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DELAWARE LAW

2017 Amendments to Delaware's General Corporation Law and Alternative Entity Statutes



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In its last session, the Delaware Legislature passed a number of amendments to the Delaware General Corporation Law (the “**DGCL**”) and the Delaware “alternative entity” statutes—the Delaware Limited Liability Company Act (the “**DLLCA**”), the Delaware Revised Uniform Limited Partnership Act (“**DRULPA**”) and the Delaware Revised Uniform Partnership Act (“**DRUPA**”). All of the amendments were effective as of Aug. 1, 2017.

The amendments to the DGCL effected a number of substantive, technical and clarifying changes, including changes to permit the use of “blockchain” or “distributed ledger” technology for the maintenance of corporate records and changes to the provisions governing stockholder action by written consent.

The amendments to the alternative entity statutes include a number of “clean up” changes as well as certain substantive improvements relating to, inter alia, delega-

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tion, formation requirements and limited partner safe harbors.

This article will first discuss the amendments to the DGCL and then the amendments to the alternative entity statutes.

Amendments to the DGCL

The “Blockchain” Amendments. [DGCL §§ 151, 202, 219, 224, 232, 364] Various provisions of the DGCL have been amended to accommodate the use of networks of electronic databases, such as the use of “blockchain” or “distributed ledger” technology, for the maintenance of corporate records, including a corporation’s stock ledger. Under the amended provisions of the DGCL, companies can use this technology to create an electronic ledger of transactions between a network of participants. Because this differs from the traditional centralized database, a number of amendments to the DGCL were necessary.

Section 219, which provides that a corporation’s stock ledger should be used to determine stockholders entitled to vote, has been amended to define “stock ledger” and to expressly permit use of distributed ledgers. In particular, Section 219(c) now defines “stock ledger” as “one or more records administered by or on behalf of the corporation in which the names of all of the corporation’s stockholders of record, the address and number of shares registered in the name of each such stockholder, and all issuances and transfers of stock of the corporation are recorded in accordance with § 224 of this title.” Similarly, Section 224 has been amended to allow for maintenance of corporate records by use of one or more electronic networks or databases, so long as such records can be converted into paper form within a reasonable time. Section 224 also requires that, in the case of stock ledgers kept by use of electronic networks or databases, such ledger must be able to be used to prepare the lists required by Sections 219 and 220, record certain information specified in Sections 156, 159, 217(a) and 218 and record transfers of stock

as governed by Article 8 of Delaware's Uniform Commercial Code.

Sections 151(f), 202(a) and 364 were also amended to permit notice under such provisions to be given to stockholders by electronic transmissions. The definition of "electronic transmissions," which is set forth in Section 232, has been amended to include the use of electronic networks or databases and covers "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."

Opting Out of Section 203. [DGCL § 203(b)] Section 203 imposes restrictions on business combinations between a corporation and an "interested stockholder." Section 203 has been amended to clarify when an amendment to a corporation's certificate of incorporation or bylaws opting out of the restrictions on business combinations in Section 203 becomes effective. Previously, the DGCL provided that such an opt-out amendment would not be effective "until 12 months after the adoption of such amendment." The amendments clarify that an opt-out amendment will be effective when the amendment is effective under Section 103, rather than at the time the stockholders adopt the amendment.

Simplifying Stockholder Consents. [DGCL § 228] Section 228, which authorizes stockholder action by written consent, has been amended to eliminate the requirement that the consent "bear the date of signature." There had been a number of decisions calling into question the validity of undated stockholder consents or consents with pre-printed dates in light of Section 228's dating requirement. To address this issue and eliminate a common foot fault, Section 228 no longer contains an individual dating requirement. Now, a stockholder consent will be deemed valid if it is delivered within 60 days of the first date on which a written consent is properly delivered to a corporation. The amendments to Section 228 shall be effective for actions taken by written consent with a record date on or after Aug. 1, 2017.

Amending the Merger and Consolidation Provisions. [DGCL § § 251, 252, 253, 254, 255, 256, 257, 258, 263, 264, 267] The amendments to the merger and consolidation provisions of the DGCL primarily provide consistency between the various sections and clarify certain technical provisions. For example, the amendments create a consistent convention by which "organized" is used to connote the creation of corporations and "formed" is used to connote the creation of non-corporate entities, regardless of the jurisdiction in which the corporation or non-corporate entity is formed. In addition, Sections 252, 253, 258 and 267 have been amended to consistently use the term "foreign corporation" for all corporations "organized under the laws of any jurisdiction other than [the State of Delaware]" as the term is defined in Section 371(a).

Sections 252, 253, 254, 256, 258, 263, 264 and 267 have been amended to allow mergers and consolidations between Delaware corporations and non-Delaware entities so long as the non-Delaware jurisdictions do not "prohibit" such mergers and consolidations. The DGCL previously authorized such mergers and consolidations if the non-Delaware jurisdiction "permitted" such action or did not "forbid" such action.

With the adoption of the amendments, so long as the non-Delaware jurisdiction does not "prohibit" the merger or consolidation, Delaware will allow it. Sections 254, 263 and 264, which permit the merger of Delaware corporations with joint-stock or other associations, partnerships and limited liability companies, have been amended to expressly permit such mergers with foreign entities.

Finally, the amendments made certain clarifying changes to Section 251. For example, the amendments to Section 251 replaced the phrase "corporations existing under the laws of the state" with "corporations of this State," and clarified that, following a merger, there is a "surviving" corporation, whereas, following a consolidation, there is a "resulting" corporation. Similarly, the amendments clarify that the requirements regarding the treatment of fractional interests apply to interests both in the surviving or resulting corporation and in any other corporation or entity the securities of which are received in the merger or consolidation.

Streamlining Annual Reports. [DGCL § § 374, 502] Section 374 has been amended to conform the annual reporting requirements for non-Delaware corporations that qualify to do business in Delaware to the requirements for Delaware corporations. Additionally, Section 502 has been amended to clarify the information that Delaware corporations must submit in their annual reports.

Amendments Common to Multiple Alternative Entity Statutes

Power to Delegate. [DLLCA § 18-407; DRULPA § 17-403(c); DRUPA § 15-401(l)] Sections 18-407 of the DLLCA, 17-403(c) of the DRULPA and 15-401(l) of the DRUPA provide for the delegation by managers, members, general partners or partners, as applicable, of their rights and powers to manage and control the business and affairs of the applicable entity. These amendments confirm that managers, members, general partners or partners, as applicable, have the power and authority to delegate "any or all" of their rights, powers and duties to manage and control the business and affairs of the applicable entity, including core government functions, notwithstanding any other provision of the applicable act. These amendments are in response to the Delaware Court of Chancery decision in *Obeid v. Hogan*, CA. No. 11900-VCL (Del. Ch. Jun. 10, 2016), which raised questions concerning the scope of delegation authorized under these provisions.

Substantial Compliance with Formation Requirements. [DLLCA § 18-201(e); DRULPA § 17-201(e)] Sections 18-201(a)(2) of the DLLCA and 17-201(a)(2) of the DRULPA currently provide that in order to form a limited liability company or limited partnership, a certificate of formation or certificate of limited partnership must be filed in the Office of the Secretary of State that sets forth the address of the registered office and the name and address of the registered agent of such entity. These amendments confirm that a certificate that contains the name of the registered agent and the address of the registered office, even if the certificate does not expressly designate such person or address as such, substantially complies with the statutory requirements.

Expansion of Definition of Entities that may Convert, Domesticate, Merge and Consolidate. [DLLCA § § 18-209(a), 18-212(a), 18-214(a), 18-216(a); DRULPA § § 17-211(a), 17-215(a), 17-217(a), 17-219(a); DRUPA § § 15-901(a), 15-902(a), 15-903(a), 15-904(a)] The conversion, domestication and merger and consolidation provisions of the DLLCA, the DRULPA and the DRUPA provide a broad list of entities that can engage in these transactions, including any unincorporated business or entity. These amendments confirm that any incorporated business or entity (in addition to a corporation) may engage in these transactions.

Amendments to the DRULPA

Expansion of Limited Partner Safe Harbor. [DRULPA § 17-303(b)(1)] Section 17-303(a) of the DRULPA provides that a limited partner of a limited partnership is not liable for the obligations of the limited partnership

unless such limited partner is also a general partner or participates in the control of the business. Section 17-303(b) of the DRULPA provides a list of safe harbors, e.g., activities that do not constitute participation in the control of the business of a partnership. The amendment to Section 17-301(b)(1) of the DRULPA expands the safe harbor relating to being a stockholder of a corporate general partner, a partner of a partnership general partner, a member of an LLC general partner and a beneficiary of an estate or trust general partner to include holding any type of interest in any such general partner.