

Professional Perspective

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Louis G. Hering and Emily M. LaSpina, Morris, Nichols, Arsht & Tunnell

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Amendments to the Delaware Alternative Entity Statutes in 2022

Contributed by [Louis G. Hering](#) and [Emily M. LaSpina](#), Morris, Nichols, Arsht & Tunnell

In 2022, the Delaware legislature passed a number of amendments to the state's "alternative entity" statutes—the [Delaware Revised Uniform Partnership Act](#) (DRUPA), the [Delaware Revised Uniform Limited Partnership Act](#) (DRULPA), the [Delaware Limited Liability Company Act](#) (DLLCA), and the [Delaware Statutory Trust Act](#) (DSTA).

The amendments to the DRUPA, DRULPA, DLLCA, and DSTA became effective on Aug. 1, 2022, except for the amendments noted below with respect to DSTA Sections 3807(n) and 3813(a)(5), which will become effective on Aug. 1, 2023.

Common Amendments

The amendments common to the DRUPA, DRULPA, DLLCA, and DSTA address electronic signatures, and at what point in time the facts stated in a certificate must be true. The amendments common to the DRUPA, DRULPA, and DLLCA address conversions and domestications, and governing documents. The amendments common to the DRULPA and DLLCA address certificates of revival, and registered and protected series.

Electronic Signatures

The amendments to the DRUPA, DRULPA, DLLCA, and DSTA amended Sections 15-124(b)(2), 17-113(b)(2), 18-113(b)(2), and 3826(b)(2) to confirm that a signature on a certificate of partnership interest, certificate of limited liability company interest, or a certificate of beneficial interest may be a manual, facsimile, or electronic signature.

Facts in a Certificate Must Be True Upon Effectiveness

The amendments to the DRUPA, DRULPA, DLLCA, and DSTA amended Sections 15-105(c), 17-204(d), 18-204(d), and 3811(c) to provide that the execution of a certificate by a person who is authorized to execute such certificate constitutes an oath or affirmation that, to the best of such person's knowledge and belief, the facts stated therein shall be true at the time such certificate becomes effective, rather than at the time such certificate is executed or filed.

Conversions & Domestications

The amendments to the DRUPA, DRULPA, and DLLCA amended Sections 15-901(h), 15-904(g), 17-215(g), 17-217(h), 18-212(g), and 18-214(h) to provide that the approval of the conversion or domestication to a partnership, limited partnership, or limited liability company and the approval of the partnership agreement or the limited liability company agreement are required to occur prior to the time a certificate of conversion or certificate of domestication becomes effective, not at the time such certificate is executed or filed.

These amendments thereby authorize the filing of a certificate of conversion or domestication with a future effective date before the conversion or domestication or the partnership agreement or the limited liability company agreement is approved as long as those approvals have been obtained when the applicable certificate becomes effective.

Governing Documents

The amendments to the DRUPA, DRULPA, and DLLCA amended Sections 15-101(14), 17-101(14)(c), and 18-101(9)(c) to confirm that a partnership agreement or limited liability company agreement, as applicable, may include or incorporate multiple documents.

Registered & Protected Series

The amendments to the DRULPA and DLLCA amended Sections 17-101(14) and 18-101(9) to confirm that any registered series or protected series of a limited partnership or limited liability company is bound by the partnership agreement or limited liability company agreement of such entity.

Certificates of Revival & Registered and Protected Series

The amendments to the DRULPA and DLLCA amended Sections 17-1111 and 18-1109. These amendments clarify the effect of the filing of a certificate of revival of limited partnership or the certificate of revival of a limited liability company on any protected series of such limited partnership or limited liability company that is not, at the time of such filing, otherwise terminated and wound up and any registered series of such limited partnership or limited liability company whose certificates of registered series are not, at the time of such filing, otherwise cancelled.

Amendment to the DSTA

The amendments to the DSTA include newly enacted Subchapter III, which contains provisions relating to control beneficial interest acquisitions (CBI Provisions). Pursuant to Section 3884(c), the CBI Provisions automatically apply to all Delaware statutory trusts that:

- Are registered under the Investment Company Act of 1940, as amended (the "1940 Act"), as closed-end management investment companies or statutory trusts that are closed-end management investment companies that have elected to be regulated as business development companies under the 1940 Act.
- Have a class of equity securities listed on a national securities exchange registered under the Securities Exchange Act of 1934 or designated for trading on the NASDAQ (collectively, the "Trusts" and each, individually, a "Trust").

The CBI Provisions do not apply to any other Delaware statutory trusts.

Control Beneficial Interest Acquisitions, Voting Rights & Exemptions

Generally, the CBI Provisions provide that holders of control beneficial interests (CBIs) of a Trust that were acquired in a control beneficial interest acquisition (CBI Acquisition) have no voting rights under the DSTA or the governing instrument of the Trust with respect to the CBIs acquired in the CBI Acquisition. However, such CBIs may have voting rights where such voting rights are approved by an affirmative vote of two-thirds of all votes entitled to be cast on the matter, excluding all votes otherwise entitled to be cast by:

- The person who makes or proposes to make a CBI Acquisition (an "Acquiring Person"). See 12 Del. C. § 3881(g); see generally 12 Del. C. § 3881(c).
- An officer or employee-trustee of the Trust.
- A trustee of the Trust who is an "interested person" of the Trust as defined in the 1940 Act or any rule adopted thereunder.

However, under Section 3883(b), the CBI Provisions do not apply to acquisitions of beneficial interests of the Trust "if the acquisition of the beneficial interests specifically, generally, or generally by types, as to specifically identified or unidentified existing or future beneficial owners or their affiliates or associates, or as to any series or classes of beneficial interests," is exempted either by a provision in the governing instrument of the Trust or by action of the trustees of the Trust (the "Exemption Provision").

The Exemption Provision provides the trustees with broad flexibility to tailor exemptions to fit specific circumstances that may arise regarding acquisition of a Trust's beneficial interests. The Exemption Provision authorizes the trustees to both exempt an acquisition of CBIs that were acquired in a CBI Acquisition after the CBI Acquisition and exempt an acquisition of CBIs that are proposed to be acquired in a CBI Acquisition.

Control Beneficial Interests

CBIs are beneficial interests of a Trust that, when aggregated with all other beneficial interests—including those not acquired in a CBI Acquisition and those exempted from the definition of a CBI Acquisition as described below—of such Trust owned by a person, or in respect of which that person is otherwise entitled to exercise or direct the exercise of voting power—excluding beneficial interests where voting power is solely by virtue of a revocable proxy—entitle that person to exercise or direct the exercise of the voting power of beneficial interests of such Trust in the election of trustees within any of the following ranges of voting power:

- 10% or more, but less than 15% of all voting power.
- 15% or more, but less than 20% of all voting power.
- 20% or more, but less than 25% of all voting power.
- 25% or more, but less than 30% of all voting power.
- 30% or more, but less than a majority of all voting power.
- A majority or more of all voting power.

When determining which beneficial interests are included for purposes of calculating the voting power that a person has in a Trust, beneficial interests owned or controlled by associates of such person are included. Beneficial interests acquired within a period of 90 days or beneficial interests acquired in a series of related transactions are considered to have been acquired in the same acquisition.

Exempted Transactions

Section 3881(d)(2) provides that a CBI Acquisition does not include the acquisition of beneficial interests:

- Before Aug. 1, 2022.
- Under a contract entered into before Aug. 1, 2022, wherein such contract created a binding obligation to purchase such beneficial interests at a set price.
- Under the laws of descent and distribution.
- Under the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing the CBI Provisions as determined by the trustees of the Trust.
- Under a merger or consolidation effected under Section 3815 if the Trust is the surviving or resulting party in the merger or consolidation, except with respect to any beneficial interests issued to a holder of CBIs in the target party (collectively, “Exempted Transactions” and each, individually, an “Exempted Transaction”).

Thus, a person retains voting rights of beneficial interests of the Trust that are owned or controlled by them if those beneficial interests were acquired in an Exempted Transaction, but, as noted above, those beneficial interests will be included in determining if a subsequent acquisition is a CBI Acquisition.

Acquiring Person Statement

Any person who has made or proposes to make a CBI Acquisition may deliver an acquiring person statement to the Trust. The acquiring person statement must provide all of the following information:

- The identity of the Acquiring Person and each other member of any group of which the Acquiring Person is a part for purposes of determining CBIs.
- A statement that the acquiring person statement is given under Title 12, Chapter 38, Subchapter III of the Delaware Code.
- The number of beneficial interests of the statutory trust owned—directly or indirectly—by the Acquiring Person and each other member of any group of which the Acquiring Person is a part.
- The applicable range of voting power as set forth in Section 3881(e).
- If the CBI Acquisition has not occurred, a description in reasonable detail of the terms of the proposed CBI Acquisition and representations of the Acquiring Person, together with a statement in reasonable detail of the facts on which they are based, that the proposed CBI Acquisition, if consummated, will not be contrary to law and that the Acquiring Person has the financial capacity, through financing to be provided by the Acquiring Person and any additional specified sources of financing required under Section 3886, to make the proposed CBI Acquisition.

Beneficial Owner Meeting to Consider Acquiring Person Voting Rights

Subject to the limitations noted below, an Acquiring Person may, at the time of delivery of an acquiring person statement, require that the issue of voting rights with respect to the CBIs be put to a vote of disinterested beneficial owners. If an Acquiring Person requests such a vote, it must undertake to pay the Trust's expenses of a special meeting of the beneficial owners of the Trust, excluding the expenses of opposing approval of the voting rights.

A call of a special meeting to consider the issue of voting rights with respect to the CBIs is not required to be made unless at the time of delivery of an acquiring person statement, the Acquiring Person has:

- Entered into a definitive financing agreement or agreements with one or more responsible financial institutions or other entities that have the necessary financial capacity providing for any amount of financing of the CBI Acquisition not to be provided by the Acquiring Person.
- Delivered a copy of the agreement to the Trust. If the Acquiring Person does not request a vote of the disinterested beneficial owners to consider the issue of voting rights with respect to the CBIs, the trustees of the Trust may, but are not required to, present such a vote to the disinterested beneficial owners.

In addition, a call of a special meeting to consider the issue of voting rights with respect to the CBIs is not required to be made if the Acquiring Person making such request—or an associate of such person—has in the three year period preceding such request made a request to have the issue of the voting rights to be accorded the beneficial interests acquired in a CBI Acquisition presented for consideration at a meeting of beneficial owners where the beneficial owners have not approved such acquisition under Section 3885. If such a vote of the disinterested beneficial owners occurs, the trustees have no obligation to approve or exempt any such CBI Acquisition.

Disclosure of CBI Acquisitions & Related Information

A holder of beneficial interests is required to disclose to the Trust any CBI Acquisition within 10 days of such CBI Acquisition. A Trust may require a holder of beneficial interests or an associate of such person to disclose the number of beneficial interests owned or with respect to which such person or an associate thereof has the direct or indirect power to exercise voting power.

Additionally, a holder of beneficial interests or an associate of such person is required to provide to the Trust within 10 days of receiving a request therefor from the Trust any information that the trustees reasonably believe is necessary or desirable to determine whether a CBI Acquisition has occurred.

Other Amendments to the DSTA

The other amendments to the DSTA address business development companies, authorized signatories, successor Delaware trustee certificates and various conforming amendments.

Business Development Companies

The amendments to the DSTA Sections 3801(f), 3804(a), 3805(h), 3806(l), 3807(b)-(c), 3815(a), 3821(b), 3823(b), and 3825(c) add business development companies to a number of provisions of the DSTA that previously applied only to registered investment companies (within the meaning of the 1940 Act).

Authorized Signatories

The amendments to the DSTA include an amendment to Section 3804(a). This amendment clarifies that, except to the extent otherwise provided in the governing instrument of a statutory trust, the trustees or other authorized persons, or the duly authorized agents of such trustees or other authorized persons, may bind a statutory trust to a contract or instrument by entering into such contract or instrument in the name of the statutory trust or in the name of any such person acting on behalf of the statutory trust.

Successor Delaware Trustee Certificate

The amendments to the DSTA include newly enacted Section 3807(n) and an amendment to Section 3813(a)(5). These amendments add a provision for the filing of a single certificate by a trustee who has succeeded the predecessor trustee of multiple statutory trusts in order to amend the name and address of such trustee in each affected certificate of trust and the payment by such successor trustee of the fee payable in connection with the filing of such certificate.

These amendments thereby significantly simplify the process of replacing the trustee of multiple statutory trusts. These amendments have a delayed effective date of Aug. 1, 2023.

Conforming Amendments

The amendments to the DSTA include newly enacted Sections 3806(o) and 3819(f), as well as amendments to Sections 3806(b)(7) and 3806(i). Consistent with prior amendments to the other alternative entity statutes, these amendments:

- Provide for the ratification of acts or transactions that are void or voidable and the waiver of requirements that were not complied with relating to such acts or transactions.
- Clarify that the “necessary and essential” test applies to a beneficial owner's right to obtain information for a stated purpose pursuant to the DSTA or the governing instrument of a statutory trust.
- Provide that a person who may manage the business and affairs of a statutory trust may delegate any of its rights, powers, or duties irrespective of whether it has a conflict of interest.

Conclusion

Attorneys advising clients with alternative entities in Delaware will want to stay abreast of the above changes. Because Delaware CBI Provisions automatically apply to all Delaware statutory trusts operating as publicly traded closed-end management investment companies (each, a “CEF”) or business development companies (each, a “BDC”), practitioners will need to understand the operation of the new Delaware provisions including the exemptions as well as the fiduciary issues that can arise where trustees grant or withhold exemptions.

Practitioners advising Delaware statutory trust clients will want to keep in mind the new provisions relating to delegation of authority to resolve conflict of interest questions, as well as the new ratification provisions to ratify acts that may be void or voidable.