

## ANALYSIS OF 2004 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 2004, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 2004 amendments to the LLC Act were contained in Delaware State House Bill No. 411 (as amended by House Amendment No. 1, “House Bill No. 411”), and became effective August 1, 2004. *See* 74 *Del. Laws*, c. 275. House Bill No. 411 amended provisions of the LLC Act concerning (among other things): the limited liability company agreement; merger and consolidation; transfer and domestication; conversion; series; and duties (including fiduciary duties) and exculpation.

**Limited Liability Company Agreement [§§ 18-101 and 18-302].** The 2004 amendments to Sections 18-101 and 18-302 of the LLC Act confirm the flexibility permitted in drafting a limited liability company agreement. Section 18-101(7) was amended to state that a limited liability company agreement may provide rights to any person, including a person who is not a party to the limited liability company agreement, to the extent set forth therein. Further, a new subsection (e) was added to Section 18-302, providing that if a limited liability company agreement sets forth the manner in which it may be amended (including by requiring the approval of a person who is not a party to the limited liability company agreement or the satisfaction of conditions), it may be amended only in that manner or as otherwise permitted by law (provided that the approval of any person may be waived by such person and that any such conditions may be waived by all persons for whose benefit such conditions were intended).

**Merger and Consolidation [§ 18-209].** House Bill No. 411 added language to Section 18-209(b) of the LLC Act to provide that, in connection with a merger or consolidation thereunder, rights or securities of or interests in a Delaware limited liability company or “other business entity” that is a constituent party to the merger or consolidation not only may be exchanged for or converted into cash, property, or rights or securities of or interests in the surviving or resulting limited liability company, the surviving or resulting other business entity, or another Delaware limited liability company or other business entity, but also may be cancelled. This amendment confirms the flexibility permitted in the LLC Act regarding a merger or consolidation. Additional 2004 amendments to Section 18-209 permit a change of the name of a surviving Delaware limited liability company to be effected by a certificate of merger. A new paragraph was added to Section 18-209(c) to provide that, in the case of a merger in which a Delaware limited liability company is the surviving entity, the certificate of merger filed under that Section may set forth such amendments to the certificate of formation of such surviving limited liability company to change its name as are desired to be effected by the merger. Under newly amended Section 18-209(e), a certificate of merger that sets forth any such amendment in accordance with Section 18-209(c) shall be deemed to be an amendment to the certificate of

formation of the limited liability company, and the limited liability company shall not be required to take any further action to amend its certificate of formation under Section 18-202 of the LLC Act with respect to such amendments set forth in the certificate of merger.

**Transfer and Domestication [§§ 18-212 and 18-213].** The 2004 amendments to Sections 18-212 and 18-213 of the LLC Act confirm the flexibility permitted in the LLC Act regarding the domestication of a “non-United States entity” as a Delaware limited liability company and regarding a limited liability company's transfer or domestication out of Delaware. Section 18-212(j), as amended, provides that, in connection with the domestication of a non-United States entity as a Delaware limited liability company under Section 18-212, rights or securities of or interests in such non-United States entity not only may be exchanged for or converted into cash, property, or rights or securities of or interests in such limited liability company, another Delaware limited liability company, or another entity, but also may be cancelled. Similarly, Section 18-213(f) was amended by House Bill No. 411 to confirm that rights or securities of or interests in a Delaware limited liability company may be cancelled in connection with such limited liability company's transfer to or domestication in another jurisdiction pursuant to Section 18-213. Also, a new subsection (g) was added to Section 18-213 to confirm the treatment under Delaware law of a limited liability company that has transferred or domesticated out of the State of Delaware. Among other things, this new subsection provides that, for all purposes of the laws of the State of Delaware, when a limited liability company has transferred or domesticated out of the State of Delaware pursuant to Section 18-213, the transferred or domesticated business form shall be deemed to be the same entity as the limited liability company, the rights, privileges, powers, and property of the limited liability company that has transferred or domesticated shall remain vested in the transferred or domesticated business form, the debts, liabilities, and duties of such limited liability company shall remain attached to such transferred or domesticated business form, and the rights, privileges, powers and interests in property of such limited liability company, as well as its debts, liabilities and duties, shall not be deemed, as a consequence of such transfer or domestication, to have been transferred to such transferred or domesticated business form.

**Conversion [§§ 18-214 and 18-216].** Section 18-214(i) of the LLC Act, as amended by House Bill No. 411, confirms the flexibility permitted in the LLC Act regarding the conversion of an “other entity” to a Delaware limited liability company under Section 18-214. Section 18-214(i) now provides that in connection with such a conversion, rights or securities of or interests in such other entity not only may be exchanged for or converted into cash, property, or rights or securities of or interests in such limited liability company or another Delaware limited liability company or other entity, but also may be cancelled. Similarly, the 2004 amendment to Section 18-216(d) confirms the flexibility permitted in the LLC Act regarding the conversion of a Delaware limited liability company to another business form pursuant to Section 18-216, providing that rights or securities of or interests in such limited liability company may be cancelled in connection with such a conversion. Also, a new subsection added to Section 18-216 in 2004 confirms the treatment under Delaware law of a Delaware limited liability company that has converted to another business form. New subsection (h) of Section 18-216 provides among other things that, for all purposes of the laws of the State of Delaware, when a limited liability company has converted to another business form pursuant to Section 18-216, such other business form shall be deemed to be the same entity as the limited liability company, the rights,

privileges, powers, and property of the limited liability company that has converted shall remain vested in the other business form to which such limited liability company has converted, the debts, liabilities, and duties of such limited liability company shall remain attached to such other business form, and the rights, privileges, powers and interests in property of such limited liability company, as well as its debts, liabilities and duties, shall not be deemed, as a consequence of the conversion, to have been transferred to such other business form.

**Series [§ 18-215].** Section 18-215(b) of the LLC Act, as amended by House Bill No. 411, confirms the manner in which assets associated with a series may be held and accounted for pursuant to Section 18-215, namely, in separate and distinct records maintained for such series.

**Duties and Exculpation [§ 18-1101].** The 2004 amendments to Section 18-1101 of the LLC Act amended subsection (c) in its entirety, re-designated the existing subsections (d) and (e) as subsections (f) and (g), respectively, and inserted new subsections (d) and (e). As amended by House Bill No. 411, subsection (c) clarifies that duties, including fiduciary duties, of a member or manager or other person to a limited liability company or to another member or manager or to another person that is a party to or otherwise bound by a limited liability company agreement, may be eliminated, as well as expanded or restricted, by provisions in the limited liability company agreement. Subsection (c) as amended, however, also confirms that a limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing. New subsection (d) of Section 18-1101 clarifies that the default exculpation provision in the LLC Act applies only in regard to breach of fiduciary duty. It states that, unless otherwise provided in the limited liability company agreement, a member or manager or other person shall not be liable to the limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by the limited liability company agreement, for breach of fiduciary duty, for the member's or manager's or other person's good faith reliance on the provisions of the limited liability company agreement. New subsection (e) confirms the flexibility permitted in the LLC Act regarding exculpation, indicating that a limited liability company agreement may provide for the limitation or elimination of any and all liabilities of a member, manager or other person for breach of contract and breach of duties (including fiduciary duties) to the limited liability company or to another member or manager or to another person party to or otherwise bound by the limited liability company agreement; subsection (e) further provides, however, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.