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# Analysis

## Delaware Law

### Analysis of the 2008 Amendments to the Delaware Corporation and Alternative Entities Code Provisions

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The Delaware General Assembly recently adopted several amendments to the Delaware General Corporation Law (the "DGCL"), the Delaware Limited Liability Company Act (the "DLLCA"), and the Delaware Revised Uniform Limited Partnership Act (the "DRULPA").

#### Amendments

The amendments to the DGCL modified Section 219(a) and (b), which set forth requirements for the maintenance and review of a corporation's stocklist, and Section 225, which provides authority for bringing an action in the Delaware Court of Chancery to address contested elections and disputes regarding stockholder votes.<sup>1</sup>

The substantive amendments to the DLLCA modified Section 18-101(12), which sets forth the definition of "person," Sections 18-110(c) and 18-111, which address contested elections and actions to interpret or enforce a limited liability company agreement, respectively, and Section 18-204, which relates to the execution of certificates under the DLLCA.<sup>2</sup>

<sup>1</sup> Delaware State Senate, 144th General Assembly, Senate Bill No. 244 (signed on June 26, 2008).

<sup>2</sup> Delaware House of Representatives, 144th General Assembly, House Bill No. 429 (signed on July 17, 2008).

The substantive amendments to the DRULPA amended Section 17-101(9), which sets forth definitions of "limited partnership" and "domestic limited partnership," Section 17-101(14), which sets forth the definition of "person," Section 17-204, which relates to the execution of certificates under the DRULPA, and Section 17-303, which relates to a limited partner's liability to third parties.<sup>3</sup>

The amendments made to each Section will be discussed in turn below.

#### DGCL Section 219

Section 219(a) requires a corporation to maintain a stocklist and sets forth requirements with regard to keeping the list open to stockholder examination prior to and during stockholder meetings.

Specifically, Section 219(a) requires that, 10 days before a stockholders' meeting, the officer in charge of the stock ledger must prepare a list of the stockholders entitled to vote at the meeting, and that list must be kept open so that stockholders can examine it for any purpose germane to the meeting for at least 10 days before the meeting (i) on a reasonably accessible electronic network (as long as it is made clear in the notice of the meeting how a stockholder can access the list); and

<sup>3</sup> Delaware House of Representatives, 144th General Assembly, House Bill No. 427 (signed on July 17, 2008).

(ii) during ordinary business hours at the principal place of business of the corporation.

If the meeting is held at a physical location, the list must be available at that location for the entire meeting, and if the meeting is held by remote communication, the list must be open to stockholder examination on a reasonably accessible electronic network during the entire meeting.

Nonsubstantively, Section 219(a) was amended so that the term "examined" is used consistently throughout when referring to a stockholder's review of the stocklist.

Substantively, Section 219(b) was amended in its entirety.

Previously, this Section provided that if directors "wilfully neglected" or refused to produce the stocklist as required at a stockholders' meeting, such directors would be ineligible to stand for election to any office at such meeting.

The General Assembly substantially rewrote Section 219(b), eliminating the "wilful neglect" standard and the "ineligible to stand for election" penalty, providing instead that if a corporation (including an officer or agent thereof) refuses to permit a stockholder to examine the stocklist, such stockholder can seek an order from the Delaware Court of Chancery compelling the corporation to permit such examination, and the corporation will bear the burden of proving that the examination sought is not germane to the meeting.

As amended, Section 219(b) also gives the Court of Chancery broad authority to grant appropriate relief, providing that, in addition to summarily ordering the corporation to permit examination of the list, the court can also "make such additional orders as may be appropriate, including, without limitation, postponing the meeting or voiding the results of the meeting."

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### **DGCL Section 225**

The General Assembly also made a substantive revision to Section 225 of the DGCL. Section 225 authorizes the Court of Chancery to (a) review the validity of any election, appointment, removal, or resignation of any director, officer, or member of a governing body and adjudicate conflicting claims with respect to such positions; and (b) review a stockholder vote on any matter other than the election of directors, officers, or members of a governing body.

Prior to the 2008 amendments, only a stockholder, director, or officer whose title was contested, or member of a nonstock corporation, could bring an action seeking judicial review of elections, appointments, and other similar matters, and only a stockholder or member of a nonstock corporation could bring an action for review of any stockholder vote regarding matters other than elections.

Although no change was made with regard to the parties able to seek judicial review of elections, Section 225(b) as amended now also allows a corporation itself to seek judicial review of stockholder votes for matters other than elections.

### **DLLCA Section 18-101(12)**

The definition of “person” in the DLLCA has been revised to confirm that any form of trust including a common law trust, business trust, statutory trust, or voting trust constitutes a “person.”

### **DLLCA Sections 18-110(c) and 18-111**

These two Sections, which address, in relevant part and respectively, contested matters relating to managers and actions to enforce the duties, obligations, or liabilities of managers, have been revised to use the broad definition of “manager” that was heretofore only used in Section 18-109 of the DLLCA.

The effect of this change is that these provisions now apply to any person, whether or not a member or a manager as defined in Section 18-101(10) of the DLLCA, that participates materially in the management of the LLC.

### **DLLCA Section 18-204**

This Section has been amended to increase the flexibility with regard to execution of a certificate of conversion or a certificate of limited liability company domestication.

In each case, such a certificate may be executed either by one or more authorized persons of the LLC or by a person authorized to execute such certificate on behalf of the other entity in the case of a conversion or the non-United States entity in the case of a domestication.

### **DRULPA Section 17-101(9)**

The definitions of “limited partnership” and “domestic limited partnership” have been revised to state that each means a partnership “consisting of 2 or more persons” rather than “formed by 2 or more persons” to conform this Section to Section 17-201 of the DRULPA, which permits a

general partner acting alone to file a certificate of limited partnership.

### **DRULPA Section 17-101(14)**

The definition of “person” in the DRULPA has been revised to confirm that any form of trust including a common law trust, business trust, statutory trust, or voting trust constitutes a “person.”

### **DRULPA Section 17-204**

This Section has been amended to increase the flexibility with regard to execution of a certificate of conversion or a certificate of limited partnership domestication.

In each case, such a certificate may be executed either by all general partners of the limited partnership or by a person authorized to execute such certificate on behalf of the other entity in the case of a conversion or the non-United States entity in the case of a domestication.

### **DRULPA Section 17-303**

A new subparagraph “n.” has been added to Section 17-303(b)(8).

The effect of this change is to provide a safe harbor from participation in the control of the business of a limited partnership for any limited partner who acts or causes the taking or refraining from taking of any action with respect to the selection or removal of, among others, an agent or employee of the limited partnership or a general partner, an officer, director, or stockholder of a corporate general partner or a member or manager of an LLC which is a general partner.