

CALIFORNIA RULLCA REVIEW

The Operating Agreement – Live by the Pen?

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The California Revised Uniform Limited Liability Company Act (RULLCA; 2012 Ch. 419 [SB 323])), codified at Section 17701.01 *et seq.* of the California Corporations Code (in effect or repealed, the Code), repealed the Beverly-Killea LLC Act (the Old Act) effective January 1, 2014.

Under RULLCA, the operating agreement governs the powers, rights, privileges, duties, obligations and activities of the members, the managers and the LLC itself even more so than under the Old Act. For instance, RULLCA provides that if the operating agreement conflicts with the articles of organization, the operating agreement prevails as to members, managers, dissociated members and transferees and the “record” (e.g., filed articles) prevails as to other persons to the extent they reasonably rely upon the record. (Section 17701.12(d) of the Code.) Under the Old Act, the articles prevailed.

RULLCA also casts its blanket of coverage more clearly to more situations. For instance, RULLCA provides that an operating agreement for a single member LLC is not unenforceable even though it only has one party. RULLCA also express provides that’s an LLC can enforce the operating

agreement even though not a party. Under RULLCA, an operating agreement governs the rights and duties of a manager even though the manager is not a party and persons that become members are “deemed to assent” to the operating agreement. Similarly, under RULLCA an operating agreement governs the obligations of the LLC and its members to a transferee of an interest even if amended after the transfer. (Sections 17701.02(s), 17701.11 and 17701.12 of the Code.)

So does RULLCA make an LLC live by the pen and die by the pen? Potentially, but not necessarily.

First, RULLCA still allows for members to enter into oral operating agreements. In fact, under RULLCA, an operating agreement expressly can be implied, consist of records and not even be referred to as an operating agreement. However, as with the Old Act, some provisions must be in a written operating agreement. RULLCA generally lists those provisions in Section 17701.10 of the Code.

Second, although RULLCA literally states that “it is the policy ... to give maximum effect to ... freedom of contract,” RULLCA still contains a list of provisions that an operating agreement cannot vary. Section 17701.10(c) and (d) of the

Code list more than 16 items that an operating agreement cannot do or vary.

Third, RULLCA contains many default provisions. So what happens in California if you use an inappropriate short form or simply confront haphazard drafting – you end up with default provisions that address omitted or unaltered issues. Conversely, what happens if you use a “bad” form of Delaware operating agreement – you end up in court or dispute resolution. California generally has decided it is better to have some provision governing basic LLC issues than none.

A clear case of default provisions relates to meetings and voting of members. RULLCA provides detailed rules on notices, quorum, actions and consents, which an operating agreement may not address in much detail. Section 17704.07(f) of the Code.)

In conclusion, RULLCA rewards the pen, but provides alternatives.

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