

Certificates of Formation

THE NEW AND THE OLD

Certificate of limited partnership

Minor differences between the old and new Dept. of State forms:

- Different requirements for addresses in filed forms (no P.O. boxes)
- Exemption from filing fee for veteran/reservist-owned small business (51 Pa.C.S.A. §9611)

Act 170 addresses conflicts between filed documents and limited partnership agreement in §8617(d):

Conflicts with partnership agreement.--Subject to subsection (c) [manifestly unreasonable provisions]:

- (1) If a provision of the certificate of limited partnership conflicts with a provision of the partnership agreement, the provision of the certificate prevails.
- (2) If a document other than its certificate of limited partnership that has been delivered by a limited partnership to the department for filing becomes effective and conflicts with a provision of the partnership agreement:
 - (i) the agreement prevails as to partners, persons dissociated as partners and transferees; and
 - (ii) the document prevails as to other persons to the extent they reasonably rely on the document.

Certificate of Limited Partnership (cont.)

Hypothetical:

- Certificate of limited partnership filed in 2014 named two individuals as the general partners of a limited partnership
- Limited partnership agreement executed on the same day identified an LLC as the general partner
- Limited partnership agreement vested all management authority in the general partner
- Lender accepted mortgage from limited partnership which the LLC signed as general partner

Certificate of Organization (LLCs)

Significant changes to Dept. of State form as a result of Act 170:

- Exemptions for veteran/reservist-owned companies
- Address information
- Deletion of strike-out provisions:
 - certificates of membership interests
 - manager management
 - existence as restricted professional services company
- Addition of option to create benefit company

Certificate of Organization (cont.)

Act 170 deals with conflicts between filed documents and operating agreement in 8817(d) (*note consistent section numbering scheme*):

Conflicts with operating agreement.--Subject to subsection (c):

(1) If a provision of the certificate of organization conflicts with a provision of the operating agreement, the provision of the certificate prevails.

(2) If a document other than its certificate of organization has been delivered by the company to the department for filing and conflicts with a provision of the operating agreement:

- (i) the operating agreement prevails as to members, dissociated members, transferees and managers; and
- (ii) the document prevails as to other persons to the extent they reasonably rely on the document.

Certificate of Organization (cont.)

Hypothetical #1:

- An LLC with 3 members was organized in 2014 by the filing of a DOS form certificate of organization, in which the management language in Box 5 was *not* stricken
- The members never signed an operating agreement

Hypothetical #2:

- An LLC with 3 members was organized in 2014 by the filing of a DOS form certificate of organization, in which the management language in Box 5 was *not* stricken
- In 2017, the members finally signed an operating agreement, which provides for management of the company on the basis of proportionate ownership interests

In both cases, you have been asked to issue a closing opinion, in support of the company obtaining a loan, as to the due execution of the loan documents

Certificate of Organization (cont.)

Helpful Act 170 Sections:

- §8811(d) – Application of Act 170 to all LLCs after April 1, 2017
- §8812 – Definition of “operating agreement,” includes oral agreements, agreements in “record form,” and “any combination thereof”
- §8847(c) – Authority conferred on managers in a manager-managed company