

2019 Amendments to Delaware's General Corporation Law and Alternative Entity Statutes

Article

09.09.2019

Bloomberg Law

In its 2019 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, and the Delaware Revised Uniform Partnership Act. Except as noted below, all of the amendments became effective on Aug. 1, 2019.

The amendments to the DGCL effected a number of substantive, technical, and clarifying changes, including changes related to the electronic execution and delivery of documents and the effectiveness of electronic notices.

The amendments to the alternative entity statutes include a number of significant substantive changes to the DRULPA (which were generally based on similar changes to the DLLCA that were adopted last year) and, as described below, create a new type of limited partnership series known as registered series, permit registered series of the same limited partnership to merge or consolidate, permit a limited partnership statutorily to divide into two or more limited partnerships, and create statutory public benefit limited partnerships. The amendments to the DLLCA, the DRULPA and the DRUPA also confirm that it is permissible under those statutes to document, sign and deliver certain types of transaction documents through DocuSign and similar electronic means.

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

AMENDMENTS TO THE DGCL

Organization Meetings. Section 108 governs the initial organization meeting of incorporators (or of directors, if named in the certificate of incorporation). Section 108(b) has been amended to clarify that notice and waiver of notice of an initial organization meeting may be given by electronic

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transmission. Section 108(c), which allows any action permitted to be taken at an initial organization meeting to be taken by consent in lieu of a meeting, has been amended to provide that any such consent may become effective at a future date or upon the happening of a future event, consistent with the provisions relating to board consents under Section 141(f).

E-Sign and E-Delivery. A new Section 116 has been added. Section 116(a) provides a “safe harbor” for memorializing, executing and delivering certain documents electronically under the DGCL or the governing documents of a corporation. For example, under Section 116(a), a voting agreement signed and delivered through DocuSign would be equally valid as a manually signed and delivered voting agreement. Section 116(a) provides that delivery by electronic transmission is deemed to have occurred when the transmission enters an information processing system designated by the recipient, and that such designation need not be express and may be determined “from the context and surrounding circumstances, including the parties’ conduct.”

Section 116(b) excludes from the safe harbor of Section 116(a) certain acts and transactions, such as documents filed with the Secretary of State, notices, stock certificates and ledgers, and board and stockholder consents, which are each governed by separate provisions of the DGCL. Corporations may opt-out of the Section 116(a) safe harbor through a certificate of incorporation or bylaw provision expressly prohibiting electronic signatures or electronic delivery (or other means of executing and delivering a document permitted by Section 116). Section 116(c) provides that the DGCL shall govern the documentation of actions, and the signature and delivery of documents, to the fullest extent that the DGCL is not preempted by the E-Sign Act. 15 U.S.C. §§ 7001 et. seq.

Resignations of Registered Agents. Section 136, which provides that a registered agent may resign by filing a certificate of resignation with the Secretary of State, has been amended to expressly permit a registered agent of a void corporation to resign. The amendments to Section 136 also add additional requirements with respect to the certificate of resignation. The certificate of resignation must be on the form provided by the Secretary of State and must include the last known contact information for the corporation.

Effectiveness of Board Consents. Section 141(f), which provides for board action by consent in lieu of a meeting, has been amended to clarify that a unanimous consent of a board of directors, or a committee thereof, need not be filed with the minutes of proceeding of the board or committee to become effective. Instead, Section 141(f) requires that the consents be filed with the minutes of the proceedings after the action is taken.

Notices of Redemptions and Payments on Partly Paid Stock. Section 160(d), which provides for notice to stockholders whose shares are called for redemption by the corporation, and Section 163, which governs calls for payment in respect of partly paid stock, have each been amended to provide that the notices required by these sections may be given in the form, and delivered in the manner,

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permitted by amended Section 232.

Proxies. Section 212(c) and (d), which describe the means by which a stockholder may authorize another person to act as the stockholder's proxy, have been amended to conform to the terminology in Section 116(a), discussed above, and to clarify that a proxy may be memorialized, executed and delivered in accordance with Section 116.

Notices of Stockholder Meetings. Section 222(a) and (b), which govern notices of stockholder meetings, have been amended to conform to amended Section 232, which permits a corporation to provide notices electronically. Under Section 222, notices of stockholder meetings can be given in writing or by electronic transmission.

Delivery of Stockholder Consents. Section 228 permits stockholders to take action by consent in lieu of a stockholder meeting, unless action by consent is prohibited in the certificate of incorporation. Section 228(d) has been amended to permit stockholder consents to be delivered to an information processing system designated by the corporation, such as a designated email address. The amendments eliminate the requirement that stockholder consents delivered electronically must be reproduced in paper form in order to be deemed delivered. Instead, a stockholder consent delivered to an information processing system is deemed delivered when it enters the information processing system, even if no one is aware of its receipt.

Returned Mail Exception. Under Section 230(b)(1), whenever notice is required to be given to any stockholder by the DGCL, or a certificate of incorporation or bylaw provision, notice need not be given to a stockholder if two consecutive annual meeting notices have been mailed to the stockholder's address but returned as undeliverable (the "Returned Mail Exception"); however, the applicable notice requirements are reinstated after the stockholder provides the corporation with a current address. Under Section 230(c), the Returned Mail Exception does not apply if the returned notices were sent by electronic transmission. Section 230(c) has been amended to provide that the Returned Mail Exception also does not apply even if the corporation has an email address for the stockholder and notice to such stockholder by email is permitted by Section 232.

Electronic Notice. Section 232 allows corporations to provide notice by electronic transmission. Section 232(a) has been amended to provide that notices under the DGCL or a certificate of incorporation or bylaw provision may be effectively given by email, unless a stockholder has notified the corporation of an objection to email notice. Email notices must include a prominent legend that the communication is an important notice regarding the corporation. Amendments to Section 232(b) (formerly Section 232(a)) provide that notices to stockholders given by other forms of electronic transmission shall be effective if given by a form of electronic transmission consented to by the stockholder and that such consent shall be revocable by the stockholder by written or electronic notice to the corporation. Section 232(d) has been amended to define "electronic mail" and

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“electronic mail address.”

Importantly, “electronic mail” is deemed to include attachments and any information accessible via a hyperlink in the email if the email includes the contact information of an officer or agent of the corporation who is available to assist with accessing such files and information. The ability of a corporation to deliver notices electronically pursuant to Section 232 is subject to two important exceptions. First, under Section 232(e), a corporation may not give notice electronically after it becomes aware that two consecutive notices were not successfully delivered. Second, Section 232 (g) lists certain notices under the DGCL that are not governed by Section 232 because other provisions control: Section 164 (notices in connection with the sale of stock held by a delinquent stockholder), Section 296 (notices to creditors by trustees or receivers), Sections 311 and 312 (notices of special stockholder meetings in connection with the revocation of a voluntary dissolution or revival) and Section 324 (attachment and sale of stock).

Other Conforming Amendments for Electronic Notice. Sections 251(c), 253(a), 255(c), 266(b) and 390(b), which govern mergers, consolidations, conversions, transfers and domestications, have been amended to provide that the notices of stockholder meetings required by these sections may be given in the form, and delivered in the manner, permitted by amended Section 232. Similarly, Section 275(a), which governs the notice of a stockholder meeting for the approval of dissolution, has been amended to provide that such notice may be given in the form, and delivered in the manner, permitted by amended Section 232.

Execution of Merger Agreements. Sections 251(b) and 255(b), which set forth the requirements for merger agreements, have been amended to permit any authorized person to execute an agreement of merger or consolidation. However, any such agreement filed with the Secretary of State must be executed in accordance with Section 103.

Appraisal Notices and Demands. Section 262 entitles a stockholder to the right to have the fair value of its stock appraised by the Delaware Court of Chancery when the corporation is party to certain mergers or consolidations. Section 262(d) has been amended to provide that a stockholder may deliver a demand for appraisal by electronic transmission to an email address (or other information processing system) expressly designated in the notice of appraisal rights. Similarly, Section 262(e) has been amended to provide that a stockholder may request the information described in that section by an electronic transmission directed to an email address (or other information processing system) expressly designated in the notice of appraisal rights.

Additionally, amendments to Section 262(d) and (e) provide that a corporation may deliver a notice of appraisal rights and a 262(e) notice in any manner permitted by amended Section 232(a), including by electronic transmission. The amendments to Section 262 are effective only with respect to a merger or consolidation consummated pursuant to an agreement entered into on or after August 1,

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Revival of Exempt Corporations. Section 313 governs the procedures for reviving an exempt corporation whose certificate of incorporation has become forfeited for failing to pay franchise tax or failing to file annual franchise tax reports. Section 313(a) has been amended to provide that the procedures of Section 313 also apply to an exempt corporation whose certificate of incorporation has become forfeited as a result of the corporation's failure to obtain and designate a new registered agent prior to the expiration of the 30-day period after its registered agent resigned.

Secretary of State Fees. Section 391(a)(11) has been amended to provide for the maximum fee payable to the Secretary of State for any certificate issued through the Secretary of State's online services. Section 391(a)(16) has been amended to increase the fee payable to the Secretary of State for a written report of a record search.

Franchise Taxes. Section 503(h) has been amended to reflect increases to the amount of annual franchise tax payable by a regulated investment company. The amendments to Section 503(h) are effective for the tax year beginning on January 1, 2019.

AMENDMENTS TO THE DRULPA

Registered Series and Protected Series. The amendments create a new type of series known as registered series, which are similar to registered series formed under Section 18-218 of the DLLCA. Registered series are addressed in new Section 17-221 of the DRULPA (with related and conforming amendments to a number of other sections). Section 17-218 of the DRULPA, which previously addressed series, was amended to provide that series formed under Section 17-218(b) of the DRULPA (both before and after the amendments became effective) 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 series is required to be filed with the Secretary of State to form a registered series, and the name of a registered series must begin with the name of the limited partnership and be distinguishable from the names of other Delaware business entities or business entities qualified or registered to do business in Delaware (Article 9 of the Delaware Uniform Commercial Code was also amended effective Aug. 1, 2019 to provide that a registered series constitutes a "registered organization").

Second, one or more registered series of a limited partnership may merge or consolidate with or into one or more other registered series of the same limited partnership. Third, certificates of good standing and certificates of existence with respect to registered series will be issued by the

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Secretary of State. Fourth, a protected series of a limited partnership may convert to a registered series of the same limited partnership and a registered series of a limited partnership may convert to a protected series of the same limited partnership. Finally, an annual franchise tax in the amount of \$75 per registered series will be required to be paid.

Division of a Limited Partnership. Pursuant to new Section 17-220 of the DRULPA, a limited partnership may divide into one or more newly formed limited partnerships, with the dividing limited partnership either continuing its existence or terminating as part of the division. A division of a limited partnership 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 limited partnership among the resulting limited partnerships and, if it survives, the dividing limited partnership; and the filing with the Secretary of State of a certificate of division and a certificate of limited partnership for each newly formed limited partnership.

A plan of division will be given effect to divide the assets and liabilities of a limited partnership among the resulting limited partnerships and, if it survives, the dividing limited partnership, so long as the plan of division does not constitute a fraudulent conveyance under applicable law. With respect to any limited partnership formed prior to Aug. 1, 2019 that is party to any written contract, indenture or other agreement entered into prior to Aug. 1, 2019 that by its terms restricts, conditions or prohibits such limited partnership 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 or transfer of assets.

The amendments also adopted a new subsection 17-301(b)(4) of the DRULPA to provide that a person is admitted as a partner of a division partnership pursuant to a division approved in accordance with Section 17-220 of the DRULPA as provided in the partnership agreement of such division partnership or in the plan of division and, in the event of any inconsistencies, the plan of division controls.

New subsection 17-301(b)(4) also provides that a person is admitted as a partner of a limited partnership pursuant to a division in which such limited partnership is not a division partnership in such division (for example, when interests are issued by such limited partnership) as provided in the partnership agreement of such limited partnership. The division provisions should prove to be valuable tools in limited partnership transactions including secondary sale transactions.

Statutory Public Benefit Limited Partnerships. Under the amendments, new subchapter XII of the DRULPA authorizes the creation of statutory public benefit limited partnerships, which are similar to public benefit corporations organized under subchapter XV of the Delaware General Corporation Law and public benefit limited liability companies formed under subchapter XII of the DLLCA.

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Subchapter XII of the DRULPA is intended to provide a simple and efficient “opt-in” procedure for forming a public benefit limited partnership. As with a public benefit corporation and a public benefit limited liability company, a statutory public benefit limited partnership is intended to produce a public benefit and to operate in a responsible and sustainable manner. New subchapter XII of the DRULPA does not limit the formation or operation of a limited partnership formed or operated for a public benefit (including a limited partnership designated as a public benefit limited partnership) that is not a statutory public benefit limited partnership.

Judicial Cancellation of Certificate of Limited Partnership. The amendments include new Section 17-112, which is similar to Section 18-112 of the DLLCA and grants the Court of Chancery jurisdiction to cancel a certificate of limited partnership for abuse or misuse of such limited partnership'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 such limited partnership.

AMENDMENTS TO THE DLLCA

Admission of a Member to a Limited Liability Company in Connection with a Division. New subsection 18-301(b)(4) of the DLLCA provides that a person is admitted as a member of a division company pursuant to a division approved in accordance with Section 18-217 of the DLLCA as provided in the limited liability company agreement of such division company or in the plan of division and, in the event of any inconsistencies, the plan of division controls. New subsection 18-301(b)(4) also provides that a person is admitted as a member of a limited liability company pursuant to a division in which such limited liability company is not a division company in such division (for example, when interests are issued by such limited liability company) as provided in the limited liability company agreement of such limited liability company.

AMENDMENTS TO THE DRUPA

Distributed Ledgers and Blockchain. The amendments to Sections 15-501 and 15-403 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 are similar to those made last year to the DLLCA and the DRULPA and confirm that this rapidly advancing technology is available to be used with respect to general partnerships.

AMENDMENTS COMMON TO MULTIPLE ALTERNATIVE ENTITY STATUTES

Electronic Transactions. The amendments to the DRUPA, the DRULPA and the DLLCA enact new Sections 15-124, 17-113 and 18-113 to create a safe harbor provision that clarifies when acts and transactions contemplated by the DRUPA, the DRULPA and the DLLCA, as applicable, may be

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documented, signed and delivered electronically. The provisions are generally based on the electronic delivery rules under Delaware's Uniform Electronic Transactions Act 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 evidencing interests in partnerships, limited partnerships and limited liability companies.

Definitions of Manager, Member, General Partner and Limited Partner. Under the amendments, the definitions of manager and member in DLLCA Section 18-101(12) and (13) include a manager or member of a limited liability company generally and a manager or member of, or associated with, a series of such limited liability company, and the definitions of general partner and limited partner in DRULPA Section 17-101(7) and (10) include a general partner or limited partner of a limited partnership generally and a general partner or limited partner of, or associated with, a series of such limited partnership. These amendments make clear that references to members, managers, general partners, or limited partners in the provisions of the DLLCA and the DRULPA that do not specifically reference series include references to the members, managers, general partners or limited partners of, or associated with, the series of a limited liability company or limited partnership without having to restate that language in each provision.

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Louis G. Hering, Melissa A. DiVincenzo, Melanie H. Young, Matthew R. Darby, "2019 Amendments to Delaware's General Corporation Law and Alternative Entity Statutes," Professional Perspective, *Bloomberg Law* (September 2019)

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