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2016 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 (***DGCL***) and the Delaware "alternative entity" statutes—the Delaware Limited Liability Company Act (***DLLCA***), the Delaware Revised Uniform Limited Partnership Act (***DRULPA***), the Delaware Revised Uniform Partnership Act (***DRUPA***) and the Delaware Statutory Trust Act (***DSTA***). All of the amendments were effective as of Aug. 1, 2016.

The amendments to the DGCL effect a number of substantive, technical and clarifying changes, including certain substantive changes to Section 251(h), Delaware's two-step merger statute, to facilitate rollover arrangements in such transactions, and to Section 262 regarding stockholder appraisal rights, to add a *de minimis* exception to the availability of appraisal rights for publicly traded stock and a provision allowing corporations to stop the accrual of statutory interest on appraisal awards by making early payments to appraisal petitioners.

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The amendments to the alternative entity statutes include several important changes. Consistent with the informal way in which many LLCs and limited partnerships are operated, the amendments eliminate, as a default rule, the requirement for consents and other actions to be taken in writing or by an affirmative vote, which a recent Delaware case held required the kind of formal action associated with a stockholder's meeting. The DLLCA was also amended to provide, as a default rule, that the voluntary assignment by the sole member of an LLC of all of the limited liability company interests in the LLC will result in the automatic admission of the assignee as a member. In addition, the DSTA was amended to provide, again as a default rule, that the trustees of a statutory trust that is a registered investment company under the Investment Company Act of 1940, as amended (the "1940 Act"), have the same fiduciary duties as directors of Delaware for-profit corporations.

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

Amendments to the DGCL

Expansion of Court of Chancery Jurisdiction Regarding Certain Stock and Asset Sale Agreements. [DGCL § 111(a)(2)] Section 111(a)(2) permits the Court of Chancery to exercise non-exclusive jurisdiction in civil actions regarding the interpretation, application, enforcement or validity of any agreement by which a corporation creates, sells, or offers to create or sell any of its stock or rights or options respecting its stock. The amendment to Section 111(a)(2) expands the agreements over which the Court of Chancery may exercise this jurisdiction to include those by which (1) a stockholder sells or offers to sell a corporation's stock if the corporation and one or more stockholders are parties and (2) a corporation agrees to sell, lease or exchange any of the corporation's property or assets if its terms

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provide that the sale, lease or exchange is subject to approval of one or more of the corporation's stockholders. This amendment is effective only with respect to agreements entered into on or after Aug. 1, 2016.

Technical Changes Regarding Manner of Acting by Boards of Directors and Committees. [DGCL § 141] Section 141(b), which among other things provides default quorum and voting standards for board action, has been amended to delete surplus language regarding the minimum quorum requirement for a one-person board of directors. Section 141(c), which authorizes committees of the board, has been amended by adding a new Subsection (c)(4) to provide default quorum and voting requirements for board committees and subcommittees. Under the default provisions, a majority of the directors then serving on a committee or subcommittee will constitute a quorum (but in no case less than one-third of the directors then serving) and committee or subcommittee action may be taken by the vote of a majority of the members who are present. The default rules are subject to any contrary provisions in the certificate of incorporation, the bylaws or the resolution creating the committee or subcommittee. Section 141(c) also has been amended to clarify that references throughout the DGCL to board committees or members of board committees shall be deemed to include references to subcommittees or subcommittee members.

Simplification of Permitted Officers to Execute Stock Certificates. [DGCL § 158] Among other things, Section 158 previously provided that holders of stock certificates were entitled to have their certificates signed by two officers of the corporation, who had to be any of (1) the chairperson or vice chairperson of the board of directors, or the president or vice president and (2) the treasurer or an assistant treasurer, or the secretary or an assistant secretary. The amendment to Section 158 simplifies the officer execution requirement to require execution by ''any two authorized officers.'' According to the legislative synopsis, this amendment is not intended to change existing law that one person holding several offices can provide both signatures.

Refinements to Procedures for Two-Step Mergers Without a Stockholder Vote. [DGCL § 251(h)] Section 251(h) provides an exception to the default requirement that stockholders of a constituent corporation must vote to approve a merger. If the transaction uses a two-step structure—that is, a merger involving a first-step tender or exchange offer followed by a second-step merger that squeezes out the remaining minority stockholders—and certain statutory requirements are satisfied, no vote of the target stockholders will be required. The 2016 amendments make a number of substantive revisions to the requirements of Section 251(h). In general, the amendments address five different issues:

1. Clarifying the meaning of public company. The lead-in to Section 251(h) provides that the exception to the stockholder vote requirement applies only if the constituent corporation is a public company. As originally drafted, the statute referred to a ''constituent corporation *whose shares* are listed on a national securities exchange or held of record by more than 2,000 holders.'' The amendments clarify that it is not necessary for *all* of the corporation's shares to be publicly listed or so held so long as it ''has a class or series of stock that is'' so listed or held. Accordingly, so long as the corporation has at least one class or series of stock that is publicly listed or held by more than 2,000 record holders, the fact that it might also have unlisted shares does not preclude it from opting into Section 251(h).

2. Clarifying and streamlining the statutory requirements for the offer. The amendments make a number of clarifying and streamlining changes to Subsection (h)(2), which generally requires that the first-step offer be made for all of the outstanding stock of the target corporation that would be entitled to vote on the merger. First, related to the public company clarification discussed above, a new proviso clarifies that the offeror ''may consummate separate offers for separate classes or series of the stock of [the target] corporation.'' Second, whereas Section 251(h) originally required that the offer be for ''any and all'' shares of the target corporation, the statute now provides that the offer must be for ''all'' shares while clarifying that the offer ''may be conditioned on the tender of a minimum number or percentage of shares of the stock of [the target] corporation, or of any class or series thereof.'' Third, the amendments expand the categories of shares that permissibly could be excluded from an offer (such as shares already owned by the buyer, the target and their respective wholly-owned subsidiaries) by adding a new defined term ''excluded stock,'' which is defined to include all of the originally excludable shares and ''rollover stock'' (a term discussed further below). The amendments also replace prior references to ''a tender or exchange offer'' with simpler references to ''an offer.''

As amended, Subsection (h)(3) will count ''rollover stock'' for purposes of determining whether the statutory minimum tender condition is satisfied.

3. Permitting rollover arrangements. The most significant amendments to Section 251(h) are designed to facilitate rollover arrangements whereby certain target stockholders receive a continuing equity interest in the surviving corporation or one of its affiliates instead of the offer and merger consideration. Before the amendments, rollover arrangements were difficult to accomplish under Section 251(h) because shares held by the rollover stockholders were not included in the numerator for purposes of calculating the statutory minimum tender condition but were included in the denominator. As amended, Subsection (h)(3) will count ''rollover stock'' for purposes of determining whether the statutory minimum tender condition is satisfied. This new term ''rollover stock'' includes any shares of the target corporation ''that are the subject of a written agreement requiring such shares to be transferred, contributed or delivered to the [corporation consummating the first-step offer] or any of its affiliates in exchange for stock or other equity interests in such consummating corporation or an affiliate thereof,'' so long as those shares in fact are so transferred, contributed or delivered. Revisions to Subsection (h)(5) discussed below also permit rollover stock to be converted by operation of the

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second-step merger into different consideration than what is paid in the offer, thus eliminating the practical need to effect the rollover transaction in between the closings of the first-step offer and second-step merger.

4. Other simplifying and technical changes to the statutory minimum tender condition. The amendments also make two other simplifying and clarifying changes to the statutory minimum tender condition. First, prior to the amendments, Subsection (h)(3) included only shares tendered into the offer and shares ''otherwise owned by'' the corporation consummating the offer for purposes of determining whether the statutory minimum tender condition had been satisfied. As amended, Subsection (h)(3) will count shares ''otherwise owned by the consummating corporation or its affiliates,'' with affiliates defined to include any person that owns, directly or indirectly, all of the outstanding stock of the corporation making the first-step offer, or that is a direct or indirect wholly owned subsidiary of such person or the consummating corporation. Second, Subsection (h)(3) only counts shares that have been ''received by the depository prior to expiration of [the] offer'' towards the statutory minimum tender condition. The amendments refine the definition of the term ''received'' for this purpose. Specifically, for certificated shares, ''received'' means ''physical receipt of a stock certificate accompanied by a letter of transmittal'' as long as the certificate is not canceled prior to the acceptance time of the tendered shares. With respect to uncertificated shares, ''received'' has separate meanings for uncertificated shares ''held of record by a clearing corporation as nominee'' and for uncertificated shares not so held. In the former case, shares are ''received'' upon ''transfer to the depository's account by means of an agent's message.'' Otherwise, ''received'' means the depository's ''physical receipt of a letter of transmittal.'' In either case, uncertificated shares cease to be ''received'' if they ''have been reduced or eliminated due to any sale of such shares prior to consummation of the offer.''

5. Simplifying exceptions to the equal treatment exceptions. Subsection (h)(5) is a requirement that all outstanding target shares be converted in the second-step merger into the same consideration paid for such shares in the front-end offer, subject to certain exceptions. Prior to the 2016 amendments, the exceptions applied only to shares held in the target's treasury, by any of the target's direct or indirect wholly owned subsidiaries, by the ultimate parent acquiror or the consummating corporation, or by any of their respective direct or indirect wholly owned subsidiaries. Furthermore, the exception would apply only if such shares were excluded from the offer under Subsection (h)(2). As amended, the statute permits these shares to be treated differently in the merger regardless of whether they were excluded from the offer and also adds rollover stock to the category of shares that may be treated differently. The amendment does this by excluding ''excluded stock'' from Subsection (h)(5)'s equal treatment requirement.

The amendments to Section 251(h) are effective only with respect to merger agreements entered into on or after Aug. 1, 2016.

Substantive and Technical Changes Regarding Appraisal Rights. [DGCL § 262] The 2016 amendments make two substantive changes and a handful of conforming changes to Section 262 of the DGCL, which governs appraisal rights, as follows:

1. New 'de minimis' exception. Section 262(g) has been amended to provide that the Court of Chancery must dismiss an appraisal proceeding as to all holders of shares that were listed on a national securities exchange immediately before the merger or consolidation unless (1) the total number of shares entitled to appraisal exceeds 1 percent of the outstanding shares of the class or series eligible for appraisal, (2) the value of the consideration provided in the merger or consolidation for such total number of shares exceeds $1 million, or (3) the merger was effected under Sections 253 or 267 of the DGCL. According to the legislative synopsis, the amendment limits the availability of appraisal rights for publicly traded shares to (a) situations where ''the dispute with regard to valuation is substantial and involves little risk that the petition for appraisal will be used to achieve a settlement because of the nuisance value of discovery and other burdens of litigation'' and (b) short-form mergers, where ''appraisal may be the only remedy.''

Section 262(h) has been amended to allow corporations to make cash payments to stockholders entitled to appraisal at any time before the entry of judgment in the appraisal case.

2. New tender of payment option to toll statutory interest. Section 262(h) has been amended to allow corporations to make cash payments to stockholders entitled to appraisal at any time before the entry of judgment in the appraisal case, in which case statutory interest will continue to accrue only on (1) the difference between the amount paid and the amount determined to be fair value and (2) previously accrued interest, unless paid at that time. Otherwise, both before and after this amendment, Subsection (h) requires that interest from the effective date of the merger through the date of payment of the judgment shall compound quarterly and accrue at the rate of 5 percent over the Federal Reserve discount rate in effect from time to time during that period. As noted in the legislative synopsis, the amount, if any, that a corporation chooses to pay in advance ''is to be determined in the sole discretion of the surviving corporation'' and ''[t]here is no requirement or inference'' that whatever amount a corporation elects to pay ''is equal to, greater than, or less than the fair value of the shares.'' Additionally, the legislative synopsis notes that, if a stockholder's ''entitlement to appraisal is contested in good faith, the corporation may elect to pay such amount only to those stockholders whose entitlement to appraisal is uncontested.''

3. Technical and conforming changes. In addition to the substantive amendments discussed above, conforming changes have been made in Subsection (d)(2) to refer simply to ''the offer'' contemplated by Section 251(h) instead of ''the tender or exchange offer.'' Similarly,

Subsection (c)(2), which permits a corporation's certificate of incorporation to confer appraisal rights in additional situations not provided by statute, has been amended to clarify that the new *de minimis* exception of Subsection (g) will apply to appraisal proceedings relating to those additional situations as well.

The amendments to Section 262 are effective only with respect to transactions consummated pursuant to agreements entered into on or after Aug. 1, 2016, and appraisal proceedings arising out of such transactions.

Procedures for Restoration of Expired Certificates of Incorporation. [DGCL § 311] Section 311 of the DGCL provides procedures to revoke a voluntary dissolution of a corporation under Section 275. The 2016 amendments add similar procedures for a corporation whose existence has expired pursuant to a limitation in its certificate of incorporation. The amendments permit restoration of the certificate of incorporation after expiration. A new Subsection (g) also has been added to clarify that a corporation revoking its dissolution or restoring its certificate of incorporation must file all annual franchise tax reports that the corporation would have had to file, and pay all franchise taxes that it would have had to pay, if it had not dissolved or expired by limitation.

Procedures for Revival of Void or Forfeited Certificates of Incorporation. [DGCL § § 312, 313, 314] Section 312 has been amended in two respects. First, consistent with the amendments to Section 311, the DGCL now distinguishes between the procedures to extend a corporation's term (requiring an amendment to the certificate of incorporation governed by Section 242), to restore a certificate of incorporation after its expiration by limitation (now governed by Section 311), and to revive a certificate of incorporation that has become forfeited or void (governed by Section 312). Accordingly, Section 312 now only uses the term ''revival'' and the terms ''renewal,'' ''extension'' and ''restoration'' have been deleted. Conforming changes have been made to Sections 313 and 314, providing that a corporation must file a certificate of revival after its certificate of incorporation has become void or forfeited. Second, the amendments clarify and simplify the procedures to revive a certificate of incorporation that has become forfeited or void. For example, the amendments clarify that the procedures of Section 312 do not apply to a corporation whose certificate of incorporation has been revoked or forfeited by the Court of Chancery pursuant to Section 284 for abuse, misuse or nonuse of its corporate powers. Revisions to Subsection (h) also provide that (1) for purposes of authorizing the revival, the members of the board of directors shall be the persons who, but for the certificate of incorporation having become forfeited or void, would be the duly elected or appointed directors, (2) a majority of the directors then in office, although less than a quorum, or the sole director then in office, may authorize the revival, and (3) if no directors are in office and stockholder elections are necessary, such elections will be conducted in accordance with the DGCL and the bylaws of the corporation that would be the governing bylaws if the certificate of incorporation had not become forfeited or void.

Amendments Common to Multiple Alternative Entity Statutes

Elimination of Written Consent, Affirmative Vote and Written Agreement Requirements. [DLLCA § § 18-215(k), 18-304, 18-702(a), 18-704(a), 18-801(a), 18-806; DRULPA § § 17-218(k), 17-401(b), 17-402(a), 17-704(a), 17-801, 17-806] The enumerated sections had required, as a default rule, a written consent, written agreement or an affirmative vote for actions taken thereunder, which include dissolution of a series, dissolution generally, admission of members and partners and revocation of dissolution. In recognition of the fact that many LLCs and limited partnerships are operated informally, the amendments have eliminated the statutory requirement for a writing to evidence consent or agreement and also eliminated the requirement of an ''affirmative'' vote, which a Delaware court has recently held contemplates formal action akin to action at a stockholder's meeting.

Actions Taken Without a Meeting. [DLLCA § § 18-302(d), 18-404(d); DRULPA § § 17-302(e), 17-405(d); DRUPA § 15-407(d)] The enumerated sections had provided that members, managers, limited partners and general partners could take action without a meeting if consented to in writing or by electronic transmission. The amendments allow actions taken without a meeting to be consented to or approved by any means permitted by law, as well as in writing or by electronic transmission. As with the elimination of the requirement for a writing or an ''affirmative'' vote discussed above, these changes were adopted in recognition of the fact that partners of a limited partnership or general partnership and members of an LLC often act informally in their management activities. These changes, as with the changes discussed in the prior section, are intended to facilitate the informal operation of such entities. It should be noted, however, that if the constituent documents for an LLC or partnership include requirements for greater formality, such as action by written consent, these provisions will generally be given effect.

Assets and Liabilities of a Series. [DLLCA § 18-215(b); DRULPA § 17-218(b); DSTA § 3804(a)] Section 18-215(b) of the DLLCA, Section 17-218(b) of the DRULPA and Section 3804(a) of the DSTA had provided that if an LLC, limited partnership or statutory trust, as applicable, establishes a series that complies with the statutory requirements, the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only and not against the assets of the entity generally or any other series thereof. Each section went on to state that unless otherwise provided in the constituent document of the applicable entity, none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the entity generally or any other series thereof would be enforceable against the assets of such series. The amendments make clear that neither these provisions nor any provision that is included in the constituent document of an LLC, limited partnership or statutory trust pursuant to these provisions, is intended, or will have the effect, of restricting the entity from agreeing to be liable for the obligations of a series or a series from agreeing to be liable for the obligations

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of the entity generally or another series. In other words, these provisions do not prohibit the entity and each series from guaranteeing the other's obligations, entering into joint obligations or agreeing to the cross collateralization of assets. In addition, with respect to limited partnerships, the same rule applies with respect to a general partner associated with a series. The amendments also make clear that the two ways in which assets relating to a series are referred to in the alternative entity statutes—namely, assets of a series and assets associated with a series—are intended to have the same meaning.

Service of Legal Process upon a Series. [DLLCA § 18-105; DRULPA § 17-105] These amendments amend Section 18-105 of the DLLCA and Section 17-105 of the DRULPA to provide a method for effecting service of legal process upon a series of an LLC or a series of a limited partnership. When providing service of process upon the registered agent of an LLC or partnership on behalf of any series, the process must include the name of the LLC or partnership and of such series.

Amendments to the DLLCA

Automatic Admission of the Transferee of a 100 Percent LLC Interest. [DLLCA § 18-704(a)] Section 18-704(a) has been amended to add a new subsection that changes the default rule for the admission of an assignee of a 100 percent limited liability company interest in a voluntary assignment. Prior to the amendment, such an assignee would not have been admitted as a member of the LLC unless that was provided in the limited liability company agreement or specific action was taken by the assigning member to admit the assignee. The prior default rule often led to situations where the status of the assignee was unclear, that is, whether the assignee was a member or not, because it was often the case that the assignor simply assigned the interest to the assignee without any mention of admitting the assignee as the successor sole member. In addition, because the statutory default rule was that the assignor ceased to be a member of the LLC, the situation could also give rise to the inadvertent dissolution of the LLC because there were no remaining members. To address these concerns, the amendment changes the default rule. However, it is important to note that the new default rule only applies to a voluntary assignment, which means that the assigning member consented to the assignment at the time of the assignment and that the assignment was not effected by foreclosure or similar legal process. In addition, it also only applies in connection with the assignment by the sole member of all of the limited liability company interests in the LLC. Finally, it should be noted that in the event the parties do not wish to have the assignment result in the assignee becoming a member, they can so provide in connection with the assignment.

Events that Terminate the Continued Membership of a Member. [DLLCA § 18-801(b)] Prior to the amendments, Section 18-801(b) had provided that, unless otherwise provided in a limited liability company agreement, the death, retirement, resignation, expulsion, bankruptcy or dissolution of any member or the occurrence of any other event that terminates the continued membership of any member shall not cause the limited liability company to be dissolved. The use of the words ''any other event that terminates the continued membership of any member'' had created some uncertainty as to whether the enumerated events, particularly the dissolution of a member, would terminate the continued membership of a member. The amendment substitutes the words ''an event'' for ''any other event'' so that the subsection now refers to ''the occurrence of an event that terminates the continued membership of any member'' and thereby eliminates the implication that the specified events terminate the continued membership of a member in an LLC.

Amendments to the DSTA

Fiduciary Duties. [DSTA § 3806] Section 3806 has been amended to add a new subsection that provides, as a default rule, that trustees of a statutory trust registered as an investment company under the 1940 Act have the same fiduciary duties as directors of private corporations for profit under the DGCL. This amendment confirms that such trustees will have the benefit of the business judgment rule under the same circumstances as corporate directors and also confirms that the arguably higher duties that apply to trustees under the Delaware common law will not apply to trustees of investment companies formed as statutory trusts.

Actions in the Name of a Series. [DSTA § 3804(a)] Section 3804(a) has been amended to provide that, except as otherwise provided in the governing instrument of the statutory trust, a statutory trust that has established series in accordance with such subsection may contract, hold title to assets, grant liens and security interests and sue and be sued in the name of a series. This provision makes clear that a statutory trust can enter into a contract in the name of a series and should simplify contracting relating to series of statutory trusts.

Proxies. [DSTA § 3811(d)] Section 3811(d) addresses powers of attorney given with respect to a statutory trust and the circumstances under which they can be irrevocable. The amendment to this section makes clear that this provision applies to proxies as well as powers of attorney. It also makes clear that drafters can include other provisions regarding irrevocable powers of attorney and irrevocable proxies in the governing instrument of a statutory trust and that this subsection will not be construed to limit the enforceability of those powers of attorney or proxies. Thus, drafters should be able to expand or limit the circumstances under which a power of attorney or proxy will be deemed irrevocable in a governing instrument of a statutory trust.

Irrevocable Delegation. [DSTA § 3806(i)] Section 3806(i) provides that a trustee of a statutory trust can delegate to one or more persons the trustee's rights and powers to manage and control the business and affairs of a statutory trust. The amendment confirms that any delegation by a trustee will be irrevocable if it states that it is irrevocable, unless otherwise provided in a governing instrument of a statutory trust, thus eliminating any question as to whether a delegation must be coupled with an interest or satisfy any additional requirements in order to be irrevocable.

Revocation of Dissolution. [DSTA § 3808(c)] Section 3808(c) has been amended to authorize provisions providing for revocation of dissolution to be included in a

governing instrument of a statutory trust, and to expand the default provision relating to revocation of dissolution. Prior to the amendments, Section 3808(c) required all remaining beneficial owners of a statutory trust to consent to the revocation of dissolution. This provision has been changed to allow a more flexible approach. It now provides that if a governing instrument of a statutory trust provides the manner in which a dissolution may be revoked, it may be revoked in that manner. Thus, the DSTA now specifically authorizes the inclusion of provisions in a governing instrument of a statutory trust that provide for revocation of dissolution. The section includes two default provisions allowing the revocation of dissolution unless such revocation is prohibited by the applicable agreement. First, if dissolution were effected by the affirmative vote or written consent of the beneficial owners or other persons, dissolution may be revoked by the same vote or consent (and the approval of any beneficial owner or other persons whose approval is required under the governing instrument to revoke a dissolution contemplated by Section 3808(c)). Second, in the case of dissolution at a time, or upon the happening of events, specified in the governing instrument of a statutory trust (other than a vote or written consent), dissolution may be revoked by the affirmative vote or written consent that, pursuant to the terms of the governing instrument, is required to amend the provision of the governing instrument effecting such dissolution (and the approval of any beneficial owners or other persons whose approval is required under the governing instrument to revoke a dissolution contemplated by Section 3808(c)).

Separate Legal Entity Status; Formation. [DSTA § § 3801(g), 3810(a)] Sections 3801(g) and 3810(a) have been amended to provide that a statutory trust can opt out of separate legal entity status if such statutory trust elects to in its certificate of trust and governing instrument. This change will permit practitioners to use a Delaware statutory trust under circumstances where they would otherwise have used a common law trust in order to avoid entity status and thereby take advantage of the other attributes of a Delaware statutory trust including limited liability for the beneficial owners and trustees. In addition, Section 3810(a) has been amended to confirm that a statutory trust will be duly formed irrespective of whether the certificate of trust is filed before the governing instrument is adopted or after it is adopted.

Maintenance and Provision of Information. [DSTA § 3819] Section 3819 has been amended to confirm that a trustee or beneficial owner seeking information under Section 3819 may seek such information in person or by an attorney or other agent, provided that any books and records demand through an attorney or other agent must be accompanied by a power of attorney or other writing that authorizes the attorney or other agent to act on behalf of the beneficial owner or trustee.

Technical Change Regarding the Provision of Public Records. [DSTA § 3813] The amendment to Section 3813 confirms that the Secretary of State may issue public records in the form of photocopies or electronic image copies and need not provide public records in any other form, in exchange for the statutorily prescribed fees.

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