

New Jersey Adopts a New Limited Liability Company Act

Greenbaum, Rowe, Smith & Davis LLP Client Alert

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On September 19, 2012, Governor Christie signed the Revised Uniform Limited Liability Company Act, which will become effective 180 days thereafter, on March 18, 2013, for limited liability companies (LLCs) formed after that date. For existing LLCs, the new Act will become effective 18 months following the adoption of the statute.

The new Act is based on the Revised Uniform Limited Liability Company Act adopted by the National Conference of Commissioners on Uniform State Laws in 1996, and later revised in 2006. It represents the first major revision to New Jersey's Limited Liability Company Act, which New Jersey first adopted in 1993 and has amended from time to time since adoption.

The new Act is intended to address a number of matters not dealt with in New Jersey's current law, and to clarify and update several other matters. The following overview summarizes some of the new Act's key provisions:

• **Perpetual Duration**

Under current law, an LLC has a duration of 30 years unless the certificate of formation specifies otherwise. Under the new Act, an LLC will have perpetual duration unless otherwise specified.

• **Flexible Management**

The new Act provides for an LLC to set forth its management structure in its operating agreement. This could consist of a corporate model with a board of directors and officers, a manager, management by the members or other structures. Although existing New Jersey law is not explicit on this point, flexible management has generally been deemed possible under current law.

• **Purpose**

The new Act permits an LLC to be formed for any lawful purpose, regardless of whether for profit. Thus, for example, an LLC can be used to

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operate a not-for-profit organization or to own non-income producing property.

• **Fiduciary Duties**

The new law provides that, if not manifestly unreasonable, the operating agreement may alter the duty of care, except to authorize intentional misconduct or knowing violations of law, and may alter any other fiduciary duties, including particular aspects of that duty. It remains to be seen how the term “manifestly unreasonable” will be construed by the courts.

• **Indemnification**

Under current law, an LLC may indemnify and hold harmless its members, managers and others. The new Act requires such indemnification but allows the operating agreement to alter or eliminate such an obligation.

• **Exculpation**

The new Act authorizes operating agreements to eliminate or limit a member or manager’s liability to the LLC or its members for money damages, except for (i) a breach of the duty of loyalty, (ii) a financial benefit received by the member or manager to which he or she is not entitled, (iii) a wrongful distribution of money or other property to the members, (iv) intentional infliction of harm on the LLC or a member, or (v) an intentional violation of criminal law.

• **Amendments to Operating Agreements**

An operating agreement may now specify that an amendment to the agreement requires the approval of a person that is not a party to the agreement or the satisfaction of a condition. This provision will most likely be utilized in certain types of financing arrangements.

• **Statement of Authority**

The new Act creates the concept of a statement of authority, which would be filed in the Office of Commercial Recording and will set forth the authority of one or more individuals to act on behalf of the LLC. This also may come to be utilized or required in certain financing transactions.

• **Charging Orders**

The new Act clarifies and expands the provisions relating to charging orders. A charging order in favor of a judgment creditor of a member of an LLC constitutes a lien on the judgment debtor’s interest in the LLC, and requires the LLC to pay over to the person holding the charging order any distributions from the LLC with respect to that interest. The new Act provides that upon a showing that distributions under the charging order will not pay the judgment debt within a reasonable time, a court may foreclose the lien and order the sale of the transferable interest. The purchaser acquires the transferable interest in a foreclosure sale but does not become a member of the LLC.

• **Deadlock and Oppression**

New Jersey deviated somewhat from the Uniform Act in adopting provisions in the new LLC Act that are

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based on the oppressed minority shareholder provisions of the New Jersey Business Corporation Act, N.J. S.A. 14A:12-7. The New Jersey Superior Court can enter an order dissolving an LLC on the grounds that its conduct is unlawful or that it is not reasonably practical to carry on the LLC's activities in conformity with either the certificate of formation or the operating agreement. Furthermore, upon a finding that the managers or members in control of an LLC have acted illegally or fraudulently or in a manner that is oppressive and directly harmful to the applicant, the court will have broad powers to dissolve the company, appoint a receiver or order the sale of certain membership interests.

Please contact the author of this Alert, W. Raymond Felton, or any member of our Corporate Department for more comprehensive information on the Revised Uniform Limited Liability Company Act and its impact on New Jersey LLCs.