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Insights

## Delaware Permits LLCs to Divide into Separate LLCs

By: Rich May, Arvid von Taube

On August 1, 2018, new [Section 18-217](#) of the Delaware Limited Liability Company Act (“DLLCA”) became effective, which allows an LLC formed domestically in the State of Delaware to divide into two or more separate LLCs.

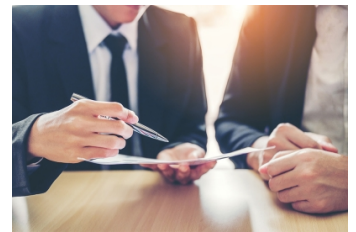
Each divided LLC will then hold its own assets and be responsible for its own liabilities, separate from the original LLC and any other resulting LLCs, much like each series in a Delaware Series LLC.

A Delaware LLC wishing to effect a division shall adopt a plan of division and file a certificate of division with the Delaware Secretary of State. The plan of division shall set forth the following:

1. The terms and conditions of division, including any conversion or exchange of LLC interests and the allocation of assets, rights, liabilities and duties among the resulting LLCs.
2. The name of each resulting LLC and whether the original LLC shall survive.
3. The name and business address of the “division contact”, which is a natural Delaware resident or a Delaware LLC or other domestic entity that shall maintain a copy of the plan of division for a period of at least six years from the effective date of the division.

The plan of division is not filed with the Delaware Secretary of State but must be maintained by the identified division contact.

A certificate of division must be filed with the Delaware Secretary of State along with a certificate of formation (pursuant to [Section 18-201](#) of the DLLCA) for each new resulting



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LLC. The certificate of division shall state the following:

1. The name of the original LLC and whether it is surviving. Practice tip: if the original LLC is not surviving, the certificate of division acts like a certificate of cancellation and a separate filing is not necessary.
2. The date of the original LLC's certificate of formation with the Delaware Secretary of State.
3. The name and business address of the division contact; that the plan of division is on file with the division contact; and that a copy of the plan of division will be furnished on request without cost to any member of the original LLC.
4. The effective date and time of the division.
5. That the proposed division has been approved in accordance with the DLLCA. Practice tip: a limited liability company agreement may provide that the LLC shall not have the power to divide.

Powerfully, the DLLCA states that effective immediately upon the division of the LLC, (i) the distinct, resulting LLCs shall come into existence, (ii) if the original LLC is not surviving, it shall cease to exist, (iii) all of the properties and assets shall be vested in the resulting LLCs, (iv) all liabilities, debts and obligations shall only be enforceable against the respective, resulting LLCs, and (v) all liens shall remain attached and be unimpaired; all in accordance with the plan of division and without any further action necessary by the parties. Arguably, this means that traditional transfer documents such as an assignment and assumption agreement and bill of sale are not needed. However, creditors may wish to update any lien perfection instruments, such as UCC filings, to refer to the correct debtor name.

A few cautionary notes. With respect to creditors, absent a possible fraudulent transfer, each resulting LLC shall only be responsible for those liabilities allocated to it under the plan of division. However, if a court finds that the transfer of assets pursuant to a plan of division constitutes a fraudulent transfer, the original LLC and each resulting LLC shall be jointly and severally liable on account of such fraudulent transfer. However, the validity of the division shall not otherwise be affected. Any debts and liabilities that are not accounted for in the plan of division shall be the joint and several debts of the original LLC and each of the resulting LLCs, provided that, as a practical matter, one does not need to itemize each asset or debt in the plan of division but can refer to them in a blanket or omnibus manner.

For any LLCs formed prior to August 1, 2018 (the effective date of the new DLLCA section permitting divisions) that are a party to a contract also entered into prior to August 1, 2018, that prohibits transfers of assets or liabilities by the LLC, including in connection with mergers or acquisitions, such restrictions shall apply to effectively block divisions. As of August 1, 2018, parties wishing to restrict divisions must specifically state so in the contract.

Disclaimer: This summary is provided for educational and information purposes only and is

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