

SPONSOR: Rep. M. Smith & Rep. Lynn & Sen. Henry & Sen.
Townsend
Reps. Brady, J. Johnson, Keeley, Mitchell, B. Short,
Smyk, Spiegelman; Sens. Cloutier, Lavelle

HOUSE OF REPRESENTATIVES
148th GENERAL ASSEMBLY

HOUSE BILL NO. 372

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 § 18-105, Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 18-105. Service of process on domestic limited liability companies and series thereof.

(a) Service of legal process upon any domestic limited liability company or any series thereof established pursuant to § 18-215(b) of this title shall be made by delivering a copy personally to any manager of the limited liability company in the State of Delaware, or the registered agent of the limited liability company in the State of Delaware, or by leaving it at the dwelling house or usual place of abode in the State of Delaware of any such manager or registered agent (if the registered agent be an individual), or at the registered office or other place of business of the limited liability company in the State of Delaware. If service of legal process is made upon the registered agent of the limited liability company in the State of Delaware on behalf of any such series, such process shall include the name of the limited liability company and the name of such series. If the registered agent be a corporation, service of process upon it as such may be made by serving, in the State of Delaware, a copy thereof on the president, vice-president, secretary, assistant secretary or any director of the corporate registered agent. Service by copy left at the dwelling house or usual place of abode of a manager or registered agent, or at the registered office or other place of business of the limited liability company in the State of Delaware, to be effective, must be delivered thereat at least 6 days before the return date of the process, and in the presence of an adult person, and the officer serving the process shall distinctly state the manner of service in the officer's return thereto. Process returnable forthwith must be delivered personally to the manager or registered agent.

(b) In case the officer whose duty it is to serve legal process cannot by due diligence serve the process in any manner provided for by subsection (a) of this section, it shall be lawful to serve the process against the limited liability company or any series thereof established pursuant to § 18-215(b) of this title upon the Secretary of State, and such service shall be as effectual for all intents and purposes as if made in any of the ways provided for in subsection (a) of this section. If service of legal process is made upon the Secretary of State on behalf of any such series, such process shall include the name of the limited liability company and the name of such series. 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 that service is effected through the Secretary of State in accordance with this subsection, the Secretary of State shall forthwith notify the limited liability company by letter, directed to the limited liability company at its address as it appears on the records relating to such limited liability company on file with the Secretary of State or, if no such address appears, at its last registered office. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such letter shall enclose a copy of the process and any other papers served on the Secretary of State pursuant to this subsection. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being effected pursuant to this subsection, and to pay the Secretary of State the sum of \$50 for the use of the State of Delaware, which sum shall be taxed as part of the costs in the proceeding if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and defendant, the title, docket number and nature of the proceeding in which process has been served upon the Secretary, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour when the service was made. The Secretary of State shall not be required to retain such information for a period longer than 5 years from the Secretary's receipt of the service of process.

Section 2. Amend § 18-215(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:

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

(b) Notwithstanding anything to the contrary set forth in this chapter or under other applicable law, in the event that a limited liability company agreement establishes or provides for the establishment of 1 or more series, and if the records maintained for any such series account for the assets associated with such series separately from the other assets of the limited liability company, or any other series thereof, and if the limited liability company agreement so provides, and if notice of the limitation on liabilities of a series as referenced in this subsection is set forth in the certificate of formation of the limited liability company, then the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the limited liability company generally or any other series thereof, and, unless otherwise provided in the limited liability company agreement, none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the limited liability company generally or any other series thereof shall be enforceable against the assets of such series. Neither the preceding sentence nor any provision pursuant thereto in a limited liability company agreement or certificate of formation shall (i) restrict a series or limited liability company on behalf of a series from agreeing in the limited liability company agreement or otherwise that any or all of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the limited liability company generally or any other series thereof shall be enforceable against the assets of such series or (ii) restrict a limited liability company from agreeing in the limited liability company agreement or otherwise that any or all of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a series shall be enforceable against the assets of the limited liability company generally. Assets associated with a series may be held directly or indirectly, including in the name of such series, in the name of the limited liability company, through a nominee or

otherwise. Records maintained for a series that reasonably identify its assets, including by specific listing, category, type, quantity, computational or allocational formula or procedure (including a percentage or share of any asset or assets) or by any other method where the identity of such assets is objectively determinable, will be deemed to account for the assets associated with such series separately from the other assets of the limited liability company, or any other series thereof. Notice in a certificate of formation of the limitation on liabilities of a series as referenced in this subsection shall be sufficient for all purposes of this subsection whether or not the limited liability company has established any series when such notice is included in the certificate of formation, and there shall be no requirement that any specific series of the limited liability company be referenced in such notice. The fact that a certificate of formation that contains the foregoing notice of the limitation on liabilities of a series is on file in the office of the Secretary of State shall constitute notice of such limitation on liabilities of a series. As used in this chapter, a reference to assets of a series includes assets associated with a series and a reference to assets associated with a series includes assets of a series.

Section 3. 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:

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

(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 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
- (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 (k)(3) of this section as in effect on July 31, 2015 (except that "affirmative" and "written" shall be deleted from such paragraph (k)(3)).

Section 4. Amend § 18-302(d), Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 18-302. Classes and voting.

(d) Unless otherwise provided in a limited liability company agreement, meetings of members may be held by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection shall constitute presence in person at the meeting.

Unless otherwise provided in a limited liability company agreement, on any matter that is to be voted on, consented to or approved by members, the members may take such action without a meeting, without prior notice and without a vote if consented to or approved, in writing ~~or~~, by electronic transmission or by any other means permitted by law, by members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all members entitled to vote thereon were present and voted. Unless otherwise provided in a limited liability company agreement, if a person (whether or not then a member) consenting as a member to any matter provides that such consent will be effective at a future time (including a time determined upon the happening of an event), then such person shall be deemed to have consented as a member at such future time so long as such person is then a member. Unless otherwise provided in a limited liability company agreement, on any matter that is to be voted on by members, the members may vote in person or by proxy, and such proxy may be granted in writing, by means of electronic transmission or as otherwise permitted by applicable law. Unless otherwise provided in a limited liability company agreement, a consent transmitted by electronic transmission by a member or by a person or persons authorized to act for a member shall be deemed to be written and signed for purposes of this subsection. For purposes of this subsection, the term "electronic transmission" means any form of communication not directly involving the physical transmission of paper that creates a record that may be retained, retrieved and reviewed by a recipient thereof and that may be directly reproduced in paper form by such a recipient through an automated process.

Section 5. Amend § 18-304, Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 18-304. Events of bankruptcy.

A person ceases to be a member of a limited liability company upon the happening of any of the following events:

(1) Unless otherwise provided in a limited liability company agreement, or with the ~~written~~ consent of all members, a member:

- a. Makes an assignment for the benefit of creditors;
- b. Files a voluntary petition in bankruptcy;
- c. Is adjudged a bankrupt or insolvent, or has entered against the member an order for relief, in any bankruptcy or insolvency proceeding;
- d. Files a petition or answer seeking for the member any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation;
- e. Files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the member in any proceeding of this nature;
- f. Seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of the member or of all or any substantial part of the member's properties; or

(2) Unless otherwise provided in a limited liability company agreement, or with the ~~written~~ consent of all members, 120 days after the commencement of any proceeding against the member seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation, if the proceeding has not been dismissed, or if within 90 days after the appointment without the member's consent or acquiescence of a

trustee, receiver or liquidator of the member or of all or any substantial part of the member's properties, the appointment is not vacated or stayed, or within 90 days after the expiration of any such stay, the appointment is not vacated.

Section 6. Amend § 18-404(d), Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 18-404. Classes and voting.

(d) Unless otherwise provided in a limited liability company agreement, meetings of managers may be held by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection shall constitute presence in person at the meeting. Unless otherwise provided in a limited liability company agreement, on any matter that is to be voted on, consented to or approved by managers, the managers may take such action without a meeting, without prior notice and without a vote if consented to or approved, in writing ~~or~~ by electronic transmission or by any other means permitted by law, by managers having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all managers entitled to vote thereon were present and voted. Unless otherwise provided in a limited liability company agreement, if a person (whether or not then a manager) consenting as a manager to any matter provides that such consent will be effective at a future time (including a time determined upon the happening of an event), then such person shall be deemed to have consented as a manager at such future time so long as such person is then a manager. Unless otherwise provided in a limited liability company agreement, on any matter that is to be voted on by managers, the managers may vote in person or by proxy, and such proxy may be granted in writing, by means of electronic transmission or as otherwise permitted by applicable law. Unless otherwise provided in a limited liability company agreement, a consent transmitted by electronic transmission by a manager or by a person or persons authorized to act for a manager shall be deemed to be written and signed for purposes of this subsection. For purposes of this subsection, the term "electronic transmission" means any form of communication not directly involving the physical transmission of paper that creates a record that may be retained, retrieved and reviewed by a recipient thereof and that may be directly reproduced in paper form by such a recipient through an automated process.

Section 7. Amend § 18-702(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:

§ 18-702. Assignment of limited liability company interest.

(a) A limited liability company interest is assignable in whole or in part except as provided in a limited liability company agreement. The assignee of a member's limited liability company interest shall have no right to participate in the management of the business and affairs of a limited liability company except as provided in a limited liability company agreement or, unless otherwise provided in the limited liability company agreement, upon the ~~affirmative~~ written consent of all of the members of the limited liability company.

Section 8. Amend § 18-704(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:

§ 18-704. Right of assignee to become member.

(a) An assignee of a limited liability company interest ~~may become~~ becomes a member:

(1) As provided in the limited liability company agreement; ~~or~~

(2) Unless otherwise provided in the limited liability company agreement, upon the ~~affirmative~~ vote or ~~written~~ consent of all of the members of the limited liability company; ~~or~~

(3) Unless otherwise provided in the limited liability company agreement by a specific reference to this subsection or otherwise provided in connection with the assignment, upon the voluntary assignment by the sole member of the limited liability company of all of the limited liability company interests in the limited liability company to a single assignee. An assignment will be voluntary for purposes of this subsection if it is consented to by the member at the time of the assignment and is not effected by foreclosure or other similar legal process.

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

§ 18-801. Dissolution.

(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 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;

(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 (a)(3) of this section as in effect on July 31, 2015 (except that "affirmative" and "written" shall be deleted from such paragraph (a)(3)).

(b) Unless otherwise provided in a limited liability company agreement, the death, retirement, resignation, expulsion, bankruptcy or dissolution of any member or the occurrence of ~~any other an~~ event that terminates the continued membership of any member shall not cause the limited liability company to be dissolved or its affairs to be wound up, and upon the occurrence of any such event, the limited liability company shall be continued without dissolution.

Section 10. Amend § 18-806, Chapter 18, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 18-806. Revocation of dissolution.

If a limited liability company agreement provides the manner in which a dissolution may be revoked, it may be revoked in that manner and, unless a limited liability company agreement prohibits revocation of dissolution, then notwithstanding the occurrence of an event set forth in § 18-801(a)(1), (2), (3) or (4) of this title, the limited liability company shall not be dissolved and its affairs shall not be wound up if, prior to the filing of a certificate of cancellation in the office of the Secretary of State, the limited liability company is continued, effective as of the occurrence of such event:

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

(2) In the case of dissolution under § 18-801(a)(1) or (2) of this title (other than a dissolution effected by the ~~affirmative~~ vote or ~~written~~ consent of the members or other persons or the occurrence of an event that causes the last remaining member to cease to be a member), pursuant to such ~~affirmative~~ vote or ~~written~~ 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 or other persons whose approval is required under the limited liability company agreement to revoke a dissolution contemplated by this paragraph); and

(3) In the case of dissolution effected by the occurrence of an event that causes the last remaining member to cease to be a member, pursuant to the ~~affirmative~~ vote or ~~written~~ consent of the personal representative of the last remaining member of the limited liability company or the assignee of all of the limited liability company interests in the limited liability company (and the approval of any other persons whose approval is required under the limited liability company agreement to revoke a dissolution contemplated by this paragraph).

If there is no remaining member of the limited liability company and the personal representative of the last remaining member or the assignee of all of the limited liability company interests in the limited liability company votes in favor of or

consents to the continuation of the limited liability company, such personal representative or such assignee, as applicable, shall be required to agree ~~in writing~~ to the admission of a nominee or designee as a member, effective as of the occurrence of the event that terminated the continued membership of the last remaining member. The provisions of this section shall not be construed to limit the accomplishment of a revocation of dissolution by other means permitted by law.

Section 11. This Act shall become effective August 1, 2016.

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 § 18-105 of the Act to provide a method for effecting service of legal process upon a series of a limited liability company established pursuant to § 18-215(b) of the Act.

Section 2. This section amends § 18-215(b) of the Act to confirm and clarify two propositions. First, neither the first sentence of § 18-215(b), nor any language in a limited liability company agreement or certificate of formation that is included pursuant to that first sentence, shall be construed as restricting a series, or a limited liability company on behalf of a series, from agreeing to be liable for any or all of the debts, liabilities, obligations or expenses incurred, contracted for or otherwise existing with respect to the limited liability company generally or any other series thereof, or restricting a limited liability company from agreeing to be liable for any or all of the debts, liabilities, obligations or expenses incurred, contracted for or otherwise existing with respect to a series. Second, any reference in the Act to assets of a series includes assets associated with a series and any reference to assets associated with a series includes assets of a series.

Section 3. This section amends § 18-215(k) of the Act to make two changes. First, it deletes the word "affirmative" as unnecessary in connection with a "vote." Second, it eliminates the requirement for a written consent and thereby permits the members associated with a series to consent to the specified action by means other than a writing.

Section 4. This section amends § 18-302(d) of the Act to confirm that the provisions of that subsection are intended to be enabling and are not intended to restrict the way in which members may vote on, consent to or approve any matter.

Section 5. This section amends § 18-304 of the Act to eliminate the requirement for a written consent and thereby permit the members of a limited liability company to consent to the specified actions by means other than a writing.

Section 6. This section amends § 18-404(d) of the Act to confirm that the provisions of that subsection are intended to be enabling and are not intended to restrict the way in which managers may vote on, consent to or approve any matter.

Section 7. This section amends § 18-702(a) of the Act to make two changes. First, it deletes the word "affirmative" as unnecessary in connection with a "vote." Second, it eliminates the requirement for a written consent and thereby permits the members of a limited liability company to consent to the specified action by means other than a writing.

Section 8. This section amends § 18-704(a) of the Act to make four changes. First, it substitutes "becomes" for "may become" to clarify the effect of paragraphs (a)(1), (a)(2) and (a)(3). Second, it deletes the word "affirmative" as unnecessary in connection with a "vote." Third, it eliminates the requirement for a written consent and thereby permits the members of a limited liability company to consent to the specified action by means other than a writing. Fourth, it adds a new subsection (3) thereto to provide that upon a voluntary assignment, which is otherwise permitted, by the sole member of a limited liability company of all of the limited liability company interests in the limited liability company to a single assignee, the assignee is admitted as a member of the limited liability company unless otherwise provided in connection with such assignment or otherwise provided in the limited liability company agreement by a specific reference to the subsection.

Section 9. This section amends § 18-801 of the Act to make four changes. First, it deletes the word "affirmative" as unnecessary in connection with a "vote." Second, it eliminates the requirement for a written consent and thereby permits the members of a limited liability company to consent to the specified action by means other than a writing. Third, it eliminates the requirement for an agreement in writing and thereby permits the personal representative of the last remaining member of a limited liability company to agree to the specified actions by means other than a writing. Fourth, it eliminates any implication regarding which events terminate the continued membership of a member of a limited liability company.

Section 10. This section amends § 18-806 of the Act to make three changes. First, it deletes the word "affirmative" as unnecessary in connection with a "vote." Second, it eliminates the requirement for a written consent and thereby permits the members of a limited liability company or the personal representative of the last remaining member of a limited liability company or the assignee of all of the limited liability company interests in a limited liability company or other persons to consent to the specified actions by means other than a writing. Third, it eliminates the requirement for an agreement in writing and thereby permits the personal representative of the last remaining member of a limited liability

company or the assignee of all of the limited liability company interests in a limited liability company to agree to the specified action by means other than a writing.

Section 11. This section provides that the proposed amendments of the Act shall become effective August 1, 2016.