

Assumed Names of LLCs

At the Michigan Association of County Clerks summer conference in August, several county clerks reported that limited liability companies have filed assumed names with the counties. Filing with the county clerk is inconsistent with the Michigan Limited Liability Company Act ("LLC act"). It is unclear how a limited liability company or its members will be treated for contract or liability purposes if it transacts business under a name other than the name of the LLC and has no certificate of assumed name filed with the Corporation Division, but it has filed one with the county clerk.

Section 206 of the LLC act, MCL 450.4206, provides, "A domestic or foreign limited liability company may transact business under an assumed name or names other than its name as set forth in its articles of organization or certificate of authority, if not precluded from use of the assumed name or names under section 204(2), by filing a certificate stating the true name of the company and the assumed name or names under which business is to be transacted." Section 206(5) specifically provides that the same name may be assumed by two or more entities participating together in a partnership or joint venture and requires each limited liability company to file a certificate of assumed name under the LLC act.

Public Act 101 of 1907, MCL 445.1-445.5, provides for filing of a certificate of assumed name with the county clerk if a person owns, conducts, or transacts business under a name other than the real name of the person owning, conducting, or transacting the business. An individual conducting business under an assumed name would file a certificate of assumed name with the county clerk in each county in which the person conducts business. Section 4 of the act, MCL 445.4, provides the act "shall in no way affect or apply to any corporation or limited partnership organized under the laws of this state, or to any corporation or limited partnership organized under the laws of any other

state and lawfully doing business in the state..."

Public Act 164 of 1913, MCL 449.101-449.106, provides for the filing of certificates of co-partnership with the county clerks when two or more persons are engaged in "carrying on any business as copartners..." Section 1, MCL 449.101, provides that "any copartnership that has filed the certificate required by Act 101 of the Public Acts of 1907, shall not be required to file the certificate herein provided for."

MCL 445.2 and MCL 449.104 both provide that the county clerks may reject any assumed name, "which is likely to mislead the public, or any assumed name already filed in the county or so nearly similar thereto as to lead to confusion or deception." Section 204 of the LLC act, MCL 450.4204, provides that the name of a limited liability company, including an assumed name, must be distinguishable on the records of the administrator from names of corporation, limited liability companies, and limited partnerships as listed in section 204. The name standard followed by the county clerks only applies to names filed with the county, and the name standard followed by the Corporation Division only applies to names filed with the agency.

If a limited liability company intends to conduct business under an assumed name but fails to file the certificate of assumed name required by section 206 of the LLC act, it could raise questions about whether the LLC or a partnership conducted the business. If an individual is the sole member of the LLC, it fails to file a certificate required by section 206, and the person files a "dba" certificate with the county clerk, it could raise questions about whether the person was conducting business as a sole proprietor or as an LLC. Unless the Certificate of Assumed Name is filed with the Corporation Division, the public record for the LLC will not reflect the assumed name. These issues can be completely avoided by ensuring that any LLC transacting business under an assumed name has

the required Certificate of Assumed Name filed with the Corporation Division.

The Certificate of Assumed Name is filed with the Bureau of Commercial Services and is effective for five full calendar years. The agency mails a notice to the company of the impending expiration of the certificate of assumed name at least 90 days before the expiration of the five-year period along with a Certificate of Renewal of Assumed Name, which is due by December 31.

Nonprofit Corporation Act

In September, the Corporation Division sent notices to Michigan nonprofit corporations to advise them of the passage of Public Act 222 of 2008, effective July 16, 2008. PA 222 amended the Nonprofit Corporation Act to increase the minimum size of the board of directors and added new requirements for charitable purpose corporations.

Section 505 of the act was amended to increase the minimum size of the board from one to three directors. Beginning January 16, 2009, the boards of corporations in existence on the effective date of the act must consist of three or more directors. Annual reports for 2008 and prior years may be filed with less than three directors, but three or more directors will be required on the 2009 annual reports due by October 1, 2009.

A definition of charitable purpose corporation was added in section 106(1). "Charitable purpose corporation" is defined as a nonprofit corporation that is a) exempt or qualifies for exemption under 501(c)(3); b) whose purposes, structure, or activities are exclusively those that are described in section 501(c)(3); or c) a corporation organized or held out to be organized exclusively for one or more charitable purposes.

Sections 548 and 922 include new requirements for charitable purpose corporations. Section 548(4) provides, "If a corporation is a charitable purpose corporation, the corporation shall not provide loans to or guarantee an obligation of an officer or direc-

tor of the corporation or a subsidiary, unless the officer or director is also a client of the corporation and the loan or guaranty is necessary to carry out the corporation's charitable purposes." Section 922 requires a "charitable purpose corporation" to notify the Attorney General within sixty days if it is automatically dissolved under section 922(1) for failure to file an annual report. In addition, the corporation is prohibited from disposing of "any of its assets without written approval of the Attorney General."

Annual Reports

Preprinted annual reports and any notices from the Corporation Division are mailed to the corporation addressed to the resident agent at the registered office. If the current year report is not submitted, a delinquency notice is sent within ninety days after the October 1 due date. If a corporation does not submit the annual report within the two years of its due date, a notice of impending dissolution is sent to the corporation. If a corporation fails to maintain a resident agent and registered office, the corporation may not know if it has become automatically dissolved, triggering the obligation to notify the Attorney General of the dissolution.

Policy Statement C-67, issued May 10, 2007, provides that statutory late penalty fees will be assessed for profit corporation annual reports received after the May 15, 2008. The number of profit corporations submitting annual reports late significantly increased between 1997 and 2007. Steps taken in 2003 to reduce the number of corporations more than five months delinquent on their annual reports were insufficient, and over 25 percent of corporations did not timely file reports. The number of delinquent profit corporations in August declined by nearly 10,000 corporations from 2007 and is the first significant decline in delinquent corporations since 1996.

Business Entity Search

Business Entity Search (www.michigan.gov/entitysearch) may be used to determine a corporation's current status, how many directors the nonprof-

it corporation has reported, and the resident agent and registered office address. The corporation's bylaws should be reviewed to determine the size of the board of directors and whether the bylaws must be amended to comply with section 505. A domestic nonprofit corporation may use FileOnline (<http://www.michigan.gov/fileonline>) to determine if any reports need to be filed and to file online. If a nonprofit corporation has been automatically dissolved, it may renew its existence by filing the reports for the last five years or any lesser number of years and paying the required fees for all the years for which they were not filed, together with the penalty of \$5.00 for each report. To request the preprinted reports required to renew corporate existence, send an email to corprenew@michigan.gov and include the corporation name, six-digit file number assigned by the Corporation Division, and email address, fax number, or mailing address to which the forms should be sent. The customer may also call the Business Services section at (517)241-6470 to request the reports.

Electronic Filing

To improve service, procedures for obtaining a MICH-ELF filer account number have been changed. A separate fax number has been established only for applications for a filer account number or to update an existing filer account. All filer account applications or changes should be faxed to (517)241-6445.

FileOnline is being modified to permit some foreign profit corporations to file annual reports online. Online filing for annual reports of foreign profit corporations in good standing with less than 60,000 shares in their home state or with 100 percent of authorized shares attributable to Michigan should be available in fall 2008. These corporations would be able to file the most current report and most recent prior year report online. Eligible foreign corporations will receive information about online filing with their 2009 profit annual report. Additional changes are planned which should permit all cor-

porations to file their reports online by the end of 2009.

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