

Building a Better Mousetrap: Delaware General Assembly Amends LLC, Limited Partnership and General Partnership Acts for 2011

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As the cool breezes and festivals of spring give way to summer heat, it can mean only one thing in Delaware: amendments to the state's cutting-edge Limited Liability Company Act, or LLC Act, Delaware Revised Uniform Limited Partnership Act, or DRULPA, and the Delaware Revised Uniform Partnership Act, or DRUPA. On June 23, 2011, the Delaware General Assembly passed another round of amendments to these important alternative business entity statutes in order to keep them current and maintain their "national preeminence," as noted in the synopses. The amendments were signed by Governor Jack Markell on July 7, 2011 and take effect Aug. 1, 2011.

Each of the LLC Act, DRULPA and DRUPA was amended to add a new subsection confirming that a certificate of correction may be filed to "correct" a certificate of cancellation that has been filed prior to the dissolution or the completion of winding up of the entity. A primary example of the utility of such a provision is the circumstance where members or partners of a terminated entity discover an asset, and want to revive the entity solely for the purpose of distributing such asset in accordance with the applicable statute.

The LLC Act, DRULPA and DRUPA were also amended to clarify that members or managers of an LLC, or partners, limited partners or general partners of a partnership, according to the respective statutes, may consent to an action in writing or by electronic transmission, without such writing or transmission restating the subject matter of the consent, unlike stockholders of a Delaware corporation, who under the General Corporation Law of the State of Delaware, or DGCL, must include a restatement of the subject matter of the consent when consenting to an action via electronic transmission.

Perhaps most notably, the LLC Act, DRULPA and DRUPA were revised to statutorily adopt a rule different from the result of the 2004 Court of Chancery case *In re LJM2 Co-Investment, L.P. Limited Partners Litigation*, in which the Court said that the "general power of amendment is subject to limitations, including, pertinently, a requirement for supermajority approval of any provision that requires supermajority consent to take action."

These statutory changes establish that provisions stating that a supermajority vote is required to amend apply only to those provisions that are expressly included in the partnership or LLC agreement of the entity, and do not apply to default voting provisions

of the applicable entity statute unless otherwise provided in the partnership or LLC agreement. These revisions to the statutes are not intended to affect the interpretation of such supermajority amendment requirement clauses as applied to the express language of the partnership or LLC agreement.

In addition, the LLC Act was amended to provide a default amendment rule for entities whose certificate of formation is filed on or after Jan. 1, 2012. The default rule now requires the unanimous consent of all members to amend the LLC agreement. Previously, the statute did not specifically identify who could amend the LLC agreement if there was not a relevant amendment provision contained in the LLC agreement, and it was not clear whether managers or other non-member parties to the LLC agreement were required to consent.

Finally, the DRUPA was amended to confirm that a partner of an LLP is not personally responsible for liabilities arising from circumstances or events occurring while the partnership is a limited liability partnership. The prior language of the statute with regard to limitation of liability referred solely to obligations incurred while a partnership is a limited liability partnership, and the revision now confirms that a partner is protected from such personal liability even if the liability is incurred after the relevant partnership ceases to be a limited liability partnership, so long as the circumstances or events creating the liability occurred while such partnership was a limited liability partnership.

The LLC Act, DRULPA and DRUPA were also amended significantly to address certain administrative and record-keeping concerns of various constituencies.

Amendments were adopted to provide that a General Partnership, or GP, a Limited Partnership, or LP, or an LLC may only register with the Secretary of State of the State of Delaware, or SOS, if the name of the entity serves to distinguish it upon the records of the SOS from the name upon such records of another domestic entity of the same type. Entities with certificates on file as of July 31, 2011, are grandfathered in and need not amend their registrations. Previously, for example, an LLC could be formed under the name ABC LLC, even if there was previously another Delaware entity called ABC LLC, provided that the party forming the new ABC LLC obtained consent from the relevant authorizing parties of the former ABC LLC. The relevant provisions of the three acts continue to allow for authorizing parties of an existing entity of another type, or a foreign entity of the same type, to consent to the use of a name that is not such as to distinguish the new entity from the existing entity in the SOS's filing system – e.g., ABC LLC, a Pennsylvania LLC registered to do business in Delaware as a foreign limited liability company, may consent to the use of the name ABC LLC by a new Delaware LLC.

This amendment prevents the circumstance of an entity being terminated under one name followed by another entity being formed later under the same name, which can create confusion among various constituencies, including the SOS, law firms and clients.

The LLC Act, DRULPA and DRUPA were also amended to provide that the address of a registered agent or registered office must include a postal code. While existing filings

need not be amended, a postal code will now be now required any time a new filing is made that references a registered agent or office.

To address another record-keeping issue, the LLC Act, DRULPA and DRUPA were amended to provide that, for filings made on or after Jan. 1, 2012, a certificate cannot have a future effective date later than 180 days from the date of filing.

In addition, the LLC Act, DRULPA and DRUPA were amended to clarify that a certificate of domestication and a certificate of formation or limited partnership, or statement of partnership existence, as applicable, must be filed simultaneously when domesticating a foreign LLC, LP or GP, and if such filings contain a future effective date, the dates must be identical. A similar amendment was made to the same statutes with respect to conversion of a Delaware entity to a LLC, LP or GP, clarifying that a certificate of conversion and a certificate of formation or limited partnership, or statement of partnership existence, as the case may be, must be filed simultaneously with the SOS.

Each of the three statutes was amended to provide that an agent may resign as registered agent for multiple entities by filing a single certificate, and the fee for each additional entity after the first will be \$2. The fee for the initial entity remains \$200. There is also a new \$50 fee for a filing that only changes the registered agent and registered office of a Delaware GP, LP or LLC.

Finally, DRUPA was amended to clarify that a Statement of Partnership Existence for a GP and a Statement of Qualification for an LLP must be cancelled separately and that cancellation of one does not of itself cancel the other.

These statutory improvements, updates and clarifications will help to ensure that Delaware's pre-eminent role in crafting business entity statutes that are simultaneously immensely practical, comprehensive and coherent is maintained for years to come. Building a better mousetrap, indeed, is a continuing process, and stakeholders in Delaware, while extolling this year's round of augmentations, are already considering what the future holds for Delaware LLCs and partnerships.