

# INSIGHTS

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## THE CORPORATE & SECURITIES LAW ADVISOR

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### STATE CORNER

#### **2014 Amendments to Delaware's Alternative Entities Legislation**

By **Monica M. Ayres**

The Delaware General Assembly recently enacted legislation amending the Delaware Limited Liability Company Act (LLC Act), the Delaware Revised Uniform Limited Partnership Act (LP Act) and the Delaware Revised Uniform Partnership Act (GP Act and collectively with the LLC Act and the LP Act, the Alternative Entity Acts).<sup>1</sup> The following is a brief summary of some of the more significant amendments that affect Delaware limited liability companies (Delaware LLCs), Delaware limited partnerships (Delaware LPs) and Delaware general partnerships (Delaware GPs and collectively with Delaware LLCs and Delaware LPs, Alternative Entities).

#### **Providing Information to Communications Contact and Books and Records Requirements**

Every Delaware LP and Delaware LLC is required to maintain a communications contact

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who is authorized to receive communications from its registered agent.<sup>2</sup> The LP Act and the LLC Act have been amended to require a Delaware LP or Delaware LLC, upon receipt of a request by its communications contact, to provide to the communications contact the name, business address, and business telephone number of a natural person who has access to the record that contains the name and last known business, residence, or mailing address of each partner, member and manager of the Delaware LP or Delaware LLC. The LP Act and LLC Act also were amended to require Delaware LPs and Delaware LLCs to maintain a current record of the name and last known business, residence, or mailing address of each partner, member, or manager.

These amendments are intended to provide a straightforward process to obtain the name and address of partners, members, and managers of a Delaware LP or Delaware LLC.

#### **Books and Records Requests by Agents**

The Alternative Entity Acts have been amended to confirm that a partner or member of an Alternative Entity may make a books and records request in person or by an attorney or other agent. The amendments to the Alternative Entity Acts also provide that if an attorney or other agent is making the demand for access to books and records, then such demand must

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include a copy of the power of attorney or other writing that authorizes the attorney or other agent to act in that representative capacity.

The General Corporation Law of the State of Delaware (DGCL), which governs the internal affairs of Delaware corporations, provides that a stockholder's attorney or other agent can properly make a books and records request on behalf of the stockholder.<sup>3</sup> Practitioners have long believed that a partner or member of an Alternative Entity also has the right to act through an agent or attorney despite the absence of specific language in the Alternative Entity Acts.<sup>4</sup> The recent amendments eliminate any argument that the statutory inconsistency between the Alternative Entity Acts and the DGCL should support a position that attorneys or other agents of a partner or member of an Alternative Entity should be denied access to the books and records of such Alternative Entity.

### Consents with a Future Effective Date

The Alternative Entity Acts have been amended to provide that, unless otherwise provided in a partnership agreement or limited liability company agreement, a person who is not then a partner, member, or manager, as applicable, may consent to any matter, provided that such consent will only be effective at a time when such person attains that status.

These amendments were adopted in response to concerns raised by the Delaware Court of Chancery's opinion in *AGR Halifax Fund, Inc. v. Fiscina*.<sup>5</sup> In *AGR Halifax*, the Chancery Court considered the validity of consents authorizing a charter amendment that were executed by individuals who had not yet become directors of a Delaware corporation. The Chancery Court concluded that such consents were not valid even though they were not delivered until such individuals became directors. The *AGR Halifax* decision created uncertainty and complicated timing issues in transactions such as acquisition

financings where directors were being replaced in connection with the financing. The amendments to the Alternative Entity Acts will simplify these structuring and timing issues by permitting persons to execute consents as partners, members, and managers in advance of such persons attaining that status so long as the consents are not effective until such status is attained.

These amendments to the Alternative Entity Acts provide significant flexibility, as they do not require the consents to become effective within a limited time period following execution and they do not require the consents to be revocable prior to their effectiveness, in contrast to similar amendments made to the DGCL.

### Revocation of Dissolution

Delaware LPs and Delaware LLCs are subject to dissolution upon the occurrence of certain events, not all of which require voluntary action by or on behalf of such entity. As a result, Delaware LPs and Delaware LLCs are sometimes inadvertently dissolved. In 2005, amendments were made to the LP Act and the LLC Act to permit partners and members to revoke dissolution of Delaware LPs and Delaware LLCs. The 2005 amendments proved helpful, but also included strict requirements for revocation which, at times, made revocation difficult or even impossible. The LLC Act and LP Act have been amended to provide additional means by which a dissolution of a Delaware LP or a Delaware LLC may be revoked, including to provide that a dissolution may be revoked in the manner provided in the organizational documents of the Delaware LP or Delaware LLC, and to confirm that a dissolution may be revoked by any other means permitted by law.

With respect to Delaware LLCs, prior to the amendments, dissolution could be revoked if all remaining members voted to revoke or, if there were no remaining members, the personal representative of the last remaining member voted to revoke. Additionally, in either case, if

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the dissolution was caused by a vote of members or other persons, the revocation also had to be approved by each member or other person (or their respective personal representatives) who voted in favor of, or consented to, the dissolution.

The LLC Act now provides that (1) if revocation of dissolution is addressed in the limited liability company agreement, dissolution may be revoked in the manner provided; and (2) if revocation of dissolution is not addressed in the limited liability company agreement, (a) if the dissolution was caused by a vote or written consent of members or other persons, the same vote is needed to revoke the dissolution, (b) if the dissolution was caused by the expiration of a stated term or another event specified in the limited liability company agreement (other than by a vote or written consent of the members or other persons or dissolution due to the Delaware LLC having no members), the dissolution may be revoked by the consent that is required under the limited liability company agreement to amend the provision that effected the dissolution, and (c) if the dissolution is caused by the Delaware LLC having no members, the dissolution may be revoked by the personal representative of the last remaining member or the assignee of all of the limited liability company interests in the LLC.

With respect to Delaware LPs, prior to the amendments, dissolution could be revoked pursuant to a vote of (1) all remaining general partners and all remaining limited partners, (2) all remaining general partners and the personal representative of the last remaining limited partner, if there were no remaining limited partners, (3) all remaining limited partners if there was no remaining general partner, or (4) the personal representative of the last remaining limited partner if there was no remaining limited partner and no remaining general partner. Additionally, if there had been a vote to dissolve, then the revocation also had to be approved by each partner and other person

(or their respective personal representatives) who voted in favor of, or consented to, the dissolution.

The LP Act now provides that if revocation of dissolution is addressed in the limited partnership agreement, dissolution may be revoked in the manner provided therein. If revocation of dissolution is not addressed in the partnership agreement and the dissolution was caused by a vote or written consent of the partners of the Delaware LP or other persons, the same vote is required to revoke the dissolution. If revocation of dissolution is not addressed in the partnership agreement and dissolution is caused by an event specified in the limited partnership agreement (other than a dissolution upon a specified vote, upon an event of withdrawal of a general partner, or upon the last remaining limited partner ceasing to be a limited partner of the Delaware LP), then the dissolution may be revoked by the consent that is required under the limited partnership agreement to amend the provision that effected the dissolution. If revocation of dissolution is not addressed in the partnership agreement and the dissolution is caused by an event of withdrawal of a general partner or by the last remaining limited partner ceasing to be a limited partner, the dissolution may be revoked: (1) by the vote or written consent of all remaining general partners and two-thirds in interest of the limited partners, or each class or group of limited partners, if applicable; (2) if there are no remaining limited partners of the Delaware LP, by the vote or written consent of all remaining general partners and the personal representative of the last remaining limited partner or assignee of all limited partner interests in the Delaware LP (who also must appoint a substitute limited partner, effective as of the occurrence of the event that caused the last remaining limited partner to cease to be a limited partner, by the same vote or written consent); or (3) if there are no remaining general partners, by the vote or written consent of two-thirds in interest of the limited partners, or each class or group of limited partners, if applicable (who also must appoint a substitute general partner, effective as of the date

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of withdrawal of the last remaining general partner, by the same vote or written consent).

A limited partnership agreement or limited liability company agreement also may provide that dissolution may not be revoked.

As was the case prior to the amendments, revocation of dissolution by any means must occur prior to the filing of a certificate of cancellation terminating the existence of the Delaware LP or Delaware LLC.

## Conclusion

The recent amendments reflect Delaware's continuing commitment to maintaining statutes governing Alternative Entities that effectively serve the business needs of the national and international business communities.

## Notes

1. The recent amendments to the LLC Act are contained in House Bill No. 327 (effective August 1, 2014); the recent amendments to LP Act are contained in House Bill No. 328 (effective August 1, 2014); and the recent amendments to GP Act are contained in House Bill No. 326 (effective August 1, 2014). Additionally, the annual franchise taxes payable to the State of Delaware by Alternative Entities have been increased pursuant to amendments contained in House Bill No. 265, as amended by House Amendment Nos. 1 and 3 (effective January 1, 2014).
2. See 6 Del.C. § 18-104(g); 6 Del.C. § 17-104(g).
3. See 8 Del.C. § 220(b).
4. See, e.g., *NAMA Holdings, LLC v. World Market Center Venture, LLC*, 948 A.2d 411, 421 (Del. Ch. 2007), a case involving access to the books and records of a Delaware LLC, in which the Delaware Court of Chancery stated that "if inspection rights are to have any substantive force, the party who benefits from them must be able to enlist the sophisticated assistance of attorneys, accountants, and other experts to meaningfully evaluate complex financial information."
5. See 743 A.2d 1188 (Del. Ch. 1999).

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