

ANALYSIS OF 2002 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 “LLC Act”), was amended in 2002, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 2002 amendments to the LLC Act were contained in Delaware State Senate Bill No. 363, and became effective August 1, 2002. *See* 73 *Del. Laws*, c. 295.¹ Senate Bill No. 363 amended provisions of the LLC Act concerning (among other things): the limited liability company agreement; powers of a Delaware limited liability company; the certificate of cancellation of the certificate of formation; certificates filed with the Delaware Secretary of State; appraisal rights; preemptive rights; delegation of management rights and powers; the name, registered office, and registered agent of a foreign limited liability company; and notice of the cancellation of the certificate of formation.

The Limited Liability Company Agreement [§ 18-101]. Section 18-101(7) of the LLC Act defines “limited liability company agreement” for purposes of the LLC Act. The first of the two 2002 amendments to Section 18-101(7) confirms the flexibility permitted by this subsection: an agreement of the member or members as to the affairs of a limited liability company and the conduct of its business is a “limited liability company agreement,” whether referred to as such, as an operating agreement, or otherwise. The second 2002 amendment to Section 18-101(7) confirms that, whether or not a Delaware limited liability company executes its limited liability company agreement, the limited liability company is bound by such agreement.

Powers of a Delaware Limited Liability Company [§ 18-106]. The 2002 amendment to Section 18-106 of the LLC Act confirms and clarifies the broad powers of a Delaware limited liability company. Specifically, such amendment makes clear that, subject to any standards and restrictions set forth in its limited liability company agreement, a Delaware limited liability company has power and authority to make contracts of guaranty and suretyship, and to enter into interest rate, basis, currency, hedge or other swap agreements, or cap, floor, put, call, option, exchange or collar agreements, derivative agreements, or other agreements similar to any of the foregoing.

Certificate of Cancellation of Certificate of Formation [§ 18-203]. Senate Bill No. 363 amended Section 18-203 of the LLC Act to delete the requirement of setting forth in the certificate of cancellation the reason for the filing thereof.

¹ Other amendments to the LLC Act, conforming certain terminology to that of the newly amended Delaware Statutory Trust Act, 12 *Del. C.* § 3801 *et seq.*, were contained in Delaware State Senate Bill No. 412, and became effective September 1, 2002. *See* 73 *Del. Laws*, c. 329.

Filed Certificates [§ 18-206]. Section 18-206 of the LLC Act has been amended to confirm that information from certificates filed with the Delaware Secretary of State pursuant to the LLC Act is permanently maintained as a public record.

Appraisal Rights [§ 18-210]. The 2002 amendment to Section 18-210 of the LLC Act confirms the ability to provide for contractual appraisal rights in certain circumstances, namely, in connection with the conversion or transfer or domestication of a Delaware limited liability company.

Preemptive Rights [§ 18-301]. A new subsection (e) has been added to Section 18-301 of the LLC Act. This new subsection confirms that a member has no preemptive rights unless otherwise provided in a limited liability company agreement or another agreement.

Delegation of Management Rights and Powers [§ 18-407]. Section 18-407 of the LLC Act addresses the delegation of rights and powers to manage and control the business and affairs of a Delaware limited liability company. As amended by Senate Bill No. 363, Section 18-407 confirms that, unless otherwise provided in the limited liability company agreement, such delegation by a member or manager will not cause the delegatee to be a member or manager.

Name, Registered Office, and Registered Agent of a Foreign Limited Liability Company [§ 18-904]. Subsection (a) of Section 18-904 of the LLC Act, which addresses the name under which a foreign limited liability company may register in Delaware, has been amended to clarify the intended meaning of such subsection.

Senate Bill No. 363 also amended subsections (c), (d), and (e) of Section 18-904 in their entirety. These amendments clarify procedures relating to a change in the address of the registered office, a change in the name of the registered agent, and a resignation of the registered agent, of a foreign limited liability company.

Notice of Cancellation of Certificate of Formation [§ 18-1108]. The 2002 amendment to subsection (b) of Section 18-1108 of the LLC Act permits the Delaware Secretary of State to carry out, through the use of electronic communication, its obligation to provide notice of the cancellation (pursuant to Section 18-1108(a)) of the certificate of formation of a Delaware limited liability company.