INTRODUCTION

Delaware has more than 1.5 million active domestic business entities. A frequently cited reason for Delaware’s preeminent position as a formation state is its modern and flexible business entity statutes. In order to keep the statutes up-to-date, and therefore able to meet the rapidly evolving needs of its entities and their stakeholders, the state’s lawmakers enact amendments to its business entity laws every year.

Keeping track of the changes to these laws is imperative for the people owning, managing, or investing in Delaware entities, as well as the in-house and outside counsel who advise Delaware entities and their management and owners.

This White Paper helps all of those people keep track of the changes made to Delaware’s corporation, limited liability company, partnership, and limited partnership laws during the 2020 legislative session.

I. Amendments to the General Corporation Law (GCL)

House Bill 341 enacted amendments to the Delaware General Corporation Law (Title 8, Sec. 101 et seq.) The amendments are effective July 16, 2020 unless specified otherwise and include the following:

1. Distinguishable Name – Sec. 102(a) was amended to provide that a corporation’s name must be distinguishable from the name of a registered series of a limited partnership.

2. Limitation of Director Liability – Sec. 102(b)(7), which permits the certificate of incorporation to eliminate or limit the personal liability of a director for money damages for certain breaches of fiduciary duty, was amended to provide that an amendment, repeal or limitation of such provision shall not affect its application with respect to an act or omission by a director occurring before such amendment, repeal or elimination - unless the provision provides otherwise at the time of the act or omission.

3. Organization Meeting – Sec. 108 was amended to provide that any action permitted to be taken at the organization meeting may be taken without a meeting upon the consent of each incorporator or director unless otherwise restricted by the certificate of incorporation and to provide that a consent may be documented, signed and delivered in any manner permitted by GCL Sec. 116.
4. Emergency Bylaws – Sec. 110, which provides the circumstances under which a board of directors may adopt emergency bylaws was amended to do the following:

(1) Include, as an example of a catastrophe upon which such emergency bylaws shall be operative, an epidemic or pandemic, and a declaration of a national emergency by the United States government,

(2) Provide that emergency bylaws contemplated by Sec. 110 may be adopted by the board of directors or, if a quorum cannot be readily convened for a meeting, by a majority of the directors present,

(3) Provide that during an emergency condition the board of directors may (i) take any action that it determines to be practical and necessary to address the circumstances of such emergency condition with respect to a meeting of stockholders notwithstanding anything to the contrary in the corporation law or in Chapter 7 of Title 5 or in the certificate of incorporation or bylaws, including, but not limited to (1) to postpone any such meeting to a later time or date and (2) with respect to a corporation subject to the reporting requirements of Sec. 13(a) or Sec. 15(d) of the Securities Exchange Act to notify stockholders of any postponement or a change of the place of the meeting (or a change to hold the meeting solely by means of remote communication) solely by a document publicly filed by the corporation with the SEC and (ii) with respect to any dividend that has been declared as to which the record date has not occurred, change each of the record date and payment date to a later date or dates (provided the payment date as so changed is not more than 60 days after the record date as so changed); provided that, in either case, the corporation gives notice of such change to stockholders as promptly as practicable thereafter (and in any event before the record date theretofore in effect), which notice, in the case of a corporation subject to the reporting requirements of Sec. 13(a) or Sec. 15(d) of the Securities Exchange Act may be given solely by a document publicly filed with the SEC, and

(4) Provide that no person shall be liable, and no meeting of stockholders shall be postponed or voided, for the failure to make a stocklist available if it was not practicable to allow inspection during any such emergency condition.

The amendments to Sec. 110 are effective retroactively to January 1, 2020 with respect to any emergency condition occurring on or after January 1, 2020 and with respect to any action contemplated by the amendments to Sec. 110 and taken on or after January 1, 2020 by or on behalf of the corporation with respect to a meeting of stockholders held or a dividend as to which the record date or payment date is anticipated to occur during the pendency of such condition.

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5. Document Form, Signature and Delivery - Sec. 116 was amended (1) to clarify that a person may execute a document by using a manual, facsimile, conformed or electronic signature, (2) to allow persons to rely on Section 116(a) as a basis for using an electronic transmission to document director, stockholder, member and incorporator consents and for signing and delivering those documents by electronic means, (3) to require that the electronic delivery of stockholder or member consents, and the electronic delivery of documents evidencing a proxy granted by a stockholder or member, must satisfy additional requirements set forth in Sec. 228(d) (with respect to consents) and Sec. 212(c) (with respect to proxies), and (4) to clarify that a provision in the certificate of incorporation or bylaws may restrict or prohibit only the electronic means (but not the manual means) to document an act or transaction and to sign and deliver a document.

6. Registered Agent - Sec. 132 was amended to clarify that a foreign LLP, LP, and LLLP are the types of foreign partnerships that may act as a registered agent.

7. Resignation of Registered Agent – Sec. 135 was amended to delete a provision stating that the Secretary of State shall issue a certificate following the resignation of a registered agent and appointment of a successor.

8. Director Action Without a Meeting - Sec. 141 was amended to permit a director to rely on Sec. 116 as a basis to document, sign and deliver a consent by electronic means, unless the use of Sec. 116 is expressly restricted or prohibited by a certificate of incorporation or bylaw provision adopted pursuant to Section 116(b).

9. Indemnification – Sec. 145(c), which provides current and former directors and officers a right to indemnification if they

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are successful on the merits or otherwise in defending claims brought against them by reason of their conduct as directors and/or officers, was amended to provide that with respect to any act or omission occurring after Dec. 31, 2020, reference to an officer means only a person who at the time of such act or omission is deemed to have consented to service by the delivery of process to the registered agent of the corporation pursuant to Title 10, Sec. 3114(b) and residents of Delaware will be treated as if they are nonresidents to apply Sec. 3114(b).

Sec. 145(c) was also amended to provide that the corporation may indemnify any other person who is not a present or former director or officer against expenses actually and reasonably incurred by such person to the extent he or she has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of Sec. 145, or in defense of any claim, issue or matter therein.

Sec. 145(f) was amended to clarify that the prohibition against the elimination or impairment of a right to indemnification or to advancement by amendment to the certificate of incorporation or the bylaws after the occurrence of the act or omission that is the subject of the action, suit or proceeding for which indemnification is sought, unless the provision in effect at the time of the act or omission explicitly authorizes such elimination or impairment, applies in the case of any repeal or elimination of the certificate of incorporation or the bylaws.

10. Proxies - Sec. 212 was amended to provide that the authorization of a person to act as a proxy may be documented, signed and delivered in accordance with Sec. 116, provided that such authorization shall set forth, or be delivered with information enabling the corporation to determine the identity of the stockholder granting such authorization.

11. Actions by Consent – Sec. 213 was amended to remove redundant references to where, and to whom, a consent may be delivered and to clarify that actions by consent are governed by Sec. 228.

12. Delivery of Consents - Sec. 228(d) was amended by (1) deleting the provisions on documenting, signing and delivering a consent by electronic means, so that those actions may be effected pursuant to amended Sec. 116, unless an express provision of the certificate of incorporation or bylaws adopted in accordance with Section 116(b) restricts or prohibits a consent from being documented, signed or delivered electronically, (2) to require certain additional information to be provided to the corporation in connection with delivering a consent electronically, (3) to delete redundant references to where, and to whom, a consent may be delivered, and (4) to replace “written consents” or consents set forth “in writing” with a new sentence stating that a consent must be set forth in writing or in an electronic transmission.

13. Delivery of Notice – Sec. 232 was amended to clarify that a corporation may give notice to a stockholder or member by email without obtaining the stockholder’s or member’s consent.

14. Holding Company Reorganization Merger – Sec. 251(g) (7) (which permits an operating corporation to become a holding corporation via a merger without shareholder approval) was amended to eliminate the requirement that the organizational documents of the surviving entity contain provisions identical to the certificate of incorporation of the constituent corporation immediately prior to the merger. The amendments to Section 251(g) shall be effective with respect to agreements of merger or consolidation consummated pursuant to an agreement entered into on or after their enactment into law.

15. Appraisal Rights – Sec. 262 was amended to remove references to the availability of appraisal rights for stockholders pursuant to Sec. 363(b) (which provided for appraisal rights for stockholders of public benefit corporations and which was deleted by H.B. 341). This amendment is effective with respect to a merger or consolidation consummated pursuant to an agreement entered into, or, with respect to a merger consummated pursuant to Section 253, resolutions of the board of directors adopted, on or after its enactment into law.

16. Conversion of Domestic Corporation – Sec. 266 was amended to (1) delete a statement that upon filing a certificate of conversion the Secretary of State shall certify that the corporation has filed all documents and paid all fees required by the GCL and to (2) provide that a copy of the certificate of conversion certified by the Secretary of State shall be prima facie evidence of the conversion.

17. Amendments to Provisions Governing Public Benefit Corporations

(1) Sec. 363 was amended to provide that a nonprofit continued on page 4
nonstock corporation may not be a constituent corporation to any merger or consolidation with a public benefit corporation or in which the certificate of incorporation of the surviving corporation is amended to include a provision under which it will become a public benefit corporation.

(2) Sec. 363(a) previously provided that a corporation could become a public benefit corporation by an amendment to the certificate of incorporation or through a merger or consolidation by a two-thirds vote by stockholders and that a public benefit corporation could become a corporation that is not a public benefit corporation by a two-thirds vote. This provision was deleted. As a result of this amendment, the vote of stockholders required to amend the certificate of incorporation of a corporation to become a public benefit corporation or to approve a merger resulting the corporation becoming a public benefit corporation, and the vote required to amend the certificate of incorporation of a public benefit corporation to become a corporation that is not a public benefit corporation or to approve a merger resulting in the public benefit corporation becoming a corporation that is not a public benefit corporation will be a majority of the outstanding stock entitled to vote thereon unless a greater or additional vote of stockholders is required under the certificate of incorporation.

(3) Sec. 363(b) provided for appraisal rights. This provision was deleted. The repeal of 363(b) and amendment to Sec. 262 result in the determination as to whether appraisal rights will be available in connection with a merger in which a public benefit corporation is a constituent corporation will be determined in accordance with Sec. 262. The amendment regarding 363(b) is effective with respect to a merger or consolidation consummated pursuant to an agreement entered into, or, with respect to a merger consummated pursuant to Sec. 253, resolutions of the board of directors adopted, on or after its enactment into law.

(4) Sec. 365, which sets forth the duties of directors of a public benefit corporation (providing that the board shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation’s conduct, and the specific public benefit or public benefits identified in its certificate of incorporation), was amended to provide that a director’s ownership of or other interest in the stock of the public benefit corporation shall not alone, for the purposes of this section, create a conflict of interest on the part of the director with respect to the director’s decision implicating the balancing requirement, except to the extent that such ownership or interest would create a conflict of interest if the corporation were not a public benefit corporation. In the absence of a conflict of interest, no failure to satisfy that balancing requirement shall, for the purposes of Sec. 102(b) (7) or Sec. 145, constitute an act or omission not in good faith, or a breach of the duty of loyalty, unless the certificate of incorporation so provides.

(5) Sec. 367, regarding suits to enforce the requirements of Sec. 365, was amended to provide that any action to enforce the balancing requirement of Sec. 365(a), including any individual, derivative or any other type of action, may not be brought unless the plaintiffs in such action own individually or collectively, as of the date of instituting such action, at least 2% of the corporation’s outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of the corporation with a market value of at least $2,000,000 as of the date the action is instituted.

Sec. 367 was also amended to provide that this section shall not relieve the plaintiffs from complying with any other conditions applicable to filing a derivative action including GCL Sec. 327 and any rules of the court in which the action is filed.

18. Registered Agent of Foreign Corporation – Sec. 377 was amended to provide that the registered agent of a foreign corporation may resign in the same manner as provided by Sec. 136 (resignation of agent of domestic corporation).

19. Fees – Sec. 391 was amended to state that for preparing and providing a written report of a record search, a fee of up to $100 shall be paid to the Secretary of State.

II. Amendments to the Limited Liability Company Act (LLCA)

House Bill 344 enacted amendments to the Delaware Limited Liability Company Act (Title 6, Sec. 18-101 et seq.) The amendments are effective July 16, 2020 and include the following:

1. Registered Agent – Sec. 18-104 was amended (1) to clarify that a foreign LLP, LP, and LLLP are the types of foreign partnerships that may act as a registered agent, (2) to delete references to the Secretary of State furnishing certified

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copies of a certificate changing the registered office address or name of registered agent and issuing a certificate that a successor registered agent is the LLC’s registered agent, and (3) to provide that a change of registered agent’s name as a result of a conversion or division is a change of name for the purposes of the section.

2. Execution of Documents - Sec. 18-113 was amended to clarify that a person may execute a document by using a manual, facsimile, conformed or electronic signature.

3. Appraisal Rights – Sec. 18-210 was amended to provide that unless otherwise provided in a limited liability company agreement or an agreement of merger or consolidation, or a plan of merger or a plan of division, no appraisal rights shall be available. The section was also amended to provide that the Court of Chancery shall have jurisdiction to hear and determine any matter relating to any appraisal rights provided in a limited liability company agreement or an agreement of merger or consolidation or a plan of merger or a plan of division.

4. Transfer or Continuance – Sec. 18-213 was amended (1) to delete a statement that the Secretary of State shall certify that the limited liability company has filed all documents and paid all fees required by the Act, (2) to provide that a copy of the certificate of transfer certified by the Secretary of State shall be prima facie evidence of the transfer or domestication or continuance by such limited liability company out of Delaware, and (3) to provide that a copy of the certificate of transfer and domestic continuance certified by the Secretary of State shall be prima facie evidence of such limited liability company’s transfer to or domestication or continuance in another jurisdiction and its continuance as a limited liability company in Delaware.

5. Conversion of Limited Liability to Non-Delaware Entity – Sec. 18-216 was amended to (1) delete a statement that the Secretary of State shall certify that the limited liability company has filed all documents and paid all fees required by the Act, and to (2) provide that a copy of the certificate of conversion to a non-Delaware entity certified by the Secretary of State shall be prima facie evidence of the conversion by such limited liability company out of Delaware.

6. Certificate of Division – Sec. 18-217 was amended to provide that the certificate of division may contain any information the dividing company determines to include therein.

7. Amending Certificate of Registered Series – Sec. 18-218 (providing for and governing registered series of members, managers, limited liability company interests or assets) was amended (1) to require the manager of a registered series, or if none, a member, who becomes aware that a matter described in the certificate of registered series has changed, making the certificate non-compliant with Sec. 18-218(e)(1) must promptly amend the certificate, and (2) to provide that the name of each registered series must be distinguishable from the name of a registered series of a limited liability company or a registered series of a limited partnership.

8. Conversion of Registered Series of a Limited Liability Company to a Protected Series of the Limited Liability Company - Sec. 18-220 was amended (1) to delete the statement that the Secretary of State shall certify that the registered series has filed all documents and paid all fees required by the Act, and (2) to provide that a copy of the certificate of conversion of registered series to protected series certified by the Secretary of State shall be prima facie evidence of the conversion by such registered series to a protected series of such limited liability company.

9. Admission of Member – Sec. 18-301 was amended (1) to confirm that a limited liability company agreement may provide for the admission of members in connection with formation, (2) to eliminate any statutory requirement that a member’s admission after formation is subject to the admission being reflected in the records of the limited liability company, and (3) to clarify that an assignee of a limited liability company interest is admitted as a member as provided in Section 18-704(a) of the Act.

10. Maintaining Records – Sec. 18-305 was amended to provide that a limited liability company may maintain its books, records or other information in other than a paper form, if such form is capable of conversion into paper form within a reasonable time.

11. Name of Foreign Limited Liability Company – Sec. 18-904 was amended to provide that a foreign limited liability company may register under a name that is not distinguishable from the name of a registered series of a limited liability company or a registered series of a limited partnership upon the written consent of such registered series.

12. Registered Agent of Foreign Limited Liability Company – Sec. 18-904 was also amended (1) to provide that foreign LPs,
LLPs, and LLLPs are the types of foreign partnerships that may be a registered agent of a foreign limited liability company, (2) to delete references to the Secretary of State furnishing certified copies of a certificate changing the registered office address or name of registered agent and issuing a certificate that a successor registered agent is the LLC’s registered agent, and (3) to provide that a change of registered agent’s name as a result of a conversion or division is a change of name for the purposes of this section.

13. Resignation of Registered Agent of Foreign Limited Liability Company – Sec. 18-904 was also amended to provide that if a foreign limited liability company has ceased to be registered pursuant to Sec. 18-1107(h) of the Act, its registered agent may resign without appointing a successor registered agent. The certificate of resignation filed with the Delaware Secretary of State when the registered agent resigns without appointing a successor shall include such information last provided to the registered agent pursuant to Section 18-104(g) for a communications contact for the foreign limited liability company. Such information regarding the communications contact shall not be deemed public.

III. Amendments to the Delaware Revised Uniform Limited Partnership Act (DRULPA)

House Bill 343 enacted amendments to the Delaware Revised Uniform Limited Partnership Act (Title 6, Sec. 17-101 et seq.) The amendments are effective July 16, 2020 and include the following:

1. Registered Agent – Sec. 17-104 was amended (1) to clarify that a foreign LLP, LP, and LLLP are the types of foreign partnerships that may act as a registered agent, (2) to delete references to the Secretary of State furnishing certified copies of a certificate changing the registered office address or name of registered agent and issuing a certificate that a successor registered agent is the limited partnership’s registered agent, and (3) to provide that a change of registered agent’s name as a result of a conversion or division is a change of name for the purposes of the section.

2. Execution of Documents – Sec. 17-113 was amended to clarify that a person may execute a document by using a manual, facsimile, conformed or electronic signature.

3. Appraisal Rights – Sec. 17-212 was amended (1) to provide that unless otherwise provided in a partnership agreement or an agreement of merger or consolidation, or a plan of merger or a plan of division, no appraisal rights shall be available, and (2) to provide that the Court of Chancery shall have jurisdiction to hear and determine any matter relating to any appraisal rights provided in a partnership agreement or an agreement of merger or consolidation or a plan of merger or a plan of division.

4. Transfer or Continuance – Sec. 17-216 was amended (1) to delete a statement that the Secretary of State shall certify that the limited partnership has filed all documents and paid all fees required by the Act, (2) to provide that a copy of the certificate of transfer certified by the Secretary of State shall be prima facie evidence of the transfer or domestication or continuance by such limited partnership out of Delaware, and (3) to provide that a copy of the certificate of transfer and domestic continuance certified by the Secretary of State shall be prima facie evidence of the limited partnership’s transfer to or domestication or continuance in another jurisdiction and its continuance as a limited partnership in Delaware.

5. Conversion of Limited Partnership to Non-Delaware Entity – Sec. 17-219 was amended (1) to delete a statement that the Secretary of State shall certify that the limited partnership has filed all documents and paid all fees required by the Act, and (2) to provide that a copy of the certificate of conversion to a non-Delaware entity certified by the Secretary of State shall be prima facie evidence of the conversion by the limited partnership out of Delaware.

6. Certificate of Division – Sec. 17-220 was amended to provide that the certificate of division may contain any information the dividing partnership determines to include therein.

7. Amending Certificate of Registered Series – Sec. 17-221 (authorizing and governing registered series of limited partners, general partners, limited partnership interests or assets) was amended to require a general partner of a registered series who becomes aware that a matter described in the certificate of registered series has changed, making the certificate non-compliant with Sec. 17-221(e)(1) to promptly amend the certificate.

8. Conversion of Registered Series of a Limited Partnership to a Protected Series of the Limited Partnership – Sec. 17-223 was amended to delete the statement that the Secretary of State shall certify that the registered series has filed all documents and paid all fees required by the Act and to provide that a copy of the certificate of conversion of

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registered series to protected series certified by the Secretary of State shall be prima facie evidence of the conversion by the registered series to a protected series of the limited partnership.

9. Admission of Limited Partner – Sec. 17-301 was amended (1) to confirm that a partnership agreement may provide for the admission of limited partners in connection with formation, (2) to eliminate any statutory requirement that a limited partner’s admission after formation is subject to the admission being reflected in the records of the limited partnership, and (3) to clarify that an assignee of a partnership interest is admitted as a limited partner as provided in Section 17-704(a) of the Act.

10. Maintaining Records – Sec. 17-305 was amended to provide that a limited partnership may maintain its books, records or other information in other than a paper form, if such form is capable of conversion into paper form within a reasonable time.

11. Name of Foreign Limited Partnership – Sec. 17-904 was amended to provide that a foreign limited partnership may register under a name that is not distinguishable from the name of a registered series of a limited liability company or a registered series of a limited partnership upon the written consent of such registered series.

12. Registered Agent of Foreign Limited Partnership – Sec. 17-904 was also amended (1) to provide that foreign LPs, LLPs, and LLLPs are the types of foreign partnerships that may be a registered agent of a foreign limited partnership, (2) to delete references to the Secretary of State furnishing certified copies of a certificate changing the registered office address or name of registered agent and issuing a certificate that a successor registered agent is the partnership’s registered agent, and (3) to provide that a change of registered agent’s name as a result of a conversion or division is a change of name for the purposes of the section.

13. Resignation of Registered Agent of Foreign Limited Partnership – Sec. 17-904 was also amended to provide that if a foreign limited partnership has ceased to be registered pursuant to Sec. 17-1109(g) of the LP Act, its registered agent may resign without appointing a successor registered agent. The certificate of resignation filed with the Delaware Secretary of State when the registered agent resigns without appointing a successor shall include such information last provided to the registered agent pursuant to Section 17-104(g) for a communications contact for the foreign limited partnership. Such information regarding the communications contact shall not be deemed public.

IV. Amendments to the Delaware Revised Uniform Partnership Act (DRUPA)

House Bill 342 enacted amendments to the Delaware Revised Uniform Partnership Act (Title 6, Sec. 15-101 et seq.) The amendments are effective July 16, 2020 and include the following:

1. Registered Agent – Sec. 15-111 was amended (1) to clarify that a foreign LLP, LP, and LLLP are the types of foreign partnerships that may act as a registered agent, (2) to delete references to the Secretary of State furnishing certified copies of a certificate changing the registered office address or name of registered agent and issuing a certificate that a successor registered agent is the partnership’s registered agent, and (3) to provide that a change of registered agent’s name as a result of a conversion or division is a change of name for the purposes of the section.

2. Appraisal Rights – Sec. 15-120 was amended (1) to provide that unless otherwise provided in a partnership agreement or an agreement of merger or consolidation, or a plan of merger or a plan of division, no appraisal rights shall be available, and (2) to provide that the Court of Chancery shall have jurisdiction to hear and determine any matter relating to any appraisal rights provided in a partnership agreement or an agreement of merger or consolidation or a plan of merger or a plan of division.

3. Execution of Documents – Sec. 15-124 was amended to clarify that a person may execute a document by using a manual, facsimile, conformed or electronic signature.

4. Maintaining Records – Sec. 15-403 was amended to provide that a partnership may maintain its books, records or other information in other than a paper form, if such form is capable of conversion into paper form within a reasonable time.

5. Conversion of Partnership to non-Delaware Entity – Sec. 15-903 was amended (1) to delete a statement that the Secretary of State shall certify that the partnership has filed all documents and paid all fees required by the Act, and (2) to provide that a copy of the certificate of conversion to a non-Delaware entity certified by the Secretary of State shall be continued on page 8
prima facie evidence of the conversion by such partnership out of the State of Delaware.

6. Transfer or Continuance – Sec. 15-905 was amended (1) to delete a statement that the Secretary of State shall certify that the partnership has filed all documents and paid all fees required by the Act, (2) to provide that a copy of the certificate of transfer certified by the Secretary of State shall be prima facie evidence of the transfer or domestication or continuance by such partnership out of Delaware, and (3) to provide that a copy of the certificate of transfer and domestic continuance certified by the Secretary of State shall be prima facie evidence of such partnership’s transfer to or domestication or continuance in another jurisdiction and its continuance as a partnership in Delaware.

7. Name of Foreign Limited Liability Partnership – Sec. 15-1102 was amended to confirm that the name of a foreign limited liability partnership as set forth in its statement of foreign qualification must comply with the requirements of Secs. 15-108 (c) and (d).

CONCLUSION

The 2020 amendments to Delaware’s business entity statutes contain some significant changes. Attorneys, business owners, investors, managers, and other advisers of Delaware entities will benefit from familiarizing themselves with these changes, many of which were noted in this white paper.