

SESSION OF 2014

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2398

As Amended by House Committee on Judiciary

Brief*

HB 2398 would make numerous changes to the Kansas Revised Limited Liability Act; however, many of these amendments would not substantively alter existing law. The bill would give a limited liability company (LLC) the power and authority to grant, hold, or exercise a power of attorney, including a revocable power of attorney, unless otherwise provided in the operating agreement. The bill would provide more specific information about irrevocable powers of attorney with respect to the organization, internal affairs, and termination of an LLC.

Pursuant to the bill, meetings of members and managers could be held by means of a conference call or other means of communication that allows all persons participating to hear each other. Participation in such meeting would constitute in-person presence at the meeting. Further, the bill would allow proxy to be granted by electronic transmission.

If not otherwise provided for in the operating agreement, the bill would require a unanimous vote of the members to amend the operating agreement. This requirement would not apply to LLCs whose original articles of organization were filed before July 1, 2014.

The bill would strike language requiring a manager to be chosen "by the members" to read that managers would be chosen as provided in the operating agreement. The bill also

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

would strike language governing members' ability to enter into contracts on behalf of an LLC.

The bill would provide that a liquidating trustee would be fully protected in relying in good faith upon the records of the LLC and such information, opinions, reports or statements presented by a person the liquidating trustee reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the LLC. This protection already exists for members and managers of an LLC.

The bill would prohibit a member from resigning from an LLC prior to the dissolution and winding up of the LLC and would provide that, unless otherwise provided in an operating agreement, within a reasonable time after resignation the member would be entitled to receive the fair value of such member's LLC interest as of the date of resignation. Current law allows resignation and states members are not entitled to the fair value upon resignation. These amendments would not apply to LLCs whose original articles of organization were filed before July 1, 2014.

The bill would strike language that gives the assignee of a member's LLC interest the right to participate in the management of the business and affairs of the LLC as a member when the assignor is the only member of the LLC at the time of the assignment. The bill also would amend the rights of a judgment creditor of a member or of a member's assignee.

Concerning dissolution and winding up of an LLC, the bill would increase from 1/2 to 2/3 the then-current percentage or other interest in the profits of the LLC members must own for a vote to dissolve an LLC. Further, the bill would expand on the provision that dissolves an LLC if at any time there are no members. Upon dissolution, the bill would require the LLC to make such provision as will be reasonably likely to provide compensation for any claim against the LLC that is the subject of a pending action, suit, or proceeding to

which the LLC is a party; and for claims that have not been made known to the LLC or that have not arisen but that, based on facts known to the LLC, are likely to arise or to become known to the LLC within ten years of dissolution. Additionally, the bill provides a member who receives a distribution in violation of the law governing distribution of assets upon winding up of an LLC would be liable to the LLC for the amount of the distribution for up to three years after the date of distribution.

The bill would allow for the expansion or elimination of a member's, manager's, or other person's duties in the operating agreement, except that the bill would prohibit the elimination of the implied contractual covenant of good faith and fair dealing. A member, manager, or other person would not be liable to an LLC or another member, manager, or another person who is a party to or is otherwise bound by an operating agreement for breach of a fiduciary duty for the member's, manager's, or other person's good faith reliance on the provision of the operating agreement. Similarly, an operating agreement could provide for the elimination of any and all liabilities for breach of contract and breach of duties, including fiduciary duties, except that the bill would prohibit the limitation or elimination of liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

The bill also includes new sections that would allow the district court to appoint one or more trustees or receivers to wind up the affairs of an LLC after dissolution; allow members of an LLC that has been dissolved other than by judicial decree to revoke the dissolution and continue the business by unanimous vote; and allow retroactive reinstatement of LLCs that have had their articles of organization or authority to do business canceled or forfeited for failure to file annual reports or failure to be current in their appointment of resident agents.

Background

The bill initially was heard in the House Judiciary Committee during the 2013 Legislative Session, where representatives of the Kansas Bar Association (KBA) and Office of the Secretary of State offered testimony in support of the bill. During the 2014 Legislative Session, the same proponents appeared before the House Judiciary Committee. The KBA representative explained that the Kansas Revised Limited Liability Company Act, which was enacted in 2000, was patterned on legislation from Delaware, which is considered “the gold standard” on business entity law. Since its adoption, the Act had not been comprehensively reviewed, and the KBA’s purpose in requesting the bill was to amend Kansas law to align with Delaware law as it has been amended to the extent those innovations are not inconsistent with Kansas law.

The Committee amended the bill to add language requiring an LLC to indemnify a present or former member, manager, officer, employee, or agent of an LLC to the extent such person has been successful on the merits or otherwise as plaintiff in an action to determine that the plaintiff is a member of an LLC. Additionally, the Committee adopted an amendment requested by the Office of the Secretary of State to strike the requirement that the date of filing be included in certificates of cancellation and reinstatement.

The fiscal note prepared by the Division of the Budget states the bill, as introduced, would increase expenditures for the Secretary of State by \$40,000 in FY 2013 to modify its online filing system because of the requirement that a certificate of reinstatement include the date of filing.