2019 AMENDMENTS AFFECTING DELAWARE ALTERNATIVE ENTITIES

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Important amendments to Delaware's alternative business entity statutes, namely, the Delaware Revised Uniform Partnership Act, 6 *Del. C.* § 15-101, *et seq.* ("DRUPA"), the Delaware Revised Uniform Limited Partnership Act, 6 *Del. C.* § 17-101, *et seq.* ("DRULPA"), and the Delaware Limited Liability Company Act, 6 *Del. C.* § 18-101, *et seq.* ("DLLCA" and, collectively with DRUPA and DRULPA, the "Alternative Entity Statutes")[2], became effective on August 1, 2019 (the "2019 Amendments"). This article briefly summarizes the more significant of those amendments.

The amendments to DRULPA discussed below relating to protected series, registered series, divisions and statutory public benefit limited partnerships bring DRULPA in line for Delaware limited partnerships ("LPs") with similar amendments to the DLLCA adopted in 2018 for Delaware limited liability companies ("LLCs"). [3] In this regard, note that the amendments to the DLLCA adopted in 2018 relating to protected series and registered series also by their terms first became effective on August 1, 2019.

In addition, the amendments to DRUPA discussed below confirming the ability to use networks of electronic databases with respect to Delaware general partnerships ("GPs") bring DRUPA in line with similar amendments to DRULPA, the DLLCA and the Delaware Statutory Trust Act, 12 *Del. C.* § 3801, *et seq.* ("DSTA"), adopted in 2018 for LPs, LLCs and Delaware statutory trusts.

ELECTRONIC SIGNATURE AND DELIVERY OF DOCUMENTS

The 2019 Amendments add new sections to DRUPA, DRULPA and the DLLCA that establish safe harbor methods for certain acts or transactions to be reduced to a written or electronic document and signed and delivered in a document manually or electronically. The 2019 Amendments were developed based on existing language in the Alternative Entity Statutes dealing with electronic transmissions as well as the Delaware Uniform Electronic Transactions Act ("UETA") and the Model Business Corporation Act. The 2019 Amendments confirm that LLCs and partnerships can enter into and deliver agreements using "Docusign" and similar electronic means.

It is important to understand that the safe harbor provisions of the 2019 Amendments apply solely for purposes of determining whether an act or transaction has been documented, and whether a document has been signed and delivered, in accordance with the provisions of the amendments and the limited liability company agreement ("LLC Agreement") or partnership agreement, as the case may be. Coverage under the safe harbor provisions does not negate other grounds for questioning the validity of the act or transaction, such as the statute of frauds or any other law that might require actions to be documented or documents to be signed and delivered, in a specified manner. To the extent that a transaction involves distinct aspects, some covered by the Alternative Entity Statutes and others not, only the aspects governed by the Alternative Entity Statutes are governed by the

2019 Amendments. Any other acts or transactions that need to be documented or reduced to a written or electronic document and signed and delivered can be so documented, reduced to writing, signed and delivered in accordance with the provisions of UETA.

There are certain types of actions and documents that are not governed by the 2019 Amendments. They include documents filed with the Delaware Secretary of State, documents filed with any court, judicial or governmental body of the State of Delaware, certificates representing interests in an LLC or partnership, matters relating to registered agents and service of process upon LLCs, partnerships, members and partners, matters relating to foreign LLCs and partnerships and matters relating to derivative actions. The 2019 Amendments make clear that the exclusion of these specific matters from the scope of the amendments is not intended to suggest that those matters may not be effected by electronic or other means, but, rather, that the amendments may not be relied on as a basis for documenting an act or transaction, or signing or delivering a document, if the exclusions apply. It should be noted that documents to be filed with the Delaware Secretary of State may already be signed using "Docusign" and similar electronic means.

As is the case with many provisions of the Alternative Entity Statutes, the 2019 Amendments make clear that an LLC Agreement or partnership agreement may restrict taking advantage of the new provisions, but any restriction must be expressly stated. For example, a provision merely stating that an act or transaction is to be documented in writing, or that a document is to be signed or delivered manually, does not adequately restrict the new provisions.

Finally, the 2019 Amendments address the interaction between the new provisions and the Electronic Signatures in Global and National Commerce Act (the "E-Sign Act"). In this regard, the 2019 Amendments are stated to control except to the extent preempted by the E-Sign Act.

PROTECTED SERIES AND REGISTERED SERIES

Section 17-218 of DRULPA currently permits an LP in its partnership agreement ("LP Agreement") to establish one or more designated series of general partners, limited partners, partnership interests or assets. Section 17-218 of DRULPA further provides that to the extent records are maintained that account for the assets associated with such series separately from the assets associated with the LP generally or any other series thereof, and if a general notice of the limitation on liabilities of such series under Section 17-218 of DRULPA is set forth in the certificate of limited partnership of the LP filed with the Delaware Secretary of State, then, unless otherwise provided in the LP Agreement, (i) the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable only against the assets of such series and any general partner associated with such series, and not against the assets of the LP generally, any other series thereof or any general partner not associated with such series, and (ii) none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the LP generally or any other series thereof shall be enforceable against the assets of such series or any general partner associated with such series that is not also a general partner of the LP generally or a general partner of such other series, as the case may be (the concepts in (i) and (ii) being referred to herein as the "interseries limitation on liability"). The 2019 Amendments to DRULPA entirely retain this concept; however, any series established under Section 17-218 of DRULPA (whether established before or after the effective date of such 2019 Amendments) will now be referred to as "protected series." In this regard, to ensure that there is no requirement that current certificates of

limited partnership on file with the Delaware Secretary of State that already contain the notice of the interseries limitation on liability and contemplate series but do not refer to them as “protected series” need to be amended, the 2019 Amendments to DRULPA clarify that the notice of the interseries limitation on liability contained in the certificate of limited partnership need not use the term “protected” when referencing series or include a reference to Section 17-218 of DRULPA.

In addition, the 2019 Amendments add a new Section 17-221 to DRULPA to provide for the formation of a new type of designated statutory series of general partners, limited partners, partnership interests or assets of an LP known as a “registered series.” Registered series, and the provisions of DRULPA related thereto, are similar to those for protected series under Section 17-218 of DRULPA, including with respect to the interseries limitation on liability. However, the statutory provisions relating to registered series differ from protected series in several significant respects. First, in order to form a registered series, a separate certificate of registered series must be filed with the Delaware Secretary of State. The name of such registered series contained in its certificate of registered series must begin with the name of the LP itself and must also be distinguishable from the name of other business entities (or, if applicable, registered series thereof) reserved, registered, formed, organized or qualified to do business in Delaware. In addition, the name of each general partner of such registered series must be included in its certificate of registered series. Second, the Delaware Secretary of State will charge an annual franchise tax on each registered series in the amount of $75. Finally, the Delaware Secretary of State will have the ability to issue a certificate of good standing and certificate of existence with respect to each registered series.

To facilitate the use of registered series by an LP without having to amend its current certificate of limited partnership and partnership agreement that already contemplates its having series under Section 17-218 of DRULPA, Section 17-221 of DRULPA clarifies that neither a partnership agreement nor a certificate of limited partnership needs to use the term “registered series” or specifically refer to Section 17-221 of DRULPA, but rather that, with respect to a registered series of an LP, including a registered series resulting from the conversion of a protected series to a registered series, references therein may continue to refer to “series” and Section 17-218 of DRULPA, and such references shall be deemed to be a reference to “registered series” and Section 17-221 of DRULPA with respect to such registered series.

It is also worth noting that regardless of whether the LP has protected series and/or registered series, the 2019 Amendments to DRULPA confirm that an LP must have at least one general partner of the LP generally and at least one general partner associated with each of its protected series and registered series. While the general partners of the LP generally and associated with each protected series and registered series can be the same or can be different, the 2019 Amendments to DRULPA clarify that (i) if a partnership agreement does not designate a general partner of a particular protected series or registered series, then each general partner of the LP generally shall be deemed to be a general partner associated with such series, and (ii) if a partnership agreement does not designate a general partner of the LP generally, then each general partner of LP not associated with a protected series or a registered series shall be deemed to be a general partner of the LP generally, but if there is no such general partner, then each general partner of each protected series and registered series shall be deemed to be a general partner of the LP generally.

The 2019 Amendments also add new Sections 17-222, 17-223 and 17-224 to DRULPA which, respectively, provide for (i) the conversion of a protected series of an LP to a registered series of such LP, (ii) the conversion of

a registered series of an LP to a protected series of such LP, and (iii) the merger or consolidation of one or more registered series of an LP with or into one or more other registered series of the same LP.

The 2019 Amendments to DRULPA with respect to protected series and registered series correspond to similar amendments made to the DLLCA in 2018 for LLCs. Such amendments to the DLLCA, although adopted in 2018, were by their terms not effective until August 1, 2019. [4] A primary purpose for adopting the amendments to the DLLCA and DRULPA to provide for registered series is to more easily facilitate the use of statutory series of LLCs and LPs in certain commercial financing transactions, particularly where the assets of such series are being pledged as security. Importantly, the requirement that a filing be made in order to form a registered series is intended to, among other things, enable a registered series to qualify as a "registered organization" under Article 9 of the Uniform Commercial Code. To this end, the Delaware Uniform Commercial Code confirms that a registered series of an LLC and an LP falls within the meaning of the term "registered organization." In this manner, the intention is to provide that to the extent that a security interest in relevant collateral granted by a registered series can be perfected by the filing of a financing statement, the appropriate jurisdiction in which to file would be Delaware, since it is the jurisdiction of organization of such "registered organization." However, it should be noted that the law governing the applicable security agreement initially applies to determine where a perfection filing must be made. Accordingly, to the extent that the law governing the security agreement is not Delaware and the Uniform Commercial Code in such jurisdiction does not contain similar language to the Delaware Uniform Commercial Code with respect to registered series, consideration will need to be given as to whether a registered series nonetheless qualifies as a registered organization under the Uniform Commercial Code as in effect in such other jurisdiction.

DIVISIONS

Similar to amendments made to the DLLCA in 2018, the 2019 Amendments to DRULPA add a new Section 17-220 to DRULPA to authorize an LP (a "dividing partnership") to divide into one or more newly formed LPs (a "division partnership" or the "division partnerships") with the dividing partnership either continuing in existence or terminating its existence in connection with the division. In order to approve a division, an LP must adopt a plan of division and file a certificate of division with the Delaware Secretary of State along with a certificate of limited partnership for each division partnership being created in connection with the division. If the LP Agreement of the dividing partnership provides for the manner of adopting a plan of division, the plan of division must be adopted in that manner. Otherwise, a plan of division must be adopted in the same manner as the LP Agreement provides for the adoption of a merger or, failing a provision addressing mergers, by all general partners of the dividing partnership and the limited partners of the dividing partnership who own more than 50 percent of the then-current percentage or other interests in profits of the dividing partnership. Additionally, a plan of division must be approved by any person who, at the effective time of the division, will be a general partner of any division partnership. A certificate of division is filed by the dividing partnership and executed on its behalf by at least one general partner of the dividing partnership, while the certificate of limited partnership for a division partnership is executed by all general partners of such division partnership.

The division amendments contain a variety of concepts analogous to those in the merger provision of DRULPA, including those relating to the conversion or exchange of rights, securities or interests in the dividing partnership, the amendment or adoption of a new LP Agreement for the dividing partnership and the contents of a certificate of

division. The division amendments also require that the plan of division effect the adoption of a new LP Agreement for each division partnership.

A division does not affect the personal liability of any person (including any general partner of the dividing partnership) incurred prior to the division with respect to matters arising prior to such division nor does it affect the validity or enforceability of any obligations or liabilities of the dividing partnership incurred prior to a division. However, so long as the plan of division does not constitute a fraudulent transfer under applicable law, upon the effectiveness of the division, the pre-division debts, obligations and liabilities of the dividing partnership are valid and enforceable only against the division partnership to which they have been allocated in the plan of division, in such a manner and basis and with such effect as is specified in such plan of division, and not against any other division partnership. All of the division partnerships are jointly and severally liable for any debts and liabilities that are either not allocated pursuant to the plan of division to one or more division partnerships or those as to which a court of competent jurisdiction determines a fraudulent transfer pursuant to the plan of division has occurred. In order to preserve records relating to obligations and liabilities of the dividing partnership, a “division contact” is required to be set forth in the certificate of division and to serve for a period of six years, during which period the division contact will provide to any creditor upon written request the name and address of the division partnership to which such creditor's claim was allocated pursuant to the plan of division.

The new provision of DRULPA on divisions is effective on August 1, 2019 and is available to any LP; however, for any LP formed prior to August 1, 2019, if such LP is a party to any written contract, indenture or other agreement entered into prior to August 1, 2019 that, by its terms, restricts, conditions or prohibits mergers, consolidations or transfers of assets, then those restrictions, conditions or prohibitions shall apply to a division to the same extent as they apply to mergers, consolidations or transfers of assets.

CONFIRMATION OF AVAILABILITY OF CONTRACTUAL APPRAISAL RIGHTS

Both the DLLCA (Section 18-210) and DRULPA (Section 17-212) have for many years allowed for a permissive right to expressly provide in an LLC Agreement or LP Agreement or in an agreement or plan of merger or consolidation for the availability of contractual appraisal rights (and grant the Delaware Court of Chancery jurisdiction to hear and determine any matter relating to any such appraisal rights) with respect to an interest in an LLC or LP for members and partners (or any class, group or series thereof or of such interests) in certain circumstances (*i.e.*, the amendment of the LLC Agreement or LP Agreement, a merger or consolidation with another entity, a conversion to another form of entity, a transfer to or domestication or continuance in another jurisdiction or the sale of all or substantially all of the assets of the LLC or LP). The 2019 Amendments expand such provisions of the DLLCA and DRULPA to provide that such contractual appraisal rights may also be (i) provided for in a plan of division and (ii) made available in connection with a merger or consolidation of a registered series of an LLC or LP, any division of an LLC or LP, a conversion of a protected series of an LLC or LP to a registered series of such LLC or LP and a conversion of a registered series of an LLC or LP to a protected series of such LLC or LP.

STATUTORY PUBLIC BENEFIT LIMITED PARTNERSHIPS

Similar to amendments made to the DLLCA in 2018 (as well as prior amendments made to the Delaware General Corporation Law), the 2019 Amendments to DRULPA add a new subchapter XII to DRULPA specifically authorizing the formation of a “statutory public benefit limited partnership” (an “SPBLP”). An SPBLP is a for-profit

LP that is formed with the intention to produce a public benefit (as defined in the new subchapter) and operate in a responsible and sustainable manner. Prior to the adoption of new subchapter XII to DRULPA, the provisions of DRULPA (similar to the provisions of the DLLCA prior to the adoption of 2018 amendments thereto to provide for statutory public benefit LLCs) offered enough flexibility to allow the formation of an LP that, through the provisions of its LP Agreement, could be operated for a public benefit and in a similar manner, which remains permissible and is not changing (as is the case with LLCs). Like with statutory public benefit LLCs, the intention behind expressly providing for the formation of an SPBLP is to allow for the efficient creation of a “standard” public benefit LP, to which certain restrictions and requirements automatically apply by statute.

In order to form an SPBLP, the certificate of limited partnership filed with the Delaware Secretary of State must (i) state in its heading that it is an SPBLP and (ii) set forth one or more specific public benefits to be promoted by it. Once such a filing is made, certain provisions of the new subchapter XII automatically will apply to the SPBLP and cannot be modified or overridden in its LP Agreement. These provisions include the vote of partners required for the taking of actions that would cause the SPBLP to cease to be such an entity or would cause the partners to become associated with another entity that is not for a similar public benefit. The SPBLP is also required by the new subchapter to provide its limited partners no less than biennially a statement as to the SPBLP's promotion of the public benefit or benefits set forth in its certificate of limited partnership and as to the best interests of those materially affected by the SPBLP's conduct.

In addition, the management of an SPBLP (whether a general partner or other persons with authority to manage or direct the business and affairs of the SPBLP) are required by the new subchapter to manage the SPBLP in a manner that balances the partners' pecuniary interests, the best interests of those materially affected by the SPBLP's conduct, and the specific public benefit or benefits set forth in its certificate of limited partnership. This balancing requirement statutorily replaces any related modification or elimination of fiduciary duties that might otherwise have been permitted or provided for in the LP Agreement of the SPBLP, although the provisions of new subchapter XII also provide that a person will be deemed to satisfy its fiduciary duties to the SPBLP and its limited partners with respect to a decision implicating such balancing requirement if “such person's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.”

It is again important to note that, prior to and continuing after the addition of new subchapter XII of DRULPA, with respect to a non-SPBLP, DRULPA expressly permits the duties (including fiduciary duties) of partners to be restricted or even eliminated in an LP Agreement. Accordingly, while by default, and if not otherwise modified in an LP Agreement, a general partner of an LP will have a full duty of loyalty and care similar to that of a director of a Delaware corporation, through a properly drafted LP Agreement, an LP that is to be operated for a public benefit but does not specifically become an SPBLP may already modify the default fiduciary duties of its general partners and specify such persons and interests that such general partners may consider (or not consider) when making determinations. As a result, an LP's becoming an SPBLP may well have the adverse effect of increasing the persons and interests that the general partners are required to consider when acting, to the extent that the fiduciary duties of such general partners would have otherwise been further modified or eliminated in the LP Agreement given that new subchapter XII of DRULPA expressly provides that the LP Agreement of an SPBLP may not contain any provisions inconsistent with subchapter XII.

For this reason, among others, new subchapter XII of DRULPA expressly confirms that, even if not being formed as an SPBLP, an LP may still be formed or operated for a public benefit and be designated as a public benefit

limited partnership. While doing so may, in practice, require careful drafting of the LP Agreement, it also affords the ability therein to modify the restrictions and requirements that would otherwise apply under subchapter XII of DRULPA, including with respect to relevant fiduciary duties and voting and reporting requirements. Consideration should, therefore, be given as to whether forming as an SPBLP is appropriate in all circumstances, even when the intention is for the LP to be operated for the promotion of a public benefit.

BLOCKCHAIN AND DISTRIBUTED LEDGERS

Similar to amendments made to the DLLCA, DRULPA and the DSTA in 2018, the 2019 Amendments to DRUPA provide specific authority for GPs to use networks of electronic databases, such as blockchain and distributed ledgers, for the creation and maintenance of GP records and for certain electronic transmissions. While DRUPA (similar to the DLLCA, DRULPA and the DSTA prior to the related 2018 amendments) was believed to provide sufficient flexibility for the use of such networks of electronic databases even without the 2019 Amendments, providing explicit authority was deemed beneficial both to make DRUPA consistent with the other Alternative Entity Statutes on this issue and given the increased frequency with which such mechanisms are anticipated to be used in the future.

CONCLUSION

By clarifying existing law where clarifications were deemed beneficial, and by creating more flexibility where additional statutory or contractual freedoms were viewed as advantageous, the 2019 Amendments continue Delaware's leadership as the jurisdiction of choice for the formation and utilization of all types of business entities.

NOTES

[1] Scott Waxman and Eric Feldman are Partners in the Wilmington, Delaware office of K&L Gates LLP, both of whom serve on the drafting committees for the statutes discussed herein. This article is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

[2] Note that no 2019 amendments were made to the Delaware Statutory Trust Act, 12 *Del. C.* § 3801, *et seq.*

[3] Please see our article from last year regarding the 2018 amendments to the Alternative Entity Statutes by clicking this link.

[4] Note that the 2019 Amendments to the DLLCA adopted certain conforming amendments with respect to protected series and registered series, intended to make the sections of the DLLCA and DRULPA relating to protected series and registered series consistent.

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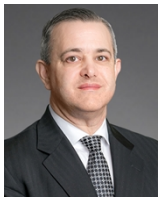

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