

message from partner in charge

In these challenging economic times, this issue offers vital information to our clients and friends.

We welcome corporate lawyer Matthew M. Greenberg, who has joined Pepper in the Wilmington office.

In cyberspace: Pepper's recent webinar series considers the current crisis on Wall Street, namely the implications for the financial services industry, trading and credit markets, and more. Another Pepper webinar looks ahead to what the financial services industry might expect from either a McCain or an Obama administration. And bankruptcy partner Francis Lawall's Peppercast spotlights the importance of thoroughness regarding Section 328 success fees.

Messrs. Greenberg and Tino's article summarizes Delaware's recent amendments to its business law statutes, specifically, to the Delaware General Corporation Law, the Delaware Revised Uniform Limited Partnership Act and the Delaware Limited Liability Company Act.

As always, thanks for reading. We welcome your comments and suggestions for future issues.

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Pepper Hamilton Expands Delaware Corporate Practice; Matthew M. Greenberg Joins Firm as a Partner

Matthew M. Greenberg, a Delaware corporate and securities lawyer, has joined the firm as a partner in the Wilmington office.

Mr. Greenberg focuses his practice on mergers and acquisitions, corporate finance and securities, and Delaware corporate and alternative entity law. He represents clients in public and private transactions, including mergers, sales and acquisitions of subsidiaries and divisions, joint ventures, recapitalizations, and asset sales in connection with bankruptcy proceedings. He counsels clients in public and private debt and equity securities offerings, exchange offers, consent solicitations and other securities transactions. He also counsels clients on fiduciary duties and corporate governance matters related to Delaware corporations, limited partnerships and limited liability companies.

"Matt has a diverse corporate practice and experience in handling significant M&A and securities engagements, in addition to a specialized Delaware corporate law knowledge," said David B. Stratton, the partner in charge of Pepper Hamilton's Wilmington office. "He also is a leader in the Delaware bar, providing countless hours of service to community outreach and other programs. We are delighted to welcome him to Pepper."

Mr. Greenberg joined Pepper Hamilton from Connolly Bove Lodge & Hutz LLP in Wilmington, where he was a partner. He started his legal career at Skadden, Arps, Slate, Meagher & Flom LLP.

Noting that Pepper Hamilton's 100-lawyer Corporate and Securities Practice Group will provide him and his clients with tremendous resources, Mr. Greenberg said, "The

strength of that firm-wide group and the talent here in the Wilmington office are extremely attractive. I am excited to join the firm.”

Dedicated to bar and community activities, Mr. Greenberg is an active member of the Delaware State Bar Association (DSBA), of which he is vice president at-large. He also is co-chair of the DSBA’s Community Service Committee and chair of the association’s Governance & Bylaws Committee, as well as a member of the Alternative Entity Subcommittee of the DSBA’s Corporation Law Council, which is responsible for drafting amendments to the Delaware statutes governing limited liability companies, limited partnerships and partnerships.

In addition, he serves on the board of the Delaware Lawyers Assistance Program, a member service of the DSBA that confidentially helps judges and lawyers with substance abuse, dependence and/or mental and physical health problems, and assists with the administration of the DSBA’s annual Race Judicata 5K footrace, which benefits local charities. He also provides services to the American Inns of Court Foundation.

Mr. Greenberg received his law degree from American University, Washington College of Law (J.D. 1996) and his undergraduate degree from Trinity College in Hartford, Conn. (B.A. 1991).

Obama and McCain: What Would They Do For (Or To) You Webinar

Whatever choice the voters make in November, it’s likely that the current federal regulatory approach to the financial services industry will change, perhaps dramatically. We’ve all heard the campaign rhetoric, but few have probed deeply into the specifics of both candidates’ positions on matters affecting the financial services business.

What would Sen. Barack Obama’s proposal for a foreclosure prevention fund mean for mortgage lenders already struggling for survival? What would Sen. John McCain do to address the financial issues at Fannie Mae and Freddie Mac, or other aspects of the ongoing credit crisis?

Listen as we examine the policies of both candidates regarding financial services regulation and related issues.

Visit Pepper’s webinar section at www.pepperlaw.com to view the webinar recording and download the PowerPoint slides from this online event.



Peppercast: Success Fees Under Section 328; Be Reasonable and Be Specific

In complex business reorganizations, debtors and other major parties-in-interest, such as trustees, examiners and creditors’ committees, will typically retain a small army of professionals – attorneys, financial advisors, accountants – to assist in the case. Not surprisingly, these professionals are entitled to compensation from the bankruptcy estate.

This podcast with **Francis J. Lawall**, a partner in Pepper’s Corporate Restructuring and Bankruptcy Practice Group, discusses the importance of thoroughness regarding Section 328 success fees and the Northwest Airlines case.

Listen today by visiting the Corporate Restructuring and Bankruptcy section of Pepper’s podcenter at www.pepperpodcasts.com.

2008 Amendments to the Delaware Business Law Statutes

Delaware has adopted amendments to its business law statutes, which took effect this summer. Below is a summary of the amendments to the Delaware General Corporation Law (DGCL), the Delaware Revised Uniform Limited Partnership Act (DRULPA) and the Delaware Limited Liability Company Act (the LLC Act).

Amendment to the Delaware General Corporation Law

The 2008 amendments to the DGCL became effective on June 26, 2008. This year's bill contained noticeably fewer amendments than in other recent years and largely represents technical refinements to the two affected statutes. The most significant change amends Section 225(b) to authorize the corporation itself to contest the results of a stockholder vote relating to matters other than the election of directors. Section 219 also was amended to allocate the burden of proof and available remedies in an action to address the lack of availability of a list of stockholders prior to and at a meeting of stockholders.

Amendment to Section 219(b) — List for Stockholder Meetings

Section 219(a) of the DGCL provides that, at least ten days before any stockholder meeting, the officer in charge of a corporation's stock ledger must prepare and make available for examination by any stockholder, for any purpose germane to the meeting, a complete list of the stockholders entitled to vote at the meeting. Before the current amendment, Section 219(b) provided, as an enforcement mechanism, that any director of the corporation who willfully neglects or refuses to produce such a list as required by Section 219(a), is "ineligible for election to any office" at the meeting.

The amendment to Section 219(b) specifically authorizes any stockholder to commence in the Court of Chancery a summary proceeding to obtain an order permitting examination of the stockholder list required for a meeting, if the corporation or any of its officers or agents refuse to produce the list. In such a summary proceeding, the corporation will bear the burden of proving that the examination sought by the stockholder "is for a purpose *not* germane to the meeting" (emphasis added). The

The most significant change amends Section 225(b) of the Delaware General Corporation Law to authorize the corporation itself to contest the results of a stockholder vote relating to matters other than the election of directors.

amendment also broadens the relief available in the event of failure to provide the required list. Prior to the amendment, a director's "willful neglect or refusal" to produce the required list would lead to the single sanction of ineligibility to stand for election. The amended Section 219(b) not only eliminates the concept of "willful neglect or refusal" but broadly empowers the court to postpone the meeting or void its results, to permit examination of the list and impose conditions on the examination, and to make "such additional orders as may be appropriate."

Amendment to Section 225 — Contested Stockholder Votes

Section 225(a) of the DGCL allows any stockholder of a Delaware corporation to commence a summary proceeding in the Delaware Court of Chancery for a determination of the validity of any election, appointment, removal or resignation of any officer or director of the corporation. Section 225(b) allows a stockholder to commence such a summary proceeding to determine the result of any stockholder vote on any other matter. Section 225 has been amended to allow commencement of a proceeding under Section 225(b) not only by a stockholder but also by the corporation itself. The amendment thus permits a Delaware corporation to obtain a prompt adjudication of the result of a stockholder vote (other than on an election matter) in the event of a controversy over that result.

Franchise Tax Charges

The legislature also increased the annual report fee for corporations from \$60 to \$100 and increased the rates at which franchise taxes are assessed. The minimum franchise tax is now \$75 for authorized share capital of 5,000 shares or less and \$150 for authorized capital between 5,001 and 10,000 shares. The rate is now \$75 (increased from \$62.50) for each 10,000-share block above the first 10,000 shares. The maximum franchise tax amount of \$165,000 was not increased.

Amendments to the Alternative Entity Laws

Delaware is well known as the principal jurisdiction for business practitioners to form alternative entities. This year, amendments were adopted to DRULPA and the LLC Act. Amendments to the Delaware Revised Uniform Partnership Act were passed by the Delaware State House of Representatives. Thereafter, the bill was assigned to the Judiciary Committee of the Delaware State Senate. The bill was not reported out of the committee, however, and consequently the legislation was not enacted. The amendments to DRULPA and the LLC Act became effective on August 1, 2008.

Limited Partner Liability to Third Parties

Generally, limited partners may not participate in the control of the business of the limited partnership (LP). However, if a limited partner participates in the control of the business, he, she or it is liable to persons who transact business with the limited partnership who reasonably believe, based on the limited partner's conduct, that the limited partner is a general partner. Section 17-303(b) of DRULPA lists several activities of limited partners of Delaware LPs that do not constitute "participation in the control of the business" and thus would not subject the limited partner to liability.

The recent amendments to DRULPA add another provision to Section 17-303 providing limited partners with additional liability protection. The amendments confirm that certain activities relating to the selection or removal of persons managing the affairs of a limited partnership will not cause a limited partner to be deemed to be participating in the control of the business of a limited partnership. Specifically, the new language states that the right or power of a limited partner to act, or cause the taking or refraining from taking of action with respect

to the selection or removal of (i) an independent contractor for, or an agent or employee of, a Delaware LP or a general partner of a Delaware LP; or a general partner of a Delaware LP that is (ii) an officer, director or stockholder of a corporate general partner, or a partner of a Delaware LP, (iii) a trustee, administrator, executor, custodian or other fiduciary or beneficiary of an estate or trust, (iv) a trustee, officer, advisor, stockholder or beneficiary of a business trust or a statutory trust, (v) a member or manager of a limited liability company or (vi) a member of a governing body of, or a fiduciary for, any person, whether domestic or foreign; does not constitute "participating in the control of the business" of a Delaware LP for purposes of Section 17-303 of DRULPA. 6 *Del. C.* §§17-303(b).

Expanded Definition of Manager under the LLC Act

Section 18-109 of the LLC Act provides that a manager of a Delaware limited liability company (LLC) may be served with process (as set forth in that section) in all actions or proceedings in Delaware involving or relating to the business of the Delaware LLC or a violation by the manager of a duty to the Delaware LLC or a member of the Delaware LLC. Under this section, the act of serving as manager of a Delaware LLC constitutes consent to the appointment as the registered agent of the LLC upon whom process may be served.

Section 18-109 defines "manager" as either (i) a person who is designated or named as such in the limited liability company agreement (or similar instrument), or (ii) a person, whether or not they are a member, who, although not designated or named as a manager in the limited liability company agreement (or similar instrument), participates materially in the management of the Delaware LLC. However, the right to select or participate in the election or selection of a "manager" under the limited liability company agreement does not, by itself, constitute participation in the management of the Delaware LLC.

Sections 18-110 and 18-111 of the LLC Act establish that certain proceedings may be brought in the Court of Chancery. Each of those sections use the term "manager" in setting forth the scope of the court's jurisdiction under that section. The 2008 amendments to Sections 18-110 and 18-111 incorporate a specialized, broader definition of "manager" for purposes of service of process in certain contested matters. The amended definition of "manager" as used in Sections 18-110 and 18-111 of the LLC Act is now consistent with the manner in which such term is defined

in Section 18-109(a) of the LLC Act. While technical in nature, these amendments effectively broaden the subject matter jurisdiction of the Court of Chancery.

The Delaware Court of Chancery recently provided additional insight into the phrase “participating materially in the management of the limited liability company” contained in the definition of “manager” in *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156 (Del. Ch.). After reviewing facts pleaded in connection with a motion to dismiss, the Court of Chancery determined that the fact that a person occasionally conferred with a manager on the board of a Delaware LLC prior to board decisions was not sufficient to support the conclusion that such person participated materially in the management of the LLC. The court also rejected an assertion that a person could be determined to be a de facto “manager” solely on the basis of the amount of power given to such person under the limited liability company agreement in light of provisions in such agreement specifically delegating management powers to others.

Additional Persons Permitted to Execute Certificates of Conversion or Certificates of Domestication

The DGCL and the alternative entity statutes provide for the conversion and domestication of entities. A “conversion” of an entity under Delaware law involves the change of a business entity’s form of organization, jurisdiction of formation or organization, or both, pursuant to specific statutory procedures. A “transfer, domestication and continuance” is similar to a conversion since it affords an entity the ability to change its form of organization and/or jurisdiction of formation or organization. However, unlike a conversion, a transfer, domestication or continuance of an entity need not be accompanied by the termination of the original entity’s existence under the laws of its initial jurisdiction. Rather, the entity may continue under both jurisdictions. In addition, a transfer, domestication or continuance is limited to transactions that cross national borders, whereas a conversion may be within the United States and even intrastate for an entity that changes its business form.

The 2008 amendments correct an anomaly regarding who is authorized to sign a certificate of conversion or certificate of domestication. Prior to the amendments, only certain persons acting on behalf of the Delaware entity were authorized under the respective acts to execute a certificate of conversion or certificate of domestication to the

applicable Delaware entity. These provisions, as written, created the paradox whereby a certificate of conversion was required to be signed by a person acting on behalf of a Delaware entity that technically would not be formed until after such certificate was signed. The amendments provide flexibility by clarifying that a certificate of conversion to a limited liability company or limited partnership or certificate of domestication for a limited liability company or limited partnership, as the case may be, may also be executed by any person authorized to sign such a certificate on behalf of the converting entity or domesticating non-United States entity, as applicable. 6 Del. C. §§17-204(a)(1); 18-204(a).

Revised Definitions

Each of the alternative entities acts contain a definition of “person,” a term that appears frequently throughout each statute. Those definitions are identical in the acts and each lists a “trust” as one of the entities and individuals that is considered a “person” for the purposes of the respective acts. The amendments alter the definition of “person” to reflect the intended broad scope of the word “trust” as used therein by including a common law trust, business trust, statutory trust, voting trust and any other form of trust. 6 Del. C. §§17-101(14); 18-101(12).

Annual Taxes

The annual tax payable by limited partnerships and LLCs was increased, for the first time in five years, from \$200 to \$250.

Delaware Statutory Trust Act

The 2008 amendments did not include any changes or modifications to the Delaware Statutory Trust Act. However, two amendments enacted in 2005 became effective July 1, 2008. The newly effective 2005 amendments impose a \$300 cap on the fee for various filings under the statute.

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Crisis on Wall Street: *What You Need to Know Today Webinar Series*

The unprecedented developments on Wall Street, and the government and market reactions to them, have companies wondering how they will be affected in numerous areas. Recently, Pepper Hamilton hosted a webinar series on the crisis on Wall Street and the implications for companies today. Visit www.pepperlaw.com/webinars.cfm to view the recordings and download the PowerPoint slides from these sessions:

- Implications for the Financial Services Industry
- Trading Markets, Securities and Executive Compensation Implications
- State of Credit Markets
- Litigation, Enforcement and White Collar Implications.

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