

COMPLIANCE UPDATE: THE 2021 AMENDMENTS TO DELAWARE'S BUSINESS ENTITY LAWS



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INTRODUCTION

Delaware has more than 1.6 million active domestic business entities. A frequently cited reason for Delaware’s preeminent position as a formation state is its modern and flexible business entity statutes. In order to keep the statutes up-to-date, and therefore able to meet the rapidly evolving needs of its entities and their stakeholders, the state’s lawmakers enact amendments to its business entity laws every year.

Keeping track of the changes to these laws is imperative for the people owning, managing, or investing in Delaware entities, as well as the in-house and outside counsel who advise Delaware entities and their management and owners. This article helps all of those people keep track of the changes made to Delaware’s corporation, limited liability company, partnership, and limited partnership laws during the 2021 legislative session.

I. Amendment to the General Corporation Law (GCL)

Senate Bill 113 amended Sec. 160 of the Delaware General Corporation Law (Title 8, Sec. 101 *et seq.*) to clarify that shares of a corporation’s stock may not be voted or counted for quorum purposes if the shares belong to a non-corporate entity in which the corporation holds a majority of the voting power, either directly or indirectly, to elect or appoint the other entity’s governing body. This amendment is effective August 1, 2021

II. Amendments to the Limited Liability Company Act (LLC Act), Revised Uniform Limited Partnership Act (RULPA), and Revised Uniform Partnership Act (RUPA)

Senate Bill 114 enacted amendments to the LLC Act (Title 6, Sec. 18-101 *et seq.*), Senate Bill 116 enacted amendments to RULPA (Title 6, Sec. 17-101 *et seq.*), and Senate Bill 115 enacted amendments to RUPA (Title 6, Sec. 15-101 *et seq.*) All amendments are effective August 1, 2021. The amendments include the following:

1. Ratification of Void or Voidable Acts or Transactions - New subsections were added to Sec. 18-106 of the LLC Act, Sec. 17-106 of RULPA, and Sec. 15-202 of RUPA to provide that any act or transaction that may be taken by or in respect of an LLC, LP, or partnership under the LLC Act, RULPA, or RUPA or an LLC agreement or partnership agreement, but that is void or voidable when taken, may be ratified (or the failure to comply with any requirements of the LLC agreement or partnership agreement making such act or transaction void or voidable may be waived) by the members, managers, partners or other persons whose approval would be

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required under the LLC agreement or partnership agreement (i) for such act or transaction to be validly taken, or (ii) to amend the LLC agreement or partnership agreement in a manner that would permit such act or transaction to be validly taken, in each case at the time of such ratification or waiver; provided, that if the void or voidable act or transaction was the issuance or assignment of any LLC or partnership interests, the interests purportedly issued or assigned shall be deemed not to have been issued or assigned for purposes of determining whether the void or voidable act or transaction was ratified or waived. Any act or transaction ratified (or with respect to which the failure to comply is waived), shall be deemed validly taken at the time of such act or transaction.

If an amendment to an LLC agreement or partnership agreement to permit an otherwise void or voidable act to be validly taken requires notice to any persons under the terms of such agreement, and the ratification or waiver of such act or transaction is effectuated by the persons whose approval would be required to amend such agreement, notice of the ratification or waiver must be given following such ratification or waiver to such persons who would have been entitled to notice of the amendment and who have not otherwise received notice of, or participated in, such ratification or waiver.

The new subsections are not to be construed to limit the accomplishment of a ratification or waiver of a void or voidable act by other means permitted by law

Upon the application of an LLC, LP, or partnership, or a member, manager or partner, or any person claiming to be substantially and adversely affected by a ratification or waiver, the Delaware Court of Chancery may hear and determine the validity and effectiveness of any such ratification or waiver effected pursuant to the new ratification provisions.

The amendments allowing the ratification of acts or transactions that are void or voidable are intended to change the rule applied in *CompoSecure, L.L.C. v. Cardux, LLC*, 206 A.3d 807 (Del. 2018), and *Absalom Absalom Trust v. Saint Gervais LLC*, 2019 Del. Ch. LEXIS 239, in which the courts held that void acts or transactions generally may not be ratified.

2. Right to obtain information – Sec. 18-305 of the LLC Act, Sec. 17-305 of RULPA, and Sec. 15-403 of RUPA were amended to provide that if a member, limited partner, or

partner is entitled to obtain information under the Acts or an LLC agreement or partnership agreement for a purpose reasonably related to the member's, limited partner's, or partner's interest as a member, limited partner, or partner or other stated purpose, the member's, limited partner's, or partner's right shall be to obtain such information as is necessary and essential to achieving that purpose.



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It also provides that the rights of a member or manager to obtain or examine information (previously, to obtain information) and the rights of a limited partner or partner to obtain information may be expanded or restricted (previously, restricted) in an original LLC agreement or partnership agreement or in any subsequent amendment thereto.

3. Delegation of Managerial Authority - Sec. 18-407 of the LLC Act, Sec. 17-403 of RULPA, and Sec. 15-401 of RUPA regarding the delegation of rights and powers to manage, were amended to provide that a member's, manager's, or general partner's delegation of any or all of the member's, manager's, or general partner's rights, powers and duties to manage and control the business and affairs of the LLC, LP, or partnership may be made irrespective of whether the member, manager, or general partner has a conflict of interest with respect to the matter as to which its rights, powers or duties are being delegated, and the person or persons to whom any such rights, powers or duties are being delegated shall not be deemed conflicted solely by reason of the conflict of interest of the member, manager or general partner. It also clarifies that any such delegation may be to a committee of one or more persons.

These amendments are intended to create a different rule than that applied by the courts in cases such as *Wenske v. Bluebell Creameries, Inc.*, 214 A.3d 958 (Del. Ch. 2019) that held that a conflicted principal is legally disabled from delegating authority over matters in which the principal is conflicted, even where the delegatee is otherwise independent.

4. Statutory Public Benefit LLC/LP - Sec. 18-1201 of the LLC Act and Sec. 17-1201 of RULPA were amended to clarify that an LLC or LP may be formed as a statutory public benefit LLC

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or statutory public benefit LP or it may elect to be become one, and to provide that if an LLC or LP is not formed as a statutory public benefit LLC or LP it may become one in the manner specified in its LLC agreement or partnership agreement or by amending the agreement and its certificate of formation or certificate of limited partnership to comply with the requirements of the subchapters governing statutory public benefit LLCs and LPs.

In addition, Sec. 18-1202 of the LLC Act and Sec. 17-1202 of RULPA were amended to provide that the LLC agreement of a statutory public benefit LLC and partnership agreement of a statutory public benefit LP must state that it is a statutory public benefit or benefits to be promoted by such entity. In the event of any inconsistency between the public benefit or benefits set forth in the LLC agreement and the certificate of formation, or the partnership agreement and the certificate of limited partnership, the LLC agreement shall control as among the members, the managers and/or other persons who are party to or otherwise bound by such agreement and the certificate of formation shall be amended to correct any inaccuracies, and the partnership agreement shall control as

among the partners and others who are party to or otherwise bound by the partnership agreement and the certificate of limited partnership shall be amended to correct any inaccuracies.

5. Applicability of RUPA to Partnership - Sec. 15-103 of RUPA was amended to clarify that unless the partnership agreement provides otherwise, the provisions of RUPA apply to a partnership that has a statement of partnership existence or a statement of qualification and a partnership agreement that has modified Sec. 15-201(a)(providing that a partnership is a separate legal entity), Sec. 15-203 (providing that property acquired by a partnership is property of the partnership and not its partners individually), or Sec. 15-501 (providing a partner is not a co-owner of partnership property and has no interest in specific partnership property).

CONCLUSION

The 2021 amendments to Delaware's business entity statutes contain some significant changes. Attorneys, owners, investors, managers, and other advisers of Delaware entities will benefit from familiarizing themselves with these changes.

Here are links to the bills

SB 113

<https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=58600&legislationTypeId=1&docTypeId=2&legislationName=SB113>

SB 114

<https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=58603&legislationTypeId=1&docTypeId=2&legislationName=SB114>

SB 115

<https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=58601&legislationTypeId=1&docTypeId=2&legislationName=SB115>

SB 116

<https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=58602&legislationTypeId=1&docTypeId=2&legislationName=SB116>

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