

2021 Amendments to Delaware Corporate Law and Alternative Entity Statutes

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Related People:
Philip D. Amoa
Scott J. Seger

The 2021 amendments to the Delaware General Corporation Law (the DGCL), the Delaware Revised Uniform Partnership Act (the DRUPA), the Delaware Revised Uniform Limited Partnership Act (the DRULPA), and the Delaware Limited Liability Company Act (the DLLCA and, together with the DRUPA and the DRULPA, the alternative entity statutes) went into effect on August 1, 2021.

Below is a brief description of some of the more notable 2021 amendments. (No amendments were made to the Delaware Statutory Trust Act in 2021.)

Amendments to the DGCL

Corporation's Own Stock for Purposes of Voting and Establishing a Quorum (Section 160(c)).

Section 160(c) of the DGCL was amended to clarify that if a corporation's capital stock is held by another entity (whether a corporation or an alternative entity) and the corporation directly or indirectly holds a majority of the voting power of such entity, then such capital stock may not be (i) voted or (ii) counted for the purposes of establishing a quorum.

Amendments to the Alternative Entity Statutes

Applicability of Certain of the DRUPA's Default Rules (Section 15-103 of the DRUPA).

Section 15-103 of the DRUPA was amended to clarify that certain of the DRUPA's default rules govern a Delaware general partnership unless the partnership modifies the default provisions in either (i) its statement of partnership existence or (ii) its statement of qualification and in its partnership agreement.

The default rules that apply to a Delaware general partnership unless modified in accordance with Section 15-103 are (a) Section 15-201(a), providing that a partnership is a separate legal entity from its partners; (b) Section 15-203, providing that property acquired by a partnership is property of the partnership and not of the partners individually; and (c) Section 15-501, providing that a partner is not a co-owner of partnership property and has no interest in specific partnership property.

Ratification of Void or Voidable Acts or Transactions (Section 15-202 of the DRUPA, Section 17-106 of DRULPA, and Section 18-106 of the DLLCA).

Section 15-202 of the DRUPA, Section 17-106 of the DRULPA, and Section 18-106 of the DLLCA were amended to provide safe-harbor procedures for (i) ratifying void or voidable acts or transactions and (ii) waiving failures to comply with the requirements of a partnership or LLC agreement.

The new subsections are intended to provide a rule different from the rule applied 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.

The new subsections now provide that any acts or transactions taken by a partnership, limited partnership (LP), or limited liability company (LLC) that were void or voidable when taken may be ratified by the approval of the persons required (i) for such act or transaction to have been validly taken or (ii) to the amend the partnership or LLC agreement to permit such act or transaction to be validly taken. The sections were further amended to provide that any act or transaction that becomes void or voidable by reason of failure to comply with the requirements of the partnership or LLC agreement may have such requirements waived by the approval of the persons required (i) for such act or transaction to have been validly taken or (ii) to the amend the partnership or LLC agreement to permit such act or transaction to be validly taken.

Any act or transaction that is ratified, or the requirements in which to take the act or transaction are waived in accordance with the above sections, is deemed to have been validly taken at the time of the act or transaction. The new subsections are not intended to preempt or restrict other valid means of ratifying acts or transactions or waiving requirements, or to impair the effectiveness of any valid ratification or waiver previously effected.

Delegation of Rights by a Conflicted Principal (Section 15-401 of the DRUPA, Section 17-403(c) of DRULPA, and Section 18-407 of the DLLCA).

Section 15-401(1) of the DRUPA, Section 17-403(c) of the DRULPA, and Section 18-407 of the DLLCA were amended to allow a person with a conflict of interest with respect to certain subject matter to delegate the authority over such subject matter to an independent person.

The sections now provide that a person who has rights, powers, or duties delegated to them by a partner, general partner, or member or manager shall not have a conflict of interest solely because the partner, general partner, or member or manager who delegated such rights, powers, or duties has a conflict of interest on the matters for which the rights, powers, or duties are being delegated.

These amendments create a different rule than the rule applied in cases such as *Wenske v. Bluebell Creameries, Inc.*, 214 A.3d 958 (Del. Ch. 2019), which says a conflicted principal is legally disabled from delegating authority, even to an independent delegatee, over the subject matter on which the principal is conflicted.

Information Rights (Section 15-403 of the DRUPA, Section 17-305 of the DRULPA, Section 18-305 of the DLLCA).

Section 15-403 of the DRUPA, Section 17-305 of the DRULPA, and Section 18-305 of the DLLCA were amended to change the current law with respect to when a partner, limited partner, or member is entitled to obtain information from an entity (i) for a purpose reasonably related to the person's interest as a partner, limited partner, or member or (ii) for a stated purpose under the partnership or LLC agreement.

The sections make certain clarifying and conforming changes, and they provide that when a partner, limited partner, or member is entitled to obtain information for a stated purpose (whether pursuant to a relevant act or a partnership or LLC agreement), the partner's, limited 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 or LLC agreement. These amendments are intended to (i) change current law, as set forth in *Murfee v. WHC Ventures, LLC*, 236 A.3d 337 (Del. 2020), that the "necessary and essential" test does not apply by default to a limited partner's contractual right to obtain information from an LP for a stated purpose and (ii) to clarify that the "necessary and essential" test applies to a partner's, limited partner's, or member's right under the relevant act to obtain information from a partnership, LP, or LLC for a purpose reasonably related to such person's interest as an interest holder in the relevant alternative entity.

Conversion to Statutory Public Benefit LPs or LLCs (Section 17-1201 of the DRULPA and Section 18-1201 of the DLLCA).

Delaware permits LPs and LLCs to operate as a statutory public benefit entity LP or LLC (each a statutory public benefit entity). A statutory public benefit entity is a for-profit entity that is formed with the intention to produce a public benefit and to operate in a responsible and sustainable manner.

Section 17-1201 of the DRULPA and Section 18-1201 of the DLLCA were amended to (i) clarify the applicability of the DRULPA and the DLLCA and (ii) provide procedures for an LP or an LLC to convert into a statutory public benefit entity.

The sections now state that if an LP or an LLC elects to become a statutory public benefit entity, then the requirements of the DRULPA or the DLLCA that are "additional or different" for the statutory public benefit entity governs and may not be altered by the LP or LLC agreement.

Each section was further amended to provide that if an LP or an LLC was not initially formed as a statutory public benefit entity, then the LP or the LLC may convert to a statutory public benefit entity either (x) in the manner specified in the partnership or LLC agreement or (y) by amending the partnership or LLC agreement and certificate of limited partnership or formation to comply with the requirements of the DRULPA or the DLLCA, as applicable, that governs statutory public benefit entities.

Requirements of Statutory Public Benefit Entities (Section 17-1202(a) of the DRULPA and Section 18-1202(a) of the DLLCA).

Section 17-1202(a) of the DRULPA and Section 18-1202 of the DLLCA were amended to (i) require certain information in a statutory public benefit entity's partnership or LLC agreement, (ii) solve the issue of when the public benefit is inconsistently stated across certain documents, (iii) require amendment of the certificate of limited partnership or formation in certain circumstances, and (iv) clarify the effect of provisions within a partnership or an LLC agreement that are inconsistent with the DRULPA and the DLLCA.

The sections now provide that the partnership or LLC agreement of a statutory public benefit entity must (i) identify the entity as a statutory public benefit LP or LLC and (ii) state the specific public benefit(s) that the entity is promoting.

Each section was further amended to provide that (i) if there is an inconsistency between the partnership or LLC agreement and the certificate of limited partnership or formation with respect to the public benefit to be promoted by the entity, then the public benefit set forth in the partnership or LLC agreement controls, and (ii) if a general partner of the LP or manager or member of the LLC becomes aware of such inconsistency, then the general partner or the

manager or member must amend the certificate of limited partnership or formation to set forth the public benefit stated in the partnership or LLC agreement.

Additionally, any provisions in the partnership or LLC agreement or certificate of limited partnership or formation of a statutory public benefit entity that are inconsistent with the DRULPA or the DLLCA are not effective to the extent of such inconsistency.

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