



STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNCIL

MEMORANDUM

To: House Committee on Commerce and Economic Development
From: David Hall
Date: March 11, 2015
Subject: H.310; knowledge and notice under proposed LLC revisions

This memo addresses provisions of H.310 concerning knowledge and notice of information in limited liability companies, as well as comparable knowledge and notice standards in other areas of Vermont law.

1. Knowledge and notice in current law and in H.310

The proposal in H.310 is as follows:

§ 3002. KNOWLEDGE AND NOTICE

- (a) A person knows a fact if the person has actual knowledge of it.
- (b) A person has notice of a fact if the person:
 - (1) ~~knows of it;~~
 - (2) has received a notification of it the fact; ~~or~~
 - (3)(2) has reason to know ~~it exists~~ of the fact from all of the facts known to the person at the time in question; ~~or~~
(3) is deemed to have notice of the fact under subsection (d) of this section.
- (c) ~~As a result of the filing or recording of a statement under this chapter, a person is deemed to know or have notice of a fact as provided in sections 3041, 3093, or 3104 of this title.~~
- (d) A person notifies or gives a notification of a fact to another by taking steps reasonably required to inform the other person in the ordinary course, whether or not ~~the other person knows of it~~ they cause the other person to know the fact.
- (d) In the case of a limited liability company's dissolution, termination, or merger or conversion, a person who is not a member of the company is deemed to have notice as follows:
 - (1) for a dissolution, 90 days after a statement of dissolution under section 3103 of this title becomes effective;
 - (2) for a termination, 90 days after the articles of termination under section 3105 of this title become effective; and
 - (3) for a merger or conversion, upon the effective date of articles of merger or a statement of conversion filed with the Secretary of State.

(e) A person receives a notification when the notification:
 (1) comes to the person's attention; or
 (2) is ~~duly~~ delivered at the person's place of business or at any other place held out by the person as a place for receiving communications.

(f) ~~An entity knows, has notice or receives a notification of a fact for purposes of a particular transaction when the individual conducting the transaction for the entity knows, has notice or receives a notification of the fact, or in any event when the fact would have been brought to the individual's attention had the entity exercised reasonable diligence. An entity exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the individual conducting the transaction for the entity and there is reasonable compliance with the routines. Reasonable diligence does not require an individual acting for the entity to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.~~ A member's knowledge, notice, or receipt of a notification of a fact in the member's capacity as a member does not impute knowledge, notice, or receipt of notification of the fact to the limited liability company.

Other than in § 3002, the term "notice" appears in multiple places throughout the draft, too numerous to include here. Other than in § 3002, the term "knowledge" appears in two places in the proposed bill, in § 3059(k)¹:

~~(j)(k)~~ (k) A ~~member-manager~~ member or manager is not acting in good faith if he or she has knowledge concerning the matter if the matter in question that makes reliance permitted by subsection ~~(i)~~ (j) of this section unwarranted.

and again in § 3072(d):

(d) A transfer of a distributional interest in violation of a restriction on transfer contained in the operating agreement is ineffective if the intended transferee has knowledge or notice of the restriction at the time of transfer.

2. Knowledge and Notice in RULLCA

Section 103 of the Revised Uniform Limited Liability Company Act, on which the Vermont language is based, provides:

¹ The words "if the matter" in the second line may be surplus but appear in the existing law. The RULLCA does not appear to have a comparable provision.

SECTION 103. KNOWLEDGE; NOTICE.

- (a) A person knows a fact if the person:
- (1) has actual knowledge of it; or
 - (2) is deemed to know it under subsection (d)(1) or law other than this [act].
- (b) A person has notice of a fact if the person:
- (1) has reason to know the fact from all the facts known to the person at the time in question; or
 - (2) is deemed to have notice of the fact under subsection (d)(2).
- (c) Subject to Section 210(f), a person notifies another person of a fact by taking steps reasonably required to inform the other person in ordinary course, whether or not those steps cause the other person to know the fact.
- (d) A person not a member is deemed:
- (1) to know of a limitation on authority to transfer real property as provided in Section 302(g); and
 - (2) to have notice of a limited liability company's:
 - (A) dissolution 90 days after a statement of dissolution under Section 702(b)(2)(A) becomes effective;
 - (B) termination 90 days after a statement of termination under Section 702(b)(2)(F) becomes effective; and
 - (C) participation in a merger, interest exchange, conversion, or domestication, 90 days after articles of merger, interest exchange, conversion, or domestication under [Article] 10 become effective.

Comment

This section is substantially slimmer than the corresponding provisions of previous uniform acts pertaining to business organizations: UPA (1997), ULLCA (1996), and ULPA (2001). Each of those acts borrowed heavily from the comparable Uniform Commercial Code provision. This act relies instead on generally applicable principles of agency law, *see* Section 111; therefore, this section is confined mostly to rules specifically tailored to this act.

Several facets of this section warrant particular note. First, and most fundamentally, because this act does not provide for “statutory apparent authority,” Section 301, this section contains no special rules for attributing to an LLC information possessed, communicated to, or communicated by a member or manager.

Second, the section contains no generally applicable provisions determining when an organization is charged with knowledge or notice, because those imputation rules: (i) comprise core topics within the law of agency; (ii) are very complicated; (iii) should not have any different content under this act than in other circumstances; and (iv) are the subject of considerable attention in the Restatement (Third) of Agency (2006). 20

Third, this act does not define “notice” to include “knowledge.” Although conceptualizing the latter as giving the former makes logical sense and has a long pedigree, that conceptualization is counter-intuitive for the uninitiated. In ordinary usage, notice has a meaning separate from knowledge. This act follows ordinary usage and therefore contains some references to “knowledge or notice.”

Subsection (a)(2)—In this context, the most important source of “law other than this [act]” is the common law of agency.

Subsection (b)(1)—The “facts known to the person at the time in question” include facts the person is deemed to know under Subsection (a)(2).

Subsection (c)—If a person “notifies” another person of a fact, the other person has “reason to know” the fact and therefore has notice under Subsection (b)(1). However, a person can have “notice” of a fact without having been “notifie[d]” of the fact. Section 210(f) pertains to delivery of records *by* the filing office.

Subsection (d)—This subsection provides constructive notice of facts stated in specified filed public records.

Subsection (d)(2)—Under this act, the power to bind a limited liability company to a third party is primarily a matter of agency law. Section 301, cmt. The constructive notice provided under this paragraph will be relevant if a third party makes a claim under agency law that someone who purported to act on behalf of a limited liability company had the apparent authority to do so.

3. Knowledge and Notice in Vermont UCC

The language in RULLCA and the language in the current and proposed Vermont LLC law is based on, and similar to, language in the Vermont Uniform Commercial Code in 9A V.S.A. § 1-202, which provides:

§ 1-202. NOTICE; KNOWLEDGE

(a) Subject to subsection (f) of this section, a person has "notice" of a fact if the person:

- (1) has actual knowledge of it;
- (2) has received a notice or notification of it; or
- (3) from all the facts and circumstances known to the person at the time in

question, has reason to know that it exists.

(b) "Knowledge" means actual knowledge. "Knows" has a corresponding meaning.

(c) "Discover," "learn," or words of similar import refer to knowledge rather than to reason to know.

(d) A person "notifies" or "gives" a notice or notification to another person by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it.

(e) Subject to subsection (f) of this section, a person "receives" a notice or notification when:

- (1) it comes to that person's attention; or

(2) it is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.

(f) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

4. Knowledge and Notice in Partnerships

The language in current and proposed Vermont LLC law is also very similar to Vermont law governing partnerships:

§ 3202. KNOWLEDGE AND NOTICE

(a) A person knows a fact if the person has actual knowledge of it.

(b) A person has notice of a fact if the person:

(1) knows of it;

(2) has received a notification of it; or

(3) has reason to know it exists from all of the facts known to the person at the time in question.

(c) A person notifies or gives a notification to another by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person learns of it.

(d) A person receives a notification when the notification:

(1) comes to the person's attention; or

(2) is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communications.

(e) Except as otherwise provided in subsection (f) of this section, a person other than an individual knows, has notice, or receives a notification of a fact for purposes of a particular transaction when the individual conducting the transaction knows, has notice, or receives a notification of the fact, or in any event when the fact would have been brought to the individual's attention if the person had exercised reasonable diligence. The person exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the individual conducting the transaction and there is reasonable compliance with the routines. Reasonable diligence does not require an individual acting for the person to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

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

5. Notice for Business Corporations and Nonprofit Corporations

The knowledge and notice provisions in current and proposed LLC law differ from the law governing notice for corporations. Section 1.41 of both Title 11A (business corporations) and Title 11B (nonprofit corporations) provides:

§ 1.41. NOTICE

(a) Notice under this title must be in writing unless oral notice is authorized in the bylaws of the corporation and is reasonable under the circumstances.

(b) Notice may be communicated in person; by telephone, voice mail, telegraph, teletype, facsimile, or other form of wire, wireless, or electronic communication; or by mail or private carrier or other method of delivery. If these forms of personal notice are impracticable, notice may be communicated by a newspaper of general circulation in the area where published; or by radio, television, or other form of public broadcast communication.

(c) Notice to shareholders. Written notice by a domestic or foreign corporation to its shareholder, if in a comprehensible form, is effective when:

(1) mailed first class postpaid and correctly addressed to the shareholder's address as shown in the corporation's current record of shareholders; or

(2) electronically transmitted to the shareholder in a manner authorized by the shareholder.

(d) Notice to corporations. Written notice to a domestic or foreign corporation (authorized to transact business in this state) may be addressed to:

(1) its registered agent at its registered office;

(2) the corporation or its secretary at its principal office shown in its most recent annual report; or

(3) in the case of a foreign corporation that has not yet delivered an annual report, the corporation or its secretary at its principal office shown in its application for a certificate of authority.

(e) Except as provided in subsection (c) of this section, written notice, if in a comprehensible form, is effective at the earliest of the following:

(1) when received;

(2) five days after its deposit in the United States mail, as evidenced by the postmark, if mailed postpaid and correctly addressed;

(3) on the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

(f) Oral notice is effective when communicated if communicated in a comprehensible manner.

(g) If this title prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements,

not inconsistent with this section or other provisions of this title, those requirements govern.

6. Knowledge and Notice for Mutual Benefit Enterprise

Title 11C, governing Vermont's most recently-created entity type, the mutual benefit enterprise, has not specific statutory provision addressing knowledge and notice, though it does include most (if not all) of the provisions in which notice and knowledge are implicated, e.g., notices to creditors, owners, Secretary of State, etc., as well as knowledge that would negate reliance on certain actions or information.