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# SB 298

Overview presented by the Nevada Resident Agent Association

## FEES: SB 298 represents an estimated \$46-\$50 million increase in commercial recording fees over a biennium.

1. NRAA Approach to Fee Change Recommendations - The Nevada Resident Agent Association (NRAA) has conducted a comprehensive analysis of the commercial recordings fee structure as provided in NRS and the industry recommendations are contained in SB 298. It is the intent of this proposal that we accomplish the following:
  - a. Nevada's fee structure must allow our state to remain competitive with other states in three specific competitive sectors:
    - i. *Western Region States* (AZ, CA, HI, ID, OR, UT, WA)
      1. Minimum Incorporation Fee (Avg) = \$122.14
      2. Minimum Annual Fees (Avg) = \$159.29
    - ii. *Incorporation Center States* (CO, DE, FL, WY)
      1. Minimum Incorporation Fee (Avg) = \$ 82.00
      2. Minimum Annual Fees (Avg) = \$ 61.25
    - iii. *States with No Corporate Tax* (SD, WY)
      1. Minimum Incorporation Fee (Avg) = \$105.00
      2. Minimum Annual Fees (Avg) = \$ 37.50
  - b. Nevada's fee structure must have a consistent pricing theory basis which will ensure that the state revenues are maximized in a manner that has a minimal negative impact on commercial recordings.
2. Reduce Fees on Elective Filing
  - a. Elective commercial recording filings are those in which the user can choose:
    - i. Whether or not to file, or
    - ii. Whether to file in Nevada or in another state.
  - b. Reducing the fee on elective commercial recordings – which are primarily the initial filing fees – results in the following:
    - i. Nevada, where the minimum initial incorporation fees are \$365 (incorporation fee + initial list fee + state business license fee), will be better able to compete within our competitive sectors for new filings.
    - ii. The barrier to entry for Nevada commercial recordings will be lowered, which will result in a higher number of corporate filings that will be attracted to the state.
    - iii. A larger base of Nevada entities makes it possible to raise significantly more revenue over time with a moderate increase in mandatory filing fees.
  - c. SB 298 would decrease the following elective fees:
    - i. The minimum initial incorporation fee from \$175 to \$75.
    - ii. The fee for filing the Initial List of Officers, Directors and Agent from \$165 to \$125.

### 3. Moderate Increases to Mandatory Filing Fees

- a. Mandatory commercial recording fees are those which are required by an entity once it has registered as a Nevada entity, or qualified to conduct business in Nevada as a foreign entity. Following are examples, with changes as provided by SB 298:

- i. Annual List fee, currently \$85. Proposed \$125 minimum. (*SEE SUBSECTION b. BELOW FOR FURTHER EXPLANATION.*)
- ii. Late Filing Penalty, currently \$50. Proposed \$75.
- iii. Reinstatement Fee, currently \$200. Proposed \$300.
- iv. Amendment Fee, currently \$150. Proposed \$175.
- v. Dissolution Fee, currently \$60. Proposed \$75.
- vi. Resident Agent Change Fee, currently \$30. Proposed \$60.
- vii. Certification Fee, currently \$20. Proposed \$30.
- viii. Name Reservation Fee, currently \$20. Proposed \$25.
- ix. Certificate of Good Standing, currently \$40. Proposed \$50.
- x. Copy Fee, currently \$1. Proposed \$2.
- xi. Resident Agent Registration Fee, currently \$250. Proposed \$500.
- xii. 24 Hour Expedite Fee, currently \$100. Proposed \$125.
- xiii. Non-profit and Corporation Sole fees increased modestly

b. Tiered Renewal Fees

- i. Currently, Nevada imposes a tiered fee structure for new corporate filings on the basis of the total aggregate value of stock as provided in the articles of incorporation. This idea is based on the theory that a corporation should pay for additional value as provided by the state.
  1. As the result of this practice, the Secretary of State's office has available the data necessary to implement a tiered annual renewal fee, which would allow the State charge additional annual fees on the basis of total aggregate value of stock as provided in the articles of incorporation.
  2. This fee increase only impacts companies which have already demonstrated an ability to pay a higher fee, as evidenced by the tiered incorporation fee structure.
- ii. The annual renewal fee proposed by SB 298 is as follows:
  1. For companies with up to \$75,000 in aggregate stock, a proposed \$125 fee.
  2. For companies with value over \$75,000, but not more than \$200,000, a proposed \$175 fee.
  3. For companies with value over \$200,000, but not more than \$500,000, a proposed \$275 fee.
  4. For companies with value over \$500,000, but not more than \$1,000,000, a proposed \$375 fee.
  5. For companies with value over \$1,000,000, a proposed fee of \$375 for the 1<sup>st</sup> \$1 million in value, plus \$275 for each additional \$500,000 value, or fraction thereof.

6. The maximum annual filing fee is set at \$11,100, which caps for companies with a total aggregate value over \$20.5 million.

**4. Annual Business License Fee**

- a. SB 298 proposes changes to the business license registration provided for in NRS364A.130(5). Currently, there is a one-time application fee of \$25 for a Nevada business license. SB298 makes the state business license an annual requirement for all persons or entities conducting business in the state, with an application/annual fee of \$50.
- b. SB298 also provides for late penalties and provisions that may be applied by the Department of Taxation in order to increase enforceability and collections of the business license tax, including a procedure for issuing a Cease and Desist Order to a person or company engaged in business in Nevada who has not complied with this requirement.

**CHARGING ORDER: SB298 makes corrections to Nevada law dealing with "charging order" limitations as they apply to limited partnerships and limited liability companies.**

1. **What is a charging order?** Charging order protection provides that a creditor may only receive from the partnership (or LLC as the case may be) distributions in satisfaction of a creditors claim.
  - a. The charging order exists to protect other members of an LLC from having involuntarily to share governance responsibilities with someone they did not choose, or from having to accept a creditor of another member as a co-manager. A charging order protects the autonomy of the original members, and their ability to manage their own enterprises.
  - b. In a single-member entity, there are no non-debtor members to protect. The charging order serves no purpose in a single-member LLC, because there are no other parties' interests effected.
  - c. A charging order does not apply when the judgment creditor has a judgment against the partnership (or LLC) itself. In such a case, the assets of the partnership (of LLC) could be sold.
2. Currently, best state laws in the area of charging order protections are **Alaska, Arizona, Oklahoma, and Wyoming**. Each of these states statutes provide that the charging order is the exclusive remedy for a creditor by statutory language for both limited partnerships and LLC's. In addition to these four states, seven states LLC language provides that the charging order is the exclusive remedy of a creditor, but remain silent with regard to limited partnership statutes.
3. Nevada attorney Steve Oshins testified earlier before the Assembly Judiciary Committee that the charging order language previously changed by the 2001 legislature was language that he had provided to the Nevada Bar Association. He further testified that the existing language has generated confusion among legal practitioners as to whether Nevada statutes provide for the charging order as the creditor's sole remedy. SB298 clarifies that confusion by making the charging order the sole remedy of a creditor.
4. The impact of this change will be to place Nevada among the most favorable jurisdictions for both limited partnerships and LLC's with regard to the charging order protection.

## LLLP: SB 298 Allows for creation of a new entity

1. **Definition.** A limited liability limited partnership (LLLP) is a limited partnership that registers under state law so the general partner will have limited liability similar to the limited partners.
  - a. LLLP registration removes bias relating to liability that may arise simply as the result of the choice of entity. The LLLP provides the same level of personal liability protection that already exists for corporations and LLC's to the partnership vehicle. The same statutory and case law that would be used to pierce the corporate veil would also be applied to individual liability for LLLP's.
2. **Precedent.**
  - a. The National Conference of Commissioners on Uniform State Laws (NCCUSL) approved and adopted the Uniform Limited Partnership Act (2001) at its annual conference in August 2001, and recommended it for enactment in all states. *The primary component of the Act is the addition of LLLP status and registration.*
    - i. The NCCUSL is comprised of more than 300 lawyers, judges and law professors, appointed by the states as well as the District of Columbia, Puerto Rico and the US Virgin Islands to draft proposals for uniform and model laws and work toward their enactment in their legislatures.
  - b. The Uniform Limited Partnership Act (2001), with LLLP provisions was approved by the American Bar Association's House of Delegates at its Midyear Meeting in Philadelphia, February 2002.
  - c. The following states have already adopted LLLP statutes
    - i. Delaware
    - ii. Florida
    - iii. Colorado
    - iv. Georgia
    - v. Maryland
    - vi. Texas
    - vii. Arizona
    - viii. Minnesota
    - ix. Missouri
    - x. South Dakota
    - xi. Iowa
    - xii. Virginia
    - xiii. North Dakota
    - xiv. Kansas
    - xv. U.S. Virgin Islands
    - xvi. 2 other states, unidentified
  - d. The following states have pending legislation in 2003:
    - i. Nevada (SB 298)
    - ii. Hawaii (HB 1166)
  - e. At this time, there is sufficient precedent among the states in forming and using LLLP's that Nevada risks becoming a jurisdiction to avoid in the area of partnership law if it does not adopt LLLP statutes.
    - i. How will foreign LLLP's that will conduct business in Nevada be treated under the law if there is no Nevada LLLP statute?
3. **Limits on LLLP Indemnification.**
  - a. A general partner (or manager) of an LLLP is not protected from individual liability in the presence of:
    - i. Partnership Agreement provisions that establish individual liability,
    - ii. Liability that was incurred prior to LLLP registration, or at any time when the partnership was not registered,
    - iii. A partner acts as the alter ego of the partnership, which is established by the presence of the following factors:

1. The LLLP is influenced and governed by the partner,
2. There is such unity of interest and ownership that the LLLP and the partner are inseparable from one another,
3. Adherence to the fiction of a separate entity would sanction fraud or promote a manifest injustice.

## **STATEMENTS REGARDING LLLP's**

**"Because of the limited liability company (LLC), LLP and LLLP, in the future, the general partnership and the limited partnership (LP) will likely become obsolete."** – *Commerce ClearingHouse, Business Owner's Toolkit, [www.toolkit.cch.com/text/P12\\_4275.asp](http://www.toolkit.cch.com/text/P12_4275.asp)*

**"The NCCUSL model act on which this bill is based represents the latest effort of the Uniform Law Commissioners to modernize our country's uniform business laws. As set forth in this bill, the model act has been modified to conform with (Hawaii's) filing procedures and practices. This bill allows limited partnerships to elect a limited liability status for their general partners and establish a limited liability limited partnership (LLL), which are increasingly being recognized and promoted by other states. It thereby provides additional flexibility for limited liability partnerships in Hawaii and encourages foreign LLLP registration in the State. Your committee believes the improvements made by this bill will reduce costs and make Hawaii a more attractive place to do business."** – *Report by the Committee on Consumer Protection and Commerce on a similar bill (HB 1166) which allows creation of the LLLP in Hawaii, Hawaii House of Representatives, Kenneth T. Hiraki, Chairman*

**"The Uniform Limited Partnership Act, last amended in 1985 and adopted in 49 states, the District of Columbia and the US Virgin Islands, has been completely revised to adapt the act to new uses. The 2001 revision recognizes modern-day uses of limited partnerships by providing greater organizational flexibility and protection for the partnership from dissolution. The changes were needed to keep pace with the evolution of other related laws, including NCCUSL's Uniform Partnership Act, which was promulgated in 1997. The use of limited partnerships has shifted with time from businesses to family limited partnerships used in estate planning."** – *Press release by the National Conference of Commissioners on Uniform State Laws, February 6, 2002*

**"Following the example of a growing number of States, this Act provides for limited liability limited partnerships. In a limited liability limited partnership ("LLLLP"), no partner – whether general or limited – is liable on account of partner status for the limited partnership's obligations. Both general and limited partners benefit from a full, status-based liability shield that is equivalent to the shield enjoyed by corporate shareholders, LLC members, and partners in an LLP. The Act is designed to serve preexisting limited partnerships as well as limited partnerships formed after the Act's enactment. Most of those preexisting limited partnerships will not be LLLP's, and accordingly the Act does not prefer or presume LLLP status. Instead, the Act makes LLLP status available through a simple statement in the certificate of limited partnership."** – *Prefatory Note to the Uniform Limited Partnership Act (2001) drafted by the National Conference of Commissioners on Uniform State Laws and by it approved and recommended for enactment in all the states.*

## Q&A regarding LLLP's

**Q: Won't the creation of the LLLP allow for too much liability protection?**

*A: The LLLP does not create any new liability protection in any degree that does not already exist for corporations or limited liability companies. The LLLP only uses the same liability protection, under the same standards as they are applied under corporate law. The liability protection provided by a LLLP only applies to an individual's liability for partnership acts or debt. It does not remove the partnership liability for its act or debts in any way.*

**Q: Is that good public policy?**

*A: The need for personal liability protection in business is the very reason that limited liability entities such as corporations, limited liability companies and limited partnerships exist in every free society. It has long been recognized that there is a proper and legitimate purpose in providing in providing this type of personal indemnification for business risks. The reason for this need is illustrated by the following quote by Peter W. Huber author of *Liability: The Legal Revolution and Its Consequences*: "Who would be building and fixing, developing and doing, treating, immunizing, and curing, while the lawyers were busy assessing the fines and keeping the jail? The answer, with growing frequency, (is) no one at all . . . When it comes to liability problems, the bold innovators are the most fleet-footed of potential defendants. More often than not, they adjusted to the threat of liability by doing less. Not innovating is a remarkably easy thing to do."*

*There is a need for limited liability in good public policy because it encourages healthy investment and activity in the risks of conducting business, which is the very basis of our global economy.*

**Q: Won't the use of LLLP's in Nevada encourage another Enron-type debacle?**

*A: First, SB298 says that when "adherence to the fiction of a separate entity would sanction fraud or promote a manifest injustice", a court could determine that the LLLP is the alter ego of the general partner(s), and remove all liability protection available to them. In any of the recently publicized corporate ethics and fraud cases, such as Enron, Worldcom, Martha Stewart, etc., the presence of an LLLP as an involved entity would not necessarily protect managers from personal liability, due to the "fraud" and "manifest injustice" provisions of the bill.*

*Second, as the NCCUSL indicated in their February 6, 2002 press release, it is generally recognized that the use of partnerships has changed significantly with time: "The use of limited partnerships has shifted with time from businesses to family limited partnerships used in estate planning." (see above) Most of the entities that would use the LLLP designation are estate planning vehicles used by families. The corporation and the LLC are the entities most commonly used by business for a variety of technical reasons – and they already enjoy limited liability.*

*Third, the LLLP status is not presumed and is not automatic. It must be elected. So, limited partnership used in a trade or business where there is a need for a degree of managerial accountability – especially to the investors – may choose not to elect LLLP status for that very reason.*

*Fourth, sophisticated planners – like the law firms responsible for structuring Enron-type arrangements – already use a separate corporation as the general partner of a limited partnership, thus eliminating personal liability through the corporate shield. Users of family limited partnerships have not traditionally implemented a corporate general partner due to the additional expense and legal resources generally required.*