

ANALYSIS OF 2001 AMENDMENTS TO THE DELAWARE LIMITED LIABILITY COMPANY ACT

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

Introduction

The Delaware Limited Liability Company Act, 6 *Del. C.* § 18-101 *et seq.* (the “LLC Act”), was amended in 2001, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 2001 amendments to the LLC Act were contained in Delaware State Senate Bill No. 173, and became effective August 1, 2001. Senate Bill No. 173 amended provisions of the LLC Act concerning (among other things): definitions; the name of a limited liability company; the registered office and the registered agent of a limited liability company; certificates filed with the Delaware Secretary of State; transfer and domestication; action by written consent; proxies; information rights; remedies; and certificated limited liability company interests.

Definitions [§ 18-101]. Section 18-101(12) of the LLC Act defines “person” for purposes of the LLC Act. The 2001 amendment to Section 18-101(12) confirms the broad scope of such defined term. (Sections 18-302(d) and 18-404(d) of the LLC Act which are discussed below, also were amended in 2001, among other things, to include a definition of “electronic transmission” as such term is used in such subsections.)

Name of a Limited Liability Company [§ 18-102]. Section 18-102(3) of the LLC Act requires that the name of a limited liability company, as set forth in its certificate of formation, must be distinguishable upon the records of the Delaware Secretary of State. Senate Bill No. 173 amended Section 18-102(3) to clarify its intended meaning.

Registered Office and Registered Agent [§ 18-104]. Subsections (b), (c), and (d) of Section 18-104 of the LLC Act have been amended in their entirety. The 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 limited liability company.

Filed Certificates [§ 18-206, 18-209, and 18-1105]. Senate Bill No. 173 amended Section 18-206 of the LLC Act to refer expressly to corrected certificates which may be filed with the Delaware Secretary of State. Sections 18-206, 18-209(d), and 18-1105(a)(3) of the LLC Act have been amended to provide for the amendment or termination, prior to any effective time or date, of any certificate with a future effective time or date (including, without limitation, a certificate of merger or a certificate of consolidation) that may be filed pursuant to the LLC Act.

Transfer and Domestication [§§ 18-212 and 18-213]. Sections 18-212 and 18-213 of the LLC Act address, respectively, (1) a “non-United States entity’s” domestication as a Delaware limited liability company, and (2) a Delaware limited liability company’s transfer to or domestication in a permitted jurisdiction outside Delaware. Senate Bill No. 173 amended both such Sections.

Section 18-212 of the LLC Act has been amended to confirm that, in connection with a domestication under the LLC Act, “rights or securities of, or interests in, the non-United States entity that is to be domesticated as a domestic limited liability company may be exchanged for or converted into cash, property, rights or securities of, or interests in, such domestic limited liability company or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, another domestic limited liability company or other entity.” 6 *Del. C.* § 18-212(j).

Section 18-213 of the LLC Act has been amended to confirm that, in connection with a transfer or domestication of a domestic limited liability company to or in another jurisdiction pursuant to the LLC Act, “rights or securities of, or interests in, such limited liability company may be exchanged for or converted into cash, property, rights or securities of, or interests in, the business form in which the limited liability company will exist in such other jurisdiction as a consequence of the transfer or domestication or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, another business form.” 6 *Del. C.* § 18-213(f).

Action by Written Consent and Proxies [§§ 18-302 and 18-404]. The 2001 amendments to Sections 18-302 and 18-404 of the LLC Act clarify the ability of members and managers, respectively, to act by written consent, and provide that written consents may be delivered by electronic transmission. Such amendments also make clear that a member’s or manager’s proxy may be granted by any legally permissible means, including by electronic transmission. Further, as amended, Sections 18-302 and 18-404 provide that, for relevant purposes, “the term ‘electronic transmission’ means any form of communication, not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved, and reviewed by a recipient thereof, and that may be directly reproduced in paper form by such a recipient through an automated process.” 6 *Del. C.* §§ 18-302 (d), 18-404(d).

Information Rights [§ 18-305]. Senate Bill No. 173 amended Section 18-305 of the LLC Act to permit a limited liability company agreement to further restrict the rights of a member or manager to obtain information. A new subsection (g) has been added to Section 18-305, providing that “[t]he rights of a member or manager to obtain information as provided in [Section 18-305] may be restricted in an original limited liability company agreement or in any subsequent amendment approved or adopted by all of the members and in compliance with any applicable requirements of the limited liability company agreement. The provisions of this subsection shall not be construed to limit the ability to impose restrictions on the rights of a member or manager to obtain information by any other means permitted under” Section 18-305. 6 *Del. C.* § 18-305(g).

Remedies [§ 18-306]. The 2001 amendment to Section 18-306 of the LLC Act clarifies the flexibility permitted in connection with providing, in a limited liability company agreement, for specified penalties or specified consequences to which a member may be subject (1) if the member fails to perform in accordance with, or to comply with the terms and conditions of, the limited liability company agreement, or (2) at the time, or upon the happening of events, specified in the limited liability company agreement. Senate Bill No. 173 added to Section 18-306 a new sentence making clear that such specified penalties or consequences may include and take the form of any penalty or consequence set forth in Section 18-502(c) of the LLC Act.

Certified Limited Liability Company Interests [§ 18-702]. Section 18-702(c) has been amended to permit greater flexibility with respect to certificating a limited liability company interest.