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SENATE BILL NO. 1241

Offered January 14, 2009

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A BILL to amend and reenact §§ 13.1-1002, 13.1-1011, 13.1-1023, 13.1-1035, 13.1-1036, 13.1-1040.1, 13.1-1049.1, 13.1-1049.3, and 13.1-1117 of the Code of Virginia, relating to limited liability companies and professional limited liability companies.

Patron—Stosch

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 13.1-1002, 13.1-1011, 13.1-1023, 13.1-1035, 13.1-1036, 13.1-1040.1, 13.1-1049.1, 13.1-1049.3, and 13.1-1117 of the Code of Virginia are amended and reenacted as follows:

§ 13.1-1002. Definitions.

As used in this chapter:

"Articles of organization" means all documents constituting, at any particular time, the articles of organization of a limited liability company. It includes the original articles of organization, the original certificate of organization issued by the Commission, and all amendments to the articles of organization. When the articles of organization have been restated pursuant to any articles of amendment, it includes only the restated articles of organization and any subsequent amendments to the restated articles of organization, but does not include the articles of amendment accompanying the restated articles of organization.

"Bankruptcy" means, with respect to any person, being the subject of an order for relief under Title 11 of the United States Code.

"Commission" means the State Corporation Commission of Virginia.

"Contribution" means any cash, property or services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services, which a member contributes to a limited liability company in his capacity as a member.

"Distribution" means a direct or indirect transfer of money or other property, or incurrence of indebtedness by a limited liability company, to or for the benefit of its members in respect of their interests.

"Domestic business trust" has the same meaning as specified in § 13.1-1201.

"Domestic corporation" has the same meaning as specified in § 13.1-603.

"Domestic limited partnership" has the same meaning as specified in § 50-73.1.

"Domestic partnership" means an association of two or more persons to carry on as co-owners a business for profit formed under § 50-73.88, or predecessor law of the Commonwealth, and includes, for all purposes of the laws of the Commonwealth, a registered limited liability partnership.

"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. Any term used in this definition that is defined in § 59.1-480 of the Uniform Electronic Transactions Act shall have the meaning set forth in such section.

"Foreign business trust" has the same meaning as specified in § 13.1-1201.

"Foreign corporation" has the same meaning as specified in § 13.1-603.

"Foreign limited liability company" means an entity, excluding a foreign business trust, that is an unincorporated ~~association~~ organization that is organized under laws other than the laws of this Commonwealth, and that affords to each of its members, pursuant to the laws under which it is organized, limited liability with respect to the liabilities of the entity.

"Foreign limited partnership" has the same meaning as specified in § 50-73.1.

"Foreign partnership" means an association of two or more persons to carry on as co-owners a business for profit formed under the laws of any state or jurisdiction other than the Commonwealth, and includes, for all purposes of the laws of the Commonwealth, a foreign registered limited liability partnership.

"Foreign registered limited liability partnership" has the same meanings as specified in §§ 50-2 and 50-73.79.

"Limited liability company" or "domestic limited liability company" means an entity that is an unincorporated ~~association~~ organization that is organized and existing under this chapter, or that has become a domestic limited liability company of the Commonwealth pursuant to § 13.1-1010.3, even

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59 though also being a non-United States entity organized under laws other than the laws of the
60 Commonwealth, or that has become a domestic limited liability company of the Commonwealth pursuant
61 to § 56-1, even though also being a limited liability company organized under laws other than the laws
62 of the Commonwealth, or that has become a domestic limited liability company of the Commonwealth
63 pursuant to § 13.1-1010.1, Article 12.2 (§ 13.1-722.8 et seq.) of Chapter 9 of this title, or, effective on
64 and after November 1, 2006, Article 14 (§ 13.1-1074 et seq.) of Chapter 12 of this title. A limited
65 liability company's status for federal tax purposes shall not affect its status as a distinct entity organized
66 and existing under this chapter.

67 "Manager" or "managers" means a person or persons designated by the members of a limited liability
68 company to manage the limited liability company as provided in the articles of organization or an
69 operating agreement.

70 "Manager-managed limited liability company" means a limited liability company that is managed by
71 a manager or managers as provided for in its articles of organization or an operating agreement.

72 "Member" means a person that has been admitted to membership in a limited liability company as
73 provided in § 13.1-1038.1 and that has not ceased to be a member.

74 "Member-managed limited liability company" means a limited liability company that is not a
75 manager-managed limited liability company.

76 "Membership interest" or "interest" means a member's share of the profits and the losses of the
77 limited liability company and the right to receive distributions of the limited liability company's assets.

78 "Non-United States entity" means a foreign limited liability company (other than one formed under
79 the laws of a state), or a corporation, business trust or association, real estate investment trust,
80 common-law trust, or any other unincorporated business, including a partnership, formed, incorporated,
81 organized, created or that otherwise came into being under the laws of any foreign country or other
82 foreign jurisdiction (other than any state).

83 "Operating agreement" means an agreement of the members as to the affairs of a limited liability
84 company and the conduct of its business, or a writing or agreement of a limited liability company with
85 one member that satisfies the requirements of subdivision A 2 of § 13.1-1023.

86 "Person" has the same meaning as specified in § 13.1-603.

87 "Principal office" means the office, in or out of the Commonwealth, where the principal executive
88 offices of a domestic or foreign limited liability company are located.

89 "State," when referring to a part of the United States, includes a state, commonwealth and the
90 District of Columbia, and their agencies and governmental subdivisions; and a territory or insular
91 possession, and their agencies and governmental subdivisions, of the United States.

92 "United States" includes a district, authority, bureau, commission, department and any other agency
93 of the United States.

94 § 13.1-1011. Articles of organization.

95 A. The articles of organization shall set forth:

96 1. A name for the limited liability company that satisfies the requirements of § 13.1-1012;

97 2. The post office address, including the street and number, if any, of the limited liability company's
98 initial registered office, the name of the city or county in which it is located, the name of its initial
99 registered agent at that office, and that the agent is either (i) an individual who is a resident of Virginia
100 and either one of the following: a member or manager of the limited liability company, a member or
101 manager of a limited liability company that is a member or manager of the limited liability company, a
102 officer or director of a corporation that is a member or manager of the limited liability company, a
103 general partner of a general or limited partnership that is a member or manager of the limited liability
104 company, a trustee of a trust that is a member or manager of the limited liability company, or a member
105 of the Virginia State Bar or (ii) a domestic or foreign stock or nonstock corporation, limited liability
106 company or registered limited liability partnership authorized to transact business in the Commonwealth;
107 and

108 3. The post office address, including the street and number, if any, of the principal office of the
109 limited liability company, which may be the same as the registered office, but need not be within the
110 Commonwealth.

111 B. The articles of organization may set forth any other matter that under this chapter is permitted to
112 be set forth in an operating agreement of a limited liability company.

113 C. The articles of organization need not set forth any of the powers enumerated in this chapter.

114 D. If the Commission finds that the articles of organization comply with the requirements of law and
115 that all required fees have been paid, it shall issue a certificate of organization.

116 § 13.1-1023. Operating agreement.

117 A. Authority.

118 1. The members of a limited liability company may enter into any operating agreement to regulate or
119 establish the affairs of the limited liability company, the conduct of its business and the relations of its
120 members. *A limited liability company is bound by its operating agreement whether or not the limited*

liability company executes the operating agreement. An operating agreement may contain any provisions regarding the affairs of a limited liability company and the conduct of its business to the extent that such provisions are not inconsistent with the laws of the Commonwealth or the articles of organization. An operating agreement may provide rights to any person, including a person who is not a party to the operating agreement, to the extent set forth in the operating agreement.

2. If a limited liability company has only one member, an operating agreement shall be deemed to include:

a. Any writing signed by the member, without regard to whether the writing constitutes an agreement, that relates to the affairs of the limited liability company and the conduct of its business.

b. Any agreement, regardless of whether the agreement is in writing, between the member and the limited liability company, that relates to the affairs of the limited liability company and the conduct of its business, provided that the limited liability company has a manager that is a person other than the member.

B. Adoption and amendment.

1. An operating agreement must initially be agreed to by all of the members. Unless the articles of organization or a written operating agreement specifically requires otherwise, an operating agreement need not be in writing.

2. If the articles of organization or an operating agreement does not provide for the manner by which an operating agreement may be amended, then all of the members must agree to any amendment of an operating agreement.

3. If the articles of organization or the operating agreement provide for the manner by which an operating agreement may be amended, including by requiring the approval of a person who is not a party to the articles of organization or requiring the satisfaction of conditions, an operating agreement may be amended only in that manner or as otherwise permitted by law; provided that (i) the approval of any person may be waived by that person and (ii) any conditions may be waived by all persons for whose benefit the conditions were intended.

C. Enforcement of operating agreement.

1. A court of equity may enforce an operating agreement by injunction or by such other relief that the court in its discretion determines to be fair and appropriate in the circumstances.

2. As an alternative to injunctive or other equitable relief, when the provisions of § 13.1-1047 are applicable, the court may order dissolution of the limited liability company.

§ 13.1-1035. Restrictions on making distribution.

A. No distribution may be made by a limited liability company if, after giving effect to the distribution:

1. The limited liability company would not be able to pay its debts as they became due in the usual course of business; or

2. The limited liability company's total assets would be less than the sum of its total liabilities plus, unless the articles of organization or an operating agreement permits otherwise, the amount that would be needed, if the limited liability company were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of members whose preferential rights are superior to the rights of members receiving the distribution.

B. The limited liability company may base a determination that a distribution is not prohibited under subsection A of this section either on:

1. Financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances; or

2. A fair valuation or other method that is reasonable in the circumstances.

C. The effect of a distribution under subsection A of this section is measured as of (i) the date the distribution is authorized if the payment occurs within 120 days after the date of authorization or (ii) the date the payment is made if it occurs more than 120 days after the date of authorization.

D. [Repealed.]

E. For the purposes of this section, the term "distribution" shall not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program.

F. *This section shall not apply to distributions in liquidation under Article 9 (§ 13.1-1046 et seq.) of this chapter.*

§ 13.1-1036. Liability upon wrongful distribution.

If a member has received a distribution in violation of the articles of organization or an operating agreement or in violation of § 13.1-1035 of this chapter, then ~~he or it~~ *the member* is liable to the limited liability company for a period of ~~six~~ *two* years thereafter for the amount of the distribution wrongfully made.

§ 13.1-1040.1. Events causing member's dissociation.

182 Except as otherwise provided in the articles of organization or an operating agreement, a member is
183 dissociated from a limited liability company upon the occurrence of any of the following events:

184 1. To the extent resignation of a member is provided for in writing in the articles of organization or
185 an operating agreement, the limited liability company's having notice of the member's express will to
186 resign as a member on a later date specified by the member in the notice or, if no later date is specified,
187 the date of notice;

188 2. An event agreed to in the articles of organization or an operating agreement as causing the
189 member's dissociation;

190 3. The member's expulsion pursuant to the articles of organization or an operating agreement;

191 4. The member's expulsion by the unanimous vote of the other members if:

192 a. It is unlawful to carry on the business of the limited liability company with that member; or

193 b. There has been an assignment or transfer of all or substantially all of that member's membership
194 interest, other than a transfer for security purposes or a court order charging the member's interest
195 ~~which, in either case has not been foreclosed;~~

196 5. On application by the limited liability company or another member, the member's expulsion by
197 judicial determination because:

198 a. The member engaged in wrongful conduct that adversely and materially affected the business of
199 the limited liability company;

200 b. The member willfully or persistently committed a material breach of the articles of organization or
201 an operating agreement; or

202 c. The member engaged in conduct relating to the business of the limited liability company which
203 makes it not reasonably practicable to carry on the business with the member;

204 6. The member's:

205 a. Becoming a debtor in bankruptcy;

206 b. Executing an assignment for the benefit of creditors;

207 c. Seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of
208 that member or of all or substantially all of that member's property; or

209 d. Failing, within ninety days after the appointment, to have vacated or stayed the appointment of a
210 trustee, receiver, or liquidator of the member or of all or substantially all of the member's property
211 obtained without the member's consent or acquiescence, or failing within ninety days after the expiration
212 of a stay to have the appointment vacated;

213 7. In the case of a member who is an individual:

214 a. The member's death;

215 b. The appointment of a guardian, committee or conservator for the member; or

216 c. A judicial determination that the member has otherwise become incapable of performing the
217 member's duties under the articles of organization or an operating agreement;

218 8. In the case of a member that is a trust or is acting as a member by virtue of being a trustee of a
219 trust, distribution of the trust's entire transferable interest in the limited liability company, but not merely
220 by reason of the substitution of a successor trustee;

221 9. In the case of a member that is an estate or is acting as a member by virtue of being a personal
222 representative of an estate, distribution of the estate's entire transferable interest in the limited liability
223 company, but not merely by reason of the substitution of a successor personal representative;

224 10. Termination of a member who is not an individual, partnership, corporation, limited liability
225 company, trust, or estate;

226 11. The expiration of ninety days after the limited liability company notifies a corporate member that
227 it will be expelled because it has filed articles of dissolution or the equivalent, its existence has been
228 terminated or its charter has been revoked, or its right to conduct business has been suspended by the
229 jurisdiction of its incorporation, if there is no revocation of the certificate of dissolution or no
230 reinstatement of its existence, its charter or its right to conduct business; or

231 12. A partnership or limited liability company that is a member has been dissolved and its business
232 is being wound up.

233 § 13.1-1049.1. Known claims against dissolved limited liability company.

234 A. A dissolved limited liability company may dispose of the known claims against it by following
235 the procedure described in this section.

236 B. The dissolved limited liability company shall deliver to each of its known claimants written notice
237 of the dissolution at any time after its effective date. The written notice shall:

238 1. Provide a reasonable description of the claim that the claimant may be entitled to assert;

239 2. State whether the claim is admitted, or not admitted, and if admitted (i) the amount that is
240 admitted, which may be as of a given date, and (ii) any interest obligation if fixed by an instrument of
241 indebtedness;

242 3. Provide a mailing address where a claim may be sent;

243 4. State a deadline, which may not be fewer than 120 days from the effective date of the written

notice, by which confirmation of the claim shall be delivered to the dissolved limited liability company; and

5. State that, except to the extent that any claim is admitted, the claim will be barred if written confirmation of the claim is not delivered by the deadline.

C. A claim against the dissolved limited liability company is barred to the extent that it is not admitted:

1. If the dissolved limited liability company delivered written notice to the claimant in accordance with subsection B and the claimant does not deliver written confirmation of the claim to the dissolved limited liability company by the deadline; or

2. If the dissolved limited liability company delivered written notice to the claimant that its claim is not admitted, in whole or in part, and the claimant does not commence a proceeding to enforce the claim within 90 days from the ~~delivery of written confirmation of the claim to the dissolved limited liability company~~ effective date of such notice.

D. For purposes of this section, "claim" does not include (i) a contingent liability or a claim based on an event occurring after the effective date of dissolution or (ii) a liability or claim the ultimate maturity of which is more than 60 days after the delivery of written notice to the claimant pursuant to subsection B.

E. If a liability exists but the full extent of any damages is or may not be ascertainable, and a proceeding to enforce the claim is commenced pursuant to subdivision C 2, the claimant may amend the pleadings after filing to include any damages that occurred or are alleged to have occurred after filing, and the court having jurisdiction of such claim may continue such proceeding during its pendency if it appears that further damages are or still may be occurring.

§ 13.1-1049.3. Court proceedings.

A. A dissolved limited liability company that has ~~published a~~ *complied with the* notice ~~under requirements of~~ § 13.1-1049.2 may file an application with the circuit court of the city or county where the dissolved limited liability company's principal office, or, if none in the Commonwealth, its registered office, is or was last located for a determination of the amount and form of security to be provided for payment of claims that (i) are contingent or have not been made known to the dissolved limited liability company or that are based on an event occurring after the effective date of dissolution but that, based on the facts known to the dissolved limited liability company, are reasonably estimated to arise after the effective date of dissolution or (ii) *are based on a liability the ultimate maturity of which is more than 60 days after delivery of written notice to the claimant pursuant to subsection B of § 13.1-1049.1.* Provision need not be made for any claim that is or is reasonably anticipated to be barred under subsection C of § 13.1-1049.2.

B. Within 10 days after the filing of the application, notice of the proceeding shall be given by the dissolved limited liability company to each claimant holding a contingent claim whose contingent claim is shown on the records of the dissolved limited liability company.

C. The court may appoint a guardian ad litem to represent all claimants whose identities are unknown in any proceeding brought under this section. The reasonable fees and expenses of such guardian, including all reasonable expert witness fees, shall be paid by the dissolved limited liability company.

D. Provision by the dissolved limited liability company for security in the amount and the form ordered by the court under subsection A shall satisfy the dissolved limited liability company's obligations with respect to claims that do not meet the definition of a claim in subsection D of § 13.1-1049.1, and such claims may not be enforced against a member who received assets in liquidation.

§ 13.1-1117. Conversion into nonprofessional company; disposition of membership interests of deceased or disqualified members.

A. A professional limited liability company organized under this chapter shall continue until dissolved in accordance with other provisions of this chapter or the provisions of Article 9 (§ 13.1-1046 et seq.) of Chapter 12 of this title.

B. Whenever all members of a professional limited liability company licensed under this chapter cease at any one time and for any reason to be licensed, certified or registered in the particular field of endeavor for which the professional limited liability company was organized, or by the vote of the holders of at least two-thirds of its membership interests, the professional limited liability company thereupon shall be treated as converted into, and shall operate henceforth solely as, a limited liability company under applicable provisions of this title, exclusive of this chapter, but may be reconverted upon removal of the disability or by the vote of the holders of at least two-thirds of its membership interests.

C. Following the occurrence of any event, ~~including a disqualification that terminates membership as provided in § 13.1-1116,~~ that terminates the continued membership of a member in a professional limited liability company, if the professional limited liability company has been continued as provided in

305 ~~§ 13.1-1046, then including a disqualification that terminates a member's membership as provided in~~
306 ~~§ 13.1-1116,~~ the limited liability company shall pay to the former member or ~~his or its~~ the former
307 member's successor in interest the value of the interest of the former member. The time of payment and
308 value of the interest of the former member shall be determined in the manner provided in writing in the
309 articles of organization or an operating agreement of the limited liability company, and to the extent not
310 so provided in the articles of organization or an operating agreement, the payment shall be made within
311 one year following the occurrence of the event that terminates the former member's membership and for
312 the book value of the interest, determined as of the end of the month immediately preceding the event
313 that terminated the membership of the former member. If applicable, the book value shall be determined
314 from the books and records of the limited liability company in accordance with the generally accepted
315 accounting principles on the accrual method of accounting. No subsequent adjustment of this book
316 value, whether by the limited liability company itself, by federal income tax audit made and agreed to,
317 or by a court decision which has become final, shall alter the amount of the payment to be made.

318 D. An arrangement or provision in the articles of organization, operating agreement or by contract
319 may be made to transfer any membership interest held by a disqualified charitable remainder trust to the
320 professional limited liability company or to persons qualified to hold such an interest under § 13.1-1103,
321 whether made before or after the disqualification of a charitable remainder trust, provided that the
322 membership interest involved shall have been so transferred within one year following such
323 disqualification.