

**Professional Perspective**

2024 Amendments to the DGCL & Delaware's Alternative Entity Statutes

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In its 2024 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). The amendments to the DGCL, the DLLCA, the DRULPA, the DRUPA, and the DSTA became effective on August 1, 2024, except that the amendments to the DGCL do not apply to or affect any civil action or proceeding completed or pending on or before August 1, 2024.

The amendments to the DGCL and the alternative entity statutes effected a number of substantive, technical, and clarifying changes. The amendments to the DGCL add several new sections intended to respond to evolving market practice. The amendments to the alternative entity statutes (i) expand the amendments that may be made to statements of partnership existence, statements of qualification, certificates of limited partnership, certificates of formation or certificates of registered series, as applicable, by merger certificates,

1. clarify certain of the mechanisms for revoking termination of a protected series, dissolution of a registered series, dissolution of a limited liability company and dissolution of a limited partnership, as applicable, and
2. confirm that pass-through voting is permissible for securities held by a statutory trust.

# Amendments to the DGCL

## *Stockholder Agreements*

Section 122, which lists specific powers that a corporation may exercise, has been amended to add a new paragraph 18. [**Section 122(18)**](https://www.bloomberglaw.com/product/corporate/document/2915430440)empowers a corporation to enter into contracts with current or prospective stockholders and provides a nonexclusive list of provisions that may be included in such contracts. Under the new provisions, a corporation may agree (i) to take or not take future actions, (ii) to obtain approvals before taking future action (including from specified directors or stockholders) and (iii) that other persons or bodies (including directors or stockholders) will take or not take specified future actions and such arrangements will not violate [**Section 141(a)**.](https://www.bloomberglaw.com/product/corporate/document/X2MSC318) The corporation must receive consideration in exchange for such agreements, the minimum amount of which must be determined by the board (or a committee). Section 122(18) was added in response to the Court of Chancery's decision in *West Palm Beach Firefighters’ Pension Fund v. Moelis & Co*., [**311**](http://www.bloomberglaw.com/citation/311%20a.3d%20809)[**A.3d 809**](http://www.bloomberglaw.com/citation/311%20a.3d%20809)(Del. Ch. 2024), which held that certain governance arrangements in an agreement between the corporation and its stockholders implicate Section 141(a) and must be included in the certificate of incorporation to be valid.

Section 122(18) is not intended to affect the fiduciary duties owed by directors, officers and stockholders, including any duties implicated in causing the corporation to enter into, perform or breach contracts. In addition, no provision of a Section 122(18) contract is enforceable against the corporation if it conflicts with the certificate of incorporation or would conflict with Delaware law if included in the certificate of incorporation (other than [**Section 115**](https://www.bloomberglaw.com/product/corporate/document/5224837672)). The exception for Section 115 permits a contract to specify an exclusive non-Delaware forum (including arbitration) for dispute resolution.

Section 122(18) provides that a corporation is subject to the remedies available under the law “governing” the contract, including for any failure to perform or comply with the contract. As noted in the synopsis to

Section 122(18), the reference to the law “governing” the contract refers to Delaware law to the extent required by choice of law principles (such as the internal affairs doctrine). Section 122(18) does not permit contracts to bind the board or individual directors or impose penalties on the board or individual directors for failing to comply with the contract.

A corporation may opt out of Section 122(18) in its certificate of incorporation.

Section 122(5) has also been amended to clarify that management contracts and other internal delegation arrangements (providing officers or agents with authority to act on behalf of the corporation) continue to be subject to Section 141(a) and the case law relating to board delegation.

## *Board Approval of Agreements, Instruments & Documents*

A new [**Section 147**](https://www.bloomberglaw.com/product/corporate/document/33465149992)has been added to clarify that any agreement, instrument or document that requires the approval of the board under the DGCL may be approved in final or substantially final form. Section 147 is intended to address an issue raised in *Sjunde AP-fonden v. Activision Blizzard, Inc.*, [**2024 BL 67209**](http://www.bloomberglaw.com/citation/2024%20bl%2067209)(Del. Ch. Feb. 29, 2024). There, the Court of Chancery reasoned that a merger agreement may not have been approved in accordance with the DGCL because the board approved a draft version of the agreement, which was missing several key terms.

The synopsis to Section 147 explains that the new provision is intended to permit a board to validly approve an agreement, instrument or document so long as all its material terms are known by the board or determinable through information or materials presented to the board.

Section 147 also provides a new ratification process. If the board acted on an agreement, instrument or document that is required to be filed with (or referenced in a certificate filed with) the Office of the Secretary of State of the State of Delaware, the board may ratify the approval of such agreement, instrument or document prior to the filing. The ratification is deemed effective as of the time of the board's original action.

This process can be used to address uncertainty over whether an agreement, instrument or document was originally approved in final or substantially final form.

## *Stockholder Notices*

[**Section 232**,](https://www.bloomberglaw.com/product/corporate/document/2915466792) which governs the delivery of notice to stockholders, has been amended to provide that materials attached to or enclosed with a stockholder notice are deemed part of the notice for purposes of satisfying notice requirements under the DGCL, the certificate of incorporation or bylaws.

## *Merger Agreements: Remedies*

[**Section 261(a)(1)**](https://www.bloomberglaw.com/product/corporate/document/2915477032)has been added in response to [***Crispo v. Musk*, 304 A.3d 567 (Del. Ch. 2023)**,](https://www.bloomberglaw.com/public/document/CrispovMusk304A3d567DelCh2023CourtOpinion?doc_id=X1IG19VA0000N) where the Court of Chancery concluded that a target company could not enforce a provision in a merger agreement defining damages to include the lost premium for the target stockholders. Under new Section 261(a)(1), a merger agreement may provide for penalties and other consequences for a pre-closing breach or a failure to consummate the merger, including damages based on a lost premium. Section 261(a)(1) also confirms that the corporation is entitled to enforce such provisions and retain payments owed under such provisions.

[**Section 261(a)(2)**](https://www.bloomberglaw.com/product/corporate/document/2915477032)has been added to confirm that a merger agreement may provide for a stockholders’ representative with exclusive authority to enforce stockholders’ rights under the agreement, such as an indemnification or escrow arrangement. Section 261(a)(2) does not empower a representative to exercise powers beyond those related to the enforcement of stockholder rights under the agreement. For example, Section 261(a)(2) does not empower a representative to waive stockholders’ appraisal rights or fiduciary claims or bind stockholders to restrictive covenants.

## *Merger Agreements: Approvals*

A new [**Section 268**](https://www.bloomberglaw.com/product/corporate/document/33465150504)has been added to streamline certain aspects of the approval process for mergers.

Section 268(a) relates to the requirement under [**Section 251(b)**](https://www.bloomberglaw.com/product/corporate/document/2915471912)that a merger agreement include a provision addressing the changes, if any, to the certificate of incorporation of the surviving corporation in the merger. Section 268(a) provides that, if all the shares of a constituent corporation are being converted into or exchanged for cash, property, rights or securities (other than stock of the surviving corporation), the merger agreement does not have to include such a provision with respect to such constituent corporation. In addition, any amendments to the certificate of incorporation of the surviving corporation to be effected in the merger may be approved by, or at the direction of, the board of such corporation (or by the other constituent entity's board or governing body, if the equity interests of such entity are converted into all the shares of the surviving corporation) and any amendments to the certificate of incorporation will not be deemed to be an amendment to the merger agreement. Section 268(a) is intended to afford the buyer in a reverse triangular merger with

more flexibility over the approval and modification of the certificate of incorporation of the surviving corporation (which will be wholly owned by the buyer following the merger).

Section 268(b) also provides that disclosure schedules and similar documents delivered in connection with merger agreements will not be deemed to be a part of the merger agreement for purposes of the DGCL. This provision confirms that officers may prepare disclosure schedules at the direction of the board and that such schedules are not part of the merger agreement for purposes of board and stockholder approval for statutory (as opposed to fiduciary) purposes.

# Amendments Common to Multiple Alternative Entity Statutes

The amendments common to the DRUPA, the DRULPA, and the DLLCA address amendments that may be made to certificates in connection with a merger. The amendments common to the DRULPA and the DLLCA clarify language regarding revocation of termination of a protected series, revocation of dissolution of a registered series, revocation of dissolution of a limited partnership and revocation of dissolution of a limited liability company.

## *Amendments in connection with Mergers*

The amendments amend Sections [**15-902**,](https://www.bloomberglaw.com/product/corporate/document/32932716072) [**17-211**](https://www.bloomberglaw.com/product/corporate/document/32932684328)and [**18-209**](https://www.bloomberglaw.com/product/corporate/document/32932647464)of the DRUPA, the DRULPA, and the DLLCA, respectively, to permit a certificate of merger or a certificate of ownership and merger to state any amendments to the statement of partnership existence of a surviving domestic partnership, the statement of qualification of a surviving domestic limited liability partnership, the certificate of limited partnership of a surviving domestic limited partnership, the statement of qualification of a surviving domestic limited liability limited partnership or the certificate of formation of a surviving domestic limited liability company, as applicable, in the merger as are desired to be effected by the merger.

The amendments also amend Sections [**17-224**](https://www.bloomberglaw.com/product/corporate/document/32932690472)and [**18-221**](https://www.bloomberglaw.com/product/corporate/document/32932642344)of the DRULPA and the DLLCA, respectively, to permit a certificate of merger of a registered series to state amendments to the certificate of registered series of a surviving registered series in the merger as are desired to be effected by the merger.

## *Revocation of Terminations and Dissolutions*

The amendments amend Sections [**17-218(d)**,](https://www.bloomberglaw.com/product/corporate/document/32932686888) [**17-221(f)**,](https://www.bloomberglaw.com/product/corporate/document/32932693032) [**17-806**,](https://www.bloomberglaw.com/product/corporate/document/32932673064) [**18-215(d)**,](https://www.bloomberglaw.com/product/corporate/document/32932644392) [**18-218(f)**](https://www.bloomberglaw.com/product/corporate/document/32932645928)and [**18-806**](https://www.bloomberglaw.com/product/corporate/document/32932636200)of the DRULPA and the DLLCA, respectively, to confirm and clarify that the references to “other persons” in each such

Section are references to other persons whose approval is required for the termination of the protected series or the dissolution of the limited partnership, limited liability company or registered series, as applicable, pursuant to the partnership agreement or limited liability company agreement, as applicable.

# Amendments specific to the DRULPA

## *Execution of Certificates under DRULPA*

Because of the above-mentioned amendments that (i) permit a certificate of merger or a certificate of ownership and merger to amend the certificate of limited partnership of a surviving domestic limited partnership in a merger to reflect the admission of one or more new general partners of the surviving domestic limited partnership in connection with the merger, and (ii) permit a certificate of merger of a registered series to amend the certificate of registered series of a surviving registered series in a merger to reflect the association of one or more new general partners with the surviving registered series in connection with the merger, the amendments to the DRULPA [**Section 17-204(a)**](https://www.bloomberglaw.com/product/corporate/document/32932682792)require each new general partner to sign the certificate of merger, certificate of ownership and merger or certificate of merger of registered series, as applicable.

# Amendments specific to the DRUPA

## *Requirement to file a Statement of Partnership Existence in connection with a Merger*

The amendments amend DRUPA Section 15-902 to require a domestic partnership that is causing a merger under DRUPA Section 15-902(m) to file a statement of partnership existence if no statement of partnership existence has previously been filed.

# Amendments specific to the DSTA

The DSTA was amended to modify the timing by which approvals are required in connection with conversions and domestications, confirm that series are bound by the governing instrument of a statutory trust regardless of whether the series executed the governing instrument, confirm that pass-through voting is permissible, confirm that amendments to governing instruments in connection with mergers may be effected only with respect to the governing instrument of the surviving or resulting statutory trust, and specify the point in time when the facts stated in a certificate must be true.

## *Approval of Conversions and Domestications*

The amendments amend DSTA Sections [**3820(g)**](https://www.bloomberglaw.com/product/corporate/document/32307956776)and [**3822(g)**](https://www.bloomberglaw.com/product/corporate/document/32307954728)to provide that the approval of a conversion to, or domestication as, a statutory trust, and the approval of the governing instrument of such statutory trust, are required to occur prior to the time a certificate of conversion or certificate of domestication, as applicable, becomes effective, rather than prior to the filing of such certificate.

## *Series Bound by Governing Instrument*

The amendments amend DSTA [**Section 3801(e)**](https://www.bloomberglaw.com/product/corporate/document/32307953192)to confirm that any series of a statutory trust is bound by the governing instrument of such statutory trust regardless of whether the series executed the governing instrument.

## *Permissibility of Pass-Through Voting*

The amendments to the DSTA create a new [**Section 3806(p)**](https://www.bloomberglaw.com/product/corporate/document/32307963432)to confirm that the trustees of a statutory trust may authorize the beneficial owners to direct the voting of securities held by the statutory trust and to provide that a trustee shall have no duties or liabilities with respect to the voting of such securities if the trustees have exercised the standard of care required of the trustees under the governing instrument or the DSTA in connection with authorizing the beneficial owners to direct how such securities will be voted.

## *Amendments in connection with Mergers*

The amendments amend DSTA [**Section 3815(f)**](https://www.bloomberglaw.com/product/corporate/document/32307959336)to confirm that an amendment to a governing instrument or the adoption of a new governing instrument in connection with a merger may be effected only with respect to the governing instrument of the surviving or resulting statutory trust and not with respect to the governing instrument of a constituent statutory trust that is not the surviving or resulting statutory trust.

## *Facts in a Certificate must be True upon Effectiveness*

The amendments amend DSTA [**Section 3811**](https://www.bloomberglaw.com/product/corporate/document/32307958824)to provide that the execution of a certificate by a trustee or other person who is authorized to execute such certificate constitutes an oath or affirmation that, to the best of such trustee's or such other person's knowledge and belief, the facts stated in such certificate shall be true at the time such certificate becomes effective, rather than at the time such certificate is executed or filed.

# Conclusion

The 2024 amendments to the DGCL, the DLLCA, the DRULPA, the DRUPA, and the DSTA continue the practice of amending Delaware's corporation and alternative entity laws to keep the laws current and to maintain Delaware's national preeminence. Attorneys advising clients with respect to Delaware entities will want to stay abreast of these changes.

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