



## Proposed Amendments to Delaware's LLC and LP Acts

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**Editor's note:** [John D. Seraydarian](#) and [Monica M. Ayres](#) are Directors at Richards, Layton & Finger, P.A. This post is based on their Richards Layton publication and is part of the [Delaware law series](#); links to other posts in the series are available [here](#).

Legislation proposing to amend the Delaware Limited Liability Company Act (LLC Act) and the Delaware Revised Uniform Limited Partnership Act (LP Act) (jointly, the LLC and LP Acts) has been introduced to the Delaware General Assembly. The following is a brief summary of some of the more significant proposed amendments that affect Delaware limited liability companies (Delaware LLCs) and Delaware limited partnerships (Delaware LPs), including amendments (i) enabling a Delaware LLC to divide into two or more Delaware LLCs as a new permitted form of Delaware LLC reorganization, (ii) providing for the formation of statutory public benefit Delaware LLCs (Statutory Public Benefit LLCs), (iii) authorizing the creation of a new type of Delaware LLC series known as a "registered series," and (iv) providing specific statutory authority for the use of networks of electronic databases (including blockchain and distributed ledgers) by Delaware LLCs and Delaware LPs. If enacted, all of the proposed amendments will become effective on August 1, 2018, except that the proposed amendments relating to Delaware LLC series will not become effective until August 1, 2019.

### Division of a Limited Liability Company

Under a new Section 18-217 of the LLC Act, a single Delaware LLC will be allowed to divide into two or more Delaware LLCs. The original dividing Delaware LLC can continue its existence or terminate as part of the division as provided in a plan of division. In connection with a division, a dividing Delaware LLC must adopt a plan of division setting forth the terms and conditions of the division, including the allocation of assets, property, rights, series, debts, liabilities and duties of such dividing Delaware LLC among the division Delaware LLCs,<sup>1</sup> the name of each resulting Delaware LLC and, if the original dividing Delaware LLC will survive the division, the name of the surviving Delaware LLC. The surviving Delaware LLC, if applicable, or any resulting Delaware LLC must then file a certificate of division and a certificate of formation for each resulting Delaware LLC with the Delaware Secretary of State.

Following a division, each division Delaware LLC will be liable for the debts, liabilities and duties of the original dividing Delaware LLC as are allocated to it pursuant to the plan of division, and no other division Delaware LLC will be liable for such obligations unless the plan of division

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<sup>1</sup> References to "division Delaware LLCs" as used herein means (i) the original dividing Delaware LLC effecting a division in the manner provided in new Section 18-217 of the LLC Act if it survives the division, and (ii) each resulting Delaware LLC formed as a consequence of the division.

constitutes a fraudulent transfer under applicable law. If any allocation of assets or liabilities is determined by a court of competent jurisdiction to constitute a fraudulent transfer, each division Delaware LLC will be jointly and severally liable on account of such fraudulent transfer. Debts and liabilities of the original dividing Delaware LLC that are not allocated by the plan of division will be the joint and several debts and liabilities of all division Delaware LLCs.

The amendments relating to division of a Delaware LLC will be effective August 1, 2018. Because of the novelty of this type of reorganization that may have not otherwise been specifically contemplated in existing contractual arrangements, the proposed amendments provide that any terms of a written contract, indenture or other agreement that restrict, condition or prohibit a Delaware LLC from consummating a merger or consolidation or transferring assets will apply with equal force to a division if (i) the Delaware LLC was formed prior to August 1, 2018, and (ii) the Delaware LLC entered into such written contract, indenture or other agreement prior to August 1, 2018.

## Statutory Public Benefit Limited Liability Companies

In a development that may be of significant interest to social entrepreneurs, the LLC Act is being amended to add a new subchapter XII for purposes of enabling Delaware LLCs to elect to be formed as Statutory Public Benefit LLCs. Such Statutory Public Benefit LLCs would remain subject to all other applicable provisions of the LLC Act, except as modified or supplanted by the new subchapter XII of the LLC Act governing Statutory Public Benefit LLCs.

In general, a Statutory Public Benefit LLC is a for-profit limited liability company that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a Statutory Public Benefit LLC is required to be operated in a way that balances the pecuniary interests of the members of such Statutory Public Benefit LLC, the best interests of those materially affected by such Statutory Public Benefit LLC's conduct, and the public benefit or public benefits as set forth in such Statutory Public Benefit LLC's certificate of formation.

Each Statutory Public Benefit LLC would be required, in its certificate of formation, to identify itself as a Statutory Public Benefit LLC and to state one or more specific public benefits to be promoted by the Statutory Public Benefit LLC. "Public benefit" is defined as "a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than members in their capacities as members) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature."

New subchapter XII of the LLC Act also (i) sets forth specific duties of members, managers and other persons with authority to manage or direct the business and affairs of a Statutory Public Benefit LLC; (ii) imposes special notice requirements on Statutory Public Benefit LLCs, mandating periodic statements to members regarding the LLC's promotion of its public benefits and as to the best interests of those materially affected by the LLC's conduct; (iii) contains limitations on the power of Statutory Public Benefit LLCs to (a) adopt amendments to their certificates of formation or effect mergers, consolidations or divisions if the effect would be to abandon their public benefit, or (b) cease to be a Statutory Public Benefit LLC; (iv) establishes a means of enforcing the promotion of the public benefits of a Statutory Public Benefit LLC by

granting certain derivative rights; (v) provides that the requirements imposed on Statutory Public Benefit LLCs may not be altered in a limited liability company agreement; and (vi) provides that such new subchapter XII is not to be construed to limit the accomplishment by any other means permitted by law of the formation or operation of a Delaware LLC that is formed or operated for a public benefit (including a Delaware LLC that is designated as a public benefit limited liability company) that is not a Statutory Public Benefit LLC.

## Limited Liability Company Series

The proposed amendments will amend the LLC Act to create a new type of Delaware LLC series known as a “registered series.” The registered series will be governed by a new Section 18-218 of the LLC Act. A registered series will qualify as a registered organization under the Uniform Commercial Code that will facilitate the use of Delaware LLC series in secured financing transactions. To form a registered series, the certificate of formation of the Delaware LLC must contain a notice of the limitation on liabilities of a registered series, and a certificate of registered series must be filed with the Delaware Secretary of State. The name of a registered series must begin with the name of the Delaware LLC and be distinguishable upon the records of the Delaware Secretary of State from any entity or other registered series formed or qualified to do business in Delaware. Registered series will be able to merge or consolidate with or into one or more other registered series of the same Delaware LLC.

Series created under Section 18-215(b) of the LLC Act, both before and after the enactment of these amendments, will be known as “protected series.” These amendments will not alter the features of protected series. An existing protected series will be able to convert to a registered series in accordance with the new Section 18-219 of the LLC Act.

The Delaware Secretary of State will be able to issue certificates of good standing and certificates of existence with respect to a registered series. Each registered series will be required to pay an annual franchise tax of \$75.

The amendments regarding series of Delaware LLCs will not be effective until August 1, 2019, to provide the Delaware Secretary of State’s office with the time necessary to prepare for the new filings to be made with, and certificates to be issued by, such office in connection with registered series.

## Blockchain and Distributed Ledgers

Several sections of the LLC and LP Acts are being amended to provide express statutory authority for Delaware LLCs and Delaware LPs to use networks of electronic databases (including blockchain and distributed ledgers) for the creation and maintenance of records of Delaware LLCs and Delaware LPs and for certain electronic transmissions. These amendments are expected to facilitate and accommodate the myriad of uses for these burgeoning technologies in the governance and activities of Delaware LLCs and Delaware LPs.

The proposed amendments reflect Delaware’s continuing commitment to maintaining statutes governing Delaware LLCs and Delaware LPs that effectively serve the business needs of the national and international business communities. The proposed amendments to the LLC Act and the LP Act are contained in Senate Bill Nos. 183 and 182, respectively.