

2010 AMENDMENTS TO THE
DELAWARE LIMITED LIABILITY COMPANY ACT

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The Delaware Limited Liability Company Act, 6 *Del. C.* § 18-101 *et seq.* (the “Act”), has been amended in 2010, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 2010 amendments to the Act were contained in Delaware State House Bill No. 372, 77 *Del. Laws*, c. 287, and became effective August 2, 2010. Among the provisions of the Act that have been amended are those concerning: inapplicability of the statute of frauds to limited liability company agreements; power of a limited liability company to grant, hold or exercise a power of attorney, and the irrevocability of certain powers of attorney relating to the organization, internal affairs or termination of a limited liability company; creation of a mechanism to implement a “short form” merger under new Section 267 of Delaware’s General Corporation Law where a Delaware limited liability company is the parent entity; scope of information rights of members and managers, contractual variation of the time period for responding to information demands by members and managers, and validity of amendments to a limited liability company agreement that are adopted in accordance with such agreement; issuance of rules and regulations by the Delaware Secretary of State allowing for electronic service of process upon the Secretary of State; confirmation of circumstances in which an assignee of a limited liability company interest may participate in management or become a member; and enforceability of the contractual choice of Delaware law in a limited liability company agreement.

Statute of frauds and limited liability company agreements [§ 18-101]. For many years the Act has permitted oral limited liability company agreements, and it explicitly recognizes that members, managers and assignees of limited liability company interests may be bound by a limited liability company agreement whether or not they execute it. In 2009, however, the Delaware Supreme Court in *Olson v. Halvorsen*, C.A. No. 1884 (Del. Supr. Dec. 15, 2009), affirmed that a limited liability company agreement is subject to the statute of frauds, which requires an agreement that cannot be performed within one year to be in writing. In light of the *Olson* decision Section 18-101(7) of the Act has been amended to provide specifically that limited liability company agreements are not subject to the statute of frauds.

Powers of attorney [§§ 18-106 and 18-204]. Section 18-106 of the Act has been amended to add a new subsection (d) confirming that, unless otherwise provided in a limited liability company agreement, a Delaware limited liability company has the power and authority to grant, hold or exercise a power of attorney, including an irrevocable power of attorney. In addition, a new subsection has been added to Section 18-204 to provide guidance as to when a power of attorney will be irrevocable. Under new Section 18-204(c) of the Act, for all purposes of the laws of the State of Delaware, a power of attorney with respect to matters relating to the organization, internal affairs or termination of a limited liability company is irrevocable if it

states that it is irrevocable and if it is coupled with an interest sufficient in law to support an irrevocable power. New Section 18-204(c) also clarifies the circumstances in which such a power of attorney will be deemed coupled with an interest sufficient in law to support an irrevocable power.

“Short form” mergers under new DGCL Section 267 [§§ 18-203, 18-206, 18-209, 18-210, 18-301 and 18-1105]. The General Corporation Law of the State of Delaware (DGCL) was amended to add a new Section 267 that permits a non-corporate parent entity, including a limited liability company, to effect a “short form” merger with its subsidiary corporation or corporations. Numerous provisions of the Act have been amended to provide a mechanism for implementing a short form merger under new DGCL Section 267 where a Delaware limited liability company is the parent entity seeking to accomplish such merger.

Information demands by members and managers; amendments restricting information rights [§ 18-305]. Section 18-305(f) of the Act has been amended to clarify the categories of information that are within its scope and to clarify that the statutorily prescribed time period for responding to an information demand by a member or manager may be varied by a limited liability company agreement, but not for a period longer than 30 business days. An amendment to Section 18-305(g) clarifies and confirms that all amendments to a limited liability company agreement, including those that restrict the rights of a member or manager to obtain information, are valid if adopted in the manner provided for in such agreement.

Electronic service of process on Delaware Secretary of State [§§ 18-105, 18-209, 18-213, 18-216, 18-910 and 18-911]. In certain circumstances the Act permits service of process on a Delaware limited liability company or on a foreign limited liability company registered or doing business in the State of Delaware to be effected by service of such process upon the Delaware Secretary of State. Amendments to Sections 18-105(b), 18-209(c)(8), 18-213(b)(7), 18-216(e)(7), 18-910(b), 18-911(a) and 18-911(c) allow for service of process upon the Secretary of State by means of electronic transmission but only as prescribed by the Secretary of State. These amendments also authorize the Secretary of State to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate.

Assignee rights [§§ 18-702 and 18-704]. An amendment to Section 18-702(a) confirms the circumstances in which an assignee of a limited liability company interest may participate in the management of the business and affairs of a limited liability company. Likewise Section 18-704(a) of the Act has been amended to confirm the circumstances in which an assignee may become a member.

Law governing limited liability company agreement [§ 18-1101]. Section 18-1101 of the Act has been amended to provide that a limited liability company agreement that provides for the application of Delaware law shall be governed by and construed under the laws of the State of Delaware in accordance with its terms. This amendment, which is embodied in a new subsection (i), is not intended to negate the application of Delaware law to the interpretation and enforcement of a limited liability company agreement that does not explicitly provide for the

application of Delaware law, or to negate the application of the internal affairs doctrine to Delaware limited liability companies.