

# 2023 Amendments to the DGCL & Delaware's Alternative Entity Statutes

## Publication

09.2023

*Bloomberg Law*

In its 2023 session, the Delaware legislature passed several 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), and the Delaware Revised Uniform Partnership Act (DRUPA). The amendments to the DGCL, the DLLCA, the DRULPA, and the DRUPA became effective on August 1, 2023.

The amendments to the DGCL and the alternative entity statutes effected a number of substantive, technical, and clarifying changes. Most notably, the amendments to the DGCL modify stockholder approval requirements for certain charter amendments and include significant revisions relevant to pledges of assets, conversions, domestications and appraisal rights. The amendments to the alternative entity statutes clarify that a subscription is irrevocable if it states it is irrevocable, provide for the ability to revoke the dissolution or termination of a series and add a requirement to amend a certificate of division under certain circumstances.

## AMENDMENTS TO THE DGCL

### CHARTER AMENDMENTS

Section 242, which governs charter amendments, has been amended in several respects, primarily relating to stock splits.

A new section (d) has been added to permit a corporation with a single class of stock outstanding—that is not divided into series—to amend its charter to effect a forward stock split without a stockholder vote.

Section 242(d) also reduces the vote required for a public corporation to amend its charter to increase or decrease the number of authorized shares or effect a reverse stock split, unless the charter expressly provides otherwise. In general, the votes in favor of the amendment must exceed the votes cast against the amendment and the corporation must meet the listing requirements

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relating to the minimum number of holders immediately after the amendment becomes effective. If the amendment increases or decreases the number of authorized shares, a separate class vote is also required, unless the certificate of incorporation opts out of the class voting requirements for increases and decreases as permitted by Section 242(b)(2).

Section 242(a)(3) has been amended to provide that stock splits must apply to all "issued" shares, i.e., all outstanding shares and shares held in treasury.

### **SALES, LEASES & EXCHANGES OF PLEDGED ASSETS & MORTGAGED PROPERTY**

Section 272, which permits a corporation to mortgage or pledge its property and assets without a stockholder vote, has been amended to provide a safe harbor for secured creditors to sell, lease or exchange pledged assets or mortgaged assets without a stockholder vote. Section 271 generally requires that stockholders approve a sale, lease or exchange of all or substantially all of the corporation's assets. A new section (b) clarifies that stockholder approval is not required if a secured party exercises its rights under applicable law, such as Article 9 of the UCC, to effect such a sale, lease or exchange of pledged assets without the corporation's consent.

Additionally, Section 272(b) provides that, in lieu of exercising such rights under applicable law, the board may authorize, without a stockholder vote, a sale, lease or exchange of pledged assets or mortgaged assets to reduce or eliminate the corporation's liability to the secured party if (i) the value of the assets or property being sold, leased or exchanged is less than or equal to the total amount of the liability being eliminated or reduced (the Asset Value Test) and (ii) such sale, lease or exchange is not prohibited by the law governing the mortgage or pledge. After such a sale, lease or exchange is consummated, the transaction cannot be invalidated for a failure to satisfy the Asset Value Test so long as the transferee provided value and acted in good faith. The amendments do not preclude actions to enjoin a pending sale, lease or exchange or fiduciary duty claims.

A charter provision adopted on or after August 1, 2023, that requires stockholder approval for the sale, lease or exchange of assets will not apply to a transaction permitted by Section 272(b)—unless the provision expressly provides otherwise.

### **CONVERSIONS & DOMESTICATIONS**

Section 265, which governs the conversion of an entity, such as a limited liability company, partnership or foreign corporation, to a Delaware corporation, has been amended to permit the entity to adopt a plan of conversion setting forth the terms and conditions of the conversion, including the treatment of equity interests. The plan may also describe corporate actions to be taken by the converted corporation in connection with the conversion—such as a second step merger or charter amendment.

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If the corporate actions described in the plan of conversion are approved in accordance with applicable law, including any approvals required for the type of corporate action specified in the plan, then such corporate actions will be duly authorized for purposes of Delaware corporate law and will not require separate approval from the board or stockholders following the conversion. If any corporate action specified in the plan of conversion requires a certificate to be filed with the Delaware Secretary of State, then the certificate must state that, in accordance with Section 265, no action by the directors or stockholders is required.

Similarly, Sections 266 and 390, which govern conversions and domestications of Delaware corporations to another type of entity, such as a limited liability company, partnership or foreign corporation, have been amended to permit corporations to adopt a plan of conversion or domestication setting forth the terms and conditions of the conversion or domestication, including the treatment of equity interests.

In addition, Section 390 has been amended to modify the approval requirements for effecting a domestication, transfer or continuance. Prior to the amendments, a domestication, transfer or continuance under Section 390 required unanimous stockholder approval—in addition to board approval. The amendments reduce the stockholder approval standard to a majority, subject to several exceptions. Importantly, any pre-amendment charter provisions or any other written agreement that restrict mergers would be deemed to restrict domestications, transfers or continuances in the same manner—unless the provision expressly provides otherwise.

Thus, to the extent an existing provision requires a corporation to obtain a higher vote to effect a merger, that same higher vote would be required to effect a domestication, transfer or continuance. Additionally, with respect to a domestication, transfer or continuance as a partnership, any stockholder that would become a general partner as a result thereof must approve the domestication, transfer or continuance.

### **APPRAISAL RIGHTS**

Section 262, which governs appraisal rights, has been amended in several respects. In connection with the amendments to Sections 265 and 390, Section 262 now provides for appraisal rights in domestications, transfers and continuances—unless appraisal rights would be denied under Section 262's market-out exception—and denies appraisal rights in mergers, consolidations, conversions and domestications that are authorized pursuant to a plan of conversion under Section 265 and Section 388.

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### NOTICE OF STOCKHOLDER ACTION BY CONSENT

Section 228(e), which provides that prompt notice of actions taken by stockholder consent must be provided to non-consenting stockholders, has been amended to streamline the means for determining the stockholders entitled to receive such notice. As amended, Section 228(e) provides that such notice must be given to non-consenting stockholders as of the record date for the action by consent, which is determined under Section 213(b). This eliminates the possibility of different record dates for the notice and the underlying consent.

In addition, Section 228(e) has been amended to provide that a notice that constitutes a notice of internet availability of proxy materials will satisfy the notice requirements of Section 228(e) for corporations entitled to use such notices.

### RATIFICATION OF DEFECTIVE CORPORATE ACTS

Section 204, which provides a statutory means to ratify defective corporate acts—i.e., acts that are invalid for purposes of Delaware law for failure to authorize or effect the act in accordance with the DGCL, the charter, bylaws or any other agreement to which the corporation is a party— has been amended in several respects to simplify the ratification procedures. Prior to the amendments, a corporation was required to file a certificate of validation with the Delaware Secretary of State when ratifying any defective corporate act that would have required a filing of a certificate under another section of the DGCL.

The amendments eliminate this requirement if a certificate was previously filed and no changes to the certificate—including a change to the effective date— are required to give effect to the ratification. For example, a certificate of validation would not be required to ratify a charter filing if the only defect is a lack of board or stockholder approval. The amendments also eliminate the requirement that a certificate of validation include the dates that board and stockholder approvals were obtained, a description of the defective corporate acts and the nature of the failure of authorization relating to those acts.

In addition, the amendments include technical changes relating to stockholder approval. Prior to the amendments, ratifications requiring stockholder approval were required to be approved by the holders of valid shares as of the record date for determining the stockholders entitled to vote on the ratification. As amended, Section 204 provides that the holders of valid shares as of the time the board adopts the ratifying resolutions are entitled to vote on the ratification.

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### OTHER CLARIFYING & TECHNICAL AMENDMENTS

Sections 152 and 153, which govern the requirements for stock issuances, have been amended to clarify that treasury shares may be issued for consideration with a value less than par value consisting of cash, any tangible or intangible property or any benefit to the corporation, or any combination thereof.

Section 157, which governs the requirements for issuances of rights and options, has been amended to clarify the procedures for boards and committees to delegate to a person or body—such as an officer— authority to issue rights and options. As amended, the board or committee, in order to delegate, must set certain parameters, including fixing the period during which the rights or options may be issued and the period during which the shares issuable upon exercise of such rights or options may be issued. The amendments eliminate the requirement that the delegation set forth the maximum number of rights or options issuable. However, the delegation must include the maximum number of shares issuable upon exercise of such rights or options.

Section 160(c), which permits a corporation to resell shares held in treasury, has been amended to clarify that treasury shares resulting from a stock redemption or repurchase may be resold, unless such shares are retired or are required to be retired by a charter provision.

Section 260 empowers a surviving corporation to issue stock, bonds and other indebtedness as necessary to effect the merger. The amendments confirm that a converted or domesticated corporation has this authority in connection with conversions and domestications.

### AMENDMENTS COMMON TO MULTIPLE ALTERNATIVE ENTITY STATUTES

The amendments common to the DRUPA, the DRULPA, and the DLLCA address irrevocability of subscriptions and amendments in connection with mergers. The amendments common to the DRULPA and the DLLCA address revocation of the termination of a protected series, revocation of the dissolution of a registered series and amendments to certificates of division.

### IRREVOCABILITY OF SUBSCRIPTIONS

The amendments to the DRUPA, the DRULPA and the DLLCA enacted new Sections 15-208, 17-506 and 18-506, which clarify that a subscription for a partnership interest or limited liability company interest, whether submitted in writing, by means of electronic transmission, or as otherwise permitted by applicable law, is irrevocable if the subscription states that it is irrevocable to the extent provided by the terms of the subscription.

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### AMENDMENTS IN CONNECTION WITH MERGERS

The amendments to the DRUPA, the DRULPA, and the DLLCA amend Sections 15-902(g), 17-211(g) and 18-209(f) to confirm that an amendment to a partnership agreement or limited liability company agreement, or the adoption of a new partnership agreement or limited liability company agreement, pursuant to a merger or consolidation may be effected only with respect to the partnership agreement or limited liability company agreement of the surviving or resulting partnership, limited partnership or limited liability company, as applicable, and not with respect to the partnership agreement or limited liability company agreement of a constituent entity that is not the surviving or resulting entity in the merger or consolidation.

### REVOCAION OF TERMINATIONS OF PROTECTED SERIES OR DISSOLUTIONS OF REGISTERED SERIES

The DRULPA and the DLLCA permit the revocation of the dissolution of a limited partnership or a limited liability company prior to the filing of a certificate of cancellation of the certificate of limited partnership or certificate of formation, as applicable, in the office of the Secretary of State, but, prior to the effectiveness of the amendments, did not address revocation of termination of a protected series or dissolution of a registered series. The amendments to the DRULPA and the DLLCA amend Sections 17-218(d), 17-221(f), 18-215(d) and 18-218(f) to permit the revocation of the termination of a protected series or the dissolution of a registered series, as applicable, prior to the completion of the winding up of such protected series or the filing in the office of the Secretary of State of a certificate of cancellation of the certificate of registered series of such registered series, as applicable.

### AMENDMENTS TO CERTIFICATES OF DIVISION

Under the DRULPA and the DLLCA, a certificate of division must state, among other things, the name and business address of the division contact and the name and address of the division partnership or division company where the plan of division is on file. Because this information may change over time, the amendments amend Sections 17-220 and 18-217 to require the filing of a certificate of amendment of a certificate of division to change the name or business address of the division contact or the name and address of the division partnership or division company, as applicable, where the plan of division is on file. The requirement to update such information in a certificate of division ends after the expiration of a period of 6 years following the effective date of the division.

The amendments to Sections 17-220 and 18-217 also confirm that a dividing partnership or dividing company, as applicable, need not be a surviving partnership or surviving company, as applicable, in a division.

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The amendments to the DRULPA and the DLLCA also amend Sections 17-1107(a), 17-1109(j), 18-1105(a) and 18-1107(k) to specify that the fee payable to the Secretary of State to file a certificate of amendment of certificate of division is \$180 and to acknowledge that a certificate of amendment of a certificate of division should be accepted for filing by the Secretary of State if at least one division partnership or division company, as applicable, is in good standing at the time of such filing.

### AMENDMENTS TO THE DRULPA

The DRULPA was amended to clarify the law with respect to the designation of a general partner for protected series and registered series and to clarify the laws regarding execution of certificates under the DRULPA.

#### DESIGNATING A GENERAL PARTNER FOR PROTECTED SERIES & REGISTERED SERIES

The amendments to the DRULPA Sections 17-218(b) and 17-221(c) clarify the law regarding designating a general partner for a limited partnership that has a protected or registered series. Each protected or registered series of a Delaware limited partnership must have a general partner associated with it. If a partnership agreement fails to designate an initial general partner associated with such a series, the DRULPA designates a general partner to be associated with such a series. If a partnership agreement fails to designate a general partner of the limited partnership generally, the DRULPA designates a general partner of the limited partnership generally. The amendments to the DRULPA Sections 17-218(b) and 17-221(c) confirm that the rules for designating a general partner for a limited partnership that has protected or registered series apply only to the designation of an initial general partner and not to subsequent general partners.

#### EXECUTION OF CERTIFICATES UNDER DRULPA

The amendments to the DRULPA Section 17-204(a) clarify that certificates required by the DRULPA to be filed in the office of the Secretary of State shall be executed in the manner set forth in Section 17-204(a) and also provide the manner in which a certificate of amendment to a certificate of division must be signed.

### AMENDMENTS TO THE DLLCA

The DLLCA was amended to clarify the laws regarding execution of certificates under the DLLCA.

#### EXECUTION OF CERTIFICATES UNDER THE DLLCA

The amendments to the DLLCA Section 18-204(a) clarify that certificates required by the DLLCA to be filed in the office of the Secretary of State shall be executed in the manner set forth in Section 18-204(a) and clarify that a failure or refusal to execute any certificate required by the DLLCA is

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subject to Section 18-205(a).

### AMENDMENTS TO THE DRUPA

The amendments to the DRUPA enacted new Section 15-101(10) to add a definition of “foreign partnership”, which term is used in the DRUPA, and fixed a typographical error in the definition of “partnership agreement”. In addition, the DRUPA Section 15-1003(b) was amended to confirm that the requirement to file annual reports under Section 15-1003(b) applies to foreign limited liability partnerships.

### CONCLUSION

The 2023 amendments to the DGCL, the DLLCA, the DRULPA, and the DRUPA became effective on August 1, 2023. Attorneys advising clients with corporations or alternative entities in Delaware will want to stay abreast of these changes.

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Melissa A. DiVincenzo, David A. Harris, Matthew R. Darby, and Emily M. LaSpina, “2023 Amendments to the DGCL & Delaware's Alternative Entity Statutes” Professional Perspective, *Bloomberg Law* (September 2023)

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### PRACTICE AREAS

Alternative Entity Counseling





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