

AN ACT

ENTITLED, An Act to revise certain Limited Liability Company statutes.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 47-34A-101 be amended to read as follows:

47-34A-101. Terms used in this chapter:

- (1) "Articles of organization" means initial, amended, and restated articles of organization and articles of merger. In the case of a foreign limited liability company, the term includes all records serving a similar function required to be filed in the Office of the Secretary of State or other official having custody of company records in the state or country under whose law it is organized;
- (2) "Business" includes every trade, occupation, profession, and other lawful purpose, whether or not carried on for profit;
- (3) "Contribution" means any benefit provided by a person to a limited liability company:
 - (A) In order to become a member upon formation of the company and in accordance with an agreement between or among the persons that have agreed to become the initial members of the company;
 - (B) In order to become a member after the formation of the company and in accordance with an agreement between the person and the company; or
 - (C) In the person's capacity as a member and in accordance with the operating agreement or an agreement between the member and the company;
- (4) "Debtor in bankruptcy" means a person who is the subject of an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application or a comparable order under federal, state, or foreign law governing insolvency;

- (5) "Distribution" means a transfer of money, property, or other benefit from a limited liability company to a member in the member's capacity as a member or to a transferee of the member's distributional interest;
- (6) "Distributional interest" means all of a member's interest in distributions by the limited liability company;
- (7) "Entity" means a person other than an individual;
- (8) "Foreign limited liability company" means an unincorporated entity formed under the law of a jurisdiction other than this state and denominated by that law as a limited liability company;
- (9) "Limited liability company" except in the phrase "foreign limited liability company" means an entity formed under this chapter;
- (10) "Manager" means a person, whether or not a member of a manager-managed company, who is vested with authority under section 301;
- (11) "Manager-managed company" means a limited liability company which is so designated in its articles of organization;
- (12) "Member" means a person that:
 - (A) Prior to formation of the limited liability company, becomes a member as agreed by that person and the organizer of the limited liability company;
 - (B) After formation of the limited liability company, becomes a member:
 - (1) As provided in the operating agreement;
 - (2) As a result of a transaction effective under Article IX;
 - (3) With the consent of all the members; and
 - (C) After having become a member, has not dissociated under Article VI;
- (13) "Member-managed company" means a limited liability company other than a

manager-managed company;

- (14) "Operating agreement" means any valid agreement, either written or oral, under § 47-34A-103 concerning the relations among the members, managers, and limited liability company; however, an integration clause contained in a written operating agreement may be given effect under other law. The term includes amendments to and restatements of the operating agreement. The operating agreement of a limited liability company having only one member shall not be unenforceable by reason of there being only one person who is a party to the operating agreement;
- (15) "Person" means an individual, corporation, business trust, cooperative corporation, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity;
- (16) "Principal office" means the office, whether or not in this state, where the principal executive office of a domestic or foreign limited liability company is located;
- (17) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;
- (18) "Sign" means, with the present intent to authenticate or adopt a record by any means including an electronic signature:
- (A) To execute or adopt a tangible symbol; or
 - (B) To attach to or logically associate with a record an electronic symbol, sound, or process;
- (19) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States;

(20) "Transfer" includes an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, gift, and transfer by operation of law;

(21) "Transferee" means a person to which all or part of a distributional interest has been transferred, whether or not the transferor is a member.

Section 2. That § 47-34A-103 be amended to read as follows:

47-34A-103.(a) Except as otherwise provided in subsection (b), all members of a limited liability company may enter into an operating agreement, which need not be in writing, to regulate the affairs of the company and the conduct of its business, and to govern relations among the members, managers, and company. A person that becomes a member of a limited liability company is deemed to assent to the operating agreement. To the extent the operating agreement does not otherwise provide, this chapter governs relations among the members, managers, and company.

(b) The operating agreement may not:

(1) Eliminate the duty of loyalty under § 47-34A-409(b) or § 47-34A-603(b)(3), but the agreement may, if not manifestly unreasonable:

(i) Identify specific types or categories of activities that do not violate the duty of loyalty; and

(ii) Specify the number or percentage of members or disinterested managers that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;

(2) Eliminate the obligation of good faith and fair dealing under § 47-34A-409(d), but the operating agreement may determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

(3) Vary the right to expel a member in an event specified in § 47-34A-601(6);

(4) Vary the requirement to wind up the limited liability company's business in a case

specified in § 47-34A-801(a)(3) or (4); or

- (5) Restrict rights of a person, other than a manager, member, and transferee of a member's distributional interest, under this chapter.

(c) If not manifestly unreasonable, the operating agreement may:

- (1) Restrict a right to information or access to records under § 47-34A-408;
- (2) Reduce the duty of care under § 47-34A-409(c) or § 47-34A-603(b)(3);
- (3) Alter any other fiduciary duty, including eliminating particular aspects of that duty.

(d) The court shall decide any claim under this § 47-34A-103 that a term of an operating agreement is manifestly unreasonable. The court:

- (1) Shall make its determination as of the time the challenged term became part of the operating agreement and by considering only circumstances existing at that time; and
- (2) May invalidate the term only if, in light of the purposes and activities of the limited liability company, it is readily apparent that:
 - (i) The objective of the term is unreasonable; or
 - (ii) The term is an unreasonable means to achieve the provision's objective.

Section 3. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as follows:

(a) If a record that has been delivered by a limited liability company to the Office of the Secretary of State for filing and has become effective under this Act, contains a provision that would be ineffective under § 47-34A-103 if contained in the operating agreement, the provision is likewise ineffective in the record.

(b) Subject to subsection (a) of this section, if a record that has been delivered by a limited liability company to the Office of the Secretary of State for filing, and which has become effective under this Act, conflicts with a provision of the operating agreement:

- (1) The operating agreement prevails as to members, dissociated members, transferees, and managers; and
- (2) The record prevails as to other persons to the extent they reasonably rely on the record.

Section 4. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as follows:

The law of this state governs:

- (1) The internal affairs of a limited liability company; and
- (2) The liability of a member as member and a manager as manager for the debts, obligations, or other liabilities of a limited liability company.

Section 5. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as follows:

It is the policy of this Act and this state to give maximum effect to the principles of freedom of contract and to the enforceability of operating agreements.

Section 6. That § 47-34A-401 be amended to read as follows:

47-34A-401. (a) If a limited liability company is to have only one member upon formation, the person becomes a member as agreed by that person and the organizer of the company. That person and the organizer may be, but need not be, different persons. If different, the organizer acts on behalf of the initial member.

(b) If a limited liability company is to have more than one member upon formation, those persons become members as agreed by the persons before the formation of the company. The organizer acts on behalf of the persons in forming the company and may be, but need not be, one of the persons.

(c) After formation of a limited liability company, a person becomes a member:

- (1) As provided in the operating agreement;
- (2) As the result of a transaction effective under Article 9;

- (3) With the consent of all the members; or
- (4) If, within 90 consecutive days after the company ceases to have any members:
 - (A) The last person to have been a member, or the legal representative of that person, designates a person to become a member; and
 - (B) The designated person consents to become a member.

(d) A person may become a member without acquiring a distributional interest and without making or being obligated to make a contribution to the limited liability company.

Section 7. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as follows:

A contribution of a member of a limited liability company may consist of tangible or intangible property or other benefit to a limited liability company, including money, promissory notes, services performed, other agreements to contribute money or property, or contracts for services to be performed.

Section 8. That § 47-34A-402 be amended to read as follows:

47-34A-402. (a) A person's obligation to make a contribution to a limited liability company is not excused by the person's death, disability, or other inability to perform personally. If a person does not make the required contribution, the person or person's estate is obligated to contribute money equal to the value of that part of the contribution which has not been made at the option of the company.

(b) A creditor of a limited liability company which extends credit or otherwise acts in reliance on an obligation described in subsection (a), and without notice of any compromise under § 47-34A-404.1(c)(5), may enforce the obligation.

Section 9. That § 47-34A-403 be amended to read as follows:

47-34A-403. (a) A limited liability company shall reimburse a member or manager for payments

made and indemnify a member or manager for liabilities incurred by the member or manager in the ordinary course of the business of the company or for the preservation of its business or property.

(b) A limited liability company shall reimburse a member for an advance to the company beyond the amount of contribution the member agreed to make.

(c) A payment or advance made by a member which gives rise to an obligation of a limited liability company under subsection (a) or (b) constitutes a loan to the company upon which interest accrues from the date of the payment or advance.

(d) A member is not entitled to remuneration for services performed for a limited liability company, except for reasonable compensation for services rendered in winding up the business of the company.

(e) A limited liability company may purchase and maintain insurance on behalf of a member or manager of the limited liability company against liability asserted against or incurred by the member or manager in that capacity or arising from that status even if the operating agreement could not eliminate or limit the person's liability to the company for the conduct giving rise to the liability.

Section 10. That § 47-34A-406 be amended to read as follows:

47-34A-406. (a) A distribution may not be made if, after the distribution is made:

- (1) The limited liability company would not be able to pay its debts as they become due in the ordinary course of business; or
- (2) The company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be dissolved, wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up, and termination of members whose preferential rights are superior to those receiving the distribution.

(b) A limited liability company may base a determination that a distribution is not prohibited

under subsection (a) on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

(c) Except as otherwise provided in subsection (e), the effect of a distribution under subsection (a) is measured:

- (1) In the case of distribution by purchase, redemption, or other acquisition of a distributional interest in a limited liability company, as of the date money or other property is transferred or debt incurred by the company; and
- (2) In all other cases, as of the date the:
 - (i) Distribution is authorized if the payment occurs within one hundred twenty days after the date of authorization; or
 - (ii) Payment is made if it occurs more than one hundred twenty days after the date of authorization.

(d) A limited liability company's indebtedness to a member incurred by reason of a distribution made in accordance with this section is at parity with the company's indebtedness to its general, unsecured creditors.

(e) Indebtedness of a limited liability company, including indebtedness issued in connection with or as part of a distribution, is not considered a liability for purposes of determinations under subsection (a) if its terms provide that payment of principal and interest are made only if and to the extent that payment of a distribution to members could then be made under this section. If the indebtedness is issued as a distribution, each payment of principal or interest on the indebtedness is treated as a distribution, the effect of which is measured on the date the payment is made.

(f) In subsection (a), "distribution" does not include amounts (i) constituting reasonable compensation for present or past services or (ii) reasonable payments made in the ordinary course

of business under a bona fide retirement plan or other benefits program.

Section 11. That § 47-34A-407 be amended to read as follows:

47-34A-407. (a) Any member of a member-managed company, or a manager of a manager-managed company who votes for or assents to a distribution made in violation of § 47-34A-406, the articles of organization, or the operating agreement is personally liable to the company for the amount of the distribution which exceeds the amount that could have been distributed without violating § 47-34A-406, the articles of organization, or the operating agreement if it is established that the member or manager did not perform the member's or manager's duties in compliance with § 47-34A-409.

(b) To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of the authority and responsibility to consent to distributions and imposes that authority and responsibility on one or more other members, the liability stated in subsection (a) applies to the other members and not the member that the operating agreement relieves of authority and responsibility.

(c) A member of a manager-managed company who knew a distribution was made in violation of § 47-34A-406, the articles of organization, or the operating agreement is personally liable to the company, but only to the extent that the distribution received by the member exceeded the amount that could have been properly paid under § 47-34A-406.

(d) A member or manager against whom an action is brought under this section may implead in the action all:

- (1) Other members or managers who voted for or assented to the distribution in violation of subsection (a) and may compel contribution from them; and
- (2) Members who received a distribution in violation of subsection (b) and may compel contribution from the member in the amount received in violation of subsection (b).

(e) A proceeding under this section is barred unless it is commenced within two years after the distribution.

Section 12. That § 47-34A-409 be amended to read as follows:

47-34A-409. (a) The only fiduciary duties a member owes to a member-managed company and, subject to § 47-34A-1101(b), its other members are the duty of loyalty and the duty of care imposed by subsections (b) and (c).

(b) A member's duty of loyalty to a member-managed company and its other members is limited to the following:

- (1) To account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity;
- (2) To refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and
- (3) To refrain from competing with the company in the conduct of the company's business before the dissolution of the company.

(c) A member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A member shall discharge the duties to a member-managed company and its other members under this chapter or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(e) A member of a member-managed company does not violate a duty or obligation under this chapter or under the operating agreement merely because the member's conduct furthers the

member's own interest.

(f) A member of a member-managed company may lend money to and transact other business with the company. As to each loan or transaction, the rights and obligations of the member are the same as those of a person who is not a member, subject to other applicable law.

(g) This section applies to a person winding up the limited liability company's business as the personal or legal representative of the last surviving member as if the person were a member.

(h) In a manager-managed company:

- (1) A member who is not also a manager owes no duties to the company or to the other members solely by reason of being a member;
- (2) A manager is held to the same standards of conduct prescribed for members in subsections (b) through (f);
- (3) A member who pursuant to the operating agreement exercises some or all of the rights of a manager in the management and conduct of the company's business is held to the standards of conduct in subsections (b) through (f) to the extent that the member exercises the managerial authority vested in a manager by this chapter; and
- (4) A manager is relieved of liability imposed by law for violation of the standards prescribed by subsections (b) through (f) to the extent of the managerial authority delegated to the members by the operating agreement.

Section 13. That § 47-34A-504 be amended to read as follows:

47-34A-504. (a) On application by a judgment creditor of a member of a limited liability company or of a member's transferee, and following notice to the limited liability company of such application, a court having jurisdiction may charge the distributional interest of the judgment debtor to satisfy the judgment.

(b) A charging order constitutes a lien on the judgment debtor's distributional interest.

(c) A distributional interest in a limited liability company which is charged may be redeemed:

(1) By the judgment debtor;

(2) With property other than the company's property, by one or more of the other members;

or

(3) With the company's property, but only if permitted by the operating agreement.

(d) This chapter does not affect a member's right under exemption laws with respect to the member's distributional interest in a limited liability company.

(e) This section provides the exclusive remedy that a judgment creditor of a member's distributional interest or a member's assignee may use to satisfy a judgment out of the judgment debtor's interest in a limited liability company. No other remedy, including foreclosure on the member's distributional interest or a court order for directions, accounts, and inquiries that the debtor, member might have made, is available to the judgment creditor attempting to satisfy the judgment out of the judgment debtor's interest in the limited liability company.

(f) No creditor of a member or a member's assignee has any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the company.

(g) This section applies to single member limited liability companies in addition to limited liability companies with more than one member.

Section 14. That § 47-34A-601 be amended to read as follows:

47-34A-601. A member is dissociated from a limited liability company upon the occurrence of any of the following events:

(1) The company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member;

(2) An event agreed to in the operating agreement as causing the member's dissociation;

(3) Upon transfer of all of a member's distributional interest, other than a transfer for security

purposes or a court order charging the member's distributional interest which has not been foreclosed;

- (4) The member's expulsion pursuant to the operating agreement;
- (5) The member's expulsion by unanimous vote of the other members if:
 - (i) It is unlawful to carry on the company's business with the member;
 - (ii) There has been a transfer of substantially all of the member's distributional interest, other than a transfer for security purposes or a court order charging the member's distributional interest which has not been foreclosed;
 - (iii) Within ninety days after the company notifies a corporate member that it will be expelled because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, the member fails to obtain a revocation of the certificate of dissolution or a reinstatement of its charter or its right to conduct business; or
 - (iv) A corporation, partnership, limited liability company, or other entity that is a member has been dissolved and its business is being wound up;
- (6) On application by the company or another member, the member's expulsion by judicial determination because the member:
 - (i) Engaged in wrongful conduct that adversely and materially affected the company's business;
 - (ii) Willfully or persistently committed a material breach of the operating agreement or of a duty owed to the company or the other members under § 47-34A-409; or
 - (iii) Engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member;

- (7) The member's:
 - (i) Becoming a debtor in bankruptcy;
 - (ii) Executing an assignment for the benefit of creditors;
 - (iii) Seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the member's property; or
 - (iv) Failing, within ninety days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the member's property obtained without the member's consent or acquiescence, or failing within ninety days after the expiration of a stay to have the appointment vacated;
- (8) In the case of a member who is an individual:
 - (i) The member's death;
 - (ii) The appointment of a guardian or general conservator for the member; or
 - (iii) A judicial determination that the member has otherwise become incapable of performing the member's duties under the operating agreement;
- (9) In the case of a member that is a trust or is acting as a member by virtue of being a trustee of a trust, distribution of the trust's entire rights to receive distributions from the company, but not merely by reason of the substitution of a successor trustee;
- (10) In the case of a member that is an estate or is acting as a member by virtue of being a personal representative of an estate, distribution of the estate's entire rights to receive distributions from the company, but not merely the substitution of a successor personal representative; or
- (11) Termination of the existence of a member if the member is not an individual, estate, or trust other than a business trust.

Section 15. That § 47-34A-901 be amended to read as follows:

47-34A-901. Terms used in this article:

- (1) "Constituent limited liability company" means a constituent organization that is a limited liability company;
- (2) "Constituent organization" means an organization that is party to a merger;
- (3) "Converted organization" means the organization into which a converting organization converts pursuant to §§ 47-34A-906 to 47-34A-909, inclusive;
- (4) "Converting limited liability company" means a converting organization that is a limited liability company;
- (5) "Converting organization" means an organization that converts into another organization pursuant to § 47-34A-906;
- (6) "Domesticated company" means the company that exists after a domesticating foreign limited liability company or limited liability company effects a domestication pursuant to §§ 47-34A-910 to 47-34A-913, inclusive;
- (7) "Domesticating company" means the company that effects a domestication pursuant to §§ 47-34A-910 to 47-34A-913, inclusive;
- (8) "Governing statute" means the statute that governs an organization's internal affairs;
- (9) "Organization" means a general partnership, including a limited liability partnership; limited partnership, including a limited liability limited partnership, limited liability company, business trust, corporation, or any other person having a governing statute. The term includes a domestic or foreign organization regardless of whether organized for profit;
- (10) "Organizational documents" means:
 - (a) For a domestic or foreign general partnership, its partnership agreement;

- (b) For a limited partnership or foreign limited partnership, its certificate of limited partnership and partnership agreement;
 - (c) For a domestic or foreign limited liability company, its certificate or articles of organization and operating agreement, or comparable records as provided in its governing statute;
 - (d) For a business trust, its agreement of trust and declaration of trust;
 - (e) For a domestic or foreign corporation for profit, its articles of incorporation, bylaws, and other agreements among its shareholders which are authorized by its governing statute, or comparable records as provided in its governing statute; and
 - (f) For any other organization, the basic records that create the organization and determine its internal governance and the relations among the persons that own it, have an interest in it, or are members of it;
- (11) "Personal liability" means liability for a debt, obligation, or other liability of an organization which is imposed on a person that co-owns, has an interest in, or is a member of the organization:
- (a) By the governing statute solely by reason of the person co-owning, having an interest in, or being a member of the organization; or
 - (b) By the organization's organizational documents under a provision of the governing statute authorizing those documents to make one or more specified persons liable for all or specified debts, obligations, or other liabilities of the organization solely by reason of the person or persons co-owning, having an interest in, or being a member of the organization;
- (12) "Surviving organization" means an organization into which one or more other organizations are merged whether the organization preexisted the merger or was created

by the merger.

Section 16. That § 47-34A-902 be amended to read as follows:

47-34A-902. (a) A limited liability company may merge with one or more other constituent organizations pursuant to this section, §§ 47-34A-903 to 47-34A-905, inclusive, and a plan of merger, if:

- (1) The governing statute of each of the other organizations authorizes the merger;
- (2) The merger is not prohibited by the law of a jurisdiction that enacted any of the governing statutes; and
- (3) Each of the other organizations complies with its governing statute in effecting the merger.

(b) A plan of merger must be in a record and must include:

- (1) The name and form of each constituent organization;
- (2) The name and form of the surviving organization and, if the surviving organization is to be created by the merger, a statement to that effect;
- (3) The terms and conditions of the merger, including the manner and basis for converting the interests in each constituent organization into any combination of money, interests in the surviving organization, and other consideration;
- (4) If the surviving organization is to be created by the merger, the surviving organization's organizational documents that are proposed to be in a record; and
- (5) If the surviving organization is not to be created by the merger, any amendments to be made by the merger to the surviving organization's organizational documents that are, or are proposed to be, in a record.

Section 17. That § 47-34A-903 be amended to read as follows:

47-34A-903.(a) Subject to § 47-34A-914, a plan of merger must be consented to by all the

members of a constituent limited liability company.

(b) Subject to § 47-34A-914 and any contractual rights, after a merger is approved, and at any time before articles of merger are delivered to the secretary of state for filing under § 47-34A-904, a constituent limited liability company may amend the plan or abandon the merger:

- (1) As provided in the plan; or
- (2) Except as otherwise prohibited in the plan, with the same consent as was required to approve the plan.

Section 18. That § 47-34A-904 be amended to read as follows:

47-34A-904.(a) After each constituent organization has approved a merger, articles of merger must be signed on behalf of:

- (1) Each constituent limited liability company, as provided in § 47-34A-205; and
- (2) Each other constituent organization, as provided in its governing statute.

(b) Articles of merger under this section must include:

- (1) The name and form of each constituent organization and the jurisdiction of its governing statute;
- (2) The name and form of the surviving organization, the jurisdiction of its governing statute, and, if the surviving organization is created by the merger, a statement to that effect;
- (3) The date the merger is effective under the governing statute of the surviving organization;
- (4) If the surviving organization is to be created by the merger:
 - (A) If it will be a limited liability company, the company's certificate of organization;
or
 - (B) If it will be an organization other than a limited liability company, the organizational document that creates the organization that is in a public record;
- (5) If the surviving organization preexists the merger, any amendments provided for in the

plan of merger for the organizational document that created the organization that are in a public record;

- (6) A statement as to each constituent organization that the merger was approved as required by the organization's governing statute;
- (7) If the surviving organization is a foreign organization not authorized to transact business in this state, the street and mailing addresses of an office that the secretary of state may use for the purposes of § 47-34A-905(b); and
- (8) Any additional information required by the governing statute of any constituent organization.

(c) Each constituent limited liability company shall deliver the articles of merger for filing in the Office of the Secretary of State.

(d) A merger becomes effective under this article:

- (1) If the surviving organization is a limited liability company, upon the later of:
 - (A) Compliance with subsection (c); or
 - (B) Subject to § 47-34A-206, as specified in the articles of merger; or
- (2) If the surviving organization is not a limited liability company, as provided by the governing statute of the surviving organization.

Section 19. That § 47-34A-905 be amended to read as follows:

47-34A-905.(a) When a merger becomes effective:

- (1) The surviving organization continues or comes into existence;
- (2) Each constituent organization that merges into the surviving organization ceases to exist as a separate entity;
- (3) All property owned by each constituent organization that ceases to exist vests in the surviving organization;

- (4) All debts, obligations, or other liabilities of each constituent organization that ceases to exist continue as debts, obligations, or other liabilities of the surviving organization;
- (5) An action or proceeding pending by or against any constituent organization that ceases to exist may be continued as if the merger had not occurred;
- (6) Except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of each constituent organization that ceases to exist vest in the surviving organization;
- (7) Except as otherwise provided in the plan of merger, the terms and conditions of the plan of merger take effect;
- (8) Except as otherwise agreed, if a constituent limited liability company ceases to exist, the merger does not dissolve the limited liability company for the purposes of §§ 47-34A-801 to 47-34A-812, inclusive;
- (9) If the surviving organization is created by the merger:
 - (A) If it is a limited liability company, the certificate of organization becomes effective;
 - or
 - (B) If it is an organization other than a limited liability company, the organizational document that creates the organization becomes effective; and
- (10) If the surviving organization preexisted the merger, any amendments provided for in the articles of merger for the organizational document that created the organization become effective.

(b) A surviving organization that is a foreign organization consents to the jurisdiction of the courts of this state to enforce any debt, obligation, or other liability owed by a constituent organization, if before the merger the constituent organization was subject to suit in this state on the debt, obligation, or other liability. A surviving organization that is a foreign organization and not

authorized to transact business in this state appoints the secretary of state as its agent for service of process for the purposes of enforcing a debt, obligation, or other liability under this subsection. Service on the secretary of state under this subsection must be made in the same manner as in § 47-34A-206.

Section 20. That § 47-34A-906 be amended to read as follows:

47-34A-906.(a) An organization other than a limited liability company or a foreign limited liability company may convert to a limited liability company, and a limited liability company may convert to an organization other than a foreign limited liability company pursuant to §§ 47-34A-907 to 47-34A-909, inclusive, and a plan of conversion, if:

- (1) The other organization's governing statute authorizes the conversion;
- (2) The conversion is not prohibited by the law of the jurisdiction that enacted the other organization's governing statute; and
- (3) The other organization complies with its governing statute in effecting the conversion.

(b) A plan of conversion must be in a record and must include:

- (1) The name and form of the organization before conversion;
- (2) The name and form of the organization after conversion;
- (3) The terms and conditions of the conversion, including the manner and basis for converting interests in the converting organization into any combination of money, interests in the converted organization, and other consideration; and
- (4) The organizational documents of the converted organization that are, or are proposed to be, in a record.

Section 21. That § 47-34A-907 be amended to read as follows:

47-34A-907. (a) Subject to § 47-34A-914, a plan of conversion must be consented to by all the members of a converting limited liability company.

(b) Subject to § 47-34A-914 and any contractual rights, after a conversion is approved, and at any time before articles of conversion are delivered to the secretary of state for filing under § 47-34A-908, a converting limited liability company may amend the plan or abandon the conversion:

- (1) As provided in the plan; or
- (2) Except as otherwise prohibited in the plan, by the same consent as was required to approve the plan.

Section 22. That § 47-34A-908 be amended to read as follows:

47-34A-908. (a) After a plan of conversion is approved:

- (1) A converting limited liability company shall deliver to the secretary of state for filing articles of conversion, which must be signed as provided in § 47-34A-205 and must include:
 - (A) A statement that the limited liability company has been converted into another organization;
 - (B) The name and form of the organization and the jurisdiction of its governing statute;
 - (C) The date the conversion is effective under the governing statute of the converted organization;
 - (D) A statement that the conversion was approved as required by this Act;
 - (E) A statement that the conversion was approved as required by the governing statute of the converted organization; and
 - (F) If the converted organization is a foreign organization not authorized to transact business in this state, the street and mailing addresses of an office which the secretary of state may use for the purposes of § 47-34A-909(c); and
- (2) If the converting organization is not a converting limited liability company, the converting

organization shall deliver to the secretary of state for filing a certificate of organization, which must include, in addition to the information required by § 47-34A-202.1(c):

- (A) A statement that the converted organization was converted from another organization;
- (B) The name and form of that converting organization and the jurisdiction of its governing statute; and
- (C) A statement that the conversion was approved in a manner that complied with the converting organization's governing statute.

(b) A conversion becomes effective:

- (1) If the converted organization is a limited liability company, when the certificate of organization takes effect; and
- (2) If the converted organization is not a limited liability company, as provided by the governing statute of the converted organization.

Section 23. That § 47-34A-909 be amended to read as follows:

47-34A-909.(a) An organization that has been converted pursuant to this Article is for all purposes the same entity that existed before the conversion.

(b) When a conversion takes effect:

- (1) All property owned by the converting organization remains vested in the converted organization;
- (2) All debts, obligations, or other liabilities of the converting organization continue as debts, obligations, or other liabilities of the converted organization;
- (3) An action or proceeding pending by or against the converting organization may be continued as if the conversion had not occurred;
- (4) Except as prohibited by law other than this Act, all of the rights, privileges, immunities,

powers, and purposes of the converting organization remain vested in the converted organization;

- (5) Except as otherwise provided in the plan of conversion, the terms and conditions of the plan of conversion take effect; and
- (6) Except as otherwise agreed, the conversion does not dissolve a converting limited liability company for the purposes of §§ 47-34A-801 to 47-34A-812, inclusive.

(c) A converted organization that is a foreign organization consents to the jurisdiction of the courts of this state to enforce any debt, obligation, or other liability for which the converting limited liability company is liable if, before the conversion, the converting limited liability company was subject to suit in this state on the debt, obligation, or other liability. A converted organization that is a foreign organization and not authorized to transact business in this state appoints the secretary of state as its agent for service of process for purposes of enforcing a debt, obligation, or other liability under this subsection. Service on the secretary of state under this subsection must be made in the same manner and has the same consequences as set forth in this Act.

Section 24. That § 47-34A-910 be amended to read as follows:

47-34A-910. (a) A foreign limited liability company may become a limited liability company pursuant to §§ 47-34A-911 to 47-34A-913, inclusive, and a plan of domestication, if:

- (1) The foreign limited liability company's governing statute authorizes the domestication;
- (2) The domestication is not prohibited by the law of the jurisdiction that enacted the governing statute; and
- (3) The foreign limited liability company complies with its governing statute in effecting the domestication.

(b) A limited liability company may become a foreign limited liability company pursuant to §§ 47-34A-911 to 47-34A-913, inclusive, and a plan of domestication, if:

- (1) The foreign limited liability company's governing statute authorizes the domestication;
- (2) The domestication is not prohibited by the law of the jurisdiction that enacted the governing statute; and
- (3) The foreign limited liability company complies with its governing statute in effecting the domestication.

(c) A plan of domestication must be in a record and must include:

- (1) The name of the domesticating company before domestication and the jurisdiction of its governing statute;
- (2) The name of the domesticated company after domestication and the jurisdiction of its governing statute;
- (3) The terms and conditions of the domestication, including the manner and basis for converting interests in the domesticating company into any combination of money, interests in the domesticated company, and other consideration; and
- (4) The organizational documents of the domesticated company that are, or are proposed to be, in a record.

Section 25. That § 47-34A-911 be amended to read as follows:

47-34A-911. (a) A plan of domestication must be consented to:

- (1) By all the members, subject to § 47-34A-912, if the domesticating company is a limited liability company; and
- (2) As provided in the domesticating company's governing statute, if the company is a foreign limited liability company.

(b) Subject to any contractual rights, after a domestication is approved, and at any time before articles of domestication are delivered to the secretary of state for filing under § 47-34A-912, a domesticating limited liability company may amend the plan or abandon the domestication:

- (1) As provided in the plan; or
- (2) Except as otherwise prohibited in the plan, by the same consent as was required to approve the plan.

Section 26. That § 47-34A-912 be amended to read as follows:

47-34A-912. (a) After a plan of domestication is approved, a domesticating company shall deliver to the secretary of state for filing articles of domestication, which must include:

- (1) A statement, as the case may be, that the company has been domesticated from or into another jurisdiction;
- (2) The name of the domesticating company and the jurisdiction of its governing statute;
- (3) The name of the domesticated company and the jurisdiction of its governing statute;
- (4) The date the domestication is effective under the governing statute of the domesticated company;
- (5) If the domesticating company was a limited liability company, a statement that the domestication was approved as required by this Act;
- (6) If the domesticating company was a foreign limited liability company, a statement that the domestication was approved as required by the governing statute of the other jurisdiction;
and
- (7) If the domesticated company was a foreign limited liability company not authorized to transact business in this state, the street and mailing addresses of an office that the secretary of state may use for the purposes of § 47-34A-913(b).

(b) A domestication becomes effective:

- (1) When the certificate of organization takes effect, if the domesticated company is a limited liability company; and
- (2) According to the governing statute of the domesticated company, if the domesticated

organization is a foreign limited liability company.

Section 27. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as follows:

(a) When a domestication takes effect:

- (1) The domesticated company is for all purposes the company that existed before the domestication;
- (2) All property owned by the domesticating company remains vested in the domesticated company;
- (3) All debts, obligations, or other liabilities of the domesticating company continue as debts, obligations, or other liabilities of the domesticated company;
- (4) An action or proceeding pending by or against a domesticating company may be continued as if the domestication had not occurred;
- (5) Except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of the domesticating company remain vested in the domesticated company;
- (6) Except as otherwise provided in the plan of domestication, the terms and conditions of the plan of domestication take effect; and
- (7) Except as otherwise agreed, the domestication does not dissolve a domesticating limited liability company for the purposes of §§ 47-34A-801 to 47-34A-812, inclusive.

(b) A domesticated company that is a foreign limited liability company consents to the jurisdiction of the courts of this state to enforce any debt, obligation, or other liability owed by the domesticating company, if, before the domestication, the domesticating company was subject to suit in this state on the debt, obligation, or other liability. A domesticated company that is a foreign limited liability company and not authorized to transact business in this state appoints the secretary of state as its agent for service of process for purposes of enforcing a debt, obligation, or other

liability under this subsection. Service on the secretary of state under this subsection must be made in the same manner and has the same consequences as set forth in this Act.

(c) If a limited liability company has adopted and approved a plan of domestication under § 47-34A-910 providing for the company to be domesticated in a foreign jurisdiction, a statement surrendering the company's certificate of organization must be delivered to the secretary of state for filing setting forth:

- (1) The name of the company;
- (2) A statement that the certificate of organization is being surrendered in connection with the domestication of the company in a foreign jurisdiction;
- (3) A statement the domestication was approved as required by this Act; and
- (4) The jurisdiction of formation of the domesticated foreign limited liability company.

Section 28. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as follows:

(a) If a member of a constituent, converting, or domesticating limited liability company will have personal liability with respect to a surviving, converted, or domesticated organization, approval or amendment of a plan of merger, conversion, or domestication is ineffective without the consent of the member, unless:

- (1) The company's operating agreement provides for approval of a merger, conversion, or domestication with the consent of fewer than all the members; and
- (2) The member has consented to the provision of the operating agreement.

(b) A member does not give the consent required by subsection (a) merely by consenting to a provision of the operating agreement that permits the operating agreement to be amended with the consent of fewer than all the members.

Section 29. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as

follows:

The proceedings authorized under §§ 47-34A-901 to 47-34A-914, inclusive, do not preclude an entity from being merged, converted, or domesticated under law other than these provisions.

Section 30. That § 47-34A-1001 be amended to read as follows:

47-34A-1001. (a) The law of the state or other jurisdiction under which a foreign limited liability company is formed governs:

- (1) The internal affairs of the company; and
- (2) The liability of a member as member and a manager as manager for the debts, obligations, or other liabilities of the company.

(b) A foreign limited liability company may not be denied a certificate of authority by reason of any difference between the law of the jurisdiction under which the company is formed and the law of this state.

(c) A certificate of authority does not authorize a foreign limited liability company to engage in any business or exercise any power that a limited liability company may not engage in or exercise in this state.

Section 31. That § 47-34A-1002 be amended to read as follows:

47-34A-1002. (a) A foreign limited liability company may not do business in this state until it obtains a certificate of authority from the secretary of state.

(b) A foreign limited liability company may apply for a certificate of authority to transact business in this state by delivering an application to the secretary of state for filing. Delivery may be made by electronic transmission if and to the extent permitted by the Office of the Secretary of State. If the document is filed in typewritten or printed form and not transmitted electronically, the Office of the Secretary of State may require one exact or conformed copy to be delivered with the document. The application must state:

- (1) The name of the company and, if the name does not comply with § 47-34A-105, an alternate name adopted pursuant to § 47-34A-105;
- (2) The name of the state or other jurisdiction under whose law the company is formed;
- (3) The street and mailing addresses of the company's principal office and if the law of the jurisdiction under which the company is formed requires the company to maintain an office in that jurisdiction, the street and mailing address of the required office; and
- (4) The name and street and mailing address of the company's initial agent for service of process in this state.

(c) A foreign limited liability company shall deliver with a completed application under subsection (a) a certificate of existence or a record of similar import signed by the secretary of state or other official having custody of the company's publicly filed records in the state or other jurisdiction under whose law the company is formed together with the fees required by § 47-34A-212, and all other fees.

Section 32. That § 47-34A-1003 be amended to read as follows:

47-34A-1003. (a) Activities of a foreign limited liability company which do not constitute transacting business in this state within the meaning of this article include:

- (1) Maintaining, defending, or settling an action or proceeding;
- (2) Carrying on any activity concerning its internal affairs, including holding meetings of its members or managers;
- (3) Maintaining accounts in financial institutions;
- (4) Maintaining offices or agencies for the transfer, exchange, and registration of the company's own securities or maintaining trustees or depositories with respect to those securities;
- (5) Selling through independent contractors;

- (6) Soliciting or obtaining orders, whether by mail or electronic means or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts;
- (7) Creating or acquiring indebtedness, mortgages, or security interests in real or personal property;
- (8) Securing or collecting debts or enforcing mortgages or other security interests in property securing the debts and holding, protecting, or maintaining property so acquired;
- (9) Conducting an isolated transaction that is completed within thirty days and is not in the course of similar transactions; and
- (10) Transacting business in interstate commerce.

(b) For purposes of this article, the ownership in this state of income-producing real property or tangible personal property, other than property excluded under subsection (a), constitutes transacting business in this state.

(c) This section does not apply in determining the contacts or activities that may subject a foreign limited liability company to service of process, taxation, or regulation under any law of this state other than this Act.

Section 33. That § 47-34A-1004 be amended to read as follows:

47-34A-1004. Unless the secretary of state determines that an application for a certificate of authority does not comply with the filing requirements of this chapter, the secretary of state, upon payment of all filing fees, shall file the application of a foreign limited liability company, prepare, sign, and file a certificate of authority to transact business in this state, and send a copy of the filed certificate, together with a receipt for the fees to the company or its representative.

Section 34. That § 47-34A-1005 be amended to read as follows:

47-34A-1005. (a) A foreign limited liability company whose name does not comply with § 47-

34A-105 may not obtain a certificate of authority until it adopts, for the purpose of transacting business in this state, an alternate name that complies with § 47-34A-105. A foreign limited liability company that adopts an alternate name under this subsection and obtains a certificate of authority with the alternate name need not comply with chapter 37-11 or § 47-34A-105. After obtaining a certificate of authority with an alternate name, a foreign limited liability company shall transact business in this state under the alternate name unless the company is authorized under chapter 37-11 or § 47-34A-105 to transact business in this state under another name.

(b) If a foreign limited liability company authorized to transact business in this state changes its name to one that does not comply with § 47-34A-105, it may not thereafter transact business in this state until it complies with subsection (a) and obtains an amended certificate of authority.

Section 35. That § 47-34A-1006 be amended to read as follows:

47-34A-1006. (a) A certificate of authority of a foreign limited liability company to transact business in this state may be revoked by the secretary of state in the manner provided in subsections (b) and (c) if the company does not:

- (1) Pay, within sixty days after the due date, any fee, tax, or penalty due to the secretary of state under this Act or law other than this Act;
- (2) Deliver, within sixty days after the due date, its annual report required under § 47-34A-211;
- (3) Appoint and maintain an agent for service of process as required by South Dakota law;
or
- (4) Deliver for filing a statement of a change within thirty days after a change has occurred in the name or address of the agent.

(b) To revoke a certificate of authority of a foreign limited liability company, the secretary of state must prepare, sign, and file a notice of revocation and send a copy to the company's agent for

service of process in this state, or if the company does not appoint and maintain a proper agent in this state, to the company's designated office. The notice must state:

- (1) The revocation's effective date, which must be at least sixty days after the date the secretary of state sends the copy; and
- (2) The grounds for revocation under subsection (a).

(c) The authority of a foreign limited liability company to transact business in this state ceases on the effective date of the notice of revocation unless before that date the company cures each ground for revocation stated in the notice filed under subsection (b). If the company cures each ground, the secretary of state shall file a record so stating.

Section 36. That § 47-34A-1007 be amended to read as follows:

47-34A-1007. To cancel its certificate of authority to transact business in this state, a foreign limited liability company must deliver to the secretary of state for filing a notice of cancellation stating the name of the company and that the company desires to cancel its certificate of authority. The certificate of authority is cancelled when the notice becomes effective.

Section 37. That § 47-34A-1008 be amended to read as follows:

47-34A-1008. (a) A foreign limited liability company transacting business in this state may not maintain an action or proceeding in this state unless it has a certificate of authority to transact business in this state.

(b) The failure of a foreign limited liability company to have a certificate of authority to transact business in this state does not impair the validity of a contract or act of the company or prevent the foreign limited liability company from defending an action or proceeding in this state.

(c) A member or manager of a foreign limited liability company is not liable for the debt, obligations, or other liabilities of the company solely because the company transacted business in that state without a certificate of authority.

(d) If a foreign limited liability company transacts business in this state without a certificate of authority or cancels its certificate of authority, it appoints the secretary of state as its agent for service of process for rights of actions arising out of the transaction of business in this state.

Section 38. That § 47-34A-1009 be amended to read as follows:

47-34A-1009. The attorney general may maintain an action to enjoin a foreign limited liability company from transacting business in this state in violation of this article.

Section 39. That § 47-34A-1101 be amended to read as follows:

47-34A-1101. (a) Subject to subsection (b), a member may maintain a direct action against another member, a manager, or the limited liability company to enforce the member's rights and otherwise protect the member's interests, including rights and interests under the operating agreement or this Act or arising independently of the membership relationship.

(b) A member maintaining a direct action under this section must plead an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company.

Section 40. That § 47-34A-1102 be amended to read as follows:

47-34A-1102. A member may maintain a derivative action to enforce a right of a limited liability company if:

- (1) The member first makes a demand on the other members in a member-managed limited liability company, or the managers of a manager-managed limited liability company, requesting that they cause the company to bring an action to enforce the right, and the managers or other members do not bring the action within a reasonable time; or
- (2) A demand under paragraph (1) would be futile.

Section 41. That § 47-34A-1103 be amended to read as follows:

47-34A-1103. (a) Except as otherwise provided in subsection (b), a derivative action under

§ 47-34A-1102 may be maintained only by a person that is a member at the time the action is commenced and remains a member while the action continues.

(b) If the sole plaintiff in a derivative action dies while the action is pending, the court may permit another member of the limited liability company to be substituted as plaintiff.

Section 42. That § 47-34A-1104 be amended to read as follows:

47-34A-1104. In a derivative action under § 47-34A-1102, the complaint must state with particularity:

- (1) The date and content of the plaintiff's demand and the response to the demand by the managers or other members; or
- (2) If a demand has not been made, the reasons a demand under § 47-34A-1102 would be futile.

Section 43. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as follows:

(a) If a limited liability company is named as or made a party in a derivative proceeding, the company may appoint a special litigation committee to investigate the claims asserted in the proceeding and determine whether pursuing the action is in the best interests of the company. If the company appoints a special litigation committee on motion by the committee made in the name of the company, except for good cause shown, the court shall stay discovery for the time reasonably necessary to permit the committee to make an investigation. The provisions of this subsection do not prevent the court from enforcing a person's right to information under § 47-34A-408 or, for good cause shown, granting extraordinary relief in the form of a temporary restraining order or preliminary injunction.

(b) A special litigation committee may be composed of one or more disinterested and independent individuals, who may be members.

(c) A special litigation committee may be appointed:

(1) In a member-managed limited liability company:

(A) By the consent of a majority of the members not named as defendants or plaintiffs in the proceeding; and

(B) If all members are named as defendants or plaintiffs in the proceeding, by a majority of the members named as defendants; or

(2) In a manager-managed limited liability company:

(A) By a majority of the managers not named as defendants or plaintiffs in the proceeding; and

(B) If all managers are named as defendants or plaintiffs in the proceeding, by a majority of the managers named as defendants.

(d) After appropriate investigation, a special litigation committee may determine that it is in the best interests of the limited liability company that the proceeding:

(1) Continue under the control of the plaintiff;

(2) Continue under the control of the committee;

(3) Be settled on terms approved by the committee; or

(4) Be dismissed.

(e) After making a determination under subsection (d), a special litigation committee shall file with the court a statement of the committee's determination and the committee's report supporting the determination, giving notice to the plaintiff. The court shall determine whether the members of the committee were disinterested and independent and whether the committee conducted its investigation and made the recommendation in good faith, independently, and with reasonable care, with the committee having the burden of proof. If the court finds that the members of the committee were disinterested and independent and that the committee acted in good faith, independently, and

with reasonable care, the court shall enforce the determination of the committee. Otherwise, the court shall dissolve the stay of discovery entered under subsection (a) and allow the action to proceed under the direction of the plaintiff.

Section 44. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as follows:

(a) Except as otherwise provided in subsection (b):

- (1) Any proceeds or other benefits of a derivative action under § 47-34A-1102, whether by judgment, compromise, or settlement, belong to the limited liability company and not to the plaintiff; and
- (2) If the plaintiff receives any proceeds, the plaintiff shall immediately remit the proceeds to the company.

(b) If a derivative action under § 47-34A-1102 is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees and costs, from the recovery of the limited liability company.

Section 45. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as follows:

Delivery of documents may be made by electronic transmission if and to the extent permitted by the Office of the Secretary of State. If the document is filed in typewritten or printed form and not transmitted electronically, the Office of the Secretary of State may require one exact or conformed copy to be delivered with the document.

An Act to revise certain Limited Liability Company statutes.

I certify that the attached Act
originated in the

HOUSE as Bill No. 1106

Chief Clerk

Speaker of the House

Attest:

Chief Clerk

President of the Senate

Attest:

Secretary of the Senate

House Bill No. 1106

File No. _____

Chapter No. _____

Received at this Executive Office
this _____ day of _____ ,

20____ at _____ M.

By _____
for the Governor

The attached Act is hereby
approved this _____ day of
_____, A.D., 20____

Governor

STATE OF SOUTH DAKOTA,
ss.
Office of the Secretary of State

Filed _____, 20____
at _____ o'clock __ M.

Secretary of State

By _____
Asst. Secretary of State