

2022 Delaware Entity Statutory Amendments

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On August 1, 2022, the 2022 amendments to Delaware's entity statutes went into effect. 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 "DSTA"). 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 Delaware entity statutes that are not detailed below.

DGCL Amendments

102(b)(7) Expanded to Permit Exculpation of Officers

In the biggest change to the DGCL this year, corporations are now permitted to eliminate or limit monetary liability for breaches of the duty of care by officers, just as they can for directors.

Section 102(b)(7) of the DGCL, which previously granted corporations the ability to eliminate or limit monetary liability of directors for breaches of the duty of care, was amended to allow corporations to adopt a similar provision for officers in the certificate of incorporation. An officer exculpation provision is permitted to cover direct claims against officers (but not derivative claims) and otherwise can cover the same types of claims that directors may currently be exculpated for – that is, an officer exculpation provision could cover breaches of the duty of care, but cannot exculpate officers for breaches of their duty of loyalty. The officers entitled by statutory default (under Section 3114(b) of Title 10 of the Delaware Code) to be covered by such an exculpatory provision are: (1) the corporation's president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer, or chief accounting officer; (2) an individual identified in public filings as one of the most highly compensated officers of the

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corporation; and (3) an individual who, by written agreement with the corporation, has consented to be identified as an officer for purposes of Section 3114(b) of Title 10 of the Delaware Code.

Majority Vote Required for Conversion

Section 266 of the DGCL, which permits the conversion of a Delaware corporation to a different form of entity, was amended so that such conversions may be approved by majority stockholder vote. Previously, Section 266 required that all stockholders, both voting and nonvoting, approve the conversion. The new rules go hand in hand with an expansion of appraisal rights to cover conversions (see below). Additionally, if the corporation is converting to a partnership with one or more general partners, such conversion will require the approval of each stockholder who will become a general partner of such partnership. Separately, Section 265(h) was amended to clarify that, prior to the certificate of conversion becoming effective, the conversion must be approved by the stockholders.

Appraisal Rights

Section 262 of the DGCL, dealing with appraisal rights, was amended in a number of ways. First, the amendments insert a new Section 262(d)(3) that permits a beneficial owner of stock to demand appraisal directly, instead of requiring that the record holder of the stock (such as Cede & Co) make the demand on behalf of the beneficial owner.

Second, to support the changes to Section 266 which permit conversions to be authorized by less than a unanimous vote (see above), Section 262 was amended to provide stockholders with appraisal rights in connection with such a conversion. Such appraisal rights remain subject to the “market out” exception in Section 262(b).

Third, Section 262(d) was amended to provide that, when sending a notice of appraisal rights, a corporation is no longer required to provide the text of Section 262 in the notice. Instead, a corporation may provide a link to a publicly accessible resource with the statute, including the website maintained on behalf of the State of Delaware on which those statutes are posted.

Stockholder List Availability During Meetings

Previously, Section 219 of the DGCL required corporations to prepare a list of stockholders entitled to vote at a meeting of stockholders and to make such list available for inspection both during the meeting and for a period of ten days before the meeting. Section 219 of the DGCL was amended to eliminate the requirement to make the list of stockholders available for inspection during the meeting.

Stockholder Meeting Notice

Section 222(a) of the DGCL was amended to clarify that a notice of a meeting of stockholders may be given in any manner permitted by Section 232 (i.e., by mail, courier

or electronic mail or, with the consent of a stockholder, pursuant to other specified means of electronic transmission). Additionally, Section 222(c) was amended to clarify that if a virtual meeting of stockholders is adjourned due to a technical failure, then the notice of when the meeting will reconvene need not be given to stockholders if the electronic network for the meeting displays the information required by Section 222(c) about when and how the meeting will reconvene or if such information regarding the adjourned meeting is provided for in the notice of meeting.

Charter Expiration for Limited Duration Corporations

Although corporations by default are perpetual, they may elect in their certificates to exist for a limited duration. Section 275 of the DGCL was amended so that such limited duration corporations are now required to file a certificate of dissolution upon termination of their existence. However, failure to file does not affect their existence or their obligation to file.

Other Noteworthy Changes

In addition to the foregoing changes to the DGCL, there were changes to: Section 103(b) (2) (clarifying effective date of oaths or affirmations); Sections 152, 153 and 157 (allowing corporations greater flexibility to delegate administration of equity incentive plans); Section 228(c) (allowing individuals to deliver stockholder consents prior to being a stockholder, so long as the consent is only effective after they are a stockholder; Section 388 (updating requirements for domesticating foreign entities into Delaware); Section 502(a)(3) (clarifying principal place of business address requirement in franchise tax report); Section 503 (regarding large corporate filer status and effectiveness of any re-designation).

Alt Entity Amendments

Electronic Execution of Certificates for LLCs and Partnerships

The 2022 amendments to the Alt Entity Acts confirm that the execution of a certificate representing an interest in an LLC or a partnership may be accomplished by a manual, facsimile or electronic signature. These amendments continue the expansion of Delaware's growing permissive policy on the use of electronic signatures in entity documentation.

Effective Time of Oaths and Affirmations in Certificates

Certificates that can be filed with the Secretary of State of the State of Delaware for LLCs and partnerships may provide for an effective time that is later than the time that the certificate is filed. The amendments this year to the Alt Entity Acts clarify that any oath or affirmation of facts made by a person who is authorized by the applicable statute to execute such certificate shall be true at the time such certificate becomes effective, rather than the time such certificate is executed.

Series Amendments

The 2022 amendments to the LLC Act and the DRULPA expand the definitions of “limited liability company agreement” and “partnership agreement” respectively, to confirm that similar to an LLC or partnership itself, any registered series or protected series of an LLC or partnership is bound by the LLC agreement of such LLC or partnership agreement of such partnership, as applicable, regardless of whether the series signs the agreement.

The amendments also clarify that when an LLC’s certificate of formation or a limited partnership’s certificate of limited partnership has been cancelled and needs to be revived, filing a certificate of revival will also revive any protected series or registered series of such LLC or partnership that has not otherwise been terminated, wound up or cancelled and upon such revival, such protected or registered series shall be exclusively liable for any contracts, acts, matters and things made, done and performed in the name of and on behalf of such series by its members, managers, partners, employees and agents, as applicable, prior to the revival of the LLC or limited partnership as if the certificate of formation of the LLC or certificate of limited partnership of the partnership, as applicable, had at all times remained in full force and effect.

LLC Agreements and Partnership Agreements

Section 18-101(9) of the LLC Act and Section 17-101(14) of the DRULPA was amended to confirm that an LLC agreement or partnership agreement, as applicable, may include or incorporate more than one document that may govern the business or affairs of the LLC or partnership or any of its registered or protected series. Similarly, Section 15-101(14) of the DRUPA was amended to confirm that a partnership agreement for a Delaware general partnership may include or incorporate more than one document that may govern the business or affairs of the partnership.

Timing of Domestication and Conversion Approvals

The amendments to the Alt Entity Acts provide that when a non-United States entity is domesticating to become a Delaware LLC or partnership, the approvals for both the domestication and resulting LLC agreement or partnership agreement, as applicable, in each case as set forth in the applicable documentation or non-Delaware law governing the internal affairs of such entity, are required to occur prior to the effective time of the Delaware certificate effectuating the domestication.

Similarly, Alt Entity Acts was also amended to provide that when an entity is converting into a Delaware LLC or partnership, the approvals for both the conversion and resulting LLC agreement or partnership agreement, as applicable, in each case as set forth in the applicable documentation or applicable law governing the internal affairs of such entity, are required to occur prior to the effective time of the Delaware certificate effectuating the conversion.

Service of Process

Section 18-109(b) of the LLC Act was amended to provide the mechanics for effecting service of process on a manager or liquidating trustee of a Delaware LLC.

DSTA Amendments

The DSTA is typically amended every other year in Delaware. This year's amendments include various amendments that mirror those made last year to the other Alt Entity Acts including clarification regarding the broad powers of trustees and other managing parties of a statutory trust to delegate their authority and amendments that mirror the traditionally corporate "necessary and essential" test for books and records requests. In addition, this year's DSTA amendments (i) address business development companies, (ii) clarify the power of trustees or other authorized persons to enter into contracts or other instruments in the name of a statutory trust, (iii) allow a successor trustee to file a certificate to amend the name and address of such trustee in each affected certificate of trust, (iv) are similar to those in the Alt Entity Acts described above with respect to the effective time of oaths or affirmations made in a certificate, (v) are similar to those in the Alt Entity Acts with respect to the electronic execution of certificates of beneficial interests of a statutory trust, and (vi) provide various other administrative and clarifying amendments.