



Game on – the Delaware LLC Act Amendments Are in Play!

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Overview

- Amendments to the Delaware Limited Liability Company Act (6 *Del. C.* § 18-101 *et seq.*) (the LLC Act) effective August 1, 2018 allow the division of an LLC into two or more separate LLCs
 - Divisions are covered in Section 217 of the LLC Act
- Amendments to the LLC Act regarding Series LLCs enacted August 1, 2018 but effective August 1, 2019
- LLC Act is viewed to be enabling in nature, and division amendments are considered to further this purpose

Overview of Division

- Applies only to LLCs
- Legislation is expected to be introduced to make corresponding amendments to the Delaware Revised Uniform Limited Partnership Act (LP Act) effective August 1, 2019
- No equivalent or proposed legislation for corporations
- Essentially a “de-merger” or the reverse of a merger
- Only a few jurisdictions; fulfills the enabling philosophy of the LLC Act
- Why do it?
 - Split-off/spin-off, separate pools of assets/liabilities

Overview of Division

- No requirement that the domestic LLC (“dividing company”) must survive the division
- Dividing company can be cancelled by division
- Filings – surviving company, if any, or any other division company files
 - Plan of division
 - Certificate of Division for surviving dividing company, if any, and for each new LLC formed by the division (“division company”) (filed with Secretary of State)
 - Acts as certificate of cancellation for a dividing company that is not a surviving company
 - Certificate of Formation for each resulting division company (filed with Secretary of State)

Creditor Considerations

- Power to divide can be prohibited in the limited liability company agreement (the “LLCA”)
- Plan of division must identify a division contact
 - Contact serves for 6 years following effectiveness of division
 - Contact provides, without cost, to any creditor of the dividing company, within 30 days of receipt of a written request from creditor, the name and business address of the division company to which the claim of such creditor was allocated

Creditor Considerations

- Assets of the dividing company are allocated to each division company according to the plan of division and each division company will be liable for the debts, liabilities, and duties of the original LLC as allocated to each of them
 - No other division company will be liable for those obligations *unless* the plan of division constitutes a fraudulent transfer under applicable law
 - If there is a fraudulent transfer, each division company will be jointly and severally liable for the obligations
- Debts and liabilities of the dividing company that are not allocated by the plan of division will be the joint and several debts and liabilities of all division companies

Authority Considerations

- Authorization – voting is as provided in the LLCA; if not so provided (and not prohibited), then as provided for merger in the LLCA; if not so provided, then effectively same approval as statutory merger vote (i.e., more than 50% vote)
- Pursuant to a plan of division, a dividing company may be divided into 2 or more division companies
- Power to divide can be prohibited in the LLCA
 - If not prohibited, the LLCA may specify the manner of adopting a plan of division, consistent with Delaware’s general deference to contracting parties
- Certificates of Division and Certificates of Formation for division companies must be executed by one or more authorized persons on behalf of each such division company
- Plan of division must identify a division contact who must be available for 6 years to identify for creditors the liabilities of division companies

Plan of Division

- May effect amendment to the LLCAs or adoption of new LLCAs, if dividing company is a surviving company
- Required: adoption of a new LLCAs for each resulting company (i.e., each LLC formed as a result of the division)
- Amendments/adoption of new LLCAs effective at effective time of division (same as merger)

Plan of Division

- Must set forth:
 - Terms and conditions of the division, including:
 - Any conversion/exchange of LLC interests
 - Allocation of assets, property, rights, series, debts, liabilities, duties of dividing company among division companies
 - Name of each resulting company and, if dividing company will survive, name of surviving company
 - Name and business address of a division contact having custody of a copy of the plan of division
 - Contact serves for 6 years following effectiveness of division
 - Contact provides, without cost, to any creditor of the dividing company, within 30 days of receipt of a written request from creditor, the name and business address of the division company to which the claim of such creditor was allocated
 - Any other matters

Division

- Authorization – voting is as provided in the LLCA; if not so provided (and not prohibited), then as provided for merger in the LLCA; if not so provided, then effectively same approval as statutory merger vote (i.e., more than 50% vote)
- Dividing company is subdivided into distinct and independent entities and if it's not a surviving company, its existence ceases; allocation of assets/liabilities in plan of division causes them to vest as so allocated or if not allocated, joint and several; actions may continue against surviving company or any resulting company with the applicable assets

Division

- Dividing company's assets remain vested and shall not be deemed, as a result of the division, to have been assigned or transferred to the division companies for DE law purposes
 - A division is not a distribution for purposes of the LLC Act
 - No division company is liable for obligations of the dividing company that are allocated to another division company unless the plan of division is a fraudulent transfer under applicable law, in which case all liabilities will be joint and several
 - Unallocated debts and liabilities of the surviving dividing company are the joint and several debts and liabilities of all resulting division companies

Division

- If a dividing company is a party to any contract, indenture or other agreement prior to August 1, 2018 that, by its terms, restricts, conditions or prohibits merger or consolidation or the transfer of assets by the dividing company, then such restriction, condition or prohibition shall be deemed to apply to division

Series LLCs

- Recent amendments to Delaware Revised Uniform Limited Partnership Act, Delaware Revised Uniform Partnership Act and Delaware Limited Liability Company Act
- Most amendments apply only to limited liability companies
- Amendments are effective August 1, 2019

Series LLCs

What is a series LLC?

- An internal cell within an LLC that may have a separate business purpose or investment objective and separate rights, powers and duties with respect to specified assets and liabilities of the LLC
- A goal of setting up a series LLC is to have the following inter-series liability protections:
 - Debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a series are enforceable against the assets of that series only, and not against the assets of the LLC generally or any other series
 - None of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the LLC generally or any other series thereof are enforceable against the assets of a particular series
- Series are not separate entities but have similarities to separate legal entities
 - Power and capacity to contract, hold title to assets, grant liens and security interests, and sue and be sued in its own name

Series LLCs

Series have traditionally faced several practical problems

- Inter-series liability protections may not be respected by jurisdictions outside of Delaware
- A series is not a separate person under the United States Bankruptcy Code
- A series is not a registered organization under the UCC
- Operating agreements tend to be complex and expensive
- Lenders are not all comfortable with series LLCs

Series LLCs

Amendments revise existing series provisions

- Three types of series recognized
 - A series created under the existing series provisions that have inter-series liability protections will be referred to as a “protected series”
 - Amendments clarify provisions regarding protected series but do not otherwise significantly alter the features of the protected series
 - Protected series do not require a filing with the Secretary of State but rather are established by the appropriate enabling provisions in the LLCA

Series LLCs

- A new registered series can be formed
 - Registered series will qualify as a registered organization under the UCC
 - Registered series are formed by filing a Certificate of Registered Series with the Secretary of State
 - Registered series will have inter-series liability protections
 - Registered series has more entity characteristics than protected series
 - Can merge with or into one or more registered series of the same LLC
 - Delaware Secretary of State can issue certificates of good standing
 - Annual franchise tax of \$75
 - Can convert to protected series and vice versa

Series LLCs

- A series that is neither a protected series nor a registered series
 - No inter-series liability protections
 - Contractual series where members agree among themselves that the series has certain features (e.g., that each series votes separately) but these features do not bind third parties
 - No separate filing is necessary, only the appropriate enabling provisions in the LLCA

Series LLCs

- Practical problems with series remain but are diminishing
 - Registered series is a registered organization under the UCC
 - As series become more popular, the inter-series liability protections should be respected by other jurisdictions
 - Many states have now adopted series provisions
 - Certain jurisdictions that do not recognize series may still “pierce the veil” between separate series of one LLC
 - Federal bankruptcy laws remain a problem, as an individual series may not file for bankruptcy without putting the LLC or other series into bankruptcy
 - Delaware has modernized its provisions to allow for proliferation of series as soon as these problems are eliminated

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