YOUNG CONAWAY

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Recent Amendments to the DGCL Address Governance Challenges During Pandemics and Add a Pro-Director Default Rule to Exculpation Provisions, Among Other Changes

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The Delaware legislature recently adopted amendments to the General Corporation Law of the State of Delaware (the "DGCL")[1] that, among other changes, give boards of directors additional tools in navigating the COVID-19 crisis and associated shut-downs, and increase the default protections afforded to directors when their corporation includes an exculpatory provision in its certificate of incorporation. Except as otherwise indicated, all of the amendments discussed below took effect on July 16, 2020.[2]

Boards' Emergency Powers Expanded

Responding to the COVID-19 pandemic and the various state shut-down orders, the legislature has greatly expanded the ability of corporate boards to act during emergencies. Importantly, the effectiveness of the emergency-power amendments is retroactive to January 1, 2020, "with respect to a meeting of stockholders held or a dividend as to which the record date or payment date is anticipated to occur during the pendency of" an emergency existing on or after the first of the year.[3] Thus, many actions that boards were driven by necessity to take regarding stockholder meetings and dividends during spring 2020 have now been validated by the emergency-power amendments.

Provisions expressly designed to assist boards of directors in their exercise of management authority during emergencies were first added to the DGCL in 1963[4] and are now found in DGCL Section 110. The types of emergencies covered by Section 110 were limited to "nuclear or atomic disaster[s]," attacks on the nation or the corporation's place of business, "catastrophe[s]," and similar conditions "as a result of which a quorum of the board of directors or a standing committee thereof cannot readily be convened for action."[5] Moreover, while such emergencies justified boards in implementing any bylaws "that may be practical and necessary for the circumstances of the emergency" regardless of other sections of the DGCL or the corporate documents, Section 110 did not specifically address the postponement of meetings of stockholders or of payment of dividends that had already been declared.

The 2020 amendments have removed from Section 110 any requirement that a board be unable to obtain a quorum before emergency powers can come into effect.[6] Also, they have added to the (now non-exclusive) list of triggering emergencies "an epidemic or pandemic" and "a declaration of a national emergency by the United States government[.]"[7]

During an emergency, in addition to putting emergency bylaws into effect, the board may

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now take any actions that are "practical and necessary" to address the emergency with respect to stockholder meetings and "any dividend that has been declared as to which the record date has not occurred[.]"[8] A stockholder meeting may, among other things, be postponed "with the record date for determining the stockholders entitled to notice of, and to vote at, such meeting applying to the postponed meeting[.]"[9] Notice of a meeting postponement, a change of meeting place, or a change to a remote meeting may, in the case of a public corporation, be given solely by means of a public filing under the Securities Exchange Act of 1934.[10] Moreover, no stockholder meeting will be voided for a failure to make available for inspection by stockholders a stocklist in accordance with DGCL Section 219 "if it was not practicable to allow inspection during any such emergency condition."[11]

As for a dividend, the board may change "each of the record date and payment date to a later date or dates[,]" provided that the new payment date is not more than 60 days after the new record date. Notice of any change to a dividend record or payment date must be given to stockholders "as promptly as practicable thereafter . . . and in any event before the record date theretofore in effect[.]"[12] As with notice of a postponed stockholder meeting, notice of a postponed dividend may be given through a public filing under the Exchange Act in the case of public corporations.[13]

Emergency bylaws may be adopted, and the other permitted emergency actions may be taken, by the board in accordance with its normal quorum and vote requirements, or by a "majority of the directors present" if a quorum cannot be "readily convened for a meeting[.]"[14]

Changes to Exculpation and Indemnification

Since 1986, the DGCL has permitted certificates of incorporation to include a provision exculpating directors from monetary liability for breaches of the duty of care.[15] The DGCL section permitting such exculpation provisions (§ 102(b)(7)) did not, however, address the possible effect that an amendment to a corporate certificate's exculpation provision could have on a director's liability for acts committed before such an amendment.

Section 102(b)(7) now contains language regarding that situation. Specifically, an "amendment, repeal or elimination" of an exculpation provision in a certificate of incorporation "shall not affect its application with respect to an act or omission by a director occurring before such amendment, repeal or elimination[,]" unless the exculpation provision "provides otherwise at the time of such act or omission."[16]

Important changes have also been made to so-called "mandatory indemnification," i.e., indemnification that every corporation is required to provide for a director or officer to the extent that he or she has been successful in defending against a claim asserted by reason of his or her service as a director or officer. The DGCL's mandatory-indemnification provision (§ 145(c)) previously did not define "officer." The 2020 amendments have filled this gap by cross-referencing the statute under which every nonresident of Delaware who "accepts election or appointment as an officer" of a Delaware corporation is deemed to have consented to personal jurisdiction in Delaware in actions connected with such officer's position.[17] Under this jurisdiction-consent statute (10 *Del. C.* § 3114(b)), an "officer" is any of the corporation's president, controller, treasurer, chief executive officer, chief operating officer, chief financial officer, chief legal officer, or chief accounting officer; a person identified in the corporation's public filings with the U.S. Securities and Exchange Commission "because such person is or was 1 of the most highly compensated executive officers of the corporation"; or a person who has consented in writing "to be identified as an officer for purposes of" the jurisdiction-consent statute. Accordingly, a corporation could now have individuals in officer positions (such as corporate secretary or

chief information officer) that will not by themselves entitle such individuals to mandatory indemnification.

The definition of "officer" contained in Section 3114(b) of Title 10 does not apply to any of the DGCL's indemnification provisions other than that regarding mandatory indemnification.[18] For purposes of applying the Section 3114(b) definition of "officer" under the mandatory-indemnification provision, Delaware residents (who would not otherwise come within Section 3114(b)) are treated as nonresidents.[19] In addition, the application of the Section 3114(b) definition to mandatory indemnification is effective only as to conduct taking place after December 31, 2020.[20]

As amended, the mandatory-indemnification provision also permits a corporation to create a right to mandatory indemnification for any person who is "*not* a present or former director or officer[.]"[21] Previously, a corporation's power to provide mandatory indemnification to individuals other than directors and officers was supported by case law but not by the express language of the statute.[22] The statute now confirms that if the corporation agrees, a covered person who is not a director or officer, and who has successfully defended an action brought by reason of his or her corporate service, will be entitled to indemnification solely as a consequence of such success, without the need of any determination that he or she has met a given standard of conduct under the other provisions of Section 145.[23]

Action by Electronic Means

In amendments that took effect on August 1, 2019, the General Assembly added to the DGCL an entirely new section, Section 116, which clarified how and when electronic transmission and electronic signatures may be used in corporate matters.[24] At the time, Section 116 provided that its validation of the use of electronic means did not apply to, among other things, consents given in lieu of a meeting by directors, stockholders, or incorporators.[25] The 2020 amendments have removed this carveout, thereby making Section 116 applicable to consents.[26] Corresponding amendments have been made to the separate DGCL sections on director, stockholder, and incorporator consents (§§ 141(f), 228, and 108, respectively) to conform those sections to amended Section 116. In addition, while Section 116 never excluded stockholder proxies from its coverage, language has been added to both Section 116 and the separate DGCL section on proxies (§ 212) to clarify how Section 116 applies to proxies.[27]

The 2020 amendments have also tightened the language on what a corporation's certificate of incorporation or bylaws must provide if they are to limit the application of Section 116. As previously drafted, Section 116 could have been interpreted as permitting the certificate or bylaws to limit even manual means of signing and delivering documents. The revised language makes clear that a corporation's certificate or bylaws may limit Section 116 only as it regards the use of electronic transmission or electronic signatures.[28]

Because the DGCL sometimes uses the term "execute" to refer to signing certain documents (e.g., merger agreements under Section 251(b)), language has also been added to Section 116 to make clear that its provisions encompass manual and electronic execution of documents.[29]

Changes Respecting Delaware Public Benefit Corporations

The 2020 amendments have eliminated two ways in which Delaware public benefit corporations ("PBCs") formerly differed from other Delaware corporations that issue stock ("non-PBCs").[30] First, the conversion of a non-PBC to a PBC (or the conversion of shares in a non-PBC to shares in a PBC), whether through an amendment to the certificate of incorporation or through a merger, no longer entitles the non-

PBC's stockholders to a statutory appraisal remedy.[31] Insofar as this elimination of the appraisal remedy applies to mergers, the amendment is effective only as to mergers pursuant to agreements entered into on or after July 16, 2020.[32] Second, the conversion of a non-PBC to a PBC (or the conversion of shares in a non-PBC to shares in a PBC), or conversions in the opposite direction, no longer require approval by two thirds of the outstanding stock entitled to vote.[33] Rather, the approval needed for a certificate amendment or a merger causing a PBC-to-non-PBC conversion, or a non-PBC-to-PBC conversion, is now the same as the approval needed for such an action when taken under the generally applicable amendment and merger provisions of the DGCL.[34] The fact that a merger involves a PBC or non-PBC conversion, however, will not preclude the stockholders' right to appraisal if the conditions set forth in the generally applicable appraisal statute (§ 262) are met.

The amendments have also clarified PBC directors' exposure to liability when they act in the shadow of the "balancing requirement" imposed on PBC boards. Set forth in DGCL Section 365(a), the balancing requirement is a PBC board's duty to manage the affairs of the PBC "in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation." The amendments have added language making clear that a director's "ownership of or other interest in the stock" of the PBC will not, by itself, create a conflict of interest implicating the director's compliance with the balancing requirement, "except to the extent that such ownership or interest would create a conflict of interest if the corporation were not a [PBC]."[35]

In addition, a default reading has been changed regarding the scope of a director-exculpation provision contained in a PBC certificate of incorporation pursuant to Section 102(b)(7) of the DGCL. Formerly, for such a provision to exculpate directors from monetary liability for disinterested breaches of the balancing requirement, the provision had to specifically so provide. Now, however, an exculpation provision in a PBC's certificate of incorporation is deemed to cover disinterested breaches of the balancing requirement unless the exculpation provision states otherwise.[36]

The 2020 amendments have also further limited the types of plaintiffs that may bring an action to enforce the balancing requirement. Formerly, the DGCL was silent regarding direct actions to enforce the balancing requirement and provided that derivative actions to enforce it could not be brought unless the stockholder plaintiffs owned at least 2% of the outstanding shares or, in the case of a publicly traded PBC, the lesser of 2% of the outstanding shares and shares with a market value of $2 million. Now, however, "*[a]ny* action to enforce the balancing requirement . . . including any individual, derivative or any other type of action, may not be brought unless the plaintiffs in such action" meet the minimum-ownership requirement.[37] It thus appears that a PBC itself may not, acting alone, sue present or former directors for breach of the balancing requirement.

Simplification of Holding-Company Reorganizations

Since 1995, Section 251(g) of the DGCL has permitted a board of directors, without obtaining any stockholder approval, to effectuate a merger in which the corporation (the "constituent corporation") becomes a wholly owned subsidiary of a holding company. Such a merger—sometimes referred to as a holding-company reorganization—causes the stockholders of the constituent corporation to become the stockholders of the holding company, which in turn becomes the sole stockholder of the constituent corporation. One of the requirements of a holding-company reorganization is that immediately after the mer-

ger, the "organizational documents" of the constituent corporation (or other surviving entity that becomes the holding company's wholly owned subsidiary in the merger) contain certain provisions designed to protect the interests of the former stockholders of the constituent corporation, who are now the stockholders of the holding company.

Specifically, Section 251(g) formerly required that, immediately after the merger, the constituent corporation's (or other surviving entity's) organizational documents contain (i) provisions "identical" to those of the constituent corporation's organizational documents immediately before the merger (subject to exceptions for the constituent corporation's name, its registered agent, and the like), and (ii) provisions requiring approval by the holding-company stockholders for any act or transaction requiring approval by the (now sole) owner of the constituent corporation (or other surviving entity) under applicable law or the constituent corporation's (or other surviving entity's) post-merger organizational documents.

The 2020 amendments have removed the "identical"-provisions requirement and have revised the holding-company vote requirement. Specifically, as amended, Section 251(g) now provides that the organizational documents of the constituent corporation (or other surviving entity), immediately after the merger, must require the holding-company stockholders' approval for the constituent corporation (or other surviving entity) to engage in an act or transaction (aside from director elections) that would have required stockholder approval under the DGCL or the constituent corporation's certificate of incorporation or bylaws if engaged in immediately before the merger.[38] Such an approval must be obtained "by the same vote" as was required under the constituent corporation's certificate of incorporation and bylaws immediately before the merger.[39]

The amendments to Section 251(g) are effective only as to mergers pursuant to agreements entered into on or after July 16, 2020.[40]

Other Changes

Because stockholder consents can be given by electronic transmission, obsolete references to "written" stockholder consents have been removed from the DGCL provisions regarding stockholder action by consent (§ 228) and the record date for such action (§ 213). In addition, repetitive text describing how stockholder consents may be delivered has been removed from the record-date provision and is now found only in the provision dedicated to stockholder consents.[41]

A sentence has been added to the DGCL section on notice to stockholders (§ 232), stating that the corporation need not have a stockholder's consent for emailed notice to such stockholder to be valid.[42] This rule, implicit after the 2019 DGCL amendments, is now explicit. Stockholder consent continues to be required if notice is to be given by a form of electronic transmission other than email.[43]

The main DGCL section on registered agents in Delaware (§ 132) has been revised to eliminate a possible reading under which a non-Delaware *general* partnership (other than a limited liability partnership) could serve as a registered agent.[44]

The ability of incorporators (or initial directors if they are named in the certificate of incorporation) to take organizational action by consent in lieu of a meeting has been made subject to restrictions in the certificate of incorporation.[45] The certificate of incorporation may thus bar the use of consents for the organizational action just as, under Section 228, the certificate may bar the use of stockholder consents.

Finally, the amendments have removed obsolete language that required the Secretary of State of the State of Delaware to certify, *sua sponte*, certain facts when a registered agent resigns and

appoints a successor registered agent (under § 135), and when a Delaware corporation converts to a non-Delaware entity (under § 266).

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[1] The DGCL is Chapter 1 (§§ 101-398) of Title 8 of the Delaware Code.

[2] Del. H.B. 341 § 22, 150th Gen. Assem. (2020).

[3] *Id*. § 23.

[4] 54 Del. Laws ch. 88, § 1 (1963).

[5] 8 *Del. C.* § 110(a) (2019).

[6] 8 *Del. C.* § 110(a).

[7] *Id*.

[8] 8 *Del. C.* § 110(i).

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] *Id*.

[13] *Id*.

[14] 8 *Del. C.* § 110(a), (i).

[15] 65 Del. Laws ch. 289, § 2 (1986).

[16] 8 *Del. C.* § 102(b)(7).

[17] 8 *Del. C.* § 145(c)(1) (referring to 10 *Del. C.* § 3114(b)).

[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] 8 *Del. C.* § 145(c)(2) (emphasis added). *See also* Del. H.B. 341 syn. § 9, 150th Gen. Assem. (2020) (explaining that "[a] corporation may rely on Section 145(f)" of the DGCL to insert in the certificate of incorporation or bylaws provisions giving non-directors and non-officers the right to mandatory indemnification).

[22] Del. H.B. 341 syn. § 9, 150th Gen. Assem. (2020).

[23] *Id*.

[24] 82 Del. Laws ch. 45, § 2 (2019).

[25] The use of electronic transmission for stockholder and director consents (other than the organizational action under DGCL Section 108) was nevertheless permitted by the DGCL provisions specifically on stockholder and director consents (Sections 228(d)(1) and 141(f)).

[26] 8 *Del. C.* § 116(b).

[27] 8 *Del. C.* §§ 116(a)(3), 212(c)(3) (requiring that a proxy given "in accordance with § 116 . . . set forth, or be delivered with information enabling the corporation to determine, the identity of the stockholder granting" the proxy).

[28] 8 *Del. C.* § 116(b).

[29] 8 *Del. C.* § 116(a)(2); Del. H.B. 341 syn. § 5, 150th Gen. Assem. (2020).

[30] Provisions specifically governing public benefit corporations are found in Subchapter XV (§§ 361-368) of the DGCL.

[31] Appraisal provisions have been removed from 8 *Del. C.* § 363 (2019).

[32] Del. H.B. 341 § 24, 150th Gen. Assem. (2020).

[33] The supermajority vote requirements found in 8 *Del. C.* § 363 (2019) have been removed.

[34] *I.e.*, 8 *Del. C.* §§ 241-242 (certificate of incorporation amendments), §§ 251-258, 263-264, 267 (mergers).

[35] 8 *Del C.* § 365(c).

[36] 8 *Del. C.* § 365(c). The amendments similarly provide that unless the certificate of incorporation otherwise states, a disinterested breach of the balancing requirement will not constitute bad faith or a breach of the fiduciary duty of loyalty for purposes of director indemnification. *Id*.

[37] 8 *Del. C.* § 367 (emphasis added).

[38] 8 *Del. C.* § 251(g)(7).

[39] *Id*.

[40] Del. H.B. 341 § 24, 150th Gen. Assem. (2020).

[41] 8 *Del. C.* §§ 213(b), 228(d).

[42] 8 *Del. C.* § 232(b).

[43] *Id*.

[44] 8 *Del. C.* § 132(a)(4).

[45] 8 *Del. C.* § 108(c).

Delaware Statutory Trust Act Has Been Amended to Permit Division of Statutory Trusts and to Clarify How Electronic Transmission May Be Used, Among Other Changes

By John J. Paschetto

Recent amendments to the Delaware Statutory Trust Act (the "DSTA")[1] have, among other changes, added entirely new sections that permit division of Delaware statutory trusts ("DSTs") and clarify how electronic transmission and electronic signatures may be used in connection with DSTs. These new sections largely track similar sections added to the Delaware Limited Liability Company Act and the Delaware Revised Uniform Limited Partnership Act in 2018 and 2019. The amendments have also modified the default rules for approval of mergers and similar transactions, and added a requirement that DSTs with registered agents have communications contacts (as was already the case for corporations, limited liability companies, and limited partnerships). All of the amendments discussed below took effect on August 1, 2020.[2]

Division of DSTs

The amendments make possible for the first time the "division" of a DST into multiple DSTs and the allocation of assets and liabilities among such DSTs without causing thereby a transfer or distribution for purposes of Delaware law. According to the terminology used in new DSTA Section 3825, the DST effecting the division is the "dividing trust" and will be the "surviving trust" if it survives the division. The DST or DSTs created in the division are "resulting trusts" and, together with the surviving trust (if any), are also "division trusts."[3]

To divide, a DST (the dividing trust) must first adopt a plan of division.[4] If the dividing trust is not registered as an investment company under the Investment Company Act of 1940 (15 U.S.C. §§ 80a-1 to 80a-64), then by default the plan of division must be approved unanimously by the dividing trust's trustees and beneficial owners.[5] If the dividing trust *is* registered under the Investment Company Act, then by default the plan of division must be approved by all of the trustees and by a majority-in-interest of the beneficial owners.[6]

The plan of division must set forth how beneficial interests in the dividing trust will be dealt with in the division (e.g., cashed out, exchanged for other interests, or left outstanding), how the assets and liabilities of the dividing trust will be allocated among the division trusts, the names of the surviving trust (if any) and the resulting trusts, and the name and address of a "division contact."[7] The division contact is an individual residing in Delaware or an entity formed under Delaware law that, for six years following the division, will provide to any requesting creditor of the dividing trust the name and address of the division trust to which the creditor's claim was allocated under the plan of division.[8] If the dividing trust will be a surviving trust, the plan of division may also effect any amendment to the governing instrument of the dividing trust, unless its governing instrument prohibits an amendment specifically in connection with a division, merger, or consolidation.[9]

The division is effectuated by filing with the Delaware Secretary of State a certificate of division containing, among other things, the name of the dividing trust, whether the dividing trust is a surviving trust, the name of each division trust, and the name and address of the division contact.[10] When the certificate of division is filed, a certificate of trust must also be filed for each resulting trust.[11] The governing instrument of each resulting trust becomes effective upon the effectiveness of the division.[12]

The effectiveness of the division causes the assets and liabilities of the dividing trust to be allocated among the division trusts pursuant to the

plan of division.[13] The allocation does not constitute a transfer or a distribution for purposes of Delaware law.[14] Likewise, the division does not by default constitute a dissolution of the dividing trust even if it is not a surviving trust.[15] Instead, when the dividing trust is not a surviving trust, its existence will merely "cease" upon the division.[16]

In addition to the requirement of a division contact, a number of provisions in Section 3825 should help protect creditors of a dividing trust. If the division is judicially found to constitute a fraudulent transfer, then each division trust, including by definition the surviving trust (if any), "shall be jointly and severally liable on account of such fraudulent transfer notwithstanding the allocations made in the plan of division[.]"[17] Also, if any liabilities of the dividing trust are not allocated under the plan of division, they will be the joint and several liabilities of all the division trusts, again including by definition the surviving trust (if any).[18]

Division is available to any DST formed on or after August 1, 2020, unless the DST's governing instrument provides otherwise. For a DST formed earlier, division will be deemed to be governed by the provisions of any written indenture or agreement to which the DST is a party that was entered into before August 1, 2020, to the extent that such provisions restrict, condition, or prohibit a merger of the DST or transfer of its assets.[19]

Acting by Electronic Means

The DSTA has been amended to provide greater specificity about how electronic transmission and electronic signatures may be used in taking actions under the DSTA or a DST's governing instrument.

Before the 2020 amendments, the DSTA already permitted the use of "electronic transmission" for multiple purposes, such as beneficial owner and trustee consents and proxies.[20] In addition, since its adoption in Delaware on July 14, 2000, the Uniform Electronic Transactions Act (the "DUETA") has provided for the use of "electronic records" and "electronic signatures" generally in business and government transactions.[21] But the provisions in the DSTA regarding electronic transmission were not as thorough as those in the DUETA, while the DUETA—which "does not apply to a transaction to the extent it is governed by" the DSTA[22]—left unclear just when the DSTA "governed" a transaction such that the DUETA was displaced. The 2020 amendments to the DSTA have clarified when electronic means such as those permitted by the DUETA will be effective under the DSTA. Central to these amendments is an entirely new section added to the DSTA, Section 3826.

This new section contains general authorization for the use of electronic transmission and electronic signatures in DST actions or transactions, subject to important statutory exceptions summarized below and any restrictions expressly set forth in the governing instrument.[23] Respecting electronic transmission, "[a]ny act or transaction contemplated or governed by" the DSTA or the governing instrument may "be provided for in a document, and an electronic transmission is the equivalent of a written document."[24] The definition of "electronic transmission" in the DSTA has remained unchanged by the 2020 amendments. Specifically, an electronic transmission is "any form of communication, not directly involving the physical transmission of paper, . . . that creates a record that may be retained, retrieved and reviewed by a recipient thereof and that may be directly reproduced in paper form by such a recipient through an automated process."[25]

Respecting electronic signatures, the new section states that whenever a signature is required or permitted by the DSTA or the governing instrument, "the signature may be a manual, facsimile, conformed or electronic signature."[26] "Electronic signature" is defined as "an electronic symbol or process that is attached to, or

logically associated with, a document and executed or adopted by a person with an intent to execute, authenticate or adopt the document."[27]

The new section also specifies safe-harbor conditions under which an electronic transmission will be deemed "delivered" for purposes of the DSTA and the governing instrument.[28] Specifically, unless "the sender and recipient" agree otherwise or the governing instrument provides otherwise, the electronic transmission is deemed delivered to a person "when it enters an information processing system that the person has designated for the purpose of receiving electronic transmissions of the type delivered, so long as the electronic transmission is in a form capable of being processed by that system and such person is able to retrieve the electronic transmission."[29] Whether a recipient has designated an information processing system for purposes of this safe harbor depends upon the DST's governing instrument and "the context and surrounding circumstances, including the parties' conduct."[30] Finally, the new section provides that a person need not be "aware" of the receipt of an electronic transmission for it to be deemed delivered under the safe harbor, and that an "electronic acknowledgement" from an information processing system "establishes that an electronic transmission was received" but not that the content received "corresponds to" what was sent.[31]

As mentioned above, new Section 3826 contains exceptions to its broad authorization of the use of electronic transmission and electronic signatures. Accordingly, that authorization does not apply to documents filed with any Delaware court or governmental body, including the office of the Secretary of State; certificates of beneficial interests; or acts under provisions that address registered agents in Delaware, foreign statutory trusts, or commencement of suits against DSTs.[32]

Conforming changes have been made to other sections of the DSTA, generally eliminating language that is now surplusage.

Approval of Certain Transactions Involving DSTs Registered Under the Investment Company Act of 1940

New language added to the DSTA sets forth separate default rules for approval of a merger or consolidation, a conversion, or a transfer or domestication when the DST is registered as an investment company under the Investment Company Act of 1940. Formerly, the sections on those transactions contained a blanket default rule under which unanimous approval by trustees and beneficial owners was required, regardless of whether the DST was registered under the Investment Company Act. Now, as a consequence of the 2020 amendments, unanimous approval is the default rule only when the DST engaging in the transaction is *not* registered under the Investment Company Act. If, on the other hand, the DST *is* registered under the Investment Company Act, the transaction must now be approved, by default, by all of the trustees but by only a majority-in-interest of the beneficial owners.[33] The amendments also provide that the new default approval rules apply only to DSTs whose original certificates of trust were filed after July 31, 2020, unless the governing instrument of such a DST provides otherwise.[34]

Communications-Contact Requirement and Other Changes Regarding Registered Agents

Multiple provisions have been added to the DSTA section that requires certain DSTs to have Delaware registered agents (§ 3807). A DST must have a registered agent in Delaware if the DST is a registered investment company under the Investment Company Act of 1940 and does not have a trustee either residing in Delaware (in the case of an individual) or having a principal place of business in Delaware (in the case of an entity).[35] The new provisions bring DSTA Sec-

tion 3807 into conformity with the statutes governing registered agents for Delaware corporations, limited liability companies ("LLCs"), and limited partnerships ("LPs").[36]

Like corporations, LLCs, and LPs, every DST that has a registered agent is now required to provide to the registered agent, and keep current, the name, business address, and business phone number of a natural person who is authorized to receive communications from the registered agent.[37] This person, termed the "communications contact," must be a trustee, beneficial owner, officer, employee, or designated agent of the DST.[38] Upon request by its communications contact, the DST must provide to him or her "the name, business address, and business telephone number of a natural person who has access to" the list containing the name and address of each beneficial owner and trustee of the DST (a list that every DST is required to maintain pursuant to DSTA Section 3819(a)(2)).[39] A registered agent may resign from representing a DST if the DST fails to provide the required communications-contact information.[40]

Other provisions added to DSTA Section 3807 specify, among other things, the duties of a registered agent generally; the particular obligations of any "commercial registered agent," i.e., a registered agent for more than 50 entities; and enforcement authority available to the Secretary of State.[41] As noted above, these provisions are substantially identical to those found in the corporation, LLC, and LP statutes.

Appraisal Rights, If Any, Must Be Contained in the Governing Instrument or Transaction Documents

Before the 2020 amendments, the DSTA contained a provision under which a governing instrument, or applicable transaction agreements, may give interest holders a right to seek an appraisal remedy in connection with certain transactions involving the DST. That provision did not, however, expressly foreclose any other possible source of appraisal rights.

The amendments make clear that no appraisal rights are available for an interest in a DST unless such rights are created in the governing instrument, in an agreement of merger or consolidation, or in a plan of division.[42] The amendments also confirm that the list in the DSTA of transactions that can give rise to contractual appraisal rights is non-exclusive.[43]

Other Changes

Changes have been made to the provisions of the DSTA regarding so-called "shielded" DST asset series, i.e., series that are not liable for the debts of any other series or of the DST generally. New language has been added to permit a DST with shielded series, unless its governing instrument provides otherwise, to "enter into an enforceable contract on behalf of 1 series of the [DST] with and on behalf of another series of the [DST] or with the [DST] generally."[44] In addition, with respect to any lien or security interest in assets of a series, "only the [DST] shall be the 'debtor' within the meaning of Article 9 of the Uniform Commercial Code . . . as the person having the power to transfer rights in such assets."[45]

The 2020 amendments have also clarified that a trustee's holding of legal title to any DST property shall not require such trustee "to be a party to any contract or other instrument (including a security agreement)" to which the DST is a party.[46]

A new section, corresponding to Section 18-112 of the Delaware Limited Liability Company Act,[47] has been added to the DSTA to empower the Delaware Court of Chancery to cancel the certificate of trust of a DST "for abuse or misuse" of the DST's "powers, privileges or existence[,]" upon motion of the Delaware Attorney General.[48] The Court of Chancery may also appoint trustees or receivers to wind up the affairs of such a canceled DST and make other orders

respecting "its affairs and assets and the rights of its beneficial owners, trustees and creditors."[49]

The amendments have removed obsolete language that required the Secretary of State to certify, *sua sponte*, certain facts when a trustee or registered agent changes its address or name,[50] when a registered agent resigns and appoints a successor registered agent,[51] when a DST converts to a non-Delaware entity,[52] when a DST transfers to a non-U.S. jurisdiction,[53] or when a registered agent of a foreign statutory trust changes its address or its name,[54] or resigns and appoints a successor registered agent.[55]

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[1] The DSTA is found in Chapter 38 (§§ 3801 to 3863) of Title 12 of the Delaware Code.

[2] Del. S.B. 244 § 19, 150th Gen. Assem. (2020).

[3] 12 *Del. C.* § 3825(a).

[4] 12 *Del. C.* § 3825(b), (g).

[5] 12 *Del. C.* § 3825(c).

[6] *Id.*

[7] 12 *Del. C.* § 3825(g).

[8] 12 *Del. C.* § 3825(g)(3).

[9] 12 *Del. C.* § 3825(f).

[10] 12 *Del. C.* § 3825(h).

[11] 12 *Del. C.* § 3825(i).

[12] *Id.*

[13] 12 *Del. C.* § 3825(l).

[14] 12 *Del. C.* § 3825(l)(8), (m).

[15] 12 *Del. C.* § 3825(d).

[16] 12 *Del. C.* § 3825(l)(1).

[17] 12 *Del. C.* § 3825(l)(5).

[18] 12 *Del. C.* § 3825(l)(6).

[19] 12 *Del. C.* § 3825(o).

[20] 12 *Del. C.* § 3806(f)-(g).

[21] 6 *Del. C.* §§ 12A-101 to 12A-117.

[22] 6 *Del. C.* § 12A-103(b).

[23] 12 *Del. C.* § 3826(a). The legislative synopsis accompanying the 2020 amendments emphasizes that any restrictions contained in a DST's governing instrument regarding the use of electronic transmission and electronic signatures must be "expressly stated" to be effective. "A provision merely specifying that an act or transaction will be documented in writing, or that a document will be signed or delivered manually, will not prohibit" application of the broad authorization contained in Section 3826(a). Del. S.B. 244 syn. § 17, 150th Gen. Assem. (2020).

[24] 12 *Del. C.* § 3826(a)(1).

[25] 12 *Del. C.* § 3801(c). The definition was formerly found in Section 3806, from which it has been removed.

[26] 12 *Del. C.* § 3826(a)(2).

[27] *Id.* The definition of "electronic signature" in the DSTA is broadly similar to the definition in the DUETA, i.e., "an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." 6 *Del. C.* § 12A-102(9).

[28] 12 *Del. C.* § 3826(a)(3).

[29] *Id.* The conditions for when an electronic transmission is deemed delivered under the DSTA are substantively similar to the conditions for when an "electronic record" is "received" under the DUETA. *See* 6 *Del. C.* § 12A-115(b).

[30] 12 *Del. C.* § 3826(a)(3).

[31] *Id.* Similar provisions are contained in the DUETA. 6 *Del. C.* § 12A-115(e)-(f).

[32] 12 *Del. C.* § 3826(b).

[33] 12 *Del. C.* §§ 3815(a) (merger or consolidation), 3821(b) (conversion), 3823(b) (transfer or domestication).

[34] 12 *Del. C.* §§ 3815(a) (merger or consolidation), 3821(b) (conversion), 3823(b) (transfer or domestication).

[35] 12 *Del. C.* § 3807(b). Every DST that is not registered under the Investment Company Act must have at least one trustee either residing in

Delaware (in the case of an individual) or having a principal place of business in Delaware (in the case of an entity). 12 *Del. C.* § 3807(a)-(b).

[36] See 8 *Del. C.* § 132 (corporations); 6 *Del. C.* §§ 18-104 (LLCs), 17-104 (LPs).

[37] 12 *Del. C.* § 3807(k).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] 12 *Del. C.* § 3807(i), (j), (l)-(m).

[42] 12 *Del. C.* § 3815(h).

[43] The amendments added the word "including" before the list of transactions for which appraisal rights may be made contractually available. *Id.*

[44] 12 *Del. C.* § 3804(a).

[45] *Id.*

[46] 12 *Del. C.* § 3805(f).

[47] 6 *Del. C.* § 18-112. *See also* 6 *Del. C.* § 17-112 (corresponding section in Delaware Revised Uniform Limited Partnership Act); 8 *Del. C.* § 284 (corresponding section in General Corporation Law of the State of Delaware).

[48] 12 *Del. C.* § 3824(a).

[49] 12 *Del. C.* § 3824(b).

[50] 12 *Del. C.* § 3807(e).

[51] 12 *Del. C.* § 3807(f).

[52] 12 *Del. C.* § 3821(f).

[53] 12 *Del. C.* § 3823(c).

[54] 12 *Del. C.* § 3854(c).

[55] 12 *Del. C.* § 3854(d).

Delaware LLC and LP Acts Have Been Amended to Simplify Default Requirements for Admission of Members and Limited Partners, Among Other Changes

By Norman M. Powell, John J. Paschetto, and Tammy L. Mercer[1]

Recent amendments to the Delaware Limited Liability Company Act (the "DLLCA") and the Delaware Revised Uniform Limited Partnership Act (the "DRULPA")[2] have removed the default provision under which a person's admission as a member of an existing limited liability company ("LLC") or a limited partner of an existing limited partnership ("LP") occurs when the admission "is reflected in the records" of the LLC or LP. Among other changes, the amendments also make clear that holders of interests in an LLC or LP have no appraisal rights in connection with a merger or similar transaction unless such rights are created by the LLC's or LP's operating agreement or by an agreement or plan of merger or a plan of division. All of the amendments discussed below took effect on July 16, 2020.[3]

Timing of Admission of Member or Limited Partner

Before the 2020 amendments, the default rules governing admission of a person as a member of an LLC or as a limited partner of an LP following the entity's formation provided that the admission was not necessarily effective as soon as the required approvals were obtained. Thus, where the person being admitted was not already an assignee of an interest in the LLC or LP, consent of all the members or partners was required for the person's admission, but the admission did not take effect until it was "reflected in the records of the [LLC or LP,]" unless the operating agreement provided otherwise. Where the person being admitted *was* already an assignee of an ownership interest, compliance with Section 18-704(a) of the DLLCA or Section 17-

704(a) of the DRULPA was required for admission, but again the admission was not effective until it was reflected in the entity's records, unless the operating agreement provided otherwise.

The 2020 amendments have removed the separate timing rule for the admission of members or limited partners after an LLC or LP has been formed. Now, unless the operating agreement provides otherwise, a person who is not already an assignee of an ownership interest is admitted simply "upon the consent of all [members or partners]."[4] A person who *is* already an assignee of an ownership interest is admitted pursuant to Section 18-704(a) (for an LLC) or Section 17-704(a) (for an LP), each of which states that unless the operating agreement provides otherwise, an assignee is admitted upon "the vote or consent" of all the members or partners.[5] In neither case is reflection on the records of the entity required by default for admission to take effect.

A similar default timing rule has also been amended in the DLLCA and DRULPA provisions on admission of a member or limited partner when the admission occurs in connection with the formation of the LLC or LP. Such an admission takes effect upon the later of (1) the entity's formation and (2) the "time provided in and upon compliance with" the operating agreement or, if the operating agreement is silent, when the admission "is reflected in the records of the [LLC or LP]."[6] The phrase "or as otherwise provided in the [operating] agreement" has been added at the end of foregoing clause (2) to confirm that the operating agreement may specifically opt out of the default timing rule.

No Source of Appraisal Rights Outside the Operating Agreement or Transaction Documents

Since 1994, the DLLCA and the DRULPA have contained provisions under which an LLC or LP operating agreement, or applicable transaction agreements, may give interest holders a right to seek appraisal of their interests in the Delaware Court of Chancery in connection with certain types of transactions involving the LLC or LP.[7] Until this year, however, neither act has stated that such agreements are the sole source of appraisal rights.

The 2020 amendments have now confirmed that no appraisal rights are available for an interest in an LLC or LP except to the extent, if any, that such rights are provided in the LLC's or LP's operating agreement or in an agreement of merger or consolidation, a plan of merger (in the case of a short-form merger where the parent company is an LLC or LP[8]), or a plan of division.[9] In addition, the amendments have made clear that the lists in the DLLCA and the DRULPA of transactions that can give rise to contractual appraisal rights are non-exclusive.[10]

Other Changes

The DLLCA and DRULPA sections on registered agents have been revised to eliminate a possible reading under which a non-Delaware *general* partnership (other than a limited liability partnership) could serve as a registered agent.[11]

Language has been added to the definition of "electronic signature" in the DLLCA and the DRULPA to confirm that it encompasses signatures where the intent is to "execute" a document.[12] Thus, there should no longer be any doubt that an electronic signature may be used on, for example, a merger agreement, which must be "executed" pursuant to other provisions of the DLLCA and the DRULPA.[13]

The sections on LLC and LP divisions have been amended to provide that a certificate of division may contain, in addition to the statutorily required information, "[a]ny other information the dividing [company or partnership] determines to include therein."[14]

The amendments have expanded the duty to amend a certificate of registered series of an LLC or LP such that the duty now arises not only if the certificate contains false information but also if the name of the registered series fails

to comply with the requirement that the series name begin with the name of the LLC or LP.[15]

The sections regarding how an LLC or LP may maintain its records have been amended to provide that such records may be maintained in other than "paper form" provided that they can be converted into "paper form," in each case as opposed to "written form" (the terminology the acts previously used).[16] This change should prevent ambiguity when those sections are read in conjunction with the section in each act on the use of electronic transmission, which states that "an electronic transmission is the equivalent of a written document."[17]

The amendments have removed obsolete language that required the Secretary of State of the State of Delaware to certify, *sua sponte*, certain facts when a registered agent for an LLC or LP changes its address or name, or resigns and appoints a successor registered agent;[18] when an LLC or LP transfers to a non-U.S. jurisdiction[19] or converts to a non-Delaware entity;[20] or when a registered series of an LLC or LP converts to a protected series.[21]

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[2] The DLLCA is Chapter 18 (§§ 18-101 to 18-1208), and the DRULPA is Chapter 17 (§§ 17-101 to 17-1208), of Title 6 of the Delaware Code.

[3] Del. H.B. 344 § 14, 150th Gen. Assem. (2020) (LLCs); Del. H.B. 343 § 14, 150th Gen. Assem. (2020) (LPs).

[4] 6 *Del. C.* § 18-301(b)(1) (LLCs), § 17-301(b)(1) (LPs).

[5] 6 *Del. C.* §§ 18-301(b)(2), 18-704(a)(2) (LLCs), §§ 17-301(b)(2), 17-704(a)(2) (LPs).

[6] 6 *Del. C.* § 18-301(a) (LLCs), § 17-301(a) (LPs).

[7] 69 Del. Laws ch. 260, § 14 (1994) (adding Section 18-210 to the DLLCA); 69 Del. Laws ch. 258, § 19 (1994) (adding Section 17-212 to the DRULPA). *Cf.* 8 *Del. C.* § 262 (providing a statutory right for a stockholder to seek appraisal of its shares in the Delaware Court of Chancery if the stockholder has not voted for or consented to certain types of mergers or consolidations involving the issuing corporation).

[8] *See* 8 *Del. C.* § 267 (corporation as subsidiary in short-form merger with LLC or LP parent); 6 *Del. C.* § 18-209(i) (short-form merger where LLC is parent), § 17-211(l) (short-form merger where LP is parent).

[9] 6 *Del. C.* § 18-210 (LLCs), § 17-212 (LPs).

[10] In each of 6 *Del. C.* § 18-210 (LLCs) and 6 *Del. C.* § 17-212 (LPs), the amendments have added the word "including" before the list of transactions for which appraisal rights may be made contractually available.

[11] 6 *Del. C.* §§ 18-104(a)(2), 18-904(b)(2) (LLCs); 6 *Del. C.* §§ 17-104(a)(2), 17-904(b)(2) (LPs).

[12] 6 *Del. C.* § 18-113(a)(2) (LLCs), § 17-113(a)(2) (LPs).

[13] 6 *Del. C.* § 18-209(c)(2) (LLCs), § 17-211(c)(2) (LPs).

[14] 6 *Del. C.* § 18-217(h)(9) (LLCs), § 17-220(h)(9) (LPs).

[15] 6 *Del. C.* § 18-218(d)(4) (LLCs), § 17-221(d)(4) (LPs).

[16] 6 *Del. C.* § 18-305(d) (LLCs), § 17-305(c) (LPs).

[17] 6 *Del. C.* § 18-113(a)(1) (LLCs), § 17-113(a)(1) (LPs).

[18] 6 *Del. C.* § 18-104(b)-(c) (LLCs), § 17-104(b)-(c) (LPs).

[19] 6 *Del. C.* § 18-213(c) (LLCs), § 17-216(c) (LPs).

[20] 6 *Del. C.* § 18-216(f) (LLCs), § 17-219(f) (LPs).

[21] 6 *Del. C.* § 18-220(f) (LLCs), § 17-223(f) (LPs).

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