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DELAWARE STATE SENATE
151st GENERAL ASSEMBLY

SENATE BILL NO. 114

AN ACT TO AMEND CHAPTER 18, TITLE 6 OF THE DELAWARE CODE RELATING TO THE CREATION, REGULATION, OPERATION AND DISSOLUTION OF DOMESTIC LIMITED LIABILITY COMPANIES AND THE REGISTRATION AND REGULATION OF FOREIGN LIMITED LIABILITY COMPANIES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend § 18-106, Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike
2 through and insertions as shown by underline as follows:

3 § 18-106. Nature of business permitted; powers.

4 (e) Any act or transaction that may be taken by or in respect of a limited liability company under this chapter or a
5 limited liability company agreement, but that is void or voidable when taken, may be ratified (or the failure to comply with
6 any requirements of the limited liability company agreement making such act or transaction void or voidable may be
7 waived) by the members, managers or other persons whose approval would be required under the limited liability company
8 agreement (i) for such act or transaction to be validly taken, or (ii) to amend the limited liability company agreement in a
9 manner that would permit such act or transaction to be validly taken, in each case at the time of such ratification or waiver;
10 provided, that if the void or voidable act or transaction was the issuance or assignment of any limited liability company
11 interests, the limited liability company interests purportedly issued or assigned shall be deemed not to have been issued or
12 assigned for purposes of determining whether the void or voidable act or transaction was ratified or waived pursuant to this
13 subsection (e). Any act or transaction ratified, or with respect to which the failure to comply with any requirements of the
14 limited liability company agreement is waived, pursuant to this subsection (e) shall be deemed validly taken at the time of
15 such act or transaction. If an amendment to the limited liability company agreement to permit any such act or transaction to
16 be validly taken would require notice to any members, managers or other persons under the limited liability company
17 agreement and the ratification or waiver of such act or transaction is effectuated pursuant to this subsection (e) by the
18 members, managers or other persons whose approval would be required to amend the limited liability company agreement,
19 notice of such ratification or waiver shall be given following such ratification or waiver to the members, managers or other
20 persons who would have been entitled to notice of such an amendment and who have not otherwise received notice of, or
21 participated in, such ratification or waiver. The provisions of this subsection (e) shall not be construed to limit the

22 accomplishment of a ratification or waiver of a void or voidable act by other means permitted by law. Upon application of
23 the limited liability company, any member, any manager or any person claiming to be substantially and adversely affected
24 by a ratification or waiver pursuant to this subsection (e) (excluding any harm that would have resulted if such act or
25 transaction had been valid when taken), the Court of Chancery may hear and determine the validity and effectiveness of the
26 ratification of, or waiver with respect to, any void or voidable act or transaction effectuated pursuant to this subsection (e),
27 and in any such application, the limited liability company shall be named as a party and service of the application upon the
28 registered agent of the limited liability company shall be deemed to be service upon the limited liability company, and no
29 other party need be joined in order for the Court to adjudicate the validity and effectiveness of the ratification or waiver,
30 and the Court may make such order respecting further or other notice of such application as it deems proper under these
31 circumstances; provided, that nothing herein limits or affects the right to serve process in any other manner now or
32 hereafter provided by law, and this sentence is an extension of and not a limitation upon the right otherwise existing of
33 service of legal process upon nonresidents.

34 Section 2. Amend § 18-217, Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike
35 through and insertions as shown by underline as follows:

36 § 18-217. Division of a limited liability company.

37 (a) As used in this section and §§ 18-203, and 18-301 ~~and 18-1203~~:

38 Section 3. Amend § 18-305, Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike
39 through and insertions as shown by underline as follows:

40 § 18-305. Access to and confidentiality of information; records.

41 (a) Each member of a limited liability company, in person or by attorney or other agent, has the right, subject to
42 such reasonable standards (including standards governing what information (including books, records and other documents)
43 ~~is are~~ to be furnished at what time and location and at whose expense) as may be set forth in a limited liability company
44 agreement or otherwise established by the manager or, if there is no manager, then by the members, to obtain from the
45 limited liability company from time to time upon reasonable demand for any purpose reasonably related to the member's
46 interest as a member of the limited liability company:

47 (d) A limited liability company may maintain its books, records and other documents in other than paper form,
48 including on, by means of, or in the form of any information storage device, method, or 1 or more electronic networks or
49 databases (including 1 or more distributed electronic networks or databases), if such form is capable of conversion into
50 paper form within a reasonable time.

51 (f) Any action to enforce any right arising under this section shall be brought in the Court of Chancery. If the
52 limited liability company refuses to permit a member, or attorney or other agent acting for the member, to obtain or a
53 manager to examine the information described in subsection (a) of this section or does not reply to the demand that has
54 been made within 5 business days (or such shorter or longer period of time as is provided for in a limited liability company
55 agreement but not longer than 30 business days) after the demand has been made, the demanding member or manager may
56 apply to the Court of Chancery for an order to compel such disclosure. The Court of Chancery is hereby vested with
57 exclusive jurisdiction to determine whether or not the person seeking such information is entitled to the information sought.
58 The Court of Chancery may summarily order the limited liability company to permit the demanding member to obtain or
59 manager to examine the information described in subsection (a) of this section and to make copies or abstracts therefrom, or
60 the Court of Chancery may summarily order the limited liability company to furnish to the demanding member or manager
61 the information described in subsection (a) of this section on the condition that the demanding member or manager first pay
62 to the limited liability company the reasonable cost of obtaining and furnishing such information and on such other
63 conditions as the Court of Chancery deems appropriate. When a demanding member seeks to obtain or a manager seeks to
64 examine the information described in subsection (a) of this section, the demanding member or manager shall first establish:

65 (1) That the demanding member or manager has complied with the provisions of this section respecting the form
66 and manner of making demand for obtaining or examining of such information, and

67 (2) That the information the demanding member or manager seeks is reasonably related to the member's interest as
68 a member or the manager's position as a manager, as the case may be.

69 The Court of Chancery may, in its discretion, prescribe any limitations or conditions with reference to the
70 obtaining or examining of information, or award such other or further relief as the Court of Chancery may deem just and
71 proper. The Court of Chancery may order books, records and other documents ~~and records~~, pertinent extracts therefrom, or
72 duly authenticated copies thereof, to be brought within the State of Delaware and kept in the State of Delaware upon such
73 terms and conditions as the order may prescribe.

74 (g) If a member is entitled to obtain information under this chapter or a limited liability company agreement for a
75 purpose reasonably related to the member's interest as a member or other stated purpose, the member's right shall be to
76 obtain such information as is necessary and essential to achieving that purpose. The rights of a member or manager to
77 obtain or examine information as provided in this section may be expanded or restricted in an original limited liability
78 company agreement or in any subsequent amendment approved or adopted by all of the members or in compliance with any
79 applicable requirements of the limited liability company agreement. The provisions of this subsection shall not be construed

80 to limit the ability to ~~impose restrictions on~~ expand or restrict the rights of a member or manager to obtain or examine
81 information by any other means permitted ~~under this chapter~~ by law.

82 Section 4. Amend § 18-407, Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike
83 through and insertions as shown by underline as follows:

84 § 18-407. Delegation of rights and powers to manage.

85 Unless otherwise provided in the limited liability company agreement, a member or manager of a limited liability
86 company has the power and authority to delegate to 1 or more other persons any or all of the member's or manager's, as the
87 case may be, rights, powers and duties to manage and control the business and affairs of the limited liability company,
88 which delegation may be made irrespective of whether the member or manager has a conflict of interest with respect to the
89 matter as to which its rights, powers or duties are being delegated, and the person or persons to whom any such rights,
90 powers or duties are being delegated shall not be deemed conflicted solely by reason of the conflict of interest of the
91 member or manager. Any such delegation may be to agents, officers and employees of a member or manager or the limited
92 liability company, and by a management agreement or another agreement with, or otherwise to, other persons, including a
93 committee of 1 or more persons. Unless otherwise provided in the limited liability company agreement, such delegation by
94 a member or manager shall be irrevocable if it states that it is irrevocable. Unless otherwise provided in the limited liability
95 company agreement, such delegation by a member or manager of a limited liability company shall not cause the member or
96 manager to cease to be a member or manager, as the case may be, of the limited liability company or cause the person to
97 whom any such rights, powers and duties have been delegated to be a member or manager, as the case may be, of the
98 limited liability company. No other provision of this chapter or other law shall be construed to restrict a member's or
99 manager's power and authority to delegate any or all of its rights, powers and duties to manage and control the business and
100 affairs of the limited liability company.

101 Section 5. Amend § 18-1201, Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike
102 through and insertions as shown by underline as follows:

103 § 18-1201. Law applicable to statutory public benefit limited liability companies; how formed.

104 This subchapter applies to all statutory public benefit limited liability companies, as defined in § 18-1202(a) of this
105 title. If a limited liability company is formed as or elects to become a statutory public benefit limited liability company
106 ~~under this subchapter~~ in the manner prescribed in this ~~subchapter~~ section, it shall be subject in all respects to the provisions
107 of this chapter, except to the extent this subchapter imposes additional or different requirements, in which case such
108 additional or different requirements shall apply, and notwithstanding § 18-1101 of this title or any other provision of this
109 title, such additional or different requirements imposed by this subchapter may not be altered in the limited liability

110 company agreement. If a limited liability company is not formed as a statutory public benefit limited liability company, it
111 may become a statutory public benefit limited liability company in the manner specified in its limited liability company
112 agreement or by amending its limited liability company agreement and certificate of formation to comply with the
113 requirements of this subchapter.

114 Section 6. Amend § 18-1202, Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike
115 through and insertions as shown by underline as follows:

116 § 18-1202. Statutory public benefit limited liability company defined; contents of certificate of formation and
117 limited liability company agreement.

118 (a) A “statutory public benefit limited liability company” is a for-profit limited liability company formed under
119 and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate
120 in a responsible and sustainable manner. To that end, a statutory public benefit limited liability company shall be managed
121 in a manner that balances the members’ pecuniary interests, the best interests of those materially affected by the limited
122 liability company’s conduct, and the public benefit or public benefits set forth in its limited liability company agreement
123 and in its certificate of formation. A statutory public benefit limited liability company shall state in its limited liability
124 company agreement and in the heading of its certificate of formation that it is a statutory public benefit limited liability
125 company and shall set forth in its limited liability company agreement and in its certificate of formation 1 or more specific
126 public benefits to be promoted by the limited liability company ~~in its certificate of formation. The limited liability company~~
127 ~~agreement.~~ In the event of any inconsistency between the public benefit or benefits to be promoted by the limited liability
128 company as set forth in its limited liability company agreement and in its certificate of formation, the limited liability
129 company agreement shall control as among the members, the managers and other persons who are party to or otherwise
130 bound by the liability company agreement. A manager of a statutory public benefit limited liability company may not
131 contain any or, if there is no manager, then any member of a statutory public benefit limited liability company who
132 becomes aware that the specific public benefit or benefits to be promoted by the limited liability company as set forth in its
133 limited liability company agreement are inaccurately set forth in its certificate of formation, shall promptly amend the
134 certificate of formation. Any provision in the limited liability company agreement or certificate of formation of a statutory
135 public benefit limited liability company that is inconsistent with this subchapter shall not be effective to the extent of such
136 inconsistency.

137 Section 7. Amend § 18-1203, Chapter 18, Title 6 of the Delaware Code by repealing § 18-1203 in its entirety and
138 inserting in lieu thereof the insertions as shown by underline as follows:

139 § 18-1203. [Reserved]

140 Section 8. Amend § 18-1204, Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike
141 through and insertions as shown by underline as follows:

142 § 18-1204. Duties of members or managers.

143 (a) The members or managers or other persons with authority to manage or direct the business and affairs of a
144 statutory public benefit limited liability company shall manage or direct the business and affairs of the statutory public
145 benefit limited liability company in a manner that balances the pecuniary interests of the members, the best interests of
146 those materially affected by the limited liability company's conduct, and the specific public benefit or public benefits set
147 forth in its limited liability company agreement and certificate of formation. Unless otherwise provided in a limited liability
148 company agreement, no member, manager or other person with authority to manage or direct the business and affairs of the
149 statutory public benefit limited liability company shall have any liability for monetary damages for the failure to manage or
150 direct the business and affairs of the statutory public benefit limited liability company as provided in this subsection.

151 (b) A member or manager of a statutory public benefit limited liability company or any other person with authority
152 to manage or direct the business and affairs of the statutory public benefit limited liability company shall not, by virtue of
153 the public benefit provisions or § 18-1202(a) of this title, have any duty to any person on account of any interest of such
154 person in the public benefit or public benefits set forth in its limited liability company agreement and certificate of
155 formation or on account of any interest materially affected by the limited liability company's conduct and, with respect to a
156 decision implicating the balance requirement in subsection (a) of this section, will be deemed to satisfy such person's
157 fiduciary duties to members and the limited liability company if such person's decision is both informed and disinterested
158 and not such that no person of ordinary, sound judgment would approve.

159 Section 9. Amend § 18-1205, Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike
160 through and insertions as shown by underline as follows:

161 § 18-1205. Periodic statements and third-party certification.

162 A statutory public benefit limited liability company shall no less than biennially provide its members with a
163 statement as to the limited liability company's promotion of the public benefit or public benefits set forth in its limited
164 liability company agreement and certificate of formation and as to the best interests of those materially affected by the
165 limited liability company's conduct. The statement shall include:

166 Section 10. This Act shall become effective August 1, 2021.

SYNOPSIS

This bill continues the practice of amending periodically the Delaware Limited Liability Company Act (the "Act") to keep it current and to maintain its national preeminence. The following is a section-by-section review of the proposed amendments of the Act.

Section 1. This section amends Section 18-106 of the Act to add subsection (e) to provide a safe harbor procedure for ratifying acts or transactions that may be taken by or in respect of a limited liability company under the Act or a limited liability company agreement that are void or voidable and waiving failures to comply with requirements of a limited liability company agreement that make such acts and transactions void or voidable. New subsection (e) is intended to provide a rule different from the rule applied in *Composecure, L.L.C. v. Cardux, LLC*, 206 A.3d 807 (Del. 2018), and *Absalom Absalom Trust v. Saint Gervais LLC*, 2019 WL 2655787 (Del. Ch. June 27, 2019), that acts or transactions determined to be void generally may not be ratified. The penultimate sentence of new subsection (e) confirms that void or voidable actions may be ratified or requirements may be waived by other means permitted by law, and accordingly, new subsection (e) is not intended to preempt or restrict other valid means of ratifying acts or transactions or waiving requirements or to impair the effectiveness of any valid ratification or waiver previously effected.

Section 2. This section amends Section 18-217 of the Act to make a conforming change.

Section 3. This section amends Section 18-305 of the Act to make certain clarifying and conforming changes, and to provide that when a member is entitled to obtain information for a stated purpose (whether pursuant to Section 18-305 or a limited liability company agreement), the member's right shall be to obtain such information as is necessary and essential to achieving that purpose, unless such right has been expanded or restricted in the limited liability company agreement. To the extent current law is that the "necessary and essential" test does not apply by default to (i) a member's right under Section 18-305(a) of the Act to obtain information from a limited liability company for a purpose reasonably related to the member's interest as a member, or (ii) a member's right under a limited liability company agreement to obtain information from a limited liability company for a stated purpose, the first sentence of subsection (g) is intended to change that law.

Section 4. This section amends Section 18-407 of the Act to provide that a member or manager may delegate any of its rights, powers or duties irrespective of whether it has a conflict of interest with respect to the matter as to which such rights, powers or duties are being delegated, and that the person or persons to whom any such rights, powers or duties are being delegated shall not be deemed conflicted solely by reason of the conflict of interest of the member or manager. The amendments to Section 18-407 create a different rule than the rule applied in cases such as *Wenske v. Bluebell Creameries, Inc.*, 214 A.3d 958 (Del. Ch. 2019), that a conflicted principal is legally disabled from delegating authority over the subject matter as to which the principal is conflicted even to an independent delegatee.

Section 5. This section amends Section 18-1201 of the Act to clarify the effect of subchapter XII of the Act and to provide for the manner in which a limited liability company may become a statutory public benefit limited liability company.

Section 6. This section amends Section 18-1202(a) of the Act to provide that a limited liability company agreement of a statutory public benefit limited liability company must state that the limited liability company is a statutory public benefit limited liability company and must set forth the specific public benefit or benefits to be promoted by the company, to provide that the limited liability company agreement shall control as among the members, the managers and other persons who are party to or otherwise bound by the liability company agreement in the event of any inconsistency between the public benefit(s) as set forth in such agreement and the certificate of formation, to require amendment of the certificate of formation of a statutory public benefit limited liability company in specified circumstances, and to clarify the effect of subchapter XII of the Act.

Section 7. This section repeals Section 18-1203 of the Act.

Section 8. This section amends Section 18-1204 of the Act to make conforming changes.

Section 9. This section amends Section 18-1205 of the Act to make a conforming change.

Section 10. This section provides that the proposed amendments to the Act shall become effective August 1, 2021.

Author: Senator Brown