YOUNG CONAWAY STARGATT & TAYLOR, LLP
Attorneys at Law

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Recent Amendments to Delaware's LLC and LP Acts: Registered Series of LLCs Will Be Permitted Starting in 2019 and LLCs Can Now Divide, among Other Changes

By Norman M. Powell, John J. Paschetto, and Justin P. Duda

As recently amended, the Delaware Limited Liability Company Act (the "DLLCA") now permits, among other things, the "division" of a Delaware limited liability company ("LLC") into new LLCs and the formation of statutory for-profit LLCs intended to produce public benefits. In addition, beginning August 1, 2019, Delaware LLCs will be able to form "registered series." While having most of the advantages of LLC series that can currently be established, registered series will also be "registered organizations" under Article 9 of the UCC, with the result that a secured party will be able to perfect security interests in most assets of such series by filing a financing statement in Delaware.

Aside from the amendments relating to registered series of LLCs, all of the amendments discussed below to the DLLCA and the Delaware Revised Uniform Limited Partnership Act (the "DRULPA") took effect on August 1, 2018.

Registered Series of LLCs

The DLLCA has permitted the establishment of series of LLC members, managers, interests, and assets since 1996. One of the attractive features of LLC series is that if certain statutory conditions are met, the assets associated with a given series are shielded from claims of creditors against other series of the LLC or against the LLC as a whole. 6 *Del. C.* § 18-215(b).

Yet LLC series have created challenges for anyone trying to situate them within the framework of UCC Article 9. A series established under the current DLLCA does not meet the UCC's definition of "registered organization" because such a series is not formed or organized "by the filing of a public organic record" with the state. UCC § 9-102(a)(71). Thus, it is unlikely that a security interest in the assets of a series can be perfected simply by filing a financing statement in Delaware, as would be the case with assets of a Delaware corporation, LLC, or other registered organization. Instead, one may need to file in the state where the series' place of business or chief executive office is located, treating the series in the same way one would treat a common law partnership.*

Amendments to the DLLCA, taking effect August 1, 2019, will help resolve the series-perfection issue by enabling Delaware LLCs to form series that will constitute "registered organizations" under Article 9. (For the registered-series amendments, see Delaware Senate Bill 183, 149th General Assembly.) The

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amendments will distinguish between a "protected series" and a "registered series." The term "protected series" will be used to refer to a shielded series of the type that can currently be established. "Registered series" will refer to a series formed by the filing of a certificate of registered series with the Delaware Secretary of State. Since a registered series will accordingly be formed "by the filing of a public organic record" with the state, it will be a registered organization under UCC Article 9, and secured parties will therefore be able to perfect security interests in most types of assets owned by a registered series by filing a financing statement with the Delaware Secretary of State.

The certificate of registered series must provide the name of the LLC forming the registered series and the name of the registered series itself. The name of a registered series must begin with the full name of the LLC, need not include the word "Series," and must meet the existing requirement of distinctness from the names of other entities on the records of the Secretary of State. The requirement that the registered series' name start with the LLC's name should help ensure that someone searching in Delaware on, for example, the word "borrower" for liens recorded against Borrower LLC will also find liens recorded against any registered series of Borrower LLC, such as Borrower LLC Fund X, Borrower LLC Fund Y, etc. The amendments will also permit the reservation of registered-series names just as the DLLCA already permits the reservation of LLC names. Unlike the certificate of formation for a Delaware LLC, a certificate of registered series will not be required to identify a registered agent in Delaware. Instead, the registered agent of an LLC will also be the registered agent for any registered series formed by the LLC.

A registered series will not necessarily have the asset-shielding characteristics of a protected series. For a registered series to be shielded, it will need to satisfy the same conditions as those currently in place for shielded series, i.e., the records maintained for the series must "account for the assets associated with such series separately from the other assets of the [LLC], or any other series thereof," plus the LLC's certificate of formation must provide "[n]otice of the limitation on liabilities" of the series, and the LLC agreement must permit the formation of series. Neither the certificate of formation nor the LLC agreement, however, must refer specifically to *registered* series or to the applicable section of the DLLCA (which will be § 18-218) for the foregoing conditions to be met.

In keeping with a registered series' status as a registered organization, the amendments will provide for the filing of a certificate of amendment to amend a certificate of registered series and the filing of a certificate of cancellation to cancel a certificate of registered series after the series has been dissolved and wound up. The Secretary of State will issue—as requested and appropriate—a certificate of good standing for a registered series. The annual Delaware tax on registered series will initially be set at $75 per series and will be due on June 1, the same date when the annual tax payable by the LLC (currently set at $300) is due.

Protected series will be able to convert into registered series of the same LLC and vice versa. Also, two or more registered series of the same LLC will be permitted to merge. No series will be permitted to convert or merge under any other provisions of the DLLCA.

LLC Division

The amendments make possible for the first time the "division" of a Delaware LLC into multiple Delaware LLCs and the allocation of assets and liabilities among such LLCs without causing thereby a transfer or distribution for purposes of Delaware law. According to the terminology used in new DLLCA § 18-217, the LLC effecting the division is the "dividing company" and will be the "surviving company" if it

survives the division. The LLC or LLCs created in the division are "resulting companies" and, together with the surviving company (if any), are also "division companies." 6 *Del. C.* § 18-217(a).

To divide, an LLC (the dividing company) must first adopt a plan of division. 6 *Del. C.* § 18-217(g). By default, the plan must be approved by a majority in interest of the dividing company's members. 6 *Del. C.* § 18-217(c). The plan must set forth how interests in the dividing company 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 company will be allocated among the division companies, the names of the surviving company (if any) and the resulting companies, and the name and address of a "division contact." 6 *Del. C.* § 18-217(g). 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 company the name and address of the division company to which the creditor's claim was allocated under the plan of division. *Id.* If the dividing company will be a surviving company, the plan of division may also effect any amendment to the operating agreement of the dividing company, unless its operating agreement prohibits an amendment specifically in connection with a division, merger, or consolidation. 6 *Del. C.* § 18-217(f).

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 company, whether the dividing company is a surviving company, the name of each division company, and the name and address of the division contact. 6 *Del. C.* § 18-217(h). When the certificate of division is filed, a certificate of formation must also be filed for each resulting company. *Id.* The operating agreement of each resulting company becomes effective upon the effectiveness of the division. 6 *Del. C.* § 18-217(i).

The effectiveness of the division causes the assets and liabilities of the dividing company to be allocated among the division companies pursuant to the plan of division. 6 *Del. C.* § 18-217(l). The allocation does not constitute a transfer or a distribution for purposes of Delaware law. 6 *Del. C.* § 18-217(l)(8), (m). Likewise, the division does not by default constitute a dissolution of the dividing company even if it is not a surviving company. 6 *Del. C.* § 18-217(d). Instead, when the dividing company is not a surviving company, its existence will merely "cease" upon the division. 6 *Del. C.* § 18-217(l)(1).

In addition to the requirement of a division contact, a number of provisions in Section 18-217 should help protect creditors of a dividing company. A division "shall not be deemed to affect the personal liability of any person incurred prior to such division with respect to matters arising prior to such division[.]" 6 *Del. C.* § 18-217(b). Also, if the division is judicially found to constitute a fraudulent transfer, then each division company, including by definition the surviving company (if any), "shall be jointly and severally liable on account of such fraudulent transfer notwithstanding the allocations made in the plan of division[.]" 6 *Del. C.* § 18-217(l)(5). Finally, if any liabilities of the dividing company are not allocated under the plan of division, they will be the joint and several liabilities of all the division companies, again including by definition the surviving company (if any). 6 *Del. C.* § 18-217(l)(6).

Division is available to any Delaware LLC formed on or after August 1, 2018, unless the LLC's operating agreement provides otherwise. For a Delaware LLC formed earlier, division will be deemed to be governed by the provisions of any written agreement to which the LLC is a party (including its operating agreement) that was entered into before August 1, 2018, to the

extent that such provisions restrict, condition, or prohibit a merger of the LLC or transfer of its assets. 6 *Del. C.* § 18-217(o).

Use of Blockchain by LLCs and LPs

In 2017, the DGCL was amended to confirm that blockchain (or "distributed database") technology could be used by corporations to satisfy certain statutory record-keeping and notice requirements. This year, similar amendments have been made to the DLLCA and the DRULPA to provide certainty regarding the use of blockchain and other "networks of electronic databases" by LLCs and LPs. *See, e.g.*, Del. S.B. 183 syn., 149th Gen. Assem. (2018). Specifically, unless the operating agreement provides otherwise, blockchain may now be used by LLC members and managers, or by LP partners, in appointing proxies and in providing consent in lieu of voting at a meeting. 6 *Del. C.* §§ 18-302(d), 18-404(d) (LLCs); 6 *Del. C.* §§ 17-302(e), 17-405(d) (LPs). Blockchain may also be used by an LLC or LP in maintaining its records, provided that the form in which the records are kept "is capable of conversion into written form within a reasonable time." 6 *Del. C.* § 18-305(d) (LLCs); 6 *Del. C.* § 17-305(c) (LPs).

Statutory Public Benefit LLCs

A new subchapter, Subchapter XII, has been added to the DLLCA to provide express statutory authorization for the formation of public benefit LLCs. 6 *Del. C.* §§ 18-1201 to18-1208. As with the blockchain amendments just discussed, the amendments authorizing public benefit LLCs follow similar amendments made previously to the DGCL. *See* 8 *Del. C.* §§ 361-368 (enabling the formation of public benefit corporations, originally adopted in 2013).

A public benefit LLC formed under Subchapter XII is termed a "*statutory* public benefit" LLC because Subchapter XII does not provide the exclusive means for "the formation or operation of a limited liability company that is formed or operated for a public benefit (including a limited liability company that is designated as a public benefit limited liability company)[.]" 6 *Del. C.* § 18-1208. Accordingly, a statutory public benefit LLC (an "SPB-LLC") is a "for-profit" LLC that not only is "intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner[,]" but also complies with the other requirements of Subchapter XII. 6 *Del. C.* § 18-1202(a).

Unlike a Delaware public benefit corporation, an SPB-LLC need not include in its name any language or abbreviation indicating that it is a public-benefit entity. Its certificate of formation must only state in the heading that the LLC is an SPB-LLC and set forth the specific public benefit or public benefits that the SPB-LLC will promote. *Id.* In addition, the operating agreement of an SPB-LLC "may not contain any provision inconsistent with" Subchapter XII of the DLLCA. *Id.* The amendments do not set forth any special approvals that must be obtained for an existing LLC to become an SPB-LLC. (By contrast, the DGCL provides in § 363(a) that a non-public-benefit corporation must obtain the approval of two thirds in interest of its stockholders to become a public benefit corporation.) However, an SPB-LLC may not cease to be an SPB-LLC (including by amending its certificate of formation to remove the public-benefit language) without the approval of two-thirds in interest of the members. 6 *Del. C.* § 18-1203.

The definition of "public benefit" for, and the special standards applicable to, an SPB-LLC are similar to those set forth in the DGCL for a public benefit corporation. A public benefit is "a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests" aside from the SPB-LLC's members *qua* members. 6 *Del. C.* § 18-1202(b). The persons who manage the SPB-LLC are required to manage it "in a manner that balances the pecuniary interests of

the members, the best interests of those materially affected by the [LLC's] conduct, and the specific public benefit or public benefits set forth in its certificate of formation." 6 *Del. C.* § 18-1204(a). Two percent in interest of the members may sue the SPB-LLC derivatively to "enforce" the balanced-management requirement, but no member or manager shall have any monetary liability for failing to meet that requirement. 6 *Del. C.* §§ 18-1206, 18-1204(a).

Moreover, in making a decision that implicates the balanced-management requirement, the persons who manage the SPB-LLC will be deemed to have satisfied their fiduciary duties if the decision is informed, disinterested, and "not such that no person of ordinary, sound judgment would approve." 6 *Del. C.* § 18-1204(b). No member or manager of the SPB-LLC shall, "by virtue of the public benefit provisions" in the operating agreement or in Subchapter XII, have a duty to any person on account of an interest in the SPB-LLC's stated public benefit or an interest "materially affected" by the SPB-LLC's conduct. *Id.*

SPB-LLCs are subject to reporting requirements similar to those governing Delaware public benefit corporations. The SPB-LLC must provide to its members at least once every two years a report stating the objectives established to promote its stated public benefit, the standards adopted to measure its progress in promoting such public benefit, "[o]bjective factual information based on those standards regarding" its success in meeting its objectives, and an assessment of such success. 6 *Del. C.* § 18-1205.

Other Amendments to the DLLCA and DRULPA

A new section, modeled on DGCL § 284 as amended this year, has been added to the DLLCA to empower the Delaware Court of Chancery to cancel the certificate of formation of an LLC "for abuse or misuse" of the LLC's "powers, privileges or existence[,]" upon motion of the Delaware Attorney General. 6 *Del. C.* § 18-112(a). The Court of Chancery may also appoint trustees or receivers to wind up the affairs of such an LLC and make other orders respecting its assets, members, and creditors. 6 *Del. C.* § 18-112(b).

The fee for filing a corrected certificate with the Delaware Secretary of State has been changed. When any certificate filed with the Secretary of State under the DLLCA or DRULPA is to be corrected, one may make the correction by filing either a certificate of correction or a corrected version of the erroneous filing. Formerly, the fee for filing a corrected version was the same as the fee for whatever type of filing was being corrected, while the fee for filing a certificate of correction was $180 regardless of the type of filing being corrected. Pursuant to the amendment, the fee for a corrected version is now the same as the fee for a certificate of correction. 6 *Del. C.* § 18-211(b) (LLCs); 6 *Del. C.* § 17-213(b) (LPs).

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* Continuing the analogy, limited liability partnerships, a subset of general partnerships, are *formed* without the need for any filing with a secretary of state or similar public office, but acquire limited liability features only by way of such a filing. Limited liability partnerships are therefore not registered organizations—their filings are prerequisites not to existence, but rather to the attribute of limited liability. *See* PERMANENT EDITORIAL BD. FOR THE UNIF. COMMERCIAL CODE, PEB COMMENTARY NO. 17: LIMITED LIABILITY PARTNERSHIPS UNDER THE CHOICE OF LAW RULES OF ARTICLE 9 (June 29, 2012).

Delaware Trust Law Is Amended to Clarify Fiduciary and Nonfiduciary Relationships, among Other Changes

By Justin P. Duda

In its recently enacted Senate Bill 195 (the "Trust Bill"), the Delaware legislature effected a number of clarifications of and modifications to Delaware's law governing trusts and fiduciary and similar relationships, including various provisions of Title 12 of the Delaware Code ("Title 12").

Amendments Regarding Fiduciaries, Non-Fiduciaries, and Their Rights and Obligations

In addition to clarifying that, unless otherwise specified, the definitions set forth in § 3301 of Title 12 apply to Chapters 33 (Administrative Provisions), 35 (Trusts), 39 (Guardianship), and 45 (Delaware Uniform Transfers to Minors Act) of Title 12 and to any other law incorporating by reference § 3301 or the law of trusts generally, the Trust Bill has clarified that the term "fiduciary" includes advisers or protectors under Title 12 § 3313(a) and designated representatives under Title 12 § 3339, in each case serving in a fiduciary capacity, and that the term "nonfiduciary" includes persons acting in such roles in a nonfiduciary capacity. 12 *Del. C.* § 3301(a), (d).

Section 6504 of Title 10 (which generally deals with courts and judicial procedure) has been modified to provide that any adviser or protector under Title 12 § 3313(a) or designated representative under Title 12 § 3339 is among the persons that may request from a Delaware court a declaration of rights or legal relations regarding certain matters, including a declaration directing trustees to do or abstain from doing any act in their fiduciary capacity or determining any question regarding the administration of a trust.

The Trust Bill has clarified that an excluded cotrustee under Title 12 § 3313A is not a fiduciary with respect to any power regarding which exclusive authority is conferred upon another cotrustee. However, the excluded cotrustee remains a fiduciary regarding any power not conferred exclusively upon another cotrustee. 12 *Del. C.* § 3313A(a)(2).

Title 12 § 3580 has been amended to clarify that for purposes of Title 12, Chapter 35, Subchapter VII, which deals generally with the liability of trustees and the rights of persons dealing with trustees, a trustee shall include fiduciaries and other persons consenting to the exercise of, or that are required to be consulted before the exercise of, powers or duties under a trust's governing instrument or under Title 12, and designated representatives under Title 12 § 3339.

Newly added subsection (g) of Title 12 § 3313 provides that in addition to any other grounds for personal jurisdiction, any person accepting appointment as, or acting as, an adviser of a trust submits to personal jurisdiction in Delaware in any matter regarding such trust.

Title 12 § 3302 generally governs investment decisions by a fiduciary for the benefit of a beneficiary, setting forth the default standard of care applicable to such fiduciary and factors involved in determining the propriety of an investment decision. Among other things, the propriety of a fiduciary's investment decision is determined by the "nature and extent of other investments and resources, whether held in trust or otherwise, available to the beneficiaries[,]" subject to the proviso that the fiduciary has no duty to inquire about assets not in the possession or control of the fiduciary. 12 *Del. C.* § 3302(c). The Trust Bill has clarified that in considering the propriety of an investment decision, a fiduciary shall have no duty to inquire about the nature and extent of investments and resources that are held by such fiduciary but regarding which a cotrustee is authorized to direct the

fiduciary in investment decisions pursuant to Title 12 § 3313 or regarding which such cotrustee has exclusive authority in investment decisions pursuant to Title 12 § 3313A. *Id.*

One of the considerations of a fiduciary when making investment decisions for the benefit of a beneficiary, pursuant to Title 12 § 3302, is such beneficiary's needs. The Trust Bill has clarified that such needs may include not just the beneficiary's financial needs but also the beneficiary's personal values and desire to engage in sustainable investment strategies. 12 *Del. C.* § 3302(a). Similarly, the Trust Bill has clarified that the governing instrument of a trust may alter any laws of general application to fiduciaries and trusts, including laws pertaining to the "manner in which a fiduciary should invest assets, including whether to engage in one or more sustainable or socially responsible investment strategies . . . with or without regard to investment performance." 12 *Del. C.* § 3303(a)(4).

Title 12 § 3313 provides a definition of "investment decision" that includes, among other things, any transaction or decision affecting the ownership of or rights in the trust investments, including decisions exercising the power to borrow or lend for investment purposes. 12 *Del. C.* § 3313(d). The Trust Bill has clarified that unless otherwise provided in a trust's governing instrument, the power to lend for investment purposes shall be an "investment decision" only with respect to loans that are not made in lieu of a distribution. *Id.*

Title 12 § 3317 generally provides that except as otherwise stated in the governing instrument, a fiduciary of a trust has the duty, upon request, to keep other fiduciaries informed about such fiduciary's specific administration of the trust to the extent the information is reasonably necessary for the other fiduciaries to perform their trust duties. Generally, the other fiduciaries requesting such information shall have no duty to monitor the conduct of the fiduciary providing such information, to provide advice to or consult with the fiduciary providing such information, or to warn any beneficiary or third party concerning instances in which the requesting fiduciary would have exercised its own discretion in a manner different from that chosen by the fiduciary providing the information. 12 *Del. C.* § 3317(1). The Trust Bill has modified § 3317 to provide that a nonfiduciary (along with a fiduciary) shall have the obligation to provide upon request information regarding such nonfiduciary's specific administration of the trust to both fiduciaries and nonfiduciaries of the trust, and that a nonfiduciary requesting and receiving information from a fiduciary or another nonfiduciary also will not have the obligation to monitor, advise, or communicate, as set forth in § 3317(1). Furthermore, the Trust Bill has also added to § 3317 new subsection (2), which provides that a fiduciary or nonfiduciary furnishing information upon request, as required by Section 3317, shall not have the duty to monitor, advise, or communicate regarding the requesting fiduciary or nonfiduciary, protections similar to those set forth in § 3317(1).

Title 12 § 3323 has been amended to clarify that the "majority rules" requirement for any power vested in three or more fiduciaries shall also apply to any power vested in three or more nonfiduciaries.

Nonjudicial Settlement Agreements and Trust Modification Mechanisms

The Trust Bill has clarified that in addition to issues regarding the resignation or appointment of a trustee, a nonjudicial settlement agreement executed pursuant to Title 12 § 3338 may also resolve issues regarding the removal of a trustee. 12 *Del. C.* § 3338(d)(4).

Title 12 § 3341 generally discusses the consequences of a trust merger or similar transaction, including the cessation of the separate existence of the "transferor trust" and

the treatment of its assets. Prior to the enactment of the Trust Bill, § 3341 provided that where a "transferee trust" is funded prior to a merger, any power of appointment exercisable over property of the transferor or transferee trust shall be exercisable only to the extent expressly provided in the instrument or document effecting the merger. The Trust Bill has clarified that "if any person holds substantially identical powers of appointment over all of the property of each trust participating in the merger," such power shall apply to all property of the transferee trust unless the merger instrument or document provides otherwise. The Trust Bill has further amended § 3341 to make clear that it is not intended to address the validity or effect of any instrument executed prior to a merger and purporting to exercise a power of appointment regarding any trust participating in the merger, other than an instrument purporting to exercise a power of appointment over property of the transferor trust.

The Trust Bill has amended Title 12 § 3342 to clarify that a trust modification agreement may be utilized to both add new provisions to a governing instrument and modify existing provisions in such instrument.

In connection with the effectuation of a decanting, Title 12 § 3528 has been amended to provide that the written exercise of the power to invade principal or income or both does not require notarization and does not need to be filed with the records of the trust to be a valid exercise.

Delaware Virtual Representation Statute

The Trust Bill has effected a number of changes to Title 12 § 3547 (the "Delaware Virtual Representation Statute"). Generally, the Delaware Virtual Representation Statute allows certain parties to represent and bind trust beneficiaries and other parties in connection with a judicial proceeding or nonjudicial matter, including the execution of a nonjudicial settlement agreement, a trust modification agreement, or a release pursuant Title 12 § 3588.

Section 3547(b) generally provides that in the absence of a material conflict of interest, a presumptive remainder beneficiary (or a person that may represent a presumptive remainder beneficiary pursuant to another section of the Delaware Virtual Representation Statute) may represent and bind a contingent successor remainder beneficiary. The Trust Bill has amended § 3547(b) to define a contingent successor remainder beneficiary as "a beneficiary who would succeed to the interest of a presumptive remainder beneficiary" if the presumptive remainder beneficiary and any other beneficiaries fail to take the interest the presumptive remainder beneficiary would receive as of a given date if the trust were terminated as of that date or, where the trust does not provide for termination, if all beneficiaries eligible to receive distributions were deceased.

The Trust Bill has also amended § 3547(b) to provide that, similar to the provision discussed in the previous paragraph, in the absence of a material conflict of interest, a contingent successor remainder beneficiary (or a person that may represent a contingent successor remainder beneficiary pursuant to another section of the Delaware Virtual Representation Statute) may represent and bind a "more remote" contingent successor remainder beneficiary. Amended § 3547(b) further provides that "a contingent successor remainder beneficiary shall be considered 'more remote' than any other beneficiary whose interest must fail in order for such contingent successor remainder beneficiary to take the interest."

The Trust Bill has added to § 3547 new subsection (c), which provides that in the absence of a material conflict of interest, a holder of a general testamentary or inter vivos power of appointment—or a holder of a nongeneral testamentary or inter vivos power of

appointment that is expressly exercisable in favor any person other than such holder, such holder's estate or creditors, or creditors of such holder's estate—may represent and bind a person whose interest, as a taker in default, is subject to the power.

The Trust Bill has also amended prior subsection (c) of § 3547, now designated subsection (d). Prior to the enactment of the Trust Bill, this subsection generally provided that in the absence of a material conflict of interest, and subject to certain other specified conditions, the parents of a minor or incapacitated beneficiary could bind and represent such beneficiary. As amended, the subsection now also applies to an unborn potential beneficiary. Furthermore, the amended subsection provides that a parent representing and binding thereunder a minor or incapacitated beneficiary or unborn potential beneficiary may also represent and bind another minor, incapacitated, unborn, or unascertainable person who has an interest with regard to the relevant matter that is substantially identical to that of the minor or incapacitated beneficiary or unborn potential beneficiary who is represented by such parent.

In addition, the Trust Bill has added to § 3547 new subsection (g), which provides that when a trust is a beneficiary of another trust, the beneficiary trust shall be represented by its trustee or, if the beneficiary trust is not in existence, by the persons that would be beneficiaries of the beneficiary trust if the beneficiary trust were in existence.

Other Amendments in the Trust Bill

The Trust Bill has amended Title 12 § 3536 to provide that a trust beneficiary holding a beneficial interest that is contingent upon surviving the trustors' spouse may release such retained interest in the trust, in whole or in part, to the beneficiaries having the next succeeding beneficial interest in the trust.

In order to avoid unnecessary cross-referencing for parties utilizing Chapter 33 of Title 12 in connection with a national trust practice, the Trust Bill has moved from Title 12 § 213 to Title 12 § 3330 certain rules for the construction of trusts and wills. Specifically, these provisions govern construction and interpretation affecting validity under the rule against perpetuities, the applicability of later-enacted laws, and class determination upon a governing instrument becoming irrevocable. Additionally, an amendment has clarified that § 3330 applies to a trust's governing instrument generally, and not just wills or a trust itself.

Title 12 § 3524 has been reordered to clarify when accountings for certain testamentary trusts are required to be filed with the Delaware Court of Chancery.

Title 12 § 3545 has been clarified to reflect that in connection with the execution, modification, or revocation of a written trust, the trustor's execution must be witnessed in writing in the trustor's presence by at least one disinterested person or two credible persons. 12 *Del. C.* § 3545(a)(1). As provided in the Trust Bill, this amendment "shall be effective with respect to the creation, modification or revocation of trusts executed on or after January 1, 2001."

The Trust Bill has clarified that Title 12 § 3585 governs statutes of limitation applicable to any person, not just a beneficiary, and to any claim against a trustee, not just breach-of-trust claims. The Trust Bill has also shortened the limitation period applicable to claims against a trustee from two years after a report adequately disclosing the facts constituting the claim was sent to the potential plaintiff, to one year after such report was sent, subject to the right to increase this limitation period in the governing instrument. 12 *Del. C.* § 3585. According to the Trust Bill, the provisions amending the limitation period from two years to one year "shall apply to trusts whenever created, but shall

apply only to reports sent to persons after the date of enactment[,]" i.e., July 11, 2018.

The Trust Bill similarly has clarified that Title 12 § 3588 provides that any person, not just a beneficiary, may *not* hold a trustee liable for any claim, not just a breach-of-trust claim, if the person consented to the challenged conduct, released the trustee, or ratified the challenged transaction, subject to certain exceptions. 12 *Del. C.* § 3588(a). Moreover, a new subsection (b) has been added to § 3588, containing language formerly found in subsection (a) of that section and now specifying that indemnification—in addition to ratification, a consent, or a release—in favor of a trustee does not need to be supported by consideration.

The Trust Bill has also effected certain changes in provisions of the Delaware Code outside of Title 12. Section 505 of Title 25, which deals generally with property rights, has been clarified such that exercises of nongeneral powers of appointment to a revocable trust, effective upon the donee's death, for the benefit of a proper object of such power, are not rendered invalid, but are deemed to create a separate trust within such revocable trust that is not subject to the creditors of the donee, the donee's estate, or the donee's revocable trust.

The Trust Bill has also amended § 4916 of Title 10 to provide that plans similar to the Delaware College Investment Plan and the Delaware Achieving a Better Life Experience Plan, but that are created under the laws of other states, also are exempt from execution or attachment process in Delaware. Finally, the Trust Bill has repealed § 2725 and § 2728 of Title 18, which deals generally with insurance matters, because such provisions have been superseded by prior amendments to § 4915 of Title 10.

Delaware's General Corporation Law Is Amended to Make Statutory Ratification of Defective Acts Available to Nonstock Corporations, among Other Changes

By Norman M. Powell, John J. Paschetto, and Justin P. Duda

The Delaware legislature recently adopted amendments to the State's General Corporation Law (the "DGCL") that, among other things, make the statutory ratification process to cure defective corporate acts available for use by Delaware non-stock corporations. Unless otherwise stated below, all of these amendments took effect on August 1, 2018.

Changes to Statutory Ratification

Section 204 of the DGCL, which took effect in 2014, sets forth self-help procedures by which a corporation can ratify and thus validate a "defective corporate act." 8 *Del. C.* § 204(a). Defective corporate acts include the over-issuance of shares and any other act "purportedly taken by or on behalf of the corporation that is . . . within the power of a corporation under subchapter II of [the DGCL], but is void or voidable due to a failure of authorization" required by the DGCL or the corporate documents. (Subchapter II of the DGCL, consisting of §§ 121-127, deals with the scope of the powers that may be exercised by a Delaware corporation.)

Several important amendments have been made this year affecting § 204. First, the § 204 validation procedures can now be used by non-stock corporations, which include almost all nonprofit corporations formed in Delaware. Previously, § 204 applied only to corporations that issue stock. Now—as a result of amendments to DGCL § 114, which contains the general rules for "translating" stock-corporation

provisions to apply them to non-stock corporations—§ 204 can be employed by non-stock corporations as well. The amendments to § 114 also enable non-stock corporations to make use of DGCL § 205, which provides for, among other things, court review of validation efforts undertaken pursuant to § 204. 8 *Del. C.* §§ 114, 205.

Second, the 2018 amendments have resolved an issue raised by a 2017 decision construing the term "defective corporate act" as used in § 204: *Nguyen v. View, Inc.*, C.A. No. 11138-VCS, 2017 WL 2439074 (Del. Ch. June 6, 2017). As noted above, a defective corporate act is one "within the power of a corporation" but void or voidable "due to a failure of authorization." In *Nguyen*, the Court of Chancery held that an act was not "within the power of a corporation" for purposes of § 204, where the act was taken by the defendant corporation despite the plaintiff stockholder's deliberate refusal to provide the necessary authorization. The holding of *Nguyen* therefore seemed to make the efficacy of § 204 depend on whether the failure to authorize a purported defective corporate act was intentional or inadvertent.

The 2018 amendments have now made clear that the underlying reason for a failure of authorization—including a deliberate withholding of consent—is not relevant to whether an action constitutes a defective corporate act under § 204. This clarification was accomplished by amending the definition of "defective corporate act" to provide that the determination whether an act was "within the power of a corporation" is to be made "without regard to the failure of authorization" that the corporation is attempting to remedy under § 204. Accordingly, if, for example, a corporation sold substantially all of its assets even though its majority stockholder had deliberately refused to provide the approval needed under DGCL § 271, the fact that the stockholder had deliberately withheld approval would not cause the sale to be outside "the power of a corporation" such that the sale could not be a defective corporate act ratifiable under § 204. Nevertheless, as the accompanying legislative synopsis makes clear, the amendments do not change the Court of Chancery's power, under DGCL § 205, to find a given instance of § 204 ratification ineffective based on equitable or other considerations. Del. S.B. 180 syn., 149th Gen. Assem. (2018).

Third, § 204 has been amended to make clear that its procedures can be used to ratify defective corporate acts when ratification would otherwise require a stockholder vote but the corporation has no "valid stock" outstanding. Fourth, § 204 now provides that where stockholder approval is required for ratification, and the defective corporate act to be ratified "involved the establishment of a record date[,]" notice must be given to holders of valid and putative stock as of the record date rather than as of the time of the defective corporate act, as is the case in other circumstances. Fifth, such notice may now be given by means of a public filing with the Securities and Exchange Commission if the corporation's stock is listed on a national securities exchange. And sixth, language has been added to provide that the failure to obtain authorization in compliance with disclosures in a proxy or consent solicitation statement can give rise to a defective corporate act ratifiable under § 204.

The amendments to § 204 are effective only as to defective corporate acts "ratified or to be ratified pursuant to resolutions adopted by a board of directors on or after August 1, 2018." Del. S.B. 180 syn., 149th Gen. Assem. (2018).

Changes to Appraisal

The amendments have made certain adjustments to the interplay between the appraisal statute and the provisions, added to the DGCL in 2013, that make possible a merger without a stockholder vote when the merger follows a successful tender offer (i.e., a so-called "intermediate-form

merger"). 8 *Del. C.*§ 251(h) (intermediate-form mergers), § 262 (appraisal).

First, the amendments have extended the appraisal statute's so-called "market-out exception" to make it available in the case of intermediate-form mergers. The market-out exception already provided, in sum, that a stockholder will not have appraisal rights as a result of a merger if the stockholder's pre-merger stock was publicly traded or held of record by more than 2,000 holders, and if the stockholder was not required to accept in the merger anything other than stock in the surviving corporation, stock in another corporation whose shares are publicly traded or held of record by more than 2,000 holders, and cash solely in lieu of fractional shares. Under the appraisal statute as previously drafted, the market-out exception could never apply to intermediate-form mergers. The 2018 amendments have reversed this, such that the market-out exception can apply to intermediate-form mergers just as it can to most other kinds of mergers.

Second, the appraisal statute has been amended to clarify that the statement of dissenting shares supplied by the surviving corporation must take into account shares not tendered into a tender offer that preceded an intermediate-form merger. The appraisal statute provides that within 120 days after a merger, any stockholder that has properly demanded appraisal will be entitled to receive from the surviving corporation, upon request, a statement of the number of shares not voted in favor of the merger and with respect to which appraisal has been demanded, and the number of holders of those shares. As amended, the appraisal statute now requires that the statement by the surviving corporation also include the same information regarding shares not tendered in a tender offer in advance of an intermediate-form merger and with respect to which appraisal has been demanded.

The amendments to the appraisal statute are effective only as to mergers "consummated pursuant to an agreement entered into on or after August 1, 2018." Del. S.B. 180 syn., 149th Gen. Assem. (2018).

Other DGCL Amendments

Under DGCL § 284, the Court of Chancery has jurisdiction to revoke a certificate of incorporation "for abuse, misuse or nonuse of its corporate powers, privileges or franchises." 8 *Del. C.* § 284. This section has been amended to provide that the Delaware Attorney General has the exclusive authority to seek such a revocation. (As discussed above in the article on amendments regarding LLCs and LPs, a section tracking amended DGCL § 284 was added to the DLLCA by the 2018 amendments.)

Finally, the DGCL has been simplified in two respects regarding tax-exempt corporations. The amendments have removed the requirement that a tax-exempt corporation include "the specific facts entitling the corporation to exemption from taxation" in the annual franchise tax report it files with the Delaware Secretary of State. 8 *Del. C.* § 502(a). In addition, the amendments have removed the obsolete requirement that upon the revival of a tax-exempt corporation under DGCL § 313, the Secretary of State issue a certificate that the corporation has been revived. 8 *Del. C.* § 313(b).

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Attorneys at Law

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Members of the Business and Tax Section

Craig D. Grear, Partner.
cgrear@ycst.com
302-571-6612

Jerome K. Grossman, Partner.
jgrossman@ycst.com
302-571-6685

James P. Hughes, Jr., Partner.
jhughes@ycst.com
302-571-6670

John J. Paschetto, Partner.
jpaschetto@ycst.com
302-571-6608

Richard J. A. Popper, Partner.
rpopper@ycst.com
302-571-6652

Norman M. Powell, Partner.
npowell@ycst.com
302-571-6629

Timothy J. Snyder, Partner.
tsnyder@ycst.com
302-571-6645

Vincent C. Thomas, Partner.
vthomas@ycst.com
302-576-3278

Justin P. Duda, Associate.
jduda@ycst.com
302-571-6724

Allurie R. Kephart, Associate.
akephart@ycst.com
302-576-3569

Ryan D. Hart, Associate.
rhart@ycst.com
302-571-5006