

An Overview of the 2021 Amendments to the Delaware General Corporation Law and Alternative Entity Acts

WRITTEN BY

Matthew M. Greenberg | Joanna J. Cline | Taylor B. Bartholomew | Christopher B. Chuff | Kevin H. Ahmed

On June 30, Governor Carney signed into law certain amendments (Amendments) to the Delaware General Corporation Law (DGCL), the Delaware Limited Liability Company Act (LLC Act), the Delaware Revised Uniform Partnership Act (GP Act), and the Delaware Revised Uniform Limited Partnership Act (LP Act and, together with the LLC Act and the GP Act, the “Alternative Entity Acts”). The Amendments, which became effective on August 1, provide for: (1) clarification of voting rights of a corporation’s stock held by its subsidiaries; (2) a new safe harbor for the ratification of void or voidable acts in the alternative entity context; (3) application of the “necessary and essential” test to the rights of members and partners to obtain books and records; (4) the ability for conflicted members, managers, and partners to delegate to third parties; and (5) the ability for LPs and LLCs to convert into a statutory public benefit entity.

Voting of Stock Held by Subsidiary

Section 160(c) of the DGCL previously provided that shares of a corporation’s capital stock held by either itself or a corporate subsidiary may not be voted nor counted for quorum purposes. The Amendments provide that shares of a corporation’s capital stock held by either a corporate or *noncorporate* subsidiary may not be voted nor counted for quorum purposes.

Ratification of Void (or Voidable) Acts

The Alternative Entity Acts were amended to provide for a safe harbor for the ratification of defective acts that are either void or voidable. These Amendments were adopted in response to the Delaware courts’ decisions in *Absalom Absalom Trust v. Saint Gervais LLC*, C.A. No. 2018-0452-TMR (Del. Ch. June 27, 2019) and *Composecure, L.L.C. v. Cardux, LLC*, 206 A.3d 807 (Del. 2018), which generally held that certain void acts or transactions could not be ratified. Any ratification under the new safe harbor provisions is deemed to have been taken at the time of such act or transaction. In addition, the Amendments expressly provide that void or voidable acts may still be ratified by other means permitted by law.

Right to Books and Records

The Amendments provide that if a member or partner is entitled to obtain information for a stated purpose under the Alternative Entity Acts or the operating or partnership agreement, then that member’s or partner’s right will include an entitlement to any information that is necessary and essential to achieving that stated purpose. Under

the Amendments, the entitlement to any necessary and essential information may be modified in an LLC or partnership agreement. These Amendments were adopted to address the Delaware Supreme Court's decision in *Murfey v. WHC Venture, LLC*, 236 A.3d 337 (Del. 2020), in which the Court held that the "necessary and essential" test would only apply if it was contractually required in the partnership (or, by analogy, the LLC) agreement.

Delegation of Authority

Prior to the Amendments, the Alternative Entity Acts provided for broad authority for members, managers, and partners to delegate their management rights to others. In response to the Delaware Court of Chancery's decision in *Wenske v. Bluebell Creameries, Inc.*, 214 A.3d 958 (Del. Ch. 2019), in which the court held that a conflicted principal was legally disabled from delegating authority over the subject matter as to which the principal was conflicted (even to an independent third party), the Amendments further broaden the authority of members, managers, and partners to delegate by providing that a member, manager, or partner is permitted to delegate any of its rights, powers, or duties irrespective of any conflict of interest.

Conversion to Statutory Public Benefit LPs or LLCs

The Amendments permit LPs and LLCs to convert into statutory public benefit LPs or LLCs, respectively. A statutory public benefit entity is required to operate in a way that balances the pecuniary interests of the members or partners and the best interests of those materially affected by the entity's conduct and its designated public benefit. The Amendments require that the LLC or partnership agreement: (1) identify the entity as a statutory public benefit entity; and (2) set forth the specific public benefit to be promoted. An LP or LLC may become a statutory public benefit entity in the manner specified in its partnership or LLC agreement, respectively, or by amending such agreement to comply with the requirements of a statutory public benefit entity as provided in the Alternative Entity Acts.