

H.310 – REVISION OF VERMONT LLC ACT

Background and Summary of Proposed Revisions

A. Background. Vermont’s existing Limited Liability Company Act (the “Current Act”) was adopted in 1996. At that time, it was part of the first generation of limited liability company statutes and included a variety of provisions designed to comply with then applicable tax and legal requirements. Those requirements have changed, as have many of the other principles applicable to the ownership and operation of limited liability companies. In response to these developments, a committee of the Vermont Bar Association has drafted a comprehensive set of revisions to the Act that are set forth in H.310 (the “Revised Act”). The revisions are based on changes to the Uniform Limited Liability Company Act approved by the National Conference of Commissioners on Uniform State Laws, which was the source of much of the Current Act. As was the case in connection with the Current Act, the drafting committee has made additional revisions to reflect the role of the Vermont Secretary of State and that otherwise are intended to serve the best interests of Vermont. H.310 was introduced by Representative Bill Botzow and Representative Michael Marcotte and passed by the Vermont House of Representatives on March 19, 2015.

B. Three Types of Changes. The proposed changes contained in the Revised Act fall, roughly, into three categories: (1) changes that provide a clearly identifiable benefit to Vermont businesses and out-of-state businesses seeking to relocate to Vermont, (2) changes that address problems that exist under the Current Act, and (3) changes that bring the Vermont LLC Act up to date with evolving case law and business practice.

1. Selected Beneficial Changes. The Revised Act includes a number of changes that are designed to make limited liability companies more “user-friendly” and more flexible for businesses considering organizing as, or converting to or from a Vermont LLC. The following is a summary of selected changes.

Simplifies Formation Filing	The Revised Act will make preparation of the Articles of Organization easier by eliminating a number of choices that need to be made and reflected in the Articles, most significantly, (a) it will not be necessary to designate an LLC as member-managed or manager-managed at the time of formation, (b) the choice of at-will or term will be eliminated, (c) the choice regarding liability of members for company debts will be eliminated, and (d) the designated office listed in the Articles need not be the company’s principal place of business.
Makes Naming Easier	The Revised Act will make naming a limited liability company easier by getting rid of the current standard that an LLC name can’t be “deceptively similar to an existing name.” Now, all that a limited liability company needs to establish is that its name is “distinguishable” – i.e., different, from those of existing Vermont companies.
Simplifies Annual Report Filing	The filing of Annual Reports by manager-managed LLCs will be easier because there will no longer be a need to name managers in an Annual Report. The Revised Act also extends the time to file from two and a half to three months following the end of each fiscal year.
Aligns the Law with Modern Practices of the	A number of provisions of the Revised Act conform the law with modern electronic filing practices of the Vermont Secretary of State’s office, reduce

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Secretary of State	the amount of paper mailings that the Vermont Secretary of State’s office is required to make, and ease administrative burdens on the Vermont Secretary of State’s office.
Facilitates Changing Form of Entity	The Current Act provides only for conversions of partnerships and limited partnerships into LLCs. The Revised Act expands the type of conversions that may be done to include (A) the conversion of Vermont LLCs into other types of Vermont entities, and (B) the conversion of other types of foreign organizations (other than foreign LLCs) into Vermont LLCs. This provision, in particular, is anticipated to be attractive to captive insurance companies. The Revised Act also expands the merger provisions to include mergers of corporations into LLCs.
Changes the Default Rule for Member Consents	The Current Act allows for approval actions to be taken by written consent in lieu of a meeting of members, but requires that the written consent be signed by all members. The Revised Act allow for actions by written consent if signed by the number of members required to approve the action had the action been taken at a duly called meeting.
Provides for Special Litigation Committees as a Means of Resolving Disputes	The Revised Act contains a new provision allowing for the creation of a special litigation committee to investigate and make determinations with respect to claims by members against an LLC.

2. Fixes to Current Act. The Revised Act contains a number of changes that address problems with the Current Act that have been identified by businesses, business attorneys and the Secretary of State’s office. Here are a few examples:

Eliminates Mandatory Buyout of Departing Member	The Current Act requires that an LLC repurchase the interest of a dissociating member, which can create a financial strain on a business for a completely non-business reason. The Revised Act eliminates this requirement.
Eliminates Open Ended Period for Name Reservation by Out-of-State LLCs	The Current Act allows out-of-state LLCs to reserve a business name with the Secretary of State indefinitely. The Revised Act eliminates this ability and treats out-of-state LLCs the same as anyone else wishing to reserve a name.
Changes the Default Rule for Distributions	The Current Act creates the default rule that, upon the winding up a business, the assets of an LLC will be distributed first to return capital contributions and thereafter in “equal shares.” The Revised Act changes this default rule such that remaining assets are distributed in proportion to capital contributions, which will be more consistent with the parties’ expectations in most cases.

3. Modernizing Current Act. The bill containing the Revised Act is approximately 156 pages long and contains changes to almost every section of the Current Act. The vast majority of these changes are technical in nature and have been made with the objective of making the Vermont limited liability company

act clearer – with the overall goal of eliminating grounds for disputes. The changes in this third category have been made with the express intent of allowing businesses to be conducted with fewer disputes that can interrupt business. Here are a few examples:

Clarifies Fiduciary Duties	The Revised Act clarifies the fiduciary duties owed by members of limited liability companies to each other, and owed by managers to members, to conform to evolving legal standards in this area.
Expands Non-Waivable Provisions	The Revised Act adds several new items to the list of “non-waivable provisions” (i.e., provisions of the statute that cannot be changed in an operating agreement) to conform to modern practice.
Clarifies Rights of Transferees	The Revised Act more clearly defines the rights and liabilities of transferees of interests in limited liability companies.
Creditors’ Rights	The Revised Act contains provisions that more clearly define the rights of a creditor of a member of an LLC.
Clarifies Rights and Liabilities Following Involuntary Termination	The Revised Act includes express statements regarding the limited liability status of an LLC, and the validity of contracts and obligations created after involuntary termination due to a failure to file an Annual Report on time, but before reinstatement of such LLC.

C. Transition Provisions. The Revised Act contains transition provisions to allow time for Vermont businesses to become familiar with the Revised Act. Because the vast majority of changes simply clarify existing law, we do not expect significant disruption to be caused by enactment of the Revised Act. The most significant practical differences are changes in filings with the Secretary of State’s office. The Revised Act contains an effective date of July 1, 2015. On this date, the Revised Act would become applicable to all LLCs formed after that date, and any existing LLCs that elect to be governed by the Revised Act. The Revised Act contains an “all-inclusive date” of July 1, 2016. After the all-inclusive date, the Revised Act would govern all LLCs.

D. Process and Proponents. The Revised Act is the product of 18 months of research, analysis and drafting by a committee of the Business Association Section of the Vermont Bar Association. The committee consisted of business lawyers from eight Vermont law firms and the Director of the Corporations Division of the Vermont Secretary of State’s Office. The drafting committee was co-chaired by Thomas Moody of Downs Rachlin Martin PLLC and Peter Erly of Gravel & Shea PC. The committee was advised by David Walker, Chair of the Drafting Committee of the National Conference of Commissioners on Uniform Laws (drafters of the Revised Uniform Limited Liability Company Act), who is also Professor of Law and Dean of Drake Law School. The Revised Act is sponsored by the Chair and Co-Chair of the House Committee on Commerce and Economic Development, Representative William Botzow of Pownal, and Representative Michael Marcotte of Coventry. H.310 has the support of the Office of the Secretary of State, the Vermont Department of Economic Development, the Vermont Chamber of Commerce, the Lake Champlain Regional Chamber of Commerce, the Vermont Business Roundtable, the Vermont Small Business Development Center, and the Vermont Commissioners on Uniform Laws. As far as we know, there are no opponents of the Revised Act.