) This section applies to entities other than (i) corporations formed under Chapter 2, professional corporations formed under Chapter 4, and real estate investment trusts governed by Chapter 10, each of which is governed by the separate recordkeeping requirements and record inspections provisions of Chapter 2, and (ii) limited liability companies formed under Chapter 5A, partnerships governed by Chapter 8A, and limited partnerships formed under Chapter 9A, each of which are governed by the separate recordkeeping requirements and record inspection provisions set forth in each entity's respective chapter governing that entity.

(b) With respect to an entity covered by this section, the books and records maintained under the chapter of this title applicable to the entity and any other books and records of the entity, wherever situated, are subject to inspection and copying at the reasonable request, and at the expense of, any owner or member or the owner's or member's agent or attorney during regular business hours. The right of access extends to the legal representative of a deceased owner or member or owner or member under legal disability. The entity shall also provide former owners and members with access to its books and records pertaining to the period during which they were owners or members.

(c) The governing documents of the entity may not unreasonably restrict an owner's or member's right to information or access to books and records.

(d) Any agent or governing person of an entity who, without reasonable cause, refuses to allow any owner or member or the owner's or member's agent or legal counsel to inspect any books or records of the entity shall be personally liable to the agent or member for a penalty in an amount not to exceed 10 percent of the fair market value of the ownership interest of the owner or member, in addition to any other damages or remedy.

Comment

This Section was derived from prior Section 10-12-16(b) of the Alabama Limited Liability Company Act, but was re-written. Prior Section 10-8A-403(b) of the Alabama Uniform Partnership Act and Sections 10-9B-105(b) and 10-9B-305 of the Alabama Limited Partnership Act covered the same topic. Notice that this provision does not apply to inspection rights in the case of corporations formed under Chapter 2, professional corporations formed under Chapter 4, real estate investment trusts governed by Chapter 10, limited liability companies formed under Chapter 5A, partnerships governed by Chapter 8A, and limited partnerships formed under Chapter 9A, each of which are governed by the separate recordkeeping requirements and record inspection provisions set forth in each entity's respective Chapter governing that entity.

§ 10A-1-3.33. Governing person's right of inspection.

(a) An entity covered by Section 10A-1-3.32 shall provide governing persons and

their agents and attorneys access to its books and records, including the books and records required to be maintained under the chapter of this title applicable to the entity and other books and records of the entity for any purpose reasonably related to the governing person's service as a governing person. The right of access shall include the right to inspect and copy books and records during ordinary business hours. An entity may impose a reasonable charge covering the costs of labor and material for copies of documents furnished.

(b) An entity covered by Section 10A-1-3.32 shall furnish to a governing person:

- (1) Without demand, any information concerning the entity's business and affairs reasonably required for the proper exercise of the governing person's rights and duties under the entity's governing documents or this title; and
- (2) On demand, any other information concerning the entity's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

(c) A court may require an entity covered by Section 10A-1-3.32 to open the books and records of the entity, including the books and records required to be maintained by the entity under the chapter of this title applicable to the entity, to permit a governing person to inspect, make copies of, or take extracts from the books and records or may require an entity to furnish the governing person with information concerning the entity's business and affairs on a showing by the governing person that:

- (1) the person is a governing person of the entity;
- (2) the person's purpose for inspecting the entity's books and records under

subsection (a) or in obtaining information as to the entity's business and affairs under subsection (b)(1) is reasonably related to the person's service as a governing person or, in the case of information as to the entity's business and affairs demanded under subsection (b)(2), that neither the demand nor the information demanded is unreasonable or otherwise improper under the circumstances;

- (3) in the case of information as to the entity's business and affairs described in subsection (b)(2), the person has made demand for the information; and
- (4) the entity refused the person's access to the books and records or to furnish information as to the entity's business and affairs.

(d) A court may award a governing person attorney fees and any other proper relief in a suit under subsection (c) to require an entity to open its books and records.

Comment

This Section was based on the information rights of a general partner as previously codified in Section 10-8-403 of the Alabama Uniform Partnership Act.

Division E Certificates Representing Ownership Interest

§ 10A-1-3.41. Certificated or uncertificated ownership interest.

- (a) Ownership interests in a domestic entity may be certificated or uncertificated.
- (b) The ownership interests in a business corporation, real estate investment trust, or professional corporation must be certificated unless the governing documents of the entity or a resolution adopted by the governing authority of the entity states that the ownership interests are uncertificated. If a domestic entity changes the form of its ownership interests from certificated to

uncertificated, a certificated ownership interest subject to the change becomes an uncertificated ownership interest only after the certificate is surrendered to the domestic entity.

(c) Ownership interests in a domestic entity, other than a domestic entity described in subsection (b), are uncertificated unless this title or the governing documents of the domestic entity state that the interests are certificated.

(d) Unless an entity's chapter specially provides otherwise, no certificate of a certificated ownership interest shall be issued in bearer form.

Comment

Subsection (a) was derived from prior Section 10-2B-6.25(a) of the Alabama Business Corporation Act. Though Subsection (a) appears to substantially change that provision, in fact there is no substantive change when prior Section 10-2B-6.26, which permitted shares without certificates, is read with the source provision previously contained in Section 10-2B-6.25(a).

§ 10A-1-3.42. Form and validity of certificates; enforcement of entity's rights.

(a) A certificated ownership interest in a domestic entity may contain an impression of the seal of the entity, if any. A facsimile of the entity's seal may be printed or lithographed on the certificate.

(b) If a domestic entity is authorized to issue ownership interests of more than one class or series, each certificate representing ownership interests that is issued by the entity must conspicuously state on the front or back of the certificate:

- (1) the designations, preferences, limitations, and relative rights of the ownership interests of each class or series to the extent they have been determined and the authority of the governing authority to make those determinations as to subsequent series; or
- (2) that the information required by subsection (1) is stated in the domestic entity's governing documents and that the domestic entity, on written

request to the entity's principal place of business or registered office, will provide a free copy of that information to the record holder of the certificate.

(c) A certificate representing ownership interests must state on the front of the certificate:

- (1) that the domestic entity is organized under the laws of this state;
- (2) the name of the person to whom the certificate is issued;
- (3) the number and class of ownership interests and the designation of the series, if any, represented by the certificate; and
- (4) if the ownership interests are shares, the par value of each share represented by the certificate, or a statement that the shares are without par value.

(d) A certificate representing ownership interests that is subject to a restriction, placed by or agreed to by the domestic entity under this title on the transfer or registration of the transfer of the ownership interests must conspicuously note the existence of the restriction on the front or back of the certificate. Even if not so noted, a restriction is enforceable against a person with actual knowledge of the restriction.

Comment

This Section was taken primarily from prior Section 10-2B-6.25(b)-(g) without substantive change, though substantially re-written; Subsection (d) of this Section was derived from the Alabama Business Corporation Law previously codified at Section 10-2B-6.27(b), without substantive change.

§ 10A-1-3.43. Signature requirement.

(a) The managerial official or officials of a domestic entity authorized by the governing documents of the entity to sign certificated ownership interests of the entity must sign any certificate representing an ownership interest in the entity.

(b) A certificated ownership interest that contains the manual or facsimile signature of a person who is no longer a managerial official of a domestic entity when the certificate is issued may be issued by the entity in the same manner and with the same effect as if the person had remained a managerial official.

Comment

This Section was derived from prior Section 10-2B-6.25(d), without substantive change.

§ 10A-1-3.44. Delivery requirement.

A domestic entity shall deliver to the owner thereof a certificate representing a certificated ownership interest to which the owner is entitled.

Comment

The Alabama Business Corporation Act did not expressly contain a delivery requirement, but such a requirement was probably implicit in prior Section 10-2B-6.25(f)'s statement that shares are personal property and transferable in the manner provided by law.

§ 10A-1-3.45. Notice for uncertificated ownership interest.

(a) Except as otherwise provided in subsection (c) and in accordance with Article 8 of Title 7, after issuing or transferring an uncertificated ownership interest, a domestic entity shall notify the owner of the ownership interest in writing of any information required under this division to be stated on a certificate representing the ownership interest.

(b) Except as otherwise expressly provided by law, the rights and obligations of the owner of an uncertificated ownership interest are the same as the rights and obligations of the owner of a certificated ownership interest of the same class and series.

(c) A domestic entity is not required to send a notice under subsection (a) if:

- (1) the required information is included in the governing documents of the entity; and
- (2) the owner of the uncertificated ownership interest is provided with a copy

of the governing documents.

Comment

This Section parallels prior law contained at Section 10-2B-6.26(b) of the Alabama Business Corporation Act.

Article 4

Filings

Division A General Provisions

- § 10A-1-4.01. Signature and delivery; execution by judicial act.
- § 10A-1-4.02. Place of filing and filing duties of judge of probate and Secretary of State.
- § 10A-1-4.03. Time for filing.
- § 10A-1-4.04. Certificates and certified copies.
- § 10A-1-4.05. Forms adopted by Secretary of State.
- § 10A-1-4.06. Powers of judge of probate and Secretary of State.

Division B When Filings Take Effect

- § 10A-1-4.11. General Rule
- § 10A-1-4.12. Delayed effectiveness of certain filings.
- § 10A-1-4.13. Abandonment before effectiveness.
- § 10A-1-4.14. Delayed effectiveness not permitted.
- § 10A-1-4.15. Acknowledgement of filing with delayed effectiveness.

Division C Correction and Amendment

- § 10A-1-4.21. Correction of filings.
- § 10A-1-4.22. Limitation on correction filings.
- § 10A-1-4.23. Certificate of correction.
- § 10A-1-4.24. Filing certificate of correction.
- § 10A-1-4.25. Effect of certificate of correction.
- § 10A-1-4.26. Amendment of filings.

Division D Filing Fees

- § 10A-1-4.31. Filing fees; all entities.

Division A General Provisions

- § 10A-1-4.01. Signature and delivery; execution by judicial act.
 - (a) A filing instrument must be:

- (1) signed by the person or persons required by this title or the applicable chapter to execute, and to verify, if required by the applicable chapter, the filing instrument; and
- (2) delivered, together with one exact or conformed copy and the additional exact or conformed copies as required by Section 10A-1-4.02(b) or (e) or other provision of this title, to the judge of probate or Secretary of State, as the case may be under the provisions of Section 10A-1-4.02, in person or by mail or courier, or, if permitted by the respective filing officer, by facsimile or electronic transmission or any other comparable form of delivery.

(b) A person authorized by this title to sign a filing instrument for an entity is not required to show evidence of the person's authority as a requirement for filing.

(c) The execution of a filing instrument constitutes an affirmation by each person executing the instrument that the facts therein are true, under penalties for perjury prescribed by Section 13A-10-103 or its successor.

(d) If a person required by this title to execute any filing instrument fails or refuses to do so, any person who is adversely affected by the failure or refusal may petition the circuit court for the judicial circuit in which the county is located where under this title the filing instrument would be filed, or if it would be filed with the Secretary of State in the circuit court in the county in which the registered agent is located, and if no registered agent is required, in the circuit court in the county in which the entity has its principal place of business in this state, and if the entity does not have a place of business in this state, in the circuit court of Montgomery County, to direct the execution of the filing instrument. If the court finds that it is proper for the filing

instrument to be executed and that any person so designated has failed or refused to execute the filing instrument, it shall order the judge of probate of the county or the Secretary of State, as the case may be, to record an appropriate filing instrument.

Comment

Subsection (c) was derived from Section 10-12-13 of the Alabama Limited Liability Company Act, without substantive change. Prior Section 10-2B-1.29 of the Alabama Business Corporation Act, prior Section 10-3A-202 of the Alabama Nonprofit Corporation Act, Section 10-9B-204(c) of the Alabama Limited Partnership Act, and prior Section 10-12-47(b) of the Alabama Limited Liability Company Act cover the same subject matter.

Subsection (d) was derived from prior Section 10-9B-205 of the Alabama Limited Partnership Act, but was changed to reflect the need to have access to courts throughout the state.

§ 10A-1-4.02. Place of filing and filing duties of judge of probate and Secretary of State.

(a) The following filing instruments shall be delivered to the judge of probate for filing, except as the chapter applicable to an entity or other provision of this title provides for filing by the Secretary of State or another filing officer:

- (1) certificates of formation or any amendments or restatements thereof;
- (2) certificates of dissolution, other than a statement of dissolution of a general partnership or a statement of cancellation by a limited liability partnership;
- (3) certificates of revocation;
- (4) certificates of correction to any filing instrument required to be delivered to the office of the judge of probate for filing; and
- (5) any other filing instrument required or permitted under this title to be delivered to the judge of probate for filing.

(b) Any of the following filing instruments delivered to the office of the judge of probate for filing shall be accompanied by an additional exact or conformed copy to permit the

judge of probate to transmit to the Secretary of State a certified copy thereof as required by subsection (g):

- (1) certificates of formation;
- (2) amendments to certificates of formation that alter the name of any entity;
- (3) restated certificates of formation;
- (4) certificates of dissolution;
- (5) certificates of revocation; and
- (6) certificates of correction correcting any of the foregoing filing instruments.

(c) The following filing instruments shall be delivered to the Secretary of State for filing:

- (1) Certificates, articles, or statements of merger, statements of conversion, and articles of share exchange;
- (2) Statements or registrations of a foreign entity for authority to transact business in this state and any statements, notices, or certificates of withdrawal or termination or statements, notices, or certificates evidencing the same or required or authorized under Article 7 of this Chapter;
- (3) the annual report of a business corporation, which may be made as provided in Section 10A-2-16.22 by filing with the Department of Revenue the public record information required by Chapter 14A of Title 40, together with the prescribed fee for the annual report;
- (4) for corporations created by an act of the Legislature prior to the adoption of the Constitution of Alabama of 1901, or for entities which have resulted from a merger, share exchange, or conversion, all filing instruments

required by this title to be delivered to the judge of probate for filing shall be delivered to the Secretary of State for filing;

- (5) any other filing instrument required or permitted under this title to be delivered to the Secretary of State for filing;
- (6) articles of correction of any filing instrument required or permitted to be delivered to the Secretary of State for filing;
- (7) statements and any other document required or permitted to be delivered to the Secretary of State for filing under Chapter 8A; and
- (8) any other filing instrument required or permitted to be filed under this title and not expressly required or permitted to be delivered to the Secretary of State or judge of probate or other designated filing office for filing.

(d) Certificates, articles, or statements of merger or articles of share exchange, and statements of conversion delivered to the Secretary of State for filing shall be accompanied by the additional number of exact or conformed copies of articles as may be required for purposes of subsection (f) hereof.

(e) If the judge of probate or Secretary of State, as the case may be, finds that a filing instrument delivered under this section and Section 10A-1-4.01 substantially conforms to the provisions of this title that apply to the entity and that all required fees have been paid, and if, in the case of a certificate of formation or an amendment to a certificate of formation that would change the name of the entity, the judge of probate finds that the name of the entity has been reserved under Article 5 of this chapter, the judge of probate or Secretary of State, as the case may be, shall file it immediately upon delivery by:

- (1) endorsing "filed," together with his or her name and official title and the

date and time of receipt on the instrument and all copies required hereunder and on the receipt for the filing fee;

- (2) accepting it into the filing system adopted by the judge or probate or Secretary of State and assigning the instrument a date of filing; and
- (3) delivering a copy thereof, endorsed as provided in subdivision (1), with the filing fee receipt, or acknowledgment of receipt of the instrument if no filing fee is required, to the entity or its representative.

(f) In the case of any of the filing instruments described in subsection (b), the judge of probate shall within 10 days transmit a certified copy of the filing instrument to the Secretary of State. In the case of certificates, articles, or statements of merger, statements of conversion, or articles of share exchange, the Secretary of State shall promptly transmit a certified copy thereof to the office of the judge of probate of the county in which each domestic entity's certificate of formation, if any, is filed.

(g) If the judge of probate or Secretary of State, as the case may be, refuses to file a filing instrument, he or she shall return it to the domestic or foreign entity or its representative within seven days after the filing instrument was delivered, together with a brief, written explanation of the reason for his or her refusal.

(h) The judge of probate's or Secretary of State's duty to file filing instruments under this title is ministerial. His or her filing or refusing to file a filing instrument does not:

- (1) affect the validity or invalidity of the filing instrument in whole or in part;
- (2) relate to the correctness or incorrectness of information contained in the filing instrument; or
- (3) create a presumption that the filing instrument is valid or invalid or that

information contained in the filing instrument is correct or incorrect.

- (i) The Secretary of State shall keep an alphabetical list of domestic and foreign entities, the certificates of formation, the statements under Chapter 8A, or statements or registrations for authority to transact business in this state, for which are filed in his or her office, together with the data contained in the filing instruments.

§ 10A-1-4.03. Time for filing.

Unless this title prescribes a specific period for filing, an entity shall promptly file each filing instrument that this title requires the entity to file.

Comment

This Section's principle of filing "promptly" was derived from prior Section 10-9B-202 of the Alabama Limited Partnership Act.

§ 10A-1-4.04. Certificates and certified copies.

(a) A court, public office, or official body shall accept a certificate issued as provided by this title by the judge of probate or Secretary of State or a copy of a filing instrument accepted by the judge of probate or Secretary of State for filing as provided by this title that is certified by the judge of probate or Secretary of State as prima facie evidence of the facts stated in the certificate or instrument.

(b) A court, public office, or official body may record a certificate or certified copy described by subsection (a).

(c) A court, public office, or official body shall accept a certificate issued under an official seal by the judge of probate or Secretary of State as to the existence or nonexistence of facts that relate to an entity that would not appear from a certified copy of a filing instrument as prima facie evidence of the existence or nonexistence of the facts stated in the certificate.

Comment

This Section was derived from prior Section 10-3A-222, without substantive change.

§ 10A-1-4.05. Forms adopted by Secretary of State.

(a) The Secretary of State may adopt forms for a filing instrument or a report authorized or required by this title to be filed with the judge of probate or Secretary of State.

(b) A person is not required to use a form adopted by the Secretary of State unless this title expressly requires use of that form.

Comment

This Section was derived from prior Section 10-2B-1.21, without substantive change.

Comment to former Section 10-2B-1.21

1. *Section 10-2B-1.21 of this Act is derived from Section 1.21(a) of the RMBCA. Its only departure from RMBCA Section 1.21(a) is to require, rather than only authorize the secretary of state to furnish the designated forms. Three of the four forms are required to be furnished by the secretary of state under the former Alabama Act. See discussion in Note 3 below.*

2. *Section 10-2B-1.21 of the RMBCA also included a provision designated as Section 10-2B-1.21(b) which authorized the secretary of state, in his discretion, to furnish non-mandatory forms for other documents. The Alabama Committee did not recommend the inclusion of such a provision. The reason was a concern that the provision though stating explicitly that the use of such forms would be non-mandatory, would nevertheless serve as an invitation to promulgate forms which would tend to restrict the exercise of professional skill and expertise by the lawyer drafting the document. Accordingly, the deletion of Section 10-2B-1.21(b) should in no way be construed as intending that the secretary of state be empowered to furnish any forms the use of which is mandatory, other than those specified in Section 10-2B-1.21.*

3. *In requiring the secretary of state to furnish forms for the annual report and forms for a foreign corporation to qualify to transact business in this state or to withdraw qualification, Section 10-2B-1.21 follows former Alabama Sections 10-2A-333 (reports), 10-2A-233(b) (application for qualification) and 10-2A-243(b) (application to withdraw). Former law did not require or expressly authorize the secretary of state to furnish forms for application for a certificate of existence.*

§ 10A-1-4.06. Powers of judge of probate and Secretary of State.

Each judge of probate and the Secretary of State shall have the powers reasonably necessary to perform the duties required of him or her by this title.

Comment

This Section was derived from prior Section 10-2B-1.30, without substantive change.

Comment to former Section 10-2B-1.30

1. *This provision is derived from RMBCA Section 1.30. It departs from RMBCA Section 1.30 only by the inclusion of the probate judge.*
2. *The corresponding provision of the former Alabama Act was Section 10-2A-330.*

Division B When Filings Take Effect

§ 10A-1-4.11. General rule.

A filing instrument submitted to the Secretary of State or judge of probate, as the case may be, takes effect on filing, except as permitted by Section 10A-1-4.12 or as provided by the provisions of this title which apply to the entity making the filing or other law.

Comment

This Section was derived from prior Section 10-2B-1.23(a) of the Alabama Business Corporation Act, without substantive change. It covers the same subject matter as prior Section 10-12-12(d) of the Alabama Limited Liability Company Act.

§ 10A-1-4.12. Delayed effectiveness of certain filings.

(a) Except as otherwise provided by Section 10A-1-4.14, a filing instrument may take effect at a specified date and time after the time the instrument would otherwise take effect as provided by this title for the entity filing the instrument.

(b) If a filing instrument is to take effect on a specific date and time other than that provided by this title:

- (1) the date may not be later than the 90th day after the date the instrument is signed; and

- (2) the specific time at which the instrument is to take effect may not be specified as “12:00 a.m.” or “12:00 p.m.”

Comment

This Section was derived from prior Section 10-2B-1.23(b).

§ 10A-1-4.13. Abandonment before effectiveness.

(a) The parties to a filing instrument may abandon the filing instrument if the instrument has not taken effect.

(b) To abandon a filing instrument the parties to the instrument must file with the filing officer a certificate of abandonment.

(c) A certificate of abandonment must:

- (1) be signed on behalf of each entity that is a party to the action or transaction by the person authorized by this title to act on behalf of the entity;
- (2) state the nature of the filing instrument to be abandoned, the date of the instrument, and the parties to the instrument; and
- (3) state that the filing instrument has been abandoned in accordance with the agreement of the parties.

(d) On the filing of the certificate of abandonment, the action or transaction evidenced by the original filing instrument is abandoned and may not take effect.

(e) If in the interim before a certificate of abandonment is filed, the name of an entity that is a party to the action or transaction becomes indistinguishable on the records of the Secretary of State from the name of another entity already on file or reserved or registered under

this title, the filing officer may not file the certificate of abandonment unless the entity by or for whom the certificate is filed changes its name in the manner provided by this title for that entity.

Comment

This Section extends and elaborates the principle previously codified in the Alabama Business Corporation Act at Section 10-2B-11.03(i).

§ 10A-1-4.14. Delayed effectiveness not permitted.

The effect of the following filing instruments may not be delayed:

- (1) a reservation of name as provided by Division B of Article 5;
- (2) a registration of name as provided by Division C of Article 5; or
- (3) a certificate of abandonment as provided by Section 10A-1-4.13.

Comment

This Section lists filing instruments as to which delayed effectiveness is not permitted.

§ 10A-1-4.15. Acknowledgement of filing with delayed effectiveness.

An acknowledgment of filing issued or other action taken by the Secretary of State or judge of probate, as the case may be, affirming the filing of a filing instrument that has a specific delayed effective date must state the date and time at which the instrument takes effect.

Comment

This section, extends to instruments with delayed effective dates the principle of prior Alabama Business Corporation Section 10-2B-1.23(a) that the filing officer's endorsement reflect the effective date and time.

***Division C
Correction and Amendment***

§ 10A-1-4.21. Corrections of filings.

- (a) A filing instrument that has been filed with the Secretary of State or judge of

probate, as the case may be, that is an inaccurate record of the event or transaction evidenced in the instrument, that contains an inaccurate or erroneous statement, or that was defectively or erroneously signed, sealed, acknowledged, or verified may be corrected by filing a certificate of correction.

(b) A certificate of correction must be signed by the person authorized by this title to act on behalf of the entity.

Comment

This Section was derived from prior Section 10-2B-1.24(a), without substantive change.

§ 10A-1-4.22. Limitation on correction of filings.

A filing instrument may be corrected to contain only those statements that this title authorizes or requires to be included in the original instrument. A certificate of correction may not alter, add, or delete a statement that by its alteration, addition, or deletion would have caused the Secretary of State to determine the filing instrument did not conform to this title at the time of filing.

Comment

This Section elaborates on the provisions of prior Alabama Business Corporation Act Section 10-2B-1.24 as to the function of a certificate of correction.

§ 10A-1-4.23. Certificate of correction.

The certificate of correction must:

- (1) state the name of the entity;
- (2) identify the filing instrument to be corrected by description and date of filing with the Secretary of State or judge of probate, as the case may be;
- (3) identify the inaccuracy, error, or defect to be corrected; and

- (4) state in corrected form the portion of the filing instrument to be corrected.

Comment

This Section was derived from prior Section 10-2B-1.24(b), without substantive change.

§ 10A-1-4.24. Filing certificate of correction.

The certificate of correction shall be filed with and acted on by the Secretary of State or judge of probate, as the case may be, as provided in Section 10A-1-4.02.

Comment

This Section was derived from prior Section 10-2B-1.24, without substantive change.

§ 10A-1-4.25. Effect of certificate of correction.

(a) After the Secretary of State or the judge of probate, as the case may be, files the certificate of correction, the filing instrument is considered to have been corrected on the date the filing instrument was originally filed, except as otherwise provided by subsection (b).

(b) As to a person who acted in reliance on the filing instrument prior to its correction and who is adversely affected by that correction, the filing instrument is considered to have been corrected on the date the certificate of correction is filed.

(c) An acknowledgment of filing or a similar instrument issued by the Secretary of State or judge of probate, as the case may be, before a filing instrument is corrected, with respect to the effect of filing the original filing instrument, applies to the corrected filing instrument as of the date the corrected filing instrument is considered to have been filed under this section.

Comment

Subsections (a) and (b) were derived from prior Section 10-2B-1.24(c) of the Alabama Business Corporation Act, without substantive change.

§ 10A-1-4.26. Amendment of filings.

A filing instrument that an entity files with the Secretary of State or the judge of probate, as the case may be, may be amended or supplemented in accordance with the provisions of the chapter that apply to that entity or in accordance with that entity’s governing documents. If neither the chapter that applies to that entity nor the governing documents of that entity provides or prohibits a process for the approval and filing of an amendment or supplement to that filing instrument for that entity, then that filing instrument may be amended or supplemented and filed utilizing the same process for approval and filing as was used to approve and file that filing instrument.

Comment

This Section simply cross-references to the appropriate entity-specific provisions.

***Division D
Filing Fees***

§ 10A-1-4.31. Filing fees; all entities.

(a) The judge of probate or the Secretary of State, as the case may be, shall collect the following fees when the filing instruments described in this title are delivered to him or her for filing:

FILING INSTRUMENT	FEE FOR STATE OF ALABAMA	FEE FOR THE JUDGE OF PROBATE
(1) Certificate of formation and restated certificate of formation	\$100	\$50
(2) Amendment to certificate of formation	\$50	\$25
(3) Name reservations:		
A. less than 24 hours	\$25	No fee
B. 24 hours or more	\$10	No fee
(4) Certificate of dissolution (other than a statement of dissolution or cancellation under Chapter 8A)	\$100	\$50
(5) Certificate, articles, or statement of	\$100	\$50

merger; statement of conversion, articles of consolidation or share exchange		
(6) Foreign entity registration including a statement of foreign limited liability partnership	\$150	No fee
(7) Certificate of existence:		
A. Less than 24 hours	\$25	No fee
B. 24 hours or more	\$10	No fee
(8) Statements and any the document required or permitted to be filed with the Secretary of State under Chapter 8A	\$100	No fee
(9) Certified statements and any the document required or permitted to be filed with the judge of probate under Chapter 8A		\$100
(10) Any other filing instrument required or permitted to be filed under this title	\$25	\$25

(b) When appropriate, two checks shall accompany a filing instrument delivered to the judge of probate or the Secretary of State for filing, one payable to the judge of probate for all charges for the judge of probate, and one payable to the State of Alabama covering all charges for the Secretary of State. In the case of any filing instrument delivered for filing to the judge of probate accompanied by a check for the charges for the Secretary of State, the check for the Secretary of State shall be forwarded by the judge of probate to the Secretary of State. In the case of any filing instrument delivered for filing to the Secretary of State accompanied by a check for the judge of probate, the check for the judge of probate shall be forwarded by the Secretary of State to the judge of probate.

(c) There is hereby established in the State Treasury a fund to be known and designated as the Secretary of State Entity Fund. All funds, fees, charges, costs, and collections

accruing to or collected by the Secretary of State under the foregoing provisions of this section or any other fees collected by the Secretary of State relating to entities shall be deposited into the State Treasury to the credit of the Secretary of State Entity Fund except as so provided in subsection (e).

(d) All funds now or hereafter deposited in the State Treasury to the credit of the Secretary of State Entity Fund shall not be expended for any purpose whatsoever unless the same shall have been allotted and budgeted in accordance with the provisions of Article 4 of Chapter 4 of Title 41, and only in the amounts and for the purposes provided by the Legislature in the general appropriation bill or this section.

(e) Seventy percent of funds collected by the Secretary of State in relation to entities during the fiscal year shall be deposited to the credit of the State General Fund.

(f) The fees herein imposed for the office of the judge of probate shall be charged and paid into the appropriate county treasury or to the judge of probate as may be authorized or required by law.

(g) The Secretary of State shall collect the following fees for copying and certifying the copy of any filing instrument relating to a domestic or foreign entity:

- (1) Two dollars (\$2.00) a page for copying; and
- (2) Ten dollars (\$10) for the certificate.

(h) The judge of probate shall collect the following fees for copying and certifying the copy of any filing instrument relating to an entity:

- (1) Two dollars (\$2.00) a page for copying; and

(2) Ten dollars (\$10) for the certificate.

(i) For requests of immediate expedition of documents to be obtained in less than 24 hours, other than name reservations and certificates of existence, by the Secretary of State regarding document filings, certifications, and certificates in addition to required fees, a one hundred dollar (\$100) surcharge shall be imposed.

Comment

This Section was derived from prior Alabama Business Corporation Act Section 10-2B-1.22, bringing into a single section the various filing fee provisions currently scattered through Title 10 and rationalizes those fees so that the fee for filing a certificate of formation is the same without regard to the type of entity being formed.

Comment to former Section 10-2B-1.22

1. *This Section integrates the fee provisions of Sections 10-2A-281 and 10-2A-282 of the former Alabama Act with Section 1.22 of the RMBCA. The intention has been to carry forward the specific fees provided for in Sections 10-2A-281 and 10-2A-282 (which were amended in 1988 to increase certain of the fees among other purposes) and to accurately reflect the more complex process for the collection of fees necessitated by the fact that Alabama has two filing officers with different responsibilities—the probate judge and the secretary of the state—while the RMBCA contemplated a single filing officer—the secretary of state.*

2. *It should be noted that under Section 10-2B-1.125(d) of this Act, as under Section 10-2A-92(a) of the former Alabama Act, reservation of the name of the proposed corporation under Section 10-2B-4.02, which corresponds to Section 10-2A-26 of the former Alabama Act, is a condition to the duty of the probate judge to receive the articles of incorporation for filing. Pursuant to this requirement, it is usual to reserve the name with the secretary of state’s office shortly before the articles of incorporation are filed with the probate judge. In those circumstances, the probate judge, pursuant to Section 10-2B-1.22(b), will receive and forward to the secretary of state the \$10.00 reservation of name fee payable to the State of Alabama under Section 10-2B-1.22(a)(2), as well as receiving and forwarding the fee payable to the State of Alabama under Section 10-2B-1.22(a)(1).*

3. *It is intended that Section 10-2B-1.22 of this Act would be “revenue neutral,” neither increasing nor decreasing the fees payable either to the probate judge or the secretary of state. Some changes from the provisions of Section 10-2A-281 of the present Alabama Act were necessitated by the fact that, as a result of substantive changes, some documents have been eliminated and others added, while the description of others have changed to some extent.*

4. *Subsections (b)-(f) and (k) are derived from provisions appearing in Sections 10-2A-281 and 10-2A-282 of the former Alabama Act and have no counterpart in the RMBCA.*

5. *Subsection (j) continues the provision of former Section 10-2A-335 that with*

respect to a corporation created by legislative act or one resulting from a merger all filings are with the secretary of state and consequently the secretary of state collects the fees which would otherwise be collected by the probate judge.

Article 5

Names of Entities, Registered Agents and Registered Offices

Division A General Provisions

- § 10A-1-5.01. Effect on rights under other law.
- § 10A-1-5.02. Unauthorized purpose in name prohibited.
- § 10A-1-5.03. Names prohibited.
- § 10A-1-5.04. Name of corporation or foreign corporation.
- § 10A-1-5.05. Name of limited partnership or foreign limited partnership.
- § 10A-1-5.06. Name of limited liability company or foreign limited liability company.
- § 10A-1-5.07. Name of limited liability partnership or foreign limited liability partnership.
- § 10A-1-5.08. Name of professional corporation or foreign professional corporation.
- § 10A-1-5.09. Name of professional entity; conflict with other law or ethical rule.
- § 10A-1-5.10. Name of general partnership; not for profit general partnership.

Division B Reservation of Names

- § 10A-1-5.11. Application for reservation of name.
- § 10A-1-5.12. Reservation of certain names prohibited; exceptions.
- § 10A-1-5.13. Action on application.
- § 10A-1-5.14. Duration of reservation of name.
- § 10A-1-5.15. Renewal of reservation.
- § 10A-1-5.16. Transfer of reservation of name.

Division C Registration of Names

§§10A-5-5.21-10A-5-5.25. Reserved.

Division D Registered Agents and Registered Offices; Service of Process

- § 10A-1-5.31. Designation and maintenance of registered agent and registered office.
- § 10A-1-5.32. Change by entity of registered office or registered agent.
- § 10A-1-5.33. Change by registered agent of name or address of registered agent.
- § 10A-1-5.34. Resignation of registered agent.
- § 10A-1-5.35. Failure to designate and maintain registered agent.
- § 10A-1-5.36. Method of service on entity not exclusive.

***Division A
General Provisions***

§ 10A-1-5.01. Effect on rights under other law.

The filing of a certificate of formation by a filing entity under this title, an application for registration or statement of foreign limited liability partnership by a foreign filing entity under this title, or an application for reservation or registration of a name under this article does not authorize the use of a name in this state in violation of a right of another under:

- (1) the Trademark Act of 1946, as amended, 15 U.S.C.S. § 1051 et seq.; or
- (2) Chapter 12 of Title 8; or
- (3) Common law.

Comment

This Section codifies the law as it existed prior to the passage of this title.

§ 10A-1-5.02. Unauthorized purpose in name prohibited.

A domestic entity, and a foreign filing entity with a registration under Article 7, may not have a name that contains any word or phrase that indicates or implies that the entity is engaged in a business that the entity is not authorized by law to pursue.

Comment

This Section was derived from prior Section 10-4-387 of the Alabama Professional Corporation Act, without substantive change. This provision is similar in subject matter to prior Section 10-2B-4.01(a)(2) of the Alabama Business Corporation Act and prior Section 10-3A-22(1) of the Alabama Nonprofit Corporation Act.

§ 10A-1-5.03. Names prohibited.

(a) A domestic entity may not have a name, and a foreign filing entity may not register to transact business in this state under a name, that is the same as or not distinguishable on the records of the Secretary of State from:

- (1) the name of another existing filing entity or a general partnership that has an effective statement of ~~statement of~~ partnership, statement of not for profit partnership, or limited liability partnership under Chapter 8A;
- (2) the name of a foreign filing entity that has a registration under Article 7;
- (3) a name that is reserved under Division B.

(b) Subsection (a) does not apply if the other entity or the person for whom the name is reserved consents in writing to the use of a name not distinguishable on the records of the Secretary of State, and submits an undertaking in form satisfactory to the Secretary of State to change its name to a name that is distinguishable on the records of the Secretary of State from the name for which application was made.

(c) In determining whether a name is the same as or not distinguishable on the records of the Secretary of State from the name of another entity, words, phrases, or abbreviations indicating the type of entity, such as “corporation,” “corp.,” “general partnership,” “GP,” “G.P.,” “not for profit general partnership” “NGP,” “N.G.P.,” “incorporated,” “Inc.,” “limited liability company,” “LLC,” “L.L.C.,” “limited partnership,” “LP,” “L.P.,” “Ltd.,” “limited liability limited partnership,” “LLLP,” “L.L.L.P.,” “limited liability partnership,” “LLP,” or “L.L.P.,” shall not be taken into account unless waived in writing by the incumbent holder of the name.

Comment

This Section was derived from prior Section 10-2B-4.01(b)-(c) of the Alabama Business Corporation Act. It should be noted that the provision replaces the “deceptively similar” test with the “distinguishable on the records of the Secretary of State” test. This provision is similar in subject matter to prior Section 10-12-5 of the Alabama Limited Liability Company Act and prior Section 10-9B-102 of the Alabama Limited Partnership Act.

§ 10A-1-5.04. Name of corporation or foreign corporation.

(a) The name of a corporation or foreign corporation registered to transact business in this state must contain:

- (1) the word “corporation” or “incorporated”; or
- (2) an abbreviation of one of those words.

(b) Subsection (a) does not apply to a nonprofit corporation or foreign nonprofit corporation, or to banks, trust companies, savings and loan associations, or insurance companies.

(c) In lieu of a word or abbreviation required by subsection (a), the name of a professional corporation must comply with the requirements of *Section 10A-1-5.08*.

(d) The requirements of subsection (a) do not apply to any corporation organized before January 1, 1981.

Comment

This Section was derived from prior Section 10-2B-4.01(a)(1) of the Alabama Business Corporation Act, without substantive change.

§ 10A-1-5.05. Name of limited partnership or foreign limited partnership.

The name of a limited partnership or a foreign limited partnership registered to transact business in this state may contain the name of any partner.

(a) The name of a limited partnership that is not a limited liability limited partnership must contain the phrase “limited partnership” or “Limited,” or the abbreviation “L.P.,” “LP,” or “Ltd.” and must not contain the phrase “limited liability limited partnership” or the abbreviation “LLLP” or “L.L.L.P.”

(b) The name of a limited liability limited partnership must contain the phrase “limited liability limited partnership” or the abbreviation “LLLP” or “L.L.L.P.” and must not contain the

abbreviation “L.P.,” “LP,” or “Ltd.”

(c) Subject to Section 10A-1-7.07, this section applies to any foreign limited partnership transacting business in this state, having a certificate of authority to transact business in this state, or applying for a certificate of authority.

(d) The name of a limited partnership may not contain the following words: “bank,” “banking,” “banker,” “trust,” “insurance,” “insurer,” “corporation,” “incorporated,” or any abbreviation of such words.

§ 10A-1-5.06. Name of limited liability company or foreign limited liability company.

The name of a limited liability company or a foreign limited liability company registered to transact business in this state must contain the words “limited liability company” or the abbreviation “L.L.C.” or “LLC.”

§ 10A-1-5.07. Name of limited liability partnership or foreign limited liability partnership.

The name of a limited liability partnership or a foreign limited liability partnership registered to transact business in this state shall contain the words “limited liability partnership” or the abbreviation “L.L.P.” or “LLP.”

§ 10A-1-5.08. Name of professional corporation or foreign professional corporation.

The name of a domestic professional corporation or of a foreign professional corporation registered to transact business in this state must contain the words “professional corporation” or the abbreviation “P.C.” or “PC” and shall otherwise conform to any rule promulgated by a licensing authority having jurisdiction of a professional service described in the certificate of formation of the corporation.

§ 10A-1-5.09. Name of professional entity; conflict with other law or ethical rule.

The name of a professional entity must be consistent with a statute or regulation that

governs a person that provides a professional service through the professional entity, including a rule of professional ethics.

§ 10A-1-5.10. Name of general partnership; not for profit general partnership.

(a) The name of a general partnership that has filed a statement of partnership in accordance with Section 10A-8A-2.02 must include the words “general partnership” or the abbreviation “G.P.” or “GP”.

(b) The name of a general partnership that has filed a statement of not for profit partnership in accordance with Section 10A-8A-2.02 must include the words “not for profit general partnership” or the abbreviation “N.G.P.” or “NGP”.

Division B
Reservation of Names

§ 10A-1-5.11. Application for reservation of name.

(a) To reserve the exclusive use of an entity name, including a fictitious name for a foreign entity whose name is not available, a person must deliver an application to the Secretary of State for filing. Any person may file an application with the Secretary of State to reserve the exclusive use of a name under this article.

(b) The application must set forth the name and address of the applicant and the name proposed to be reserved and must be:

- (1) accompanied by any required filing fee; and
- (2) signed by the applicant or by the agent or attorney of the applicant.

(c) The name may also be reserved by electronic means, subject to the requirements as the Secretary of State may establish for reservation of names by means, including requirements

for payment of the fee for name reservation.

Comment

This Section was derived from prior Section 10-2B-4.02(a), without substantive change.

§ 10A-1-5.12. Reservation of certain names prohibited; exceptions.

(a) The Secretary of State may not reserve a name that is the same as, or not distinguishable on the records of the Secretary of State from:

- (1) the name of an existing filing entity; the name of a general partnership that has an effective statement of partnership, statement of not for profit partnership, or statement of limited liability partnership on file with the secretary of state under Chapter 8A;
- (2) the name of a foreign filing entity that has a registration under Article 7; or
- (3) a name that is reserved under this division.

(b) Subsection (a) does not apply if the other entity or the person for whom the name is reserved consents in writing to the subsequent reservation of a name not distinguishable on the records of the Secretary of State, and submits an undertaking in form satisfactory to the Secretary of State to change its name to a name that is distinguishable on the records of the Secretary of State from the name applied for or, if the conflict is with a reserved or registered name, transfers its reservation to the applicant pursuant to Section 10A-1-5.16.

Comment

This Section was derived from prior Sections 10-2B-4.01(b)-(c) and 10-2B-4.02, without substantive change, except for the replacement of the “deceptively similar” test with that “distinguishable on the records” test.

§ 10A-1-5.13. Action on application.

If the Secretary of State determines that the name specified in the application is eligible for reservation, the Secretary of State shall reserve that name for the exclusive use of the applicant.

Comment

This Section was derived from prior Sections 10-2B-4.03(c) and 10-2B-4.02(a), without substantive change.

§ 10A-1-5.14. Duration of reservation of name.

The Secretary of State shall reserve the name for the applicant until the earlier of:

- (1) one year from the date the application is accepted for filing; or
- (2) the date the applicant files with the Secretary of State a written notice of withdrawal of the reservation.

Comment

This Section made no substantive change in the 120 day reservation period of prior Section 10-2A-4.02(a) of the Alabama Business Corporation Act.

§ 10A-1-5.15. Renewal of reservation.

A person may renew the person's reservation of a name under this division for successive one-year periods if, during the 90-day period preceding the expiration of that reservation, the person:

- (1) files an application to renew the name reservation; and
- (2) pays the required filing fee.

Comment

This Section made no substantive change in the right to renew a name reservation recognized in the Commentary to prior Alabama Business Corporation Act Section 10-2B-4.02,

but provides more elaborate procedures for doing so.

§ 10A-1-5.16. Transfer of reservation of name.

(a) A person may transfer the person's reservation of a name by filing with the Secretary of State a notice of transfer.

(b) The notice of transfer must:

(1) be signed by the person for whom the name is reserved; and

(2) state the name and address of the person to whom the reservation is to be transferred.

Comment

This Section was derived from prior Section 10-2B-4.02(b), without substantive change.

***Division C
Registration of Names***

§§ 10A-5-5.21-10A-5-5.25. RESERVED.

***Division D
Registered Agents and Registered Offices;
Service of Process***

§ 10A-1-5.31. Designation and maintenance of registered agent and registered office.

(a) Each filing entity, each foreign filing entity with a registration under Article 7, and each general partnership that has an effective statement of partnership, statement of not for profit partnership, or statement of limited liability partnership on file with the Secretary of State in accordance with Chapter 8A, shall designate and continuously maintain in this state:

(1) a registered agent; and

(2) a registered office.

- (b) A registered agent:
 - (1) is an agent of the entity on which may be served any process, notice, or demand required or permitted by law to be served on the entity;
 - (2) may be:
 - (A) an individual who is a resident of this state; or
 - (B) a domestic entity or a foreign entity that is registered to transact business in this state; and
 - (3) must maintain a business office at the same address as the entity's registered office.
- (c) The registered office:
 - (1) must be located at a street address where process may be personally served on the entity's registered agent;
 - (2) is not required to be a place of business of the filing entity or foreign filing entity; and
 - (3) may not be solely a mailbox service or a telephone answering service.

Comment

This Section was derived from prior Section 10-3A-23 of the Alabama Nonprofit Corporation Act, without substantive change. The Section also parallels another section of the Alabama Nonprofit Corporation Act, prior Section 10-3A-176, and covers the same subject as prior Sections 10-2B-5.01 and 10-2B-15.07 of the Alabama Business Corporation Act, Section 10-8A-1003 of the Alabama Uniform Partnership Act, Sections 10-9B-104 and 10-9B-902 of the Alabama Limited Partnership Act, and Section 10-12-15 of the Alabama Limited Liability Company Act. This Section now includes general partnerships that have filed a statement of partnership, a statement of not for profit partnership, or a statement of limited liability partnership under Chapter 8A, as well as foreign limited liability partnerships that have filed a statement of foreign limited liability partnership in accordance with Article 7.

§ 10A-1-5.32. Change by entity of registered office or registered agent.

(a) An entity required to maintain a registered office and registered agent under Section 10A-1-5.31 may change its registered office, its registered agent, or both, by delivering to the Secretary of State for filing a statement of the change in accordance with the procedures in Article 4.

(b) The statement must contain:

- (1) the name of the entity;
- (2) the name of the entity's registered agent;
- (3) the street address of the entity's registered agent;
- (4) if the change relates to the registered agent, the name of the entity's new registered agent and the new registered agent's written consent to the appointment, either on the statement or attached to it;
- (5) if the change relates to the registered office, the street address of the entity's new registered office;
- (6) a recitation that the change specified in the statement is authorized by the entity; and
- (7) a recitation that the street address of the registered office and the street address of the registered agent's business are the same.

(c) On acceptance of the statement by the Secretary of State, the statement is:

- (1) in the case of a domestic filing entity, effective to change the designation of the entity's registered agent or registered office, or both, without the necessity of amending the entity's certificate of formation;
- (2) in the case of a general partnership with an effective a statement of

partnership, statement of not for profit partnership, or statement of limited liability partnership on file with the secretary of state under Chapter 8A, effective to change its registered agent or registered office, or both, without the necessity of amending its statement of partnership, statement of not for profit partnership, or statement of limited liability partnership under Chapter 8A;

- (3) in the case of a foreign filing entity other than a foreign limited liability partnership, effective to change the designation of the entity's registered agent or registered office, or both, and effective as an amendment of its application for registration as a foreign entity under Article 7; or
- (4) in the case of a foreign limited liability partnership, effective to change the designation of its registered agent or registered office, or both, without the necessity of amending its statement of foreign limited liability partnership under Article 7.

Comment

This Section was derived from prior Section 10-3A-24(a) of the Alabama Nonprofit Corporation Act, without substantive change, but with the insertion of additional procedural matters. The Section covers the same subject matter as prior Sections 10-2B-5.02(a) of the Alabama Business Corporation Act and 10-3A-177(a) of the Alabama Nonprofit Corporation Act. This Section now includes general partnerships that have filed a statement of partnership, a statement of not for profit partnership, or a statement of limited liability partnership under Chapter 8A, as well as foreign limited liability partnerships that have filed a statement of foreign limited liability partnership in accordance with Article 7.

§ 10A-1-5.33. Change by registered agent of name or address of registered agent.

(a) The registered agent of any entity required by Section 10A-1-5.31 to designate and maintain a registered agent or registered office may change its name, its address as the address of

the entity's registered office, or both, by delivering to the Secretary of State for filing a statement of the change in accordance with the procedures in Article 4.

(b) The statement must be signed by the registered agent, or a person authorized to sign the statement on behalf of the registered agent, and must contain:

- (1) the name of the entity represented by the registered agent;
- (2) the name of the entity's registered agent and the address at which the registered agent maintained the entity's registered office;
- (3) if the change relates to the name of the registered agent, the new name of that agent;
- (4) if the change relates to the address of the registered office, the new address of that office; and
- (5) a recitation that written notice of the change was given to the entity at least 10 days before the date the statement is filed.

(c) On acceptance of the statement by the Secretary of State, the statement is:

- (1) in the case of a domestic filing entity, effective to make the change set forth in the statement without the necessity of amending the entity's certificate of formation;
- (2) in the case of a general partnership with an effective a statement of partnership, statement of not for profit partnership, or statement of limited liability partnership on file with the secretary of state, effective to change its registered agent or registered office, or both, without the necessity of amending its statement of partnership, statement of not for profit partnership, or statement of limited liability partnership under Chapter 8A;

- (3) in the case of a foreign filing entity, effective to make the change set forth in the statement, and effective as an amendment of its application for registration as a foreign entity under Article 7; or
 - (4) in the case of a foreign limited liability partnership, effective to make the change set forth in the statement, and effective as an amendment to its statement of foreign limited liability partnership under Article 7;
- (d) A registered agent may file a statement under this section that applies to more than one entity.

Comment

This Section was derived from prior Section 10-3A-24(d) of the Alabama Nonprofit Corporation Act, without substantive change but with the addition of specific procedures. This Section covers the same subject matter as prior Sections 10-2B-5.02(b) and 10-2B-15.08(b) of the Alabama Business Corporation Act and 10-3A-177(d) of the Alabama Nonprofit Corporation Act. This Section now includes general partnerships that have filed a statement of partnership, a statement of not for profit partnership, or a statement of limited liability partnership under Chapter 8A, as well as foreign limited liability partnerships that have filed a statement of foreign limited liability partnership in accordance with Article 7.

§ 10A-1-5.34. Resignation of registered agent.

- (a) A registered agent of any entity required by Section 10A-1-5.31 to designate and maintain a registered agent or registered office may resign as the registered agent by giving notice to that entity and to the Secretary of State.
- (b) Notice to the entity must be given to the entity at the address of the entity most recently known by the agent.
- (c) Notice to the Secretary of State must be given before the 11th day after the date notice under subsection (b) is mailed or delivered and must include:
 - (1) the address of the entity most recently known by the agent;

(2) a statement that written notice of the resignation has been given to the entity; and

(3) the date on which that written notice of resignation was given.

(d) On compliance with subsections (b) and (c), the appointment of the registered agent terminates. The termination is effective on the 31st day after the date the Secretary of State receives the notice.

(e) If the Secretary of State finds that a notice of resignation received by the filing officer conforms to subsections (b) and (c), the Secretary of State shall:

(1) notify the entity of the registered agent's resignation; and

(2) file the resignation in accordance with Article 4, except that a fee is not required to file the resignation.

Comment

This Section was derived from prior Section 10-2B-5.03 of the Alabama Business Corporation Act, without substantive change. It also covers the same subject matter as prior Section 10-3A-24(c) of the Alabama Nonprofit Corporation Act. This Section now includes general partnerships that have filed a statement of partnership, a statement of not for profit partnership, or a statement of limited liability partnership under Chapter 8A, as well as foreign limited liability partnerships that have filed a statement of foreign limited liability partnership in accordance with Article 7.

§ 10A-1-5.35. Failure to designate and maintain registered agent.

If an entity required by Section 10A-1-5.31 to designate and maintain a registered agent fails to do so, or the registered agent cannot with reasonable diligence be served, the entity may be served with process as provided by the Alabama Rules of Civil Procedure and may be served with any other notice or demand required or permitted by law to be served on the entity in a manner similar to the procedure provided by the Alabama Rules of Civil Procedure for the service of process.

Comment

This Section was derived from prior Section 10-3A-25(b) of the Alabama Nonprofit Corporation Act, without substantive change. It also covers the same subject matter as prior sections 10-2B-5.04(a) of the Alabama Business Corporation Act and 10-12-17(b) of the Alabama Limited Liability Company Act. This Section now includes general partnerships that have filed a statement of partnership, a statement of not for profit partnership, or a statement of limited liability partnership under Chapter 8A, as well as foreign limited liability partnerships that have filed a statement of foreign limited liability partnership in accordance with Article 7.

§ 10A-1-5.36. Method of service on entity not exclusive.

This division does not prescribe the only or required means of serving an entity. Nothing contained in this division specifically or in this title generally shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served on an entity in any other manner now or hereafter permitted by law.

Comment

This Section was derived from prior Section 10-3A-25(c) of the Alabama Nonprofit Corporation Act, without substantive change. It also covers the same subject matter as prior Section 10-2B-5.04(c) of the Alabama Business Corporation Act. This Section now includes general partnerships that have filed a statement of partnership, a statement of not for profit partnership, or a statement of limited liability partnership under Chapter 8A, as well as foreign limited liability partnerships that have filed a statement of foreign limited liability partnership in accordance with Article 7.

Article 6

Indemnification and Insurance

Division A General Provision

- § 10A-1-6.01. Definitions.
- § 10A-1-6.02. Application of article.

Division B Mandatory and Court Ordered Indemnification

- § 10A-1-6.11. Mandatory indemnification.
- § 10A-1-6.12. Court-ordered indemnification.
- § 10A-1-6.13. Limitations in governing documents.

Division C Permissive Indemnification and Advancement of Expenses

- § 10A-1-6.21. Permissive indemnification.
- § 10A-1-6.22. General scope of permissive indemnification.
- § 10A-1-6.23. Manner for determining permissive indemnification.
- § 10A-1-6.24. Advancement of expenses.
- § 10A-1-6.25. Indemnification and advancement of expenses to persons other than governing persons.
- § 10A-1-6.26. Permissive indemnification of and reimbursement of expenses to witnesses.

Division D Liability Insurance; Reporting Requirements

- § 10A-1-6.31. Insurance and other arrangements.
- § 10A-1-6.32. Reports of indemnification and advances.

Division A General Provision

- § 10A-1-6.01. Definitions.

In this division:

- (1) “Delegate” means a person who is serving or who has served as a representative of an enterprise at the request of that enterprise at another

enterprise. A person is a delegate to an employee benefit plan if the performance of the person's official duties to the enterprise also imposes duties on or otherwise involves service by the person to the plan or participants in or beneficiaries of the plan.

- (2) "Enterprise" means a domestic entity or an organization subject to this article, including a predecessor domestic entity or organization.
- (3) "Expenses" includes court costs and attorney's fees. The term does not include a judgment, a penalty, a settlement, a fine, or an excise or similar tax or an excise tax assessed against the person regarding an employee benefit plan.
- (4) "Former Governing Person" means a person who was a governing person of an enterprise.
- (5) "Official Capacity" means:
 - (A) with respect to a governing person, the office of the governing person in the enterprise or the exercise of authority by or on behalf of the governing person under this title or the governing documents of the enterprise; and
 - (B) with respect to a person other than a governing person, the elective or appointive office, if any, in the enterprise held by the person or the relationship undertaken by the person on behalf of the enterprise.
- (6) "Predecessor Enterprise" means a sole proprietorship or organization that is

a predecessor to an enterprise in:

- (A) a merger, conversion, consolidation, or other transaction in which the liabilities of the predecessor enterprise are transferred or allocated to the enterprise by operation of law; or
- (B) any other transaction in which the enterprise assumes the liabilities of the predecessor enterprise and the liabilities that are the subject matter of this chapter are not specifically excluded.

(7) “Proceeding” means:

- (A) a threatened, pending, or completed action or other proceeding, whether civil, criminal, administrative, arbitrative, or investigative and whether formal or informal;
- (B) an appeal of an action or proceeding described by paragraph (A); and
- (C) an inquiry or investigation that could lead to an action or proceeding described by paragraph (A).

(8) “Representative” means a person serving as a partner, director, officer, venturer, proprietor, trustee, employee, or agent of an enterprise or serving a similar function for an enterprise.

(9) “Respondent” means a person named as a respondent or defendant in a proceeding.

Comment

This Section was derived from prior Section 10A-2B-8.50, without substantive change but with a number of changes in definitional language.

§ 10A-1-6.02. Application of article.

(a) Except as provided by subsection (b), this article does not apply to a:

- (1) general partnership;
- (2) limited liability company;
- (3) limited partnership; and
- (4) nonprofit corporation.

(b) The governing documents of a general partnership, limited liability company, limited partnership, or nonprofit corporation may adopt provisions of this article or may contain enforceable provisions relating to:

- (1) indemnification;
- (2) advancement or reimbursement of expenses;
- (3) insurance; or
- (4) other arrangements.

Comment

This Section is consistent with prior Alabama law as of the codification of this title.

Division B Mandatory and Court Ordered Indemnification

§ 10A-1-6.11. Mandatory indemnification.

(a) An enterprise shall indemnify a governing person or former governing person

against reasonable expenses actually incurred by the person in connection with a proceeding in which the person is a respondent because the person is or was a governing person if the person is successful, on the merits or otherwise, in the defense of the proceeding, or any claim, issue, or matter in the proceeding, notwithstanding that he or she was not successful on any other claim, issue, or matter in the proceeding.

(b) A court that determines, in a suit for indemnification, that a governing person is entitled to indemnification under this section shall order indemnification and award to the person the expenses incurred in securing the indemnification.

Comment

This Section was derived from prior Section 10-2B-8.52, without substantive change.

§ 10A-1-6.12. Court-ordered indemnification.

On application of a governing person, former governing person, or delegate and after notice is provided as required by the court, a court may order an enterprise to indemnify the person to the extent the court determines that the person is fairly and reasonably entitled to indemnification in view of all the relevant circumstances.

(a) This section applies without regard to whether the governing person, former governing person, or delegate applying to the court satisfies the requirements of Section 10A-1-6.21 or has been found liable:

- (1) to the enterprise; or
- (2) because the person improperly received a personal benefit, without regard to whether the benefit resulted from an action taken in the person's official capacity.

(b) The indemnification ordered by the court under this section is limited to reasonable expenses if the governing person, former governing person, or delegate is found liable:

- (1) to the enterprise; or
- (2) because the person improperly received a personal benefit, without regard to whether the benefit resulted from an action taken in the person's official capacity.

Comment

This Section was derived from prior Section 10-2A-8.54, without substantive change.

§ 10A-1-6.13. Limitations in governing documents.

The certificate of formation of an enterprise may restrict the circumstances under which the enterprise must or may indemnify a person under this division.

Comment

This Section is consistent with the provisions of prior Subsection 10-2B-2.02 of the Alabama Business Corporation Act as to permissive provisions in the articles of incorporation.

Division C
Permissive Indemnification and Advancement of Expenses

§ 10A-1-6.21. Permissive indemnification.

(a) An enterprise may indemnify a governing person, former governing person, or delegate who was, is, or is threatened to be made a respondent in a proceeding to the extent permitted by Section 10A-1-6.22 if it is determined in accordance with Section 10A-1-6.23 that:

- (1) the person:
 - (A) acted in good faith; and
 - (B) reasonably believed:

- i. in the case of conduct in the person's official capacity that the person's conduct was in the enterprise's best interests; and
- ii. in all other cases, that the person's conduct was not opposed to the enterprise's best interests; and

(C) in the case of a criminal proceeding, did not have a reasonable cause to believe the person's conduct was unlawful;

- (2) with respect to expenses, the amount of expenses is reasonable; and
- (3) indemnification should be paid.

(b) Action taken or omitted by a governing person or delegate with respect to an employee benefit plan in the performance of the person's duties for a purpose reasonably believed by the person to be in the interests of the participants in and beneficiaries of the plan is for a purpose that is not opposed to the best interests of the enterprise.

(c) Action taken or omitted by a delegate to another enterprise for a purpose reasonably believed by the delegate to be in the interest of the other enterprise or its owners or members is for a purpose that is not opposed to the best interests of the enterprise.

(d) A person does not fail to meet the standard under subsection (a)(1) solely because of the termination of a proceeding by:

- (1) judgment;
- (2) order;
- (3) settlement;
- (4) conviction; or

- (5) a plea of nolo contendere or its equivalent.

Comment

This Section was derived from prior Section 10-2B-8.51, without substantive change.

§ 10A-1-6.22. General scope of permissive indemnification.

(a) Except as otherwise provided by subsection (d) and subject to subsection (b), an enterprise may indemnify a governing person, former governing person, or delegate against a judgment, penalty, settlement, or fine, including an excise or similar tax or an excise tax assessed against the person regarding an employee benefit plan, and against reasonable expenses actually incurred by the person in connection with a proceeding.

(b) Indemnification under this chapter of a person who is found liable to the enterprise or is found liable because the person improperly received a personal benefit:

- (1) is limited to reasonable expenses actually incurred by the person in connection with the proceeding; and
- (2) may not be made in relation to a proceeding in which the person has been found liable for:
 - (A) willful or intentional misconduct in the performance of the person's duty to the enterprise;
 - (B) breach of the person's duty of loyalty owed to the enterprise; or
 - (C) an act or omission not committed in good faith that constitutes a breach of a duty owed by the person to the enterprise.

(c) A governing person, former governing person, or delegate is considered to have been found liable in relation to a claim, issue, or matter only if the liability is established by an order, including a judgment or decree of a court, and all appeals of the order are exhausted or

foreclosed by law.

(d) Notwithstanding any other provision of this chapter, an enterprise may not indemnify or advance expenses to a person if the indemnification or advancement conflicts with a restriction in the enterprise's governing documents.

Comment

This Section elaborates on the provisions of prior Section 10-2B-8.51 of the Alabama Business Corporation Act, but without substantive change.

§ 10A-1-6.23. Manner for determining permissive indemnification.

(a) Except as otherwise provided by subsections (b) and (c), the determinations required under Section 10A-1-6.21(a) must be made by:

- (1) a majority vote of a quorum composed of the governing persons who at the time of the vote are disinterested and independent;
- (2) if a quorum described by subsection (a)(1) cannot be obtained, a majority vote of a committee of the board of directors of the enterprise designated to act in the matter by a majority vote of the governing persons and composed of at least one governing person who at the time of the vote is disinterested and independent;
- (3) special legal counsel selected by the board of directors of the enterprise, or selected by a committee of the board of directors, by vote in accordance with subdivision (1) or subdivision (2) or, if a quorum described by subdivision (1) cannot be obtained and a committee described by subdivision (2) cannot be established, by a majority vote of the governing persons of the enterprise;

- (4) a majority of the membership interests that are entitled to vote on the transactions by virtue of not being owned by or under control of the governing persons constitutes a quorum for purposes of taking action under this section; or
- (5) a unanimous vote of the owners or members of the enterprise.

(b) If special legal counsel determines under subsection (a)(3) that a person meets the standard under Section 10A-1-6.21(a)(1), the special legal counsel shall determine whether the amount of expenses is reasonable under Section 10A-1-6.21(a)(2) but may not determine whether indemnification should be paid under Section 10A-1-6.21(a)(3). The determination whether indemnification should be paid must be made in a manner specified by subsection (a)(1), (2), (4), or (5).

(c) A provision contained in the governing documents of the enterprise, a resolution of the owners, members, or governing authority, or an agreement that requires the indemnification of a person who meets the standard under Section 10A-1-6.21(a)(1) constitutes a determination under Section 10A-1-6.21(a)(3) that indemnification should be paid even though the provision may not have been adopted or authorized in the same manner as the determinations required under Section 10A-1-6.21(a). The determinations required under Section 10A-1-6.21(a)(1) and (2) must be made in a manner provided by subsection (a).

Comment

This Section was derived from prior Section 10-2B-8.55, without substantive change.

§ 10A-1-6.24. Advancement of expenses.

(a) An enterprise may pay or reimburse reasonable expenses incurred by a governing person, former governing person, or delegate that was, is, or is threatened to be made a

respondent in a proceeding in advance of the final disposition of the proceeding without making the determinations required under Section 10A-1-6.21(a) after the enterprise receives:

- (1) written affirmation by the person of the person's good faith belief that the person has met the standard of conduct necessary for indemnification under this article; and
- (2) written undertaking by or on behalf of the person to repay the amount paid or reimbursed if the final determination is that the person has not met that standard or that indemnification is prohibited by Section 10A-1-6.22.

(b) A provision in the governing documents of the enterprise, a resolution of the owners, members, or governing authority, or an agreement that requires the payment or reimbursement permitted under this section authorizes that payment or reimbursement after the enterprise receives an affirmation and undertaking described by subsection (a).

(c) The written undertaking required by subsection (a)(2) must be an unlimited general obligation of the person but need not be secured and may be accepted by the enterprise without regard to the person's ability to make repayment.

(d) An enterprise may not advance expenses to or reimburse expenses of a person if the advancement or reimbursement conflicts with a restriction in the enterprise's governing documents.

Comment

This Section was derived from prior Section 10-2B-8.53, without substantive change.

§ 10A-1-6.25. Indemnification and advancement of expenses to persons other than governing persons.

(a) Notwithstanding any other provision of this chapter but subject to subsection (d)

and to the extent consistent with other law, an enterprise may indemnify and advance expenses to a person who is not a governing person, including an officer, employee, agent, or delegate, as provided by:

- (1) the enterprise's governing documents;
- (2) general or specific action of the enterprise's governing authority;
- (3) resolution of the enterprise's owners or members;
- (4) contract; or
- (5) common law.

(b) An enterprise shall indemnify and advance expenses to an officer to the same extent that indemnification or advancement of expenses is required under this chapter for a governing person.

(c) A person described by subsection (a) may seek indemnification or advancement of expenses from an enterprise to the same extent that a governing person may seek indemnification or advancement of expenses under this chapter.

(d) The certificate of formation of an enterprise may restrict the circumstances under which the enterprise must or may indemnify a person under this section.

Comment

This Section was derived from prior Section 10-2B-8.56 of the Alabama Business Corporation Act, without substantive change.

§ 10A-1-6.26. Permissive indemnification of and reimbursement of expenses to witnesses.

Notwithstanding any other provision of this chapter, an enterprise may pay or reimburse

reasonable expenses incurred by a governing person, officer, employee, agent, delegate, or other person in connection with that person's appearance as a witness or other participation in a proceeding at a time when the person is not a respondent in the proceeding.

Comment

This is consistent with prior indemnification provisions of Alabama law.

Division D
Liability Insurance; Reporting Requirements

§ 10A-1-6.31. Insurance and other arrangements.

(a) Notwithstanding any other provision of this article, an enterprise may purchase or procure or establish and maintain insurance or another arrangement to indemnify or hold harmless an existing or former governing person, delegate, officer, employee, or agent against any liability:

- (1) asserted against and incurred by the person in that capacity; or
- (2) arising out of the person's status in that capacity.

(b) The insurance or other arrangement established under subsection (a) may insure or indemnify against the liability described by subsection (a) without regard to whether the enterprise otherwise would have had the power to indemnify the person against that liability under this chapter.

(c) Insurance or another arrangement that involves self-insurance or an agreement to indemnify made with the enterprise or a person that is not regularly engaged in the business of providing insurance coverage may provide for payment of a liability with respect to which the enterprise does not otherwise have the power to provide indemnification only if the insurance or arrangement is approved by the owners or members of the enterprise.

(d) For the benefit of persons to be indemnified by the enterprise, an enterprise, in addition to purchasing or procuring or establishing and maintaining insurance or another arrangement, may:

- (1) create a trust fund;
- (2) establish any form of self-insurance, including a contract to indemnify;
- (3) secure the enterprise's indemnity obligation by grant of a security interest or other lien on the assets of the enterprise; or
- (4) establish a letter of credit, guaranty, or surety arrangement.

(e) Insurance or another arrangement established under this section may be purchased or procured or established and maintained:

- (1) within the enterprise; or
- (2) with any insurer or other person considered appropriate by the governing authority, regardless of whether all or part of the stock, securities, or other ownership interest in the insurer or other person is owned in whole or in part by the enterprise.

(f) A governing authority's decision as to the terms of the insurance or other arrangement and the selection of the insurer or other person participating in an arrangement is conclusive. The insurance or arrangement is not voidable and does not subject the governing persons approving the insurance or arrangement to liability, on any ground, regardless of whether the governing persons participating in approving the insurance or other arrangement are beneficiaries of the insurance or arrangement. This subsection does not apply in case of actual

fraud.

Comment

This Section covers the same matter as prior Section 10-2B-8.57, but is more elaborate.

§ 10A-1-6.32. Reports of indemnification and advances.

(a) An enterprise shall report in writing to the owners or members of the enterprise an indemnification of or advance of expenses to a governing person.

(b) Subject to subsection (c), the report must be made with or before the notice or waiver of notice of the next meeting of the owners or members of the enterprise and before the next submission to the owners or members of a consent to action without a meeting.

(c) A report required by this section must be made not later than the first anniversary of the date of the indemnification or advance.

Comment

This Section was derived from prior Section 10-2B-16.21 of the Alabama Business Corporation Act, without substantive change.

Article 7

Foreign Entities

Division A Registration

- § 10A-1-7.01. Definitions; foreign entities required to register.
- § 10A-1-7.02. Foreign entities not required to register.
- § 10A-1-7.03. Permissive registration.
- § 10A-1-7.04. Registration procedure.
- § 10A-1-7.05. Effect of registration.
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- § 10A-1-7.07. Entity name.

Division B Withdrawal I

- § 10A-1-7.11. Voluntary withdrawal of registration.
- § 10A-1-7.12. Grounds for revocation.
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- § 10A-1-7.14. Appeal from revocation.

Division C Consequences of Transacting Business without Registering

- § 10A-1-7.22. Transaction of business without registration; actions to restrain.
- § 10A-1-7.23. Late filing fees.
- § 10A-1-7.24. Requirements of other law.

Division D Business, Rights, and Obligations

- § 10A-1-7.31. Business of foreign entity.
- § 10A-1-7.32. Rights and privileges.
- § 10A-1-7.33. Reserved.
- § 10A-1-7.34. Right of foreign entity to participate in the business of certain domestic entities.
- § 10A-1-7.35. Out of state business or property of foreign entity and subject to control or regulation.
- § 10A-1-7.36. Right of eminent domain.
- § 10A-1-7.37. Extension of lines, tracks, ways or works into state.

Division E
Miscellaneous Provisions

§ 10A-1-7.41. Applicability of this title to certain foreign entities.

Division A
Registration

§ 10A-1-7.01. Definitions; Foreign entities required to register.

(a) (1) For purposes of this Article 7, the terms “register,” “registering,” and “registered” includes (i) a foreign entity other than a foreign limited liability partnership delivering to the Secretary of State for filing an application for registration and the Secretary of State filing the application for registration, and (ii) a foreign limited liability partnership delivering to the Secretary of State for filing a statement of foreign limited liability partnership and the Secretary of State filing the statement of foreign limited liability partnership.

~~(b)~~(2) For purposes of this Article 7, the term “registration” includes (i) a filed application for registration and (ii) a filed statement of foreign limited liability partnership.

(b) For purposes of this Article 7, the terms “transact business” and “transacting business” shall include conducting a business, activity, not for profit activity, and any other activity, whether or not for profit.

(c) To transact business in this state, a foreign entity must register under this chapter if the foreign entity:

(1) is a foreign entity, the formation of which, if formed in this state, would

require the filing under Article 3 of a certificate of formation;

(2) is a foreign limited liability partnership; or

(3) affords limited liability under the law of its jurisdiction of formation for any owner or member.

(d) A foreign entity described by subsections (c) must maintain the entity's registration while transacting business in this state.

Comment

The definitions set forth in Subsection (a) and (b) are intended to include foreign limited liability partnerships within the purview of this Article 7. This Section differentiates between types of foreign entities subject to the registration requirement (e.g., foreign corporations, limited partnerships, limited liability partnerships, and limited liability companies) and those that are not (e.g., foreign general partnerships which are not foreign limited liability partnerships).

§ 10A-1-7.02. Foreign entities not required to register.

(a) A foreign entity not described by Sections 10A-1-7.01(c) may transact business in this state without registering under this chapter.

(b) Subsection (a) does not relieve a foreign entity from the duty to comply with applicable requirements under other law to file or register.

(c) A foreign entity is not required to register under this chapter if other law of this state or of federal law authorizes the foreign entity to transact the particular business authorized by law in this state.

(d) A foreign unincorporated nonprofit association is not required to register under this chapter.

(e) A foreign entity which is exempt from the requirements of Chapter 46, Title 16, is not required to register under this chapter.

§ 10A-1-7.03. Permissive registration.

A foreign entity that is eligible under other law of this state to register to transact business in this state, but that is not registered under that law, may register under this chapter unless that registering is prohibited by the other law. A registration under this chapter confers only the authority provided by this chapter.

Comment

This Section supplements the registration provisions of Alabama law.

§ 10A-1-7.04. Registration procedure.

(a) (1) A foreign entity described in Section 10A-1-7.01(c) other than a foreign limited liability partnership, registers by delivering to the Secretary of State for filing an application for registration in accordance with the procedures in Article 4.

(2) A foreign limited liability partnership registers by delivering to the Secretary of State for filing a statement of foreign limited liability partnership in accordance with the procedures in Article 4.

(b) The application for registration of a foreign entity described in Section 10A-1-7.01(c) other than a foreign limited liability partnership must state:

- (1) the foreign entity's name or, if that name is not available for use in this state or otherwise would not comply with Article 5, a name that satisfies the requirements of Section 10A-1-7.07 under which the entity will transact business in this state;
- (2) the foreign entity's type;
- (3) the foreign entity's jurisdiction of formation;
- (4) the date of the foreign entity's formation;

- (5) that the foreign entity exists as a valid foreign entity of the stated type under the laws of the foreign entity's jurisdiction of formation;
 - (6) the date the foreign entity began or will begin to transact business in this state;
 - (7) the street address and mailing address, if different, of the principal office of the foreign entity and;
 - (8) the street address and mailing address, if different, of the initial registered office and the name of the initial registered agent for service of process which Article 5 requires to be maintained at that office.
- (c) The statement of foreign limited liability partnership must state:
- (1) the foreign limited liability partnership's name or, if that name is not available for use in this state or otherwise would not comply with Article 5, a name that satisfies the requirements of Section 10A-1-7.07 under which the foreign entity will transact business in this state;
 - (2) the jurisdiction which governs the foreign limited liability partnership's partnership agreement and under which it is a limited liability partnership;
 - (3) the date of the foreign limited liability partnership's formation;
 - (4) that the foreign limited liability partnership exists as a valid foreign limited liability partnership under the laws of the jurisdiction which governs the foreign limited liability partnership's partnership agreement and under which it is a limited liability partnership;
 - (5) the date the foreign limited liability partnership will begin to transact

business in this state;

(6) the street address and mailing address, if different, of the principal office of the foreign limited liability partnership;

(7) the street address and mailing address, if different, of the initial registered office and the name of the initial registered agent for service of process which Article 5 requires to be maintained at that office;

(d) The application for registration of a foreign entity described in Section 10A-1-7.01(c) other than a foreign limited liability partnership shall be executed by one or more persons authorized to execute an application for registration. The statement of foreign limited liability partnership shall be executed by one or more partners authorized to execute a statement of foreign limited liability partnership.

(e) The status of the foreign entity after registration and the liability of ~~a-~~its owners, managers, members, or managerial officials shall not be adversely affected by error or subsequent changes in the information stated in the application for registration or statement of foreign limited liability partnership, as applicable.

(f) The fact that an application for registration or a statement of foreign limited liability partnership, as applicable, is on file with the Secretary of State is notice that the foreign entity is ~~an~~ authorized to transact business in this state and as notice of all facts required to be set forth in the application for registration or the statement of foreign limited liability partnership, as applicable.

(g) A foreign entity may register regardless of any differences between the law of the foreign entity's jurisdiction and of this state applicable to the governing of the internal affairs or

to the liability of an owner, member, or managerial official. Notwithstanding the foregoing, no foreign entity may carry on in this state any business of a character that may not lawfully be carried on by a domestic entity of the same type.

~~(h) In the case of a foreign corporation filing an application pursuant to this section, the foreign corporation shall also, to the extent required by the Constitution of Alabama of 1901, file a copy of its articles or certificate of incorporation or association or other certificate of formation and all amendments thereto duly certified by the Secretary of State or other official having custody of corporate records in the state or other jurisdiction under whose law it is incorporated.~~

(h) ~~(i)~~-A statement of foreign limited liability partnership is a filing instrument.

Comment

This Section was derived from prior Section 10-2B-15.03 of the Alabama Business Corporation Act, but substitutes a simplified registration procedure for that of the issuance of a certificate of authority by the Secretary of State.

Comment to former Section 10-2B-15.03

1. *Section 10-2B-15.03 is derived from RMBCA Section 15.03, with changes. One change is the substitution of the term “jurisdiction” for that of “country.” This was made in recognition of the fact that a foreign corporation that is not organized under the laws of a “state” (which is defined broadly in Section 10-2B-1.40 to include, for example, territories and possessions of the United States) may be organized under the laws of a governmental entity that is other than the national government.*

2. *A second change from RMBCA Section 15.03 is found in the requirement of Section 10-2B-15.03(b) of this Act that a foreign corporation submit with its application a duly certified copy of “its articles or certificate of incorporation or association and all amendments thereto.” This requirement is substituted for the RMBCA Section 15.03(b) requirement that the foreign corporation submit a “certificate of existence.” The reason for the change is that Section 232 of the Alabama Constitution, in the language quoted in the Reporter’s Note as to Changes to Section 10-2B-15.01, requires the submission of the articles themselves, rather than merely a certificate of existence.*

3. *The corresponding provision of the former Alabama Act was Section 10-2A-232. In general the same information is required under Section 10-2B-15.03 of this Act as was required under Section 10-2A-232. One change is the deletion of the legal capital information required by Section 10-2A-232(8)-(10). This is omitted because of the changes in legal capital*

rules under this Act. It should be noted however that information as to the capitalization of a foreign corporation is required under provisions of the Alabama revenue laws applicable to foreign corporations qualifying to transact business in this state. See Section 40-14-2, requiring that a foreign corporation file, in connection with the payment of the admission or qualification tax required under Section 40-14-1 a statement as to its paid-in capital and actual amount of capital employed in this state. The actual amount of capital employed in this state is also used to determine the fee for the permit required upon admission and each year thereafter by Section 40-14-21, and is the tax base as to foreign corporations for the annual franchise tax levied by Section 40-14-41.

~~Section 10-2B-15.03(b) of this Act also omits the requirement of Section 10-2A-232(b) of the former Alabama Act that the purpose of the corporation be set forth. Again it should be noted that the permit application required by Section 40-14-21 requires a "brief statement of the character of business in which the corporation is actually engaged in this state." It should also be noted that section 233 of the Alabama provides that: "No corporation shall engage in any business other than that expressly authorized in its charter or articles of incorporation."~~

~~4. As has been indicated in the discussion in the foregoing notes, and as is underscored here, qualification of a foreign corporation to transact business in Alabama involves the requirements of the revenue laws as well as the requirements of this Act. This Act does not require an application for a certificate of authority to be accompanied by proof that the requirements of the revenue laws (these include those pertaining to the admission or qualification tax, Sections 40-14-1 through 40-14-3, the permit fee, Section 40-14-21, and the initial franchise tax, Section 40-14-41), but completion of these requirements is necessary to complete qualification. See Section 10-2B-15.02, under which the consequences of a failure to qualify attach to delinquencies in connection with these requirements as well as to a failure to comply with this Act.~~

§ 10A-1-7.05. Effect of registration.

(a) The application for registration of a foreign entity and the statement of foreign limited liability partnership takes effect in accordance with Article 4 of this Chapter. The registration of a foreign entity remains in effect until the registration terminates, is withdrawn, or is revoked.

(b) Except in a proceeding to revoke the registration of a foreign entity, or as otherwise provided by the law of Alabama, the Secretary of State's issuance of an acknowledgment that the foreign entity has filed an application for registration or a statement of foreign limited liability partnership, as applicable, is conclusive evidence of the authority of the foreign entity to transact business in this state under the foreign entity's name or under another

name stated in the application for registration in accordance with Section 10A-1-7.04(b)(1) or stated in the statement of foreign limited liability partnership in accordance with Section 10A-1-7.04(c)(1), as applicable.

Comment

This Section covers the same subject matter as prior Section 10-9B-903.

Comment to former Section 10-2B-15.05

1. Section 10-2B-15.05 of this Act is derived without changes from RMBCA Section 15.05.

2. Section 10-2B-15.05(a) of this Act corresponds to Section 10-2A-234 of the former Alabama Act, while Section 10-2B-15.05(b) corresponds to Section 10-2A-227 of the former Act. In neither case is there any substantive change. Section 10-2B-15.05(c) of this Act is new but codifies the common law in Alabama, Boyette v. Preston Motors Corp., 206 Ala. 240, 89 So. 746 (1921).

It should be noted that there are additional sections of the present Act that deal more specifically with the powers of foreign corporations. These are Section 10-2A-225, dealing with nonregulation of the out-of-state business of a foreign corporation with its principal place of business in the state; Section 10-2A-228, dealing with rights of eminent domain of foreign corporations; and Section 10-2A-229, dealing with extension of lines, tracks, ways or works into this state by a foreign corporation. In general, it appears that these are redundant and that the provisions of each are merely a specific application of our present Section 10-2A-227 and of the proposed 10-2B-15.05(b). However it is recommended that each be retained by being excepted from repeal. That there is a possible scope for their separate operation illustrated by Gralapp v. Mississippi Power Co., 280 Ala. 368, 194 So. 2d 527 (1967) (Mississippi Power, a Maine corporation, could exercise powers of eminent domain in Alabama for the purpose of connecting transmission lines with Alabama Power, even though under its charter it had no right of eminent domain in its “home” state of Maine), a fact pattern that illustrates the scope of operation of Section 10-2A-225.

§ 10A-1-7.06. Amendments to registration.

(a) If any statement in an application for registration or a statement of foreign limited liability partnership was false when made or any arrangements or other facts described have changed, making the application for registration or statement of foreign limited liability partnership, as applicable, inaccurate in any respect, the foreign entity shall file with the Secretary of State an amendment correcting the false or inaccurate statement. A foreign entity must amend

its registration to change its name if the name has changed. If the name of a foreign entity as changed is not available in this state or otherwise does not satisfy the requirements of Article 5, the foreign entity, pursuant to the requirements of Section 10A-1-7.07, must adopt a name that complies with Article 5 under which it will transact business in this state.

(b) A foreign entity may amend its application for registration or statement of foreign limited liability partnership by filing an application for amendment of registration as provided by Article 4.

(c) The application for amendment must be filed promptly on the discovery that any statement in the application for registration or statement of foreign limited liability partnership, as applicable, was false when made, but not later than 60 days after the discovery. The application for amendment must be filed promptly after any arrangements other facts described in the application have changed, making the application inaccurate in any respect, but not later than 90 days after the change.

Comment

This Section covers the same subject matter as prior Sections 10-9B-905 and 10-12-50. Subsection (a) covers the same subject matter as prior 10-2B-15.06(e).

§ 10A-1-7.07. Entity name.

If the name of a foreign entity does not satisfy the requirements of Article 5, the foreign entity, for use in this state, may:

- (1) if a corporation, add to its corporate name the word “corporation” or “incorporated” or an abbreviation of one of the words;
- (2) if a banking corporation, add to its corporate name the words “bank,” “banking,” or “bankers”;

- (3) if a limited partnership that is not a limited liability limited partnership, add to its partnership name the word “limited” or the abbreviation “Ltd.” or the phrase “limited partnership” or the abbreviation “L.P.” or “LP” but its name must not contain the phrase “limited liability limited partnership” or the abbreviation “LLLP” or “L.L.L.P.”;
- (4) if a limited partnership that is a limited liability limited partnership, add to its partnership name the phrase “limited liability limited partnership” or the abbreviation “LLLP” or “L.L.L.P.” and must not contain the abbreviation “Ltd.,” “L.P.,” or “LP.”
- (5) if a limited liability company, add to its company name the phrase “limited liability company” or the abbreviation “L.L.C.” or “LLC”;
- (6) if a professional corporation, add to its corporate name the phrase “professional corporation” or the abbreviation “P.C.” or “PC”;
- (7) if a limited liability partnership, add to its partnership name the phrase “limited liability partnership” or the abbreviation “L.L.P.” or “LLP”;
- (8) if a general partnership that is authorized by the laws of the jurisdiction that govern its partnership agreement to file the equivalent of a statement of partnership as provided under ~~Section 10A-Chapter 8A-2.02A~~, add to its name the phrase “general partnership” or the abbreviation “G.P.” or “GP”;
- (9) if a general partnership that is authorized by the laws of the jurisdiction that govern its partnership agreement to file the equivalent of a statement of not for profit partnership as provided under ~~Section 10A-Chapter 8A-2.02A~~, add to its name the phrase “not for profit general partnership” or the

abbreviation “N.G.P.” or “NGP”; and

- (10) use a fictitious name available for use in this state that satisfies the requirements of Article 5, if it delivers to the Secretary of State for filing a copy of the resolution of its governing authority, certified by its secretary, adopting the fictitious name.

Comment

This Section collects in one place the various provisions of prior Alabama law, such as prior Section 10-12-49 of the Alabama Limited Liability Company Act, that required foreign entities to adopt names that satisfy the same name requirements as domestic entities.

Division B Withdrawal

§ 10A-1-7.11. Voluntary withdrawal of registration.

(a) A foreign entity registered in this state may withdraw the foreign entity’s registration at any time by filing a certificate of withdrawal as provided in Article 4.

(b) A certificate of withdrawal for a foreign entity described must state:

- (1) the name of the foreign entity as set forth on its registration;
- (2) the type of entity and the entity’s jurisdiction of formation, and in the case of a foreign limited liability partnership, the jurisdiction which laws govern the foreign limited liability partnership and its partnership agreement;
- (3) the street address and mailing address, if different, of the principal office of the foreign entity;
- (4) that the foreign entity no longer is transacting business in this state;
- (5) that the foreign entity:

- (A) revokes the authority of the foreign entity's registered agent in this state to accept service of process; and
- (B) consents that service of process in any action, suit, or proceeding stating a cause of action arising in this state during the time the foreign entity was authorized to transact business in this state may be made on the foreign entity in accordance with the Alabama Rules of Civil Procedure and any other notice or demand required or permitted by law to be served on the foreign entity may be served in a manner similar to the procedure provided for the service of process by the Alabama Rules of Civil Procedure;

(6)

- (A) a mailing address to which process may be mailed pursuant to the applicable service of process procedures of the Alabama Rules of Civil Procedure and to which any notice or demand required or permitted by law to be served on the foreign entity may be mailed; and
- (B) a commitment by the foreign entity that if the mailing address stated in the certificate of withdrawal under paragraph (A) changes, the foreign entity will promptly amend the certificate of withdrawal to update the address; and

(7) that any money due or accrued to the state has been paid or describes the

provisions that have been made for the payment of that money.

(c) A certificate from the Alabama Department of Revenue that all applicable taxes and fees have been paid must be filed with the certificate of withdrawal.

(d) If the existence or separate existence of a foreign entity registered in this state terminates, a certificate by an authorized governmental official of the entity's jurisdiction of formation that evidences the termination shall be filed with the Secretary of State.

(e) The registration of the foreign entity terminates when a certificate of withdrawal under this section or a certificate evidencing termination under subsection (d) is filed.

Comment

Subsections (a) and (b)(5) cover the same subject matter as prior Sections 10-9B-906 and 10-12-51.

§ 10A-1-7.12. Grounds for revocation.

The Secretary of State may commence a proceeding under Section 10A-1-7.13 to revoke the registration of a foreign entity authorized to transact business in this state if:

- (1) the foreign entity does not deliver its annual report, if required by law, to the Secretary of State within 180 days after it is due;
- (2) the foreign entity does not pay within 180 days after they are due any applicable privilege or corporation share tax, qualification fee or admission tax, or interest or penalties imposed by this title or other law;
- (3) the foreign entity is without a registered agent or registered office in this state for 60 days or more;
- (4) the foreign entity does not file a statement of change of registered agent or

registered office with the Secretary of State under Section 10A-1-5.32 within 60 days of the change or its registered agent does not file a change of name or change of address of the registered office with the Secretary of State under Section 10A-1-5.33 within 60 days of the change;

- (5) an organizer, governing person, or agent of the foreign entity signed a document he or she knew was false in any material respect with intent that the document be delivered to the Secretary of State for filing; or
- (6) the Secretary of State receives a duly authenticated certificate from the Secretary of State or other official having custody of entity records in the state or country under whose laws the foreign entity is formed or is governed stating that the foreign entity has been terminated.

Comment

This Section covers the same subject matter as prior Section 10-3A-184(a).

Comment to former Section 10-2B-15.30

1. Section 10-2B-15.30 of this Act is derived, with changes, from RMBCA Section 15.30. The corresponding provision of the former Alabama Act was Section 10-2A-244.

2. In Sections 10-2B-15.30(1) and (2) “60 days” has been changed to “180 days” consistent with the changes made in Section 10-2B-14.20 of this Act. “Day” for purposes of such as these is defined in Section 10-2B-1.40. Generally this Act uses days, rather than months, for calendar measurements, so that the time period measure is uniform without respect to the number of days in a particular month. A second change in Section 10-2B-15.30(2) adds “permit fees” (imposed by Section 40-14-21) and “qualification fee or admission tax” (imposed by Section 40-14-1) to “franchise taxes” (imposed by Section 40-14-41) as obligations for which a six month delinquency exposes the foreign corporation to revocation of its certificate of authority.

3. Section 10-2B-15.30 of this Act makes some procedural changes from Section 10-2A-244 of the former Alabama act. The provisions of the former Alabama Act corresponding to Section 10-2B-15.30(1)-(4) did not spell out a period of delinquency as to annual report, franchise taxes, or registered office or agent that results in the delinquent foreign corporation becoming subject to revocation of its certificate. Instead, under the present act, the secretary of state gives notice of the deficiency and the secretary of state’s notice triggers a 60 day grace

period in which to cure the deficiency. This Act sets forth a period of delinquency, after which the secretary gives notice. That notice triggers an additional period, similar to the post-notice period under the present Act, to correct the deficiency. See Section 10-2B-15.31, below.

4. One ground of revocation under the former Act was the failure to file certified copies of amendments to the articles of incorporation. Since the former Act's requirement of filing amended articles (Section 10-2A-239) has not been carried forward, that ground of revocation has also been eliminated.

§ 10A-1-7.13. Procedure for and effect of revocation.

(a) If the Secretary of State determines that one or more grounds exist under Section 10A-1-7.12 for revocation of a registration the Secretary of State shall serve the foreign entity with written notice of the determination of the Secretary of State by serving ~~for~~the foreign entity's registered agent, which service may be by registered mail, or, if the foreign entity has no registered agent or its registered agent cannot with reasonable diligence be served, by serving the foreign entity by any method permitted under Sections 10A-1-5.35 and 10A-1-5.36.

(b) If the foreign entity does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after service of the notice is perfected under subsection (a), the Secretary of State may revoke the foreign entity's registration by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date. The Secretary of State shall file the original of the certificate and serve a copy on the foreign entity by serving its registered agent, which service may be by registered mail, or, if the foreign entity has no registered agent or its registered agent cannot with reasonable diligence be served, by serving the foreign entity by any method permitted under Sections 10A-1-5.35 and 10A-1-5.36.

(c) The authority of a foreign entity to transact business in this state ceases on the date shown on the certificate revoking its registration.

(d) Revocation of a foreign entity's registration does not terminate the authority of the registered agent of the foreign entity. Service of process in any action, suit, or proceeding stating a cause of action arising in this state during the time the foreign entity was authorized to transact business in this state may be made on the foreign entity whose registration has been suspended by service on the registered agent or by serving the entity by any method permitted under Sections 10A-1-5.35 and 10A-1-5.36.

Comment

This Section covers the same subject matter as prior Sections 10-3A-184(b), and 10-3A-185.

Comment to former Section 10-2B-15.31

1. *Section 10-2B-15.31 of this Act is derived without change from RMBCA Section 15.31.*

2. *Sections 10-2A-244(b) and 10-2A-245 of the former Alabama Act correspond to the provisions of Section 10-2B-15.31(a)-(c). Subsections (d) and (e) of Section 10-2B-15.31 of this Act are new. Subsection (d) is analogous to the rule that continues to apply to a foreign corporation that has withdrawn. See Section 10-2B-15.20(c).*

§ 10A-1-7.14. Appeal from revocation.

(a) A foreign entity may appeal the Secretary of State's revocation of its registration to the Circuit Court of Montgomery County within 30 days after service of the certificate of revocation is perfected under Section 10A-1-7.13. The foreign entity appeals by petitioning the court to set aside the revocation and attaching to the petition copies of the Secretary of State's acknowledgment of its application for registration or statement of foreign limited liability partnership, as applicable and the Secretary of State's certificate of revocation.

(b) The court may summarily order the Secretary of State to reinstate the registration, may order a trial de novo, or may take any other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings.

Comment

This Section covers the same subject matter as prior Section 10-3A-221.

Comment to former Section 10-2B-15.32

1. *Section 10-2B-15.32 of this Act is derived from RMBCA Section 15.32, with changes. In Section 10-2B-15.32(a), the circuit court of Montgomery County is designated as the court from which appeal of the secretary of state's revocation may be taken. In Section 10-2B-15.32(b) the language "may order a trial de novo" has been added to indicate one option available to the circuit court. A similar change is made in Section 10-2B-1.26 and in Section 10-2B-14.32(c). Under the former Alabama Act, a trial de novo was required, and it was thought important to retain this as an option available to the circuit court.*

2. *The corresponding provision of the former Alabama Act was Section 10-2A-331(b). As noted above, one change is that a trial de novo is not required under this Act, as it was under the present Act, and the former Act did not authorize the court to act summarily.*

Division C

Consequences of Transacting Business without Registering

§ 10A-1-7.22. Transaction of business without registration; actions to restrain.

(a) The failure of a foreign filing entity to register to transact business in this state or to appoint and maintain a registered agent in this state shall not impair the validity of any contract or act of the foreign entity and shall not prevent the foreign entity from defending any action or proceeding in any court of this state, but the foreign entity shall not maintain any action or proceeding in any court of this state until it has delivered to the Secretary of State for filing an application for registration or a statement of foreign limited liability partnership, as applicable, in accordance with Section 10A-1-7.04. A foreign filing entity, by transacting business in this state without filing an application for registration or a statement of foreign limited liability partnership, as applicable, appoints the Secretary of State as its agent for service of process with respect to causes of action arising out of the transaction of business or activities in this state. The liability of the owners, members, and managerial officials of a foreign filing entity is governed by the laws of the jurisdiction under whose laws it was formed or under which it is governed, and any limitations

on that liability are not waived solely by reason of having transacted business in this state without filing an application for registration or a statement of foreign limited liability partnership, as applicable.

(b) The Attorney General may bring an action to restrain a foreign entity from transacting business in this state in violation of this title.

Comment

This Section covers the same subject matter as prior Sections 10-9B-908.

Comment to former Section 10-12-53

This Section is similar to § 10-9A-167 of the Alabama Limited Partnership Act of 1983, Uniform Act § 1009, and ABA Prototype Act § 1009.

§ 10A-1-7.23. Late filing fee.

The Secretary of State may collect from a foreign filing entity a late filing fee equal to the application for registration fee or the statement of foreign limited liability partnership fee, as applicable, for the foreign filing entity for each year of delinquency if the foreign filing entity has transacted business in this state for more than 90 days. The Secretary of State may condition the effectiveness of a registration on the payment of the late filing fee.

§ 10A-1-7.24. Requirements of other law.

This article does not excuse a foreign filing entity from complying with duties imposed under other law, including other chapters of this title, relating to filing or registering requirements.

Division D Business, Rights, and Obligations

§ 10A-1-7.31. Business of foreign entity.

A foreign entity may not conduct in this state a business-~~or~~ activity, not for profit activity, or any other activity, whether or not for profit, that is not permitted by this title to be transacted by

the domestic entity to which it most closely corresponds, unless other law of this state authorizes the entity to conduct the business-~~or~~, activity, not for profit activity, or any other activity, whether or not for profit.

Comment

This Section covers the same subject matter as prior Section 10-9B-901.

§ 10A-1-7.32. Rights and privileges.

A foreign entity with a registration under this article enjoys the same but no greater rights and privileges as the domestic entity to which it most closely corresponds.

Comment

This Section covers the same subject matter as prior Section 10-3A-171.

§ 10A-1-7.33. Reserved.

§ 10A-1-7.34. Right of foreign entity to participate in the business of certain domestic entities.

A vote cast or consent provided by a foreign entity with respect to its ownership or membership interest in a domestic entity of which the foreign entity is a lawful owner or member, and the foreign entity's participation in the management and control of the business and affairs of the domestic entity to the extent of the participation of other owners or members, are not invalidated if the foreign entity does not register to transact business in this state, subject to all law governing a domestic entity, including the antitrust law of this state.

§ 10A-1-7.35. Out of state business or property of foreign entity not subject to control or regulation.

(a) The public interest lying in the promotion of business and industry in this state, it is the intent of the Legislature and declared to be the policy of the State of Alabama by passage of this section to promote and encourage industry and business in Alabama and specifically to

induce the location within this state of the principal administrative office, principal distribution or manufacturing plant or principal place of business of foreign entities engaged in manufacturing, industrial, commercial, business, transportation, utility, public service, and research enterprises. This section shall be liberally construed in conformity with this intention.

(b) When a foreign entity that transacts only a portion of its business in this state has located, or is in the process of locating, its principal administrative office, its principal distribution or manufacturing plant or its principal place of business in this state, the authority, jurisdiction or power conferred by any law of this state on any agency, commission, department, or instrumentality of the state to control or regulate the foreign entity, its business, property, securities, or obligations shall not be deemed to apply to, and shall not be exercised with respect to, that portion of its business transacted or its property located without the state nor to the securities or obligations of the foreign entity; provided that nothing contained in this section shall be construed to repeal, alter, or modify any of the provisions of Title 8 relating to securities.

Comment to former Section 10-2B-15.11

This provision carries forward Section 10-2A-225 of the former Alabama Act. There is no corresponding provision of the RMBCA.

§ 10A-1-7.36. Right of eminent domain.

Foreign entities that have complied with the constitution and laws of this state as to transacting business in this state shall have the same right of eminent domain and the same remedies for enforcing the rights as domestic entities of like kind and character possess.

Comment to former Section 10-2B-15.12

Section 10-2B-15.12 of this Act carries forward Section 10-2A-228 of the former Alabama Act. There is no corresponding provision in the RMBCA.

§ 10A-1-7.37. Extension of lines, tracks, ways, or works into state.

Any foreign entity which has complied with the constitution and laws of this state for transacting business in this state and which is engaged in constructing or operating a streetcar, electric light, telegraph, telephone or power lines, pipelines, or works in an adjoining state may extend its lines, tracks, ways, pipelines, or works into this state and connect with other lines, pipelines, ways or works of similar or like character and, for that purpose, may have and exercise the same rights, privileges, immunities and remedies as to right of eminent domain and condemnation proceedings as are had and exercised by domestic entities engaged in like or similar business.

Comment to former Section 10-2B-15.13

Section 10-2B-15.13 of this Act carries forward Section 10-2A-229 of the former Alabama Act. There is not a corresponding provision in the RMBCA.

***Division E
Miscellaneous Provisions***

§ 10A-1-7.41. Applicability of this title to certain foreign entities.

(a) Except as otherwise provided by a statute described by this subsection, the provisions of this title governing a foreign entity apply to a foreign entity registered or granted authority to transact business in this state under:

- (1) a special statute that does not contain a provision regarding a matter provided for by this title with respect to a foreign entity; or
- (2) another statute that specifically provides that the general law for the granting of a registration or certificate of authority to the foreign entity to transact business in this state supplements the special statute.

(b) Except as otherwise provided by a special statute described by subsection (a), a

document required to be filed with the Secretary of State under the special statute must be signed and filed in accordance with Article 4.

Comment

This Section supplements special entity statutes insofar as they do not contain a complete procedure for foreign entities.

Article 8

Conversion and Mergers

§ 10A-1-8.01. Conversion of business and non-profit entities.

§ 10A-1-8.02. Mergers of entities.

§ 10A-1-8.03. Nonexclusive application of article.

§ 10A-1-8.04. Merger with or conversion from a foreign entity.

§ 10A-1-8.01. Conversion of entities.

(a) A conversion of an entity may be accomplished as provided in this section:

(1) Corporations.

- a. The terms and conditions of a conversion of a corporation other than a nonprofit corporation must be approved by all of the corporation's shareholders or as otherwise provided in the corporation's governing documents; but in no case may the vote required for shareholder approval be set at less than a majority of the votes entitled to be cast by each voting group entitled by law to vote separately on the conversion. If the governing documents provide for approval of a conversion by less than all of a corporation's shareholders, approval of the conversion shall constitute corporate action subject to dissenter's rights pursuant to Article 13 of Chapter 2 of the Alabama Business Corporation Law. No conversion of a corporation to a general or limited partnership may be effected without the consent in writing of each shareholder who will have personal liability with respect to the converted entity, notwithstanding any provision in the governing documents of the

converting corporation providing for less than unanimous shareholder approval for the conversion.

b. The terms and conditions of a conversion of a nonprofit corporation must be approved by all the corporation's members entitled to vote thereon, if it is a nonprofit corporation with members with voting rights, or as otherwise provided in the corporation's governing documents; but in no case may the governing documents provide for approval by less than a majority of the members entitled to vote thereon. If the converting nonprofit corporation has no members, or no members entitled to vote thereon, the terms and conditions of the conversion must be approved by a unanimous vote of the board of directors of the converting nonprofit corporation, or as otherwise provided in the governing documents; but in no case may the governing documents provide for approval by less than a majority of the board of directors.

(2) Limited partnerships. The terms and conditions of a conversion of a limited partnership must be approved by all of the partners or as otherwise provided in the partnership agreement. No conversion of a limited partnership to a general partnership may be effected without the consent in writing of each limited partner who will have personal liability with respect to the converted entity, notwithstanding any provision in the limited partnership agreement of the converting limited partnership providing for approval of the conversion by less than all partners.

- (3) Limited liability companies. The terms and conditions of a conversion of a limited liability company must be approved by all of the limited liability company's members or as otherwise provided in the limited liability company's governing documents. No conversion of a limited liability company to a general or limited partnership may be effected without the consent in writing of each member who will have personal liability with respect to the converted entity, notwithstanding any provision in the governing documents of the converting limited liability company providing for less than unanimous member approval for the conversion.
- (4) General partnerships, including limited liability partnerships. The terms and conditions of a conversion of a general partnership must be approved by all of the partners or as otherwise provided in the partnership agreement. No conversion of a limited liability partnership to a general or limited partnership may be effected without the consent in writing of each partner who will have personal liability with respect to the converted entity, notwithstanding any provision in the partnership agreement of the converting limited liability partnership providing for less than unanimous partner approval for the conversion.
- (5) Real estate investment trust. The terms and conditions of a conversion of a real estate investment trust must be approved by all of the trust's shareholders or as otherwise provided in the trust's declaration of trust; but in no case may the vote required for shareholder approval be set at less than a majority of all the votes entitled to be cast. No conversion of a real estate

investment trust to a general or limited partnership may be effected without the consent in writing of each shareholder who will have personal liability with respect to the converted entity, notwithstanding any provision in the declaration of trust of the converting real estate investment trust providing for less than unanimous shareholder approval for the conversion.

- (6) Other entity. The terms and conditions of a conversion of any entity not specified above must be approved by all owners of the converting entity. No conversion of any entity shall be effected without the consent in writing of any owner of the converting entity who has limited liability and who shall become an owner without limited liability protection of the converted entity.
- (7) Entity without owners. If the converting entity does not have owners, the terms and conditions of the conversion must be unanimously approved by the governing authority of the converting entity.

(b) After the conversion is approved pursuant to subsection (a), the following documentation and filing requirements apply:

- (1) If the conversion is to a corporation, limited liability company, limited partnership, real estate investment trust, or other entity required to file a certificate of formation, the statement of conversion, when filed in accordance with Section 10A-1-4.02(c)(1), shall be deemed to:
 - a. constitute a certificate of formation or amended and restated certificate of formation, as the case may be, for the converted entity;
 - and

- b. shall satisfy the requirements of Section 10A-1-4.02(a).
- (2) In addition to any information or statements otherwise required by law to be included in a certificate of formation for a filing entity, a statement of conversion shall include the following:
- a. The name and type of entity of the converted entity and the jurisdiction of its governing statute and its unique identifying number or other designation as assigned by the Secretary of State, if any.
 - b. The former name of the converting entity.
 - c. A statement that the converting entity has been converted into the converted entity.
 - d. The public office where the certificate of formation, if any, of the converting entity is filed and the date of the filing thereof.
 - e. If the converted entity is one in which one or more owners lack limited liability protection, a statement that each owner of the converting entity who is to become an owner without limited liability protection of the converted entity has consented in writing to the conversion as required by this section.
 - f. A statement that the conversion was approved pursuant to this section and, if either the converting entity or the converted entity is a foreign entity, that the conversion was approved as required by the governing statute of such foreign entity.
- (3) After the conversion has become effective in accordance with subsection

(c), then, as provided in Section 10A-1-4.02(c)(4), all filing instruments with respect to the converted entity that would otherwise be required by this title to be delivered to the judge of probate for filing shall instead be delivered to the Secretary of State for filing.

(c) A conversion takes effect as follows:

(1) Upon the filing of the statement of conversion in accordance with Section 10A-1-4.02(c)(1), except as otherwise provided in subdivision (2).

(2) Upon any delayed effective date if, but only if, each of the following requirements is satisfied:

a. A delayed effective date is specified in the statement of conversion;
and

b. If either the converted entity or the converting entity is a foreign entity, then any filing required under the governing statute of such foreign entity to effectuate the conversion is filed before the effective date specified in the statement of conversion.

(3) If a delayed effective date is specified, and the conditions of subdivision (2) are met, the conversion is effective at the close of business, unless a different hour is specified, on that date.

(d) Conversion has the following effects:

(1) a. Any entity that has been converted pursuant to this article is for all purposes the same entity that existed before the conversion and the conversion shall constitute a continuation of the existence of the converting entity in the form of the converted entity. The

conversion shall not be deemed to constitute a dissolution or termination of the converting entity.

- b. If the Secretary of State has assigned a unique identifying number or other designation to the converting entity, that number or designation shall continue to be assigned to the converted entity.
- (2)
- a. All property, real, personal, and mixed owned by the converting entity; all rights, immunities, and franchises of the converting entity, of a public as well as a private nature; and all debts or obligations due the converting entity, shall remain owned and held by, vested in, and due to, the converted entity, shall not be deemed to have been transferred to the converted entity as a consequence of the conversion, and shall not revert or be in any way impaired by reason of the conversion.
 - b. A certified copy of the statement of conversion may be filed in the office of the judge of probate in any county in which the converting entity owned real property, to be recorded without payment and without collection by the judge of probate of any deed or other transfer tax or fee. The judge of probate shall, however, be entitled to collect the filing fees prescribed by Section 12-19-90. Any filing shall evidence chain of title, but lack of filing shall not affect the converted entity's title to the real property.
- (3) All debts, obligations, and other liabilities of the converting entity shall continue as the debts, obligations, and liabilities of the converted entity and

the converted entity shall continue to be responsible and liable for all the liabilities and obligations of the converting entity. Neither the rights of creditors, nor any liens upon the property of the converting entity, shall be impaired by the conversion, and an owner of the converted entity shall continue to be liable for all obligations of the converting entity for which the owner was personally liable before the conversion.

- (4) Any claim existing or any action or proceeding of any kind pending by or against the converting entity shall be prosecuted or continued as if the conversion had not occurred.
- (5)
 - a. An owner with limited liability protection remains liable, if at all, for an obligation incurred by the converting entity before the conversion takes effect only to the extent, if any, the owner would have been liable if the conversion had not occurred.
 - b. An owner with limited liability protection who becomes an owner without limited liability protection is liable for an obligation of the converted entity incurred after conversion to the extent provided for by the laws applicable to the converted entity.
- (6) An owner without limited liability protection who as a result of a conversion becomes an owner of a converted entity with limited liability protection remains liable for an obligation incurred by the converting entity before the conversion takes effect only to the extent, if any, the owner would have been liable if the conversion had not occurred.

§ 10A-1-8.02. Mergers of entities.

(a) Pursuant to an approved plan of merger, a corporation, limited partnership, limited liability company, general partnership, real estate investment trust, or any other entity may merge with any other entity or entities, whether the other entity or entities are the same or another form of entity, as provided in this section.

(b) A plan of merger shall include the following:

- (1) The name of each entity that is a party to the merger.
- (2) The name of the surviving entity into which the other entity or entities will merge.
- (3) The form of the surviving entity and the status in the surviving entity of each owner of an entity that is a party to the merger.
- (4) The terms and conditions of the merger.
- (5) The manner and basis of converting the interests of each party to the merger into interests or obligations of the surviving entity, or into money or other property in whole or part.

(c) A plan of merger may set forth:

- (1) Amendments to the certificate of formation of the surviving entity; and
- (2) Other provisions relating to the merger.

(d) A plan of merger shall be approved as follows:

(1) *Corporations.*

- a. In the case of a corporation, other than a nonprofit corporation, that is a party to a merger, the plan of merger must be approved in accordance with the procedures and by the shareholder vote

required by Section 10A-2-11.03 or Section 10A-2-11.04. If the governing documents of the corporation provide for approval of a merger by less than all of the corporation's shareholders, approval of the merger shall constitute corporate action subject to dissenter's rights pursuant to Article 13 of Chapter 2. No merger of a corporation into a general or limited partnership may be effected without the consent in writing of each shareholder who will have personal liability with respect to the resulting or surviving entity, notwithstanding any provision in the governing documents of the corporation that is a party to the merger providing for less than unanimous shareholder approval for the conversion.

- b. In the case of a nonprofit corporation, the plan of merger must be approved by all the corporation's members entitled to vote thereon, if it is a nonprofit corporation with members with voting rights, or as otherwise provided in the corporation's governing documents; but in no case may the governing documents provide for approval by less than a majority of the members entitled to vote thereon. If the nonprofit corporation has no members, or no members entitled to vote thereon, the plan of merger must be approved by a unanimous vote of the board of directors of the nonprofit corporation, except as otherwise provided in the governing documents; but in no case may the governing documents provide for approval by less than a majority of the board of directors.

- (2) *Limited partnerships.* In the case of a limited partnership that is a party to the merger, the plan of merger must be approved in writing by all of the partners or as otherwise provided in the partnership agreement. No merger of a limited partnership with a general partnership in which the general partnership is the surviving or resulting entity may be effected without the consent in writing of each limited partner who will have personal liability with respect to the surviving or resulting entity, notwithstanding any provision in the limited partnership agreement of the merging limited partnership providing for approval of the merger by less than all partners.
- (3) *Limited liability companies.* In the case of a limited liability company that is a party to the merger, the plan of merger must be approved in writing by all of the limited liability company's members or as otherwise provided in the limited liability company's governing documents. No merger of a limited liability company with a general or limited partnership that is the surviving or resulting entity may be effected without the consent in writing of each member who will have personal liability with respect to the surviving or resulting entity, notwithstanding any provision in the governing documents of the merging limited liability company providing for less than unanimous shareholder approval for a merger.
- (4) *General partnerships, including limited liability partnerships.* In the case of a general partnership that is a party to the merger, the plan of merger must be approved in writing by all of the partners or as otherwise provided in the partnership agreement. No merger of a limited liability partnership

into a general or limited partnership may be effected without the consent in writing of each partner who will have personal liability with respect to the surviving or resulting entity, notwithstanding any provision in the partnership agreement of the limited liability partnership providing for less than unanimous partner approval for a merger.

(5) *Real estate investment trust.* In the case of a real estate investment trust that is a party to the merger, the plan of merger must be approved in writing by all of the trust's shareholders or as otherwise provided in the trust's declaration of trust, but in no case may the vote required for shareholder approval be set at less than a majority of all the votes entitled to be cast. No merger of a real estate investment trust with a general or limited partnership that is to be the surviving or resulting entity may be effected without the consent in writing of each shareholder who will have personal liability with respect to the surviving or resulting business entity.

(6) *Other entity.* In the case of an entity other than a corporation, limited partnership, limited liability company, general partnership, or real estate investment trust that is a party to the merger, by approval in writing of all owners of the entity. No merger of any the entity shall be effected without the consent in writing of any owner who has limited liability as an owner of an entity party to the merger, and who will have personal liability with respect to the surviving or resulting entity.

(e) After a plan of merger is approved and before the merger takes effect, the plan may be amended or abandoned as provided in the plan, or if the plan does not provide for amendment

or abandonment, in the same manner as required for the approval of the plan of merger originally.

- (f) The merger takes effect as follows:
 - (1) Upon the filing of the statement of merger in accordance with Section 10A-1-4.02(c)(1), except as otherwise provided in subdivision (2).
 - (2) Upon any delayed effective date if, but only if, each of the following requirements is satisfied:
 - a. A delayed effective date is specified in the statement of merger; and
 - b. If either the converted entity or the merging entity is a foreign entity, then any filing required under the governing statute of such foreign entity to effectuate the merger is filed before the effective date specified in the statement of merger.
 - (3) If a delayed effective date is specified and the conditions of subdivision (2) are met, the merger is effective at the close of business, unless a different hour is specified, on that date in accordance with and subject to Section 10A-1-4.12.
- (g) The certificate of merger shall include the following:
 - (1) The names of each of the entities which are to merge and their respective unique identifying numbers or other designations as assigned by the Secretary of State, if any.
 - (2) The public office where the certificate of formation, if any, of each of the parties to the merger is filed.
 - (3) A statement that a plan of merger has been approved by each of the entities which are to merge in the manner set forth in this article.

- (4) If the surviving or resulting entity is one in which one or more owners lack limited liability protection, a statement that each owner of an entity party to the merger who is to be an owner of the surviving or resulting entity without limited liability protection has consented in writing to the merger as required by this article.
- (5) The name of the surviving or resulting entity.
- (6) The date, or date and time, on which the merger becomes effective if it is not to be effective upon the filing of the certificate of merger.
- (7) That the plan of merger is on file at a place of business of the surviving or resulting entity, and shall state the address thereof.
- (8) That a copy of the plan of merger will be furnished by the surviving or resulting entity, on request and without cost, to any owner of any entity which is a party to the merger.
- (9) If the plan of merger includes any amendments to the certificate of formation of the surviving or resulting entity, a statement of all such amendments.

(h) The certificate of merger shall be filed with the Secretary of State in accordance with Section 10A-1-4.02.

(i) The merger shall have the following effects:

- (1) Every other entity party to the merger merges into the surviving entity which shall be deemed to be the resulting entity of the merger and the separate existence of every entity, other than the surviving or resulting entity, ceases.

- (2) All property, real, personal, and mixed owned by each of the merged entities; all rights, immunities, and franchises of the merged entities, of a public as well as a private nature; and all debts and obligations due the merged entities, are taken and deemed to be transferred and vested in the surviving or resulting entity without the necessity of any deed or other instrument of conveyance to the surviving or resulting entity and without payment and without collection by any filing officer of any deed or other transfer tax or fee. A certified copy of the certificate of merger may be filed in the real estate records in the office of the judge of probate in any county in which any entity a party to the merger owned real property, to be recorded without payment and without collection by the judge of probate of any deed or other transfer tax or fee. The judge of probate shall, however, be entitled to collect the filing fees prescribed by Section 12-19-90. Any filing shall evidence chain of title, but lack of filing does not affect the resulting entity's title to any real property.
- (3) The surviving or resulting entity shall be responsible and liable for all the liabilities and obligations of the entities that are parties to the merger; however, neither the rights of creditors nor any liens upon the property of the entities that are parties to the merger shall be impaired by the merger.
- (4) Any claim existing or action or proceeding, of any kind, pending by or against an entity that is a party to the merger may be prosecuted or continued as if the merger had not occurred, or the surviving or resulting entity may be substituted as a party to the action or proceeding.

- (5) Service of process in an action or proceeding against a surviving or resulting foreign entity to enforce an obligation of a domestic entity that is a party to a merger may be made by registered mail addressed to the surviving entity at the address set forth in the certificate of merger or by any method provided by the Alabama Rules of Civil Procedure. Any notice or demand required or permitted by law to be served on a domestic entity may be served on the surviving or resulting foreign entity by registered mail addressed to the surviving entity at the address set forth in the certificate of merger or in any other manner similar to the procedure provided by the Alabama Rules of Civil Procedure for the service of process.
- (6) a. An owner of an entity with limited liability protection remains liable, if at all, for an obligation incurred prior to the merger by an entity that ceases to exist as a result of the merger only to the extent, if any, that the owner would have been liable under the laws applicable to owners of the form of entity that ceased to exist if the merger had not occurred.
- b. An owner with limited liability protection who, as a result of the merger, becomes an owner without limited liability protection of the surviving or resulting entity is liable for an obligation of the surviving or resulting entity incurred after merger to the extent provided for by the laws applicable to the surviving or resulting entity.

- (7) An owner without limited liability protection of an entity that ceases to exist as a result of a merger and who as a result of the merger becomes an owner of a surviving or resulting entity with limited liability protection remains liable for an obligation of the entity that ceases to exist incurred before the merger takes effect only to the extent, if any, that the owner would have been liable if the merger had not occurred.

§ 10A-1-8.03. Nonexclusive application of article.

This article is not exclusive. This article does not preclude an entity from being converted or merged under law other than this chapter.

Comment

This Section is substantially similar to Section 10A-9A-10.11 to the Alabama Limited Partnership Law and Section 10A-5A-10.10 to the Alabama Limited Liability Company Law. This Section clarifies that an entity utilizing this Article may do so without using the merger or conversion provisions of another Chapter or may elect to use the merger or conversion provisions of another Chapter without using the provisions of this Article.

§ 10A-1-8.04. Merger with or conversion from a foreign entity.

(a) One or more foreign entities may merge with one or more domestic entities, and a foreign entity may convert to a domestic entity or a domestic entity may convert to a foreign entity if:

- (1) The merger or conversion is permitted by the law of the state or country under whose law each foreign entity is formed and each foreign entity complies with that law in effecting the merger or conversion.
- (2) In the case of a conversion, the foreign entity complies with subsection (b)

of Section 10A-1-8.01.

- (3) In the case of a merger, the foreign entity complies with subsection (g) of Section 10A-1-8.02 if it is the surviving entity of the merger.

(b) Upon the merger or conversion taking effect, the surviving foreign entity of a merger and the foreign entity resulting from a conversion is deemed:

- (1) To consent that service of process in a proceeding to enforce any obligation or any dissenter's rights of owners of each domestic entity a party to the merger or conversion may be made by registered mail addressed to the surviving or converted entity at the address set forth in the certificate of merger or statement of conversion, as the case may be, or by any method provided by the Alabama Rules of Civil Procedure. Any notice or demand required or permitted by law to be served on the domestic entity may be served on the surviving or converted foreign entity by registered mail addressed to the surviving or converted entity at the address set forth in the plan of merger or statement of conversion, as the case may be, or in any other manner similar to the procedure provided by the Alabama Rules of Civil Procedure for the service of process; and
- (2) To agree that it will promptly pay to dissenting owners of each domestic entity that is a party to the merger or conversion the amount, if any, to which they are entitled under Alabama law.

Article 9

Winding up and Termination of Domestic Entity

Division A General Provisions

- § 10A-1-9.01. Applicability to entities.
- § 10A-1-9.02. Definitions.

Division B Winding up of Domestic Entity

- § 10A-1-9.11. Event requiring winding up of domestic entity.
- § 10A-1-9.12. Winding up procedures.

Division C Provision for Known and Unknown Claims

- § 10A-1-9.21. Known claims against dissolved domestic entity.
- § 10A-1-9.22. Unknown claims against dissolved domestic entity.

Division D Revocation and Reinstatement

- § 10A-1-9.31. Revocation of voluntary winding up.
- § 10A-1-9.32. Reinstatement.

Division A General Provisions

§ 10A-1-9.01. Applicability to Entities.

This article does not apply to limited liability companies, general partnerships, and limited partnerships.

§ 10A-1-9.02. Definitions.

In this article, the following terms have the following meanings:

- (1) Claim. A right to payment, damages, or property, whether liquidated or unliquidated, accrued or contingent, matured or unmatured.

- (2) Winding Up. The process of winding up the business and affairs of a domestic entity as a result of the occurrence of an event requiring winding up.

Comment

Subsection (1) was derived from prior Section 10-2B-14.06 (d) of the Alabama Business Corporation Act. Subsection (2) is implicit in such provisions as prior Section 10-9B-403 of the Alabama Limited Partnership Act and prior Section 10-12-9 of the Alabama Limited Liability Company Act.

Division B
Winding up of Domestic Entity

§ 10A-1-9.11. Event requiring winding up of domestic entity.

The dissolution of a domestic entity shall be as specified in the chapter of this title applicable to the entity.

Comment

This Section is a cross-reference to the appropriate entity-specific chapter. Because of the substantial differences among entities as to causes of dissolution, that subject is left to the entity specific provisions.

§ 10A-1-9.12. Winding up procedures.

(a) As soon as reasonably practicable after a domestic entity is dissolved, the domestic entity shall:

- (1) cease to carry on its business, except to the extent necessary to wind up its business;
- (2) collect and sell its property to the extent the property is not to be distributed in kind to the domestic entity's owners or members; and
- (3) perform any other act required to wind up its business and affairs.

(b) During the winding up process, the domestic entity may prosecute or defend a civil, criminal, or administrative action and perform any other act appropriate to wind up its business and affairs, including sending notice of the winding up to known claimants or publishing

notice of the winding up to unknown claimants.

Comment

This Section covers the same subject matter as prior Sections 10-2B-14.05 of the Alabama Business Corporation Act, 10-8A-803 of the Alabama Uniform Partnership Act, 10-9B-803 of the Alabama Limited Partnership Act, and 10-12-40 of the Alabama Limited Liability Company Act.

Division C ***Provision for Known and Unknown Claims***

§ 10A-1-9.21. Known claims against dissolved domestic entity.

(a) A dissolved domestic entity may dispose of the known claims against it by following the procedure described in subsection (b) at any time after the effective date of the dissolution of that dissolved domestic entity.

(b) A dissolved domestic entity may give notice of the dissolution in a writing to the holder of any known claim. The notice must:

- (1) identify the dissolved domestic entity;
- (2) describe the information required to be included in a claim;
- (3) provide a mailing address to which the claim is to be sent;
- (4) state the deadline, which may not be fewer than 120 days from the effective date of the notice, by which the dissolved domestic entity must receive the claim; and
- (5) state that if not sooner barred, the claim will be barred if not received by the deadline.

(c) Unless sooner barred by any other statute limiting actions, a claim against a dissolved domestic entity is barred:

- (1) if a claimant who was given notice under subsection (b) does not deliver the claim to the dissolved domestic entity by the deadline; or
- (2) if a claimant whose claim was rejected by the dissolved domestic entity does not commence a proceeding to enforce the claim within 90 days from the effective date of the rejection notice.

(d) For purposes of this section, “known claim” or “claim” includes unliquidated claims but does not include a contingent liability that has not matured so that there is no immediate right to bring suit or a claim based on an event occurring after the effective date of dissolution.

(e) Nothing in this section shall be deemed to extend any otherwise applicable statute of limitations.

Comment

This Section was derived from prior Section 10-2B-14.06 of the Alabama Business Corporation Act. This Section also covers the same subject matter as prior Section 10-12-43 of the Alabama Limited Liability Company Act. Notice that the procedures of this Section do not apply to general or limited partnerships.

Comment to former Section 10-2B-14.06

1. *Section 10-2B-14.06 is derived, with changes, from RMBCA Section 14.06. The changes consist of the addition of language in Section 10-2B-14.06(d) making it clear that a “known claim” includes one that is unliquidated, as well as language in the same Subsection indicating what is meant by a contingent liability, that is not within the concept of a “known claim.” These changes are an attempt to tighten the definition of “known claim,” the key concept in distinguishing between Section 10-2B-14.06 treatment and Section 10-2B-14.07 treatment. The language used is drawn from the Official Comment.*

2. *The former Alabama Act did not include a provision that corresponds directly with Section 10-2B-14.06. Under the former Alabama Act, the articles of dissolution, which under the former two-step procedure was filed at the end of the winding up process as the last act in the dissolution sequence, had to state that all known debts, obligations, and liabilities had been paid or provided for. Section 10-2A-190(3). However, the former Act did not have a provision for notice to holders of known claims or for barring their claims if not pursued within a specified*

time frame. Thus the Section is a new one.

It should be noted that while the notice to known creditors is stated in mandatory terms and thus appears to be burden on the corporation, it really is an advantage to the dissolving corporation in that it starts a short claims-barring period running as to the claim.

§ 10A-1-9.22. Unknown claims against dissolved domestic entity.

(a) A dissolved domestic entity may publish notice of its dissolution and request that persons with claims against the dissolved domestic entity present them in accordance with the notice.

(b) The notice authorized by subsection (a) must:

- (1) be published at least one time in a newspaper of general circulation in the county in which the dissolved domestic entity's principal office is located, or, if it has none in this state, in the county in which the dissolved domestic entity's registered office is or was last located;
- (2) describe the information that must be included in a claim and provide a mailing address to which the claim is to sent; and
- (3) state that if not sooner barred, a claim against the dissolved domestic entity will be barred unless a proceeding to enforce the claim is commenced within two years after the publication of the notice.

(c) If a dissolved domestic entity publishes a newspaper notice in accordance with subsection (b), unless sooner barred by any other statute limiting actions, the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved domestic entity within two years after the publication date of the newspaper notice:

- (1) a claimant who was not given notice under Section 10A-1-9.21;
 - (2) a claimant whose claim was timely sent to the dissolved domestic entity but not acted on by the dissolved domestic entity; and
 - (3) a claimant whose claim is contingent at the effective date of the dissolution of the dissolved domestic entity, or is based on an event occurring after the effective date of the dissolution of the dissolved domestic entity.
- (d) A claim that is not barred under this section, any other statute ~~limited~~limiting actions, or Section 10A-1-9.21 may be enforced:
- (1) against a dissolved domestic entity, to the extent of its undistributed assets; and
 - (2) except as provided in subsection (h), if the assets of a dissolved domestic entity have been distributed after dissolution, against the person or persons owning ownership interests in the dissolved domestic entity to the extent of that person's proportionate share of the claim or of the assets of the dissolved domestic entity distributed to that person after dissolution, whichever is less, but a person's total liability for all claims under subsection (d) may not exceed the total amount of assets distributed to that person after dissolution of the dissolved domestic entity.
- (e) A dissolved domestic entity that published a notice under this section may file an application with the circuit court in the county in which the dissolved domestic entity's principal place of business is located and if the dissolved domestic entity does not have a principal place of business within this state, in the county in which

the dissolved domestic entity's most recent registered office is located, for a determination of the amount and form of security to be provided for payment of claims that are contingent or have not been made known to the dissolved domestic entity or that are based on an event occurring after the effective date of the dissolution of the dissolved domestic entity but that, based on the facts known to the dissolved domestic entity, are reasonably estimated to arise after the effective date of the dissolution of the dissolved domestic entity. Provision need not be made for any claim that is or is reasonably anticipated to be barred under subsection (c).

- (f) Within ten days after the filing of the application provided for in subsection (e), notice of the proceeding shall be given by the dissolved domestic entity to each potential claimant as described in subsection (e).
- (g) The circuit court under subsection (e) may appoint a guardian ad litem to represent all claimants whose identities are unknown in any proceeding brought under this section. The reasonable fees and expenses of the guardian, including all reasonable expert witness fees, shall be paid by the dissolved domestic entity.
- (h) Provision by the dissolved domestic entity for security in the amount and the form ordered by the circuit court under subsection (e) shall satisfy the dissolved domestic entity's obligation with respect to claims that are contingent, have not been made known to the dissolved domestic entity, or are based on an event occurring after the effective date of the dissolution of the dissolved domestic entity, and those claims may not be enforced against a person owning a

~~transferable~~ ownership interest to whom assets have been distributed by the dissolved domestic entity after the effective date of the dissolution of the dissolved domestic entity.

- (i) Nothing in this section shall be deemed to extend any otherwise applicable statute of limitations.
- (j) If a claim has been satisfied, disposed of, or barred under Section 10A-1-9.21, this section, or other law, the person or persons designated to wind up the affairs of a dissolved domestic entity, and the owners of the ownership interests receiving assets from the dissolved domestic entity, shall not be liable for that claim.

Comment

This Section was derived from Section 10-2B-14.06 of the Alabama Business Corporation Act.

Comment to former Section 10-2B-14.07

1. *Section 10-2B-14.07 of this Act is derived, with changes, from RMBCA Section 14.07. The provision of the former Alabama Act most nearly corresponding to Section 10-2B-14.07 is Section 10-2A-203, providing for the survival or remedies against a dissolved corporation for a period of two years. Section 10-2B-14.07 of this Act continues the two year time limitation of prior law. Section 10-2B-14.07 is new in requiring published notice to unknown claimants.*

2. *Section 10-2B-14.07 of this Act makes several changes from RMBCA Section 14.07. The most important of these is the reduction of the time period following publication of notice in which holders of unknown claims must bring suit. In the RMBCA this is five years; consistent with the prior Alabama provision as to survival or remedies, the time period in this Act is fixed at two years. Subsection (e) has been added to make it clear that the two year period does not extend any otherwise applicable statute of limitations. Finally the language “in liquidation” has been added at the end of Section 10-2B-14.07(d)(2) to make it clear that pre-liquidation amounts received by a shareholder do not increase his potential liability under that provision.*

Division D Revocation and Reinstatement

§ 10A-1-9.31. Revocation of voluntary winding up.

(a) A domestic entity may revoke a voluntary decision to dissolve the entity by approval of the revocation in the manner and within the time specified in the chapter of this title governing the entity. If the chapter of this title does not specify a time within which a revocation must be made, revocation of a voluntary decision to dissolve must be made before winding up of the entity is complete.

(b) A domestic entity may continue its business following the revocation of a voluntary decision to wind up under subsection (a).

Comment

This Section covers the same subject matter as prior Alabama Business Corporation Act Section 10-2B-14.04, but leaves to the procedure for revocation to the entity specific chapters.

§ 10A-1-9.32. Reinstatement.

In addition to the grounds for reinstating a dissolved entity pursuant to the chapter of this title applicable to the entity, if the chapter of this title applicable to the entity does not provide for reinstatement, the entity may be reinstated if the legal existence of the entity is necessary to:

- (1) convey or assign property;
- (2) settle or release a claim or liability;
- (3) take an action; or
- (4) sign an instrument or agreement.

Comment

This Section is new.

Part 3:

CHAPTER 5A AMENDMENTS

(Alabama Limited Liability Companies Company Law)

Article 1

General provisions

§ 10A-5A-1.01. Short title.

This chapter and the provisions of Chapter 1, to the extent applicable to limited liability companies, shall be known and may be cited as the “Alabama Limited Liability Company Law of 2014.”

Comment

The date was added to the title to clearly differentiate this new limited liability company law from the prior limited liability company law that was codified in Acts 2009, No. 09-513, effective January 1, 2011, as part of the Business and Nonprofit Entities Code. References in the commentary to the prior limited liability company law that was codified in Acts 2009, No. 09-513, effective January 1, 2011, as part of the Business and Nonprofit Entities Code Act, is hereinafter referred to as the “Prior LLC Law.”

Reference in the commentary to “RUPA” refers to the Revised Uniform Partnership Act (1997); reference to “RULPA” refers to the Revised Uniform Limited Partnership Act (1985); reference to “ULPA” refers to the Uniform Limited Partnership Act (2001); reference to “RULLCA” refers to the Revised Uniform Limited Liability Company Act (2006); references to “RPLLCA” refers to the Revised Prototype Limited Liability Company Act (2011); and reference to “RMBCA” refers to the Revised Model Business Corporation Act (2007).

Reference in the commentary to “Colorado, § _____” refers to a Section in the Colorado Limited Liability Company Act (Colo. Rev. Stat. § 7-80-101, et. seq.) or the Colorado Corporations and Associations Act (Colo. Rev. Stat. § 7-90-101, et. seq.); reference in the comment Sections to “Delaware, § _____” refers to a Section in the Delaware Limited Liability Company Act (6 Del. C. § 18-101, et. seq.); reference in the comment Sections to “Texas, § _____” refers to a Section in the Texas Business Organizations Code (Tex. Bus. Orgs. Code § 1.001, et. seq.); and reference in the comment Sections to “Virginia, § _____” refers to a Section in the Virginia Limited Liability Company Act (Code of Virginia, § 13.1-1000, et. seq.).

§ 10A-5A-1.02. Definitions.

Notwithstanding Section 10A-1-1.03, as used in this chapter, unless the context otherwise

requires, the following terms mean:

(a) “Certificate of formation,” with respect to a limited liability company, means the certificate provided for by Section 10A-5A-2.01, and the certificate as amended or restated.

(b) “Constituent limited liability company” means a constituent organization that is a limited liability company.

(c) “Constituent organization” means an organization that is party to a merger under Article 10.

(d) “Converted organization” means the organization into which a converting organization converts pursuant to Article 10.

(e) “Converting limited liability company” means a converting organization that is a limited liability company.

(f) “Converting organization” means an organization that converts into another organization pursuant to Article 10.

(g) “Disqualified person” means any person who is not a qualified person.

(h) “Distribution” except as otherwise provided in Section 10A-5A-4.06(e), means a transfer of money or other property from a limited liability company, or series thereof, to another person on account of a transferable interest.

(i) “Foreign limited liability company” means a limited liability company governed by the laws of a jurisdiction other than this state which would be a limited liability company if governed by the laws of this state.

~~(j)~~(i) “Governing statute” means the statute that governs an organization’s internal affairs.

~~(j)~~(k) “Limited liability company,” except in the phrase “foreign limited liability company,” means an entity formed or existing under this chapter.

~~(k)~~(l) “Limited liability company agreement” means any agreement (whether referred to as a limited liability company agreement, operating agreement or otherwise), written, oral or implied, of the member or members as to the activities and affairs of a limited liability company or series thereof. The limited liability company agreement of a limited liability company having only one member shall not be unenforceable by reason of there being only one person who is a party to the limited liability company agreement. The limited liability company agreement includes any amendments to the limited liability company agreement.

~~(j)~~(m) “Member” means a person admitted under Section 10A-5A-4.01 and not dissociated under Section 10A-5A-6.02.

~~(m)~~(n) “Organization” means a general partnership, including a limited liability partnership; limited partnership, including a limited liability limited partnership; limited liability company; business trust; corporation; nonprofit corporation; professional corporation; or any other person having a governing statute. The term includes domestic and foreign organizations whether or not organized for profit.

~~(n)~~(o) “Organizational documents” means:

(1) for a general partnership or foreign general partnership, its partnership agreement and if applicable, its registration as a limited liability partnership or a foreign limited

liability partnership;

(2) for a limited partnership or foreign limited partnership, its certificate of formation and partnership agreement, or comparable writings as provided in its governing statute;

(3) for a limited liability company or foreign limited liability company, its certificate of formation and limited liability company agreement, or comparable writings as provided in its governing statute;

(4) for a business or statutory trust or foreign business or statutory trust its agreement of trust and declaration of trust, or comparable writings as provided in its governing statute;

(5) for a corporation for profit or foreign corporation for profit, its certificate of formation, bylaws, and other agreements among its shareholders that are authorized by its governing statute, or comparable writings as provided in its governing statute;

(6) for a nonprofit corporation or foreign nonprofit corporation, its certificate of formation, bylaws, and other agreements that are authorized by its governing statute, or comparable writings as provided in its governing statute;

(7) for a professional corporation or foreign professional corporation, its certificate of formation, bylaws, and other agreements among its shareholders that are authorized by its governing statute, or comparable writings as provided in its governing statute; and

(8) for any other organization, the basic writings that create the organization and determine its internal governance and the relations among the persons that own it, have an interest in it, or are members of it.

~~(p)~~(p) “Qualified person,” with respect to a limited liability company rendering professional services in this state, means a person authorized by this state or a regulatory authority of this state to own a transferrable interest in that limited liability company.

~~(q)~~(q) “Surviving organization” means an organization into which one or more other organizations are merged under Article 10, whether the organization pre-existed the merger or was created pursuant to the merger.

~~(r)~~(r) “Transfer” means an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, gift, or transfer by operation of law.

~~(s)~~(s) “Transferee” means a person to which all or part of a transferable interest has been transferred, whether or not the transferor is a member.

~~(t)~~(t) “Transferrable interest” means a member’s right to receive distributions from a limited liability company or a series thereof.

~~(u)~~ “Foreign limited liability company” means a limited liability company governed by the laws of a jurisdiction other than this state which would be a limited liability company if governed by the laws of this state.

Comment

It is important to remember that Chapter 1 of this title contains a number of definitions that are applicable to this Chapter, and that the definitions set forth in this Chapter are intended to override Chapter 1 for purposes of this Chapter and the limited liability company law.

“Certificate of formation” replaces “Articles of organization” in an effort to conform to Chapter 1. (§ 10A-1-1.06 provides that “certificate of formation” includes “articles of organization.”)

“Limited liability company” is defined as domestic only. This definition is intended to override the definition in Chapter 1 (§ 10A-1-1.03(50)), which includes both domestic and foreign limited liability companies.

“Limited liability company agreement” replaces “Operating Agreement” to reflect the general terminology used in the Alabama Partnership Law (Partnership Agreement) and the Limited Partnership Law (Limited Partnership Agreement). The change from “operating agreement” to “limited liability company agreement” also reflects a combination of Colorado and Delaware law. The old definition has been replaced by the definition used in RPLCA § 102(14). Note the change from being a written agreement under current law to “written, oral, or implied” in the new definition.

“Member” definition has been changed and reflects the definition derived from RULLCA § 102(11) and RPLCA § 102(16). This definition is intended to override the definition in Chapter 1 (§ 10A-1-1.03(55)) for purposes of this Chapter and the limited liability company law.

“Transfer” was added to accommodate the use of the word transfer throughout this Chapter, which term is also used in the Alabama Partnership Law §10A-8-1.02(9) and the Alabama Limited Partnership Law §10A-9-1.02(21). Conformity with the other Alabama unincorporated Acts will be useful to the practitioner.

“Transferee” was added to conform to the usage of transferable interest. This definition is derived from RULLCA §102(22).

“Transferable interest” was added to replace the definition of “financial rights” to conform this Chapter to the Alabama Limited Partnership Law (§10A-9-1.02(22)), and the Alabama Partnership Law generally, but the concept that the only interest which may be assigned or transferred by a member is the right to receive distributions from the limited liability company remains intact.

Although the Alabama Limited Partnership Law defines “personal liability”, it was determined that such term was understood by courts and thus did not need defining for this Chapter.

§ 10A-5A-1.06. Rules of construction.

(a) It is the policy of this chapter and this state to give maximum effect to the principles of freedom of contract and to the enforceability of limited liability company agreements.

(b) Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.

(c) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.

(d) The use of any gender shall be applicable to all genders. The captions contained in this chapter are for purposes of convenience only and shall not control or affect the construction of this chapter.

(e) Sections 7-9A-406 and 7-9A-408 of the Uniform Commercial Code, and all successor statutes thereto, do not apply to any interest in a limited liability company, including all rights, powers, and interests arising under a limited liability company agreement or this chapter. This provision prevails over Sections 7-9A-406 and 7-9A-408 of the Uniform Commercial Code, and all successor statutes thereto, and is expressly intended to permit the enforcement of the provisions of a limited liability company agreement that would otherwise be ineffective under Sections 7-9A-406 and 7-9A-408 of the Uniform Commercial Code, and all successor statutes thereto.

(f) Division E of Article 3 of Chapter 1 of this title shall have no application to this chapter.

(g) Sections ~~10A-1-1.03(73), (81), (88), and (91)~~ The terms “President,” “Vice-President,” “Secretary,” and “Treasurer” as defined in Chapter 1 shall have no application to this chapter.

(h) Section 10A-1-2.13(c) shall have no application to this chapter.

COMMENT

Subsections (a) through (e) are derived from RPLCA § 107, but are similar to the Alabama Partnership Law § 10A-8-1.05 and the Alabama Limited Partnership Law § 10A-1-1.07. In addition, Subsection (e) is derived from the Alabama Limited Partnership Law § 10A-1-7.02(h). Subsection (f) was added to clarify that the provisions of Chapter 1 (§§ 10A-1-3.41 through 10A-1-3.45) regarding certificates shall not apply to limited liability companies. If the members of the limited liability company wish to issue certificates, such certificates may be issued in accordance with the limited liability company agreement and Section 5.02(c). In addition, to the extent that the members desire to have Article 8 of the UCC apply, Article 8 has specific requirements regarding such certificates. Subsection (g) was added to prevent the application of

the definitions of “President,” “Vice-President,” “Secretary” and “Treasurer” to limited liability companies. If a limited liability company desires to designate a person’s title as “President,” “Vice-President,” “Secretary,” “Treasurer” or other title, that person will have the powers and authorities granted that person under the limited liability company agreement or as otherwise provided or determined under Section 3.02. Subsection (h) was added to avoid the creation of certain presumptions and certain statutory causes of action regarding guarantees in the limited liability company context. These matters are best left to existing remedies and to the parties to the limited liability company agreement.

Part 4:

CHAPTER 9A AMENDMENTS

(Alabama Limited Partnership Law)

§ 10A-9A-1.07. Supplemental principles of law; rate of interest.

(a) It is the policy of this chapter and this state to give maximum effect to the principles of freedom of contract and to the enforceability of partnership agreements.

(b) Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.

(c) If an obligation to pay interest arises under this chapter and the rate is not specified, the rate is the applicable federal rate as determined from time to time by the United States Treasury pursuant to 26 U.S.C. § 1274(d) or any successor law.

(d) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.

(e) The use of any gender shall be applicable to all genders. The captions contained in this chapter are for purposes of convenience only and shall not control or affect the construction of this chapter.

(f) Sections 7-9A-406 and 7-9A-408 of the Uniform Commercial Code, and all successor statutes thereto, do not apply to any interest in a limited partnership, including all rights, powers, and interests arising under a partnership agreement or this chapter. This provision prevails over Sections 7-9A-406 and 7-9A-408 of the Uniform Commercial Code, and all successor statutes thereto, and is expressly intended to permit the enforcement of the provisions of

a partnership agreement that would otherwise be ineffective under Sections 7-9A-406 and 7-9A-408 of the Uniform Commercial Code, and all successor statutes thereto.

(g) Division E of Article 3 of Chapter 1 shall have no application to this chapter.

(h) Sections 10A-1-1.03(73), (81), (88) and (91) The terms “President,” “Vice-President,” “Secretary,” and “Treasurer” as defined in Chapter 1 shall have no application to this chapter.

(i) Section 10A-1-2.13(c) shall have no application to this chapter.

Comment

Subsections (a) through (i) are similar to the Alabama Limited Liability Company Law of 2014 Section 10A-5A-1.06, and Subsections (a) through (e) are similar to the Alabama Partnership Law Section 10A-8-1.05. Subsection (f) is substantially similar to the Alabama Limited Company Law of 2014 Section 10A-5A-1.06(e). Subsection (g) was added to clarify that the provisions of Chapter 1 (Sections 10A-1-3.41 through 10A-1-3.45) regarding certificates shall not apply to limited partnerships. If the partners of the limited partnership wish to issue certificates, such certificates may be issued in accordance with the limited partnership agreement. In addition, to the extent that the partners desire to have Article 8 of the UCC apply, Article 8 has specific requirements regarding such certificates. Subsection (h) was added to prevent the application of the definitions of “President,” “Vice-President,” “Secretary” and “Treasurer” to limited partnerships. Subsection (i) was added to avoid the creation of certain presumptions and certain statutory causes of action regarding guarantees in the limited partnership context. These matters seem best left to current remedies and to the parties to the partnership agreement. As to subsection (b), a court should not assume that a case concerning a general partnership is automatically relevant to a limited partnership governed by this Chapter. A general partnership case may be relevant by analogy, especially if (1) the issue in dispute involves a provision of this Chapter for which a comparable provision exists under the law of general partnerships; and (2) the fundamental differences between a general partnership and limited partnership are immaterial to the disputed issue. Because of the effort to conform this Chapter with the Alabama Limited Liability Company Law of 2014, a case involving an Alabama limited liability company may be relevant by analogy, especially if (1) the issue in dispute involves a provision of this Chapter for which a comparable provision exists under the Alabama Limited Liability Company Law of 2014; and (2) the fundamental differences between a limited liability company and limited partnership are immaterial to the disputed issue.

Part 5:

CHAPTER 17 AMENDMENTS

(Unincorporated Nonprofit Associations)

§ 10A-17-1.02. Definitions.

In this chapter:

"(1) "Member" means a person who, under the rules or practices of a nonprofit association, may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy of the nonprofit association.

"(2) "Nonprofit association" means an unincorporated organization consisting of two or more members joined by mutual consent as an association for a stated common, nonprofit purpose, but does not include a limited liability company, general partnership, or limited partnership. In addition, ~~However,~~ joint tenancy, tenancy in common, or tenancy by the entireties does not by itself establish a nonprofit association, even if the co-owners share use of the property for a nonprofit purpose.

(3) "Nonprofit purpose" shall be any purpose for which a nonprofit corporation could be organized under the Alabama Nonprofit Corporation Act, as amended, and where no part of income or profit is distributable to its members, directors and offic

