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2020 Amendments to Delaware's General Corporation Law & Alternative Entity Statutes

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In its 2020 session, the Delaware legislature passed a number of amendments to the Delaware General Corporation Law and the Delaware "alternative entity" statutes—the Delaware Limited Liability Company Act, the Delaware Revised Uniform Limited Partnership Act, the Delaware Revised Uniform Partnership Act and the Delaware Statutory Trust Act.

The amendments to the Delaware General Corporation Law, the Delaware Limited Liability Company Act, the Delaware Revised Uniform Limited Partnership Act, and the Delaware Revised Uniform Partnership Act became effective on July 16, 2020, and the amendments to the Delaware Statutory Trust Act became effective August 1, 2020. This article discusses amendments to the DGCL and to the alternative entity statutes.

Amendments to the DGCL effected a number of substantive, technical, and clarifying changes, including changes that afford corporations additional flexibility to respond to the challenges of Covid-19, define the officers entitled to mandatory indemnification of expenses, and eliminate the supermajority vote required for a traditional corporation to convert to a public benefit corporation.

Amendments to the alternative entity statutes include a number of significant substantive changes to the DSTA. Several were based on similar provisions of the DRULPA and the DLLCA; others are unique to the DSTA. As described below, these amendments do the following:

- Permit a statutory trust statutorily to divide into two or more statutory trusts
- Confirm that it is permissible under the DSTA to document, sign, and deliver certain types of transaction documents through DocuSign and similar electronic means
- Change the default rule for mergers, consolidations, and other statutory transactions for Delaware statutory trusts that are formed as registered investment companies
- Confirm that a statutory trust may enter into contracts on behalf of one series with another series of the same statutory trust or with the trust itself

The amendments to the DLLCA clarify the rules for admission of the transferee of 100% of the membership interest in a limited liability company in connection with a voluntary transfer of that interest from a 100% owner, and the amendments to the DLLCA, DRULPA, DRUPA, and DSTA confirm that owners of interests in the entities formed under those statutes do not have appraisal rights under those statutes, whether in connection with mergers, consolidations, conversions, asset sales, or otherwise.

Amendments to the DGCL

Exculpatory Provisions

Section 102(b)(7), which permits a corporation to include in its certificate of incorporation a provision that eliminates the personal liability of directors for certain acts and omissions, has been amended to clarify the effect of an amendment, repeal, or elimination of such a provision. As amended, Section 102(b)(7) provides that an amendment, repeal, or elimination of such a provision will not affect its application with respect to a director's act or omission occurring before such amendment, repeal, or elimination unless the provision otherwise provides at the time of such act or omission.

Organization Meetings

Section 108, which governs the initial organization meeting of incorporators, or of directors, if named in the certificate of incorporation, has been amended to provide that action taken by consent in lieu of an initial organization meeting may be documented, signed and delivered in any manner permitted under Section 116, discussed below.

Emergency Bylaws

Section 110, which permits a corporation to adopt bylaws containing provisions applicable during certain emergency conditions, has been amended to clarify the types of conditions that would cause the emergency provisions to apply and to expand the actions that directors are permitted to take during the continuation of the emergency conditions.

Previously, Section 110 provided that such bylaws would be operative if, as a result of an emergency condition, a quorum of the board of directors could not readily be convened for action. As amended, Section 110 provides that such bylaws may be operative during the emergency condition, irrespective of whether a quorum can readily be convened for action. Amended Section 110 also clarifies that epidemics and pandemics constitute an emergency condition and provides that if a quorum of directors cannot be readily convened for a meeting, emergency bylaws may be adopted by a majority of directors present.

A new subsection (i) has been added to Section 110, which provides that during an emergency condition, the board of directors, or, if a quorum cannot be readily convened for a meeting, a majority of directors present, may take any action it determines to be practical and necessary with respect to a stockholder meeting, including postponing the meeting, and may change the record and payment dates for a dividend that has been declared but for which the record date has not yet occurred.

The new provisions also permit public corporations to notify stockholders of any postponement of the meeting, any change to the location of the meeting, any change to hold the meeting solely in a virtual format, or any change to the record or payment date of a dividend solely by a public filing with the Securities and Exchange Commission. Subsection (i) also provides that no stockholder meeting will be postponed or voided if it was not practical to provide stockholders with a list of stockholders before and during the meeting, as required by Section 219.

The amendments to Section 110 are effective retroactively as of Jan. 1, 2020 with respect to any emergency condition occurring on or after that date and with respect to any action contemplated by Section 110 taken on or after such date by or on behalf of the corporation.

E-Sign and E-Delivery

Section 116(a), which provides a "safe harbor" for memorializing, executing, and delivering certain documents electronically under the DGCL or the governing documents of a corporation, has been amended to expand and clarify its applicability. As amended, the safe harbor of Section 116(a) extends to director, stockholder and incorporator consents. The amendments to Section 116(a) also clarify that a person may "execute" a document, such as a merger agreement, using any type of signature permitted under Section 116.

Section 116(b), which permits corporations to opt out of the Section 116(a) safe harbor through a certificate of incorporation or bylaw provision expressly prohibiting or restricting electronic signatures or electronic delivery, has been amended to clarify that any such provision may restrict or prohibit only the electronic means to document an act or transaction and to sign and deliver a document.

Board Consents

Section 141(f), which provides for board action by consent in lieu of a meeting, has been amended to provide that any such consent may be documented, signed and delivered in any manner permitted by Section 116.

Indemnification

Section 145(c), which provides directors and officers with a right to indemnification of expenses if they are successful in defending claims brought against them by reason of their conduct as directors or officers, has been amended to define the officers entitled to indemnification thereunder as the officers who would be deemed to have consented to suit in Delaware under 10 Del. C. § 3114(b). Thus, as amended, Section 145(c) defines an "officer" as any president, chief executive

officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer, or chief accounting officer; any person identified in the corporation's public filings as one of the most highly compensated executive officers of the corporation; or any person who has, by written agreement with the corporation, consented to be identified as an officer for purposes of 10 Del. C. § 3114.

For any other person, including officers not within the categories described above, the corporation may provide mandatory indemnification of expenses, including pursuant to its certificate of incorporation or bylaws, but is not required to do so. The forgoing amendments to Section 145(c) are applicable to acts and omissions occurring after Dec. 31, 2020.

Section 145(f) has been amended to clarify that a right to indemnification or to advancement under a provision of the certificate of incorporation or the bylaws may not be eliminated or impaired by an elimination or repeal of the certificate of incorporation or bylaws after the act or omission that is the subject of the action, suit or proceeding for which indemnification or advancement is sought, unless the provision expressly provides otherwise at the time of such act or omission.

Proxies

Section 212(c), which describes the means by which a stockholder may authorize another person to act as the stockholder's proxy, has been amended to expressly provide that such authorization may be documented, signed and delivered in accordance with Section 116 if such authorization sets forth or is delivered with information enabling the corporation to determine the identity of the stockholder granting such authorization.

Stockholder Consents

Section 228, which governs stockholder action by consent in lieu of a stockholder meeting, has been amended to simplify the procedures governing consent by electronic transmission. Under amended Section 228, a consent may be documented, signed and delivered in accordance with Section 116, provided that the consent sets forth or is delivered with information that enables the corporation to determine the date of delivery of such consent and the identity of the person giving such consent, and, if applicable, the information required by Section 212(c), described above.

Electronic Notice

Section 232, which allows corporations to provide notice by electronic transmission, has been amended to clarify that a stockholder's consent is not required for notices under the DGCL or a certificate of incorporation or bylaw provision to be given by email.

Holding Company Mergers

Section 251(g), which permits a corporation to convert to a holding company structure without a stockholder vote by merging with a direct or indirect wholly-owned subsidiary of a Delaware corporate holding company, has been amended to eliminate the requirement that the charter and bylaws of the surviving subsidiary corporation immediately after the merger—i.e., the subsidiary of the holding company—must contain provisions identical to the corporation's pre-merger governing documents. The amendments to Section 251(g) are effective with respect to a merger or consolidation consummated pursuant to an agreement entered into on or after July 16, 2020.

Appraisal Rights

Section 262, which entitles a stockholder to the right to have the fair value of its stock appraised by the Delaware Court of Chancery in connection with certain mergers or consolidations of the corporation, has been amended to conform to the amendments to Section 363 described below. As a result of such amendments, the right to seek appraisal in connection with a traditional corporation becoming a public benefit corporation, whether by merger or amendment, is eliminated. The amendments to Section 262 are effective with respect to a merger or consolidation consummated pursuant to an agreement entered into on or after July 16, 2020.

Public Benefit Corporations

Sections 363, 365 and 367, which relate to public benefit corporations, have been amended in several respects.

Section 363 has been amended to eliminate the supermajority stockholder vote required to convert a traditional corporation to a public benefit corporation, or vice versa, by amendment to the certificate of corporation or merger. The amendments to Section 363 also eliminate appraisal rights for stockholders who did not vote in favor of an amendment to convert to a public benefit corporation or a merger that converts shares into shares of a public benefit corporation. The amendments to Section 363 are effective with respect to a merger or consolidation consummated pursuant to an agreement entered into on or after July 16, 2020.

Section 365 has been amended to clarify certain aspects of directors' duties with respect to the balancing requirement thereunder. Under Section 365(a), the board of directors of a public benefit corporation must balance the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in the certificate of incorporation.

Section 365(b) provides that directors will be deemed to have satisfied their fiduciary duties with respect to a decision implicating the balancing requirement if the decision is informed and disinterested and not such that no person of ordinary, sound judgment would approve. The amendments to Section 365(c) clarify that a director will not be interested with respect to a decision implicating the balancing requirement due to the director's ownership of, or other interest in, stock of the corporation, except to the extent that such ownership or interest would create a conflict of interest if the corporation were not a public benefit corporation.

The amendments also provide that, absent a conflict of interest and unless the certificate of incorporation otherwise provides, a failure to satisfy the balancing requirement will not constitute an act or omission not in good faith for the purposes of Section 102(b)(7) or Section 145.

Section 367 has been amended to clarify that an action to enforce the balancing requirement described above may only be brought by stockholders that, individually or collectively, own at least 2% of the voting power of the corporation's outstanding shares or, in the case of a corporation listed on a national securities exchange, shares with a value of at least $2,000,000, if such number is lower.

Secretary of State Fees

Section 391(a)(16) has been amended to provide for the maximum fee payable to the secretary of state for a written report of a record search.

Other Conforming and Clarifying Amendments

Section 102(a) has been amended to provide that the name of a corporation must be such as to distinguish it from the name of any registered series of a limited partnership. Section 132 has been amended to remove erroneous references to a foreign "general" partnership. Section 135 has been amended to reflect the current practice of the Office of the secretary of state relating to the appointment of a successor registered agent by a registered agent of a corporation.

Section 213 has been amended to conform to amended Section 228 and eliminate redundant references to where, and to whom, a consent may be delivered. Section 266 has been amended to reflect the current practice of the Office of the secretary of state relating to the issuance of a certified copy of a certificate of conversion to a non-Delaware entity. Section 377 has been amended to conform the process relating to the resignation of a registered agent of a foreign corporation to the process applicable to the resignation of a registered agent of a corporation under Section 136.

Amendments to the DSTA

Series of a Statutory Trust

The amendments to Section 3804 of the DSTA confirm that a statutory trust may enter into contracts on behalf of one series with another series of the same statutory trust or with the trust itself and that the statutory trust, rather than a series, is the debtor for Uniform Commercial Code purposes.

The confirmation regarding contracting is particularly important with respect to statutory trusts that are registered investment companies as they often enter into reorganization agreements on behalf of two series of the same trust when they are combining those series. The confirmation regarding the statutory trust as debtor is important for all secured

transactions involving the series of statutory trusts and makes clear, for example, that the trust not the series should be listed as debtor in the financing statement.

Mergers, Consolidations and Conversion

The amendments to Section 3815(a) and Section 3821(b) of the DSTA change the default voting approval requirements for beneficial owners of registered investment companies to approve merger, consolidation and conversion transactions from a unanimous vote to a majority-in-interest vote. Typically, these entities provide for majority-in-interest votes in their governing instruments for these sort of transactions consistent with the statutory requirement of other public entities. However, such provisions are sometimes inadvertently omitted. The amendments to Section 3815(a) and Section 3821(b) bring the DSTA in line with Delaware's other entity statutes and industry expectations. Because of the significance of the changes, they apply only to statutory trusts formed after July 31, 2020.

Division of a Statutory Trust

Pursuant to new Section 3825 of the DSTA, a statutory trust may divide into one or more newly formed statutory trusts, with the dividing statutory trust either continuing its existence or terminating as part of the division. A division of a statutory trust is effected by the adoption of a plan of division setting forth the terms and conditions of the division, including, among others, the allocation of assets, property, rights, series, debts, liabilities and duties of the dividing statutory trust among the resulting statutory trusts and, if it survives, the dividing statutory trust; and the filing with the secretary of state of a certificate of division and a certificate of trust for each newly formed statutory trust.

A plan of division will be given effect to divide the assets and liabilities of a statutory trust among the resulting statutory trusts and, if it survives, the dividing statutory trust, so long as the plan of division does not constitute a fraudulent conveyance under applicable law. With respect to any statutory trust formed prior to Aug. 1, 2020 that is party to any written contract, indenture, or other agreement entered into prior to Aug. 1, 2020 that by its terms restricts, conditions, or prohibits such statutory trust from consummating a merger or consolidation with or into another party, or transferring assets, such restriction, condition or prohibition shall be deemed to apply to a division as if it were a merger or consolidation or transfer of assets.

Electronic Transactions

The amendments to the DSTA enact new Section 3826 to create a safe harbor provision that clarifies when acts and transactions contemplated by the DSTA may be documented, signed and delivered electronically. The provisions are generally based on the electronic delivery rules under Delaware's Uniform Electronic Transactions Act and similar sections of the DGCL, DRULPA, DRUPA and DLLCA and, in recognition of the increasing prevalence of the use of electronic signatures in many investment and financing transactions, permit various contracts including operating agreements and merger agreements to be adopted, executed, and delivered via DocuSign and similar electronic processes.

A small class of documents is excluded from the new electronic rules, including documents filed with the secretary of state, the Delaware Register in Chancery, or a Delaware court or other judicial or governmental body and certificates of beneficial interest (though most if not all are governed by their own rules, which permit some form of electronic documentation, execution and delivery). New Section 3826 also clarifies that a person may “execute” a document by using any type of signature contemplated by Section 3826, including by electronic signature.

Title to Assets

The amendments to Section 3805 of the DSTA confirm that a trustee of a statutory trust that holds title to trust assets is not required to be a party to any contracts of such trust, including security agreements.

Judicial Cancellation of Certificate of Trust

The amendments include new Section 3824 of the DSTA, which is similar to Section 17-112 of the DRULPA and Section 18-112 of the DLLCA, and grants the Court of Chancery jurisdiction to cancel a certificate of trust of a statutory trust for abuse or misuse of such trust's powers, privileges or existence upon a motion by the attorney general. Upon such cancellation, the Court of Chancery has the power, by appointment of trustees, receivers or otherwise, to administer and wind up the affairs of the trust.

Amendments to the DLLCA

Admission of Members

Section 18-301 of the DLLCA was amended to eliminate any statutory default requirement that a member's admission to a limited liability company be reflected in the records of the limited liability company and to confirm that an assignee of a membership interest is admitted as a member as provided in Section 18-704(a) of the DLLCA. Under amended Section 18-301, if not otherwise provided in the limited liability company agreement, a member is admitted to the limited liability company after its formation upon the consent of all members without any further action.

This amendment also clarifies that upon the voluntary assignment by the sole member of a limited liability company of all of its limited liability company interest in the limited liability company to a single assignee, the assignee will automatically be admitted to the limited liability company as a member as set forth in Section 18-704(a) of the DLLCA. This amendment addresses the court's concern in Perry v. Neupert, C.A. No. 2017-0290-VCL (Del. Ch. Dec. 6, 2017), in dicta, that the DLLCA required that the admission of an assignee as a sole member to be reflected on the books and records of the limited liability company for the admission to be effective.

Amendments to the DRULPA

Admission of Limited Partners

Section 17-301 of the DRULPA was amended to eliminate the statutory default requirement that a limited partner's admission to a limited partnership be reflected in the records of the limited partnership and to confirm that an assignee of a partnership interest is admitted as a limited partner as provided in Section 17-704(a) of the DRULPA. Under amended Section 17-301, if not otherwise provided in the partnership agreement, a limited partner is admitted to the limited partnership after its formation upon the consent of all partners without any further action.

Amendments Common to Multiple Alternative Entity Statutes

Electronic Transactions

The amendments to the DRUPA, the DRULPA and the DLLCA amend Sections 15-124(A)(2), 17-113(a)(2) and 18-113(a)(2) to clarify that a person may "execute" a document by using any type of signature contemplated by the applicable Section, including by electronic signature.

Appraisal Rights

The amendments to the DRUPA, DRULPA, DLLCA and DSTA amend Sections 15-120, 17-112, 18-210 and 3815(h) to clarify that there are no statutory appraisal rights available with respect to interests in a partnership, limited partnership, limited liability company, or statutory trust, as applicable, including in connection with mergers, consolidations, divisions or assets sales.

Books and Records

The amendments to the DRULPA, the DLLCA and the DSTA amend Sections 17-305(c), 18-305(d) and 3819(d) to confirm that the books, records and other information of limited partnerships, limited liability companies and statutory trusts, as applicable, can be kept in forms other than paper form, including electronic form, as long as such form is capable of being converted into paper form within a reasonable time.

Implementation Checklist

- Review officers' rights to indemnification in light of the amendments to Section 145(c), which define the officers entitled to mandatory indemnification of expenses if they are successful in defending claims brought against them by reason of their conduct as officers. To the extent a corporation desires to extend this right of indemnification to other officers, the corporation should expressly provide for such right in a provision of its certificate of incorporation or bylaws or in an indemnification agreement.
- Update appraisal notice forms in light of the amendments to Section 262, which eliminate appraisal rights in connection with certain transactions involving public benefit corporations.