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Recent Amendments to Delaware's LLC and LP Acts: Default Admission of Assignee as LLC Member When Acquiring All LLC Interests, Fewer Formalities for Member and Partner Action by Consent, and Other Changes

By John J. Paschetto

Recent amendments to the Delaware Limited Liability Company Act (the "DLLCA") and the Delaware Revised Uniform Limited Partnership Act (the "DRULPA") have, among other things, (i) added a new default rule under which the assignee of all the interests of an LLC in a voluntary transfer will automatically be admitted as the LLC's sole member, and (ii) removed language implying that an action of members, managers, or partners, to be valid, must be taken by a vote at a meeting or by consent in writing or an electronic transmission. These amendments took effect on August 1, 2016.

Automatic Membership of Assignee of All LLC Interests

Under the DLLCA, an acquirer of LLC interests is not necessarily admitted as a member of the LLC. To become a member, the acquirer must be admitted as such to the LLC, either pursuant to provisions in the LLC agreement or with the approval of all the members (assuming the LLC agreement does not provide otherwise). 6 *Del. C.* § 18-704(a).

This separation of the acquisition of interests from admission as a member can create a problem when the seller of the interests is the sole member of the LLC and is selling all of the seller's interests. By default, the transfer of all of the seller's interests will cause the seller automatically to cease to be a member. 6 *Del. C.* § 18-702(b)(3). Thus, if the seller does not admit the acquirer as a member of the LLC, the sale will (by default) cause the LLC to have no members at all, which will in turn cause the LLC to dissolve under § 18-801(a)(4) of the DLLCA. Years may pass, and the LLC interests may have several different owners, before the LLC's unintended dissolution is discovered. Although the dissolution can then be revoked under § 18-806, doing so will require that the then-holder of the LLC interests (or its designee) be admitted as a member "effective as of the occurrence of the event that terminated the continued membership of the last remaining member." When a substantial period of time and several owners have come between that "event" and the revocation of dissolution, the current holder of the LLC interests may be understandably reluctant to have its membership relate back to when the LLC last had a true member.

Amendments to DLLCA § 18-704 have largely obviated this chain of events. As amended, the section now states that unless the LLC agreement or the parties provide otherwise, an acquirer becomes a member of the LLC "upon the voluntary assignment by the sole member" to the acquirer of all of the LLC interests in the LLC. The amendments further explain that an assignment will be deemed "voluntary" if "it is consented to by the member at the time of the assignment and is not effected by foreclosure or other similar legal process." In addition, automatic admission under the amendments to § 18-704 can occur only if the assignment is to a "single" acquirer.

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Greater Flexibility for Actions without a Meeting by Members and Partners

Before this year's amendments, the DLLCA and the DRULPA contained multiple references to "written" consents or consents "in writing." To maintain the policy in favor of private ordering that underlies the DLLCA and the DRULPA, both Acts have been amended to remove "written" and revise similar language where it suggested a mandatory level of formality more appropriate to the corporate form.

Thus, § 18-302(d) of the DLLCA and § 17-302(e) of the DRULPA have been amended to provide that members and limited partners can act without a vote and without a meeting if the action is "consented to or approved, in writing, by electronic transmission or by any other means permitted by law," by members or limited partners having a sufficient number of votes. Similar changes have been made respecting actions by managers of LLCs (§ 18-404(d)) and general partners of LPs (§ 17-405(d)).

Likewise, all occurrences of the term "written consent," when used in connection with members, managers, or partners, have been replaced with simply "consent" throughout the DLLCA and the DRULPA. *See, e.g.*, §§ 18-215(k)(3), 18-304, 17-218(k)(3), 17-402. The phrase "in writing" has been removed from provisions that previously required members or partners to agree in writing. *See, e.g.*, §§ 18-806, 17-801. Relatedly, "affirmative" has been removed from occurrences of the expression "affirmative vote" on the grounds that the word is unnecessary. *See, e.g.*, §§ 18-801, 17-806.

Additional Amendments

The DLLCA and the DRULPA enable LLCs and LPs to form what are often called "shielded" series of assets, i.e., series that will not be subject to claims against other series of the LLC or LP, or against the LLC or LP generally (as distinguished from its series). To form a shielded series, one must comply with certain requirements set forth in § 18-215(b) of the DLLCA and § 17-218(b) of the DRULPA. Provisions relating to shielded LLC and LP series have been amended this year in two respects.

First, language has been added to make explicit that (i) a shielded series may agree to allow liabilities of other series or of the entity generally to be charged against the assets of the shielded series, and (ii) the entity may agree to allow liabilities of a shielded series to be charged against the assets of the entity generally. 6 *Del. C.* §§ 18-215(b), 17-218(b). In the case of LPs, these permissive provisions extend also to the assets of general partners associated with series and the liability of general partners. The amendments confirm as well that "assets associated with a series" and "assets of a series" are synonymous as used in the Acts.

Second, the DLLCA and the DRULPA now specify means for serving process on shielded series. Service on the series may be accomplished in the same manner as service on the entity. However, if service is accomplished by serving the entity's registered agent in Delaware, or by serving the Delaware Secretary of State when other means are unavailable, the process must include the name of the entity and the name of the series being served. 6 *Del. C.* §§ 18-105, 17-105.

Finally, the DLLCA has been amended to eliminate a possible implication regarding what may cause an LLC member that is an entity to cease to be a member. As previously worded, § 18-801(b) stated that, by default, dissolution of an LLC will not be triggered by, among other things, a member's bankruptcy or dissolution, "or the occurrence of any other event that terminates the continued membership of any member[.]" The phrase "any *other* event" implied that the bankruptcy or dissolution of a member that is an entity would by default cause the entity to cease to be a member. That implication has now been removed by the change of "any other event" to simply "an event."

The DGCL Is Amended to Require Dismissal of Certain Appraisal Actions Involving Shares of Public Companies and to Broaden the Availability of Short-Form Mergers, Among Other Changes

By John J. Paschetto

The Delaware legislature recently adopted amendments to the State's General Corporation Law (the "DGCL") that should, among other things, help to deter "nuisance" actions for appraisal of publicly traded stock and make it easier to acquire corporations by means of two-step, tender-offer-plus-merger transactions. Unless otherwise stated below, all of these amendments took effect on August 1, 2016.

Deterrence of Economically Inefficient Appraisal Actions

Under § 262 of the DGCL, stockholders of a Delaware corporation are entitled to have the Court of Chancery appraise the "fair value" of their shares if the corporation engages in a merger having certain characteristics and the stockholders follow the statutory procedures. 8 *Del. C.* § 262. The main policy goal underlying the appraisal remedy is to provide a source of relief for stockholders who oppose a merger and believe that the merger price does not reflect the corporation's value were it to continue as a stand-alone enterprise. Experience in recent decades has shown, however, that the appraisal remedy can be abused by parties that buy stock after a merger is announced and use the nuisance aspects of an appraisal proceeding to obtain a settlement from the defendant corporation.

The legislature has amended § 262 in an effort to reduce the frequency of nuisance appraisal actions. As amended, § 262(g) provides that an appraisal action must be dismissed if the class or series of stock containing the shares for which appraisal is sought was listed on a national securities exchange immediately before the merger, unless any of three exceptions applies. The exceptions are that (i) the total number of shares for which appraisal has been sought is greater than 1% of all the outstanding shares of the same class or series, (ii) the stockholders that have sought appraisal would have received more than $1 million in the merger if they had not dissented, or (iii) the merger was a "short-form" merger under either § 253 or § 267 of the DGCL.

Section 262 has also been amended to include a mechanism by which corporations defending appraisal actions can limit their interest-rate risk. Under amended § 262(h), the defendant corporation can make a payment, while an appraisal action is pending, to the stockholders seeking appraisal. If the corporation does so, then for the period after the payment, the appraisal judgment can include interest only on the amount, if any, by which the payment is exceeded by the court's appraised value of the shares and on "interest theretofore accrued, unless paid at that time." All of the amendments to § 262 will apply only to mergers under agreements entered into on August 1, 2016, or later.

Further Refinement of Second-Step Short-Form Merger Provisions

In 2013, the Delaware legislature amended the DGCL's basic merger statute, 8 *Del. C.* § 251, to simplify the consummation of a merger when it forms the second step of a standard two-step acquisition of a public corporation (in which a merger follows a successful tender offer for the target corporation's shares). Under then-new § 251(h), when various requirements were met, the acquiring corporation would be spared the necessity of obtaining approval of the merger from the target corporation's stockholders if, following the tender offer, the acquiring corporation owned enough shares to determine the outcome of any stockholder vote on the merger (typically, anything over 50% of the shares entitled to vote). This was a significant innovation because, under prior law, approval by the target's stockholders could be avoided only if the acquirer held at least 90% of the target's voting shares after the tender offer and any subsequent "top-up" purchases.

This year, § 251(h) has been amended in various respects that should make it easier for acquiring corporations to dispense with a stockholder vote after a tender offer. First, for § 251(h) to be available as an option, there is no longer a requirement that *all* of the target's stock be publicly traded or widely held. Instead, this must be the case for only one class or series of target stock. Second, § 251(h) now expressly permits a qualifying tender offer to condition its closing on the tender of a specified minimum number or proportion of target shares. Third, while § 251(h) continues to require that the offer be made for all outstanding shares of the target's voting stock, the section now expressly permits a qualifying offer to be made up of separate offers for separate classes or series of target stock. Fourth, the section now provides greater specificity regarding when tendered shares of the target are deemed to have been "received" pursuant to an offer.

Fifth, the amendments to § 251(h) have enlarged the category of shares that can be counted in determining whether the acquiring corporation owns enough target shares that a stockholder vote would be unnecessary. Previously, the only shares that could be counted were those already owned by the acquiring corporation and those the acquiring corporation had irrevocably accepted for purchase in the tender offer. Now the acquirer can also count (i) any target shares owned by a direct or indirect parent of the acquirer; (ii) any target shares owned by a direct or indirect wholly owned subsidiary of the acquirer or its parent; and (iii) any target shares that the acquirer, its parent, or a wholly owned subsidiary of the acquirer or its parent has a contractual right to acquire in exchange for equity in the acquirer, parent, or subsidiary, as the case may be, provided that such shares (termed "rollover stock") are in fact acquired before the merger is consummated.

To effectuate these amendments, several new defined terms—including "affiliate" and "rollover stock"—have been added to § 251(h). Practitioners should also be aware that the legislative synopsis in connection with the amendments contains a definition of the term "agent's message," which is used in the amended provisions regarding when shares are deemed "received." The legislative synopsis can be found online at http://www.legis.delaware.gov/LIS/lis148.nsf/vwLegislation/HB+371/$file/legis.html?open. The amendments to § 251(h) will apply only to merger agreements entered into on August 1, 2016, or later.

Change to the Signature Requirement for Stock Certificates

The DGCL long required that stock certificates (if any are issued) be signed by one officer from each of two lists contained in § 158. Those lists were (i) the chairperson, vice-chairperson, president, or vice-president, and (ii) the treasurer, assistant treasurer, secretary, or assistant secretary. The 2016 amendments have removed these lists of officers and replaced them with the requirement that stock certificates be signed by "any two authorized officers[.]" The legislative synopsis explains that this change "is not intended to change the existing law that the signatures on a stock certificate may be the signatures of the same person, so long as each signature is made in a separate officer capacity of such person." It is not clear, however, whether the officers formerly listed in § 158 continue to be authorized by default to sign stock certificates. Accordingly, it may be prudent to include in corporate bylaws provisions that expressly authorize at least two officers to sign stock certificates.

Reorganized Provisions on Revocation of Corporate Dissolutions and Revival of Void Corporations

Sections 311 through 314 of the DGCL address the revocation of a vote by stockholders to dissolve a corporation and the revival of a corporation that has become "void" (typically, because it has failed to pay its annual franchise tax or file its annual franchise tax report). These sections have been thoroughly revised so that, among other things, they now also deal expressly with corporations whose existence has expired by the terms of their charters, and they no longer provide remedies duplicative of those found elsewhere in the DGCL.

A Delaware corporation may include in its certificate of incorporation a provision limiting its existence "to a specified date[.]" 8 *Del. C.* § 102(b)(5). When that date is reached, such a corporation dissolves. 8 *Del. C.* § 278. However, before this year's amendments, the DGCL did not clearly provide a mechanism by which the stockholders of a corporation that had dissolved by the passage of time could undo the dissolution. As amended, § 311 now enables a corporation with an "expired" certificate of incorporation to "restore" it.

The procedure for restoring an expired certificate of incorporation parallels the long-standing procedure for revoking voluntary dissolution. Action to restore must be taken within three years after the date of expiration (unless the Court of Chancery has extended this period). The board of directors must adopt a resolution recommending restoration and submit the resolution to a vote by those who were stockholders on the date of expiration and entitled to vote on an amendment to the charter. If a majority in interest votes in favor of restoration, a certificate of restoration must be filed with the Delaware Secretary of State to restore the expired charter. Among other things, the certificate of restoration must contain the new date when the charter will expire or state that the corporation's existence will be perpetual.

The amendments to § 311 have also removed an obsolete provision requiring the Secretary of State to issue a certificate that the dissolution has been revoked, "upon being satisfied" that § 311 has been complied with. Section 311 now simply provides that a revocation of dissolution or restoration of an expired charter will be effective upon the effective time of the filing of the corporation's certificate of revocation or restoration. Finally, the amendments have added language to § 311 to confirm that in connection with revocation of dissolution or restoration, the corporation must pay any franchise taxes and file any annual franchise tax reports that it would have paid and filed if it had not been dissolved or its charter had not expired.

The provisions on reviving void corporations, found in § 312, have been amended to remove language pertaining to the extension of the time of a corporation's existence if its existence is not perpetual. There is no need to address the latter in § 312, since it is now covered by § 311 if the corporation has already expired, and it is covered by the DGCL provisions on charter amendments (§§ 241-242) if the corporation has not yet expired. Likewise, references in § 312 to "renewal, revival, extension and restoration" have been shortened to simply "revival," and the clauses specifying the contents of a certificate of revival have been shortened and clarified.

The "revival" provisions have also been amended to make clear that a void corporation's revival may be authorized by the directors who, "but for the certificate of incorporation having become forfeited or void pursuant to this title, would be the duly elected or appointed directors[.]" 8 *Del. C.* § 312(h). The amended section also now states plainly that revival will cause all property and rights acquired by the corporation while it was void to be vested in the corporation as if it had never been void. Finally, the amendments confirm that revival is not available for a void corporation whose charter was revoked or forfeited by court order under § 284 of the DGCL. Conforming changes have been made to § 313 (which deals with revival of charters of exempt corporations) and § 314 (which confirms the rights of corporations that properly "renew, extend and continue" their existence).

Additional Amendments

The subject-matter jurisdiction of the Court of Chancery has been enlarged by an amendment to DGCL § 111. Previously, it gave the court jurisdiction to interpret and enforce agreements by which corporations create or sell stock or stock options (among other things). The amendment has added jurisdiction to interpret and enforce agreements (i) to which a corporation and any of its stockholders are parties, and under which the stockholders sell stock in the corporation, or (ii) whose provisions include a sale or lease of assets by a corporation and approval of the sale or lease by any of the corporation's stockholders.

Provisions regarding committees of boards of directors and subcommittees of committees have been amended to provide default quorum and voting proportions matching those already provided for full boards. 8 *Del. C.* § 141. The amendments also make clear that a reference in the DGCL to a board committee or member of a committee will be deemed to apply to a subcommittee or member of a subcommittee. Lastly, the amendments have deleted the clause of § 141 stating that when a board consists of one director, a quorum is one. As the legislative synopsis states that this clause was surplusage, its removal does not reflect a change in the law.

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