

ANALYSIS OF 2009 AMENDMENTS TO THE DELAWARE LIMITED LIABILITY COMPANY ACT

By *Matthew J. O'Toole, Esquire* and *Robert L. Symonds, Jr., Esquire*
Stevens & Lee
Wilmington, Delaware

The Delaware Limited Liability Company Act, 6 *Del. C.* § 18-101 *et seq.* (the “Act”), has been amended in 2009, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 2009 amendments to the Act were contained in Delaware State Senate Bill No. 82, 77 *Del. Laws*, c. 58, and in Delaware State House Substitute No. 1 for House Bill No. 267 as amended by House Amendment No. 2, 77 *Del. Laws*, c. 78, §§ 25-37, 69, and became effective August 1, 2009. Among the provisions of the Act that have been amended are those concerning: subject matter jurisdiction of the Delaware Court of Chancery; execution of a certificate of merger or consolidation filed with the Delaware Secretary of State; amendment of the certificate of formation; the doctrine of independent legal significance; and amounts payable to the Delaware Secretary of State.

Subject matter jurisdiction of the Delaware Court of Chancery [§ 18-111]. Section 18-111 of the Act establishes that certain actions may be brought in the Court of Chancery of the State of Delaware. New language added to that Section provides that any action to interpret, apply or enforce any provision of the Act, or of any instrument, document, agreement or certificate contemplated by the Act, may be brought in the Court of Chancery. As such actions are in addition to other proceedings that already may be brought in the Court of Chancery pursuant to such Section, the effect of the amendment to Section 18-111 is to broaden the court’s subject matter jurisdiction.

Execution of certificate of merger or consolidation filed with the Delaware Secretary of State [§§ 18-204 and 18-209]. Section 18-204 of the Act addresses the execution of certificates filed with the Secretary of State of the State of Delaware. As amended in 2009, Section 18-204(a) clarifies that a certificate of merger or consolidation filed by a surviving or resulting “other business entity” must be executed by a person authorized to execute the certificate on behalf of such other business entity. A conforming amendment was made to Section 18-209(a).

Amendment of the certificate of formation [§ 18-209]. Section 18-209(c) of the Act has been amended to facilitate a change of the registered agent or registered office of a Delaware limited liability company that is the surviving entity in a merger. As revised, Section 18-209(c) provides that a certificate of merger may set forth an amendment to the certificate of formation of a surviving Delaware limited liability company to change its registered agent or registered office. This amendment obviates the need for a separate filing, which previously was required to effect such a change.

Doctrine of independent legal significance [§§ 18-209, 18-302, and 18-1101].

Predictability is a hallmark of the Act, but in the view of some practitioners, the Delaware Court of Chancery's 2007 decision in the *Twin Bridges Limited Partnership* case nurtured uncertainty about the application of the doctrine of independent legal significance in the limited liability company setting. Senate Bill No. 82 in 2009 amended Sections 18-209(f), 18-302(e), and 18-1101(h) of the Act with the intent of removing any such doubt. New subsection (h) in Section 18-1101 clarifies that the doctrine of independent legal significance, as developed in the Delaware corporation law, applies in the Delaware limited liability company context. (The synopsis to Senate Bill No. 82 makes clear that this provision is not intended to limit the development or application, with respect to Delaware limited liability companies, of the doctrine as developed in corporate law cases.) The changes to Sections 18-209(f) and 18-302(e) specifically confirm that, in a properly approved merger, the merger agreement may effect any amendment to the limited liability company agreement of a Delaware limited liability company that survives the merger. In accordance with the Act's freedom of contract policy, however, this statutory rule is not controlling when a provision in the limited liability company agreement by its terms applies to and governs such an amendment.

Amounts payable to Delaware Secretary of State [§§ 18-1105, 18-1107, and 18-1109].

The Act requires the payment of various amounts to the Delaware Secretary of State. Amendments to Sections 18-1105, 18-1107, and 18-1109 were included in Delaware State House Substitute No. 1 for House Bill No. 267 as amended by House Amendment No. 2. These changes adjust a number of different fees payable to the Secretary of State under the Act, such as the fee for a certified copy of a filed document and the fee for the issuance of a good standing certificate. Also, pursuant to language newly added to Section 18-1105(b)(1) of the Act, 30-minute expedited service is now available from the Secretary of State, for a substantial fee. In addition, the amendment to Section 18-1109 modifies the calculation of penalties and interest payable upon revival of a Delaware limited liability company, in a way that may alleviate the payment burden in some cases. The annual tax payable under the Act was unchanged in 2009.