

Client Alert

Real Estate Department

Revised October 2011

Delaware vs. NY LLCs

The choice between Delaware and New York as the jurisdiction of organization for a new limited liability company which will do business in New York needs to be reviewed in every circumstance. The following is a list of the pros and cons of using Delaware when representing the controlling member:

Cons

1. **Filing Fees.** Assuming the business will operate in NY, the Company will need to file in both Delaware (organization) and NY (qualification to do business). This adds approximately \$300 to the cost of the organization.
2. **Statutory Representation.** The Company needs a statutory agent in Delaware. This adds approximately \$175 per annum.
3. **Accounting Fees/Tax Filings.** The Company must file tax returns in both Delaware and NY. Estimated additional costs of \$250 per annum for Delaware fees.

Pros

1. **Superior Statute.** Delaware has a superior statute which is regularly updated to resolve any inconsistencies.
2. **Fiduciary Duty.** Delaware expressly permits the restriction or elimination of fiduciary duty. See §18-1101. NY does not.
3. **Case Law.** As the case law has developed, Delaware courts are turning out to be more sophisticated than NY courts at interpreting their respective statutes.
4. **Need for Operating Agreement.** NY requires a written operating agreement within 90 days. See §417. The impact of failing to do so is unclear. Delaware does not require a written agreement.
5. **Management by Managers.** NY §401(a) appears to require that if management is changed from members to managers, an amendment to the charter is required.
6. **Classes of Members.** NY §418(a) could be interpreted to require that the articles must describe different classes or groups of members.
7. **Removal of Managers.** Unless otherwise expressly provided in the operating agreement, NY §414 permits removal of the manager without cause by a vote of members holding a majority in interest.

8. **Merger.** DE §18-209(b) permits a merger of the LLC without a vote of members if expressly provided in the LLC Agreement. NY §1001(c) requires a vote by no less than a majority in interest of the members in all cases.

In general, if the additional costs are not meaningful to the client, we should recommend that Delaware be used in most circumstances.

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