

2020 Delaware Entity Statutory Amendments

by Amelia R. Messa and Brian Burke

The State of Delaware's Governor John Carney recently signed into law the 2020 amendments to Delaware's entity statutes. These included amendments to the Delaware General Corporation Law (the "DGCL"), the Delaware Limited Liability Company Act (the "LLC Act"), the Delaware Revised Uniform Limited Partnership Act (the "DRULPA"), the Delaware Revised Uniform Partnership Act (the "DRUPA" and together with the LLC Act and the DRULPA, the "Alt Entity Acts") and the Delaware Statutory Trust Act (the "DST Act"). Unlike historically when the Delaware entity amendments have been effective August 1, due to the current COVID-19 pandemic, most of this year's amendments became effective when they were enacted by the Governor, except with respect to certain DGCL amendments and the DST Act amendments which will become effective on August 1st. Descriptions of some of the more notable amendments to each of the Delaware entity statutes are set forth below. There were also several other technical and clarifying amendments enacted for each of the statutes that are not detailed below.

DGCL Amendments

Emergency Powers

Section 110 of the DGCL has long provided the board of directors of a Delaware corporation with the authority to adopt emergency bylaws in the face of an attack or certain emergency conditions. In direct response to the challenges facing corporations during the COVID-19 pandemic, Section 110 was amended to expressly provide that the board may invoke such emergency powers in instances of a pandemic, epidemic or declared national emergency. The amendments also clarify that the emergency powers may be invoked by the board or, if a quorum cannot be readily convened, a majority of the directors present. Furthermore, a new Section 110(i) was added which grants the board flexibility to (1) postpone a stockholder meeting (with the record date of such stockholder meeting applying to the postponed meeting), and (2) delay the payment date of a dividend that has been declared, as to which the record date has not yet occurred,

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for up to 60 days. Notably, in light of the current pandemic, the amendments to Section 110 of the DGCL were effective retroactively as of January 1, 2020 with respect to any emergency condition occurring or board action contemplated and taken on or after such date.

Exculpation and Indemnification

Section 145(c) of the DGCL provides for mandatory indemnification of directors and officers of a Delaware corporation if they are successful on the merits in defense of any action, suit or proceeding referred to in Sections 145(a) or (b). The amendments this year clarify that effective December 31, 2020, “officer” means the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer, and anyone identified in public filings as one of the most highly compensated executive officers of the corporation. Furthermore, the amendments provide that the corporation may extend such mandatory indemnification to additional officers.

Section 102(b)(7) of the DGCL provides that a Delaware corporation may adopt an exculpation provision in its certificates of incorporation eliminating or limiting the personal liability of a director to the corporation or its stockholders for breaches of certain fiduciary duties. The amendments clarify that if a corporation later repeals, amends or eliminates such a provision, then such repeal, amendment or elimination will not affect the application of the exculpation provision with respect to prior acts or omissions, unless the provision provides otherwise at the time of such act or omission.

Public Benefit Corporations

Public benefit corporations are for-profit corporations managed in a manner that balances the stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct, and the public benefit or benefits identified in its certificate of incorporation. Reflecting the continued focus on environmental and social responsibility, the amendments to the DGCL this year reduce the voting threshold required for converting from a regular corporation to a public benefit corporation from two-thirds of the outstanding stock to a majority. Furthermore, the amendments also remove the application of appraisal rights to a conversion.

For Delaware corporations that already are public benefit corporations, the amendments this year revise the provisions dealing with duties of directors in two key respects. First, the amendments revise Section 365 of the DGCL to clarify that a director’s ownership of stock in the corporation does not, in and of itself, create a conflict of interest for purposes of the balancing requirement. Second, Section 365 previously provided that a corporation may provide protection to its directors by adopting a provision in its certificate of incorporation stating that, in absence of a conflict of interest, a failure to satisfy the balancing requirement does not constitute an act or omission not in good faith or a breach of the duty of loyalty for purposes of Sections 102(b)(7) or 145 of the DGCL. The amendments this year make this protection the default; that is, directors are entitled to the foregoing protection unless the certificate of incorporation says otherwise.

Electronic Transmissions and Consents

In 2019, the DGCL was revised to add Section 116 which provided that documents contemplated by the DGCL may be executed by electronic means, and to amend Section 232(a) to provide that notice to stockholders may be provided by electronic means. The amendments this year attempt to remove any ambiguity raised in the application of the former revisions, and further clarify that electronic transmission and consents are generally acceptable under the DGCL.

Holding Company Mergers

Section 251(g) of the DGCL provides a framework for stockholders of an operating company to, by way of merger, create a new holding company with the operating company as a wholly-owned subsidiary. Previously, Section 251(g) also provided that the governing documents of the operating company following such holding company merger must be identical to those of the operating company prior to the merger. Acknowledging that many provisions of the operating company may no longer make sense in the context of a wholly-owned subsidiary, the amendments this year dispense with this requirement. The amendments do preserve the requirement in Section 251(g)(7) that the governing documents of the operating company require approval by the stockholders of the holding company for actions that previously required consent of the operating company's stockholders.

Alternative Entity Amendments

Appraisal Rights

The Alt Entity Acts were all amended, including the titles of Section 18-210 of the LLC Act, 17-212 of the DRULPA and 15-120 of the DRUPA, to confirm that no appraisal rights are available with respect to interests in an LLC or partnership unless they are contractually provided for in an LLC agreement, a partnership agreement, an agreement of merger or consolidation, a plan of merger or a plan of division, as applicable.

Admission of Members and Limited Partners

In order to reduce the occurrence of technical pitfalls, Section 18-301 of the LLC Act and Section 17-301 of the DRULPA were each amended to eliminate the statutory requirement that a limited partner's or member's admission to a limited partnership or LLC, as applicable, be subject to reflection on the records of such limited partnership or LLC. These sections were also amended to confirm that a partnership agreement or LLC agreement may provide for the admission of limited partner or members, as applicable, in connection with formation. These amendments further clarify that after formation, an assignee of a limited liability company interest or partnership interest is admitted as a member or limited partner, as applicable, as provided in Section 18-704(a) of the LLC Act or Section 17-704(a) of the DRUPLA, each addressing transfers and the right of an assignee to become a member or limited partner, as applicable.

Information in Certificates of Division

In 2018 and 2019, the LLC Act and the DRULPA were each amended to allow a Delaware LLC or a Delaware limited partnership to divide into two or more LLCs or limited partnerships, as applicable. In connection with a division, a certificate of division is required to be filed with the Secretary of State of the State of Delaware. This year, Section 18-217 of the LLC Act and 17-220 of the DRULPA were each amended to permit a dividing company to have the flexibility to include any “other information the dividing company determines to include” in the certificate of division beyond the statutorily required information.

Electronic Execution and Record Maintenance

Expanding on the amendments from 2019 that permitted the use of electronic signatures and documentation for Delaware LLCs and partnerships, the amendments this year to each of the Alt Entity Acts clarify that a person may “execute” an LLC or partnership document with either a “wet ink” signature or electronic signature. The amendments this year also clarify that an LLC or partnership may maintain its books and records in a form other than paper form, including electronically, so long as such form is capable of being converted into paper form within a reasonable time.

Registered Series

The LLC Act and the DRULPA were each previously amended to create a type of series called a “registered series,” which is a series that, among other things, is permitted to be a debtor under the Uniform Commercial Code. Unlike the other types of series recognized by the LLC Act and the DRULPA, a registered series is required to file a certificate of registered series with the Secretary of State of the State of Delaware and is required to have a name that begins with the name of the Delaware LLC or limited partnership and that is distinguishable in Delaware from the name of any other registered entity or series in the State of Delaware. The amendments this year clarify that a certificate of registered series is required to be promptly amended if the name of the series no longer complies with those statutory requirements.

DST Act Amendments

Among other things, this year’s amendments to the DST Act (i) provide similar amendments to those enacted in the other entity statutes last year and this year providing for the use of electronic signatures and record keeping, (ii) create the concept of a “division” of a Delaware statutory trust similar to the concept previously adopted for Delaware LLCs and limited partnerships, (iii) confirm that unless contractually created, no appraisal rights are available with respect to a beneficial interest or other interest in a Delaware statutory trust, (iv) provide a default majority vote for approving a merger or consolidation, conversion, transfer or domestication or continuance of a Delaware statutory trust registered as an investment company under the Investment Company Act of 1940, unless otherwise provided in the statutory trust’s governing instrument, (v) clarify that a trustee is not a necessary party to a contract to which a Delaware statutory

trust is a party solely because the trustee holds legal title to the statutory trust property, and (vi) in a different approach from the LLC Act and the DRULPA, confirming that when a Delaware statutory trust has established series, the statutory trust, and not the series, shall be the “debtor” in connection with liens and security interests granted in any assets of a series.