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DELAWARE STATE SENATE
152nd GENERAL ASSEMBLY

SENATE BILL NO. 113

AN ACT TO AMEND 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 (Three-fifths of all members elected to each house thereof concurring therein):

Section 1. Amend § 18-204, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 18-204. Execution.

(a) Each certificate required by this ~~subchapter~~ chapter to be filed in the office of the Secretary of State shall be executed by 1 or more authorized persons or, in the case of a certificate of conversion to limited liability company or certificate of limited liability company domestication, by any person authorized to execute such certificate on behalf of the other entity or non-United States entity, respectively, except that a certificate of merger or consolidation filed by a surviving or resulting other business entity shall be executed by any person authorized to execute such certificate on behalf of such other business entity.

Section 2. Amend § 18-205, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 18-205. Execution, amendment or cancellation by judicial order.

(a) If a person required to execute a certificate required by this ~~subchapter~~ chapter fails or refuses to do so, any other person who is adversely affected by the failure or refusal may petition the Court of Chancery to direct the execution of the certificate. If the Court finds that the execution of the certificate is proper and that any person so designated has failed or refused to execute the certificate, it shall order the Secretary of State to record an appropriate certificate.

Section 3. Amend § 18-209, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 18-209. Merger and consolidation.

(f) An agreement of merger or consolidation or a plan of merger approved in accordance with subsection (b) of this section may:

(1) Effect any amendment to the limited liability company agreement; or

(2) Effect the adoption of a new limited liability company agreement, in either case, for a limited liability company if it is the surviving or resulting limited liability company in the merger or consolidation.

Section 4. Amend § 18-215, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 18-215. Series of members, managers, limited liability company interests or assets.

(d) If a limited liability company agreement provides the manner in which a termination of a protected series may be revoked, it may be revoked in that manner and, unless the limited liability company has dissolved and such dissolution has not been revoked or the limited liability company agreement prohibits revocation of termination of a protected series, then notwithstanding the occurrence of an event set forth in paragraph (b)(9)a., b., or c. of this section, the protected series shall not be terminated and its affairs shall not be wound up if, prior to the completion of the winding up of the protected series, the protected series is continued, effective as of the occurrence of such event:

(1) In the case of termination effected by the vote or consent of the members associated with the protected series or other persons, pursuant to such vote or consent (and the approval of any members associated with the protected series or other persons whose approval is required under the limited liability company agreement to revoke a termination contemplated by this paragraph); and

(2) In the case of termination under paragraph (b)(9)a. or b. of this section (other than a termination effected by the vote or consent of the members associated with the protected series or other persons), pursuant to such vote or consent that, pursuant to the terms of the limited liability company agreement, is required to amend the provision of the limited liability company agreement effecting such termination (and the approval of any members associated with the protected series or other persons whose approval is required under the limited liability company agreement to revoke a termination contemplated by this paragraph).

If a protected series is terminated by the dissolution of the limited liability company, unless the winding up of the protected series has been completed or the limited liability company agreement prohibits revocation of termination of the protected series, the termination of the protected series shall be automatically revoked upon any revocation of dissolution of the limited liability company in accordance with § 18-806 of this title.

The provisions of this subsection shall not be construed to limit the accomplishment of a revocation of termination of a protected series by other means permitted by law.

Section 5. Amend § 18-217, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

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

(h) If a domestic limited liability company divides under this section, the dividing company shall file a certificate of division executed by 1 or more authorized persons on behalf of such dividing company in the office of the Secretary of State in accordance with § 18-204 of this title and a certificate of formation that complies with § 18-201 of this title for each resulting company executed by 1 or more authorized persons in accordance with § 18-204 of this title.

(1) The certificate of division shall state:

~~(4)~~ a. The name of the dividing company and, if it has been changed, the name under which its certificate of formation was originally filed and whether the dividing company is a surviving company;

~~(2)~~ b. The date of filing of the dividing company's original certificate of formation with the Secretary of State;

~~(3)~~ c. The name of each division company;

~~(4)~~ d. The name and business address of the division contact required by paragraph (g)(3) of this section;

~~(5)~~ e. The future effective date or time (which shall be a date or time certain) of the division if it is not to be effective upon the filing of the certificate of division;

~~(6)~~ f. That the division has been approved in accordance with this section;

~~(7)~~ g. That the plan of division is on file at a place of business of such division company as is specified therein, and shall state the address thereof;

~~(8)~~ h. That a copy of the plan of division will be furnished by such division company as is specified therein, on request and without cost, to any member of the dividing company; and

~~(9)~~ i. Any other information the dividing company determines to include therein.

(2) A certificate of division may be amended to change the name or business address of the division contact in a certificate of division or to change information in the certificate of division required by paragraph (h)(1)g. of this section. A certificate of division is amended by filing a certificate of amendment thereto for each division company that exists as a limited liability company in the office of the Secretary of State. Each certificate of amendment of certificate of division must include all of the following:

a. The name of the dividing company and, if the name has been changed, the name under which the dividing company's certificate of formation was originally filed.

b. The name of the division company to which the amendment to the certificate of division relates.

80 c. The amendment to the certificate of division.

81 (3) If the dividing company is a surviving company, a manager of the dividing company or, if there is no
82 manager of the dividing company, any member of the dividing company, who becomes aware that the name or
83 business address of the division contact, or information in the certificate of division required by paragraph (h)(1)g. of
84 this section, in a certificate of division was false when made, or that the name or business address of the division
85 contact, or information in the certificate of division required by paragraph (h)(1)g. of this section, in a certificate of
86 division has changed, must promptly amend the certificate of division. If the dividing company is not a surviving
87 company or no longer exists as a limited liability company, a manager of any resulting company or, if there is no
88 manager of any resulting company, then any member of any resulting company who becomes aware that the name or
89 business address of the division contact, or information in the certificate of division required by paragraph (h)(1)g. of
90 this section, in a certificate of division was false when made, or that the name or business address of the division
91 contact, or information in the certificate of division required by paragraph (h)(1)g. of this section, in a certificate of
92 division has changed, must promptly amend the certificate of division. This subsection does not apply after the
93 expiration of a period of 6 years following the effective date of the division.

94 (4)a. Unless otherwise provided in the plan of division or the certificate of division, each certificate of
95 amendment of certificate of division must be executed as follows:

96 1. If the dividing company is a surviving company, by 1 or more authorized persons on behalf of the
97 dividing company acting on behalf of the division company to which the certificate of amendment of
98 certificate of division relates.

99 2. If the dividing company is not a surviving company or no longer exists as a limited liability
100 company, by 1 or more authorized persons on behalf of a resulting company acting on behalf of the division
101 company to which the certificate of amendment of certificate of division relates.

102 b. Each division company is deemed to have consented to the execution of a certificate of amendment of
103 certificate of division under paragraph (h)(4) of this section.

104 (5) Unless otherwise provided in this chapter or unless a later effective date or time (which shall be a date or
105 time certain) is provided for in the certificate of amendment of certificate of division, a certificate of amendment of
106 certificate of division is effective at the time of its filing with the Secretary of State.

107 (6) Subject to this chapter, the Secretary of State shall accept the filing of certificates of amendment of
108 certificate of division for all division companies resulting from the same certificate of division if at least 1 division
109 company is in good standing at the time of such filings.

(f) Upon the division of a domestic limited liability company becoming effective:

(1) The dividing company shall be divided into the distinct and independent ~~resulting~~ division companies named in the plan of division, and, if the dividing company is not a surviving company, the existence of the dividing company shall cease.

(9) Any action or proceeding pending against a dividing company may be continued against the surviving ~~company~~ company, if any, as if the division did not occur, but subject to paragraph (1)(4) of this section, and against any resulting company to which the asset, property, right, series, debt, liability or duty associated with such action or proceeding was allocated pursuant to the plan of division by adding or substituting such resulting company as a party in the action or proceeding.

Section 6. Amend § 18-218, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 18-218. Registered series of members, managers, limited liability company interests or assets.

(f) If a limited liability company agreement provides the manner in which a dissolution of a registered series may be revoked, it may be revoked in that manner and, unless the limited liability company has dissolved and such dissolution has not been revoked or the limited liability company agreement prohibits revocation of dissolution of a registered series, then notwithstanding the occurrence of an event set forth in paragraph (c)(9)a., b., or c. of this section, the registered series shall not be dissolved and its affairs shall not be wound up if, prior to the filing of a certificate of cancellation of the certificate of registered series in the office of the Secretary of State, the registered series is continued, effective as of the occurrence of such event:

(1) In the case of dissolution effected by the vote or consent of the members associated with the registered series or other persons, pursuant to such vote or consent (and the approval of any members associated with the registered series or other persons whose approval is required under the limited liability company agreement to revoke a dissolution contemplated by this paragraph); and

(2) In the case of dissolution under paragraph (c)(9)a. or b. of this section (other than a dissolution effected by the vote or consent of the members associated with the registered series or other persons), pursuant to such vote or consent that, pursuant to the terms of the limited liability company agreement, is required to amend the provision of the limited liability company agreement effecting such dissolution (and the approval of any members associated with the registered series or other persons whose approval is required under the limited liability company agreement to revoke a dissolution contemplated by this paragraph).

139 If a registered series is dissolved by the dissolution of the limited liability company, unless a certificate of
140 cancellation of the certificate of registered series with respect to such registered series has been filed in the office of the
141 Secretary of State or the limited liability company agreement prohibits revocation of dissolution of the registered series, the
142 dissolution of the registered series shall be automatically revoked upon any revocation of dissolution of the limited liability
143 company in accordance with § 18-806 of this title.

144 The provisions of this subsection shall not be construed to limit the accomplishment of a revocation of dissolution
145 of a registered series by other means permitted by law.

146 Section 7. Amend Subchapter V, Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike
147 through and insertions as shown by underline as follows:

148 § 18-506. Irrevocability of subscription.

149 For all purposes of the laws of the State of Delaware, a subscription for a limited liability company interest,
150 whether submitted in writing, by means of electronic transmission, or as otherwise permitted by applicable law, is
151 irrevocable if the subscription states that it is irrevocable to the extent provided by the terms of the subscription.

152 Section 8. Amend § 18-1105, Title 6 of the Delaware Code by making deletions as shown by strike through and
153 insertions as shown by underline as follows:

154 § 18-1105. Fees.

155 (a) No document required to be filed under this chapter shall be effective until the applicable fee required by this
156 section is paid. The following fees shall be paid to and collected by the Secretary of State for the use of the State of
157 Delaware:

158 (3) Upon the receipt for filing of a certificate of formation under § 18-201 of this title or a certificate of
159 registered series under § 18-218 of this title, a fee in the amount of \$70 and upon the receipt for filing of a certificate of
160 limited liability company domestication under § 18-212 of this title, a certificate of transfer or a certificate of transfer
161 and domestic continuance under § 18-213 of this title, a certificate of conversion to limited liability company under §
162 18-214 of this title, a certificate of conversion to a non-Delaware entity under § 18-216 of this title, a certificate of
163 amendment under ~~§ 18-202~~ § 18-202, § 18-217(h)(2), or § 18-218(d)(3) of this title (except as otherwise provided in
164 paragraph (a)(11) of this section), a certificate of cancellation under § 18-203 or § 18-218(d)(7) of this title, a
165 certificate of merger or consolidation or a certificate of ownership and merger under § 18-209 of this title, a restated
166 certificate of formation or a restated certificate of registered series under § 18-208 of this title, a certificate of
167 amendment of a certificate with a future effective date or time under § 18-206(c) of this title, a certificate of
168 termination of a certificate with a future effective date or time under § 18-206(c) of this title, a certificate of correction

under § 18-211 of this title, a certificate of division under § 18-217 of this title, a certificate of conversion of protected series to registered series under § 18-219 of this title, a certificate of conversion of registered series to protected series under § 18-220 of this title, a certificate of merger or consolidation of registered series under § 18-221 of this title or a certificate of revival under § 18-1109 or § 18-1110 of this title, a fee in the amount of \$180, plus, in the case of a certificate of cancellation under § 18-203 of this title, a fee in the amount of \$50 for each registered series of the limited liability company named in the certificate of cancellation.

Section 9. Amend § 18-1107, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 18-1107. Taxation of limited liability companies and registered series.

(k) A domestic limited liability company that has ceased to be in good standing by reason of the domestic limited liability company's neglect, refusal or failure to pay an annual tax shall remain a domestic limited liability company formed under this chapter, and each registered series thereof shall remain a registered series formed under this chapter, and each protected series thereof shall remain a protected series established under this chapter. A registered series that has ceased to be in good standing by reason of the registered series' neglect, refusal or failure to pay an annual tax shall remain a registered series formed under this chapter. The Secretary of State shall not accept for filing any certificate (except a certificate of resignation of a registered agent when a successor registered agent is not being appointed and certificates of amendment of certificate of division as required by § 18-217(h)(6) of this title) required or permitted by this chapter to be filed in respect of any domestic limited liability company, registered series or foreign limited liability company if such domestic limited liability company, registered series or foreign limited liability company has neglected, refused or failed to pay an annual tax, and shall not issue any certificate of good standing with respect to such domestic limited liability company, registered series or foreign limited liability company, unless or until such domestic limited liability company, registered series or foreign limited liability company shall have been restored to and have the status of a domestic limited liability company or registered series in good standing or a foreign limited liability company duly registered in the State of Delaware.

Section 10. This Act takes effect August 1, 2023.

SYNOPSIS

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

Section 1 amends § 18-204(a) of the LLC Act to clarify that certificates required by the LLC Act to be filed in the office of the Secretary of State are to be executed in the manner set forth in § 18-204(a).

Section 2 amends § 18-205(a) of the LLC Act to clarify that a failure or refusal to execute any certificate required by the LLC Act is subject to § 18-205(a) of the LLC Act.

Section 3 amends § 18-209(f) of the LLC Act. Currently, § 18-209(f) of the LLC Act permits a duly approved agreement of merger or consolidation or plan of merger to effect any amendment to a limited liability company agreement or effect the adoption of a new limited liability company agreement. This amendment to § 18-209(f) confirms that an amendment to a limited liability company agreement or adoption of a new limited liability company agreement effected pursuant to § 18-209(f) of the LLC Act may be effected only with respect to the limited liability company agreement of the surviving or resulting limited liability company and not with respect to the limited liability company agreement of a constituent limited liability company that is not the surviving or resulting limited liability company.

Section 4 amends § 18-215 of the LLC Act. Currently, § 18-806 of the LLC Act permits revocation of dissolution of a limited liability company prior to the filing of a certificate of cancellation of the certificate of formation in the office of the Secretary of State; however, the LLC Act does not currently address revocation of termination of a protected series prior to the completion of the winding up of the protected series. This amendment adds a new §18-215(d) to permit revocation of termination of a protected series prior to the completion of the winding up of the protected series.

Section 5 amends § 18-217(h) of the LLC Act. Currently, among other requirements, a certificate of division must state the name and business address of the division contact and the name and address of the division company where the plan of division is on file. Because this information may change over time, this amendment permits or requires the filing of a certificate of amendment of certificate of division to amend the name or business address of the division contact or the name and address of the division company where the plan of division is on file. The requirement to update such information in a certificate of division ends after the expiration of a period of 6 years following the effective date of the division.

Section 5 also amends § 18-217(l)(1) of the LLC Act to clarify that pursuant to a division, a dividing company is divided into distinct and independent division companies as such term is used in the LLC Act.

Finally, Section 5 also amends § 18-217(l)(9) of the LLC Act. Currently, under § 18-217 of the LLC Act, a dividing company does not need to survive a division. This amendment confirms that a dividing company need not be a surviving company.

Section 6 amends § 18-218 of the LLC Act. Currently, § 18-806 of the LLC Act permits revocation of dissolution of a limited liability company prior to the filing of a certificate of cancellation of the certificate of formation in the office of the Secretary of State; however, the LLC Act does not currently address revocation of dissolution of a registered series prior to the filing of a certificate of cancellation of the certificate of registered series in the office of the Secretary of State. This amendment adds a new § 18-218(f) to permit revocation of dissolution of a registered series prior to the filing of a certificate of cancellation of the certificate of registered series in the office of the Secretary of State.

Section 7 adds a new § 18-506 to the LLC Act to clarify that a subscription for a limited liability company interest may be irrevocable if the subscription states it is irrevocable to the extent provided by the terms of the subscription.

Section 8 amends § 18-1105(a)(3) of the LLC Act to specify the fee payable to the Secretary of State to file a certificate of amendment of certificate of division.

Section 9 amends § 18-1107(k) of the LLC Act to acknowledge that certificates of amendment of certificate of division should be accepted for filing by the Secretary of State if at least 1 division company is in good standing at the time of such filings.

Section 10 provides that the amendments to the LLC Act take effect August 1, 2023.

This Act requires a greater than majority vote for passage because § 11 of Article VIII of the Delaware Constitution requires the affirmative vote of three-fifths of the members elected to each house of the General Assembly to impose or levy a tax or license fee.

Author: Senator Gay