

1 **LIMITED LIABILITY COMPANY**

2 **AMENDMENTS**

3 2006 GENERAL SESSION

4 STATE OF UTAH

5 **Chief Sponsor: J. Stuart Adams**

6 Senate Sponsor: Curtis S. Bramble

7

8 **LONG TITLE**

9 **General Description:**

10 This bill modifies Title 48, Chapter 2c, Utah Revised Limited Liability Company Act.

11 **Highlighted Provisions:**

12 This bill:

- 13 ▶ allows the creation of a series within a limited liability company;
- 14 ▶ provides that a series may have a separate business purpose and separate rights and
- 15 liabilities from the limited liability company or another series of the company;
- 16 ▶ describes the requirements for creating a series;
- 17 ▶ provides a method for making distributions from a series;
- 18 ▶ outlines methods for termination of a series;
- 19 ▶ describes the winding up process for a series;
- 20 ▶ outlines the requirements for a foreign limited liability company, the operating
- 21 agreement of which allows the creation of a series, to do business in the state; and
- 22 ▶ makes technical changes.

23 **Monies Appropriated in this Bill:**

24 None

25 **Other Special Clauses:**

26 None

27 **Utah Code Sections Affected:**



28 AMENDS:

29 48-2c-120, as last amended by Chapter 141, Laws of Utah 2005

30 ENACTS:

31 48-2c-606, Utah Code Annotated 1953

32 48-2c-607, Utah Code Annotated 1953

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40 48-2c-615, Utah Code Annotated 1953

41 48-2c-616, Utah Code Annotated 1953



43 *Be it enacted by the Legislature of the state of Utah:*

44 Section 1. Section 48-2c-120 is amended to read:

45 **48-2c-120. Articles of organization and operating agreement.**

46 (1) A company's articles of organization or operating agreement may not:

47 (a) restrict a right to inspect and copy records under Section 48-2c-113;

48 (b) reduce the duties of members or managers under Section 48-2c-807;

49 (c) eliminate the obligation of good faith and fair dealing, except that the members by
50 written agreement may determine the standards by which the performance of the obligation is
51 to be measured, if the standards are not manifestly unreasonable;

52 (d) vary any filing requirement under this chapter;

53 (e) vary any requirement under this chapter that a particular action or provision be
54 reflected in a writing;

55 (f) vary the right to expel a member based on any event specified in Subsection
56 48-2c-710(3);

57 (g) vary the remedies under Section 48-2c-1210 for judicial dissolution of a company;

58 (h) except as allowed by Section 48-2c-1103 or any other provision of law, restrict

59 rights of, or impose duties on, persons other than the members, their assignees and transferees,
60 the managers, and the company, without the consent of those persons; or

61 (i) eliminate or limit the personal liability of any person vested with management
62 authority to the company or its members for damages for any breach of duty in the capacity
63 where a judgment or other final adjudication adverse to the manager establishes that the
64 manager's acts or omissions:

65 (i) were in bad faith;

66 (ii) involved gross negligence;

67 (iii) involved willful misconduct; or

68 (iv) ~~[the manager personally gained]~~ resulted in a financial profit or other advantage to
69 which the manager was not legally entitled.

70 (2) The articles of organization and operating agreement may:

71 (a) vary the requirement under Section 48-2c-1104 that, if all of the other members of
72 the company other than the member proposing to dispose of the member's interest do not
73 approve of the proposed transfer or assignment by unanimous written consent, the transferee of
74 the member's interest shall have no right to participate in the management of the business or
75 affairs of the company or to become a member; and

76 (b) vary the requirement under Section 48-2c-703 that, after the filing of the original
77 articles of organization, a person may be admitted as an additional member only upon the
78 written consent of all members.

79 Section 2. Section **48-2c-606** is enacted to read:

80 **48-2c-606. Series of members, managers, or limited liability company interests.**

81 (1) An operating agreement may establish or provide for the establishment of one or
82 more designated series of members, managers, or interests in the company having separate
83 rights, powers, or duties with respect to specified property or obligations of the limited liability
84 company or profits and losses associated with specified property or obligations.

85 (2) A series may have a business purpose or investment objective separate from the
86 company.

87 (3) Notwithstanding any other applicable law, a series' debts, liabilities, obligations,
88 and expenses are enforceable against the assets of that series only, and not against the assets of
89 the company generally or any other series if:

- 90 (a) the operating agreement provides for separate treatment of the series;
91 (b) separate and distinct records are maintained concerning the series;
92 (c) the assets associated with the series are held and accounted for separately from the
93 other assets of the company and any other series; and
94 (d) notice of the limitation on liability of a series is included in the company's articles
95 of organization.

96 (4) Unless otherwise provided in the operating agreement, none of the debts, liabilities,
97 obligations, and expenses incurred, contracted for, or otherwise existing with respect to the
98 company generally or any other series are enforceable against the assets of a series.

99 Section 3. Section **48-2c-607** is enacted to read:

100 **48-2c-607. Notice of series -- Articles of organization.**

101 (1) Notice in a company's articles of organization of the limitation on liabilities of a
102 series, as required by Section 48-2c-606, is sufficient whether or not the company has
103 established any series at the time the notice is included in the articles of organization.

104 (2) The notice required by Section 48-2c-606 need not reference any specific series.

105 (3) The filing of the notice required by Section 48-2c-606 with the division constitutes
106 notice of the limitation on liability of a series.

107 Section 4. Section **48-2c-608** is enacted to read:

108 **48-2c-608. Agreement to be liable.**

109 Notwithstanding Section 48-2c-601, a member or manager may agree to be obligated
110 personally for any or all of the debts, obligations, and liabilities of one or more series.

111 Section 5. Section **48-2c-609** is enacted to read:

112 **48-2c-609. Series related provisions in operating agreement.**

113 (1) An operating agreement may provide for classes or groups of members or managers
114 associated with a series.

115 (2) An operating agreement may provide for the future creation of additional classes or
116 groups of members or managers associated with a series having such relative rights, powers,
117 and duties as may from time to time be established, including rights, powers, and duties senior
118 to existing classes and groups of members or managers associated with the series.

119 (3) An operating agreement may provide for the taking of an action without the vote or
120 approval of any member or manager, or class or group of members or managers, including:

121 (a) an action to create a class or group of a series of interests in the company that was
122 not previously outstanding; and

123 (b) amending the operating agreement.

124 (4) An operating agreement may provide that any member or class or group of
125 members associated with a series has no voting rights.

126 (5) (a) An operating agreement may grant to all or certain identified members or
127 managers, or a specified class or group of the members or managers associated with a series,
128 the right to vote separately or with all or any class or group of the members or managers
129 associated with the series, on any matter.

130 (b) Voting by members or managers associated with a series may be on a per capita,
131 number, financial interest, class, group, or any other basis.

132 Section 6. Section **48-2c-610** is enacted to read:

133 **48-2c-610. Management of a series.**

134 (1) Unless otherwise provided in an operating agreement, the management of a series is
135 vested in the members associated with the series in proportion to the then-current percentage or
136 other interest of members in the profits of the series owned by all of the members associated
137 with the series.

138 (2) The decision of members owning more than 50% of the then-current percentage or
139 other interest in the profits controls.

140 (3) Notwithstanding Subsection (2), if an operating agreement provides for the
141 management of the series in whole or in part by a manager, the management of the series is
142 vested to that extent in the manager, who is chosen in the manner provided in the operating
143 agreement.

144 (4) The manager of a series holds the offices and has the responsibilities accorded to
145 the manager under the operating agreement.

146 (5) A series may have more than one manager.

147 (6) Subject to a manager's resignation, a manager ceases to be a manager with respect
148 to a series as provided in the operating agreement.

149 (7) Except as otherwise provided in an operating agreement, any event under this
150 chapter or in an operating agreement that causes a manager to cease to be a manager with
151 respect to a series does not, by itself, cause the manager to cease to be a manager of the limited

152 liability company or with respect to any other series.

153 Section 7. Section **48-2c-611** is enacted to read:

154 **48-2c-611. Distributions concerning a series.**

155 (1) Subject to an operating agreement, at the time a member associated with a series
156 becomes entitled to receive a distribution with respect to the series, the member has the status
157 of, and is entitled to all remedies available to, a creditor of the series with respect to the
158 distribution.

159 (2) An operating agreement may provide for the establishment of a record date for
160 allocations and distributions concerning a series.

161 (3) Notwithstanding Section 48-2c-1005, a limited liability company may make a
162 limited distribution with respect to a series only.

163 (4) No distribution may be made by a company under this section with respect to a
164 series if, after giving effect to the distribution:

165 (a) the series would not be able to pay its debts as they become due in the usual and
166 regular course of its business; or

167 (b) the value of the series' total assets would be less than the sum of:

168 (i) its total liabilities; and

169 (ii) unless the articles of organization or the operating agreement permit otherwise, the
170 amount that would be needed, if the series were to be dissolved and wound up at the time of the
171 distribution, to satisfy the preferential rights upon dissolution and winding up of members
172 whose preferential rights are superior to the rights of members receiving the distribution.

173 (5) The company may base a determination that a distribution is not prohibited under
174 Subsection (4) either on:

175 (a) financial statements prepared on the basis of accounting practices and principles
176 that are reasonable in the circumstances; or

177 (b) a fair valuation or other method that is reasonable in the circumstances.

178 (6) For purposes of this section, amounts constituting reasonable compensation for
179 present or past services or reasonable payments made in the ordinary course of business
180 pursuant to a bona fide retirement plan or other benefits program do not constitute a
181 distribution.

182 (7) A member who receives a distribution in violation of this section, and who knew at

183 the time of the distribution that the distribution violated this section, is liable to the series for
184 the amount of the distribution.

185 (8) Subject to Section 48-2c-1006, this section does not affect any obligation or
186 liability of a member under an agreement or other applicable law for the amount of a
187 distribution.

188 Section 8. Section **48-2c-612** is enacted to read:

189 **48-2c-612. Member removal from a series -- Effect.**

190 (1) Unless otherwise provided in the operating agreement, a member ceases to be
191 associated with a series and to have the power to exercise any rights or powers of a member
192 with respect to the series upon the assignment of all of the member's interest in the company
193 with respect to the series.

194 (2) Unless otherwise provided in an operating agreement, any event under this chapter
195 or the operating agreement that causes a member to cease to be associated with a series does
196 not, by itself:

197 (a) cause the member to cease to be associated with any other series;

198 (b) terminate the continued membership of a member in the limited liability company;

199 or

200 (c) cause the termination of the series, regardless of whether the member is the last
201 remaining member associated with the series.

202 Section 9. Section **48-2c-613** is enacted to read:

203 **48-2c-613. Termination of series.**

204 (1) Subject to Section 48-2c-1201, except to the extent otherwise provided in the
205 operating agreement, a series may be terminated and its affairs wound up without causing the
206 dissolution of the limited liability company.

207 (2) The termination of a series does not affect the limitation on liabilities of the series
208 provided by Section 48-2c-606.

209 (3) A series is terminated and its affairs shall be wound up upon the dissolution of the
210 limited liability company under Section 48-2c-1201 or otherwise upon the first to occur of the
211 following:

212 (a) the time specified in the operating agreement;

213 (b) the happening of events specified in the operating agreement;

214 (c) unless otherwise provided in the operating agreement, the affirmative vote or
215 written consent of:

216 (i) (A) the members of the limited liability company associated with the series; or

217 (B) if there is more than one class or group of members associated with the series, by
218 each class or group of members associated with the series; and

219 (ii) (A) members associated with the series who own more than 2/3 of the then-current
220 percentage or other interest in the profits of the series owned by all of the members associated
221 with the series; or

222 (B) the members in each class or group of the series, as appropriate; or

223 (d) the termination of the series under Section 48-2c-614.

224 Section 10. Section **48-2c-614** is enacted to read:

225 **48-2c-614. Court-decreed termination of series.**

226 On application by or for a member or manager associated with a series, the district court
227 may decree termination of the series whenever it is not reasonably practicable to carry on the
228 business of the series in conformity with an operating agreement.

229 Section 11. Section **48-2c-615** is enacted to read:

230 **48-2c-615. Participation in winding up.**

231 (1) Notwithstanding Section 48-2c-1303, unless otherwise provided in the operating
232 agreement, the series' affairs may be wound up by the following:

233 (a) a manager associated with a series who has not wrongfully terminated the series; or

234 (b) if there is no manager under Subsection (1)(a):

235 (i) the members associated with the series, or a person approved by the members
236 associated with the series, who own more than 50% of the then-current percentage or other
237 interest in the profits of the series owned by all of the members associated with the series; or

238 (ii) if there is more than one class or group of members associated with the series, then
239 by each class or group of members associated with the series owning more than 50% of the
240 then-current percentage or other interest in the profits of the series owned by all of the
241 members in each class or group associated with the series.

242 (2) (a) The district court may, upon cause shown, wind up the affairs of the series upon
243 application of any member associated with the series, the member's personal representative, or
244 the member's assignee.

245 (b) If the district court winds up the affairs of a series under Subsection (2)(a), the
246 district court may appoint a liquidating trustee.

247 (3) (a) A person winding up the affairs of a series may, in the name of the limited
248 liability company and on behalf of the limited liability company and the series, take any action
249 with respect to the series that is allowed by Part 13, Winding Up.

250 (b) A person winding up the affairs of a series shall comply with Part 13, Winding Up.

251 (c) The winding up the affairs of a series in accordance with this section does not:

252 (i) affect the liability of members; or

253 (ii) impose liability on a liquidating trustee.

254 Section 12. Section **48-2c-616** is enacted to read:

255 **48-2c-616. Foreign limited liability company -- Series.**

256 (1) If a foreign limited liability company that is registering to do business in the state is
257 governed by an operating agreement establishing or providing for the establishment of a series,
258 that fact shall be stated on the application for authority to transact business in the state.

259 (2) (a) A company shall identify on an application for authority to transact business in
260 the state which of the protections for the series and company found in Section 48-2c-606 apply
261 to a series.

262 (b) If different protections found in Section 48-2c-606 apply to different series of a
263 company, the application for authority to transact business in the state shall identify:

264 (i) the protections that apply to each existing series; and

265 (ii) the protections that will apply to any later-created series.

Legislative Review Note
as of 1-18-06 8:12 AM

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

Office of Legislative Research and General Counsel