

Nevada Business Entities Law Update

The 77th Session of the Nevada Legislature made various changes to provisions of Title 7 of the Nevada Revised Statutes (NRS), governing business entities, including corporations, limited liability companies and partnerships. This legislation was signed by Governor Sandoval on May 30, 2013, and will be effective October 1, 2013. The following is a summary of the significant changes.

1. Confirmation of Fiduciary Duties in the Change-of-Control Context. The amendment to NRS 78.139 confirms that the fiduciary duties of corporate directors and officers set forth in NRS 78.138—as well as the presumption of the “business judgment rule” and the prerogative to undertake and act on the considerations set forth therein—apply to all changes or potential changes of control, including voluntary transactions. The legislative history of the amendment is clear that these amendments are clarifications and not changes to existing Nevada law, which has rejected the application of so-called “Revlon duties” in change-of-control transactions since the enactment of NRS 78.139 in 1999.

2. Nevada LLCs as “Bankruptcy-Remote” Entities. In order to remove any concern or doubt that Nevada limited liability companies can be used as bankruptcy remote entities on par with those used in Delaware, a definition of a “personal representative” was adopted and NRS 86.286 was amended to provide for the powers and abilities of a personal representative. NRS Chapter 86 was also revised to add language expressly permitting a person to become a member or to acquire a member’s interest in an LLC without being required to make a capital contribution to the company.

3. Scope of LLC Operating Agreements. The revisions to NRS Chapter 86 also confirm that an operating agreement may include any provision, not inconsistent with law or the company’s articles of organization, which the members elect to set out in the operating agreement for the regulation of the internal affairs of the company. In addition, the clarifications of certain other provisions of NRS 86.286, in light of proposed amendments to Delaware’s limited liability company statutes regarding default fiduciary duties for LLC managers, may prove to distinguish Nevada as a more flexible and attractive jurisdiction in terms of drafting LLC operating agreements and enforcing those agreements as written.

4. Consent to Personal Jurisdiction and Services of Process on Officers and Directors. In *Consipio Holding v. Carlberg*, 282 P.3d 751 (Nev. 2012), the Nevada Supreme Court addressed the issue of whether Nevada courts can properly exercise personal jurisdiction over nonresident officers and directors who directly harm a Nevada corporation. The amendments provide that a “management person” (defined as a director, officer, manager, managing member, general partner or trustee) of a Nevada business entity will be deemed to have consented to the personal jurisdiction of Nevada courts, and the irrevocable appointment of the entity’s registered agent in Nevada as an agent for service of process on such person, with respect to an action or proceeding in Nevada relating to a violation of such management person’s duty in such capacity. The provision applies to any individual who is elected or re-elected as a “management person” on or after October 1, 2013, and to any individual who serves as a “management person” on or after October 1, 2014.

5. Ability of the Board of Directors to Provide Dissenter’s Rights. NRS 92A.390 limits the availability of dissenter’s rights for stockholders of publicly traded corporations engaging in a merger, conversion or exchange unless the articles of incorporation provide otherwise. The 2013 amendments

grant the board of directors the ability to grant dissenter's rights pursuant to the board resolutions approving the plan of merger, conversion or exchange.

6. Non-Profit Insurance Company Authority. As amended, NRS Chapter 82 will authorize an insurance company to organize as a Nevada nonprofit corporation provided that such entity complies with all laws before operating and does not infringe on the laws of any other state or country. Nevada nonprofit corporations will now be permitted to organize as insurance companies and obtain the same insurance licenses available to nonprofits organized outside of Nevada.

7. Amendments to Ability to Change Venue. NRS 13.050, as amended, will permit a change of venue between Nevada district courts, from a county lacking a "business court" to a county that has one.

8. Statute of Limitations for Actions Pre-Dissolution and Post-Dissolution. Revisions to NRS 78.585 and NRS 86.505 confirm that a two-year statute of limitation applies to causes of action in which the plaintiff learns or should have learned of the underlying facts before the date of dissolution, and, as in Delaware, provides a three-year statute of limitation with respect to post-dissolution claims.

9. Filing Fees for Foreign Corporations. NRS 80.050(1) was amended to make the maximum filing fee for foreign corporations consistent with that in NRS Chapter 78 governing domestic corporations.

The 2013 amendments also include certain clerical amendments, as well as technical revisions and clarifications regarding (i) the record date for stockholder actions by written consent, (ii) procedures and requirements for articles of dissolution and (iii) domestication of foreign entities.

The corporate transactional lawyers in Brownstein Hyatt Farber Schreck's Las Vegas office have broad experience in the application of Nevada's business laws and expertise in advising as to their impact on a wide range of business transactions. If you have any questions about how Nevada's business laws could affect you, or how Nevada may provide an advantageous alternative to other jurisdictions, please contact Ellen Schulhofer (eschulhofer@bhfs.com) or Albert Kovacs (akovacs@bhfs.com) in the firm's Las Vegas office.

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