

2007 AMENDMENTS TO THE DELAWARE LIMITED LIABILITY COMPANY ACT

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Introduction

The Delaware Limited Liability Company Act, 6 *Del. C.* § 18-101 *et seq.* (the “Act”), has been amended in 2007, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 2007 amendments to the Act were contained in Delaware State Senate Bill No. 96, and became effective August 1, 2007. *See* 76 *Del. Laws*, c. 105. Among the provisions of the Act that have been amended are those concerning: the limited liability company agreement; defined terms; cancellation of the certificate of formation; good standing certificates; merger and consolidation; limited liability company power; appraisal rights; and series.

Limited liability company agreement [§§ 18-101 and 18-201]. Senate Bill No. 96 amended the meaning of the term “limited liability company agreement,” set forth in Section 18-101(7), to include implied agreements. This change conforms the Act’s definition of “limited liability company agreement” to the definition of “partnership agreement” under the Delaware Revised Uniform Partnership Act. Section 18-201 of the Act also was amended, making conforming changes in regard to the foregoing revised definition and also confirming that the Act requires a limited liability company agreement.

Defined terms [§ 18-101]. The 2007 amendment to Section 18-101(11) of the Act clarifies the intended meaning of the term “member.”

Cancellation of certificate of formation [§§ 18-203 and 18-206]. Section 18-203 of the Act has been amended in 2007 to clarify the time at which the certificate of formation is cancelled in connection with certain mergers, consolidations, transfers, and conversions. A technical amendment to Section 18-206(b) confirms that the certificate of formation is cancelled as specified in Section 18-1108(a) upon a limited liability company’s failure to pay the annual tax under the Act for three years from the due date of such payment.

Good standing certificates [§ 18-203]. Section 18-203 of the Act has been amended to confirm that the Delaware Secretary of State shall not issue a certificate of good standing with respect to a limited liability company if its certificate of formation is cancelled.

Merger and consolidation [§ 18-209]. Section 18-209 of the Act governs the merger or consolidation of a limited liability company. Several amendments to this Section were enacted in 2007. Amendments to the meaning of the term “other business entity,” defined in Section 18-209(a) and used throughout the Section, confirm the flexibility that exists under Section 18-209. The amendments to Section 18-209(c)(8) provide that a certificate of merger or consolidation

need not contain a consent to jurisdiction where the surviving or resulting entity is a Delaware general partnership. Finally, a new provision added to Section 18-209(g) confirms that, unless otherwise agreed, the merger or consolidation of a limited liability company does not constitute its dissolution.

Limited liability company power [§§ 18-209, 18-213, 18-216, and 18-702]. New subsections 18-209(h), 18-213(h), and 18-216(i) of the Act confirm the ability to provide in the limited liability company agreement that a limited liability company lacks the power to merge or consolidate under Section 18-209, to transfer, domesticate or continue under Section 18-213, or to convert under Section 18-216. These amendments are not intended to imply that its limited liability company agreement may not deny other powers to a limited liability company. Also, Section 18-702(c) of the Act was amended in 2007; as amended, that subsection provides that a limited liability company shall not have the power to issue a certificate of limited liability company interest in bearer form.

Appraisal rights [§ 18-210]. Section 18-210 of the Act has been amended to provide that contractual appraisal rights may be made available for a series of members or limited liability company interests, confirming the flexibility that exists under that Section.

Series [§ 18-215]. Section 18-215 of the Act addresses series, and has been amended in several respects in 2007. Amendments to Section 18-215(a) provide that a limited liability company agreement may establish a series of assets. Amendments to Section 18-215(b) not only clarify the statute's requirements regarding the manner in which assets must be accounted for pursuant to such subsection, but also confirm the flexibility that exists under this subsection with respect to both the holding of series assets and series recordkeeping. A new subsection (c) confirms the broad purposes and powers that a series established under subsection 18-215(b) is permitted to have.