

2009 Amendments to Delaware Business Statutes

Delaware's Governor, Ruth Ann Minner, recently signed into law bills amending Delaware's renowned alternative business entity statutes, namely the Delaware Revised Uniform Partnership Act, 6 *Del. C. § 15-101, et seq.* ("DRUPA"), the Delaware Revised Uniform Limited Partnership Act, 6 *Del. C. § 17-101, et seq.* ("DRULPA"), and the Delaware Limited Liability Company Act, 6 *Del. C. § 18-101, et seq.* ("DLLCA", and, collectively with DRUPA and DRULPA, the "Alternative Entity Statutes"). The amendments to the Alternative Entity Statutes represent a continuing effort by Delaware to create a flexible statutory framework for alternative business organizations. The balance of this article will touch upon some of the more significant amendments to the Alternative Entity Statutes. Each of these amendments became effective on August 1, 2009. No amendments were made this year to the Delaware Statutory Trust Act, 12 *Del. C. § 3801, et seq.*

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Scott E. Waxman is chair of the Structured Finance and Alternative Entity Group and chair of the Business Group, and **Christina M.**

Houston is an associate and member of the Structured Finance and Alternative Entity Group at the Wilmington, Delaware law firm of Potter Anderson & Corroon LLP. The views or opinions expressed herein are those of the authors alone and do not necessarily represent the views or opinions of Potter Anderson & Corroon LLP or its clients.

Doctrine of Independent Legal Significance

The Alternative Entity Statutes have been amended to clarify that the doctrine of independent legal significance, as developed in Delaware corporate law, applies to Delaware partnerships and limited liability companies. 6 *Del. C. §§ 15-1201, 17-1101, 18-1101*. These amendments confirm that if an action is validly taken pursuant to one provision of an Alternative Entity Statute, such action will not be found to be invalid solely because such action could have been taken pursuant to a similar statutory provision but fails to satisfy all of the requirements of such other provision.

Mergers and Conversions – Amendments; Authorized Signatories

Consistent with the amendments codifying the doctrine of independent legal significance, each of the Alternative Entity Statutes has been revised to confirm the ability by merger or consolidation to amend a governing agreement or to adopt a new governing agreement for a surviving domestic entity by obtaining the requisite approvals for merger or consolidation without also needing to satisfy the requirements to amend or restate such governing agreement, unless the governing agreement provides otherwise. 6 *Del. C. §§ 15-902(g), 17-211(g), 18-209(f)*; see also 6 *Del. C. §§ 15-407(e), 17-302(f), 18-302(e)*.

1313 North Market Street

P.O. Box 951

Wilmington, DE 19899-0951

(302) 984-6000

www.potteranderson.com

This amendment provides a default rule in the event that a governing instrument does not expressly state whether amendment restrictions in a governing instrument must be satisfied in the event of a merger or consolidation.

Each of DRUPA and DLLCA has been amended to provide that a certificate of merger or consolidation, where the Delaware general partnership or limited liability company, as the case may be, is not the surviving entity, must be executed by a person authorized to sign such certificate on behalf of the surviving entity. 6 Del. C. §§ 15-105(c), 18-204(a). DRUPA also has been amended to clarify that a certificate of conversion to partnership and a certificate of partnership domestication may be executed either by a partner, an authorized person or any person authorized to execute such certificate on behalf of the entity that is converting to, or domesticating as, a Delaware partnership. 6 Del. C. §§ 15-105(c), 15-901(a), 15-902(a), 15-904(a). These revisions to the Alternative Entity Statutes clarify the scope of authorized signatories in the event of a merger, consolidation, conversion or domestication.

Each of the Alternative Entity Statutes also now permits a change of registered agent or registered office to be set forth in a certificate of merger filed by a surviving Delaware partnership or limited liability company, as the case may be. 6 Del. C. §§ 15-902(c)(4), 17-211(c)(4), 18-209(c)(4). This amendment eliminates the need (and cost) of preparing and filing a separate certificate of amendment if the surviving domestic entity wants to change its registered agent or registered office at the time of a merger.

Limited Liability Partnerships – Formation Issues

DRUPA has been amended to extend certain statutory benefits and protections to limited liability partnerships despite not having filed a statement of existence with the Delaware Secretary of State. DRUPA has been amended to provide that the laws of the State of Delaware shall govern a partnership agreement if the partnership agreement so provides and **either** a statement of partnership existence **or a statement of qualification** is filed with the Delaware Secretary of State. 6 Del. C. §15-106(c). Therefore, parties forming a limited liability partnership now may receive the benefits of DRUPA's governing law provision notwithstanding the fact that the parties did not file a statement of partnership existence with the Delaware Secretary of State. Various sections of DRUPA have been amended to permit parties to opt out of default rules under DRUPA in **either** a partnership's statement of partnership existence **or its statement of qualification**. 6 Del. C. §§ 15-103(c), 15-201(a), 15-203 and 15-501. These amendments streamline the requirements for limited liability partnerships. Statements of qualification now have the same force and effect in respect of limited liability partnerships as do statements of partnership existence for general partnerships that have not elected limited liability partnership status under DRUPA.

DRUPA also has been amended to clarify that the statement of qualification must contain the number of partners of the partnership “as the time of effectiveness of the statement of qualification. *6 Del. C. § 15-1001(c)(3)*. This clarifies that it is not necessary for a limited liability partnership to amend its statement of qualification each time there is a change in the composition of the partnership.

Jurisdiction of the Delaware Court of Chancery

Each of the Alternative Entity Statutes has been amended to clarify the scope of the jurisdiction of the Delaware Court of Chancery over matters involving partnerships and limited liability companies formed in the State of Delaware, as well as general partnerships doing business in the State of Delaware. Previously, each of the Alternative Entity Statutes provided, among other things, that any action to interpret or enforce a governing agreement of a Delaware limited liability company or a Delaware partnership (or a general partnership doing business in the State of Delaware) could be brought in the Court of Chancery. Now, the Alternative Entity Statutes have been updated to clarify that any action to interpret or enforce not only the governing agreement, but also “any provision of this chapter, or any other instrument, document, agreement or certificate contemplated by any provision of this chapter” may be brought in the Court of Chancery. *6 Del. C. §§ 15-122, 17-111, 18-111*.

Definition of “Person”

The term “trust” in the definition of “Person” in DRUPA has been amended to clarify that such term includes “a common law trust, business trust, statutory trust, voting trust or any other form of trust”. *6 Del. C. § 15-101(16)*. This revision conforms with revisions previously made to both DRULPA and DLLCA.

Conclusion

By clarifying existing law where the clarifications were deemed beneficial and creating more flexibility where additional contractual freedoms were viewed as advantageous, the recent amendments to DRUPA, DRULPA and DLLCA continue Delaware’s leadership as the jurisdiction of choice for the formation of all types of business entities.