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SPONSOR: Rep. George & Sen. Blevins;
Reps. Bennett, Carson, Hudson, Kovach, Lavelle;
Sen. Sorenson

HOUSE OF REPRESENTATIVES
145th 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:

1 Section 1. Amend § 18-101(7), Chapter 18, Title 6 of the Delaware Code by inserting the following sentence after
2 the fifth sentence of this subsection: "A limited liability company agreement is not subject to any statute of frauds
3 (including Section 2714 of this Title).".

4 Section 2. Amend § 18-105(b), Chapter 18, Title 6 of the Delaware Code by deleting the first two sentences
5 thereof and replacing them with the following five sentences: "In case the officer whose duty it is to serve legal process
6 cannot by due diligence serve the process in any manner provided for by subsection (a) of this section, it shall be lawful to
7 serve the process against the limited liability company upon the Secretary of State, and such service shall be as effectual for
8 all intents and purposes as if made in any of the ways provided for in subsection (a) hereof. Process may be served upon
9 the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of
10 State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary
11 of State deems necessary or appropriate. In the event that service is effected through the Secretary of State in accordance
12 with this subsection, the Secretary of State shall forthwith notify the limited liability company by letter, directed to the
13 limited liability company at its address as it appears on the records relating to such limited liability company on file with
14 the Secretary of State or, if no such address appears, at its last registered office. Such letter shall be sent by a mail or
15 courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the
16 signature of the recipient.".

17 Section 3. Amend § 18-106, Chapter 18, Title 6 of the Delaware Code by inserting a new subsection (d) at the end
18 of such section to read as follows: "(d) Unless otherwise provided in a limited liability company agreement, a limited
19 liability company has the power and authority to grant, hold or exercise a power of attorney, including an irrevocable power
20 of attorney.".

21 Section 4. Amend § 18-203, Chapter 18, Title 6 of the Delaware Code by inserting the words "or a certificate of
22 ownership and merger" immediately after the first occurrence of the word "consolidation" in the first sentence thereof, and
23 by inserting the words "or a certificate of ownership and merger" immediately after the third occurrence of the word
24 "consolidation" in the first sentence thereof.

25 Section 5. Amend § 18-204, Chapter 18, Title 6 of the Delaware Code by redesignating subsection "(c)" thereof as
26 subsection "(d)" and inserting a new subsection (c) thereto to read as follows: "(c) For all purposes of the laws of the
27 State of Delaware, a power of attorney with respect to matters relating to the organization, internal affairs or termination of
28 a limited liability company or granted by a person as a member or assignee of a limited liability company interest or by a
29 person seeking to become a member or an assignee of a limited liability company interest shall be irrevocable if it states
30 that it is irrevocable and it is coupled with an interest sufficient in law to support an irrevocable power. Such irrevocable
31 power of attorney, unless otherwise provided therein, shall not be affected by subsequent death, disability, incapacity,
32 dissolution, termination of existence or bankruptcy of, or any other event concerning, the principal. A power of attorney
33 with respect to matters relating to the organization, internal affairs or termination of a limited liability company or granted
34 by a person as a member or an assignee of a limited liability company interest or by a person seeking to become a member
35 or an assignee of a limited liability company interest and, in either case, granted to the limited liability company, a manager
36 or member thereof, or any of their respective officers, directors, managers, members, partners, trustees, employees or agents
37 shall be deemed coupled with an interest sufficient in law to support an irrevocable power."

38 Section 6. Amend § 18-206(a), Chapter 18, Title 6 of the Delaware Code by inserting the words "any certificate of
39 ownership and merger," immediately after the word "consolidation," in the first sentence thereof, and by inserting the words
40 "the certificate of ownership and merger," immediately after the word "consolidation," in the first sentence of subparagraph
41 (1) of the fifth sentence thereof.

42 Section 7. Amend § 18-206(b), Chapter 18, Title 6 of the Delaware Code by inserting the words "or certificate of
43 ownership and merger" immediately after each occurrence of the word "consolidation" in the second sentence thereof.

44 Section 8. Amend § 18-206(d), Chapter 18, Title 6 of the Delaware Code by inserting the words "a certificate of
45 ownership and merger," immediately after the word "consolidation,".

46 Section 9. Amend § 18-209(a), Chapter 18, Title 6 of the Delaware Code by inserting the following sentence at
47 the end thereof: "As used in this section and in §§ 18-210 and 18-301 of this title, "plan of merger" means a writing
48 approved by a domestic limited liability company, in the form of resolutions or otherwise, that states the terms and
49 conditions of a merger under subsection (i) of this section."

50 Section 10. Amend § 18-209(b), Chapter 18, Title 6 of the Delaware Code by deleting the word "a" immediately
51 before the word "merger" in the second sentence thereof and substituting in lieu thereof the words "an agreement of", by
52 inserting the words "or a plan of merger" immediately after the word "consolidation" in the second sentence thereof, by
53 inserting the words "or a plan of merger" immediately after the first occurrence of the word "consolidation" in the fourth
54 sentence thereof, and by inserting the words "or plan of merger" immediately after the second occurrence of the word
55 "consolidation" in the fourth sentence thereof.

56 Section 11. Amend § 18-209(c), Chapter 18, Title 6 of the Delaware Code by deleting the word "If" at the
57 beginning of the first sentence thereof, and by substituting in lieu thereof the words "Except in the case of a merger under
58 subsection (i) of this section, if".

59 Section 12. Amend § 18-209(c)(8), Chapter 18, Title 6 of the Delaware Code by inserting two new sentences
60 immediately after the first sentence thereof worded as follows: "Process may be served upon the Secretary of State under
61 this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State
62 is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or
63 appropriate."

64 Section 13. Amend § 18-209(d), Chapter 18, Title 6 of the Delaware Code by inserting the words "or in the case
65 of a merger under subsection (i) of this section in a certificate of ownership and merger," immediately after the first
66 occurrence of the word "consolidation," and by inserting the words "or a certificate of ownership and merger" immediately
67 before the "." at the end thereof.

68 Section 14. Amend § 18-209(e), Chapter 18; Title 6 of the Delaware Code by inserting the words "or a certificate
69 of ownership and merger" immediately after the first occurrence of the word "consolidation" in the first sentence thereof.

70 Section 15. Amend § 18-209(f), Chapter 18, Title 6 of the Delaware Code by inserting the words "or a plan of
71 merger" immediately after the first occurrence of the word "consolidation" in the first sentence thereof.

72 Section 16. Amend § 18-209, Chapter 18, Title 6 of the Delaware Code by inserting a new subsection (i) at the
73 end of such section to read as follows: "(i) In any case in which (x) at least 90% of the outstanding shares of each class of
74 the stock of a corporation or corporations (other than a corporation which has in its certificate of incorporation the provision
75 required by § 251(g)(7)(i) of Title 8), of which class there are outstanding shares that, absent § 267(a) of Title 8, would be
76 entitled to vote on such merger, is owned by a domestic limited liability company, (y) 1 or more of such corporations is a
77 corporation of the State of Delaware, and (z) any corporation that is not a corporation of the State of Delaware is a
78 corporation of any other state or the District of Columbia or another jurisdiction, the laws of which do not forbid such
79 merger, the domestic limited liability company having such stock ownership may either merge the corporation or

80 corporations into itself and assume all of its or their obligations, or merge itself, or itself and 1 or more of such
81 corporations, into 1 of the other corporations, pursuant to a plan of merger. If a domestic limited liability company is
82 causing a merger under this subsection, the domestic limited liability company shall file a certificate of ownership and
83 merger executed by 1 or more authorized persons on behalf of the domestic limited liability company in the office of the
84 Secretary of State. The certificate of ownership and merger shall certify that such merger was authorized in accordance
85 with the domestic limited liability company's limited liability company agreement and this chapter, and if the domestic
86 limited liability company shall not own all the outstanding stock of all the corporations that are parties to the merger, shall
87 state the terms and conditions of the merger, including the securities, cash, property, or rights to be issued, paid, delivered
88 or granted by the surviving domestic limited liability company or corporation upon surrender of each share of the
89 corporation or corporations not owned by the domestic limited liability company, or the cancellation of some or all of such
90 shares. If a corporation surviving a merger under this subsection is not a corporation organized under the laws of the State
91 of Delaware, then the terms and conditions of the merger shall obligate such corporation to agree that it may be served with
92 process in the State of Delaware in any proceeding for enforcement of any obligation of the domestic limited liability
93 company or any obligation of any constituent corporation of the State of Delaware, as well as for enforcement of any
94 obligation of the surviving corporation, including any suit or other proceeding to enforce the right of any stockholders as
95 determined in appraisal proceedings pursuant to § 262 of Title 8, and to irrevocably appoint the Secretary of State as its
96 agent to accept service of process in any such suit or other proceedings, and to specify the address to which a copy of such
97 process shall be mailed by the Secretary of State. Process may be served upon the Secretary of State under this subsection
98 by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to
99 issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In
100 the event of such service upon the Secretary of State in accordance with this subsection, the Secretary of State shall
101 forthwith notify such surviving corporation thereof by letter, directed to such surviving corporation at its address so
102 specified, unless such surviving corporation shall have designated in writing to the Secretary of State a different address for
103 such purpose, in which case it shall be mailed to the last address so designated. Such letter shall be sent by a mail or
104 courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the
105 signature of the recipient. Such letter shall enclose a copy of the process and any other papers served on the Secretary of
106 State pursuant to this subsection. It shall be the duty of the plaintiff in the event of such service to serve process and any
107 other papers in duplicate, to notify the Secretary of State that service is being effected pursuant to this subsection and to pay
108 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
109 the proceeding, if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such

110 service setting forth the name of the plaintiff and the defendant, the title, docket number and nature of the proceeding in
111 which process has been served, the fact that service has been effected pursuant to this subsection, the return date thereof,
112 and the day and hour service was made. The Secretary of State shall not be required to retain such information longer than
113 5 years from receipt of the service of process."

114 Section 17. Amend § 18-210, Chapter 18, Title 6 of the Delaware Code by inserting the words "or a plan
115 of merger" immediately after the first occurrence of the word "consolidation" in the first sentence thereof.

116 Section 18. Amend § 18-213(b)(7), Chapter 18, Title 6 of the Delaware Code by inserting two new sentences
117 immediately after the first sentence thereof worded as follows: "Process may be served upon the Secretary of State under
118 subsection (b)(6) of this section by means of electronic transmission but only as prescribed by the Secretary of State. The
119 Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State
120 deems necessary or appropriate."

121 Section 19. Amend § 18-216(e)(7), Chapter 18, Title 6 of the Delaware Code by inserting two new sentences
122 immediately after the first sentence thereof worded as follows: "Process may be served upon the Secretary of State under
123 paragraph (6) of this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The
124 Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State
125 deems necessary or appropriate."

126 Section 20. Amend § 18-301(b), Chapter 18, Title 6 of the Delaware Code by inserting the words "or
127 plan of merger" immediately after the second and third occurrences of the word "consolidation" in the first sentence of
128 subparagraph (3) thereof.

129 Section 21. Amend § 18-305(f), Chapter 18, Title 6 of the Delaware Code by deleting the reference to "(3)" after
130 the words "subsection (a)" wherever it appears in this subsection and by inserting the following language after the words "5
131 business days" in the second sentence of this subsection: "(or such shorter or longer period of time as is provided for in a
132 limited liability company agreement but not longer than 30 business days)".

133 Section 22. Amend § 18-305(g), Chapter 18, Title 6 of the Delaware Code by deleting the word "and" and
134 substituting in lieu thereof the word "or" immediately after the words "adopted by all of the members" in the first sentence
135 thereof and by deleting the word "section" and substituting in lieu thereof the word "chapter" immediately before the "." in
136 the second sentence thereof.

137 Section 23. Amend § 18-702(a), Chapter 18, Title 6 of the Delaware Code by deleting the words "and upon: (1)
138 The approval" from the second sentence thereof and substituting in lieu thereof the words "or, unless otherwise provided in
139 the limited liability company agreement, upon the affirmative vote or written consent" and by deleting the words "other

140 than the member assigning the limited liability company interest; or (2) Compliance with any procedure provided for in the
141 limited liability company agreement" from the second sentence thereof.

142 Section 24. Amend § 18-704(a), Chapter 18, Title 6 of the Delaware Code by deleting the words "as provided in a
143 limited liability company agreement and upon", by deleting the words "The approval of all of the members of the limited
144 liability company other than the member assigning limited liability company interest" and substituting in lieu thereof the
145 words "As provided in the limited liability company agreement", and by deleting the words "Compliance with any
146 procedure provided for in the limited liability company agreement" and substituting in lieu thereof "Unless otherwise
147 provided in the limited liability company agreement, upon the affirmative vote or written consent of all of the members of
148 the limited liability company".

149 Section 25. Amend § 18-902, Chapter 18, Title 6 of the Delaware Code by renumbering subsection "(2)" thereof
150 as subsection "(3)" and inserting a new subsection (2) thereto to read as follows: "(2) A certificate, as of a date not
151 earlier than 6 months prior to the filing date, issued by an authorized officer of the jurisdiction of its formation evidencing
152 its existence. If such certificate is in a foreign language, a translation thereof, under oath of the translator, shall be attached
153 thereto."

154 Section 26. Amend § 18-910(b), Chapter 18, Title 6 of the Delaware Code by deleting the first two sentences
155 thereof and replacing them with the following five sentences: "In case the officer whose duty it is to serve legal process
156 cannot by due diligence serve the process in any manner provided for by subsection (a) of this section, it shall be lawful to
157 serve the process against the foreign limited liability company upon the Secretary of State, and such service shall be as
158 effectual for all intents and purposes as if made in any of the ways provided for in subsection (a) hereof. Process may be
159 served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the
160 Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as
161 the Secretary of State deems necessary or appropriate. In the event that service is effected through the Secretary of State in
162 accordance with this subsection, the Secretary of State shall forthwith notify the foreign limited liability company by letter,
163 directed to the foreign limited liability company at its last registered office. Such letter shall be sent by a mail or courier
164 service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of
165 the recipient."

166 Section 27. Amend § 18-911(a), Chapter 18, Title 6 of the Delaware Code by adding the following two sentences
167 at the end thereof as follows: "Process may be served upon the Secretary of State under this subsection by means of
168 electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such
169 rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate."

170 Section 28. Amend § 18-911(c), Chapter 18, Title 6 of the Delaware Code by deleting the words "certified mail,
171 return receipt requested," in the first sentence thereof and by inserting a new sentence immediately after the first sentence
172 thereof worded as follows: "Such letter shall be sent by a mail or courier service that includes a record of mailing or
173 deposit with the courier and a record of delivery evidenced by the signature of the recipient."

174 Section 29. Amend § 18-1101, Chapter 18, Title 6 of the Delaware Code by inserting a new subsection (i) at the
175 end of such section to read as follows: "(i) A limited liability company agreement that provides for the application of
176 Delaware law shall be governed by and construed under the laws of the State of Delaware in accordance with its terms."

177 Section 30. Amend § 18-1105(a), Chapter 18, Title 6 of the Delaware Code by inserting the words "or a certificate
178 of ownership and merger" immediately after the word "consolidation" in subparagraph (3) thereof.

179 Section 31. This Act shall become effective August 2, 2010.

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 § 18-101(7) of the Act to provide, in light of the decision of the Delaware Supreme Court in *Olson v. Halvorsen*, C.A. No. 1884 (Del. Supr. Dec. 15, 2009), that a limited liability company agreement is not subject to any statute of frauds.

Sections 2, 26, 27 and 28. Sections 2, 26, 27 and 28 amend §§ 18-105(b), 18-910(b), 18-911(a) and 18-911(c) of the Act to allow for service of process upon the Secretary of State thereunder by means of electronic transmission but only as prescribed by the Secretary of State, to authorize the Secretary of State to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate, and to enable the Secretary of State, in the event that service is effected through the Secretary of State in accordance therewith, to provide notice of service by letter 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.

Section 3. This section amends § 18-106 of the Act to confirm the broad powers of a limited liability company.

Sections 4, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 20 and 30. Sections 4, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 20 and 30 amend §§ 18-203, 18-206(a), 18-206(b), 18-206(d), 18-209(a), 18-209(b), 18-209(c), 18-209(d), 18-209(e), 18-209(f), 18-209, 18-210, 18-301(b) and 18-1105(a) of the Act to provide a mechanism to implement a short form merger under new Section 267 of Title 8 where a domestic limited liability company is the parent Entity (as defined in new Section 267(e)(2) of Title 8).

Section 5. This section amends § 18-204 of the Act to clarify, for purposes of the laws of the State of Delaware, when a power of attorney will be irrevocable, and the effects of such irrevocability.

Sections 12, 18 and 19. Sections 12, 18 and 19 amend §§ 18-209(c)(8), 18-213(b)(7), and 18-216(e)(7) of the Act to allow for service of process upon the Secretary of State thereunder by means of electronic transmission but only as prescribed by the Secretary of State, and to authorize the Secretary of State to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate.

Section 21. This section amends § 18-305(f) of the Act to clarify both the categories of information that are within its scope and that the prescribed time period for responding to an information demand may be varied by a limited liability company agreement.

Section 22. This section amends § 18-305(g) of the Act to make it consistent with other sections of the Act and to clarify and confirm that all amendments are valid if adopted in the manner provided for in the limited liability company agreement.

Section 23. This section amends § 18-702(a) of the Act to confirm the circumstances in which an

assignee of a limited liability company interest has the right to participate in the management of the business and affairs of a limited liability company.

Section 24. This section amends § 18-704(a) of the Act to confirm the circumstances in which an assignee of a limited liability company interest may become a member.

Section 25. This section amends § 18-902 of the Act to require that a foreign limited liability company registering with the Secretary of State must file a certificate, as of a date not earlier than 6 months prior to the filing date, issued by an authorized officer of the jurisdiction of its formation evidencing its existence, along with, if applicable, a translation thereof under oath.

Section 29. This section amends § 18-1101 of the Act to provide that a limited liability company agreement that provides for the application of Delaware law shall be governed by and construed under the laws of the State of Delaware in accordance with its terms. This amendment is not intended to negate the application of Delaware law to the interpretation and enforcement of a limited liability company agreement that does not explicitly provide for the application of Delaware law or to negate the application of the internal affairs doctrine to Delaware limited liability companies.

Section 31. This section provides that the proposed amendments of the Act shall become effective August 2, 2010.