

No. 2 of 2022.

*Nevis Limited Liability Company
(Amendment) Ordinance, 2022.*

Island of Nevis.



I assent,

HYLEETALIBURD, M.H.

Deputy Governor-General

20th October 2022.

ISLAND OF NEVIS

No. 2 of 2022

AN ORDINANCE to amend the Nevis Limited Liability Company Ordinance, No. 2 of 2017 and for matters related thereto and connected therewith.

[Published 10th November 2022, Official Gazette No. 67 of 2022.]

BE IT ENACTED by the King's Most Excellent Majesty, by and with the advice and consent of the Nevis Island Assembly and by the authority of same, as follows:-

1. Short Title

This Ordinance may be cited as the Nevis Limited Liability Company (Amendment) Ordinance, 2022.

2. Interpretation

In this Ordinance, the "Principal Ordinance" means the Nevis Limited Liability Company Ordinance, No. 2 of 2017.

3. Insertion of new sections 72A, 72B, 72C, 72D and 72E

The Principal Ordinance is amended by inserting immediately after section 72 the following new sections:

"72A. Merger of subsidiary limited liability companies

(1) A domestic limited liability company owning at least ninety percent (90%) of the outstanding interest, cash or other consideration of another domestic limited liability company or companies may merge such other limited liability company or companies into itself without the authorisation of the members of any such limited liability company. Its managers shall approve a plan of merger setting forth:

- (a) the name of each subsidiary limited liability company to be merged and the name of the surviving limited liability company, and if the name has been changed, the name under which it was formed;
- (b) the designation and outstanding interest, cash or other consideration of each subsidiary limited liability company to be merged and the interest, cash or other consideration owned by the surviving limited liability company;

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- (c) the terms and conditions of the proposed merger, including the manner and basis of converting the interest, cash or other consideration of each subsidiary limited liability company to be merged, not owned by the surviving limited liability company, into interest, bonds or securities, cash or other consideration to be paid or delivered in exchange for interest, bonds or securities of each such subsidiary limited liability company or a combination thereof; and
 - (d) such other provisions with respect to the proposed merger as the managers consider necessary or desirable.
- (2) A copy of such plan of merger or an outline of the material features thereof shall be delivered via any methods of delivering written communication, now known or hereinafter invented or adopted, which will provide proof of delivery and receipt of such communication to all holders of interest, bonds or securities of each subsidiary limited liability company to be merged, not owned by the surviving limited liability company, unless the giving of such copy or outline has been waived by such holders.
- (3) The surviving limited liability company shall deliver duplicate originals of the Articles of Merger to the Registrar of Companies and those Articles of Merger shall set forth:
- (a) the plan of merger;
 - (b) the date when the Articles of Organisation of each constituent limited liability company were filed with the Registrar of Companies; and
 - (c) if the surviving limited liability company does not own all the interest of each subsidiary limited liability company to be merged, either the date of the giving to holders of interest, cash or other consideration of each subsidiary limited liability company, not owned by the surviving limited liability company, a copy of the plan of merger or an outline of the material features thereof, or a statement that the giving of such copy or outline has been waived, if such is the case.
- (4) The Articles of Merger shall be filed with the Registrar of Companies in accordance with the provisions of section 4.

72B. Merger or consolidation of domestic and foreign limited liability companies

- (1) One (1) or more foreign limited liability companies may be merged or consolidated with one (1) or more domestic limited liability companies in the following manner, if such merger or consolidation is permitted by the laws of the jurisdiction under which each such foreign limited liability company is formed:
- (a) each domestic limited liability company shall comply with the provisions of this Ordinance with respect to the merger or consolidation as the case may be, of domestic limited liability companies and each foreign limited liability company shall comply with the applicable provisions of the laws of the jurisdiction under which it is formed;

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- (b) if the surviving or consolidated limited liability company is to be governed by the laws of any jurisdiction other than Nevis, it shall file with the Registrar of Companies:
 - (i) an agreement that it will promptly pay to the dissenting members of any such domestic limited liability company the amount, if any, to which they shall be entitled under the provisions of this Ordinance with respect to the rights of dissenting members; and
 - (ii) a certificate of merger or consolidation issued by the appropriate official of the foreign jurisdiction.
- (2) The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic limited liability companies if the surviving or consolidated limited liability company is to be governed by this Ordinance.
- (3) If the surviving or consolidated limited liability company is to be governed by the laws of a jurisdiction other than Nevis, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic limited liability companies, except insofar as the laws of such other jurisdiction provide otherwise.
- (4) The effective date of a merger or consolidation in cases where the surviving or consolidated limited liability company is to be governed by the laws of any foreign jurisdiction shall be determined by the filing requirements and laws of such foreign jurisdiction.
- (5) The procedure for the merger of a subsidiary limited liability company or limited liability company under this Ordinance shall be available where either a subsidiary limited liability company or the limited liability company owning at least ninety percent (90%) of the outstanding interest, cash or other consideration of a subsidiary is a foreign limited liability company and such merger is permitted by the laws of the jurisdiction under which such foreign limited liability company is formed.

72C. Sale, lease, exchange or other disposition of assets.

- (1) A sale, lease, exchange or other disposition of all or substantially all the assets of a limited liability company, if not made in the usual or regular course of the business actually conducted by such limited liability company, shall be authorized only in accordance with the following procedure:
 - (a) the managers shall approve the proposed sale, lease, exchange or other disposition and direct its submission to a vote of the members;
 - (b) notice of the meeting shall be given to each member, whether or not entitled to vote; and
 - (c) at such meeting, the managers may authorise such sale, lease, exchange or other disposition and may fix or may authorise the managers to fix any and all terms and conditions thereof and the consideration to be received by the limited liability company therefor.

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(2) An authorisation under subsection (1)(c) shall require the affirmative vote of the holders of two-thirds of the interest of the limited liability company entitled to vote thereon unless any class of interest is entitled to vote thereon as a class, in which event such authorisation shall require the affirmative vote of the holders of a majority of the interest of each class of interest entitled to vote as a class thereon and of the total interest entitled to vote thereon.

(3) The managers may authorise any mortgage or pledge of, or the creation of a security interest in, all or any part of the property of the limited liability company, or any interest therein, wherever situated.

(4) Unless the Articles of Organisation provide otherwise, no vote or consent of the managers shall be required to authorise such action by the managers under subsection (3).

72D. Right of dissenting members to receive payment for interest.

A member of a limited liability company shall have the right to dissent from any of the following company actions and receive payment of the fair value of his interest, cash or other consideration:

- (a) a plan of merger or consolidation to which the limited liability company is a party; or
- (b) a sale or exchange of all or substantially all of the property and assets of the limited liability company, not made in the usual and regular course of its business, including a sale in dissolution, but not including a sale pursuant to an order of a Court having jurisdiction in the premises or a sale for cash on terms requiring that all or substantially all the net proceeds of sale be distributed to the members, in accordance with their respective interest, cash or other consideration within one (1) year of the date of the sale.

72E. Procedure to enforce member's right to receive payment for interest, cash or consideration

(1) A member intending to enforce his right to receive payment for his interest, cash or other consideration if certain proposed company action is taken, shall file with the limited liability company, written objection to the action before the meeting of members at which the action is to be submitted to a vote, or at such meeting but before the vote, file written objection to the action.

(2) The objection by a member under subsection (1) shall include a statement that he intends to demand payment for his interest, cash or other consideration if the action is taken.

(3) Such objection is not required from any member to whom the limited liability company did not give notice of such meeting in accordance with this Ordinance, or where the proposed action is authorized by written consent of members without a meeting.

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- (4) Within twenty (20) days after the members' authorisation date, which term as used in this section means the date on which the members' vote authorizing such action was taken, or the date on which such consent without a meeting was obtained from the requisite members, the limited liability company shall give written notice of such authorization or consent by any method of delivering written communication, now known or hereinafter invented or adopted, which will provide proof of the delivery and receipt of such communication, to each member who filed written objection or from whom written objection was not required, excepting any who voted for or consented in writing to the proposed action.
- (5) Within twenty (20) days after giving of notice to him, any member to whom the limited liability company was required to give such notice and who elects to dissent shall file with the limited liability company a written notice of such election, stating his name and residential address, the number and classes of interest as to which he dissents, and a demand for payment of the fair value of his interest, cash or other consideration.
- (6) A member who elects to dissent from a merger under section 72D shall file a written notice of such election to dissent within twenty (20) days after the giving to him of a copy of the plan of merger, or an outline of the material features thereof under.
- (7) A member may not dissent as to fewer than all the interest, cash or other consideration that he owns beneficially. A nominee or fiduciary may not dissent on behalf of any beneficial owner as to fewer than all the interest, cash or other consideration of such owner held of record by such nominee or fiduciary.
- (8) Upon filing a notice of election to dissent, the member shall cease to have any of the rights of a member, except the right to be paid fair value for his interest, cash or other consideration.
- (9) Within seven (7) days after the expiration of the period within which members may file their notices of election to dissent, or within seven (7) days after the proposed company action is consummated, whichever is later, the limited liability company, or in the case of a merger or consolidation, the surviving or consolidated limited liability companies, shall make a written offer and send by any method of delivering communication, now known or hereinafter invented or adopted, which will provide proof of the delivery and receipt of such communication, to each member who has filed such notice of election to pay for his interest at a specified price which the limited liability company considers to be their fair value.
- (10) If within thirty (30) days after the making of an offer under subsection (9), the limited liability company making the offer and any member agree upon the price to be paid for his interest, payment therefor shall be made within thirty (30) days after the making of such offer upon the surrender of the certificates representing such interest.

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(11) The following procedure shall apply if the limited liability company fails to make an offer with the period of seven (7) days, or if it makes the offer and any dissenting member fails to agree with it within the period of thirty (30) days thereafter upon the price to be paid for the interest of such member:

- (a) The limited liability company shall, within twenty (20) days after the expiration of whichever is applicable of the two periods last mentioned, institute a special proceeding in the High Court to determine the rights of the dissenting members and to fix the fair value of their interest. If in the case of a merger or consolidation the surviving or consolidated limited liability company is not registered under this Ordinance, such legal action shall be brought in the appropriate court in such foreign domicile where the limited liability company is registered.
- (b) If the limited liability company fails to institute legal action within such period of twenty (20) days, any dissenting member may institute legal action for the same purpose not later than thirty (30) days after the expiration of such twenty (20) day period. If legal action is not instituted within the thirty (30) day period, all dissenters' rights shall be lost unless the court, for good cause shown, shall otherwise direct;
- (c) all dissenting members, except those who have agreed with the limited liability company upon the price to be paid for their interest, shall be made parties to such legal action which shall have the effect of an action quasi in rem against their interest. The limited liability company shall serve a copy of the petition in such legal action upon each dissenting member, in the manner provided by law for the service of summons;
- (d) the court shall determine whether each dissenting member, as to whom the limited liability company requests the court to make such determination, is entitled to receive payment for his interest. If the limited liability company does not request any such determination or if the court finds that any dissenting member is so entitled, it shall proceed to fix the value of the interest, which for the purpose of this section, shall be the fair value as of the close of business on the day prior to the members' authorisation date, excluding any appreciation or depreciation directly or indirectly induced by such company action or its proposal. The court may appoint an appraiser to receive evidence and recommend a decision on the question of fair value; and
- (e) the final order in the proceeding shall be entered against the limited liability company in favour of each dissenting member who is a party to the proceeding and is entitled thereto for the value of his interest so determined. Within sixty (60) days after the final determination of the proceeding, the limited liability company shall pay each dissenting member the amount found to be due to him, upon surrender of the certificates representing his interest.

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(12) Interest acquired by the limited liability company upon payment of the agreed value therefor or of the amount due under the final order, as provided in this section, shall become treasury interest or be cancelled except that, in the case of a merger or consolidation, they may be held and disposed of as the plan of merger or consolidation may otherwise provide.

(13) The enforcement by a member of his right to receive payment for his interest in the manner provided herein, shall exclude the enforcement by such member of any right to which he might otherwise be entitled by virtue of interest ownership, except that this section shall not exclude the right of such member to bring or maintain an appropriate action to obtain relief on the ground that such company action will be or is illegal or fraudulent as to such member.

4. Amendment to Section 73

Section 73 of the Principal Ordinance is amended as follows:

(a) In the heading by deleting the heading in its entirety and replacing it as follows:

“73. Removal from register and restoration.”

(b) In subsection (4) by deleting the subsection in its entirety and replacing it as follows:

“(4) A limited liability company which is removed from the register pursuant to subsections (1) and (2) shall, subject to subsection (7), be restored to the register within three (3) years of the date of removal, upon filing an application for restoration with the Registrar of Companies in the prescribed form together with the prescribed fee for restoration and all outstanding fees and penalties accrued as at the date of the application.”

(c) In subsection (6) by deleting that subsection in its entirety and replacing it as follows:

“(6) Where a limited liability company has been removed from the register of companies for over three (3) years, the Registrar of Companies may in his discretion, restore a limited liability company to the register of companies at any time upon an application made by the limited liability company for restoration on the prescribed form and upon payment to the Registrar of Companies of the prescribed fees.

HONOURABLE FARREL SMITHEN
President

Passed by the Nevis Island Assembly this 18th day of October, 2022.

MYRA A WILLIAMS
Clerk of the Nevis Island Assembly

