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**DELAWARE LAW****2014 Amendments to Delaware's General Corporation Law,  
Alternative Entity Statutes and Contract Statute of Limitations**

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In its latest session, the Delaware legislature amended the General Corporation Law (“DGCL”) and Delaware’s “alternative entity” statutes—the Delaware Limited Liability Company Act (“DLLCA”), the Delaware Revised Uniform Limited Partnership Act (“DRULPA”), the Delaware Revised Uniform Partnership Act (“DRUPA”) and the Delaware Statutory Trust Act (“DSTA”). In addition, the Delaware legislature amended Chapter 81 of Title 10 of the Delaware Code, which contains the statute of limitations for breach of contract claims. Gov. Jack Markell (D) signed the bills into law July 15.

The amendments to the DGCL include a number of changes that create additional flexibility for practitioners. In particular, the amendments (i) allow advance

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execution of written consents by persons before they become directors or stockholders; (ii) permit corporations to effect a name change without obtaining a stockholder vote; and (iii) expand the availability of the medium-form merger statute adopted in 2013 so it can be used even in transactions involving an interested party.

The amendments to the alternative entity statutes include several important changes. The amendments also allow advance consent by persons before they become members, managers, partners, beneficial owners or trustees. In addition, the amendments authorize contractual provisions to revoke dissolution and significantly expand the statutory default rules for revoking the dissolution of limited liability companies and limited partnerships.

The amendment to Section 8106 of Title 10 provides significant flexibility to contracting parties by allowing such parties, under certain circumstances, to provide for a contractual limitations period for breach of contract claims of up to 20 years.

The amendments also make a number of technical and clarifying changes.

This article will discuss the amendments to the DGCL, amendments that affect multiple alternative entity statutes in a similar way, amendments unique to

one or more of the alternative entity statutes and the amendment to the breach of contract statute of limitations, each in turn.

## Amendments to the DGCL

### Absent Incorporator [DGCL §§ 103(a)(1), 108]

The amendments to Section 103 delete the limitations on the circumstances in which an incorporator will be considered unavailable for purposes of authorizing another individual to sign instruments to be filed with the Delaware Secretary of State. Section 108(d) is a new, related provision that allows any person for whom or on whose behalf the incorporator was acting as an employee or agent to take any action that the incorporator could have taken in circumstances where the incorporator is not available to act, subject to certain requirements. This amendment provides a path for taking actions that the DGCL may require an incorporator to perform, such as appointment of the initial board of directors, when the incorporator is not available.

### Director Actions by Written Consent [DGCL § 141]

Section 141(f) was amended to clarify that a person, whether then a director, may execute a written consent of directors and provides, through an instruction to an agent or otherwise, that such consent will be effective at a future time, though not more than 60 days after such instruction is given or such provision is made. The statute expressly provides that such consent must be revocable prior to the time that it becomes effective. This amendment will allow consents to be placed in escrow so long as the escrow period does not exceed 60 days and will provide the flexibility to arrange for closings of complex transactions without the need for in-person attendance by newly appointed directors.

### Voting Trusts [DGCL § 218]

Section 218 governs the use of voting trusts, which allow stockholders to deposit stock into a trust and for the trust to become the record owner of the shares while the beneficiaries retain the economic interest in the shares. Currently, under Section 218, a copy of the voting trust must be filed with the corporation's registered office. The amendments to Section 218(a) and (b) now permit a copy of the voting trust to be delivered to either the corporation's registered office in Delaware or its principal place of business.

### Stockholder Action by Written Consent [DGCL § 228(c)]

Section 228(c) was amended to clarify that a person may execute a written consent of stockholders and provide, through an instruction to an agent or otherwise, that such consent will be effective at a future time, though not more than 60 days after such instruction is given or such provision is made. If evidence of that instruction or provision is given to the corporation, the consent will be deemed to have been signed at its stated effective time. The stockholder consent will be revocable prior to the effective time unless otherwise provided. Like the parallel change to Section 141(f), the amendment to Section 228(c) will allow stockholder consents to be placed in escrow so long as the escrow period does not exceed 60 days.

### Charter Amendments [DGCL § 242]

The amendments to Section 242 permit a corporation to file an amendment to its certificate of incorporation to change the corporation's name without stockholder approval. In addition, the amendments allow a corporation, without stockholder approval, to amend its certificate of incorporation to eliminate certain provisions regarding the incorporator, initial directors and stock subscribers, and provisions regarding previous reclassifications or stock splits. Finally, Section 242(b)(1), as amended, will eliminate the statutory requirement that notice of a stockholder meeting to vote on an amendment include a copy of the amendment or a brief summary thereof where the meeting is being noticed under the procedures for notice of Internet availability of proxy materials under the Securities Exchange Act of 1934. This change will conform the statute to current notice and access disclosure practice.

### Mergers [DGCL § 251]

The amendments to Section 251(h) eliminate the prohibition on using the medium-form merger statute, adopted in 2013, when at the time the target board approves the merger, a party to the merger agreement is an "interested stockholder," as that term is used in Section 203. In addition, the amendments clarify that the requirement in Section 251(h) that the acquiror own sufficient shares to approve the offer in a long-form merger after the tender offer may be satisfied by taking into account shares that have been irrevocably accepted and received by a depository. The amendments also clarify, however, that shares tendered by notice of guaranteed delivery, but not yet received, do not count toward the necessary total. Finally, the amendments allow shares owned at the commencement of the offer by either constituent corporation or by certain affiliates to be treated differently than other shares, thus allowing those shares to be converted into surviving corporation shares if desired (including for tax purposes). The proposed amendments will be effective with respect to merger agreements entered into on or after Aug. 1, 2014.

## Amendments Common to Multiple Alternative Entity Statutes

### Pre-Position Action [DLLCA §§ 18-302(d), 18-404(d); DRULPA §§ 17-302(e), 17-405(d); DRUPA § 15-407(d); DSTA §§ 3806(f), 3806(g)]

Sections 18-302(d), 18-404(d), 17-302(e), 17-405(d), 15-407(d), 3806(f) and 3806(g) have been amended to clarify that, unless otherwise provided in the constituent documents of the applicable entity, whether then a member, manager, partner, beneficial owner or trustee, a person or entity may consent as such if he, she or it provides that such consent will be effective at a future time—so long as the person holds the applicable position at such future time. This amendment will allow, among other things, consents to be placed in escrow and will provide the flexibility to arrange for closings of complex transactions without the need for in-person attendance by persons who are to become members, managers, partners, beneficial owners or trustees.

## **Revocation of Dissolution [DLLCA § 18-806; DRULPA § 17-806]**

Sections 18-806 and 17-806 have been amended to authorize provisions providing for revocation of dissolution to be included in an LLC agreement or limited partnership agreement, and to expand the default provisions relating to revocation of dissolution. Prior to the amendments, Sections 18-806 and 17-806 required all remaining members of an LLC or all partners of a limited partnership, respectively, to consent to the revocation of dissolution. Both statutes have now been changed to allow a more flexible approach. They now provide that if the LLC agreement or limited partnership agreement provides the manner in which a dissolution may be revoked, it may be revoked in that manner. Thus, each statute now specifically authorizes the inclusion of provisions in an LLC agreement or limited partnership agreement that provide for revocation of dissolution.

Each statute then includes several default provisions allowing the revocation of dissolution unless such revocation is prohibited by the applicable agreement. First, they provide that if dissolution were effected by the affirmative vote or written consent of the members, partners or other persons, dissolution may be revoked by the same vote or consent (and the approval of any members, partners or other persons whose approval is required under the LLC agreement or partnership agreement to revoke a dissolution contemplated by Sections 18-806 or 17-806).

Second, in the case of dissolution at a time, or upon the happening of events, specified in the LLC agreement or the partnership agreement (other than a vote or written consent, an event of withdrawal of a general partner, or an event that causes the last remaining member to cease to be a member or the last remaining limited partner to cease to be a limited partner), dissolution may be revoked by the affirmative vote or written consent that, pursuant to the terms of the LLC agreement or partnership agreement, as applicable, is required to amend the provision of such agreement effecting such dissolution (and the approval of any members, partners or other persons whose approval is required under the LLC agreement or partnership agreement to revoke a dissolution contemplated by Sections 18-806 or 17-806).

Finally, with respect to LLCs, in the case of dissolution effected by the occurrence of an event that causes the last remaining member to cease to be a member, dissolution may be revoked by the affirmative vote or written consent of the personal representative of the last remaining member or the assignee of all of the LLC interests in the LLC (and the approval of any members or other persons whose approval is required under the LLC agreement or partnership agreement to revoke a dissolution contemplated by Section 18-806) and, with respect to limited partnerships, in the case of dissolution effected by an event of withdrawal of a general partner or the occurrence of an event that causes the last remaining limited partner to cease to be a limited partner, by the affirmative vote or written consent of all remaining general partners and the limited partners of the limited partnership who own more than two-thirds of the then-current percentage or other interest in the profits of the limited partnership (or by that vote of each class or group of limited partners if there is more than one class or group) and if there is no remaining

limited partner, by the personal representative of the last remaining limited partner or the assignee of all of the limited partners' partnership interest in the limited partnership (and the approval of any partners or other persons whose approval is required under the LLC agreement or partnership agreement to revoke a dissolution contemplated by Section 17-806). In any case where there is no remaining member, general partner or limited partner, one must be appointed by the same vote.

These amendments effect two important changes. First, in a situation where there is no remaining member or limited partner, the personal representative of the last remaining member or limited partner, as applicable, can take the required action, as before the amendments. However, it can sometimes be difficult to identify the personal representative of the last remaining member or limited partner, particularly where there have been a series of transfers where the transferees have not been admitted as members or partners, as applicable, and some of the transferors may have terminated. Now, in addition to action by the personal representative, the assignee of all of the limited partners' partnership interests or the assignee of all of the LLC interests also may take the required action. Even when it is difficult to identify the personal representative of the last remaining member or last remaining limited partner, it is often possible to determine who is the holder of all of the LLC interests or limited partners' partnership interests. In addition, the amendments in many cases will permit revocation of dissolution with less than a unanimous vote, depending on the applicable amendment provisions. This flexibility can be particularly useful to late stage private equity and hedge funds where it is important that the funds not be dissolved, for example, in certain secondary transactions that offer liquidity to investors who wish to withdraw, but a continuation of the business of the fund for investors who wish to remain invested.

## **Maintenance and Provision of Information [DLLCA §§ 18-104(g), 18-305(a), (e), (h); DRULPA §§ 17-104(g), 17-305(a), (d), (e), (g); DRUPA § 15-403(d)]**

Sections 18-104(g), 18-305(a), (e), (h), 17-104(g), 17-305(a), (d), (e), (g) and 15-403(d) have been amended to confirm that an LLC or limited partnership is required to maintain a current record that identifies the name and last known business, residence or mailing address of each member, manager and partner, as applicable, and to provide the communications contact required to be maintained under the applicable statute with the name, business address and business telephone number of a natural person who has access to the record of the name and last known business, residence or mailing address of each member, manager or partner, as applicable. Such information may be provided in writing or by electronic transmission. In addition, the amendments confirm that a member or partner seeking information under Sections 15-403, 18-305 or 17-305 may seek such information in person or by an attorney or other agent, provided that any books and records demand must be accompanied by a power of attorney or other writing that authorizes the attorney or other agent to act on behalf of the member or limited partner.

## Amendments to the DSTA

### Action by Trustees [DSTA § 3806(b)(10)]

A new clause, (b)(10), has been added to Section 3806 of the DSTA, which confirms that the governing instrument of a statutory trust may provide for specific trustees or a certain number of trustees or a percentage of trustees to vote in favor of any action for such action to be considered approved by the trustees. It further provides that if the governing instrument of a statutory trust is silent as to the specific trustees, the number of trustees or the percentage of trustees required to take any action, then the vote of the majority of the trustees (or if the action requires approval of a particular class, group or series of trustees, then a majority of such class, group or series) will be sufficient to approve such action. This change is confirmatory because the majority rule was already in effect for DSTAs by virtue of Section 3809, which looks to the laws of Delaware pertaining to trusts in situations not governed by the statutory trust's governing instrument or other DSTA provisions.

### Interests May Remain Outstanding in a Merger [DSTA § 3815(a)]

Section 3815(a) has been amended to confirm that in connection with a merger, rights or securities of, or interests in, a constituent party that is the surviving entity in the merger may remain outstanding rather than being exchanged for, or converted into, other property or being canceled.

### Interests May Remain Outstanding in Connection With a Conversion, Domestication or Transfer [DSTA §§ 3820(i), 3821(d), 3822(j), 3823(f)]

Sections 3820(i), 3821(d), 3822(j) and 3823(f) have been amended to confirm that in connection with a conversion, domestication or transfer, rights or securities of, or interests in, an entity that is domesticating or converting to a statutory trust and rights or securities of, or interests in, a statutory trust that is transferring to or domesticating in another jurisdiction or converting to a different type of entity or jurisdiction may remain outstanding in connection with such conversion, domestication or transfer. These amendments confirm existing law and make clear, for example, that in connection with the domestication of a non-U.S. entity to a Delaware statutory trust, the interests in that entity can remain outstanding as interests in the Delaware statutory trust, which pursuant to DSTA Section 3822 is deemed to be the same entity as the domesticated non-U.S. entity for all purposes of Delaware law.

### Use of "Bank" in Entity Name [DSTA § 3814(c)]

Section 3814(c) has been amended to prohibit the use of the word "bank" in the name of a statutory trust except (i) in the case of a bank, or the subsidiary of a bank, meeting certain requirements; or (ii) in a context clearly not referring to banking business, not likely to mislead the public regarding the nature of the business of such entity, or not likely to lead to a pattern of abuse that might cause harm to the interest of the public or the state.

### No Usury Defense to Obligations to a Beneficial Owner or Trustee [DSTA § 3803(d)]

The amendment to Section 3803(d) provides that obligations to a beneficial owner or trustee of a statutory trust arising under the governing instrument or a separate agreement in writing will not be subject to the defense of usury.

## Amendments to Contract Statute of Limitations

### Statute of Limitations [10 Del. C. § 8106]

Section 8106(c) of Title 10 is a new subsection that permits parties to a written contract or agreement involving at least \$100,000 to provide that any action based on such contract or agreement may be brought within a period specified therein so long as the action is brought before the expiration of 20 years from the accrual of the cause of action. This change allows contracting parties to opt out of the three- or four-year statute of limitations period that would otherwise apply and gives effect to a longer limitations period without requiring the parties to enter into a contract under seal. The synopsis provides examples of a "period" that can be specified in the contract, including "a period of time defined by reference to the occurrence of some other event or action, another document or agreement or another statutory period" or "an indefinite period of time." This amendment should be particularly useful in private merger and acquisition transactions where the parties often provide for representation and warranty survival periods in excess of the applicable breach of contract statute of limitations.<sup>2</sup>

<sup>2</sup> See generally *GRT, Inc. v. Marathon GTF Tech., Ltd.*, No. 5571-CS, 2011 BL 185693 (Del. Ch. July 11, 2011) (addressing, in dicta, a provision purporting to cause representations and warranties to survive indefinitely and explaining that such a provision would constitute an impermissible attempt to extend the statute of limitations under Delaware law).