Memorandum

TO: Unincorporated Organization Acts Committee, its advisors and observers
FROM: Daniel S. Kleinberger, Reporter
SUBJECT: Reporter's Proposal for Profit/Loss Sharing Fix and Associated Changes for UPA (2013), with introductory note and various explanatory notes
DATE: October 18, 2021

Introductory Note

A. Background to Original Issue

It is tempting to think of a limited liability partnership as simply an ordinary general partnership plus "a corporate-styled liability shield."[1] Indeed UPA (1997 and 2013) both state: "A limited liability partnership continues to be the same entity that existed before the filing of a statement of qualification under Section 1001."[2]

However, with respect to some key economic issues, an LLP and a non-LLP are different breeds. At least with regard to sharing profits and losses, the LLP and non-LLP constructs reflect a duality.

Partners in a non-LLP share profits and losses and a partner may be obligated to contribute additional funds to the partnership not only to protect creditors of the partnership but also to "true up" losses *inter se* (i.e., according to any agreed upon ratio, or equally if no agreement).[3]

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[1] Ederer v. Gursky, 9 N.Y.3d 514, 525, 881 N.E.2d 204, 211 (2007) (quoting Prefatory Note, Addendum to Uniform Partnership Act [1997]; internal quotations omitted).

[2] UPA (2013 and 1997) § 201(b).

[3] Here are two very simple examples:

Example 1

A and B are partners in a non-LLP. A and B agree to share profits and losses equally and each invests $100 in the partnership as start-up capital. The partnership promptly fails, having eaten up all the start up capital and leaving $80 still due to partnership creditors. Both A and B are liable to the creditors, but *inter se* A and B are each required to contribute $40 to the partnership so that the partnership can pay off the creditors. Assuming A and B make the required contributions, when the dust settles, A has lost $140 ($100 start up capital contribution; $40 contribution to pay off partnership creditors) and so has B (same arithmetic).

Example 2

X and Y are partners in a non-LLP. They make no agreement about sharing profits and losses. Therefore, the default rule applies (share profits equally, share losses in proportion to profit share – in this instance equally.) X invests $100 in the partnership as start-up capital, and Y invests $50. The partnership promptly fails, having eaten up all the start up capital but managing to pay off all creditors. Y must contribute $25 to the partnership, which the partnership will distribute to X to equalize the losses *inter se* the partners. In this way, X will have lost X's initial investment ($100) but will have received $25, for a net loss of $75. Y will have lost Y's initial investment ($50) and will have also lost the additional $25 contributed to the partnership for the benefit of X, for a net loss of $75.

In an LLP, partners do not contribute to the benefit of partnership creditors and, per a decision of the Harmonization Committee, LLP partners do not contribute to true up losses *inter se*. Whether the latter rule was merely a clarification or rather a new policy,[4] in an LLP "[c]apital losses 'lay where they fall.'"[5]

B. 2013 Revisions and the Duality Problem

Unfortunately, the Harmonization Committee failed to fully recognize the duality described above and therefore did not address the resulting mechanical ramifications. For example, UPA (1997) § 401(a) had instituted simple partner accounts to accommodate the profit and loss sharing in a non-LLP.[6] The Harmonization Committee eliminated these accounts, which are immaterial to an LLP, but are still crucial to the economic default structure of a non-LLP.

This draft recognizes the duality and its technical ramifications and establishes a dual track (LLP and non-LLP) for provisions pertaining to profit and loss sharing. In particular, the draft provides:

- a method for accounting for nontax profit and loss sharing issues in a non-LLP; and
- a way to take a snapshot of the profit and loss sharing situation when a non-LLP partnership becomes an LLP.

On the second point, a new section (Section 914) provides the snap shot. As to the first point, the Reporter previously suggested[7] restoring in principal part the simple set of partner accounts deemed to exist by UPA (1997) § 401(a). The deemed accounts and the snap shot were intended to be used only for the purposes of UPA (2013). Neither the deemed accounts nor the snap shot were to have any relation or relevance to accounting rules, whether tax or otherwise.[8]

C. Practical Problems with Restoring the Section 401(a) Accounts

Following distribution of the Reporter's Draft of 8-17-21, Steve Frost and the Reporter discussed at some length how, in his view (and eventually the Reporter's), reinstating the simplified partner accounts under the Section 401(a) might cause confusion.

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[4] Under UPA (1997), the rule for LLPs is arguably ambiguous.

[5] UPA (2013) § 306(c), Effect of LLP Status on Relations Inter Se the Partners.

[6] UPA (1997) does not provide for interim distributions, and UPA (1997) invokes the simple accounts only for the purposes of settling accounts among partners during winding up. (Section 701(b) – buyout of dissociated partner – implicitly invokes the partner accounts, because the subsection determines a buy-out price as if the partnership were winding up.)

[7] Reporter's Draft of 8-17-21.

[8] It is crucial to keep this distinction in mind. Questions like "wait, capital accounts don't work like this for tax purposes" or "what about depreciation" are things one should not think about, Cf. Jerome Lawrence and Robert E. Lee, Inherit the Wind), film version (Mathew Harrison Brady [on the witness stand]: I do not think about things I do not think about. Henry Drummond [counsel for the defendant]: Do you ever think about things that you do think about?)

To explain the both problem and this draft's solution, this Section C of this Introductory Note uses:

- ~ "this-act-only" accounts to refer to:
  - = the very simplified partner accounts,
  - = which exist solely to accommodate loss sharing *inter se* the partners in a nonLLP, and
  - = which were:
    - first established under UPA (1994) § 401,
    - omitted from UPA (2013),
    - suggested to be reinstated under Section 401(a) of the Reporter's Draft of 8-17-21; and
- ~ "real-world accounts" to refer to the nuanced, complex partner accounts maintained to comply with partnership tax law or serve nontax business purposes.

Reinstating Section 401(a) may cause confusion, due to a lack of parallelism between the bailiwick of this-act-only accounts and real-world accounts. The former type accounts pertain only to nonLLPs; the latter type of accounts pertain to both nonLLPs and LLPs.

The following chart shows the lack of parallelism that results from the limited purview of the this-act-only accounts:

	Do This-Act-Only Partner Accounts Exist and Function in …	Do Real World Partner Accounts Exist and Function in …
a nonLLP	yes	yes
an LLP	no	yes

This potential confusion did not exist when RUPA first instituted partner accounts (1994), because RUPA did not then provide for LLPs.

This draft avoids the potential confusion by:

- omitting from UPA (2013) any formal partner accounts; and
- transferring the mechanics of Section 401(a) to Section 806B, which provides for the settlement of accounts among partners upon the dissolution of a nonLLP.

This approach will remove the lack of parallelism between the this-act-only accounts and real-world accounts and will locate the this-act-only "accounting" calculations in the only place they apply.[9]

[9] The Section 401(a) accounts do not apply to interim distributions. Indeed, the default rules under all three uniform general partnership acts presuppose no interim distributions and provide for settling of accounts inter se only upon dissolution. Of course in real life, interim distributions are commonplace (by agreement), and tax law requires

D. Are Profit-Loss Allocations Transferable?
(related issue that arose while preparing this and previous drafts)

UPA (2013) § 102(23) defines "transferable interest" as:

> the right, as initially owned by a person in the person's capacity as a partner, to receive distributions from a partnership, whether or not the person remains a partner or continues to own any part of the right. The term applies to any fraction of the interest, by whomever owned.

The definition makes no reference to a share of profits and losses.

In sharp contrast, UPA (1997) § 502 states that "[t]he … transferable interest of a partner in the partnership is the partner's share of the profits and losses of the partnership and the partner's right to receive distributions." However, other UPA (1997) provisions at least imply the contrary. Section 503(b), which states the principal effect of a transfer, focuses on distributions and does not mention profit-loss allocation.[10] In addition, Section 504(d) states: "[u]pon transfer, the transferor retains the rights and duties of a partner other than the interest in distributions transferred." (Emphasis added.)

After a lengthy and fruitful conversation with Don Weidner, Reporter for UPA (1997), the UOAC Reporter understands that the drafters of UPA (1997) intended the transferable interest to include profit-loss allocations. Therefore, this draft follows UPA (1997) § 502 and expands the definition of "transferable interest" to provide that, in a non-LLP, the interest includes profits and losses as well as distributions.

Interpreting this Draft

The black letter in this draft comes from UPA (2013). Additions to the black letter are underscored in blue and deletions are ~~struck through in red~~, except that:

- language relocated from within UPA (2013) is in *italics, underscored* or ~~*struck through*~~, as appropriate; and

annual accounting as to the profits, losses, and capital account of each partner. However, the default rules are "above" such realities. Or, put another way: the complexities would be daunting of one wanted to provide default rules for interim distributions and accompanying profit/loss accounting. Moreover, partnership agreements vary widely (perhaps even wildly) when delineating interim distributions, and thus there is no typical situation for a default rule to reflect.

Note: the default rule for sharing per capita interim distributions (if made) does not purport to reflect a typical situation. The rule merely avoids traps for the unwary inherent in a per capital default rule and, moreover, continues a centuries-old principle of partnership law.

[10] With regard to profits and losses, this draft uses "share" and "allocation" interchangeably.

- additions sourced from UPA (1997) appear underlined in green, with related deletions in ~~pink, struck-through~~.

SECTION 102. DEFINITIONS. ….

(23) "Transferable interest" means the right, as initially owned by a person in the person's capacity as a partner, to receive distributions from a partnership and to share in the profits and losses of a partnership that is not a limited liability partnership, whether or not the person remains a partner or continues to own any part of the right. The term applies to any fraction of the interest, by whomever owned. [11]

SECTION 108. SIGNING OF RECORDS TO BE DELIVERED FOR FILING TO [SECRETARY OF STATE].

(a) A record delivered to the [Secretary of State] for filing pursuant to this [act] must be signed as follows:

(1) Except as otherwise provided in paragraphs (2) and (3), a record signed by a partnership must be signed by a person authorized by the partnership.

(2) A record filed on behalf of a dissolved partnership that has no partner must be signed by the person winding up the partnership's business under Section 802(c) or a person appointed under Section 802(d) to wind up the business.

(3) A statement of denial by a person under Section 304 must be signed by that person.

[11] See discussion in the Introductory Note, Section D.

(4) A statement of qualification under Section 901(a)(1) must be signed by all persons described in Section 901(a)(1)(A).[12]

(5) Any other record delivered on behalf of a person to the [Secretary of State] for filing must be signed by that person.

RELATIONS OF PARTNERS TO EACH OTHER AND TO PARTNERSHIP

SECTION 401. PARTNER'S RIGHTS AND DUTIES.[13]

(a) ~~Each partner is entitled to an equal share of the partnership distributions and, except in the case of a limited liability partnership, is chargeable with a share of the partnership losses in proportion to the partner's share of the distributions.~~[14]*Each partner has equal rights in the management and conduct of the partnership's business.*[15]

(b) *A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the affirmative vote or consent of all the partners.*[16]

(c) A partner may use or possess partnership property only on behalf of the partnership.

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[12] Section 901 has been revised to provide for "LLP upon formation" – i.e., without the partnership existing as a non-LLP for even a nanosecond (or any fraction thereof ….). The language added here states a signature requirement for the persons intending to form a partnership that is to become an LLP upon formation.
[13] To create the dual track, this draft relocates purely financial matters to Sections 405 and 806 *et seq*.
[14] The deleted language was part of the Harmonization Committee's incomplete attempt to address two different situations (LLP; non-LLP) without employing a full dual track approach.
[15] It being necessary to have something in subsection (a), this draft gives first position to a venerable principle for managing a general partnership.
[16] Given the new subject matter chosen for subsection (a), this draft relocates several other subsections to produce a more logical sequence.

(d) A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.

(e) A partnership shall reimburse a partner for an advance to the partnership beyond the amount of capital the partner agreed to contribute.

(f) A partnership shall reimburse a partner for any payment made by the partner in the course of the partner's activities on behalf of the partnership, if the partner complied with this section and Section 409 in making the payment.

~~*(d)*~~ *(g) A payment or advance made by a partner*[17] *which gives rise to a partnership obligation under subsection (e) or (f) constitutes a loan to the partnership which accrues interest from the date of the payment or advance.*

~~*(e)*~~ *(h)* A partnership shall indemnify and hold harmless a person with respect to any claim or demand against the person and any debt, obligation, or other liability incurred by the person by reason of the person's former or present capacity as a partner, if the claim, demand, debt, obligation, or other liability does not arise from the person's breach of this section or Section 407 or 409.

~~*(d)*~~ *(i)* In the ordinary course of its business, a partnership may advance reasonable expenses, including attorney's fees and costs, incurred by a person in connection with a claim or demand against the person by reason of the person's former or present capacity as a partner, if the person promises to repay the partnership if the person ultimately is determined not to be

[17] Current Drafting Rules would substitute "that" for "which" – a point made by John Stieff. This draft does not resolve this issue.

entitled to be indemnified under subsection ~~(e)~~ *(h)*.

~~(e)~~ *(j)* A partnership may purchase and maintain insurance on behalf of a partner against liability asserted against or incurred by the partner in that capacity or arising from that status even if, under Section 105(c)(7), the partnership agreement could not eliminate or limit the person's liability to the partnership for the conduct giving rise to the liability.

~~*(f) A partnership shall reimburse a partner for an advance to the partnership beyond the amount of capital the partner agreed to contribute.*~~

~~*(g) A payment or advance made by a partner which gives rise to a partnership obligation under subsection (b) or (f) constitutes a loan to the partnership which accrues interest from the date of the payment or advance.*~~

~~(h)~~ ~~*Each partner has equal rights in the management and conduct of the partnership's business.*~~

~~*(i) A partner may use or possess partnership property only on behalf of the partnership.*~~

~~(j)~~ ~~*A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.*~~

~~*(k) A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the affirmative vote or consent of all the partners.*~~

SECTION 402. BECOMING PARTNER. ***NO CHANGES***

SECTION 403. FORM OF CONTRIBUTION. ***NO CHANGES***

SECTION 404. LIABILITY FOR CONTRIBUTION. ***NO CHANGES***

SECTION 405. DISTRIBUTIONS BEFORE DISSOLUTION; SHARING OF PROFITS AND LOSSES IN PARTNERSHIP THAT IS NOT LIMITED LIABILITY PARTNERSHIP.[18]

(a) *Subject to Section 701, a person has a right to a distribution before the dissolution and winding up of a partnership only if the partnership decides to make an interim distribution.*[19]

(b) Any distribution made by a partnership before its dissolution and winding up must be in equal shares among partners, except to the extent necessary to comply with a transfer effective under Section 503 or charging order in effect under Section 504.

. (c) A person does not have a right to demand or receive a distribution from a partnership in any form other than money. ~~Except as otherwise provided in~~ Subject to Section ~~806~~ 806C,[20] a partnership may distribute an asset in kind ~~only~~ if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person's share of distributions.[21]

(d) If a partner or transferee becomes entitled to receive a distribution, the partner or transferee has the status of, and is entitled to all remedies available to, a creditor of the partnership with respect to the distribution. However, the partnership's obligation to make a

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[18] This Section carries approximately half the burden of the dual track approach. Sections 806 *et seq.* carry the other half.

[19] For the sake of more logical sequencing, this draft moves UPA (2013) § 405(a) to subsection (b) and moves UPA (2013) § 405(b) to subsection (a).

[20] This draft includes Sections 806, 806A, 806B, and 806C. The latter three numbers are merely temporary.

[21] As currently written, the language states a precondition but could be read to imply that in some circumstances the precondition does not apply – i.e., "as otherwise provided in Section 806". However, Section 806 is more, not less restrictive; in the context of winding up, Section 806 prohibits anything other than a distribution in cash. See UPA (2013) § 806(f) ("All distributions … must be paid in money.") The revision is intended to eliminate the implication. Query: Does the revised language make clear that "if" means "if and only if"?

distribution is subject to offset for any amount owed to the partnership by the partner or a person dissociated as partner on whose account the distribution is made.

(e) In a partnership that is not a limited liability partnership, each partner must be allocated:

(1) an equal share in the profits of the partnership; and

(2) a share in losses of the partnership according to the partner's share in the profits.[22]

SECTION 406. LIMITATIONS ON DISTRIBUTIONS BY LIMITED LIABILITY PARTNERSHIP. ***NO CHANGES***

SECTION 407. LIABILITY FOR IMPROPER DISTRIBUTIONS BY LIMITED LIABILITY PARTNERSHIP. ***NO CHANGES***

SECTION 408. RIGHTS TO INFORMATION OF PARTNERS AND PERSONS DISSOCIATED AS PARTNER. ***NO CHANGES***

SECTION 410. ACTIONS BY PARTNERSHIP AND PARTNERS. ***NO CHANGES***

SECTION 411. CONTINUATION OF PARTNERSHIP BEYOND DEFINITE TERM OR PARTICULAR UNDERTAKING. ***NO CHANGES***

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[22] Language to this effect is necessary to give effect to the transferability of profits and losses in a non-LLP. See Section 503(b)(1)(A) and Introductory Note, Section D.

TRANSFERABLE INTERESTS AND RIGHTS

OF TRANSFEREES AND CREDITORS

SECTION 501. PARTNER NOT CO-OWNER OF PARTNERSHIP PROPERTY. A partner is not a co-owner of partnership property and has no interest in partnership property which can be transferred, either voluntarily or involuntarily.

SECTION 502. NATURE OF TRANSFERABLE INTEREST. A transferable interest is personal property.

. **SECTION 503. TRANSFER OF TRANSFERABLE INTEREST.**

(a) A transfer, in whole or in part, of a transferable interest:

(1) is permissible;

(2) does not by itself cause a person's dissociation as a partner or a dissolution and winding up of the partnership business; and

(3) subject to Section 505, does not entitle the transferee to:

(A) participate in the management or conduct of the partnership's business; or

(B) except as otherwise provided in subsection (c), have access to records or other information concerning the partnership's business.

(b) A transferee has the right ~~to~~:

(1) ~~receive,~~ in accordance with the transfer:

(A) subject to Section 806B(c),[23] to the allocation of profits and losses

[23] For the purpose of truing up loss sharing among partners in a non-LLP, under Section 806B(c) any transferable interest transferred by a partner is treated as still belonging to the partner (regardless of whether the interest has been re-transferred).

otherwise credited or chargeable to the transferor;[24] and

(B) to receive distributions to which the transferor would otherwise be entitled; and

(2) seek under Section 801(5) a judicial determination that it is equitable to wind up the partnership business.

(c) In a dissolution and winding up of a partnership, a transferee is entitled to an account of the partnership's transactions only from the date of dissolution.

(d) A partnership need not give effect to a transferee's rights under this section until the partnership knows or has notice of the transfer.

(e) A transfer of a transferable interest in violation of a restriction on transfer contained in the partnership agreement is ineffective if the intended transferee has knowledge or notice of the restriction at the time of transfer.

(f) Except as otherwise provided in Section 601(4)(B), if a partner transfers a transferable interest, the transferor retains the rights of a partner other than the transferable interest transferred and retains all the duties and obligations of a partner.

(g) If a partner transfers a transferable interest to a person that becomes a partner with respect to the transferred interest, the transferee is liable for the partner's obligations under Sections 404[25] and 407[26] known to the transferee when the transferee becomes a partner.[27]

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[24] Note: Will a comment suffice to make clear that such "this-act-only" allocations occur only in a non-LLP.
[25] Liability for contribution
[26] Liability for improper distributions by a limited liability partnership
[27] Query: Suppose Partner X transfers 50% of X's transferable interest to Alpha and 50% to Beta. Alpha and Beta each become "a partner with respect to the transferred interest." UPA (2013) § 503(g). Are Alpha and Beta each liable to the partnership for 100% of "the partner's obligations under Sections 404 and 407?" *Id*. Or are Alpha and Beta each liable to the partnership only for their respective proportionate share of those liabilities? ;

SECTION 806. ~~DISPOSITION OF ASSETS IN WINDING UP; WHEN CONTRIBUTIONS REQUIRED~~ WINDING UP; SETTLING WITH CREDITORS.[28]

(a) In winding up its business, before settling accounts among partners, a partnership shall apply its assets,[29] including the contributions required by this section, to discharge the partnership's obligations to creditors, including partners that are creditors.[30]

~~*(b) After a partnership complies with subsection (a), any surplus must be distributed in the following order, subject to any charging order in effect under Section 504:*~~

~~*(1) to each person owning a transferable interest that reflects contributions made and not previously returned, an amount equal to the value of the unreturned contributions; and*~~

~~*(2) among persons owning transferable interests in proportion to their respective rights to share in distributions immediately before the dissolution of the partnership.*~~[31]

~~*(c)*~~ (b) If a partnership's assets are insufficient to satisfy all its obligations under subsection (a), with respect to each unsatisfied obligation incurred when the partnership was not a limited liability partnership,[32] the following rules apply:

(1) Each person that was a partner when the obligation was incurred and that has

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In any event, a substituted partner is not liable for the former partner's obligations under UPA (2013) § 306(a) (unshielded obligations). See Section 306(b) ("A person that becomes a partner is not personally liable for a debt, obligation, or other liability of the partnership incurred before the person became a partner.")

[28] Changes to Section 806 all pertain to implementing the dual path approach.

[29] A comment will note that a partnership's assets include any *partner* obligation created under Section 914.

[30] A comment will state that a partnership's obligations include any *partnership* obligation created under Section 914.

[31] Relocated to Section 806B.

[32] By its terms, this provision applies only to unshielded claims by creditors – i.e., "with respect to each unsatisfied obligation incurred when the partnership was not a limited liability partnership" (emphasis added).

not been released from the obligation under Section 703(c) and (d) shall contribute to the partnership for the purpose of enabling the partnership to satisfy the obligation. The contribution due from each of those persons is in proportion to the right to receive distributions in the capacity of a partner in effect for each of those persons when the obligation was incurred.

(2) If a person does not contribute the full amount required under paragraph (1) with respect to an unsatisfied obligation of the partnership, the other persons required to contribute by paragraph (1) on account of the obligation shall contribute the additional amount necessary to discharge the obligation. The additional contribution due from each of those other persons is in proportion to the right to receive distributions in the capacity of a partner in effect for each of those other persons when the obligation was incurred.

(3) If a person does not make the additional contribution required by paragraph (2), further additional contributions are determined and due in the same manner as provided in that paragraph.

(d) A person that makes an additional contribution under subsection (c)(2) or (3) may recover from any person whose failure to contribute under subsection (c)(1) or (2) necessitated the additional contribution. A person may not recover under this subsection more than the amount additionally contributed. A person's liability under this subsection may not exceed the amount the person failed to contribute.

SECTION 806A.[33] **SETTLING ACCOUNTS AMONG PARTNERS IN DISSOLVED LIMITED LIABILITY PARTNERSHIP.**

(a) *After a* limited liability *partnership complies with ~~subsection (a)~~* Section 806*, any*

[33] Section numbers 806A, 806B, and 806C are temporary.

surplus must be distributed in the following order, subject to any charging order in effect under Section 504:

(1) to each person owning a transferable interest that reflects contributions made and not previously returned, an amount equal to the value of the unreturned contributions; and

(2) among persons owning transferable interests in proportion to their respective rights to share in distributions immediately before the dissolution of the partnership.

~~(c)~~ (b) If a partnership does not have sufficient surplus to comply with subsection ~~(b)~~(1)(a)(1), any surplus must be distributed among the owners of transferable interests in proportion to the value of the respective unreturned contributions.

~~*(f) All distributions made under subsections (b) and (c) must be paid in money.*~~[34]

SECTION 806B. SETTLING ACCOUNTS AMONG PARTNERS IN DISSOLVED PARTNERSHIP THAT IS NOT LIMITED LIABILITY PARTNERSHIP.

(a) After a partnership that is a not a limited liability partnership complies with Section 806(a), any surplus must be applied to pay in cash the net amount distributable to partners in accordance with their right to distributions under subsections (b) and (c).

(b) Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business. In settling accounts among the partners::

(1) The partnership shall calculate for each partner, cumulatively for the period stated in subsection (c):

[34] Relocated to Section 806C.

(A) a credit equal to:

(i) the money plus the value of any other property, net of the amount of any liabilities, that the partner has contributed to the partnership; and

(ii) the amount of partnership profits allocated to the partner; and

(B) a debit equal to:

(i) the money plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner; and

(ii) the amount of partnership losses allocated to the partner.

(2) If the credit calculated for a partner under subsection (b)(1)(A) exceeds the debit calculated for the partner under subsection (b)(1)(B), the partnership shall make a distribution in respect of the partner in an amount equal to the excess. If the debit calculated for a partner under subsection (b)(1)B) exceeds the credit calculated for the partner under subsection (b)(1)(A), the partner shall contribute to the partnership an amount equal to the excess.

(c) The period for a calculation under subsection (b)(1) begins on the date the partner became a partner and extends through the liquidation of the partnership's assets in winding up, including profits and losses that result from the liquidation.

(d) In calculating a credit and debit for a partner under subsection (b), the partnership shall disregard any transfer of a transferable interest by the partner and include into the calculation any profits or losses allocated to a transferee.[35] This subsection does not affect the obligations of the partnership to make distributions in conformity with a transferee's rights under Section 502.

[35] The first sentence of subsection (d) is necessary to avoid needing subaccounts for transferees.

SECTION 806C. NO IN-KIND DISTRIBUTION IN WINDING UP. Any distribution made under Section 806A or 806B must be paid in money.

SECTION 901. BECOMING LIMITED LIABILITY PARTNERSHIP; STATEMENT OF QUALIFICATION.

(a) A partnership may become a limited liability partnership ~~pursuant to this section~~: [36]

(1) upon formation, if, before formation all persons that have agreed to become initial partners in the partnership being formed:

(A) agree that the partnership will become a limited liability partnership upon formation;[37] and

(B) deliver to the [Secretary of State] for filing a statement of qualification under subsection (b);

(2) after formation, ~~(b) The~~ if the terms and conditions on which a partnership becomes a limited liability partnership ~~must be~~ are approved:

(A) by the affirmative vote or consent necessary to amend the partnership agreement; or

(B) ~~except, in the case of a~~ if the partnership agreement ~~that~~ expressly addresses obligations to contribute to the partnership, by the affirmative vote or consent necessary to amend those provisions.

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[36] Unnecessary.
[37] Query – do we need to limit how far in advance the statement of qualification may be delivered for filing?

~~(c)~~ (b) After the agreement or approval required by subsection ~~(b)~~ (a), a partnership may be formed as a limited liability partnership or an existing partnership may become a limited liability partnership by delivering to the [Secretary of State] for filing a statement of qualification. The statement must contain:

(1) the name of the partnership which must comply with Section 902;

(2) the street and mailing addresses of the partnership's principal office and, if different, the street address of an office in this state, if any;

(3) the name and street and mailing addresses in this state of the partnership's registered agent; ~~and~~

(4) a statement that the partnership elects to become a limited liability partnership; and

(5) if the partnership will become a limited liability partnership upon formation, a statement of that fact.[38]

~~(d)~~ (c) A partnership's status as a limited liability partnership remains effective, regardless of changes in the partnership, until it is canceled pursuant to subsection ~~(f)~~ (e) or administratively revoked pursuant to Section 903.

~~(e)~~ (d) The status of a partnership as a limited liability partnership and the protection against liability of its partners for the debts, obligations, or other liabilities of the partnership while it is a limited liability partnership is not affected by errors or later changes in the information required to be contained in the statement of qualification.

~~(f)~~ (e) A limited liability partnership may amend or cancel its statement of qualification

[38] Thus, per the public record, the partnership is formed on the date the statement of qualification takes effect.

by delivering to the [Secretary of State] for filing a statement of amendment or cancellation. The statement must be approved by the affirmative vote or consent of all the partners and state the name of the limited liability partnership and in the case of:

(1) an amendment, state the text of the amendment; and

(2) a cancellation, state that the statement of qualification is canceled.

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SECTION 914. CALCULATING LOSS SHARING WHEN PARTNERSHIP BECOMES LIMITED LIABILITY PARTNERSHIP AFTER FORMATION.[39]

(a) If a partnership becomes a limited liability partnership after formation, the partnership shall determine according to Sections 806 and 806B the amount each partner would receive from or owe to the partnership under Section 806B, if, on the day before the partnership's statement of qualification becomes effective, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern and the partnership were wound up as of that day.[40]

(b) If a partner would owe an amount to the partnership under subsection (a), the amount is an obligation of the partner to the partnership. If a partner would receive an amount from the

[39] Section 914 is the "snap shot" provision.
[40] This language beginning with "if, on the day" is taken from UPA (1997 and 2013) § 701(b). Query: Suppose the subsection (a) determination indicates the partnership is insolvent, need the act provide any protection for the creditors? No, because if "push comes to shove" (i.e., the partnership eventually fails to meet its obligations), other provisions kick in to protect creditors. See Section 806(b).

partnership under subsection (a), the amount is an obligation of the partnership to the partner. An obligation under this subsection is due without interest:[41]

(1) when a person dissociates as a partner, if the dissociation does not result in a dissolution and winding up of the partnership; or

(2) otherwise, when the partnership dissolves and is wound up.

(c) The beginning date for the determination under subsection (a) is:

(1) the date of the partnership's formation, if the partnership has not previously been a limited liability partnership; or

(2) the date the partnership most recently ceased to be a limited liability partnership.

[end]

[41] It has been suggested that this provision refer to contribution obligations and rights to distribution (as in done in an actual winding up of a non-LLP partnership; see Section 806B(b)(2)). The reporter prefers the current approach, as somewhat easier to draft and, for the non-cognoscenti, easier to understand.