SPONSOR: Sen. Brown & Sen. Townsend & Sen. Pettyjohn &
Rep. Griffith & Rep. Bush
Sens. Hoffner, Mantzavinos

DELAWARE STATE SENATE
153rd GENERAL ASSEMBLY

SENATE BILL NO. 98

AN ACT TO AMEND TITLE 6 OF THE DELAWARE CODE RELATING TO THE DELAWARE LIMITED LIABILITY COMPANY ACT.

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

Section 1. Amend § 18-104, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 18-104. Registered office; registered agent.

(e)(1) Every registered agent shall:

~~(1)~~a. If an entity, maintain a business office in the State of Delaware which is generally open, or if an individual, be generally present at a designated location in the State of Delaware, at sufficiently frequent times to accept service of process and otherwise perform the functions of a registered agent;

~~(2)~~b. If a foreign entity, be authorized to transact business in the State of Delaware;

~~(3)~~c. Accept service of process and other communications directed to the limited liability companies (and any protected series or registered series thereof) and foreign limited liability companies for which it serves as registered agent and forward same to the limited liability company or foreign limited liability company to which the service or communication is directed;

~~(4)~~d. Forward to the limited liability companies and foreign limited liability companies for which it serves as registered agent the statement for the annual tax for such limited liability company (and each registered series thereof) or such foreign limited liability company, as applicable, as described in § 18-1107 of this title or an electronic notification of same in a form satisfactory to the Secretary of State; and

~~(5)~~e. Satisfy and adhere to regulations established by the Secretary regarding the verification of both the identity of the entity's contacts and individuals for which the registered agent maintains a record for the reduction of risk of unlawful business purposes.

(2) A registered agent may not perform its duties or functions solely through the use of a virtual office, the retention by the agent of a mail forwarding service, or both. For purposes of this subsection (e)(2), "virtual office" means the performance of duties or functions solely through the internet or solely through other means of remote communication.

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

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

(e) Any act or transaction that may be taken by or in respect of a limited liability company under this chapter or a limited liability company agreement, including, in either case, any act or transaction by any member, manager, or other person, whether the member, manager or other person is acting in the member's, manager's, or other person's individual capacity or on behalf of the limited liability company, but that is void or voidable when taken, may be ratified (or the failure to comply with any requirements of the limited liability company agreement making such act or transaction void or voidable may be waived) by the members, ~~managers~~ managers, or other persons whose approval would be required under the limited liability company agreement:

(1) For such act or transaction to be validly taken; or

(2) To amend the limited liability company agreement in a manner that would permit such act or transaction to be validly taken, in each case at the time of such ratification or ~~waiver;~~ waiver.

~~provided, that if~~ Any such ratification or waiver may be express or implied, including by the statements, action, inaction, or acquiescence of or by such members, managers, or other persons. If the void or voidable act or transaction was the issuance or assignment of any limited liability company interests, the limited liability company interests purportedly issued or assigned shall be deemed not to have been issued or assigned for purposes of determining whether the void or voidable act or transaction was ratified or waived pursuant to this subsection. Any act or transaction ratified, or with respect to which the failure to comply with any requirements of the limited liability company agreement is waived, pursuant to this subsection shall be deemed validly taken at the time of such act or transaction. If an amendment to the limited liability company agreement to permit any such act or transaction to be validly taken would require notice to any members, ~~managers~~ managers, or other persons under the limited liability company agreement and the ratification or waiver of such act or transaction is effectuated pursuant to this subsection by the members, ~~managers~~ managers, or other persons whose approval would be required to amend the limited liability company agreement, notice of such ratification or waiver shall be given following such ratification or waiver to the members, ~~managers~~ managers, or other persons who would have been entitled to notice of such an amendment and who have not otherwise received notice of, or participated in, such ratification or ~~waiver.~~ waiver; provided that the giving of the notice is not a condition to the effectiveness of such ratification or waiver. The provisions of this subsection shall not be construed to limit the accomplishment of a ratification or waiver of a void or voidable act by other means permitted by law. Upon application of the limited liability company, any member, any manager or any person claiming to be substantially and adversely affected by a ratification or waiver pursuant to this subsection

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

Section 3. Amend § 18-203, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 18-203. Cancellation of certificate.

(b) A certificate of cancellation that is filed in the office of the Secretary of State prior to the dissolution or the completion of winding up of a limited liability company may be corrected or nullified as an erroneously executed certificate of cancellation by filing with the office of the Secretary of State a certificate of correction of such certificate of cancellation in accordance with § 18-211 of this title.

Section 4. 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.

(c) Except in the case of a merger under subsection (i) of this section, if a domestic limited liability company is merging or consolidating under this section, the domestic limited liability company or other business entity surviving or resulting in or from the merger or consolidation shall file a certificate of merger or consolidation executed by 1 or more authorized persons on behalf of the domestic limited liability company when it is the surviving or resulting entity in the office of the Secretary of State. The certificate of merger or consolidation shall state:

(1) The name, jurisdiction of formation or organization and type of entity of each of the domestic limited liability companies and other business entities which is to merge or consolidate;

(2) That an agreement of merger or consolidation has been approved and executed by each of the domestic limited liability companies and other business entities which is to merge or consolidate;

(3) The name of the surviving or resulting domestic limited liability company or other business entity;

(4) In the case of a merger in which a domestic limited liability company is the surviving entity, such amendments, if any, to the certificate of formation of the surviving domestic limited liability company as are desired to be effected by the merger (which amendments may amend and restate the certificate of formation of the surviving domestic limited liability company in its entirety);

(5) In the case of a consolidation in which the resulting entity is a domestic limited liability company, that the certificate of formation of the resulting domestic limited liability company shall be as set forth in an attachment to the certificate of consolidation;

~~(5)~~(6) The future effective date or time (which shall be a date or time certain) of the merger or consolidation if it is not to be effective upon the filing of the certificate of merger or consolidation;

~~(6)~~(7) That the agreement of merger or consolidation is on file at a place of business of the surviving or resulting domestic limited liability company or other business entity, and shall state the address thereof;

~~(7)~~(8) That a copy of the agreement of merger or consolidation will be furnished by the surviving or resulting domestic limited liability company or other business entity, on request and without cost, to any member of any domestic limited liability company or any person holding an interest in any other business entity which is to merge or consolidate; and

~~(8)~~(9) If the surviving or resulting entity is not a domestic limited liability company, or a corporation, partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)) or statutory trust organized under the laws of the State of Delaware, a statement that such surviving or resulting other business entity agrees that it may be served with process in the State of Delaware in any action, suit or proceeding for the enforcement of any obligation of any domestic limited liability company which is to merge or consolidate, irrevocably appointing the Secretary of State as its agent to accept service of process in any such action, suit or proceeding and specifying the address to which a copy of such process shall be mailed to it by the Secretary of State. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event of service hereunder upon the Secretary of State, the procedures set forth in § 18-911(c) of this title shall be applicable, except that the plaintiff in any such action, suit or proceeding shall furnish the Secretary of State with the address specified in the certificate of merger or consolidation provided for in this section and any other address which the plaintiff may elect to furnish, together with copies of such process as required by the Secretary of State, and the Secretary of State shall

notify such surviving or resulting other business entity at all such addresses furnished by the plaintiff in accordance with the procedures set forth in § 18-911(c) of this title.

Section 5. Amend § 18-211, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 18-211. Certificate of correction.

(a) Whenever any certificate authorized to be filed with the office of the Secretary of State under any provision of this chapter has been so filed and is an inaccurate record of the action therein referred to, or was defectively or erroneously executed, such certificate may be corrected or nullified by filing with the office of the Secretary of State a certificate of correction of such certificate. ~~The~~ If the certificate is to be corrected, the certificate of correction shall specify the inaccuracy or defect to be corrected, shall set forth the portion of the certificate in corrected form, and shall be executed and filed as required by this chapter. If the certificate is to be nullified, the certificate of correction shall specify the inaccuracy or defect with respect to the certificate, shall provide for the nullification of the certificate, and shall be executed and filed as required by this chapter. The certificate of correction shall be effective as of the date the original certificate was filed, except as to those persons who are substantially and adversely affected by the ~~correction,~~ correction or nullification, and as to those persons the certificate of correction shall be effective from the filing date.

Section 6. Amend § 18-302, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 18-302. Classes and voting.

(e) If a limited liability company agreement provides for the manner in which it may be amended, including by requiring the approval of a person who is not a party to the limited liability company agreement or the satisfaction of conditions, it may be amended only in that manner or as otherwise permitted by law, including as permitted by ~~§ 18-209(f)~~ §§ 18-209(f), 18-217(f), and 18-221(e) of this title (provided that the approval of any person may be waived by such person and that any such conditions may be waived by all persons for whose benefit such conditions were intended). Unless otherwise provided in a limited liability company agreement, a supermajority amendment provision shall only apply to provisions of the limited liability company agreement that are expressly included in the limited liability company agreement. As used in this section, "supermajority amendment provision" means any amendment provision set forth in a limited liability company agreement requiring that an amendment to a provision of the limited liability company agreement be adopted by no less than the vote or consent required to take action under such latter provision.

(f) If a limited liability company agreement does not provide for the manner in which it may be amended, the limited liability company agreement may be amended with the approval of all of the members or as otherwise permitted by

law, including as permitted by ~~§ 18-209(f)~~ §§ 18-209(f), 18-217(f), and 18-221(e) of this title. This subsection shall only apply to a limited liability company whose original certificate of formation was filed with the Secretary of State on or after January 1, 2012.

Section 7. 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.

(c) The annual tax for a domestic limited liability company shall be due and payable on the first day of June following the close of the calendar year or upon the cancellation of a certificate of formation. The annual tax for a registered series shall be due and payable on the first day of June following the close of the calendar year or upon the cancellation of a certificate of registered series. The annual tax for a foreign limited liability company shall be due and payable on the first day of June following the close of the calendar year or upon the cancellation of the certificate of registration. If the existence of a domestic limited liability company or a registered series, or the registration of a foreign limited liability company, will cease by the filing of a certificate under this chapter, the full amount of the annual tax for the calendar year in which the certificate becomes effective is due and payable before the filing of the certificate. The Secretary of State shall receive the annual tax and pay over all taxes collected to the Department of Finance of the State of Delaware. If the annual tax remains unpaid after the due date, the tax shall bear interest at the rate of 1 and one-half percent for each month or portion thereof until fully paid.

Section 8. This Act takes effect on August 1, 2025.

Ssynopsis

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

Section 1 amends § 18-104(e) of the LLC Act, which addresses certain duties of a registered agent of a limited liability company. Amended § 18-104(e) specifies that a registered agent may not perform its duties or functions solely through the use of a virtual office, the retention by the agent of a mail forwarding service, or both. Amended § 18-104(e) defines "virtual office" as the performance of duties or functions solely through the internet or solely through other means of remote communication.

Section 2 amends § 18-106(e) of the LLC Act to provide that § 18-106(e) applies to ratification or waiver of a void or voidable act or transaction by any member, manager, or other person in respect of a limited liability company, in addition to acts or transactions by a limited liability company. This Section also amends § 18-106(e) to provide that ratification or waiver pursuant to § 18-106(e) may be express or implied, including by the statements, action, inaction, or acquiescence of or by the members, managers, or other persons. Further, this Section amends § 18-106(e) to clarify that in a circumstance in which § 18-106(e) requires notice of the ratification or waiver to be given, the giving of the notice is not a condition to the effectiveness of the ratification or waiver. The amendments to § 18-106(e) in this Section are intended to provide rules different from the rules applied in existing case law that § 18-106(e) is limited to ratification or waiver of a limited liability company's own acts and transactions and that § 18-106(e) does not apply to ratification or waiver by conduct.

Section 3 amends § 18-203(b) of the LLC Act to confirm that, in addition to correcting a certificate of cancellation, a certificate of correction may nullify a certificate of cancellation.

Section 4 amends § 18-209(c) of the LLC Act to provide that a certificate of formation must be attached to a certificate of consolidation for a consolidation in which the resulting entity from such consolidation is a domestic limited liability company.

Section 5 amends § 18-211(a) of the LLC Act, which provides for the correction of certificates filed with the Secretary of State. The amendment confirms that, in addition to correcting a previously filed certificate, a certificate of correction may nullify a previously filed certificate by specifying the inaccuracy or defect with respect to such previously filed certificate and providing that the previously filed certificate is nullified. Such a provision is sufficient if it states that the previously filed certificate is nullified or void or uses words of similar meaning.

Section 6 amends § 18-302 of the LLC Act to confirm that a limited liability company agreement may be amended in connection with a division of a limited liability company and a merger of registered series of a limited liability company, as is specifically contemplated by §§ 18-217(f) and 18-221(e) of the LLC Act, respectively.

Section 7 amends § 18-1107(c) of the LLC Act to confirm that when the existence of a domestic limited liability company or registered series, or the registration of a foreign limited liability company, will cease by the filing of a certificate under the LLC Act, the full amount of the annual tax for the calendar year in which such certificate becomes effective is due and payable before the filing of such certificate.

Section 8 provides that the amendments to the LLC Act take effect on August 1, 2025.

Author: Senator Brown