

## Low-Profit Limited Liability Company Legislation

In January, Michigan became one of a small number of states to specifically provide for the designation of a limited liability company ("LLC") as a low-profit LLC.<sup>1</sup> Public Acts 566 and 567 of 2008, effective January 16, 2009, amended the Michigan Limited Liability Company Act to add a definition for "low-profit limited liability company;" require a low-profit LLC to use certain words or abbreviations in its name; and allow the Attorney General to seek dissolution of a low-profit LLC that fails to change its name within 60 days after it ceases to meet the definition of a low-profit LLC.

The Revised Uniform Limited Liability Company Act (2006) takes an expansive approach and permits a limited liability company to be formed for "any lawful purpose, regardless of whether for profit."<sup>2</sup> The revised ULLCA comments state the ULLCA "does not bar a limited liability company from being organized to carry on charitable activities, and this act does not include any protective provisions pertaining to charitable purposes. Those protections must be (and typically are) found in other law, although sometimes that 'other law' appears within a state's nonprofit corporation statute." A Legislative Note to section 104 of the revised ULLCA advises states to "consider whether to amend statutes protecting the public interest in organizations for charitable or similar purposes."

In several states, including Delaware, Texas, Hawaii, California, Maine, Massachusetts, Washington, Ohio, Florida, and Utah, the limited liability company act allows an LLC to be formed for "any lawful purpose" and permits the formation of nonprofit limited liability companies.

The Michigan Limited Liability Company Act does not authorize the formation of a nonprofit limited liability company. The Michigan LLC Act, 1993 PA 23, was drawn in part from the American Bar Association's November 23, 1991 draft of its Prototype Limited Liability Company Act,

the Michigan Business Corporation Act, and the Michigan Revised Uniform Limited Partnership Act. Section 201 of the Michigan LLC Act, MCL 450.4201, provides, "A limited liability company may be formed under this act for any lawful purpose for which a domestic corporation or a domestic partnership could be formed, except as otherwise provided by law. A limited liability company formed to provide services in a learned profession, or more than learned profession, shall comply with article 9."

"Domestic corporation" is defined in section 102(2)(e) of the act, MCL 450.4102(2)(3), as a corporation formed under the Business Corporation Act, a corporation existing on January 1, 1973, and formed under another statute for a purpose for which a corporation may form under the Business Corporation Act, or a corporation from under the Professional Service Corporation Act. Section 251 of the Business Corporation Act, MCL 450.1251, prohibits a corporation from forming under Business Corporation Act to engage in a business for which a corporation can be formed under another act, unless that act permits formation under the Business Corporation Act. A nonprofit corporation may form under the Nonprofit Corporation Act, 1982 PA 162, and that act does not permit formation of a nonprofit corporation under the Business Corporation Act.

Domestic partnership is defined in MCL 449.6 as an association of two or more persons to carry on as co-owners in a business for profit. "Services in a learned profession" is defined in section 102(2)(t) of the Michigan LLC Act, MCL 450.4102(2)(t) as "services rendered by a dentist, an osteopathic physician, a physician, a surgeon, a doctor of divinity or other clergy, or an attorney-at-law."

Under the Michigan LLC Act, a limited liability company is a for-profit entity and can be formed for any lawful purpose for which a corporation could be formed under the Business Corporation Act. The articles of organization for a low-profit limited liability company must state

the business purpose for which the LLC is being formed. In addition, the definition of "low-profit limited liability company" in section 102(2)(m) of the Michigan LLC Act, MCL 450.4102(2)(m), places limits on the purposes of a limited liability company that is designated as a low-profit limited liability company.

The Banking Code of 1999, MCL 487.11101-487.15105, includes provisions recognizing limited liability companies. For example, section 1201, MCL 487.11201, includes liability company in the definitions of "affiliate" and "person" and section 1202(l), MCL 487.11202(1), defines "member" as "a person with ownership interest under the Michigan limited liability company act." Section 1105(2) of the Banking Code of 1999, MCL 487.11105(2), provides that "[e]xcept for acting as an escrow agent, only an individual or corporation shall act as a fiduciary in this state."

An LLC is not a corporation. "Limited liability company" is defined in section 102(2)(k) of the Michigan LLC Act, MCL 450.4102(2)(k), as "an unincorporated membership organization." A LLC has business organization characteristics of a partnership with a liability shield similar to a corporation and, like a corporation, is a creature of statute. It derives its right to exist and conduct business from the statute. It has only the powers and capacity conferred on it by the statute. Any powers not given in the statute are deemed withheld.

The March 10, 2009, press release of prepared remarks of Senator Charles Grassley, On Charities and Governance, includes a brief statement about low-profit limited liability companies.<sup>3</sup> Senator Grassley indicated, "There is very little information about these new entities, known as low-profit, limited liability companies, or L3Cs. Neither the Finance Committee nor the Ways and Means Committee has conducted any hearings about them. So I was a little surprised that the loosening of the tax rules for them was proposed as

a stimulus initiative. It's too early for us to consider this proposal."

On March 19, 2009, the National Association of State Charity Officials ("NASCO") sent a letter to Senator Max Baucus (D-Montana), Chairman, and Senator Charles Grassley (R-Iowa), Ranking member, of the U.S. Senate Finance Committee outlining concerns and questions posed by charity regulators regarding program-related investments and low-profit limited liability companies. The letter asked "whether the U.S. Senate Finance Committee is planning to pursue changes in federal law that would streamline the current process for approving program-related investments (PRI) to accomplish one or more of the purposes described in section 170(c)(2)(B), if such PRI were invested in an entity organized under state law as a low-profit limited liability company?" The response from the Senate Finance Committee states, "We are committed to strengthening charities and philanthropy. However, we have not had any hearings on this particular matter and do not think that it is ripe for federal legislation."

Bills to enact legislation for low-profit LLCs have been introduced in other states, including Arkansas, Illinois, Maine, Missouri, Montana, and North Dakota. North Dakota HB 1545 was amended to provide that the legislative council "shall consider studying the feasibility and desirability of creating a new type of limited liability company called a low-profit limited liability company" and report their finding by the 2011 legislative session. Amendments to the Montana limited liability company act, Montana HB 235, regarding low-profit limited liability companies, passed the Montana House in February 2009. Montana HB 235 was on the agenda of the Montana Senate Judiciary Committee on March 24, 2009, and tabled by the committee on March 25, 2009. The Montana bill died in committee on April 28, 2009. The letter from NASCO to Senators Baucus and Grassley is included in the information available online from the Montana Senate. [\[mt.gov/legbills/2009/Minutes/Senate/Exhibits/jus65b04.pdf\]\(http://mt.gov/legbills/2009/Minutes/Senate/Exhibits/jus65b04.pdf\)](http://data.opi.</a></p>
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When a low-profit limited liability company is being formed consideration must be given to the Internal Revenue Service requirements regarding program-related investments, and the issues raised by the National Association of State Charity Officials may need to be addressed. In addition, the provisions of the Michigan LLC Act and the Banking Code of 1999 must be taken into consideration to determine the permissible activities of a low-profit limited liability company.

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#### NOTES

1. Vermont, Michigan, and Wyoming have adopted L3C legislation.
2. Available on National Conference of Commissioners of Uniform State Laws website at <http://www.nccusl.org/Update/Act-SearchResults.aspx>
3. [http://grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=19725](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=19725)

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