



Proposed Amendments to Delaware's LLC and Partnership 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 & Finger memorandum 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), the Delaware Revised Uniform Limited Partnership Act (LP Act) and the Delaware Revised Uniform Partnership Act (GP Act) (collectively, the LLC and Partnership 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), Delaware limited partnerships (Delaware LPs) and Delaware general partnerships (Delaware GPs), including amendments (i) relating to document forms, including electronic signatures and delivery, (ii) enabling a Delaware LP to divide into two or more Delaware LPs as a new permitted form of Delaware LP reorganization (LP Division), (iii) providing for the formation of statutory public benefit Delaware LPs (Statutory Public Benefit LPs), (iv) authorizing the creation of a new type of Delaware LP series known as a "registered series" (LP Series), (v) providing specific statutory authority for the use of networks of electronic databases (including blockchain and distributed ledgers) by Delaware GPs, and (vi) confirming the availability of contractual appraisal rights in connection with certain transactions involving Delaware LLCs and Delaware LPs. If enacted, all of the proposed amendments will become effective on August 1, 2019.

The proposed amendments to the LP Act described herein relating to LP Division, Statutory Public Benefit LPs and LP Series are substantially similar to the legislation enacted last year that amended the LLC Act to (i) enable a Delaware LLC to divide into two or more Delaware LLCs as a new permitted form of Delaware LLC reorganization, (ii) provide for the formation of statutory public benefit Delaware LLCs, and (iii) authorize the creation of a new type of Delaware LLC series known as a "registered series." Further, the proposed amendments to the GP Act relating to providing specific statutory authority for the use by Delaware GPs of networks of electronic databases (including blockchain and distributed ledgers) are substantially similar to the amendments enacted last year with respect to Delaware LLCs and Delaware LPs that provide specific statutory authority for the use of such networks and databases by Delaware LLCs and Delaware LPs. Please see [here](#) for our May 10, 2018 Delaware LLC and LP Law Update for a brief summary of the foregoing 2018 amendments.

Document Forms, Including Electronic Signatures and Delivery

The proposed amendments to the LLC and Partnership Acts include the addition of provisions relating to the execution of documents by electronic signature and delivery of documents by electronic transmission (collectively, the Electronic Signature and Delivery Provisions). The Electronic Signature and Delivery Provisions explicitly state that any act or transaction contemplated or governed by the LLC and Partnership Acts or a limited liability company or partnership agreement may be provided for in a document, and an electronic transmission will be deemed the equivalent of a written document. The term “document” is defined to mean “(i) any tangible medium on which information is inscribed, and includes handwritten, typed, printed or similar instruments, and copies of such instruments and (ii) an electronic transmission.” The term “electronic transmission” is defined as “any form of communication not directly involving the physical transmission of paper, including the use of, or participation in, 1 or more electronic networks or databases (including 1 or more distributed electronic networks or databases), that creates a record that may be retained, retrieved and reviewed by a recipient thereof and that may be directly reproduced in paper form by such a recipient through an automated process.”

Whenever the LLC and Partnership Acts or a limited liability company or partnership agreement require or permit a signature, an electronic signature will be a permissible mode of executing a document. An electronic signature is defined 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.”

The Electronic Signature and Delivery Provisions further provide that, unless otherwise provided in a limited liability company or partnership agreement or agreed to between the sender and recipient, an electronic transmission is delivered to a person at the time it enters an information-processing system that the person 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 the person is able to retrieve it.

The Electronic Signature and Delivery Provisions establish non-exclusive safe harbor methods of reducing specified acts or transactions to a written or electronic document and executing and delivering a document manually or electronically. The Electronic Signature and Delivery Provisions do not prohibit one or more persons from conducting a transaction in accordance with Delaware’s Uniform Electronic Transactions Act, so long as the part or parts of the transaction that are governed by the LLC and Partnership Acts are documented, signed and delivered in accordance with the applicable Electronic Signature and Delivery Provisions or the other relevant provisions of the LLC and Partnership Acts. Further, the safe harbor methods provided for in the Electronic Signature and Delivery Provisions apply solely for purposes of determining whether an act or transaction has been documented, and whether the document has been signed and delivered, in accordance with the LLC and Partnership Acts and a limited liability company or partnership agreement. As application of the Electronic Signature and Delivery Provisions are limited specifically to the LLC and Partnership Acts and a limited liability company or partnership agreement, the Electronic Signature and Delivery Provisions do not preempt any statute of frauds or other applicable law that might require that actions be documented or documents be signed and delivered in a specified manner.

The Electronic Signature and Delivery Provisions set forth certain documents and actions that are not governed thereby, including (i) a document filed with or submitted to the Delaware Secretary of State, the Register in Chancery, or a court or other judicial or governmental body of the State of Delaware, (ii) a certificate of limited liability company interest or partnership interest, and (iii) an act or transaction effected pursuant to the respective provisions of the LLC and Partnership Acts relating to the requirement to maintain a registered office and registered agent in the State of Delaware, service of process, foreign entities or derivative actions. The Electronic Signature and Delivery Provisions expressly state that the foregoing shall not create any presumption regarding the lawful means to document a matter, or sign or deliver a document, addressed by these excluded items. Further, the Electronic Signature and Delivery Provisions state that no provision of a limited liability company or partnership agreement shall limit the application of the Electronic Signature and Delivery Provisions, unless such provision expressly restricts one or more of the means of documenting an act or transaction, or of signing or delivering a document, permitted by the Electronic Signature and Delivery Provisions.

Finally, the Electronic Signature and Delivery Provisions address the interaction between the LLC and Partnership Acts and the U.S. federal Electronic Signatures in Global and National Commerce Act (E-Sign Act). In general, the E-Sign Act provides that, with respect to a transaction in or affecting interstate or foreign commerce (and subject to specified exceptions and limitations), a signature, contract or other record relating to the transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form, and a contract relating to such transaction may not be denied legal effect, validity or enforceability solely because an electronic signature or electronic record was used in its formation. The Electronic Signature and Delivery Provisions state that if any provision of the LLC and Partnership Acts is deemed to modify, limit or supersede the E-Sign Act, the provisions of the LLC and Partnership Acts will control to the fullest extent permitted by Section 7002(a)(2) thereof. Section 7002(a)(2) of the E-Sign Act provides:

A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 7001 of [the E-Sign Act] with respect to State law only if such statute, regulation, or rule of law . . . (A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if (i) such alternative procedures or requirements are consistent with [subchapters I and II of the E-Sign Act]; and (ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; and (B) if enacted or adopted after June 30, 2000, makes specific reference to [the E-Sign Act].

Thus, the Electronic Signature and Delivery Provisions expressly confirm an intent to allow the LLC and Partnership Acts to govern the documentation of actions, and the signature and delivery of documents, to the fullest extent the LLC and Partnership Acts are not preempted by the E-Sign Act.

LP Division

Under a new Section 17-220 of the LP Act, a single Delaware LP will be allowed to divide into two or more Delaware LPs. The original dividing Delaware LP 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 LP 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 LP among the division Delaware LPs,¹ the name of each resulting Delaware LP and, if the original dividing Delaware LP will survive the division, the name of the surviving Delaware LP. The dividing Delaware LP must then file a certificate of division and a certificate of limited partnership for each resulting Delaware LP with the Delaware Secretary of State.

Following a division, each division Delaware LP will be liable for the debts, liabilities and duties of the original dividing Delaware LP as are allocated to it pursuant to the plan of division, and no other division Delaware LP will be liable for such obligations unless the plan of 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 LP will be jointly and severally liable on account of such fraudulent transfer. Debts and liabilities of the original dividing Delaware LP that are not allocated by the plan of division will be the joint and several debts and liabilities of all division Delaware LPs.

The amendments relating to division of a Delaware LP will be effective August 1, 2019. 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 LP from consummating a merger or consolidation or transferring assets will apply with equal force to a division if (i) the Delaware LP was formed prior to August 1, 2019, and (ii) the Delaware LP entered into such written contract, indenture or other agreement prior to August 1, 2019.

Statutory Public Benefit LPs

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

In general, a Statutory Public Benefit LP is a for-profit limited partnership 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 LP is required to be operated in a way that balances the pecuniary interests of the partners of such Statutory Public Benefit LP, the best interests of those materially affected by such Statutory Public Benefit LP's conduct, and the public

¹ References to "division Delaware LPs" herein refer to (i) the original dividing Delaware LP effecting a division in the manner provided in new Section 17-220 of the LP Act if it survives the division, and (ii) each resulting Delaware LP formed as a consequence of the division.

benefit or public benefits as set forth in such Statutory Public Benefit LP's certificate of limited partnership.

Each Statutory Public Benefit LP would be required, in its certificate of limited partnership, to identify itself as a Statutory Public Benefit LP and to set forth one or more specific public benefits to be promoted by the Statutory Public Benefit LP. "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 partners in their capacities as partners) 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 LP Act also (i) sets forth specific duties of general partners and other persons with authority to manage or direct the business and affairs of a Statutory Public Benefit LP; (ii) imposes special notice requirements on Statutory Public Benefit LPs, mandating periodic statements to limited partners regarding the Delaware LP's promotion of its public benefits and as to the best interests of those materially affected by the Delaware LP's conduct; (iii) contains limitations on the power of Statutory Public Benefit LPs to (a) adopt amendments to their certificates of limited partnership 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 LP; (iv) establishes a means of enforcing the promotion of the public benefits of a Statutory Public Benefit LP by granting certain derivative rights; (v) provides that the requirements imposed on Statutory Public Benefit LPs may not be altered in a partnership 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 LP that is formed or operated for a public benefit (including a Delaware LP that is designated as a public benefit limited partnership) that is not a Statutory Public Benefit LP.

LP Series

The proposed amendments will amend the LP Act to create a new type of Delaware LP series known as a "registered series." The registered series will be governed by a new Section 17-221 of the LP Act. A registered series will qualify as a registered organization under the Uniform Commercial Code that will facilitate the use of Delaware LP series in secured financing transactions. To form a registered series, the certificate of limited partnership of the Delaware LP 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 LP 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 LP.

Series created under Section 17-218(b) of the LP 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 17-222 of the LP Act, and a registered series will in turn be able to convert to a protected series in accordance with the new Section 17-223 of the LP 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.

Blockchain and Distributed Ledgers

The GP Act is being amended to provide express statutory authority for Delaware GPs to use networks of electronic databases (including blockchain and distributed ledgers) for the creation and maintenance of records of Delaware GPs and for certain electronic transmissions. This is expected to facilitate and accommodate the myriad of uses for these burgeoning technologies in the governance and activities of Delaware GPs.

Contractual Appraisal Rights Confirmed Available in Certain Transactions Involving Delaware LLCs and Delaware LPs

The LLC Act and the LP Act each currently contemplate that contractual appraisal rights may be provided with respect to a limited liability company interest, partnership interest or another interest in a Delaware LLC or Delaware LP in connection with any amendment of a limited liability company or partnership agreement, any merger or consolidation in which a Delaware LLC or Delaware LP is a constituent party, any conversion of a Delaware LLC or Delaware LP to another business form, any transfer to or domestication or continuance in any jurisdiction by a Delaware LLC or Delaware LP, or the sale of all or substantially all of a Delaware LLC's or Delaware LP's assets. The proposed amendments to the LLC Act and the LP Act include provisions that confirm that contractual appraisal rights may also be made available in connection with (i) a merger or consolidation in which a registered series is a constituent party, (ii) any division, (iii) any conversion of a protected series to a registered series, and (iv) any conversion of a registered series to a protected series.

The proposed amendments reflect Delaware's continuing commitment to maintaining statutes governing Delaware LLCs, Delaware LPs and Delaware GPs that effectively serve the business needs of the national and international business communities. The proposed amendments to the LLC Act, the LP Act and the GP Act are contained in Senate Bill Nos. 91, 89 and 90, respectively.