

Client newsletter



JANUARY 2011

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Mississippi's Revised Limited Liability Act

In the 2010 regular session, the Mississippi Legislature passed the "Revised Mississippi Limited Liability Company Act" (the "Revised LLC Act"). The Revised LLC Act is intended to replace the previous "Mississippi Limited Liability Company Act." The Revised LLC Act became effective January 1, 2011 and applies in its entirety to limited liability companies ("LLCs") formed on or after that date. LLCs which were formed before January 1, 2011 must conform to the Revised LLC Act on or before January 1, 2012. There are a number of provisions in the Revised LLC Act that add or change default rules. As such, you should consider performing an audit of your LLC's operating agreement to determine what, if any, changes may be necessary.

Annual Report

One of the more significant differences between the previous Mississippi LLC Act and the Revised LLC Act involves the requirement to file annual reports. Effective January 1, 2011, all domestic and foreign LLCs authorized to transact business in Mississippi, regardless of their date of formation, must start filing annual reports with the Secretary of State or face administrative dissolution. Annual reports are due each year on or before April 15th. As part of the report, manager-managed LLCs are now required to disclose the names and addresses of all managers. Member-managed LLCs are now required to disclose the names and addresses of at

least one member. It should be noted that the Revised LLC Act also makes a couple of distinctions between domestic and foreign LLCs. Domestic LLCs are not required to pay a filing fee with their annual reports. Foreign LLCs, on the other hand, must pay a \$250.00 filing fee. In addition, domestic LLCs may file reports online or by mail, while foreign LLCs may only file their annual reports by mail.

Management

By default under the previous Mississippi LLC Act, an LLC is considered member-managed unless the certificate of formation or the operating agreement provide for management by a manager(s). This remains unchanged under the Revised LLC Act. However, the "check the box" approach in the certificate of formation has been eliminated. Now, if an LLC is manager-managed, management by manager must be designated by expressly stating so in the operating agreement or by stating so in the "optional language" portion of the certificate of formation. As with the previous Mississippi LLC Act, if a LLC is member-managed, each member of the LLC will be considered an agent of the LLC with authority to bind it.

Fiduciary Duties

The Revised LLC Act implements provisions that allow members to expand, eliminate or restrict elements of fiduciary duties. This can be done by identifying

specific types of activities in the operating agreement that would not be considered a violation of a fiduciary duty. Fiduciary duties, including eliminating particular aspects of those duties, may be altered or eliminated altogether in the operating agreement. Provided the standard is "not manifestly unreasonable," the operating agreement can also set forth a standard by which the performance of the implied contractual covenant of good faith and fair dealing is measured. Note, however, that redefining the scope of fiduciary duties should be approached with caution. There is still an open question as to what extent Mississippi courts will actually allow redefinition of the scope of fiduciary duties under the "not manifestly unreasonable" standard.

Indemnification

As with the previous Mississippi LLC Act, the Revised LLC Act allows a LLC to indemnify any member, manager, officer or other person from any claims and demands, unless they are found liable for acts or omissions that involve fraud, intentional infliction of harm or violations of criminal law, bad faith violations of the implied contractual covenant of good faith and fair dealing, or certain other instances. Indemnification may be expressly provided for in the LLCs certificate of formation or its operating agreement, but is not required.

Limitation of Liability

The Revised LLC Act continues to allow LLCs to limit or eliminate liability for the acts or omissions of its managers, members, or other individuals, if such limitations are expressly provided for in the company's certificate of formation or operating agreement. Liability for breach of contract or breach of duties, including the fiduciary duties, of a member, manager, officer or other person, may also be limited or eliminated. However, as with indemnification, LLCs may not eliminate liability for fraud, intentional infliction of harm; intentional violations of criminal law; or other acts in bad faith.

Transferable Interests

The Revised LLC Act makes it important to adequately address transfer rights in

the operating agreement. Under the Revised LLC Act, a member's "interest" refers to all of the "governance interests" and/or "financial interests" in the limited liability company held by such member. "Governance interests" means all of a member's rights as a member in the limited liability company other than financial rights and the right to assign financial rights. "Financial interests," on the other hand, only relates to the right to share in profits and losses and receive distributions from the LLC. Under the default rules, when a member transfers a financial interest, the transferor is only transferring the right to distribution and retains all other rights as a member. Transferees under these circumstances will have no role in the management of the LLC and will have few rights other than to receive distributions. Consequently, unlike the sale of stock, a

buyer of an interest in an LLC will only obtain the economic interest. Governance rights can only be transferred to a buyer with the unanimous consent of the other members unless the operating agreement provides otherwise.

Conclusion

The provisions of the new Mississippi LLC Act could ultimately require some changes for your LLC. Accordingly, a re-evaluation of your operating agreement in the near future should be considered. As always, the attorneys at YoungWilliams P.A. are available to answer any questions you may have regarding the new Mississippi LLC Act.

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