

Legislative Developments in Delaware's "Alternative Entities"

Limited Liability Companies
Limited Partnerships
Partnerships
Statutory Trusts

In its latest session, the Delaware legislature enacted several amendments to Delaware's four "alternative entity" statutes – the Delaware Limited Liability Company Act ("DLLCA"), the Delaware Revised Uniform Limited Partnership Act ("DRULPA"), the Delaware Revised Uniform Partnership Act ("DRUPA") and the Delaware Statutory Trust Act ("DSTA").¹ Among other things, the amendments (i) provide a statutory default rule for the amendment of LLC agreements which requires the consent of all members; (ii) provide that a standard "supermajority amendment provision" applies only to supermajority provisions in an LLC agreement or partnership agreement and not to supermajority provisions under the applicable alternative entity statute; and (iii) modify the language relating to action by written consent by members, managers and partners to eliminate the requirement that the written consent set forth the action so taken thereby facilitating action by consent, particularly by electronic means.

The utility of the Delaware alternative entity statutes, as well as the other advantages of using Delaware entities (for example, the business sophistication of the Delaware courts and the customer friendly attitude of the Delaware Secretary of State's office), has resulted in significant use of Delaware alternative entities. According to the Delaware Secretary of State, 1,263 statutory trusts, 6,295 limited partnerships and 82,027 LLCs were formed in 2010, bringing the total number of each of these entities existing at the end of 2010 to 22,734, 71,399 and 550,238 respectively. The continued formation and use of Delaware alternative entities have predictably led to additional litigation, and we have again updated our survey of Delaware case law relating to alternative entities. The 2011 Cumulative Survey is now

¹ Unless otherwise provided herein, the amendments to the DLLCA, the DRULPA, the DRUPA and the DSTA became effective on August 1, 2011.

available on our website at www.MorrisNichols.com under *Publications*.

The changes referenced above, together with other changes of particular interest, are summarized below.

Certain 2011 Amendments to the Delaware Limited Liability Company Act 6 DEL. C. § 18-101 ET SEQ.

Correction to Certificate of Cancellation *[Section 18-203(b)]*

Pursuant to DLLCA Section 18-203, with certain exceptions not here relevant, a certificate of cancellation is filed upon the dissolution and completion of winding up of an LLC. However, because it sometimes happens that a certificate of cancellation is filed prior to the dissolution or the completion of winding up of an LLC, because the certificate was filed by mistake, the parties thought the winding up was completed when in fact it was not or otherwise, new Section 18-203(b) now provides that such a premature filing may be corrected as an "erroneously executed" certificate by filing a certificate of correction with the Delaware Secretary of State. Such a certificate of correction can have the effect of canceling the certificate of cancellation.

Future Effective Date *[Section 18-206(b)]*

Section 18-206(b) of the DLLCA has been amended to provide that the future effective date or time of any certificate filed under the DLLCA cannot be a time on a date that is more than 180 days after the date of its filing if such filing is on or after January 1, 2012.

Action by Written Consent *[Sections 18-302(d) and 18-404(d)]*

The amendments to Sections 18-302(d) and 18-404(d) of the DLLCA clarify the way in which members and managers of a Delaware LLC may consent to action in writing or by electronic transmission. Prior to the amendments, action

by written consent by members or managers required that “a consent or consents in writing, setting forth the action so taken, shall be signed by” the requisite number of members or managers. The amendments eliminate the quoted language and substitute the concept that members or managers may act by consenting “in writing or by electronic transmission” to the desired action. The prior approach generally followed the requirements for stockholder action under Section 228 of the Delaware General Corporation Law (the “DGCL”), while the approach adopted by the amendments, which is intended to facilitate consent by electronic means where the “action so taken” may not be specifically set forth, is now comparable to the approach taken by Section 141(f) of the DGCL relating to action by a board of directors by consent without a meeting.

Supermajority Amendment Requirements
[Section 18-302(e)]

Section 18-302(e) has been amended to address certain aspects of supermajority amendment provisions. These provisions generally require a supermajority vote or consent to amend a provision that itself requires a supermajority vote or consent. In *In re LJM2 Co-Investment, L.P. Ltd. Partners Litig.*, C.A. No. 300-N (Del. Ch. Dec. 21, 2004), the Delaware Court of Chancery found that such a supermajority amendment provision applied not only to the supermajority provisions of the agreement at issue (which in that case was a limited partnership agreement), but also to the supermajority default provisions of the DRULPA. The amendment changes this rule so that such supermajority amendment provisions, unless otherwise provided, apply only to the supermajority provisions expressly included in the LLC agreement and not those in the DLLCA.

Amendments to LLC Agreements
[Section 18-302(f)]

New Section 18-302(f) sets forth a default rule for amending LLC agreements. Where an LLC agreement does not provide for the manner in which it may be amended, Section 18-302(f) provides that the agreement can be amended with the approval of all members or as otherwise permitted by law, including pursuant to Section 18-209(f) in the context of a merger. Importantly, non-members such as managers have no right to vote on amendments under Section 18-302(f)’s default rule even if the managers are parties to the LLC agreement and have rights thereunder. Because the amendment could be viewed as changing the law in this respect, Section 18-302(f) only applies to Delaware LLCs whose initial certificate of formation is filed on or after January 1, 2012.

Registered Agent/Office Address
[Sections 18-104(k) and 18-206(g)]

Section 18-104, which sets forth the requirements for an LLC’s registered office and registered agent in Delaware, has been amended to provide that any document filed with the State Office that requires the address of the registered agent or registered office to be set forth therein include the postal code as part of such address. However, Section 18-206 has been amended to provide that this requirement will only apply to filings made on or after August 1, 2011.

Domestication and Conversion Requirements
[Sections 18-212(b) and 18-214(b)]

Sections 18-212 and 18-214, setting forth the requirements for domestication and conversion as a Delaware LLC, require the filing with the State Office of a certificate of domestication or conversion, as applicable, and a certificate of formation. The amendments to these Sections provide that the certificate of domestication or conversion, as applicable, must be filed simultaneously with the certificate of formation, and if the certificates provide for a post-filing effective date, both certificates must have the same effective date or time.

Certain 2011 Amendments to the Delaware
Revised Uniform Limited Partnership Act
6 DEL. C. § 17-101 ET SEQ.

Correction to Certificate of Cancellation
[Section 17-203(b)]

Pursuant to DRULPA Section 17-203, with certain exceptions not here relevant, a certificate of cancellation is filed upon the dissolution and completion of winding up of a limited partnership. However, because it sometimes happens that a certificate of cancellation is filed prior to the dissolution or the completion of winding up of a limited partnership, because the certificate was filed by mistake, the parties thought the winding up was completed when in fact it was not or otherwise, new Section 17-203(b) now provides that such a premature filing may be corrected as an “erroneously executed” certificate by filing a certificate of correction with the Delaware Secretary of State. Such a certificate of correction can have the effect of canceling the certificate of cancellation.

Future Effective Date

[Section 17-206(b)]

Section 17-206(b) of the DRULPA has been amended to provide that the future effective date or time of any certificate filed under the DRULPA cannot be a time on a date that is more than 180 days after the date of its filing if such filing is on or after January 1, 2012.

Action by Written Consent

[Sections 17-302(e) and 17-405(d)]

The amendments to Sections 17-302(e) and 17-405(d) of the DRULPA clarify the way in which limited partners and general partners of a Delaware limited partnership may consent to action in writing or by electronic transmission. Prior to the amendments, action by written consent by limited partners or general partners required that “a consent or consents in writing, setting forth the action so taken, shall be signed by” the requisite number of limited partners or general partners. The amendments eliminate the quoted language and substitute the concept that limited partners or general partners may act by consenting “in writing or by electronic transmission” to the desired action. The prior approach generally followed the requirements for stockholder action under Section 228 of the DGCL, while the approach adopted by the amendments, which is intended to facilitate consent by electronic means where the “action so taken” may not be specifically set forth, is now comparable to the approach taken by Section 141(f) of the DGCL relating to action by a board of directors by consent without a meeting.

Supermajority Amendment Requirements

[Section 17-302(f)]

Section 17-302(f) has been amended to address certain aspects of supermajority amendment provisions. These provisions generally require a supermajority vote or consent to amend a provision that itself requires a supermajority vote or consent. In *In re LJM2 Co-Investment, L.P. Ltd. Partners Litig.*, C.A. No. 300-N (Del. Ch. Dec. 21, 2004), the Delaware Court of Chancery found that such a supermajority amendment provision applied not only to the supermajority provisions of the limited partnership agreement at issue, but also to the supermajority default provisions of the DRULPA. The amendment changes this rule so that such supermajority amendment provisions, unless otherwise provided, apply only to the supermajority provisions expressly included in the limited partnership agreement and not those in the DRULPA.

Registered Agent/Office Address

[Sections 17-104(k) and 17-206(f)]

Section 17-104, which sets forth the requirements for a limited partnership’s registered office and registered agent in Delaware, has been amended to provide that any document filed with the State Office that requires the address of the registered agent or registered office to be set forth therein include the postal code as part of such address. However, Section 17-206 has been amended to provide that this requirement will only apply to filings made on or after August 1, 2011.

Domestication and Conversion Requirements

[Sections 17-215(b) and 17-217(b)]

Sections 17-215 and 17-217, setting forth the requirements for domestication as a Delaware limited partnership and conversion as a Delaware limited partnership or LLLP, require the filing with the State Office of a certificate of domestication or conversion, as applicable, a certificate of limited partnership and, in the case of a conversion to an LLLP, a statement of qualification. The amendments to these Sections provide that the certificate of domestication or conversion, as applicable, must be filed simultaneously with the certificate of limited partnership and, in the case of a conversion to an LLLP, the statement of qualification, and if the certificates (and, as applicable, the statement) provide for a post-filing effective date, both certificates (and, as applicable, the statement) must have the same effective date or time.

Certain 2011 Amendments to the
Delaware Revised Uniform Partnership Act
6 DEL. C. § 15-101 ET SEQ.

Future Effective Date

[Section 15-105(h)]

Section 15-105(h) of the DRUPA has been amended to provide that the future effective date or time of any statement or certificate filed under the DRUPA cannot be a time on a date that is more than 180 days after the date of its filing if such filing is on or after January 1, 2012.

Action by Written Consent

[Section 15-407(d)]

The amendment to Section 15-407(d) of the DRUPA clarifies the way in which partners of a Delaware general partnership may consent to action in writing or by

electronic transmission. Prior to the amendment, action by written consent by partners required that “a consent or consents in writing, setting forth the action so taken, shall be signed by” the requisite number of partners. The amendment eliminates the quoted language and substitutes the concept that partners may act by consenting “in writing or by electronic transmission” to the desired action. The prior approach generally followed the requirements for stockholder action under Section 228 of the DGCL, while the approach adopted by the amendment, which is intended to facilitate consent by electronic means where the “action so taken” may not be specifically set forth, is now comparable to the approach taken by Section 141(f) of the DGCL relating to action by a board of directors by consent without a meeting.

Supermajority Amendment Requirements

[Section 15-407(e)]

Section 15-407(e) has been amended to address certain aspects of supermajority amendment provisions. These provisions generally require a supermajority vote or consent to amend a provision that itself requires a supermajority vote or consent. In *In re LJM2 Co-Investment, L.P. Ltd. Partners Litig.*, C.A. No. 300-N (Del. Ch. Dec. 21, 2004), the Delaware Court of Chancery found that such a supermajority amendment provision applied not only to the supermajority provisions of the agreement at issue (which in that case was a limited partnership agreement), but also to the supermajority default provisions of the DRULPA. The amendment changes this rule so that such supermajority amendment provisions, unless otherwise provided, apply only to the supermajority provisions expressly included in the partnership agreement and not those in the DRUPA.

Liability of Partners of an LLP

[Section 15-306(c)]

The amendment to Section 15-306(c) of the DRUPA confirms that the elimination of liability of partners of an LLP relates to obligations arising out of or related to circumstances or events occurring while the partnership is an LLP as well as to obligations incurred while the partnership is an LLP. Thus, the amendment makes clear that a partner of a Delaware LLP would not be personally liable for a judgment rendered against the partnership after it ceased to be an LLP if it related to conduct that occurred while the partnership was an LLP.

Registered Agent/Office Address

[Sections 15-105(l) and 15-111(k)]

Section 15-111, which sets forth the requirements for

a partnership’s registered office and registered agent in Delaware, has been amended to provide that any document filed with the State Office that requires the address of the registered agent or registered office to be set forth therein include the postal code as part of such address. However, Section 15-105 has been amended to provide that this requirement will only apply to filings made on or after August 1, 2011.

Domestication and Conversion Requirements

[Sections 15-901(b) and 15-904(b)]

Sections 15-901 and 15-904, setting forth the requirements for domestication as a Delaware general partnership and conversion as a Delaware general partnership or LLP, require the filing with the State Office of a certificate of domestication or conversion, as applicable, a statement of partnership existence and, in the case of a conversion to an LLP, a statement of qualification. The amendments to these Sections provide that the certificate of domestication or conversion, as applicable, must be filed simultaneously with the statement of partnership existence and, in the case of a conversion to an LLP, the statement of qualification, and if the certificate and statement(s) provide for a post-filing effective date, such certificate and statement(s) must have the same effective date or time.

Certain 2011 Amendments to the Delaware Statutory Trust Act

12 DEL. C. § 3801 ET SEQ.

Amendment to Governing Instrument in Connection with Merger or Consolidation

[Section 3815(f)]

The amendment to Section 3815(f) of the DSTA provides that an agreement of merger or consolidation approved in accordance with Section 3815(a) of the DSTA may effect an amendment to the governing instrument or effect the adoption of a new governing instrument if it is the surviving or resulting statutory trust in such merger or consolidation without any reference in the governing instrument to such action and notwithstanding any provision of the governing instrument relating to amendment or the adoption of a new governing instrument, other than a provision that by its terms applies to an amendment to the governing instrument or the adoption of a new governing instrument, in either case, in connection with a merger or consolidation. This change is intended to conform this section of the DSTA to the analogous sections of the DLLCA, the DRULPA and the DRUPA.

Future Effective Date
[Section 3812(b)]

Section 3812(b) of the DSTA has been amended to provide that the future effective date or time of any certificate filed under the DSTA cannot be a time on a date that is more than 180 days after the date of its filing if such filing is on or after January 1, 2012.

Trustee and Registered Agent/Office Address
[Sections 3807(h) and 3812(g)]

Section 3807, which sets forth the requirements for a statutory trust's trustee and registered office and registered agent in Delaware, has been amended to provide that any document filed with the State Office that requires the address of a trustee or the registered agent or registered office to be set forth therein include the postal code as part of such address. However, Section 3812 has been amended

to provide that this requirement will only apply to filings made on or after August 1, 2011.

Domestication and Conversion Requirements
[Sections 3820(a) and 3822(b)]

Sections 3820 and 3822, setting forth the requirements for domestication and conversion as a Delaware statutory trust, require the filing with the State Office of a certificate of domestication or conversion, as applicable, and a certificate of trust. The amendments to these Sections provide that the certificate of domestication or conversion, as applicable, must be filed simultaneously with the certificate of trust, and if the certificates provide for a post-filing effective date, both certificates must have the same effective date or time.

For further information, please contact a member of Morris Nichols' Delaware Alternative Entities Group.

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