

## Delaware Corporation Law Section Approves Amendments to Delaware's Alternative Entity Acts

On April 6, 2018, the Corporation Law Section of the Delaware State Bar Association approved amendments to the Delaware Limited Liability Company Act, 6 Del. C. §§ 18-101 et seq. (the "DLLCA"), the Delaware Revised Uniform Limited Partnership Act, 6 Del. C. §§ 17-101 et seq. (the "DRULPA"), and the Delaware Revised Uniform Partnership Act, 6 Del. C. §§ 15-101 et seq. (the "DRUPA").<sup>1</sup> The amendments are subject to further approval in the Bar Association process and, if approved, will be introduced and considered by the Delaware legislature. The amendments include a number of significant substantive changes to the DLLCA described below to, inter alia, (i) create a new type of limited liability company series known as registered series, (ii) permit registered series of the same limited liability company to merge or consolidate, (iii) permit a limited liability company to statutorily divide into two or more limited liability companies, (iv) create statutory public benefit limited liability companies and (v) confirm the authority to use distributed ledgers, blockchain and other networks of electronic databases for the creation and maintenance of limited liability company records and for certain electronic transmissions. Similar amendments regarding the use of distributed ledgers, blockchain and other networks of databases were made to the DRULPA. If approved by the Bar Association and the legislature and signed by the Governor, the amendments will become effective on August 1, 2018, except that the amendments relating to registered series will not become effective until August 1, 2019.

### Registered Series and Protected Series.

[DLLCA §§ 18-101; 18-102(3); 18-103; 18-104; 18-105; 18-203; 18-206; 18-207; 18-208; 18-209(a); 18-215; 18-218; 18-219; 18-220; 18-221; 18-1105(a); 18-1107; 18-1108; and 18-1109] The proposed amendments amend numerous provisions of the DLLCA to create a new type of series known as registered series. Registered series will be addressed in new Section 18-218 of the DLLCA. Section 18-215 of the DLLCA, which currently addresses series, will be amended to provide that series formed under Section 18-215(b) of the DLLCA (either before or after the amendments) will be known as protected series. The provisions relating to registered series are similar to the provisions relating to protected series with several notable exceptions. First, in order to facilitate the use of registered series in secured financing transactions, registered series are designed to qualify as registered organizations under the Uniform Commercial Code. Thus, a certificate of registered

<sup>1</sup> Amendments to the Delaware General Corporation Law, 8 Del. C. §§ 101 et seq., were also approved by the Corporation Law Section, and on March 29, 2018, amendments to the Delaware Statutory Trust Act, 12 Del. C. §§ 3801 et seq., were approved by the Commercial Law Section of the Bar Association. You will receive separate newsletters on those amendments.

<sup>2</sup> In connection with these amendments, subject to further approval in the Bar Association process and approval by the Delaware legislature, Article 9 of the Delaware Uniform Commercial Code is also being amended effective August 1, 2019 to provide that a registered series constitutes a "registered organization".

series is required to be filed with the Delaware Secretary of State to form a registered series,<sup>2</sup> and the name of a registered series must begin with the name of the limited liability company and be distinguishable from the names of other Delaware business entities or business entities qualified or registered to do business in Delaware. Second, one or more registered series of a limited liability company may merge or consolidate with or into one or more other registered series of the same limited liability company. Third, certificates of good standing and certificates of existence with respect to registered series will be issued by the Delaware Secretary of State. Fourth, a protected series of a limited liability company may convert to a registered series of the same limited liability company and a registered series of a limited liability company may convert to a protected series of the same limited liability company. Finally, an annual franchise tax in the amount of \$100 per registered series will be required to be paid, but the aggregate amount of annual franchise tax for all registered series of a limited liability company will be limited to \$5,000. Because of the time necessary to implement the creation of registered series, including time needed to prepare for filings with, and the issuance of certificates by, the Delaware Secretary of State, the amendments regarding registered series and protected series will not be effective until August 1, 2019.

## Division of a Limited Liability Company.

[DLLCA §§ 18-206; 18-209(a); 18-217; and 18-1105(a)] Pursuant to new Section 18-217 of the DLLCA, the proposed amendments permit a limited liability company to divide into two or more newly formed limited liability companies, with the dividing limited liability company either continuing its existence or terminating as part of the division. A division of a limited liability company is effected by (i) 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 limited liability company among the resulting limited liability companies and, if it survives, the dividing limited liability company, and (ii) the filing with the Delaware Secretary of State of a certificate of division and a certificate of formation for each newly formed limited liability company. A plan of division will be given effect to divide the assets and liabilities of a limited liability company among the resulting limited liability companies and, if it survives, the dividing limited liability company, so long as the plan of division does not constitute a fraudulent conveyance under applicable law. With respect to any limited liability company formed prior to August 1, 2018 that is party to any written contract, indenture or other agreement entered into prior to August 1, 2018 that by its terms restricts, conditions or prohibits such limited liability company from (x) consummating a merger or consolidation with or into another party or (y) transferring assets, such restriction shall be deemed to apply to a division as if it were a merger or consolidation.

## Statutory Public Benefit Limited Liability Companies.

[DLLCA Subchapter XII] Under the proposed amendments, new subchapter XII of the DLLCA authorizes the creation of statutory public benefit limited liability companies, which are similar to public benefit corporations organized under subchapter XV of the Delaware General Corporation Law. Subchapter XII of the DLLCA is intended to provide a simple and efficient “opt-in” procedure for forming a public benefit limited liability company. As with a public benefit corporation, a statutory public benefit limited liability company is intended to produce a public benefit and to operate in a responsible and sustainable manner. New subchapter XII of the DLLCA does not limit the formation or operation of a limited liability company formed or operated for a public benefit (including a limited liability company designated as a public benefit limited liability company) that is not a statutory public benefit limited liability company.

## Distributed Ledgers and Blockchain.

[DLLCA §§ 18-104(g); 18-302(d); 18-305(d); and 18-404(d); DRULPA §§ 17-104(g); 17-302(e); 17-305(c); and 17-405(d)] The proposed amendments amend numerous provisions of the DLLCA and the DRULPA to provide express statutory authority to use networks of electronic databases, including distributed ledgers and blockchain, to create or maintain records of the entity and for certain electronic transmissions. These amendments confirm that this rapidly advancing technology is available to be used with respect to limited liability companies and limited partnerships.

***Should you have any questions on any of the amendments, please feel free to contact a member of the Morris Nichols Delaware Alternative Entities Group referenced below.***

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