

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 that limited liability company agreements, limited partnership agreements and partnership agreements are not subject to any statute of frauds, thus overriding the Delaware Supreme Court's decision in *Olson v. Halvorsen*; (ii) permit, in conjunction with newly added Section 267 of the Delaware General Corporation Law, short-form mergers involving a parent limited liability company, limited partnership or partnership and one or more subsidiary corporations where each subsidiary corporation is at least 90% owned by such parent; and (iii) confirm when a power of attorney in a limited liability company agreement or partnership agreement will be irrevocable.

The utility of the Delaware alternative entity statutes, as well as the other advantages of using Delaware entities (for example, the predictability 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, 1,312 statutory trusts, 5,420 limited partnerships and 70,274 LLCs were formed in 2009, bringing the total number of each of these entities existing at the end of 2009 to 22,557, 70,829 and 519,940 respectively. The continued formation and use of Delaware's alternative entities have predictably led to additional litigation, and we have again

¹ The amendments to the DSTA became effective on August 1, 2010, while the amendments to the DLLCA, the DRULPA and the DRUPA became effective on August 2, 2010.

updated our survey of Delaware case law relating to alternative entities. The 2010 Cumulative Survey is now 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 2010 Amendments to Delaware Limited Liability Company Act 6 DEL. C. §§ 18-101 ET SEQ.

Statute of Frauds

[Section 18-101(7)]

In response to the Delaware Supreme Court's holding in *Olson v. Halvorsen*, C.A. No. 1884 (Del. Dec. 15, 2009), that the DLLCA neither expressly nor implicitly exempted a limited liability company agreement from the operation of the statute of frauds, Section 18-101(7) was amended to provide that a limited liability company agreement is not subject to the statute of frauds. This change is consistent with existing Section 18-101(7) which already provided for oral agreements and Section 18-1101(b) which provides for the maximum enforceability of limited liability company agreements.

Powers of Attorney

[Sections 18-106(d) and 18-204(c)]

Powers of attorney are regularly used in limited liability company agreements and related documentation, which often provide that such powers will be irrevocable. The amendments to the DLLCA confirm the Delaware law regarding powers used by and in connection with Delaware LLCs. Section 18-106(d) confirms that a Delaware LLC has the power to grant, hold and exercise a power of attorney, including an irrevocable power. Section 18-204(c) now provides that a power of attorney with respect to matters relating to the organization, internal affairs or termination of a limited liability company or granted by a person as a member or assignee of a limited liability company interest or seeking to become a member or assignee of a limited liability company interest is irrevocable if it states that it is irrevocable and is coupled with an interest sufficient in law to support an irrevocable power. If such a power

of attorney is granted to a limited liability company, a manager or member thereof, or any of their respective officers, directors, managers, members, partners, trustees, employees or agents, such power of attorney is deemed coupled with an interest sufficient in law to support an irrevocable power. An irrevocable power of attorney, unless otherwise provided therein, is not affected by the subsequent death, disability, incapacity, dissolution, termination of existence of or bankruptcy of, or any other event concerning, the principal.

Short-Form Mergers
[Section 18-209(i)]

Together with the newly added Section 267 of the Delaware General Corporation Law (“DGCL”), new Section 18-209(i) provides a mechanism whereby a parent limited liability company that owns at least 90% of the outstanding shares of each class of the stock of a corporation or corporations can effect a short-form merger by authorizing such merger and filing a plan of merger which, if the corporate subsidiaries are not wholly owned, must provide the terms of such merger. As in a corporate short-form merger, the benefit of a short-form merger under Section 18-209(i) of the DLLCA and Section 267 of the DGCL is that the corporate subsidiaries are not required to approve the merger.

Assignee’s Right to Participate in the Management of the Business and Affairs of a Limited Liability Company

Section 18-702(a) has been amended to confirm that an assignee has no right to participate in the management of the business and affairs of a limited liability company except as provided in the limited liability company agreement or upon the affirmative vote or written consent of all of the members, unless otherwise provided in the limited liability company agreement.

Right of Assignee to Become a Member
[Section 18-704(a)]

Section 18-704(a) has been amended to confirm that an assignee becomes a member as provided in the limited liability company agreement or upon the affirmative vote or written consent of all of the members, unless otherwise provided in the limited liability company agreement.

Choice of Law
[Section 18-1101(i)]

Newly added Section 18-1101(i) confirms that a limited liability company agreement that provides for the application of Delaware law will be governed by and construed under

the laws of the State of Delaware in accordance with its terms.

**Certain 2010 Amendments to
Delaware Revised Uniform Limited Partnership Act**
6 DEL. C. §§ 17-101 ET SEQ.

Statute of Frauds
[Section 17-101(12)]

In response to the Delaware Supreme Court’s holding in *Olson v. Halvorsen*, which dealt with a limited liability company agreement but may apply to a partnership agreement by analogy, Section 17-101(12) was amended to provide that a partnership agreement is not subject to the statute of frauds. This change is consistent with existing Section 17-101(12) which already provided for oral agreements and Section 17-1101(c) which provides for the maximum enforceability of partnership agreements.

Powers of Attorney
[Sections 17-106(d) and 17-204(c)]

Powers of attorney are regularly used in partnership agreements and related documentation, which often provide that such powers will be irrevocable. The amendments to the DRULPA confirm the Delaware law regarding powers used by and in connection with Delaware limited partnerships. Section 17-106(d) confirms that a Delaware limited partnership has the power to grant, hold and exercise a power of attorney, including an irrevocable power. Section 17-204(c) now provides that a power of attorney with respect to matters relating to the organization, internal affairs or termination of a limited partnership or granted by a person as a partner or assignee of a partnership interest or seeking to become a partner or assignee of a partnership interest is irrevocable if it states that it is irrevocable and is coupled with an interest sufficient in law to support an irrevocable power. If such a power of attorney is granted to a limited partnership, a general partner or limited partner thereof, or any of their respective officers, directors, managers, members, partners, trustees, employees or agents, such power of attorney is deemed coupled with an interest sufficient in law to support an irrevocable power. An irrevocable power of attorney, unless otherwise provided therein, is not affected by the subsequent death, disability, incapacity, dissolution, termination of existence of or bankruptcy of, or any other event concerning, the principal.

Short-Form Mergers

[Section 17-211(l)]

Together with the newly added Section 267 of the DGCL, new Section 17-211(l) provides a mechanism whereby a parent limited partnership that owns at least 90% of the outstanding shares of each class of the stock of a corporation or corporations can effect a short-form merger by authorizing such merger and filing a plan of merger which, if the corporate subsidiaries are not wholly owned, must provide the terms of such merger. As in a corporate short-form merger, the benefit of a short-form merger under Section 17-211(l) of the DRULPA and Section 267 of the DGCL is that the corporate subsidiaries are not required to approve the merger.

Right of Assignee to Become a Limited Partner

[Section 18-704(a)]

Section 17-704(a) has been amended to confirm that an assignee becomes a limited partner as provided in the partnership agreement or upon the affirmative vote or written consent of all of the partners, unless otherwise provided in the partnership agreement.

Choice of Law

[Section 17-1101(i)]

Newly added Section 17-1101(i) confirms that a partnership agreement that provides for the application of Delaware law will be governed by and construed under the laws of the State of Delaware in accordance with its terms.

Certain 2010 Amendments to Delaware Revised Uniform Partnership Act

6 DEL. C. §§ 15-101 ET SEQ.

Statute of Frauds

[Section 15-101(12)]

In response to the Delaware Supreme Court's holding in *Olson v. Halvorsen*, which dealt with a limited liability company agreement but may apply to a partnership agreement by analogy, Section 15-101(12) was amended to provide that a partnership agreement is not subject to the statute of frauds. This change is consistent with existing Section 15-101(12) which already provided for oral agreements and Section 15-103(d) which provides for the maximum enforceability of partnership agreements.

Powers of Attorney

[Sections 15-202(d) and 15-123]

Powers of attorney are regularly used in partnership agreements and related documentation, which often provide

that such powers will be irrevocable. The amendments to the DRUPA confirm the Delaware law regarding powers used by and in connection with Delaware partnerships. Section 15-202(d) confirms that a Delaware partnership has the power to grant, hold and exercise a power of attorney, including an irrevocable power. Newly added Section 15-123 provides that a power of attorney with respect to matters relating to the organization, internal affairs or termination of a partnership or granted by a person as a partner or transferee of an economic interest or seeking to become a partner or transferee of an economic interest is irrevocable if it states that it is irrevocable and is coupled with an interest sufficient in law to support an irrevocable power. If a power of attorney is granted to a partnership, a partner thereof, or any of their respective officers, directors, managers, members, partners, trustees, employees or agents, such power of attorney is deemed coupled with an interest sufficient in law to support an irrevocable power. An irrevocable power of attorney, unless otherwise provided therein, is not affected by the subsequent death, disability, incapacity, dissolution, termination of existence of or bankruptcy of, or any other event concerning, the principal.

Short-Form Mergers

[Section 15-902(m)]

Together with the newly added Section 267 of the DGCL, new Section 15-902(m) provides a mechanism whereby a parent partnership that owns at least 90% of the outstanding shares of each class of the stock of a corporation or corporations can enter into a short-form merger by authorizing such merger and filing a plan of merger which, if the corporate subsidiaries are not wholly owned, must provide the terms of such merger. As in a corporate short-form merger, the benefit of a short-form merger under Section 15-902(m) of the DRUPA and Section 267 of the DGCL is that the corporate subsidiaries are not required to approve the merger.

Certain 2010 Amendments to Delaware Statutory Trust Act

12 DEL. C. §§ 3801 ET SEQ.

Construction and Application of Chapter and Governing Instrument

[Section 3825(c)]

Newly added Section 3825(c) effectively codifies the doctrine of independent legal significance, as developed in Delaware corporation law. The amendment is in the form of a statement of the doctrine: that an action validly taken

under one provision of the DSTA shall not be deemed invalid solely because it is similar to an action that could have been taken under another provision of the DSTA but fails to satisfy the conditions of that other provision.

Effect of Merger or Consolidation of a Statutory Trust
[Section 3815(g)]

The amendments to Section 3815(g) confirm that a statutory trust that is not the surviving or resulting entity in a merger or consolidation is not considered to have dissolved and is not required to wind-up its affairs.

**Power to Merge, Convert,
Transfer, Domesticate or Continue**
[Sections 3815(i), 3821(i) and 3823(i)]

Newly added Sections 3815(i), 3821(i) and 3823(i) clarify that a governing instrument may provide that a statutory trust does not have the power to merge, convert, transfer, domesticate or, in connection with a transfer or domestication, continue its existence in Delaware.

For further information, please contact a member of Morris Nichols' Commercial Law Counseling Group.

**Morris Nichols
Commercial Law Counseling Group**

David Ley Hamilton
(302) 351-9207
dhamilton@mnat.com

David A. Harris
(302) 351-9351
dharris@mnat.com

Louis G. Hering
(302) 351-9213
lhering@mnat.com

Michael Houghton
(302) 351-9215
mhoughton@mnat.com

Donald Nelson Isken
(302) 351-9222
disken@mnat.com

Walter C. Tuthill
(302) 351-9204
wtuthill@mnat.com

Morris, Nichols, Arshnt & Tunnell LLP combines a broad national practice of corporate, intellectual property, business reorganization and restructuring and commercial law and litigation with a general business, tax, estate planning and real estate practice within the State of Delaware. The firm's clients include Fortune 500 companies, smaller firms and partnerships, financial institutions, government agencies, law firms and not-for-profit organizations.