

2021 Delaware Entity Statutory Amendments

by Amelia R. Messa and Brian Burke

The State of Delaware's Governor John Carney recently signed into law the 2021 amendments to Delaware's entity statutes. These included amendments to the Delaware General Corporation Law (the "DGCL"), the Delaware Limited Liability Company Act (the "LLC Act"), the Delaware Revised Uniform Limited Partnership Act (the "DRULPA"), and the Delaware Revised Uniform Partnership Act (the "DRUPA" and together with the LLC Act and the DRULPA, the "Alt Entity Acts"). There were no statutory amendments this year to the Delaware Statutory Trust Act. The 2021 amendments to the DGCL and the Alt Entity Acts will be effective August 1, 2021. Descriptions of some of the more notable amendments to each of the Delaware entity statutes are set forth below. There were also several other technical and clarifying amendments enacted for each of the Alt Entity Acts that are not detailed below.

DGCL Amendments

Corporate Stock for Purposes of Establishing a Quorum and Voting

Section 160(c) of the DGCL was amended to clarify that if shares of a corporation's stock are held by another entity, such shares are not entitled to be either voted or counted for purposes of establishing a quorum if the corporation either directly or indirectly holds a majority of such other entity's voting power that is entitled to vote or if the corporation directly or indirectly controls such other entity.

Alternative Entity Amendments

Safe Harbor for Ratification of Void or Voidable Acts

In reaction to two Delaware court cases, *Composecure, L.L.C. v. Cardux, LLC*, 206 A.3d 807 (Del. 2018), and *Absalom Absalom Trust v. Saint Gervais LLC*, 2019 Del. Ch. LEXIS 239 (Del. Ch. 2019), where the courts found that certain acts or transactions were void generally and therefore may not be ratified, the 2021 amendments to the Alt Entity Acts provide a new safe harbor procedure to ratify defective acts or transactions. Similar to

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the approach taken in Section 204 of the DGCL, the amendments add new subsections to Section 18-106 of the LLC Act, Section 17-106 of the DRULPA and Section 15-202 of the DRUPA to provide for steps that can be taken by or in respect of an LLC, limited partnership or general partnership, as applicable, that will (i) ratify acts or transactions that are otherwise void or voidable and (ii) waive failures to comply with any provision of an LLC agreement or partnership agreement that make certain acts and transactions void or voidable. Notably, these amendments expressly confirm that void or voidable acts may still be ratified or requirements may be waived by other means permitted by law.

Test to Obtain Information Rights

In 2020, the Delaware Supreme Court held in *Murfey v. WHC Venture, LLC*, 236 A.3d 337 (Del. 2020), that the requirement that books and records requested by a stockholder of a Delaware corporation be “necessary and essential” to the stockholder’s stated purpose for the records does not apply by default to a limited partner’s contractual right to obtain information from a limited partnership for a stated purpose. Instead, the Court held that the “necessary and essential” test would only apply if it was contractually required in the partnership agreement.

In response to the *Murfey* case, the 2021 amendments to the Alt Entity Acts clarify that the historically corporate “necessary and essential” test applies to a member’s or partner’s rights under the Alt Entity Acts to obtain information from the LLC or partnership for a purpose reasonably related to such person’s interest as a member or partner. The amendments also provide that the right of a member or partner to obtain necessary and essential information may be expanded or restricted in an LLC agreement or partnership agreement.

Delegation of Management Authority in Conflict Situations

Each of the Alt Entity Acts currently provides broad authority for members and partners to delegate their management rights to others. The 2021 amendments to Section 18-407 of the LLC Act, 17-403(c) of the DRULPA and 15-401(l) of the DRUPA expand on this already broad authority to make it clear that a member, manager or partner may delegate any of its rights, powers or duties irrespective of whether it has a conflict of interest and, should it actually have a conflict of interest, the person to whom such rights, powers or duties are being delegated shall not be deemed conflicted solely by reason of the conflict of interest of the delegating party. The goal of these amendments is to create a different rule from the holding 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, even if the delegatee is independent.

Statutory Public Benefit Entity Requirements

The 2021 amendments to the LLC Act and the DRULPA also modify the applicable provisions of such statutes dealing with Delaware statutory public benefit LLCs and

limited partnerships. The 2021 amendments to the LLC Act and the DRUPLA require that the LLC agreement of a statutory public benefit LLC and the partnership agreement of a statutory public benefit limited partnership state that the entity is a statutory public benefit entity and such agreement must set forth the specific public benefit(s) to be promoted by the entity. The amendments also provide that the applicable LLC agreement or partnership agreement shall control as among the members, managers, partners or other persons who are bound by such agreement in the event of an inconsistency between the public benefit(s) as set forth in such agreement and the certificate of formation or certificate of limited partnership, as applicable. The new provisions further require that the certificate of formation or certificate of limited partnership of a Delaware statutory public benefit entity be promptly amended if a manager, member or general partner becomes aware that the specific public benefit to be promoted by such entity as set forth in such certificate is inaccurate.

The 2021 amendments also provide that a Delaware LLC or Delaware limited partnership may become a statutory public benefit entity by (i) complying with any specific requirements to convert itself to a statutory public benefit entity as specified in its LLC agreement or partnership agreement, as applicable, or (ii) amending its LLC agreement or partnership agreement, as applicable, and its certificate of formation or certificate of limited partnership, as applicable, to comply with the requirements set forth in the LLC Act or the DRULPA, as applicable.

Effect of Delaware General Partnership Opt-Outs

The DRUPA currently provides that a Delaware general partnership can opt-out of certain default provisions by providing for such modification in (i) the statement of partnership existence or (ii) a statement of qualification and in a partnership agreement. These default provisions include (x) Section 15-201(a), providing that a partnership is a separate legal entity distinct from its partners, (y) Section 15-203, providing that property acquired by a partnership is property of the partnership and not of the partners individually, and (z) Section 15-501, providing that a partner is not a co-owner of partnership property and has no interest in specific partnership property. Section 15-103 of the DRUPA was amended this year to confirm and clarify that, unless otherwise provided in a partnership agreement, a general partnership that has opted-out of any of these default provisions in accordance with the DRUPA will continue to be governed by the DRUPA.