

**DELAWARE UPDATE – 2007 LEGISLATION AMENDING
CERTAIN ALTERNATIVE ENTITY LAWS
AND ARTICLES 8 & 9 OF DELAWARE’S UCC**

by

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In its legislative session ended June 30, 2007, the Delaware General Assembly enacted amendments to the Delaware Limited Liability Company Act, 6 Del. C. § 18-101 et seq. (the “DLLC Act”), the Delaware Revised Uniform Limited Partnership Act, 6 Del. C. § 17-101 et seq. (the “DLP Act”), and Articles 8 and 9 of the Uniform Commercial Code as in effect in the State of Delaware, 6 Del. C. § 1-101 et seq. (respectively, “Delaware Article 8” and “Delaware Article 9”). The amendments to the DLLC Act and the DLP Act took effect on August 1, 2007; the amendments to Delaware Article 8 and Delaware Article 9 took effect upon enactment into law on July 5, 2007.

The amendments to the DLLC Act and the DLP Act are substantially similar. Most significant, perhaps, are those amendments relating to limited liability company agreements and partnership agreements, and those amendments dealing with series. Limited liability company agreements and partnership agreements, in addition to being written or oral, may be implied, and may be entered into or otherwise exist before, after, or at the time a certificate of formation or certificate of limited partnership is filed. Limited liability companies can have one or more designated series of members, managers, limited liability company interests, or assets, and limited partnerships can have one or more designated series of limited partners, general partners, partnership interests, or assets. Assets associated with a series may be held directly or indirectly, including in the name of such series, in the name of the limited liability company or limited partnership, through a nominee, or otherwise.

The amendments to Delaware Article 8 and Delaware Article 9 provide additional methods by which secured parties may obtain control of (and thus perfect security interests in) deposit accounts, securities accounts, uncertificated securities, and security entitlements.

This article summarizes these amendments to the DLLC Act (Senate Bill No. 96, 76 Del. Laws 105), the DLP Act (Senate Bill No. 95, 76 Del. Laws 104), and Delaware Article 8 and Delaware Article 9 (Senate Bill No. 120, 76 Del. Laws 92).

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DLLC ACT AMENDMENTS.

The DLLC Act was amended by Senate Bill No. 96, 76 Del. Laws 105, effective August 1, 2007.

Certain definitions have been amended. Section 18-101(7) provides that limited liability company agreements can be not only written or oral, but implied, as well. Conforming changes appear in Section 18-201(d) and conforming and other technical changes appear in Section 18-101(11).

Section 18-104(a)(2) confirms that a registered agent's business office address is to be identical to the limited liability company's registered office address. Conforming changes appear in Section 18-904(b)(2) with respect to foreign limited liability companies, and also conform the eligibility requirements for such registered agents to those applicable with respect to domestic limited liability companies. Sections 18-104(d), 18-104(i)(4), 18-904(e), and 18-1108(a) now provide that in certain circumstances certificates of formation and registrations are cancelled, not "deemed to be" cancelled. Section 18-104(e) and (g) confirm that registered agents' duties under such sections (i.e., to accept and forward service of process and statements for annual taxes, and to maintain current communications contacts) apply to foreign limited liability companies as well as Delaware limited liability companies.

Technical changes were made to Section 18-203 relating to cancellation of certificates of formation in connection with merger, consolidation, and transfer, and to clarify that good standing certificates shall not issue for a limited liability company whose certificate of formation is cancelled. Similarly, technical changes were made to Sections 18-206, 18-213(g), and 18-1105(a)(3) regarding transfer and domestic continuance. Section 18-209(a), relating to merger and consolidation, clarifies the broad definition of "other business entity" in the context of merger and consolidation. Section 18-209(c)(8) has been simplified, and provides that a certificate of merger need not contain a consent to jurisdiction where the surviving or resulting entity is a Delaware general partnership. Section 18-209(g) clarifies that merger or consolidation of a domestic limited liability company doesn't constitute dissolution of such company unless otherwise agreed. Amendments to Sections 18-209(h), 18-213(h), and 18-216(i) confirm that a limited liability company agreement can specifically deny the limited liability company the power to merge or consolidate under Section 18-209, to transfer, domesticate or continue under Section 18-213, or to convert under Section 18-216. Section 18-216(h) reflects a technical change, deleting language duplicative of text appearing elsewhere (Section 18-216(c)) and providing that a business entity or form to which a limited liability company has been converted shall be deemed the same entity as the limited liability company for purposes of Delaware law.

Section 18-215 has been amended to permit establishment (or provision for establishment) of one or more designated series not only of members, managers, and limited liability company interests, but assets as well. It clarifies and continues the requirement that the records maintained for any series account for the assets associated with such series separately from other assets of the limited liability company or any other series thereof. New text provides that assets associated with a series may be held directly or indirectly, including in the name of such series, in the name of the limited liability company, through a nominee or otherwise, and

specifically empowers series to contract, hold title to assets, grant liens and security interests, and sue and be sued. Section 18-210 clarifies that contractual appraisal rights may be made available for any series, and are available in connection with continuance in any jurisdiction.

Section 18-702(c) specifically denies limited liability companies the right to issue certificates of limited liability company interest in bearer form. Section 18-906 contains technical amendments relating to cancellation of registration.

DLP ACT AMENDMENTS.

The DLP Act was amended by Senate Bill No. 95, 76 Del. Laws 104, effective August 1, 2007.

Certain definitions have been amended. Section 17-101(12) provides that limited liability company agreements can be not only written or oral, but implied, as well. Conforming changes appear in Section 17-201(d) and conforming and other technical changes appear in Sections 17-101(5) and 17-101(8).

Section 17-104(a)(2) confirms that a registered agent's business office address is to be identical to the limited partnership's registered office address. Conforming changes appear in Section 17-904(b)(2) with respect to foreign limited partnerships, and also conform the eligibility requirements for such registered agents to those applicable with respect to domestic limited partnerships. Sections 17-104(d), 17-104(i)(4), 17-904(e), and 17-1110(a) now provide that in certain circumstances certificates of formation and registrations are cancelled, not "deemed to be" cancelled. Sections 17-104(e) and (g) confirm that registered agents' duties under such sections (i.e., to accept and forward service of process and statements for annual taxes, and to maintain current communications contacts) apply to foreign limited partnerships as well as Delaware limited partnerships.

Technical changes were made to Section 17-203 relating to cancellation of certificates of limited partnership in connection with merger, consolidation, and transfer, and to clarify that good standing certificates shall not issue for a limited partnership whose certificate of limited partnership is cancelled. Similarly, technical changes were made to Sections 17-204(a), 17-206, 17-207(a), 17-216(g) and 17-1107(a)(3) regarding transfer and domestic continuance. Section 17-211(a), relating to merger and consolidation, clarifies the broad definition of "other business entity" in the context of merger and consolidation. Section 17-211(c)(8) has been simplified, and provides that a certificate of merger need not contain a consent to jurisdiction where the surviving or resulting entity is a Delaware general partnership. Section 17-211(h) clarifies that merger or consolidation of a domestic limited partnership doesn't constitute dissolution of such limited partnership unless otherwise agreed. Amendments to Sections 17-211(k), 17-216(h), and 17-219(i) confirm that a partnership agreement can specifically deny a domestic limited partnership the power to merge or consolidate under Section 17-211, to transfer, domesticate or continue under Section 17-216, or to convert under Section 17-219. Section 17-219(h) reflects a technical change, deleting language duplicative of text appearing elsewhere (Section 17-219(c)) and providing that a business entity or form to which a limited partnership has been converted shall be deemed the same entity as the limited partnership for purposes of Delaware law.

Section 17-218 has been amended to permit establishment (or provision for establishment) of one or more designated series not only of limited partners, general partners, or partnership interests, but assets as well. It clarifies and continues the requirement that the records maintained for any series account for the assets associated with such series separately from other assets of the limited partnership or any other series thereof. New text provides that assets associated with a series may be held directly or indirectly, including in the name of such series, in the name of the limited partnership, through a nominee or otherwise, and specifically empowers series to contract, hold title to assets, grant liens and security interests, and sue and be sued. Section 17-212 clarifies that contractual appraisal rights may be made available for any series, and are available in connection with continuance in any jurisdiction.

Section 17-702(b) specifically denies limited partnerships the right to issue certificates of partnership interest in bearer form. Section 17-906 contains technical amendments relating to cancellation of registration.

DELAWARE UCC AMENDMENTS.

Delaware Article 8 and Delaware Article 9 were amended by Senate Bill No. 120, 76 Del. Laws 92, effective upon its enactment into law.

New subsection 9-104(a)(4) facilitates “control” of a deposit account (and thus perfection of a security interest therein) by the debtor, secured party, and bank authenticating a record that (i) is conspicuously denominated a control agreement, (ii) identifies the deposit account, and (iii) addresses the disposition of funds in the deposit account or the right to direct such disposition. Parallel provisions have been added with respect to uncertificated securities (8-106(c)(3)) and security entitlements (8-106(d)(4)). New subsection 9-104(a)(5) facilitates “control” of a deposit account where the name on the deposit account is the name of the secured party or indicates that the secured party has a security interest therein. A parallel provision has been added with respect to securities accounts (9-106(d)).

New subsection 9-104(c) expressly provides that neither authentication of a record under subsection 9-104(a)(2) or new subsection 9-104(a)(4), nor naming or indicating a secured party under new subsection 9-104(a)(5), imposes upon a bank any duty not expressly agreed to by the bank. New subsections 9-106(e) and 8-106(h) similarly disclaim implied duties of a securities intermediary.

New subsection 9-104(d) expressly provides that any conditions to the bank’s duty to comply with instructions originated by the secured party (other than further consent by the debtor) is irrelevant to control of a bank account. New subsection 8-106(i) provides a similar statement with respect to uncertificated securities and security entitlements. Finally, new subsection 9-104(e) expressly provides that these new means of achieving control are not to be considered in assessing the achievement of control by other means.