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Planning for the Operation of Pass Through Entities

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**43rd WILLIAM & MARY
TAX CONFERENCE**

**PLANNING FOR THE OPERATION OF
PASS THROUGH ENTITIES**

**RECENT DEVELOPMENTS IN UNINCORPORATED
BUSINESS ORGANIZATION STATUTES**

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I. AMENDMENTS INSPIRED BY THE CHECK-THE BOX REGULATIONS

A. LLCs

1. Two-Member Minimum Requirement

a. Express Authorization for Single Member/Implied Authorization by Deletion of Two Member Minimum

(1) 1997

Alaska. A.S. § 10.50.155.

Arizona. Ariz. Rev. Stat. § 29-601.8(a).

Connecticut. Conn. Gen. Stat. § 34-101(9).

Georgia. (H.B. 349) Ga. Code § 14-11-101(12).

Hawaii. Haw. Rev. Stat. § 428-202.

Illinois. (S.B. 1020) § 805 ILCS 180/5-1.

Indiana. IC § 23-18-11.

Iowa. Iowa Code Ann. § 490A.102.13.

Louisiana (H.B. 506), R.S. 12:1301(A)(10).

Maryland. H.B. 390 amended Md. Code Ann. § 4A-202(a).

Michigan. H.B. 4606 amended MCL § 450.450 to delete express two member requirement.

Minnesota. Minn. Stat. § 322.11.

Missouri. R.S. Mo. §§ 347.015 (deleted section (10) definition of LLC as entity having 2 members) and 347.017.

Nebraska. Neb. Rev. Stat. § 21-2605 (one to form, but eliminated provision as to effect of less than 2).

Nevada. (SB 297) NRS § 86.151.3.

New Hampshire. N.H. RSA § 304-C:1, V

North Carolina. N.C.G.S. § 57C-2-20(a).

North Dakota. N.D. C.C. § 10-32-06.

Ohio. (H.B. 170) §§ O.R.C. 1705.04(A) (deleted "two to form" requirement) and 1705.43(A) (deleted provision for dissolution when less than 2 members).

Oklahoma. 18 O.S. § 2001.12.

Oregon. S.B. 811 amended ORS § 63.001(13) expressly to authorize single member.

Rhode Island. (97-S0805 (Substitute B)) amended R.I. Gen. Laws §§7-16-2(m) to delete 2-member requirement from LLC definition), and 7-16-6(2) to delete statement from articles.

Utah. Utah Code Ann § 48-2b-103(2)(a).

Washington. S.B. 5109, Chap. 21, 1997 Laws, amended RCW § 25.15.270 by deleting provision that LLC dissolved upon having fewer than 2 members for more than 90 days.
Wyoming. W.S. § 17-15-144(d).

(2) Pre-1997

| | |
|-------------|----------------|
| Arkansas | New York |
| Colorado | Oregon |
| Delaware | South Carolina |
| Idaho | Texas |
| Maine | Vermont |
| Mississippi | Virginia |
| Montana | West Virginia |
| New Mexico | Wisconsin |

b. "Operating Agreement" for Single Member LLC

Arizona. Ariz. Rev. Stat. § 29-601.12(b).
Colorado. (S.B. 97-233) § 7-80-102(11).
Georgia. (H.B. 349) Ga. Code § 14-11-101(18).
Illinois. (S.B. 1020) 805 ILCS § 15-5(c).
Louisiana. R.S. 12:1301(A)(16).
Missouri. R.S. Mo. § 347.015(13).
New Hampshire. N.H. RSA § 304-C:1, VI.
Ohio. O.R.C. § 1705.01(J).
Rhode Island. (97-S805 (Substitute B)), amended R.I. Gen. Laws §7-16-2(s).
Utah. Utah Code Ann. §48-26-12b(5).
Virginia. Va. Code § 13.1-1023.A.2.

c. Assignee of Single Member LLC Interest becomes a Member without further action or by action of Assignor.

Connecticut. Conn. Gen. Stat. § 34-172(a)(3).
New Hampshire. N.H. RSA § 34-C:23, II(c).

2. Elimination of the Limited Duration Provision

Deletion of requirement to state a latest date for dissolution in the articles/ express authorization for perpetual life.

Arizona. Ariz. Rev. Stat. § 29-632.A.3.
 Connecticut. Conn. Gen. Stat. § 34-121.
 Delaware. (S.B. 104) amended § 18-801(a)(1) to make perpetual life the default rule, unless members otherwise agree; prior law authorized members to provide for perpetual life.
 Idaho. Idaho Code § 53-608 (deleted subsection 3).
 Illinois. (S.B. 1020) 805 ILCS 180/5-5(a)(6).
 Iowa. Iowa Code Ann. § 490A.303.1.d. (may be perpetual).
 Louisiana. H.B. 506, R.S. 1303B (perpetual unless limited duration stated in articles).
 Maryland. H.B. 390, amended Md. Code Ann. § 4A-203(1) to permit perpetual duration and § 4A-204(2) to delete requirement to state latest date for dissolution.
 Michigan. H.B. 4606 amended MCL § 450.4203(1)(e) (maximum duration, if other than perpetual).
 Minnesota. Minn. Stat. § 322 B. 20, subd. 2.
 Missouri. R.S. Mo. § 347.039.
 Nebraska. Neb. Rev. Stat. § 21-2606(1) (deleted former subsection (b), which imposed 30-year limit).
 New Jersey. N.J.S. § 42:2B-11(4).
 Oklahoma. 18 O.S. § 2005.2.
 Oregon. S.B. 811 amended ORS § 63.077(1) to authorize perpetual duration.
 Rhode Island. (97-S0805 (Substitute B)), amended R.I. Gen. Laws §§7-16-3 to add perpetual existence as the default rule and 7-16-6(a)(3) to delete latest date statement in the articles.
 Virginia. Va. Code §§ 13.1-1002 and 13.1-1011.A (deleted subsection 4).

3. Member Dissociation as a Default Dissolution Event

a. Elimination as a default dissolution event.

Alaska. A.S. § 10.50.400 (deleted former subsection 3).
 Connecticut. Conn. Gen. Stat. § 34-206.
 Colorado. (S.B. 97-233) § 7-80-801(1) (subsection (a) deleted).
 Delaware. SB104 § 18-801(b) (unless within 90 days of the event majority in interest agree to dissolve).
 Illinois. (S.B. 1020) 805 ILCS 180/35-1.
 Iowa. Iowa Code Ann. § 490A.1301 (subsection 3 deleted).
 Louisiana. H.B. 506 repealed R.S. § 12:1334(3).
 Maryland. H.B. 390, amended Md. Code Ann. § 4A-902 to delete former subsection (3).

Michigan. H.B. 4606 amended MCL § 450.4801 to delete former subsection (d).

Missouri. R.S. Mo. § 347.137.

Nebraska. Neb. Rev. Stat. § 21-2622 (deleted former subsection 3).

New Hampshire. N.H. RSA § 304-C:50.

New Jersey. N.J.S. § 42:2B-48(d)

Oklahoma. 18 O.S. § 2037.

Oregon. S.B. 811 amended ORS § 63.621 to delete subsection (2).

Rhode Island. 97-S0805 (Substitute B) amended R.I. Gen. Laws § 7-16-39(d).

Utah. (except for failure to have at least one member) . Utah Code Ann. §48-2b-137(2).

ULLCA. § 801 amended to eliminate dissociation as a dissolution event (1996).

b. Effect of dissociation of last or sole member.

Arizona. Ariz. Rev. Stat. § 29-781.A.5.

Connecticut. Conn. Gen. Stat. § 34-173(b).

Delaware. (S.B. 104), § 18-801(a)(4). If there are no members, LLC dissolves unless, within 90 days, personal representative of the last remaining member agrees to continue and to admission of a member.

Maryland. H.B. 309 amended Md. Code Ann. § 4A-902 to provide that LLC dissolves after 90 days with no members.

New Jersey. N.J.S. § 42:2B(d) (added 90-day grace period to replace last member).

Oregon. S.B. 811 added ORS § 63.621 to provide for dissolution when no members.

Rhode Island. (97-S0805 (Substitute B)) amended R.I. Gen. Laws § 7-16-39(e) to add 90 day grace period to replace last remaining member.

c. Change vote to continue from “majority in interest” to different standard.

Virginia. Va. Code § 13.1-1046.3 (majority vote).

d. Status of dissociated member.

Illinois. (S.B. 1020) 805 ILCS 180/35-60(a). LLC is required to purchase interest of dissociated member if dissociation does not result in dissolution.

Maryland. H.B. 309 Md. Code Ann. § 4A-606.1(A)(1). No right to "put" interest; deemed assignee with no right to vote; LLC has "call" at "fair value," based upon distributions.

4. **Elimination of Requirement for Member Vote on Assignee's Becoming a Member**

None

5. **Effective Dates and Transition Rules**

In some states, for entities formed before the effective date the prior default rule applies unless members otherwise agree (e.g., Connecticut).

B. General Partnerships

NCCUSL Executive Committee in January, 1997, approved amendment of RUPA §801(2)(i) to provide that partner dissociation from a term partnership will not result in dissolution unless within 90 days after the event at least half the remaining partners agree to wind up the business.

The amendment was approved at the NCCUSL annual meeting in July, 1997.

Arizona. Same amendment. Ariz. Rev. Stat. § 29-1071.1

Minnesota. Same amendment. Minn. Stats. § 323A.801(2)(i).

Oklahoma. Same amendment. 54 O.S. § 1-801(2)(i).

C. Limited Partnerships

1. **Elimination of Limited Duration Provision**

Alaska. A.S. § 32.11.010(a) (former subsection 4 deleted)

Arizona. Ariz. Rev. Stat. § 29-308.A.4.

Idaho. Idaho Code § 53-208 (deleted latest date requirement).

2. Elimination of Unanimous Consent Dissolution Avoidance Vote

Alaska. A.S. § 32.11.370(3).

Arizona. Ariz. Rev. Stat. § 29-344.4. Agreement may specify less than unanimous vote to avoid dissolution if there is no remaining general partner.

Colorado. (S.B. 97-233) § 7-62-401(2). Upon withdrawal of last remaining general partner, unless otherwise agreed, successor general partner may be admitted on vote of a majority of the limited partners, and if majority fail to act within a reasonable time, court may admit successor on application of any limited partner.

§ 7-62-801. Unless otherwise agreed, partnership dissolves on consent of a majority of limited partners within 90 days after event of withdrawal of last remaining general partner.

Delaware. (S.B. 107) § 17-801(3). Replaces vote to continue by majority in interest of the remaining partners with majority in interest of the current profits, or business is continued pursuant to right stated in the agreement.

Rhode Island. (97-S0805 (Substitute B)) amended R.I. Gen. Laws §7-13-44(3) (majority interest of the partners).

Texas. Tex. Rev. Civ. Stat. Ann. art. 6132a-1, § 803.

D. Conformity of State Income Taxation with Check-the-Box.

1. Express Conformity

a. Including Disregard of Single Member LLCs

Arizona. Ariz. Rev. Stat. § 29-857; DOR PTR 97-2.

California. Franchise Tax Board-proposed to repeal Regulation 23038(b) and replace it with Regulations 23038(h)-1 to 23038(h)-3.

SB 1234 provides that the classification of a business entity shall be determined under FTB regulations, which shall be consistent with federal classification regulations in effect 1/1/97, including those that disregard the separate existence of certain business entities.

Colorado.

Connecticut. Conn. Rev. Stat. § 34-113.

Hawaii. Dept. of Taxation Tax Info. Rel. No. 97-4.

Maryland. Md. Code Ann. § 10-819.

Massachusetts. Dept. of Rev. TIR 97-8.
Minnesota. DOR Notice 97-03 (3/17/97).
Missouri. R.S. Mo. § 347.187.2.
Nebraska. Neb. Rev. Stat. §21-2633.
New Jersey. Div. of Taxation, New Jersey State Tax News, Spring 1997.
New York. TSB-A-96(19)C (7/24/96).
North Carolina. N.C. Gen. Stats. § 57C-10-06; Dept. of Rev. Tech. Advice Memo (1/27/97).
North Dakota. N.D.C.C. §57-38-07.2.
Ohio. 58 State Tax Rev. #40 (10/16/97).
Oregon. S.B. 811 amended ORS § 63.180.
Pennsylvania. Act. 1997 - 7 eliminated application of corporate net income tax, but LLC remains subject to the capital stock and franchise tax.
Rhode Island. (97-S0805 (Substitute B)), amended R.I. Gen. Laws § 7-16-73(b); and §7-16-6(a)(5) articles to set forth treatment for federal income tax purposes.
South Carolina. S.C. Code §12-2-25(B).
Tennessee. DOR Rev. Rul. 97-41. (Single member LLC may be disregarded even though statute states that an LLC will be treated as a partnership or corporation under federal law.)
Utah. Utah Code Ann. § 59-10-801.
Virginia. P.D. 97-343 (8/28/97) .

b. No Disregard

Alabama. § 40-18-28, Dept. of Rev. Rev. Proc. 97-002. A disregarded LLC will be classified as a partnership.

2. General Conformity.

Indiana. IC § 6-3-1-11 (Regulations adopted under IRC (§ 7805(a) are regarded as rules adopted by the state Tax Dept.).
Vermont. 32 V.S.A. § 5921.

II. AMENDMENTS INSPIRED BY IRC §2704(b)

A. LCCs

1. Eliminate Default Right of Member to Receive “Fair Value” Upon Dissociation.

Connecticut. Conn. Gen. Stat. § 34-159(a).

Maryland HB § 390 amended Md. Code Ann. § 4A-606-1.
New Hampshire. N.H. RSA § 304-C:41, I.
Nebraska. Neb. Rev. Stat. § 21-2619(3).
Oklahoma. 18 O.S. § 2026.
Oregon. S.B. 811 amended ORS § 63.205 to change default rule prohibiting withdrawal to permit withdrawal but without “put” right.
Rhode Island. (97-S805 (Substitute B)), amended R.I. Gen. Laws §7-16-29.

2. Modified Definition of “Fair Value.”

New Jersey. N.J.S. § 42:2B-39 (Net present value of right to share in distributions less “all applicable valuation discounts.”

3. Eliminate Default Right to Dissociate/May Withdraw Only as Provided in Operating Agreement

Alaska. A.S. § 10.50.185(b)
Arkansas. Ark. Code §4-32-802(c).
Iowa. Iowa Code Ann. § 490A.704A(2).
Michigan. MCL § 450.4509(1).
Ohio. O.R.C. § 1705.16(C).

B. Limited Partnerships

Eliminate Default Right to Dissociate.

Alaska. A.S. § 32.11.260
Iowa. Iowa Code Ann. § 487.603.
North Dakota. N.D.C.C. §§ 57-38-07.1 and .2.
Ohio. O.R.C. § 1782.33(B).
Rhode Island. (97-S0805 (Substitute B)), amended R.I. Gen. Laws § 7-13-33.
Texas. Tex. Rev. Civ. Stat. Ann. art. 6132a-1, § 6.03.
Virginia. Va. Code § 50-73.38 amended to conform to LLC act (Va. Code § 13.1-1032).

III. ADOPTION OF UNIFORM ACTS (CUMULATIVE)

A. Revised Uniform Partnership Act (1994)

| | |
|----------------------|--------------------------------------|
| Alabama | Minnesota* Minn. Stat. §§ 323A.101 |
| Arizona | through 323A.1203. |
| California | Montana |
| Colorado* | Nebraska* L.B. 523 |
| Connecticut | New Mexico |
| District of Columbia | North Dakota |
| Florida | Oklahoma* (SB 483), 54 O.S. §§ 1-100 |
| Maryland* Md. Code | through 1-1209. |
| Ann. §§ 9-101 | Oregon* (SB 268) |
| through 9-1205. | Virginia |
| | West Virginia |
| | Wyoming |

B. Uniform LLP Amendment (1996)

Arizona
Colorado*
District of Columbia*
Maryland
Minnesota*
Montana*
Nebraska
New Mexico
North Dakota*
Oklahoma
Oregon
Virginia

C. Uniform LLC Act (1995)

Hawaii
Illinois* (S.B. 1020).
South Carolina
Vermont
West Virginia

*1997 Enactment

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