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2009 Amendments to Delaware's General Corporation Law and Alternative Entity Statutes

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In its latest session, the Delaware legislature enacted several amendments to the General Corporation Law ("DGCL") and to three of Delaware's four "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").¹ The amendments became effective Aug. 1.

As will be discussed in greater detail below, the amendments to the DGCL (i) clarify that a corporation's bylaws may require the corporation to include stockholder nominees in the corporation's proxy materials; (ii) provide that a corporation's bylaws may obligate the corporation to reimburse proxy solicitation expenses incurred by a stockholder; (iii) adopt a default rule that indemnification rights granted pursuant to a charter or bylaw provision cannot be eliminated or impaired by an amendment to such provision after the act or omission giving rise to

¹ No amendments were adopted to the Delaware Statutory Trust Act.

such rights occurs; (iv) permit a corporation's board of directors to set a separate record date to determine stockholders entitled to vote at a meeting; and (v) empower the Delaware Court of Chancery to remove directors in certain instances.

Among other things, the amendments to the alternative entity statutes (i) effectively codify the doctrine of independent legal significance, as developed in Delaware corporation law, to apply to LLCs, limited partnerships, and general partnerships; and (ii) confirm the ability by merger or consolidation to amend an operating or partnership agreement or adopt a new operating or partnership agreement for an entity that is the surviving or resulting entity in a merger or consolidation. This article will discuss the amendments specific to the DGCL, amendments that commonly affect alternative entities, and amendments specific to DRUPA.

Amendments Specific to the DGCL

Proxy Access Bylaws [8 Del. C. § 112]—The legislature added a new Section 112 to the DGCL that clarifies that a corporation's bylaws may include a proxy access bylaw obligating the corporation to include stockholder nominees for director

in the corporation's proxy materials in addition to those persons nominated by the board. The statute makes clear that such a bylaw may impose certain conditions on a stockholder's right of access to the corporation's proxy materials, including any of the following: (i) a provision requiring a minimum record or beneficial ownership, or duration of ownership, of the corporation's stock by the nominating stockholder, and defining beneficial ownership to take into account options or other rights in respect of or related to such stock; (ii) a provision requiring a nominating stockholder to submit to the corporation certain information concerning the stockholder and the stockholder's nominees; (iii) a provision conditioning eligibility for proxy access on the number or proportion of directors nominated by stockholders or whether such stockholder previously sought to require such access; (iv) a provision precluding nominations by any person if such person, any nominee of such person, or any affiliate or associate of such person or nominee, has acquired or publicly proposed to acquire shares constituting a certain percentage of the voting power of the corporation's outstanding voting stock within a certain period of time before the election; (v) a provision requiring a nominating stockholder to undertake to indemnify the corporation in certain circumstances in connection with a nomination; and (vi) any other lawful condition.

Proxy Reimbursement Bylaws [8 Del. C. § 113]—A new Section 113

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was also added to the DGCL, which provides that a corporation may have a proxy reimbursement bylaw requiring the corporation to reimburse stockholders for their proxy solicitation expenses in connection with an election of directors. Such a bylaw may impose limitations on such reimbursement, including: (i) conditioning eligibility for reimbursement upon the number or proportion of persons nominated by such stockholder or upon whether such stockholder previously sought reimbursement for similar expenses; (ii) limitations on the amount of reimbursement based upon the proportion of votes cast in favor of one or more of the persons nominated by such stockholder, or upon the amount spent by the corporation in soliciting proxies in connection with the election; (iii) limitations concerning elections of directors by cumulative voting; or (iv) any other lawful condition.

Default Vesting Rule for Indemnification Rights [8 Del. C. § 145(f)]—Section 145(f) has been amended to make clear that the right to indemnification or advancement arising under a provision of a corporation's certificate of incorporation or bylaws cannot be eliminated or impaired by an amendment to such provision after the occurrence of the act or omission that is the subject of the proceeding for which indemnification or advancement of expenses is sought, unless such provision explicitly authorizes such elimination or impairment after such an act or omission has occurred. Accordingly, under the current default rule, the right to indemnification or advancement vests at the time of the act or omission giving rise to such a right. The legislature adopted this default rule in response to the Delaware Court of Chancery's decision in *Schoon v. Troy Corp.*, 948 A.2d 1157 (Del. Ch. 2008). In that case, the court enforced a bylaw amendment eliminating a corporation's advancement obligations to former directors, even though the former director that sought advancement had served under the corporation's prior bylaws and had left the board before the bylaw amendment eliminated his right to advancement.

Record Date for Stockholder Meetings [8 Del. C. § 213(a)]—The amendments to Section 213 allow a board of directors to fix two separate record dates for stockholder meetings: one date to determine the stockholders

entitled to notice of a meeting, and a second, later date to determine the stockholders who are entitled to vote at the meeting. Section 213, therefore, enables a corporation to fix the second "voting" record date closer to the meeting, increasing the likelihood that the stockholders entitled to vote at the meeting will continue to hold stock on the meeting date. A number of technical amendments to other provisions of the DGCL were adopted to reflect the changes to Section 213, including changes to Sections 211(c) (stockholder meetings), 219(a) (stock list), 222 (inspection of corporate books and records), 228(e) (notice of action by written consent), 262 (appraisal rights), and 275(a) (corporate dissolution).

Court Removal of Directors [8 Del. C. § 225(c)]—The legislature added a new subsection to Section 225 to empower the Delaware Court of Chancery to remove a director or directors of a corporation in certain limited circumstances. Specifically, upon application by a corporation, or derivative action by any stockholder or member of a nonstock corporation, the court may remove a director or directors if (i) such director or directors had been convicted of a felony in connection with the duties of such director or directors to the corporation, or if there has been a prior judgment on the merits by a court of competent jurisdiction that one or more directors has committed a breach of the duty of loyalty in connection with the duties of such director or directors to that corporation, and (ii) the Delaware Court of Chancery determines (a) that the director or directors did not act in good faith in performing the acts resulting in the prior conviction, or judgment, and (b) judicial removal is necessary to avoid irreparable harm to the corporation.

Amendments to Alternative Entities

Doctrine of Independent Legal Significance [DLLCA § 18-1101(h); DRULPA § 17-1101(h); DRUPA § 15-1201]—Sections 18-1101(h), 17-1101(h), and 15-1201 have been amended to effectively codify the doctrine of independent legal significance, as developed in Delaware corporation law. Each amendment is in the form of a statement of the doctrine: that an action validly taken under one provision of the DLLCA, the DRULPA, or the DRUPA shall not be deemed invalid solely because it is similar to an action that could have been taken under another provision

of the DLLCA, the DRULPA, or the DRUPA, but fails to satisfy the conditions of that other provision.

Merger or Consolidation [DLLCA § 18-209(f); DRULPA § 17-211(g); DRUPA § 15-902(g)]—Related to the amendments codifying the doctrine of independent legal significance, Sections 18-209(f), 17-211(g), and 15-902(g) were amended to confirm the ability by merger or consolidation to amend an operating or partnership agreement or adopt a new operating or partnership agreement for an entity that is the surviving or resulting entity in a merger or consolidation by obtaining the approval of the requisite number of members, limited partners or partners, as applicable, to approve such merger or consolidation, unless the operating or partnership agreement by its terms limits such amendment or adoption.

Interpretation and Enforcement of Operating or Partnership Agreement [DLLCA § 18-111; DRULPA § 17-111; DRUPA § 15-122]—Sections 18-111, 17-111, and 15-122 have been amended to broaden the jurisdiction of the chancery court to include any action to interpret, apply, or enforce any provision of the DLLCA, the DRULPA, or the DRUPA or any other instrument, document, agreement, or certificate contemplated by any provision of the DLLCA, the DRULPA, or the DRUPA.

Classes and Voting [DLLCA § 18-302(e); DRULPA § 17-302(f); DRUPA § 15-407(e)]—In connection with the corresponding amendments to the merger or consolidation provisions, Sections 18-302(e), 17-302(f), and 15-407(e) have been amended to confirm that the reference in each such section to "as otherwise permitted by law" includes an amendment made in connection with a merger or consolidation as permitted by Section 18-209(f), Section 17-211(g), and Section 15-902(g), respectively.

Amendments Specific to DRUPA

Definition of "Person" [DRUPA § 15-101(16)]—The definition of "person" 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."

Effect of Partnership Agreement; Nonwaivable Provisions [DRUPA § 15-103(c)]—Section 15-103(c) has been amended to permit Sections 15-201, 15-203, and 15-501 to be modified as follows:

■ *Partnership as Entity [Section 15-201(a)]*—Section 15-201(a) has been amended to permit a limited liability partnership to use its statement of qualification rather than a statement of partnership existence to opt-out of the default rule that a partnership is a separate legal entity, distinct from its partners.

■ *Partnership Property [Section 15-203]*—Section 15-203 has been amended to permit a limited liability partnership to use its statement of qualification rather than a statement of partnership existence to opt-out of the default rule that property acquired by a partnership is property of the partnership, not of the partners individually.

■ *Partner Not Co-Owner of Partnership Property [Section 15-501]*—Section 15-501 has been amended to permit a limited liability partnership to use its statement of qualification, rather than a statement of partnership existence, to opt-out of the de-

fault rule that a partner is not a co-owner of partnership property, and has no interest in specific partnership property.

Governing Law [DRUPA § 15-106(c)]—Section 15-106(c) has been amended to provide that Delaware law shall govern a partnership agreement when (a) a partnership agreement provides for the application of Delaware law, and (b) the partnership files either a statement of partnership existence or a statement of qualification with the secretary of state.

Statement of Qualification of a Domestic Partnership [DRUPA § 15-1001(c)]—Section 15-1001(c) has been amended to provide that the

statement of qualification must contain the number of partners of the partnership at the time of the effectiveness of the statement of qualification.

Execution, Filing and Recording of Statements and Certificates [DRUPA § 15-105(c)]—Section 15-105(c) has been amended to increase the flexibility with regard to execution of a certificate of conversion or a certificate of partnership domestication. In each such case, such a certificate may be executed either by a partner, by one or more authorized persons of the 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-U.S. entity in the case of a domestication.

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