322C.0408 INDEMNIFICATION AND INSURANCE.

Subdivision 1. **Definitions.** (a) For purposes of this section, the terms defined in this subdivision have the meanings given them.

(b) "Limited liability company" includes a domestic or foreign limited liability company that was the predecessor of the limited liability company referred to in this section in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction.

(c) "Official capacity" means (1) with respect to a member of a member-managed company, a manager of a manager-managed company, or a governor of a board-managed company, actions taken in that capacity, (2) with respect to a person other than a member of a member-managed company, a manager of a manager-managed company, or a governor of a board-managed company, the elective or appointive office or position held by a manager or officer, member of a committee of the board of governors, the employment relationship undertaken by an employee of the limited liability company, or the scope of the services provided by members of the limited liability company who provide services to the limited liability company, and (3) with respect to a governor, manager, member, or employee of the limited liability company who, while a member, governor, manager, or employee of the limited liability company, is or was serving at the request of the limited liability company or whose duties in that position involve or involved service as a governor, director, manager, officer, member, partner, trustee, employee, or agent of another organization or employee benefit plan, the position of that person as a governor, director, manager, officer, member, partner, trustee, employee, or agent, as the case may be, of the other organization or employee benefit plan.

(d) "Proceeding" means a threatened, pending, or completed civil, criminal, administrative, arbitration, or investigative proceeding, including a proceeding by or in the right of the limited liability company.

(e) "Special legal counsel" means counsel who has not in the preceding five years (1) represented the limited liability company or a related organization in a capacity other than special legal counsel, or (2) represented a member, governor, manager, member of a committee of the board of governors, or employee, or other person whose indemnification is in issue.

Subd. 2. **Indemnification.** (a) Subject to the provisions of subdivision 4, a limited liability company shall indemnify a person made or threatened to be made a party to a proceeding by reason of the former or present official capacity of the person against judgments, penalties, fines, including, without limitation, excise taxes assessed against the person with respect to an employee benefit plan, settlements, and reasonable expenses, including attorney fees and disbursements, incurred by the person in connection with the proceeding, if, with respect to the acts or omissions of the person complained of in the proceeding, the person:

(1) has not been indemnified by another organization or employee benefit plan for the same judgments, penalties, fines, including, without limitation, excise taxes assessed against the person with respect to an employee benefit plan, settlements, and reasonable expenses, including attorney fees and disbursements, incurred by the person in connection with the proceeding with respect to the same acts or omissions;

(2) acted in good faith;

(3) received no improper personal benefit and complied with the duties stated in sections 322C.0405 and 322C.0409, if applicable;

(4) in the case of a criminal proceeding, had no reasonable cause to believe the conduct was unlawful; and

(5) in the case of acts or omissions occurring in the official capacity described in subdivision 1, paragraph (c), clause (1) or (2), reasonably believed that the conduct was in the best interests of the limited liability company, or in the case of acts or omissions occurring in the official capacity described in subdivision 1, paragraph (c), clause (3), reasonably believed that the conduct was not opposed to the best interests of the limited liability company. If the person's acts or omissions complained of in the proceeding relate to conduct as a director, officer, trustee, employee, or agent of an employee benefit plan, the conduct is not considered to be opposed to the best interests of the limited liability company if the person reasonably believed that the conduct was in the best interests of the participants or beneficiaries of the employee benefit plan.

(b) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent does not, of itself, establish that the person did not meet the criteria set forth in this subdivision.

Subd. 3. **Advances.** Subject to the provisions of subdivision 4, if a person is made or threatened to be made a party to a proceeding, the person is entitled, upon written request to the limited liability company, to payment or reimbursement by the limited liability company of reasonable expenses, including attorney fees and disbursements, incurred by the person in advance of the final disposition of the proceeding:

(1) upon receipt by the limited liability company of a written affirmation by the person of a good faith belief that the criteria for indemnification in subdivision 2 have been satisfied and a written undertaking by the person to repay all amounts so paid or reimbursed by the limited liability company, if it is ultimately determined that the criteria for indemnification have not been satisfied; and

(2) after a determination that the facts then known to those making the determination would not preclude indemnification under this section.

The written undertaking required by clause (1) is an unlimited general obligation of the person making it, but need not be secured and shall be accepted without reference to financial ability to make the repayment.

Subd. 4. **Prohibition or limit on indemnification or advances.** The articles of organization or the operating agreement either may prohibit indemnification or advances of expenses otherwise required by this section or may impose conditions on indemnification or advances of expenses in addition to the conditions contained in subdivisions 2 and 3 including, without limitation, monetary limits on indemnification or advances of expenses, if the conditions apply equally to all persons or to all persons within a given class. A prohibition or limit on indemnification or advances may not apply to or affect the right of a person to indemnification or advances of expenses with respect to any acts or omissions of the person occurring before the effective date of a provision in the articles of organization, a member control agreement, or the date of adoption of a provision in the bylaws establishing the prohibition or limit on indemnification or advances.

Subd. 5. **Reimbursement to witnesses.** This section does not require, or limit the ability of, a limited liability company to reimburse expenses, including attorney fees and disbursements, incurred by a person in connection with an appearance as a witness in a proceeding at a time when the person has not been made or threatened to be made a party to a proceeding.

Subd. 6. **Determination of eligibility.** (a) All determinations whether indemnification of a person is required because the criteria in subdivision 2 have been satisfied and whether a person is entitled to payment or reimbursement of expenses in advance of the final disposition of a proceeding as provided in subdivision 3 must be made:

(1) in a board-managed limited liability company:

(i) by the board of governors by a majority of a quorum, provided that governors who are, at the time, parties to the proceeding shall not be counted for determining either a majority or the presence of a quorum;

(ii) if a quorum under item (i) cannot be obtained, by a majority of a committee of the board of governors, consisting solely of two or more governors not at the time parties to the proceeding, duly designated to act in the matter by a majority of the full board of governors including governors who are parties; and

(iii) if a determination is not made under item (i) or (ii), by special legal counsel, selected either by a majority of the board of governors or a committee by vote pursuant to item (i) or (ii) or, if the requisite quorum of the full board of governors cannot be obtained and the committee cannot be established, by a majority of the full board of governors including governors who are parties;

(2) in all other cases, by the affirmative vote of the members, subject to section 322C.1204, subdivision 3, with each member having voting power in proportion to the member's interest in distributions of the limited liability company prior to dissolution, but the membership interests held by parties to the proceeding must not be counted in determining the presence of a quorum and are not considered to be present and entitled to vote on the determination; or

(3) if an adverse determination is made under clause (1) or (2), or if no determination is made under clause (1) or (2) within 60 days after (i) the later to occur of the termination of a proceeding or a written request for indemnification to the limited liability company or (ii) a written request for an advance of expenses, as the case may be, by a court in this state, which may be the same court in which the proceeding involving the person's liability took place, upon application of the person and any notice the court requires. The person seeking indemnification or payment or reimbursement of expenses pursuant to this clause has the burden of establishing that the person is entitled to indemnification or payment or reimbursement of expenses.

(b) With respect to a person who is not, and was not at the time of the acts or omissions complained of in the proceedings, a member, governor, manager, or person possessing, directly or indirectly, the power to direct or cause the direction of the management or policies of the limited liability company, the determination whether indemnification of this person is required because the criteria set forth in subdivision 2 have been satisfied and whether this person is entitled to payment or reimbursement of expenses in advance of the final disposition of a proceeding as provided in subdivision 3 may be made (i) in a board-managed limited liability company, by an annually appointed committee of the board of governors, having at least one member who is a governor, which committee shall report at least annually to the board of governors concerning its actions and (ii) in all other cases by a committee appointed annually by the members, having at least one committee member who is a member of the limited liability company, which committee shall report at least annually to the board of governors concerning its actions.

Subd. 7. **Insurance.** A limited liability company may purchase and maintain insurance on behalf of a member, manager, or governor of the company against liability asserted against or incurred by the member, manager, or governor in that capacity or arising from that status even if, under section 322C.0110, subdivision 7, the operating agreement could not eliminate or limit the person's liability to the company for the conduct giving rise to the liability and whether or not the limited liability company would have been required to indemnify the person against the liability under this section.

Subd. 8. **Disclosure.** A limited liability company that indemnifies or advances expenses to a person according to this section in connection with a proceeding by or on behalf of the limited liability company shall report to the members in writing the amount of the indemnification or advance and to whom and on whose behalf it was paid not later than the next meeting of members.

Subd. 9. **Indemnification of other persons.** Nothing in this section must be construed to limit the power of the limited liability company to indemnify persons other than a governor, manager, member, employee, or member of a committee of the board of the limited liability company, by contract or otherwise.

History: *2014 c 157 art 1 s 37; 2015 c 39 s 35*