

SENATE, No. 1993

STATE OF NEW JERSEY

INTRODUCED APRIL 17, 1997

By Senators LaROSSA and INVERSO

1 AN ACT concerning limited liability companies, amending P.L.1973,
2 c.367 and amending and supplementing P.L.1993, c.210.

3

4 **BE IT ENACTED** *by the Senate and General Assembly of the State*
5 *of New Jersey:*

6

7 1. Section 11 of P.L.1993, c.210 (C.42:2B-11) is amended to read
8 as follows:

9 11. a. In order to form a limited liability company, one or more
10 authorized persons must execute a certificate of formation. The
11 certificate of formation shall be filed in the office of the Secretary of
12 State and set forth:

13 (1) The name of the limited liability company;

14 (2) The address of the registered office and the name and address
15 of the registered agent for service of process required to be maintained
16 by section 6 of this act;

17 (3) That the limited liability company has two or more members;

18 (4) If the limited liability company is to have perpetual existence,
19 regardless of whether the limited liability company is subject to any
20 dissolution contingencies, then the word "perpetual" shall be stated;
21 if the limited liability company is to have a specific date of dissolution,
22 regardless of whether the limited liability company is subject to any
23 dissolution contingencies, the latest date on which the limited liability
24 company is to dissolve; and

25 (5) Any other matters the members determine to include therein.

26 b. A limited liability company is formed at the time of the filing of
27 the initial certificate of formation in the office of the Secretary of State
28 or at any later date or time specified in the certificate of formation if,
29 in either case, there has been substantial compliance with the
30 requirements of this section. A limited liability company formed under
31 this act shall be a separate legal entity, the existence of which as a
32 separate legal entity shall continue until cancellation of the limited
33 liability company's certificate of formation.

34 (cf: P.L.1993, c.210, s.11)

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

1 2. Section 14 of P.L.1993, c.210 (C.42:2B-14) is amended to read
2 as follows:

3 14. a. A certificate of formation shall be canceled upon the
4 dissolution and the completion of winding up of a limited liability
5 company, [or at any other time there are fewer than two members,] or
6 upon the filing of a certificate of merger or consolidation if the limited
7 liability company is not the surviving or resulting entity in a merger or
8 consolidation.

9 b. A certificate of cancellation shall be filed in the office of the
10 Secretary of State to accomplish the cancellation of a certificate of
11 formation upon the dissolution and the completion of winding up of a
12 limited liability company [or at any other time there are not two
13 members] and shall set forth:

14 (1) The name of the limited liability company;

15 (2) The date of filing of its certificate of formation;

16 (3) The reason for filing the certificate of cancellation;

17 (4) The future effective date or time (which shall be a date or time
18 certain) of cancellation if it is not to be effective upon the filing of the
19 certificate; and

20 (5) Any other information the person filing the certificate of
21 cancellation determines.

22 c. A certificate of formation shall not be canceled, and no
23 certificate of cancellation shall be required to be filed, when a limited
24 liability company has only one member, and the certificate of
25 formation shall remain valid when a limited liability company has only
26 one member, if within 90 days of the date on which the limited liability
27 company first had only one member, one or more additional members
28 are admitted. If no additional member is admitted within that 90 day
29 period, the certificate of formation of that limited liability company
30 shall be canceled and a certificate of cancellation shall be filed on and
31 as of the end of that 90 day period.

32 (cf: P.L.1993, c.210, s.14)

33

34 3. Section 18 of P.L.1993, c.210 (C.42:2B-18) is amended to read
35 as follows:

36 18. A certificate of formation filed in the office of the Secretary of
37 State is notice that the entity formed in connection with the filing of
38 the certificate of formation is a limited liability company formed under
39 the laws of this State and is notice of all other facts set forth therein
40 which are required or permitted to be set forth in a certificate of
41 formation by paragraphs (1) and (2) of subsection a. of section 11 of
42 this act. If any provision of an operating agreement is inconsistent
43 with the information contained in the certificate of formation of that
44 limited liability company, as amended, on file with the office of the
45 Secretary of State, the operating agreement shall be controlling except
46 with respect to any third party who can show actual and reasonable

1 reliance to the detriment of that third party, upon the information
2 contained in the certificate of formation.

3 (cf: P.L.1993, c.210, s.18)

4

5 4. Section 22 of P.L.1993, c.210 (C.42:2B-22) is amended to read
6 as follows:

7 22. a. An operating agreement may provide for classes or groups
8 of members having such relative rights, powers and duties as the
9 operating agreement may provide, and may make provision for the
10 future creation in the manner provided in the operating agreement of
11 additional classes or groups of members having such relative rights,
12 powers and duties as may from time to time be established, including
13 rights, powers and duties senior to existing classes and groups of
14 members. An operating agreement may provide for the taking of an
15 action, including the amendment of the operating agreement, without
16 the vote or approval of any member or class or group of members,
17 including an action to create under the provisions of the operating
18 agreement a class or group of limited liability company interests that
19 was not previously outstanding.

20 b. An operating agreement may grant to all or certain identified
21 members or a specified class or group of the members the right to
22 vote, separately or with all or any class or group of managers or
23 members, on any matter. Voting by members may be on a per capita,
24 number, financial interest, class, group or any other basis. [In the
25 absence of any provision in the operating agreement, voting by
26 members shall be on a per capita basis.]

27 c. An operating agreement which grants a right to vote may set
28 forth provisions relating to notice of the time, place or purpose of any
29 meeting at which any matter is to be voted on by any manager or class
30 or group of managers, waiver of any such notice, action by consent
31 without a meeting, the establishment of a record date, quorum
32 requirements, voting in person or by proxy, or any other matter with
33 respect to the exercise of any such right to vote.

34 (cf: P.L.1993, c.210, s.22)

35

36 5. Section 24 of P.L.1993, c.210 (C.42:2B-24) is amended to read
37 as follows:

38 24. A [person ceases to be a] member [of] shall be dissociated
39 from a limited liability company upon the [happening] occurrence of
40 any of the following events:

41 a. Unless otherwise provided in an operating agreement, or with
42 the written consent of all members,

43 (1) the limited liability company receives notice of the member's
44 resignation as a member, or on a later date specified by the member;

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

- 1 (3) a member:
- 2 [(1) Makes an assignment for the benefit of creditors;
- 3 (2) Files a voluntary petition in bankruptcy;
- 4 (3) Is adjudged bankrupt or insolvent, or has entered against him
- 5 an order for relief, in any bankruptcy or insolvency proceeding;
- 6 (4) Files a petition or answer seeking for himself any
- 7 reorganization, arrangement, composition, readjustment, liquidation,
- 8 dissolution or similar relief under any statute, law or regulation;
- 9 (5) Files an answer or other pleading admitting or failing to contest
- 10 the material allegations of a petition filed against him in any
- 11 proceeding of this nature;
- 12 (6) Seeks]
- 13 (a) becomes a debtor in bankruptcy;
- 14 (b) executes an assignment for the benefit of creditors;
- 15 (c) seeks, consents to or acquiesces in the appointment of a
- 16 trustee, receiver or liquidator of the member or of all or [any
- 17 substantial part of his] substantially all of that member's properties; or
- 18 (d) fails, within 90 days after the appointment, without the
- 19 member's consent or acquiescence, of a trustee, receiver or liquidator
- 20 of the member or of all or substantially all of that member's properties,
- 21 to have the appointment vacated or stayed, or fails within 90 days after
- 22 the expiration of a stay to have the appointment vacated; or
- 23 b. [Unless otherwise provided in an operating agreement, or with
- 24 the written consent of all members, 120 days after the commencement
- 25 of any proceeding against the member seeking reorganization,
- 26 arrangement, composition, readjustment, liquidation, dissolution or
- 27 similar relief under any statute, law or regulation, if the proceeding has
- 28 not been dismissed, or if within 90 days after the appointment without
- 29 his consent or acquiescence of a trustee, receiver or liquidator of the
- 30 member or of all or any substantial part of his properties, the
- 31 appointment is not vacated or stayed, or within 90 days after the
- 32 expiration of any such stay, the appointment is not vacated.]
- 33 (1) the member's expulsion pursuant to the operating agreement;
- 34 (2) the member's expulsion by the unanimous vote of the other
- 35 members if:
- 36 (a) it is unlawful to carry on the limited liability company without
- 37 that member;
- 38 (b) there has been a transfer of all or substantially all of that
- 39 member's transferable interest in the limited liability company, other
- 40 than a transfer for security purposes, or a court order charging the
- 41 member's interest;
- 42 (c) within 90 days after the limited liability company notifies a
- 43 corporate member that it will be expelled because it has filed a
- 44 certificate of dissolution or the equivalent, its charter has been
- 45 revoked, or its right to conduct business has been suspended by the
- 46 jurisdiction of its incorporation, there is no revocation of the

1 certificate of dissolution or no reinstatement of its charter or its right
2 to conduct business; or

3 (d) a limited liability company that is a member has been dissolved
4 and its business is being wound up;

5 (3) on application by the limited liability company or another
6 member, the member's expulsion by judicial determination because:

7 (a) the member engaged in wrongful conduct that adversely and
8 materially affected the limited liability company's business;

9 (b) the member willfully or persistently committed a material
10 breach of the operating agreement; or

11 (c) the member engaged in conduct relating to the limited liability
12 company business which makes it not reasonably practicable to carry
13 on the business with the member as a member of the limited liability
14 company;

15 (4) in the case of a member who is an individual:

16 (a) the member's death;

17 (b) the appointment of a guardian or general conservator for the
18 member; or

19 (c) a judicial determination that the member has otherwise become
20 incapable of performing the member's duties under the operating
21 agreement;

22 (5) in the case of a member that is a trust or is acting as a member
23 by virtue of being a trustee of a trust, distribution of the trust's entire
24 transferable interest in the limited liability company, but not merely by
25 reason of the substitution of a successor trustee;

26 (6) in the case of a member that is an estate or is acting as a
27 member by virtue of being a personal representative of an estate,
28 distribution of the estate's entire transferable interest in the limited
29 liability company, but not merely by reason of the substitution of a
30 successor personal representative; or

31 (7) termination of a member who is not an individual, partnership,
32 corporation, trust or estate.

33 (cf: P.L.1993, c.210, s.24)

34

35 6. (New section) Upon a member's dissociation, the dissociated
36 member has, subject to section 39 of P.L.1993, c.210 (C.42:2B-39),
37 only the rights of an assignee of a member's limited liability interest.

38

39 7. Section 27 of P.L.1993, c.210 (C.42:2B-27) is amended to read
40 as follows:

41 27. a. (1) Unless otherwise provided in an operating agreement,
42 the management of a limited liability company shall be vested in its
43 members in proportion to the then current percentage or other interest
44 of members in the profits of the limited liability company owned by all
45 of the members, the decision of members owning more than 50 percent
46 of the then current percentage or other interest in the profits

1 controlling; (2) provided, however, that if an operating agreement
2 provides for the management, in whole or in part, of a limited liability
3 company by [a manager] one or more managers, the management of
4 the limited liability company, to the extent so provided, shall be vested
5 in the manager or managers who shall be chosen by the members in the
6 manner provided in the operating agreement. The [manager]
7 managers shall also hold the offices and have the responsibilities
8 accorded to [him] them by the members and set forth in an operating
9 agreement. Subject to section 37 of this act, a manager shall cease to
10 be a manager as provided in an operating agreement.

11 b. (1) If a limited liability company is managed by its members,
12 unless otherwise provided in the operating agreement, each member
13 shall have the authority to bind the limited liability company. In
14 addition, unless otherwise provided in the operating agreement, or to
15 the extent that a court of competent jurisdiction determines that the
16 operating agreement is without effect in this regard, each member in
17 a limited liability company managed by its members shall also have the
18 authority to file for insolvency or reorganization under appropriate
19 State or federal law, so long as that filing has the prior approval of
20 members then owning more than 50 percent of the interests in the
21 profits of the limited liability company.

22 (2) If the limited liability company is managed by a manager or
23 managers, the managers shall, in addition to all other authority
24 accorded by the operating agreement, have the authority to file for
25 insolvency or reorganization under appropriate State or federal law,
26 unless otherwise provided in the operating agreement, except to the
27 extent a court of competent jurisdiction determines that the operating
28 agreement is without effect in this regard.

29 (cf: P.L.1993, c.210, s.27)

30

31 8. Section 39 of P. L.1993, c.210 (C.42:2B-39) is amended to read
32 as follows:

33 39. a. Except as provided in this act, upon resignation any
34 resigning member is entitled to receive any distribution to which he is
35 entitled under an operating agreement and, if not otherwise provided
36 in an operating agreement, he is entitled to receive, within a reasonable
37 time after resignation, the fair value of his limited liability company
38 interest as of the date of resignation based upon the net present value
39 of his right to share in distributions from the limited liability company,
40 less all applicable valuation discounts, unless the operating agreement
41 provides for another distribution formula. If the resignation of a
42 member violates an operating agreement, in addition to any remedies
43 otherwise available under applicable law, a limited liability company
44 may recover from the resigning member damages for breach of the
45 operating agreement and offset the damages against the amount
46 otherwise distributable to the resigning member.

1 b. As used in subsection a. of this section, “all applicable valuation
2 discounts” shall include discounts for lack of liquidity, relative size of
3 holding, absence of any trading market and comparable factors.

4 (cf: P.L.1993, c.210, s.39)

5
6 9. Section 44 of P.L.1993, c.210 (C.42:2-44) is amended to read
7 as follows:

8 44. a. A limited liability company interest is assignable in whole or
9 in part except as provided in an operating agreement. The assignee of
10 a member's limited liability company interest shall have no right to
11 participate in the management of the business and affairs of a limited
12 liability company except as provided in an operating agreement and
13 upon:

14 (1) The approval of all of the members of the limited liability
15 company other than the member assigning his limited liability company
16 interest; or

17 (2) Compliance with any procedure provided for in the operating
18 agreement.

19 b. Unless otherwise provided in an operating agreement:

20 (1) An assignment entitles the assignee to share in the profits and
21 losses, to receive the distribution or distributions, and to receive the
22 allocation of income, gain, loss, deduction, or credit or similar item to
23 which the assignor was entitled, to the extent assigned;

24 (2) A member ceases to be a member and to have the power to
25 exercise any rights or powers of a member upon assignment of all of
26 his limited liability company interest; and

27 (3) The pledge of, or granting of a security interest, lien or other
28 encumbrance in or against, any or all of the limited liability company
29 interest of a member shall not cause the member to cease to be a
30 member or to have the power to exercise any rights or powers of a
31 member.

32 c. An operating agreement may provide that a member's interest in
33 a limited liability company may be evidenced by a certificate of limited
34 liability company interest issued by the limited liability company.

35 d. Unless otherwise provided in an operating agreement and except
36 to the extent assumed by agreement, until an assignee of a limited
37 liability company interest becomes a member, the assignee shall have
38 no liability as a member solely as a result of the assignment.

39 e. An assignee shall have no authority to seek or obtain a court
40 order dissolving or liquidating a limited liability company.

41 (cf: P.L.1993, c.210, s.44)

42
43 10. Section 45 of P.L.1993, c.210 (C.42:2B-45) is amended to
44 read as follows:

45 45. On application to a court of competent jurisdiction by any
46 judgment creditor of a member, the court may charge the limited

1 liability company interest of the member with payment of the
2 unsatisfied amount of the judgment with interest. To the extent so
3 charged, the judgment creditor has only the rights of an assignee of the
4 limited liability company interest. An action by a court pursuant to
5 this section does not deprive any member of the benefit of any
6 exemption laws applicable to his limited liability company interest. A
7 court order charging the limited liability company interest of a member
8 pursuant to this section shall be the sole remedy of a judgment
9 creditor, who shall have no right under P.L.1993, c.210 (C.42:2B-1 et
10 seq.) or any other State law to interfere with the management or force
11 dissolution of a limited liability company or to seek an order of the
12 court requiring a foreclosure sale of limited liability company interest.
13 Nothing in this section shall be construed to affect in any way the
14 rights of a judgment creditor of a member under federal bankruptcy or
15 reorganization laws.

16 (cf: P.L.1993, c.210, s.45)

17

18 11. Section 48 of P.L.1993, c.210 (C.42:2B-48) is amended to
19 read as follows:

20 48. A limited liability company is dissolved and its affairs shall be
21 wound up upon the first to occur of the following:

22 a. [At] Unless the certificate of formation specifies that the limited
23 liability company is perpetual, at the time specified in an operating
24 agreement, or 30 years from the date of the formation of the limited
25 liability company if no [such] specified time for dissolution and
26 winding up, regardless of any dissolution contingencies, is set forth in
27 the operating agreement;

28 b. Upon the happening of events specified in an operating
29 agreement;

30 c. The written consent of all members, which includes written
31 consent of the sole remaining member of a limited liability company;

32 d. [The death, retirement, resignation, expulsion, bankruptcy or
33 dissolution of a member or the occurrence of any other event which
34 terminates the continued membership of a member in the limited
35 liability company unless the business of the limited liability company
36 is continued either by the consent of all the remaining members within
37 90 days following the occurrence of any such event or pursuant to a
38 right to continue stated in the operating agreement] Ninety days after
39 the date on which the limited liability company has only one member,
40 unless at least one additional member is admitted within 90 days after
41 the date on which the limited liability company had only one member;

42 or

43 e. The entry of a decree of judicial dissolution under section 49 of
44 this act.

45 (cf: P.L.1993, c.210, s.48)

1 12. Section 50 of P.L.1993, c.210 (C.42:2B-50) is amended to
2 read as follows:

3 50. a. Unless otherwise provided in an operating agreement, a
4 manager who has not wrongfully dissolved a limited liability company
5 or, if there is no manager, the members or a person approved by the
6 members or, if there is more than one class or group of members, then
7 by each class or group of members, in either case, by members who
8 own more than 50 percent of the then current percentage or other
9 interest in the profits of the limited liability company owned by all of
10 the members or by the members in each class or group, as appropriate,
11 may wind up the limited liability company's affairs; but the [Court of]
12 Chancery Division, General Equity Part of Superior Court, upon cause
13 shown, may wind up the limited liability company's affairs upon
14 application of any member or manager, his legal representative or
15 assignee, and in connection therewith, may appoint a liquidating
16 trustee.

17 b. Upon dissolution of a limited liability company and until the
18 filing of a certificate of cancellation as provided in section 14 of this
19 act, the persons winding up the limited liability company's affairs may,
20 in the name of, and for and on behalf of, the limited liability company,
21 prosecute and defend suits, whether civil, criminal or administrative,
22 gradually settle and close the limited liability company's business,
23 dispose of and convey the limited liability company's property,
24 discharge or make reasonable provision for the limited liability
25 company's liabilities, and distribute to the members any remaining
26 assets of the limited liability company, all without affecting the liability
27 of members and managers and without imposing liability on a
28 liquidating trustee.

29 (cf: P.L.1993, c.210, s.50)

30

31 13. (New section) a. Each domestic and foreign limited liability
32 company shall file an annual report with the office of the Secretary of
33 State, setting forth:

34 (1) the name and address of the limited liability company;

35 (2) the name and address of the registered agent of the limited
36 liability company; and

37 (3) the name and addresses of the managing members or managers,
38 as the case may be.

39 b. If no annual report is filed as required by this section for two
40 consecutive years,

41 (1) the certificate of a domestic limited liability company shall be
42 transferred to an inactive list maintained by the Secretary of State. A
43 limited liability company on the inactive list shall remain a limited
44 liability company and the limited liability of its members and managers
45 shall not be affected by its transfer to this list. The name of a limited
46 liability company on the inactive list shall, subject to any other rights

1 that limited liability company may have to its name, be available for
2 use by any other limited liability company, including a newly-formed
3 limited liability company.

4 (2) the certificate of a foreign limited liability company may be
5 revoked by the Secretary of State.

6
7 14. Section 2 of P.L.1973, c.367 (C.54:50-13) is amended to read
8 as follows:

9 2. Until all taxes owing by it have been paid, or provided for as set
10 forth in section 4 of P.L.1973, c.367 (C.54:50-15):

11 a. no domestic or foreign corporation shall merge or consolidate
12 into a foreign corporation not authorized to transact business in this
13 State; and

14 b. no domestic corporation shall dissolve and no domestic or
15 foreign corporation shall distribute any of its assets in dissolution or
16 liquidation to any shareholder unless

17 (1) one or more domestic corporations or foreign corporations
18 authorized to transact business in this State are owners in the
19 aggregate of 50% or more of all classes of such corporation's capital
20 stock and, prior to such dissolution or distribution, all such holders of
21 the corporation's capital stock jointly and severally undertake in
22 writing to pay all such taxes on or before the date such taxes are
23 payable; or

24 (2) such corporate action is pursuant to a plan of reorganization
25 under which a domestic corporation or a foreign corporation
26 authorized to transact business in this State has purchased, or is about
27 to purchase, all, or substantially all, of the assets of such corporation
28 in exchange for shares of its capital stock and has undertaken in
29 writing to pay all such taxes on or before the date such taxes are
30 payable; and

31 c. no business entity shall merge or consolidate into any other
32 business entity other than a domestic [corporation] business entity or
33 a foreign [corporation] business entity authorized to transact business
34 in this State.

35 (cf: P.L.1995, c.279, s.23)

36
37 15. Section 3 of P.L.1973, c.367 (C.54:50-14) is amended to read
38 as follows:

39 3. The Secretary of State shall not:

40 a. accept for filing a certificate of dissolution of a domestic
41 corporation;

42 b. issue a certificate of withdrawal of a foreign corporation, unless
43 such withdrawal is effected by its merger or consolidation into a
44 domestic corporation or a foreign corporation authorized to transact
45 business in this State;

46 c. accept for filing a certificate of merger or consolidation of a

1 domestic corporation into a foreign corporation not authorized to
2 transact business in this State; or

3 d. accept for filing a certificate of merger or consolidation of any
4 business entity into any other business entity other than a domestic
5 [corporation] business entity or a foreign [corporation] business entity
6 authorized to transact business in this State;

7 unless the business entity files with the Secretary of State a
8 certificate issued by the Director of the Division of Taxation dated not
9 earlier than 45 days prior to the effective date of the business entity
10 action evidencing that the business entity's taxes have been paid or
11 provided for.

12 (cf: P.L.1995, c.279, s.24)

13

14 16. This act shall take effect immediately.

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16

17

STATEMENT

18

19 This bill makes revisions to the “New Jersey Limited Liability
20 Company Act” as suggested by the 1995 Annual Report of the New
21 Jersey Corporate and Business Law Study Commission, and in
22 recognition of recent Internal Revenue Service “check-the-box”
23 regulations, to put domestic and foreign business entities authorized
24 to transact business in New Jersey on a more “level playing field” with
25 similar entities in other states.

26 Significant among these revisions, the bill: allows for perpetual
27 existence of a limited liability company, as permitted by the recent IRS
28 rules; permits a limited liability company to continue temporarily with
29 only one member, so long as one or more additional members are
30 added within 90 days; revises the termination of membership
31 provisions; authorizes each member of a limited liability company,
32 when managed by its members, to bind the limited liability company,
33 including the authority to file for insolvency or reorganization on
34 behalf of the limited liability company; clarifies the rights of a resigning
35 member to receive the fair value of the member’s interest as of the
36 date of resignation; and finally, adds a new section to the act requiring
37 limited liability companies to file an annual report with the Secretary
38 of State.

39 The New Jersey Corporate and Business Law Study Commission is
40 charged with studying and reviewing statutes, legislation and decisions
41 of the courts of New Jersey and other states relating to business
42 entities, including business and nonprofit corporations, partnerships
43 and the issuance of ownership interests and securities, and then
44 reporting annually to the Governor and the Legislature concerning its
45 findings.

- 1 _____
- 2
- 3 Revises law concerning limited liability companies.