



SEMINAR REFERENCE BOOK - 2017

Delaware's Business Entity Laws

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INTRODUCTION

The United States does not have a federal law governing the formation and internal operations of corporations, limited liability companies, and other business entities. Instead, all 50 states have their own, individual business entity statutes.

A business entity may choose any state as its formation or home state. The home state does not have to be a state where the entity is headquartered, owns property, has employees, or even does business.

The choice of a formation state is an important decision for the owners and managers of a corporation or unincorporated entity. It is important because the business entity will be formed and dissolved under that state's laws. In addition, its post-formation transactions—such as mergers—will be completed under the home state's laws.

It is also important because state and federal courts will apply the law of the home state in litigation involving the business entity's internal affairs. Say, for example, a shareholder in a Delaware corporation files a derivative suit alleging that the directors breached their duty of loyalty. The shareholders and directors live in New York. The corporation is based in New York, and the lawsuit is filed in New York. Because the litigation involves the internal affairs of a Delaware corporation, Delaware law will be applied to the issues of whether the shareholder has standing to bring the derivative suit, and whether the directors breached their duties.

That may explain why legal professionals who advise business entities, their managers or owners need to know about the business entity laws of states other than where they and their clients are located. However, it does not explain the need to know about the business entity laws of Delaware—one of the smallest and least populous states.

The explanation for that is that Delaware is the most important entity formation state in the country. As of the end of 2016 more than 1,250,000 entities called Delaware home, including more than 60% of the Fortune 500 and more than half of the nation's publicly-traded corporations.

This seminar is intended to help legal professionals familiarize themselves with the laws governing Delaware's corporations and unincorporated entities. The seminar begins by examining why Delaware is the formation state of choice. It then looks at the statutes governing the two most popular types of business entities—corporations and limited liability companies. The seminar also includes a briefer look at the laws governing other unincorporated entities, as well as a look at filing issues and franchise tax requirements.

I. WHY IS DELAWARE THE LEADING FORMATION STATE?

All states have a chance to compete for corporations, limited liability companies, and other entities. There are four main reasons why Delaware is the undisputed winner of the competition: (1) its business entity statutes, (2) its court system—especially the Chancery Court, (3) its extensive body of case law, and (4) its filing office—the Division of Corporations. This part of the seminar will take a closer look at each reason.

A. Delaware's Business Entity Statutes

The selection of a formation state is also the selection of a governing law. Therefore, one of the reasons the principals of corporations and unincorporated entities choose to incorporate or organize in Delaware is so that the business entity will be governed by Delaware's statute.

1. Words Describing Delaware's Business Entity Statutes

The following are some of the words often used to describe Delaware's business entity statutes, and some examples of why these words are used:

"Modern"—The statutes keep up with the times. For example, shortly after teleconferences became possible, the corporation law was amended to allow directors to participate in meetings via that new technology.

"Flexible"—The statutes give management choices in deciding what actions to take—rather than requiring actions. An example of this flexibility is the fact that the limited liability company and limited partnership laws do not require those entities to provide indemnification or appraisal rights, but allow the owners or managers to decide whether these rights should be available.

“Liberal”, “Non-Restrictive”— Delaware’s statutes do not contain as many restrictions on what an entity can do as some state statutes. Delaware, for example, was one of the first states to allow corporations to enter into business deals with their directors.

“Efficient”— The statutes allow entities to be run in the most efficient way. For example, Delaware’s was the first corporation law to allow alternate committee members to be appointed so that a committee of directors could still meet, even if a member could not attend.

“Predictable”— Major changes in the laws, or the principles under which they were drafted, are unlikely. An example of Delaware’s commitment to predictability is the fact that the state Constitution requires a two-thirds vote of legislators for any amendment to the corporation law, while requiring a majority vote to amend most other state statutes.

2. The Four Guiding Principles of Delaware’s Entity Laws

Delaware’s business entity statutes are modern, flexible, liberal, etc., because they were drafted, and are amended, with the following four guiding principles in mind.

Principle 1— Business entity laws should allow management to act quickly, with minimum interference from non-managing constituents or the state.

Principle 2— Business entity laws should respect the freedom of contract and allow owners to define their rights and duties in bylaws, LLC agreements, partnership agreements and other contracts.

Principle 3— Business entity laws should be “enabling statutes” that set forth general principles for the entities to follow, rather than “regulatory statutes” that contain rules that must be followed.

Principle 4— Business entity laws must be adaptable to the changes in business environments and needs.

3. Entity Laws Adaptable to Business Climate

It is not only the substantive content of Delaware’s statutes that is considered an advantage. It is also Delaware’s ability to keep its laws current and able to meet rapidly changing needs. Delaware does this by considering and enacting amendments to the laws every year.

Suggestions for these amendments come from corporate lawyers located in and outside of Delaware, from law professors, management officials, investors, the Secretary of State’s office and other interested groups or individuals. The impetus for the suggestion is generally one of the following:

A change in business needs— For example, after the creation of the LLC, corporations needed an easier way to convert to an LLC than forming a new LLC and having the corporation merge into it. Consequently, the corporation and LLC laws were amended to allow for statutory conversions.

A need to adapt to changes in the world in general—For example, the creation and growing popularity of the Internet brought about amendments allowing notice, voting and consent to be completed through “electronic means” such as e-mail or postings on a website.

Responses to unpopular court decisions—For example, shortly after a Delaware Supreme Court decision holding that directors breached their duty of care after voting in favor of a merger, the corporation law was amended to allow corporations to limit the liability of directors for breaches of the duty of care.

The suggested amendments are considered by a subcommittee of the Delaware Bar Association’s Section on Corporation Law. The subcommittee drafts legislation and commentary, which must be approved by the Council of the Section. The draft legislation is then considered by an executive committee of the Delaware Bar Association. The executive committee then submits the draft legislation to the Delaware General Assembly.

Keeping its corporation, LLC and other entity laws up to date and meeting business needs is a higher priority in Delaware than it is in many other states. A main reason for this is that Delaware relies more on the revenue it receives from its domestic business entities than other states.

B. Delaware’s Court System

Another principal reason for Delaware’s popularity is its court system. Delaware has a special court that interprets its corporation and unincorporated business entity statutes and hears cases involving an entity’s internal affairs. This court is the Chancery Court, which has a national reputation for expertise in corporate and business entity matters. The decisions of the Chancery Court—and the Delaware Supreme Court, which hears appeals of Chancery Court decisions—are widely respected and cited by courts around the nation.

1. What is the Delaware Chancery Court?

The Delaware Chancery Court was created in 1792. It is a trial level court. It is also an equity court. An equity court is a court whose purpose is to provide relief suited to the facts of the case, where no adequate remedy is provided for by statute or common law. Delaware is one of only a few states that has separate trial courts for equity and law cases.

The Chancery Court has five judges—one Chancellor and four Vice Chancellors, appointed for 12 year terms. The Chancery Court is a state-wide court. Cases can be brought in any of Delaware’s three counties, regardless of where the claim arose or the parties are located.

There are no juries in the Chancery Court. Cases are heard by the Chancellor or one of the Vice Chancellors. In addition, punitive damages may not be awarded in cases brought in the Chancery Court.

2. Three Ways to the Chancery Court

The Chancery Court is a court of limited jurisdiction. It generally does not hear criminal, tort or family law matters.

A case may be brought in the Chancery Court in three situations: (1) if equitable relief is sought, rather than monetary damages (i.e., if an injunction or declaratory judgment is sought), (2) if the cause of action is equitable in nature, even if monetary damages are sought (i.e., an action for breach of fiduciary duty seeking money damages), or (3) where jurisdiction is conferred by statute.

The corporation and unincorporated entity laws explicitly confer jurisdiction on the Chancery Court to hear various matters. For example, the acts provide that any action to interpret, apply or enforce the provisions of the certificate of incorporation or bylaws of a corporation, the LLC agreement of a limited liability company, the partnership agreement of a limited partnership, or any other instrument, document, agreement or certificate contemplated by the acts may be brought in the Chancery Court. The business entity laws also give the Chancery Court jurisdiction to hear and determine issues relating to appraisal rights, elections of directors or managers, liabilities and duties of managing officials, and other matters.

3. Benefits of Delaware Court System to Business Entities

Expertise—The judges appointed to the Chancery Court are experts in corporate and business law.

Speed—The Chancery Court is known for bringing cases to trial with great speed. In addition, the Chancery Court can render decisions very quickly—particularly when the litigation involves a pending transaction. Appeals to the Delaware Supreme Court can also be heard and decided faster than in most states.

Thoroughness—The Chancery and Supreme Court judges fully explain the reasons for their decisions in their opinions.

Flexibility—As an equity court, the Chancery Court can fashion remedies appropriate to the particular needs of the litigants and facts of the case.

Consistency—Delaware courts interpret the business entity laws and apply the legal principles in a consistent and predictable manner.

C. Delaware's Case Law

A third reason why Delaware is the formation state of choice is its extensive body of case law.

Having a large body of case law is particularly important for corporations, and a significant benefit Delaware provides corporate officials and their legal counsel are extensive precedents in the areas that are most likely to involve litigation — such as when a merger is being considered, a corporation is for sale or bankrupt, a proxy fight is being waged, or an election of directors is in dispute.

The larger the body of case law, the more guidance management has in assessing the legal consequences of its acts. Say, for example, a corporation's board of directors is concerned about hostile takeovers and wants to implement anti-takeover devices. There is a great deal of case law from the Delaware Chancery and Supreme Courts on what the board of director's fiduciary duty is under these circumstances. There is also a significant amount of case law dealing with the types of anti-takeover devices that are valid or invalid under the Delaware General Corporation Law. This large body of case law helps the directors decide what actions to take.

In addition, Delaware's courts have had the opportunity to issue a significant number of decisions interpreting the LLC Act and the LLC agreements that govern these entities. Therefore, Delaware's extensive body of LLC case law has become an important advantage as well.

D. The Division of Corporations

The fourth reason for Delaware's popularity as a formation state is its filing office — the Division of Corporations — which has a national reputation for responsive service to business entities.

1. What is the Division of Corporations?

The Division of Corporations is the agency that exercises the powers and responsibilities of the Secretary of State's office in corporate and business entity matters.

The Division's role is to receive and handle all business entity filings and document requests, to maintain official records for corporations and unincorporated entities, and to assess and collect franchise taxes.

2. Why is the Division of Corporations a Delaware Advantage?

Modern, technologically advanced office — The Delaware Division of Corporations is usually one of the first filing offices to take advantage of new technology that can increase its efficiency. This is illustrated

by the fact that in 1983 the Division of Corporations installed a computer system that allowed filings to be entered and data retrieved electronically, and in 1989 the office began to image all documents.

Efficiency— It is an office known for its efficiency. Filings, for example, can be processed within 30 minutes, 1 or 2 hours of delivery, on the same day, or within 24 hours.

Revenue generator— The Division of Corporations considers its role to be that of a revenue producer for the state. As such, it is committed to making sure revenue from business entity filings, document requests, and annual taxes does not drop due to problems in the filing office.

Meets and works with user community— The office is committed to meeting the needs of its user community. An example of this commitment is the fact that the Division of Corporations has quarterly meetings and an annual conference with corporate service companies to discuss how to improve its service.

Public/private partnership with service companies— Another benefit is the unique role corporate service companies play, and the public/private partnership between the Division of Corporations and corporate service companies.

Corporate service companies are companies that assist corporations and unincorporated entities with their filings and provide other services such as acting as registered agent. The Division of Corporations gives qualified corporate service companies access to its computer system. The corporate service company may enter information from a document directly into the state's database and then scan the document into the computer network. The service company may also retrieve documents—such as certified copies—directly from the computer network. This allows corporations and unincorporated entities to make their filings and obtain necessary documents without the delays often experienced in other states.

3. Filing Documents with the Division of Corporations

Forms— There are no official state forms that must be used when making filings with the Division of Corporations.

Delivery of Documents— One copy of the document is required to be delivered for filing. Filings are electronically dated and time stamped by the Division of Corporation's imaging system. The document is then checked for propriety, indexed and scanned into the system. Proof of filing may be obtained after the form is processed.

A corporate service company that participates in the Division of Corporation's computer network may enter the information from a document directly into the state's database and scan the document into the computer network.

Effective Date—A document is effective upon filing or upon a later date or time set forth in the document. The delayed effective date may not be more than 90 days after filing.

Documents containing an effective date earlier than the filing date will be rejected by the Division of Corporations. An exception may be made if the document is accompanied by an Affidavit of Extraordinary Condition attesting to the fact that a good faith effort was made to deliver the document on an earlier date and that the effort was unsuccessful due to an extraordinary condition such as an emergency resulting from an attack, invasion or war, a malfunction of electrical or telephone service to the Division of Corporations, or a weather condition causing the Division to be closed. In such a case, the Division of Corporations may establish the earlier date as the filing date.

Expedited Filings—In 1986, the legislature authorized the Division of Corporations to provide expedited services for an additional fee. There are currently five levels of expedited services. The Division of Corporations will process filings within 30 minutes, one hour, two hours, on the same day or within 24 hours.

Corrections—If a document was inaccurate when filed or if it was defectively or erroneously executed, either a Certificate of Correction, or a corrected version of the document may be filed. The effective date of the corrected document will be the same as the document being corrected.

Execution of Documents—Original signatures are not required. Signatures may be conformed, facsimile or electronically transmitted. The person executing the document should state beneath or opposite the person's signature, his or her name and the capacity in which the person is signing. Documents may be signed by the following:

Corporation—In general, documents filed by or on behalf of a corporation may be executed by any authorized officer, or if there are no officers, then by a majority of directors, or if there are no officers or directors, then by the holders of record of a majority of outstanding shares.

Limited Liability Company—Documents filed by or on behalf of a limited liability company may be executed by one or more authorized persons.

Limited Partnership—An initial Certificate of Limited Partnership and a Certificate of Cancellation are signed by all general partners; a Certificate of Amendment by at least one general partner and any new general partner; and other documents by at least one general partner.

Limited Liability Partnership—Documents filed by or on behalf of limited liability partnerships may be executed by at least one partner or other authorized person.

Statutory Trust—A Certificate of Trust, Cancellation, Conversion, or Merger must be signed by all trustees. A Certificate of Amendment or Correction, by at least one trustee.

Document Ordering— The Division of Corporations also fulfills requests for documents. The most common request is for a Certificate of Good Standing. When a Delaware corporation or unincorporated entity applies to do business in another state, a Certificate of Good Standing generally must accompany the application. It may also be needed if the corporation or unincorporated entity is involved in a merger or other transaction where it must prove it is in good standing.

There are two forms of Certificates of Good Standing—short and long. A short form Certificate of Good Standing lists the entity's name and states that it was duly incorporated or formed, is in good standing and that all franchise taxes were paid and reports filed. The long form has all of the above, plus it lists all documents filed by the entity.

Another common document request is for certified copies of documents on file or being filed. Another is for a Certificate in Re (also known as a Certificate of Fact)—which is a certificate evidencing that the entity was involved in the transaction referenced by the certificate.

Document requests may be ordered on an expedited basis. In addition, participating corporate service companies may print out Certificates of Good Standing and certified copies from the Division of Corporation's database.

II. DELAWARE'S GENERAL CORPORATION LAW

A. Brief History of Delaware's General Corporation Law

Delaware has had two corporation statutes — The General Corporation Law of 1899 and the General Corporation Law of 1967.

1. How the GCL of 1899 Came About

The states first began adopting corporation statutes during the 1800s. However, most of the statutes enacted that century were very restrictive. They limited, for example, a corporation's duration, authorized capital, purposes, and ability to do business in other states. In 1875, New Jersey adopted the first "liberal" general corporation act, which eliminated these restrictions. Many corporations chose to incorporate in New Jersey to take advantage of the statute.

In 1897, Delaware held a Constitutional Convention. The delegates, noting the revenue New Jersey was obtaining from corporation fees, decided Delaware should have its own corporation statute. The result was the General Corporation Law of 1899, which was based largely on New Jersey's GCL.

Few corporations chose Delaware instead of New Jersey until 1913, when New Jersey passed a law known as the "Seven Sisters Act", that outlawed trusts and holding companies and made incorporation in New Jersey less desirable. Most of New Jersey's corporations reincorporated in Delaware, and Delaware replaced New Jersey as the incorporation state of choice.

2. How the GCL of 1967 Came About

Eventually, other states saw the monetary benefits Delaware was enjoying and revised their corporation laws to compete for incorporations. By 1963, Delaware's corporate revenues had fallen and the legislature decided to investigate the possibility of enacting a new General Corporation Law.

A Delaware Corporation Law Revision Committee was formed. Its objective was to “update and clarify the language of the existing corporate law, to simplify mechanics for corporate action, and to make substantive changes where experience indicates improvements could be made.”

The result of the Committee’s effort was the General Corporation Law of 1967, which went into effect on July 3, 1967. The law was received favorably and helped Delaware maintain and expand its position as the leading incorporation state in the United States. The current GCL is codified at Title 8, Chapter 1, Sec. 101 *et seq.* of the Delaware Code. The following sections review the GCL provisions dealing with formation, stockholders, directors and officers, and post-formation transactions.

3. Federal Securities Laws

Delaware corporations that are publicly traded are also subject to the provisions of the federal securities laws. Historically the federal securities laws focused mainly on requiring corporations to disclose material information to the public. The statutes, and the regulations promulgated under them, did not regulate corporate internal affairs. Internal governance was left by Congress to the states to regulate.

However, since 2002 Congress has amended the securities laws in ways that encroach upon areas of corporate law traditionally left to the states. And some of these federal provisions are inconsistent with the GCL. For example, the Sarbanes-Oxley Act of 2002 prohibits corporations from making personal loans to officers and directors. In contrast, the GCL permits such loans where, in the judgment of the directors the loan may reasonably be expected to benefit the corporation.

In addition, the Dodd-Frank Wall Street Consumer Protection Act of 2010 requires corporations to allow shareholders to cast advisory votes on executive compensation while the GCL does not have such a requirement. Sarbanes-Oxley and Dodd-Frank also have mandates concerning the composition and responsibilities of certain board committees. The GCL leaves these matters to the corporation.

Where there is a conflict or inconsistency the federal law supersedes the GCL.

B. Formation

There are four steps in the incorporation process: (1) preparing and filing the Certificate of Incorporation, (2) holding an organizational meeting, (3) electing directors and adopting bylaws, and (4) issuing stock

1. Certificate of Incorporation

Sec. 102 of the GCL provides that the Certificate of Incorporation must contain the following five items of information:

(1) *Name of the Corporation*

Sec. 102 provides that the name of a Delaware corporation must contain one of the following words—“association”, “company”, “corporation”, “club”, “foundation”, “fund”, “incorporated”, “institute”, “society”, “union”, “syndicate”, or “limited”, or an abbreviation of one of those words, or words or abbreviations of like import of foreign countries. The Division of Corporations may waive this requirement if the corporation executes, acknowledges and files a certificate stating that its total assets are not less than \$10 million.

A corporation’s name must also be distinguishable upon the records of the Division of Corporations from a name reserved on such records and from the name of another domestic or foreign corporation, partnership, limited partnership (LP), limited liability company (LLC), or statutory trust (ST). The name may be used, however, with the written consent of the entity that is the holder of record of the name.

(2) *Registered Office Address, Registered Agent Name*

Every Delaware corporation must appoint and continuously maintain a registered office that may, but need not be the same as its place of business, and a registered agent. The address of the office and name of the registered agent at that office must be set forth in the Certificate of Incorporation. The registered agent receives service of process and other communications directed to those corporations for which it serves as registered agent and forwards them to the corporations.

(3) *Purposes*

The GCL requires the Certificate of Incorporation to set forth “the nature of the business or purposes to be conducted or promoted”. However, specific purposes do not have to be set forth. It is sufficient to have an “all purpose” clause such as “the purpose is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law”.

(4) *Authorized Capital*

If the corporation is to have only one class of stock, the Certificate of Incorporation must set forth the total number of authorized shares, the par value of the shares, or a statement that the shares are without par value. (Par value sets a minimum issue price for shares—i.e., shares with a par value of \$1 may not be issued for less than \$1 per share. It is not the actual issue price.)

If the corporation is to have more than one class of stock, the Certificate of Incorporation must set forth the total number of authorized shares for each class, and the par value of the shares of each class, or a statement that the shares are without par value. In addition, the Certificate of Incorporation will have to set forth a statement of the designations, powers, preferences, rights, qualifications, limitations or restrictions of each class or series of a class that the corporation wishes to fix by the Certificate of Incorporation.

(5) Name and Address of Incorporators

Any one or more persons, partnerships, associations or corporations may act as an incorporator of a Delaware corporation. The role of the incorporator is to sign and deliver the Certificate of Incorporation for filing. In addition, if initial directors are not named in the Certificate of Incorporation, the incorporator organizes and manages the corporation until directors are elected.

2. Protect the Desired Name

Before filing the Certificate of Incorporation, it is advisable to make sure the desired name is available (that is, distinguishable upon the Division of Corporation's records).

If the name is available it should be reserved. By reserving the name, no other corporation or unincorporated entity can take it before the client's Certificate of Incorporation is filed. Corporate names may be reserved for a 120 day period by filing an application for reservation. The same applicant may renew for successive 120 day periods by filing an application for renewal.

3. Optional Provisions of the Certificate of Incorporation

In addition to the items of required information, Sec. 102 states that the Certificate of Incorporation may contain: "Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders".

There are several optional provisions expressly mentioned in the GCL. These include the following:

Limitation of director's liability—Sec. 102 (b) (7) states that the Certificate of Incorporation may contain: "A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) for any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under Sec. 174 of this title [dealing with

unlawful distributions]; or (iv) for any transaction from which the director derived an improper personal benefit.”

Through use of this provision, directors may not be held liable for a breach of their duty of care. Most Delaware corporations have this provision in their Certificates of Incorporation. The Delaware courts have consistently upheld these provisions.

Name and address of initial directors— If included in the Certificate of Incorporation, the initial directors will organize the corporation and adopt initial bylaws. If this optional provision is excluded, the incorporators will fulfill that role.

Grant of authority to the board of directors to fix by resolution the designations, rights, preferences, powers, qualifications, limitations or restrictions of classes or series of stock— This grant of authority—which is known as the “blank check” power—allows the board of directors to create new classes of stock without having to obtain stockholder approval of an amendment to the Certificate of Incorporation. The blank check power makes it easier for the board of directors to enter into deals with potential subscribers, as the board can quickly create preferred stock with the rights the subscriber has requested.

Grant of preemptive rights— Preemptive rights allow stockholders to subscribe ratably for their proportion of any additional shares issued by the corporation. For example, a stockholder who owns 10% of a corporation’s stock would be entitled to purchase 100 shares if the corporation issues 1,000 new shares. Preemptive rights protect minority stockholders by ensuring that their voting power will not be watered down by new issues of stock. (In practice, preemptive rights are rarely granted to stockholders in publicly-traded corporations.)

Supermajority voting requirement— The GCL’s default rule for approving most corporate actions is a majority vote of stockholders. However, the Certificate of Incorporation may contain a provision requiring the vote of a larger percentage of the stock than the default requirement. A less than majority vote is not authorized.

Staggered term of the board of directors— Sec. 141(d) states that the Certificate of Incorporation may provide that a corporation’s board of directors will be divided into two or three classes, with the directors serving staggered two or three year terms. A staggered board is intended to provide for continuity and stability of management, as the whole board of directors cannot be removed at one time.

Grant of power to the board of directors to make, amend or repeal bylaws— Directors do not have the power to make, amend or repeal bylaws unless the Certificate of Incorporation so provides.

Sec. 102 also provides that any provision that is required or permitted by the GCL to be stated in the bylaws, may instead be stated in the Certificate of Incorporation. Consequently, the corporation’s

officials have a choice of setting forth many of the provisions governing the corporation in either the Certificate of Incorporation or bylaws.

One of the considerations in making this choice is that provisions in the Certificate of Incorporation are public knowledge while bylaw provisions remain private. Another consideration is that changes to the Certificate of Incorporation generally require the approval of both the directors and stockholders, while bylaws can be amended or repealed by the stockholders without director approval—or if the Certificate of Incorporation so provides, by the directors without stockholder approval.

4. Incorporation Fees

Filing fees—The fees for filing a Certificate of Incorporation consist of:

A filing fee based on the number of authorized shares without par value and/or the capital value of the authorized shares with par value (minimum \$15, no maximum)

\$25 receiving and indexing fee

\$5 for entering the filing into the state database

\$20 municipality fee

A county fee of \$15 plus \$9 per page [Note that there is always a certification page included, so, for example, the county fee for a one page certificate of incorporation would be \$33 (\$15 + \$9 for the certification page + \$9 for the certificate of incorporation)]

Filing fee—The Filing Fee is calculated as follows:

<u>For Stock With No Par Value</u>	<u>Rate Per Share</u>
First 20,000 shares	1 cent
Shares from 20,001 to 2 million	1/2 cent
Shares over 2 million	2/5 cent
<u>Stock With Par Value (each \$100 of capital stock = 1 share)</u>	<u>Rate Per Share</u>
First 20,000 shares	2 cents
From 20,001 to 200,000	1 cent
Over 200,000	2/5 cent

(Delaware corporations that will be publicly traded and therefore need a large number of authorized shares can lower their initial fee substantially by setting forth a low par value rather than having no par shares. For example, the filing fee for a corporation with one million shares without par value is \$5,100,

while the filing fee for a corporation with one million shares with a par value of 1 cent would be the \$15 minimum.)

5. Holding the Organizational Meeting

Sec. 108 requires an organizational meeting to be held after filing the Certificate of Incorporation. The meeting is called by incorporators if initial directors are not named in the Certificate of Incorporation or by the initial directors if they are named. The meeting may be held in or outside of Delaware.

The main purposes of the incorporators' organizational meeting are to elect directors and adopt bylaws. The main purposes of the initial directors' organizational meeting are to elect officers and adopt bylaws.

The incorporators or initial directors are also authorized to take any other actions necessary to perfect the organization and facilitate commencement of business. In practice, these actions are rarely taken at the incorporators' meeting. However, the initial directors may take additional actions such as designating the depository for the corporation's funds, approving the form of corporate seal and stock certificate, and accepting subscriptions for stock and issuing stock certificates to subscribers.

All actions that may be taken at an organizational meeting may be taken without a meeting if consents are signed by the incorporators or initial directors setting forth the actions taken. In practice, the organizational actions are usually accomplished by consent in lieu of a meeting.

6. Bylaws

Sec. 109 states that bylaws "may contain any provision, not inconsistent with law or with the Certificate of Incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers, or the rights or powers of its stockholders, directors, officers or employees." (Note that if a bylaw conflicts with a provision of the Certificate of Incorporation, the Certificate of Incorporation provision will apply).

Topics typically addressed in a corporation's bylaws include:

- size of the board of directors
- election of directors
- stockholders' and directors' meetings (including the date, place, notice, quorum, proxy and voting requirements)
- creation and duties of directors' committees
- titles and duties of officers
- indemnification of directors and others

The power to amend or repeal bylaws belongs to the stockholders. The corporation may give directors the power as well in the Certificate of Incorporation. However, such a provision results in both stockholders and directors having the power to amend bylaws. The corporation may not take away the stockholders' right to amend the bylaws.

7. Issuance of Stock

Sec. 152 provides that the board of directors may authorize capital stock to be issued for consideration consisting of cash, any tangible or intangible property, or any benefit to the corporation, or any combination thereof.

Sec. 153 provides that shares of stock without par value may be issued for any amount of consideration determined by the board of directors. Shares with par value may be issued for any consideration having a value not less than the par value. The board's judgment of what is adequate consideration is conclusive in the absence of actual fraud.

Sec. 155 states that fractional shares may be issued. Sec. 151 provides that a corporation may issue classes or series of redeemable shares, as long as there is at least one class or series with full voting power that is not redeemable. A corporation may also issue shares that are convertible or exchangeable for other shares of stock, and it may issue shares upon receiving partial payment.

8. Stock Certificates

Sec. 158 provides that a corporation may issue to stockholders a certificate representing their shares. The stock certificate must be signed by two officers. Facsimile signatures are acceptable. A corporation may issue uncertificated stock if the board of directors issues a resolution to that effect.

9. Use of Legal Capital Concepts

An unusual feature of the GCL is that it still uses the "legal capital" concepts of par value, capital, and surplus. (Par value is a minimum issuance price; capital is the aggregate par value of all shares with par value and/or the part of the consideration received for no par shares that the board decides to count as capital; and surplus is the excess of net assets over capital.) These concepts mainly affect the issuance of shares, dividends, and the initial filing fee and annual franchise tax. The Model Business Corporation Act (MBCA) and the vast majority of state corporation acts no longer refer to these concepts, which have been criticized for being complex and confusing and for no longer serving their original purpose of protecting creditors.

C. Stockholders: Meetings, Voting and Other Rights

1. Stockholder Meetings

An annual meeting is required to be held by Sec. 211. The purpose of an annual meeting is to elect directors and transact any other proper business. The date of the meeting may be fixed in the bylaws. Special meetings may be called by the board of directors or any other person authorized by the Certificate of Incorporation or bylaws.

The place of a meeting may be designated by or in the manner provided in the Certificate of Incorporation or bylaws. If it is not designated, then the board of directors may decide on a place. Sec. 211 also states that if the board of directors is authorized to determine the place of the meeting, then, in its sole discretion, the board may determine that the meeting will be held by means of remote communication.

2. Notice and Quorum

Sec. 222 states that notice of meetings must be given to all stockholders entitled to vote, not less than 10 or more than 60 days before a meeting. Sec. 251 provides that notice of a meeting at which a merger will be voted on must be sent at least 20 days before the meeting, to all stockholders, whether or not entitled to vote. Notice may be given in writing or by a form of electronic transmission consented to by the stockholder.

The default rule of Sec. 216 is that a majority of the shares entitled to vote, present in person or by proxy constitutes a quorum. The Certificate of Incorporation or bylaws may fix a different number of shares required for a quorum. However, it cannot be less than one-third of the shares.

3. Action by Consent

Sec. 228 states that stockholder action may be taken without a meeting, prior notice or vote if consents by the holders of stock sufficient to take the action at a meeting at which all shares entitled to vote were present and voted, are delivered to the corporation.

If the consent is less than unanimous, prompt notice of the action taken must be given to all stockholders who did not consent. Consents may be delivered in writing or by electronic transmission. The right to act upon consent may be denied in the Certificate of Incorporation.

Sec. 211 provides that unanimous written consent to elect directors may serve in lieu of voting at an annual meeting. Less than unanimous consent is allowed only if all directorships are vacant and being filled by the consents.

4. Voting

Sec. 212 provides that each stockholder is entitled to one vote for each share of stock held, unless the Certificate of Incorporation provides that the shares will be entitled to more or less than one vote. The Certificate of Incorporation may also provide for classes or series with no voting rights, with greater or lesser rights than other classes or series, or with limited voting rights (such as the right to vote on only certain matters).

Sec. 214 provides that the Certificate of Incorporation may authorize cumulative voting for directors. Stockholders with cumulative voting rights are entitled to as many votes as equal their number of shares multiplied by the number of directors. Say, for example, a corporation is to elect 7 directors. A stockholder with 100 voting shares will be entitled to 700 votes. The stockholder may then cast all votes for one director or divide the votes among the various candidates. Cumulative voting increases minority stockholders' chances of electing a director to represent their interests.

5. Proxy Voting

Each stockholder may vote by proxy. Sec. 212 provides that a proxy is valid for no more than three years unless the proxy provides for a longer period. A proxy is revocable unless the proxy states otherwise and is coupled with an interest. A stockholder may appoint a proxy by executing a writing or by transmitting or authorizing the transmission of a telegram, cablegram, or other means of electronic transmission to the proxy holder or its agent.

6. Dividends

Dividends are payable if and when declared by the board of directors. Sec. 170 states that dividends may be paid only out of surplus, or, if none, out of net profits for the current or previous year. The provisions regulating dividends are designed to protect creditors—not stockholders. The board of directors is under no obligation to declare a dividend, even when there are ample funds available to do so.

7. Inspection of Books and Records

Sec. 220 provides that a stockholder may inspect the stock ledger, stockholder list, and other books and records. The stockholder must make a written demand, under oath, stating a proper purpose. If the corporation refuses to honor the demand, the stockholder may apply to the Chancery Court for an order to compel the inspection.

Sec. 220 defines a proper purpose as one reasonably related to the person's interest as a stockholder. Case law has held that a proper purpose includes communicating with other stockholders about corporate affairs, investigating mismanagement, or valuing stockholdings. Improper purposes includes harassing, competing with, or harming the corporation or furthering a personal interest.

Sec. 220 also states that when the request is to inspect the stockholder list or stock ledger, the corporation has the burden of proving an improper purpose. The burden of proving a proper purpose is on the stockholder for other books and records.

8. Derivative Suits

A stockholder derivative suit is a lawsuit brought on behalf of a corporation by one or more of its stockholders. Sec. 327 provides that the complaint must aver that the plaintiff was a stockholder at the time of the action complained of and at the time the lawsuit was commenced. This “contemporaneous ownership” requirement is the only statutory requirement concerning derivative suits. The remaining requirements are found in Chancery Court Rule 23.1 and case law.

Chancery Court Rule 23.1 requires a stockholder filing a derivative suit to adequately plead either: (1) that a demand was made on the board of directors to take action and the demand was wrongfully refused or (2) that making a demand would have been futile and is therefore excused.

The demand is a notice requirement. It is a recognition that it is the board of director’s responsibility—and not the stockholders—to decide whether a corporation should bring litigation or decide how to redress any harm suffered. The MBCA and many state laws have a “universal demand” rule, under which a demand always has to be made on the board of directors—even if directors had a personal interest in the litigation (such as being named as defendants). Delaware does not have a “universal demand” rule. In Delaware, a demand may be excused if it is futile.

Delaware courts interpreting Rule 23.1 have held that when a stockholder claims that making a demand would be futile, the complaint must raise a reasonable doubt that the board of directors was disinterested and independent or that it exercised due care in entering into the transaction. Where the stockholder makes a demand, the complaint must raise a reasonable doubt that the decision to reject the demand was made in good faith or in an informed manner.

D. Directors and Officers

1. Board of Directors

Sec. 141 of the GCL provides that the business and affairs of every corporation shall be managed by or under the direction of a board of directors, except as otherwise provided in the Certificate of Incorporation. The board of directors may consist of one or more members. The number of directors may be fixed in the Certificate of Incorporation or bylaws. Directors hold office until their successors are elected and qualified or until their earlier resignation or removal.

Any director, or the entire board, may be removed with or without cause by the holders of a majority of stock entitled to vote at an election of directors. However, if the board is staggered, directors may be removed for cause only, unless the Certificate of Incorporation provides otherwise. Directors may also be removed for cause only if the corporation authorizes cumulative voting and less than the entire board is to be removed.

2. Election of Directors

Sec. 211 states that an annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws. Stockholders may, unless the certificate of incorporation provides otherwise, act by unanimous written consent to elect directors. They may act by less than unanimous consent in lieu of holding a meeting only if all of the directorships are vacant and are to be filled.

Sec. 216 provides that unless the certificate of incorporation or bylaws provide otherwise, directors shall be elected by a plurality of the votes of the shares present in person or represented by proxy at the meeting and entitled to vote.

In recent years some corporations have adopted a majority voting standard for electing directors rather than the plurality standard. Other have adopted what is referred to as a “director resignation” policy. Under this policy a director may be required to resign upon the failure to receive a specified vote for reelection.

3. Director Meetings

The procedures for holding directors’ meetings are generally set forth in a corporation’s bylaws. The default rules are that the vote of a majority of directors present at a meeting at which a quorum is present constitutes an act of the board of directors, and that a majority of the total number of directors constitutes a quorum.

Unless the Certificate of Incorporation provides otherwise, directors may participate in a meeting by conference telephone or other communication equipment that allows participants to hear each other. Directors may not act at a meeting by proxy.

Unless the Certificate of Incorporation provides otherwise, any action required or permitted to be taken by the board at a meeting may be taken without a meeting if all members of the board consent. (Note that the board of directors can only act without a meeting by unanimous consent, whereas stockholders may act by the consent of a majority. The difference is that directors owe a duty of care that requires them to meet and discuss transactions where there are differences of opinion. Stockholders have no such duty.)

4. Committees

Sec. 141(c) provides that the board of directors may, by resolution, designate one or more committees, each consisting of one or more members. The board may also designate one or more alternate members, who may replace any absent or disqualified member at a committee meeting. In addition, a committee may create one or more subcommittees.

A committee may exercise all of the powers and authority of the board of directors except for certain exceptions, including that it may not approve, adopt, or recommend to stockholders any action (other than the election or removal of directors) required to be submitted to stockholders for a vote or adopt, amend or repeal a bylaw.

5. Directors' Fiduciary Duties

The GCL does not define a director's standard of conduct. Instead, the duties are defined by case law. The Delaware courts have held that directors of Delaware corporations owe a duty of loyalty and a duty of care.

The duty of loyalty requires directors to place the corporation's interests above their own and prohibits them from using their position for personal gain. It may be violated, for example, if the director has a financial interest in a contract or transaction being entered into by the corporation. Say, for example, the directors have the corporation acquire a company they own, for a price well above market value.

The duty of loyalty may also be breached if a director competes with the corporation or takes for himself or herself a business opportunity that belongs to the corporation.

The duty of care requires directors to make informed decisions. To satisfy this duty, directors must avail themselves of all reasonably available material information concerning the subject of the vote, before deciding how to vote.

6. Business Judgment Rule

Delaware's courts have determined that the actions of directors of Delaware corporations are protected by the business judgment rule. The business judgment rule is a presumption that in making a business decision, the director acted on an informed basis, in good faith, and in the honest belief that the action taken was in the corporation's best interests.

The business judgment rule is also a procedural rule. The plaintiff challenging a transaction must overcome the presumption. If the plaintiff can do so, the burden shifts to the directors to show the "entire fairness" of the transaction.

The business judgment rule prevents courts from second guessing directors' decisions and interfering in internal affairs. It also shields directors from liability for honest, informed decisions, no matter how badly they turned out.

In some circumstances, the actions of the directors of Delaware corporations are evaluated by a different standard than the business judgment rule. For example, the steps taken by directors in response to a takeover threat are subject to an "enhanced scrutiny" test. Under this test, the directors must show a good faith, reasonable belief that the takeover offer threatened corporate policy and that the action taken was reasonable in relation to the threat posed.

Another situation is where the board of directors decides to sell the corporation. When a corporation is for sale, the board of director's duty changes from preservation of the corporation as an entity to maximization of the value for the stockholders' benefit. Thus, the directors become auctioneers. Their duty is to obtain the highest value reasonably available.

7. Statutory Protections of Directors

In addition to the case law protection of the business judgment rule, the GCL contains a number of statutory protections.

Reliance on reports and experts—Sec. 141(d) provides that a director, in the performance of his or her duties, will be fully protected in relying in good faith on records of the corporation and upon information, reports, statements or opinions presented to the corporation by any person as to matters the director reasonably believed was within the person's professional or expert competence and who had been selected with reasonable care.

Liability limitation in Certificate of Incorporation—Sec. 102(b)(7) states that the Certificate of Incorporation may contain a provision eliminating the directors' liability for a breach of the duty of care. This provision was enacted in 1986, when many directors were being sued over their responses to takeover offers, and when corporations were having difficulty securing insurance for their directors and officers. This provision was a response to the corporate community's fear that capable people would be unwilling to act as directors.

Conflict of interest transactions—Sec. 144 provides that a transaction between a corporation and its directors or officers will not be void or voidable solely because the director or officer was involved in the transaction, or participated in the meeting where the transaction was authorized, or because his or her vote on the matter was counted, if the board of directors or stockholders knew about the director's or officer's interest in the transaction, and the transaction was authorized, in good faith, by either a majority of the disinterested members of the board, a committee of directors, or by the stockholders.

Sec. 144 does not alter the directors' duty of loyalty as to transactions in which they have an interest. However, it invokes the business judgment rule in any action challenging the transaction, and shifts the burden of proof to the plaintiff. Generally, the protections of the business judgment rule cannot be claimed by interested directors.

Renouncing corporate opportunities— Sec. 122 (17) provides that a corporation has the power to renounce, in its Certificate of Incorporation or by action of the board of directors, any interest or expectancy of the corporation in specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or its officers, directors or stockholders.

8. Officers

Sec. 142 of the GCL states that every corporation “shall have such officers, with such titles and duties as shall be stated in the bylaws or in a resolution of the board of directors”. Thus, a Delaware corporation may give its executives any titles it wishes and may allocate the power among the executives as it sees fit. The only requirement is that the corporation must have such officers as will enable it to comply with the statutory requirements for executing documents filed with the Secretary of State and for executing stock certificates. In addition, one of the officers must have the duty of recording minutes of stockholders' and directors' meetings. Any number of offices may be held by the same person — unless the Certificate of Incorporation or bylaws provides otherwise.

Officers are chosen and hold office for the term as prescribed in the bylaws or determined by the board. An officer holds office until a successor is selected and qualified or until the officer's earlier resignation or removal. Vacancies occurring by death, resignation, removal or otherwise are filled as provided in the bylaws. In the absence of a provision, the board of directors fills the vacancy.

9. Indemnification

Indemnification is the payment or reimbursement by a corporation to its directors, officers and other persons for expenses and liabilities arising out of the person's service to the corporation. Delaware's statutory indemnification scheme is found in Sec. 145.

Secs. 145(a) and (b) are the permissive indemnification provisions. Sec. 145(a) applies to third party actions. It provides that a corporation may indemnify a director, officer, employee or agent who is a party to, or is threatened to be made a party to a civil, criminal, administrative or investigative suit or proceeding. The corporation may indemnify the person for his or her expenses, attorneys fees, judgments, fines and amounts paid in settlement, if the person acted in good faith and in a manner reasonably expected to be in, or not opposed to, the corporation's best interests, and in the case of a criminal proceeding, had no reasonable cause to believe the conduct was unlawful.

Sec. 145(b) applies to suits brought by or in the right of a corporation. It permits indemnification of expenses and attorneys fees under the same standard as Sec. 145(a), except that a corporation may not provide indemnification in respect of any claim as to which a person was adjudged liable to the corporation.

Sec. 145(c) is the mandatory indemnification provision. It requires indemnification where a present or former director or officer has been successful on the merits or otherwise in defense of a claim.

Sec. 145(e) allows advancement of expenses to directors, officers, and other persons upon the receipt of an undertaking by the person to repay if it is determined that he or she is not entitled to indemnification.

Sec. 145(g) provides that a corporation may purchase insurance on behalf of directors, officers, employees, and agents against liabilities incurred in or arising out of their official capacity. The insurance policy may cover liability under those circumstances where the corporation would not have been able to provide indemnification under Sec. 145(a) or (b).

Corporations do not have to rely on the statutory scheme. Instead, they may have provisions in the bylaws or Certificate of Incorporation or separate agreements dealing with indemnification. In fact, in practice, many Delaware corporations include a provision in their bylaws or Certificate of Incorporation making indemnification mandatory under the circumstances where it would only be permissive under Sec. 145.

E. Amendment, Merger, Conversion & Dissolution

1. Amendments to Certificate of Incorporation

Sec. 242 states that a corporation may amend its Certificate of Incorporation “from time to time, in any and as many respects as may be desired, so long as its Certificate of Incorporation as amended contains only such provisions as it would be lawful and proper to insert in an original Certificate of Incorporation filed at the time of filing the amendment.”

In order to amend the Certificate of Incorporation, the board of directors must adopt a resolution setting forth the amendment, the stockholders must vote in favor of it, and the corporation must file a certificate setting forth the amendment and certifying that it has been duly adopted.

The default rule is that a majority of outstanding stock entitled to vote and a majority of the stock of each class entitled to vote as a class must vote in favor of the amendment. The holders of shares of a class are entitled to vote as a class upon any amendment that would increase or decrease the number of authorized shares or the par value of the class or adversely change the powers, rights or preferences.

An amendment to the Certificate of Incorporation may be made before a corporation receives payment for stock if the amendment is adopted by a majority of the directors or by a majority of incorporators if there are no directors. The amendment will be deemed effective as of the date the original Certificate of Incorporation went into effect.

2. Restated Certificate of Incorporation

When the Certificate of Incorporation is amended several times, it may become difficult to tell which provisions are currently in effect. It may also be very expensive when ordering certified copies of the Certificate of Incorporation and all amendments thereto. At that point, it may be advisable to file a Restated Certificate of Incorporation.

In a Restated Certificate of Incorporation, a corporation may integrate into a single instrument all provisions of its Certificate of Incorporation then in effect and operative. Upon filing, the original Certificate of Incorporation is superseded. However, the original date of incorporation remains unchanged.

A stockholder vote is not necessary to file a Restated Certificate of Incorporation. An amendment may be made at the same time a Restated Certificate of Incorporation is filed. However, stockholder approval will then be required.

3. Mergers

The GCL authorizes a Delaware corporation to merge with the following entities:

- domestic or foreign corporations (Secs. 251, 252)
- its parent corporation or a subsidiary corporation (Sec. 253)
- domestic or foreign joint stock or other associations (Sec. 254)
- domestic or foreign nonstock corporations (Secs. 257, 258)
- domestic or foreign general partnerships, limited partnerships, limited liability partnerships, limited liability limited partnerships (Sec. 263)
- domestic or foreign limited liability companies (Sec. 264)
- a noncorporate parent entity (Sec. 267)

4. Consolidations and Share Exchanges

The GCL also authorizes Delaware corporations to enter into consolidations. In a consolidation, two or more corporations, or one or more corporations and other business entities, consolidate to form a new corporation or other business entity. A consolidation differs from a merger in that all of the constituent entities disappear in a consolidation, while one of the constituents survives in a merger. The procedure for entering into a consolidation is almost the same as for a merger. In practice, very few consolidations are entered into by Delaware corporations.

The GCL does not authorize share exchanges. A share exchange is another form of statutory combination that is authorized by some state corporation laws. In a share exchange, a corporation acquires all of the outstanding shares of one or more classes or series of another corporation, with both corporations surviving.

5. General Merger Procedure

Although there are some differences in the approval procedure and in the content of the merger documents depending upon whether there are foreign or unincorporated entities as constituents, the general procedure for entering into a merger is as follows:

The first step is that the board of directors must adopt a resolution approving an Agreement of Merger. The Agreement of Merger must set forth, among other information, the terms and conditions of the merger, any amendments to the survivor's Certificate of Incorporation, and the manner, if any, of converting the shares or interests of the constituents into shares, interests or other securities of the survivor, or cash, property, rights, securities or interests of any other corporation or entity, or of canceling some or all of such shares or interests.

The Agreement of Merger must then be submitted to the stockholders for their approval. The default rule requires a majority of outstanding stock entitled to vote, to vote in favor of the Agreement.

The stockholders of a surviving Delaware corporation do not have to approve the merger if their interests will not be materially changed. Specifically, Sec. 251(f) provides that approval is not required if: (1) the Agreement of Merger does not amend the survivor's Certificate of Incorporation, (2) each share of stock of the corporation outstanding immediately before the merger is to be an identical share of the surviving corporation after the merger, and (3) either no shares of common stock of the surviving corporation and no shares, securities or obligations convertible into such stock are to be issued or delivered under the plan of merger, or the authorized unissued shares of common stock of the surviving corporation to be issued or delivered under the plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under the plan do not exceed 20% of the shares of common stock of the corporation outstanding immediately before the merger.

Following approval, the corporation must file either a copy of the Agreement of Merger or a Certificate of Merger. The Certificate of Merger generally identifies the constituents, states that the Agreement of Merger was duly adopted, gives the address of the office where the executed Agreement is on file, and states that a copy of the Agreement will be furnished upon request to any stockholder or owner of a constituent. (In practice, a Certificate of Merger is usually filed rather than a copy of the Agreement. Because the county assessment and certified copy fees are based on the number of pages, it is less expensive to file the Certificate of Merger, which is a much shorter document. In addition, by filing the Certificate of Merger rather than the Agreement, the terms and conditions of the merger remain private.)

6. Parent-Subsidiary Mergers

Sec. 253 is the GCL's main short form merger provision. A merger may be effected under Sec. 253 when a corporation owns at least 90% of the outstanding shares of each class of stock of another corporation of which class there are outstanding shares that would be entitled to vote on the merger, absent the provisions of Sec. 253 denying the right to vote. The short form provision may be used whether the parent survives or the subsidiary survives.

A parent-subsubsidiary merger is effected by the parent filing a Certificate of Ownership and Merger, which must set forth a copy of the resolution of its board of directors to merge and the date of adoption. If the parent does not own all of the shares, the resolution must include the terms and conditions of the merger, including the consideration received by the subsidiary's minority stockholders. If the survivor will be a Delaware corporation, it may change its name by so providing in the resolution. However, no other amendments to the Certificate of Incorporation may be made.

If the parent corporation survives, stockholder approval is not required. If the subsidiary survives, stockholder approval is required. When the subsidiary survives, the resolution must include provision for the pro rata issuance of its stock to the parent's stockholders and the Certificate of Ownership and Merger must state that the merger has been approved by a majority of the outstanding stock of the parent corporation.

Sec. 267 permits the short form merger procedure to be used where a noncorporate entity is the parent and at least one of the subsidiaries is a Delaware corporation. Where a non-Delaware entity or corporation is a constituent the laws of the formation state must not forbid such a merger. The merger may be effected by the parent entity authorizing the merger in accordance with its governing documents and statute and acknowledging and filing a Certificate of Ownership and Merger.

7. Appraisal Rights

The right to an appraisal is a right given to stockholders, whereby the fair value of their stock may be appraised by a court, and where they may sell their stock back to the corporation for the appraised value, if the corporation enters into a merger that alters the character of their investment, without their consent.

Sec. 262, Delaware's appraisal rights statute, provides that appraisal rights are available to a stockholder who owns stock when the demand for an appraisal was made, makes a demand at the required time, holds the shares through the date of the merger, and does not vote for or consent to the merger.

Appraisal rights are not available for the shares of any class or series that are publicly traded or held by more than 2,000 stockholders and where the stockholders are not required to accept any consideration for their shares other than shares in the survivor or shares in another corporation that are publicly traded or held by more than 2,000 stockholders. This is known as the "market out" exception. It exists because the market sets the fair value, thereby making appraisal by the Chancery Court unnecessary. Appraisal rights are also not available for stockholders who are not entitled to vote, as the stockholders' interests are not being significantly affected.

8. Domestication

Sec. 388 authorizes the domestication in Delaware of a Non-United States corporation, limited liability company (LLC), statutory trust (ST), business trust (BT) or association, REIT, common law trust or any other unincorporated business or entity, including a general partnership (GP), limited liability partnership (LLP), limited partnership (LP), or limited liability limited partnership (LLLP). The domesticating entity must file a Certificate of Domestication and a Certificate of Incorporation, after which it will be governed by the GCL.

Sec. 390 authorizes Delaware corporations to domesticate to a jurisdiction outside of the United States, Puerto Rico, Guam, or any possession or territory of the United States. The corporation may transfer to the foreign jurisdiction—in which case its existence as a Delaware corporation ceases, or, it may continue in the foreign jurisdiction—in which case its existence as a Delaware corporation does not cease. The board of directors must adopt a resolution to domesticate, all outstanding shares must vote in favor of the resolution, and a Certificate of Transfer or a Certificate of Continuance must be filed.

9. Conversion

Sec. 265 authorizes the conversion of a Delaware or foreign LLC, ST, BT or association, REIT, common law trust or other unincorporated business or entity, including a GP, LLP, LP, LLLP or a foreign corporation to a Delaware corporation. The unincorporated entity approves the conversion in the manner provided for in its governing document. It must then file a Certificate of Conversion and a Certificate of Incorporation.

Sec. 266 allows a Delaware corporation to convert to a Delaware or foreign LLC, ST, BT or association, REIT, common law trust or other unincorporated business or entity, including a GP, LLP, LP, LLLP or a foreign corporation. The board of directors must adopt a resolution to convert, all outstanding shares of stock must vote in favor, and the corporation must file a Certificate of Conversion. If converting to a

Delaware entity, any document required to be filed by the statute governing the formation of the entity into which the corporation is converting must be filed as well.

10. Dissolution

Sec. 275 provides that dissolution of a Delaware corporation may be approved: (1) upon the board of directors adopting a resolution to dissolve, submitting the resolution to the stockholders for a vote at a meeting, and a majority of the outstanding stock entitled to vote approving the resolution, or (2) upon the unanimous written consent of the stockholders without director action. Following approval pursuant to Sec. 275, a Certificate of Dissolution must be filed.

Sec. 274 provides that a corporation that has not issued shares, or that has issued shares but not begun doing business, may be dissolved by the act of a majority of its directors, or if it has no directors, by the act of a majority of its incorporators.

Sec. 278, Delaware's "survival statute", provides that a dissolved corporation continues as a "body corporate" for three years, or longer if the Chancery Court so decides, for the purposes of prosecuting and defending suits, settling and closing business, disposing of property, discharging liabilities, and distributing remaining assets to stockholders.

Sec. 311 states that at any time before the expiration of three years from the date of dissolution, a corporation may revoke its dissolution. The board of directors must adopt a resolution, a majority of outstanding stock must vote in favor, and a Certificate of Revocation of Dissolution must be filed.

III. DELAWARE'S LIMITED LIABILITY COMPANY ACT

A. Overview

Delaware's Limited Liability Company Act (DLLCA) went into effect on October 1, 1992. DLLCA is modeled after Delaware's limited partnership act—not the General Corporation Law. The Act is codified at Title 6, Chapter 18, Sec. 18-101 *et seq.* Most of the provisions are default provisions that can be opted out of by the members in the LLC agreement.

The policy of DLLCA is set forth in Sec. 18-1101, which states that: “it is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements”. This statement reflects the legislature's intention to allow members to define their own rights and duties, and decide for themselves how the LLC is to be governed.

B. Formation

1. Certificate of Formation

A limited liability company is formed by one or more authorized persons executing and filing a Certificate of Formation. Sec. 18-201 provides that the only required content of the Certificate of Formation is the LLC's name and the address of its registered office and name of its registered agent. The Certificate of Formation may also contain any other information the members choose to include. The filing fee is \$90 (which consists of a \$70 fee for filing and a \$20 courthouse municipality fee).

2. Name

Sec. 18-102 provides that a limited liability company's name must contain the words “Limited Liability Company”, or the abbreviation “L.L.C.”, or the designation “LLC”.

An LLC's name must be distinguishable on the records of the Division of Corporations from the name of any domestic or foreign corporation, partnership, limited partnership, statutory trust, or limited liability company. However, an indistinguishable name may be used with the written consent of the entity holding the name.

The availability of an LLC's name may be checked with the Division of Corporations. If available, the name may be reserved for renewable 120 days periods. A reservation is made by filing an application with the Division of Corporations.

3. Permitted Purposes

Sec.18-106 provides that an LLC may carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of banking.

4. LLC Agreement

Sec. 18-201 states that "a limited liability company agreement shall be entered into or otherwise existing either before, after or at the time of the filing of a certificate of formation..." An LLC agreement is defined by Sec. 18-101 as "any agreement (whether referred to as a limited liability company agreement, operating agreement or otherwise), written, oral or implied, of the member or members as to the affairs of a limited liability company and the conduct of its business".

The LLC agreement is the main governing document of a Delaware limited liability company. It contains the kind of provisions found in a corporation's Certificate of Incorporation, bylaws, and stockholder agreements. It may be used to opt out of the statute's default provisions and fill in gaps where there are no default provisions.

The matters typically dealt with in the LLC agreement include:

- term of existence of the LLC
- purposes and powers of the LLC
- power and authority of members, managers, officers, and others
- admission of members
- indemnification
- allocation of profits, losses and distributions
- voting rights of members and managers
- meeting requirements (quorum, record date, notice, action by consent)

- fiduciary duties of managers and members
- maintenance and inspection of books and records
- events of dissolution and winding up procedure
- assignment and transfer of interests

5. Series LLC

A limited liability company may be formed having one or more designated series of members, managers, interests or assets, with each series having its own powers, purposes, rights, and duties with respect to specified LLC property or obligations. Each series may have its own business purpose or investment objective as well. A series has the power to, in its own name, contract, hold assets, grant security interests, sue and be sued. A series may carry on any lawful business, purpose or activity, for profit or not for profit, except for banking.

The series must be established in the LLC agreement or its establishment must be provided for in the LLC agreement. The assets of a series must be accounted for separately from the assets of the LLC or any other series thereof. In addition, the Certificate of Formation and LLC agreement must clearly state that it is a Series LLC. If these requirements are met, then the debts, liabilities and expenses incurred by the series are payable only from the assets of that series, not from the LLC itself or the other series.

C. Members

1. Admission of Members

An LLC may have one or more members. Any natural person, partnership, corporation or other entity may be a member. After formation, members may be admitted as provided in the LLC agreement. If the LLC agreement is silent on the issue, the consent of all members will be required.

Sec. 18-501 states that a member may contribute cash, property or services rendered, a promissory note or other obligation to contribute cash, property or perform services. A person may also be admitted to an LLC as a member without making a contribution or being obligated to make a contribution.

The LLC agreement may set forth penalties for failure to make contributions. The penalties may include forfeiture of the member's interest.

2. Classes of Members

Sec. 18-302 states that the LLC agreement may provide for classes or groups of members having different rights, powers, or duties. Therefore, for example, an LLC may be structured like a corporation that has common and preferred stock, by having one group of members with voting rights, and another group with preferential rights to distributions but no voting rights.

3. Limitation of Liability

Sec. 18-303 states as follows: “The debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation, or liability of the limited liability company solely by reason of being a member or acting as a manager”.

4. Voting by Members

Sec. 18-302 states that voting by members may be on a per capita, number, financial interest, or any other basis. Consequently, the members may decide to share voting rights equally, or give those who invested more a greater vote. The LLC agreement may also provide that any member or class or group of members will have no voting rights or will only be able to vote on certain matters.

5. Member Meetings

Unlike the GCL, which requires an annual stockholders’ meeting, no meetings are required to be held by the DLLCA. The LLC agreement, however, may require meetings, and may set forth provisions relating to the place, date and frequency of meetings, as well as notice, record date, quorum and other requirements. Unless the LLC agreement provides otherwise, meetings may be held by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other.

6. Right to Profits, Losses and Distributions

Members share in profits, losses and distributions of LLC assets. Profits, losses and distributions may be allocated among the members in the manner provided in the LLC agreement. In the absence of a provision, Secs. 18-503 and 18-504 state that profits, losses and distributions will be allocated on the basis of the agreed value of the contributions of the members.

7. Access to Information

Pursuant to Sec. 18-305, members have a right to obtain information regarding the state of the LLC's business and financial condition, tax returns, a list of members and other information. A written demand must be made, stating the purpose, which must be related to the member's interest as a member. The LLC agreement may set forth what information is to be furnished, at what time, and at whose expense. The right to obtain information may also be restricted in the LLC agreement.

8. Derivative Suits

Members may bring a derivative suit on the LLC's behalf in the Chancery Court. Secs. 18-1001 to 18-1004 state that the plaintiff must have been a member when filing the action and when the challenged transaction occurred. The complaint must allege with particularity the effort made to secure initiation of the action by the members or managers, or that making an effort was not likely to succeed.

9. Resignation

Sec. 18-603 states that a member may not resign from an LLC before dissolution unless the LLC agreement gives members that right. A person ceases to be a member, unless the LLC agreement provides otherwise, by voluntarily petitioning for bankruptcy or being adjudged insolvent or bankrupt.

10. Assignment of LLC Interest

An LLC interest is defined as "a member's share of the profits and losses of a limited liability company and a member's right to receive distributions of the limited liability company's assets." An LLC interest is assignable, unless the LLC agreement provides otherwise.

A member who makes an assignment ceases to be a member. However, the assignee does not become a member unless all of the remaining members consent to the assignee's admission or the assignee complies with any other procedure the members may choose.

D. Managers & Management

1. Management

Sec. 18-402 states that unless the LLC agreement provides otherwise, management is vested in the LLC's members in proportion to the then current percentage or interests of the members in the LLC's profits, and the decisions of members owning more than 50% of the profits controls.

If the LLC agreement so provides, management may be vested in one or more managers. The LLC agreement may also provide that the members will manage, but that a unanimous or supermajority vote is required to take some or all actions.

2. Managers

Managers are chosen in the manner provided for in the LLC agreement. A manager may resign at the time or upon the happening of events specified in the LLC agreement. The LLC agreement may provide that a manager may not resign. If so, the manager may still resign, but will be liable for breaching the agreement, and subject to damages set forth in the LLC agreement.

Managers hold the offices and have the responsibilities accorded them in the LLC agreement. Thus, for example, an LLC may have a corporate-type structure, with managers acting as president, vice-president, secretary and treasurer. The LLC agreement may also provide for classes or groups of managers with different rights and duties.

The right to manage and control the LLC's business and affairs may also be delegated to officers, agents, or employees.

3. Manager Meetings

The provisions governing manager meetings may be set forth in the LLC agreement. In addition, unless the LLC agreement provides otherwise, managers may act without a meeting upon the consent of the number of managers necessary to take action at a meeting. Managers may also vote by proxy. (Note that directors of Delaware corporations cannot act without a meeting on less than unanimous consent or vote by proxy.) Unless the LLC agreement provides otherwise, meetings may be held by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other.

4. Fiduciary Duties

DLLCA does not define a standard of conduct for members or managers or state whether they owe fiduciary duties.

5. Statutory Protections

Sec. 18-1101 states that to the extent that at law or in equity members or managers have duties (including fiduciary duties) to an LLC, its members, managers or other parties bound by the LLC agreement, these duties may be expanded, restricted, or eliminated in the LLC agreement, provided that the contractual implied covenant of good faith and fair dealing may not be eliminated.

Sec. 18-108 states that an LLC has the power to indemnify and hold harmless any member, manager or other person, from and against any or all claims and demands, subject to any standards or restrictions contained in the LLC agreement.

Sec. 18-406 provides that managers and members are protected from liability where they relied in good faith on LLC records and upon information, opinions, reports or statements presented by persons as to matters the member or manager believed were within the person's expertise. In addition, Sec. 18-1108 states that a member or manager will not be held liable for breach of duty if the member or manager relied in good faith on a provision of the LLC agreement.

E. Amendment, Merger, Conversion & Dissolution

1. Amendment to Certificate of Formation

Sec. 18-202 states that a manager, or if none, a member, who becomes aware that any statement in the Certificate of Formation was false when made, or that any matter described therein has changed, making the Certificate of Formation false in any material respect, must promptly amend the Certificate of Formation. The Certificate of Formation may also be amended to add or delete an optional provision. A Certificate of Amendment must be filed setting forth the name of the LLC and the amendment. There is also provision for filing a Restated Certificate of Formation.

2. Merger

Sec. 18-209 states that a Delaware limited liability company may merge with one or more domestic or foreign limited liability companies or "other business entities". "Other business entity" is defined as a corporation, ST or association, REIT, common-law trust, or other unincorporated business, including a GP, LLP, LP, or LLLP. The merger must be effected pursuant to an Agreement of Merger. DLLCA does not specify the information that must be included in the Agreement of Merger.

The default rule is that a Delaware LLC approves a merger by a vote of its members who own more than 50% of the then current percentage or other interest in the profits of the LLC. Following approval, the surviving entity must file a Certificate of Merger that, in general, identifies the constituents and their home jurisdictions, states that the Agreement of Merger was duly approved and executed, gives the address of the office where the executed Agreement is on file, and states that a copy of the Agreement will be furnished upon request to any owner of a constituent. If a Delaware LLC is the survivor, the Certificate may set forth an amendment to change the name or registered agent or office. If a foreign entity is the survivor, it must agree to service of process on the Secretary of State in actions to enforce obligations of a nonsurviving Delaware LLC. A copy of the Agreement of Merger may be filed instead, if

it contains the information required of the Certificate of Merger. An LLC agreement may provide that an LLC shall not have the power to merge.

Sec. 18-209 also authorizes short form mergers where a Delaware LLC owns at least 90% of the outstanding shares of a Delaware corporation. In such a case the LLC may merge the corporation into itself or itself into the corporation pursuant to a plan of merger. The LLC must file a Certificate of Ownership and Merger.

Appraisal rights are not provided for by the DLLCA. However, the LLC agreement or the Agreement of Merger may provide that contractual rights are available, to whom they are available, and the procedure that must be followed to assert the rights.

3. Conversion

Sec. 18-214 states that any domestic or foreign corporation, ST or association, REIT, common-law trust, GP, LP, LLP, LLLP or other unincorporated business may convert to a Delaware limited liability company. The other entity must approve the conversion as provided in its governing documents and applicable law. An LLC agreement must be approved by the same authorization required to approve the conversion. After approval, the other entity must file a Certificate of Conversion and a Certificate of Formation.

Sec. 18-216 states that a Delaware limited liability company may convert to a Delaware or foreign corporation, ST, REIT, common-law trust, GP, LLP, LP, or LLLP. The conversion must be authorized as specified in the LLC agreement. If the LLC agreement does not specify how a conversion is to be authorized, then it will be authorized in the same manner specified for approving a merger. If the approval of a merger is not specified, then a conversion is approved by the vote of members owning more than 50% of the profits. (Note that the GCL requires a unanimous stockholder vote.) An LLC agreement may provide that an LLC shall not have the power to convert.

An LLC converting to a Delaware entity files a Certificate of Conversion and any formation document required by the Delaware statute governing the entity. An LLC converting to a business entity organized outside of Delaware must file a Certificate of Conversion to Non-Delaware Entity.

4. Other Authorized Transactions

Delaware LLCs may also enter into consolidations pursuant to Sec. 18-209. The procedure is basically the same as for entering into mergers. A Delaware LLC may also domesticate in a non-United States jurisdiction pursuant to Sec. 18-213. A Certificate of Transfer must be filed if the LLC will no longer exist as a Delaware LLC, and a Certificate of Transfer and Continuation must be filed if the LLC's Delaware existence is to continue. In addition, a non-United States corporation or unincorporated entity may domesticate as a Delaware LLC by filing a Certificate of LLC Domestication and a Certificate of

Formation. An LLC agreement may provide that an LLC shall not have the power to consolidate, transfer, domesticate or continue.

5. Dissolution & Cancellation

Sec. 18-801 states that an LLC is dissolved and its affairs must be wound up upon the first to occur of the following:

- At a time specified in the LLC agreement
- Upon the happening of events specified in the LLC agreement
- Unless the LLC agreement provides otherwise, upon the vote or written consent of the members who own more than two-thirds of the percentage or other interests in the profits
- At a time there are no members. (However, the LLC is not dissolved, unless the LLC agreement provides otherwise, if the last member's personal representative agrees to continue the LLC and become or designate a member, or a new member is admitted as permitted by the LLC agreement)
- Upon an entry of judicial decree

The death, retirement, expulsion, resignation, bankruptcy, or dissolution of a member does not cause the dissolution of an LLC unless the LLC agreement specifies these as events causing dissolution.

After the event causing dissolution, Sec. 18-803 states that a manager, or if none, the members or a person approved by the members, may wind up the LLC. Upon dissolution, until filing the Certificate of Cancellation, the person winding up may, in the LLC's name, bring or defend suits, dispose of property, discharge liabilities, and distribute remaining assets to members.

Upon the completion of winding up, a Certificate of Cancellation must be filed setting forth the name of the LLC, the date of filing of its Certificate of Formation, and the reason for filing the Certificate of Cancellation. Sec. 18-806 allows an LLC to revoke the dissolution, before filing the Certificate of Cancellation, pursuant to the vote or consent of all members (or their representatives).

IV. OTHER DELAWARE UNINCORPORATED BUSINESS ENTITIES

This part of the seminar will look at the laws governing three other Delaware unincorporated entities—the limited partnership, limited liability partnership, and statutory trust.

A. Delaware Revised Uniform Limited Partnership Act

1. Overview

The Delaware Revised Uniform Limited Partnership Act (DRULPA) went into effect on January 1, 1983. It is codified at Title 6, Chapter 17, Sec. 17-101 *et seq.* The policy of DRULPA, like that of the LLC Act, is to give maximum effect to the principle of freedom of contract and the enforceability of partnership agreements. Most of the provisions of the LP Act are default provisions that can be modified in the partnership agreement.

2. Certificate of Limited Partnership

A Delaware limited partnership is formed by the filing of a Certificate of Limited Partnership, signed by all general partners. The filing fee is \$200. Sec. 17-201 states that the Certificate of Limited Partnership must set forth: (1) the name of the limited partnership, (2) the address of the registered office and name of registered agent, and (3) the name and address of each general partner. It may also set forth any other provision the partners so desire.

3. Name

Sec. 17-102 provides that a limited partnership's name must contain the words "Limited Partnership" or the abbreviation "L.P." or "LP". The name must be distinguishable on the records of the Division of Corporations from the name of any domestic or foreign corporation, partnership, LP, ST, or LLC. An LP's name may be reserved for renewable 120 days periods.

4. Partnership Agreement

The main governing document of a limited partnership is the partnership agreement. It serves the same purposes as an LLC agreement. As such, it is used to provide for the governing of the LP's internal affairs and the relationship among the partners and between the partners and the LP. It is also used to opt out of the statute's default provisions and fill in gaps where there are no default provisions.

5. Limited Partners

A limited partnership must have one or more limited partners. Following formation, limited partners are admitted as provided in the partnership agreement, or, if not provided, then upon the consent of all partners.

Limited partners are entitled to a share of the profits and losses and distributions of assets, which may be allocated as provided in the partnership agreement. They also have the right to inspect certain books and records, unless the right is restricted in the partnership agreement, and may bring a derivative suit. The partnership agreement may provide for classes of limited partners having different rights, powers and duties.

6. Liability of Limited Partners

Sec. 17-303 states that limited partners are not liable for the limited partnership's obligations unless they are also general partners or participate in the control of the limited partnership's business. If they are liable it is only to persons doing business with the LP who reasonably believed the limited partner was a general partner based on the limited partner's conduct.

Sec. 17-303 contains a broad safe harbor of activities that a limited partner may engage in without losing limited liability. These activities include: (1) being an independent contractor, agent, officer, stockholder, partner, trustee, member or employee of a general partner, (2) consulting with or advising a general partner, (3) lending money to or borrowing from the limited partnership or a general partner, (4) attending or participating in a meeting of the partners, (5) winding up the limited partnership, (6) pursuing a derivative action, (7) serving on a committee of the limited partnership, and (8) voting on various matters including dissolution, amendment, merger, sale of assets, payment or discharge of debts, admission or removal of partners, and indemnification.

7. General Partners

A limited partnership must have one or more general partners. General partners have the same rights, powers and liabilities as partners in general partnerships. Thus, they have the power to bind the limited partnership and manage its business. They are also liable for its debts. After formation, general partners may be admitted only upon the consent of all partners, unless the partnership agreement provides otherwise. Sec. 18-401 states that the partnership agreement may provide for classes of general partners having different rights, powers and duties.

8. Management

Limited partnerships are managed by their general partners. Sec. 17-405 states that the general partners may delegate their right to manage to agents, officers, employees or other persons.

DRULPA does not define a standard of conduct for partners or state whether fiduciary duties are owed. Sec. 17-1101 does, however, state that to the extent any duties, including fiduciary duties, are owed, the partnership agreement may expand, restrict or eliminate those duties. (Although the implied contractual covenant of good faith and fair dealing may not be eliminated.)

9. Amendment of Certificate of Limited Partnership

Sec. 17-202 provides for amendments in three situations. First, a general partner who becomes aware that any statement in the Certificate of Limited Partnership was false when made, or that any matter described in the Certificate of Limited Partnership has changed, must promptly amend the Certificate of Limited Partnership.

In addition, the Certificate of Limited Partnership must be amended no later than 90 days after the following: (1) the admission of a new general partner, (2) the withdrawal of a general partner, (3) a change of name, or (4) a change of registered office or agent. The Certificate of Limited Partnership may also be amended to add, delete or change an optional provision. To amend the Certificate of Limited Partnership a Certificate of Amendment must be filed, setting forth the LP's name and the amendment.

10. Merger

Pursuant to Sec. 17-211, a Delaware limited partnership may merge with one or more domestic or foreign corporations or unincorporated business entities (including LPs, LLCs and LLPs).

Unless the partnership agreement provides otherwise, a Delaware LP approves a merger by the vote of all general partners and the vote of limited partners who own more than 50% of the current percentage or other interests in the profits of the LP.

The surviving entity must file a Certificate of Merger setting forth the same type of information required of a Certificate of Merger filed under the LLC Act or GCL. In lieu of the Certificate of Merger, the Agreement of Merger may be filed, provided it contains all of the information required of the Certificate.

Sec. 17-211 also provides for short form mergers involving LP parents and Delaware corporate subsidiaries.

A partnership agreement may provide that an LP shall not the power to merge. Appraisal rights are not granted by statute, but the partnership agreement or the Agreement of Merger may provide for contractual appraisal rights.

11. Conversion

Sec. 17-217 states that any domestic or foreign corporation or unincorporated business entity may convert to a Delaware LP. The converting entity must file a Certificate of Conversion and a Certificate of Limited Partnership.

Sec. 17-219 provides that a Delaware limited partnership may convert to a Delaware or foreign corporation or unincorporated entity. The conversion must be authorized as specified in the partnership agreement. If not specified, then in the manner specified for approving a merger, or, if that is not specified, then the conversion is approved by the vote of all general partners and the limited partners owning more than 50% of the profits. The partnership agreement may provide that the LP shall not the power to convert. An LP converting to a Delaware entity files a Certificate of Conversion and any formation document required by the Delaware statute governing the entity. An LP converting to a business entity organized outside of Delaware must file a Certificate of Conversion to Non-Delaware Entity.

12. Dissolution and Cancellation

Sec. 17-801 provides that an LP is dissolved, and its affairs must be wound up, upon the first to occur of a number of specified events, including a time or event set forth in the partnership agreement, a vote of all general partners and limited partners owning two-thirds of the profits, the withdrawal of a general partner (unless the partnership agreement or a vote of partners allows the LP to continue) or a time when there are no limited partners (unless a new limited partner is admitted).

After the event causing dissolution, the general partners, or if none, the limited partners, may wind up the LP. Upon the completion of winding up, a Certificate of Cancellation of the Certificate of Limited Partnership must be filed. Sec. 17-806 allows an LP to revoke the dissolution, before filing the Certificate of Cancellation, pursuant to the vote or consent of all partners (or their representatives).

13. Limited Partnership As Limited Liability Limited Partnership

A limited liability limited partnership (LLLP) is an LP in which the general partners do not have unlimited liability for the partnership's debts. Sec. 17-214 states that an LP may be formed as, or may become, an LLLP pursuant to the section. An LP may become an LLLP as permitted by the LP's partnership agreement or, if the partnership agreement does not provide for the LP's becoming an LLLP, with the approval by all general partners and by the limited partners who own more than 50 percent of the then current percentage or other interest in the LP's profits. To be formed or to become, and to continue as an LLLP, an LP must, in addition to complying with the requirements of DRULPA, file a Statement of Qualification as provided in Sec. 15-1001 of the Delaware Revised Uniform Partnership Act (DRUPA) and have as the last words or letters of its name the words "Limited Liability Limited Partnership," or the abbreviation "L.L.L.P.," or the designation "LLLP."

A Delaware LLLP is governed by DRULPA and the sections of DRUPA concerning the filing of the Statement of Qualification and liability of partners. In a Delaware LLLP, those partners who are liable for the debts, liabilities, or obligations of the LP have the same limited liability afforded to partners of a limited liability partnership under DRUPA.

B. Limited Liability Partnerships (as governed by the Delaware Revised Uniform Partnership Act)

1. Overview

Delaware approved a law authorizing the registration of limited liability partnerships in 1993, becoming the third state (after Texas and Louisiana) to recognize this special form of partnership. Those original provisions were repealed when Delaware enacted the Revised Uniform Partnership Act (DRUPA). DRUPA, which went into effect on January 1, 2000, contained new provisions governing LLPs. DRUPA is codified at Title 6, Chapter 15, Sec. 15-101 *et seq.* Article 10 deals specifically with the registration of a Delaware LLP.

2. Statement of Qualification

Sec. 15-1001 states that a general partnership may become a Delaware limited liability partnership or a partnership that has not yet been formed may be formed as an LLP by filing a Statement of Qualification that sets forth: (1) the name of the limited liability partnership, (2) the address of the registered office and name of registered agent, (3) the number of partners at the time of the effective date of the Statement, and (4) a statement that the partnership elects to become an LLP. The filing fee is \$200 per partner, up to a maximum of \$120,000.

In the case of a newly formed LLP, its original partnership agreement must state that it is formed as an LLP. In the case of an existing general partnership, the terms and conditions of becoming an LLP must be approved by the general partners by the vote necessary to amend the partnership agreement, and, if specified, also by the vote necessary to amend the provision of the partnership agreement considering the obligation to make contributions.

3. Name

An LLP's name must contain as the last words or letters "Limited Liability Partnership", "L.L.P." or "LLP". The name must be distinguishable on the records of the Division of Corporations from the name of any domestic or foreign corporation, partnership, LP, ST, or LLC. An LLP's name may be reserved for renewable 120 days periods.

4. Registered Office and Registered Agent

Sec. 15-111 requires every limited liability partnership to have and maintain a registered office and registered agent for service of process. Delaware differs from many states, where this requirement exists only if the LLP will not have an office in the state.

5. Partnership Agreement

In an LLP, the management and operation of the partnership and the partners' relations and rights are provided for in the partnership agreement—which is the main governing document.

6. Liability of Partners

Sec. 15-306 provides that "an obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort or otherwise, is solely the obligation of the partnership. A partnership is not personally liable, directly or indirectly, by way of indemnification, contribution, assessment, or otherwise for such an obligation solely by reason of being or so acting as a partner."

7. Amendment to Statement of Qualification

Sec. 15-105 provides that a person authorized to file a Statement of Qualification who becomes aware that any statement was false when made, or that any matter described therein has changed, must promptly amend the Statement of Qualification by filing a certificate that sets forth the name of the LLP, identifies the statement being amended, and sets forth the substance of the amendment.

8. Merger

Sec. 15-902 states that a Delaware partnership (which the Division of Corporations interprets to include an LLP) may merge with one or more domestic or foreign corporations or unincorporated business entities. Unless the partnership agreement provides otherwise, a Delaware partnership approves a merger by the vote of all partners. The surviving entity must file a Certificate of Merger or a copy of the Agreement of Merger. The partnership agreement may provide that the LLP shall not have the power to merge.

9. Conversions

Sec. 15-901 states that any domestic or foreign corporation or unincorporated business entity may convert to a Delaware LLP. The converting entity must file a Certificate of Conversion and a Statement of Qualification.

Sec. 15-903 states that a Delaware LLP may convert to a Delaware or foreign corporation or unincorporated entity. The conversion must be authorized as specified in the partnership agreement, or, if not specified, in the manner specified for approving a merger, or, if that is not specified, then by the vote of all partners. The partnership agreement may provide that the LLP shall not have the power to convert. An LLP converting to a Delaware entity files a Certificate of Conversion and any formation document required by the Delaware statute governing the entity. An LLP converting to a business entity organized outside of Delaware must file a Certificate of Conversion to Non-Delaware Entity.

10. Cancellation of Statement of Qualification

A person authorized to file a Statement of Qualification may cancel the statement pursuant to Sec. 15-105. The document canceling the Statement of Qualification must set forth the name of the LLP, identify the statement being cancelled, and set forth the substance of the cancellation. An amendment removing the entity indicator ("Limited Liability Partnership", "L.L.P." or "LLP") must be filed simultaneously. The effect of a cancellation of the Statement of Qualification is that the partnership ceases to be a limited liability partnership. Instead, it becomes a regular general partnership and the partners lose their liability shield. Cancellation of the Statement of Qualification does not dissolve the partnership.

C. Delaware Statutory Trust Act

Delaware enacted the Delaware Business Trust Act (DBTA) in 1988. In 2002, the name of the act was changed to the Statutory Trust Act. The act is codified at Title 12, Chapter 38, Sec. 3801 *et seq.*

1. Definition of Statutory Trust

Sec. 3801 defines a statutory trust as “an unincorporated association which is created by a governing instrument under which property is or will be held, managed, administered, controlled, invested, reinvested and/or operated or business or professional activities for profit are carried on or will be carried on, by a trustee or trustees for the benefit of such person or persons as are or may become entitled to a beneficial interest in the trust property”.

2. Certificate of Trust

Sec. 3810 provides that a Delaware statutory trust is formed by filing a Certificate of Trust setting forth the name of the ST (which must be distinguishable from the names of other entities), and the name and address of at least 1 resident trustee. The Certificate of Trust must be signed by all trustees.

3. Governing Instrument

A statutory trust must have a governing instrument that creates the statutory trust and that, according to Sec. 3806 “may contain any provision relating to the management of the business and affairs of the statutory trust and the rights, duties and obligations of the trustees, beneficial owners and other persons.”

4. Resident Trustee

Sec. 3807 states that a statutory trust must, at all times, have at least one trustee who, if a person, is a resident of Delaware, or if not a person, has its principal place of business in Delaware. However, if the statutory trust is or will become a registered investment company, it does not have to have a resident trustee if it has a registered office and registered agent in Delaware.

5. Liability of Owners and Trustees

Sec. 3803 provides that beneficial owners are entitled to “the same limitation of personal liability extended to stockholders of private corporations”. In addition, trustees, officers, managers, or employees, when acting in those capacities, are not liable for acts, omissions or obligations of the statutory trust.

6. Management

Sec. 3806 provides that a statutory trust is managed by or under the direction of its trustees, unless its governing instrument provides otherwise. The governing instrument may provide that the beneficial owners or other persons may participate in management.

7. Amendments, Mergers, Conversions

Sec. 3810 states that when any information set forth in the Certificate of Trust changes, a Certificate of Amendment must be filed. Sec. 3818 permits a Delaware statutory trust to merge with another domestic or foreign statutory trust or other entity. Sec. 3821 allows conversions to and from another type of Delaware or foreign entity and Secs. 3822 and 3823 authorize domestications and transfers.

8. Dissolution and Cancellation

A Delaware statutory trust is dissolved and wound up at the time and in the manner specified in the governing instrument. Upon completion of winding up, the statutory trust's existence may be terminated by filing a Certificate of Cancellation.

V. PAYING ANNUAL TAXES

A. Annual Franchise Tax—Corporations

1. Due Date

Delaware corporations are required to pay an annual franchise tax and file an annual franchise tax report. The tax and report must be received by the Secretary of State's office no later than March 1.

Corporations whose estimated franchise tax is \$5,000 or more must pay installments of estimated tax as follows: 40% on June 1, 20% on September 1, 20% on December 1, with the actual balance due paid on or before March 1.

2. Penalties for Failure to Pay or File

Corporations that neglect or fail to pay the franchise tax or file a complete franchise tax report for more than one year will have their charters voided. The Secretary of State is required to notify such corporations by November 30 that their charters will be voided unless the taxes are paid or a complete report is filed by March 1. Additional time may be given for good cause shown. After March 1, the Secretary of State certifies a list of corporations that have neglected or refused to pay or file for one year and their charters are proclaimed void on or before June 30.

3. Calculating Franchise Tax

There are two methods for calculating the franchise tax. The lesser tax is payable. The maximum tax is \$180,000. The minimum tax using method 1 is \$75. The minimum tax using method 2 is \$350.

Method 1 — Based on number of authorized shares. (Method 1 must be used to calculate the tax on shares without par value):

- For a corporation with 1 to 5,000 authorized shares—the tax is \$75
- For a corporation with 5,001 to 10,000 shares—the tax is \$150

- For a corporation with over 10,000 shares—the tax is \$75 for each 10,000 shares or part thereof above the initial 10,000.

Method 2—Based on assumed par value capital. The tax rate under this method is \$350 per \$1 million or portion thereof of assumed par value capital. To see how the tax is calculated under this method see Appendix A—Delaware Franchise Tax Calculation Worksheet.

The Division of Corporations calculates the tax due based on the authorized shares method (Method 1) and preprints that amount on the Annual Franchise Tax Report for each corporation. However, the corporation may recalculate its tax using the assumed par value capital method (Method 2) and may pay that amount instead.

B. Annual Taxes for Other Delaware Entities

Limited liability companies and limited partnerships pay an annual tax of \$250, which is due on June 1. If the LLC or LP fails to pay by the due date, penalties and interest are imposed and the LLC or LP will lose its good standing status. If it fails to pay for three years, the LLC's Certificate of Formation or the LP's Certificate of Limited Partnership will be cancelled.

A limited liability partnership is subject to an annual report requirement. The annual report must be filed by June 1. The fee is \$200 per partner. Failure to pay by the due date will result in the revocation of the Statement of Qualification.

About the Author

Sandra Feldman is the Publications and Research Attorney for CT. She has written extensively about corporations and unincorporated entities and has written the books for CT seminars on: “Public Filings for Mergers and Acquisitions”, “Understanding Business Entity Formation, Maintenance and Termination”, “Business Entity Choice, Combination and Conversion”, “The Limited Liability Company”, “Statutory Filings for Multi-Entity Merger, Exchange, Consolidation, and Conversion”, “The Corporation vs. The LLC — A Comparison”, “Service of Process — A Primer for Business Entities”, “The Series LLC”, “Merger Filings in the 21st Century”, “LLC Law Today & Beyond”, and “What’s in a Name — Selecting and Protecting Business Entity Names”. Ms. Feldman is a graduate of the Boston University School of Law and is admitted to practice law in New York and Massachusetts.

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