

Amendments to the Delaware Limited Liability Company Act

Amendments to the Delaware Limited Liability Company Act (the "DLLCA") previously introduced in April 2018 were signed into law on July 24, 2018¹. The amendments enable a Delaware limited liability company (an "LLC") to engage in several new forms of transactions including: the (1) division of an LLC into two or more separate LLCs, (2) formation of registered series of LLCs and statutory public benefit LLCs and (3) use of blockchain technology for maintenance of LLC records and for electronic transmissions.

I. Division of LLCs

Overview

Effective August 1, 2018, an LLC may divide itself, and its assets and liabilities, into two or more LLCs and then either terminate or continue the dividing LLC's existence. Dividing an LLC may be beneficial in many types of structuring transactions such as spinoffs, sales of one or more lines of business, or sales of assets along with related liabilities, thereby eliminating the need to transfer or assign assets and liabilities to newly formed LLCs. The division of an LLC may also be used to streamline the sale of separate lines of business to separate buyers simultaneously, allowing the equity interests in the newly divided LLCs to be issued solely to the buyers of such lines of business.

Effecting a Division

The division of an LLC is effected through a "plan of division" adopted by the dividing LLC. If the LLC agreement of the dividing LLC contains provisions regarding the approval needed to effect a merger, a plan of division will require the same approval. If the LLC agreement is silent, approval of more than 50% of the interests in the profits of the dividing LLC is required. The plan of division (1) guides the allocation of the LLC's assets and liabilities among the newly created LLCs (the "resulting companies"), (2) specifies whether the dividing LLC continues and under what terms, and (3) creates the new LLC agreements for the resulting companies. The assets and liabilities allocated by such plan of division need only to be reasonably identified, rather than specifically identified.

Upon consummation of a division, each resulting company owns the assets and is responsible for the liabilities of the dividing LLC allocated to it by the plan of division (assuming such allocation does not constitute a fraudulent transfer). In the event of a fraudulent transfer, or a failure to allocate debts and liabilities in the plan of division, the dividing company (if surviving) and all resulting companies are jointly and severally liable at law regardless of any provision in the plan of division that states otherwise. If the dividing LLC survives, its interests may remain outstanding; if the dividing LLC terminates, its interests may be exchanged for, or converted into, cash, property or interests in one or more of the resulting companies or in any other business entity.

The plan of division is not required to be filed with the Delaware Secretary of State. To effect the division, a short form certificate of division (similar to a certificate of merger) is filed. The division becomes effective on the date filed or the date specified on the certificate. To enable creditors to follow their claims from the dividing LLC to the resulting companies, the certificate of division is required to name a division contact who must keep a copy of the plan of division for six years following the division. This contact is also responsible for providing any creditor of the dividing LLC with the name and address of the resulting companies to which such creditor's claim was allocated.

¹ A copy of the bill can be found here <https://legis.delaware.gov/BillDetail/26554>.

The amendments to the DLLCA specifically provide that “[t]he rights, privileges, powers and interests in property of the dividing company that have been allocated to a division company, as well as the debts, liabilities and duties of the dividing company that have been allocated to such division company pursuant to a plan of division, shall remain vested in each such division company and shall not be deemed, as a result of the division, to have been assigned or transferred to such division company for any purpose of the laws of the State of Delaware.”² The provision clarifies that a division is not an assignment or transfer and therefore would not trigger any contractual provisions requiring consent to assignment or transfer taxes under Delaware law. However, the laws of each other applicable jurisdiction should be consulted to confirm such treatment.

II. Considerations for Existing and Future Contracts

While credit agreements, indentures and other contracts typically contain covenants addressing mergers, asset sales and similar transactions, they do not specifically cover divisions. If an LLC formed prior to August 1, 2018 is a party to any agreement entered into prior to that date containing a provision restricting, conditioning or prohibiting mergers, consolidations or transfers of assets by such LLC, the new rule provides that such restriction will be deemed to apply to any attempted division by such LLC.

Parties that enter into agreements with LLCs on or after August 1, 2018, that wish to restrict, condition or prohibit LLC divisions must specifically provide for same in their agreements. As such, when entering into new agreements or amending existing agreements, the parties should: (1) update definitions to include transfers of assets effected by a division, (2) expand any covenants related to mergers and transfers of assets to include LLC divisions, (3) modify covenants that require future entities to take action (for example, to deliver collateral or guarantees) to specifically include future LLCs formed by division, (4) revise non-assignment provisions to specifically address allocation of assets and liabilities by division and (5) expand any approvals needed for mergers or transfers of assets to include divisions.

III. Other Amendments to the DLLCA

Formation of registered series of LLCs

To address concerns and limitations that have been discovered in existing series of LLCs, the amendments authorized a new type of series of LLC: a "registered series." Limitations addressed by the registered series include (1) the inability of an existing series to obtain a goodstanding certificate for an LLC entity, (2) the inability of an existing series to merge with other series of the same LLC and (3) the fact that existing series are not considered "registered organizations" for purposes of the Uniform Commercial Code, thereby affecting perfection of security interests. The form of LLC series that existed before the amendments is henceforth referred to as "protected series."

Statutory public benefit LLCs

The amendments provide for the formation of public benefit LLCs. Public benefit LLCs are intended, like public benefit corporations, to produce a public benefit and to operate in a responsible and sustainable manner, such as an artistic, charitable, cultural, religious or educational benefit.

² § 18-217(1)(8).

Cancellation of LLC

The amendments provide the Delaware Attorney General with the authority to file a motion to cancel a certificate of formation of any LLC for abuse of its powers, privileges, or existence.

Use of blockchain technology

Pursuant to the new amendments, LLCs may use networks of electronic databases, known as blockchains or distributed ledgers, to create and maintain records. A similar amendment was also made to the Delaware Revised Uniform Limited Partnership Act for limited partnerships.

IV. Conclusion

Each of the amendments discussed herein became effective August 1, 2018, except for the amendments relating to registered series, which will become effective August 1, 2019. Previously announced amendments to the Delaware General Corporate Law were also signed into law effective August 1, 2018. A link to our firm memo outlining those amendments can be found [here](#).

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Helene Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; or Kaitlyn Pasco at 212.701.3859 or kpasco@cahill.com.