

Delaware Amendments Would Permit Divisions of LLCs, Formation of Registered Series and Statutory Public Benefit LLCs

Skadden

04 / 25 / 18

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Allison L. Land

Partner / Wilmington
302.651.3180
allison.land@skadden.com

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Four Times Square
New York, NY 10036
212.735.3000

One Rodney Square
920 N. King St.
Wilmington, DE 19801
302.651.3000

skadden.com

On April 19, 2018, the Executive Committee of the Delaware State Bar Association (DSBA) approved proposed amendments to the Delaware Limited Liability Company Act (the DLLCA), the Delaware Revised Uniform Limited Partnership Act (DRULPA) and the Delaware Revised Uniform Partnership Act (collectively, the Acts) which are intended to keep the Acts current and maintain their national pre-eminence. This year's proposed amendments provide for (i) the division of an LLC into two or more separate LLCs, (ii) the formation of registered series of LLCs and statutory public benefit LLCs, and (iii) the use of blockchain technology for maintenance of LLC and LP records and for electronic transmissions, among other things.

Division of LLCs

The proposed amendments would enable a single LLC to divide into two or more newly formed LLCs with the dividing company either continuing or terminating its existence, as the case may be. A division may be utilized to facilitate a spin-off or the sale of a line of business, eliminating the need to transfer assets and liabilities to newly formed LLCs. Rather, upon effectiveness of a division, the dividing company's assets and liabilities are "allocated" to, and vested in, the resulting LLCs, as specified in the plan of division, without the need for any further action by any party. Existing creditors would be protected by a provision that would make each resulting LLC jointly and severally liable for any liabilities if the division constitutes a fraudulent transfer with respect to such obligations.

The plan of division would not be filed with the Delaware secretary of state or otherwise publicly available. Only a certificate of division would be filed, specifying the name and address of a "division contact" who, for a period of six years following the division, would be required to provide any creditor of the dividing company the name and address of the resulting LLC to which such creditor's claim was allocated.

Registered Series

The proposed amendments would authorize the formation of "registered series," a new type of series of an LLC, to address certain issues that have arisen in connection with entities that have established series. Presently, it is unclear how to perfect security interests against assets of a series under the Uniform Commercial Code (UCC). Under the proposed amendments, a registered series would be an "association" and have the attributes of a "registered organization" for purposes of the UCC since, among other things, a certificate of registered series must be filed with the secretary of state in order to form a registered series. Accordingly, UCC filings for a registered series formed under the DLLCA would be filed in the state of Delaware. Registered series would have the same rights, powers and interseries limitations on liabilities as series previously formed under Section 18-215(b) of the DLLCA, which will be known as "protected series." Moreover, registered series will be able to obtain good standing certificates from the secretary of state, something that protected series are unable to do. Because registered series have many of the attributes of a separate entity, and the state is required to maintain a record for registered series, an annual fee of \$75 will be payable by each registered series to the secretary of state.

An existing protected series would be able to convert to a registered series under the proposed amendments by filing a certificate of conversion and a certificate of registered series. Similarly, a registered series will be able to convert to a protected series. Additionally, the proposed amendments provide that one or more registered series of an

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LLC may merge or consolidate with or into one or more other registered series of such LLC, a more practical way to combine the assets and liabilities of two series than presently available under applicable law (*i.e.*, transferring all assets and liabilities).

If adopted, the proposed amendments related to registered series would not become effective until August 1, 2019, in order to provide the secretary of state the necessary time to reprogram its systems to accommodate the changes.

Statutory Public Benefit LLCs

The proposed amendments provide for the formation of statutory public benefit LLCs which, like public benefit corporations, are intended to produce a public benefit and to operate in a responsible and sustainable manner. A statutory public benefit LLC permits a for-profit LLC to balance the members' pecuniary interests with the public benefit to be promoted by the statutory public benefit LLC (as set forth in its certificate of formation) and the best interests of those materially affected by the statutory public benefit LLC's conduct. The managers, members or other persons managing the business and affairs of the statutory public benefit LLC are required to balance such interests, though there is no personal liability for monetary damages for failure to balance such interests in accordance with this provision. Fiduciary duties of the statutory public benefit LLC may otherwise be modified or eliminated.

The proposed amendments impose a two-third member voting requirement for a statutory public benefit LLC seeking to amend its certificate of formation in order to revise the statement of its public benefit, merge into an entity that is not a statutory public

benefit LLC (or similar entity) or otherwise cease to be a statutory public benefit LLC. The proposed amendments correspond to provisions of the Delaware General Corporation Law (DGCL) that relate to public benefit corporations, though formation of a statutory public benefit LLC is not the exclusive means of forming an LLC operated for a public benefit.

Cancellation of LLC Upon Abuse of Powers

Under the proposed amendments, the Delaware attorney general would be able to file a motion in the Court of Chancery to cancel the certificate of formation of any LLC for abuse or misuse of its powers, privileges or existence. Upon any such cancellation, the court has the power to appoint trustees, receivers or otherwise wind up the LLC's affairs. This new Section 18-112 corresponds to Section 284 of the DGCL (as proposed to be amended in 2018).

Blockchain Maintenance of Records and Electronic Transmissions

The proposed amendments to the DLLCA and DRULPA would provide specific statutory authority for LLCs and LPs to use networks of electronic databases, known as blockchains or distributed ledgers, to create and maintain LLC or LP records, as applicable. These proposed amendments correspond to last year's amendments to the DGCL relating to blockchain technology.

A copy of the proposed legislation is [available here](#). The proposed amendments will be introduced in the General Assembly for consideration and, if adopted, would become effective August 1, 2018, except for the proposed amendments relating to registered series, which would become effective August 1, 2019.