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DELAWARE STATE SENATE
148th GENERAL ASSEMBLY

SENATE BILL NO. 78

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 § 18-204(c), Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

(c) For all purposes of the laws of the State of Delaware, unless otherwise provided in a limited liability company agreement, a power of attorney or proxy with respect to ~~matters relating to the organization, internal affairs or termination of a limited liability company or granted by a person as a member or assignee of a limited liability company interest or by a person seeking to become a member or an assignee of a limited liability company interest~~ a limited liability company granted to any person shall be irrevocable if it states that it is irrevocable and it is coupled with an interest sufficient in law to support an irrevocable power or proxy. Such irrevocable power of attorney or proxy, unless otherwise provided therein or in a limited liability company agreement, shall not be affected by subsequent death, disability, incapacity, dissolution, termination of existence or bankruptcy of, or any other event concerning, the principal. A power of attorney or proxy with respect to matters relating to the organization, internal affairs or termination of a limited liability company or granted by a person as a member or an assignee of a limited liability company interest or by a person seeking to become a member or an assignee of a limited liability company interest and, in either case, granted to the limited liability company, a manager or member thereof, or any of their respective officers, directors, managers, members, partners, trustees, employees or agents shall be deemed coupled with an interest sufficient in law to support an irrevocable power or proxy. The provisions of this subsection shall not be construed to limit the enforceability of a power of attorney or proxy that is part of a limited liability company agreement.

Section 2. Amend § 18-209(b), Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

(b) Pursuant to an agreement of merger or consolidation, 1 or more domestic limited liability companies may merge or consolidate with or into 1 or more domestic limited liability companies or 1 or more other business entities formed or organized

under the laws of the State of Delaware or any other state or the United States or any foreign country or other foreign jurisdiction, or any combination thereof, with such domestic limited liability company or other business entity as the agreement shall provide being the surviving or resulting domestic limited liability company or other business entity. Unless otherwise provided in the limited liability company agreement, an agreement of merger or consolidation or a plan of merger shall be approved by each domestic limited liability company which is to merge or consolidate ~~by the members or, if there is more than 1 class or group of members, then by each class or group of members, in either case, by members who own more than 50 percent~~ of the then current percentage or other interest in the profits of the domestic limited liability company owned by all of the members ~~or by the members in each class or group, as appropriate~~. In connection with a merger or consolidation hereunder, rights or securities of, or interests in, a domestic limited liability company or other business entity which is a constituent party to the merger or consolidation may be exchanged for or converted into cash, property, rights or securities of, or interests in, the surviving or resulting domestic limited liability company or other business entity or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, a domestic limited liability company or other business entity which is not the surviving or resulting limited liability company or other business entity in the merger or consolidation, may remain outstanding or may be canceled. Notwithstanding prior approval, an agreement of merger or consolidation or a plan of merger may be terminated or amended pursuant to a provision for such termination or amendment contained in the agreement of merger or consolidation or plan of merger. Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by the second sentence of this subsection as in effect on July 31, 2015.

Section 3. Amend § 18-213(b), Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

(b) If the limited liability company agreement specifies the manner of authorizing a transfer or domestication or continuance described in subsection (a) of this section, the transfer or domestication or continuance shall be authorized as specified in the limited liability company agreement. If the limited liability company agreement does not specify the manner of authorizing a transfer or domestication or continuance described in subsection (a) of this section and does not prohibit such a transfer or domestication or continuance, the transfer or domestication or continuance shall be authorized in the same manner as is specified in the limited liability company agreement for authorizing a merger or consolidation that involves the limited liability company as a constituent party to the merger or consolidation. If the limited liability company agreement does not specify the manner of authorizing a transfer or domestication or continuance described in subsection (a) of this section or a merger or consolidation that involves the limited liability company as a constituent party and does not prohibit such a transfer or domestication or continuance, the transfer or domestication or continuance shall be authorized by the approval by ~~the members or, if there is more than 1 class or group of members, then by each class or group of members, in either case, by the members~~ who own more than 50% percent of the then current percentage or other interest in the profits of the domestic limited liability company owned by all of the members ~~or by the members in each class or group, as appropriate~~. If a transfer or domestication or continuance described in subsection (a) of this section shall be authorized as provided in this subsection (b), a certificate of

transfer if the limited liability company's existence as a limited liability company of the State of Delaware is to cease, or a certificate of transfer and domestic continuance if the limited liability company's existence as a limited liability company in the State of Delaware is to continue, executed in accordance with § 18-204 of this title, shall be filed in the office of the Secretary of State in accordance with § 18-206 of this title. The certificate of transfer or the certificate of transfer and domestic continuance shall state:

- (1) The name of the limited liability company and, if it has been changed, the name under which its certificate of formation was originally filed;
- (2) The date of the filing of its original certificate of formation with the Secretary of State;
- (3) The jurisdiction to which the limited liability company shall be transferred or in which it shall be domesticated or continued and the name of the entity or business form formed, incorporated, created or that otherwise comes into being as a consequence of the transfer of the limited liability company to, or its domestication or continuance in, such foreign jurisdiction;
- (4) The future effective date or time (which shall be a date or time certain) of the transfer to or domestication or continuance in the jurisdiction specified in paragraph (b)(3) of this section if it is not to be effective upon the filing of the certificate of transfer or the certificate of transfer and domestic continuance;
- (5) That the transfer or domestication or continuance of the limited liability company has been approved in accordance with this section;
- (6) In the case of a certificate of transfer, (i) that the existence of the limited liability company as a limited liability company of the State of Delaware shall cease when the certificate of transfer becomes effective, and (ii) the agreement of the limited liability company that it may be served with process in the State of Delaware in any action, suit or proceeding for enforcement of any obligation of the limited liability company arising while it was a limited liability company of the State of Delaware, and that it irrevocably appoints the Secretary of State as its agent to accept service of process in any such action, suit or proceeding;
- (7) The address (which may not be that of the limited liability company's registered agent without the written consent of the limited liability company's registered agent, such consent to be filed with the certificate of transfer) to which a copy of the process referred to in paragraph (b)(6) of this section shall be mailed to it by the Secretary of State. Process may be served upon the Secretary of State under paragraph (b)(6) of this section 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 this subsection and any other address that 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 the limited liability

company that has transferred or domesticated or continued out of the State of Delaware at all such addresses furnished by the plaintiff in accordance with the procedures set forth in § 18-911(c) of this title; and

(8) In the case of a certificate of transfer and domestic continuance, that the limited liability company will continue to exist as a limited liability company of the State of Delaware after the certificate of transfer and domestic continuance becomes effective.

Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by the third sentence of this subsection as in effect on July 31, 2015.

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

(k) Subject to § 18-801 of this title, except to the extent otherwise provided in the limited liability company agreement, a series may be terminated and its affairs wound up without causing the dissolution of the limited liability company. The termination of a series established in accordance with subsection (b) of this section shall not affect the limitation on liabilities of such series provided by subsection (b) of this section. A series is terminated and its affairs shall be wound up upon the dissolution of the limited liability company under § 18-801 of this title or otherwise upon the first to occur of the following:

- (1) At the time specified in the limited liability company agreement;
- (2) Upon the happening of events specified in the limited liability company agreement;
- (3) Unless otherwise provided in the limited liability company agreement, upon the affirmative vote or written consent of ~~the members of the limited liability company associated with such series or, if there is more than 1 class or group of members associated with such series, then by each class or group of members associated with such series, in either case,~~ by members associated with such series who own more than 2/3 of the then-current percentage or other interest in the profits of the series of the limited liability company owned by all of the members associated with such series ~~or by the members in each class or group of such series, as appropriate;~~ or
- (4) The termination of such series under subsection (m) of this section.

Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by paragraph (3) of this subsection as in effect on July 31, 2015.

Section 5. Amend § 18-215(l), Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

(l) Notwithstanding § 18-803(a) of this title, unless otherwise provided in the limited liability company agreement, a manager associated with a series who has not wrongfully terminated the series or, if none, the members associated with the series

or a person approved by the members associated with the series ~~or, if there is more than 1 class or group of members associated with the series, then by each class or group of members associated with the series,~~ in either case, by members who own more than 50 percent of the then current percentage or other interest in the profits of the series owned by all of the members associated with the series ~~or by the members in each class or group associated with the series, as appropriate,~~ may wind up the affairs of the series; but, if the series has been established in accordance with subsection (b) of this section, the Court of Chancery, upon cause shown, may wind up the affairs of the series upon application of any member or manager associated with the series, or the member's personal representative or assignee, and in connection therewith, may appoint a liquidating trustee. The persons winding up the affairs of a series may, in the name of the limited liability company and for and on behalf of the limited liability company and such series, take all actions with respect to the series as are permitted under § 18-803(b) of this title. The persons winding up the affairs of a series shall provide for the claims and obligations of the series and distribute the assets of the series as provided in § 18-804 of this title, which section shall apply to the winding up and distribution of assets of a series. Actions taken in accordance with this subsection shall not affect the liability of members and shall not impose liability on a liquidating trustee. Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by the first sentence of this subsection as in effect on July 31, 2015.

Section 6. Amend § 18-216(b), Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

(b) If the limited liability company agreement specifies the manner of authorizing a conversion of the limited liability company, the conversion shall be authorized as specified in the limited liability company agreement. If the limited liability company agreement does not specify the manner of authorizing a conversion of the limited liability company and does not prohibit a conversion of the limited liability company, the conversion shall be authorized in the same manner as is specified in the limited liability company agreement for authorizing a merger or consolidation that involves the limited liability company as a constituent party to the merger or consolidation. If the limited liability company agreement does not specify the manner of authorizing a conversion of the limited liability company or a merger or consolidation that involves the limited liability company as a constituent party and does not prohibit a conversion of the limited liability company, the conversion shall be authorized by the approval ~~by the members or, if there is more than 1 class or group of members, then by each class or group of members, in either case,~~ by members who own more than 50 percent of the then current percentage or other interest in the profits of the domestic limited liability company owned by all of the members ~~or by the members in each class or group, as appropriate.~~ Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by the third sentence of this subsection as in effect on July 31, 2015.

Section 7. 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:

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 the member's or manager's, as the case may be,

rights and powers to manage and control the business and affairs of the limited liability company, including to delegate to agents, officers and employees of a member or manager or the limited liability company, and to delegate by a management agreement or another agreement with, or otherwise to, other 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 and powers have been delegated to be a member or manager, as the case may be, of the limited liability company.

Section 8. Amend § 18-603, Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

A member may resign from a limited liability company only at the time or upon the happening of events specified in a limited liability company agreement and in accordance with the limited liability company agreement. Notwithstanding anything to the contrary under applicable law, unless a limited liability company agreement provides otherwise, a member may not resign from a limited liability company prior to the dissolution and winding up of the limited liability company. Notwithstanding anything to the contrary under applicable law, a limited liability company agreement may provide that a limited liability company interest may not be assigned prior to the dissolution and winding up of the limited liability company.

Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 1996, shall continue to be governed by this section as in effect on July 31, 1996, ~~and shall not be governed by this section.~~

Section 9. Amend § 18-801(a), Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

- (a) A limited liability company is dissolved and its affairs shall be wound up upon the first to occur of the following:
- (1) At the time specified in a limited liability company agreement, but if no such time is set forth in the limited liability company agreement, then the limited liability company shall have a perpetual existence;
 - (2) Upon the happening of events specified in a limited liability company agreement;
 - (3) Unless otherwise provided in a limited liability company agreement, upon the affirmative vote or written consent of ~~the members of the limited liability company or, if there is more than 1 class or group of members, then by each class or group of members, in either case, by~~ members who own more than 2/3 of the then-current percentage or other interest in the profits of the limited liability company owned by all of the members ~~or by the members in each class or group, as appropriate;~~
 - (4) At any time there are no members; provided, that the limited liability company is not dissolved and is not required to be wound up if:
 - a. Unless otherwise provided in a limited liability company agreement, within 90 days or such other period as is provided for in the limited liability company agreement after the occurrence of the event that terminated the continued membership of the last remaining member, the personal

representative of the last remaining member agrees in writing to continue the limited liability company and to the admission of the personal representative of such member or its nominee or designee to the limited liability company as a member, effective as of the occurrence of the event that terminated the continued membership of the last remaining member; provided, that a limited liability company agreement may provide that the personal representative of the last remaining member shall be obligated to agree in writing to continue the limited liability company and to the admission of the personal representative of such member or its nominee or designee to the limited liability company as a member, effective as of the occurrence of the event that terminated the continued membership of the last remaining member, or

b. A member is admitted to the limited liability company in the manner provided for in the limited liability company agreement, effective as of the occurrence of the event that terminated the continued membership of the last remaining member, within 90 days or such other period as is provided for in the limited liability company agreement after the occurrence of the event that terminated the continued membership of the last remaining member, pursuant to a provision of the limited liability company agreement that specifically provides for the admission of a member to the limited liability company after there is no longer a remaining member of the limited liability company.

(5) The entry of a decree of judicial dissolution under § 18-802 of this title.

Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by paragraph (3) of this subsection as in effect on July 31, 2015.

Section 10. Amend § 18-803(a), Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

(a) Unless otherwise provided in a limited liability company agreement, a manager who has not wrongfully dissolved a limited liability company or, if none, the members or a person approved by the members ~~or, if there is more than 1 class or group of members, then by each class or group of members~~, in either case, by members who own more than 50 percent of the then current percentage or other interest in the profits of the limited liability company owned by all of the members ~~or by the members in each class or group, as appropriate~~, may wind up the limited liability company's affairs; but the Court of Chancery, upon cause shown, may wind up the limited liability company's affairs upon application of any member or manager, or the member's personal representative or assignee, and in connection therewith, may appoint a liquidating trustee. Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by this subsection as in effect on July 31, 2015.

Section 11. Amend § 18-1105(a)(5), Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

(5) The Secretary of State may issue photocopies or electronic image copies of instruments on file, as well as

instruments, documents and other papers not on file, and for all such photocopies or electronic image copies, whether certified or not, a fee of \$10 shall be paid for the first page and \$2.00 for each additional page. ~~The Secretary of State may also issue microfiche copies of instruments on file as well as instruments, documents and other papers not on file, and for each such microfiche a fee of \$2.00 shall be paid therefor.~~ Notwithstanding ~~the State of Delaware's~~ Freedom of Information Act [Chapter 100 of Title 29] or other provision of ~~this Code~~ law granting access to public records, the Secretary of State upon request shall issue only photocopies, microfiche or electronic image copies of public records in exchange for the fees described above in this section, and in no case shall the Secretary of State be required to provide copies (or access to copies) of such public records (including without limitation bulk data, digital copies of instruments, documents and other papers, databases or other information) in an electronic medium or in any form other than photocopies or electronic image copies of such public records in exchange, as applicable, for the fees described in this section or § 2318 of Title 29 for each such record associated with a file number.

Section 12. Sections 1 through 10 shall become effective August 1, 2015. Section 11 shall be effective upon its enactment into law.

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 § 18-204(c) of the Act to confirm that the provisions of that section relating to a power of attorney also apply to a proxy.

Sections 2, 3, 4, 5, 6, 9 and 10. These sections amend § 18-209(b), § 18-213(b), § 18-215(k), § 18-215(l), § 18-216(b), § 18-801(a) and § 18-803(a) of the Act to delete the default requirement for a class or group vote in connection with mergers and consolidations, transfers or continuances, termination and winding up of series, conversions and the dissolution and winding up of a limited liability company. A limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, however, shall continue to be governed by the default requirements for a class or group vote as in effect on July 31, 2015, unless otherwise provided in its limited liability company agreement.

Section 7. This section amends § 18-407 of the Act to confirm that unless otherwise provided in a limited liability company agreement, a delegation of rights and powers is irrevocable if it states that it is irrevocable.

Section 8. This section amends § 18-603 of the Act to delete surplus language.

Section 11. This section amends § 18-1105(a)(5) of the Act to confirm that in exchange for the fees described the Secretary of State may issue public records in the form of photocopies or electronic image copies and need not provide public records in any other form.

Section 12. This section provides proposed amendments of the Act shall become effective August 1, 2015, except that the amendment to Section 18-1105(a)(5) shall be effective upon its enactment into law.

Author: Senator Townsend