

# Model Charters Issued for Russian Limited Liability Companies

1 November 2018

On 24 September 2018, the Russian Ministry of Economic Development published Order No. 411 (the “Order”), approving 36 model charters for limited liability companies. The Order was dated 1 August 2018 and enters into force on 24 June 2019.

The model charters have been approved pursuant to Article 12 of the Federal Law on Limited Liability Companies (the “Law”), which provides that a company may operate on the basis of either a charter approved by the members of the company or a model charter approved by the Ministry of Economic Development.

## Debevoise & Plimpton

Although the use of model charters was first provided for by the Russian Civil Code in 2014 as part of corporate regulatory reform, the Order represents the first time the necessary templates have been established. Although the Russian Civil Code allows model charters to be used for any legal entity except for commercial partnerships and state corporations, the model charters included in the Order are approved only for limited liability companies.<sup>1</sup>

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### The Content of Model Charters

All 36 model charters are extremely concise (less than two pages each) and are each structured with the following eight sections: (i) general provisions; (ii) rights and obligations of members; (iii) transfer of interest in the charter capital; (iv) exit of members from the company; (v) governance; (vi) maintenance and distribution of records and information; (vii) interested party transactions; and (viii) reorganization and liquidation. In many of the model charters, the sections merely contain references to the relevant provisions of the Law.

When a model charter is used, the name of the company, its location and the size of its charter capital are not included in the charter. This information is only included in the Russian Unified State Register of Legal Entities (“USRLE”).

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<sup>1</sup> According to the Russian Tax Service, the limited liability company is the most common form of incorporation in Russia for commercial entities, accounting for 97 percent of the 3.6 million companies currently registered in Russia.

## Principal Differences in Model Charters

The model charter forms vary in the regulation of certain matters that the Law permits the members to determine on their own within the established limits:

Issue	Options	
Transfer by a member of its interest (or part thereof) to another member	Consent of other members required	Consent of other members not required
Transfer by a member of its interest (or part thereof) to a third party	Consent of other members required	Consent of other members not required
Pre-emptive right of members to acquire the interest or part thereof being transferred by another member to a third party	Available	Not available <sup>2</sup>
Passing of a member's interest to its heirs/successors	Consent of other members required	Consent of other members not required
Exit of a member from the company	Permitted	Not permitted
Control over the day-to-day operations of the company	Exercised by the sole executive body (general director) elected by the general meeting of members for five years	Exercised by the members of the company who act as the sole executive body (director) so long as they remain members; <sup>3</sup> for this purpose, the authority to act on behalf of the company is exercised (depending on the form of the model charter) by: <ul style="list-style-type: none"> <li>• each member acting alone; or</li> </ul>

<sup>2</sup> Some model charters explicitly exclude the pre-emptive right of members to acquire interest (or part thereof) being transferred by another member to a third party. However, the legality of such a provision is doubtful. Article 21(4) of the Law permits the establishment of “a different procedure for the exercise of the pre-emptive right,” but does not permit that right to be excluded entirely.

<sup>3</sup> This approach appears debateable. Article 40 of the Law states that “the sole executive body [...] shall be elected by the general meeting of members”; there is no provision for an automatic (ex officio) appointment of any persons (including members of the company) as the sole executive body. In addition, the charter must indicate the term for which the sole executive body is elected. A question may arise in this connection as to what extent the term of office set forth by the model form—“until [such member] ceases to be a member”—fulfils this requirement.

Issue	Options	
		<ul style="list-style-type: none"><li>• all members acting jointly</li></ul>
Endorsement of resolutions of the general meeting of members	Certification of the minutes by notary	Signing of the minutes by all members in attendance

The above options are combined in a variety of ways in the 36 model charters.<sup>4</sup>

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## Use of Model Form

As with an ordinary charter, a model charter may be adopted by unanimous consent of the members at the general meeting when the company is incorporated, or at a subsequent general meeting by a two-thirds vote (unless a larger majority is specified by the original charter). The use of a model charter will be noted on the company's USRLE record. Similarly, a company that has adopted a model charter may at any time replace that charter with an ordinary charter, subject to the customary two-thirds (or greater) approval of the members at the general meeting.

Unlike many foreign jurisdictions, Russian legislation does not provide for the registration of a model charter that has been revised or supplemented. However, a company may create its own charter based on the model charters and then register that charter according to general procedures.

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## Amendments to the Model Charters

The Ministry of Economic Development may amend the approved model charters in the future. The amendments will become effective on the date set forth by the Ministry of Economic Development, but no earlier than 15 days after their official publication. Accordingly, any company using a model charter and its members will need to monitor amendments to the model form so that if unacceptable amendments are made, the company can promptly either switch to a different model form or adopt its own charter.

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<sup>4</sup> In April 2018, the Ministry of Economic Development posted a comparative table illustrating the various options for each of the model forms on the Federal Portal of Draft Legal Acts at <http://regulation.gov.ru>.

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## Principal Advantages of Model Charters

The use of the model charters simplifies the process of preparing the charter and negotiating its provisions, thus reducing the costs to the company's members. Using a model charter also relieves the company of the need to bring its charter in compliance with subsequent changes to corporate regulation and compliance procedures. However, the use of model charters in general does not have any effect on the charter registration procedure.

Some observers claim that one advantage of the charters is that they do not require any amendment if the company's name, location or charter capital are changed, as these details are not included in the model charter. However, this advantage is likely to be insignificant from a practical point of view, given that a resolution on these issues still must be adopted at a general meeting of members and the company's USRLE record must be updated—all of which must be done in accordance with the regulations for amending a charter.

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## Principal Disadvantages of Model Charters

Although the Order includes 36 model charters with various combinations of the above provisions, the actual range of corporate mechanisms available is extremely limited. Specifically:

- All model charters provide for a simplified structure of governing bodies consisting of the general meeting of members and the sole executive body. None of the model forms allow for the creation of a board of directors or a collective executive body (management board).
- All model charters set forth the standard scope of authority for the general meeting of members stipulated by the Law by default. However, it is often necessary to expand the scope of authority of the general meeting (for example, to limit the authority of the general director).
- The term of office of the general director in the model forms is fixed at five years, which may be too long in the view of some members. It should be noted that in general, the members may terminate the general director at any time prior to the end of the term—but that in such a case, the general director must receive the severance package specified in his or her employment contract and in no case less than three months' salary, pursuant to Article 279 of the Russian Labor Code.
- In addition to having a sole general director, the model charters also provide for a fairly extravagant structure in which day-to-day activities are managed by the company's members, acting either collectively individually. The ability of more

than one person to act as the sole executive body (together or independently) is provided for by Articles 53 and 65.3 of the Russian Civil Code. However, vesting all members with such authority over the company's daily operations goes against the underlying rationale of limited liability companies, which are designed to represent a pooling of capital rather than a grouping of persons.<sup>5</sup> In contrast, consider a situation permissible in foreign jurisdictions, in which two or more directors—who may or may not be members—are appointed with a flexible division of powers among them, such as where the authority over all or certain matters may be exercised by (i) all or certain directors acting jointly or (ii) any director acting individually.<sup>6</sup>

- None of the model charters includes a pre-emptive right of the company itself to acquire an interest in the charter capital being sold to a third party.
- None of the model charters permits fine-tuning of the mechanism for exercising the pre-emptive rights of members to acquire an interest being sold by another member to a third party. A company may find it necessary, for example, to adjust the period for exercising the pre-emptive right or providing for a non-proportional or partial exercise of that right.
- None of the model forms allows the pledge of an interest to a third party.
- None of the model forms provides for the ability to make contributions to the assets of the company without an increase in charter capital—a financing arrangement which occurs frequently.
- In 2015, the requirement for companies to have a corporate seal was eliminated—but if a company intends to use a seal, that use must be reflected in the charter. None of the model forms provides for the use of a seal, although many companies continue to use one.—

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<sup>5</sup> Direct involvement of the members in day-to-day business operations is more common for legal entities, such as partnerships, that are a grouping of persons based on their personal involvement.

<sup>6</sup> This approach is not expressly provided for by Articles 53 and 65.3 of the Russian Civil Code, but it follows from the guidance of the Russian Supreme Court (see paragraph 24 of Resolution No. 25 of the Plenum of the Russian Supreme Court dated 23 June 2015). In foreign jurisdictions, companies are also permitted to appoint different classes of directors who can act on behalf of the company in various combinations depending on the nature of the transaction (e.g., (i) any two directors A and B acting jointly are entitled to make transactions with real property; (ii) director A with director B or C are entitled to make any transactions exceeding USD 100,000; and (iii) director A acting alone or any two directors B and C acting jointly—any transactions for up to USD 100,000). However, it is unclear whether different classes of directors may be appointed in Russian companies as there is no provision in Russian regulation expressly permitting the appointment of such directors.

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## For Which Companies Are Model Charters Appropriate?

Model charters can be appropriate for certain types of companies:

- companies with a sole member who is also the general director or has appointed a “controlled” general director; or
- companies having the standard corporate governance structure set forth by law by default and a basic set of corporate rights and which do not need special agreements among the members (such as those covering transfer of interests, payment of dividends, exercise of voting rights or other matters)—provided that the members are comfortable with the general director’s five-year term of office.

Examples of companies for which the model charters would not be appropriate include:

- companies that need to limit the scope of authority of the general director;<sup>7</sup>
- joint venture companies involving investors with independent interests and a sophisticated corporate governance structure requiring complex issues to be addressed in detail, such as those involving the transfer of interests, corporate governance, financing and access to information;
- subsidiaries that are special purpose vehicles or operating companies (including wholly owned subsidiaries), since it is usually necessary to coordinate the corporate governance system of the holding company with that of subsidiaries;
- companies that intend to have a seal since the model charters do not provide for a corporate seal;
- companies that need to have an official name in a foreign language (a foreign-language company name cannot be used in the USRLE and is only specified in a company’s charter—but the model charters do not specify company names);
- companies whose members are unwilling to monitor amendments to the model charters that may be made by the Ministry of Economic Development; or
- companies subject to special regulation (*e.g.*, credit institutions, whose corporate bodies are required by law to have specific structures and competencies).

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<sup>7</sup> By default, the scope of authority of the general director in limited liability companies includes all matters other than those that fall within the scope of authority of the general meeting of members under law or the charter.

The model charters aim to simplify the process of preparing and negotiating a charter and thereby to reduce the related costs to the company's members. However, the narrow range of corporate mechanisms covered by the model charters and their variations is likely to significantly limit use of the model charters.

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Please do not hesitate to contact us with any questions.

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