

# State of South Dakota

EIGHTY-EIGHTH SESSION  
LEGISLATIVE ASSEMBLY, 2013

670U0170

## SENATE COMMERCE AND ENERGY ENGROSSED NO. **HB 1106** - 02/12/2013

Introduced by: Representatives Lust, Feinstein, and Gosch and Senators Rave and Brown

1 FOR AN ACT ENTITLED, An Act to revise certain Limited Liability Company statutes.

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

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

4 47-34A-101. Terms used in this chapter:

5 (1) "Articles of organization" means initial, amended, and restated articles of  
6 organization and articles of merger. In the case of a foreign limited liability company,  
7 the term includes all records serving a similar function required to be filed in the  
8 Office of the Secretary of State or other official having custody of company records  
9 in the state or country under whose law it is organized;

10 (2) "Business" includes every trade, occupation, profession, and other lawful purpose,  
11 whether or not carried on for profit;

12 (3) "Contribution" means any benefit provided by a person to a limited liability  
13 company:

14 (A) In order to become a member upon formation of the company and in  
15 accordance with an agreement between or among the persons that have agreed



1           to become the initial members of the company;

2           (B) In order to become a member after the formation of the company and in  
3           accordance with an agreement between the person and the company; or

4           (C) In the person's capacity as a member and in accordance with the operating  
5           agreement or an agreement between the member and the company;

6           (4) "Debtor in bankruptcy" means a person who is the subject of an order for relief under  
7           Title 11 of the United States Code or a comparable order under a successor statute  
8           of general application or a comparable order under federal, state, or foreign law  
9           governing insolvency;

10          ~~(4)~~(5) "Distribution" means a transfer of money, property, or other benefit from a limited  
11          liability company to a member in the member's capacity as a member or to a  
12          transferee of the member's distributional interest;

13          ~~(5)~~(6) "Distributional interest" means all of a member's interest in distributions by the  
14          limited liability company;

15          ~~(6)~~(7) "Entity" means a person other than an individual;

16          ~~(7)~~(8) "Foreign limited liability company" means an unincorporated entity ~~organized under~~  
17          ~~laws other than the laws of this state which afford limited liability to its owners~~  
18          ~~comparable to the liability under section 303 and is not required to obtain a certificate~~  
19          ~~of authority to transact business under any law of this state other than this chapter~~  
20          formed under the law of a jurisdiction other than this state and denominated by that  
21          law as a limited liability company;

22          ~~(8)~~(9) "Limited liability company" ~~means a limited liability company organized under this~~  
23          ~~chapter~~ except in the phrase "foreign limited liability company" means an entity  
24          formed under this chapter;

1       ~~(9)~~(10)       "Manager" means a person, whether or not a member of a manager-managed  
2                   company, who is vested with authority under section 301;

3       ~~(10)~~(11)       "Manager-managed company" means a limited liability company which is so  
4                   designated in its articles of organization;

5       (12)   "Member" means a person that:

6           (A)   Prior to formation of the limited liability company, becomes a member as  
7                   agreed by that person and the organizer of the limited liability company;

8           (B)   After formation of the limited liability company, becomes a member:

9                   (1)   As provided in the operating agreement;

10                   (2)   As a result of a transaction effective under Article IX;

11                   (3)   With the consent of all the members; and

12           (C)   After having become a member, has not dissociated under Article VI;

13       ~~(11)~~(13)       "Member-managed company" means a limited liability company other than a  
14                   manager-managed company;

15       ~~(12)~~(14)       "Operating agreement" means any valid agreement, either written or oral,  
16                   under § 47-34A-103 concerning the relations among the members, managers,  
17                   and limited liability company; however, an integration clause contained in a  
18                   written operating agreement may be given effect under other law. The term  
19                   includes amendments to and restatements of the operating agreement. ~~It shall~~  
20                   ~~be styled a "Declaration" if the company has a single member~~ The operating  
21                   agreement of a limited liability company having only one member shall not be  
22                   unenforceable by reason of there being only one person who is a party to the  
23                   operating agreement;

24       ~~(13)~~(15)       "Person" means an individual, corporation, business trust, cooperative

1 corporation, estate, trust, partnership, limited liability company, association,  
2 joint venture, government, governmental subdivision, agency, or  
3 instrumentality, or any other legal or commercial entity;

4 ~~(14)~~(16) "Principal office" means the office, whether or not in this state, where the  
5 principal executive office of a domestic or foreign limited liability company  
6 is located;

7 ~~(15)~~(17) "Record" means information that is inscribed on a tangible medium or that is  
8 stored in an electronic or other medium and is retrievable in perceivable form;

9 ~~(16)~~(18) "Sign" means ~~to identify a record by means of a signature, mark, or other~~  
10 ~~symbol, with intent to authenticate it, with the present intent to authenticate~~  
11 or adopt a record by any means including an electronic signature:

12 (A) To execute or adopt a tangible symbol; or

13 (B) To attach to or logically associate with a record an electronic symbol, sound,  
14 or process;

15 ~~(17)~~(19) "State" means a state of the United States, the District of Columbia, the  
16 Commonwealth of Puerto Rico, the United States Virgin Islands, or any  
17 territory or insular possession subject to the jurisdiction of the United States;

18 ~~(18)~~(20) "Transfer" includes an assignment, conveyance, deed, bill of sale, lease,  
19 mortgage, security interest, encumbrance, ~~and gift, and transfer by operation~~  
20 of law;

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

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

24 47-34A-103. ~~(a) Except as otherwise provided in subsection (b), all members of a limited~~

1 ~~liability company may enter into an operating agreement, which need not be in writing, to~~  
2 ~~regulate the affairs of the company and the conduct of its business, and to govern relations~~  
3 ~~among the members, managers, and company. To the extent the operating agreement does not~~  
4 ~~otherwise provide, this chapter governs relations among the members, managers, and company.~~

5 ~~— (b) The operating agreement may not:~~

6 ~~— (1) Unreasonably restrict a right to information or access to records under § 47-34A-408;~~

7 ~~— (2) Eliminate the duty of loyalty under § 47-34A-409(b) or 47-34A-603(b)(3), but the~~  
8 ~~agreement may:~~

9 ~~— (i) Identify specific types or categories of activities that do not violate the duty of~~  
10 ~~loyalty, if not manifestly unreasonable; and~~

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

14 ~~— (3) Unreasonably reduce the duty of care under § 47-34A-409(c) or 47-34A-603(b)(3);~~

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

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

19 ~~— (6) Vary the requirement to wind up the limited liability company's business in a case~~  
20 ~~specified in § 47-34A-801(3) or (4); or~~

21 ~~— (7) Restrict rights of a person, other than a manager, member, and transferee of a~~  
22 ~~member's distributional interest, under this chapter. (a) Except as otherwise provided~~

23 ~~in subsection (b), all members of a limited liability company may enter into an~~  
24 ~~operating agreement, which need not be in writing, to regulate the affairs of the~~

1 company and the conduct of its business, and to govern relations among the  
2 members, managers, and company. A person that becomes a member of a limited  
3 liability company is deemed to assent to the operating agreement. To the extent the  
4 operating agreement does not otherwise provide, this chapter governs relations  
5 among the members, managers, and company.

6 (b) The operating agreement may not:

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

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

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

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

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

18 (4) Vary the requirement to wind up the limited liability company's business in a case  
19 specified in § 47-34A-801(a) (3) or (4); or

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

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

23 (1) Restrict a right to information or access to records under § 47-34A-408;

24 (2) Reduce the duty of care under § 47-34A-409(c) or § 47-34A-603(b)(3);

1       (3) Alter any other fiduciary duty, including eliminating particular aspects of that duty.

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

4       (1) Shall make its determination as of the time the challenged term became part of the  
5 operating agreement and by considering only circumstances existing at that time; and

6       (2) May invalidate the term only if, in light of the purposes and activities of the limited  
7 liability company, it is readily apparent that:

8           (i) The objective of the term is unreasonable; or

9           (ii) The term is an unreasonable means to achieve the provision's objective.

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

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

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

19       (1) The operating agreement prevails as to members, dissociated members, transferees,  
20 and managers; and

21       (2) The record prevails as to other persons to the extent they reasonably rely on the  
22 record.

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

1 The law of this state governs:

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

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

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

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

10 ~~47-34A-401. A contribution of a member of a limited liability company may consist of~~  
11 ~~tangible or intangible property or other benefit to the company, including money, promissory~~  
12 ~~notes, services performed, or other agreements to contribute cash or property, or contracts for~~  
13 ~~services to be performed.~~ (a) If a limited liability company is to have only one member upon  
14 formation, the person becomes a member as agreed by that person and the organizer of the  
15 company. That person and the organizer may be, but need not be, different persons. If different,  
16 the organizer acts on behalf of the initial member.

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

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

- 22 (1) As provided in the operating agreement;
- 23 (2) As the result of a transaction effective under Article 9;
- 24 (3) With the consent of all the members; or



1 (4) If, within 90 consecutive days after the company ceases to have any members:

2 (A) The last person to have been a member, or the legal representative of that  
3 person, designates a person to become a member; and

4 (B) The designated person consents to become a member.

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

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

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

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

14 47-34A-402. (a) A ~~member's~~ person's obligation to ~~contribute money, property, or other~~  
15 ~~benefit to, or to perform services for,~~ make a contribution to a limited liability company is not  
16 excused by the ~~member's~~ person's death, disability, or other inability to perform personally. If  
17 a ~~member~~ person does not make the required contribution of ~~property or services,~~ the member,  
18 the person or person's estate is obligated ~~at the option of the company~~ to contribute money equal  
19 to the value of that ~~portion~~ part of the ~~stated~~ contribution which has not been made at the option  
20 of the company.

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

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

1       47-34A-403. (a) A limited liability company shall reimburse a member or manager for  
2 payments made and indemnify a member or manager for liabilities incurred by the member or  
3 manager in the ordinary course of the business of the company or for the preservation of its  
4 business or property.

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

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

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

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

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

19       47-34A-406. (a) A distribution may not be made if, after the distribution is made:

20       (1) The limited liability company would not be able to pay its debts as they become due  
21 in the ordinary course of business; or

22       (2) The company's total assets would be less than the sum of its total liabilities plus the  
23 amount that would be needed, if the company were to be dissolved, wound up, and  
24 terminated at the time of the distribution, to satisfy the preferential rights upon

1 dissolution, winding up, and termination of members whose preferential rights are  
2 superior to those receiving the distribution.

3 (b) A limited liability company may base a determination that a distribution is not prohibited  
4 under subsection (a) on financial statements prepared on the basis of accounting practices and  
5 principles that are reasonable in the circumstances or on a fair valuation or other method that  
6 is reasonable in the circumstances.

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

9 (1) In the case of distribution by purchase, redemption, or other acquisition of a  
10 distributional interest in a limited liability company, as of the date money or other  
11 property is transferred or debt incurred by the company; and

12 (2) In all other cases, as of the date the:

13 (i) Distribution is authorized if the payment occurs within one hundred twenty  
14 days after the date of authorization; or

15 (ii) Payment is made if it occurs more than one hundred twenty days after the date  
16 of authorization.

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

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

1 the indebtedness is treated as a distribution, the effect of which is measured on the date the  
2 payment is made.

3 (f) In subsection (a), "distribution" does not include amounts (i) constituting reasonable  
4 compensation for present or past services or (ii) reasonable payments made in the ordinary  
5 course of business under a bona fide retirement plan or other benefits program.

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

7 47-34A-407. (a) Any member of a member-managed company, or a ~~member~~ or manager of  
8 a manager-managed company who votes for or assents to a distribution made in violation of  
9 § 47-34A-406, the articles of organization, or the operating agreement is personally liable to the  
10 company for the amount of the distribution which exceeds the amount that could have been  
11 distributed without violating § 47-34A-406, the articles of organization, or the operating  
12 agreement if it is established that the member or manager did not perform the member's or  
13 manager's duties in compliance with § 47-34A-409.

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

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

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

- 1 (1) Other members or managers who voted for or assented to the distribution in violation
- 2 of subsection (a) and may compel contribution from them; and
- 3 (2) Members who received a distribution in violation of subsection (b) and may compel
- 4 contribution from the member in the amount received in violation of subsection (b).
- 5 ~~(d)~~(e) A proceeding under this section is barred unless it is commenced within two years
- 6 after the distribution.

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

8 47-34A-409. (a) The only fiduciary duties a member owes to a member-managed company

9 and, subject to § 47-34A-1101(b), its other members are the duty of loyalty and the duty of care

10 imposed by subsections (b) and (c).

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

12 limited to the following:

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

22 (c) A member's duty of care to a member-managed company and its other members in the

23 conduct of and winding up of the company's business is limited to refraining from engaging in

24 grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

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

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

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

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

12 (h) In a manager-managed company:

13 (1) A member who is not also a manager owes no duties to the company or to the other  
14 members solely by reason of being a member;

15 (2) A manager is held to the same standards of conduct prescribed for members in  
16 subsections (b) through (f);

17 (3) A member who pursuant to the operating agreement exercises some or all of the  
18 rights of a manager in the management and conduct of the company's business is held  
19 to the standards of conduct in subsections (b) through (f) to the extent that the  
20 member exercises the managerial authority vested in a manager by this chapter; and

21 (4) A manager is relieved of liability imposed by law for violation of the standards  
22 prescribed by subsections (b) through (f) to the extent of the managerial authority  
23 delegated to the members by the operating agreement.

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

1       47-34A-504. (a) On application by a judgment creditor of a member of a limited liability  
2 company or of a member's transferee, and following notice to the limited liability company of  
3 such application, a court having jurisdiction may charge the distributional interest of the  
4 judgment debtor to satisfy the judgment.

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

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

8       (1) By the judgment debtor;

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

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

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

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

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

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

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

1       47-34A-601. A member is dissociated from a limited liability company upon the occurrence  
2 of any of the following events:

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

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

6       (3)    Upon transfer of all of a member's distributional interest, other than a transfer for  
7            security purposes or a court order charging the member's distributional interest which  
8            has not been foreclosed;

9       (4)    The member's expulsion pursuant to the operating agreement;

10      (5)    The member's expulsion by unanimous vote of the other members if:

11           (i)    It is unlawful to carry on the company's business with the member;

12           (ii)   There has been a transfer of substantially all of the member's distributional  
13            interest, other than a transfer for security purposes or a court order charging  
14            the member's distributional interest which has not been foreclosed;

15           (iii)   Within ninety days after the company notifies a corporate member that it will  
16            be expelled because it has filed a certificate of dissolution or the equivalent,  
17            its charter has been revoked, or its right to conduct business has been  
18            suspended by the jurisdiction of its incorporation, the member fails to obtain  
19            a revocation of the certificate of dissolution or a reinstatement of its charter or  
20            its right to conduct business; or

21           (iv)   A corporation, partnership ~~or a~~ limited liability company, or other entity that  
22            is a member has been dissolved and its business is being wound up;

23      (6)    On application by the company or another member, the member's expulsion by  
24            judicial determination because the member:



- 1 (i) Engaged in wrongful conduct that adversely and materially affected the  
2 company's business;
- 3 (ii) Willfully or persistently committed a material breach of the operating  
4 agreement or of a duty owed to the company or the other members under § 47-  
5 34A-409; or
- 6 (iii) Engaged in conduct relating to the company's business which makes it not  
7 reasonably practicable to carry on the business with the member;
- 8 (7) The member's:
  - 9 (i) Becoming a debtor in bankruptcy;
  - 10 (ii) Executing an assignment for the benefit of creditors;
  - 11 (iii) Seeking, consenting to, or acquiescing in the appointment of a trustee,  
12 receiver, or liquidator of the member or of all or substantially all of the  
13 member's property; or
  - 14 (iv) Failing, within ninety days after the appointment, to have vacated or stayed the  
15 appointment of a trustee, receiver, or liquidator of the member or of all or  
16 substantially all of the member's property obtained without the member's  
17 consent or acquiescence, or failing within ninety days after the expiration of  
18 a stay to have the appointment vacated;
- 19 (8) In the case of a member who is an individual:
  - 20 (i) The member's death;
  - 21 (ii) The appointment of a guardian or general conservator for the member; or
  - 22 (iii) A judicial determination that the member has otherwise become incapable of  
23 performing the member's duties under the operating agreement;
- 24 (9) In the case of a member that is a trust or is acting as a member by virtue of being a

1 trustee of a trust, distribution of the trust's entire rights to receive distributions from  
2 the company, but not merely by reason of the substitution of a successor trustee;

3 (10) In the case of a member that is an estate or is acting as a member by virtue of being  
4 a personal representative of an estate, distribution of the estate's entire rights to  
5 receive distributions from the company, but not merely the substitution of a successor  
6 personal representative; or

7 (11) Termination of the existence of a member if the member is not an individual, estate,  
8 or trust other than a business trust.

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

10 47-34A-901. Terms used in this article:

11 ~~(1) "Corporation" means a corporation under State Dakota Business Act, a predecessor~~  
12 ~~law, or comparable law of another jurisdiction;~~

13 ~~(2) "General partner" means a partner in a partnership and a general partner in a limited~~  
14 ~~partnership;~~

15 ~~(3) "Limited partner" means a limited partner in a limited partnership;~~

16 ~~(4) "Limited partnership" means a limited partnership created under chapter 48-7, a~~  
17 ~~predecessor law, or comparable law of another jurisdiction;~~

18 ~~(5) "Partner" includes a general partner and a limited partner;~~

19 ~~(6) "Partnership" means a general partnership under chapter 48-7A, a predecessor law,~~  
20 ~~or comparable law of another jurisdiction;~~

21 ~~(7) "Partnership agreement" means an agreement among the partners concerning the~~  
22 ~~partnership or limited partnership;~~

23 ~~(8) "Shareholder" means a shareholder in a corporation.~~

24 (1) "Constituent limited liability company" means a constituent organization that is a

1 limited liability company;

2 (2) "Constituent organization" means an organization that is party to a merger;

3 (3) "Converted organization" means the organization into which a converting  
4 organization converts pursuant to §§ 47-34A-906 to 47-34A-909, inclusive;

5 (4) "Converting limited liability company" means a converting organization that is a  
6 limited liability company;

7 (5) "Converting organization" means an organization that converts into another  
8 organization pursuant to § 47-34A-906;

9 (6) "Domesticated company" means the company that exists after a domesticating  
10 foreign limited liability company or limited liability company effects a domestication  
11 pursuant to §§ 47-34A-910 to 47-34A-913, inclusive;

12 (7) "Domesticating company" means the company that effects a domestication pursuant  
13 to §§ 47-34A-910 to 47-34A-913, inclusive;

14 (8) "Governing statute" means the statute that governs an organization's internal affairs;

15 (9) "Organization" means a general partnership, including a limited liability partnership;  
16 limited partnership, including a limited liability limited partnership, limited liability  
17 company, business trust, corporation, or any other person having a governing statute.

18 The term includes a domestic or foreign organization regardless of whether organized  
19 for profit.

20 (10) "Organizational documents" means:

21 (a) For a domestic or foreign general partnership, its partnership agreement;

22 (b) For a limited partnership or foreign limited partnership, its certificate of  
23 limited partnership and partnership agreement;

24 (c) For a domestic or foreign limited liability company, its certificate or articles

1                   of organization and operating agreement, or comparable records as provided  
2                   in its governing statute;

3                   (d) For a business trust, its agreement of trust and declaration of trust;

4                   (e) For a domestic or foreign corporation for profit, its articles of incorporation,  
5                   bylaws, and other agreements among its shareholders which are authorized by  
6                   its governing statute, or comparable records as provided in its governing  
7                   statute; and

8                   (f) For any other organization, the basic records that create the organization and  
9                   determine its internal governance and the relations among the persons that  
10                  own it, have an interest in it, or are members of it;

11               (11) "Personal liability" means liability for a debt, obligation, or other liability of an  
12               organization which is imposed on a person that co-owns, has an interest in, or is a  
13               member of the organization;

14               (a) By the governing statute solely by reason of the person co-owning, having an  
15               interest in, or being a member of the organization; or

16               (b) By the organization's organizational documents under a provision of the  
17               governing statute authorizing those documents to make one or more specified  
18               persons liable for all or specified debts, obligations, or other liabilities of the  
19               organization solely by reason of the person or persons co-owning, having an  
20               interest in, or being a member of the organization;

21               (12) "Surviving organization" means an organization into which one or more other  
22               organizations are merged whether the organization preexisted the merger or was  
23               created by the merger.

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

1       47-34A-902. (a) ~~A partnership or limited partnership may be converted to a limited liability~~  
2 ~~company pursuant to this section.~~

3       ~~—(b) The terms and conditions of a conversion of a partnership or limited partnership to a~~  
4 ~~limited liability company must be approved by all of the partners or by a number or percentage~~  
5 ~~of the partners required for conversion in the partnership agreement.~~

6       ~~—(c) An agreement of conversion must set forth the terms and conditions of the conversion~~  
7 ~~of the interests of partners of a partnership or of a limited partnership, as the case may be, into~~  
8 ~~interests in the converted limited liability company or the cash or other consideration to be paid~~  
9 ~~or delivered as a result of the conversion of the interests of the partners, or a combination~~  
10 ~~thereof.~~

11       ~~—(d) After a conversion is approved under subsection (b), the partnership or limited~~  
12 ~~partnership shall file articles of organization in the Office of the Secretary of State which satisfy~~  
13 ~~the requirements of § 47-34A-203 and contain:~~

14       ~~—(1) A statement that the partnership or limited partnership was converted to a limited~~  
15 ~~liability company from a partnership or limited partnership, as the case may be;~~

16       ~~—(2) Its former name;~~

17       ~~—(3) A statement of the number of votes cast by the partners entitled to vote for and~~  
18 ~~against the conversion and, if the vote is less than unanimous, the number or~~  
19 ~~percentage required to approve the conversion under subsection (b); and~~

20       ~~—(4) In the case of a limited partnership, a statement that the certificate of limited~~  
21 ~~partnership is to be canceled as of the date the conversion took effect.~~

22       ~~—(e) In the case of a limited partnership, the filing of articles of organization under subsection~~  
23 ~~(d) cancels its certificate of limited partnership as of the date the conversion took effect.~~

24       ~~—(f) A conversion takes effect when the articles of organization are filed in the Office of the~~

1 ~~Secretary of State or at any later date specified in the articles of organization.~~

2 ~~— (g) A general partner who becomes a member of a limited liability company as a result of~~  
3 ~~a conversion remains liable as a partner for an obligation incurred by the partnership or limited~~  
4 ~~partnership before the conversion takes effect.~~

5 ~~— (h) A general partner's liability for all obligations of the limited liability company incurred~~  
6 ~~after the conversion takes effect is that of a member of the company. A limited partner who~~  
7 ~~becomes a member as a result of a conversion remains liable only to the extent the limited~~  
8 ~~partner was liable for an obligation incurred by the limited partnership before the conversion~~  
9 ~~takes effect. (a) A limited liability company may merge with one or more other constituent~~

10 ~~organizations pursuant to this section, §§ 47-34A-903 to 47-34A-905, inclusive, and a plan of~~  
11 ~~merger, if:~~

12 (1) ~~The governing statute of each of the other organizations authorizes the merger;~~

13 (2) ~~The merger is not prohibited by the law of a jurisdiction that enacted any of the~~  
14 ~~governing statutes; and~~

15 (3) ~~Each of the other organizations complies with its governing statute in effecting the~~  
16 ~~merger.~~

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

18 (1) ~~The name and form of each constituent organization;~~

19 (2) ~~The name and form of the surviving organization and, if the surviving organization~~  
20 ~~is to be created by the merger, a statement to that effect;~~

21 (3) ~~The terms and conditions of the merger, including the manner and basis for~~  
22 ~~converting the interests in each constituent organization into any combination of~~  
23 ~~money, interests in the surviving organization, and other consideration;~~

24 (4) ~~If the surviving organization is to be created by the merger, the surviving~~

1 organization's organizational documents that are proposed to be in a record; and

2 (5) If the surviving organization is not to be created by the merger, any amendments to  
3 be made by the merger to the surviving organization's organizational documents that  
4 are, or are proposed to be, in a record.

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

6 47-34A-903. ~~(a) A partnership or limited partnership that has been converted pursuant to~~  
7 ~~this article is for all purposes the same entity that existed before the conversion.~~

8 ~~(b) When a conversion takes effect:~~

9 ~~(1) All property owned by the converting partnership or limited partnership vests in the~~  
10 ~~limited liability company;~~

11 ~~(2) All debts, liabilities, and other obligations of the converting partnership or limited~~  
12 ~~partnership continue as obligations of the limited liability company;~~

13 ~~(3) An action or proceeding pending by or against the converting partnership or limited~~  
14 ~~partnership may be continued as if the conversion had not occurred;~~

15 ~~(4) Except as prohibited by other law, all of the rights, privileges, immunities, powers,~~  
16 ~~and purposes of the converting partnership or limited partnership vest in the limited~~  
17 ~~liability company; and~~

18 ~~(5) Except as otherwise provided in the agreement of conversion under § 47-34A-902(c),~~  
19 ~~all of the partners of the converting partnership continue as members of the limited~~  
20 ~~liability company. (a) Subject to § 47-34A-914, a plan of merger must be consented~~  
21 ~~to by all the members of a constituent limited liability company.~~

22 (b) Subject to § 47-34A-914 and any contractual rights, after a merger is approved, and at  
23 any time before articles of merger are delivered to the secretary of state for filing under  
24 § 47-34A-904, a constituent limited liability company may amend the plan or abandon the

1 merger:

2 (1) As provided in the plan; or

3 (2) Except as otherwise prohibited in the plan, with the same consent as was required to  
4 approve the plan.

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

6 47-34A-904. ~~(a) Pursuant to a plan of merger approved under subsection (c), a limited~~  
7 ~~liability company may be merged with or into one or more limited liability companies, foreign~~  
8 ~~limited liability companies, corporations, foreign corporations, partnerships, foreign~~  
9 ~~partnerships, limited partnerships, foreign limited partnerships, or other domestic or foreign~~  
10 ~~entities.~~

11 ~~— (b) A plan of merger must set forth:~~

12 ~~— (1) The name of each entity that is a party to the merger;~~

13 ~~— (2) The name of the surviving entity into which the other entities will merge;~~

14 ~~— (3) The type of organization of the surviving entity;~~

15 ~~— (4) The terms and conditions of the merger;~~

16 ~~— (5) The manner and basis for converting the interests of each party to the merger into~~  
17 ~~interests or obligations of the surviving entity, or into money or other property in~~  
18 ~~whole or in part; and~~

19 ~~— (6) The street address of the surviving entity's principal place of business.~~

20 ~~— (c) A plan of merger must be approved:~~

21 ~~— (1) In the case of a limited liability company that is a party to the merger, by all of the~~  
22 ~~members or by a number or percentage of members specified in the operating~~  
23 ~~agreement;~~

24 ~~— (2) In the case of a foreign limited liability company that is a party to the merger, by the~~



1 vote required for approval of a merger by the law of the state or foreign jurisdiction  
2 in which the foreign limited liability company is organized;

3 ~~— (3) In the case of a partnership or domestic limited partnership that is a party to the~~  
4 ~~merger, by the vote required for approval of a conversion under § 47-34A-902(b);~~  
5 ~~and~~

6 ~~— (4) In the case of any other entities that are parties to the merger, by the vote required for~~  
7 ~~approval of a merger by the law of this state or of the state or foreign jurisdiction in~~  
8 ~~which the entity is organized and, in the absence of such a requirement, by all the~~  
9 ~~owners of interests in the entity.~~

10 ~~— (d) After a plan of merger is approved and before the merger takes effect, the plan may be~~  
11 ~~amended or abandoned as provided in the plan.~~

12 ~~— (e) The merger is effective upon the filing of the articles of merger with the secretary of~~  
13 ~~state, or at such later date as the articles may provide. (a) After each constituent organization~~  
14 ~~has approved a merger, articles of merger must be signed on behalf of:~~

15 (1) Each constituent limited liability company, as provided in § 47-34A-205; and

16 (2) Each other constituent organization, as provided in its governing statute.

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

18 (1) The name and form of each constituent organization and the jurisdiction of its  
19 governing statute;

20 (2) The name and form of the surviving organization, the jurisdiction of its governing  
21 statute, and, if the surviving organization is created by the merger, a statement to that  
22 effect;

23 (3) The date the merger is effective under the governing statute of the surviving  
24 organization;

- 1       (4) If the surviving organization is to be created by the merger:
- 2           (A) If it will be a limited liability company, the company's certificate of
- 3                 organization; or
- 4           (B) If it will be an organization other than a limited liability company, the
- 5                 organizational document that creates the organization that is in a public
- 6                 record;
- 7       (5) If the surviving organization preexists the merger, any amendments provided for in
- 8                 the plan of merger for the organizational document that created the organization that
- 9                 are in a public record;
- 10       (6) A statement as to each constituent organization that the merger was approved as
- 11                 required by the organization's governing statute;
- 12       (7) If the surviving organization is a foreign organization not authorized to transact
- 13                 business in this state, the street and mailing addresses of an office that the secretary
- 14                 of state may use for the purposes of § 47-34A-905(b); and
- 15       (8) Any additional information required by the governing statute of any constituent
- 16                 organization.
- 17       (c) Each constituent limited liability company shall deliver the articles of merger for filing
- 18 in the Office of the Secretary of State.
- 19       (d) A merger becomes effective under this article:
- 20           (1) If the surviving organization is a limited liability company, upon the later of:
- 21                 (A) Compliance with subsection (c); or
- 22                 (B) Subject to § 47-34A-206, as specified in the articles of merger; or
- 23           (2) If the surviving organization is not a limited liability company, as provided by the
- 24                 governing statute of the surviving organization.

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

2 47-34A-905. (a) ~~After approval of the plan of merger under § 47-34A-904(c), unless the~~  
3 ~~merger is abandoned under § 47-34A-904(d), articles of merger must be signed on behalf of~~  
4 ~~each limited liability company and other entity that is a party to the merger and delivered to the~~  
5 ~~secretary of state for filing. The articles must set forth:~~

6 ~~—(1)—The name and jurisdiction of formation or organization of each of the limited liability~~  
7 ~~companies and other entities that are parties to the merger;~~

8 ~~—(2)—For each limited liability company that is to merge, the date its articles of~~  
9 ~~organization were filed with the secretary of state;~~

10 ~~—(3)—That a plan of merger has been approved and signed by each limited liability~~  
11 ~~company and other entity that is to merge;~~

12 ~~—(4)—The name and address of the surviving limited liability company or other surviving~~  
13 ~~entity;~~

14 ~~—(5)—The effective date of the merger;~~

15 ~~—(6)—If a limited liability company is the surviving entity, such changes in its articles of~~  
16 ~~organization as are necessary by reason of the merger;~~

17 ~~—(7)—If a party to a merger is a foreign limited liability company, the jurisdiction and date~~  
18 ~~of filing of its initial articles of organization and the date when its application for~~  
19 ~~authority was filed by the secretary of state or, if an application has not been filed,~~  
20 ~~a statement to that effect; and~~

21 ~~—(8)—If the surviving entity is not a limited liability company, an agreement that the~~  
22 ~~surviving entity may be served with process in this state and is subject to liability in~~  
23 ~~any action or proceeding for the enforcement of any liability or obligation of any~~  
24 ~~limited liability company previously subject to suit in this state which is to merge,~~

1 and for the enforcement, as provided in this chapter, of the right of members of any  
2 limited liability company to receive payment for their interest against the surviving  
3 entity.

4 ~~— (b) If a foreign limited liability company is the surviving entity of a merger, it may not do  
5 business in this state until an application for that authority is filed with the secretary of state.~~

6 ~~— (c) The surviving limited liability company or other entity shall furnish a copy of the plan  
7 of merger, on request and without cost, to any member of any limited liability company or any  
8 person holding an interest in any other entity that is to merge.~~

9 ~~— (d) Articles of merger operate as an amendment to the limited liability company's articles  
10 of organization.~~ (a) When a merger becomes effective:

11 (1) The surviving organization continues or comes into existence;

12 (2) Each constituent organization that merges into the surviving organization ceases to  
13 exist as a separate entity;

14 (3) All property owned by each constituent organization that ceases to exist vests in the  
15 surviving organization;

16 (4) All debts, obligations, or other liabilities of each constituent organization that ceases  
17 to exist continue as debts, obligations, or other liabilities of the surviving  
18 organization;

19 (5) An action or proceeding pending by or against any constituent organization that  
20 ceases to exist may be continued as if the merger had not occurred;

21 (6) Except as prohibited by other law, all of the rights, privileges, immunities, powers,  
22 and purposes of each constituent organization that ceases to exist vest in the  
23 surviving organization;

24 (7) Except as otherwise provided in the plan of merger, the terms and conditions of the

1 plan of merger take effect;

2 (8) Except as otherwise agreed, if a constituent limited liability company ceases to exist,  
3 the merger does not dissolve the limited liability company for the purposes of  
4 §§ 47-34A-801 to 47-34A-812, inclusive;

5 (9) If the surviving organization is created by the merger:

6 (A) If it is a limited liability company, the certificate of organization becomes  
7 effective; or

8 (B) If it is an organization other than a limited liability company, the  
9 organizational document that creates the organization becomes effective; and

10 (10) If the surviving organization preexisted the merger, any amendments provided for in  
11 the articles of merger for the organizational document that created the organization  
12 become effective.

13 (b) A surviving organization that is a foreign organization consents to the jurisdiction of the  
14 courts of this state to enforce any debt, obligation, or other liability owed by a constituent  
15 organization, if before the merger the constituent organization was subject to suit in this state  
16 on the debt, obligation, or other liability. A surviving organization that is a foreign organization  
17 and not authorized to transact business in this state appoints the secretary of state as its agent  
18 for service of process for the purposes of enforcing a debt, obligation, or other liability under  
19 this subsection. Service on the secretary of state under this subsection must be made in the same  
20 manner as in § 47-34A-206.

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

22 ~~47-34A-906. (a) When a merger takes effect:~~

23 ~~—(1)— The separate existence of each limited liability company and other entity that is a~~  
24 ~~party to the merger, other than the surviving entity, terminates;~~

1 ~~—(2)— All property owned by each of the limited liability companies and other entities that~~  
2 ~~are party to the merger vests in the surviving entity;~~

3 ~~—(3)— All debts, liabilities, and other obligations of each limited liability company and other~~  
4 ~~entity that is party to the merger become the obligations of the surviving entity;~~

5 ~~—(4)— An action or proceeding pending by or against a limited liability company or other~~  
6 ~~party to a merger may be continued as if the merger had not occurred or the surviving~~  
7 ~~entity may be substituted as a party to the action or proceeding; and~~

8 ~~—(5)— Except as prohibited by other law, all the rights, privileges, immunities, powers, and~~  
9 ~~purposes of every limited liability company and other entity that is a party to a merger~~  
10 ~~vest in the surviving entity.~~

11 ~~—(b) If the surviving foreign entity fails to appoint or maintain a registered agent designated~~  
12 ~~for service of process in this state or the agent for service of process cannot with reasonable~~  
13 ~~diligence be found, service of process may be made on the foreign entity as provided in § 59-11-~~  
14 ~~16.~~

15 ~~—(c) A member of the surviving limited liability company is liable for all obligations of a~~  
16 ~~party to the merger for which the member was personally liable before the merger.~~

17 ~~—(d) Unless otherwise agreed, a merger of a limited liability company that is not the surviving~~  
18 ~~entity in the merger does not require the limited liability company to wind up its business under~~  
19 ~~this chapter or pay its liabilities and distribute its assets pursuant to this chapter.~~

20 ~~—(e) Articles of merger serve as articles of dissolution for a limited liability company that is~~  
21 ~~not the surviving entity in the merger: (a) An organization other than a limited liability company~~  
22 ~~or a foreign limited liability company may convert to a limited liability company, and a limited~~  
23 ~~liability company may convert to an organization other than a foreign limited liability company~~  
24 ~~pursuant to §§ 47-34A-907 to 47-34A-909, inclusive, and a plan of conversion, if:~~

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

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

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

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

15       47-34A-907. ~~This article does not preclude an entity from being converted or merged under~~  
16 ~~other law.~~ (a) Subject to § 47-34A-914, a plan of conversion must be consented to by all the  
17 members of a converting limited liability company.

18       (b) Subject to § 47-34A-914 and any contractual rights, after a conversion is approved, and  
19 at any time before articles of conversion are delivered to the secretary of state for filing under  
20 § 47-34A-908, a converting limited liability company may amend the plan or abandon the  
21 conversion:

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

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

2 47-34A-908. (a) ~~A domestic limited liability company may be converted to a different type~~  
3 ~~of entity pursuant to this section by adopting a plan of conversion.~~

4 ~~— (b) The terms and conditions of a plan of conversion of a limited liability company to a~~  
5 ~~different type of entity must be approved by all of the members or by a number or percentage~~  
6 ~~of members specified in the operating agreement.~~

7 ~~— (c) To effect a conversion, the converting limited liability company must act on and the~~  
8 ~~members of the limited liability company must approve a plan of conversion containing the~~  
9 ~~provisions required by § 47-34A-909.~~

10 ~~— (d) A conversion may not take effect if the conversion is prohibited by or inconsistent with~~  
11 ~~the laws of this state, and the formation, incorporation, or organization of the converted entity~~  
12 ~~under the plan of conversion must be effected in compliance with those laws pursuant to the~~  
13 ~~plan of conversion.~~

14 ~~— (e) At the time a conversion takes effect, each member of the converting limited liability~~  
15 ~~company, other than those who receive payment of their membership interest under any~~  
16 ~~applicable provisions of this chapter, has, unless otherwise agreed to by that member, a~~  
17 ~~membership interest in, and is an owner, partner, or member of, the converted entity.~~

18 ~~— (f) A limited liability company may not convert under this section if a member or manager~~  
19 ~~of the limited liability company, as a result of the conversion, becomes personally liable,~~  
20 ~~without the consent of the member or manager, for a liability or other obligation of the~~  
21 ~~converted entity. (a) After a plan of conversion is approved:~~

22 (1) A converting limited liability company shall deliver to the secretary of state for filing  
23 articles of conversion, which must be signed as provided in § 47-34A-205 and must  
24 include:



- 1           (A) A statement that the limited liability company has been converted into another
- 2                     organization;
- 3           (B) The name and form of the organization and the jurisdiction of its governing
- 4                     statute;
- 5           (C) The date the conversion is effective under the governing statute of the
- 6                     converted organization;
- 7           (D) A statement that the conversion was approved as required by this Act;
- 8           (E) A statement that the conversion was approved as required by the governing
- 9                     statute of the converted organization; and
- 10          (F) If the converted organization is a foreign organization not authorized to
- 11                     transact business in this state, the street and mailing addresses of an office
- 12                     which the secretary of state may use for the purposes of § 47-34A-909(c); and
- 13          (2) If the converting organization is not a converting limited liability company, the
- 14                     converting organization shall deliver to the secretary of state for filing a certificate
- 15                     of organization, which must include, in addition to the information required by
- 16                     § 47-34A-202.1(c):
- 17           (A) A statement that the converted organization was converted from another
- 18                     organization;
- 19           (B) The name and form of that converting organization and the jurisdiction of its
- 20                     governing statute; and
- 21           (C) A statement that the conversion was approved in a manner that complied with
- 22                     the converting organization's governing statute.
- 23          (b) A conversion becomes effective:
- 24           (1) If the converted organization is a limited liability company, when the certificate of

1           organization takes effect; and

2           (2) If the converted organization is not a limited liability company, as provided by the  
3           governing statute of the converted organization.

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

5           47-34A-909. (a) ~~A plan of conversion must include:~~

6           ~~(1) The name of the converting limited liability company;~~

7           ~~(2) The name of the converted entity;~~

8           ~~(3) A statement that the converting limited liability company is continuing its existence~~  
9           ~~in the organizational form of the converted entity;~~

10          ~~(4) A statement of the type of entity that the converted entity is to be;~~

11          ~~(5) The manner and basis of converting the membership interests of the converting~~  
12          ~~limited liability company into ownership or membership interests of the converted~~  
13          ~~entity;~~

14          ~~(6) Any certificate of formation required to be filed under this chapter if the converted~~  
15          ~~entity is a filing entity; and~~

16          ~~(7) The certificate of formation or similar organizational document of the converted~~  
17          ~~entity if the converted entity is not a filing entity.~~

18          ~~(b) An item required by subsection (a)(6) or (7) may be included in the plan of conversion~~  
19          ~~by an attachment or exhibit to the plan. (a) An organization that has been converted pursuant~~  
20          ~~to this Article is for all purposes the same entity that existed before the conversion.~~

21          (b) When a conversion takes effect:

22          (1) All property owned by the converting organization remains vested in the converted  
23          organization;

24          (2) All debts, obligations, or other liabilities of the converting organization continue as

1 debts, obligations, or other liabilities of the converted organization;

2 (3) An action or proceeding pending by or against the converting organization may be  
3 continued as if the conversion had not occurred;

4 (4) Except as prohibited by law other than this Act, all of the rights, privileges,  
5 immunities, powers, and purposes of the converting organization remain vested in  
6 the converted organization;

7 (5) Except as otherwise provided in the plan of conversion, the terms and conditions of  
8 the plan of conversion take effect; and

9 (6) Except as otherwise agreed, the conversion does not dissolve a converting limited  
10 liability company for the purposes of §§ 47-34A-801 to 47-34A-812, inclusive.

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

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

21 ~~47-34A-910. A plan of conversion may include other provisions relating to the conversion~~  
22 ~~that are not inconsistent with the laws of this state.~~ (a) A foreign limited liability company may  
23 become a limited liability company pursuant to §§ 47-34A-911 to 47-34A-913, inclusive, and  
24 a plan of domestication, if:

1       (1) The foreign limited liability company's governing statute authorizes the  
2       domestication;

3       (2) The domestication is not prohibited by the law of the jurisdiction that enacted the  
4       governing statute; and

5       (3) The foreign limited liability company complies with its governing statute in effecting  
6       the domestication.

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

9       (1) The foreign limited liability company's governing statute authorizes the  
10       domestication;

11       (2) The domestication is not prohibited by the law of the jurisdiction that enacted the  
12       governing statute; and

13       (3) The foreign limited liability company complies with its governing statute in effecting  
14       the domestication.

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

16       (1) The name of the domesticating company before domestication and the jurisdiction  
17       of its governing statute;

18       (2) The name of the domesticated company after domestication and the jurisdiction of  
19       its governing statute;

20       (3) The terms and conditions of the domestication, including the manner and basis for  
21       converting interests in the domesticating company into any combination of money,  
22       interests in the domesticated company, and other consideration; and

23       (4) The organizational documents of the domesticated company that are, or are proposed  
24       to be, in a record.

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

2 47-34A-911. ~~The conversion of a limited liability company is effective upon the filing of~~  
3 ~~the plan of conversion with the secretary of state, or at such later date as the plan of conversion~~  
4 ~~may provide:~~ (a) A plan of domestication must be consented to:

5 (1) By all the members, subject to § 47-34A-912, if the domesticating company is a  
6 limited liability company; and

7 (2) As provided in the domesticating company's governing statute, if the company is a  
8 foreign limited liability company.

9 (b) Subject to any contractual rights, after a domestication is approved, and at any time  
10 before articles of domestication are delivered to the secretary of state for filing under  
11 § 47-34A-912, a domesticating limited liability company may amend the plan or abandon the  
12 domestication:

13 (1) As provided in the plan; or

14 (2) Except as otherwise prohibited in the plan, by the same consent as was required to  
15 approve the plan.

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

17 47-34A-912. ~~If a conversion takes effect:~~

18 ~~(a) The converting limited liability company continues to exist without interruption in~~  
19 ~~the organizational form of the converted entity rather than in the organizational form~~  
20 ~~of the converting limited liability company;~~

21 ~~(b) All rights, title, and interests to all property owned by the converting limited liability~~  
22 ~~company continues to be owned, subject to any existing liens or other encumbrances~~  
23 ~~on the property, by the converted entity in the new organizational form without:~~

24 ~~(1) Reversion or impairment;~~

- 1 ~~———— (2) Further act or deed; or~~
- 2 ~~———— (3) Any transfer or assignment having occurred;~~
- 3 ~~—— (c) All liabilities and obligations of the converting limited liability company continue to~~  
4 ~~be liabilities and obligations of the converted entity in the new organizational form~~  
5 ~~without impairment or diminution because of the conversion;~~
- 6 ~~—— (d) The rights of creditors or other parties with respect to or against the previous owners~~  
7 ~~or members of the converting limited liability company in their capacities as~~  
8 ~~members or managers in existence when the conversion takes effect continue to exist~~  
9 ~~as to those liabilities and obligations and may be enforced by the creditors and~~  
10 ~~obligees as if a conversion had not occurred;~~
- 11 ~~—— (e) A proceeding pending by or against the converting limited liability company or by~~  
12 ~~or against any of the converting limited liability company's members or managers in~~  
13 ~~their capacities as members or managers may be continued by or against the~~  
14 ~~converted entity in the new organizational form and by or against the previous~~  
15 ~~members or managers without a need for substituting a party;~~
- 16 ~~—— (f) The membership interests of the converting limited liability company that are to be~~  
17 ~~converted into ownership or membership interests of the converted entity as provided~~  
18 ~~in the plan of conversion are converted as provided by the plan, and the former~~  
19 ~~members and managers are entitled only to the rights provided in the plan of~~  
20 ~~conversion or elsewhere provided in this chapter;~~
- 21 ~~—— (g) If, after the conversion takes effect, an owner or member of the converted entity as~~  
22 ~~an owner or member is liable for the liabilities or obligations of the converted entity,~~  
23 ~~the owner or member is liable for the liabilities and obligations of the converting~~  
24 ~~limited liability company that existed before the conversion took effect only to the~~

1 extent that the owner or member:

2 ~~\_\_\_\_\_ (1) Agrees in writing to be liable for the liabilities or obligations;~~

3 ~~\_\_\_\_\_ (2) Was liable, before the conversion took effect, for the liabilities or obligations;~~

4 or

5 ~~\_\_\_\_\_ (3) By becoming an owner or member of the converted entity, becomes liable~~

6 ~~under other applicable law for the existing liabilities and obligations of the~~

7 ~~converted entity; and~~

8 ~~\_\_\_\_\_ (h) In a proceeding to enforce any obligation or right of dissenting owners or members~~

9 ~~of the converting domestic entity, the provisions of § 15-6-4(d) govern the service~~

10 ~~of process. (a) After a plan of domestication is approved, a domesticating company~~

11 ~~shall deliver to the secretary of state for filing articles of domestication, which must~~

12 ~~include:~~

13 ~~(1) A statement, as the case may be, that the company has been domesticated from or~~

14 ~~into another jurisdiction;~~

15 ~~(2) The name of the domesticating company and the jurisdiction of its governing statute;~~

16 ~~(3) The name of the domesticated company and the jurisdiction of its governing statute;~~

17 ~~(4) The date the domestication is effective under the governing statute of the~~

18 ~~domesticated company;~~

19 ~~(5) If the domesticating company was a limited liability company, a statement that the~~

20 ~~domestication was approved as required by this Act;~~

21 ~~(6) If the domesticating company was a foreign limited liability company, a statement~~

22 ~~that the domestication was approved as required by the governing statute of the other~~

23 ~~jurisdiction; and~~

24 ~~(7) If the domesticated company was a foreign limited liability company not authorized~~

1 to transact business in this state, the street and mailing addresses of an office that the  
2 secretary of state may use for the purposes of § 47-34A-913(b).

3 (b) A domestication becomes effective:

4 (1) When the certificate of organization takes effect, if the domesticated company is a  
5 limited liability company; and

6 (2) According to the governing statute of the domesticated company, if the domesticated  
7 organization is a foreign limited liability company.

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

10 (a) When a domestication takes effect:

11 (1) The domesticated company is for all purposes the company that existed before the  
12 domestication;

13 (2) All property owned by the domesticating company remains vested in the  
14 domesticated company;

15 (3) All debts, obligations, or other liabilities of the domesticating company continue as  
16 debts, obligations, or other liabilities of the domesticated company;

17 (4) An action or proceeding pending by or against a domesticating company may be  
18 continued as if the domestication had not occurred;

19 (5) Except as prohibited by other law, all of the rights, privileges, immunities, powers,  
20 and purposes of the domesticating company remain vested in the domesticated  
21 company;

22 (6) Except as otherwise provided in the plan of domestication, the terms and conditions  
23 of the plan of domestication take effect; and

24 (7) Except as otherwise agreed, the domestication does not dissolve a domesticating



1 limited liability company for the purposes of §§ 47-34A-801 to 47-34A-812,  
2 inclusive.

3 (b) A domesticated company that is a foreign limited liability company consents to the  
4 jurisdiction of the courts of this state to enforce any debt, obligation, or other liability owed by  
5 the domesticating company, if, before the domestication, the domesticating company was  
6 subject to suit in this state on the debt, obligation, or other liability. A domesticated company  
7 that is a foreign limited liability company and not authorized to transact business in this state  
8 appoints the secretary of state as its agent for service of process for purposes of enforcing a debt,  
9 obligation, or other liability under this subsection. Service on the secretary of state under this  
10 subsection must be made in the same manner and has the same consequences as set forth in this  
11 Act.

12 (c) If a limited liability company has adopted and approved a plan of domestication under  
13 § 47-34A-910 providing for the company to be domesticated in a foreign jurisdiction, a  
14 statement surrendering the company's certificate of organization must be delivered to the  
15 secretary of state for filing setting forth:

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

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

23 (a) If a member of a constituent, converting, or domesticating limited liability company will  
24 have personal liability with respect to a surviving, converted, or domesticated organization,

1 approval or amendment of a plan of merger, conversion, or domestication is ineffective without  
2 the consent of the member, unless:

3 (1) The company's operating agreement provides for approval of a merger, conversion,  
4 or domestication with the consent of fewer than all the members; and

5 (2) The member has consented to the provision of the operating agreement.

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

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

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

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

14 47-34A-1001. (a) The ~~laws~~ law of the state or other jurisdiction under which a foreign  
15 limited liability company is ~~organized govern its organization and~~ formed governs:

16 (1) The internal affairs of the company; and the liability of its managers, members, and  
17 their transferees

18 (2) The liability of a member as member and a manager as manager for the debts,  
19 obligations, or other liabilities of the company.

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

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

1 exercise in this state.

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

3 47-34A-1002. (a) A foreign limited liability company may not do business in this state until  
4 it obtains a certificate of authority from the secretary of state.

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

11 (1) The name of the ~~foreign company or and, if its~~ the name is unavailable for use in this  
12 state, a does not comply with 47-34A-105, an alternate name that satisfies the  
13 requirements of § 47-34A-1005 adopted pursuant to 47-34A-105;

14 (2) The name of the state or ~~country~~ other jurisdiction under whose law it is organized  
15 the company is formed;

16 (3) The street address and mailing addresses of its the company's principal office and if  
17 the law of the jurisdiction under which the company is formed requires the company  
18 to maintain an office in that jurisdiction, the street and mailing address of the  
19 required office; and

20 (4) ~~Repealed by SL 2008, ch 275, § 79;~~

21 ~~(5) The information required by § 59-11-6;~~

22 ~~(6) Whether the duration of the company is for a specified term and, if so, the period~~  
23 ~~specified;~~

24 ~~(7) Whether the company is manager-managed, and, if so, the name and address of each~~

1 initial manager; and

2 ~~(8) Whether the members of the company are to be liable for its debts and obligations~~  
3 ~~under a provision similar to § 47-34A-303(c)~~ The name and street and mailing  
4 address of the company's initial agent for service of process in this state.

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

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

11 47-34A-1003. (a) Activities of a foreign limited liability company ~~that~~ which do not  
12 constitute transacting business in this state within the meaning of this article include:

- 13 (1) Maintaining, defending, or settling an action or proceeding;
- 14 (2) ~~Holding meetings of its members or managers or carrying~~ Carrying on any ~~other~~  
15 activity concerning its internal affairs, including holding meetings of its members or  
16 managers;
- 17 (3) Maintaining ~~bank~~ accounts in financial institutions;
- 18 (4) Maintaining offices or agencies for the transfer, exchange, and registration of the  
19 ~~foreign~~ company's own securities or maintaining trustees or depositories with respect  
20 to those securities;
- 21 (5) Selling through independent contractors;
- 22 (6) Soliciting or obtaining orders, whether by mail or electronic means or through  
23 employees or agents or otherwise, if the orders require acceptance outside this state  
24 before they become contracts;

- 1 (7) Creating or acquiring indebtedness, mortgages, or security interests in real or  
2 personal property;
- 3 (8) Securing or collecting debts or enforcing mortgages or other security interests in  
4 property securing the debts; and holding, protecting, ~~and~~ or maintaining property so  
5 acquired;
- 6 (9) Conducting an isolated transaction that is completed within thirty days and is not ~~one~~  
7 in the course of similar transactions ~~of a like manner~~; and
- 8 (10) Transacting business in interstate commerce.

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

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

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

16 47-34A-1004. Unless the secretary of state determines that an application for a certificate  
17 of authority ~~fails to~~ does not comply ~~as to form~~ with the filing requirements of this chapter, the  
18 secretary of state, upon payment of all filing fees, shall file the application of a foreign limited  
19 liability company, prepare, sign, and file a certificate of authority to transact business in this  
20 state, and send a copy of the filed certificate, together with a receipt for it ~~and~~ the fees to the  
21 ~~limited liability~~ company or its representative.

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

23 47-34A-1005. (a) ~~If the name of a foreign limited liability company does not satisfy the~~  
24 ~~requirements of § 47-34A-105, the company, to obtain or maintain a certificate of authority to~~

1 ~~transact business in this state, must use a fictitious name to transact business in this state if its~~  
2 ~~real name is unavailable and it delivers to the secretary of state for filing a copy of the resolution~~  
3 ~~of its managers, in the case of a manager-managed company, or of its members, in the case of~~  
4 ~~a member-managed company, adopting the fictitious name.~~

5 ~~—(b) Except as authorized by subsections (c) and (d), the name, including a fictitious name~~  
6 ~~to be used to transact business in this state, of a foreign limited liability company must be~~  
7 ~~distinguishable upon the records of the secretary of state from:~~

8 ~~—(1) The name of any corporation, limited partnership, or company incorporated,~~  
9 ~~organized, or authorized to transact business in this state;~~

10 ~~—(2) A name reserved or registered under § 47-34A-106 or 47-34A-107; and~~

11 ~~—(3) The fictitious name of another foreign limited liability company authorized to~~  
12 ~~transact business in this state.~~

13 ~~—(c) A foreign limited liability company may apply to the secretary of state for authority to~~  
14 ~~use in this state a name that is not distinguishable upon the records of the secretary of state from~~  
15 ~~a name described in subsection (b). The secretary of state shall authorize use of the name~~  
16 ~~applied for if:~~

17 ~~—(1) The present user, registrant, or owner of a reserved name consents to the use in a~~  
18 ~~record and submits an undertaking in form satisfactory to the secretary of state to~~  
19 ~~change its name to a name that is distinguishable upon the records of the secretary~~  
20 ~~of state from the name of the foreign applying limited liability company; or~~

21 ~~—(2) The applicant delivers to the secretary of state a certified copy of a final judgment of~~  
22 ~~a court establishing the applicant's right to use the name applied for in this state.~~

23 ~~—(d) A foreign limited liability company may use in this state the name, including the~~  
24 ~~fictitious name, of another domestic or foreign entity that is used in this state if the other entity~~

1 is incorporated, organized, or authorized to transact business in this state and the foreign limited  
2 liability company:

3 ~~—(1)— Has merged with the other entity;~~

4 ~~—(2)— Has been formed by reorganization of the other entity; or~~

5 ~~—(3)— Has acquired all or substantially all of the assets, including the name, of the other  
6 entity.~~

7 ~~—(e) If a foreign limited liability company authorized to transact business in this state changes  
8 its name to one that does not satisfy the requirements of § 47-34A-105, it may not transact  
9 business in this state under the name as changed until it adopts a name satisfying the  
10 requirements of § 47-34A-105 and obtains an amended certificate of authority. A foreign limited  
11 liability company whose name does not comply with § 47-34A-105 may not obtain a certificate  
12 of authority until it adopts, for the purpose of transacting business in this state, an alternate name  
13 that complies with § 47-34A-105. A foreign limited liability company that adopts an alternate  
14 name under this subsection and obtains a certificate of authority with the alternate name need  
15 not comply with chapter 37-11 or § 47-34A-105. After obtaining a certificate of authority with  
16 an alternate name, a foreign limited liability company shall transact business in this state under  
17 the alternate name unless the company is authorized under chapter 37-11 or § 47-34A-105 to  
18 transact business in this state under another name.~~

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

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

23 47-34A-1006. (a) ~~A certificate of authority of a foreign limited liability company to transact  
24 business in this state may be revoked by the secretary of state in the manner provided in~~

1 subsection (b) if:

2 ~~— (1) — The company fails to:~~

3 ~~— (i) — Pay any fees, taxes, and penalties owed to this state;~~

4 ~~— (ii) — Deliver its annual report required under § 47-34A-211 to the secretary of state~~  
5 ~~within sixty days after it is due;~~

6 ~~— (iii) — Appoint and maintain an agent for service of process as required by § 59-11-6;~~

7 ~~or~~

8 ~~— (iv) — File a statement of a change in the name or business address of the agent as~~  
9 ~~required by § 59-11-11; or~~

10 ~~— (2) — A misrepresentation has been made of any material matter in any application, report,~~  
11 ~~affidavit, or other record submitted by the company pursuant to this article.~~

12 ~~— (b) The secretary of state may not revoke a certificate of authority of a foreign limited~~  
13 ~~liability company unless the secretary of state sends the company notice of the revocation, at~~  
14 ~~least sixty days before its effective date, by a record served in accordance with §§ 59-11-16 to~~  
15 ~~59-11-19, inclusive. The notice must specify the cause for the revocation of the certificate of~~  
16 ~~authority. The authority of the company to transact business in this state ceases on the effective~~  
17 ~~date of the revocation unless the foreign limited liability company cures the failure before that~~  
18 ~~date. A certificate of authority of a foreign limited liability company to transact business in this~~  
19 ~~state may be revoked by the secretary of state in the manner provided in subsections (b) and (c)~~  
20 ~~if the company does not:~~

21 ~~(1) Pay, within sixty days after the due date, any fee, tax, or penalty due to the secretary~~  
22 ~~of state under this Act or law other than this Act;~~

23 ~~(2) Deliver, within sixty days after the due date, its annual report required under~~  
24 ~~§ 47-34A-211;~~



1       (3) Appoint and maintain an agent for service of process as required by South Dakota  
2           law; or

3       (4) Deliver for filing a statement of a change within thirty days after a change has  
4           occurred in the name or address of the agent.

5       (b) To revoke a certificate of authority of a foreign limited liability company, the secretary  
6       of state must prepare, sign, and file a notice of revocation and send a copy to the company's  
7       agent for service of process in this state, or if the company does not appoint and maintain a  
8       proper agent in this state, to the company's designated office. The notice must state:

9       (1) The revocation's effective date, which must be at least sixty days after the date the  
10           secretary of state sends the copy; and

11       (2) The grounds for revocation under subsection (a).

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

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

17       47-34A-1007. ~~A foreign limited liability company may cancel its authority to transact~~  
18 ~~business in this state by filing in the Office of the Secretary of State a certificate of cancellation.~~  
19 ~~Delivery may be made by electronic transmission if and to the extent permitted by the Office~~  
20 ~~of the Secretary of State. If the document is filed in typewritten or printed form and not~~  
21 ~~transmitted electronically, the Office of the Secretary of State may require one exact or~~  
22 ~~conformed copy to be delivered with the document. Cancellation does not terminate the~~  
23 ~~authority of the secretary of state to accept service of process on the company for claims for~~  
24 ~~relief arising out of the transactions of business in this state.~~ To cancel its certificate of authority

1 to transact business in this state, a foreign limited liability company must deliver to the secretary  
2 of state for filing a notice of cancellation stating the name of the company and that the company  
3 desires to cancel its certificate of authority. The certificate of authority is cancelled when the  
4 notice becomes effective.

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

6 47-34A-1008. (a) A foreign limited liability company transacting business in this state may  
7 not maintain an action or proceeding in this state unless it has a certificate of authority to  
8 transact business in this state.

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

13 ~~(c) Limitations on personal liability of managers, members, and their transferees are not~~  
14 ~~waived solely by transacting business in this state without a certificate of authority. A member~~  
15 ~~or manager of a foreign limited liability company is not liable for the debt, obligations, or other~~  
16 ~~liabilities of the company solely because the company transacted business in that state without~~  
17 ~~a certificate of authority.~~

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

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

23 47-34A-1009. The attorney general may maintain an action to ~~restrain~~ enjoin a foreign  
24 limited liability company from transacting business in this state in violation of this article.

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

2 47-34A-1101. ~~A member of a limited liability company may maintain an action in the right~~  
3 ~~of the company if the members or managers having authority to do so have refused to~~  
4 ~~commence the action or an effort to cause those members or managers to commence the action~~  
5 ~~is not likely to succeed.~~ (a) Subject to subsection (b), a member may maintain a direct action  
6 against another member, a manager, or the limited liability company to enforce the member's  
7 rights and otherwise protect the member's interests, including rights and interests under the  
8 operating agreement or this Act or arising independently of the membership relationship.

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

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

13 47-34A-1102. ~~In a derivative action for a limited liability company, the plaintiff must be a~~  
14 ~~member of the company when the action is commenced; and:~~

15 ~~— (1) — Must have been a member at the time of the transaction of which the plaintiff~~  
16 ~~complains; or~~

17 ~~— (2) — The plaintiff's status as a member must have devolved upon the plaintiff by operation~~  
18 ~~of law or pursuant to the terms of the operating agreement from a person who was~~  
19 ~~a member at the time of the transaction.~~ A member may maintain a derivative action  
20 to enforce a right of a limited liability company if:

21 (1) The member first makes a demand on the other members in a member-managed  
22 limited liability company, or the managers of a manager-managed limited liability  
23 company, requesting that they cause the company to bring an action to enforce the  
24 right, and the managers or other members do not bring the action within a reasonable

1           time; or

2           (2)   A demand under paragraph (1) would be futile.

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

4           47-34A-1103. ~~In a derivative action for a limited liability company, the complaint must set~~  
5 ~~forth with particularity the effort of the plaintiff to secure initiation of the action by a member~~  
6 ~~or manager or the reasons for not making the effort.~~ (a) Except as otherwise provided in  
7 subsection (b), a derivative action under § 47-34A-1102 may be maintained only by a person  
8 that is a member at the time the action is commenced and remains a member while the action  
9 continues.

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

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

13          47-34A-1104. ~~If a derivative action for a limited liability company is successful, in whole~~  
14 ~~or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or~~  
15 ~~settlement of an action or claim, the court may award the plaintiff reasonable expenses,~~  
16 ~~including reasonable attorney's fees, and shall direct the plaintiff to remit to the limited liability~~  
17 ~~company the remainder of the proceeds received.~~ In a derivative action under § 47-34A-1102,  
18 the complaint must state with particularity:

19          (1)   The date and content of the plaintiff's demand and the response to the demand by the  
20               managers or other members; or

21          (2)   If a demand has not been made, the reasons a demand under § 47-34A-1102 would  
22               be futile.

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

1 (a) If a limited liability company is named as or made a party in a derivative proceeding, the  
2 company may appoint a special litigation committee to investigate the claims asserted in the  
3 proceeding and determine whether pursuing the action is in the best interests of the company.  
4 If the company appoints a special litigation committee on motion by the committee made in the  
5 name of the company, except for good cause shown, the court shall stay discovery for the time  
6 reasonably necessary to permit the committee to make an investigation. The provisions of this  
7 subsection do not prevent the court from enforcing a person's right to information under  
8 § 47-34A-408 or, for good cause shown, granting extraordinary relief in the form of a temporary  
9 restraining order or preliminary injunction.

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

12 (c) A special litigation committee may be appointed:

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

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

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

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

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

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

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

- 1 (1) Continue under the control of the plaintiff;
- 2 (2) Continue under the control of the committee;
- 3 (3) Be settled on terms approved by the committee; or
- 4 (4) Be dismissed.

5 (e) After making a determination under subsection (d), a special litigation committee shall  
6 file with the court a statement of the committees determination and the committee's report  
7 supporting the determination, giving notice to the plaintiff. The court shall determine whether  
8 the members of the committee were disinterested and independent and whether the committee  
9 conducted its investigation and made the recommendation in good faith, independently, and  
10 with reasonable care, with the committee having the burden of proof. If the court finds that the  
11 members of the committee were disinterested and independent and that the committee acted in  
12 good faith, independently, and with reasonable care, the court shall enforce the determination  
13 of the committee. Otherwise, the court shall dissolve the stay of discovery entered under  
14 subsection (a) and allow the action to proceed under the direction of the plaintiff.

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

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

18 (1) Any proceeds or other benefits of a derivative action under § 47-34A-1102, whether  
19 by judgment, compromise, or settlement, belong to the limited liability company and  
20 not to the plaintiff; and

21 (2) If the plaintiff receives any proceeds, the plaintiff shall immediately remit the  
22 proceeds to the company.

23 (b) If a derivative action under § 47-34A-1102 is successful in whole or in part, the court  
24 may award the plaintiff reasonable expenses, including reasonable attorney's fees and costs,

1 from the recovery of the limited liability company.

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

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