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Entity Lifecycles: An Overview of the Statutory Requirements Relating to the Formation, Maintenance, and Termination of Delaware Corporations, Limited Liability Companies, and Statutory Trusts

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When starting up a company, forming a subsidiary, or creating an investment vehicle, selecting a business entity is one of the most significant decisions made by business lawyers and their clients. Delaware generally is recognized as the premier jurisdiction for business formation, and there is a variety of entities available under Delaware law. Different types of business entities, each with different characteristics, may be formed to achieve the client's business goals and to organize the relationship among the business's owners, creditors, and management. The various forms available in Delaware include, among others, corporations (including public benefit corporations), limited liability companies, and statutory trusts.

For a variety of reasons and entirely depending on the goals of the organization, these three entity types are those most often selected. For instance, if the parties intend that all of the profits be retained by the entity for growth purposes, or if the ultimate plan is to take the entity public, then a corpora-

tion may be the best entity choice. Similarly, if the parties are engaging in a structured finance transaction, such as the securitization of assets or project or equipment finance, a statutory trust may be best suited to meet their needs. Likewise, if the goal is flexibility in the structuring of the entity, a limited liability company may be the best option. The avoidance of double taxation can be accomplished in both the limited liability company and corporate context, however, and a real estate financing transaction that requires a special-purpose entity may utilize either a statutory trust or a limited liability company. Furthermore, if the entity has, for instance, a strong charitable, artistic, environmental, religious, social, or similar focus or mission, a public benefit corporation might be the logical choice. It is therefore imperative to the selection process that all parties involved possess a basic understanding regarding the formation, maintenance, and termination of each of these three entity types. Although certainly not your exclusive source of information, the first place to gain this requisite

understanding is the Delaware Code. [The Delaware General Corporation Law](#), Del. Code Ann. tit. 8, §§ 101–619 (the DGCL), the [Delaware Limited Liability Company Act](#), Del. Code Ann. tit. 6, §§ 18-101–18-1109 (the LLC Act), and the [Delaware Statutory Trust Act](#), Del. Code Ann. tit. 12, §§ 3801–63 (the DST Act), all set forth the fundamental requirements for establishing, maintaining, and terminating these entities.

Formation of Delaware Corporations

Under sections 101(a) and 362 of the DGCL, a corporation (including a public benefit corporation) may be organized in the state of Delaware by filing a certificate of incorporation with the Office of the Secretary of State of the State of Delaware (the Delaware Secretary of State). The certificate of incorporation must set forth the information required by section 102 (and, in the case of a public benefit corporation, the additional information required by section 362) and must be executed, acknowledged, and filed in accordance with section 103.

Corporate existence commences under section 106 upon the filing of the certificate of incorporation (or at such later time as may be specified in such certificate of incorporation).

Further, every Delaware corporation (including a public benefit corporation) must have a registered office (which may, but need not be, the same as its place of business) and a registered agent for service of process in the state of Delaware (a Registered Agent) under sections 131–32. Such Registered Agent shall have agreed (in advance of its designation as such in the certificate of incorporation) to accept legal papers on the corporation’s behalf if it is sued, and such Registered Agent must meet the requirements of section 132.

Following the filing of the certificate of incorporation, the incorporator (or the initial directors named in the certificate of incorporation) may perfect the organization of the corporation under sections 108–09 by appointing directors (if not already named in the certificate of incorporation) and adopting bylaws.

Formation of Delaware Limited Liability Companies

Under section 18-201 of the LLC Act, a limited liability company may be organized in the state of Delaware by filing a certificate of formation with the Delaware Secretary of State. The certificate of formation must set forth the information required by section 18-201(a) and must be executed by an “authorized person” in accordance with section 18-204. Limited liability company existence commences upon the filing of the certificate of formation (or at such later time as may be specified in such certificate of formation).

In addition, a limited liability company agreement shall be entered into or otherwise existing either before, after, or at the time of the filing of the certificate of formation and may be made effective as of the effective time of such filing or at such other time or date as provided in the limited liability company agreement. Moreover, each limited liability company must have at least one person admitted as a member

at the time of the filing of the certificate of formation under section 18-101(6).

As is the case with Delaware corporations, every Delaware limited liability company must have a Registered Agent. Such Registered Agent shall have agreed (in advance of its designation as such in the certificate of formation) to accept legal papers on the limited liability company’s behalf if it is sued, and such Registered Agent must meet the requirements of section 18-104.

Formation of Delaware Statutory Trusts

Under section 3810 of the DST Act, a statutory trust may be organized in the state of Delaware by filing a certificate of trust with the Delaware Secretary of State. The certificate of trust must set forth the information required by section 3810(a)(1) and must be executed by all of the trustees of the trust in accordance with section 3811(a). Trust existence commences upon the filing of the certificate of trust (or at such later time as may be specified in such certificate of trust).

In addition to the certificate of trust, a governing instrument—that is, any written instrument, whether referred to as a trust agreement, a declaration of trust, or otherwise, which creates the statutory trust or provides for the governance of the affairs of the statutory trust and the conduct of its business—shall be entered into at or prior to the time of filing of the certificate of trust under section 3801(g).

Further, under section 3807(a), every Delaware statutory trust shall at all times have at least one trustee which, in the case of a natural person, shall be a person who is a resident of the state of Delaware or which, in all other cases, has its principal place of business in the state of Delaware.

Regardless of which entity type is selected, there are a few practical items that parties forming these entities may want to keep in mind. First, in Delaware and in many other states, it is possible to reserve an entity name in advance of formation. It is generally recommended to reserve your chosen name not only in Delaware, but also in each other state where you wish the entity to conduct business to avoid the need to

amend your formation and transaction documents should the name be unavailable in one of the selected jurisdictions. Second, it is important to take a close look at how you have named your entity. Each of the three statutes has words that you must (or may not) use in the name of your entity. Having the Delaware Secretary of State reject your filing for improper naming protocol reflects poorly on the practitioner and leads to increased costs. It is also important to remember that your entity name does not equate to trademark protection—if you plan to use a name in trade, you should check the [trademark register](#).

Public Filings Generally

The Delaware Secretary of State is the appropriate office for entity-related filings for all three of the subject Delaware entity types. Under the DCGL and LLC Act, unless the names of the directors/officers (in the case of a corporation, including a public benefit corporation) or the members/managers (in the case of a limited liability company) are set forth in the certificate of incorporation or certificate of formation, as the case may be, no amendments are required to such certificate(s) in connection with changes to the identities of the persons holding those positions. When dealing with a Delaware statutory trust, the certificate of trust must be amended to reflect changes to the name or address of the trustee and/or to correct any inaccuracy set forth therein. Likewise, the certificate of incorporation of a Delaware corporation or the certificate of formation of a Delaware limited liability company, as the case may be, must be amended to reflect changes to the name or address of the Registered Agent and/or to correct any inaccuracy set forth therein.

As a practical matter, one of the many benefits of utilizing a Delaware entity is the limited public disclosure requirements. Specifically, none of the subject entities are required under Delaware law to disclose in any public filing with the Delaware Secretary of State the names or other personal information of their equity or beneficial owners. Delaware corporations (including public benefit corporations) are required

each year to file with the Delaware Secretary of State annual reports (together with their required annual franchise tax payments), which must list: (1) the company's physical address (not a P.O. box and not the corporation's Registered Agent's address); (2) the name and physical address of at least one director; and (3) if there are any officers, the name, title, and physical address of at least one of the officers. Delaware limited liability companies, although obligated to pay franchise taxes to the state of Delaware each year, do not have annual reporting requirements.

Books and Records

As indicated above, each of the three Delaware entities requires designation of a Registered Agent or a trustee (as applicable) in the relevant entity filing made with the Delaware Secretary of State, and this information must be kept up to date in the Delaware Secretary of State filing system. Further, even though the DGCL, the LLC Act, and the DST Act do not require any other public filing to be made in the state of Delaware in respect of stock ownership or membership or beneficial interest ownership, as the case may be, this information should nonetheless be kept up to date in the internal books and records maintained with respect to each Delaware registered legal entity.

Delaware Corporations

With respect to Delaware corporations, in addition to the certificate of incorporation and bylaws, the following books and records should be maintained (note, however, that this is not an exclusive list):

1. stock ledger
2. list of stockholders
3. stockholder agreements, option agreements, and documents of similar import
4. records of board (and committee) meetings and action
5. records of stockholder meetings and action, including, in the case of a public benefit corporation, copies of the biennial statements to stockholders as to the corporation's promotion of the

public benefit stated in its certificate of incorporation and of the best interests of those materially affected by the corporation's conduct, all as required by section 366 of the DGCL

6. financial records and ledgers
7. copies of annual reports filed with the Delaware Secretary of State (together with Delaware franchise tax receipts)
8. any other information deemed necessary or convenient by the officers and/or directors.

Delaware Limited Liability Companies

With respect to Delaware limited liability companies, in addition to the certificate of formation and limited liability company agreement, the following books and records should be maintained (note, however, that this is not an exclusive list):

1. membership interest ledger
2. list of members
3. records of manager (and committee) meetings and action
4. records of member meetings and action
5. financial records and ledgers
6. copies of Delaware franchise tax receipts
7. any other information deemed necessary or convenient by the managers and/or members.

Delaware Statutory Trusts

With respect to Delaware statutory trusts, in addition to the certificate of trust and governing instrument of the trust, the following books and records should be maintained (note, however, that this is not an exclusive list):

1. beneficial interest ledger
2. list of beneficial owners
3. records of trustee meetings and action
4. records of beneficial owner meetings and action
5. financial records and ledgers
6. any other information deemed necessary or convenient by the trustee and/or beneficial owners.

Management Structure, Requirements, or Restrictions

Unlike other jurisdictions, the DGCL, the LLC Act, and the DST Act do not impose a maximum number of directorship, managerial, or trustee roles (as applicable) any one natural person or business entity can hold. However, each of the three entity statutes does set general parameters for the management of each entity.

Delaware Corporations

Under section 141(b) of the DGCL, the board of directors of a Delaware corporation (including a public benefit corporation) must be comprised of at least one member, each of whom shall be a natural person. Directors are not required to be stockholders unless so mandated by the certificate of incorporation or the bylaws, and the certificate of incorporation or bylaws may also prescribe other qualifications for directors. The number of directors shall be established by, or in the manner provided in, the bylaws, unless the certificate of incorporation establishes the number of directors, in which case a change in the number of directors requires an amendment to the certificate of incorporation. Practically speaking, unless you are dealing with a closely held corporation (where getting the necessary stockholder consent to amend the certificate of incorporation will be straightforward), or there are specific business reasons to set forth the number of directors in the certificate of incorporation, it is generally not recommended to put this provision in the certificate of incorporation. Limiting this information to the bylaws allows the corporation to be a bit more flexible and nimble when it comes to board composition.

As a general rule, a majority of the total number of directors of a Delaware corporation (including a public benefit corporation) shall constitute a quorum for the transaction of business unless the certificate of incorporation or the bylaws require a greater number. Unless the certificate of incorporation provides otherwise, the bylaws may provide that a number less than a majority constitutes a quorum, but in no instance may that number be less than one-third of the total

number of directors (except in the circumstance where a board is comprised of a single director, in which event that one director constitutes a quorum). The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless the certificate of incorporation or the bylaws shall require a vote of a greater number.

Pursuant to section 141(c)(2) of the DGCL, the board of directors of a Delaware corporation (including a public benefit corporation) may, by resolution or in the bylaws, designate one or more committees, each consisting of one or more of the directors of the corporation. Any such committee, to the extent provided in the resolution or in the bylaws, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation, and may authorize the seal of the corporation to be affixed to all papers which may require it, but no such committee shall have the power or authority in reference to the following matters: (1) approving or adopting, or recommending to the stockholders, any action or matter (other than the election or removal of directors) expressly required by the DGCL to be submitted to stockholders for approval; or (2) adopting, amending, or repealing any bylaw of the corporation.

Moreover, other than as may be set forth in the bylaws of the Delaware corporation (including a public benefit corporation), there is no DGCL requirement regarding the occurrence or frequency of meetings of the directors. However, section 211(b) of the DGCL requires that, unless directors are elected by written consent in lieu of an annual meeting, 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.

Delaware Limited Liability Companies

Under section 18-402 of the LLC Act, unless otherwise provided in the limited liability company agreement, the management of a Delaware limited liability company shall be vested in its members in proportion to the

then-current percentage or other interest of members in the profits of the limited liability company owned by all of the members; *provided, however*, that if a limited liability company agreement provides for the management, in whole or in part, of a limited liability company by a manager, the management of the limited liability company, to the extent so provided, shall be vested in the manager who shall be chosen in the manner provided in the limited liability company agreement. The manager shall also hold the offices and have the responsibilities accorded to the manager by or in the manner provided in a limited liability company agreement. A limited liability company may have more than one manager.

Under section 18-404(c), a limited liability company agreement may set forth provisions relating to notice of the time, place, or purpose of any meeting at which any matter is to be voted on by any manager or class or group of managers, waiver of any such notice, action by consent without a meeting, the establishment of a record date, quorum requirements, voting in person or by proxy, or any other matter with respect to the exercise of any such right to vote. Further, under section 18-407, unless otherwise provided in the limited liability company agreement, a member or manager of a limited liability company has the power and authority to delegate to one or more other persons the member's or manager's, as the case may be, rights and powers to manage and control the business and affairs of the limited liability company, including to delegate to agents, officers, and employees of a member or manager of the limited liability company, and to delegate by a management agreement or another agreement with, or otherwise to, other persons. Although not expressly required by statute, best practices dictates that records of such delegations be maintained in the books and records of the limited liability company.

The LLC Act contains no requirement, other than as may be set forth in the limited liability company agreement, for holding annual or periodic meetings of the managers or members of the Delaware limited liability company.

Delaware Statutory Trusts

As previously mentioned, under section 3807(a) of the DST Act, every Delaware statutory trust shall at all times have at least one trustee which, in the case of a natural person, shall be a person who is a resident of the state of Delaware or which, in all other cases, has its principal place of business in the state of Delaware. Further, except to the extent otherwise provided in the governing instrument of the Delaware statutory trust, the business and affairs of such statutory trust shall be managed by or under the direction of its trustees. To the extent provided in the governing instrument of a statutory trust, any person (including a beneficial owner) shall be entitled to direct the trustees or other persons in the management of the Delaware statutory trust under section 3806(a).

Under section 3806(b)(5), a governing instrument of a Delaware statutory trust may contain any provision (not inconsistent with law or the provisions of the certificate of trust) relating to the management of the business and affairs of the trust and the rights, duties, and obligations of the trustees, beneficial owners, and other persons, and may, if and to the extent that voting rights are granted under the governing instrument, set forth provisions relating to notice of the time, place, or purpose of any meeting at which any matter is to be voted on, waiver of any such notice, action by consent without a meeting, the establishment of record dates, quorum requirements, voting in person, by proxy or in any other manner, or any other matter with respect to the exercise of any such right to vote.

Pursuant to section 3806(i), except to the extent otherwise provided in the governing instrument of a Delaware statutory trust, a trustee of a Delaware statutory trust has the power and authority to delegate to one or more other persons the trustee's rights and powers to manage and control the business and affairs of such statutory trust, including to delegate to agents, officers, and employees of the trustee or the statutory trust, and to delegate by management agreement or other agreement with, or otherwise to, other persons. Although not expressly re-

quired by statute, best practices dictate that records of such delegations be maintained in the books and records of the statutory trust.

The DST Act contains no requirement, other than as may be set forth in the governing instrument of the Delaware statutory trust, for holding annual or periodic meetings of the trustees or beneficial owners.

Dissolution

As a general matter, unless otherwise provided in the certificate of incorporation of a Delaware corporation (including a public benefit corporation) under section 102(b)(5) of the DGCL, the limited liability company agreement of a Delaware limited liability company under section 18-801(a)(1) of the LLC Act, or the governing instrument of a Delaware statutory trust under section 3808(a) of the DST Act, each of these three entities has perpetual existence. Despite this similarity, the relevant statutes do set forth different requirements and procedures for dissolution of each of the entities. It is particularly important for parties to understand the differences in the way Delaware corporations and Delaware limited liability companies are dissolved. As further discussed below, the filing of a certificate of dissolution of a Delaware corporation is the action that commences the three (3)-year winding up period; conversely, the filing of a certificate of cancellation of a Delaware limited liability company takes place following the winding up of the entity.

Delaware Corporations

Generally, the procedure for dissolution of a Delaware corporation (including a public benefit corporation) under section 275 of the DGCL requires: (1) the adoption by a majority of the board of directors of a resolution deeming dissolution advisable (in the judgment of such board of directors) and the subsequent vote in favor of dissolution by a majority of the stockholders entitled to vote thereon, or without action of the directors if all the stockholders entitled to vote thereon consent in writing to dissolution; (2) the filing of a certificate of dissolution setting forth the information

required by section 275(d), which has been executed, acknowledged, and filed in accordance with section 103; and (3) the payment of any then-due franchise taxes owing to or assessable by the state of Delaware and the filing of any related annual reports.

It is important to note that a Delaware corporation (including a public benefit corporation) continues to exist for a term of three years from the time of filing of a certificate of dissolution (or for such longer period as the Court of Chancery shall direct) for the purpose of prosecuting and defending suits, whether civil, criminal, or administrative, by or against it, and of enabling it gradually to settle and close its business, to dispose of and convey its property, to discharge its liabilities, and to distribute to its stockholders any remaining assets in accordance with section 281, but not for the purpose of continuing the business for which the corporation was organized. The DCGL also sets forth in section 280 a mechanism that both permits distributions upon dissolution and avoids the risk that a future claimant would be able to establish that such distribution on dissolution was in violation of any duty owed to the corporation's creditors.

Delaware Limited Liability Companies

A Delaware limited liability company may be dissolved upon any of: (1) the time or the happening of events specified in the limited liability company agreement; (2) unless otherwise provided in the limited liability company agreement, the affirmative vote or written consent of the members of the limited liability company or, if there is more than one class or group of members, then by each class or group of members, in either case, by members who own more than two-thirds of the then-current percentage or other interest in the profits of the limited liability company owned by all of the members or by the members in each class or group, as appropriate; or (3) the entry of a decree of judicial dissolution under section 18-802 of the LLC Act. Further, a Delaware limited liability company may be dissolved at any time there are no members, *provided that* the Delaware limited li-

ability company is not dissolved and is not required to be wound up if the criteria set forth in section 18-801(a)(4) are met.

Upon dissolution of a Delaware limited liability company in accordance with section 18-801, and until the filing of a certificate of cancellation as provided in section 18-203(a), the persons winding up the limited liability company's affairs under section 18-803(b) may, in the name of and for and on behalf of the limited liability company, prosecute and defend suits, whether civil, criminal, or administrative; gradually settle and close the limited liability company's business; dispose of and convey the limited liability company's property; discharge or make reasonable provision for the limited liability company's liabilities; and distribute to the members any remaining assets of the limited liability company.

Upon completion of the winding up process referenced above, a certificate of cancellation of the limited liability company must be filed with the Delaware Secretary of State (together with the payment of any then-due franchise taxes owing to or assessable the state of Delaware and the filing of any related annual reports), whereupon the existence of the limited liability company shall cease under section 18-203(a).

Delaware Statutory Trusts

Pursuant to section 3808(a) of the DST Act, except to the extent otherwise provided in the governing instrument of a Delaware statutory trust, a Delaware statutory trust shall have perpetual existence, and may not be terminated or revoked by a beneficial owner or other person except in accordance with the terms of its governing instrument. In the event that a Delaware statutory trust does not have perpetual existence, a Delaware statutory trust is dissolved and its affairs shall be wound up at the time or upon the happening of events specified in the governing instrument.

Upon dissolution of a Delaware statutory trust and until the filing of a certificate of cancellation as provided in section 3810(d), the persons who, under the governing instrument of the Delaware statutory trust, are responsible for winding up

the statutory trust's affairs may, under section 3808(d), in the name of and for and on behalf of the statutory trust, prosecute and defend suits, whether civil, criminal, or administrative; gradually settle and close the statutory trust business; dispose of and convey the statutory trust property; discharge or make reasonable provision for the statutory trust liabilities; and distribute to the beneficial owners any remaining assets of the statutory trust.

Upon completion of the winding up process referenced above, a certificate of cancellation of the certificate of trust must be filed with the Delaware Secretary of State, whereupon the existence of the Delaware

statutory trust shall cease under section 3810(d).

In conclusion, although many similarities exist among Delaware corporations (including public benefit corporations), Delaware limited liability companies, and Delaware statutory trusts, they are each distinct types of business entities with distinct characteristics. A thorough understanding of the essential statutory requirements for formation, maintenance, and termination of these entities provides a starting point for business decision-makers in determining which of these entities can meet the needs of the enterprise and establish the intended relationship among owners, creditors, and management.

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