

2005 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 2005, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 2005 amendments to the Act were contained in Delaware State Senate Bill No. 86, and became effective August 1, 2005. *See* 75 *Del. Laws*, c. 51. Among the provisions of the Act that have been amended are those concerning: the binding effect of the limited liability company agreement; permitted activities of a Delaware limited liability company; transfer of a Delaware limited liability company to another jurisdiction; admission of members; protection from liability in reliance on records; rights of creditors of members and assignees; revocation of dissolution; and foreign limited liability companies.

Binding effect of the limited liability company agreement [§ 18-101]. A new sentence has been included in Section 18-101(7) of the Act to make explicit a principle that previously was implicit. The additional language confirms that the limited liability company agreement is binding on each member and each manager of a Delaware limited liability company and on each assignee of a limited liability company interest. This rule applies even if the member, manager, or assignee has not executed the limited liability company agreement.

Permitted activities of a Delaware limited liability company [§ 18-106]. Prior to the 2005 amendments to the Act, a Delaware limited liability company was prohibited from carrying on the business of granting policies of insurance, or assuming insurance risks. This prohibition has been eliminated, thus expanding the businesses, purposes, and activities permitted to a Delaware limited liability company under the Act. This amendment parallels provisions in the newly enacted Delaware Revised Captive Insurance Company Act, 18 *Del. C.* c. 69, *see* 75 *Del. Laws*, c. 150, which specifically permit a captive insurance company to be organized as a limited liability company.

Transfer of a Delaware limited liability company to another jurisdiction [§ 18-213]. Under Section 18-213 of the Act, a Delaware limited liability company may transfer to or domesticate in another jurisdiction. Changes have been made to the statutory provision governing the manner in which such a transaction is to be authorized. Previously, such a transfer or domestication required the written approval of all managers and all members of the company unless the limited liability company agreement provided otherwise. This default rule was unusual, among other things, in specifically requiring that approval of the transaction had to be in writing. Section 18-213(b) of the Act has been amended so that the default approval requirements for the transfer or domestication of a Delaware limited liability company now parallel those under the Act governing a conversion of the company. Under Section 18-213 as

amended, if the limited liability company agreement does not prohibit a transfer or domestication and does not specify the manner in which such a transaction is to be approved, and if it sets forth the manner for approving a merger or consolidation in which the company is a constituent entity, then the transfer or domestication must be authorized in the same manner, but if the limited liability company agreement also does not specify the manner of authorizing such a merger or consolidation, then a transfer or domestication must be approved by members who own a majority interest in the company's profits (subject as applicable to a separate vote by class or group).

Admission of members [§ 18-301]. Section 18-301 of the Act addresses the admission of members to a Delaware limited liability company. The 2005 amendments to that Section clarify the manner in which members are admitted pursuant to a merger or consolidation. Under Section 18-301(b)(3) as amended, a person admitted as a member of a surviving or resulting limited liability company pursuant to a merger or consolidation is admitted as provided in the surviving or resulting company's limited liability company agreement or in the agreement of merger or consolidation; if there is any inconsistency on this point between the agreement of merger or consolidation and the limited liability company agreement, the former controls. Further, Section 18-301(b)(3) now makes clear that in the case of a person being admitted as a member of a limited liability company pursuant to a merger or consolidation in which such company is not the surviving or resulting entity, such admission is accomplished as provided in that company's limited liability company agreement.

Protection from liability in reliance on records [§ 18-406]. The Act has been amended to clarify the circumstances in which reliance on records and other information affords protection from liability. As amended in 2005, Section 18-406 provides that a member, manager, or liquidating trustee of a limited liability company is fully protected in relying in good faith upon records of the company and upon information, opinions, reports, or statements presented by another constituent of the company or by any other person as to matters reasonably believed to be within such person's professional or expert competence. The amendment to Section 18-406 further clarifies that a member, manager, or liquidating trustee may be protected in relying on information, opinions, reports, or statements regarding, among other things, the value and amount of assets or reserves or contracts, agreements or other undertakings that would be sufficient to pay claims and obligations of the limited liability company.

Rights of creditors of members and assignees [§ 18-703]. Section 18-703 of the Act, dealing with rights of creditors of members and assignees, has been substantially amended in 2005. Among other changes, the effect of a charging order has been clarified; a judgment creditor in whose favor a charging order has been entered against a limited liability company interest held by its judgment debtor has only the right to receive any distribution to which the judgment debtor would have been entitled in respect of such interest. The amendments also make clear that the entry of a charging order is the exclusive remedy by which a judgment creditor may satisfy its judgment out of its judgment debtor's limited liability company interest, and that other remedies such as attachment or foreclosure are not available to the judgment creditor. Further, newly added Section 18-703(f) provides that the Delaware Court of Chancery has jurisdiction to hear and determine any matter relating to such a charging order.

Revocation of dissolution [§ 18-806]. Section 18-806 is another new addition to the Act. Consistent with the statute's general flexibility, this Section explicitly provides that the dissolution of a Delaware limited liability company may be revoked in certain circumstances. If a certificate of cancellation has not yet been filed, even though the limited liability company has suffered a dissolution event under Section 18-801 of the Act (other than a decree of judicial dissolution) the company will not be dissolved if it is continued by the affirmative vote or written consent of all remaining members or (if there is no remaining member) of the personal representative of the last remaining member, and of any other person whose approval is required under the limited liability company agreement to revoke a dissolution pursuant to Section 18-806. A dissolution that is caused by a vote or written consent cannot be revoked unless each member and each other person who approved the dissolution votes or consents in writing to continue the company.

Foreign limited liability companies [§ 18-912]. New Section 18-912 of the Act identifies certain activities of a foreign limited liability company that do not constitute "doing business" in the State of Delaware. Such activities include: maintaining, defending or settling an action or proceeding; activities concerning the company's internal affairs; maintaining bank accounts; maintaining offices or agencies for transfers or exchanges of the company's own securities, or maintaining trustees or depositories with respect to those securities; selling through independent contractors; soliciting or obtaining orders that require acceptance outside Delaware before they become contracts; certain sales of machinery, plants or equipment; creating, as borrower or lender, or acquiring indebtedness; collecting debts, foreclosing mortgages or security interests, and taking specified actions regarding property so acquired; conducting an isolated transaction; doing business in interstate commerce; and doing business as an insurance company. This listing is helpful in determining when a foreign limited liability company must register under the Act.