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Recent Amendments to Delaware's LLC and LP Acts: Delegation of "Any or All" Managerial Authority Now Expressly Permitted, among Other Changes

By John J. Paschetto

Recent amendments to the Delaware Limited Liability Company Act (the "DLLCA") and the Delaware Revised Uniform Limited Partnership Act (the "DRULPA") have, among other things, made clear that members or managers of an LLC, and general partners of an LP, may delegate "any or all" of their rights, powers, and duties respecting management and control of the entity. The amendments took effect on August 1, 2017.

Delegation of Rights, Powers, and Duties

Since 1994, the DLLCA and the DRULPA have expressly permitted members or managers of an LLC, and general partners of an LP, to delegate to others their "rights and powers to manage and control the business and affairs" of the entity, unless the entity's operating agreement provided otherwise. 6 *Del. C.* § 18-407 (LLCs), § 17-403(c) (LPs). Whether the scope of permissible delegation was actually unlimited, however, was questioned last year by the Delaware Court of Chancery in *Obeid v. Hogan*, C.A. No. 11900-VCL, 2016 Del. Ch. LEXIS 86 (Del. Ch. June 10, 2016).

In *Obeid*, the managers of two Delaware LLCs purported to delegate to a non-manager the authority to decide whether the LLCs should pursue certain alleged derivative claims. On a summary-judgment motion challenging the delegation of this authority, the court held that it was prohibited by each LLC's operating agreement. The court also advanced, in dicta, the view that such delegation was prohibited by the DLLCA. As the court explained, although § 18-407 of the DLLCA "validates the vast array of ordinary-course-of-business delegations that are part of the operation of an entity[,]" it "does not validate every theoretically possible delegation[.]" *Obeid*, 2016 Del. Ch. LEXIS 86, at *49.

The 2017 amendments confirm that permissible delegation is not limited to matters in the ordinary course of business. As amended, § 18-407 of the DLLCA and § 17-403(c) of the DRULPA now state that unless the operating agreement provides otherwise, members, managers, and general partners may delegate to other persons "any or all" of the members', managers', or general partners' "rights, powers and duties to manage and control the business and affairs" of the LLC or LP. The full breadth of the new "any or all" phrasing is indicated in the legislative synopses accompanying the 2017 amendments in bill form, stating that delegable rights, powers, and duties "includ[e] any core governance functions." Del. S.B. 71-72 syn., 149th Gen. Assem. (2017).

Other Amendments

Registered Office and Registered Agent. The DLLCA and the DRULPA require that the organic document filed with the Delaware Secretary of State—a certificate of formation in the case of an LLC or a certificate of limited partnership in the case of an LP—provide the

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address of the entity's registered office in Delaware and the name and address of the entity's registered agent in Delaware. 6 *Del. C.* §§ 18-201(a), 17-201(a). Often, those filing such certificates have not strictly followed the statutory directions, failing to designate, for example, the address of the registered office separately from the address of the registered agent. Amendments to §§ 18-201 and 17-201 have now made clear that a certificate of formation or a certificate of limited partnership meets the requirements regarding the registered office and registered agent as long as the certificate "contains" the required name and address, without needing to specify that the name is the name of the registered agent or that the address is the address of the registered agent or the registered office or both.

Non-Participation in Control of an LP. Under the DRULPA, a limited partner is not liable for the debts of the LP unless the limited partner is also a general partner or "participates in the control of the business." 6 *Del. C.* § 17-303(a). Helpfully, § 17-303(b) lists various capacities in which a limited partner may act that will not, by themselves, cause the limited partner's actions to be deemed participation in the control of the LP's business. Those capacities include, among others, that of a stockholder, member, partner, or beneficiary of a general partner that is a corporation, LLC, partnership, statutory trust, business trust, or estate or trust. To this list have now been added, by the 2017 amendments, the capacities of "interest holder" and (with respect to statutory trusts and business trusts) "beneficial owner."

Definition of "Foreign" LLC or LP. The 2017 amendments have made more intuitive the meaning of "foreign limited liability company" (specified in § 18-101) and of "foreign limited partnership" (specified in § 17-101). The requirement that a foreign LLC be "denominated as such" under the applicable foreign law has been removed. The wording of the definition of "foreign limited partnership" has been modified to eliminate assorted pointless discrepancies between it and the definition of "limited partnership." And the definitions of both "foreign limited liability company" and "foreign limited partnership" have been revised to make explicit that when each Act refers to a "member," "manager," "limited partner," "general partner," etc., of a foreign LLC or foreign LP (as applicable), it means those concepts under the law of the relevant foreign jurisdiction.

Domestic and Foreign LLCs and LPs. The DLLCA and the DRULPA have been amended throughout to make consistent their use of "domestic limited liability company," "foreign limited liability company," "domestic limited partnership," "foreign limited partnership," and "state," as those terms are defined in §§ 18-101 and 17-101.

Incorporated "Other" Entities. In various sections dealing with mergers, conversions, and domestications, the DLLCA and the DRULPA list the types of entities that may be constituent parties in such transactions. These types of entities typically include corporations, trusts, LLCs, partnerships, and (before the 2017 amendments) "any other *unincorporated* business or entity" (emphasis added). 6 *Del. C.* § 18-209 (LLC merger), § 18-212 (domestication as LLC), § 18-214 (conversion to LLC), § 18-216 (conversion by LLC), § 17-211 (LP merger; using slightly different language before amendments), § 17-215 (domestication as LP), § 17-217 (conversion to LP), § 17-219 (conversion by LP). To prevent the implication that these provisions do not include *incorporated* businesses or entities other than the specific types listed, the provisions have been revised to refer to "any other *incorporated or* unincorporated business or entity" (emphasis added).

Delaware's General Corporation Law Is Amended to Permit Decentralized Recordkeeping and to Eliminate Requirement That Stockholder Consents Be Dated, among Other Changes

By John J. Paschetto

The Delaware legislature recently adopted amendments to the State's General Corporation Law (the "DGCL") that, among other things, are intended to enable Delaware corporations to use decentralized databases—such as those employing blockchain technology—for maintaining stock ledgers and other records. Unless otherwise stated below, all of these amendments took effect on August 1, 2017.

The "Blockchain Amendments"

According to its many proponents, the digital technology generally referred to as "blockchain" makes it possible to create systems in which transaction records can be trusted without looking to an authoritative record keeper (such as a corporate secretary) for an ultimate determination of their accuracy. Blockchain technology does this by embedding in blocks of data information that anyone, in theory, can use to establish whether a block is what it purports to be—for example, an accurate record of a certain transfer of value from A to B. Systems based on blockchain technology are therefore sometimes characterized as using "distributed ledgers" or "decentralized databases."

The DGCL has been amended to make way for distributed ledgers as a method of corporate recordkeeping. Corporate records may now be kept by means of "one or more electronic networks or databases (including one or more distributed electronic networks or databases)," provided that (as was already required) the records can be "converted" into a paper form within a reasonable time. 8 *Del. C.* § 224.

Similarly, the kinds of "electronic transmission" authorized for giving notice, submitting ballots, etc., now include "the use of, or participation in, one or more electronic networks or databases (including one or more distributed electronic networks or databases)," subject to the preexisting requirement that the transmission can be stored, retrieved, and "directly reproduced in paper form . . . through an automated process." 8 *Del. C.* § 232(c) (defining "electronic transmission" for purposes of the DGCL). Multiple small conforming changes have been made to the wording of other sections of the DGCL.

The amendments liberalizing the forms in which corporate records may be kept were accompanied by new provisions specifying the information that a "stock ledger" (a term previously used but not defined) must contain and the functions it must be able to perform. A stock ledger is now defined as "one or more records administered by or on behalf of the corporation in which the names of all of the corporation's stockholders of record, the address and number of shares registered in the name of each such stockholder, and all issuances and transfers of stock of the corporation are recorded[.]" 8 *Del. C.* § 219(c). It must be kept in such a way that it "can be used to prepare the list of stockholders" required in advance of stockholder meetings or for inspection pursuant to a proper demand, and records the names of fiduciaries, pledgees, or trustees empowered to vote stock. 8 *Del. C.* § 224.

Although the blockchain-related amendments have drawn a good deal of attention from commentators, it is apparent that the amendments are intended only to remove doubt about whether the DGCL permits the use of distributed ledgers "for the creation and maintenance of corporate records, including the corporation's stock ledger" (as explained in the legislative synopsis accompanying the 2017 amendments in bill form). Del. S.B. 69 syn.,

149th Gen. Assem. (2017). The impact that blockchain and similar technologies may ultimately have in the corporate setting, the range of novel legal questions they may generate in actual practice, and indeed what "actual practice" might turn out to be as corporations adopt and modify such technologies remain to be seen.

Written Stockholder Consents Need Not Be Dated

The 2017 amendments have eliminated the requirement, present in the DGCL since 1987, that written stockholder consents "bear the date of signature[.]" 8 *Del. C.* § 228(c) (2016). Accordingly, for stockholders to take action by written consent, consents to the action signed by the holders of a sufficient number of shares must now be delivered to the corporation within 60 days following the date when the first such consent was *delivered*, as opposed to 60 days following the first delivered consent's *date of signature* (as was required under the statute's earlier text).

In other words, there now appears to be no statutory constraint on the length of time during which written consents may be collected from stockholders before the consents are delivered to the corporation. Practitioners should bear in mind, however, that for the consents to be effective, they must be unrevoked, and the persons providing them must be stockholders on the applicable record date as determined pursuant to § 213(b) of the DGCL.

The amendments to § 228 apply only to instances where the record date for determining stockholders entitled to act by written consent was on or after August 1, 2017.

Franchise Tax Increases

The amendments have increased various dollar amounts that are factored into determination of the annual Delaware corporate franchise tax. Specifically, for corporations that use the authorized-shares method of calculating the franchise tax, a $10 increase—from $75 to $85—was made in the tax for each 10,000 shares by which a corporation's total authorized shares exceed 10,000. 8 *Del. C.* § 503(a). The cap on the franchise tax under the authorized-shares method was increased by $20,000—from $180,000 to $200,000. 8 *Del. C.* § 503(c).

For corporations that use the assumed-capital method (a/k/a the "alternative method") of calculating the franchise tax, a $10 increase—from $75 to $85—was made in the tax for each $1 million by which a corporation's assumed no-par capital exceeds $1 million, and a $50 increase—from $350 to $400—was made in the tax for each $1 million by which a corporation's assumed par value capital exceeds $1 million. 8 *Del. C.* § 503(a). The minimum franchise tax under the alternative method was increased by $50—from $350 to $400—and the cap on the franchise tax under the alternative method was increased by $20,000—from $180,000 to $200,000. 8 *Del. C.* § 503(c).

The 2017 amendments also created an exception for corporations coming within a newly defined classification. Termed "Large Corporate Filers," these are publicly traded Delaware corporations for which (i) consolidated gross revenues or consolidated assets are $750 million or more, (ii) neither consolidated gross revenues nor consolidated assets are below $250 million, and (iii) the franchise tax would be $200,000 if the new exception did not apply. 8 *Del. C.* § 503(c). The franchise tax for a Large Corporate Filer is $250,000. *Id.*

Changes Concerning Annual Reports to the Secretary of State

The late fee charged by the Delaware Secretary of State when an annual franchise tax report is submitted after March 1 has been raised by $75—from $125 to $200. 8 *Del. C.* § 502(c).

The required contents of annual reports filed by foreign corporations have been considerably

simplified. Foreign corporations need no longer provide in their annual reports such information as the number and par value (if any) of authorized shares, the number of outstanding shares, and the basis for any claimed tax exemption. 8 *Del. C.* § 374. The amendments also subject officers and directors of foreign corporations to the same standard for perjury that already applied to officers and directors of domestic corporations, regarding false statements in annual reports. *Id.*

Merger Provisions Overhauled

Unlike the approach taken in the Delaware Limited Liability Company Act and the Delaware Revised Uniform Limited Partnership Act, the DGCL does not have just one section that covers mergers with all possible combinations of domestic and foreign entities. *See* 6 *Del. C.* § 18-209 (LLC mergers), § 17-211 (LP mergers). Instead, the DGCL's earliest section permitting mergers of domestic stock corporations with domestic or foreign stock corporations was gradually supplemented, over a period of almost 75 years, with separate sections permitting mergers of stock and nonstock, domestic and foreign, and incorporated and unincorporated entities. 8 *Del. C.* §§ 251-258, 263, 264, 267. As a result of this sporadic development and subsequent piecemeal amendments, the various merger provisions of the DGCL came to contain numerous inconsistences, large and small, that begged for a holistic update.

The 2017 amendments have effected a global revision of the DGCL's merger provisions. At the most basic level, the amendments have caused the merger provisions to use consistently such recurring terms as "surviving corporation," "resulting corporation," "foreign corporation," "organized," and "formed." The amendments also have ensured that concepts appearing in more than one section are treated in the same way on each occurrence. For example, language regarding amendments to the survivor's certificate of incorporation—which formerly was found in different spots in different sections—has in every applicable instance been placed in the subsection dealing with the merger agreement.

Consistency has been further attained by causing all of the merger sections to contain (to the extent possible) the options available under any of the merger sections. Thus, §§ 255 and 256, which deal with mergers of domestic and foreign nonstock corporations, have been amended to track (*mutatis mutandis*) certain language already present in § 251 (mergers between domestic stock corporations), § 252 (mergers between domestic and foreign stock corporations), and § 257 (mergers between domestic stock and nonstock corporations). As a consequence, all these sections now consistently permit a merger agreement to provide for consideration in the form of cash, property, or securities in other entities. Similarly, the existing provision found in § 251 permitting, pursuant to a merger agreement, the payment of cash in lieu of consideration in the form of fractional shares has been clarified to cover fractional securities issued as considera-tion by any entity and is replicated in all the other merger sections except those dealing with short-form mergers (i.e., §§ 253 and 267, which do not require the employment of a merger agreement).

All eight of the sections on mergers with foreign entities are now consistent in covering not only those formed in other states but also those formed in other countries. 8 *Del. C.* §§ 252-254, 256, 258, 263, 264, 267. (Previously, only four of these sections expressly permitted mergers with entities in foreign countries.) In addition, the language in all eight sections now provides that a merger with a foreign entity is permitted unless the laws of the foreign jurisdiction "prohibit" it. (Previously, four of these sections stated that the foreign laws had to "permit" the

merger, while the other four sections stated that the foreign laws must not "forbid[]" the merger.)

Two of the foreign-entity merger sections—§ 254 (merger involving domestic or foreign joint-stock association) and § 258 (merger involving domestic or foreign stock or nonstock corporations)—have been amended to require, consistently with other sections, that the certificate of merger filed with the Delaware Secretary of State include, as appropriate, a foreign surviving entity's agreement to service of process in Delaware. And all of the foreign-entity merger sections except the two dealing with short-form mergers (§§ 253 and 267) have been amended to provide that the merger agreement must contain any provisions that the laws of the foreign entity's jurisdiction require a merger agreement to contain.

Finally, certain language regarding the conversion or exchange of memberships or membership interests when a nonstock corporation merges with a stock corporation—language formerly found only in § 257—has been deleted. This language provided, among other things, that the voting rights of members of a nonstock corporation "need not be considered an element of value in measuring the reasonable equivalence of the value of the interests received in the surviving or resulting stock corporation[.]" 8 *Del. C.* § 257(b), last paragraph (2016). Since the legislative synopsis describes this language as "redundant[,]" its purport should presumably be taken as implied not only in § 257 but also in the other merger sections that track § 257 with respect to mergers of nonstock corporations. Del. S.B. 69 syn., 149th Gen. Assem. (2017).

Antitakeover Statute Opt-Out Clarified

Delaware's antitakeover statute—§ 203 of the DGCL—permits a corporation to opt out of the statutory protections by means of an amendment to its certificate of incorporation or bylaws approved by a majority in interest of the stockholders. 8 *Del. C.* § 203(b)(3). Several clarifying changes have been made to the § 203 opt-out provisions.

Section 203(b)(3) now specifies that the amendment opting out must be approved by a majority of the outstanding shares "entitled to vote *thereon*" (emphasis added), instead of shares simply "entitled to vote" as under the prior formulation. In addition, the statute now makes clear that when a corporation opts out by means of an amendment to its certificate of incorporation, the opt-out will not take effect until (in the case of a corporation that was never previously subject to the § 203 protections) the certificate has been filed with the Delaware Secretary of State and has become effective, or (in the case of all other corporations) 12 months after the certificate's filing and effectiveness. By contrast, an opt-out by means of a bylaw amendment takes effect when the amendment is approved or 12 months thereafter (depending, again, on whether the corporation was ever previously subject to the § 203 protections).

Section 203 also permits a corporation that is not otherwise covered to opt *in* to the statutory protections by including an opt-in in its certificate of incorporation. 8 *Del. C.* § 203(b), last sentence. The 2017 amendments have clarified that the effectiveness of an opt-in, like that of an out-out by means of a certificate of incorporation amendment, will be determined based on the date when the filed certificate becomes effective.

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