

Proposed Amendments to DGCL and Delaware Alternative Entity Laws Would Permit Electronic Documentation, Notices and Signatures

04 / 08 / 19

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

Edward B. Micheletti

Partner / Wilmington
302.651.3220
edward.micheletti@skadden.com

Edward P. Welch

Partner / Wilmington
302.651.3060
edward.welch@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

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

On April 4, 2019, the Corporation Law Section of the Delaware State Bar Association (DSBA) approved proposed amendments to the Delaware General Corporation Law (DGCL), the Delaware Limited Liability Company Act (the DLLCA), the Delaware Revised Uniform Limited Partnership Act (DRULPA) and the Delaware Revised Uniform Partnership Act (DRUPA and, together with the DGCL, the DLLCA and DRULPA, the Acts). The most significant changes that would be effected by this year's amendments would provide safe harbors for electronic documentation of certain acts and transactions and electronic signature of documents, and permit electronic delivery of stockholder notices, including appraisal notices.

Electronic Transactions and Signatures

The proposed amendments to the Acts establish non-exclusive, safe harbor methods to reduce certain acts and transactions to a written or electronic document and to execute and deliver a document electronically. The amendments would permit a wide variety of acts and transactions that are "contemplated or governed by" the Acts to be documented and executed electronically, including merger agreements, stockholders agreements, proxies, and LLC or partnership agreements. Under the proposed amendments, an electronic document is deemed functionally equivalent to a written document.

The amendments would broadly define an electronic signature as an electronic symbol or process that is attached to, or logically associated with, a document, and executed or adopted by a person with an intent to authenticate or adopt the document. If adopted, the amendments would permit any document contemplated or governed by the Acts to be documented, signed and delivered electronically, including by DocuSign and similar electronic means. Further, unless otherwise provided in the entity's organizational documents or agreed between the sender and recipient, an electronic transmission is deemed to be delivered to a person for purposes of the Acts and the organizational documents when it enters an information processing system that the recipient has designated for the purpose of receiving electronic transmissions of the type delivered, so long as the electronic transmission is in a form capable of being processed by that system and such recipient is able to retrieve the electronic transmission. The recipient's designation of an information processing system is determined by the organizational documents or from the context and surrounding circumstances, including the parties' conduct. Notably, the amendments provide that an electronic transmission delivered in accordance with the above procedures is deemed delivered even if no person is aware of its receipt.

The safe harbor provisions under the proposed amendments apply solely for purposes of determining whether an act or transaction has been documented, and whether a document has been signed and delivered in accordance with the Acts and the entity's organizational documents. The safe harbor would not preempt any statute of frauds or other law that might require actions to be documented or documents to be signed and delivered in a specified manner.

The amendments are based, in part, on the Delaware Uniform Electronic Transactions Act (UETA), and clarify how UETA interacts with the Acts. UETA provides that it does not apply to transactions that are governed by the Acts. As a result, documents such as merger agreements, stockholders' agreements, LLC agreements, partnership agreements and other documents governed by the Acts may not be executed in reliance on UETA. If the amendments are adopted, however, parties may document, execute and deliver such documents electronically by complying with the provisions of the amendments. The intent of the proposed amendments is to allow the Acts to govern the documentation of

Proposed Amendments to DGCL and Delaware Alternative Entity Laws Would Permit Electronic Documentation, Notices and Signatures

actions and the signature and delivery of documents to the fullest extent that they are not preempted by the Electronic Signatures in Global and National Commerce Act.

A corporation, limited liability company, or limited or general partnership would be able to opt out of the provisions of the amendments by expressly providing specific restrictions on documenting electronic transactions in its certificate of incorporation, bylaws, LLC Agreement or partnership agreement. It is important to note that provisions in the organizational documents requiring that an act or transaction be documented in writing, or that a document be signed or delivered manually, would not prohibit the use of electronic transmission or an electronic signature.

The amendments also specify certain documents that would not qualify for this safe harbor, including, among other things, (i) documents filed with the secretary of state, the register in chancery, or a court or other judicial or governmental body of Delaware, (ii) a document comprising part of the stock ledger, (iii) actions by written consent of directors, stockholders or incorporators (which may be delivered electronically under existing provisions of the DGCL), (iv) stock certificates and certificates evidencing limited liability company or partnership interests or other securities, and (v) waivers of notice. However, it is important to note that many of these excluded items are governed by separate provisions of the Acts that facilitate the use of electronic media or transmission, including, for example, documents filed with the secretary of state and delivery of written consents and electronic notices.

Default Provisions for Delivery of Notice to Stockholders

The proposed amendments to the DGCL also include noteworthy changes to the statutory default provisions relating to delivery of stockholder notices. Under the proposed amendments, a corporation would be permitted to send notices to a stockholder's valid email address, as it appears on the corporations' records, without first obtaining the consent of such stockholder, unless such stockholder specifically notifies the corporation in writing (including by electronic transmission) of its objection to receiving notices by email. The proposed amendments provide that a corporation would be able to provide notice to stockholders by (i) U.S. mail, with time of notice being when the notice is placed in the mail, (ii) courier service, with the time of notice being the earlier of when it is received by the stockholder or left at stockholder's address, or (iii) electronic mail, with time of notice being when it is directed to the stockholder's email address.

These statutory default notice provisions would apply to any notice required by the DGCL, the certificate of incorporation or the bylaws (including notice of appraisal rights), but do not alter

any other notice requirements by which the corporation may be bound, including, for example, under securities laws. Additionally, under the proposed amendments, a corporation may deliver stockholder notices electronically, even if its certificate of incorporation or bylaws requires that notice be delivered by U.S. mail or courier service, eliminating the need for corporations to amend their organizational documents in order to take advantage of the provisions of the amendments.

Appraisal notices may be delivered electronically, including by email, under the proposed amendments, or by courier (or U.S. mail). Additionally, the proposed amendments would allow for the delivery of stockholder demand for appraisal to the corporation by electronic transmission, but only if the corporation expressly designates, in the notice of appraisal rights given by the corporation, an information processing system for receipt of electronic delivery of demands. Among other things, the proposed amendments would permit the corporation to so designate an email address for purposes of receiving stockholder appraisal demands.

Division of a Limited Partnership

The proposed amendments to DRULPA would enable a limited partnership to divide, consistent with the 2018 amendments with respect to division of a limited liability company. Under the proposed amendments, a limited partnership would be able to divide into two or more newly formed resulting limited partnerships, with the dividing limited partnership continuing its existence or terminating, as the case may be. Divisions would enable a limited partnership to facilitate a spin-off or the sale of assets or a line of business, eliminating the need to transfer assets and liabilities to a buyer or newly formed limited partnerships.

Registered Series of a Limited Partnership

Under the proposed amendments to DRULPA, a limited partnership also would be permitted to form registered series, similar to the provisions adopted in 2018 to the DLLCA, effective August 1, 2019. The amendments would enable registered series of limited partnerships to obtain a good standing certificate and merge, providing a more practical way to combine the assets and liabilities of two series than presently available under applicable law. The proposed amendments also provide that an existing protected series can convert to a registered series by filing a certificate of conversion and a certificate of registered series.

A copy of our 2018 mailing describing LLC divisions and registered series can be found [here](#).¹

¹ <https://www.skadden.com/insights/publications/2018/11/insights-the-delaware-edition/delaware-enacts-amendments-to-llc-act>.

Proposed Amendments to DGCL and Delaware Alternative Entity Laws Would Permit Electronic Documentation, Notices and Signatures

Resignation of a Registered Agent

The proposed amendments would allow registered agents of a corporation, limited liability company, or limited or general partnership to resign without appointing a successor, including for entities whose certificate of incorporation, certificate of formation or certificate of limited partnership has become void as a result of failure to pay franchise taxes or annual fees. Such resignation may be effected by filing a certificate of resignation with the secretary of state after the required 30-day prior notice to the affected entity, which certificate must be accompanied by the last known information for a communications contact for the affected entity, which information must be provided to the secretary of state but will not be deemed public or subject to FOIA requests.

A copy of the proposed legislation is available [here](#).² The proposed amendments must be approved by the Executive Committee of the DSBA and, if so approved, will be introduced in the General Assembly for consideration. If adopted, the amendments would become effective August 1, 2019, except for the provisions relating to electronic delivery of appraisal notices and demands, which would become effective for merger agreements entered into on or after August 1, 2019.

² <https://legis.delaware.gov/BillDetail?LegislationId=25730>.