Delaware Corporation Law Section Approves Amendments to Delaware’s Alternative Entity Acts

Client Alert
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On April 7, 2021, the Corporation Law Section of the Delaware State Bar Association approved amendments to the Delaware Revised Uniform Partnership Act, 6 Del. C. §§ 15-101 et seq. (the “DRUPA”), the Delaware Revised Uniform Limited Partnership Act, 6 Del. C. §§ 17-101 et seq. (the “DRULPA”), and the Delaware Limited Liability Company Act, 6 Del. C. §§ 18-101 et seq. (the “DLLCA”). The amendments have now received final approval in the Delaware State Bar Association process and soon will be introduced and considered by the Delaware legislature. The amendments include a number of significant substantive changes described below to, inter alia,

1. provide a safe harbor procedure for ratifying acts or transactions taken by or in respect of a partnership, a limited partnership or a limited liability company that are void or voidable,

2. provide that when a partner or member exercises a right to inspect information for a stated purpose, such partner’s or member’s right shall be limited to inspecting such information as is necessary and essential to achieve such purpose,

3. provide that a partner, general partner, member or manager may delegate any of its rights, powers or duties irrespective of whether it has a conflict of interest with respect to the matter as to which such rights, powers or duties are being delegated, and the person to whom such rights, powers or duties are delegated shall not be deemed conflicted solely because of the conflict of the delegating partner, general partner, member or manager and

4. confirm that all the provisions of the DRUPA apply to a partnership whether or not it has opted out of entity status.

If approved by the legislature and signed by the Governor, the amendments will become effective on August 1, 2021.
RATIFYING ACTS AND TRANSACTIONS

[DRUPA §§ 15-202(g); DRULPA §§ 17-106(e); and DLLCA §§ 18-106(e)] The proposed amendments to the DRUPA, the DRULPA and the DLLCA enact new Sections 15-202(g), 17-106(e) and 18-106(e) to provide that acts or transactions taken by or in respect of (i) a partnership under the DRUPA or its partnership agreement, (ii) a limited partnership under the DRULPA or its partnership agreement, or (iii) a limited liability company under the DLLCA or its limited liability company agreement that are void or voidable can be ratified, and failure by a partnership, limited partnership or limited liability company to comply with any requirements of its partnership agreement or limited liability company agreement, as applicable, can be waived, by the persons whose approval would be required under its partnership agreement or limited liability company agreement, as applicable, (i) for such act or transaction to be validly taken or (ii) to amend such partnership agreement or limited liability company agreement in a manner that would permit such act or transaction to be validly taken. Any act or transaction ratified, or any failure to comply with requirements that is waived, under the new sections is deemed to have been taken at the time of such act or transaction. The amendments confirm that void or voidable actions may still be ratified, or requirements may be waived, by other means permitted by law. These proposed amendments are intended to change the rule applied by the Delaware Court of Chancery in Composecure, L.L.C. v. Cardux, LLC, 206 A.3d 807 (Del. 2018), and Absalom Absalom Trust v. Saint Gervais LLC, 2019 WL 2655787 (Del. Ch. June 27, 2019), that acts or transactions determined to be void generally may not be ratified.

RIGHT TO INFORMATION

[DRUPA §§ 15-403(f); DRULPA §§ 17-305(f); and DLLCA §§ 18-305(g)] The proposed amendments to the DRUPA, the DRULPA and the DLLCA amend Sections 15-403(f), 17-305(f), 18-305(g) to provide that if a partner or member is entitled to obtain information for a stated purpose pursuant to the DRUPA, the DRULPA and the DLLCA or a partnership agreement or limited liability company agreement, such partner’s or member’s right shall be to obtain such information as is necessary and essential to achieving that purpose, unless such right has been expanded or restricted in the applicable partnership agreement or limited liability company agreement. These proposed amendments are intended to change the rule set forth in Murfey v. WHC Ventures, LLC, 236 A.3d 337 (Del. 2020), which held that the “necessary and essential” test does not apply to a proper purpose requirement in a partnership agreement or limited liability company agreement and to confirm previous holdings of the Court of Chancery that the “necessary and essential” test does apply to the proper purpose requirement under Section 15-403(a) of the DRUPA, Section 17-305(a) of the DRULPA, and under Section 18-305(a) of the DLLCA.
DELEGATION OF PARTNER, GENERAL PARTNER MEMBER OR MANAGER WITH A CONFLICT OF INTEREST

[DRUPA §§ 15-401(l); DRULPA §§ 17-403(c); and DLLCA §§ 18-407] Under the proposed amendments to the DRUPA, the DRULPA and the DLLCA to Sections 15-401(l), 17-403(c) and 18-407, a partner, general partner, member or manager may delegate any of its rights, powers or duties irrespective of whether it has a conflict of interest with respect to the matter as to which such rights, powers or duties are being delegated, and the person or persons to whom any such rights, powers or duties are being delegated shall not be deemed conflicted solely by reason of the conflict of interest of the delegating partner, general partner, member or manager. These proposed amendments are intended to change the current law, as applied in Wenske v. Bluebell Creameries, Inc., 214 A.3d 958 (Del. Ch. 2019), that a conflicted principal is legally disabled from delegating authority over the subject matter as to which the principal is conflicted to a delegate, even if the delegate is independent.

STATUTORY PUBLIC BENEFIT LIMITED PARTNERSHIPS AND STATUTORY PUBLIC BENEFIT LIMITED LIABILITY COMPANIES

[DRULPA §§ 17-1201, 17-1202(a), 17-1203, 17-1204, and 17-1205; and DLLCA §§ 18-1201, 18-1202(a), 18-1203, 18-1204, and 18-1205] The proposed amendments to Subchapter XII of the DRULPA and Subchapter XII of the DLLCA provide that if a limited partnership or limited liability company is not formed as a statutory public benefit limited partnership or statutory public benefit limited liability company, as applicable, it may become one in the manner specified in its partnership agreement or limited liability company agreement, as applicable, or by amending such agreement and its certificate of limited partnership or certificate of formation, as applicable, to comply with the requirements of Subchapter XII of the DRULPA or Subchapter XII of the DLLCA, as applicable. Further, the proposed amendments provide that the partnership agreement or limited liability company agreement, as applicable, of a statutory public benefit limited partnership or a statutory public benefit limited liability company must state that it is a statutory public benefit limited partnership or a statutory public benefit limited liability company, as applicable, and must set forth the specific public benefit or benefits to be promoted by such entity. The proposed amendments also provide that, in the event of any inconsistency between the public benefit or benefits set forth in the partnership agreement or limited liability company agreement, as applicable, and the certificate of limited partnership or the certificate of formation, as applicable, the partnership agreement or limited liability company agreement shall control as among the partners, the members, the managers and/or other persons who are party to or otherwise bound by such agreement and the certificate of formation or the certificate of limited partnership, as applicable, shall be amended to correct any inaccuracies.
APPLICATION OF THE DRUPA TO PARTNERSHIPS THAT HAVE OPTED OUT OF ENTITY STATUS

[DRUPA §§ 15-103] The proposed amendments to Section 15-103 amend the DRUPA to clarify that, notwithstanding any modifications provided in a statement of partnership existence or a statement of qualification and in a partnership agreement of a partnership as contemplated by Sections 15-201 (a), 15-203, and 15-501 of the DRUPA, which permit partnerships to opt out of entity status or to opt to have partners have interests in specific partnership property, all other provisions of the DRUPA continue to apply, unless the partnership agreement provides that such other provisions do not apply. Thus, for example, the dissolution rules in Section 15-801 of the DRUPA would continue to apply to a partnership that had opted out of entity status unless the partnership agreement provides otherwise.

Should you have any questions on any of the amendments, please feel free to contact a member of the Alternative Entity Counseling Group.

1 Amendments to the Delaware General Corporation Law, 8 Del. C. §§ 101 et seq., were also approved by the Corporation Law Section.

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PRACTICE AREAS

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