

2022 Amendments to Delaware's Alternative Entity Acts

Client Alert

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The Delaware General Assembly recently enacted 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"), the Delaware Limited Liability Company Act, 6 Del. C. §§ 18-101 et seq. (the "DLLCA"), and the Delaware Statutory Trust Act, 12 Del. C. §§ 3801 et seq. (the "DSTA").¹ The amendments were effective August 1, 2022, except as noted below with respect to the amendments to DSTA Sections 3807(n) and 3813(a)(5), which allow for a single filing to affect a change of the Delaware trustee of multiple statutory trusts; these two amendments will become effective on August 1, 2023.

The most significant amendment is the addition of a control beneficial interest acquisition provision (also known as a control share provision) to the DSTA. The control beneficial interest acquisition provision applies to all statutory trusts registered under the Investment Company Act of 1940 (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 and that, in either case, have a publicly listed class of beneficial interests. In general, the provision restricts the voting rights of holders of beneficial interests with respect to beneficial interests acquired in certain acquisitions unless the governing instrument, the board of trustees or the other beneficial owners of the statutory trust approve or exempt the acquisition. Other significant changes include (i) adding business development companies to a number of provisions of the DSTA that previously applied only to registered investment companies, (ii) providing a safe harbor procedure for ratifying acts or transactions taken by or in respect of a statutory trust that are void or voidable, (iii) providing that when a beneficial owner of a statutory trust exercises a right to inspect information for a stated purpose, such inspection right shall be limited to inspecting such information as is necessary and essential to achieve such purpose, (iv) permitting electronic signatures on certificates evidencing interests in alternative entities, and (v) providing that a person who manages 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, 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 person.

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CONTROL BENEFICIAL INTEREST ACQUISITIONS

[DSTA §§ 3881 et seq.] This amendment to the DSTA adds new Subchapter III, which implements a control beneficial interest acquisition provision for statutory trusts registered under 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 and that in either case have a class of equity securities listed on a national securities exchange registered under the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.) or designated for trading on the National Association of Securities Dealers Automated Quotation System (NASDAQ). The new control beneficial interest acquisition provision applies automatically, but the governing instrument of a statutory trust may include provisions approving or exempting an acquisition and the board of trustees may approve or exempt any acquisition, including specifically, generally, or as to any series or class. Unless otherwise exempted or approved, holders of control beneficial interests acquired in a control beneficial interest acquisition have no voting rights under the DSTA or the governing instrument of the statutory trust with respect to the control beneficial interests acquired in the acquisition and such beneficial interests are not considered to be outstanding for quorum or other voting purposes.

BUSINESS DEVELOPMENT COMPANIES

[DSTA §§ 3801(f), 3804(a), 3805(h), 3806(l), 3807(b)-(c), 3815(a), 3821(b), 3823(b), and 3825(c)] These amendments to the DSTA 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). Though similar to registered investment companies in many respects, business development companies as a technical matter are not registered investment companies but instead elect to be subject to many of the federal regulations applicable to registered investment companies and have increasingly been used in transactions similar to those involving registered investment companies.

RATIFYING ACTS AND TRANSACTIONS

[DSTA § 3806(o)] This amendment to the DSTA provides that acts or transactions taken by or in respect of a statutory trust under the DSTA or its governing instrument that are void or voidable can be ratified, and failure by a statutory trust to comply with any requirements of its governing instrument can be waived, by the persons whose approval would be required under its governing instrument (i) for such act or transaction to be validly taken or (ii) to amend such governing instrument 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 section is deemed to have been taken at the time of such act or transaction. The amendment confirms that void or voidable actions may be ratified, or requirements may be waived, by other means permitted

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by law. This amendment is 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.

ELECTRONIC SIGNATURES

[DRUPA § 15-124(b)(2); DRULPA § 17-113(b)(2); DLLCA § 18-113(b)(2); and DSTA § 3826(b)(2)] These amendments to the DRUPA, the DRULPA, the DLLCA, and the DSTA 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.

RIGHT TO INFORMATION

[DSTA § 3819(f)] This amendment to the DSTA provides that if a beneficial owner is entitled to obtain information for a stated purpose pursuant to the DSTA or the governing instrument of a statutory trust, such beneficial owner'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 governing instrument. To the extent current law is that the "necessary and essential" test does not apply by default to (i) a beneficial owner's right under Section 3819(a) of the DSTA to obtain information from a statutory trust for a purpose reasonably related to the beneficial owner's interest as a beneficial owner of the statutory trust or (ii) a beneficial owner's right under a governing instrument to obtain information from a statutory trust for a stated purpose, this amendment is intended to change that law.

DELEGATION OF TRUSTEE WITH A CONFLICT OF INTEREST

[DSTA §§ 3806(b)(7) and 3806(i)] Under these amendments to the DSTA, a trustee, officer, employee, manager or other 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 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 trustee, officer, employee, manager or other person who may manage the business and affairs of the statutory trust. These 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.

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CONVERSIONS AND DOMESTICATIONS

[DRUPA §§ 15-901(h), 15-904(g); DRULPA §§ 17-215(g), 17-217(h); and DLLCA §§ 18-212(g), 18-214(h)] These amendments to the DRUPA, the DRULPA, and the DLLCA provide that the conversion or domestication to a partnership, limited partnership, or limited liability company, as applicable, in the manner provided for by the document, instrument, agreement or other writing, as the case may be, governing the internal affairs of the other entity and the conduct of its business or by applicable law, as appropriate, and the approval of the partnership agreement or the limited liability company agreement by the same authorization required to approve such conversion or domestication, are required to occur prior to the time a certificate of conversion or certificate of domestication, as applicable, becomes effective, not at the time such certificate is executed.

TRUTH UPON CERTIFICATE EFFECTIVENESS

[DRUPA § 15-105(c); DRULPA § 17-204(d); DLLCA § 18-204(d); and DSTA § 3811(c)] These amendments to the DRUPA, the DRULPA, the DLLCA, and the DSTA clarify 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, not at the time such certificate is executed.

REGISTERED AND PROTECTED SERIES

[DRULPA § 17-101(14); and DLLCA § 18-101(9)] These amendments to the DRULPA and the DLLCA 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, as applicable, of such entity regardless of whether the series executed such partnership agreement or limited liability company agreement. This amendment is not intended to imply that other references to "limited partnership" or "limited liability company", as applicable, in the DRULPA and DLLCA do not include protected series or registered series thereof (to the extent required by the context).

GOVERNING DOCUMENTS

[DRUPA § 15-101(14); DRULPA § 17-101(14)(c); and DLLCA § 18-101(9)(c)] These amendments to the DRUPA, the DRULPA, and the DLLCA confirm that a partnership agreement or limited liability company agreement, as applicable, may include or incorporate multiple documents that may govern the business or affairs of the entity, or any of its series where applicable.

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CERTIFICATE OF REVIVAL AND REGISTERED AND PROTECTED SERIES

[DRULPA § 17-1111; and DLLCA § 18-1109] These amendments to the DRULPA and the DLLCA 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.

AUTHORIZED SIGNATORIES

[DSTA § 3804(a)] This amendment to the DSTA 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

[DSTA § 3807(n) and 3813(a)(5)] These amendments to the DSTA add a provision for the filing of a certificate by a trustee who has succeeded the predecessor trustee of one or more 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 have a delayed effective date of August 1, 2023.

SERVICE OF PROCESS

[DLLCA § 18-109(b)] This amendment to the DLLCA provides that when service of process is being effected on a manager or liquidating trustee of a limited liability company, the Prothonotary or the Register in Chancery of the court in which the civil action or proceeding is pending shall address the required copies and statements to the manager or liquidating trustee of the limited liability company at the principal place of business of the limited liability company (if such address is known) and to the manager's or liquidating trustee's address last known to the party desiring to make such service.

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

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PRACTICE AREAS

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