

ACT 164

S.B. NO. 1139

A Bill for an Act Relating to Limited Liability Companies.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 428, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§428- Amended and restated articles of organization. (a) A limited liability company at any time may amend and restate its articles of organization by complying with the procedures and requirements of section 428-204.

(b) Upon its adoption, the amended and restated articles of organization shall set forth:

- (1) All of the operative provisions of the articles of organization as there-fore amended;
- (2) The information required by section 428-204; and
- (3) A statement that the amended and restated articles of organization supersede the original articles of organization and all amendments thereto.

(c) The amended and restated articles of organization shall be delivered to the director for filing. The director may certify the amended and restated articles of organization as the articles of organization currently in effect, without including the information required to be filed by subsection (b)(2) and (3).”

SECTION 2. Section 428-103, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) The operating agreement may not:

- (1) Unreasonably restrict a right to information or access to records under section 428-408;
- (2) Eliminate the duty of loyalty under section 428-409(b) or 428-603(b)(3), but the agreement may:
 - (A) Identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and
 - (B) Specify the number or percentage of members or disinterested managers that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;
- (3) Unreasonably reduce the duty of care under section 428-409(c) or 428-603(b)(3);
- (4) Eliminate the obligation of good faith and fair dealing under section 428-409(d), but the operating agreement may determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;
- (5) Vary the right to expel a member in an event specified in section 428-601(5);
- (6) Vary the requirement to wind up the limited liability company’s business in a case specified in section 428-801(3) or 428-801(4) [or 428-801(5)]; or
- (7) Restrict rights of third parties under this chapter, other than managers, members, or their transferees.”

SECTION 3. Section 428-111, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) A limited liability company may be organized under this chapter for any lawful purpose[; provided that the following purposes are prohibited:

- (1) Activities of a financial institution under chapter 412;
- (2) Activities under chapter 431; or
- (3) Activities under chapter 442, 448, 453, 455, 459, 460, 461, 463E, 465, 466, 471, or 605, or section 554-2.

A limited liability company shall be], subject to any law of this State governing or regulating business. [If the purpose for which a limited liability company is organized or its form makes it subject to a special provision of law, the limited liability company shall also comply with that provision.]”

SECTION 4. Section 428-404, Hawaii Revised Statutes, is amended by amending subsections (a), (b), and (c) to read as follows:

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

- (1) Each member has equal rights in the management and conduct of the company’s business; and
- (2) Except as specified in subsection (c) [or in section 428-801(3)(A)], any matter relating to the business of the company may be decided by a majority of the members[; and

- (3) Each member who is not an individual must be qualified to transact business in this State].
- (b) In a manager-managed limited liability company:
 - (1) The manager or managers have the exclusive authority to manage and conduct the company's business;
 - (2) Except as specified in subsection (c) [or in section 428-801(3)(A)], any matter relating to the business of the company may be exclusively decided by the manager or, if there is more than one manager, by a majority of the managers; and
 - (3) A manager shall:
 - (A) Be designated, appointed, elected, removed, or replaced by a vote, approval, or consent of a majority of the members; and
 - [(B) Be qualified to transact business in this State if the manager is an entity; and
 - (C)] (B) Remain in office until a successor has been elected [and qualified], unless the manager resigns or is removed sooner.

(c) The [following] only matters [require] of a limited liability company's business that require the consent of all the members [of the limited liability company:] are:

- (1) Amendments to the operating agreement under section 428-103;
- (2) Authorization or ratification of acts or transactions under section 428-103(b)(2)(B) which would otherwise violate the duty of loyalty;
- (3) Amendments to the articles of organization under section 428-204;
- (4) Compromising an obligation to make a contribution under section 428-402(b);
- (5) Compromising among members, of an obligation of a member to make a contribution or return money or other property paid or distributed in violation of this chapter;
- (6) Making interim distributions under section 428-405(a);
- (7) Admission of a new member;
- (8) Use of the company's property to redeem an interest subject to a charging order;
- (9) Consent to dissolve the company under section 428-801(2);
- (10) Waiving of the right to have the company's business wound up and the company terminated under section 428-802(b);
- (11) Merging the company with another entity under section 428-904(c)(1); and
- (12) Selling, leasing, exchanging, or otherwise disposing of all, or substantially all, of the company's property with or without goodwill."

SECTION 5. Section 428-503, Hawaii Revised Statutes, is amended by amending subsection (e) to read as follows:

- "(e) A transferee who does not become a member is entitled to:
- (1) Receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled;
 - (2) Receive, upon dissolution and winding up of the limited liability company's business:
 - (A) In accordance with the transfer, the net amount otherwise distributable to the transferor; and
 - (B) A statement of account only from the date of the latest statement of account agreed to by all the members; and
 - (3) Seek under section [428-801(6),] 428-801(5), a judicial determination that it is equitable to dissolve and wind up the company's business."

SECTION 6. Section 428-603, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) [If under section 428-801] Upon a member’s dissociation from a limited liability company [results in a dissolution and winding up of the company’s business, part VIII shall apply. If a member’s dissociation from the company does not result in a dissolution and winding up of the company’s business under section 428-801]:

- (1) In an at-will company, the company shall cause the dissociated member’s company interest to be purchased under part VII; and
- (2) In a company having a specified term:
 - (A) If the company dissolves and winds up its business on or before the expiration of its specified term, part VIII applies to determine the dissociated member’s rights to distributions; and
 - (B) If the company does not dissolve and wind up its business on or before the expiration of its specified term, the company must cause the dissociated member’s distributional interest to be purchased under part VII on the date of the expiration of the term specified at the time of the member’s dissociation.”

SECTION 7. Section 428-701, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) If the price and other terms of a purchase of a distributional interest are fixed or are to be determined by the operating agreement, the price and terms so fixed or determined govern the purchase unless the purchaser defaults. In that case the dissociated member is entitled to commence a proceeding to have the company dissolved under section [428-801(5).] 428-801(4).”

SECTION 8. Section 428-702, Hawaii Revised Statutes, is amended by amending subsection (d) to read as follows:

“(d) If the purchase is not completed in accordance with the specified terms, the company is to be dissolved upon application under section [428-801(5)(D).] 428-801(4)(D).¹ If a limited liability company is so dissolved, the dissociated member shall have the same rights and priorities in the company’s assets as if the sale had not been ordered.”

SECTION 9. Section 428-801, Hawaii Revised Statutes, is amended to read as follows:

“**[[§428-801]] Events causing dissolution and winding up of company’s business.** A limited liability company is dissolved, and its business shall be wound up, upon the occurrence of any of the following events:

- (1) An event specified in the operating agreement;
- (2) Consent of the number or percentage of members specified in the operating agreement;
- [(3) Dissociation of a member-manager or, if none, a member of an at-will company, and dissociation of a member-manager or, if none, a member of a company having a specified term but only if the dissociation was for a reason provided in section 428-601(6) to (10) and occurred before the expiration of the specified term, provided that the company is not dissolved and required to be wound up by reason of the dissociation:
 - (A) If, within ninety days after the dissociation, a majority of the remaining members agree to continue the business of the company; or

- (B) The business of the company is continued under a right to continue stated in the operating agreement;
- (4) (3) An event that makes it unlawful for all or substantially all of the business of the company to be continued[,]; provided that any cure of illegality within ninety days after notice to the company of the event shall be effective retroactively to the date of the event for purposes of this section;
- [(5)] (4) On application by a member or a dissociated member, upon entry of a judicial decree that:
 - (A) The economic purpose of the company is likely to be unreasonably frustrated;
 - (B) Another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the company's business with that member;
 - (C) It is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement;
 - (D) The company failed to purchase the petitioner's distributional interest as required by section 428-701; or
 - (E) The managers or members in control of the company have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial to the petitioner; or
- [(6)] (5) On application by a transferee of a member's interest, a judicial determination that it is equitable to wind up the company's business:
 - (A) After the expiration of the specified term, if the company was for a specified term at the time the applicant became a transferee by member dissociation, transfer, or entry of a charging order that gave rise to the transfer; or
 - (B) At any time, if the company was at-will at the time the applicant became a transferee by member dissociation, transfer, or entry of a charging order that gave rise to the transfer; or
- (7) The expiration of a specified term]."

SECTION 10. Section 428-811, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) A limited liability company administratively terminated may apply to the director for reinstatement within [ninety days] two years after the effective date of termination. The application shall:

- (1) Recite the name of the company and the effective date of its administrative termination;
- (2) State that all delinquent annual reports have been filed and that all delinquent fees, penalties, assessments, and costs have been paid; and
- (3) Contain a certificate from the director of taxation reciting that all taxes owed by the company have been paid."

SECTION 11. Section 428-1202, Hawaii Revised Statutes, is repealed.

SECTION 12. Statutory material to be repealed is bracketed. New statutory material is underscored.²

SECTION 13. This Act shall take effect on July 1, 1999; provided that any limited liability company administratively terminated before July 1, 1999, may apply to the director for reinstatement within ninety days after the effective date of

termination.

(Approved June 28, 1999.)

Notes

1. Period should be underscored.
2. Edited pursuant to HRS §23G-16.5.