

2021 Amendments to the DGCL and Delaware's Alternative Entity Statutes

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Bloomberg Law

In its 2021 session, the Delaware legislature passed a number of amendments to the Delaware General Corporation Law (DGCL) and the Delaware “alternative entity” statutes—the Delaware Limited Liability Company Act (DLLCA), the Delaware Revised Uniform Limited Partnership Act (DRULPA), and the Delaware Revised Uniform Partnership Act (DRUPA). The amendments to the DGCL, the DLLCA, the DRULPA, and the DRUPA became effective on August 1, 2021.

The amendments to the DGCL effected a clarifying change related to the voting of shares of a corporation’s stock held by subsidiaries.

The amendments to the alternative entity statutes include a number of significant substantive changes described below. These include amendments that do the following:

- 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.
- 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.
- 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. Further, 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.
- Confirm that all the provisions of the DRUPA apply to a partnership whether or not it has opted out of entity status.

This article will first discuss the amendments to the DGCL and then the amendments to the alternative entity statutes.

2021 Amendments to the DGCL and Delaware's Alternative Entity Statutes

AMENDMENTS TO THE DGCL

One section of the DGCL was amended in regard to voting of a corporation's shares.

VOTING OF A CORPORATION'S SHARES

Section 160(c) has been amended to clarify the treatment of shares held by non-corporate subsidiaries. Previously, Section 160(c) provided that shares of a corporation's stock belonging to the corporation itself or to another corporation, where a majority of the other corporation's shares are held, directly or indirectly, by the corporation, are not entitled to vote and are not counted for quorum purposes.

The amendments clarify that shares of a corporation's stock belonging to a non-corporate entity similarly are not entitled to vote. Further, they are not counted for quorum purposes if the corporation, directly or indirectly, holds a majority of the voting power of such entity or otherwise controls such entity. The synopsis provides that the amendments should not be interpreted to create any negative implication regarding the inclusion or exclusion of alternative entities in other sections of the DGCL.

AMENDMENTS COMMON TO MULTIPLE ALTERNATIVE ENTITY STATUTES

The amendments common to the DRUPA, the DRULPA, and the DLLCA address ratifying acts and transactions, right to information, delegation of a partner, general partner member, or manager with a conflict of interest, and statutory public benefit limited partnerships and statutory public benefit limited liability companies.

RATIFYING ACTS AND TRANSACTIONS

The amendments to the DRUPA, the DRULPA and the DLLCA enacted new Sections 15-202(g), 17-106(e) and 18-106(e). These sections provide that acts or transactions taken by or in respect of a partnership under the DRUPA or its partnership agreement, a limited partnership (LP) under the DRULPA or its partnership agreement, or a limited liability company (LLC) under the DLLCA or its LLC agreement that are void or voidable can be ratified. Further, the failure by a partnership, LP, or LLC to comply with any requirements of its partnership agreement or LLC agreement, can be waived. Such ratification or waiver is by the persons whose approval would be required under the partnership agreement or LLC agreement for such act or transaction to be validly taken or to amend the partnership agreement or LLC agreement in a manner that would permit such act or transaction to be validly taken.

2021 Amendments to the DGCL and Delaware's Alternative Entity Statutes

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 amendments were adopted in response to the decisions in *Composecure, L.L.C. v. Cardux, LLC*, **206 A.3d 807** (Del. 2018), and *Absalom Absalom Trust v. Saint Gervais LLC*, **2019 BL 238570** (Del. Ch. June 27, 2019). In these cases, the courts held that acts or transactions determined to be void generally may not be ratified.

The courts applied a rule developed in the corporate context and the amendments take a more contractually based approach to LLCs, LPs, and partners, which are contractually based entities. The amendments should also be consistent with the reasonable expectations of the parties regarding the effect of ratifying actions or waivers since they are based on contractual principles. The amendments further provide specific guidance as to how otherwise void or voidable actions can be ratified, which should prove very useful to practitioners.

RIGHT TO INFORMATION

The amendments to the DRUPA, the DRULPA, and the DLLCA amend Sections 15-403(f), 17-305(f), 18-305(g). These sections 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 LLC 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 partnership agreement or LLC agreement.

These amendments are intended to change the rule set forth in *Murfey v. WHC Ventures, LLC*, **236 A.3d 337** (Del. 2020). This case held that the "necessary and essential" test does not apply to a proper purpose requirement in a partnership agreement or LLC agreement. The amendments 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

Under the 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. This is 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. The person or persons to whom any such rights, powers, or duties are being delegated is not deemed conflicted solely by reason of the

2021 Amendments to the DGCL and Delaware's Alternative Entity Statutes

conflict of interest of the delegating partner, general partner, member or manager.

These amendments are intended to change the current law, as applied in *Wenske v. Bluebell Creameries, Inc.*, **214 A.3d 958** (Del. Ch. 2019). Under the current law, 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.

The amendments are consistent with the provisions of the DRUPA, the DRULPA, and the DLLCA that currently authorize an irrevocable delegation of authority. This means that a conflicted principal could relinquish all control over the delegated subject matter.

The amendments authorize and confirm an important practice by which a conflicted partner or member can delegate authority over the conflicted matter. If properly done, this provides a useful mechanism to authorize a conflicted transaction, such as review of a derivative action or a transaction between a general partner and the partnership or a managing member and the LLC.

STATUTORY PUBLIC BENEFIT LPS AND STATUTORY PUBLIC BENEFIT LLCs

The amendments to Subchapter XII of the DRULPA and Subchapter XII of the DLLCA provide that if a LP or LLC is not formed as a statutory public benefit LP or statutory public benefit LLC, it may become one in the manner specified in its partnership agreement or LLC agreement. Further, the LP or LLC may amend such agreement and its certificate of limited partnership or certificate of formation, to comply with the requirements of Subchapter XII.

Further, the amendments provide that the partnership agreement or LLC agreement, of a statutory public benefit LP or a statutory public benefit LLC must state that it is a statutory public benefit LP or a statutory public benefit LLC. The agreement must also set forth the specific public benefit or benefits to be promoted by such entity.

The amendments also provide that, in the event of any inconsistency between the public benefit or benefits set forth in the partnership agreement or LLC agreement, and the certificate of limited partnership or the certificate of formation, the agreement shall control as among the partners, the members, the managers and other persons who are party to or otherwise bound by such agreement. The certificate of formation or the certificate of limited partnership, shall be amended to correct any inaccuracies.

AMENDMENTS TO THE DRUPA

One section of the DRUPA was amended regarding the application of the DRUPA to partnerships that have opted out of entity status.

2021 Amendments to the DGCL and Delaware's Alternative Entity Statutes

APPLICATION OF THE DRUPA TO PARTNERSHIPS THAT HAVE OPTED OUT OF ENTITY STATUS

The amendments to the DRUPA Section 15-103 clarify that for partnerships that opt out of entity status or 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. This is 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. 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.

CONCLUSION

The 2021 amendments to the DGCL, the DLLCA, the DRULPA, and the DRUPA became effective on Aug. 1, 2021. Attorneys advising clients with corporations or alternative entities in Delaware will want to stay abreast of these changes.

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