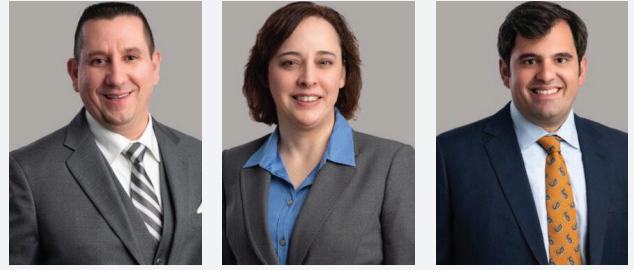


Recent Developments to Delaware LLC and LP Acts

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Delaware limited liability companies (“LLCs”) and Delaware limited partnerships (“LPs”) are increasingly common vehicles used in connection with a diverse range of business applications in the real estate world. Such broad range of applications is buttressed by the Delaware legislature’s emphasis on the primacy of freedom of contract for LLCs and LPs and the resulting flexibility of such entities.¹ Despite such inherent flexibility, however, LLCs and LPs remain subject to their respective governing statutes in Delaware—the Delaware Limited Liability Company Act (6 *Del. C.* § 18-101, *et al.*) (the “LLC Act”) for LLCs and the Delaware Revised Uniform Limited Partnership Act (6 *Del. C.* § 17-101, *et al.*) (the “LP Act”) for LPs—with respect to the formation of such business entities and the operations thereof. This article will briefly examine significant amendments to the LLC Act and the LP Act affecting LLCs and LPs that have been enacted in recent years. This article does not purport to be a comprehensive review of all recent amendments to the LLC Act and the LP Act. Rather, our discussion focuses on those recent amendments that have the most relevant applications on the formation and operation of LLCs and LPs.

I. Formation

A. Series

i. Generally.

For almost 30 years, LLCs and LPs have been enabled to establish series of members, managers, limited liability company interests, limited partners, general partners, partnership interests or assets, as applicable.² Each such series can be treated separately from any other series and the LLC or LP itself with respect to assets and liabilities in that each of the LLC Act and the LP Act allows the governing documents of an LLC or LP to provide that obligations with respect to one series of such LLC or LP can be enforced against the assets of that series only and not against the assets of the LLC or LP generally or of any other series thereof.³ While a series is not a separate and independent entity under Delaware law, a series may have certain aspects of separate legal identity: (i) each series may have different members, managers, limited

liability company interests, partners, partnership interests or assets; (ii) each series may have a separate business purpose or investment objective; (iii) each series may, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued; (iv) much of the flexibility of the LLC Act and the LP Act in dealing with management and similar issues can be dealt with differently for each series; (v) an individual or entity may be a member or partner associated with one or more series so that such individual’s or entity’s cessation as a member or partner in one series does not necessarily affect such individual’s status as a member or partner, as applicable, in any other series; and, (vi) as noted above, each series may be treated separately from any other series and the LLC or LP itself with respect to its liabilities and the exposure of its assets to third-party claims and thus may hold property and perform functions as if it were a separate entity.⁴

Under the historical series regime, it was not clear how a series should be treated under the Uniform Commercial Code as in effect in the State of Delaware (the “Delaware UCC”) because, while series possess certain aspects of separate legal identity, a series is not a separate legal entity. Additionally, because historical series were established solely under the applicable limited liability company agreement or partnership agreement, there was no public record of the existence of such series.⁵ These uncertainties chilled the use of series in certain transactions, including financing transactions where lenders require a perfected security interest against a counterparty.

Largely in response to these concerns, the LLC Act was amended in 2018 and the LP Act in 2019 to permit and create a new type of series known as a “registered series.”⁶ A registered series qualifies as a registered organization under the Delaware UCC, clarifying the applicability of the Delaware UCC to series and facilitating the use of series in secured financing transactions.⁷

To form a registered series, the certificate of formation of an

LLC or the certificate of limited partnership of an 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.⁸

The name of a registered series must begin with the name of the applicable LLC or 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.⁹ The Delaware Secretary of State is able to issue certificates of good standing and certificates of existence with respect to a registered series.¹⁰ Each registered series is required to pay an annual franchise tax of \$75.¹¹ Registered series can also merge or consolidate with or into one or more other registered series of the same LLC or LP.¹²

Series created under Section 18-215(b) of the LLC Act and Section 17-218(b) of the LP Act, both before and after the enactment of the amendments enabling the use of registered series, are known as “protected series.”¹³ Such amendments did not alter the features of protected series.¹⁴ Unlike the formation of a registered series, the establishment of a protected series does not involve the filing of a certificate for such protected series, so protected series do not qualify as registered organizations under the Delaware UCC.¹⁵ As a result, protected series are of limited use as borrowers in transactions in which lenders require perfected security interests against debtors. In addition to the existing provisions relating to protected series, the LLC Act and LP Act now provide that an existing protected series can convert to a registered series in accordance with Section 18-219 of the LLC Act or Section 17-222 of the LP Act, as applicable.¹⁶ Likewise, an existing registered series can convert to a protected series in accordance with Section 18-220 of the LLC Act or Section 17-223 of the LP Act, as applicable.¹⁷

ii. Revocation of dissolution of registered series and termination of protected series.

The dissolution of an LLC or LP marks the beginning of the end of such entity’s life cycle, following which its purpose shifts from its original business purpose to a new purpose of winding up its affairs.¹⁸ Once the LLC or LP has paid or made reasonable provision for its liabilities and distributed its remaining assets to its equity holders and the winding-up process is complete, the LLC or LP is terminated pursuant to the filing of a certificate of cancellation with the Delaware Secretary of State.¹⁹ At this point, the entity is cancelled and ceases to exist.²⁰ At all points prior to the termination of the LLC or LP by the filing of this certificate of cancellation, from its dissolution through its winding up, the LLC or LP continues to exist as a separate legal entity.²¹

Pursuant to Section 18-801 of the LLC Act and Section 17-801 of the LP Act, events of dissolution may be specified in a limited liability company agreement or a partnership agreement, such as a fixed date upon which dissolution shall occur.²² In the LLC context, the LLC Act provides that dissolution shall occur upon (i) the affirmative vote or written consent of members who own more than two-thirds of the then-current percentage in the profits of the LLC, unless a limited liability company agreement provides otherwise; (ii) an event that causes there to be no remaining members of the LLC; or (iii) the entry of a decree of judicial dissolution of the LLC.²³ In the LP context, the LP Act provides that dissolution shall occur upon (i) the affirmative vote of all general partners and limited partners who own more than two-thirds of the then current percentage in the profits of the LP, unless a partnership agreement provides otherwise; (ii) an event of withdrawal of a general partner; (iii) an event that causes there to be no remaining limited partners of the LP; or (iv) the entry of a decree of judicial dissolution of the LP.²⁴ Under Delaware law, no filings with the Delaware Secretary of State are needed to effect the dissolution of an LLC or LP.²⁵

The life cycle of a series of an LLC or LP mirrors the life cycle of the LLC or LP itself, but the terminology used for protected series differs from the terminology used for registered series, LLCs and LPs.²⁶ Rather than “dissolving,” protected series “terminate.”²⁷ Events of dissolution of a registered series and termination of a protected series may be specified in a limited liability company agreement or a partnership agreement, such as a fixed date upon which dissolution shall occur, and a registered series will dissolve, and a protected series will terminate, upon the dissolution of the LLC or LP of which it is a series.²⁸ Unless a partnership agreement provides otherwise, the LP Act provides that the dissolution of a registered series, and the termination of a protected series, of an LP shall occur upon (i) the dissolution of the LP generally; (ii) the affirmative vote of all general partners associated with such registered series or protected series, as applicable, and limited partners who own more than two-thirds of the then current percentage in the profits of such registered series or protected series, as applicable; (iii) an event of withdrawal of a general partner associated with such registered series or protected series, as applicable; or (iv) the entry of a decree of judicial dissolution of the registered series or protected series, as applicable.²⁹ A registered series of an LP is not dissolved, and a protected series of an LP is not terminated, at the time there are no remaining limited partners associated with such registered series because there is no requirement under the LP Act that a series have any

limited partners associated with such series.³⁰ Unless a limited liability company agreement provides otherwise, the LLC Act provides that the dissolution of a registered series, and the termination of a protected series, of an LLC shall occur upon (i) the dissolution of the LLC generally; (ii) the affirmative vote or written consent of members who own more than two-thirds of the then-current percentage in the profits of such registered series or protected series, as applicable; or (iii) the entry of a decree of judicial dissolution of such registered series or protected series, as applicable.³¹ A registered series of an LLC is not dissolved, and a protected series of an LLC is not terminated, at the time there are no remaining members associated with such registered series because there is no requirement under the LLC Act that a series have any members associated with such series.³²

In circumstances where a dissolved LLC or LP may desire to revoke its dissolution and resume its original business purpose, each of the LLC Act and the LP Act contains a provision permitting such dissolved entity to revoke its dissolution, with the manner of revocation depending on the manner in which the LLC or LP was originally dissolved.³³ The LLC Act and the LP Act have also been recently amended to provide for the revocation of termination of a protected series and the revocation of dissolution of a registered series, similar to the existing provisions of the LLC Act and the LP Act allowing for the revocation of dissolution of an LLC or LP.³⁴

Unless the revocation of termination of a protected series is prohibited in the applicable limited liability company agreement or partnership agreement, the termination of a protected series may be revoked prior to the completion of the winding up of such protected series: (i) in the manner provided by the applicable limited liability company agreement or partnership agreement; (ii) in the case of a termination effected by vote or consent, pursuant to such vote or consent (and any other approvals required by the limited liability company agreement or partnership agreement to revoke such termination); (iii) in the case of a termination at the time specified in the limited liability company agreement or partnership agreement or upon the happening of events specified in the limited liability company agreement or partnership agreement (other than a vote or consent), pursuant to such vote or consent that is required under the limited liability company agreement or partnership agreement for the amendment of the provision effecting such termination (and any other approvals required by the limited liability company agreement or partnership agreement to revoke such termination); or (iv) for a protected series of a Delaware limited partnership only, in the case of a termination effected by

an event of withdrawal of a general partner associated with the protected series, pursuant to the vote or consent set forth in the LP Act.³⁵

Further, if a protected series is terminated by the dissolution of the LLC or LP, the termination of a protected series will be automatically revoked upon any revocation of dissolution of the LLC or LP pursuant to the LLC Act and the LP Act.³⁶ The termination of a protected series may not be revoked if the LLC or LP, as applicable, has dissolved and the dissolution of such entity has not been revoked.³⁷

Unless the revocation of dissolution of a registered series is prohibited in the applicable limited liability company agreement or partnership agreement, the dissolution of a registered series may be revoked prior to the filing of a certificate of cancellation of the certificate of registered series of such registered series: (i) in the manner provided by the applicable limited liability company agreement or partnership agreement; (ii) in the case of a dissolution effected by vote or consent, pursuant to such vote or consent (and any other approvals required by the limited liability company agreement or partnership agreement to revoke such dissolution); (iii) in the case of a dissolution at the time specified in the limited liability company agreement or partnership agreement or upon the happening of events specified in the limited liability company agreement or partnership agreement (other than a vote or consent), pursuant to such vote or consent that is required under the limited liability company agreement or partnership agreement for the amendment of the provision effecting such dissolution (and any other approvals required by the limited liability company agreement or partnership agreement to revoke such dissolution); or (iv) for a registered series of a Delaware limited partnership only, in the case of a dissolution effected by an event of withdrawal of a general partner associated with the registered series, pursuant to the vote or consent set forth in the LP Act.³⁸

Additionally, if a registered series is dissolved by the dissolution of the LLC or LP, respectively, unless a certificate of cancellation of the certificate of registered series has been filed, the dissolution of a registered series will be automatically revoked upon any revocation of dissolution of the LLC or LP pursuant to the LLC Act and the LP Act.³⁹ The dissolution of a registered series may not be revoked if the LLC or LP has dissolved and the dissolution of such entity has not been revoked.⁴⁰

B. Statutory Public Benefit Entities

In a development that may be of significant interest to social entrepreneurs, the LLC Act and the LP Act were amended in recent years to enable an LLC or LP to elect to be a statutory public benefit LLC or statutory public benefit LP (each, a “Statutory Public Benefit Entity”).⁴¹ In general, a Statutory Public Benefit Entity is a for-profit LLC or LP that is intended to produce a public benefit and to operate in a responsible and sustainable manner.⁴² To that end, a Statutory Public Benefit Entity is required to be operated in a manner that balances the pecuniary interests of the members or partners, as applicable, of such Statutory Public Benefit Entity, the best interests of those materially affected by such Statutory Public Benefit Entity’s conduct, and the stated public benefit or public benefits set forth in such Statutory Public Benefit Entity’s limited liability company agreement and certificate of formation, in the case of a Statutory Public Benefit Entity that is an LLC, or partnership agreement and certificate of limited partnership, in the case of a Statutory Public Benefit Entity that is an LP.⁴³ Each Statutory Public Benefit Entity is currently required in its certificate of formation or certificate of limited partnership, as applicable, to (i) identify itself as a Statutory Public Benefit Entity, and (ii) set forth one or more specific public benefits to be promoted by such Statutory Public Benefit Entity. The term “public benefit” is statutorily defined broadly as a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than members or partners, as applicable, in such capacities), including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.⁴⁴

The new provisions of the LLC Act and the LP Act further provide that a Statutory Public Benefit Entity must identify its specific public benefit and its existence as a Statutory Public Benefit Entity in its limited liability company agreement or partnership agreement, as applicable.⁴⁵ Such provisions further provide that the public benefit listed in the limited liability company agreement or partnership agreement will control as among the members, managers and partners, as applicable, and other persons bound by such agreement, in the event there is an inconsistency between the applicable agreement and certificate, and that a provision in the applicable agreement or certificate will not be effective to the extent it is inconsistent with the applicable provisions of the LLC Act or the LP Act.⁴⁶ Additionally, such provisions obligate the managers, members or general partners, as applicable, of a Statutory Public Benefit Entity to promptly

amend such Statutory Public Benefit Entity’s certificate of formation or certificate of limited partnership, as applicable, if such person becomes aware that a specific public benefit to be promoted is inaccurately set forth in such certificate.⁴⁷

In addition to the foregoing, the new provisions of the LLC Act and the LP Act relating to Statutory Public Benefit Entities set forth mandatory statutory duties for those persons with the authority to manage or direct the business and affairs of a Statutory Public Benefit Entity.⁴⁸ Each Statutory Public Benefit Entity is also required to make periodic statements to equity holders (i) regarding the promotion by such Statutory Public Benefit Entity of its public benefits, and (ii) as to the best interests of those materially affected by such Statutory Public Benefit Entity’s conduct.⁴⁹ Further, such provisions establish a means of enforcing the promotion of the public benefits of a Statutory Public Benefit Entity by granting certain derivative rights to equity holders in a Statutory Public Benefit Entity and any assignees thereof.⁵⁰ The requirements imposed on Statutory Public Benefit Entities under the new provisions of the LLC Act and the LP Act relating to Statutory Public Benefit Entities may not be altered in a limited liability company agreement or a partnership agreement, as applicable.⁵¹ Finally, the amendments to the LLC Act and the LP Act authorizing the formation of Statutory Public Benefit Entities pursuant to the terms thereof expressly provide that such new provisions of the LLC Act and the LP Act do not limit the accomplishment by any other means permitted by law of the formation or operation of an LLC or LP that is formed or operated for a public benefit (including an LLC or LP that is designated as a public benefit limited liability company or limited partnership, as applicable) that is not a Statutory Public Benefit Entity.⁵²

The new provisions of the LLC Act and the LP Act also allow an existing LLC or LP to become a Statutory Public Benefit Entity either by (i) complying with the applicable requirements specified in its limited liability company agreement or partnership agreement, as applicable, or (ii) amending its certificate of formation or certificate of limited partnership, as applicable, and its limited liability company agreement or partnership agreement, as applicable, to comply with the statutory requirements.⁵³

II. Operations

In addition to those recent amendments to the LLC Act and the LP Act relating to the formation and organization of LLCs and LPs, there have been several amendments in recent years that relate to the manner in which such entities

may choose to operate, including the introduction of a new business restructuring known as a division, an expansion of the ability of an LLC or LP to ratify past void acts, and clarifications on the ability of an LLC or LP to execute documents electronically.

A. Division

The LLC Act was amended in 2018 and the LP Act was amended in 2019 to permit a single LLC or a single LP, as applicable, to divide into two or more LLCs or LPs, respectively.⁵⁴ At this time, a single LLC may only divide into two or more LLCs and a single LP may only divide into two or more LPs.⁵⁵ The original dividing LLC or LP may continue its existence or terminate as a result of such division.⁵⁶ In connection with a division, (i) a dividing LLC or 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 LLC or LP among the resulting LLCs or LPs of the division (which may include a dividing LLC or LP, if not terminated as a result of the division), the name of each resulting LLC or LP and, if the dividing LLC or LP will survive the division, the name of such surviving LLC or LP; and (ii) the dividing LLC or LP must file with the Delaware Secretary of State (a) a certificate of division and (b) a certificate of formation or certificate of limited partnership for each resulting LLC or LP of the division.⁵⁷

Following a division, each LLC or LP that participated in the division will be liable for the debts, liabilities and duties of the original LLC or LP that entered into the division as are allocated to it in the plan of division, and such allocation of liabilities and obligations will be respected unless the plan of division constitutes a fraudulent transfer under applicable law.⁵⁸ If any allocation of assets or liabilities is determined by a court of competent jurisdiction to constitute a fraudulent transfer, each LLC or LP that participated in the division will be jointly and severally liable on account of such fraudulent transfer.⁵⁹ Debts and liabilities of the original dividing LLC or LP that entered into the division that are not allocated by the plan of division will be the joint and several debts and liabilities of all LLCs or LPs that participated in the division.⁶⁰

Among the information required to be set forth in a certificate of division are the name and business address of a division contact, a natural person who is a Delaware resident or a business entity formed in the State of Delaware (which such business entity may be the LLC or LP that entered into the division, if it survives the division, or any LLC or

LP resulting from the division), that is required to maintain a copy of the plan of division for a period of six years from the effective date of the division.⁶¹ Additionally, an LLC or LP that participated in the division must file a certificate of amendment to a certificate of division if the name or business address of such division contact is determined to have been false when made or changed during the six years following the filing of the certificate of division.⁶² After such six-year period, the filing of such a certificate of amendment is discretionary.⁶³

B. Ratification

Prior to 2021, a series of cases in Delaware focused on the distinction between “voidable” acts—acts that fall within the power of an LLC or LP but are not properly authorized—and “void” acts—acts that are outside the purpose of an LLC or LP entirely—in holding that only voidable acts, and not void acts, are capable of being ratified by a subsequent authorization of the defective act.⁶⁴ In *CompoSecure, L.L.C. v. Cardux, LLC*, 206 A.3d 807 (Del. 2018), the Delaware Supreme Court declared that an LLC is unable to ratify acts or transactions rendered void by the plain language of its limited liability company agreement. The Delaware Supreme Court defined void acts as those that are “ultra vires and generally cannot be ratified.”⁶⁵ In *Absalom Trust v. Saint Gervais LLC*, 2019 WL 2655787 (Del. Ch. June 27, 2019), the Delaware Court of Chancery applied the *CompoSecure* rule in determining that a transaction deemed “null and void” by the express contractual terms of an LLC’s limited liability company agreement is incapable of being ratified.⁶⁶

In response to *CompoSecure* and *Absalom*, and with the express intent of providing a rule different from those applied therein, the LLC Act and the LP Act were amended in 2021 to provide a safe harbor procedure for (i) the ratification of acts or transactions taken by an LLC or LP that are void or voidable when taken, and (ii) waiving failures to comply with any requirements under the limited liability company agreement or the partnership agreement, as applicable, of an LLC or LP that make such acts or transactions void or voidable.⁶⁷

The LLC Act and the LP Act each expressly allow the ratification of acts or transactions that are void or voidable when taken (or the waiver of the failure to comply with any requirements of the limited liability company agreement or the partnership agreement, as applicable, making such act or transaction void or voidable) by the persons whose approval would otherwise be required under such agreement at the

time of such ratification or waiver (i) for such act or transaction to be validly taken, or (ii) to amend such agreement in a manner to permit such act or transaction to be validly taken. Any act or transaction so ratified (or the waiver of the failure to comply with any requirements of such agreement) is given retroactive effect and deemed validly taken at the time of such act or transaction.⁶⁸ Such relevant provision of each of the LLC Act and the LP Act expressly provides that such safe harbor provision is not to be construed to limit the ratification or waiver of void or voidable acts or transactions by other means permitted by law.⁶⁹ Accordingly, the LLC Act and the LP Act are not intended to preclude or restrict other valid means of ratification or waiver or to impair the effectiveness of valid ratifications and waivers effected prior to the adoption of the amendments.⁷⁰

The LLC Act and the LP Act additionally provide a procedure whereby the entity, a member, a manager or a partner, as applicable, and any person claiming to be substantially and adversely affected by a ratification or waiver (excluding any harm that would have resulted had the act or transaction been valid when taken) may petition the Delaware Court of Chancery for a determination with respect to the validity and effectiveness of any such ratification or waiver effected pursuant to the new safe harbor ratification provisions of the LLC Act or the LP Act.⁷¹

If an amendment to a limited liability company agreement or partnership agreement to permit an otherwise void or voidable act to be validly taken requires notice to any persons under the terms of such agreement, and the ratification or waiver of such act or transaction is effectuated by the persons whose approval would be required to amend such agreement, notice of the ratification or waiver must be given following such ratification or waiver to such persons who would have been entitled to notice of the amendment and who have not otherwise received notice of, or participated in, such ratification or waiver.⁷²

C. Electronic Signatures

The LLC Act and the LP Act were each recently amended (with fortuitous timing prior to the outbreak of the COVID-19 pandemic) to expressly permit the execution of documents by electronic signature and delivery of documents by electronic transmission (collectively, the “Electronic Signature and Delivery Provisions”).⁷³ The Electronic Signature and Delivery Provisions explicitly state that any act or transaction contemplated or governed by the LLC Act and the LP Act or a limited liability company agreement or partnership agreement may be provided for in a document, and an

electronic transmission is deemed the equivalent of a written document.⁷⁴ 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.”⁷⁵ 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.”⁷⁶

Whenever the LLC Act and the LP Act or a limited liability company agreement or partnership agreement require or permit a signature, an electronic signature will be a permissible mode of executing a document.⁷⁷ 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.”⁷⁸

The Electronic Signature and Delivery Provisions further provide that, unless otherwise provided in a limited liability company agreement 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.⁷⁹

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.⁸⁰ 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 Act and the LP Act are documented, signed and delivered in accordance with the applicable Electronic Signature and Delivery Provisions or the other relevant provisions of the LLC Act and the LP Act.⁸¹ 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 Act and the LP Act and a limited liability company agreement or partnership agreement.⁸² As application of the Electronic Signature and Delivery Provisions are limited specifically to the LLC Act and the LP Act and a limited liability company agreement 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.⁸³

As initially enacted, 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 Act and the LP Act 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.⁸⁴ 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. While 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, some uncertainty had arisen relating to the permitted methods of executing certificates representing limited liability company interests and partnership interests.⁸⁵ As a result, the Electronic Signature and Delivery Provisions of the LLC Act and the LP Act were further amended to confirm that a signature on a certificate of limited liability company interest or partnership interest may be a manual, facsimile or electronic signature, thereby facilitating modern transactions by providing greater flexibility with respect to the manner of executing certificates representing ownership interests of LLCs and LPs.⁸⁶ Further, the Electronic Signature and Delivery Provisions state that no provision of a limited liability company agreement 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.⁸⁷

Finally, the Electronic Signature and Delivery Provisions address the interaction between the LLC Act and the LP Act and the U.S. federal Electronic Signatures in Global and National Commerce Act (the “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.⁸⁸ The Electronic Signature and Delivery Provisions state that if any provision of the LLC Act and the LP Act is deemed to modify, limit or supersede the E-Sign Act, the provisions of the LLC Act and the LP Act will control to the fullest extent permitted by Section 7002(a)(2) of the E-Sign Act.⁸⁹ 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].⁹⁰

Thus, the Electronic Signature and Delivery Provisions expressly confirm an intent to allow the LLC Act and the LP Act to govern the documentation of actions, and the signature and delivery of documents, to the fullest extent the LLC Act and the LP Act are not preempted by the E-Sign Act.⁹¹

III. Conclusion

The amendments to the LLC Act and the LP Act discussed above reflect Delaware’s continuing commitment to maintaining statutes governing Delaware entities, including

limited liability companies and limited partnerships, that effectively serve the business needs of the national and international business communities, including but not limited to the real estate community.

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Endnotes

- ¹ See Delaware Limited Liability Company Act (6 Del. C. 18-101, et al.) (the “LLC Act”), § 18-1101(b) (“[i]t is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements”); Delaware Revised Uniform Limited Partnership Act (6 Del. C. 17-101, et al.) (the “LP Act”), § 17-1101(c) (“[i]t is the policy of this chapter to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements”).
- ² Del. H.B. 528, 138th Gen. Assem. (1996); Del. H.B. 530, 138th Gen. Assem. (1996); LLC Act, § 18-215; LP Act, § 17-218.
- ³ *Id.*
- ⁴ *Id.*
- ⁵ *Id.*
- ⁶ Del. S.B. 183, 149th Gen. Assem. (2018); Del. S.B. 89, 150th Gen. Assem. (2019); LLC Act, § 18-218; LP Act, § 17-221.
- ⁷ 6 Del. C. § 9-102(a)(71) (“[t]he term [‘registered organization’] also includes a series of a registered organization if the series is an organization formed or organized under the law of a single State and the statute of the State governing the series requires that the public organic record of the series be filed with the State”); see LLC Act, § 18-218; LP Act, § 17-221.
- ⁸ LLC Act, § 18-218(a); LP Act, § 17-221(a).
- ⁹ LLC Act, § 18-218(e); LP Act, § 17-221(e).
- ¹⁰ See LLC Act, § 18-1105(a)(10); LP Act, § 17-1107(a)(10).
- ¹¹ LLC Act, § 18-1107(b); LP Act, § 17-1109(a).
- ¹² LLC Act, § 18-221; LP Act, § 17-224.
- ¹³ LLC Act, § 18-215(b); LP Act, § 17-218(b); Del. S.B. 183, 149th Gen. Assem. (2018); Del. S.B. 89, 150th Gen. Assem. (2019).
- ¹⁴ See Del. S.B. 183, 149th Gen. Assem. (2018); Del. S.B. 89, 150th Gen. Assem. (2019).
- ¹⁵ See 6 Del. C. § 9-102(a)(71); LLC Act, § 18-215(b); LP Act, § 17-218(b).
- ¹⁶ LLC Act, § 18-219; LP Act, § 17-222.
- ¹⁷ LLC Act, § 18-220; LP Act, § 17-223.
- ¹⁸ See LLC Act, § 18-801; LP Act, § 17-801.
- ¹⁹ LLC Act, § 18-203; LP Act, § 17-203.
- ²⁰ *Id.*
- ²¹ See *id.*; LLC Act, § 18-201(b); LP Act, § 17-201(b).
- ²² LLC Act, § 18-801; LP Act, § 17-801.
- ²³ LLC Act, §§ 18-801 and 18-802.
- ²⁴ LP Act, §§ 17-801 and 17-802.

- ²⁵ See LLC Act, § 18-801; LP Act, § 17-801.
- ²⁶ Compare LLC Act, §§ 18-215(b)(9), 18-218(c)(9) and 18-801; compare LP Act, §§ 17-218(b)(10), 17-221(c)(10) and 17-801.
- ²⁷ LLC Act, § 18-215(b)(9); LP Act, § 17-218(b)(10).
- ²⁸ LLC Act, §§ 18-215(b)(9) and § 18-218(c)(9); LP Act, §§ 17-218(b)(10) and 17-221(c)(10).
- ²⁹ LP Act, §§ 17-218(b)(10); 17-221(c)(10).
- ³⁰ LP Act, §§ 17-218 and 17-221.
- ³¹ LLC Act, §§ 18-215(b)(10); 18-218(c)(9).
- ³² See LLC Act, § 18-215 and 18-218.
- ³³ LLC Act, § 18-806; LP Act, § 17-806.
- ³⁴ See LLC Act, §§ 18-215(d) and 18-218(f); LP Act, §§ 17-218(d) and 17-221(f).
- ³⁵ LLC Act, § 18-215(d); LP Act, § 17-218(d).
- ³⁶ *Id.*
- ³⁷ *Id.*
- ³⁸ LLC Act, § 18-218(f); LP Act, § 17-221(f).
- ³⁹ *Id.*
- ⁴⁰ *Id.*
- ⁴¹ Del. S.B. 183, 149th Gen. Assem. (2018); Del. S.B. 89, 150th Gen. Assem. (2019); LLC Act, § 18-1201, et al.; LP Act, § 17-1201, et al.
- ⁴² LLC Act, § 18-1202(a); LP Act, § 17-1202(a).
- ⁴³ *Id.*
- ⁴⁴ LLC Act, § 18-1202(b); LP Act, § 17-1202(b).
- ⁴⁵ LLC Act, § 18-1202(a); LP Act, § 17-1202(a).
- ⁴⁶ LLC Act, § 18-1202(a); LP Act, § 17-1202(a).
- ⁴⁷ *Id.*
- ⁴⁸ LLC Act, § 18-1204(a) (“[t]he members or managers or other persons with authority to manage or direct the business and affairs of a statutory public benefit limited liability company shall manage or direct the business and affairs of the statutory public benefit limited liability company in a manner that balances the pecuniary interests of the members, the best interests of those materially affected by the limited liability company’s conduct, and the specific public benefit or public benefits set forth in its limited liability company agreement and certificate of formation.”); LP Act, § 17-1204(a) (“[t]he general partners or other persons with authority to manage or direct the business and affairs of a statutory public benefit limited partnership shall manage or direct the business and affairs of the statutory public benefit limited partnership in a manner that balances the pecuniary interests of the partners, the best interests of those materially affected by the limited partnership’s conduct, and the specific public benefit or public benefits set forth in its partnership agreement and certificate of limited partnership.”).
- ⁴⁹ LLC Act, § 18-1205; LP Act, § 17-1205.
- ⁵⁰ LLC Act, § 18-1206; LP Act, § 17-1206.
- ⁵¹ LLC Act, § 18-1201; LP Act, § 17-1201.
- ⁵² LLC Act, § 18-1208; LP Act, § 17-1208.
- ⁵³ LLC Act, § 18-1201; LP Act, § 17-1201.
- ⁵⁴ Del. S.B. 183, 149th Gen. Assem. (2018); Del. S.B. 89, 150th Gen. Assem. (2019); LLC Act, § 18-217; LP Act, § 17-220.
- ⁵⁵ LLC Act, § 18-217; LP Act, § 17-220.
- ⁵⁶ See LLC Act, § 18-217(j); LP Act, § 17-220(j).
- ⁵⁷ LLC Act, § 18-217(h); LP Act, § 17-220(h).
- ⁵⁸ LLC Act, § 18-217(l)(4); LP Act, § 17-220(l)(4).
- ⁵⁹ LLC Act, § 18-217(l)(5); LP Act, § 17-220(l)(5).
- ⁶⁰ LLC Act, § 18-217(l)(6); LP Act, § 17-220(l)(6).

⁶¹ LLC Act, §§ 18-217(h)(1)d., 18-217(h)(3); LP Act, § 17-220(h)(1)d., 17-220(h)(3).

⁶² LLC Act, § 18-217(h)(3); LP Act, § 17-220(h)(3).

⁶³ *Id.*

⁶⁴ See *CompoSecure, L.L.C. v. Cardux, LLC*, 206 A.3d 807 (Del. 2018); *Absalom Trust v. Saint Gervais LLC*, 2019 WL 2655787 (Del. Ch. June 27, 2019).

⁶⁵ *CompoSecure*, 206 A.3d at 816-17.

⁶⁶ *Absalom*, 2019 WL 2655787 (Del. Ch. June 27, 2019).

⁶⁷ S Del. S.B. 114, 151st Gen. Assem. (2021); Del. S.B. 116, 151st Gen. Assem. (2021); LLC Act, § 18-106(e); LP Act, § 17-106(e).

⁶⁸ LLC Act, § 18-106(e); LP Act, § 17-106(e).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ S Del. S.B. 91, 150th Gen. Assem. (2019); Del. S.B. 89, 150th Gen. Assem. (2019); LLC Act, § 18-113; LP Act, § 17-113.

⁷⁴ LLC Act, § 18-113(a)(1); LP Act, § 17-113(a)(1).

⁷⁵ LLC Act, § 18-101(4); LP Act, § 17-101(3).

⁷⁶ LLC Act, § 18-101(5); LP Act, § 17-101(4).

⁷⁷ LLC Act, § 18-113(a)(1); LP Act, § 17-113(a)(1).

⁷⁸ LLC Act, § 18-113(a)(2); LP Act, § 17-113(a)(2).

⁷⁹ LLC Act, § 18-113(a)(3); LP Act, § 17-113(a)(3).

⁸⁰ See LLC Act, § 18-113; LP Act, § 17-113.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See Del. S.B. 91, 150th Gen. Assem. (2019); Del. S.B. 89, 150th Gen. Assem. (2019).

⁸⁵ See *id.*

⁸⁶ Del. S.B. 275, 151st Gen. Assem. (2022); Del. S.B. 274, 151st Gen. Assem. (2022); LLC Act, § 18-113; LP Act, § 17-113.

⁸⁷ LLC Act, § 18-113(b); LP Act, § 17-113(b).

⁸⁸ Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001-31 (“E-Sign Act”).

⁸⁹ LLC Act, § 18-113(c); LP Act, § 17-113(c).

⁹⁰ E-Sign Act, § 7002(a)(2).

⁹¹ LLC Act, § 18-113(c); LP Act, § 17-113(c).