

Corporate Advisory, LLCs, Policy, Legislation, Nevada
Nevada Legislature Innovates Corporation and LLC Laws
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Client Alert

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The Nevada Legislature and Gov. Steve Sisolak have recently approved Assembly Bill No. 207 (AB 207), a bill passed under the leadership and guidance of Assembly Speaker Jason Frierson. AB 207 makes certain meaningful changes and amendments to Title 7 of the Nevada Revised Statutes (NRS), which governs business entities, including corporations and limited liability companies. The changes are effective as of Oct. 1, 2019.

Clarification of Fiduciary Duties in Limited Liability Companies

Limited liability companies (LLCs) are among the most common business entities in Nevada. NRS Chapter 86, which governs LLCs, has not directly specified the fiduciary duties of members and managers, as NRS Chapter 78 does for directors and officers of corporations. Without statutory guidance, courts have been left to assign duties after the fact, leaving LLCs, their members and their managers with uncertainty and unpredictability.

Under AB 207, new provisions will be added to NRS Chapter 86 that reinforce the LLC as a contract-based business entity. The new statutory language confirms that the duties of a manager or managing member of an LLC are the contractual duty of good faith and fair dealing and such other duties as are expressly prescribed by the LLC's articles of organization or operating agreement. NRS 86.286 will still permit an LLC to expand, restrict or eliminate any and all other duties of managers and members in the way that best suits the company's business and management structure. The amendments apply only prospectively, but should nonetheless give business leaders and courts much-needed clarity on an important governance issue.

Alter Ego Standards for Limited Liability Companies

NRS 78.747 codifies the "alter ego" doctrine for corporations, whereby a court in extenuating circumstances could "pierce the veil" of the corporation to impose liability on stockholders. However, NRS Chapter 86 has lacked a counterpart to address this issue for LLCs. In *Gardner v. Henderson Water Park, LLC* (Nev. 2017), the Nevada Supreme Court expressly held that the alter ego doctrine applies to LLCs. AB 207 includes a new provision structurally identical to NRS 78.747, so that courts no longer need to apply the corporate statute to LLCs by analogy.

Authorization for Intermediate Form Mergers

AB 207 adds a new section to NRS Chapter 92A, which permits an exchange-listed Nevada corporation to authorize an "intermediate form" merger without the need for stockholder approval. This new provision has its conceptual roots in Section 251(h) of the Delaware General Corporation Law, which permits the consummation of second-step mergers without stockholder approval following a tender or exchange offer.

Under the new section of NRS Chapter 92A, the stockholders of an exchange-listed Nevada corporation would

no longer be required to approve a merger in which the corporation is a constituent entity, if:

- the voting power of the shares of the exchange-listed Nevada corporation beneficially owned by the other constituent entity in the merger or such other constituent entity's owned affiliates (excluding any shares acquired from the corporation or any of its directors, officers, affiliates or associates in the six months preceding the adoption of the plan of merger) would be sufficient to approve the merger under NRS Chapter 92A and the governing documents of the exchange-listed Nevada corporation; or
- the voting power of the shares of the exchange-listed Nevada corporation beneficially owned by the other constituent entity in the merger (or such other constituent entity's owned affiliates), together with such shares irrevocably accepted for purchase or exchange in a tender offer, would be sufficient to approve the merger under NRS Chapter 92A and the governing documents of the exchange-listed Nevada corporation.

If such an intermediate-form merger is approved pursuant to the new provisions without a tender offer, notice of the proposed merger must be sent to all stockholders at least 30 days prior to the effective date of the merger.

Corporations

AB 207 also makes certain notable changes to NRS Chapter 78 governing corporations. Among other clarifications, the amendments:

- Explicitly permit a corporation to include a forum selection clause in its articles of incorporation or bylaws mandating that certain claims regarding the internal affairs of the corporation be brought in specified courts, which must include Nevada state district court;
- Supplement the "market out" exception to dissenter's rights under NRS 92A.390 to include transactions in which stockholders receive certain contingent value rights or other securities meeting specified liquidity requirements;
- Reorganize and enhance the statutes relating to indemnification of directors and officers and advancement of expenses, confirming that corporations have flexibility to provide broad protections in their governing documents or other agreements or arrangements;
- Supplement NRS 78.751 to clarify that the corporation is the primary obligor with respect to indemnification or advancement of expenses unless the articles of incorporation, bylaws or an agreement between the parties provide otherwise;
- Clarify NRS 78.288 relating to the payment of distributions by corporations;
- Confirm the long-standing practice that shares represented by proxy at a stockholder meeting will count toward a quorum as long as the shares are present in person or by proxy regardless of whether the proxy has the power to vote on any particular matter; and
- More precisely define "issuing corporation" in the "acquisition of controlling interest" statutes under NRS Chapter 78, to help avoid inadvertent or vexatious applicability of those provisions.

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