

ANALYSIS OF THE 1999 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 1999, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 1999 amendments to the LLC Act were contained in Delaware State Senate Bill No. 178, and, with one exception, became effective August 1, 1999. Senate Bill No. 178 amended provisions of the LLC Act concerning (among other things): enforceability of limited liability company agreements; powers of a Delaware limited liability company; consent to service of process; transfer and domestication; conversion; member action by written consent; offices and responsibilities of managers; members’ rights to receive distributions upon resignation; dissolution; the effect of amendments to the LLC Act; and restoration.

Enforceability of Limited Liability Company Agreements [§ 18-101].

Section 18-101(7) of the LLC Act has been amended to confirm that the limited liability company agreement (the “LLC agreement”) of a Delaware limited liability company having only one member is not unenforceable by reason of there being only one party to such agreement. The definition of “limited liability company agreement,” set forth in Section 18-101(7), now provides that “[a] limited liability company agreement of a limited liability company having only one member shall not be unenforceable by reason of there being only one person who is a party to the limited liability company agreement.” 6 *Del. C.* § 18-101(7).

Limited Liability Company Powers [§ 18-106]. Senate Bill No. 178 amended Section 18-106(b) of the LLC Act, which sets forth a Delaware limited liability company’s powers and privileges, to clarify the intended meaning of such Section.

Consent to Service of Process [§ 18-109]. Section 18-109 of the LLC Act, which addresses service of process on managers and liquidating trustees of Delaware limited liability companies, was also amended by Senate Bill No. 178. Among other things, Section 18-109 provides that a person’s service as a manager of a Delaware limited liability company constitutes such person’s consent: (1) to the irrevocable appointment of the limited liability company’s registered agent (or the Delaware Secretary of State if there is no such registered agent) as such person’s agent upon whom service of process may be made; and (2) that any process served in accordance with Section 18-109 shall have the same legal force and validity as if served upon such person within the State of Delaware. 6 *Del. C.* § 18-109(a). The 1999 amendment to Section 18-109 specifies that such provisions of Section 18-109(a) regarding consent to service of process (as well as other provisions of Section 18-109) apply not only to a person who is a “manager” (as defined in Section 18-101(10) of the LLC Act) of a Delaware limited liability company, but also to a person who, although not a manager, is a member of, and participates materially in the management of, a limited liability company. Section 18-109 as amended also

states, however, that the power to elect (or otherwise select or participate in the election or selection of) a manager does not, by itself, constitute participation in the management of a Delaware limited liability company. The 1999 amendments to Section 18-109 of the LLC Act became effective January 1, 2000.

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. 178 amended both such Sections.

A new subsection “(i)” has been added to Section 18-212. Such new subsection provides that: (1) for all purposes of Delaware law, upon the domestication of a “non- United States entity” as a Delaware limited liability company, such limited liability company is deemed to be the same entity as the domesticating non-United States entity; (2) unless otherwise agreed or required under applicable non-Delaware law, the domestication of a non-United States entity as a Delaware limited liability company (a) shall not require such domesticating entity to wind up its affairs, pay its liabilities, or distribute its assets, (b) shall not be deemed to constitute a dissolution of such non-United States entity, and (c) shall constitute a continuation of the existence of the domesticating entity in the form of a Delaware limited liability company; and (3) if a non-United States entity has domesticated as a Delaware limited liability company and, following such domestication, continues its existence in the foreign jurisdiction in which it was existing immediately prior to the domestication, then, for all purposes of Delaware law, the Delaware limited liability company and such non-United States entity constitute a single entity formed and existing under the laws of the State of Delaware and the laws of such foreign jurisdiction.

The 1999 amendment to Section 18-213 of the LLC Act confirms that, for all purposes of Delaware law, so long as a Delaware limited liability company continues as to exist a Delaware limited liability company following the filing of a certificate of transfer and continuance with the Delaware Secretary of State, such continuing limited liability company and the foreign entity arising as a consequence of the limited liability company’s transfer or domestication constitute a single entity formed and existing under the laws of the State of Delaware and the laws of the foreign jurisdiction.

Conversion [§§ 18-214 and 18-216]. Section 18-214 of the LLC Act has been amended to include corporations among the “other entities” that may convert into Delaware limited liability companies. Such Section also has been amended to confirm that when an “other entity” has been converted into a Delaware limited liability company, the Delaware limited liability company, for all purposes of Delaware law, is deemed to be the same entity as the converting other entity.

Section 18-216 of the LLC Act, which governs the conversion of a Delaware limited liability company, has been amended to include corporations among the entities into which Delaware limited liability companies may convert.

Member Action by Written Consent [§ 18-302]. The 1999 amendment to Section 18-302 of the LLC Act deals with a “quorum requirement” of sorts. The amendment clarifies that, unless otherwise provided in the LLC agreement, member action by written consent in lieu of a meeting requires the signed consent in writing of members “having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting *at which all interests in the limited liability company entitled to vote thereon were present and voted.*” 6 Del. C. § 18-302(d).

Offices and Responsibilities of Managers [§ 18-402]. Senate Bill No. 178 also amended Section 18-402 of the LLC Act. Such amendment provides additional flexibility with respect to the mechanics of determining the offices held by, and the responsibilities assigned to, managers of Delaware limited liability companies. Under Section 18-402, as so amended, the manager of a Delaware limited liability company holds such offices and has such responsibilities as are accorded to the manager by, or in the manner provided in, the LLC agreement.

Members’ Rights to Receive Distributions Upon Resignation [§ 18-604]. Section 18-604 of the LLC Act, concerning members’ rights to receive distributions upon resignation, was amended by Senate Bill No. 178. As amended, Section 18-604 states that, except as otherwise provided in the LLC Act, upon resignation a resigning member is entitled to receive any distribution to which such member is entitled under the LLC agreement and, unless otherwise provided in the LLC agreement, is also entitled to receive, within a reasonable time after resignation, the fair value (as of the date of resignation, based upon the member’s right to share in distributions from the limited liability company) of such member’s limited liability company interest.

Dissolution [§ 18-801]. Senate Bill No. 178 amended various provisions (specifically, subsections (a)(3), (a)(4), and (b)) of Section 18-801 of the LLC Act, which deals with dissolution.

The amendment to Section 18-801(a)(3) of the LLC Act confirms that, unless otherwise provided in the LLC agreement, dissolution of a Delaware limited liability company may be approved either by written consent of members or by affirmative vote of members.

The amendment to Section 18-801(a)(4) adds flexibility that can be used in connection with continuing a Delaware limited liability company without dissolution when there are no members. Section 18-801(a)(4) as amended expressly states that the LLC agreement of a Delaware limited liability company may set forth the obligation of the last remaining member’s personal representative to agree in writing to the continuation of the limited liability company and to the admission (effective as of the occurrence of the event that terminated the continued membership of the last remaining member) of such personal representative (or its nominee or designee) as a member of the limited liability company. The amendment also provides that a Delaware limited liability company is not dissolved and its affairs are not required to be wound up if a member is admitted to the limited liability company, in the manner provided for in the LLC agreement, effective as of the occurrence of the event that terminated the continued membership of the last remaining member, within 90 days (or such other period as is provided for in the LLC agreement) after the occurrence of such event, pursuant to a provision of the LLC

agreement that specifically provides for the admission of a member to the limited liability company after there is no longer a remaining member.

The amendment to Section 18-801(b) of the LLC Act eliminates the prior “default rule” that (even in the absence of a provision in the LLC agreement so authorizing and empowering the members to dissolve the Delaware limited liability company) members, by timely written agreement of a majority in interest of each class or group of members, could dissolve the limited liability company following the death, retirement, resignation, expulsion, bankruptcy, dissolution, or termination of the continued membership of any member.

Retroactive Effect of Amendments [§ 18-1106]. Section 18-1106 of the LLC Act reserves to the State of Delaware the power to alter or repeal the LLC Act, and subjects all rights of members and managers to such reserved power. Senate Bill No. 178 added a new sentence to such Section. The new provision states that, “[u]nless expressly stated to the contrary in [the LLC Act], all amendments of [the LLC Act] shall apply to limited liability companies and members and managers whether or not existing as such at the time of the enactment of any such amendment.” 6 *Del. C.* § 18-1106.

Restoration [§ 18-1107]. Section 18-1107(i) of the LLC Act has been amended so that a Delaware limited liability company that has ceased to be in good standing no longer must file a certificate of restoration with the Delaware Secretary of State to be restored to such status. Now, the payment of all amounts owing to the Secretary of State, without more, suffices to restore the limited liability company to good standing. Likewise, a foreign limited liability company need no longer file a certificate of restoration to restore its registration in Delaware.