

## CORPORATE MATTERS: DELAWARE OR NEW YORK L.L.C.?

### Authors

Nina Krauthamer  
Simon Prisk  
Kenneth Lobo  
Sheryl Shah

### Tags

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When a client is considering commencing business operations in New York, we are often asked whether it is preferable to form a limited liability company (“L.L.C.”) in New York or in Delaware. As we have mentioned in a previous issues,<sup>80</sup> Delaware is generally the preferred jurisdiction for incorporation and the jurisdiction we typically recommend.

We thought it might be helpful to set out a short summary of issues that one will encounter in choosing between a New York or a Delaware L.L.C. and the relevant advantages and disadvantages of using either state.

### **Filing Fees**

The fee for filing the articles of organization for a New York L.L.C. is \$200,<sup>81</sup> while the fee for filing a certificate of formation in Delaware is only \$90.00.<sup>82</sup> However, if the Delaware L.L.C. intends to conduct business in New York, it must file an application of authority for a foreign limited liability company, accompanied with a certificate of good standing from Delaware.

The determination of whether the Delaware L.L.C. is conducting business in New York is largely fact specific.<sup>83</sup> The filing fee for the application for authority is \$250,<sup>84</sup> and the Delaware fee for a certificate of good standing can range from \$50 (for a short form certificate) to \$175 (for a long form certificate).<sup>85</sup>

### **New York Publication Requirements**

Within 120 days after its articles of organization become effective (in the case of a New York L.L.C.) or filing as a foreign entity (in the case of a Delaware L.L.C.), the L.L.C. must publish a copy of the articles of organization (or a notice related to the formation of the L.L.C.) or application for authority (or a notice related to the qualification of the L.L.C.) for eight weeks in two separate newspapers located within the county in which the L.L.C. is located. The affidavits of publication,

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<sup>80</sup> [Insights Volume 1 No. 2](#); [Insights Volume 1 No. 5](#)

<sup>81</sup> N.Y.L.L.C.L. §1101(f) (Consol. 2014).

<sup>82</sup> 6 Del. C. §18-1105(a)(3).

<sup>83</sup> [“Doing Business in New York, An Introduction to Qualification,”](#) Department of State, General Counsel, February 2000.

<sup>84</sup> N.Y.L.L.C.L. §1101(k) (Consol. 2014).

<sup>85</sup> 6 Del. C. §18-1105(a)(10).

certificate of publication form, and filing fee must be filed with the New York Department of State.

**Accounting Fees/Tax Filings**

A Delaware L.L.C. is not required to file an annual report but is required to pay an annual franchise tax. Taxes are to be received no later than June 1 of each year. The franchise tax is a flat rate of \$300.00. Failure to pay the tax by June 1 results in an additional \$200 penalty, plus interest on the tax and the penalty at a rate of 1.5% per month, and loss of the entity’s good standing status.<sup>86</sup>

A Delaware L.L.C. conducting business in New York (or a New York L.L.C.) must pay an annual filing fee to New York State using Form IT-204-LL.<sup>87</sup> The amount of the filing fee will be based on the total of the New York-source gross income for the tax year immediately preceding the tax year for which the fee is due. If an L.L.C. did not have any New York-source gross income for the preceding tax year, the filing fee will be \$25. Form IT-204-LL must be filed within 60 days of the last day of the L.L.C.’s tax year. There is no extension of time allowed to file Form IT-204-LL or for payment of the fee.

The filing fee in New York is based on a progressive rate as follows:

N.Y.-source gross income of an L.L.C. or L.L.P.		Filing fee:
Greater than:	Not exceeding:	
\$0	\$100,000	\$25
\$100,000	\$250,000	\$50
\$250,000	\$500,000	\$175
\$500,000	1,000,000	\$500
\$1,000,000	\$5,000,000	\$1,500
\$5,000,000	\$25,000,000	\$3,000
\$25,000,000	N/A	\$4,500

**Statutory Representation/Registered Agent in Delaware**

Delaware law requires that an L.L.C. have and maintain a registered agent in Delaware who may be either an individual resident or a business entity that is authorized to conduct business in Delaware. The registered agent must have a physical street address in Delaware. If the business is physically located in Delaware, then the business may act as its own registered agent.<sup>88</sup>

<sup>86</sup> 6 Del. C. §18-1107.

<sup>87</sup> “Instructions for Form IT-204-LL,” New York State Department of Taxation and Finance; “Form IT-204-LL.”

<sup>88</sup> 6 Del. C. §18-104(a)

Consequently, the fee for a registered agent in Delaware will represent an additional annual cost.

In New York, the secretary of state must be designated as agent for service of process. New York does not require a third-party registered agent.<sup>89</sup>

### **Fiduciary Duty**

Delaware expressly permits the restriction or elimination of fiduciary duties with the exception of the duty of good faith and the duty of fair dealing. Consequently, a member, or manager, may be personally liable for violating the above two duties.<sup>90</sup>

Likewise, in New York, an operating agreement may limit or even eliminate the personal liability of managers or members. However, the New York operating agreement cannot limit or eliminate the liability of a manager who acts in bad faith, is involved in intentional misconduct, has knowledge of a violation of the law or has gained a financial profit to which he or she was not legally entitled.<sup>91</sup>

### **Necessity of Operating Agreement**

New York requires a written operating agreement (limited liability company agreement) within 90 days of the entity's formation. Members are required to be signatories to the operating agreement, but there is no requirement that the L.L.C. itself be a party to the agreement.<sup>92</sup> On the other hand, Delaware specifically provides that an L.L.C. is bound by its limited liability company agreement whether or not the L.L.C. executes the agreement.<sup>93</sup> While Delaware does not require one, we nevertheless generally recommend a written operating agreement (limited liability company agreement) for Delaware L.L.C.'s.

### **Management by Managers**

In both New York and Delaware, unless management authority of an L.L.C. is given to a manager, management of the L.L.C. will be by the members. Management authority can be designated to a manager either at formation or possibly through an amendment at a later point in time.<sup>94</sup>

### **Removal of Managers**

In Delaware, a manager is typically removed pursuant to the terms of the limited liability company agreement.<sup>95</sup> A manager can also be removed through a decision by the Delaware Court of Chancery. A manager may also resign at any time upon notice to the members and other managers. An L.L.C. may recover damages if the

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<sup>89</sup> N.Y.L.L.C.L. §§203 (e)(4), (e)(5) (Consol. 2014).  
<sup>90</sup> 6 Del. C. §18-1101(c), (e).  
<sup>91</sup> N.Y.L.L.C.L. §417(a) (Consol. 2014).  
<sup>92</sup> N.Y.L.L.C.L. §417(c) (Consol. 2014).  
<sup>93</sup> 6 Del. C §18-101(7).  
<sup>94</sup> N.Y.L.L.C.L. §401(a).  
<sup>95</sup> 6 Del. C. §18-402, 6 Del. C. §18-110(a).

*“Delaware permits a merger of an L.L.C. without a vote of members if expressly provided in the L.L.C. Agreement... In New York, an operating agreement may change the percentage required for a merger approval.”*

resignation contravenes the L.L.C. agreement.<sup>96</sup> In New York, managers can be removed with or without cause by a vote of a majority of the members entitled to vote. However, this rule may be changed by a provision in the operating agreement.<sup>97</sup> As in the case of a Delaware L.L.C., a manager may resign, although the L.L.C. may recover damages.<sup>98</sup>

### **Merger**

Delaware permits a merger of an L.L.C. without a vote of members if expressly provided in the L.L.C. Agreement.<sup>99</sup> If not stipulated in the agreement, then a merger is permitted if approved by members owning more than 50% of the ownership percentage (or other ownership interest) of the L.L.C. In New York, an operating agreement may change the percentage required for a merger approval, but this percentage cannot be less than a majority in interest who are entitled to vote.<sup>100</sup>

### **Indemnification**

Both New York and Delaware allow indemnification of any member or manager or other person from and against any and all claims, consistent with their respective statutes.<sup>101</sup>

## **CONCLUSION**

The choice between forming a New York L.L.C. versus a Delaware L.L.C. for a New York business will depend on the particular facts and circumstances of the client. While Delaware may prove to be the more expensive choice (unless the New York publication requirements are found to be inapplicable), Delaware’s L.L.C. law is more frequently updated and may prove to be more manager-friendly.

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<sup>96</sup> 6 Del. C. §18-602.

<sup>97</sup> N.Y.L.L.C.L. §414 (Consol. 2014).

<sup>98</sup> N.Y.L.L.C.L. §415 (Consol. 2014).

<sup>99</sup> 6 Del. C. §18-209(b).

<sup>100</sup> N.Y.L.L.C.L. §1002(c) (Consol. 2014).

<sup>101</sup> N.Y.L.L.C.L. §420 (Consol. 2014); 6 Del.C. §18-108.