

Amended Delaware Laws Allow Transactions to Be Documented Electronically, Among Other Changes



ALERT | July 23, 2019

Taylor B. Bartholomew | bartholomewt@pepperlaw.com
Matthew M. Greenberg | greenbergm@pepperlaw.com
Christopher B. Chuff | chuffc@pepperlaw.com

Governor John Carney recently signed legislation that will put into effect a variety of amendments to the Delaware General Corporation Law (DGCL), the Delaware Limited Liability Company Act (DLLCA), the Delaware Revised Uniform Limited Partnership Act (DRULPA), and the Delaware Revised Uniform Partnership Act, effective August 1, 2019. While the amendments make several changes to the statutes, the primary change is to expressly permit transactions (such as merger agreements, voting agreements, stockholder agreements, limited liability company agreements and partnership agreements) to be documented, signed and delivered electronically, including through the use of “Docu-Sign.”

THIS PUBLICATION MAY CONTAIN ATTORNEY ADVERTISING

The material in this publication was created as of the date set forth above and is based on laws, court decisions, administrative rulings and congressional materials that existed at that time, and should not be construed as legal advice or legal opinions on specific facts. The information in this publication is not intended to create, and the transmission and receipt of it does not constitute, a lawyer-client relationship. Please send address corrections to phinfo@pepperlaw.com.

© 2019 Pepper Hamilton LLP. All Rights Reserved.

The Safe Harbor Provisions

As noted above, the primary change to the statutes is the adoption of nonexclusive safe harbors that permit transactions to be documented through electronic means. Importantly, the governing documents of a Delaware entity (such as the certificate of incorporation or bylaws of a corporation, or the limited liability agreement of a limited liability company) can override the application of the safe harbor provisions, but the prohibition must be expressly stated. A provision that merely specifies that an act or transaction will be documented in writing, or that a document will be signed or delivered manually, will not prohibit application of the safe harbor provisions. Unless otherwise provided in the governing documents of a Delaware entity or as agreed upon by the sender and recipient, an electronic transmission is deemed delivered to a person when it enters an information processing system that the person has designated for the purpose of receiving the electronic transmission. An electronic transmission is deemed delivered even if no person is aware of its receipt. For instance, if sent by email, a document will be deemed delivered under the safe harbors at the time the email is sent.

Corporate Notices

Some of the most notable amendments to the statutes apply uniquely to corporations. Under amended sections 222 and 232 of the DGCL, a corporation may send notices to its stockholders (including notices of stockholder meetings, stockholder action taken by non-unanimous written consent, and appraisal) via email. This significant revision reverses previous section 232 of the DGCL, which provided that a stockholder must have expressly consented to the receipt of notice by electronic transmission for the notice to be effective. Corporations should especially be aware that amended section 232 requires that any notice given by email include a prominent legend that the communication is an important notice regarding the corporation. A notice may not be given by email after the corporation is both unable to deliver two consecutive notices or the inability to deliver becomes known to the secretary of the corporation or another person responsible for giving notice.

Limited Partnerships – Division, Registered Series and Public Benefit

The amendments to the DRULPA effect a number of changes that are substantially similar to some of the 2018 amendments to the DLLCA (a summary of which can be found here). In particular, the DRULPA is being amended to allow for the division of a limited partnership into two or more limited partnerships to facilitate greater flexibility in business transactions. In addition, in order to facilitate secured financing transactions through

limited partnerships, the amendments to the DRULPA provide that a limited partnership may create a registered series. As in the case of a registered series created under the DLLCA, a registered series will qualify as a registered organization under the Uniform Commercial Code and will be subject to the provisions of the UCC regarding security interests. Registered series will also be able to obtain certificates of good standing from the Delaware Secretary of State. Finally, the amendments to DRULPA provide for the formation of statutory public benefit limited partnerships, which, like public benefit corporations, are intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner.

Resignation of Registered Agent

The amendments provide registered agents of Delaware corporations, limited liability companies, limited partnerships and general partnerships with the ability to resign without appointing a successor registered agent, including in circumstances where any such entity has become void for failure to pay franchise taxes and annual fees. To resign, a registered agent must give the entity at least 30 days' notice before filing a certificate of resignation with the Delaware Secretary of State.