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A LIMITED LIABILITY PARTNERSHIP

Incorporating in Delaware and Taking Advantage of the Delaware General Corporation Law

The decision of where to form a corporation or limited liability company is based on several factors, including location of assets and operations and owner/investor preference. Meanwhile, selecting a jurisdiction for a new subsidiary in a complex corporate structure may be driven primarily by tax concerns. Additional considerations, such as exchange listing obligation, may impact where publicly traded companies wish to incorporate.

A state's corporation law or LLC law can also play a role. The Delaware General Corporation Law ("DGCL") is considered highly advanced and viewed as being very management friendly. Nearly two-thirds of Fortune 500 companies are incorporated in Delaware. Delaware LLC law and practice are similarly advanced. Delaware entities can have internal disputes resolved by the judges-only Court of Chancery, considered one of nation's premier arbiters of corporate law matters due to the large number of prominent business matters it annually adjudicates. Certain states, such as Georgia, base their corporation statutes on the DGCL, while others, such as Nevada, seek to be equally accommodating. Other states, most notably California, have adopted statutes that are considered more favorable to shareholders and minority investors. In fact, California seeks to apply specific provisions of its statute to corporations that, while formed elsewhere, have significant California contacts.

A corporation deciding to make Delaware its home can take advantage of certain provisions of the DGCL briefly described below to structure its governance to meet specific goals and needs such as allowing for tight, centralized management control or promoting broad shareholder participation and protection of investor rights.

Cumulative Voting. Cumulative voting is a procedure that allows shareholders to cast all of their votes for a single nominee for the board of directors when the company has multiple openings on its board. Cumulative voting can protect minority shareholders by ensuring they have board representation, but can be burdensome for controlling shareholders, especially if there is any discord. Delaware allows corporations to decide for themselves whether they wish to have cumulative voting. Meanwhile, certain states such as California, Arizona and Hawaii make cumulative voting mandatory for non-publicly traded corporations. Other states such as Illinois follow an intermediate path where cumulative voting is the default rule, but may be eliminated in the articles of incorporation.

Blockchain Technology. The Delaware General Assembly has approved changes to the DGCL to allow Delaware corporations to use "distributed ledgers" or "blockchains" to create and maintain corporate records with the goal of enabling end-to-end digitization for administration of securities.

Fixing Defective Corporate Acts. The DGCL contains mechanisms for a corporation to ratify unilaterally defective corporate acts or to have the Court of Chancery validate certain corporate acts. These procedures can remove clouds over stock issuances and other actions that are void or voidable due to non-compliance with technical requirements in the DGCL or a corporation's organic documents.

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Shareholder Approval of Mergers. In Delaware, mergers can be approved by shareholders holding a majority of the voting power, absent requirements to the contrary elected by the corporation. This simplicity may come in handy with a company that has preferred stock outstanding, especially multiple classes of preferred stock. Delaware corporations can approve the merger with a single vote. In contrast, California requires the approval of each class of outstanding preferred stock, thereby potentially allowing holders of a single, small class of preferred to hold an entire transaction hostage.

Special Shareholder Meetings. In Delaware, the power to call a special shareholder meeting can be limited to a corporation's board of directors. Corporate law statutes in other states give shareholders the ability to call such special meetings. Corporate principals wishing to ensure smooth control may prefer not to give shareholders the right to call shareholder meetings.

Number of Directors. A Delaware corporation need only have one director regardless of how many shareholders it has. Having one director can be convenient for firms with a controlling shareholder and certain other closely held entities. These corporations can save the time and expense by neither holding directors meetings nor coordinating multiple-signature board consents without necessarily sacrificing quality corporate governance. In contrast, under California law, a corporation must have at least three directors, unless it has only one or two shareholders.

FisherBroyles partners can assist companies deciding where to incorporate as well as new corporations being formed in Delaware or existing corporations reincorporating in Delaware with charter and bylaw provisions to address their unique needs.

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