SPONSOR: Sen. Brown & Sen. Townsend & Rep. Lynn
Sens. Gay, Hansen, S. McBride, Pettyjohn; Reps. Brady, Bush, Griffith, Mitchell

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:

Section 1. Amend § 18-106, Chapter 18, 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, 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 or other persons whose approval would be required under the limited liability company agreement (i) for such act or transaction to be validly taken, or (ii) 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; provided, that 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 (e). 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 (e) 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 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 (e) by the members, 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 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. The provisions of this subsection (e) 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 (e) (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 (e), 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 2. Amend § 18-217, Chapter 18, 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.

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

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

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

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

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

(f) Any action to enforce any right arising under this section shall be brought in the Court of Chancery. If the limited liability company refuses to permit a member, or attorney or other agent acting for the member, to obtain or a

manager to examine the information described in subsection (a) of this section or does not reply to the demand that has been made within 5 business days (or such shorter or longer period of time as is provided for in a limited liability company agreement but not longer than 30 business days) after the demand has been made, the demanding member or manager may apply to the Court of Chancery for an order to compel such disclosure. The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking such information is entitled to the information sought. The Court of Chancery may summarily order the limited liability company to permit the demanding member to obtain or manager to examine the information described in subsection (a) of this section and to make copies or abstracts therefrom, or the Court of Chancery may summarily order the limited liability company to furnish to the demanding member or manager the information described in subsection (a) of this section on the condition that the demanding member or manager first pay to the limited liability company the reasonable cost of obtaining and furnishing such information and on such other conditions as the Court of Chancery deems appropriate. When a demanding member seeks to obtain or a manager seeks to examine the information described in subsection (a) of this section, the demanding member or manager shall first establish:

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

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

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

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

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

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

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

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

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

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

agreement or by amending its limited liability company agreement and certificate of formation to comply with the requirements of this subchapter.

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

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

(a) A "statutory public benefit limited liability company" is a for-profit limited liability company formed under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a statutory public benefit limited liability company shall be managed in a manner that balances the members' pecuniary interests, the best interests of those materially affected by the limited liability company's conduct, and the public benefit or public benefits set forth in its limited liability company agreement and in its certificate of formation. A statutory public benefit limited liability company shall state in its limited liability company agreement and in the heading of its certificate of formation that it is a statutory public benefit limited liability company and shall set forth in its limited liability company agreement and in its certificate of formation 1 or more specific public benefits to be promoted by the limited liability company ~~in its certificate of formation. The limited liability company agreement~~. In the event of any inconsistency between the public benefit or benefits to be promoted by the limited liability company as set forth in its limited liability company agreement and in its certificate of formation, 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. A manager of a statutory public benefit limited liability company ~~may not contain any~~ or, if there is no manager, then any member of a statutory public benefit limited liability company who becomes aware that the specific public benefit or benefits to be promoted by the limited liability company as set forth in its limited liability company agreement are inaccurately set forth in its certificate of formation, shall promptly amend the certificate of formation. Any provision in the limited liability company agreement or certificate of formation of a statutory public benefit limited liability company that is inconsistent with this subchapter shall not be effective to the extent of such inconsistency.

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

§ 18-1203. [Reserved]

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

§ 18-1204. Duties of members or managers.

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

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

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

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

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

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