

DRAFT
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UNIFORM PARTNERSHIP ACT (1997) (*Last Amended 20__*)

Uniform Law Commission

September 22 – 23, 2023 Committee Meeting Draft



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National Conference of Commissioners on Uniform State Laws

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September 12, 2023

**Drafting Committee on
Uniform Unincorporated Organization Acts (20__)**

The committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:

Lisa R. Jacobs	Pennsylvania, <i>Chair</i>
Robert J. Desiderio	New Mexico
Steven G. Frost	Illinois
Thomas E. Geu	South Dakota
Patrick A. Guida	Rhode Island
Harry J. Haynsworth IV	Minnesota
David S. Jensen	Idaho
Kimberly A. Lowe	Minnesota
Edwin E. Smith	Massachusetts
Michael J. Wilkins	Utah
Thomas Hemmendinger	Rhode Island, <i>Division Chair</i>
Dan Robbins	California, <i>President</i>

Other Participants

William H. Clark Jr.	Pennsylvania, <i>National Conference Reporter</i>
David S. Walker	Iowa, <i>National Conference Reporter</i>
Elizabeth S. Miller	Texas, <i>American Bar Association Advisor</i>
James C. Wine	Iowa, <i>American Bar Association Section Advisor</i>
John J. Stieff	Indiana, <i>Style Liaison</i>
Tim Schnabel	Illinois, <i>Executive Director</i>

Copies of this act may be obtained from:

Uniform Law Commission
111 N. Wabash Ave., Suite 1010
Chicago, IL 60602
(312) 450-6600
www.uniformlaws.org

UNIFORM PARTNERSHIP ACT (1997) (Last Amended 2013)

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UNIFORM PARTNERSHIP ACT—QUICK CHRONOLOGY

1914—Original Uniform Partnership Act.

1992—Promulgation of Uniform Partnership Act (1992) by Uniform Law Commissioners.

1993—Amendments to Uniform Partnership Act (1992). Becomes Uniform Partnership Act (1993).

1994—Amendments to Uniform Partnership Act (1993). Becomes Uniform Partnership Act (1994).

1996—Amendments to Uniform Partnership Act (1994). Adds Limited Liability Partnership. Becomes Uniform Partnership Act (1996).

1997—Amendment to Uniform Partnership Act (1996), Section 801. Becomes Uniform Partnership Act (1997)

2011—Amendments adopted as part of the Harmonization Project. Becomes Uniform Partnership Act (1997) (Last Amended 2013).

PREFATORY NOTE TO UNIFORM PARTNERSHIP ACT (1997)

The National Conference of Commissioners on Uniform State Laws first considered a uniform law of partnership in 1902. Although early drafts had proceeded along the mercantile or "entity" theory of partnerships, later drafts were based on the common-law "aggregate" theory. The resulting Uniform Partnership Act ("UPA"), which embodied certain aspects of each theory, was finally approved by the Conference in 1914. The UPA governs general partnerships, and also governs limited partnerships except where the limited partnership statute is inconsistent. The UPA has been adopted in every State other than Louisiana and has been the subject of remarkably few amendments in those States over the past 80 years.

In January of 1986, an American Bar Association subcommittee issued a detailed report that recommended extensive revisions to the UPA. See UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations, Section of Business Law, American Bar Association, *Should the Uniform Partnership Act be Revised?*, 43 Bus. Law. 121 (1987) ("ABA Report"). The ABA Report recommended that the entity theory "should be incorporated into any revision of the UPA whenever possible." *Id.* at 124.

In 1987, the Conference appointed a Drafting Committee to Revise the Uniform Partnership Act and named a Reporter. The Committee held its initial meeting in January of 1988 and a first reading of the Committee's draft was begun at the Conference's 1989 Annual Meeting in Kauai, Hawaii. The first reading was completed at the 1990 Annual Meeting in Milwaukee. The second reading was begun at Naples, Florida, in 1991 and completed at San Francisco in 1992. The Revised Uniform Partnership Act (1992) was adopted unanimously by a vote of the States on August 6, 1992. The following year, in response to suggestions from various groups, including an American Bar Association subcommittee and several state bar associations, the Drafting Committee recommended numerous revisions to the Act. Those were adopted at the Charleston, South Carolina, Annual Meeting in 1993, and the Act was restyled as the Uniform Partnership Act (1993). Subsequently, a final round of changes was incorporated, and the Conference unanimously adopted the Uniform Partnership Act (1994) at its 1994 Annual Meeting in Chicago. The Revised Act was approved by the American Bar Association House of Delegates in August, 1994.

The Uniform Partnership Act (1994) ("Revised Act" or "RUPA") gives supremacy to the partnership agreement in almost all situations. The Revised Act is, therefore, largely a series of "default rules" that govern the relations among partners in situations they have not addressed in a partnership agreement. The primary focus of RUPA is the small, often informal, partnership. Larger partnerships generally have a partnership agreement addressing, and often modifying, many of the provisions of the partnership act.

The Revised Act enhances the entity treatment of partnerships to achieve simplicity for state law purposes, particularly in matters concerning title to partnership property. RUPA does not, however, relentlessly apply the entity approach. The aggregate approach is retained for some purposes, such as partners' joint and several liability.

The Drafting Committee spent significant effort on the rules governing partnership

1 breakups. RUPA's basic thrust is to provide stability for partnerships that have continuation
2 agreements. Under the UPA, a partnership is dissolved every time a partner leaves. The Revised
3 Act provides that there are many departures or "dissociations" that do not result in a dissolution.
4

5 Under the Revised Act, the withdrawal of a partner is a "dissociation" that results in a
6 dissolution of the partnership only in certain limited circumstances. Many dissociations result
7 merely in a buyout of the withdrawing partner's interest rather than a winding up of the
8 partnership's business. RUPA defines both the substance and procedure of the buyout right.
9

10 Article 6 of the Revised Act covers partner dissociations; Article 7 covers buyouts; and
11 Article 8 covers dissolution and the winding up of the partnership business. See generally
12 Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters'*
13 *Overview*, 49 *Bus. Law.* 1 (1993).
14

15 The Revised Act also includes a more extensive treatment of the fiduciary duties of
16 partners. Although RUPA continues the traditional rule that a partner is a fiduciary, it also makes
17 clear that a partner is not required to be a disinterested trustee. Provision is made for the
18 legitimate pursuit of self-interest, with a counterbalancing irreducible core of fiduciary duties.
19

20 Another significant change introduced by RUPA is provision for the public filing of
21 statements containing basic information about a partnership, such as the agency authority of its
22 partners. Because of the informality of many partnerships, and the inadvertence of some,
23 mandatory filings were eschewed in favor of a voluntary regime. It was the Drafting
24 Committee's belief, however, that filings would become routine for sophisticated partnerships
25 and would be required by lenders and others for major transactions.
26

27 Another innovation is found in Article 9. For the first time, the merger of two or more
28 partnerships and the conversion of partnerships to limited partnerships (and the reverse) is
29 expressly authorized, and a "safe harbor" procedure for effecting such transactions is provided.
30

31 One final change deserves mention. Partnership law no longer governs limited
32 partnerships pursuant to the provisions of RUPA itself. First, limited partnerships are not
33 "partnerships" within the RUPA definition. Second, UPA Section 6(2), which provides that the
34 UPA governs limited partnerships in cases not provided for in the Uniform Limited Partnership
35 Act (1976) (1985) ("RULPA") has been deleted. No substantive change in result is intended,
36 however. Section 1105 of RULPA already provides that the UPA governs in any case not
37 provided for in RULPA, and thus the express linkage in RUPA is unnecessary. Structurally, it is
38 more appropriately left to RULPA to determine the applicability of RUPA to limited partnerships.
39 It is contemplated that the Conference will review the linkage question carefully, although no
40 changes in RULPA may be necessary despite the many changes in RUPA.
41

42 Finally, the Drafting Committee wishes to express its deep appreciation for the
43 extraordinary time and effort that has been devoted to this project by its Reporter, Donald J.
44 Weidner, Dean of the Florida State University College of Law; by its Assistant Reporter,
45 Professor John W. Larson of the Florida State University College of Law; by its American Bar
46 Association Advisors Allan G. Donn, of Norfolk, Virginia (ABA Section of Taxation and later the

1 ABA Advisor, and a member of the original ABA subcommittee that recommended revising the
2 UPA), Harry J. Haynsworth, Dean of the Southern Illinois University School of Law (the original
3 ABA Advisor until he became a Commissioner and member of the Drafting Committee in 1992
4 and who was also a member of the original ABA subcommittee), S. Stacy Eastland, of Houston,
5 Texas (Probate and Trust Division of the ABA Section of Real Property, Probate and Trust Law),
6 and Caryl B. Welborn, of San Francisco, California (Real Property Division of the ABA Section
7 of Real Property, Probate and Trust Law); and by a number of other advisors and observers
8 without whose assistance the successful completion of this project would not have been possible:
9 Edward S. Merrill of Walnut Creek, California, Gregory P.L. Pierce of Chicago, Illinois, Paul L.
10 Lion, III, of San Jose, California, Professor Robert W. Hillman of the University of California at
11 Davis School of Law, John Goode of Richmond, Virginia, Ronald H. Wilcomes of New York,
12 New York, Professor Gary S. Rosin of the South Texas College of Law, James F. Fotenos of San
13 Francisco, California, and Joel S. Adelman of Detroit, Michigan (who also was a member of the
14 original ABA subcommittee).

15
16 The Drafting Committee also would like to express its appreciation to the members of the
17 ABA Committee on Partnerships and Unincorporated Business Organizations, and its chairs,
18 Thurston R. Moore of Richmond, Virginia, and John H. Small of Wilmington, Delaware, for all
19 the time and effort they devoted to this project, and to that Committee's special Subcommittee on
20 the Revised Uniform Partnership Act, the chairs of that subcommittee, Lauris G.L. Rall of New
21 York, New York, and Gerald V. Niesar of San Francisco, California, and its members, in
22 particular, Robert R. Keatinge of Denver, Colorado, Professor Larry E. Ribstein of the George
23 Mason University School of Law, and Anthony van Westrum of Denver, Colorado. Each of these
24 individuals added immeasurably to the Drafting Committee's discussion and consideration of
25 both the major policy issues and the technical drafting issues raised by the Act.

26 27 **Addendum Pertaining to 1997 Amendments**

28 In 1995, the Conference appointed a Drafting Committee to add provisions to RUPA
29 authorizing the creation of a new form of general partnership called a limited liability partnership
30 (LLP). At the time RUPA was first approved in 1992, only two states had adopted limited
31 liability partnership legislation. By the time the LLP amendments to RUPA were approved by the
32 Conference at the 1996 Annual Meeting, over forty states had adopted limited liability
33 partnership provisions to their general partnership statutes.

34
35 The LLP amendments to RUPA deal with four major issues: (1) scope of a partner's
36 liability shield; (2) the voting requirement to become an LLP; (3) the effect of becoming an LLP
37 on the partnership agreement; and (4) the annual filing requirement.

38 39 **1. Scope of a Partner's Liability Shield**

40
41 The amendments to add LLP provisions to RUPA include a new Section 306(c) providing
42 for a corporate-styled liability shield which protects partners from vicarious personal liability for
43 all partnership obligations incurred while a partnership is a limited liability partnership. The
44 complete liability shield comports with the modern trend among the states. Most states,
45 however, have adopted a partial liability shield protecting the partners only from vicarious

1 personal liability for all partnership obligations arising from negligence, wrongful acts or
2 misconduct, whether characterized as tort, contract or otherwise, committed while the partnership
3 is an LLP. The Act does not alter a partner's liability for personal misconduct and does not alter
4 the normal partnership rules regarding a partner's right to indemnification from the partnership
5 (Section 401(c)). Therefore, the primary effect of the new liability shield is to sever a partner's
6 personal liability to make contributions to the partnership when partnership assets are insufficient
7 to cover its indemnification obligation to a partner who incurs a partnership obligation in the
8 ordinary course of the partnership's business.

9 10 2. Voting Requirement to Become an LLP

11
12 The Act includes a new Section 1001(b) which provides that the decision to become an
13 LLP is a major partnership event equivalent to an amendment of the partnership agreement.
14 Therefore, the required vote equals the vote required to amend the partnership agreement. When
15 the agreement is silent on these matters, the required vote would be unanimous. Where the
16 agreement includes several amendment votes depending on the nature of the amendment, the
17 required vote is that which considers contribution obligations since those obligations are the most
18 affected by the amendments. Most states currently consider the required vote to become a
19 limited liability partnership to be an ordinary partnership decision requiring only a majority
20 consent.

21
22 In becoming an LLP, each partner should consider a personal liability calculus. Where
23 partnership assets are insufficient to indemnify a partner for an LLP obligation, each partner
24 forfeits a right to receive contributions from other partners in exchange for being relieved of the
25 obligation to contribute to the personal liability of other partners. This calculus will be different
26 for each partner and will vary, for example, depending on the size and business of the
27 partnership, the number of partners, the amount of insurance, and the relative risk of each
28 partner's business practice compared to fellow partners. To adequately consider these varying
29 interests, the Act adopts the vote required to amend the partnership agreement in special and
30 general cases.

31 32 3. Effect of Becoming an LLP on the Partnership Agreement

33
34 The last sentence in new Section 306(c) provides that when a partnership becomes an
35 LLP, the resulting liability shield applies notwithstanding inconsistent provisions of the
36 partnership agreement existing immediately before the vote to become an LLP was taken. When
37 the partners vote to become an LLP, they obviously intend to sever their personal responsibility
38 to make contributions to the partnership when partnership assets are insufficient to cover
39 partnership indemnification obligations to a partner. A partner's contribution obligation may be
40 enforced not only by a partner (Sections 401 and 405) but also by a partner's creditors (Section
41 807(f)). In essence, the new Section 306(c) automatically "amends" the partnership agreement to
42 remove personal liability for contribution obligations that may exist under the terms of the
43 partnership agreement as it exists immediately before the vote. However, the partners are not
44 prohibited from thereafter amending the partnership agreement again to reestablish contribution
45 obligations (see Section 103(b)).

4. Annual Filing Requirement

The Act includes new Section 1001(d) which provides that a partnership's status as an LLP remains effective until it is revoked by a vote of the partners or is canceled by the Secretary of State under new Section 1003(c) for the failure to file an annual report or pay the required annual fees. Most states provide that unless an LLP timely files an annual registration statement, its LLP status is "automatically" terminated but may be resurrected prospectively only with a subsequent corrective filing. Under this view, an operating partnership may have significant "gaps" in its shield which is further complicated by sourcing rules necessary to determine when a partnership obligation belongs to the shielded LLP or the unshielded partnership. As with corporations and limited liability companies, the Act preserves the LLP status and the partners' liability shield unless the LLP status is revoked by the partners or canceled by the Secretary of State. In the latter case, potential gaps in the liability shield are cured with a retroactive resurrection of the LLP status if a corrective filing is made within two years (Section 1003(e)).

The LLP Drafting Committee wishes to express its gratitude to the Reporter for this project, Professor Carter G. Bishop of Suffolk University Law School. Professor Bishop's comprehensive knowledge of partnership law and tax and his drafting expertise were instrumental in enabling the Drafting Committee to complete this project in one year. The Drafting Committee also wishes to thank the following advisors and observers, whose expertise and advice were very important to the success of this project: Elizabeth G. Hester of Richmond, Virginia (ABA Advisor); Lou Conti of Orlando, Florida (ABA Section of Business Law Advisor); Steven G. Frost of Chicago, Illinois (ABA Section of Taxation Advisor); Professor Thomas E. Geu of the University of South Dakota School of Law (ABA Section of Real Property, Probate and Trust Advisor); Sanford J. Liebschutz of Rochester, New York (ABA Section of Real Property, Probate and Trust Advisor and American College of Real Estate Lawyers Advisor); Robert A. Creamer of Chicago, Illinois (Attorneys' Liability Assurance Society, Inc.); R. Michael Duffy of Washington, D.C. (The Accountant's Coalition); Professor Philip Hablutzel of Chicago, Illinois (Illinois Secretary of State's Corporation Law Advisory Committee); Robert R. Keatinge of Denver, Colorado (ABA Business Law Section); Mark Lubin of San Francisco, California (California Bar Association); Professor Sandra Miller of Chester, Pennsylvania; and William R. Stein of Washington, D.C. (The Accountant's Coalition); and Ronald H. Wilcomes of Paramus, New Jersey (American College of Real Estate Lawyers).

PREFATORY NOTE TO 2011 AND 2013 HARMONIZATION AMENDMENTS

From 2009 to 2013, the Uniform Law Conference undertook an intensive effort to harmonize, to the extent possible, all uniform acts pertaining to unincorporated organizations. As part of that effort, the Uniform Partnership Act (1997) underwent four types of changes: substantive; major improvements in language; minor revisions in language for the sake of harmonization; and relocation within this particular "spoke" of provisions that are part of the "HUB" in the new Uniform Business Organizations Code ("UBOC").

Substantive Changes

The most significant substantive changes are:

- simplifying the section on “knowledge” and “notice,” Section 103;
- centralizing constructive notice provisions, Section 103(d);
- revising and expanding provisions pertaining to the partnership agreement, Sections 105–107;
- updating various filing provisions pertaining to limited liability partnerships, Sections 108–118;
- providing that, in the context of a claim to “pierce the veil” of a limited liability partnership, “[t]he failure of [the] limited liability partnership to observe formalities relating to the exercise of its powers or management of its business is not a ground for imposing liability on a partner for a debt, obligation, or other liability of the partnership,” Section 306(d);
- providing rules on unlawful distributions, Sections 406–407;
- “uncabining” (*i.e.*, making non-exhaustive) the codification of fiduciary duties, Section 409 (a)–(b);
- making clear that the act’s obligation of good faith and fair dealing is the common law obligation of contract law, Section 409(d);
- adding as an event causing dissolution “the passage of 90 consecutive days during which the partnership does not have at least two partners,” Section 801(6); and
- adding the comprehensive provisions of the Model Entity Transactions Act, Article 11.

Substantial Improvements to Language

The most significant improvements in language appear in Section 105 (formerly Section 103), the first of three sections addressing the partnership agreement. The structure of Section 105 is far less complicated than the structure of former Section 103.

Harmonization-Based Language Changes

Minor changes in language for the sake of harmonization appear throughout the act.

Relocation and Renumbering of HUB-Based Provisions

The Harmonization Project included both the harmonization of various stand-alone acts and the compilation of UBOC, which comprises a “HUB” (somewhat analogous to Article 1 of the Uniform Commercial Code) and various spokes. Each spoke pertains to a different type of organization (*e.g.*, general partnership, limited partnership, limited liability company, statutory trust entity). Naturally, spokes in the Code do not repeat the provisions from the HUB. In

1 contrast, each stand-alone act includes provisions that appear in the HUB in the Code.

2
3 So that the section numbers of this “spoke” correspond with the spoke provisions in the
4 Code, HUB-based provisions of this Act have been renumbered to appear at the end of articles.
5 *See, e.g.*, Sections 112–121.

6
7 The Drafting Committee on Harmonization of Business Entity Acts was greatly assisted
8 in its work by the very substantial and knowledgeable contributions of the following Observers,
9 who diligently attended and actively participated in its meetings:

10
11 ELIZABETH K. BABSON, One Logan Square, 18th & Cherry Sts., Philadelphia, PA 19103
12 LISA R. JACOBS, One Liberty Place, 1650 Market St., Philadelphia, PA 19103
13 GARTH JACOBSON, 520 Pike St., Seattle, WA 98101
14 JULIE M. KARAVAS, 1248 O St., Lincoln, NE 68508
15 DAVID MARTIN, 333W. Wyoming, St. Paul, MN 55107
16 SANDRA K. MILLER, One University Place, Chester, PA 19013
17 JOHN A. SINGER, Federal Trade Commission, Washington, D.C.
18 ROBERT H. SITKOFF, 1575 Massachusetts Ave., Cambridge, MA 02138
19 SARAH STEINBECK, Colorado Secretary of State, Denver, CO
20 KEVIN P. WALSH, One Logan Square, 18th & Cherry Sts., Philadelphia, PA 19103
21 HOWARD P. WALTHALL, Cumberland School of Law, Birmingham, AL 35229
22

23 EXPLANATORY NOTE ON THE REVISED COMMENTS

24 As part of the Harmonization Project, the Conference substantially revised the comments
25 to the Uniform Partnership Act. Professor Daniel S. Kleinberger was the principal drafter of the
26 revised comments.

27 To distinguish among the current and prior versions of uniform business organization
28 acts, the Harmonization Comments use the following references.

29
30 The phrase “this act” refers to the Harmonized act (*i.e.*, the Uniform Partnership Act
31 (1997) (Last Amended 2013)).

32
33 “UPA (1997)” refers to the version of the Uniform Partnership Act originally
34 promulgated in 1994, with all amendments through 1997.

35
36 “UPA (1914)” refers to the original Uniform Partnership Act as promulgated in 1914.

37
38 “ULLCA (2006) (Last Amended 2013)” refers to the Revised Uniform Limited Liability
39 Company Act as harmonized.

40
41 “ULLCA (2006)” refers to the Revised Uniform Limited Liability Act as promulgated in
42 2006.

43
44 “ULLCA (1996)” refers to the original Uniform Limited Liability Company Act as

1 promulgated in 1996.

2
3 “ULPA (2001) (Last Amended 2013)” refers to the Uniform Limited Partnership Act
4 (2001) as harmonized.

5
6 “ULPA (2001)” refers to the Uniform Limited Partnership Act as promulgated in 2001.

7
8 “ULPA (1976/1985)” refers to the Revised Uniform Limited Partnership Act as
9 promulgated in 1976 and substantially revised in 1985.

10
11 “ULPA (1976)” refers to the Revised Uniform Limited Partnership Act, as promulgated in
12 1976.

13
14 “ULPA (1916)” refers to the Uniform Limited Partnership Act as promulgated in 1916.

15
16 “MBCA” refers to the Model Business Corporation Act.

1 **UNIFORM PARTNERSHIP ACT (1997)**
2 **(Last Amended ~~2013~~ 20)**

3
4 **[ARTICLE] 1**

5 **GENERAL PROVISIONS**

6 **SECTION 101. SHORT TITLE.** This [act] may be cited as the Uniform Partnership
7 Act.

8 **Comment**

9 This act is drafted to replace a state’s current general partnership statute, whether or not
10 that statute is based on UPA (1914) or UPA (1997). Section 110 contains transition provisions.

11
12 **SECTION 102. DEFINITIONS.** In this [act]:

13 (1) “Business” includes every trade, occupation, and profession.

14 (2) “Contribution”, except in the phrase “right of contribution”, means property or a
15 benefit described in Section 403 which is provided by a person to a partnership to become a
16 partner or in the person’s capacity as a partner.

17 (3) “Debtor in bankruptcy” means a person that is the subject of:

18 (A) an order for relief under Title 11 of the United States Code or a comparable
19 order under a successor statute of general application; or

20 (B) a comparable order under federal, state, or foreign law governing insolvency.

21 (4) “Distribution” means a transfer of money or other property from a partnership to a
22 person on account of a transferable interest or in a person’s capacity as a partner. The term:

23 (A) includes:

24 (i) a redemption or other purchase by a partnership of a transferable
25 interest; and

26 (ii) a transfer to a partner in return for the partner’s relinquishment of any
27 right to participate as a partner in the management or conduct of the partnership’s business or

1 have access to records or other information concerning the partnership’s business; and

2 (B) does not include amounts constituting reasonable compensation for present or
3 past service or payments made in the ordinary course of business under a bona fide retirement
4 plan or other bona fide benefits program.

5 (5) “Foreign limited liability partnership” means a foreign partnership whose partners
6 have limited liability for the debts, obligations, or other liabilities of the foreign partnership
7 under a provision similar to Section 306(c).

8 (6) “Foreign partnership” means an unincorporated entity formed under the law of a
9 jurisdiction other than this state which would be a partnership if formed under the law of this
10 state. The term includes a foreign limited liability partnership.

11 **(7) “Governing jurisdiction” means the jurisdiction whose law governs the internal**
12 **affairs of an entity.**

13 ~~(7)~~ **(8)** “Jurisdiction”, used to refer to a political entity, means the United States, a state, a
14 foreign country, or a political subdivision of a foreign country.

15 ~~(8) “Jurisdiction of formation” means the jurisdiction whose law governs the~~
16 ~~internal affairs of an entity.~~

17 *{Source: Issue I}*

18 (9) “Limited liability partnership”, ~~except in the phrase “foreign limited liability~~
19 ~~partnership” and in [Article] 11, or “domestic limited liability partnership”~~ means a
20 partnership that has filed a statement of qualification under Section 901 and does not have a
21 similar statement in effect in any other jurisdiction.

22 (10) “Partner” means a person that:

23 (A) has become a partner in a partnership under Section 402 or was a partner in a

1 partnership when the partnership became subject to this [act] under Section 110; and

2 (B) has not dissociated as a partner under Section 601.

3 (11) “Partnership”, ~~except in [Article] 11, or “domestic partnership”~~ means an
4 ~~association of two or more persons to carry on as co-owners a business for profit entity~~
5 formed under this [act] or ~~that becomes subject to~~ whose internal affairs become governed by
6 this [act] under Section 104 or 110 or [Article] 11 ~~or Section 110. The term includes a Each~~
7 term includes a domestic limited liability partnership but not a foreign limited liability
8 partnership.

9 {Source: Issue I}

10 (12) “Partnership agreement” means the agreement, whether or not referred to as a
11 partnership agreement and whether oral, implied, in a record, or in any combination thereof, of
12 all the partners of a partnership concerning the matters described in Section 105(a). The term
13 includes the agreement as amended or restated.

14 (13) “Partnership at will” means a partnership in which the partners have not agreed to
15 remain partners until the expiration of a definite term or the completion of a particular
16 undertaking.

17 (14) “Person” means an individual, ~~business corporation, nonprofit corporation,~~
18 ~~partnership, limited partnership, limited liability company, [general cooperative~~
19 ~~association,] limited cooperative association, unincorporated nonprofit association,~~
20 ~~statutory trust, business trust, common-law business trust,~~ estate, ~~trust, association, joint~~
21 ~~venture, public corporation,~~ business or nonprofit entity, government or governmental
22 subdivision, agency, or instrumentality, or ~~any~~ other legal ~~or commercial~~ entity. The term
23 includes a protected series, however denominated, of an entity if the protected series is

**established under law that limits, or limits if conditions specified under law are satisfied,
the ability of a creditor of the entity or of another protected series of the entity to satisfy a
claim from assets of the protected series.**

{Source: Issue I}

(15) “Principal office” means the principal executive office of a partnership or a foreign limited liability partnership, whether or not the office is located in this state.

(16) “Property” means all property, whether real, personal, or mixed or tangible or intangible, or any right or interest therein.

(17) “Record”, used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(18) “Registered agent” means an agent of a limited liability partnership or foreign limited liability partnership which is authorized to receive service of any process, notice, or demand required or permitted by law to be served on the partnership.

(19) “Registered foreign limited liability partnership” means a foreign limited liability partnership that is registered to do business in this state pursuant to a statement of registration filed by the [Secretary of State].

(20) “Sign” means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(21) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(22) “Transfer” includes:

(A) an assignment;

(B) a conveyance;

(C) a sale;

(D) a lease;

(E) an encumbrance, including a mortgage or security interest;

(F) a gift; and

(G) a transfer by operation of law.

(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 **domestic partnership or foreign** 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.

{Source: Issue 3.}

(24) “Transferee” means a person to which all or part of a transferable interest has been transferred, whether or not the transferor is a partner.

Comment

UPA (1997) section 101 defined fourteen terms. This section defines twenty-four terms. The increase is generally due to harmonization and more particularly to changes made to bring the LLP provisions pertaining to limited liability and filings into line with the corresponding provisions of ULPA (2001) (Last Amended 2013) and ULLCA (2006) (Last Amended 2013). *See, e.g.*, Sections 111–117 (provisions pertaining to filings), 407 (liability for improper distributions).

This section contains definitions for terms used throughout the act; it is important to remember that “partnership” means solely a domestic general partnership, except when “partnership” is used as part of a multiword-term (*e.g.*, “foreign partnership”). Section 1101 contains definitions specific to Article 11’s provisions on mergers, conversions, interest exchanges, and domestications.

“Business” [(1)]—This definition originated in UPA (1914) § 2 and is fundamentally

1 important; a general partnership must have a business purpose. *See* Section 202(a) (referring to
2 the association of two or more persons to carry on as co-owners a business for profit). *Compare*
3 Section 102(1), *with* ULPA (2001) (Last Amended 2013) § 110(b) (“A limited partnership may
4 have any lawful purpose, regardless of whether for profit.”), *and* ULLCA (2006) (Last Amended
5 2013) § 108(a) (same as to a limited liability company).

6
7 **“Contribution” [(2)]**—This definition is based on ULPA (2001) § 102(2)
8 (“Contribution”, except in the phrase “right of contribution”, means any benefit provided by a
9 person to a limited partnership in order to become a partner or in the person’s capacity as a
10 partner.”). UPA (1997) did not define “contribution.” The Harmonization Project added this
11 definition.

12
13 This definition serves to distinguish capital contributions from other circumstances under
14 which a partner or would-be partner might provide benefits to a general partnership (*e.g.*,
15 providing services to the partnership as an employee or independent contractor, leasing property
16 to the partnership).

17
18 This definition also distinguishes “contributions” from capital raised from transferees
19 who invest; to be a contribution, the property or benefit must be “provided by a person ... to
20 become a partner or in the person’s capacity as a partner. This distinction is ubiquitous in the law
21 of unincorporated business organizations. *See, e.g.,* ULPA (2001) § 102(2) definition (quoted
22 above); N.Y. LTD. LIAB. CO. LAW § 102(f) (McKinney 2013) (“‘Contribution’ means any cash,
23 property, services rendered, or a promissory note or other binding obligation to contribute cash or
24 property or to render services that a member contributes to a limited liability company in his or
25 her capacity as a member.”)

26
27 In contrast, partnership agreements sometimes provide for contributions from transferees.
28 In such circumstances, the default rules for liquidating distributions should be altered
29 accordingly. *See* Section 806(b)(1) (referring to distributions to be made “to each person owning
30 a transferable interest that reflects *contributions* made and not previously returned.”) (emphasis
31 added).

32
33 **“Distribution” [(4)(A)—redemptions included]**—This provision specifically refers to
34 transactions between a general partnership and one of its partners, which in the corporate context
35 would be labeled “redemption.” The paragraph has subparts because ownership interests in a
36 partnership are conceptually bifurcated into economic rights (“transferable interest”), and
37 governance and information rights.

38
39 Under Section 405(a), “[a]ny distribution made by a partnership before its dissolution and
40 winding up must be in equal shares among partners, except to the extent necessary to comply
41 with a transfer effective under Section 503 or charging order in effect under Section 504.” Since
42 a redemption is a distribution, absent authorization in the partnership agreement a partnership
43 may not redeem the interest of one partner or transferee without redeeming (or at least offering to
44 redeem) the interests of all other partners and transferees to a comparable extent.

45
46 The law of close corporations has flirted with a similar notion. *See, e.g., Donahue v. Rodd*

1 *Electrotype Co. of New England, Inc.*, 328 N.E.2d 505, 518 (Mass. 1975) (stating, with regard to
2 closely held corporations, “if the stockholder whose shares were purchased was a member of the
3 controlling group, the controlling stockholders must cause the corporation to offer each
4 stockholder an equal opportunity to sell a ratable number of his shares to the corporation at an
5 identical price”); *cf. Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976)
6 (stating that “untempered application of the strict good faith standard enunciated in *Donahue* . . .
7 will result in the imposition of limitations on legitimate action by the controlling group in a close
8 corporation which will unduly hamper its effectiveness in managing the corporation in the best
9 interests of all concerned”). *See also Toner v. Baltimore Envelope Co.*, 498 A.2d 642, 650 (Md.
10 1985) (rejecting the “per se breach of duty” approach).

11
12 A partnership agreement can override Section 405(a)’s equal treatment requirement
13 without specifically mentioning redemptions.

14
15 EXAMPLE: Ryan Company is a general partnership whose partnership agreement:
16 (i) includes a list (the “protected list”) of decisions or actions that may be taken only with
17 the consent of all partners; and (ii) provides that all other decisions and acts may be taken
18 as the Management Committee determines. The protected list does not include
19 redemptions. The partnership agreement overrides the Section 404(a)’s equal treatment
20 requirement.

21
22 [(4)(B)—exclusion]—This exclusion affects the reach of: (i) the charging order remedy
23 under Section 504; and (ii) Section 407’s clawback provision applicable to distributions made by
24 a limited liability partnership. The effect on the clawback provision reflects the law in several
25 states, *see, e.g.*, DEL. CODE ANN. tit. 6, § 15-309(a) (2014); VA. CODE ANN. § 13.1-1036 (2014),
26 and makes sense conceptually and as a matter of policy. *See In re Tri-River Trading, L.L.C.*, 329
27 B.R. 252, 266 (B.A.P. 8th Cir. 2005), *aff’d*, 452 F.3d 756 (8th Cir. 2006) (“We know of no
28 principle of law which suggests that a manager of a company is required to give up agreed upon
29 salary to pay creditors when business turns bad.”). UPA (1997) provides no clawback provision,
30 an omission that disadvantaged creditors of an LLP compared to creditors of other entities with a
31 liability shield.

32
33 “Foreign limited liability partnership” and “Foreign partnership” [(5) and (6)]—
34 These definitions intend a flexible, comparative approach. Under Paragraph 6, if a particular
35 type of foreign entity has key legal characteristics that approximate the essential legal
36 characteristics of a domestic general partnership, that particular type of foreign entity is a foreign
37 partnership under this act. Likewise, under Paragraph 5, if a foreign partnership has a liability
38 shield similar to the shield provided under this act for a domestic LLP, the foreign partnership is
39 a foreign limited liability partnership.

40
41 As further explained in the comment to Section 306(c), this act provides a full liability
42 shield (*i.e.*, the shield applies regardless of the law giving rise to a claim against an LLP). A few
43 jurisdictions provide only a partial shield. *See, e.g.*, 15 PA. CONS. STAT. ANN. § 8204 (West 2013)
44 (providing the partners of an LLP a shield for claims against the partnership “whether sounding
45 in contract or tort or otherwise,” but only the claims that “arise from any negligent or wrongful
46 acts or misconduct committed by another partner or other representative of the partnership”).

1 The resulting partial shield does not protect partners against liability for the partnership's
2 ordinary commercial debts, such as liability for lease payments. Nonetheless, a partial-shield
3 foreign LLP would be a "foreign limited liability partnership" under Paragraph 6.

4
5 **"Jurisdiction of formation" [(8)] "Governing jurisdiction" [(7)]**—This definition" is
6 not limited to United States jurisdictions.

7
8 **"Limited liability partnership" [(9)]**—Under this act (and most, if not all, LLP
9 statutes), a general partnership obtains its LLP status from only one jurisdiction. The resulting
10 LLP is "domestic" with regard to that jurisdiction and "foreign" with regard to all others.

11
12 Sections 901(f) (cancellation of statement of qualification) and 903 (administrative
13 revocation of statement of qualification) limit this paragraph's open-ended definition of a
14 "limited liability partnership" as "a partnership that has filed a statement of qualification under
15 Section 901." Under this act, LLP status depends on a statement of qualification being in effect.
16 See Section 903(d) and its comment.

17
18 **"Partner" [(10)]**—Under Section 202(a), any "person" can be a partner. Paragraph 14 of
19 this section defines "person" very broadly to include individuals and "any . . . legal or
20 commercial entity." At common law, "[t]he general rule . . . [was] that every person of sound
21 mind, *sui juris*, and not otherwise restrained by law, may enter into a contract of partnership."
22 JOSEPH STORY, COMMENTARIES ON THE LAW ON PARTNERSHIP § 7, at 10 (2d ed. 1850). The
23 phrase "sound mind" and the term "*sui juris*" suggest that at common law a partner was
24 necessarily an individual. See BLACK'S LAW DICTIONARY (9th ed. 2009) (defining *sui juris* as
25 one "[o]f full age and capacity"). UPA (1914) § 2 defined "person" to include "partnerships,
26 corporations, and other associations." See, e.g., *Williams v. Mammoth of Alaska, Inc.*, 890 P.2d
27 581, 584 n.8 (Alaska 1995) (stating that under UPA (1914) "[a] partner need not be a natural
28 person").

29
30 After a person has been dissociated as a partner under Section 602, the term "partner"
31 continues to apply to the person's conduct while a partner. See Section 603(b).

32
33 **"Partnership" [(11)]**—This definition, combined with Section 202(a), makes clear that a
34 general partnership is a *business* organization. This definition makes no reference to a
35 partnership having partners upon formation, but Section 202(a) **does explicitly states that a**
36 **partnership may be formed "whether or not the persons intend to form a partnership."**

37
38 **Because a partnership is defined as "an entity formed under this [act] or whose**
39 **internal affairs become governed by this [act]" references in this act to "a partnership"**
40 **mean a domestic partnership. The more complete term "domestic partnership" is used in**
41 **several places in this act to highlight the scope of particular provisions. Use of the term**
42 **"domestic partnership" in those places is not intended to affect the meaning of partnership**
43 **when it appears elsewhere in the act.**

44
45 **"Partnership agreement" [(12)]**—This definition must be read in conjunction with
46 Sections 105 through 107, which further describe the partnership agreement. In particular,

1 although this definition refers to “the agreement . . . of all the partners,” the partnership itself is
2 bound by and may enforce the agreement. Section 106(a).

3
4 A partnership agreement is a contract, and therefore all statutory language pertaining to
5 the partnership agreement must be understood in the context of the law of contracts.

6
7 The definition in Paragraph 12 is very broad and recognizes a wide scope of authority for
8 the partnership agreement: “the matters described in Section 105(a).” Those matters include not
9 only all relations *inter se* the partners and the partnership but also “the business of the
10 partnership and the conduct of that business.” Section 105(a)(2). Moreover, the definition puts
11 no limits on the form of the partnership agreement. To the contrary, the definition contains the
12 phrase “whether oral, implied, in a record, or in any combination thereof.”

13
14 Unless the partnership agreement itself provides otherwise:

- 15
- 16 • A partnership agreement may comprise a number of separate documents (or records),
17 however denominated; and
 - 18 • Subject to Section 106(b) (deeming new partners to assent to the then-existing
19 partnership agreement), a document, record, understanding, etc. can be part of the
20 partnership agreement only with the assent of all persons then partners.
- 21

22 An agreement among less than all partners might well be enforceable among those
23 partners as parties, but would not be part of the partnership agreement. However, under Section
24 105(a)(3), an amendment to a partnership agreement can be made with less than unanimous
25 consent if the partnership agreement itself so provides.

26
27 An agreement to form a partnership is not itself a partnership agreement. The term
28 “partnership agreement” presupposes “partners,” and a person cannot be a partner in a
29 partnership before the partnership exists. However, as soon as a partnership comes into
30 existence, it perforce has a partnership agreement. For example, suppose: (i) two persons orally
31 and informally agree to join their activities in a manner that satisfies Section 202 (formation of
32 partnership); (ii) the partnership is thus formed; and (iii) without further ado or agreement, the
33 persons become the partnership’s initial partners. A partnership agreement exists. In the words of
34 Paragraph 12 “all the partners” have agreed who the partners are and that, as “all the partners,”
35 they will conduct a business. That agreement—no matter how informal or rudimentary—is an
36 agreement “concerning the matters described in Section 105(a).” To the extent the agreement
37 does not provide the *inter se* “rules of the game,” the “default rules” of this act “fill in the gaps.”
38 Section 105(b).

39
40 This act states no rule as to whether the statute of frauds applies to partnership
41 agreements. Case law suggests that the answer is yes:

42
43 Partnership agreements, like other contracts, are subject to the Statute of Frauds.
44 A contract of partnership for a term exceeding one year is within the Statute of
45 Frauds and is void unless it is in writing [and signed by the party to be bound];
46 however, a contract establishing a partnership terminable at the will of any partner

1 is generally held to be capable of performance by its terms within one year of its
2 making and, therefore, to be outside the Statute of Frauds.

3
4 *Abbott v. Hurst*, 643 So. 2d 589, 592 (Ala. 1994) (citations omitted).

5
6 Likewise, the land provision of the statute of frauds:

7
8 applies to an oral contract to transfer or convey partnership real property, and the
9 interest of the other partners therein, to one partner as an individual, as well as to
10 a parol contract by one of the parties to convey certain land owned by him
11 individually to the partnership, or to another partner, or to put it into the
12 partnership stock.

13
14 *Froiseth v. Nowlin*, 287 P. 55, 56 (Wash. 1930) (quoting 27 C.J.S. § 220); *see also E.*
15 *Piedmont 120 Associates, L.P. v. Sheppard*, 434 S.E.2d 101, 102 (Ga. Ct. App. 1993) (same,
16 stating that “the fact that promises covered by the Statute of Frauds are made in the context of a
17 partnership or joint venture agreement does not render the statute inapplicable”); *Filippi v.*
18 *Filippi*, 818 A.2d 608, 618 (R.I. 2003) (applying the statute of frauds to an alleged oral
19 agreement to transfer land owned by a limited partnership to one of its partners).

20 In contrast, the land provision does not apply to a partner’s interest in a partnership, no
21 matter how much the partnership owns or deals in real property. Interests in a partnership are
22 personal property and reflect no direct interest in the entity’s assets. *See* Sections 102(23), 501.
23 Thus, the real property issues pertaining to a partnership ownership of land do not “flow
24 through” to the partners and partnership interests. *See, e.g., Wooten v. Marshall*, 153 F. Supp.
25 759, 763–64 (S.D.N.Y. 1957) (involving an “oral agreement for a joint venture concerning the
26 purchase, exploitation and eventual disposition of this 160 acre tract” and stating “[t]he real
27 property acquired and dealt with by the venturers takes on the character of personal property as
28 between the partners in the enterprise, and hence is not covered by [the Statute of Frauds]”); *see*
29 *also Wade v. DeHart*, 1926 WL 2944 (Ohio Misc. 1926), *aff’d sub nom., Wade v. De Hart*, 159
30 N.E. 838 (Ohio Ct. App. 1927) (same).

31
32 On the question of how far a written (or “in a record”) partnership agreement can go to
33 prevent oral or implied-in-fact terms, see Section 105(a)(3), comment. For the effect of a pre-
34 formation agreement, see Section 106(c). For the partnership’s status viz-a-viz the partnership
35 agreement, see Section 106(a).

36
37 **“Partnership at will” [(13)]**—This paragraph defines “partnership at will” in the
38 negative (*i.e.*, by stating what the defined term is not). A partnership is “at will” if the partners’
39 agreement does not obligate them to remain in the partnership until the passage of a specified
40 time (a term) or the completion of a specified task, job, project, etc. (an undertaking).

41
42 “Partnership at will” is thus the default mode under this act; that is, a partnership is “at
43 will” unless the partners have agreed otherwise. Absent such agreement, a partner may rightfully
44 leave the partnership at any time (dissociate), Sections 601(1), 602(b)(2), and rightfully cause or
45 seek the winding up of the partnership and its business (dissolution), Section 801(1); *see Fleming*
46 *v. Hagen Estate*, 702 N.W.2d 786, 789 (Minn. Ct. App. 2005) (rejecting “the [appellant] estate’s

1 assertion that the district court erred by not concluding that [a partner’s] counterclaim
2 unilaterally dissolved the agreement pursuant to [Minnesota Statutes section 323A.0801]”;
3 noting that “section 323A.0801(1) is applicable only to an at-will partnership”).
4

5 This act does not directly define “partnership for a term” and “partnership for an
6 undertaking,” but their respective meanings are clear from this paragraph’s wording and the case
7 law. *E.g.*, *Girard Bank v. Haley*, 332 A.2d 443, 447 (Pa. 1975) (“A ‘particular undertaking’ under
8 the statute must be capable of accomplishment at some time, although the exact time may be
9 unknown and unascertainable at the date of the agreement.”). This paragraph thus suggests that a
10 partnership under this act will fit into one of three conveniently labeled categories: at-will, for a
11 term, for an undertaking. However, hybrid structures are possible.
12

13 EXAMPLE: The partnership agreement of a general partnership:

- 14 • states a minimum term of ten years;
- 15 • permits one particular partner to leave the partnership at any time upon thirty days
16 advance written notice; and
- 17 • provides that that person’s dissociation as a partner will neither cause the partnership
18 to dissolve nor entitle any other person to dissociate.
19

20 Hybrid structures cause no trouble, if the partnership agreement: (i) clearly and completely
21 details the partners’ understanding as to dissociation and dissolution; and (ii) does not confuse
22 matters by inaccurately labeling the partnership as if it were a pure form of one of the three
23 categories.

24 **“Person” [14] – This term is the standard definition used in uniform acts generally,**
25 **including the optional last sentence of the standard definition dealing with protected series.**
26

27 **“Principal office” [(15)]**—This term appears mostly in provisions pertaining to court
28 proceedings, *e.g.*, Section 809(a), or delivery or service of information; *e.g.*, Sections 117(f)(3),
29 912(b). The term also helps determine the governing law for a partnership that is not a limited
30 liability partnership. Section 104(2).

31 UPA (1997) referred to a partnership’s “chief executive office,” *e.g.*, UPA (1997)
32 § 106(a), but did not define the term. *Id.*, cmt. The Harmonization Project substituted “principal
33 office,” as a more traditional and better-understood term in business entity statutes. In most
34 cases, a partnership’s principal office will be the same as the partnership’s chief executive office
35 (however defined). With regard to LLPs and foreign LLPs registered to do business in this state,
36 the annual/biennial report will record the LLP’s view on where the LLP’s principal office is
37 located. *See* Sections 913(a)(3) (domestic LLP), 1003(4) (foreign LLP).
38

39 **“Property” [(16)]**—This definition encompasses every form of property. For rules
40 determining when property belongs to the partnership, see Section 204.
41

42 **“Transfer” [(22)]**—The term “transfer” is broadly defined to include all types of
43 conveyances of interests in property. The reference to “transfer by operation of law” is
44 significant in connection with Section 502 (Transfer of Transferable Interest). That section

severely restricts a transferee's rights (absent the consent of the partners), and this definition makes those restrictions applicable; for example, to transfers ordered by a family court as part of a divorce proceeding and transfers resulting from the death of a partner. The restrictions also apply to transfers in the context of a partner's bankruptcy, except to the extent that bankruptcy law supersedes this act.

“Transferable interest” [(23)]—Absent a contrary provision in the partnership agreement or the consent of the partners, a “transferable interest” is the only interest in a partnership which can be transferred to a non-partner. *See* the comment to Section 502. This act does not define any term to encompass the entirety of a partner's rights in a partnership (*i.e.*, governance and information rights as well as economic rights).

UPA (1997) took a different approach, defining the entirety of a partner's rights directly and identifying the economic aspect through a limit on transferability. *See* UPA (1997) §§ 101(9) (defining “[p]artnership interest” or “partner's interest in the partnership” as “all of a partner's interests in the partnership, including the partner's transferable interest and all management and other rights”), 502 (stating that “the only 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”).

This act defines “[t]ransferable interest” as an interest “initially owned by a person in the person's capacity as a partner,” because this act does not contemplate a partnership directly creating interests that comprise only economic rights. *See* Sections 402 (addressing how a person becomes a partner), 503 (addressing how a person becomes a transferee).

SECTION 103. KNOWLEDGE; NOTICE.

(a) A person knows a fact if the person:

(1) has actual knowledge of it; or

(2) is deemed to know it under subsection (d)(1) or law other than this [act].

(b) A person has notice of a fact if the person:

(1) has reason to know the fact from all the facts known to the person at the time in question; or

(2) is deemed to have notice of the fact under subsection (d)(2).

(c) Subject to Section 117(f), a person notifies another person of a fact by taking steps reasonably required to inform the other person in ordinary course, whether or not those steps cause the other person to know the fact.

1 (d) A person not a partner is deemed:

2 (1) to know of a limitation on authority to transfer real property as provided in

3 Section 303(g); and

4 (2) to have notice of:

5 (A) a person's dissociation as a partner 90 days after a statement of

6 dissociation under Section 704 becomes effective; and

7 (B) a partnership's:

8 (i) dissolution 90 days after a statement of dissolution under

9 Section 802 becomes effective;

10 (ii) termination 90 days after a statement of termination under

11 Section 802 becomes effective; and

12 (iii) participation in a merger, interest exchange, conversion, or

13 domestication, 90 days after articles of merger, interest exchange, conversion, or domestication

14 under [Article] 11 become effective.

15 (e) A partner's knowledge or notice of a fact relating to the partnership is effective

16 immediately as knowledge of or notice to the partnership, except in the case of a fraud on the

17 partnership committed by or with the consent of that partner.

18 **Comment**

19 The Harmonization Project made two important changes to this section. First, unlike UPA
20 (1997), this act contains no generally applicable provisions determining when an organization
21 other than a partnership is charged with knowledge or notice, because those imputation rules:
22 (i) comprise core topics within the law of agency; (ii) are very complicated; (iii) should not have
23 any different content under this act than in other circumstances; and (iv) are the subject of
24 considerable attention in the Restatement (Third) of Agency (2006). However, Subsection (e)
25 does provide a rule for attributing to a partnership knowledge or notice possessed by a partner.

26
27 Second, this act does not define "notice" to include "knowledge." Although
28 conceptualizing the latter as giving the former makes logical sense and has a long pedigree, that

1 conceptualization is counter-intuitive for the uninitiated. In ordinary usage, notice has a meaning
2 separate from knowledge. This act follows ordinary usage and therefore contains some
3 references to “knowledge or notice.”
4

5 **Subsection (a)(2)**—In this context, the most important source of “law other than this
6 [act]” is the common law of agency.
7

8 **Subsection (b)(1)**—The “facts known to the person at the time in question” include facts
9 the person is deemed to know under Subsection (a)(2).
10

11 **Subsection (c)**—If a person “notifies” another person of a fact, the other person has
12 “reason to know” the fact and therefore has notice under Subsection (b)(1). However, a person
13 can have “notice” of a fact without having been “notifie[d]” of the fact.
14

15 Section 117(f) pertains to delivery of records *by* the filing office.
16

17 **Subsection (d)**—Following the pioneering approach of UPA (1997), this subsection
18 provides constructive notice of facts stated in specified filed public records. The subsection
19 works in conjunction with other sections of this act to curtail the power to bind and personal
20 liability of partners and persons dissociated as partners. *See* Sections 702, 703, 804, 805. The
21 constructive notice begins ninety days after the effective date of the filed record. For this act’s
22 rules on delayed effective dates, see Section 114.
23

24 UPA (1997) used an oblique and decentralized approach to constructive notice. *See, e.g.,*
25 UPA (1997) § 704(c) (stating that “for the purposes of Sections 702(a)(3) [pertaining to the
26 lingering power to bind the partnership of a person dissociated as a partner] and 703(b)(3)
27 [pertaining to a the lingering liability for partnership obligations of a person dissociated as a
28 partner], a person not a partner is deemed to have notice of the dissociation 90 days after [a]
29 statement of dissociation is filed”). As revised by the Harmonization Project, this subsection
30 provides directly for constructive notice and centralizes all of this act’s constructive notice
31 provisions except for those pertaining to statements of authority under Section 303.
32

33 **Subsection (e)**—This subsection states the rule for imputing a partner’s knowledge or
34 notice to the partnership. The rule was part of the common law. *Peoples' Bank of Baltimore v.*
35 *Keech*, 26 Md. 521, 533 (Md. 1867) (holding that “the firm is bound by notice to one of the co-
36 partners; because each represents the firm and is general agent of all”). UPA (1914) § 12
37 codified the rule, and UPA (1997) § 102(f) carried forward the codified rule with some
38 modification. The Harmonization Project did not change UPA (1997) § 102(f), except to delete
39 “receipt of a notification”; the phrase “receipt of a notification” is no longer a term of art in the
40 LLC and partnership acts.
41

42 **SECTION 104. GOVERNING LAW.** The internal affairs of a partnership and the
43 liability of a partner as a partner for a debt, obligation, or other liability of the partnership are
44 governed by:

1 (1) in the case of a limited liability partnership, the law of this state; and

2 (2) in the case of a partnership that is not a limited liability partnership, the law of the
3 jurisdiction in which the partnership has its principal office.

4 **Comment**

5 This section states two choice-of-law rules: an invariable rule for limited liability
6 partnerships, Paragraph 1, and a default rule for non-LLPs, Paragraph 2. Both rules address
7 “internal affairs” and “the liability of a partner as a partner for the debts, obligations, or other
8 liabilities of the partnership.”
9

10 Like any other legal concept, “internal affairs” may be indeterminate at its edges.
11 However, the concept certainly includes interpretation and enforcement of the partnership
12 agreement, relations among the partners as partners, and relations between the partnership and a
13 partner as a partner. *Compare* Section 104, with RESTATEMENT (SECOND) OF CONFLICT OF LAWS
14 § 302, cmt. a (1971) (defining “internal affairs” with reference to a corporation as “the relations
15 inter se of the corporation, its shareholders, directors, officers or agents”).
16

17 “Internal affairs” do not encompass the power *vel non* of a person to bind a partnership.
18 RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 292(2) (1971) (“The principal will be held
19 bound by the agent’s action if he would so be bound under the local law of the state where the
20 agent dealt with the third person, provided at least that the principal had authorized the agent to
21 act on his behalf in that state or had led the third person reasonably to believe that the agent had
22 such authority.”), 295(1) (“Whether a partnership is bound by action taken on its behalf by an
23 agent in dealing with a third person is determined by the local law of the state selected by
24 application of the rule of § 292.”); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 345, cmt. c
25 (1934) (Law Governing Effect of Act of Agent or Partner) (“If . . . the principal or partner sends
26 the agent or other partner into a state to act on his behalf, he assumes the risk of liability not only
27 for authorized but for unauthorized conduct of the agent or partner in accordance with the law of
28 that state.”); *see also Farm & Ranch Services, Ltd. v. LT Farm & Ranch, L.L.C.*, 779 F. Supp. 2d
29 949, 960 (S.D. Iowa 2011).
30

31 “Internal affairs” and the “liability of a partner as a partner” are mentioned separately,
32 because it can be argued that the liability of partners to third parties is not an internal affair. *See*,
33 *e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307 (1971) (treating shareholders’ liability
34 separately from the internal affairs doctrine). A few cases subsume owner/manager liability into
35 internal affairs. *See, e.g., Kalb, Voorhis & Co. v. American Fin. Corp.*, 8 F.3d 130, 132 (2d Cir.
36 1993) (holding that the corporation’s “primary purpose is to insulate shareholders from legal
37 liability” and therefore “the state of incorporation has the greater interest in determining when
38 and if that insulation is to be stripped away” (quoting *Soviet Pan Am Travel Effort v. Travel*
39 *Comm., Inc.*, 756 F. Supp. 126, 131 (S.D.N.Y. 1991) (internal quotation marks omitted)).
40

41 In any event, neither “internal affairs” nor the “liability of a partner as a partner”
42 encompass a claim that a partner is liable to a third party for: (i) having purported inaccurately to

1 have the actual authority to bind a partnership to the third party; or (ii) having committed a tort
2 against the third party while acting on the partnership’s behalf or in the course of the
3 partnership’s business. That liability is not by status (*i.e.*, not “as a partner”) but rather results
4 from function or conduct.

5
6 Treating “liability of a partner as a partner” as a matter of domestic law comports
7 generally with the law of business entities. For example, some (if not all) limited liability
8 partnership statutes so provide. *E.g.*, DEL. CODE ANN. tit. 6, § 15-1101(a) (2013) (stating that
9 “[t]he law under which a foreign limited liability partnership is formed governs . . . the liability
10 of partners for obligations of the partnership”); N.Y. P’SHP LAW § 121-1502(l) (2014) (stating
11 that “[t]he laws of the jurisdiction that govern a foreign limited liability partnership shall
12 determine . . . the liability of partners for debts, obligations and liabilities of, or chargeable to, the
13 foreign limited liability partnership”).

14
15 Moreover, “[t]he general rule [from the case law] is that a plaintiff’s alter ego theory is
16 governed by the law of the state in which the business at issue is organized.” *Rual Trade Ltd. v.*
17 *Viva Trade L.L.C.*, 549 F. Supp. 2d 1067, 1077 (E.D. Wis. 2008); *see also In re Gulf Fleet*
18 *Holdings, Inc.*, 491 B.R. 747, 787 (Bankr. W.D. La. 2013) (stating both conceptual and policy
19 rationales for choosing the law of the state of formation); *In re Saba Enters., Inc.*, 421 B.R. 626,
20 648–51 (Bankr. S.D.N.Y. 2009) (examining the issue in detail and applying the state of formation
21 rule).

22
23 **Paragraph 1**—The partnership agreement cannot alter this paragraph. *See* Section
24 105(c)(1). In essence, when a partnership chooses where to deliver for filing a statement of
25 qualification, the partnership chooses its governing law. This approach comports with the law of
26 other businesses entities whose formation or legal status depends at least in part on a publicly
27 filed record. *See, e.g.*, ULPA (2001) (Last Amended 2013) § 104 (stating that the law of the state
28 of formation is the domestic entity’s governing law); ULLCA (2006) (Last Amended 2013) § 104
29 (same).

30
31 However, a partnership agreement may lawfully incorporate by reference the provisions
32 of another state’s partnership act. If done correctly, this incorporation makes the foreign
33 statutory language part of the partnership agreement, and the incorporated terms (together with
34 the rest of the partnership agreement) then govern the partners (and those claiming through the
35 partners) to the extent not prohibited by this act. *See* Section 105. This approach: (i) does not
36 switch the limited liability partnership’s governing law to that of another state; (ii) instead takes
37 the provisions of another state’s law and incorporates them by reference into the contract among
38 the partners; (iii) raises complex drafting issues – *e.g.*, how to address subsequent changes to the
39 incorporated law (whether occurring by statutory amendment or court decision); and (iv) thus is
40 rarely, if ever, a good idea.

41
42 **Paragraph 2**—Section 102(15) defines “principal office.”

43
44 The partnership agreement may change the rule stated in this paragraph, although other
45 law may limit a partnership’s options. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS
46 §§ 294 (1971) (Relationship of Partners Inter Se), 187(2) (stating the limited bases for

disregarding a contractual choice of law).

When a statement of qualification becomes effective under Section 901: (i) this paragraph no longer applies; and (ii) neither the partnership's principal office nor the partnership agreement is relevant to determining the law governing the partnership's internal affairs. Section 105(c)(1) (stating that the partnership agreement may not "vary the law applicable under Section 104(1)").

SECTION 105. PARTNERSHIP AGREEMENT; SCOPE, FUNCTION, AND LIMITATIONS.

(a) Except as otherwise provided in subsections (c) and (d), the partnership agreement governs:

(1) relations among the partners as partners and between the partners and the partnership;

(2) the business of the partnership and the conduct of that business; and

(3) the means and conditions for amending the partnership agreement.

(b) To the extent the partnership agreement does not provide for a matter described in subsection (a), this [act] governs the matter.

(c) A partnership agreement may not:

(1) vary the law applicable under Section 104(1);

(2) vary the provisions of Section 110;

(3) vary the provisions of Section 307;

(4) unreasonably restrict the duties and rights under Section 408, but the partnership agreement may impose reasonable restrictions on the availability and use of information obtained under that section and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use;

(5) alter or eliminate the duty of loyalty or the duty of care, except as otherwise provided in subsection (d);

1 (6) eliminate the contractual obligation of good faith and fair dealing under
2 Section 409(d), but the partnership agreement may prescribe the standards, if not manifestly
3 unreasonable, by which the performance of the obligation is to be measured;

4 (7) unreasonably restrict the right of a person to maintain an action under Section
5 410(b);

6 (8) relieve or exonerate a person from liability for conduct involving bad faith,
7 willful or intentional misconduct, or knowing violation of law;

8 (9) vary the power of a person to dissociate as a partner under Section 602(a),
9 except to require that the notice under Section 601(1) be in a record;

10 (10) vary the grounds for expulsion specified in Section 601(5);

11 (11) vary the causes of dissolution specified in Section 801(4) or (5);

12 (12) vary the requirement to wind up the partnership's business as specified in
13 Section 802(a), (b)(1), and (d);

14 (13) vary the right of a partner under Section 901(f) to vote on or consent to a
15 cancellation of a statement of qualification;

16 (14) vary the right of a partner to approve a merger, interest exchange, conversion,
17 or domestication under Section 1123(a)(2), 1133(a)(2), 1143(a)(2), or 1153(a)(2);

18 (15) vary the required contents of a plan of merger under Section 1122(a), plan of
19 interest exchange under Section 1132(a), plan of conversion under Section 1142(a), or plan of
20 domestication under Section 1152(a);

21 (16) vary any requirement, procedure, or other provision of this [act] pertaining
22 to:

23 (A) registered agents; or

1 (B) the [Secretary of State], including provisions pertaining to records
2 authorized or required to be delivered to the [Secretary of State] for filing under this [act]; or

3 (17) except as otherwise provided in Sections 106 and 107(b), restrict the rights
4 under this [act] of a person other than a partner.

5 (d) Subject to subsection (c)(8), without limiting other terms that may be included in a
6 partnership agreement, the following rules apply:

7 (1) The partnership agreement may:

8 (A) specify the method by which a specific act or transaction that would
9 otherwise violate the duty of loyalty may be authorized or ratified by one or more disinterested
10 and independent persons after full disclosure of all material facts; and

11 (B) alter the prohibition in Section 406(a)(2) so that the prohibition
12 requires only that the partnership's total assets not be less than the sum of its total liabilities.

13 (2) To the extent the partnership agreement expressly relieves a partner of a
14 responsibility that the partner would otherwise have under this [act] and imposes the
15 responsibility on one or more other partners, the agreement also may eliminate or limit any
16 fiduciary duty of the partner relieved of the responsibility which would have pertained to the
17 responsibility.

18 (3) If not manifestly unreasonable, the partnership agreement may:

19 (A) alter or eliminate the aspects of the duty of loyalty stated in Section
20 409(b);

21 (B) identify specific types or categories of activities that do not violate the
22 duty of loyalty;

23 (C) alter the duty of care, but may not authorize conduct involving bad

1 faith, willful or intentional misconduct, or knowing violation of law; and

2 (D) alter or eliminate any other fiduciary duty.

3 (e) The court shall decide as a matter of law whether a term of a partnership agreement is
4 manifestly unreasonable under subsection (c)(6) or (d)(3). The court:

5 (1) shall make its determination as of the time the challenged term became part of
6 the partnership agreement and by considering only circumstances existing at that time; and

7 (2) may invalidate the term only if, in light of the purposes and business of the
8 partnership, it is readily apparent that:

9 (A) the objective of the term is unreasonable; or

10 (B) the term is an unreasonable means to achieve the term's objective.

11 **Comment**

12
13 The Harmonization Project re-wrote this section, for the most part conforming this
14 section to the corresponding section of ULLCA (2006).

15 *Principal Provisions of the Act Concerning the Partnership Agreement*

16
17
18 The partnership agreement is pivotal to a partnership, and Sections 105 through 107 are
19 pivotal to this act. They must be read together, along with Section 102(12) (defining the
20 partnership agreement).

21
22 This section performs five essential functions. Subsection (a) establishes the primacy of
23 the partnership agreement in establishing *inter se* relations among the partners and partnership.
24 Subsection (b) recognizes this act as comprising mostly default rules (*i.e.*, gap fillers for issues as
25 to which the partnership agreement provides no rule). Subsection (c) lists the few mandatory
26 provisions of the act. Subsection (d) lists some provisions frequently found in partnership
27 agreements, authorizing some unconditionally and others so long as “not manifestly
28 unreasonable.” Subsection (e) delineates in detail both the meaning of “not manifestly
29 unreasonable” and the information relevant to determining a claim that a provision of a
30 partnership agreement is manifestly unreasonable.

31 Section 106 details the effect of a partnership agreement on the partnership and on
32 persons becoming partners. Section 107 concerns the effect of a partnership agreement on third
33 parties.

34 *Role and Inevitability of Partnership Agreement*

1 Section 102(12) delineates a very broad scope for “partnership agreement.” As a result,
2 once a partnership comes into existence, a partnership agreement necessarily exists. *See* the
3 comment to Section 102(12). Accordingly, this act refers to “the partnership agreement” rather
4 than “a partnership agreement.” This phrasing should not, however, be read to require a
5 partnership or its partners to take any formal action to adopt a partnership agreement.
6

7 The partnership agreement is the exclusive consensual process for modifying this act’s
8 various default rules pertaining to relationships *inter se* the partners and between the partners and
9 the partnership. Section 105(a). The partnership agreement also has power over “the obligations
10 of a partnership and its partners to a person in the person’s capacity as a transferee or person
11 dissociated as a partner.” Section 107(b). For the relationship between the partnership agreement
12 and public records in the filing office, see Section 107(d).
13

14 *The Partnership Agreement and the Fiduciary and Other Duties of Those Who Manage* 15

16 One of the most complex questions in the law of unincorporated business organizations is
17 the extent to which an agreement among the organization’s owners can affect the fiduciary and
18 other duties of those who have ultimate power to manage the organization—in a general
19 partnership, the partners themselves. As explained in detail in the comment to Subsection (d)(3),
20 this act rejects the notion that a contract can completely transform an inherently fiduciary
21 relationship into a merely arm’s length association. Within that limitation, however, this section
22 provides substantial power to the partnership agreement to reshape, limit, and eliminate fiduciary
23 and other managerial duties.
24

25 Subsection (a) recognizes that the partnership agreement is the map to the parties’ deal
26 and that any claim by a partner of managerial misconduct must be assessed first under the
27 relevant terms of the partnership agreement. Subsection (d) specifically validates arrangements
28 commonly used to reshape managerial duties and limit the consequences of breaching those
29 duties. Subsection (c) contains relevant limitations, but those limitations: (i) must be read
30 together with Subsection (d); and (ii) do not preclude the partnership agreement fundamentally
31 redesigning the duties applicable to the partners. For the act’s design of those duties, see Sections
32 408 and 409.
33

34 **Subsection (a)**—This section describes the very broad scope of a partnership’s
35 partnership agreement, which includes all matters constituting “internal affairs.” *Compare*
36 Section 105(a), *with* Section 104 (using the phrase “internal affairs” in stating a choice of law
37 rule). This broad grant of authority is subject to the restrictions stated in Subsection (c),
38 including the broad restriction stated in Subsection (c)(17) (concerning the rights of third parties
39 under this act).
40

41 **Subsection (a)(1)**—This paragraph encompasses all the rights and duties of each partner,
42 including rights and duties pertaining to transactions under Article 11.
43

44 **Subsection (a)(3)**—Under this provision, the partnership agreement can control both the
45 quantum of consent required (*e.g.*, majority of partners) and the means by which the consent is
46 manifested (*e.g.*, prohibiting modifications except when consented to in writing). *See* the

comment to Section 107(a).

If the partnership agreement does not address the issue, Section 401(k) applies and requires the affirmative vote or consent of all the partners. Under Section 119 (supplemental principles of law), the parol evidence rule will apply to a written partnership agreement when appropriate under contract law.

Subsection (b)—To the extent the partnership agreement does not determine an *inter se* matter, this act determines the matter. The partnership agreement may vary any provision of this act pertaining to *inter se* matters, except as provided in Subsections (c) and (d).

Sometimes—but not always—the comments to this act refer to a variable provision as a “default rule” and a non-waivable provision as “mandatory.” These references are merely to draw attention to the default/mandatory distinction in particular contexts and have neither the intent nor the power to affect the default/mandatory status of provisions of this act whose comments lack a comparable reference.

Subsection (c)—This subsection lists provisions of this act whose respective effects cannot be varied or may be varied subject to a stated limitation. For historical reasons, this subsection uses the words “vary” and “alter” interchangeably. No difference in meaning is intended.

If a person claims that a term of the partnership agreement violates this subsection, as a matter of ordinary procedural law the burden of proof is on the person making the claim.

Subsection (c)(1)—“[T]he law applicable under Section 104(1)” establishes the governing law for the internal affairs of a partnership. The organizers of a partnership make this choice of law by choosing to form a partnership under this act. Domestication to another jurisdiction will re-set the choice of law, *see* Sections 1151–56, but the partnership agreement cannot. *See* the comment to Section 104(1).

Subsection (c) contains no parallel prohibition on varying Section 901 (stating the governing law for foreign limited liability partnerships), because a prohibition is unnecessary. As a matter of fundamental contract law, an agreement among partners of one partnership is powerless to govern the affairs of another partnership.

Subsection (c)(3)—Under this act, a partnership is emphatically an entity, and the partners lack the power to alter that characteristic.

The cited section pertains to “actions by and against partnership and partners,” arguably comes within Subsection (c)(17) (prohibiting the partnership agreement from “restrict[ing] the rights under this [act] of a person other than a partner”), but is specifically noted for the avoidance of doubt.

Subsection (c)(4)—Although phrased as a restriction, this provision grants substantial power to the partnership agreement.

1 EXAMPLE: A law firm operates as a partnership, and the partnership agreement provides
2 that a “Compensation Committee” periodically decides each partner’s compensation. The
3 agreement also states that only partners who are on the Compensation Committee may
4 have access to the Committee’s compensation decisions pertaining to other partners. This
5 restriction is reasonable.

6
7 The act also empowers the partnership “as a matter within the ordinary course of its
8 business [to] impose reasonable restrictions and conditions on access to and use of information”
9 obtained under Section 408. *See* Section 408(j).

10
11 In determining whether a restriction is reasonable, a court might consider: (i) the danger
12 or other problem the restriction seeks to avoid; (ii) the purpose for which the information is
13 sought; and (iii) whether, in light of both the problem and the purpose, the restriction is
14 reasonably tailored.

15
16 **Subsection (c)(5)**—This limitation is less powerful than might first appear, because
17 Subsection (d) specifically authorizes substantial alterations to the duties of loyalty and care,
18 including restricting and substantially eliminating those duties.

19
20 **Subsection (c)(6)**—Section 409(d) refers to the “contractual obligation of good faith and
21 fair dealing,” which contract law implies in every contract. The partnership agreement cannot
22 eliminate this obligation, neither in whole (*i.e.*, generally) nor in part (*i.e.*, as applicable to
23 specified situations).

24
25 However, a partnership agreement may “prescribe the standards . . . by which the
26 performance of [that] obligation is to be measured.”

27
28 EXAMPLE: A partnership agreement designates a managing partner, provides that
29 partner almost total control of the partnership’s operations, and grants the partner the
30 discretion to cause the partnership to enter into contracts with affiliates of the partner (so-
31 called “Conflict Transactions”). The agreement further provides: “When causing the
32 Company to enter into a Conflict Transaction, the Managing Partner complies with
33 Section 409(d) of [this act] if a disinterested person, knowledgeable in the subject matter,
34 states in writing that the terms and conditions of the Conflict Transaction are equivalent
35 to the terms and conditions that would be agreed to by persons at arm’s length in
36 comparable circumstances.” This provision “prescribes[s] the standards by which the
37 performance of the [Section 409(d)] obligation is to be measured.”

38
39 EXAMPLE: Same facts as the previous example, except that, during the performance of
40 a Conflict Transaction, the managing partner causes the partnership to waive material
41 protections under the applicable contract. The standard stated in the previous example is
42 inapposite to this conduct. Section 409(d) therefore applies to the conduct without any
43 direct contractual delineation. (However, other terms of the agreement may be relevant to
44 determining whether the conduct violates Section 409(d). *See* the comment to Section
45 409(d).)

1 EXAMPLE: A partnership agreement designates a managing partner and gives that
2 partner “sole discretion” to make various decisions. The agreement further provides:
3 “Whenever this agreement requires or permits the Managing Partner to make a decision
4 that has the potential to benefit one class of partners to the detriment of another class, the
5 Managing Partner complies with Section 409(d) of [this act] if the Managing Partner
6 makes the decision with:

- 7 a. the honest belief that the decision:
8 i. serves the best interests of the Partnership; or
9 ii. at least does not injure or otherwise disserve those interests; and
10 b. the reasonable belief that the decision breaches no partner’s rights under this
11 agreement.”

12 This provision “prescribe[s] the standards by which the performance of the [Section
13 409(d)] obligation is to be measured.” *Compare* Section 105(c)(6), with *Nemec v.*
14 *Shrader*, 991 A.2d 1120 (Del. 2010) (considering such a situation in the context of the
15 right to call preferred stock and deciding by a three-two vote that exercising the call did
16 not breach the implied covenant of good faith and fair dealing).

17
18 A partnership agreement that seeks to prescribe standards for measuring the contractual
19 obligation of good faith and fair dealing under Section 409(d) should expressly refer to the
20 obligation. *See Gerber v. Enter. Prods. Hldgs., L.L.C.*, 67 A.3d 400, 418 (Del. 2013)
21 (distinguishing between the implied contractual covenant and an express contractual obligation
22 of “good faith” as stated in a limited partnership agreement).

23
24 For an explanation of the function and role of the covenant of good faith and fair dealing,
25 see the comment to Section 409(d). For the rules delimiting the “not manifestly unreasonable”
26 requirement, see Subsection (e).

27
28 **Subsection (c)(7)**—Section 410(b) delineates a partner’s rights to “maintain an action
29 against the partnership or another partner.” It would be unreasonable to frustrate these rights but
30 not unreasonable to channel their exercise. For example, the partnership agreement might select
31 a forum, require pre-suit mediation, provide for arbitration, or require a pre-suit demand on a
32 management committee before a partner files suit against the partnership. Similarly, it is not
33 unreasonable to provide for liquidated damages consonant with the law of contracts. In contrast,
34 it would be unreasonable for a partnership agreement to both: (i) require a partner intending to
35 sue the partnership to make demand on a management committee before filing suit against the
36 partnership regardless of futility; and (ii) bar taking the claim to court no matter how long the
37 management committee ponders the demand.

38
39 **Subsection (c)(8)**—These restrictions are ubiquitous in the law of business entities and,
40 in conjunction with other provisions of this section, control the otherwise very broad power of a
41 partnership agreement to affect fiduciary and other duties. The restrictions are central to the raft
42 of exculpatory provisions that sprung up in corporate statutes in response to *Smith v. Van*
43 *Gorkum*, 488 A.2d 858 (Del. 1985), *overruled on other grounds by Gantler v. Stephens*, 965 A.2d
44 695 (Del. 2009). Delaware led the response with Delaware Code Annotated title 8, section
45 102(b)(7), and a number of LLC statutes have similar provisions. *E.g.*, GA. CODE ANN. § 14-11-
46 305(4)(A) (2011). For an extreme example, see Virginia Code Annotated section 13.1-1025 (B)

(2012). In this context, “conduct” includes both acts and omissions. BLACK’S LAW DICTIONARY (9th ed. 2009) (defining conduct as “[p]ersonal behavior, whether by action or inaction”).

The term “bad faith” has multiple meanings, and the context determines which meaning applies. In the context of the duty of loyalty, “bad faith” includes conduct motivated by ill will or other intent purposely to harm another person. The concept also includes conduct from which a person derives an improper personal benefit. *See, e.g., Mroz v. Hoaloha Na Eha, Inc.*, 410 F. Supp. 2d 919, 936–37 (D. Haw. 2005) (denying a motion to dismiss a claim that “the Majority Partners” were personally liable for the partnership’s wrongful termination of the plaintiff; quoting the complaint as alleging that “the Majority Partners, individually and as a group, acted with malice and/or ill will, and/or with an intent to serve their own personal interests and/or without an intent to serve company interests, and/or outside of the scope of their authority and/or without justification”); *BOGNC, LLC v. Cornelius NC Self-Storage L.L.C.*, 10 CVS 19072, 2013 WL 1867065, at *9 (N.C. Super. [Business Court] May 1, 2013) (noting that “no . . . [exculpatory] provision may limit a manager’s liability for acts known to be in conflict with the interests of the limited liability company, or for acts from which the manager derived an improper personal benefit”) (citing N.C. GEN. STAT. § 57C-3-32(b)); *Lasica v. Savers Grp. of Minn., L.L.C.*, A12-0092, 2012 WL 3553246, at *2 (Minn. Ct. App. Aug. 20, 2012) (noting that an “individual seeking indemnification [under statute providing for indemnification]) must have acted in good faith and must not have received an improper personal benefit”) (citing MINN. STAT. § 322B.699, subdivs. 2(a)(2), (3) (2010)).

In the context of the duty of care, the concept of bad faith comes primarily from corporate law and means an extreme breach of the duty (*i.e.*, “the failure to exercise “*honest judgment* in the lawful and legitimate furtherance of corporate purposes”). *Deblinger v. Sani-Pine Products Co., Inc.*, 107 A.D.3d 659, 661 (N.Y. 2013) (quoting *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979)) (emphasis added) (internal quotation marks omitted).

Thus, when a plaintiff alleges bad faith as pertaining to the duty of care, “[t]he burden . . . is to show irrationality: a plaintiff must demonstrate that no reasonable business person could possibly authorize the action in good faith. Put positively, the decision must go so far beyond the bounds of reasonable business judgment that its only explanation is bad faith.” *In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (discussing then prevailing Delaware law) (citation omitted); *see also KDW Restructuring & Liquidation Servs. L.L.C. v. Greenfield*, 874 F. Supp. 2d 213, 226 (S.D.N.Y. 2012) (referring to a lack of “a rationale corporate purpose” and “a disregard for the duty to examine all available information—*information that was readily at hand*”) (emphasis added).

With regard to both the duty of loyalty and the duty of care, “bad faith” is entirely distinct from the meaning of “good faith” in the contractual covenant of good faith and fair dealing. *See* the comment to Section 409(d).

Subsection (c)(8) pertains to indirect as well as direct efforts to “relieve or exonerate” and thus limits how far a partnership agreement can go in providing for indemnification. *See* Section 401(c) (stating a default rule for indemnification).

1 Although this paragraph does not expressly address contracts between a partnership and a
2 partner, the stated constraints must also apply to such contracts. If not, those constraints are
3 effectively meaningless.
4

5 EXAMPLE: A general partnership enters into a management contract with its sole
6 managing partner, and the contract provides the partner exoneration for liability to the
7 partnership even for willful and intentional misconduct. Most likely, contract law will
8 treat the provision as against public policy and therefore unenforceable. RESTATEMENT
9 (SECOND) OF CONTRACTS § 195(1) (1981) (“A term exempting a party from tort liability
10 for harm caused intentionally or recklessly is unenforceable on grounds of public
11 policy.”). If not, a court should hold the provision unenforceable to avoid evisceration of
12 Subsection (c)(8). (Or, the court could invoke the policy expressed in Subsection (c)(8) as
13 grounds for holding the provision unenforceable under contract law.)
14

15 **Subsection (c)(9)**—As a result of this restriction, a partner always has the power to
16 dissociate; the partnership agreement can only negate the right. This approach is consistent with
17 the notions that: (i) a partnership is a voluntary association, *see, e.g., Gangl v. Gangl*, 281
18 N.W.2d 574, 580 (N.D. 1979) (stating that “[t]he term [association] connotes not only a group of
19 two or more persons but also voluntariness”); (ii) the partnership relationship is essentially
20 contractual, *see, e.g., Wallner v. Schmitz*, 239 Minn. 93, 95, 57 N.W.2d 821, 823 (1953) (stating
21 that “[a] partnership is a contractual relationship as between the parties”); and (iii) only in
22 exceptional circumstances does a party to a contract lack the power to breach, and courts will not
23 enjoin a person to remain in an ongoing contractual relationship that involves trust and
24 confidence. E. ALLAN FARNSWORTH, CONTRACTS § 12.7, at 781 (3d ed.1999) (“A court will not
25 grant specific performance of a contract to provide a service that is personal in nature. This
26 refusal . . . is based [in part] of the undesirability of compelling the continuance of personal
27 relations after disputes have arisen and confidence and loyalty have been shaken and the
28 undesirability, in some instances, of imposing what might seem like involuntary servitude.”)
29 (footnote omitted).
30

31 **Subsection (c)(10)**—The partnership agreement may not change the stated grounds for
32 expulsion but may determine the forum in which a claim for expulsion under Section 601(5) is
33 determined.
34

35 **Subsection (c)(11)**—The partnership agreement may not change the stated grounds for
36 dissolution but may determine the forum in which a claim for dissolution under Section 801(4)
37 or (5) is determined. For example, arbitration and forum selection clauses are commonplace in
38 business relationships in general and in partnership agreements in particular.
39

40 The approach of this paragraph differs from the law of Delaware. *See Huatuco v. Satellite*
41 *Healthcare*, CV 8465-VCG, 2013 WL 6460898, at *1, n.2 (Del. Ch. Dec. 9, 2013) (stating that
42 “the right to judicial dissolution is a default right which the parties may eschew by contract” but
43 reserving the question of “[w]hether the parties may, by contract, divest this Court of its
44 authority to order a dissolution in all circumstances, even where it appears manifest that equity
45 so requires—leaving, for instance, irreconcilable members locked away together forever like
46 some alternative entity version of Sartre’s *Huis Clos*”).

1
2 **Subsection (c)(12)**—The cited provisions comprise the non-waivable aspects of winding
3 up a dissolved partnership. The other provisions of Section 802 are default rules and therefore
4 waivable.
5

6 **Subsection (c)(13)**—Section 901(f) requires the “the affirmative vote or consent of all
7 the partners.” The requirement is non-waivable, because canceling a statement of qualification
8 eliminates the LLP liability shield and makes each partner automatically liable for partnership’s
9 obligations subsequently incurred.
10

11 **Subsection (c)(14)**—Sections 1123(a)(1), 1133(a)(1), 1143(a)(1), and 1153(a)(1) each
12 requires the consent or the affirmative vote of all partners. The partnership agreement may
13 modify these requirements. In contrast, under the sections stated in this subsection:
14

- 15 ▪ each partner is protected from being merged, exchanged, converted, or domesticated
16 “into” the status of a partner in a general partnership that is not a limited liability
17 partnership (or a comparable “unshielded” position in some other organization) without
18 the partner having *directly* consented to either:
 - 19 ○ the merger, interest exchange, conversion, or domestication; or
 - 20 ○ a partnership agreement provision that permits such transactions to occur with
21 less than unanimous consent of the partners; and
- 22 ▪ merely consenting to a partnership agreement provision that permits amendment of the
23 partnership agreement with less than unanimous consent of the partners does not qualify
24 as the requisite direct consent.
25

26 **Subsection (c)(15)**—Because these plans are the basic “deal documents” for each of the
27 organic transactions contemplated in Article 11, the partnership agreement may not vary the
28 contents of these plans.
29

30 **Subsection (c)(16)**—This prohibition is arguably implicit in Subsection (c)(17) (affecting
31 rights under this act of third parties) but is stated expressly to avoid any doubt.
32

33 **Subsection (c)(17)**—This limitation pertains only to “the rights under this [act] of” third
34 parties” other than partners. Moreover, the limitation is subject to two major exceptions: Section
35 106 (pertaining to the partnership agreement’s relationship to the partnership itself and to persons
36 becoming partners) and Section 107(b) (pertaining to the partnership agreement’s power over the
37 rights of transferees).
38

39 **Subsection (d)**—The partnership agreement has plenipotentiary power over the matters
40 described in Subsection (a), except as specifically limited by Subsections (c) and (d)(3).
41 However, for the convenience of practitioners and the courts, Paragraphs 1 and 2 list various
42 terms often found in partnership agreements. No negative inference should be drawn about terms
43 not listed; the listing is provided “without limiting other terms that may be included in a
44 partnership agreement.”
45

46 Paragraph 3 lists arrangements subject to the “not manifestly unreasonable” standard.

1 Subsection (e) delineates that standard. The same standard applies to terms of a partnership
2 agreement which seek to “prescribe the standards . . . by which the performance of the
3 [contractual] obligation [of good faith and fair dealing under Section 409(d)] is to be measured.”
4 Subsection (c)(6).

5
6 **Subsection (d)(1)(A)**—An arrangement *not* involving “one or more disinterested and
7 independent persons” acting “after full disclosure of all material facts” would “alter . . . the
8 aspects of the duty of loyalty stated in Section 409(b)” and would therefore be subject to the “not
9 manifestly unreasonable standard” of Subsection (d)(3)(A).

10
11 For the meaning of “material” as applied to information, see the comment to Section
12 409(f).

13
14 **Subsection (d)(1)(B)**—Section 405(a)(2) prohibits distributions by a limited liability
15 partnership:

- 16
17 • *not merely* when, after the distribution, “the partnership’s total assets would be less than
18 the sum of its total liabilities”;
- 19
20 • *but also* when, after the distribution, the assets would less than the total liabilities “plus
21 the amount that would be needed, if the partnership were to be dissolved and wound up
22 at the time of the distribution, to satisfy the preferential rights upon dissolution and
23 winding up of partners and transferees whose preferential rights are superior to the rights
24 of persons receiving the distribution.”

25
26 The second part of the solvency test pertains to preferential rights to distributions, is thus a
27 matter *inter se* the partners and any transferees, and is therefore subject to change in the
28 partnership agreement.

29
30 In contrast, the first part of the solvency test protects third parties—creditors of the
31 partnership—and therefore cannot be changed by the partnership agreement. Section 105(c)(17).
32 Likewise, the partnership agreement cannot change the solvency test stated in Section 406(a)(1)
33 (that “the partnership would not be able to pay its debts as they become due in the ordinary
34 course of the partnership’s business”).

35
36 **Subsection (d)(2)**—The “not manifestly unreasonable” standard does not apply to
37 partnership agreement provisions within this paragraph.

38
39 EXAMPLE: ABC Company (“ABC”) has three partners. ABC has two entirely separate
40 lines of business, the Alpha business and the Beta business. Under ABC’s partnership
41 agreement:

- 42
43 • Partner 1’s responsibilities pertain exclusively to the Alpha business, while
44 responsibility for:
 - 45 ○ the Beta business is allocated exclusively to Partner 2; and
 - 46 ○ ABC’s overall operation is allocated exclusively to Partner 3.

- Partner 2’s responsibilities pertain exclusively to the Beta business, while responsibility for:
 - the Alpha business is allocated exclusively to Partner 1; and
 - ABC’s overall operation is allocated exclusively to Partner 3.
- Partner 1 has no fiduciary duties pertaining to the Beta business.
- Partner 2 has no fiduciary duties pertaining to the Alpha business.

The elimination of Partner 1’s fiduciary duties with regard to the Beta business and Partner 2’s fiduciary duties with regard to the Alpha business are enforceable, without regard to the “manifestly unreasonable” standard of Subsection (d)(3).

Section (d)(3)—This act rejects the ultra-contractarian notion that fiduciary duty within a business organization is merely a set of default rules and seeks instead to balance the virtues of “freedom of contract” against the dangers that inescapably exist when some persons have power over the interests of others.

Nonetheless, a properly drafted partnership agreement may substantially alter and even eliminate fiduciary duties. Two important limitations exist. First, arrangements subject to this subsection may not be “manifestly unreasonable.” *See* Subsection (e) (delineating this standard).

Second, the partnership agreement may not transform the relationship *inter se* partners and the partnership into an entirely arm’s length arrangement. For example, displacement of fiduciary duties is effective only to the extent that the displacement is stated clearly and with particularity. This rule is fundamental in the jurisprudence of fiduciary duty. *See, e.g., Paige Capital Mgmt., L.L.C. v. Lerner Master Fund, L.L.C.*, Civ. A. No. 5502–CS, 2011 WL 3505355, at *31 (Del. Ch. Aug. 8, 2011) (stating that, even under a statute that “permits the waiver of fiduciary duties . . . such waivers must be set forth clearly”); *Kelly v. Blum*, Civ. A. No. 4516–VCP, 2010 WL 629850, at *10 n.70 (Del. Ch. Feb. 24, 2010) (“Having been granted great contractual freedom by the LLC Act, drafters of or parties to an LLC agreement should be expected to provide . . . clear and unambiguous provisions when they desire to expand, restrict or eliminate the operation of traditional fiduciary duties”). It would therefore be manifestly unreasonable for a partnership agreement to negate this rule.

Although Subsection (d)(3) does not expressly address contracts between a partnership and a partner, the stated constraints must also apply to such contracts. If not, those constraints are effectively meaningless.

EXAMPLE: A general partnership enters into a management contract with its sole managing partner, and the contract provides that the duties of loyalty stated in Section 409(b) are entirely eliminated. If the partnership agreement were to so provide, the provision would be subject to the “manifestly unreasonable standard.” Section 105(d)(3)(A). Absent the authorization provided by Section 105(d)(3)(A), the management contract’s attempt to waive fiduciary duties may be unenforceable as a matter of public policy and contract law. *See Neubauer v. Goldfarb*, 108 Cal. App. 4th 47, 57, 133 Cal. Rptr. 2d 218 (2003) (stating that “waiver of corporate directors’ and majority shareholders’ fiduciary duties to minority shareholders in private close corporations is

1 against public policy and a contract provision in a buy-sell agreement purporting to effect
2 such a waiver is void”). If not, a court should hold the provision unenforceable
3 nonetheless so as to avoid eviscerating Subsection (d)(3).
4

5 **Subsection (d)(3)(A)**—Subject to the “not manifestly unreasonable” standard, this
6 paragraph empowers the partnership agreement to eliminate *all* aspects of the duty of loyalty
7 listed in Section 409(b). The obligation of good faith and fair dealing, Section 409(d), would
8 remain. *See* Subsection (c)(6). As to any other, uncodified aspects of the duty of loyalty, see
9 Subsection (d)(3)(D) (empowering the partnership agreement to “alter or eliminate any other
10 fiduciary duty”).
11

12 **EXAMPLE:** Joint Venture Partnership (“JV”) is a general partnership, with two partners,
13 Kappa, Inc. (“Kappa”) and Lambda, LLC (“Lambda”). The partnership agreement
14 provides that:

- 15 • JV is managed by a “board” consisting of one person appointed by Kappa and one
16 person appointed by Lambda;
- 17 • each appointee:
 - 18 ○ owes fiduciary and any other duties exclusively to the partner that made
 - 19 the appointment; and
 - 20 ○ owes no duties to the other partner and the partnership.

21 The “not manifestly unreasonable” standard applies to these provisions under Subsection
22 (d)(3)(A) and (D), and the provisions are not manifestly unreasonable. Note that the
23 provisions do not affect the duties of Kappa and Lambda to each other.
24

25 **Subsection (d)(3)(B)**—Under this paragraph, a partnership agreement might provide that
26 an affiliate of a partner will provide compensated services to the partnership at a price not
27 exceeding market price, or that the partner may pursue opportunities that otherwise would be
28 partnership opportunities. Such arrangements are commonplace and permissible.
29

30 **Subsection (d)(3)(C)**—In this context, “conduct” includes both acts and omissions.
31 BLACK’S LAW DICTIONARY (9th ed. 2009) (defining conduct as “[p]ersonal behavior, whether by
32 action or inaction”). Subject to the “not manifestly unreasonable” standard and the bedrock
33 requirements stated here and in Subsection (c)(8), the partnership agreement can reduce the duty
34 of care substantially. In particular, the partnership agreement can eliminate the aspects of the
35 duty of care pertaining to gross negligence and recklessness.
36

37 This provision replicates in a particular context the general rule stated in Subsection
38 (c)(8). For the meaning of “bad faith” in the context of the duty of care, see Subsection (c)(8),
39 comment.

40 **Subsection (e)**—The “not manifestly unreasonable” concept became part of uniform
41 business entity statutes when UPA (1997) imported the concept from the Uniform Commercial
42 Code. (In the current version of the Uniform Commercial Code, the concept appears in Section
43 1-302(b).)
44

45 This subsection provides rules for applying the concept, specifying:
46

- 1 • who decides the issue of “manifestly unreasonable”
 - 2 ▪ “the court . . . as a matter of law,” Subsection (e);
- 3 • the framework for determining the issue
 - 4 ▪ determination to be made “in light of the purposes, activities, and affairs of the
 - 5 partnership,” Subsection (e)(2);
- 6 • the temporal setting for determining the issue
 - 7 ▪ “[d]etermination [to be made] as of the time the challenged term became part of
 - 8 the partnership agreement,” Subsection (e)(1); and
- 9 • what information is admissible for determining the issue
 - 10 ▪ “[o]nly circumstances existing” when “the challenged term became part of the
 - 11 partnership agreement,” Subsection (e)(1).

12
13 The subsection also provides a very demanding standard for persons claiming that a term
14 of a partnership agreement is “manifestly unreasonable.” “The court . . . may invalidate the term
15 only if, in light of the purposes, and business of the partnership, it is *readily apparent* that: (A)
16 the objective of the term is unreasonable; or (B) the term is an unreasonable means to achieve the
17 term’s objective.” Subsection (e)(2) (emphasis added).

18
19 Subsection (e) is fundamental to this act, because: (i) this act generally defers to the
20 agreement among the partners; and (ii) Subsection (e) safeguards the partnership agreement in at
21 least four ways:

- 22 • Determining manifest unreasonableness *inter se* owners of an organization is a different
23 task than doing so in a commercial context, where concepts like “usages of trade” are
24 available to inform the analysis. Each business organization must be understood in its
25 own terms and context.
- 26 • If loosely applied, the concept of “manifestly unreasonable” would permit a court to
27 rewrite the partners’ agreement, which would destroy the balance this act seeks to
28 establish between freedom of contract and fiduciary duty.
- 29 • Case law has not adequately delineated the concept. *See, e.g., In re Brobeck, Phleger &*
30 *Harrison L.L.P.*, 408 B.R. 318, 335 (Bankr. N.D. Cal. 2009) (“RUPA [UPA (1997)] does
31 not define what is ‘manifestly unreasonable’ and the parties have not cited, nor can the
32 court locate, a decision that defines the term. Absent case law or even a dictionary
33 definition, the court must rely on its common sense to recognize something as manifestly
34 unreasonable.”).
- 35 • In the context of statutes permitting stock transfer restrictions unless “manifestly
36 unreasonable,” courts have often ignored the word “manifestly.” *See, e.g., Brandt v.*
37 *Somerville*, 692 N.W.2d 144, 152 (N.D. 2005) (stating that “in close corporations, a
38 majority of courts have sustained restrictions that are determined to be reasonable in light
39 of the relevant circumstances”); *Roof Depot, Inc. v. Ohman*, 638 N.W.2d 782, 786 (Minn.
40 Ct. App. 2002) (stating that “the restrictions [on share transfer] are not ‘manifestly
41 unreasonable’ because they are reasonable means to ensure that the management and
42 control of the business remains in the group of investors or with people well known to
43 them”); *Castriota v. Castriota*, 633 A.2d 1024, 1027–28 (N.J. App. Div. 1993) (“We are
44 obliged to apply the statute in a manner consonant with its essential purpose to permit
45 reasonable restrictions upon alienation.”).

Subsection (e)(1)—The significance of the phrase “as of the time the term as challenged became part of the partnership agreement” is best shown by example.

EXAMPLE: When a particular partnership comes into existence, its business plan is quite unusual and its success depends on the willingness of a particular individual to serve as the partnership’s sole managing partner. This individual has a rare combination of skills, experiences, and contacts, which are particularly appropriate for the partnership’s start-up. In order to induce the individual to accept the position of sole managing partner, the other partners are willing to have the partnership agreement significantly limit the managing partner’s fiduciary duties. Several years later, when the partnership’s operations have turned prosaic and the managing partner’s talents and background are not nearly so crucial, a partner challenges the fiduciary duty limitations as manifestly unreasonable. The relevant time under Subsection (e)(1) is when the partnership began. Subsequent developments are not relevant, except as they might inferentially bear on the circumstances in existence at the relevant time.

EXAMPLE: As initially adopted, a partnership agreement identifies a category of decisions ordinarily subject to the duty of loyalty and provides that “the managing partner’s sole, reasonable discretion” satisfies the duty. A year later, the agreement is amended to delete the word “reasonable.” Later, a partner claims that, without the word “reasonable,” the provision is manifestly unreasonable. The relevant time under Subsection (e)(1) is when the agreement was amended, not when the agreement was initially adopted.

Subsection (e)(2)—If a person claims that a term of the partnership agreement is manifestly unreasonable under Subsections (c)(6) or (d)(3), as a matter of ordinary procedural law the person making the claim has the burden of proof.

SECTION 106. PARTNERSHIP AGREEMENT; EFFECT ON PARTNERSHIP AND PERSON BECOMING PARTNER; PREFORMATION AGREEMENT.

(a) A partnership is bound by and may enforce the partnership agreement, whether or not the partnership has itself manifested assent to the agreement.

(b) A person that becomes a partner is deemed to assent to the partnership agreement.

(c) Two or more persons intending to become the initial partners of a partnership may make an agreement providing that upon the formation of the partnership the agreement will become the partnership agreement.

Comment

1 **Subsection (a)**—This subsection resolves twin questions that have troubled some
2 courts – namely, whether an unincorporated entity that has not signed its foundational agreement
3 nonetheless is bound by and may enforce the agreement. The questions have been particularly
4 troubling in the context of agreements to arbitrate. *See, e.g., Elkjer v. Scheef & Stone, L.L.P.*,
5 3:13-CV-1655-K, 2014 WL 1255844, at *5–6 (N.D. Tex. Mar. 27, 2014) (concluding that a
6 limited liability partnership “is a party to the Partnership Agreement,” even though the
7 partnership itself never signed or otherwise assented to the agreement; enforcing arbitration
8 provision to the benefit of the LLP). *Contra Trover v. 419 OCR, Inc.*, 921 N.E.2d 1249, 1255
9 (2010) (finding that “neither FODG [an LLC] nor the Golf Club [a related LLC] was a party to
10 the operating agreements and that they are therefore not bound by the arbitration clauses
11 therein”).
12

13 Developments pertaining to the Virginia LLC Act further illustrate the difficulties. In
14 *Mission Residential, L.L.C. v. Triple Net Properties, L.L.C.*, 654 S.E.2d 888, 891 (Va. 2008), the
15 Virginia Supreme Court held that an LLC member’s derivative claim was not subject to the
16 arbitration provision in the operating agreement, because: (i) the LLC was “the real party in
17 interest”; (ii) the LLC had not signed the operating agreement; and (iii) requiring the claim to be
18 arbitrated would “ignore[] the separate existence of Holdings [the LLC].” The Virginia
19 legislature promptly disagreed and amended the LLC act to state: “A limited liability company is
20 bound by its operating agreement whether or not the limited liability company executes the
21 operating agreement.” 2009 VA. ACTS 763 (S.B. 1241), codified as VA. CODE ANN. § 13.1-
22 1023.A.1 (2012). The legislature left open the question of a limited liability company’s power to
23 enforce an operating agreement that the company has not executed.
24

25 This subsection answers the twin questions, categorically and in the affirmative.
26

27 This subsection does not consider whether a partnership is an indispensable party to a suit
28 concerning the partnership agreement. That question is one of procedural law, and the answer
29 can determine whether federal diversity jurisdiction exists.
30

31 **Subsection (b)**—Given the possibility of oral and implied-in-fact terms in the partnership
32 agreement, a person becoming a partner of an existing partnership should take precautions to
33 ascertain fully the contents of the partnership agreement. *See* Section 105(a)(3), cmt.
34

35 **Subsection (c)**—A pre-formation arrangement is not a partnership agreement. A
36 partnership agreement is among “partners,” and, under this act, the earliest a person can become
37 a partner is upon the formation of the partnership. *See* Section 402.
38

1 **SECTION 107. PARTNERSHIP AGREEMENT; EFFECT ON THIRD PARTIES**
2 **AND RELATIONSHIP TO RECORDS EFFECTIVE ON BEHALF OF PARTNERSHIP.**

3 (a) A partnership agreement may specify that its amendment requires the approval of a
4 person that is not a party to the agreement or the satisfaction of a condition. An amendment is
5 ineffective if its adoption does not include the required approval or satisfy the specified
6 condition.

7 (b) The obligations of a partnership and its partners to a person in the person's capacity
8 as a transferee or person dissociated as a partner are governed by the partnership agreement.
9 Subject only to a court order issued under Section 504(b)(2) to effectuate a charging order, an
10 amendment to the partnership agreement made after a person becomes a transferee or is
11 dissociated as a partner:

12 (1) is effective with regard to any debt, obligation, or other liability of the
13 partnership or its partners to the person in the person's capacity as a transferee or person
14 dissociated as a partner; and

15 (2) is not effective to the extent the amendment:

16 (A) imposes a new debt, obligation, or other liability on the transferee or
17 person dissociated as a partner; or

18 (B) prejudices the rights under Section 701 of a person that dissociated as
19 a partner before the amendment was made.

20 (c) If a record delivered by a partnership to the [Secretary of State] for filing becomes
21 effective and contains a provision that would be ineffective under Section 105(c) or (d)(3) if
22 contained in the partnership agreement, the provision is ineffective in the record.

23 (d) Subject to subsection (c), if a record delivered by a partnership to the [Secretary of

State] for filing becomes effective and conflicts with a provision of the partnership agreement:

(1) the agreement prevails as to partners, persons dissociated as partners, and transferees; and

(2) the record prevails as to other persons to the extent they reasonably rely on the record.

Comment

Subsection (a)—This subsection, derived from Delaware Code Annotated title 6, § 18-302(e), permits the partnership agreement to: (i) accord a non-partner veto rights over amendments to the agreement; and (ii) establish other preconditions for amendments. An amendment made in derogation of a veto right or precondition is ineffective.

Veto rights are likely to be sought by lenders but may also be attractive to non-partner managers.

EXAMPLE: A non-partner manager enters into a management contract with a partnership, and that agreement provides in part that the partnership may remove the manager without cause only with the consent of partners holding two-thirds of the profits interests. The partnership agreement contains a parallel provision (the “quantum provision”), but the non-partner manager is not a party to the partnership agreement. Later, the partners amend the quantum provision to reduce the quantum to a simple majority of profits interests and thereafter purport to remove the manager without cause. Although the partnership has undoubtedly breached its contract with the manager and subjected itself to a damage claim, the partnership has the *power* under Section 105(a)(2) to effect the removal—unless the partnership agreement provides the manager a veto right over changes in the partnership agreement’s quantum provision.

This subsection does not refer to partner veto rights because, unless otherwise provided in the partnership agreement, the consent of each partner is necessary to effect an amendment. *See* Section 401(k).

Because “[a] partnership agreement may specify that its amendment requires . . . the satisfaction of a condition,” a partnership agreement can require that any amendment be made through a writing or a record signed by each partner. *See* Section 105(a)(3) (empowering the partnership agreement to determine “the means and conditions for amending the partnership agreement”).

Subsection (b)—The law of unincorporated business organizations is only beginning to grapple in a modern way with the tension between the rights of an organization’s owners to carry on their activities as they see fit (or have agreed) and the rights of transferees of the organization’s economic interests. If, as is often the situation, the partnership agreement

1 overrides Section 701 (Purchase of Interest of Person Dissociated as Partner), such transferees
2 can include the heirs of the partnership’s founders as well as former partners who, by agreement,
3 are “locked in” as transferees of their own interests.
4

5 If the law categorically favors the owners, there is a serious risk of expropriation and
6 other abuse. On the other hand, if the law grants former owners and other transferees the right to
7 seek judicial protection, that specter can “freeze the deal” as of the moment an owner leaves the
8 enterprise or a third party obtains an economic interest.
9

10 There is little case law in this area, and almost all of it pertains to limited rather than
11 general partnerships. The case law clearly favors the remaining owners over former owners and
12 other transferees. *See, e.g., Bauer v. Blomfield Co./Holden Joint Venture*, 849 P.2d 1365, 1367
13 n.2 (Alaska 1993) (holding that a mere assignee “was not entitled to complain about a decision
14 made with the consent of all the partners” and stating “[w]e are unwilling to hold that partners
15 owe a duty of good faith and fair dealing to assignees of a partner's interest”); *Bynum v. Frisby*,
16 311 P.2d 972, 975 (Nev. 1957) (“[A]n assignment of a partnership interest from one partner to a
17 stranger does not bring that stranger into fiduciary relationship with the remaining partners nor
18 require them to resort to dissolution in order to prevent such a relationship from arising. The
19 stranger remains a stranger entitled only to share in the partnership's worth and to demand an
20 accounting upon dissolution.”) (applying UPA (1914) § 27, which pertains to rights of an
21 assignee). *See generally* Daniel S. Kleinberger, *The Plight of the Bare Naked Assignee*, 42
22 SUFFOLK L. REV. 587 (2009).
23

24 This subsection follows *Bauer* and other cases by expressly subjecting transferees
25 (including a person dissociated as a partner) to partnership agreement amendments made after
26 the transfer or dissociation, except amendments that increase obligations on transferees. For
27 example, an amendment might extend the duration of a partnership but may not institute a new
28 capital call obligation on transferees.
29

30 The issue of whether, in extreme and sufficiently harsh circumstances, transferees might
31 be able to claim some type of duty or obligation to protect against expropriation awaits
32 development in the case law. An unreported LLC case suggests the answer might be yes, but the
33 decision rests primarily on the wording of the LLC’s operating agreement. In *Kohannim v.*
34 *Katoli*, 08-11-00155-CV, 2013 WL 3943078, at *10–11 (Tex. App. July 24, 2013), the court: (i)
35 noted that a limited liability company’s “[r]egulations provide[] for the distribution of ‘available
36 cash’ to members quarterly provided that the available cash is not needed for a reasonable
37 working capital reserve”; (ii) also noted that “Jacob [the defendant member] paid himself
38 \$100,000 for management services that were not performed and failed to make any profit
39 distributions to Mike [former member and ex-spouse of the plaintiff Parvaneh] or Parvaneh [ex-
40 spouse of Mike, who became Mike’s transferee as part of their divorce proceeding] even though
41 more than \$250,000 in undistributed profit had accumulated in the company’s accounts since the
42 mortgage on the property had been paid off in February 2007”; and (iii) concluded that “more
43 than a scintilla of evidence supports the trial court's finding that Jacob failed to make profit
44 distributions to Pavaneh.” In essence, the court upheld a finding that Jacob had breached (or
45 caused the partnership to breach) a contractual obligation to make distributions. But the court
46 went further: “We also agree with the trial court's conclusion that the established facts

1 demonstrated Jacob engaged in wrongful conduct and exhibited a lack of fair dealing in the
2 company's affairs to the prejudice of Parvaneh.” *Id.* at *11.

3
4 For the very limited statutory rights of transferees, see Section 503.

5
6 **Subsection (b)(1)**—This provision is inapposite when “a partner or transferee becomes
7 entitled to receive a distribution.” Section 405(d). In that circumstance:

- 8
9
 - “the partner or transferee has the status of . . . a creditor of the partnership with
10 respect to the distribution,” *id.*; and
 - the relevant obligation is not owed to “a person in the person’s capacity as a
11 transferee or person dissociated as a partner,” Subsection (b), but rather to the
12 person in the person’s capacity as a creditor.

13
14
15
16 **Subsection (c)**—This provision precludes using a filed record (*e.g.*, a statement of
17 authority) to make an end run around the strictures of Section 105(c) and (d)(3).

18
19 **Subsection (d)**—It will be possible, albeit improvident, for a partnership agreement to be
20 inconsistent with a public filing pertaining to the partnership. For those circumstances, this
21 subsection provides rules for determining which source of information prevails.

- 22
23
 - For partners and transferees, the partnership agreement is paramount.
 - Third parties may invoke the public record upon a showing of reasonable reliance,
24 which presupposes actual knowledge – *i.e.*, deemed knowledge under Section
25 103(d) does not suffice.

26
27
28
29 The mere fact that a term is present in a publicly filed record and not in the partnership
30 agreement, or *vice versa*, does not automatically establish a conflict. This subsection does not
31 expressly cover a situation in which: (i) one of the specified filed records contains information in
32 addition to, but not inconsistent with, the partnership agreement, and (ii) a person, other than a
33 partner or transferee, reasonably relies on the additional information. However, the policy
34 reflected in this subsection seems equally applicable to that situation. Moreover, to argue that the
35 partnership agreement prevails over the filed record is to argue that the additional term does
36 conflict with the partnership agreement, at least in effect.

37
38 Section 105(a)(3) might also be relevant to the subject matter of this subsection. Absent a
39 contrary provision in the partnership agreement, language in a record delivered to the filing
40 office for filing on behalf of the partnership might be evidence of the partners’ agreement and
41 might thereby constitute or at least imply a term of the partnership agreement.

42
43 This subsection does not apply to records delivered to the filing office for filing on behalf
44 of persons other than a partnership.

**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.

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

(b) A record filed under this [act] may be signed by an agent. Whenever this [act] requires a particular individual to sign a record and the individual is deceased or incompetent, the record may be signed by a legal representative of the individual.

(c) A person that signs a record as an agent or legal representative affirms as a fact that the person is authorized to sign the record.

Comment

Subsection (a)—Section 102(20) defines “sign” broadly, including “an electronic symbol, sound, or process.”

Subsection (a)(1)—From the perspective of the filing office, it is not necessary that a partner sign a record delivered for filing on behalf of a partnership. The partnership agreement can impose such a requirement as an *inter se* matter, but the requirement would not affect this provision. *See* Section 105(c)(16)(B) (stating that the partnership agreement may not “vary any requirement, procedure, or other provision of this [act] pertaining to . . . the [Secretary of State],

1 including provisions pertaining to records authorized or required to be delivered to the [Secretary
2 of State] for filing under this [act]”).

3
4 The filing office will not check whether a person who purports to be authorized to sign a
5 record on behalf of a partnership actually has that authority, even if a statement of authority
6 pertaining to the matter is in effect. Indeed, even if the filing office somehow “knows” of a
7 statement limiting authority, the office lacks the authority to reject a record on that basis. *See* the
8 comment to Section 117(a) (stating the requirements for filing and noting that the filing office’s
9 review is ministerial and limited to information pertaining to the stated requirements), and the
10 comment to Section 117(c) (explaining why such a statement of authority does not affect the
11 filing office).

12
13 **Subsection (b)**—The filing office will not check the bona fides of a person purporting to
14 have signed a record in a representative capacity. This subsection expressly authorizes taking
15 action through an agent to provide context for Subsection (c) and for the avoidance of doubt. No
16 negative inference should be drawn about using agents to take other action under this act.

17
18 **Subsection (c)**—As a matter of agency law, a person who signs in a representative
19 capacity gives a “warranty of authority.” RESTATEMENT (THIRD) OF AGENCY § 6.10 (2006). This
20 subsection has criminal law implications. Under Section 109(c), “[a]n individual who signs a
21 record authorized or required to be filed under this [act] affirms under penalty of perjury that the
22 information stated in the record is accurate.”

23
24 **SECTION 109. LIABILITY FOR INACCURATE INFORMATION IN FILED**
25 **RECORD.**

26 (a) If a record delivered to the [Secretary of State] for filing under this [act] and filed by
27 the [Secretary of State] contains inaccurate information, a person that suffers loss by reliance on
28 the information may recover damages for the loss from:

29 (1) a person that signed the record, or caused another to sign it on the person’s
30 behalf, and knew the information to be inaccurate at the time the record was signed; and

31 (2) subject to subsection (b), a partner if:

32 (A) the record was delivered for filing on behalf of the partnership; and

33 (B) the partner knew or had notice of the inaccuracy for a reasonably
34 sufficient time before the information was relied upon so that, before the reliance, the partner
35 reasonably could have:

1 (i) effected an amendment under Section 901(f);
2 (ii) filed a petition under Section 112; or
3 (iii) delivered to the [Secretary of State] for filing a statement of
4 change under Section 909 or a statement of correction under Section 116.

5 (b) To the extent the partnership agreement expressly relieves a partner of responsibility
6 for maintaining the accuracy of information contained in records delivered on behalf of the
7 partnership to the [Secretary of State] for filing under this [act] and imposes that responsibility
8 on one or more other partners, the liability stated in subsection (a)(2) applies to those other
9 partners and not to the partner that the partnership agreement relieves of the responsibility.

10 (c) An individual who signs a record authorized or required to be filed under this [act]
11 affirms under penalty of perjury that the information stated in the record is accurate.

12 **Comment**

13 **Subsection (a)**—This subsection relates to liability to third parties for inaccurate
14 information in a filed record. Paragraph 1 requires actual knowledge because the paragraph can
15 inculcate a person who is not a partner. Under Paragraph 2(B), notice suffices, because: (i) the
16 provision applies only to partners; (ii) by status partners have overall management authority; and
17 (iii) therefore, it is reasonable to impose liability when a partner either knows or “has reason to
18 know . . . from all the facts known to the person at the time in question.” Section 103(b)(1)
19 (defining notice). For the same reason, Paragraph 1 applies only to “information [known] to be
20 inaccurate at the time the record was signed,” while Paragraph 2 applies whenever a “partner
21 knew or had notice of the inaccuracy for a reasonably sufficient time before the information was
22 relied upon so that, before the reliance, the partner reasonably could have [taken corrective
23 action].” Paragraph (2)(B).

24
25 **Subsection (a)(2)**—Although this act establishes the avoidance of gross negligence as
26 the standard of care for partners viz-a-viz the partnership, this subsection encompasses liability
27 to third parties. Accordingly, the standard here is more demanding. The phrases “reasonably
28 sufficient time” and “reasonably could have” indicate a standard of ordinary care. “[N]otice of
29 the inaccuracy” involves “reason to know.” Section 103(b)(1).

30
31 **Subsection (b)**—Section 105(d)(2) authorizes the partnership agreement to establish an
32 analogous rule *inter se* the partners. This subsection goes where the partnership agreement
33 cannot reach and affects the rights of third parties.
34

1 **Subsection (c)**—This subsection provides criminal liability. The elements of perjury are
2 a matter for the criminal law of the jurisdiction.

3
4 **SECTION 110. APPLICATION TO EXISTING RELATIONSHIPS.**

5 (a) Before [all-inclusive date], this [act] governs only:

6 (1) a partnership formed on or after [the effective date of this [act]]; and

7 (2) except as otherwise provided in subsection (c), a partnership formed before
8 [the effective date of this [act]] which elects, in the manner provided in its partnership agreement
9 or by law for amending the partnership agreement, to be subject to this [act].

10 (b) Except as otherwise provided in subsection (c), on and after [all-inclusive date] this
11 [act] governs all partnerships.

12 (c) With respect to a partnership that elects pursuant to subsection (a)(2) to be subject to
13 this [act], after the election takes effect the provisions of this [act] relating to the liability of the
14 partnership’s partners to third parties apply:

15 (1) before [all-inclusive date], to:

16 (A) a third party that had not done business with the partnership in the
17 year before the election took effect; and

18 (B) a third party that had done business with the partnership in the year
19 before the election took effect only if the third party knows or has been notified of the election;
20 and

21 (2) on and after [all-inclusive date], to all third parties, but those provisions
22 remain inapplicable to any obligation incurred while those provisions were inapplicable under
23 paragraph (1)(B).

24 **Legislative Note:**

25 *For states that have previously enacted UPA (1997): For these states this section is*
26 *unnecessary. There is no need for a delayed effective date, even with regard to pre-existing*

1 *partnerships. (Presumably, the “linkage” issue [discussed below] was addressed when UPA*
2 *(1997) was enacted.)*

3
4 ***For states that have not previously enacted UPA (1997):*** *Each enacting jurisdiction*
5 *should consider whether: (i) this act makes material changes to the “default” (or “gap filler”)*
6 *rules of the predecessor statute; and (ii) if so, whether Subsection (c) should carry forward any*
7 *of those rules for pre-existing partnerships. In this assessment, the focus is on pre-existing*
8 *partnerships that have left default rules in place, whether advisedly or not. The central question*
9 *is whether, for such partnerships, expanding Subsection (c) is necessary to prevent material*
10 *changes to the partners’ “deal.”*

11
12 *The “all-inclusive” date should be at least one year after the effective date of this act,*
13 *Section 1206, but no more than two years.*

14
15 ***The “linkage” issue—for states that still have ULPA (1976) or ULPA (1976/1985) in***
16 ***effect:*** *These states should enact ULPA (2001) (Last Amended 2013) to take effect in conjunction*
17 *with this act. If not, a state’s current limited partnership act must be amended to link to this act.*
18

19 **SECTION 111. DELIVERY OF RECORD.**

20 (a) Except as otherwise provided in this [act], permissible means of delivery of a record
21 include delivery by hand, mail, conventional commercial practice, and electronic transmission.

22 (b) Delivery to the [Secretary of State] is effective only when a record is received by the
23 [Secretary of State].

24 **Comment**

25 **Subsection (a)**—Permissible means of delivery are not limited to those listed in this
26 subsection, because this subsection by its terms is a non-exclusive list. Conventional commercial
27 practice includes the use of private delivery or courier services. What constitutes conventional
28 commercial practice may change over time.

29
30 **Subsection (b)**—This section lists permissible means of delivery but, except for delivery
31 to the filing office, does not determine when delivery occurs. Delivery to the filing office is
32 effective only upon actual receipt.

33 34 **SECTION 112. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER.**

35 (a) If a person required by this [act] to sign a record or deliver a record to the [Secretary
36 of State] for filing under this [act] does not do so, any other person that is aggrieved may petition
37 [the appropriate court] to order:

1 (1) the person to sign the record;

2 (2) the person to deliver the record to the [Secretary of State] for filing; or

3 (3) the [Secretary of State] to file the record unsigned.

4 (b) If a petitioner under subsection (a) is not the partnership or foreign limited liability
5 partnership to which the record pertains, the petitioner shall make the partnership or foreign
6 partnership a party to the action.

7 (c) A record filed under subsection (a)(3) is effective without being signed.

8 **Comment**

9 This section gives the court the flexibility to order either that a record be signed or that
10 the record be filed by the filing office unsigned. The latter circumstance may arise; for example,
11 in a situation where the person who should sign the record is not subject to the jurisdiction of the
12 court. This section also makes clear that the court may order a person with control over a record
13 that has been signed to deliver the record to the filing office for filing.

14
15 **SECTION 113. FILING REQUIREMENTS.**

16 (a) To be filed by the [Secretary of State] pursuant to this [act], a record must be received
17 by the [Secretary of State], comply with this [act], and satisfy the following:

18 (1) The filing of the record must be required or permitted by this [act].

19 (2) The record must be physically delivered in written form unless and to the
20 extent the [Secretary of State] permits electronic delivery of records.

21 (3) The words in the record must be in English, and numbers must be in Arabic or
22 Roman numerals, but the name of an entity need not be in English if written in English letters or
23 Arabic or Roman numerals.

24 (4) ~~The~~ **Except as provided in Section 112, the** record must be signed by a
25 person authorized or required under this [act] to sign the record.

26 ***{Source: Issue 15.}***

1 (5) The record must state the name and capacity, if any, of each individual who
2 signed it, either on behalf of the individual or the person authorized or required to sign the
3 record, but need not contain a seal, attestation, acknowledgment, or verification.

4 (b) If law other than this [act] prohibits the disclosure by the [Secretary of State] of
5 information contained in a record delivered to the [Secretary of State] for filing, the [Secretary of
6 State] shall file the record if the record otherwise complies with this [act] but may redact the
7 information.

8 (c) When a record is delivered to the [Secretary of State] for filing, any fee required under
9 this [act] and any fee, tax, interest, or penalty required to be paid under this [act] or law other
10 than this [act] must be paid in a manner permitted by the [Secretary of State] or by that law.

11 (d) The [Secretary of State] may require that a record delivered in written form be
12 accompanied by an identical or conformed copy.

13 (e) The [Secretary of State] may provide forms for filings required or permitted to be
14 made by this [act], but, except as otherwise provided in subsection (f), their use is not required.

15 (f) The [Secretary of State] may require that a cover sheet for a filing be on a form
16 prescribed by the [Secretary of State].

17 **(g) The following information in a record delivered to the [Secretary of State] for**
18 **filing under this [act] may not be made dependent on facts outside the record:**

- 19 **(1) a required name or address of a person;**
20 **(2) the registered office of an entity;**
21 **(3) the registered agent of an entity;**
22 **(4) a statement of the number of authorized interests and designation of each**
23 **class or series of interests of a business corporation;**

1 (5) the effective date of the record; and

2 (6) a required statement of the date on which the underlying transaction was
3 approved or the manner in which the approval was given.

4 {Source: Issue 16.}

5 **Comment**

6 The filing office's duty under this section is ministerial, Section 117(a), and the office's
7 assessment of a record delivered for filing is limited to conformity with this section. The filing
8 office *must* file a record delivered for filing if the record contains the information required by
9 this act and is accompanied by the required filing fee. The filing office is authorized to provide
10 forms but not require their use, and, as a result, may not reject records delivered for filing on the
11 basis of form (except to the very limited extent permitted by Subsections (d) and (f)).

12
13 In view of the very limited discretion granted to the filing office under this section and
14 Section 117(a), "[t]he filing of . . . a record does not create a presumption that . . . the
15 information contained in the record is correct" Section 117(e).

16
17 **Subsection (a)**—The first requisite for having a record filed is to cause the record
18 actually to be received by the filing office. Section 111(b) reiterates this point.

19
20 **Subsection (a)(2)**—A record delivered for filing must be in ~~typewritten or printed~~
21 **written** form unless the filing office permits delivery by electronic transmission. The types of
22 electronic transmission that may be used will be determined by the filing office and ~~is~~ **are**
23 intended to include the evolving methods of electronic delivery, including facsimile
24 transmissions, electronic transmissions between computers, and filings through delivery of
25 storage media.

26
27 {Source: Issue 15.}

28
29 **Subsection (a)(3)**—The text of an entity filing must be in the English language, except to
30 the limited extent permitted by this paragraph.

31
32 **Subsection (a)(4)**—To be filed a record must be signed by the appropriate person. See
33 the definition of "sign" in Section 102(20) for a description of the manner in which a record may
34 be "signed." Who is an appropriate person is determined under Section 108, but the filing office
35 will not check to determine whether a person purportedly authorized to sign is in fact authorized.
36 See the comment to Section 108(a)–(c).

37
38 The requirement in some state statutes that records delivered for filing on behalf of an
39 entity must be acknowledged or verified as a condition for filing has been rejected. These
40 requirements serve little purpose in connection with entity filings. On the other hand, many
41 organizations, like lenders or title companies, may desire that specific records include

1 acknowledgements, verifications, or seals; Subsection (a)(4) does not prohibit the addition of
2 these forms of execution and their use does not affect the eligibility of the record for filing.

3
4 **Subsection (b)**—Under this subsection, a confidentiality obligation does not affect the
5 filing office’s duty to file, and the filing office is authorized but not required to redact. This act
6 does not affect any confidentiality-related obligations the filing office may have under other law.

7
8 **SECTION 114. EFFECTIVE DATE AND TIME.** Except as otherwise provided in
9 Section 115 and subject to Section 116(c), a record filed under this [act] is effective:

10 (1) on the date and at the time of its filing by the [Secretary of State], as provided in
11 Section 117(b);

12 (2) on the date of filing and at the time specified in the record as its effective time, if later
13 than the time under paragraph (1);

14 (3) at a specified delayed effective date and time, which may not be more than 90 days
15 after the date of filing; or

16 (4) if a delayed effective date is specified, but no time is specified, at 12:01 a.m. on the
17 date specified, which may not be more than 90 days after the date of filing.

18 **Comment**

19 Records accepted for filing become effective at the date and time of filing as recorded by
20 the filing office, or at another specified time on that date, unless a permissible delayed effective
21 date is stated in the record.

22
23 Section 117(b) requires the filing office to maintain some means of recording the date and
24 time of delivery of a record and requires that office to record that date and time as the date and
25 time of filing. That provision gives express statutory authority to the common practice of most
26 filing offices of ignoring processing time and treating a record as filed as of the date and time it
27 is delivered for filing even though it may not be reviewed and accepted for filing until several
28 days after delivery. That section contemplates that time of delivery, as well as the date, will be
29 routinely recorded.

30
31 **Paragraph (1)**—In the absence of provision for a delayed effective date, a record
32 delivered for filing becomes effective on the date and time of filing by the filing office. Since
33 under Section 117(b) the date and time of filing is the recorded date and time of delivery of the
34 record to the filing office (which under Section 117(b) is the date and time of actual receipt),
35 together these provisions eliminate any doubt about situations involving same-day transactions in

1 which a record, for example, a statement of merger, is delivered for filing on the morning of the
2 day the merger is to become effective.

3
4 **Paragraph (3)**—This paragraph does not authorize or contemplate the retroactive
5 establishment of an effective date before the date of filing.

6
7 **Paragraphs (3) and (4)**—A record that states an effective date beyond the ninety-day
8 limit is not a record that “satisfies this [act],” Section 117(a), and will properly be rejected by the
9 filing office.

10
11 **SECTION 115. WITHDRAWAL OF FILED RECORD BEFORE**
12 **EFFECTIVENESS.**

13 (a) Except as otherwise provided in Sections 1124, 1134, 1144, and 1154, a record
14 delivered to the [Secretary of State] for filing may be withdrawn before it takes effect by
15 delivering to the [Secretary of State] for filing a statement of withdrawal.

16 (b) A statement of withdrawal must:

17 (1) be signed by each person that signed the record being withdrawn, except as
18 otherwise agreed by those persons;

19 (2) identify the record to be withdrawn; and

20 (3) if signed by fewer than all the persons that signed the record being withdrawn,
21 state that the record is withdrawn in accordance with the agreement of all the persons that signed
22 the record.

23 (c) On filing by the [Secretary of State] of a statement of withdrawal, the action or
24 transaction evidenced by the original record does not take effect.

25 **Comment**

26 Only records that have not yet taken effect may be withdrawn under this section. If a
27 record has taken effect, it may be corrected under Section 116 if the requirements of that section
28 are satisfied. Otherwise, the record must be amended in accordance with this act.

29
30 **Subsection (b)(1)**—This provision is subject to Section 108(b) (“Whenever this [act]
31 requires a particular individual to sign a record and the individual is deceased or incompetent, the

1 record may be signed by a legal representative of the individual.”).

2 **SECTION 116. CORRECTING FILED RECORD.**

3 (a) A person on whose behalf a filed record was delivered to the [Secretary of State] for
4 filing may correct the record if:

5 (1) the record at the time of filing was inaccurate;

6 (2) the record was defectively signed; or

7 (3) the electronic transmission of the record to the [Secretary of State] was
8 defective.

9 (b) To correct a filed record, a person on whose behalf the record was delivered to the
10 [Secretary of State] must deliver to the [Secretary of State] for filing a statement of correction.

11 (c) A statement of correction:

12 (1) may not state a delayed effective date;

13 (2) must be signed by the person correcting the filed record;

14 (3) must identify the filed record to be corrected;

15 (4) must specify the inaccuracy or defect to be corrected; and

16 (5) must correct the inaccuracy or defect.

17 (d) A statement of correction is effective as of the effective date of the filed record that it
18 corrects except for purposes of Section 103(d) and as to persons relying on the uncorrected filed
19 record and adversely affected by the correction. For those purposes and as to those persons, the
20 statement of correction is effective when filed.

21 **Comment**

22 This section permits making corrections in filed records without re-submitting the entire
23 record.

24
25 **Subsection (a)(1) and (2)**—A filed record may be corrected because it contains an
26 inaccuracy or because it was defectively signed (including defects in optional forms of execution

1 that do not affect the eligibility of the original record for filing).

2
3 **Subsection (a)(3)**—In addition, a filed record may be corrected if its electronic
4 transmission was defective (*i.e.*, where an electronic delivery is made but, due to a defect in
5 transmission, the filed record is later discovered to be inconsistent with the record intended to be
6 filed). If no delivery is made because of a defect in transmission, a statement of correction may
7 not be used to make a retroactive filing effective. Therefore, a partnership making an electronic
8 delivery should take steps to confirm that the filing office receives the transmission.

9
10 **Subsection (c)**—A provision in a filed record setting an effective date may be corrected
11 under this section, but the corrected effective date must comply with Section 114, which limits
12 delayed effective dates to within ninety days after filing. A corrected effective date is thus
13 measured from the date of the original filing of the record being corrected (*i.e.*, it cannot be
14 before the date of filing of the record or more than ninety days thereafter).

15
16 **Subsection (d)**—The correction relates back to the original effective date of the record
17 being corrected, except as to persons relying on the original entity filing and adversely affected
18 by the correction. As to these persons, the effective date of the statement of correction is the date
19 the statement is filed.

20
21 **SECTION 117. DUTY OF [SECRETARY OF STATE] TO FILE; REVIEW OF**
22 **REFUSAL TO FILE; DELIVERY OF RECORD BY [SECRETARY OF STATE].**

23 (a) ~~The~~ **Except as provided in subsection (g), the** [Secretary of State] shall file a record
24 delivered to the [Secretary of State] for filing which satisfies this [act]. The duty of the [Secretary
25 of State] under this section is ministerial.

26 **{Source: Issue 17.}**

27 (b) When the [Secretary of State] files a record, the [Secretary of State] shall record it as
28 filed on the date and at the time of its delivery. After filing a record, the [Secretary of State] shall
29 deliver to the person that submitted the record a copy of the record with an acknowledgment of
30 the date and time of filing and, in the case of a statement of denial, also to the partnership to
31 which the statement pertains.

32 (c) If the [Secretary of State] refuses to file a record, the [Secretary of State] shall, not
33 later than [15] business days after the record is delivered:

1 (1) return the record or notify the person that submitted the record of the refusal;
2 and

3 (2) provide a brief explanation in a record of the reason for the refusal.

4 (d) If the [Secretary of State] refuses to file a record, the person that submitted the record
5 may petition [the appropriate court] to compel filing of the record. The record and the
6 explanation of the [Secretary of State] of the refusal to file must be attached to the petition. The
7 court may decide the matter in a summary proceeding **and may:**

8 **(1) order the [Secretary of State] to file the record or a revision of the record;**
9 **and**

10 **(2) take other appropriate action with respect to the filing.**

11 {Source: Issue 17.}

12 (e) The filing of or refusal to file a record does not:

13 (1) affect the validity or invalidity of the record in whole or in part; or

14 (2) create a presumption that the information contained in the record is correct or
15 incorrect.

16 (f) Except as otherwise provided by Section 909 or by law other than this [act], the
17 [Secretary of State] may deliver any record to a person by delivering it:

18 (1) in person to the person that submitted it;

19 (2) to the address of the person's registered agent;

20 (3) to the principal office of the person; or

21 (4) to another address the person provides to the [Secretary of State] for delivery.

22 **(g) The [Secretary of State] may refuse to file a record if the [Secretary of State]**
23 **reasonably believes the record:**

1 (1) is being filed fraudulently; or

2 (2) may be used to accomplish a fraudulent, criminal, or unlawful purpose.

3 {Source: Issue 17.}

4 **Comment**

5 **Subsection (a)**—Under this subsection the filing office is required to file a record if it
6 “satisfies this [act].” The purpose of this language is to limit the discretion of the filing office to a
7 ministerial role in reviewing the contents of records. **The one exception is a record that is**
8 **described in subsection (g) where the Secretary of State is authorized to refuse to file a**
9 **record if there is a reasonable belief that the record is being filed fraudulently or for a**
10 **fraudulent, criminal, or unlawful purpose.** If the record submitted is in the form prescribed,
11 contains the information required by this act, and the appropriate filing fee is tendered, the filing
12 office must file the record. Consistent with this approach, this subsection states explicitly that the
13 filing duty of the filing office is ministerial. See Subsection (e) (pertaining to presumptions not
14 created).

15
16 **Subsection (b)**—This subsection provides that when the filing office files a record, the
17 filing office records it as filed on the date and time of delivery to the filing office, retains the
18 original record for the office’s records, and delivers a copy of the record to the person who
19 delivered the record for filing with an acknowledgement of the date and time of filing. In the
20 case of a statement of denial, Section 304, the filing office will also send a copy of the record and
21 acknowledgment to the partnership.

22
23 In the case of a record transmitted electronically to the filing office that office may
24 deliver by electronic transmission. The copy returned will be the exact or conformed copy if the
25 filing office has required one, or will be a copy made by the filing office if an exact or
26 conformed copy was not required.

27
28 Under this subsection the acceptance of a filing is evidenced merely by the filing office’s
29 delivery of a copy of the record with an acknowledgment of the date and time of filing. The act
30 does not provide for the filing office to issue a formal certificate of filing. A copy of the filed
31 record together with an acknowledgment of the date and time of filing should sufficiently
32 indicate that the filing has been accepted for filing and been filed.

33
34 **Subsection (c)**—Because of the simplification of formal filing requirements and the
35 limited discretion granted to the filing office by this act, it is probable that rejection of records
36 delivered to the filing office for filing will occur only rarely. This subsection provides that if the
37 filing office does reject a record delivered for filing, the filing office must return the record to the
38 person that submitted the filing within fifteen days together with a brief written explanation of
39 the reason for rejection. In the case of a record delivered by electronic transmission, rejection of
40 the record may be made electronically by the filing office or by a mailing to the person that
41 submitted the record.

Subsection (d)—The relief that may be ordered by a court when the Secretary of State has refused to file a record will usually include ordering the Secretary of State to complete the filing, although it may be necessary for the court to require that the record be revised to address the objection of the Secretary of State.

Subsection (d) confirms that the power of the court to decide whether a record should be accepted by the Secretary of State for filing includes the inherent power to take other action or award other relief with respect to the record that the court considers appropriate. An example of other relief a court might order is preserving as the filing date the date on which the record was first delivered to the Secretary of State, even though that date is outside the normal time in which the Secretary of State would ordinarily treat the date of delivery as the filing date. Preserving the original filing date may be important, for example, to demonstrate compliance with a contractual condition (such as that a transaction be completed by a certain date), or to permit filing a lawsuit by a nonregistered foreign entity close to the end of the running of the applicable statute of limitations (which lawsuit would be barred if the foreign entity's registration is not processed until after the statute of limitations has run).

If the Secretary of State refuses to file a record under subsection (g), the refusal may be challenged under subsection (d).

Subsection (e)—This subsection provides that the filing of a record by the filing office does not affect the validity or invalidity of any provision contained in the record and does not create any presumption with respect to any information in the record. Likewise, the refusal of the filing office to file a record creates no presumption that any of the information in the record is incorrect. Persons adversely affected by a statement in a filed record may contest the statement in a proceeding appropriate for that purpose, including a damage action under Section 109.

SECTION 118. RESERVATION OF POWER TO AMEND OR REPEAL. The [legislature of this state] has power to amend or repeal all or part of this [act] at any time, and all limited liability partnerships and foreign limited liability partnerships subject to this [act] are governed by the amendment or repeal.

Comment

Provisions similar to this section have their genesis in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819), which held that the United States Constitution prohibited the application of newly enacted statutes to existing corporations while suggesting the efficacy of a reservation of power similar to this section. This section is a generalized form of the type of provision found in many entity organic laws, the purpose of which is to avoid any possible argument that an entity has contractual or vested rights in any specific statutory provision of its organic law and to ensure that the state may in the future modify its entity statutes as it deems appropriate and require existing entities to comply with the statutes as

1 modified.

2
3 This section applies to changes in mandatory provisions of this act; the section does not
4 pertain to changes in default rules.

5
6 EXAMPLE: Having enacted this act, State A later amends Section 402(b)(3) (affirmative
7 vote or consent of all partners required for a person to become a partner) to reduce, as a
8 default rule, the necessary quantum of consent to consent from partners owning in the
9 aggregate at least two-third of the interests in current profits owned by partners at the
10 time of the consent. XYZ is a partnership formed under State A's act before the
11 amendment. XYZ's partnership agreement is silent on this issue, leaving in place the
12 act's default rule. Whether the act's amended default rule applies depends on whether the
13 partners initially: (i) agreed (whether expressly or implicitly) to accept the then-
14 applicable default rule requiring unanimous consent; (ii) agreed (whether expressly or
15 implicitly) to adopt whatever rule the act provided; or (iii) never considered the issue. In
16 short, the change in a default rule occasions an inquiry into the partners' express or
17 implied agreement as to the role of the default rule in their mutual understanding. In the
18 first instance, the old rule would continue in effect. In the second and third instances, the
19 new rule would apply.
20

21 **SECTION 119. SUPPLEMENTAL PRINCIPLES OF LAW.** Unless displaced by
22 particular provisions of this [act], the principles of law and equity supplement this [act].

23 **Comment**

24 For this act, the common law rules of contract and agency are among the most important
25 supplemental "principles of law." With regard to transactions under Article 11, noteworthy
26 principles include the rights of creditors following leveraged buyouts, spinoffs, asset purchases,
27 or other similar transactions; and creditors' rights under other laws.
28

29 **[ARTICLE] 2**

30 **NATURE OF PARTNERSHIP**

31 **SECTION 201. PARTNERSHIP AS ENTITY.**

32 (a) A partnership is an entity distinct from its partners.

33 (b) A partnership is the same entity regardless of whether the partnership has a statement
34 of qualification in effect under Section 901.

35 **Comment**

36 **Subsection (a)**—The law of general partnerships long struggled with the question of

whether a partnership is merely an aggregate of its partners or an entity distinct from its partners.

The common law took the aggregate approach. *X-L Liquors v. Taylor*, 111 A.2d 753, 759 (1955) (stating that “the common law did not recognize the separate existence of partnerships”); *Watson v. G.C. Associates Ltd. P’ship*, 691 P.2d 417, 418 (1984) (referring to the “common law or aggregate theory of partnership”); *McKinney v. Truck Ins. Exch.*, 324 S.W.2d 773, 776 (Mo. Ct. App. 1959) (referring to “the aggregate or common-law theory as to partnerships”).

Under UPA (1914), a general partnership had both entity and aggregate characteristics, in part because that act’s first reporter, who died during the lengthy drafting process, strongly favored the entity approach, while his replacement just as strongly favored the aggregate construct. *New England Herald Dev. Grp. v. Town of Falmouth*, 521 A.2d 693, 697 (Me. 1987) (“The draftsmen of the uniform act were divided over what effect it should have on the common law [aggregate] rule The result is the Act contains language that supports application of either [the entity or aggregate] theory.”).

According to the comment to this section, UPA (1997) “embrace[d] the entity theory of the partnership,” characterized “the entity theory as the dominant model” for the act, and highlighted a key problem arising from the aggregate aspect of UPA (1914)—namely, “the necessity of a deed to convey title from the ‘old’ partnership to the ‘new’ partnership every time there is a change of cast among the partners.” Under UPA (1997), “there [was] no ‘new’ partnership just because of membership changes,” thereby “avoid[ing] the result in cases such as *Fairway Development Co. v. Title Insurance Co.*, 621 F. Supp. 120 (N.D. Ohio 1985), which held that the ‘new’ partnership resulting from a partner’s death did not have standing to enforce a title insurance policy issued to the ‘old’ partnership.”

The Harmonization process made no changes to this aspect of UPA (1997). Note, however, that UPA (1997) retained several aspects of the aggregate construct: (i) joint and several liability of the partners for the obligations of a partnership that is not an LLP, Section 306(a); (ii) the concept of a partnership at-will, under which dissociation of any partner by “express will” dissolves the partnership, Section 801(1); and (iii) the susceptibility to dissolution of a partnership for a term or undertaking following the dissociation of a person as a partner. Section 801(2). Those vestiges continue under the Harmonization amendments adopted in 2011 and 2013.

Subsection (b)—Neither becoming nor ceasing to be a limited liability partnership affects a partnership’s entity status. These changes merely add or subtract a characteristic. Compare Section 201(b), with Section 1146(a)(1) (stating that “[w]hen a conversion becomes effective [] (1) the converted entity is: (A) organized under and subject to the organic law of the converted entity [and therefore a different type of entity]; and (B) the same entity without interruption as the converting entity”).

SECTION 202. FORMATION OF PARTNERSHIP.

(a) Except as otherwise provided in subsection (b), the association of two or more

1 persons to carry on as co-owners a business for profit forms a partnership, whether or not the
2 persons intend to form a partnership.

3 (b) An association formed under a statute other than this [act], a predecessor statute, or a
4 comparable statute of another jurisdiction is not a partnership under this [act] **, unless the**
5 **internal affairs of the association become governed by this [act] under Section 104 or 110 or**
6 **[Article] 11.**

7 *{Source: Issue 1.}*

8 (c) In determining whether a partnership is formed, the following rules apply:

9 (1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property,
10 common property, or part ownership does not by itself establish a partnership, even if the co-
11 owners share profits made by the use of the property.

12 (2) The sharing of gross returns does not by itself establish a partnership, even if
13 the persons sharing them have a joint or common right or interest in property from which the
14 returns are derived.

15 (3) A person who receives a share of the profits of a business is presumed to be a
16 partner in the business, unless the profits were received in payment:

17 (A) of a debt by installments or otherwise;

18 (B) for services as an independent contractor or of wages or other
19 compensation to an employee;

20 (C) of rent;

21 (D) of an annuity or other retirement or health benefit to a deceased or
22 retired partner or a beneficiary, representative, or designee of a deceased or retired partner;

23 (E) of interest or other charge on a loan, even if the amount of payment

varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or (F) for the sale of the goodwill of a business or other property by installments or otherwise.

Comment

UPA (1997) § 202 combined UPA (1914) §§ 6 and 7, recasting the “definition” of a partnership in UPA (1914) § 6(1) “as an operative rule of law – *i.e.*, “[a] partnership is an association of two or more persons . . .” became “the association of two or more persons . . . forms.” The change was stylistic and made no substantive change in the law. The Harmonization Project made no substantive change to this section, except to clarify that this act is not linked to the uniform limited partnership act. *See* Subsection (b), cmt.

The addition of the phrase, “whether or not the persons intend to form a partnership,” merely codifies the universal judicial construction of UPA (1914) § 6(1) that a partnership is created by the association of persons whose intent is to carry on as co-owners a business for profit, regardless of their subjective intention to be “partners.” Indeed, they may inadvertently create a partnership despite their expressed subjective intention not to do so. The language of Section 202 alerts readers to this possibility.

Subsection (a)—Consistent with the common law and UPA (1914), under this act “co-ownership” is a key concept. Ownership involves the power of ultimate control (albeit a power that can be substantially diminished by agreement) and a right to share in the profits of the co-owned business. To state that partners are co-owners of a business is to state that: (i) they share in the profits (if any) of the enterprise; and (ii) *ab initio* at least, they collectively have the power of ultimate control. Consequently:

- mere passive co-ownership of property, as distinguished from using the property to carry on a business, does not establish a partnership, Subsection (c)(1); and
- merely sharing gross revenues is likewise insufficient, Subsection (c)(2).

UPA (1997) added, “whether or not the persons intend to form a partnership” to the UPA (1914) formulation, thereby codifying a rule uniformly applied by courts: Subjective intent to create the legal relationship of “partnership” is irrelevant. What matters is the intent *vel non* to establish the business relationship that the law labels a “partnership.” Thus, a disclaimer of partnership status is ineffective to the extent the parties’ intended arrangements meet the criteria stated in this subsection.

Subsection (b)—This subsection continues the UPA (1914) concept that the general partnership is the residual form of business association. Accordingly, partnership-like organizations formed under specially applicable statutes are not within this act. *E.g.*, MONT.

1 CODE ANN. §§ 35-13-101 to 102 (pertaining to mining partnerships). **In addition, organizations**
2 **formed under the laws of other jurisdictions are not subject to this act when formed, but**
3 **may become subject to this act under Section 104 or 110 or Article 11.**
4

5 An arrangement labeled a “joint venture” is a partnership if the arrangement meets the
6 criteria stated in Subsection (a). In fact, in many jurisdictions, the law of general partnerships
7 applies almost without analysis to joint ventures in which the co-venturers share profits. *See*
8 *Jonathan Woodner Co. v. Laufer*, 531 A.2d 280, 285 n.7 (D.C. 1987) (stating that: (i) “[s]trictly
9 speaking, a joint venture is not the same as a partnership, but there is ‘very little law . . .
10 applicable to one that does not apply to the other’”; (ii) “the rights and liabilities of joint
11 venturers among themselves are generally governed by the laws of partnership”; and (iii)
12 “[p]rinciples of partnership law, in particular the Uniform Partnership act, apply in most
13 instances to joint ventures”) (quoting 46 AM. JUR. 2D JOINT VENTURES § 4, at 25 (1969) and
14 collecting cases).

15
16 A limited partnership is not a partnership under this act; a limited partnership is “formed
17 under a statute other than this [act]” (*i.e.*, ULPA (2001) (Last Amended 2013) § 201). Moreover,
18 ULPA (2001) delinked the uniform limited partnership act from the uniform general partnership
19 act. *See* ULPA (2001) (Last Amended 2013) Prefatory Note, *The Decision to “De-Link” and*
20 *Create a Stand Alone Act.*

21
22 An unincorporated nonprofit organization is not a partnership under this act, because the
23 organization is limited to “nonprofit purposes” and therefore cannot “carry on a business” in the
24 traditional sense of that concept. *See* UUNA (2008) (Last Amended 2013) § 102(11) (defining
25 “unincorporated nonprofit association”).

26
27 **Subsection (c)**—UPA (1997) derived this subsection from UPA (1914) § 7 and with one
28 exception, made no substantive change to the law. The substantive change pertains to the sharing
29 of profits, which UPA (1997) recast as creating a rebuttable presumption of partnership rather
30 merely constituting *prima facie* evidence. “*Prima facie*” means that the party with the burden of
31 proof has adduced sufficient evidence to carry that burden, subject to the finder of fact’s view of
32 any contrary evidence. The burden of persuasion is unchanged. In contrast, “rebuttable
33 presumption” switches the burden of persuasion.

34
35 **Subsection (c)(3)**—The protected categories listed in this paragraph apply regardless of
36 whether the profit share is a single, unvarying percentage or a ratio that varies; for example, after
37 reaching a dollar floor or different levels of profits. Like UPA (1914), this act makes no attempt
38 to answer in every case whether a partnership is formed. Whether a relationship is more properly
39 characterized as that of borrower and lender, employer and employee, or landlord and tenant is
40 left to the trier of fact. As under UPA (1914), a person may function in both partner and non-
41 partner capacities.

42
43 **Subsection (c)(3)(E)**—UPA (1997) added this protected category, excepting from the
44 rebuttable presumption a share of the profits received in payment of interest or other charges on a
45 loan, “including a direct or indirect present or future ownership in the collateral, or rights to
46 income, proceeds, or increase in value derived from the collateral.” The quoted language was

1 taken from Section 211 of the Uniform Land Security Interest Act and is intended to protect
2 shared-appreciation mortgages, contingent or other variable or performance-related mortgages,
3 and other equity participation arrangements by clarifying that contingent payments do not
4 presumptively convert lending arrangements into partnerships.

5
6 **SECTION 203. PARTNERSHIP PROPERTY.** Property acquired by a partnership is
7 property of the partnership and not of the partners individually.

8 **Comment**

9 Although phrased differently, this section, which originated in UPA (1997), produces the
10 same result as do UPA (1914) §§ 8(1) and 25. All property acquired by a partnership, by
11 whatever manner acquired, becomes partnership property and belongs to the partnership as an
12 entity, rather than to the individual partners.

13
14 Section 204 provides guidance concerning when property is “acquired by” the
15 partnership.

16
17 UPA (1914) § 25(2)(c) and (e) also provides that partnership property is not subject to
18 exemptions, allowances, or rights of a partner’s spouse, heirs, or next of kin. UPA (1997) omitted
19 those provisions as unnecessary, because the exemptions and rights inure to the property of the
20 partners, and not to partnership property.

21
22 **SECTION 204. WHEN PROPERTY IS PARTNERSHIP PROPERTY.**

23 (a) Property is partnership property if acquired in the name of:

24 (1) the partnership; or

25 (2) one or more partners with an indication in the instrument transferring title to
26 the property of the person’s capacity as a partner or of the existence of a partnership but without
27 an indication of the name of the partnership.

28 (b) Property is acquired in the name of the partnership by a transfer to:

29 (1) the partnership in its name; or

30 (2) one or more partners in their capacity as partners in the partnership, if the
31 name of the partnership is indicated in the instrument transferring title to the property.

32 (c) Property is presumed to be partnership property if purchased with partnership assets,

1 even if not acquired in the name of the partnership or of one or more partners with an indication
2 in the instrument transferring title to the property of the person's capacity as a partner or of the
3 existence of a partnership.

4 (d) Property acquired in the name of one or more of the partners, without an indication in
5 the instrument transferring title to the property of the person's capacity as a partner or of the
6 existence of a partnership and without use of partnership assets, is presumed to be separate
7 property, even if used for partnership purposes.

8 **Comment**

9 Section 204 states the rules *inter se the partners and partnership* for determining when
10 property is acquired by the partnership and so becomes partnership property. These rules apply to
11 "all property, whether real, personal, or mixed or tangible or intangible, or any right or interest
12 therein." Section 102(16) (defining "property").

13
14 These rules provide three separate approaches—according to:

- 15
- 16 • the name or names used in acquiring the property;
- 17 • when a partner's name appears as a transferee, the capacity in which the partner is
- 18 acting; and
- 19 • for property acquired by purchase, whether the partnership provided the
- 20 consideration for the property.
- 21

22 These approaches are complementary, not mutually exclusive.

23
24 This section omits any provision corresponding to UPA (1914) § 8(4), which states: "A
25 conveyance to a partnership in the partnership name, even without words of inheritance, passes
26 the entire estate of the grantor unless a contrary intent appears." UPA (1997) omitted the
27 provision as unnecessary because under modern conveyancing law all transfers pass the entire
28 estate or interest of the grantor unless a contrary intent appears.

29
30 To what extent this section's *inter se* rules affect third party rights is a matter for other
31 law, but in any event these rules yield automatically to statutes providing record title for
32 particular types of property. For an example, see Subsection (c), comment.

33
34 **Subsection (a) and (b)**—These subsections act in combination to provide the first two of
35 the approaches listed above. Under these subsections, property becomes partnership property if
36 acquired:

- 37 • in the name of the partnership; or

- in the name of one or more of the partners with an indication in the instrument transferring title of either:
 - their capacity as partners; or
 - of the existence of a partnership, even if the name of the partnership is not indicated.

Property acquired “in the name of the partnership” includes property acquired in the name of one or more partners in their capacity as partners, but only if the name of the partnership is indicated in the instrument transferring title.

Property transferred to a partner is partnership property, even though the name of the partnership is not indicated, if the instrument transferring title indicates either: (i) the partner’s capacity as a partner; or (ii) the existence of a partnership. This approach is consonant with the entity theory of partnership and resolves the troublesome issue of a conveyance to fewer than all the partners but that nevertheless indicates their partner status.

Subsections (c) and (d)—At least *inter se* the partners and partnership, it is the intention of the partners that controls whether property belongs to the partnership or to one or more of the partners in their individual capacities. These subsections each contain a rebuttable presumption as to the partners’ intent.

When applicable, the presumptions switch the burden of persuasion but are subject to an important limitation in favor of third parties. *See* Section 302(a)(3) (“Partnership property held in the name of one or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, may be transferred by an instrument of transfer executed signed by the persons in whose name the property is held.”).

Subsection (c)—Under this subsection, property purchased with partnership property is presumed to be partnership property, notwithstanding the name in which title is held or any other indicia. In this context, a promise made by a partnership in exchange for property triggers the presumption, including a promise to perform services or to guarantee another person’s obligation with regard to the purchase of the property.

The presumption is entirely ineffective against third parties with regard to property with record title.

EXAMPLE: Using partnership funds, a partner purchases realty in the partner’s own name and records the purchase in the appropriate land records. The partner later transfers title to the realty to a third party that has neither knowledge nor notice of any rights the partnership may have in the property. The relevant real estate statute is the applicable law; this subsection is entirely inapposite.

Subsection (d)—Under this subsection, property acquired in the name of one or more of the partners, without an indication of their capacity as partners and without use of partnership funds or credit, is presumed to be the partners’ separate property, even if used for partnership

1 purposes. In effect, this subsection presumes that only the use of the property is contributed to
2 the partnership.

3 4 [ARTICLE] 3

5 RELATIONS OF PARTNERS TO PERSONS DEALING WITH PARTNERSHIP

6 **SECTION 301. PARTNER AGENT OF PARTNERSHIP.** Subject to the effect of a
7 statement of partnership authority under Section 303, the following rules apply:

8 (1) Each partner is an agent of the partnership for the purpose of its business. An act of a
9 partner, including the signing of an instrument in the partnership name, for apparently carrying
10 on in the ordinary course the partnership business or business of the kind carried on by the
11 partnership binds the partnership, unless the partner did not have authority to act for the
12 partnership in the particular matter and the person with which the partner was dealing knew or
13 had notice that the partner lacked authority.

14 (2) An act of a partner which is not apparently for carrying on in the ordinary course the
15 partnership's business or business of the kind carried on by the partnership binds the partnership
16 only if the act was actually authorized by all the other partners.

17 **Comment**

18 At common law, a general partner was considered a general agent of the partnership.
19 Joseph Story, COMMENTARIES ON THE LAW ON PARTNERSHIP § 101, at 153 (2d ed. 1850);
20 RESTATEMENT (SECOND) OF AGENCY § 14A, cmt. a (1958). The mere status of a general partner
21 "clothes" a person with apparent authority to carry on the partnership business. *Stockwell v. U.S.*,
22 80 U.S. 531, 567 (1871); *Lincoln Nat'l Bank v. Schoen*, 56 Mo. App. 160, 164 (Mo. Ct. App.
23 1894); *Kansallis Fin. Ltd. v. Fern*, 659 N.E.2d 731, 733, 740 (Mass. 1996). In 1914, the UPA
24 codified this principle, UPA (1914) § 9, and "statutory apparent authority" has been part of
25 uniform partnerships acts ever since. *See* UPA (1997) § 301 (1997) (Partnership Agent of
26 Partnership); ULPA (2001) § 402 (General Partner Agent of Limited Partnership).

27
28 This section's principal purpose is to delineate a partner's statutory apparent authority.
29 The partnership agreement and Section 401 govern the rights of the partners among themselves,
30 including the right to restrict a partner's actual authority.

31
32 **Section 301(1)**—This paragraph retains the basic principles reflected in UPA (1914)

1 § 9(1) and in effect characterizes a partner as a general managerial agent. Such agents have both
2 actual and apparent authority, and this section delineates the apparent authority. For a discussion
3 of the scope of actual authority, see Section 401(h), comment.
4

5 The agency law origins of statutory apparent authority has informed courts' application of
6 UPA (1914) § 9(1), and that case law is equally applicable under this act. For example, although
7 the statutory language does not appear to require that the appearance of authority be reasonable,
8 the case law does so routinely. *See, e.g., In re Fox Hill Office Invs., Ltd.*, 101 B.R. 1007, 1019
9 (Bankr. W.D. Mo. 1989) (stating a third-party lender in possession of a copy of a limited
10 partnership's partnership agreement was on notice of the general partner's lack of authority and
11 therefore should have inquired as to the partner's authority), *aff'd*, 926 F.2d 752 (8th Cir. 1991);
12 *Investors Title Ins. Co. v. Herzig*, 360 S.E.2d 786, 789 (N.C. 1987) (stating that "in order to hold
13 the [partnership] liable, [a third party] must show that in the exercise of reasonable care under
14 the circumstances, it was justified in believing that the principal had conferred . . . authority to
15 [act] on behalf of the partnership"); *First Interstate Bank of Oregon, N.A. v. Bergendahl*, 723
16 P.2d 1005, 1010 (Or. Ct. App. 1986) (stating that bank in possession of management agreement
17 was on notice of general partner's restricted authority and could not rely on a theory of apparent
18 authority).
19

20 Likewise, per the law of apparent authority, a partner can bind a partnership under this
21 section even if the partner intends to take and does take the resulting benefits for the partner's
22 own benefit. *See Wolfe v. Harms*, 413 S.W.2d 204, 216 (Mo. 1967) (stating that partnership is
23 liable for partner's acts "even if the predominant motive of the partner was to benefit himself or
24 third persons"); *Rouse v. Pollard*, 18 A.2d 5, 7 (N.J. Eq. 1941) ("All the partners are responsible
25 for the act of one of their number as agent, even though he acts for some secret purpose of his
26 own, and not really for the benefit of the [partnership]."), *aff'd*, 21 A.2d 801 (N.J. Eq. 1941);
27 *Investors Title Ins. Co. v. Herzig*, 360 S.E.2d 786, 788 (N.C. 1987) (stating that the mere fact that
28 the partner's act was for personal gain was not enough to justify summary judgment for the
29 partnership on the subject of the partnership's liability for the act).
30

31 UPA (1997) § 301(1) effected three changes from UPA (1914) § 9(1). First, Section
32 301(1) clarified that a partner's apparent authority includes acts for carrying on in the ordinary
33 course "business of the kind carried on by the partnership," not just the business of the particular
34 partnership in question. UPA (1914) is ambiguous on this point, but the drafters of UPA (1997)
35 found some authority for an expanded construction in accordance with the so-called English rule.
36 *See, e.g., Burns v. Gonzalez*, 439 S.W.2d 128, 131 (Tex. Civ. App. 1969) (dictum); *Comm'l Hotel*
37 *v. Weeks*, 254 S.W. 521 (Tex. Civ. App. 1923).
38

39 The Harmonization Project preserved this UPA (1997) change, the significance of which
40 depends on how broadly courts construe "business of the kind carried on by the partnership." For
41 example, does a partnership that acts as a grain broker (never taking a position in grain) do
42 business "of the kind carried on" by a partnership that buys grain for resale?
43

44 Second, UPA (1997) used "carrying on in the ordinary course" in lieu of the UPA (1914)
45 phrase "in the usual way." The 1997 comments stated that: (i) "[t]he UPA and the case law use
46 both terms without apparent distinction"; and (ii) "[n]o substantive change [was] intended by use

1 of the more customary phrase.”

2
3 The change in language had the benefit of aligning Section 301(1) with Section 305
4 (establishing attribution rules for a partner’s wrongful conduct and referring to “ordinary course
5 of business of the partnership” and “the ordinary course of the partnership’s business”). The
6 Harmonization Project also preserved this UPA (1997) change. For a discussion of the
7 relationship between the ordinary course of the partnership’s business and a partner’s ordinary
8 duties, see Section 305(a), comment.

9
10 UPA (1997)’s third change to UPA (1914) § 9(1) concerned the allocation of risk of a
11 partner’s lack of authority. Under UPA (1914) § 9(1) and (4), a restriction on a partner’s
12 authority binds only a person with knowledge of the restriction. In contrast, UPA (1997) § 301(1)
13 provides that a person who has received a notification of a restriction is also bound. Thus, UPA
14 (1997) shifted the risk of lack of authority somewhat away from the partnership and somewhat
15 toward third parties dealing with partners.

16
17 The Harmonization Project shifted the risk a bit further, binding third parties who know
18 or *have reason to know* of a restriction. Section 301(1). (However, it is arguable that the
19 Harmonization Project merely made explicit a rule implicit in the case law. As noted above, the
20 case law requires a third party to show a *reasonable* belief in the partner’s authority. A third party
21 who has reason to know of a partner’s lack of authority will be hard pressed to make that
22 showing.)

23
24 Statements of partnership authority, Section 303, affect the application of this paragraph
25 only in two ways. First, under Section 303(e) all persons (other than partners) are deemed to
26 know of a limitation on the authority of a partner to transfer real property contained in a
27 statement recorded in the appropriate land records. Second, a person (other than a partner) with
28 actual knowledge of a grant or limitation of a partner’s authority may rely on that knowledge.

29
30 **Section 301(2)**—UPA (1997) drew this paragraph directly from UPA (1914) § 9(2), with
31 conforming changes to mirror the new language of Paragraph (1). Consistent with the law of
32 agency, a partnership is bound by a partner’s actual authority, even if the partner lacks apparent
33 authority. Under general agency principles, a partnership can subsequently ratify a partner’s
34 unauthorized act. *See* Section 119.

35
36 **UPA (1914) § 9(3) and (4)**—UPA (1997) omitted UPA (1914) § 9(3), which lists five acts
37 requiring unanimous consent of the partners to bind the partnership. Most of the listed acts
38 probably remain outside the apparent authority of a partner under this act, such as disposing of
39 the goodwill of the business, but the drafters of UPA (1997) believed that eliminating categorical
40 rules affords useful flexibility. In particular, it seemed “archaic to always require unanimous
41 consent to submit a partnership claim to arbitration.” UPA (1997) § 301, cmt.

42
43 UPA (1914) § 9(4) provides that a partnership is not bound by an act of a partner in
44 contravention of a restriction on a partner’s authority known to the other party. UPA (1997)
45 omitted that provision as being entirely redundant of UPA (1997) § 301(1).

1 The Harmonization Project preserved UPA (1997)’s approach to both UPA (1914) § 9(3)
2 and (4).

3
4 **SECTION 302. TRANSFER OF PARTNERSHIP PROPERTY.**

5 (a) Partnership property may be transferred as follows:

6 (1) Subject to the effect of a statement of partnership authority under Section 303,
7 partnership property held in the name of the partnership may be transferred by an instrument of
8 transfer signed by a partner in the partnership name.

9 (2) Partnership property held in the name of one or more partners with an
10 indication in the instrument transferring the property to them of their capacity as partners or of
11 the existence of a partnership, but without an indication of the name of the partnership, may be
12 transferred by an instrument of transfer signed by the persons in whose name the property is
13 held.

14 (3) Partnership property held in the name of one or more persons other than the
15 partnership, without an indication in the instrument transferring the property to them of their
16 capacity as partners or of the existence of a partnership, may be transferred by an instrument of
17 transfer signed by the persons in whose name the property is held.

18 (b) A partnership may recover partnership property from a transferee only if it proves that
19 signing of the instrument of initial transfer did not bind the partnership under Section 301 and:

20 (1) as to a subsequent transferee who gave value for property transferred under
21 subsection (a)(1) and (2), proves that the subsequent transferee knew or had been notified that
22 the person who signed the instrument of initial transfer lacked authority to bind the partnership;
23 or

24 (2) as to a transferee who gave value for property transferred under subsection
25 (a)(3), proves that the transferee knew or had been notified that the property was partnership

1 property and that the person who signed the instrument of initial transfer lacked authority to bind
2 the partnership.

3 (c) A partnership may not recover partnership property from a subsequent transferee if the
4 partnership would not have been entitled to recover the property, under subsection (b), from any
5 earlier transferee of the property.

6 ~~(d) If a person holds all the partners' interests in the partnership, all the partnership~~
7 ~~property vests in that person. The person may sign a record in the name of the partnership~~
8 ~~to evidence vesting of the property in that person and may file or record the record.~~

9 {Source: Issue 1.}

10 Comment

11 UPA (1997) § 302 replaced UPA (1914) §10 and provides rules for the transfer and
12 recovery of partnership property. While UPA (1914) § 10 covers only real property, this section
13 applies also to personal property acquired by instrument and held in the name of the partnership
14 or one or more of the partners.

15
16 The language of this section was adapted in part from the Georgia partnership statute in
17 effect during the UPA (1997) drafting process. *See* GA. CODE ANN. § 14-8-10. Rules stated in this
18 section necessarily parallel the rules stated in Section 203.

19
20 **Subsection (a)**—Subsection (a)(1) deals with the transfer of partnership property held in
21 the name of the partnership and Subsection (a)(2) deals with property held in the name of one or
22 more of the partners with an indication either of their capacity as partners or of the existence of a
23 partnership. Subsection (a)(3) deals with partnership property held in the name of one or more of
24 the partners without an indication of their capacity as partners or of the existence of a
25 partnership. Like Section 301, Subsection (a)(1) is subject to statements of partnership authority
26 under Section 303. *See* the comment to Section 301(1).

27
28 **Subsection (b)**—This subsection deals with the right of a partnership to recover
29 partnership property transferred by a partner without actual authority. The subsection's structure
30 corresponds to the structure of Subsection (a).

31
32 **Subsection (b)(1)**—This paragraph deals with the recovery of “property transferred
33 under subsection (a)(1) [or] (2).”

34
35 **Subsection (b)(2)**—This paragraph deals with the recovery of “property transferred
36 under subsection (a)(3).”

1
2 **Subsection (c)**—UPA (1997) added this subsection, which parallels Uniform Fraudulent
3 Transfer Act, section 8(a) (subsequent transferee from bona fide purchaser protected), 8(b)(2)
4 (same).
5

6 **Subsection (d)**—UPA (1997) added this subsection. So that this provision does not
7 destroy transferee rights, “all the partners interests” must be read to mean “each interest that
8 originated as a partner interest—which includes all transferable interests, by whomever owned.”
9

10 The UPA (1997) comment to this subsection took a noteworthy position on the
11 consequences of all the partners’ interests in the partnership being held by one person:
12

13 Subsection (d) allows for clear record title, even though the partnership no longer
14 exists as a technical matter. When a partnership becomes a sole proprietorship by
15 reason of the dissociation of all but one of the partners, title vests in the remaining
16 “partner,” although there is no “transfer” of the property. The remaining “partner”
17 may execute a deed or other transfer of record in the name of the non-existent
18 partnership to evidence vesting of the property in that person’s individual
19 capacity.
20

21 Section 801(6), added during the Harmonization Project, changes the analysis. The paragraph
22 states that dissolution is caused by “the passage of 90 consecutive days during which the
23 partnership does not have at least two partners.” Consequently, for at least eighty-nine
24 consecutive days a partnership remains un-dissolved although having only one partner, and even
25 at ninety days the partnership remains a partnership, albeit dissolved and compelled to wind up
26 its business. Subsection (d) remains quite useful if the sole remaining partner winds up the
27 partnership by becoming a sole proprietor, but it is no longer accurate to state that a partnership
28 with only one partner “no longer exists as a technical matter.”
29

30 **SECTION 303. STATEMENT OF PARTNERSHIP AUTHORITY.**

31 (a) A partnership may deliver to the [Secretary of State] for filing a statement of
32 partnership authority. The statement:

33 (1) must include the name of the partnership and:

34 (A) if the partnership is not a limited liability partnership, the street and
35 mailing addresses of its principal office; or

36 (B) if the partnership is a limited liability partnership, the name and street
37 and mailing addresses of its registered agent;

38 (2) with respect to any position that exists in or with respect to the partnership,

1 may state the authority, or limitations on the authority, of all persons holding the position to:

2 (A) sign an instrument transferring real property held in the name of the
3 partnership; or

4 (B) enter into other transactions on behalf of, or otherwise act for or
5 bind, the partnership; and

6 (3) may state the authority, or limitations on the authority, of a specific person to:

7 (A) sign an instrument transferring real property held in the name of the
8 partnership; or

9 (B) enter into other transactions on behalf of, or otherwise act for or bind,
10 the partnership.

11 (b) To amend or cancel a statement of authority filed by the [Secretary of State], a
12 partnership must deliver to the [Secretary of State] for filing an amendment or cancellation
13 stating:

14 (1) the name of the partnership;

15 (2) if the partnership is not a limited liability partnership, the street and mailing
16 addresses of the partnership's principal office;

17 (3) if the partnership is a limited liability partnership, the name and street and
18 mailing addresses of its registered agent;

19 (4) the date the statement being affected became effective; and

20 (5) the contents of the amendment or a declaration that the statement is canceled.

21 (c) A statement of authority affects only the power of a person to bind a partnership to
22 persons that are not partners.

23 (d) Subject to subsection (c) and Section 103(d)(1), and except as otherwise provided in

1 subsections (f), (g), and (h), a limitation on the authority of a person or a position contained in an
2 effective statement of authority is not by itself evidence of any person's knowledge or notice of
3 the limitation.

4 (e) Subject to subsection (c), a grant of authority not pertaining to transfers of real
5 property and contained in an effective statement of authority is conclusive in favor of a person
6 that gives value in reliance on the grant, except to the extent that if the person gives value:

7 (1) the person has knowledge to the contrary;

8 (2) the statement has been canceled or restrictively amended under subsection (b);

9 or

10 (3) a limitation on the grant is contained in another statement of authority that
11 became effective after the statement containing the grant became effective.

12 (f) Subject to subsection (c), an effective statement of authority that grants authority to
13 transfer real property held in the name of the partnership, a certified copy of which statement is
14 recorded in the office for recording transfers of the real property, is conclusive in favor of a
15 person that gives value in reliance on the grant without knowledge to the contrary, except to the
16 extent that when the person gives value:

17 (1) the statement has been canceled or restrictively amended under subsection (b),
18 and a certified copy of the cancellation or restrictive amendment has been recorded in the office
19 for recording transfers of the real property; or

20 (2) a limitation on the grant is contained in another statement of authority that
21 became effective after the statement containing the grant became effective, and a certified copy
22 of the later-effective statement is recorded in the office for recording transfers of the real
23 property.

1 (g) Subject to subsection (c), if a certified copy of an effective statement containing a
2 limitation on the authority to transfer real property held in the name of a partnership is recorded
3 in the office for recording transfers of that real property, all persons are deemed to know of the
4 limitation.

5 (h) Subject to subsection (i), an effective statement of dissolution is a cancellation of any
6 filed statement of authority for the purposes of subsection (f) and is a limitation on authority for
7 purposes of subsection (g).

8 (i) After a statement of dissolution becomes effective, a partnership may deliver to the
9 [Secretary of State] for filing and, if appropriate, may record a statement of authority that is
10 designated as a post-dissolution statement of authority. The statement operates as provided in
11 subsections (f) and (g).

12 (j) Unless canceled earlier, an effective statement of authority is canceled by operation of
13 law five years after the date on which the statement, or its most recent amendment, becomes
14 effective. The cancellation is effective without recording under subsection (f) or (g).

15 (k) An effective statement of denial operates as a restrictive amendment under this section
16 and may be recorded by certified copy for purposes of subsection (f)(1).

17 **Comment**

18 UPA (1997) § 303 pioneered this concept, which was refined in ULLCA (2006) and
19 further refined in the Harmonization Project. This section is conceptually divided into two
20 realms: (i) statements pertaining to the power to transfer interests in the partnership real property;
21 and (ii) statements pertaining to other matters. In the latter realm, statements are filed only in the
22 records of the filing office and operate only to the extent the statements are actually known and
23 relied on by a third party. Section 303(d), (e).

24
25 As to interests in real property, in contrast, this section: (i) requires double filing—with
26 the filing office and in the appropriate land records; and (ii) provides for constructive knowledge
27 of statements limiting authority. Thus, a properly filed and recorded statement can protect the
28 partnership, Section 303(g), and, in order for a statement pertaining to real property to be a
29 sword in the hands of a third party, the statement must have been both filed and properly

1 recorded, Section 303(f). Experience suggests that statements of authority will most often be
2 used in connection with transactions in real estate.

3
4 By its terms, this section applies only to domestic general partnerships. The section refers
5 throughout to “partnership,” which means a domestic general partnership. *See* Section 102(11)
6 (“‘Partnership’ . . . means an association of two or more persons to carry on as co-owners a
7 business for profit formed under this [act] or that becomes subject to this [act] under [Article] 11
8 [mergers and other organic transactions] or Section 110 [transition provision that eventually
9 makes pre-existing general partnerships subject to this act].”). *Cf. Fannie Mae v. Heather*
10 *Apartments Ltd. P’ship*, A13-0562, 2013 WL 6223564, at *6 (Minn. Ct. App. Dec. 2, 2013)
11 (considering the remedies available to a judgment creditor with respect to the judgment debtor’s
12 interest in a Cook Islands LLC; rejecting the debtor’s argument that the creditor’s “only remedy
13 is to obtain a charging order under” [the Minnesota LLC statute]; explaining that “this argument
14 fails because that statute only applies to Minnesota limited liability companies” which that
15 statute “defines . . . as ‘a limited liability company, other than a foreign limited liability company,
16 *organized or governed by this chapter*’”) (emphasis added) (statutory citations omitted).

17
18 **Subsection (a)(2)**—This paragraph permits a statement to designate authority by position
19 (or office) rather than by specific person, thus avoiding the need to file anew whenever a new
20 person assumes the position or the office. This type of a statement will enable partnerships to
21 provide evidence of ongoing power to enter into transactions without having to disclose to third
22 parties the entirety of the partnership agreement.

23
24 Here and elsewhere in the section, the phrase “real property” includes all types of
25 interests in real property, such as mortgages, easements, etc.

26
27 **Subsection (a)(2)(A) and (a)(3)(A)**—The authority to “sign” an instrument includes the
28 authority to commit the partnership to the transfer reflected in the agreement. *See* Subsection (f)
29 (referring not merely to signing but also to “an effective statement of authority that grants
30 authority to transfer real property”).

31
32 **Subsection (c)**—This subsection expresses a very important limitation – *i.e.*, that this
33 section’s rules do not operate *viz-a-viz* partners. For partners, the partnership agreement is
34 controlling. Section 107(d). However, like any other record delivered for filing on behalf of a
35 partnership, a statement of authority might be some evidence of the contents of the partnership
36 agreement. *See* the comment to Section 107(d).

37
38 Another important limitation exists. The filing office is not affected by a statement of
39 authority that purports to delineate the authority of persons to sign documents to be delivered for
40 filing of behalf of a partnership. The act does define “[p]erson” to include a “government or
41 governmental subdivision, agency, or instrumentality,” Section 102(14), but “a limitation on the
42 authority of a person or a position contained in an effective statement of authority is not by itself
43 evidence of knowledge or notice of the limitation by any person,” Subsection (d).

44
45 Moreover, even if an employee of the filing office happened to see that a statement of
46 authority purported to delineate the authority of persons to sign records to be delivered on behalf

1 of a partnership, that information would not pertain to a “fact [that] is material to the agent's
2 duties to the principal” and therefore would not be attributed to the filing office. RESTATEMENT
3 (THIRD) OF AGENCY § 5.03 (2006).

4
5 **Subsection (d)**—The phrase “by itself” is important, because the existence of a limitation
6 of authority could be evidence if, for example, the person in question reviewed the public record
7 at a time when the limitation was of record.

8
9 **Subsection (e)(2)**—This paragraph by its terms does not affect a claim of lingering
10 apparent authority. A person could: (i) assert knowledge of a statement of authority as the
11 statement existed before a cancellation or restrictive amendment; and (ii) characterize the
12 original statement as a manifestation of authority traceable to the partnership. RESTATEMENT
13 (THIRD) OF AGENCY § 3.03, cmt. b (2006) (“Apparent authority is present only when a third
14 party's belief is traceable to manifestations of the principal.”).

15
16 However, for apparent authority to exist, the purported agent must *reasonably* appear to
17 be authorized. RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006) (stating that apparent authority
18 can only exist when “a third party reasonably believes the actor has authority to act on behalf of
19 the principal”). Given the possibility of cancellation or restrictive amendment, how reasonable
20 can it be for a person to know of a statement of authority, let time pass, and then rely on the
21 statement without re-checking the public record?

22
23 **Subsections (f)–(h)**—These subsections: (i) pertain to transactions in real property; (ii)
24 provide a mechanism by which authority to transfer a partnership’s real property can be made to
25 appear in the real estate records; and (iii) thus address the principal concerns (raised by real
26 estate lawyers) that led the drafters of UPA (1997) to provide for statements of authority.

27
28 **Subsection (f)**—This subsection provides a sword for a vendee of real property. If the
29 vendee has “give[n] value in reliance on the grant without knowledge to the contrary,” the
30 statement of authority protects the vendee against claims that contradict the grant.

31
32 **Subsection (f)(1) and (2)**—As to a claim of lingering apparent authority, see Section
33 (e)(2), comment. The analysis stated there applies even more strongly in the context of
34 customary practices involving land transfers.

35
36 **Subsection (g)**—This subsection provides a shield for the partnership as alleged vendor.
37 If a vendee’s claim contradicts the stated limitation, constructive notice knowledge (“deemed to
38 know”) defeats the claim even if the vendee gave value and lacked actual knowledge.

39
40 **Subsection (h)**—This subsection integrates statements of dissolution, Section
41 802(b)(2)(A), and termination, Section 802(b)(2)(F), into the operation of this section.
42 The effect of a statement of dissolution depends on the circumstances.

43
44 EXAMPLE: ABC, a general partnership, has in effect a properly filed and recorded
45 statement of authority authorizing ABC’s CEO to transfer real estate owned by the
46 partnership. The proper filing and recording by ABC of a statement of dissolution cancels

1 the statement of authority. Subsequently, Buyer gives value in return for a deed signed by
2 the CEO on behalf of ABC. Due to Subsections (h) and (f)(1), Subsection (f) does not
3 protect Buyer. Moreover, under Subsections (g) and (h), Buyer is “deemed to know” of
4 the dissolution. Whether that deemed knowledge functions to deprive the CEO of
5 authority to bind ABC depends on agency law and additional facts. For example, the
6 CEO might have had actual or apparent authority to transfer the real estate despite the
7 dissolution of the partnership.
8

9 In contrast, the effect of a statement of termination, Section 802(b)(2)(f), is categorical. If
10 properly filed with the filing office and properly recorded in the office for land records, the
11 statement eliminates the power of any person to transfer real property owned in the name of the
12 partnership. No one can have the authority to act for a non-existent entity. *Cf.* RESTATEMENT
13 (THIRD) OF AGENCY § 4.04(1)(a) (2006) (precluding ratification by a principal that did not exist
14 at the time of the unauthorized act).
15

16 **Subsection (i)**—This provision permits a partnership to use statements of authority
17 during winding up. As an additional protection for third parties, a statement must be “designated
18 as a post-dissolution statement of authority” to be effective under this provision.
19

20 **Subsection (k)**—Presumably, when real property is involved, a person who obtains the
21 filing of a statement of denial under Section 304 will cause a certified copy of the statement to be
22 “recorded by certified copy for purposes of subsection (f)(1)” [undercutting constructive notice
23 as to authority to transfer real property]. However, nothing in this subsection prevents the
24 partnership from causing a certified copy to appear in the land records; due the section’s use of
25 the passive voice (“may be recorded”), the act does not delimit who has the authority to act under
26 this subsection.
27

28 **SECTION 304. STATEMENT OF DENIAL.** A person named in a filed statement of
29 authority granting that person authority may deliver to the [Secretary of State] for filing a
30 statement of denial that:

31 (1) provides the name of the partnership and the caption of the statement of authority to
32 which the statement of denial pertains; and

33 (2) denies the grant of authority.
34

1 **Comment**

2 A person whose powers are delineated in the public record by another person should have
3 the right to dissent from that delineation. This section takes an “all or nothing” approach; a
4 person may not deny in part and confirm in part. For the effect of a statement of denial, see
5 Section 303(c), comment, and Section 303(k).
6

7 Section 308(c) makes clear that a person does not become a partner solely because he is
8 named as a partner in a statement of partnership authority filed by another person.
9

10 **SECTION 305. PARTNERSHIP LIABLE FOR PARTNER’S ACTIONABLE**

11 **CONDUCT.**

12 (a) A partnership is liable for loss or injury caused to a person, or for a penalty incurred,
13 as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the
14 ordinary course of business of the partnership or with the actual or apparent authority of the
15 partnership.

16 (b) If, in the course of the partnership’s business or while acting with actual or apparent
17 authority of the partnership, a partner receives or causes the partnership to receive money or
18 property of a person not a partner, and the money or property is misapplied by a partner, the
19 partnership is liable for the loss.

20 **Comment**

21 **Subsection (a)**—This provision is derived from UPA (1914) § 13 (Partnership Bound by
22 Partner’s Wrongful Act), as modernized by UPA (1997) § 305(a) (Partnership Liable for Partner’s
23 Actionable Conduct) and for the most part parallels the agency law doctrine of *respondeat*
24 *superior*. See RESTATEMENT (SECOND) OF AGENCY § 14A, cmt. a (1958) (“When one of the
25 partners is in active management of the business or is otherwise regularly employed in the
26 business, he is a servant of the partnership.”). The liability is vicarious and without regard to the
27 fault of those managing the partnership.
28

29 UPA (1997) expanded this attribution rule in two ways. First, the 1997 language omitted
30 the 1914 phrase “not being a partner in the partnership,” thereby permitting a partner to sue the
31 partnership under this subsection during the term of the partnership, rather than being limited to
32 the remedies of dissolution and an accounting. This change was consistent with UPA(1997) §
33 410(b) (stating “[a] partner may maintain an action against the partnership or another partner,
34 with or without an accounting as to partnership business, to enforce the partner’s rights and

1 protect the partner’s interests”). Second, adding “or other actionable conduct” broadens the
2 subsection to cover no-fault torts.

3
4 To successfully invoke this provision, a plaintiff must show: (i) “a wrongful act or
5 omission or other actionable conduct” by a partner; (ii) that caused “loss or injury”; and (iii) that
6 at the relevant moment, the partner was acting with actual authority, apparent authority (if
7 relevant), or within “the ordinary course of business of the partnership.”

8
9 Extrapolating from agency law, apparent authority is relevant only when the appearance
10 of authority augments the impact of the wrongful act. *See* RESTATEMENT (THIRD) OF AGENCY, §
11 7.08 (2006) (“A principal is subject to vicarious liability for a tort committed by an agent in
12 dealing or communicating with a third party on or purportedly on behalf of the principal when
13 actions taken by the agent with apparent authority constitute the tort or enable the agent to
14 conceal its commission.”).

15
16 An act or omission may be “in the ordinary course of business of the partnership” even
17 though the act is wrongful. Any other interpretation would vitiate the “ordinary course” element.
18 “The proper question . . . is not whether the specific wrongful act is ‘ordinary course’ . . . , but
19 rather whether that type of act, if done rightfully, would be.” DANIEL S. KLEINBERGER, AGENCY,
20 PARTNERSHIP AND LLCs: EXAMPLES AND EXPLANATIONS § 10.5.1, at 350 (4th ed. 2012)
21 (emphasis omitted)

22
23 However, in *Jackson v. Jackson*, 201 S.E.2d 722, 724 (N.C. App. 1974), the North
24 Carolina Court of Appeals stated that, while “[a]dvising the initiation of a criminal prosecution is
25 clearly within the normal range of activities for a typical law partnership, . . . taking such action
26 maliciously and without probable cause is quite a different matter.” The court held that “[i]n
27 view of [ethics] rules, which clearly forbid any attempt by a lawyer to prosecute a person without
28 cause, it cannot be held that malicious prosecution is within the ordinary course of business of a
29 law partnership.” *Id.* It is difficult to identify a reasonable limit to this approach. Presumably, at
30 least, a partner’s “plain vanilla” malpractice is within a law firm’s ordinary course of business
31 despite the ethical rules requiring lawyers to act zealously and competently.

32
33 In any event, Subsection (a) refers to “the ordinary course of business of the *partnership*”
34 (emphasis added); thus, the proper question is whether the conduct is in the ordinary course for
35 the partnership and not whether the particular partner ordinarily plays a role in that part of the
36 partnership’s business. *See Vanacore v. Kennedy*, 86 F. Supp. 2d 42, 51 (D. Conn. 1998), *aff’d*
37 *sub nom.*, *Vanacore v. Space Realty, Inc.*, 208 F.3d 204 (2d Cir. 2000) (stating that “Kennedy [a
38 partner] committed his misdeeds, which led directly to plaintiff’s injuries, within the ordinary
39 course of the business of E & K [the partnership]”); *Sheridan v. Desmond*, 697 A.2d 1162, 1166
40 (Conn. App. Ct. 1997) (stating that to be considered “in ordinary course of the business,” a
41 partner’s action must be “the kind of thing *a* . . . partner would do”) (emphasis added); *In Moren*
42 *ex. rel. Moren v. JAX Rest.*, 679 N.W.2d 165, 167–68 (Minn. Ct. App. 2004) (stating, as part of
43 its analysis under UPA (1997) § 305, that “[i]t is undisputed that one of the cooks scheduled to
44 work that evening [at the partnership’s restaurant] did not come in, and that [one] partner asked
45 [another partner] to help in the kitchen . . . [and] that [the other partner] was making pizzas for
46 the partnership when” her negligence injured the plaintiff).

1 **Subsection (b)**—This provision is derived from UPA (1914) § 14 (Partnership Bound by
2 Partner’s Breach of Trust) and UPA (1997) § 305(b) (Partnership Liable for Partner’s Actionable
3 Conduct). It is not necessary that the partner “receiv[ing] or caus[ing] the partnership to receive
4 money or property” do so wrongfully. Culpability is necessary at the second phase—*i.e.* when
5 “the money or property is misapplied by a partner.”
6

7 **SECTION 306. PARTNER’S LIABILITY.**

8 (a) Except as otherwise provided in subsections (b) and (c), all partners are liable jointly
9 and severally for all debts, obligations, and other liabilities of the partnership unless otherwise
10 agreed by the claimant or provided by law.

11 (b) A person that becomes a partner is not personally liable for a debt, obligation, or other
12 liability of the partnership incurred before the person became a partner.

13 (c) A debt, obligation, or other liability of a partnership incurred while the partnership is a
14 limited liability partnership is solely the debt, obligation, or other liability of the limited liability
15 partnership. A partner is not personally liable, directly or indirectly, by way of contribution or
16 otherwise, for a debt, obligation, or other liability of the limited liability partnership solely by
17 reason of being or acting as a partner. This subsection applies:

18 (1) despite anything inconsistent in the partnership agreement that existed
19 immediately before the vote or consent required to become a limited liability partnership under
20 Section 901(b); and

21 (2) regardless of the dissolution of the limited liability partnership.

22 (d) The failure of a limited liability partnership to observe formalities relating to the
23 exercise of its powers or management of its business is not a ground for imposing liability on a
24 partner for a debt, obligation, or other liability of the partnership.

25 (e) The cancellation or administrative revocation of a limited liability partnership’s
26 statement of qualification does not affect the limitation in this section on the liability of a partner

1 for a debt, obligation, or other liability of the partnership incurred while the statement was in
2 effect.

3 **Comment**

4 **Derivation**—This section was derived from UPA (1997) § 306, which was also the
5 source for ULPA (2001) § 404 and ULLCA (2006) § 304. The Harmonization Project brought the
6 two partnership acts and the limited liability company act into accord to the extent the three acts
7 overlap.
8

9 **Subsection (a)**—Until the advent of limited liability partnerships and limited liability
10 limited partnerships, one hallmark of general partner status was strict, vicarious liability for the
11 debts, obligations, and other liabilities of the partnership. This subsection states that venerable
12 rule, albeit with two changes:
13

- 14 • Under UPA (1914) § 15, the nature of the general partners' liability depended on the
15 claim, giving rise to the partnership's liability. If the partnership's liability sounded in
16 tort, the general partners' liability was joint and several. If the partnership's liability
17 sounded in contract, the general partners' liability was only several. UPA (1997) § 306(a)
18 dispensed with that distinction.
- 19 • UPA (1997) § 307(d) generally requires a judgment creditor to exhaust the partnership's
20 assets before enforcing a judgment against the separate assets of a partner. Prior law was
21 to the contrary.
22

23 The Harmonization Project made no substantive changes to this subsection.
24

25 **Subsection (b)**—UPA (1997) continued the approach of UPA (1914) §§17 and 41(7) to
26 the vicarious liability of an incoming partner, but used a simpler and clearer formulation. The
27 Harmonization Project made no substantive changes to this subsection.
28

29 With regard to when a partnership incurs a debt, obligation, or other liability, the case law
30 is scant and concerns only contractual and similar obligations. The leading case is *Conklin Farm*
31 *v. Leibowitz*, 658 A.2d 1257 (N.J. 1995), which holds that: (i) obligations on a loan, whether for
32 interest or principal, are incurred when the loan is made, not when each particular payment is
33 due; and (ii) obligations for lease payments are incurred when each rental payment is due, not
34 when the lease is made.
35

36 *Conklin* concerned a partnership loan obligation that was: (i) entered into before a
37 particular partner joined the partnership; but (ii) for the most part, was payable afterwards. The
38 court held that “interest is part of the contractual debt, and the obligation to pay interest on a loan
39 arises, if at all, at the time that the parties execute the note or other debt instrument. *Conklin*, 658
40 A.2d at 1261. The court indicated that the same analysis applies to the obligation to repay
41 principal. *Id.* at 1263 (stating that “the decisive issue before this court . . . [is that] [p]ayment of
42 interest, like repayment of advances, is an obligation that arises at the time the debt instrument is
43 executed”).

Conklin discussed the lease issue in response to the creditor's argument that “just as a rent obligation arises for current use of property, an interest obligation arises for current use of principal.” *Id.* at 1261. Rejecting that argument, the court: (i) noted “the *common-law* obligation to pay rent based on current tenancy [which] . . . arises with each period of tenancy, and . . . arises even in the absence of a lease”; (ii) described “the common-law obligation to pay rent [as] entirely independent of the contractual obligation under the lease”; and (iii) held that, for purposes of partnership law, the rule for “incurring” a lease obligation rests on the common law duty in tenancy and not on the lease as a contract. *Id.* at 1262 (citing *Ellingson v. Walsh, O'Connor & Barneson*, 104 P.2d 507, 508 (Cal. 1940)).

As to when a partnership incurs a tort liability, the answer might be found by analogy to statute of limitation rules, another area of law concerned with when claims arise. “Although the courts have not been consistent . . . , the interpretation of [when] a . . . statute [of limitations begins to run] as applied to torts has been such that the statute does not usually begin to run until the tort is complete A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff.” RESTATEMENT (SECOND) OF TORTS § 899, cmt c (1979); *see also* *Loehr v. Ventura Cnty. Cmty. Coll. Dist.*, 147 Cal. App. 3d 1071, 1078 (Cal. Ct. App. 1983). By analogy, a partnership would incur liability for a tort when the harm occurs. *See, e.g., Jones v. Cox*, 828 P.2d 218, 224 (Colo. 1992) (“A cause of action has commonly been understood to ‘accrue’ when a suit may be maintained thereon.”) (quoting BLACK’S LAW DICTIONARY 19 (5th ed. 1979)); *Loehr*, 147 Cal. App. 3d at 1078.

However, a policy argument exists to the contrary. Vicarious liability for a partnership's torts should be confined to persons who are partners when the wrongful conduct occurs. It is the conduct, not the consequences, that is wrongful; therefore, the occurrence of the wrongful conduct should determine which set of partners is liable for the conduct's consequences.

For further discussion of the “incurred” issue, see Subsection (c), comment (The Temporal Nexus—When Claim Incurred).

Subsection (c)—This subsection provides a corporate/LLC-like liability shield for partners, protecting them from (and only from) the debts, obligations and liabilities of the partnership — *i.e.*, against a partner’s alleged vicarious liability for the obligations of the entity.

Full Liability Shield

This act provides a full liability shield – *i.e.*, the shield applies regardless of the law giving rise to a claim against an LLP. A few jurisdictions provide only a partial shield. *See, e.g.*, 15 PA. CONS. STAT. ANN. § 8204 (West 2013) (providing the partners of an LLP a shield for claims against the partnership “whether sounding in contract or tort or otherwise,” but only the claims that “arise from any negligent or wrongful acts or misconduct committed by another partner or other representative of the partnership”). The resulting partial shield does not protect partners against liability for the partnership’s ordinary commercial debts, such as liability for lease payments.

1 *Shield Applicable Regardless of the Identity of the Plaintiff*

2
3 What makes the shield relevant is the nature of the claim. If the complaint seeks to hold a
4 partner vicariously liability for the LLP's obligations, the shield applies. If not, not. Thus, there
5 is no distinction among a claim arising from an LLP's debt to a commercial creditor, a partner's
6 claim that the LLP has failed to return a contribution as required by the partnership agreement,
7 and a claim by a former partner that the LLP has failed to follow through on a buy-out
8 agreement. *See Rappaport v. Gelfand*, 197 Cal. App. 4th 1213, 1230–32 (Cal. Ct. App. 2011)
9 (involving a claim by a former partner). *Accord Ederer v. Gursky*, 881 N.E.2d 204, 212–13 (N.Y.
10 2007) (Smith, J., dissenting).

11
12 *Shield Inapposite for Claims Arising from a Partner's Own Conduct*

13
14 Because the partner liability at issue is solely vicarious, the LLP shield is irrelevant to
15 claims seeking to hold a partner directly liable on account of the partner's own conduct. Case law
16 on this issue comes from the analogous context of limited liability companies, and in that context
17 a few judges have failed to understand this point. *See ULLCA* (2006) (Last Amended 2013) §
18 304(c), cmt. (Shield Inapposite for Claims Arising from a Member's or Manager's Own
19 Conduct). However, the overwhelming weight of case law is contrary, as are the actual words of
20 shield provisions (immunizing only for obligations of the entity and making no reference to
21 direct obligations of an owner or manager) and public policy (which recoils from the idea of
22 immunizing a person's misconduct solely because the person acts on behalf of an organization).

23
24 EXAMPLE: A partner personally guarantees a debt of a limited liability partnership.
25 Subsection (c) is irrelevant to the partner's liability as guarantor.

26
27 EXAMPLE: A partner purports to bind a limited liability partnership while lacking any
28 agency law power to do so. The LLP is not bound, but the partner is liable for having
29 breached the "warranty of authority" (an agency law doctrine). Subsection (c) does not
30 apply. The liability is not *for* a debt, obligation, or other liability of the LLP, but is rather
31 the partner's own, direct liability. Indeed, the liability exists because the LLP is *not*
32 indebted, obligated or liable. RESTATEMENT (THIRD) OF AGENCY § 6.10 (2006).

33
34 EXAMPLE: A partner of a limited liability partnership defames a third party in
35 circumstances that render an LLP vicariously liable under Section 305(a). Under
36 Subsection (c), the third party cannot hold the partner accountable for the *partnership's*
37 liability, but that protection is immaterial. The partner is the tortfeasor and in that role is
38 directly liable to the third party.

39
40 EXAMPLE: A limited liability partnership provides professional services, and one of its
41 partners commits malpractice. The liability shield is irrelevant to the partner's direct
42 liability in tort. However, if the partner's malpractice liability is attributed to the
43 partnership under Section 305(a), the liability shield will protect the other partners
44 against a claim that they must make good on the LLP's liability. The same analysis
45 applies if the plaintiff also successfully claims that another partner was negligent in
46 supervising the first partner

1 EXAMPLE: A limited liability partnership with two partners enters into a contract to
2 build a home, and the partners perform substantial amounts of the work. The homeowner
3 sues both the LLP and the partners for allegedly defective work, but the complaint sounds
4 in contract rather than in tort. The LLP may be liable, but the partners are not. *See Ogea*
5 *v. Merritt*, 130 So. 3d 888, 905 (La. 2013).

6
7 Subsection (c) pertains only to claims based on the LLP's liability and is irrelevant to
8 claims by a limited liability partnership or a partner against another partner and *vice versa*. *See*
9 Sections 307 (pertaining to actions by partners), 409 (pertaining to management duties).

10 11 *Shield Inapposite to Role Liability Claims*

12
13 Provisions of regulatory law may impose liability on a partner of an LLP due to a role the
14 partner plays in the partnership. *See, e.g., Food Team Intern., Ltd. v. Unilink, L.L.C.*, 872 F. Supp.
15 2d 405, 424 (E.D Pa. 2012) (holding several individuals "subject to secondary individual liability
16 under PACA [Perishable Agricultural Commodities Act]" because their roles within a limited
17 liability company enabled them to control the relevant assets) (citing *Bear Mountain Orchards,*
18 *Inc. v. Mich-Kim, Inc.*, 623 F.3d 163, 172 (3d Cir. 2010)). Subsection (c) does not affect this
19 "role liability."

20 21 *The Temporal Nexus—When Claim Incurred*

22
23 The LLP shield functions only with respect to obligations incurred while the partnership
24 is a limited liability partnership. The shield does not protect partners from vicarious liability for
25 partnership obligations incurred before a partnership becomes an LLP or after the partnership
26 cancels its LLP status. *See* Section 903(d). The same is true initially when LLP status has been
27 administratively revoked, but reinstatement of LLP status resurrects the shield retroactively,
28 except as to persons who relied on the revocation. Section 903(d).

29
30 For a preliminary discussion of when a partnership obligation is incurred, see Subsection
31 (b), comment. It could well be argued that "incurred" under Subsection (c) has the same meaning
32 as "incurred" under Subsection (b). *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) (referring to "the
33 normal rule of statutory interpretation that identical words used in different parts of the same
34 statute are generally presumed to have the same meaning"); *Timberline Air Serv., Inc. v. Bell*
35 *Helicopter-Textron, Inc.*, 884 P.2d 920, 925 (1994) (stating that "[w]hen the same words are used
36 in different parts of the same statute, it is presumed that the Legislature intended that the words
37 have the same meaning").

38
39 However, the argument should yield if the subsections' different contexts raise different
40 issues of policy. 1A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:12 (7th ed.)
41 (stating that "departure from the literal construction of a statute is justified when such a
42 construction would produce an absurd and unjust result and would clearly be inconsistent with
43 the purposes and policies of the act in question"); *see, e.g., S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex.
44 1996) ("[W]e have held that a cause of action accrues when a wrongful act causes some legal
45 injury, even if the fact of injury is not discovered until later, and even if all resulting damages
46 have not yet occurred. We have not applied this rule without exception, however, and have

1 sometimes held that an action does not accrue until the plaintiff knew or in the exercise of
2 reasonable diligence should have known of the wrongful act and resulting injury.”) (citations
3 omitted).

4
5 The case law concerning contractual obligations (incurred when the contract is made)
6 applies appropriately in the context of the LLP shield. However, the lease case law is
7 problematic. If an obligation is incurred each time rent is due, subsection(c) is a trap for the
8 unwary landlord.

9
10 EXAMPLE: Ordinary general partnership enters into a lease with a commercial landlord.
11 Knowing that each partner is automatically liable for the partnership's debt, the landlord
12 does not obtain personal guarantees. Subsequently, the partnership becomes an LLP. If
13 future rent payments are incurred when due, and not as of when the lease was made, the
14 landlord loses a very important part of the bargain.

15
16 Thus, for the purposes of Subsection (c), lease obligations should be treated as contractual
17 obligations, incurred when the contract is made.

18
19 A similar issue exists with regard to tort liability. Courts must look to when the conduct
20 causing the injury takes place and not to when actual injury occurs. Otherwise, a partnership
21 could: (i) engage in wrongful conduct that does not cause immediate injury; (ii) come to realize
22 that the conduct has occurred; (iii) subsequently file a statement of qualification; (iv) thereby
23 become an LLP; and (v) thereby eliminate the vicarious liability of its partners for all harm
24 subsequently arising from the misconduct. *Cf. Savini v. Univ. of Haw.*, 153 P.3d 1144, 1150
25 (Haw. 2007) (addressing the question of when a statute of limitations begins to run for bodily
26 injury, when another statute precludes bringing a claim until the amount of damages has reached
27 a specified threshold).

28
29 In general, courts should determine the “incurred” question under Subsection (c) so that
30 the LLP shield protects the partners of an LLP to the same extent that the corporate and LLC
31 shields protect corporate shareholders and LLC members. From that perspective, LLP status
32 obtained after a partnership commits a wrongful act should provide no greater protection for the
33 partners than a sole proprietor obtains by forming an LLC after committing a wrongful act – *i.e.*,
34 none. *See, e.g., Foxchase, L.L.P. v. Cliatt*, 562 S.E.2d 221, 224 (Ga. Ct. App. 2002) (holding
35 that a partnership’s liability shield did not protect partners from claims of property damage
36 caused by the construction of a golf course, where the jury could have found that the “damage . .
37 . occurred when they, not the partnership, owned the course”).

38
39 From the same perspective, *Evanston Ins. Co. v. Dillard Dept. Stores, Inc.*, 602 F.3d 610
40 (5th Cir. 2010) makes no sense. Interpreting the Texas LLP statute, the court held that a partner’s
41 liability for a partnership debit is incurred only when judgment is entered against the partnership.
42 Although the decision itself benefitted creditors, the holding invites the type of gamesmanship
43 shown in the leasing example, above. Moreover, the decision: (i) has been criticized by the Texas
44 Court of Appeals, *Am. Star Energy & Minerals Corp. v. Stowers*, 405 S.W.3d 905, 907 (Tex.
45 App. 2013); (ii) ignores the precedent discussed in Subsection (b), comment and Section 307(c),
46 comment; and (iii) can be distinguished as depending on the particular (non-uniform) language

1 of the Texas statute. *Evanston Ins. Co v. Dillard Dep't Stores, Inc.*, 602 F.3d 610, 615–16 (5th
2 Cir. 2010) (contrasting “incurred” with “committed”).

3 4 *Effect of LLP Status on Relations Inter Se the Partners*

5
6 Although the most noticeable consequence of LLP status is the corporate/LLC-like
7 liability shield, there are two *inter se* consequences as well. One is straightforward; the other is
8 complex.

- 9
- 10 • When a partnership chooses the jurisdiction in which to deliver for filing a statement of
11 qualification, the partnership chooses its governing law. Section 104(1). The partnership
12 agreement cannot override that choice. Section 105(c)(1).
 - 13 • When a partnership becomes a limited liability partnership, several related default rules
14 change (going forward):
 - 15 ○ Partners no longer share losses. Capital losses “lay where they fall.”
 - 16 ○ Except for contributions promised but not made, partners no longer have
17 contribution obligations.
 - 18 ▪ Due to:
 - 19 • the liability shield, partners are no longer required to contribute
20 capital to enable the partnership to meet its obligations to creditors;
21 and
 - 22 • the elimination of loss sharing, partners are no longer required to
23 contribute capital to adjust capital losses *inter se*.

24 In this context, a partnership’s obligations include a duty to indemnify partners (and others).
25 Thus, indemnification provisions (whether as provided by this act, Section 401(c), or the
26 partnership agreement) are no longer “backstopped” by the partners. *See* the comment to
27 Subsection (c)(1).

28
29 **Subsection (c)(1)**—The main part of Subsection (c) overrides contribution obligations
30 under this act. Paragraph 1 overrides contribution obligations created by the partnership
31 agreement.

32
33 **EXAMPLE:** The partnership agreement of a non-LLP partnership requires partners to
34 contribute additional capital as necessary to fund the partnership’s obligations to
35 indemnify partners. When the partnership becomes an LLP, Paragraph 1 overrides that
36 requirement.

37
38 Paragraph 1 does not, however, override contribution and indemnification requirements
39 running directly from partner to partner. These obligations are not obligations of the LLP but
40 rather personal to each partner. If such obligations remain in the partnership agreement, they
41 might disable the shield as to partnership liability arising from the misconduct of a partner.

42
43 **EXAMPLE:** The partnership agreement of a non-LLP partnership requires partners to
44 contribute additional capital as necessary to fund the partnership’s obligations to
45 indemnify the Managing Partner and also states:

46 To the extent the partnership lacks sufficient funds to perform the partnership’s

1 indemnification obligation, each partner shall indemnify the Managing Partner to
2 the same extent and under the same conditions as the partnership. As among
3 themselves, the indemnifying partners shall share the indemnification obligation
4 proportional to their rights to distributions of then current profits as of the time the
5 Managing Partner's conduct gave rise to the claim for which the Managing
6 Partner is to be indemnified.

7 The partnership becomes an LLP. Subsequently, the Managing Partner is held liable in
8 tort for conduct within the scope of the Managing Partner's responsibility and the
9 partnership is held liable under Section 305(a). The partnership has no funds to pay the
10 judgment or indemnify the Managing Partner. Paragraph 1 overrides the contribution
11 requirement but does not change each partner's obligation to indemnify the Managing
12 Partner.

13 The Managing Partner's right to be indemnified is an asset of the Managing Partner, and
14 the judgment creditor can levy on that asset, thereby defeating the liability shield in effect
15 if not in form.
16

17 **Subsection (c)(2)—*The Shield and Dissolution.*** The rule stated here is inherent in the
18 nature of partnership dissolution. "[D]issolution does not end a partnership's existence but rather
19 changes the purpose of that existence." Section 801, cmt. "A dissolved partnership shall wind up
20 its business and... continues after dissolution ... for the purpose of winding up." Section 802(a).
21 Put another way: dissolution and winding up are part of the life cycle of a partnership –
22 sometimes the most complicated part. There is no logical reason to remove the shield during the
23 last part of an LLP's life cycle.

24 This subsection makes this point expressly, because it is possible to misinterpret some
25 outlying cases as holding to the contrary. *See, e.g., Carolina Cas. Ins. Co. v. L.M. Ross Law Grp.,*
26 *LLP*, 151 Cal. Rptr. 3d 628, 635 (2012) (affirming the trial court's decision to hold an LLP's
27 named partner liable for a judgment against his limited liability partnership; noting that "[c]entral
28 to the decision to amend the judgment to add Ross [the named partner] as a judgment debtor ...
29 is the trial court's finding that Ross Law Group dissolved"; recognizing, however, that, before the
30 partnership incurred the liability, Ross had signed and filed with the California Secretary of State
31 a form stating that the law firm had "cease[d] to be a registered limited liability partnership and
32 is hereby filing this notice with the California Secretary of State that [it] is no longer a registered
33 limited partnership") (quotation marks omitted).

34 *The Shield and Termination.* This subsection does not expressly provide that, when a
35 limited liability partnership's existence terminates, the LLP shield remains in place as to any
36 debt, obligation, or other liability of the partnership incurred before the termination. However,
37 the point follows ineluctably from Subsection 306(b). That subsection adopts an "occurrence"
38 rather than a "claims made" basis for determining whether the shield applies. *See* the comment
39 to Subsection (b). (The Temporal Nexus –When Claim Incurred).

40 Moreover, any other result would: (i) create huge holes in the shield; (ii) put the law of
41 unincorporated businesses at odds with the law of corporations; (iii) render surplus this act's
42 distribution recapture provision, Section 407; (iv) render meaningless the exception to the notice
43 requirement as stated in Sections 807(b)(5) and 808(b)(4); and (v) render nonsensical the
44 otherwise logical extension of the equitable trust fund theory to limited liability partnerships. *Cf.*

1 *Velasquez v. Franz*, 589 A.2d 143, 146 (N.J. 1991) (explaining that “the trust-fund doctrine...
2 renders shareholders who receive distributed assets of the corporation liable as ‘trustees’ for
3 claims of the corporation's creditors”).
4

5 **Subsection (d)**—This subsection was added during the Harmonization Project and
6 pertains to the equitable doctrine of “piercing the veil” – *i.e.*, conflating an entity and its owners
7 to hold one liable for the obligations of the other. The doctrine of “piercing the corporate veil” is
8 well established, and courts should apply the doctrine to limited liability partnerships for the
9 same reasons that courts have regularly (and sometimes almost reflexively) applied the doctrine
10 to limited liability companies. *Cf. Axtmann v. Chillemi*, 740 N.W.2d 838, 847 (N.D. 2007)
11 (stating that “the shield of a limited liability partnership may be pierced under ‘the case law that
12 states the conditions and circumstances under which the corporate veil or limited liability shield
13 of a corporation may be pierced under North Dakota law’”) (quoting N.D.C.C. § 45-22-
14 09(1)).
15

16 However, as with LLC piercing, LLP piercing involves one important distinction from
17 the corporate realm. While under corporate law “disregard of corporate formalities” is a key
18 piercing factor, that factor is inapposite in the law of unincorporated organizations. Corporate
19 formalities reflect statutory mandates. LLP formalities derive for the most part from the
20 agreement among the partners. From a policy perspective, disregarding formalities adopted by
21 agreement differs substantially from disregarding formalities imposed by law. *See e.g. In re*
22 *Packer*, Bankruptcy No. 13–41304, 2014 WL 5100095 (Bankr. E.D. Tex. Oct. 10, 2014) (noting
23 the informality of LLC governance, recognizing that “the disregard of corporate formalities ...
24 [is] one of the key factors in [corporate] veil-piercing determinations”; but holding that “it
25 makes no sense to imperil the shield simply because the members do not undergo meaningless
26 formalities such as formal meetings”) (citing Carter G. Bishop & Daniel S. Kleinberger,
27 LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW ¶ 6.03 at *3 (Thomson Reuters Tax
28 and Accounting 2014)).

29 Moreover, because the terms of a partnership agreement may be “implied,” Section
30 102(12), an LLP’s ongoing disregard of formalities may well constitute an amendment to the
31 partnership agreement. If so, disregard equals amendment, and the concept of “disregard of
32 formalities” makes no sense.
33

34 In contrast, this subsection is inapposite to another key piercing factor – disregard of the
35 separateness between entity and owner. *Cf. Vanderford Co. v. Knudson*, 165 P.3d 261, 271 (Idaho
36 2007) (noting that managing member and “his accountant testified that the LLC’s checking
37 account was so confusing that the accountant could not be sure whose money was in the account
38 at what times”); *Utzler v. Braca*, 972 A.2d 743 (Conn. App. Ct. 2009) (holding that veil piercing
39 was appropriate under alter-ego theory when owner deposited LLC funds into a commingled
40 bank account from which he made withdrawals for personal needs and unrelated projects).
41

42 **EXAMPLE:** A partner in a limited liability partnership uses a car titled in the
43 partnership’s name for personal purposes and writes checks on the partnership’s account
44 to pay for personal expenses. These facts are relevant to a piercing claim; they pertain to
45 economic separateness, not Subsection (b) formalities.

46 This subsection addresses claims to “impos[e] liability on a partner for a debt, obligation,

1 or other liability of the partnership” – *i.e.*, for what is sometimes termed a “direct pierce.”
2 Whether the same approach should apply to claims for a “reverse pierce” is a question for the
3 courts. *See Comm’r of Envtl. Prot. v. State Five Indus. Park, Inc.*, 37 A.3d 724, 732–33 (Conn.
4 2012) (stating that “[a]lthough some courts have adopted reverse veil piercing with little
5 distinction as a logical corollary of traditional veil piercing, because the two share the same
6 equitable goals, others wisely have recognized important differences between them”).

7
8 This subsection is inapposite to a member’s claim that the disregard of agreed-upon
9 formalities is a breach of the partnership agreement.

10
11 **Subsection (e)**—The rule stated here is implicit in Subsection (c) but is stated expressly
12 for the avoidance of doubt.

13
14 **SECTION 307. ACTIONS BY AND AGAINST PARTNERSHIP AND PARTNERS.**

15 (a) A partnership may sue and be sued in the name of the partnership.

16 (b) To the extent not inconsistent with Section 306, a partner may be joined in an action
17 against the partnership or named in a separate action.

18 (c) A judgment against a partnership is not by itself a judgment against a partner. A
19 judgment against a partnership may not be satisfied from a partner’s assets unless there is also a
20 judgment against the partner.

21 (d) A judgment creditor of a partner may not levy execution against the assets of the
22 partner to satisfy a judgment based on a claim against the partnership unless the partner is
23 personally liable for the claim under Section 306 and:

24 (1) a judgment based on the same claim has been obtained against the partnership
25 and a writ of execution on the judgment has been returned unsatisfied in whole or in part;

26 (2) the partnership is a debtor in bankruptcy;

27 (3) the partner has agreed that the creditor need not exhaust partnership assets;

28 (4) a court grants permission to the judgment creditor to levy execution against
29 the assets of a partner based on a finding that partnership assets subject to execution are clearly
30 insufficient to satisfy the judgment, that exhaustion of partnership assets is excessively

1 burdensome, or that the grant of permission is an appropriate exercise of the court's equitable
2 powers; or

3 (5) liability is imposed on the partner by law or contract independent of the
4 existence of the partnership.

5 (e) This section applies to any debt, liability, or other obligation of a partnership which
6 results from a representation by a partner or purported partner under Section 308.

7 **Comment**

8 Section 307 reflects the entity construct, Section 201(a), was new in UPA (1997), and
9 cannot be varied by the partnership agreement. *See* Section 105(c)(3). The Harmonization
10 Project made no substantive changes to this section.

11
12 **Subsection (a)**—UPA (1997) § 307 clarified and simplified an “entity versus aggregate”
13 question that had been at best complicated under the common law and UPA (1914) (*i.e.*, whether
14 a general partnership could sue and be sued in its own name and without joining all the partners).
15

16 “[A]t common law, . . . a partnership could neither sue or be sued in its name. The
17 individual partners were required to be named as plaintiffs in an action brought by the
18 partnership and as defendants in an action against a partnership.” *Telamarketing Commc'ns, Inc.*
19 *v. Liberty Partners*, 798 S.W.2d 462, 463 (Ky. 1990) (discussing Kentucky law); *see also* JOSEPH
20 STORY, COMMENTARIES ON THE LAW ON PARTNERSHIP § 241, at 373–74 (2d ed. 1850) (“It is a
21 general rule, that in all such suits at law [between a partnership and a third party] all the partners
22 should join.”).
23

24 UPA (1914) was silent on the point, although some courts inferred capacity to sue (and
25 presumably to be sued) from other entity-like characteristics reflected in that act. *E.g.*, *Decker*
26 *Coal Co. v. Commonwealth Edison Co.*, 714 P.2d 155, 157 (Mont. 1986) (agreeing with a party's
27 contention that “[a]lthough . . . the UPA does not expressly deal with the question of a
28 partnership's capacity to sue, . . . the UPA does show the modern tendency to treat a partnership
29 as a legal entity distinct from and independent of the individuals composing it”; citing as an
30 example, a partnership's ability to “own property in its own name”; and holding that “it is clear
31 that a partnership is indeed a legal entity distinct from its partners [and] [t]herefore, . . . has the
32 capacity to sue in its own name”).
33

34 The situation was further complicated by “common name” statutes enacted in many
35 states. *See Silliman v. DuPont*, 302 A.2d 327, 331 (Del. Super. 1972), *aff'd sub nom.*, *F. I. Du*
36 *Pont, Glore Forgan & Co. v. Silliman*, 310 A.2d 128 (Del. 1973) (“The basic purpose of
37 [common name] statutes was to permit a non-corporate entity to be sued in the name it presented
38 to the public without the necessity of joining the many individuals who composed it.”).
39

1 The rule stated here is perhaps implicit in Section 201(a) (“A partnership is an entity
2 distinct from its partners.”). It is a hallmark of a legal entity that it can sue and be sued. In any
3 event, this subsection leaves no room for doubt.
4

5 **Subsection (b)**—The phrase “not inconsistent with Section 306” means:
6

- 7 • If a debt, obligation, or other liability is incurred by a limited liability partnership,
8 this subsection does not permit joinder of a partner.
- 9 • Likewise, if a debt, obligation, or other liability is incurred by an ordinary
10 partnership before a person becomes a partner, this subsection does not permit
11 joinder of that person.
12

13 As for when a claim is incurred, see Section 307(c) and (d), comments.
14

15 The reference to “not inconsistent with Section 306” is the procedural analog to the
16 substantive protections of Section 306(b) (incoming partner not liable for pre-existing
17 partnership obligations) and (c) (partners not liable for partnership obligations incurred by an
18 LLP). When a partner has personally guaranteed a partnership obligation, naming that partner in
19 a suit against the partnership is “not inconsistent with Section 306.” See the comment to Section
20 306(c) (Shield Inapposite for Claims Arising from a Partner’s Conduct); cf. *Bank of Bos. Conn. v.*
21 *Schlesinger*, 595 A.2d 872, 875 (Conn. 1991) (upholding pre-judgment attachment of a partner’s
22 assets, where the partner had personally guaranteed the partnership’s obligations).
23

24 **Subsection (c)**—Reflecting the entity construct, Section 201(a), this subsection provides
25 that a judgment against the partnership: (i) is not, standing alone, a judgment against the
26 partners; and (ii) cannot be satisfied from a partner’s personal assets absent a judgment against
27 the partner.
28

29 As did UPA (1914) and UPA (1997), this act leaves to the law of judgments to determine
30 the collateral effects to be accorded a prior judgment for or against the partnership in a
31 subsequent action against a partner individually. See RESTATEMENT (SECOND) OF JUDGMENTS §
32 60, cmts. (1982); see also *Detrio v. U.S.*, 264 F.2d 658 (5th Cir. 1959); *Brunson v. Seltz*, 414
33 N.W.2d 547 (Minn. Ct. App. 1987) (Lansing, J.). *Contra Evanston Ins. Co. v. Dillard Dep’t*
34 *Stores, Inc.*, 602 F.3d 610, 618 (5th Cir. 2010) (disregarding *sub silentio* the separateness of
35 partner and partnership, overlooking therefore the issue of collateral estoppel, discussing with
36 approval a bankruptcy case in which “the trustee sought to enforce the partnership judgment
37 against [partners] simply by virtue of their status as partner”; and quoting with approval that
38 case’s holding that “[o]nce the liability of the partnership became fixed, the only issue remaining
39 was whether the Defendants are partners of [the partnership]” (quoting *In re Jones*, 161 B.R.
40 180, 183–84 (Bankr. N.D. Tex. 1993)).
41

42 This subsection and Subsection (d) combine to create a trap for the unwary. For statute of
43 limitations purposes, a creditor’s claim against the partners accrues simultaneously with the
44 claim against the partnership. If a creditor chooses not to sue the partners in its suit against the
45 partnership, the statute of limitations may run before the creditor commences suit against the
46 partners. *Am. Star Energy & Minerals Corp. v. Stowers*, 405 S.W.3d 905, 907 (Tex. App. 2013)

1 (holding that the partnership creditor “was obligated to sue the partners of S & J . . . within the
2 same limitations period it had to sue S & J, the partnership” and that “[b]ecause, [the creditor]
3 did not, the trial court correctly held that limitations ran”); *Sunseri v. Proctor*, 487 F. Supp. 2d
4 905, 908 (E.D. Mich. 2007), *aff’d*, 286 F. App’x 930 (6th Cir. 2008) (“While the plaintiff may use
5 collateral estoppel to prevent the partner from relitigating the issue of liability, the plaintiff must
6 still bring suit within the applicable limitations period for the underlying wrong.”)
7

8 **Subsection (d)**—Subject to the five listed exceptions, this subsection prevents a partner’s
9 assets from being the first recourse for a judgment creditor of the partnership, even if the partner
10 is liable for the judgment debt under Section 306.
11

12 Although this subsection is silent with respect to pre-judgment remedies, as a matter of
13 policy the subsection should guide courts as they apply the law of pre-judgment remedies.
14 *Compare Sec. Pac. Nat’l Bank v. Matek*, 175 Cal. App. 3d 1071, 1077 (Cal. Ct. App. 1985)
15 (granting a pre-judgment remedy against a partner because there is “no distinction between those
16 sued individually as partners and those sued as sole proprietors”), *with Bank of Bos. Conn. v.*
17 *Schlesinger*, 595 A.2d 872, 875 (Conn. 1991) (upholding pre-judgment attachment of a partner’s
18 assets, because the partner had personally guaranteed the partnership’s obligations).
19

20 **Subsection (e)**—The effect of this subsection depends on whether Section 308 applies to
21 produce a partnership obligation or a joint and several obligation. *See* Section 308(a) (“If
22 partnership liability results [under the subsection], the purported partner is liable with respect to
23 that liability as if the purported partner were a partner. If no partnership liability results, the
24 purported partner is liable with respect to that liability jointly and severally with any other person
25 consenting to the representation.”), (b) (“If all the partners of the existing partnership consent to
26 the representation, a partnership act or obligation results. If fewer than all the partners of the
27 existing partnership consent to the representation, the person acting and the partners consenting
28 to the representation are jointly and severally liable.”).
29

30 **SECTION 308. LIABILITY OF PURPORTED PARTNER.**

31 (a) If a person, by words or conduct, purports to be a partner, or consents to being
32 represented by another as a partner, in a partnership or with one or more persons not partners, the
33 purported partner is liable to a person to whom the representation is made, if that person, relying
34 on the representation, enters into a transaction with the actual or purported partnership. If the
35 representation, either by the purported partner or by a person with the purported partner’s
36 consent, is made in a public manner, the purported partner is liable to a person who relies upon
37 the purported partnership even if the purported partner is not aware of being held out as a partner
38 to the claimant. If partnership liability results, the purported partner is liable with respect to that

1 liability as if the purported partner were a partner. If no partnership liability results, the
2 purported partner is liable with respect to that liability jointly and severally with any other person
3 consenting to the representation.

4 (b) If a person is thus represented to be a partner in an existing partnership, or with one or
5 more persons not partners, the purported partner is an agent of persons consenting to the
6 representation to bind them to the same extent and in the same manner as if the purported partner
7 were a partner with respect to persons who enter into transactions in reliance upon the
8 representation. If all the partners of the existing partnership consent to the representation, a
9 partnership act or obligation results. If fewer than all the partners of the existing partnership
10 consent to the representation, the person acting and the partners consenting to the representation
11 are jointly and severally liable.

12 (c) A person is not liable as a partner merely because the person is named by another as a
13 partner in a statement of partnership authority.

14 (d) A person does not continue to be liable as a partner merely because of a failure to file
15 a statement of dissociation or to amend a statement of partnership authority to indicate the
16 person's dissociation as a partner.

17 (e) Except as otherwise provided in subsections (a) and (b), persons who are not partners
18 as to each other are not liable as partners to other persons.

19 **Comment**

20 UPA (1997) § 308 continued the basic principles of partnership by estoppel stated in UPA
21 (1914) § 16. To the extent a partnership liability results under Section 308, Section 307 applies.
22 See Section 307(e). The Harmonization Project made no substantive changes to this section.

23
24 **Subsections (a) and (b)**—Even though these subdivisions refer to “reliance” without
25 expressly imposing a reasonableness requirement, the requirement exists in the case law. *See,*
26 *e.g., In re Cay Clubs*, 319 P.3d 625, 633 (Nev. 2014) (adopting the requirement and stating that,
27 although the requirement is not explicitly stated in [the statute,] [g]enerally, jurisdictions provide

1 that the partnership-by-estoppel doctrine conditions liability on the plaintiff having reasonably
2 relied on the representation of partnership, which often involves an exercise of due diligence to
3 ascertain the facts”).

4
5 **Subsection (a)**—This subsection continues the distinction between representations made
6 to specific persons and those made in a public manner. In both circumstances, the claimant must
7 show reliance.

8
9 Like UPA (1914) § 16, this section imposes no duty of denial; thus, a person held out by
10 another as a partner is not liable without having actually consented to the representation. *See*
11 Subsection (c) (no duty to file statement of denial); Subsection (d) (no duty to file statement of
12 dissociation or to amend statement of partnership authority).

13
14 **Subsections (c) and (d)**—These subsections were new in UPA (1997) and preclude
15 negative inferences from outdated information in filed statements.

16
17 **Subsection (e)**—Derived from UPA (1914) § 7(1), this subsection circumscribes the
18 circumstances in which a person can be liable as a partner to third parties for the obligations of
19 the partnership – *i.e.*, only if (i) the person is a partner in the partnership; or (ii) the person is
20 liable under Section 308(a) or (b).

21 22 [ARTICLE] 4

23 RELATIONS OF PARTNERS TO EACH OTHER

24 AND TO PARTNERSHIP

25 SECTION 401. PARTNER’S RIGHTS AND DUTIES.

26 (a) ~~Each partner is entitled to an equal share of the partnership distributions and,~~
27 ~~except in the case of a limited liability partnership, is chargeable with a share of the~~
28 ~~partnership losses in proportion to the partner’s share of the distributions. (Reserved.)~~

29 {Source: Issues 6 and 7.}

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

33 (c) A partnership shall indemnify and hold harmless a person with respect to any claim or
34 demand against the person and any debt, obligation, or other liability incurred by the person by

1 reason of the person's former or present capacity as a partner, if the claim, demand, debt,
2 obligation, or other liability does not arise from the person's breach of this section or Section 407
3 or 409.

4 (d) In the ordinary course of its business, a partnership may advance reasonable expenses,
5 including attorney's fees and costs, incurred by a person in connection with a claim or demand
6 against the person by reason of the person's former or present capacity as a partner, if the person
7 promises to repay the partnership if the person ultimately is determined not to be entitled to be
8 indemnified under subsection (c).

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

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

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

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

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

21 (j) A partner is not entitled to remuneration for services performed for the partnership,
22 except for reasonable compensation for services rendered in winding up the business of the
23 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.

Comment

~~For the most part,~~ Section 401 ~~merely~~ restates the rules of UPA (1914) § 18, thereby establishing many of the default rules that govern the relations among partners. All of these rules are, however, subject to contrary agreement of the partners as provided in Sections 105 through 107.

~~UPA (1997) § 401(a) experimented with providing a default configuration for capital accounts. For the reasons stated in Section 405, comment, the Harmonization Project ended the experiment and eliminated the configuration.~~

~~Subsection (a)—This subsection continues the approach of UPA (1914) § 18(a), although for the reasons stated in Section 405, comment, the Harmonization Project substituted “distribution” for “profits.” Distributions are shared equally and losses are shared in proportion to each partner’s share of distributions. Thus, under this default rule, partners share distributions per capita and not in proportion to capital contribution (per capital).~~

~~If partners agree to share distributions other than equally, losses will be shared in the same proportion as distributions, absent agreement to do otherwise. This rule, carried over from UPA (1914) rests on the assumption that partners would likely agree to share losses on the same basis as distributions, but may fail to say so. Of course, by agreement, they may share losses on a different basis from distributions.~~

~~Subject to contrary agreement and the effect of Section 806(e), this subsection’s loss sharing rules apply, even where one or more of the partners contribute no capital. The rule was the same under UPA (1914) § 18(a), although there is some case law to the contrary. See, e.g., *Kovacik v. Reed*, 315 P.2d 314 (Cal. 1957); *Becker v. Killarney*, 523 N.E.2d 467 (Ill. App. Ct. 1988). It may seem unfair that the contributor of services, who contributes little or no capital, should be obligated to contribute toward the capital loss of the large contributor who contributed no services. In entering a partnership with such a capital structure, the partners should foresee that application of the default rule might bring about unusual results and take advantage of their power to vary by agreement the allocation of capital losses.~~

~~Subsections (b) and (c)—A partnership’s obligation, if any, to reimburse or indemnify others (e.g., employees, other agents, and independent contractors) is a question for other law, including the law of agency, contract, and restitution. The fact a person has dissociated as a~~

1 partner does not affect any obligations incurred by the partnership under these subsections for
2 conduct occurring before the dissociation.

3
4 To the extent a partnership agreement modifies or displaces the default rules stated in
5 Sections 401 and 409, the agreement should also address these sections. For example, if the
6 partnership agreement establishes a duty of ordinary care (modifying Section 409(c)), the
7 agreement should specify which level of care is necessary to satisfy Subsections (b) and (c). It is
8 not necessary that the levels of care be the same, only that the partnership agreement make the
9 situation clear and thereby avoid difficult issues of interpretation.

10
11 **Subsection (b)**—UPA (1997) derived this subsection from UPA (1914) § 18(b). The
12 Harmonization Project made two changes: (i) deleting “for the preservation of its business or
13 property” as a separate category for reimbursement, because that category is a subset of the
14 category of “payments made . . . in the course of the partner’s activities on behalf of the
15 partnership”; and (ii) conditioning reimbursement on the partner’s having complied with the
16 duties stated in Section 409.

17
18 The reimbursement obligation stated here is a default rule and roughly parallels a rule of
19 agency law. Restatement (Third) of Agency § 8.14(2) (2006) (stating that “[a] principal has a
20 duty to indemnify an agent . . . when the agent makes a payment (i) within the scope of the
21 agent’s actual authority, or (ii) that is beneficial to the principal, unless the agent acts officiously
22 in making the payment”).

23
24 **Subsection (c)**—This subsection provides for indemnification, but the provision is a
25 default rule.

26
27 The rule’s eligibility requirements correspond to the default rules on management duties,
28 which is appropriate because otherwise the statutory default rule on indemnification could
29 undercut or even vitiate the statutory default rules on duty. However, subject only to Section
30 105(c)(8), the partnership agreement can substantially relax the eligibility requirements. The
31 agreement can also impose stricter preconditions.

32
33 Although referring broadly to any “person,” this subsection is actually limited to present
34 and former partners. The indemnification obligation applies to only a “debt, obligation, or other
35 liability incurred by the person by reason of the person’s former or present capacity as a partner.”
36 Thus, by its terms this subsection does not apply to a person in the capacity of an officer,
37 manager, etc.

38
39 Of course, the partnership agreement may mandate indemnification to persons in such
40 positions, as well as to other persons providing services to or acting for the partnership. Within
41 the limitations stated in Section 105(c)(8), a partnership agreement may obligate a partnership to
42 indemnify a person even though the person has breached a duty to the partnership.

43
44 A separate agreement between a partnership and another person may also provide for
45 indemnification. For example, a management contract between a partnership and its managing
46 partner may contain an indemnification provision. The limitations stated in Section 105(c)(8)
apply to such separate agreements, for the reasons stated in the comment to that paragraph.

1
2 **Subsection (d)**—This subsection authorizes but does not require a partnership to provide
3 advances to cover expenses. *Cf. Majkowski v. Am. Imaging Mgmt. Servs., L.L.C.*, 913 A.2d 572,
4 589 (Del. Ch. 2006) (“Because rights to indemnification and advancement differ in important
5 ways, our courts have refused to recognize claims for advancement not granted in specific
6 language clearly suggesting such rights.”). The phrase “hold harmless” likewise does not
7 encompass advances. *Id.* The authorization applies only to those persons eligible for
8 indemnification under Subsection (c), but the partnership agreement certainly can authorize a
9 broader scope and can also make advances obligatory.

10
11 The reference to “ordinary course” pertains to Subsection (k) (stating that any “difference
12 arising in the ordinary course of the business of the partnership may be decided by a majority of
13 the partners”).

14
15 **Subsection (e)**—This subsection’s language is very broad and authorizes a partnership to
16 purchase insurance to cover (*e.g.*, a partner’s intentional misconduct). It is unlikely that such
17 insurance would be available. This authorization comes from the act, not the partnership
18 agreement, and therefore is not subject to Section 105(c)(8) (precluding the partnership
19 agreement from “reliev[ing] or exonerate[ing] a person from liability for conduct involving bad
20 faith, willful or intentional misconduct, or knowing violation of law”).

21
22 **Subsection (f)**—This subsection was UPA (1997) § 401(d) and is based on UPA (1914) §
23 18(c).

24
25 **Subsection (g)**—This subsection was UPA (1997) § 401(e) and is based on UPA (1914) §
26 18(c).

27
28 **Subsection (h)**—This subsection was UPA (1997) § 401(f) and is based on UPA (1914) §
29 18(e). UPA (1997) § 401, comment 7, suggests that UPA (1914) § 18(e) case law continues to be
30 relevant and notes that Section 18(e) “has been interpreted broadly to mean that, absent contrary
31 agreement, each partner has a continuing right to participate in the management of the
32 partnership and to be informed about the partnership business, even if, per the partnership
33 agreement, the partner’s assent to partnership business decisions is not required.”

34
35 Note also that for some decisions this act requires the affirmative vote or consent of all
36 partners. *See, e.g.*, Subsection (k) (“an act outside the ordinary course of business of a
37 partnership and an amendment to the partnership agreement”); Section 402(b)(3) (becoming a
38 partner after formation of the partnership).

39
40 The subsection has important implications for a partner’s actual authority to act on behalf
41 of the partnership. The actual authority of a partner is a question of agency law and depends
42 fundamentally on the contents of the partnership agreement. If, however, the partnership
43 agreement is silent on the issue, this subsection helps delineate that actual authority. Acting
44 individually, a partner:

- 45
46 ▪ has no actual authority to commit the partnership to any matter for which this act requires

- 1 the affirmative vote or consent of all partners;
- 2 ■ has the actual authority to commit the partnership to usual and customary matters, unless
- 3 the partner has reason to know that: (i) other partners might disagree; or (ii) for some
- 4 other reason consultation with fellow partners is appropriate; and
- 5 ■ has no actual authority to take unusual or non-customary actions that will have a
- 6 substantial effect on the partnership.

7
8 The first point follows self-evidently from the language of this act. Where this act
9 requires unanimity, no partner could reasonably believe to the contrary (unless the partnership
10 agreement provided otherwise).

11
12 The second point follows because:

- 13
- 14 ■ Subsection (h) serves as the gap-filler manifestation from the partnership to its
- 15 partners and does *not* require partners to act *only* in concert or after consultation. To
- 16 the contrary, subject to the partnership agreement, this subsection expressly provides
- 17 that “each partner has equal rights in the management and conduct of the
- 18 partnership’s business.”
- 19 ■ It would be impractical to require collective action on even the smallest of decisions.
- 20 ■ However, to the extent a partner has reason to know of a possible difference of
- 21 opinion among the partner, Subsection (k) requires a decision by at least “a majority
- 22 of the partners” and by unanimous consent if the matter is “outside the ordinary
- 23 course of the business.”

24
25 The third point is a matter of common sense. The more serious the matter, the less likely
26 it is that a partner has actual authority to act unilaterally. *Cf.* RESTATEMENT (THIRD) OF AGENCY §
27 3.03, cmt. c (2006) (noting the unreasonableness of believing, without more facts, that an
28 individual has “an unusual degree of unilateral authority over a matter fraught with enduring
29 consequences for the institution” and stating that “[t]he gravity of the matter from the standpoint
30 of the organization is relevant to whether a third party could reasonably believe that the manager
31 has authority to proceed unilaterally”).

32
33 Finally, the authority granted by this subsection includes the authority to delegate.
34 Delegation does not relieve the delegating partner or partners of their duties under Section 409.
35 However, the fact of delegation is a fact relevant to any breach of duty analysis.

36
37 EXAMPLE: A partner personally handles all important paperwork for a partnership. The
38 partner neglects to renew the fire insurance coverage on a building owned by the
39 partnership, despite having received and read a warning notice from the insurance
40 company. The building subsequently burns to the ground and is a total loss. The partner
41 might be liable for breach of the duty of care under Section 409(c) (gross negligence).

42
43 EXAMPLE: A partner delegates responsibility for insurance renewals to the partnership’s
44 office manager, and that manager neglects to renew the fire insurance coverage on the
45 building. Even assuming that the office manager has been grossly negligent, the partner is
46 not necessarily liable under Section 409(c). The office manager’s gross negligence is not

1 automatically attributed to the partner. Under Section 409(c), the question is whether the
2 partner was grossly negligent (or worse) in selecting the office manager, delegating
3 insurance renewal matters to the office manager, and supervising the general manager
4 after the delegation.

5 The partnership agreement may also provide for delegation and, subject to Section
6 105(c), may modify a partner's duties under Section 409 accordingly.
7

8 **Subsection (i)**—This subsection states directly what UPA (1914) § 25(2)(a) provides
9 indirectly, through the “tenancy in partnership.” That tenancy reflected the aggregate view of
10 partnership (in the extreme), stated management rights as property rights, and was eliminated by
11 UPA (1997) 401(g). The Harmonization Project relocated the UPA (1997) provision into this
12 subsection.
13

14 The substance of UPA (1997) § 401(i), which continued the substance of UPA (1914) §
15 18(g), now appears in Section 402(b)(3) (providing that no person can become a partner without
16 the affirmative vote or consent of all partners).
17

18 **Subsection (j)**—This subsection (i) follows the default rule of UPA (1914) § 18(f)
19 (providing that a partner is not entitled to remuneration for services performed, except in
20 winding up the partnership); while (ii) expanding the exception to include any partner who
21 undertakes winding up. “[R]easonable compensation” includes reimbursement for reasonable
22 expenses. *Moran v. Willensky*, 339 S.W.3d 651, 663 (Tenn. Ct. App. 2010) (stating that “the
23 winding up partner . . . [is] entitled to recover costs associated with the winding up process); *see*
24 *also O'Reilly's Adm'r v. Brady*, 28 Ala. 530, 535 (1856) (holding that “the surviving partner is
25 entitled, at least, to an allowance and deduction for ‘tavern bills,’ [sic] and ‘other expenses
26 incurred’ ‘in the adjustment and settling up’ of the affairs of the partnership.”). Reasonable
27 expenses include reasonable attorney's fees, even when the winding up partner has (rightfully)
28 caused the partnership to sue one of the partners. *Moran*, 339 S.W.3d at 663 (“Because Mr.
29 Willensky's capital account had a negative balance, Ms. Moran was well within her rights to sue
30 him to make up that balance.”).
31

32 In UPA (1997), this subsection was Subsection (h). The Harmonization Project made no
33 change except to relocate the provision.
34

35 **Subsection (k)**—UPA (1997) continued the allocation of management authority stated by
36 UPA (1914) § 18(h), with one important clarification. UPA (1914) § 18(h) requires majority
37 consent for ordinary matters and unanimous consent for amending the partnership but is silent
38 regarding extraordinary matters. Courts have generally required the consent of all partners for
39 those matters. *See, e.g., Paciaroni v. Crane*, 408 A.2d 946 (Del. Ch. 1989); *Thomas v. Marvin E.*
40 *Jewell & Co.*, 440 N.W.2d 437 (Neb. 1989); *Duell v. Hancock*, 83 A.D.2d 762 (N.Y. 1981). UPA
41 (1997) codified those cases in § 401(j). The Harmonization Project made no substantive change
42 but relocated the provision to Subsection (k).
43

44 Other provisions of this act also contain default rules providing for unanimous consent.
45 *E.g.*, Sections 402(b)(3) (for a person to become a partner), 504(c) (for compromising a person's
46 obligation to make a contribution). In addition, absent a contrary provision in the partnership

1 agreement, the transactions authorized under Article 11 each require unanimous consent.

2
3
4 **SECTION 402. BECOMING PARTNER.**

5 (a) Upon formation of a partnership, a person becomes a partner under Section 202(a).

6 (b) After formation of a partnership, a person becomes a partner:

7 (1) as provided in the partnership agreement;

8 (2) as a result of a transaction effective under [Article] 11; or

9 (3) with the affirmative vote or consent of all the partners.

10 (c) A person may become a partner without:

11 (1) acquiring a transferable interest; or

12 (2) making or being obligated to make a contribution to the partnership.

13 **Comment**

14 This section was adopted in the 2011 and 2013 Harmonization amendments and changes
15 UPA (1997) both in style and substance.

16 **Subsection (b)(2)**—Article 11 deals with entity transactions (*e.g.*, mergers and
17 conversions). This reference is new, although UPA (1997) Article 9 did contemplate mergers and
18 conversions.

19 **Subsection (b)(3)**—A partnership being a creature of contract, consent is determined on
20 an objective basis (*i.e.*, contract law’s “reasonable person” standard). Depending on the terms of
21 the partnership agreement, the partners’ manifestation of consent might involve detailed
22 formalities, entirely informal activities, or anything in between. Moreover, the partnership
23 agreement might reduce the quantum of consent necessary or shift the consent right to the
24 management committee or managing partners.

25
26 A partnership being a voluntary association, a person cannot become a partner without
27 manifesting consent to do so. That consent also is judged objectively.

28
29 Under Section 106(b), “[a] person that becomes a partner is deemed to assent to the
30 partnership agreement,” and the agreement binds the partner regardless of whether the partner
31 has actually indicated assent in any way.

32
33 **Subsection (c)(1)**—To accommodate business practices, this provision permits so-called
34 “non-economic partners.”
35

SECTION 403. FORM OF CONTRIBUTION. A contribution may consist of property transferred to, services performed for, or another benefit provided to the partnership or an agreement to transfer property to, perform services for, or provide another benefit to the partnership.

Comment

This section is derived from ULLCA (2006) § 402, was adopted as part of the 2011 and 2013 Harmonization amendments, is intentionally quite broad, and encompasses past, present, and promised benefits.

Partnership law and practice are in accord. *E.g.*, *Canet v. Gooch Ware Travelstead*, 917 F. Supp. 969, 974 (E.D.N.Y. 1996) (referring to “Travelstead’s acknowledged use of ‘sweat equity’ participations” in two projects); *In re Jones*, 445 B.R. 677, 717 (Bankr. N.D. Tex. 2011) (stating that “Ex-Mrs. Mullen essentially put ‘sweat equity’ (*i.e.*, the provision of modeling services and related consultation) into Simple Beaute and not a significant monetary investment”); *Tumminaro v. Tumminaro*, 556 N.E.2d 293, 299 (Ill. App. Ct. 1990) (“A partner’s contribution to the partnership may consist of ‘services, skill, know-how, or “sweat equity.”’) (quoting *Becker v. Killarney*, 532 N.E.2d 931 (Ill. App. Ct. 1988)).

This act does not contain a statute of frauds specifically applicable to promised contributions. Generally applicable statutes of fraud might apply, however. For example, a promise to contribute land to a partnership would be subject to the statute of frauds pertaining to land transfers. Likewise, a promise that by its terms requires performance that extends beyond one year from the making of the contract would be subject to the one-year provision of the statute of frauds. *See* the comment to Section 102(12).

SECTION 404. LIABILITY FOR CONTRIBUTION.

(a) A person's obligation to make a contribution to a partnership is not excused by the person's death, disability, termination, or other inability to perform personally.

(b) If a person does not fulfill an obligation to make a contribution other than money, the person is obligated at the option of the partnership to contribute money equal to the value of the part of the contribution which has not been made.

(c) The obligation of a person to make a contribution may be compromised only by the affirmative vote or consent of all the partners. If a creditor of a limited liability partnership extends credit or otherwise acts in reliance on an obligation described in subsection (a) without

1 knowledge or notice of a compromise under this subsection, the creditor may enforce the
2 obligation.

3 **Comment**

4 **Subsection (a)**—Under common law principles of impracticability, an individual’s death
5 or incapacity will sometimes discharge a duty to render performance. RESTATEMENT (SECOND) OF
6 CONTRACTS §§ 261 (Discharge by Supervening Impracticability), 262 (Death or Incapacity of
7 Person Necessary For Performance) (1981). This subsection overrides those principles.
8 Moreover, the reference to “perform personally” is not limited to individuals but rather may refer
9 to any legal person (including an entity) that has a non-delegable duty.

10
11 **Subsection (b)**—This subsection is a statutory liquidated damage provision, exercisable
12 at the option of the partnership, with the damage amount set according to the value of the
13 promised, non-monetary contribution.

14
15 **EXAMPLE:** In order to become a partner, a person promises to contribute to the
16 partnership various assets “free and clear,” which the partnership agreement values at
17 \$150,000. In return for the person’s promise, and in light of the agreed value, the
18 partnership admits the person as a partnership with a right to receive twenty-five percent
19 of the partnership’s distributions.

20
21 However, the promised assets are subject to a security agreement, and, before the
22 partner can contribute the assets, the secured party forecloses on the security interest and
23 sells the assets at a public sale for \$75,000. Even if the \$75,000 reflects the actual fair
24 market value of the assets, under this subsection the partnership has a claim against the
25 partner for “money equal to the value of the part of the contribution which has not been
26 made” – *i.e.*, \$150,000.

27
28 **EXAMPLE:** Same facts as the previous example, except that the public sale brings
29 \$225,000. The limited liability company is neither obliged to invoke this subsection nor
30 limited to the \$150,000. The LLC may instead sue for breach of the promise to make the
31 contribution, asserting the \$225,000 figure as evidence of the actual loss suffered as a
32 result of the breach.

33
34 **Subsection (c)**—The unanimity requirement expressed in the first sentence might
35 indirectly benefit creditors, but the requirement is nonetheless a default rule and therefore may
36 be varied in the partnership agreement. The right of each partner to consent is not a “right[]
37 under this [act] of a person other than a partner.” *See* Section 105(c)(17) (preventing the
38 partnership agreement from affecting such rights). In contrast, the right stated in the second
39 sentence fits squarely within Section 105(c)(17) and therefore may not be varied by the
40 partnership agreement.

41 **SECTION 405. SHARING OF AND RIGHT TO DISTRIBUTIONS BEFORE**

42

DISSOLUTION.

(a) 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.

(b) 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.

(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 Section 806, 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.

(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 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.

Comment

Past uniform unincorporated entity acts and many current limited liability company acts provide default rules for allocation of profits, and UPA (1997) even provides a default configuration for maintaining capital accounts. For the following reasons, this act, incorporating changes made by the Harmonization Project, provides a default rule only for rights to share in distributions:

- Capital accounts are maintained for one purpose, to determine how distributions will be made to partners. The rules for maintenance of capital accounts can be very complex. Generally, however, profits increase capital account balances (and increase the amounts that will be distributed to the partners) and losses reduce capital account balances (and reduce the amounts that will be distributed to the partners). If the statute has a simple default rule for how distributions are to be made to the partners, providing an additional set of default profit and loss allocation provisions and capital account rules will be, at best, duplicative and, at worse, inconsistent with the distribution rules.

- Some argue that capital account rules and profit and loss allocation provisions are necessary to comply with tax requirements. Tax income or loss is allocated to partners according to the partners' economic interests in the partnership, and these interests are based on distributions that would be made to partners on liquidation of the partnership. By including default distribution provisions, the act includes the information necessary to make these tax determinations. To the extent the tax law allows partners to make further tax elections or satisfy alternative safe harbors, the partners may look to the tax law for guidance and include necessary provisions in their agreements.

Subsection (a)—The rule stated applies to redemptions as well as operating distributions but is a default rule in both contexts. *See* the comment to Section 102(4)(A).

Subsection (b)—Section 701 provides a default rule for buying out a person dissociated as a partner when the dissociation does not lead to dissolution of the partnership.

Subsection (d)—For the rights of partners and transferees that receive a distribution in the form of indebtedness, see Section 406(d).

SECTION 406. LIMITATIONS ON DISTRIBUTIONS BY LIMITED LIABILITY

PARTNERSHIP.

(a) A limited liability partnership may not make a distribution, including a distribution under Section 806, if after the distribution:

(1) the partnership would not be able to pay its debts as they become due in the ordinary course of the partnership's business; or

(2) the partnership's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the partnership were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of partners and transferees whose preferential rights are superior to the rights of persons receiving the distribution.

(b) A limited liability partnership may base a determination that a distribution is not prohibited under subsection (a) on:

(1) financial statements prepared on the basis of accounting practices and

1 principles that are reasonable in the circumstances; or

2 (2) a fair valuation or other method that is reasonable under the circumstances.

3 (c) Except as otherwise provided in subsection (e), the effect of a distribution under
4 subsection (a) is measured:

5 (1) in the case of a distribution as defined in Section 102(4)(A), as of the earlier
6 of:

7 (A) the date money or other property is transferred or debt is incurred by
8 the limited liability partnership; or

9 (B) the date the person entitled to the distribution ceases to own the
10 interest or rights being acquired by the partnership in return for the distribution;

11 (2) in the case of any other distribution of indebtedness, as of the date the
12 indebtedness is distributed; and

13 (3) in all other cases, as of the date:

14 (A) the distribution is authorized, if the payment occurs not later than 120
15 days after that date; or

16 (B) the payment is made, if the payment occurs more than 120 days after
17 the distribution is authorized.

18 (d) A limited liability partnership's indebtedness to a partner or transferee incurred by
19 reason of a distribution made in accordance with this section is at parity with the partnership's
20 indebtedness to its general, unsecured creditors, except to the extent subordinated by agreement.

21 (e) A limited liability partnership's indebtedness, including indebtedness issued as a
22 distribution, is not a liability for purposes of subsection (a) if the terms of the indebtedness
23 provide that payment of principal and interest is made only if and to the extent that a payment of

1 a distribution could then be made under this section. If the indebtedness is issued as a
2 distribution, each payment of principal or interest is treated as a distribution, the effect of which
3 is measured on the date the payment is made.

4 (f) In measuring the effect of a distribution under Section 806, the liabilities of a
5 dissolved limited liability partnership do not include any claim that has been disposed of under
6 Section 807, 808, or 809.

7 **Comment**

8 Both this section and Section 407 were derived essentially from the Model Business
9 Corporation Act section 6.40, and were added during the Harmonization Project. Both sections
10 are necessary and appropriate because a limited liability partnership provides the partners a
11 corporate-like liability shield. With the exception noted in the comment to Subsection (a)(2), the
12 provisions of this section are non-waivable. Section 105(c)(17).

13
14 “Distribution” does not include “amounts constituting reasonable compensation for
15 present or past service or payments made in the ordinary course of business under a bona fide
16 retirement plan or other bona fide benefits program.” Section 102(4)(B).

17
18 **Subsection (a)**—Insolvency is a fundamental issue under this section, and this subsection
19 provides two tests of insolvency. The tests are disjunctive; a distribution violates this section if
20 after the distribution the LLP fails either of the tests. The subsection applies both to interim and
21 liquidating distributions.

22
23 Solvency is also a fundamental issue under bankruptcy and fraudulent transfer law, which
24 provide their own respective definitions of the concept.

25
26 **Subsection (a)(2)**—The reference to “preferential rights upon dissolution and winding
27 up” is a default rule, because removing this protection for preferred partners or transferees is an
28 *inter se* matter. *See* Section 105(d)(1)(B). The rest of the section is not subject to change in the
29 partnership agreement. Section 105(c)(17).

30
31 **Subsection (b)**—This subsection states a standard of ordinary care, in contrast with the
32 generally applicable standard stated in Section 409(c) (gross negligence).

33
34 **Subsection (b)(2)**—This alternative valuation provision is likely to be both useful and
35 fair when the partnership has appreciated assets but for accounting purposes these assets are
36 valued at book value less depreciation.

37
38 **Subsection (c)**—This subsection provides three alternative rules for determining the
39 point(s) in time of as which to apply the solvency tests stated in Subsection (a). The timing

1 depends on which of three categories encompasses a distribution: (i) a distribution in the nature
2 of a redemption (regardless of whether the distribution includes a distribution of indebtedness);
3 (ii) any distribution of indebtedness other than a distribution in the nature of a redemption; and
4 (iii) any distribution that involves neither a redemption nor a distribution of indebtedness. A
5 requirement for additional solvency testing pertaining to distributions of indebtedness appears in
6 Subsection (e).

7
8 **Subsection (c)(1)**—Section 102(4)(A) encompasses distributions in the nature of a
9 redemption.

10
11 **Subsection (c)(1)(A) and (B)**—Under Subparagraph (A), any beginning of payment
12 activity triggers the rule and sets the date as of when to apply the solvency tests. Under
13 Subparagraph (B), the partnership's complete acquisition of the rights is necessary to trigger the
14 rule.

15
16 **Subsection (c)(2)**—This provision states the general rule for distributions in the form of
17 debt and which are not connected with a redemption.

18
19 **Subsection (c)(3)**—This provision states alternative rules for all distributions of money
20 or property (*i.e.*, not debt). The measuring date depends on the length of time between the
21 authorization and payment of the distribution.

22
23 **Subsection (d)**—For a related provision, characterizing as a creditor a person who has
24 become entitled to receive a distribution, see Section 405(d).

25
26 **Subsection (e)**—This subsection contains two rules pertaining to indebtedness issued as
27 part of a distribution and the Subsection (a) solvency tests. The first sentence states the sensible
28 rule that indebtedness that is essentially subordinated to the solvency requirement (*i.e.*, not
29 payable if making payment would transgress that requirement) is not counted in determining
30 liabilities for purposes of the solvency tests. The second sentence applies the solvency tests to
31 each payment of principal and interest on any indebtedness issued as a distribution, in addition to
32 any previous testing required by Subsection (c)(1)(A) or (c)(2).

33
34 **EXAMPLE:** A limited liability partnership and one of its partners agree that the LLP will
35 buy out the person's entire ownership interest in the LLP in return for a promissory note
36 from the LLP, payable in installments. Under the redemption agreement: (i) on January
37 15 the person surrenders all its interests and rights and dissociates as a partner; and
38 (ii) the LLP signs and delivers the note to the person on February 15. Under the note,
39 payment of interest is due monthly beginning March 15, with a balloon payment of the
40 principal due December 30.

41 Under Subsection (c)(1)(B), the solvency tests are applied as of January 15. Under
42 Subsection (e), the solvency tests are again applied on the March 15, April 15, etc., and
43 again on December 30.

44
45 **Subsection (f)**—The cited sections provide methods for extinguishing or limiting the
46 debts of an LLP that is winding up its affairs and activities and thus any debt affected by any of

1 the cited sections is irrelevant for purposes of solvency testing.
2

1 **SECTION 407. LIABILITY FOR IMPROPER DISTRIBUTIONS BY LIMITED**
2 **LIABILITY PARTNERSHIP.**

3 (a) Except as otherwise provided in subsection (b), if a partner of a limited liability
4 partnership consents to a distribution made in violation of Section 406 and in consenting to the
5 distribution fails to comply with Section 409, the partner is personally liable to the partnership
6 for the amount of the distribution which exceeds the amount that could have been distributed
7 without the violation of Section 406.

8 (b) To the extent the partnership agreement of a limited liability partnership expressly
9 relieves a partner of the authority and responsibility to consent to distributions and imposes
10 that authority and responsibility on one or more other partners, the liability stated in subsection
11 (a) applies to the other partners and not to the partner that the partnership agreement relieves of
12 the authority and responsibility.

13 (c) A person that receives a distribution knowing that the distribution violated Section
14 406 is personally liable to the limited liability partnership but only to the extent that the
15 distribution received by the person exceeded the amount that could have been properly paid
16 under Section 406.

17 (d) A person against which an action is commenced because the person is liable under
18 subsection (a) may:

19 (1) implead any other person that is liable under subsection (a) and seek to
20 enforce a right of contribution from the person; and

21 (2) implead any person that received a distribution in violation of subsection (c)
22 and seek to enforce a right of contribution from the person in the amount the person received in
23 violation of subsection (c).

(e) An action under this section is barred unless commenced not later than two years after the distribution.

Comment

This section and Section 406 were derived essentially from Model Business Corporation Act section 6.40. The provisions of this section are non-waivable. Section 105(c)(17).

This section contemplates two categories of liability: liability of those who have authorized improper distributions (Subsection (a) – *i.e.*, the partners) and the liability of those who have received improper distributions (Subsection (c) – *i.e.*, partners and transferees). Neither dissociating as a partner nor ceasing to be a transferee affects liability previously incurred under this section.

The liability is to the LLP, not to the creditors of an insolvent LLP. *Weinstein v. Colborne Foodbotics, L.L.C.*, 302 P.3d 263, 268 (Colo. 2013); *Rev O, Inc. v. Woo*, 725 S.E.2d 45, 52 (N.C. Ct. App. 2012).

This section does not preclude or interfere with claims for fraudulent transfer. *See* the comment to Subsection (e).

Subsection (a)—The liability is not strict liability but rather attaches only to the extent a decision maker has failed to comply with the duties stated in Section 409. To the extent those duties have been permissibly revised by the partnership agreement, the revised standards apply to this subsection. *See* Section 406(b)(1) (permitting reasonable reliance on specified financial information).

Subsection (b)—*Compare* Section 407(b), *with* Section 105(d)(2) (generally permitting provisions of this type).

Subsection (c)—Actual knowledge is necessary to impose liability. Reason to know does not suffice. *Compare* Section 407(c), *with* Section 103(a), (b).

Subsections (c) and (d)(2)—Liability could apply to a person who receives a distribution under a charging order, but only if the person meets the knowledge requirement. That situation is very unlikely unless the person with the charging order is also a partner.

Subsection (e)—When the distribution is in the form of indebtedness, the distribution may occur on several different dates. *See* the comment to Section 406(e).

This statute of limitations applies only to actions “under this section” and does not affect claims under other applicable law, which most often is fraudulent transfer law. For a different approach, see Delaware Code Annotated title 6, section 15-309(c) (West 2013) (applying a three-year statute of limitations to claims “under this chapter or other applicable law”); New York Limited Liability Company section 508(c) (2013) (same). *But see, e.g., In re The Heritage Org.*,

1 *L.L.C.*, 413 B.R. 438, 461 (Bankr. ND Tex. 2009) (invoking the Texas Uninform Fraudulent Act
2 (TUFTA) to recover distributions made by a Delaware LLC headquartered in Texas; rejecting
3 Delaware Code title 6, section 18-607(c) on choice of law grounds; stating that “the Delaware
4 legislature cannot limit the reach of TUFTA”).

5
6 **SECTION 408. RIGHTS TO INFORMATION OF PARTNERS AND PERSONS**

7 **DISSOCIATED AS PARTNER.**

8 (a) A partnership shall keep its books and records, if any, at its principal office.

9 (b) On reasonable notice, a partner may inspect and copy during regular business hours,
10 at a reasonable location specified by the partnership, any record maintained by the partnership
11 regarding the partnership’s business, financial condition, and other circumstances, to the extent
12 the information is material to the partner’s rights and duties under the partnership agreement or
13 this [act].

14 (c) The partnership shall furnish to each partner:

15 (1) without demand, any information concerning the partnership’s business,
16 financial condition, and other circumstances which the partnership knows and is material to the
17 proper exercise of the partner’s rights and duties under the partnership agreement or this [act],
18 except to the extent the partnership can establish that it reasonably believes the partner already
19 knows the information; and

20 (2) on demand, any other information concerning the partnership’s business,
21 financial condition, and other circumstances, except to the extent the demand or the information
22 demanded is unreasonable or otherwise improper under the circumstances.

23 (d) The duty to furnish information under subsection (c) also applies to each partner to
24 the extent the partner knows any of the information described in subsection (c).

25 (e) Subject to subsection (j), on 10 days’ demand made in a record received by a
26 partnership, a person dissociated as a partner may have access to information to which the person

1 was entitled while a partner if:

2 (1) the information pertains to the period during which the person was a partner;

3 (2) the person seeks the information in good faith; and

4 (3) the person satisfies the requirements imposed on a partner by subsection (b).

5 (f) Not later than 10 days after receiving a demand under subsection (e), the partnership
6 in a record shall inform the person that made the demand of:

7 (1) the information that the partnership will provide in response to the demand
8 and when and where the partnership will provide the information; and

9 (2) the partnership's reasons for declining, if the partnership declines to provide
10 any demanded information.

11 (g) A partnership may charge a person that makes a demand under this section the
12 reasonable costs of copying, limited to the costs of labor and material.

13 (h) A partner or person dissociated as a partner may exercise the rights under this section
14 through an agent or, in the case of an individual under legal disability, a legal representative. Any
15 restriction or condition imposed by the partnership agreement or under subsection (j) applies
16 both to the agent or legal representative and to the partner or person dissociated as a partner.

17 (i) Subject to Section 505, the rights under this section do not extend to a person as
18 transferee.

19 (j) In addition to any restriction or condition stated in its partnership agreement, a
20 partnership, as a matter within the ordinary course of its business, may impose reasonable
21 restrictions and conditions on access to and use of information to be furnished under this section,
22 including designating information confidential and imposing nondisclosure and safeguarding
23 obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this

subsection, the partnership has the burden of proving reasonableness.

Comment

Subsections (a) and (c) derive from UPA (1997). The other subsections are derived from the ULPA (2001) § 401 (rights to information of general partners and former general partners) and were adopted as part of the 2011 and 2103 Harmonization amendments. The rules stated here might be termed “quasi-default rules”—subject to some change by the partnership agreement. See Section 105(c)(4) (prohibiting unreasonable restrictions on the information rights stated in this section).

Although the rights and duties stated in this section are extensive, they are not necessarily all-inclusive. This act’s statement of fiduciary duties is not exhaustive, *see* the comment to Section 409(a), and some cases characterize owners’ information rights as reflecting a fiduciary duty of those with management power. *E.g. Bakerman v. Sidney Frank Importing Co., Inc.*, No. Civ.A. 1844–N, 2006 WL 3927242, at *14 (Del. Ch. Oct. 16, 2006) (holding that an LLC manager owed “certain duties to members of the LLC” and stating that “[w]hen fiduciaries communicate with their beneficiaries in the context of asking the beneficiary to make a discretionary decision—such as whether to consent to a sale of substantially all the assets of an LLC—the fiduciary has a duty to disclose all material facts bearing on the decision at issue”) (citing *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 137 (Del. 1997)).

Subsection (a)—A general partnership is often a very informal organization. Accordingly, this subsection states a default-required location for any books and records a partnership may have but does not require that books and records be kept. Other law may so require, however—particularly tax law. This subsection applies to any books and records kept to satisfy other law.

Subsection (b)—This subsection states the rule pertaining to information memorialized in “any record maintained by the partnership.” For the meaning of “material” as applied to information, *see* Section 409(f), comment.

Subsections (c) and (d)—In appropriate circumstances, violation of either or both of these provisions might cause a court to enjoin or even rescind action taken by the partnership, especially when the violation has interfered with an approval or veto mechanism involving partner consent. *E.g., Blue Chip Emerald L.L.C. v. Allied Partners Inc.*, 299 A.D.2d 278, 279–80 (N.Y. App. Div. 2002) (invoking partnership law precedent as reflecting a duty of full disclosure and holding that “[a]bsent such full disclosure, the transaction is voidable”).

Subsection (c)—This subsection imposes a duty on the partnership, not the partners. However, a partner could be liable in damages if the partner were to: (i) breach a duty under Section 409 or the partnership agreement; and (ii) in doing so cause or suffer the partnership to breach the duty stated in this paragraph.

Subsection (c)(1)—This provision imposes an affirmative duty to volunteer information. However, given the assumption that each partner will be active in management, the obligation

1 ceases “to the extent the partnership can establish that it reasonably believes the partner already
2 knows the information.”
3

4 In any event, the obligation is limited to information that is both material and known by
5 the partnership. “Knowledge” is viewed subjectively (*i.e.*, actual knowledge). Section 103(a)(1).
6 Materiality is viewed objectively. Thus, the duty applies to known, material information, even if
7 the partnership does not know that the information is material.
8

9 A partnership will “know” what its partners know. Under Section 103(e), “[a] partner’s
10 knowledge . . . of a fact relating to the partnership is effective immediately as knowledge of or
11 notice to the partnership.” As to others acting or reasonably appearing to act on behalf of the
12 partnership, common law agency rules will apply. RESTATEMENT (THIRD) OF AGENCY § 5.03
13 (2006) (Imputation of Notice of Fact to Principal).
14

15 Typically a partner’s duties are continuous, and therefore a partner’s right to information
16 is not just transaction-specific. Ongoing managerial responsibilities require ongoing
17 information—both periodically and *ad hoc* when a situation warrants.
18

19 For the meaning of “material” as applied to information, see Section 409(f), comment.
20

21 **Subsection (c)(2)**—Other law determines which party has the burden of proof as to the
22 stated exception.
23

24 **Subsection (d)**—This subsection imposes a duty directly on each partner, “except to the
25 extent the [partner] can establish that it reasonably believes [another] partner already knows the
26 information.”
27

28 **EXAMPLE:** A partnership has two partners: each of which is regularly engaged in
29 conducting the partnership’s activities; both of which are aware of and have regular
30 access to all significant partnership records; and neither of which has special
31 responsibility for or knowledge of any particular aspect of those activities or the relevant
32 partnership records. Most likely, neither partner is obliged to draw the other general
33 partner’s attention to information apparent in the partnership’s records.

34 **EXAMPLE:** Although a partnership has three partners, one is the managing partner with
35 day-to-day responsibility for running the partnership’s activities. The other two meet
36 periodically with the managing partner and together with that partner function in a
37 manner analogous to a corporate board of directors. Most likely, the managing partner
38 has a duty to draw the attention of the other partners to important information, even if
39 that information would be apparent from a review of the partnership’s records.
40

41 Because this subsection imposes duties directly on partner, the duties are in the nature of a
42 contractual obligation, and breach is a matter of strict liability. For example, it is no defense for a
43 partner under this section to assert that, although the partner failed to furnish required
44 information, the failure did not amount to gross negligence under Section 409(c).
45

1 **Subsection (e)**—Codifying the information rights of former owners began with UPA
2 (1997) § 403(b).

3
4 For the additional information rights of the legal representative of a deceased partner, see
5 Section 505.

6
7 **Subsection (e)(1)**—A person dissociated as a partner has information rights in that
8 capacity only as to the period during which the person was a partner. To the extent that further
9 information is accessible under Section 505(2) (providing access to the legal representative of a
10 deceased partner), that access is limited both in purpose (“for purposes of settling the estate”)
11 and in scope (“the rights the deceased partner had under Section 408”).

12
13 **Subsection (e)(2)**—A duty of good faith is needed here, because a person claiming
14 access under this subsection is no longer a partner and is no longer subject to a partner’s
15 obligation of good faith and fair dealing under Section 409(d). *See* Section 603(b)(2) (stating a
16 person’s dissociation as a partner terminates as to subsequent events the person’s duties under
17 Section 409, including the contractual obligation of good faith). *But see id.*, cmt (noting that the
18 common law implied covenant will continue to be relevant if the partnership agreement provides
19 continuing rights and obligations for a person dissociated as a partner).

20
21 In the context of Subsection (e)(2), “good faith” is properly understood to mean an honest
22 belief that the request is made for a proper purpose. *Associated Indem. Corp. v. CAT*
23 *Contracting, Inc.*, 964 S.W.2d 276, 285 (Tex. 1998) (holding that “‘good faith’ in the surety
24 agreement before us refers to conduct which is honest in fact, free of improper motive or wilful
25 ignorance of the facts at hand”); *Andrews v. Bible*, 812 S.W.2d 284, 288 (Tenn. 1991)
26 (describing “subjective good faith” as “[a] pure heart but an empty head”) (quoting *Whittington*
27 *v. Ohio River Co.*, 115 F.R.D. 201, 209 (E.D.Ky.1987)). Willful ignorance includes being an
28 ostrich. “While ‘honesty’ may require no more than a pure heart, it is questionable that a pure
29 heart can co-exist with closed eyes. It is not honest to close one’s eyes so as to maintain an empty
30 head.” *J.R. Hale Contracting Co. v. United New Mexico Bank at Albuquerque*, 799 P.2d 581,
31 591 (NM 1990). *See also* UPA (1914) § (3)(1) (“A person has ‘knowledge’ of a fact within the
32 meaning of this act not only when he has actual knowledge thereof, but also when he has
33 knowledge of such other facts as in the circumstances shows bad faith.”).

34
35 **Subsection (h)**—For the avoidance of doubt, this subsection expressly authorizes taking
36 action through an agent. The doubt might arise from old corporate cases in which the parties
37 contested a shareholder’s right to exercise inspection rights through another person. *White v.*
38 *Coeur D’Alene Big Creek Mining Co.*, 55 P.2d 720, 723 (Idaho 1936) (stating that “[t]he refusal
39 to permit respondent [shareholder] to appoint his own attorney or agent to make the examination
40 [of the corporation’s books] was in effect a denial of his right” of inspection); *State v. Monida &*
41 *Yellowstone Stage Co.*, 124 N.W. 971, 972 (Minn. 1910) (upholding a trial court’s mandamus
42 order, “which shall provide that [the shareholder complainant], or such attorney or agent as he
43 may select, ... shall be allowed to inspect the books, records, and papers of the defendant
44 [corporation]”).

45
46 No negative inference should be drawn about using agents to take other action under this

1 act.

2
3 **Subsection (j)**—This subsection provides fallback protection for gaps in the partnership
4 agreement. For example, the partners may protect trade secrets from disclosure and prohibit
5 various misuses of confidential information even if the partnership agreement omits to do so.
6

7 The reference to “ordinary course” pertains to Section 401(k) (stating that any “matter in
8 the ordinary course of business of a partnership may be decided by a majority of the partners”).
9 This approach is necessary, lest a requesting partner have the power to block imposition of a
10 reasonable restriction or condition needed to prevent the requestor from abusing the partnership.
11

12 The burden of persuasion under this subsection contrasts with the burden of persuasion
13 under Section 105(c)(4) (prohibiting unreasonable limitations on the information rights provided
14 by this section). Under that paragraph, as a matter of ordinary procedural law the burden is on
15 the person making the claim.
16

17 **SECTION 409. STANDARDS OF CONDUCT FOR PARTNERS.**

18 (a) A partner owes to the partnership and the other partners the duties of loyalty and care
19 stated in subsections (b) and (c).

20 (b) The fiduciary duty of loyalty of a partner includes the duties:

21 (1) to account to the partnership and hold as trustee for it any property, profit, or
22 benefit derived by the partner:

23 (A) in the conduct or winding up of the partnership’s business;

24 (B) from a use by the partner of the partnership’s property; or

25 (C) from the appropriation **before the dissolution of the partnership** of a
26 partnership opportunity;

27 (2) to refrain from dealing with the partnership in the conduct or winding up of
28 the partnership business as or on behalf of a person having an interest adverse to the partnership;
29 and

30 (3) to refrain from competing with the partnership **before the dissolution of the**
31 **partnership** in the conduct of the partnership’s business ~~before the dissolution of the~~

1 **partnership.**

2 *{Source: Issue 5.}*

3 (c) The duty of care of a partner in the conduct or winding up of the partnership business
4 is to refrain from engaging in grossly negligent or reckless conduct, willful or intentional
5 misconduct, or a knowing violation of law.

6 (d) A partner shall discharge the duties and obligations under this [act] or under the
7 partnership agreement and exercise any rights consistently with the contractual obligation of
8 good faith and fair dealing.

9 (e) A partner does not violate a duty or obligation under this [act] or under the partnership
10 agreement solely because the partner's conduct furthers the partner's own interest.

11 (f) All the partners may authorize or ratify, after full disclosure of all material facts, a
12 specific act or transaction by a partner that otherwise would violate the duty of loyalty.

13 (g) It is a defense to a claim under subsection (b)(2) and any comparable claim in equity
14 or at common law that the transaction was fair to the partnership.

15 (h) If, as permitted by subsection (f) or the partnership agreement, a partner enters into a
16 transaction with the partnership which otherwise would be prohibited by subsection (b)(2), the
17 partner's rights and obligations arising from the transaction are the same as those of a person that
18 is not a partner.

19 **Comment**

20 This section originated as UPA (1997) § 404. The 2011 and 2013 Harmonization
21 amendments made one major substantive change; they "un-cabined" fiduciary duty. UPA (1997)
22 § 404 had deviated substantially from UPA (1914) by purporting to codify all fiduciary duties
23 owed by partners. This approach had a number of problems. Most notably, the exhaustive list of
24 fiduciary duties left no room for the fiduciary duty owed by partners to each other – *i.e.*, "the
25 punctilio of an honor the most sensitive". *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).
26 Although UPA (1997) § 404(b) purported to state "[a] partner's duty of loyalty to the partnership
27 *and the other partners*" (emphasis added), the three listed duties each protected the partnership

1 and not the partners.

2
3 “Un-cabining” harmonized this act to ULLCA (2006), and this section states some of the
4 core aspects of the fiduciary duty of loyalty, provides a duty of care, and incorporates the
5 contractual obligation of good faith and fair dealing. The duties stated in this section are subject
6 to the partnership agreement, but Sections 105(c) and (d) contain important limitations on the
7 power of the partnership agreement to affect fiduciary and other duties and the obligation of
8 good faith and fair dealing.

9
10 For the effect of dissociation on a person’s duties under this section, see Section
11 603(b)(2).

12
13 **Subsection (a)**—This subsection recognizes two core managerial duties but, unlike UPA
14 (1997), does not purport to be exhaustive. For example, many cases characterize a manager’s
15 duty to disclose as a fiduciary duty. *E.g., Lonergan v. EPE Holdings, L.L.C.*, 5 A.3d 1008, 1023
16 (Del. Ch. 2010) (stating that “in the limited partnership context, absent contractual modification,
17 a general partner owes fiduciary duties that include a duty of full disclosure”) (quotation marks
18 omitted) (citation omitted); *Exxon Corp. v. Burglin*, 4 F.3d 1294, 1298 (5th Cir. 1993) (“Under
19 Alaska law, a general partner stands in a fiduciary relationship with the limited partnership and
20 thereby owes ‘a fiduciary duty . . . to disclose information concerning partnership affairs.’”) (quoting
21 *Parker v. N. Mixing Co.*, 756 P.2d 881, 894 (Alaska 1988)).

22
23 **Subsection (b)**—This subsection states three core aspects of the fiduciary duty of loyalty:
24 (i) not “usurping” partnership opportunities or otherwise wrongly benefiting from the
25 partnership’s operations or property; (ii) avoiding conflict of interests in dealing with the
26 partnership (whether directly or on behalf of another); and (iii) refraining from competing with
27 the partnership. Essentially the same duties exist in agency law and under the law of all types of
28 business organizations.

29
30 This subsection applies beginning with “the partnership’s business,” which by definition
31 cannot exist before the partnership does; thus the stated duties do not apply to pre-formation
32 activities.

33
34 The stated duties comprise a default rule. Under Section 105(d)(3)(A): “If not manifestly
35 unreasonable, the partnership agreement may . . . alter or eliminate the aspects of the duty of
36 loyalty stated in Section 409(b).”

37
38 **Subsection (b)(1)**—The phrase “hold as trustee” dates back to UPA (1914) § 21 and
39 reflects the availability of disgorgement remedies, such as a constructive trust. In contrast to an
40 actual trustee, a person subject to this duty does not: (i) face the special obstacles to consent
41 characteristic of trust law; or (ii) enjoy protection for decisions taken in reliance on the
42 governing instrument and other sources of information. *Cf.* Uniform Statutory Trust Entity Act
43 (2009) (Last Amended 2013) § 506 (“A trustee [of a statutory trust]. . . is not liable to the trust or
44 to a beneficial owner for breach of any duty, *including a fiduciary duty*, to the extent the breach
45 results from reasonable reliance on: (i) a term of the governing instrument; (ii) a record of the
46 statutory trust; or (iii) an opinion, report, or statement of another person that the person to which

1 the opinion, report, or statement is made or delivered reasonably believes is within the other
2 person’s professional or expert competence and is made or delivered to the trustee”)
3 (emphasis added).
4

5 **Subsection (b)(1)(A)**—This provision is consistent with a basic principle of agency
6 law—namely, that an agent may not benefit at all from the performance of the agency unless the
7 principal consents. RESTATEMENT (THIRD) OF AGENCY § 8.06, cmt. c. (2006). Typically, however,
8 the partnership agreement will legitimize particular benefits – e.g., a management fee paid to a
9 managing partner in addition to that partner’s share of distributions. Also, an agreed allocation of
10 distributions takes those benefits outside the reach of this provision.
11

12 **Subsection (b)(1)(B)**—For the expansive meaning of “property,” see Section 102(16).
13 The term includes confidential information.
14

15 **Subsection (b)(1)(C)**—This act does not specify what constitutes “a partnership
16 opportunity,” but ample case law exists. *See, e.g., Triple Five of Minn., Inc. v. Simon*, 404 F.3d
17 1088, 1096 (8th Cir. 2005) (“An opportunity that is closely related to the entity's existing or
18 prospective line of business, would competitively advantage the partnership, and is one that the
19 partnership has the financial ability, knowledge and experience to pursue is a partnership
20 opportunity.”); *Knudson v. Kylo*, 831 N.W.2d 763, 767 (N.D. 2013) (explaining why conducting
21 farming operations on land owned by others was a partnership opportunity while purchasing
22 farmland was not).
23

24 The duty stated here ~~continues through winding up, although in that context the~~
25 ~~scope of partnership opportunities inevitably narrows~~ ends when the partnership is
26 dissolved.
27

28 In most, if not all, situations, usurping a partnership opportunity also breaches the duty
29 not to compete, Paragraph (b)(3), but not vice versa.
30

31 **The duties not to appropriate a partnership opportunity and not to compete with**
32 **the partnership may be violated by wrongfully causing dissolution with the intention of**
33 **appropriating a partnership opportunity or competing with the partnership following**
34 **dissolution because in those cases the conduct of the partner will have begun before**
35 **dissolution.**
36

37 **Subsection (b)(2)**—In this context, the phrase “adverse interest” is a term of art, meaning
38 “to be on the other side of the table” in some dealing with the partnership. Absent informed
39 consent by the partnership, this duty is breached by the mere existence of the conflict of interest
40 and the partnership need not prove that the outcome of the dealing was adverse to the
41 partnership. *But see* Subsection (g) (permitting the defense of fairness). This duty continues
42 through winding up.
43

44 **Subsection (b)(3)**—Although competition is often thought of in terms of potential
45 customers, this duty applies equally to competition for resources, including employees. This duty
46 ends when the partnership dissolves.

1
2 **Subsection (c)**—This act no longer refers to the duty of care as a fiduciary duty, because:
3 (i) the duty of care applies in many non-fiduciary situations; and (ii) breach of the duty of care is
4 remediable in damages while breach of a fiduciary duty gives rise also to equitable remedies,
5 including disgorgement, constructive trust, and rescission.
6

7 The change in label is consistent with the Restatement (Third) of Agency section 8.02
8 (2006), which refers to the agent’s “fiduciary duty” to act loyally, but eschews the word
9 “fiduciary” when stating the agent’s duties of “care, competence, and diligence.” *Id.* § 8.08.
10 However, the label change is merely semantics; no change in the law is intended.
11

12 The partnership agreement can raise the standard of care, or subject to Sections 105(c)(8)
13 and (d)(3)(C), lower it. A person’s practical exposure for breaching the duty of care involves not
14 only the standard of care but also any partnership agreement provision that: (i) exonerates the
15 person from liability for breach of the duty of care, Section 105(c)(8); or (ii) entitles the person
16 to indemnification despite such breach, Section 408(b), cmt.
17

18 **Subsection (d)**—This subsection refers to the “*contractual* obligation of good faith and
19 fair dealing” (emphasis added) and thereby invokes the implied obligation that exists in every
20 contract. *See* RESTATEMENT (SECOND) CONTRACTS § 205 (1981) (“Every contract imposes upon
21 each party a duty of good faith and fair dealing in its performance and its enforcement.”). The
22 adjective (“contractual”) should help avoid decisions like *Phelps v. Frampton*, 170 P.3d 474, 483
23 (Mont. 2007) (holding that Montana’s version of UPA (1997) creates a statutory obligation of
24 good faith and fair dealing separate from the implied contractual covenant).
25

26 At first glance, it may seem strange to apply a contractual obligation to statutory duties
27 and rights – *i.e.*, duties and rights “under this [act].” However, for the most part those duties and
28 rights apply to relationships *inter se* the partners and the partnership and function only to the
29 extent not displaced by the partnership agreement. Those statutory default rules are thus intended
30 to function like a contract; applying the contractual notion of good faith and fair dealing
31 therefore makes sense.
32

33 The contractual obligation of “good faith” has nothing to do with the corporate concept of
34 good faith that for years bedeviled courts and attorneys trying to understand: (i) Delaware’s
35 famous corporate law exoneration provision; and (ii) that provision’s exception “for acts or
36 omissions not in good faith.” DEL. CODE ANN. tit. 8, § 102(b)(7) (2012). In that context, good
37 faith is an aspect of the duty of loyalty. *See Stone ex rel. AmSouth Bancorporation v. Ritter*, 911
38 A.2d 362, 369–70 (Del. 2006).
39

40 Likewise, the contractual obligation of good faith and fair dealing has nothing to do with
41 the “utmost good faith” sometimes used to describe the fiduciary duties that owners of closely
42 held businesses owe each other. *See, e.g., Meinhard v. Salmon*, 477, 164 N.E. 545, 551 (NY
43 1928) (“[W]here parties engage in a joint enterprise each owes to the other the duty of the utmost
44 good faith in all that relates to their common venture. Within its scope they stand in a fiduciary
45 relationship.”); *Donahue v. Rodd Electrotpe Co. of New England, Inc.*, 328 N.E.2d 505, 515
46 (Mass. 1975) (“[S]tockholders in the close corporation owe one another substantially the same

1 fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous
2 decisions, we have defined the standard of duty owed by partners to one another as the utmost
3 good faith and loyalty.”) (footnotes omitted) (citations omitted) (internal quotations omitted).
4

5 To the contrary, the contractual obligation of good faith and fair dealing is not a fiduciary
6 duty, does not command altruism or self-abnegation, and does not prevent a partner from acting
7 in the partner’s own self-interest:
8

9 “Fair dealing” is not akin to the fair process component of entire fairness, *i.e.*,
10 whether the fiduciary acted fairly when engaging in the challenged transaction as
11 measured by duties of loyalty and care It is rather a commitment to deal
12 “fairly” in the sense of consistently with the terms of the parties’ agreement and
13 its purpose. Likewise “good faith” does not envision loyalty to the contractual
14 counterparty, but rather faithfulness to the scope, purpose, and terms of the
15 parties’ contract. Both necessarily turn on the contract itself and what the parties
16 would have agreed upon had the issue arisen when they were bargaining
17 originally.
18

19 *Gerber v. Enter. Prods. Holdings, L.L.C.*, 67 A.3d 400, 418–19 (Del. 2013) (quoting *ASB*
20 *Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, L.L.C.*, 50 A.3d 434,
21 440–42 (Del. Ch. 2012), *aff’d in part, rev’d in part on other grounds*, 68 A.3d 665 (Del. 2013);
22 *see also* Subsection (e).
23

24 Courts should not use the contractual obligation to change *ex post facto* the parties’ or
25 this act’s allocation of risk and power. To the contrary, the obligation should be used only to
26 protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable
27 person could have contemplated when the arrangements were made.
28

29 The partnership agreement or this act may grant discretion to a partner, and the
30 contractual obligation of good faith and fair dealing is especially salient when discretion is at
31 issue. However, a partner may properly exercise discretion even though another partner suffers
32 as a consequence. Conduct does not violate the obligation of good faith and fair dealing merely
33 because that conduct substantially prejudices a party. Indeed, parties allocate risk precisely
34 because prejudice may occur.
35

36 The exercise of discretion constitutes a breach of the obligation of good faith and fair
37 dealing only when the party claiming breach shows that the conduct has no honestly held
38 purpose that legitimately comports with the parties’ agreed-upon arrangements:
39

40 An implied covenant claim . . . looks to the past. It is not a free-floating duty
41 unattached to the underlying legal documents. It does not ask what duty the law
42 should impose on the parties given their relationship at the time of the wrong, but
43 *rather what the parties would have agreed to themselves had they considered the*
44 *issue in their original bargaining positions at the time of contracting.*
45

46 *Gerber v. Enter. Prods. Holdings, L.L.C.*, 67 A.3d 400, 418 (Del. 2013) (quoting *ASB Allegiance*

1 *Real Estate Fund v. Scion Breckenridge Managing Member, L.L.C.*, 50 A.3d 434, 440–42 (Del.
2 Ch. 2012), *aff'd in part, rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013)).
3

4 In sum, the purpose of the contractual obligation of good faith and fair dealing is to
5 protect the arrangement the partners have chosen for themselves, not to restructure that
6 arrangement under the guise of safeguarding it.
7

8 As to the power of the partnership agreement to affect the contractual obligation of good
9 faith and fair dealing, see Section 105(c)(6) (prohibiting elimination but allowing the agreement
10 to “prescribe standards, if not manifestly unreasonable, by which the performance of the
11 obligation is to be measured”). For examples, see Section 105(c)(6), comment. As to whether the
12 obligation stated in this subsection applies to the benefit of transferees, see Section 107(b),
13 comment.

14 **Subsection (e)**—A partner in a general partnership has at least two different roles: (i) as a
15 party to the partnership agreement, with rights and obligations under that agreement; and (ii) as
16 co-manager of the enterprise. This provision pertains to the first role. A partner’s exercise of
17 rights under the partnership agreement is subject to the obligation of good faith and fair dealing,
18 Subsection (d), but a partner does not breach that contractual obligation “solely because the
19 partner’s conduct furthers the partner’s own interest.” In contrast, this provision is ineffective
20 with regard to a partner’s duties as co-manager. For example, a partner’s liability under Section
21 409(b)(3) (prohibiting competition) is not “solely because the partner’s conduct furthers the
22 partner’s own interest.” Rather, the liability results from the breach of a specific obligation – *i.e.*,
23 the codified aspect of the duty of loyalty that prohibits competition.
24

25 **Subsection (f)**—Here and elsewhere in this act, information “is material if there is a
26 substantial likelihood that a reasonable [decision maker] would consider it important in deciding
27 how to vote” or take other action under this act or the partnership agreements. *See Basic Inc. v.*
28 *Levinson*, 485 U.S. 224, 231–32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S.
29 438, 449 (1976)).
30

31 The partnership agreement can provide additional or different methods of authorization or
32 ratification, subject to the strictures of Section 105(c)(5), (d)(1), and (d)(3)(A)(B) and (D).
33

34 **Subsection (g)**—This subsection codifies judge-made law applicable to all business
35 entities. *See, e.g., Kahn v. Lynch Commc’n Sys., Inc.*, 638 A.2d 1110, 1116 (Del. 1994)
36 (discussing “entire fairness” in the context of a corporation’s merger with an affiliate); *Loneragan*
37 *v. EPE Holdings, L.L.C.*, 5 A.3d 1008, 1019 (Del. Ch. 2010) (discussing “entire fairness” in the
38 context of a limited partnership”); *Gottsacker v. Monnier*, 697 N.W.2d 436, 444 (Wis. 2005)
39 (referring to “a willful failure to deal fairly with the LLC or its other members”).
40

41 **Subsection (h)**—This subsection is the modern, reformulated version of a language that
42 sought to overturn the now-defunct notion that debts to partners were categorically inferior to
43 debts to non-partner creditors. *See, e.g.,* ULPA (2001) § 112 (“A partner may lend money to and
44 transact other business with the limited partnership and has the same rights and obligations with
45 respect to the loan or other transaction as a person that is not a partner.”). The reformulation
46 makes clear that this provision has nothing to do with the fiduciary duty pertaining to conflict of

1 interests. *See BT-I v. Equitable Life Assurance Soc'y of the U.S.*, 75 Cal. App. 4th 1406, 1415
2 (Cal. Ct. App. 1999) (examining the prior formulation, explaining its history and stating “[w]e
3 cannot discern anything in the purpose of [the prior formulation] that suggests an intent to affect
4 a general partner's fiduciary duty to limited partners”).

5
6 This subsection states a default rule. The partnership agreement may provide that debt to
7 a partner (or partners generally) is subordinate to other partnership obligations. The agreement
8 that creates the debt may do likewise.

9 10 **SECTION 410. ACTIONS BY PARTNERSHIP AND PARTNERS.**

11 (a) A partnership may maintain an action against a partner for a breach of the partnership
12 agreement, or for the violation of a duty to the partnership, causing harm to the partnership.

13 (b) A partner may maintain an action against the partnership or another partner, with or
14 without an accounting as to partnership business, to enforce the partner’s rights and protect the
15 partner’s interests, including rights and interests under the partnership agreement or this [act] or
16 arising independently of the partnership relationship.

17 (c) A right to an accounting on dissolution and winding up does not revive a claim barred
18 by law.

19 **Comment**

20 In UPA (1997) this section was Section 405. The Harmonization Project did not change
21 the section other than to renumber it.

22
23 **Subsection (a)**—This subsection originated in UPA (1997) § 405(a) and reflects the
24 entity theory of partnership.

25
26 **Subsection (b)**—This subsection is the successor to UPA (1914) § 22 but with significant
27 changes.

28
29 UPA (1914) § 22 itself had made significant changes to the common law. “It . . . generally
30 was established at common law that an equitable accounting was a condition precedent to an
31 action in law between partners,” *Thompson v. Coughlin*, 997 P.2d 191, 194 (Or. 2000), and an
32 accounting was generally not available before dissolution. Thus, claims among partners
33 pertaining the partnership could not be asserted except through an action for dissolution and
34 accounting. UPA (1914) § 22 modified this “exclusivity rule,” specifying certain circumstances
35 in which an accounting action is available without requiring an action to dissolve the partnership.
36

1 UPA (1997) eliminated the "exclusivity rule" entirely; an action of dissolution and
2 accounting remains available but is no longer "a condition precedent" to other claims.
3

4 This subsection authorizes a partner to bring claims "to enforce the partner's rights and
5 protect the partner's interests" – *i.e.*, direct claims. The statutory language does not contemplate
6 derivative claims; thus, this act neither authorizes nor precludes such claims. *See Tzolis v. Wolff*,
7 884 N.E.2d 1005 (N.Y. 2008) (rejecting the argument that "members of a limited liability
8 company (LLC) may [not] bring derivative suits on the LLC's behalf, . . . [because] there are no
9 provisions governing such suits in the Limited Liability Company Law").
10

11 The case law does generally recognize the direct/derivative distinction in the context of
12 general partnerships, and some cases permit a partner to sue derivatively. *E.g.*, *Hill v. Vanderbilt*
13 *Capital Advisors, L.L.C.*, 834 F. Supp. 2d 1228, 1246 (D.N.M. 2011) (stating that "[t]he Supreme
14 Court of New Mexico extended the scope of derivative suits beyond the corporate context . . .
15 and allowed a partner's derivative suit on behalf of a general partnership") (citations omitted).
16

17 In general, however, the cases are conflicting and somewhat confused. A decision of the
18 Maryland Court of Special Appeals illustrates the situation. At one point the court states:
19

20 We agree that the term "derivative" is an inappropriate and confusing term to use
21 in the general partnership context. "Derivative" actions are necessary in the
22 corporate and limited partnership context, where the shareholders and limited
23 partners have no managerial rights and thus must "derive" the right to sue from
24 the entity itself. Unlike shareholders and limited partners, however, general
25 partners all have the ability to act on behalf of the partnership, and all have
26 management rights [citations omitted]. Thus, general partners have no need for
27 "derivative" action.
28

29 *George Wasserman & Janice Wasserman Goldsten Family L.L.C. v. Kay*, 14 A.3d 1193, 1215
30 (Md. Ct. Spec. App. 2011) (citing the comment to the UPA (1997) version of this section).
31 However, later in the opinion the court recognizes that the partners' "ability to act on behalf of
32 the partnership, and . . . [the partners'] management rights" are ineffective when a partner with a
33 controlling interest declines to cause the partnership to sue the controlling partner for alleged
34 misconduct.
35

36 The court concludes that such a "partnership claim may be enforced by all of the
37 *disinterested* partners." *Wasserman*, 14 A.3d at 1216. In addition, the court cites with approval
38 *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161 (5th Cir.1985), which includes a lengthy
39 discussion of circumstances in which a partner in a general partnership might be entitled to bring
40 a derivative claim on behalf of the partnership. *Cates*, 756 F.2d at 1178 (referring to the possible
41 "availability of a derivative action" but cautioning "[w]e do not hold that Texas law would
42 *necessarily* allow a derivative action on the part of a minority partner") (emphasis added).
43

44 Despite the conflict and confusion in the cases, one proposition does appear reasonably
45 certain: A minority partner in a general partnership must have some right to sue "where the
46 controlling partners, for improper, ulterior motives and not because of what they in good faith

1 believe to be the best interests of the partnership, decline to sue on a valid, valuable *partnership*
2 *cause of action* which it is advantageous to the partnership to pursue.” *Cates*, F.2d at 1179
3 (emphasis added).
4

5 **Subsection (c)**—This subsection originated as UPA (1997) § 405(c) and reversed the rule
6 stated in UPA (1914) § 43. This subsection inevitably implies that other law governs the accrual
7 of a claim under Subsection (b) as well as the statute of limitations applicable to those claims. As
8 a result, partners must take care not to “to sit on their claims” waiting for the partnership to
9 dissolve. *Veloski v. State Farm Mut. Auto Ins. Co.*, 719 N.E.2d 574, 576 (Ohio Ct. App. 1998).
10
11
12
13

14 **SECTION 411. CONTINUATION OF PARTNERSHIP BEYOND DEFINITE**

15 **TERM OR PARTICULAR UNDERTAKING.**

16 (a) If a partnership for a definite term or particular undertaking is continued, without an
17 express agreement, after the expiration of the term or completion of the undertaking, the rights
18 and duties of the partners remain the same as they were at the expiration or completion, so far as
19 is consistent with a partnership at will.

20 (b) If the partners, or those of them who habitually acted in the business during the term
21 or undertaking, continue the business without any settlement or liquidation of the partnership,
22 they are presumed to have agreed that the partnership will continue.

23 **Comment**

24 This section originated as UPA (1997) § 406 and continues the approach of UPA (1997)
25 (1914) § 23, with no substantive change.
26

27 **Subsection (a)**—Continuation beyond an agreed term or undertaking results in a
28 partnership at will, not an automatic renewal of the term or extension of the undertaking. *See* the
29 comment to Section 102(13 (partnership at will)).
30

31 **Subsection (b)**—In general, a pattern of conduct can imply a term in a partnership
32 agreement. Section 102(12) (defining partnership agreement and referring to an agreement
33 among all the partners, “whether oral, implied, in a record, or in any combination thereof”). In
34 particular, this subsection creates a presumption that by their conduct the partners have agreed to
35 continue the business. The presumption shifts the burden of persuasion to the person claiming
36 that the partnership is dissolved.

1
2 [ARTICLE] 5

3 TRANSFERABLE INTERESTS AND RIGHTS

4 OF TRANSFEREES AND CREDITORS

5 SECTION 501. PARTNER NOT CO-OWNER OF PARTNERSHIP PROPERTY. A

6 partner is not a co-owner of partnership property and has no interest in partnership property

7 which can be transferred, either voluntarily or involuntarily.

8 **Comment**

9 This section originated in UPA (1997), followed ineluctably from the concept of a
10 partnership as an entity, Section 201, abolished the UPA (1914) construct of “partnership in
11 tenancy,” and was retained during the Harmonization Project as a “belt and suspenders”
12 approach to reinforcing the entity construct. *See* Section 203 (providing that property transferred
13 to or otherwise acquired by the partnership is property of the partnership and not of the partners
14 individually).

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

17 **Comment**

18 For the definition of transferable interest, see Section 102(23). Absent a contrary
19 provision in the partnership agreement or the consent of the partners, a “transferable interest” is
20 the only interest in a partnership that can be transferred to a person not already a partner. *See*
21 Section 503. As to whether a partner may transfer governance rights to a fellow partner, the
22 question is moot absent a provision in the partnership agreement changing the default rule, *see*
23 Section 401(h) (allocating governance rights *per capita*). In the default mode, a partner’s transfer
24 of governance rights to another partner: (i) does not increase the transferee’s governance rights;
25 (ii) eliminates the transferor’s governance rights; (iii) and thereby changes the denominator but
26 not the numerator in calculating governance rights.

27 EXAMPLE: LCN Company is a general partnership with three partners, Laura, Charles,
28 and Nora. The partnership agreement does not displace this act’s default rule on the
29 allocation of governance rights among general partners. Thus, each partner has 1/3 of
30 those rights. Laura transfers her entire ownership interest to Charles. The transfer does
31 not increase Charles’s governance rights but does eliminate Laura’s. After the transfer,
32 Laura has no governance rights (regardless of whether Charles and Nora agree to expel
33 Laura under Section 601(4)(B)). As a result, Charles and Nora each have 1/2 of the
34 governance rights.

1 Whether a transferable interest pledged as security is governed by Article 8 or 9 of the
2 Uniform Commercial Code depends on the rules stated in those Articles.

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

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

5 (1) is permissible;

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

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

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

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

13 (b) A transferee has the right to:

14 (1) receive, in accordance with the transfer, distributions to which the transferor
15 would otherwise be entitled; and

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

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

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

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

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

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

8 **Comment**

9 One of the most fundamental characteristics of partnership law is its fidelity to the "pick
10 your partner" principle. *See, e.g., Bynum v. Frisby*, 311 P.2d 972, 975 (Nev. 1957) (stating that (i)
11 "the assignment of a partnership interest from one partner to a stranger does not bring that
12 stranger into fiduciary relationship with the remaining partners"; and (ii) absent consent by the
13 remaining partners "[t]he stranger remains a stranger" with no rights to management or even
14 information). This section is the core of the act's provisions reflecting and protecting that
15 principle. A partner's rights in a partnership are bifurcated into economic rights (the transferable
16 interest) and governance rights (including management rights, consent rights, rights to
17 information, rights to seek judicial intervention). Unless the partnership agreement otherwise
18 provides, a partner acting without the consent of all other partners lacks both the power and the
19 right to: (i) bestow partnership on a non-partner, Section 402(b)(3); or (ii) transfer to a non-
20 partner anything other than some or all of the partner's transferable interest, Section 503(a)(3).
21 The rights of a mere transferee are quite limited (*i.e.*, to receive distributions), Section 503(b),
22 and, if the partnership dissolves and winds up, to receive specified information pertaining to the
23 partnership from the date of dissolution, Section 503(c).

24
25 This section applies regardless of whether the transferor is a partner, a transferee of a
26 partner, a transferee of a transferee, etc. *See* Section 102(23) (defining "transferable interest" in
27 terms of a right "initially owned by a person in the person's capacity as a partner" regardless of
28 "whether or not the person remains a partner or continues to own any part of the right").

29
30 This section does not directly consider whether a partner may transfer governance rights
31 to another partner without obtaining consent from all the other partners. As noted in Section 502,
32 comment, the question is moot under this act's default rule for allocating governance rights.

33
34 However, the question can be pivotal when the partnership agreement displaces the
35 default rule on governance rights but does not determine whether transfer restrictions (whether
36 contractual, statutory, or both) apply to transfers of governance rights from one partner to
37 another. Case law is scant and pertains to limited liability companies. Nonetheless, the cases
38 suggest that this act does not protect partners from control shifts that result from transfers among

1 partners. *Blythe v. Bell*, No. 11 CVS 933, 2012 WL 7807800, at ¶ 6 (N.C. Dist. Dec. 10, 2012)
2 (holding in a case of “first impression in North Carolina” that “in the absence of articles of
3 incorporation or an operating agreement to the contrary . . . the assignment of control [*i.e.*,
4 governance] interests between members is effective without unanimous member consent”);
5 *Achaian, Inc. v. Leemon Family LLC*, 25 A.3d 800, 810 (Del. Ch. 2011) (Strine, Ch.) (holding
6 that the terms of the LLC agreement did not preclude one member of a three-member LLC from
7 transferring the member’s entire interest (including governance rights) to a second member
8 without first having the consent of the third member; stating that the third member’s “argument
9 relies on a very thinly sliced version of [the “pick-your-partner” principle, the strained version
10 being] . . . that once one chooses his initial co-members, one continues to hold a veto over how
11 much additional voting power they may acquire” explaining that “[t]he problem for [the third
12 member] is that nothing in the LLC Agreement supports [that member’s] reading of it that would
13 require an already admitted Member, like [the acquirer – *i.e.*, the second member], to become
14 once, twice (or even three times) a Member each and every time that Member acquires an
15 additional block of Interests”).

16
17 Other law may affect the applicability of this section. *See* 11 U.S.C. § 541(c)(1)
18 (providing that, initially at least, all property of a debtor becomes part of the bankruptcy estate
19 regardless of restrictions on transfer); UCC §§ 9-406, 9-408 (overriding specified restrictions on
20 assignment in specified circumstances, regardless of whether state law or a contract imposes the
21 restrictions).

22
23 In any event, this section does not apply to the transfer of ownership interests in a partner
24 that is an entity.

25
26 EXAMPLE: ABC, Partnership (“ABC”) has three partners: Ralph (an individual), Alice,
27 Inc. (“Alice”), and Norton, LLC (“Norton”). Section 502 applies to any attempt by Ralph,
28 Alice, or Norton to transfer their respective partnership interest in ABC. Section 502 is
29 inapplicable, however, to a change in control of Alice or Norton or even a complete
30 change in their respective ownership.

31
32 **Subsection (a)**—The definition of “transfer,” Section 102(22), and this subsection’s
33 reference to “in whole or in part” combine to mean that this section encompasses not only
34 unconditional, permanent, and complete transfers but also temporary, contingent, and partial
35 ones. Thus, for example, a charging order under Section 504 effects a transfer of part of the
36 judgment debtor’s transferable interest, as does the pledge of a transferable interest as collateral
37 for a loan and the gift of a life-interest in a partner’s rights to distribution.

38
39 **Subsection (a)(2)**—The phrase “by itself” contemplates Section 601(4)(B), which creates
40 a risk of dissociation via expulsion when a partner transfers all of the partner’s transferable
41 interest.

42
43 **Subsection (a)(3)**—Mere transferees have no right to participate in management or
44 otherwise intrude as the partners carry on the business of the partnership and their activities as
45 partners.

1 Because Section 102(22)(G) defines “transfer” to include “a transfer by operation of
2 law,” this section affects the power of other law to effect transfers of a partner’s ownership
3 interest. For example, a divorce court lacks the power to award a partner’s spouse anything
4 beyond the partner’s transferable interest. Nor does the partner have the power to enter into a
5 property settlement purporting to effect any greater transfer.
6

7 For the divorce court, the best solution is to value the partner’s complete ownership
8 interest (*i.e.*, the transferable interest as enhanced by the management and information rights and
9 the standing to sue) and: (i) if possible, award the partner’s spouse marital property of equal
10 value; or (ii) if not possible, award the partner’s spouse a money judgment and a charging order
11 to enforce the judgment.
12

13 Granting the non-partner any part of a partner’s transferable interest is almost always
14 imprudent; marital discord will almost inevitably carry over into the business relationship.
15 Granting the partner’s ex-spouse the entire transferable interest is rarely a viable alternative. If
16 the partner is active participant in the partnership, the approach is impossible. The partner’s
17 transferable interest will typically constitute much or all of the partner’s remuneration for the
18 partner’s activity. Even if the partner is essentially passive, granting the transferable interest to
19 the ex-spouse puts him or her at great risk as a “bare naked assignee.” *See* the comment to
20 Section 107(b).
21

22 When a partner dies, subject to the partnership agreement other law may effect a transfer
23 of the partner’s transferable interest to the partner’s estate or personal representative. However,
24 for the reasons just stated, other law lacks the power to transfer anything more than a transferable
25 interest. (Section 505 does provide extra information rights for the purposes of settling the estate
26 of the deceased partner.)
27

28 **Subsection (a)(3)(B)**—For a related provision, providing that that section’s information
29 rights do not apply to transferees, see Section 408(i).
30

31 **Subsection (b)**—Amounts due under this subsection are of course subject to offset for
32 any amount owed to the partnership by the partner or person dissociated as a partner on whose
33 account the distribution is made. Section 405(d). As to whether a partnership may properly offset
34 for claims against a transferor that was never a partner is matter for other law, specifically the
35 law of contracts dealing with assignments.
36

37 **Subsection (c)**—This very limited grant of information rights encompasses only
38 transactions occurring at or after the date of the partnership’s dissolution. The transferee has only
39 the right to information as to the allocation of net assets among the partnership’s creditors,
40 partners, and transferees—and only from the date of dissolution.
41

42 This subsection does not prevent a transferee from contracting with a partner-transferor to
43 require the partner-transferor to disclose further information to the transferee. Whether such an
44 agreement would breach the partnership agreement, the implied contractual obligation of good
45 faith and fair dealing, Section 409(d), or a fiduciary duty depends on the circumstances.
46

1 If a dissolved partnership rescinds its dissolution, Section 803, this subsection no longer
2 applies.

3
4 **Subsection (e)**—This provision originated as UPA (1997) § 503(e), was then consistent
5 with Uniform Commercial Code section 9-318(3), and is now consistent with section 9-406(a)
6 (stating that “an account debtor . . . may discharge its obligation by paying the assignor until, but
7 not after, the account debtor receives a notification, authenticated by the assignor or the assignee,
8 that the amount due or to become due has been assigned and that payment is to be made to the
9 assignee”).

10 The term “notice” includes “reason to know,” Section 103(b)(1), and ordinarily a
11 potential transferee has reason to inquire about transfer restrictions that might be contained in the
12 partnership agreement.

13 **Subsection (f)**—Under this subsection, a partner remains a partner (with all attendant
14 rights and obligations) even after permanently transferring the entirety of the transferable
15 interest, unless: (i) the other partners opt for expulsion under Section 601(4)(B); or (ii) as
16 otherwise provided in the partnership agreement.

17 **SECTION 504. CHARGING ORDER.**

18 (a) On application by a judgment creditor ~~of~~ **to enforce a judgment against** a partner or
19 ~~transferee~~ **other holder of a transferable interest in a domestic partnership or foreign**
20 **partnership**, a court may enter a charging order against the transferable interest of the judgment
21 debtor for the unsatisfied amount of the judgment. A charging order constitutes a lien on a
22 judgment debtor’s transferable interest and requires the **domestic** partnership **or foreign**
23 **partnership** to pay over to the person to which the charging order was issued any distribution
24 that otherwise would be paid to the judgment debtor.

25 (b) To the extent necessary to effectuate the collection of distributions pursuant to a
26 charging order in effect under subsection (a), the court may:

27 (1) appoint a receiver of the distributions subject to the charging order, with the
28 power to make all inquiries the judgment debtor might have made; and

29 (2) make all other orders necessary to give effect to the charging order.

30 (c) Upon a showing **by a judgment creditor** that distributions under a charging order

1 will not pay the judgment debt within a reasonable time,~~the~~:

2 **(1) The court may foreclose the lien and order the sale of the transferable interest**
3 **in a domestic partnership.**

4 **(2) The court may foreclose the lien and order the sale of the transferable**
5 **interest in a foreign partnership if the law of the governing jurisdiction of the partnership**
6 **allows foreclosure. The foreclosure and sale must be conducted under the law of this state.**

7 **(d)** The purchaser at the foreclosure sale **under subsection (c)** obtains only the
8 transferable interest, does not thereby become a partner, and is subject to Section 503.

9 ~~(d)~~ **(e)** At any time before ~~foreclosure~~ **completion of a sale** under subsection (c), the
10 partner or transferee whose transferable interest is subject to a charging order under subsection
11 (a) may extinguish the charging order by satisfying the judgment and filing a certified copy of
12 the satisfaction with the court that issued the charging order.

13 ~~(e)~~ **(f)** At any time before foreclosure under subsection (c), ~~a~~ **the domestic partnership**
14 **or foreign** partnership or one or more partners whose transferable interests are not subject to the
15 charging order may pay to the judgment creditor the full amount due under the judgment and
16 thereby succeed to the rights of the judgment creditor, including the charging order.

17 ~~(f)~~ **(g)** This [act] does not deprive any partner or transferee of the benefit of any
18 exemption law applicable to the transferable interest of the partner or transferee.

19 ~~(g)~~ **(h)** This section provides the exclusive remedy by which a person seeking in the
20 capacity of a judgment creditor to enforce a judgment against a partner or ~~transferee~~ **other**
21 **holder of a transferable interest in a domestic partnership or foreign partnership** may
22 satisfy the judgment from the judgment debtor's transferable interest.

23 ***{Source: Issue 3.}***

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1
2 The partnership agreement has no power to alter the provisions of this section to the
3 prejudice of third parties. Section 105(c)(17).
4

5 **Subsection (a)**—The phrase “judgment debtor” encompasses both partners and
6 **transferees other holders of a transferable interest. A charging order is available against**
7 **the holder of a transferable interest regardless of whether the holder received the**
8 **transferable interest in a transfer. For example, if a person is dissociated as a partner, the**
9 **person may continue to hold a transferable interest and that interest will be available to**
10 **satisfy the claim of a judgment creditor of the person dissociated as a partner.**
11

12 The lien **of a charging order** pertains only to a distribution, which excludes “amounts
13 constituting reasonable compensation for present or past service or payments made in the
14 ordinary course of business under a bona fide retirement plan or other bona fide benefits
15 program.” Section 102(4)(B). A judgment creditor that wishes to levy on such amounts should
16 use the appropriate creditor’s remedy, such as garnishment (which may be subject to exemptions
17 or exclusions not relevant to a charging order). *Cf. PB Real Estate, Inc. v. Dem II Props.*, 719
18 A.2d 73, 76 (Conn. Ct. App. 1998) (rejecting the contention of an LLC’s two members that
19 “payments of \$28,000 to each of them” should be treated “as expenses for wages” rather than as
20 distributions).
21

22 Whether an application for a charging order must be served on the partnership, the
23 judgment debtor, or both is a matter for other law, principally the law of remedies and civil
24 procedure. The order itself must be served on the partnership. Whether the order must also be
25 served on the judgment debtor is a matter for other law.
26

27 If a distribution consists of rights to acquire interests in a partnership, the charging order
28 applies only to those rights within the definition of transferable interest. *See* Section 102(23)
29 (defining transferable interest).
30

31 **Subsection (b)**—Paragraph (2) refers to “other orders” rather than “additional orders.”
32 Therefore, given appropriate circumstances, a court may invoke Paragraph (1), Paragraph (2), or
33 both.
34

35 **Subsection (b)(1)**—The receiver contemplated here is emphatically not a receiver for the
36 partnership, but rather a receiver for the distributions subject to the charging order. The principal
37 advantage provided by this paragraph is an expanded right to information. However, that right
38 goes no further than “the extent necessary to effectuate the collections of distributions pursuant
39 to a charging order.” For a correctly narrow reading of this provision, see *Wells Fargo Bank, Nat.*
40 *Ass'n v. Continuous Control Solutions, Inc.*, No. 11–1285, 2012 WL 3195759 (Iowa Ct. App.
41 Aug. 8, 2012).
42

43 **Subsection (b)(2)**—This paragraph must be understood in the context of: (i) the very
44 limited nature of the charging order; and (ii) the importance of preventing overreaching on behalf
45 of a person that is not a judgment creditor of the partnership, has no claim on the partnership’s
46 assets, and has no right to interfere in the activities, affairs, and management of the partnership.

1 In particular, the court’s power to make “all other orders” is limited to “orders necessary to give
2 effect to the charging order.”
3

4 EXAMPLE: A judgment creditor with a charging order believes that the partnership
5 should invest less of its surplus in operations, leaving more funds for distributions. The
6 creditor moves the court for an order directing the partnership to restrict re-investment.
7 Subsection (b)(2) does not authorize the court to grant the motion.
8

9 EXAMPLE: A judgment creditor with a judgment for \$10,000 against a partner obtains a
10 charging order against the partner’s transferable interest. Having been properly served
11 with the order, the partnership nonetheless fails to comply and makes a \$3000
12 distribution to the partner. The court has the power to order the partnership to pay \$3000
13 to the judgment creditor to “give effect to the charging order.”
14

15 Under Subsection (b)(2), the court has the power to decide whether a particular payment
16 is a distribution, because that decision determines whether the payment is part of a transferable
17 interest subject to a charging order.
18

19 EXAMPLE: Partner A of ABC, a general partnership, has for some years received
20 distributions from the partnership. However, when a judgment creditor of Partner A
21 obtains a charging order against Partner A’s transferable interest, the partnership ceases to
22 make distributions to Partner A and instead provides a salary to Partner A equivalent to
23 former distributions. A court might deem this salary a disguised distribution. (In any
24 event, the salary will be subject to garnishment.)
25

26 This act has no specific rules for determining the fate or effect of a charging order when
27 the partnership undergoes a merger, conversion, interest exchange, or domestication under
28 Article 11. In the proper circumstances, such an organic change might trigger an order under
29 Subsection (b)(2).
30

31 **Subsection (c)**—The phrase “that distributions under the charging order will not pay the
32 judgment debt within a reasonable ~~period of~~ time” comes from case law. *See, e.g., Nigri v. Lotz*,
33 453 S.E.2d 780, 783 (Ga. Ct. App. 1995); *Stewart v. Lanier Park Med. Office Bldg., Ltd.*, 578
34 S.E.2d 572, 574 (Ga. Ct. App. 2003) (“Judicial sale may be appropriate where . . . it is apparent
35 that distributions under the charging order will not pay the judgment debt within a reasonable
36 amount of time.”). A purchaser at a foreclosure sale obtains only the very limited rights of a
37 transferee under Section 503 and is in some ways more vulnerable and less powerful than the
38 holder of a charging order. After foreclosure and sale, Subsection (b) no longer applies. More
39 generally, the court is no longer involved in the matter. For the vulnerability of a transferee, see
40 Sections 503(a)(3) comment; 107(b), comment.
41

42 **Subsection (d) – This provision applies to a foreclosure involving a transferable**
43 **interest in either a domestic or foreign partnership. Even if the law of the governing**
44 **jurisdiction of a foreign partnership permits a purchaser in a foreclosure sale to obtain the**
45 **entire interest of the partner whose interest is being foreclosed, a foreclosure sale under the**
46 **[act] will result in the purchaser only acquiring a transferable interest. For a purchaser to**

1 **obtain the entire partnership interest, the foreclosure sale would need to be conducted**
2 **under the law of the governing jurisdiction.**
3

4 Subsection ~~(d)~~ **(e)**—This provision allows the judgment debtor to end the charging order
5 without need for a hearing **by satisfying the judgment before the sale of the transferable**
6 **interest has been completed. When the transferable interest has transferred to the**
7 **purchaser in the foreclosure sale, the judgment debtor’s right to end the charging order**
8 **terminates.**
9

10 Subsection ~~(e)~~ **(f)**—Traditionally, charging order provisions referred to the possibility of
11 “redeeming” an interest subject to a charging order. That usage was confusing, leaving several
12 important questions unanswered. This act substitutes a far simpler approach, contemplating the
13 partnership or its partners buying the underlying judgment and thereby dispensing with any
14 interference the judgment creditor might seek to inflict on the partnership.
15

16 In many circumstances, buying the judgment is superior to the mechanism provided by
17 this subsection, because: (i) this subsection requires full satisfaction of the underlying judgment;
18 and (ii) the partnership or the other partners might be able to buy the judgment for less than face
19 value. On the other hand, this subsection operates without need for the judgment creditor’s
20 consent, so it remains a valuable protection in the event a judgment creditor seeks to do mischief
21 to the partnership.
22

23 Whether a partnership’s decision to invoke this subsection is “ordinary course” or
24 “outside the ordinary course,” Section 401(k), depends on the circumstances. However, the
25 involvement of this subsection does not by itself make the decision “outside the ordinary
26 course.”
27

28 Subsection ~~(f)~~ **(g)**—This subsection preserves otherwise applicable exemptions but does
29 not create any. *In re Foos*, 405 B.R. 604, 609 (Bankr. N. D. Ohio 2009) (interpreting the
30 comparable provision in UPA (1997) and stating that “it is clear that [the provision] does not
31 create an exemption”).
32

33 Subsection ~~(g)~~ **(h)**—This subsection does not override Uniform Commercial Code,
34 Article 9, which may provide different remedies for a secured creditor acting in that capacity. A
35 secured creditor with a judgment might decide to proceed under Article 9 alone, under this
36 section alone, or under both Article 9 and this section. In the last-mentioned circumstance, the
37 constraints of this section would apply to the charging order but not to the Article 9 remedies.
38

39 This subsection is not intended to prevent a court from effecting a “reverse pierce” where
40 appropriate. In a reverse pierce, the court conflates the entity and its owner to hold the entity
41 liable for a debt of the owner. *Litchfield Asset Mgmt. Corp. v. Howell*, 799 A.2d 298, 312 (Conn.
42 App. Ct. 2002) (approving a reverse pierce where a judgment debtor had established a
43 partnership in a patent attempt to frustrate the judgment creditor), *overruled on other grounds by*,
44 *Robinson v. Coughlin*, 830 A.2d 1114 (Conn. 2003). Likewise, this subsection does not supplant
45 fraudulent transfer law.
46

SECTION 505. POWER OF LEGAL REPRESENTATIVE OF DECEASED

PARTNER. If a partner dies, the deceased partner's legal representative may exercise:

(1) the rights of a transferee provided in Section 503(c); and

(2) for purposes of settling the estate, the rights the deceased partner had under Section

408.

Comment

The estate and those claiming through the estate are transferees, and as such they have very limited rights to information. This section provides temporary, additional information rights to the legal representative of the estate. Sections 408 and 503(c) pertain only to information rights.

1 [ARTICLE] 6

2 DISSOCIATION

3 SECTION 601. EVENTS CAUSING DISSOCIATION. A person is dissociated as a
4 partner when:

5 (1) the partnership knows or has notice of the person's express will to withdraw as a
6 partner, but, if the person has specified a withdrawal date later than the date the partnership knew
7 or had notice, on that later date;

8 (2) an event stated in the partnership agreement as causing the person's dissociation
9 occurs;

10 (3) the person is expelled as a partner pursuant to the partnership agreement;

11 (4) the person is expelled as a partner by the affirmative vote or consent of all the other
12 partners if:

13 (A) it is unlawful to carry on the partnership business with the person as a partner;

14 (B) there has been a transfer of all of the person's transferable interest in the
15 partnership, other than:

16 (i) a transfer for security purposes; or

17 (ii) a charging order in effect under Section 504 which has not been
18 foreclosed;

19 (C) the person is an entity and:

20 (i) the partnership notifies the person that it will be expelled as a partner
21 because the person has filed a statement of dissolution or the equivalent, the person has been
22 administratively dissolved, the person's charter or the equivalent has been revoked, or the
23 person's right to conduct business has been suspended by the person's governing jurisdiction of

1 **formation**; and

2 *{Source: Issue 1.}*

3 (ii) not later than 90 days after the notification, the statement of
4 dissolution or the equivalent has not been withdrawn, rescinded, or revoked, or the person's
5 charter or the equivalent or right to conduct business has not been reinstated; or

6 (D) the person is an unincorporated entity that has been dissolved and whose
7 activities and affairs are being wound up;

8 (5) on application by the partnership or another partner, the person is expelled as a
9 partner by judicial order because the person:

10 (A) has engaged or is engaging in wrongful conduct that has affected adversely
11 and materially, or will affect adversely and materially, the partnership's business;

12 (B) has committed willfully or persistently, or is committing willfully or
13 persistently, a material breach of the partnership agreement or a duty or obligation under Section
14 409; or

15 (C) has engaged or is engaging in conduct relating to the partnership's business
16 which makes it not reasonably practicable to carry on the business with the person as a partner;

17 (6) the person:

18 (A) becomes a debtor in bankruptcy;

19 (B) signs an assignment for the benefit of creditors; or

20 (C) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or
21 liquidator of the person or of all or substantially all the person's property;

22 (7) in the case of an individual:

23 (A) the individual dies;

(B) a guardian or general conservator for the individual is appointed; or

(C) a court orders that the individual has otherwise become incapable of performing the individual's duties as a partner under this [act] or the partnership agreement;

(8) in the case of a person that is a testamentary or inter vivos trust or is acting as a partner by virtue of being a trustee of such a trust, the trust's entire transferable interest in the partnership is distributed;

(9) in the case of a person that is an estate or is acting as a partner by virtue of being a personal representative of an estate, the estate's entire transferable interest in the partnership is distributed;

(10) in the case of a person that is not an individual, the existence of the person terminates;

(11) the partnership participates in a merger under [Article] 11 and:

(A) the partnership is not the surviving entity; or

(B) otherwise as a result of the merger, the person ceases to be a partner;

(12) the partnership participates in an interest exchange under [Article] 11 and, as a result of the interest exchange, the person ceases to be a partner;

(13) the partnership participates in a conversion under [Article] 11;

(14) the partnership participates in a domestication under [Article] 11 and, as a result of the domestication, the person ceases to be a partner; or

(15) the partnership dissolves and completes winding up.

Comment

This section mostly states default rules, which the partnership agreement may vary. However, it makes no sense to vary some of the rules – *e.g.*, that the death of a partner who is an individual does *not* cause the individual's dissociation as a partner, Paragraph (7)(A), or that a entity remains a partner even *after* the existence of the entity has terminated, Paragraph (10).

1
2 **Paragraph (1)**—Partnership agreements often require notice of dissociation to be in
3 writing and to specify the effective date of the dissociation. The partnership cannot eliminate the
4 power of a partner to dissociate by express will, Section 110(c)(9), but can eliminate the right
5 and thereby make the dissociation wrongful.
6

7 **Paragraph (3)**—General partnership agreements often provide for “no cause” expulsion,
8 and courts differ somewhat in how they approach such provisions. *Compare Gelder Med. Grp. v.*
9 *Webber*, 363 N.E.2d 573, 576 (N.Y. 1977), *with Winston & Strawn v. Nosal*, 664 N.E.2d 239, 245
10 (Ill. App. Ct. 1996). *See also* the comment to Section 409(d) (stating and explaining the implied
11 contractual covenant of good faith and fair dealing).
12

13 **Paragraph (4)(B)**—This paragraph permits expulsion when a partner no longer has any
14 “skin in the game.” Although Article 7 provides for the buy-out of a dissociated partner’s
15 transferable interest, in this context the dissociated partner has no transferable interest.
16

17 **Paragraph (5)**—For examples of conduct warranting an expulsion order, see *Della Ratta*
18 *v. Dyas*, 961 A.2d 629, 642 (Md. Ct. Spec. App. 2008), *aff’d*, 996 A.2d 382 (Md. 2010) (noting
19 that “[t]he trial court expressly found that [two major capital] calls ‘were issued in bad faith’. . .
20 [and the] court also found that, ‘[by] another improper accounting movement’ in [the
21 partnership], \$580,000 was taken ‘for executive office expenses which was improper’”);
22 *Brennan v. Brennan Assocs.*, 977 A.2d 107, 117–18 (Conn. 2009) (referring to the expelled
23 partner’s “moral turpitude, criminal fraud, and failure to be honest in court as to the extent of his
24 criminal wrongdoing” as well as “his baseless claims of fraud” against a fellow partner; stating
25 “he has rung the bell and it cannot be unring”).
26

27 For an analysis that helps distinguish Paragraph (5)(C) from Paragraphs (5)(A) and (B),
28 *see All Saints University of Medicine Aruba v. Chilana*, A-2628-09T1, 2012 WL 6652510, at *15
29 (N.J. Super. Ct. App. Div. Dec. 24, 2012) (interpreting predecessor law and noting that the “not
30 reasonably practicable standard” does not require a showing of wrongful conduct). *Cf. Dunnagan*
31 *v. Watson*, 204 S.W.3d 30, 40 (Tex. Ct. App. 2006) (same issue in the context of dissolution).
32

33 Where grounds exist for both dissociation and dissolution, a court has the discretion to
34 choose between the alternatives. *Robertson v. Jacobs Cattle Co.*, 830 N.W.2d 191, 201–02 (Neb.
35 2013). “[T]here is no textual basis for imposing a higher burden of proof for dissociation than
36 dissolution.” *Brennan v. Brennan Assocs.*, 977 A.2d 107, 121 (Conn. 2009).
37

38 The partnership agreement cannot vary the stated grounds for expulsion, Section
39 105(c)(10), but can choose an alternate forum – *e.g.*, arbitration. *Compare* Section 801(a)(4)
40 (containing analogous grounds for dissolution by court order), *with* Section 105(c)(11) (making
41 the Section 701(a)(4) grounds non-waivable).
42

43 **Paragraph (6)(A)**—This provision is subject to bankruptcy law. *See, e.g.*, 11 U.S.C.A. §
44 365(e) (invalidating “ipso facto” clauses, subject to some exceptions).
45

46 **Paragraphs (8) and (9)**—A change in trustee or personal representative does not cause

1 dissociation.

2
3 **Paragraph (11)(A)**—If a partnership disappears as part of a merger, no person can
4 continue as a partner of the partnership. When the merger takes effect, those partners of the
5 disappearing company are perforce dissociated. Depending on the plan of merger, those persons
6 may become partners of a surviving partnership. In those circumstances, the merger will have
7 dissociated them from one partnership and admitted them into partnership in the surviving
8 partnership. *See* Sections 402(b)(2) and 1126(a)(10).
9

10 **Paragraph (11)(B)**—It is possible for a plan of merger to “shuffle the equity” of the
11 surviving entity, even to the extent of “taking out” some or all of the owners of the surviving
12 entity. A reverse triangular merger involving a partnership as the surviving entity would
13 dissociate all the partners of the partnership.
14

15 **Paragraph (13)**—By definition, a partnership that converts ceases to be a partnership.
16 *See* Section 1146. Thus, when the plan of conversion takes effect, all the partners of the
17 converted entity are dissociated from that entity. In many cases, those persons will all be owners
18 of the converted entity. In some cases, the conversion will “shuffle the equity” and “take out”
19 some of the partners of the converting partnership.
20

21 **Paragraph (14)**—Domestication does not by itself dissociate a partner, because the
22 domesticated entity remains both a partnership and “the same entity without interruption as the
23 domesticating company.” Section 1156(a)(1)(B). However, an “equity shuffle” could dissociate a
24 partner.

25 **SECTION 602. POWER TO DISSOCIATE AS PARTNER; WRONGFUL**
26 **DISSOCIATION.**

27 (a) A person has the power to dissociate as a partner at any time, rightfully or wrongfully,
28 by withdrawing as a partner by express will under Section 601(1).

29 (b) A person’s dissociation as a partner is wrongful only if the dissociation:

30 (1) is in breach of an express provision of the partnership agreement; or

31 (2) in the case of a partnership for a definite term or particular undertaking, occurs
32 before the expiration of the term or the completion of the undertaking and:

33 (A) the person withdraws as a partner by express will, unless the
34 withdrawal follows not later than 90 days after another person’s dissociation by death or
35 otherwise under Section 601(6) through (10) or wrongful dissociation under this subsection;

(B) the person is expelled as a partner by judicial order under Section 601(5);

(C) the person is dissociated under Section 601(6); or

(D) in the case of a person that is not a trust other than a business trust, an estate, or an individual, the person is expelled or otherwise dissociated because it willfully dissolved or terminated.

(c) A person that wrongfully dissociates as a partner is liable to the partnership and to the other partners for damages caused by the dissociation. The liability is in addition to any debt, obligation, or other liability of the partner to the partnership or the other partners.

Comment

Subsection (a)—A general partnership is a voluntary association, *see* Section 105(c)(9), and voluntary in this context means “proceeding from the will or from one’s own choice or consent . . . having power of free choice.” BLACK’S LAW DICTIONARY (9th ed. 2009). Necessarily therefore, a general partner always has the power to dissociate by express will. Accordingly, the partnership agreement cannot vary this subsection except to the extent of requiring the notice of dissociation to be in writing. Section 105(c)(9).

The phrase “rightfully or wrongfully” reflects the distinction between a partner’s *power* to withdraw in contravention of the partnership agreement and a partner’s *right* to do so. Thus, although a partner cannot be enjoined from exercising the power to dissociate, the dissociation may be wrongful under Subsection (b).

Subsection (b)—This subsection list exhaustively (“only if”) the dissociations that are “wrongful.” The label has three consequences:

- under Subsection (c) liability for resulting damages, which, under Section 701(c), may be offset against the amount of the buyout price due to the partner under Section 701(a);
- under Section 701(h) postponement of payment of the buyout price until the term expires or the undertaking is completed; and
- under Section 804, exclusion from the winding up process, if the dissociation results in dissolution of the partnership.

This subsection states a default rule. The partnership agreement can expand the list (*e.g.*, by making wrongful a dissociation that beaches the implied contractual covenant of good faith and fair dealing). In theory, the partnership agreement can provide for liquidated damages (subject to the requirements of contract law) and, in theory, can also shrink or even eliminate the

1 list of wrongful dissociations.

2
3 **Subsection (b)(2)(A)**—This paragraph protects a partner’s reactive withdrawal from a
4 term partnership after the premature departure of another partner, such as the partnership’s
5 rainmaker or main supplier of capital, under the same circumstances that may result in the
6 dissolution of the partnership under Section 801(2)(A). Under that provision, a term partnership
7 is dissolved ninety days after the bankruptcy, incapacity, death (or similar dissociation of a
8 partner that is an entity), or wrongful dissociation of any partner, unless a majority in interest of
9 the remaining partners agree to continue the partnership. Under this provision, a partner’s
10 exercise of the right of withdrawal by express will under those circumstances is rendered
11 “rightful,” even if the partnership is continued by others, and does not expose the withdrawing
12 partner to damages for wrongful dissociation under Section 602(c).

13
14 **Subsection (b)(2)(C)**—This provision refers to Section 601(6), which involves *inter alia*
15 dissociation on account of bankruptcy, which in turn is subject to bankruptcy law. *See, e.g.*, 11
16 U.S.C.A. § 365(e) (invalidating “ipso facto” clauses, subject to some exceptions).

17
18 **Subsection (c)**—A partner who prematurely dissociates from a partnership for an agreed
19 term or undertaking risks liability for any resulting damages. For example, the partnership might
20 incur substantial expenses in replacing the general partner’s expertise, reputation, or
21 creditworthiness.

22
23 In effect, this subsection equates wrongful dissociation with breach of contract.
24 Accordingly, courts should look to contract law to determine what consequential damages are
25 recoverable. *See Hadley v. Baxendale*, 9 Exch. 341 (1854); RESTATEMENT (SECOND) OF
26 CONTRACTS § 351 (1981); *see also Williams v. Hildebrand*, 247 S.W.2d 356, 358 (Ark. 1952)
27 (interpreting UPA (1914) § 38(2)(a)(II), pertaining to wrongful dissolution, and stating that “the
28 measure of damages, when the partnership was to have continued for a fixed term, is the profits
29 that the injured partner would have received”).

30 31 **SECTION 603. EFFECT OF DISSOCIATION.**

32 (a) If a person’s dissociation results in a dissolution and winding up of the partnership
33 business, [Article] 8 applies; otherwise, [Article] 7 applies.

34 (b) If a person is dissociated as a partner:

35 (1) the person’s right to participate in the management and conduct of the
36 partnership’s business terminates, except as otherwise provided in Section 802(c); and

37 (2) the person’s duties and obligations under Section 409 end with regard to
38 matters arising and events occurring after the person’s dissociation, except to the extent the

1 partner participates in winding up the partnership’s business pursuant to Section 802.

2 (c) A person’s dissociation does not of itself discharge the person from any debt,
3 obligation, or other liability to the partnership or the other partners which the person incurred
4 while a partner.

5 **Comment**

6 **Subsection (a)**—This subsection is a “switching” provision, invoking either Article 7 or
7 8 depending on whether a person’s dissociation as a partner results in dissolution.

8
9 **Subsection (b)**—This section originated as UPA (1997) § 603(b) and deals with some of
10 the internal effects of a person’s dissociation as a partner.

11
12 **Subsection (b)(1)**—A person’s dissociation as a partner ends immediately the person’s
13 right to participate in the management of the business, unless the dissociation results in
14 dissolution of the partnership. *See* Section 802(c) (“A person whose dissociation as a partner
15 resulted in dissolution may participate in winding up as if still a partner, unless the dissociation
16 was wrongful.”).

17
18 **Subsection (b)(2)**—Unless a person’s dissociation as a partner results in dissolution and
19 the person participates in winding up, Section 802(c), this provision establishes a dividing line,
20 separating out “matters arising and events occurring after the person’s dissociation.” If the
21 partnership has continuing projects with clients, ongoing relationships with clients, or both, the
22 dividing line requires special attention with regard to non-competition and partnership
23 opportunities duties. *See* Section 409(b)(1), (3).

24
25 Disputes involving law firms have generated much of the relevant case law. *See, e.g.,*
26 *Meehan v. Shaughnessy*, 535 N.E.2d 1255, 1257 (Mass. 1989); *Jewel v. Boxer*, 156 Cal. App. 3d
27 171, 175 (Cal. Ct. App. 1984). To a large extent a well-drawn partnership agreement can
28 delineate the parties’ respective rights and responsibilities and thereby avoid problems. However,
29 if the partnership becomes insolvent, the bankruptcy court may well scrutinize the partners’ *inter*
30 *se* arrangements. *See Geron v. Robinson & Cole L.L.P.*, 476 B.R. 732, 743 (Bankr. S.D.N.Y.
31 2012) (considering whether a law firm had “fraudulently transferred . . . assets when its partners
32 adopted the Jewel Waiver [releasing rights recognized by *Jewel v. Boxer*] on the eve of
33 dissolution without consideration”).

34
35 This provision does not determine the effect of a person’s dissociation as a partner on the
36 person’s future obligations or rights under the partnership agreement. Some contractual
37 obligations typically extend beyond dissociation – *e.g.*, non-competition agreements, buyout
38 arrangements. To the extent provisions of the partnership agreement continue to apply, the
39 common law obligation of good faith continues to apply as well. *See* the comment to Section
40 409(d) (explaining that the subsection “invokes the implied obligation that exists in every
41 contract” as a matter of common law).

Subsection (c)—A partner’s obligation to safeguard trade secrets and other confidential or proprietary information is incurred when the partner learns or otherwise obtains the information. This subsection preserves the obligation post-dissociation.

[ARTICLE] 7

PERSON'S DISSOCIATION AS A PARTNER WHEN BUSINESS NOT WOUND UP

SECTION 701. PURCHASE OF INTEREST OF PERSON DISSOCIATED AS PARTNER.

(a) If a person is dissociated as a partner without the dissociation resulting in a dissolution and winding up of the partnership business under Section 801, the partnership shall cause the person's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b).

(b) The buyout price of the interest of a person dissociated as a partner is the amount that would have been distributable to the person under Section 806(b) if, on the date of dissociation, the assets of the partnership were sold and the partnership were wound up, with the sale price equal to the greater of:

(1) the liquidation value; or

(2) the value based on a sale of the entire business as a going concern without the person .

(c) Interest accrues on the buyout price from the date of dissociation to the date of payment, but damages for wrongful dissociation under Section 602(b), and all other amounts owing, whether or not presently due, from the person dissociated as a partner to the partnership, must be offset against the buyout price.

(d) A partnership shall defend, indemnify, and hold harmless a person dissociated as a partner whose interest is being purchased against all partnership liabilities, whether incurred

1 before or after the dissociation, except liabilities incurred by an act of the person under Section
2 702.

3 (e) If no agreement for the purchase of the interest of a person dissociated as a partner is
4 reached not later than 120 days after a written demand for payment, the partnership shall pay, or
5 cause to be paid, in money to the person the amount the partnership estimates to be the buyout
6 price and accrued interest, reduced by any offsets and accrued interest under subsection (c).

7 (f) If a deferred payment is authorized under subsection (h), the partnership may tender a
8 written offer to pay the amount it estimates to be the buyout price and accrued interest, reduced
9 by any offsets under subsection (c), stating the time of payment, the amount and type of security
10 for payment, and the other terms and conditions of the obligation.

11 (g) The payment or tender required by subsection (e) or (f) must be accompanied by the
12 following:

13 (1) a statement of partnership assets and liabilities as of the date of dissociation;

14 (2) the latest available partnership balance sheet and income statement, if any;

15 (3) an explanation of how the estimated amount of the payment was calculated;

16 and

17 (4) written notice that the payment is in full satisfaction of the obligation to
18 purchase unless, not later than 120 days after the written notice, the person dissociated as a
19 partner commences an action to determine the buyout price, any offsets under subsection (c), or
20 other terms of the obligation to purchase.

21 (h) A person that wrongfully dissociates as a partner before the expiration of a definite
22 term or the completion of a particular undertaking is not entitled to payment of any part of the
23 buyout price until the expiration of the term or completion of the undertaking, unless the person

1 establishes to the satisfaction of the court that earlier payment will not cause undue hardship to
2 the business of the partnership. A deferred payment must be adequately secured and bear
3 interest.

4 (i) A person dissociated as a partner may maintain an action against the partnership,
5 pursuant to Section 410(b)(2), to determine the buyout price of that person's interest, any
6 offsets under subsection (c), or other terms of the obligation to purchase. The action must be
7 commenced not later than 120 days after the partnership has tendered payment or an offer to pay
8 or within one year after written demand for payment if no payment or offer to pay is tendered.
9 The court shall determine the buyout price of the person's interest, any offset due under
10 subsection (c), and accrued interest, and enter judgment for any additional payment or refund. If
11 deferred payment is authorized under subsection (h), the court shall also determine the security
12 for payment and other terms of the obligation to purchase. The court may assess reasonable
13 attorney's fees and the fees and expenses of appraisers or other experts for a party to the action,
14 in amounts the court finds equitable, against a party that the court finds acted arbitrarily,
15 vexatiously, or not in good faith. The finding may be based on the partnership's failure to tender
16 payment or an offer to pay or to comply with subsection (g).

17 **Comment**

18 Article 7 originated in UPA (1997) and provides for the buyout of the interest of a person
19 dissociated as a partner if the dissociation does not result in a dissolution and winding up of the
20 partnership's business under Article 8. *See* Section 603(a). If there is no dissolution, the
21 remaining partners have a right to continue the business and the person dissociated as a partner
22 has a right to be bought out. These rights can, of course, be varied in the partnership agreement.
23 *See* Section 105. A person dissociated as a partner has a continuing relationship with the
24 partnership and third parties as provided in Sections 603(b), 702, and 703. *See* Section 408(e)
25 (access to information of person dissociated as a partner).

26
27 The rules in this section are merely default rules. The partners may, in the partnership
28 agreement, fix the method or formula for determining the buyout price and all of the other terms
29 and conditions of the buyout right. Indeed, the very right to a buyout itself may be modified,

1 although a provision providing for a complete forfeiture would probably not be enforceable. *See*
2 Section 119 (Supplemental Principles of Law).

3
4 **Subsection (a)**—This subsection provides that, if a person’s dissociation as a partner
5 does not result in a windup of the business, the partnership shall cause the interest of the
6 dissociating partner to be purchased for a buyout price determined pursuant to Subsection (b).
7 The buyout is mandatory, unless the partnership provides otherwise. The “cause to be purchased”
8 language is intended to accommodate a purchase by the partnership, one or more of the
9 remaining partners, or a third party.

10
11 **Subsection (b)**—This subsection provides how the “buyout price” is to be determined.
12 The terms “fair market value” or “fair value” were not used because they are often considered
13 terms of art having a special meaning depending on the context, such as in tax or corporate law.
14 “Buyout price” was a new term in UPA (1997). Under Subsection (b), the buyout price is the
15 amount that would have been distributable to the dissociating partner under Section 807(b) if, on
16 the date of dissociation, the assets of the partnership were sold at a price equal to the greater of
17 liquidation value or going concern value without the departing partner. Liquidation value is not
18 intended to mean distress sale value. Under general principles of valuation, the hypothetical
19 selling price in either case should be the price that a willing and informed buyer would pay a
20 willing and informed seller, with neither being under any compulsion to deal. The notion of a
21 minority discount in determining the buyout price is negated by valuing the business as a going
22 concern. Other discounts, such as for a lack of marketability or the loss of a key partner, may be
23 appropriate, however. For a case applying the concept, see *Fotouhi v. Mansdorf*, 427 B.R. 798,
24 803–05 (Bankr. N.D. Cal. 2010)

25
26 Since the buyout price is based on the value of the business at the time of dissociation,
27 the partnership must pay interest on the amount due from the date of dissociation until payment
28 to compensate the dissociating partner for the use of his interest in the firm. Under UPA (1914) §
29 42, the person dissociated as a partner could elect a share of the profits in lieu of interest. UPA
30 (1997) eliminated that option.

31
32 UPA (1914) § 38(2)(c)(II) provides that the good will of the business not be considered in
33 valuing a wrongfully dissociating partner’s interest. UPA (1997) implicitly rejected that
34 approach. Under this section, unless the partnership’s goodwill is damaged by the wrongful
35 dissociation, the value of the wrongfully dissociating partner’s interest will include any goodwill
36 value of the partnership. If the firm’s goodwill is damaged, the amount of the damages suffered
37 by the partnership and the remaining partners will be offset against the buyout price.

38
39 **Subsection (c)**—This subsection provides that the partnership may offset against the
40 buyout price all amounts owing by the person dissociated as a partner to the partnership, whether
41 or not presently due, including any damages for wrongful dissociation under Section 602(c). This
42 rule has the effect of accelerating payment of amounts not yet due from the former partner to the
43 partnership, including a long-term loan by the partnership to the former partner. Where
44 appropriate, the amounts not yet due should be discounted to present value. A dissociating
45 partner, on the other hand, is not entitled to an add-on for amounts owing to him by the
46 partnership. Thus, a departing partner who has made a long-term loan to the partnership must

1 wait for repayment, unless the terms of the loan agreement provide for acceleration upon
2 dissociation.

3
4 The partnership's right of setoff does not limit the amount of damages the partnership
5 may claim for the wrongful dissociation and does not alter any other amounts owed to the
6 partnership. Those amounts may result in a net sum due to the partnership from the person
7 dissociated as a partner.
8

9 **Subsection (d)**—Following the rule stated in UPA (1914) § 38, this section requires the
10 partnership to indemnify a person dissociated as a partner against all partnership liabilities,
11 whether incurred before or after the dissociation, except those incurred by the person under
12 Section 702. The rationale for covering post-dissociation liabilities is the fact of dissociation; the
13 person dissociated as a partner is no longer a co-owner of the enterprise. As for pre-existing
14 liabilities, the determination of the buyout price necessarily assumes that these liabilities will be
15 paid. Thus, in effect the person's share of these liabilities has already been paid through the
16 valuation process.
17

18 **Subsection (e)**—If a person dissociated as a partner makes a written demand for payment
19 and no agreement for the purchase of the interest is reached within 120 days after the demand,
20 the partnership must pay, or cause to be paid, in cash the amount it estimates to be the buyout
21 price, adjusted for any offsets allowed and accrued interest. Thus, the person dissociated as a
22 partner will receive in cash within 120 days of dissociation the undisputed minimum value of the
23 person's partnership interest. If the person claims that the buyout price should be higher, suit may
24 thereafter be brought as provided in Subsection (i) to have the amount of the buyout price
25 determined by the court. This is similar to the procedure for determining the value of dissenting
26 shareholders' shares under the Model Business Corporation Act §§ 13.20–13.28.
27

28 The "cause to be paid" language of Subsection (a) is repeated here to permit either the
29 partnership, one or more of the continuing partners, or a third-party purchaser to tender payment
30 of the estimated amount due.
31

32 **Subsection (f)**—Under this subsection, when deferred payment is authorized in the case
33 of a wrongfully dissociating partner, a written offer stating the amount the partnership estimates
34 to be the purchase price should be tendered within the 120-day period, even though actual
35 payment of the amount may be deferred, possibly for many years. *See* the comment to
36 Subsection (h). The dissociated partner is entitled to know at the time of dissociation what
37 amount the remaining partners think is due, including the estimated amount of any damages
38 allegedly caused by the partner's wrongful dissociation that may be offset against the buyout
39 price.
40

41 **Subsection (g)**—This subsection provides that the payment of the estimated price (or
42 tender of a written offer under Subsection (f)) by the partnership must be accompanied by: (i) a
43 statement of the partnership's assets and liabilities as of the date of the person's dissociation as a
44 partner; (ii) the latest available balance sheet and income statement, if the partnership maintains
45 such financial statements; (iii) an explanation of how the estimated amount of the payment was
46 calculated; and (iv) a written notice that the payment will be in full satisfaction of the

1 partnership's buyout obligation unless the person dissociated as a partner commences an action
2 to determine the price within 120 days of the notice. Subsection (g) is based in part on the
3 dissenters' rights provisions of Model Business Corporation Act Section 13.25(b).

4
5 Those disclosures should serve to identify and narrow substantially the items of dispute
6 between the person dissociated as a partner and the partnership over the valuation of the
7 partnership interest. The disclosures will also serve to pin down the parties as to their claims of
8 partnership assets and values and as to the existence and amount of all known liabilities. Lastly,
9 the disclosures will force the remaining partners to consider thoughtfully the difficult and
10 important questions as to the appropriate method of valuation under the circumstances, and in
11 particular, whether they should use going concern or liquidation value. Simply getting that
12 information on the record in a timely fashion should increase the likelihood of a negotiated
13 resolution of the parties' differences during the 120-day period within which the person
14 dissociated as a partner must bring suit.

15
16 **Subsection (h)**—UPA (1914) § 38 contemplates a buyout in the context of the
17 partnership business being continued after a partner's wrongful dissociation has (inevitably)
18 caused dissolution. UPA (1914) § 38(2)(c) entitles the wrongfully dissociating partner to have the
19 buyout price "paid to him in cash, or the payment secured by bond approved by the court." UPA
20 (1997) took a different approach, which the Harmonization Project did not change. Under
21 Subsection (h), a wrongfully dissociating partner is not entitled to receive any portion of the
22 buyout price before the expiration of the term or completion of the undertaking, unless the
23 person dissociated as a partner establishes to the satisfaction of the court that earlier payment
24 will not cause undue hardship to the business of the partnership.

25
26 **Subsection (i)**—This subsection provides that a person dissociated as a partner may
27 maintain an action against the partnership to determine the buyout price, any offsets, or other
28 terms of the purchase obligation. The action must be commenced within 120 days after the
29 partnership tenders payment of the amount it estimates to be due or, if deferred payment is
30 authorized, its written offer. This provision creates a 120-day "cooling off" period. It also allows
31 the parties an opportunity to negotiate their differences after disclosure by the partnership of its
32 financial statements and other required information.

33
34 If the partnership fails to tender payment of the estimated amount due (or a written offer,
35 if deferred payment is authorized), the person dissociated as a partner has one year after written
36 demand for payment in which to commence suit.

37 38 **SECTION 702. POWER TO BIND AND LIABILITY OF PERSON**

39 **DISSOCIATED AS PARTNER.**

40 (a) After a person is dissociated as a partner without the dissociation resulting in a
41 dissolution and winding up of the partnership business and before the partnership is merged out
42 of existence, converted, or domesticated under [Article] 11, or dissolved, the partnership is

bound by an act of the person only if:

(1) the act would have bound the partnership under Section 301 before dissociation; and

(2) at the time the other party enters into the transaction:

(A) less than two years has passed since the dissociation; and

(B) the other party does not know or have notice of the dissociation and reasonably believes that the person is a partner.

(b) If a partnership is bound under subsection (a), the person dissociated as a partner which caused the partnership to be bound is liable:

(1) to the partnership for any damage caused to the partnership arising from the obligation incurred under subsection (a); and

(2) if a partner or another person dissociated as a partner is liable for the obligation, to the partner or other person for any damage caused to the partner or other person arising from the liability.

Comment

A person's dissociation as a partner ends immediately the person's actual authority to act for the partnership, unless the dissociation results in a dissolution and winding up of the business of the partnership. *See* Section 603(b)(1). However, the person's apparent authority may linger.

This section does not affect a person's power to bind a partnership in another capacity – *e.g.*, as an employee with actual authority.

Subsection (a)—This subsection codifies and constrains the lingering apparent authority of a person dissociated as a partner. The constraint is in the phrase “only if.”

The provision applies until the partnership dissolves or under Article 11 ceases to be governed by this act. Once a partnership dissolves, Section 804 applies.

With respect to authority of a person dissociated as a partner to transfer partnership real property, Section 303(e) provides that third parties are deemed to have knowledge of a limitation on the person's authority to transfer real property held in the partnership name upon the proper

1 recording of a statement containing such a limitation. Section 704(b) provides that a statement of
2 dissociation operates as a limitation on the person's authority for the purposes of Section 303(e).
3 Thus, a properly recorded statement of dissociation provides, immediately upon recording,
4 constructive knowledge of the lack of authority of a person dissociated as a partner to transfer
5 real property held in the partnership name.

6
7 **Subsection (a)(1)**—It is the statutory apparent authority from Section 301 which lingers.

8
9 **Subsection (a)(2)(A)**—In any event, any lingering apparent authority ends two years
10 after the dissociation.

11
12 **Subsection (a)(2)(B)**—A person might have notice under Section 103(d)(2)(A)
13 (statement of dissociation) as well as under Section 103(b)(1) (person “ha[ving] reason to know
14 the fact from all the facts known to the person at the time in question”).

15
16 **Subsection (b)**—The liability stated in this subsection is not exhaustive. For example, if
17 a person dissociated as a partner causes a partnership to be bound under Subsection (a) and, due
18 to a guaranty, some other person—not a partner nor a person dissociated as a partner—is liable
19 on the resulting obligation, that other person may have a claim under other law against the
20 person dissociated as a partner.

21
22 **SECTION 703. LIABILITY OF PERSON DISSOCIATED AS PARTNER TO**
23 **OTHER PERSONS.**

24 (a) Except as otherwise provided in subsection (b), a person dissociated as a partner is not
25 liable for a partnership obligation incurred after dissociation.

26 (b) A person that is dissociated as a partner is liable on a transaction entered into by the
27 partnership after the dissociation only if:

28 (1) a partner would be liable on the transaction; and

29 (2) at the time the other party enters into the transaction:

30 (A) less than two years has passed since the dissociation; and

31 (B) the other party does not have knowledge or notice of the dissociation
32 and reasonably believes that the person is a partner.

33 (c) By agreement with a creditor of a partnership and the partnership, a person
34 dissociated as a partner may be released from liability for a debt, obligation, or other liability of

1 the partnership.

2 (d) A person dissociated as a partner is released from liability for a debt, obligation, or
3 other liability of the partnership if the partnership's creditor, with knowledge or notice of the
4 person's dissociation but without the person's consent, agrees to a material alteration in the
5 nature or time of payment of the debt, obligation, or other liability.

6 **Comment**

7 To the extent a partnership has been a limited liability partnership throughout its
8 existence, the liability rules stated in this section are moot. *See* Subsection (b)(1).

9
10 This section parallels Section 805.

11
12 **Subsection (a)**—As stated in Section 306(b), comment and 306(c), comment, other law
13 determines when a partnership obligation is “incurred.”

14
15 **Subsection (b)**—The rule stated here for the “lingering liability” of a person dissociated
16 a partner parallels the rule stated in Section 702 for the lingering apparent authority of a person
17 dissociated as a partner.

18
19 **Subsection (b)(2)(A)**—In any event, the lingering liability ends two years after the
20 dissociation.

21
22 **Subsection (b)(2)(B)**—A person might have notice under Section 103(d)(2)(A)
23 (statement of dissociation) as well as under Section 103(b)(1) (person “ha[ving] reason to know
24 the fact from all the facts known to the person at the time in question”).

25
26 **Subsections (c) and (d)**—These provisions trace back to UPA (1914) § 36(2), (3).

27 28 **SECTION 704. STATEMENT OF DISSOCIATION.**

29 (a) A person dissociated as a partner or the partnership may deliver to the [Secretary of
30 State] for filing a statement of dissociation stating the name of the partnership and that the person
31 has dissociated from the partnership.

32 (b) A statement of dissociation is a limitation on the authority of a person dissociated as a
33 partner for the purposes of Section 303.

34 **Comment**

1 A partnership and a person dissociated as a partner each have the right (but not an
2 obligation) to deliver to the filing office a statement of dissociation, and each has an incentive to
3 do so. *See* Sections 702(a)(2)(B) (extinguishing the lingering apparent authority of a person
4 dissociated as a partner as to any party that has notice of the dissociation), 703(b)(2)(B)
5 (extinguishing the lingering liability of a person dissociated as a partner as to any party that has
6 notice of the dissociation).

7
8 This section originated as UPA (1997) § 704 and was unchanged by the Harmonization
9 Project.

10
11 **Subsection (a)**—“A person not a partner is deemed . . . to have notice of a person’s
12 dissociation as a partner 90 days after a statement of dissociation under Section 704 becomes
13 effective.” Section 103(d)(2)(A). This constructive notice ends both the lingering apparent
14 authority and lingering liability exposure of the person dissociated as a partner. *See* Sections
15 702(a)(2)(B), 703(b)(2)(B).

16
17 **Subsection (b)**—This subsection interrelates a statement of dissociation with the act’s
18 intricate section on statements of authority. *See* Section 303.

19
20 **SECTION 705. CONTINUED USE OF PARTNERSHIP NAME.** Continued use of a
21 partnership name, or the name of a person dissociated as a partner as part of the partnership
22 name, by partners continuing the business does not of itself make the person dissociated as a
23 partner liable for an obligation of the partners or the partnership continuing the business.

24 **Comment**

25 Section 705 originated in UPA (1997) and is an edited version of UPA (1914) § 41(10).
26 The section merely protects a person dissociated as a person from liability in case the partnership
27 continues to use the person’s name. Whether a partnership has a right to the continued use is a
28 matter for the partnership agreement; this act states no rule on the subject.

29
30 If the partnership agreement does not expressly address the issue, custom may imply a
31 term. *See Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 684 S.E.2d 756, 762, n.6 (S.C. 2009)
32 (“This Court takes judicial notice of the custom and practice in this state of law firms continuing
33 to use the names of deceased members in their firm names. Heretofore, the basis has been the
34 taking for granted that the deceased partner would consent. Hereafter, it is presumed, unless
35 proven otherwise, that the deceased partner consented to the continued use of his or her name in
36 the partnership’s name.”).

1 [ARTICLE] 8

2 DISSOLUTION AND WINDING UP

3 SECTION 801. EVENTS CAUSING DISSOLUTION. A partnership is dissolved,
4 and its business must be wound up, upon the occurrence of any of the following:

5 (1) in a partnership at will, the partnership knows or has notice of a person's express will
6 to withdraw as a partner, other than a ~~partner~~ person that has dissociated as a partner under
7 Section 601(2) through (10), but, if the person has specified a withdrawal date later than the date
8 the partnership knew or had notice, on the later date;

9 {Source: Issue 2.}

10 (2) in a partnership for a definite term or particular undertaking:

11 (A) within 90 days after a person's dissociation by death or otherwise under
12 Section 601(6) through (10) or wrongful dissociation under Section 602(b), the affirmative vote
13 or consent of at least half of the remaining partners to wind up the partnership business, for
14 which purpose a person's rightful dissociation pursuant to Section 602(b)(2)(A) constitutes that
15 partner's consent to wind up the partnership business;

16 (B) the affirmative vote or consent of all the partners to wind up the partnership
17 business; or

18 (C) the expiration of the term or the completion of the undertaking;

19 (3) an event or circumstance that the partnership agreement states causes dissolution;

20 (4) on application by a partner, the entry by [the appropriate court] of an order dissolving
21 the partnership on the grounds that:

22 (A) the conduct of all or substantially all the partnership's business is unlawful;

23 (B) the economic purpose of the partnership is likely to be unreasonably

1 frustrated;

2 (C) another partner has engaged in conduct relating to the partnership business
3 which makes it not reasonably practicable to carry on the business in partnership with that
4 partner; or

5 (D) it is otherwise not reasonably practicable to carry on the partnership business
6 in conformity with the partnership agreement;

7 (5) on application by a transferee, the entry by [the appropriate court] of an order
8 dissolving the partnership on the ground that it is equitable to wind up the partnership business:

9 (A) after the expiration of the term or completion of the undertaking, if the
10 partnership was for a definite term or particular undertaking at the time of the transfer or entry of
11 the charging order that gave rise to the transfer; or

12 (B) at any time, if the partnership was a partnership at will at the time of the
13 transfer or entry of the charging order that gave rise to the transfer; ~~or~~

14 (6) the passage of 90 consecutive days during which the partnership ~~does not have at~~
15 ~~least two partners~~ **has only one partner unless, before the end of the period, one or more**
16 **persons are admitted as partners; or**

17 **(7) the passage of 90 consecutive days during which the partnership has no partners**
18 **unless, before the end of the period:**

19 **(A) consent to admit at least two specified persons as partners is given by**
20 **transferees owning the rights to receive a majority of distributions as transferees at the**
21 **time the consent is to be effective; and**

22 **(B) at least two of the persons specified in the consent become partners in**
23 **accordance with the consent.**

2 **Comment**

3 “Dissolution” has been a term of art in the law of unincorporated business organizations
4 since at least the time of Roman law. JOSEPH STORY, COMMENTARIES ON THE LAW OF
5 PARTNERSHIP § 266, at 408 (2d ed. 1850) (“The Roman law . . . declared, that partnership might
6 be dissolved in various ways . . .”). Dissolution does not end a partnership’s existence but rather
7 changes the purpose of that existence: “A dissolved partnership shall wind up its business and...
8 the partnership continues after dissolution only for the purpose of winding up.” Section 802(a).
9 The partnership may, but need not, file a statement of dissolution. Section 802(b)(2)(A). The
10 partnership terminates when winding up is complete. The partnership may, but need not, file a
11 statement of termination. Section 802(b)(2)(F).
12

13 UPA (1914) took a strictly aggregate approach to dissolution; under UPA (1914) § 29, the
14 departure of any partner under any circumstances inevitably caused the partnership to dissolve. A
15 partnership agreement had no power to avoid this result, although many partnership agreements
16 purported to do so. A partnership agreement could provide for the continuation of the partnership
17 business in a successor partnership, UPA (1914) § 38(2)(b), but that approach was often
18 problematic. *See* the comment to Section 201(a).
19

20 UPA (1997) fundamentally changed this aspect of the law of general partnerships, making
21 the partnership entity much more durable than the UPA (1914) aggregate. For example, expelling
22 a partner does not cause the partnership to dissolve, even if the partnership is at-will. Section
23 801(1). More generally, the grounds for dissolution stated in Section 801 are exhaustive, unless
24 the partnership agreement states otherwise.
25

26 Given this act’s built-in transfer restrictions, Section 503, increasing the partnership’s
27 durability necessarily decreases each partner’s exit rights. Under UPA (1914), each partner has a
28 non-waivable power to exit the enterprise; dissociation inevitably causes dissolution, which in
29 most instances will lead to a buyout of the dissociating partner, subject to any damages for
30 wrongful dissolution. UPA (1914) § 38. Eliminating that power creates a risk of “lock-in.”
31

32 UPA (1997) addressed the lock-in issue through UPA (1997) § 701. When a person
33 dissociates as a partner, whether rightfully or wrongfully, the partnership is obligated to buy out
34 the person’s interest. Note, however, that Section 701, like UPA (1997) § 701, is a default rule.
35

36 Except for Paragraphs 4 and 5, this section comprises default rules. Paragraphs 4 and 5
37 are mandatory only with regard to the stated grounds for dissolution. *See* the comment to Section
38 105(c)(11). Variations to the statutory causes of dissolution are commonplace.
39

40 Section 803 permits rescission of dissolution in some circumstances. In some
41 circumstances, an amendment to the partnership agreement might avert dissolution – *e.g.*, by
42 revising an agreed-upon deadline for selling the partnership assets and winding up the business.
43 A retroactive amendment may also be possible. *See Kindred Ltd. P’ship v. Screen Actors Guild,*
44 *Inc.*, CV082220PSGPJWX, 2009 WL 279080, at *5–6 (C.D. Cal. Feb. 3, 2009) (giving effect to

1 an amendment that retroactively eliminated an event of dissolution; noting that UPA (1997)
2 § 802(b) permitted a partnership to rescind dissolution).

3
4 ~~The Harmonization Project added Paragraph 6 but otherwise made no significant~~
5 ~~changes to this section.~~
6

7 **Paragraph (1)**—This paragraph: (i) recognizes the power of any partner in a partnership
8 at will to dissolve the partnership at any time “by express will”; and (ii) provides that a partner
9 who has already been dissociated under some other provision of this section lacks the power to
10 dissolve the partnership. The latter proposition seems self-evident; a person dissociated as a
11 partner is no longer a partner.
12

13 **Paragraph (2)**—This paragraph provides three ways in which a term partnership may be
14 dissolved before the expiration of the term.
15

16 **Paragraph (2)(A)**—This provision: (i) originated in UPA (1997); (ii) helps make the
17 partnership entity more durable; (iii) protects the remaining partners where the dissociating
18 partner is crucial to the successful continuation of the business; and (iv) reverses the approach of
19 UPA (1914).
20

21 Under UPA (1914), any dissociation dissolves the partnership, and unanimous consent of
22 the remaining partners to continue the business. Thus each partner has the right to cause
23 liquidation. *See* UPA (1914) § 38(2)(b). Under this act, a term partnership is more durable.
24

25 A person’s dissociation as a partner by death or otherwise under Section 601(6) to (10) or
26 wrongful dissociation under Section 602(b), makes a term partnership *susceptible* to dissolution.
27 If within ninety days after the dissociation at least half of the remaining partners express their
28 will to dissolve the partnership, the partnership dissolves. Section 601(6) to (10) pertain,
29 respectively, to a partner’s bankruptcy or similar financial impairment (6); a partner’s death or
30 incapacity (7); the distribution by a trust-partner of its entire transferable interest (8); the
31 distribution by an estate-partner of its entire transferable interest; and the termination of an
32 entity-partner (10).
33

34 During the same ninety-day window, Section 602(b)(2)(A) permits each remaining
35 partner to withdraw rightfully by express will. A partner does not express a desire to withdraw
36 solely by reason of voting for or consenting to the winding up of the partnership business.
37 However, the converse is true: “[A] person’s rightful dissociation pursuant to Section
38 602(b)(2)(A) constitutes the expression of that partner’s consent to wind up the partnership
39 business.” Section 801(2)(A).
40

41 **EXAMPLE:** A term partnership has seven partners, and one of the partners dissociates by
42 dying before the end of the term. Section 601(7). The partnership will dissolve if within
43 ninety days after the dissociation three of the remaining five partners affirmatively vote
44 or consent to dissolution.
45

46 **EXAMPLE:** Same facts, except the partner dissociates in breach of the partnership

1 agreement. Same result.

2
3 EXAMPLE: Same facts, except that the partner is “a person that . . . is acting as a partner
4 by virtue of being a trustee of . . . a trust, [and] the trust’s entire transferable interest in
5 the partnership [has been] distributed. Section 601(8). Same result.
6

7 **Paragraph (2)(B)**—This provision states that a term partnership may be dissolved and
8 wound up at any time by the express will of all the partners. The provision merely reflects the
9 general rule that the partnership agreement may override the statutory default rules and that the
10 partnership agreement, like any contract, can be amended at any time by unanimous consent.
11

12 **Paragraph (2)(C)**—This rule is inherent in the concept of a partnership for a specified
13 term or undertaking. This provision must be read in conjunction with Section 411. Under Section
14 411(a), if the partners continue the business after the expiration of the term or the completion of
15 the undertaking, the partnership will be treated as a partnership at will. Moreover, if the partners
16 continue the business without any settlement or liquidation of the partnership, under Section
17 411(b) they are presumed to have agreed that the partnership will continue, despite the lack of a
18 formal agreement.
19

20 **Paragraph (3)**—The partners can avoid the effects of this paragraph either by amending
21 the partnership agreement before dissolution occurs or using Section 803 to rescind dissolution.
22 A retroactive amendment may also be possible. *See Kindred Ltd. P’ship v. Screen Actors Guild,*
23 *Inc.*, CV082220PSGPJWX, 2009 WL 279080, at *5–6 (C.D. Cal. Feb. 3, 2009) (giving effect to
24 an amendment that retroactively eliminated an event of dissolution; noting that UPA (1997)
25 § 802(b) permitted a partnership to rescind dissolution).
26

27 **Paragraph (4)**—The partnership agreement cannot vary the stated grounds for
28 dissolution.
29

30 **Paragraph (4)(A)**—The “all or substantially all” proviso is intended to avoid dissolution
31 for insubstantial or innocent regulatory violations.
32

33 **Paragraph (4)(B)–(D)**—The Virginia Supreme Court has referred to “these statutory
34 bases for judicial dissolution as the economic purpose test, the partner conduct test, and the
35 business operations test, respectively.” *Russell Realty Assocs. v. Russell*, 724 S.E.2d 690, 693
36 (Va. 2012). These tests somewhat overlap and are often pled together. *E.g.*, *Wood v. Apodaca*,
37 375 F. Supp. 2d 942, 948 (N.D. Cal. 2005).
38

39 Some courts have held that, if the trial court finds grounds for dissolution under one or
40 more of these provisions, that court has no power to order a lesser remedy, such as a buyout.
41 *Pankratz Farms, Inc. v. Pankratz*, 95 P.3d 671, 679–80 (Mont. 2004) (so holding even though: (i)
42 “judicial dissolution of the Partnership would trigger significant adverse tax consequences to all
43 the parties involved, including Marvin [who commenced the action seeking dissolution”]; and (ii)
44 “Marvin [had] requested monetary damages as an alternative to dissolution”); *Navarro v. Perron*,
45 122 Cal. App. 4th 797, 801, 19 Cal. Rptr. 3d 198, 201 (2004) (“Where the court determines it is
46 not reasonably practical to carry on the partnership, the court has no discretion to deny a

1 partner's application to dissolve it.”).

2
3 **Paragraph (4)(B)**—“[P]oor financial performance” is neither sufficient nor necessary to
4 satisfy this provision. *Russell Realty Assocs. v. Russell*, 724 S.E.2d 690, 694 (Va. 2012). The
5 provision's history substantiates the first point (not by itself sufficient). *See* UPA (1997) § 801,
6 cmt. 8 (“RUPA deletes UPA Section 32(1)(e) which provides for dissolution when the business
7 can only be carried on at a loss. That provision might result in a dissolution contrary to the
8 partners' expectations in a start-up or tax shelter situation, in which case ‘book’ or ‘tax’ losses do
9 not signify business failure.”).

10
11 As for the second point (not always necessary), *see Russell Realty Assocs. v. Russell*, 724
12 S.E.2d 690, 694–55 (Va. 2012) (noting that the partnership's purpose was “to acquire, hold,
13 invest in, and lease and sell investment properties”; stating with regard to the Virginia analog to
14 Paragraph 4(B) that “[t]he partners' expectations for realizing these purposes included not only
15 expectations of economic success, but also the ability to undertake these activities in an efficient
16 and productive manner to maximize return to the partnership”; and listing numerous ways in
17 which the relationship between the partners frustrated the economic purpose of the partnership).

18
19 **Paragraph (4)(C)**—A partner can trigger this provision without necessarily breaching
20 the partnership agreement. *E.g., Robertson v. Jacobs Cattle Co.*, 830 N.W.2d 191, 202 (Neb.
21 2013) (stating that “the somewhat autocratic manner in which Ardith conducted the affairs of the
22 partnership in recent years, even if not in violation of the partnership agreement, would
23 constitute grounds for dissolution under [the UPA (1997) version of] this provision”).

24
25 **Paragraph (4)(D)**—The specific terms of the partnership agreement are the frame of
26 reference for applying this provision. *Sriram v. Preferred Income Fund III Ltd. P'ship*, 22 F.3d
27 498, 502 (2d Cir. 1994) (“The issue is not whether the partnerships can effectively carry out the
28 general purpose of the Agreements after considerable modification of their terms. Rather, the
29 query . . . is whether the purpose of the Agreements can be carried out ‘in conformity with the
30 partnership agreement,’ that is, in conformity with the terms and conditions of the Agreements to
31 which the limited partners ascribed and on which they relied when choosing to part with their
32 capital.”) (applying the provision of RULPA (1976/1985) that is analogous to Paragraph (4)(C)).

33
34 **Paragraph (5)**—This paragraph gives a transferee rights comparable to a partner who
35 seeks dissolution because the other partners are continuing the business in derogation of the
36 partner's rights to obtain dissolution. The paragraph is based on UPA (1914) § 32(2) but UPA
37 (1997) added the requirement that the court determine that it is equitable to wind up the business.
38 The rights of a transferee under this section cannot be varied in the partnership agreement. *See*
39 Section 105(c)(11). Neither ULPA (2001) (Last Amended 2013) nor ULLCA (2006) (Last
40 Amended 2013) have a comparable provision, because both those acts provide for perpetual
41 existence. *See* ULPA (2001) (Last Amended 2013) § 110 and ULLCA (2006) (Last Amended
42 2013) § 108.

43
44 **Paragraph (6)**—~~The Harmonization Project added this provision, which is~~
45 ~~consistent with Section 202(a) (stating that “the association of two or more persons to carry~~
46 ~~on as co-owners a business for profit forms a partnership”). See the comment to Section~~

1 **302(d); *Pemstein v. Pemstein*, G030217, 2004 WL 1260034 (Cal. Ct. App. June 9, 2004)**
2 **(““Can one person carry on a partnership?” In short, the answer is no Just as it takes**
3 **two to form a marriage, it takes a minimum of two to run a viable partnership. We were**
4 **unable to find any contrary authority, and appellants fail to provide any, holding a**
5 **partnership can be carried on by less than two persons.”)**
6

7 **Paragraphs (6), (7)—In some statutes and rules, use of the word “days” raises the**
8 **question whether the term includes or excludes holidays and is limited to “business days”,**
9 **but not here. Use of the word “consecutive” makes clear that every day counts—holidays,**
10 **business days, and weekends included. Reference to other law of the state supplies the**
11 **answer to the question of what date applies if the last day of the period falls on a holiday or**
12 **weekend.**
13
14

15 **SECTION 802. WINDING UP.**

16 (a) A dissolved partnership shall wind up its business and, except as otherwise provided
17 in Section 803, the partnership continues after dissolution only for the purpose of winding up.

18 (b) In winding up its business, the partnership:

19 (1) shall discharge the partnership’s debts, obligations, and other liabilities, settle
20 and close the partnership’s business, and marshal and distribute the assets of the partnership; and

21 (2) may:

22 (A) deliver to the [Secretary of State] for filing a statement of dissolution
23 stating the name of the partnership and that the partnership is dissolved;

24 (B) preserve the partnership business and property as a going concern for a
25 reasonable time;

26 (C) prosecute and defend actions and proceedings, whether civil, criminal,
27 or administrative;

28 (D) transfer the partnership’s property;

29 (E) settle disputes by mediation or arbitration;

30 (F) deliver to the [Secretary of State] for filing a statement of termination

1 stating the name of the partnership and that the partnership is terminated; and

2 (G) perform other acts necessary or appropriate to the winding up.

3 (c) A person whose dissociation as a partner resulted in dissolution may participate in
4 winding up as if still a partner, unless the dissociation was wrongful.

5 (d) If a dissolved partnership does not have a partner and no person has the right to
6 participate in winding up under subsection (c), the personal or legal representative of the last
7 person to have been a partner may wind up the partnership's business. If the representative does
8 not exercise that right, a person to wind up the partnership's business may be appointed by the
9 affirmative vote or consent of transferees owning a majority of the rights to receive distributions
10 at the time the consent is to be effective. A person appointed under this subsection has the
11 powers of a partner under Section 804 but is not liable for the debts, obligations, and other
12 liabilities of the partnership solely by reason of having or exercising those powers or otherwise
13 acting to wind up the partnership's business.

14 (e) On the application of any partner or person entitled under subsection (c) to participate
15 in winding up, the [appropriate court] may order judicial supervision of the winding up of a
16 dissolved partnership, including the appointment of a person to wind up the partnership's
17 business, if:

18 (1) the partnership does not have a partner and within a reasonable time following
19 the dissolution no person has been appointed under subsection (d); or

20 (2) the applicant establishes other good cause.

21 **Comment**

22 Under the default rules of this act, dissolution does not change governance arrangements.
23 However, dissolution does change the context for determining whether a matter is in or outside
24 "the ordinary course of business of [the] partnership." Section 401(k). In addition, dissolution
25 triggers a default rule entitling each partner to "reasonable compensation for services rendered in

winding up the business of the partnership.” Section 401(j).

Section 804 governs the post-dissolution power of a partner to bind the partnership, and Section 805 governs the “liability after dissolution of partner and person dissociated as general partner.”

Subsection (a)—For more information on the impact of a partnership’s dissolution, see Section 801, comment.

Subsection (b)—The particular circumstances determine how long winding up may continue without giving “good cause” for court intervention under Section 802(e). There is no “hard and fast” rule. *See, e.g., Mathis v. Meyeres*, 574 P.2d 447, 450 (Alaska 1978) (stating “we are aware of [no authority] requiring that deadlines be set in the winding up of a partnership”); *8182 Md. Assocs., Ltd. P’ship v. Sheehan*, 14 S.W.3d 576, 581 (Mo. 2000) (“The Uniform Partnership Law contemplates that dissolved partnerships may continue in business for a short, long or indefinite period of time.”) (quoting *Schoeller v. Schoeller*, 497 S.W.2d 860, 867 (Mo. Ct. App. 1973)).

“Winding up usually entails the time necessary for the partners to finish old business, collect and pay debts, and finally distribute remaining assets to the partners.” *Gibson v. Deuth*, 270 N.W.2d 632, 635 (Iowa 1978). “Generally the best interests of the partnership will be served by winding up the partnership affairs as quickly as possible.” *Doting v. Trunk*, 856 P.2d 536, 540 (Mont. 1993). However, in some circumstances, a long period of winding up is not only appropriate but necessary. *Lebanon Trotting Ass’n v. Battista*, 306 N.E.2d 769, 772 (Ohio Ct. App. 1972) (“[I]f the only means of availing the partners of the benefit of the value of the lease would be to continue to operate under such lease until its expiration, then such operation may continue as part of the winding up of the partnership affairs after dissolution. It is not necessary that a partnership, in the absence of the consent of all the partners, abandon a valuable asset upon dissolution merely because it may have no ready market value, but the value of such asset can continue to inure to the benefit of the partners through the continuation of the partnership after dissolution.”).

Subsection (b)(2)(A) and (F)—For the constructive notice effect of a statement of dissolution or termination, see Sections 103(d)(2)(A) and (B) and 303.

Subsection (c)—This provision applies only to “[a] partner whose [rightful] dissociation resulted in dissolution.”

EXAMPLE: Partner A dissociates from the Killarney Company (“Killarney”), a general partnership. Partner A’s dissociation does not result in dissolution, and, per the Killarney partnership agreement, Partner A’s transferable interest is being redeemed over five years. One year after Partner A’s dissociation, Partner B dissociates rightfully, and dissolution results. Partner B may participate in Killarney’s winding up; Partner A may not.

EXAMPLE: Partner A wrongfully dissociates from Killarney, and the dissociation results in the dissolution of Killarney. Partner A may not participate in winding up.

1
2 A partner's duties and obligation under Section 409 extend to winding up. Section
3 603(b)(2). However, under Section 409(b)(3), each partner's duty not to compete ends when the
4 partnership dissolves.

5
6 **Subsection (d)**—A person appointed under this section will normally be an agent of the
7 dissolved partnership, acting pursuant to a contract. Agency and contract law will determine the
8 person's duties; by its terms Section 409 does not apply.

9
10 **SECTION 803. RESCINDING DISSOLUTION.**

11 (a) A partnership may rescind its dissolution, unless:

12 (1) a statement of termination applicable to the partnership has become effective

13 ~~or~~

14 (2) [the appropriate court] has entered an order under Section 801(4) or (5)
15 dissolving the partnership; or

16 (3) the dissolution occurred under Section 801(6) or (7).

17 (b) Rescinding dissolution under this section requires:

18 (1) if the dissolution occurred under:

19 (A) Section 801(1), the affirmative vote or consent of the person whose
20 express will to withdraw as a partner caused the dissolution;

21 (B) Section 801(2), (3), or (4), the affirmative vote or consent of each
22 partner; or

23 (C) Section 801(5), the affirmative vote or consent of each partner and
24 each applicant transferee; and

25 (2) if the partnership has delivered to the [Secretary of State] for filing a statement
26 of dissolution and:

27 (A) the statement has not become effective, delivery to the [Secretary of
28 State] for filing of a statement of withdrawal under Section 115 applicable to the statement of

1 dissolution; or

2 (B) the statement of dissolution has become effective, delivery to the
3 [Secretary of State] for filing of a statement of rescission stating the name of the partnership and
4 that dissolution has been rescinded under this section.

5 (c) If a partnership rescinds its dissolution:

6 (1) the partnership resumes carrying on its business as if dissolution had ~~never~~
7 not occurred;

8 (2) subject to paragraph (3), ~~any~~ liability ~~incurred by the partnership of a~~
9 person for an act occurring after the dissolution and before the rescission has become effective
10 is determined as if dissolution had ~~never~~ not occurred; and

11 (3) the rights of a third party arising out of conduct in reliance on the dissolution
12 before the third party knew or had notice of the rescission may not be adversely affected.

13 {Source: Issue 2.}

14 Comment

15 ~~The Harmonization Project added this section, replacing UPA (1997) § 802(b)~~
16 ~~(permitting the partners to “waive the right to have the partnership’s business wound up~~
17 ~~and the partnership terminated” after which “the partnership resumes carrying on its~~
18 ~~business as if dissolution had never occurred”).~~

19
20 ~~Subsection (a)—The first exclusion results inevitably from the effect of a statement~~
21 ~~of termination, Section 802(b)(2)(F)—i.e., the partnership ceases to exist. A “dead” entity~~
22 ~~lacks both the capacity and power to bring itself back from the dead.~~

23
24 ~~The second and third exclusions pertain to dissolutions effected by outsiders—i.e.,~~
25 ~~the court and the filing office.~~

26
27 Subsection (a)—Like other business entities, a partnership may rescind dissolution
28 in certain circumstances. Drawing on Section 801, Section 803(b) identifies those
29 circumstances and states how the rescission must be accomplished. In some circumstances,
30 nothing remains which is within the power of the partners to rescind in order to avoid
31 dissolution. Section 803(a) describes those circumstances. Where the partnership has been
32 terminated, dissolution has occurred, and the winding up or liquidation has been

1 completed, the partnership's existence as an entity has been terminated. Where the court
2 has ordered dissolution under Section 801(4) or (5), it is necessarily beyond the power of
3 the partners to rescind or avoid by their own actions. And where 90 consecutive days have
4 passed with the partnership having only one partner, or no partners, and no action to
5 admit one or more partners has been taken, the partnership is dissolved and no one at that
6 point is authorized to act for it other than to wind up.

7
8 **Subsections (b)(1) Subsection (b)**—The requirement of unanimous consent **in**
9 **subsection (b)(2), (3), and (4)** protects any vested rights or reliance by partners. However, the
10 partnership agreement may vary this provision. **Subsection (b)(3) includes all of the plaintiff**
11 **partners.**

12
13 **Subsection (c)(3)**—This paragraph protects third parties. *E.g., Neurobehavioral*
14 *Associates, P.A. v. Cypress Creek Hosp., Inc.*, 995 S.W.2d 326, 331 (Tex. App. 1999) (“If the
15 Hospital had the right to terminate the Agreement when it did because the Association was then
16 dissolved, then even though the Association can revoke articles of dissolution and have that
17 relate back to the date of dissolution, it would be grossly unfair to let the Association assert its ex
18 post facto change as a defense. Surely the Association would be estopped from doing so, having
19 created the very conditions that gave the Hospital the correct impression that it was then
20 dissolved.”).

21 22 **SECTION 804. POWER TO BIND PARTNERSHIP AFTER DISSOLUTION.**

23 (a) A partnership is bound by a partner's act after dissolution which:

24 (1) is appropriate for winding up the partnership business; or

25 (2) would have bound the partnership under Section 301 before dissolution if, at
26 the time the other party enters into the transaction, the other party does not know or have notice
27 of the dissolution.

28 (b) A person dissociated as a partner binds a partnership through an act occurring after
29 dissolution if:

30 (1) at the time the other party enters into the transaction:

31 (A) less than two years has passed since the dissociation; and

32 (B) the other party does not know or have notice of the dissociation and
33 reasonably believes that the person is a partner; and

34 (2) the act:

1 (A) is appropriate for winding up the partnership’s business; or

2 (B) would have bound the partnership under Section 301 before

3 dissolution and at the time the other party enters into the transaction the other party does not
4 know or have notice of the dissolution.

5 **Comment**

6 This section provides the “power to bind” rules applicable once dissolution occurs. The
7 section originated in UPA (1997), which significantly departed from the approach of UPA
8 (1914). The Harmonization Project revised this section to conform to ULPA (2001). However,
9 the revisions are essentially stylistic.

10
11 In general, this section parallels Section 702 (power to bind of a person dissociated as
12 partner when dissolution does not result from the dissociation). However, one significant
13 difference exists. Section 702(a)(2)(A) contains a provision analogous to a statute of repose. A
14 person’s power to bind the partnership terminates two years after the date of dissociation.
15 Subsection (b) contains a comparable provision, but Subsection (a) does not.

16
17 **Subsections (a) and (b)**—Subsection (a) states the power-to-bind rules for persons still
18 partners when dissolution occurs. Subsection (b) pertains to persons dissociated before
19 dissolution, including a partner whose dissociation results in dissolution. *Compare* Section 804,
20 *with* Section 802(c) (stating that as an *inter se* matter a person whose rightful dissociation results
21 in dissolution may participate in winding up “as if still a partner.”).

22
23 **Subsection (a)(1)**—This paragraph states a rule of inherent agency power. *See*
24 RESTATEMENT (SECOND) OF AGENCY § 8A (defining “inherent agency power” as “the power of
25 an agent which is derived not from authority, apparent authority or estoppel, but solely from the
26 agency relation and exists for the protection of persons harmed by or dealing with a servant or
27 other agent”). Thus, a partner might act without actual or apparent authority and still bind the
28 partnership. The partnership agreement cannot change the stated rule because the rule pertains to
29 the rights under this act of third parties. *See* Section 105(c)(17).

30
31 If a partner’s words or conduct trigger this paragraph, thereby binding the partnership,
32 and the partner lacks the actual authority to do so, the partner breaches an agent’s duty to act
33 within authority, and is liable to the partnership for any resulting damages. RESTATEMENT
34 (THIRD) OF AGENCY § 8.09(1) (“An agent has a duty to take action only within the scope of the
35 agent’s actual authority”). The partner might also be liable for breach of the partnership
36 agreement.

37
38 **Subsection (a)(2)**—A person might have notice under Section 103(d)(2)(B)(i) (statement
39 of dissolution) as well as under Section 103(b)(1) (reason to know).

40
41 **Subsection (b)**—This subsection deals with the post-dissolution power to bind of a

1 person dissociated as a partner. For the most part: (i) Paragraph 1 replicates Section 702,
2 pertaining to the pre-dissolution power to bind of a person dissociated as a partner; and
3 (ii) Paragraph 2 replicates Subsection (a) of this section, which states the post-dissolution power
4 to bind of a person is still a partner.

5
6 For a person dissociated as a partner to bind a dissolved partnership:

- 7 • the person's dissociation must have:
 - 8 ○ been rightful; and
 - 9 ○ resulted in dissolution; and
- 10 • the person's act must satisfy both Paragraphs 1 and 2.

11
12 **Subsection (b)(1)(B)**—A person might have notice under Section 103(d)(2)(B)(i)
13 (statement of dissolution) as well as under Section 103(b)(1) (reason to know).

14
15 **Subsection (b)(2)(B)**—A person might have notice under Section 103(d)(2)(B)(i)
16 (statement of dissolution) as well as under Section 103(b)(1) (reason to know).

17
18
19 **SECTION 805. LIABILITY AFTER DISSOLUTION OF PARTNER AND**
20 **PERSON DISSOCIATED AS PARTNER.**

21 (a) If a partner having knowledge of the dissolution causes a partnership to incur an
22 obligation under Section 804(a) by an act that is not appropriate for winding up the partnership
23 business, the partner is liable:

24 (1) to the partnership for any damage caused to the partnership arising from the
25 obligation; and

26 (2) if another partner or person dissociated as a partner is liable for the obligation,
27 to that other partner or person for any damage caused to that other partner or person arising from
28 the liability.

29 (b) Except as otherwise provided in subsection (c), if a person dissociated as a partner
30 causes a partnership to incur an obligation under Section 804(b), the person is liable:

31 (1) to the partnership for any damage caused to the partnership arising from the
32 obligation; and

(2) if a partner or another person dissociated as a partner is liable for the obligation, to the partner or other person for any damage caused to the partner or other person arising from the obligation.

(c) A person dissociated as a partner is not liable under subsection (b) if:

(1) Section 802(c) permits the person to participate in winding up; and

(2) the act that causes the partnership to be bound under Section 804(b) is appropriate for winding up the partnership's business.

Comment

This section parallels Section 702. It is possible for more than one person to be liable under this section on account of the same partnership obligation. This act does not provide any rule for apportioning liability in that circumstance.

Subsection (a)(2)—If the partnership is not a limited liability partnership, the liability created by this paragraph includes liability under Sections 306(a) and 703(b). The paragraph also applies when a partner or person dissociated as a general partner suffers damage due to a contract of guaranty.

Other law determines liability (if any) to a person that is neither a partner nor dissociated as a partner.

SECTION 806. DISPOSITION OF ASSETS IN WINDING UP; WHEN CONTRIBUTIONS REQUIRED.

(a) In winding up its business, a partnership shall apply its assets, including the contributions required by this section, to discharge the partnership's obligations to creditors, including partners that are creditors.

(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 with respect to that transferable interest and not previously returned, an amount equal to the

value **at the time of contribution** of the unreturned contributions; and

{Source: Issues 6 and 7.}

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

(c) 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, the following rules apply:

(1) Each person that was a partner when the obligation was incurred and that has not been released from the obligation under Section 703(c) ~~and~~ or (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.

{Source: Issues 6 and 7.}

(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

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

5 (e) If a partnership does not have sufficient surplus to comply with subsection (b)(1), any
6 surplus must be distributed among the owners of transferable interests in proportion to the value
7 **at the time of contribution** of the respective unreturned contributions.

8 {Source: Issues 6 and 7.}

9 (f) All distributions made under subsections (b) and (c) must be paid in money.

10 Comment

11 **Subsection (a)**—This subsection is non-waivable as to creditors who are not partners.
12 See Section 105(c)(17) (stating that the partnership agreement may not “restrict the rights under
13 this [act] of a person other than a partner”). However, if a creditor is willing, a dissolved
14 partnership may certainly make agreements with the creditor specifying the terms under which
15 the partnership will “discharge its obligations” to the creditor. If under Section 306(a) one or
16 more partners are also liable on a partnership obligation, any agreement between the partnership
17 and the creditor should take in account Section 703(d).

18
19 **Subsection (b)**—For the most part, this subsection states default rules. For example,
20 partnership agreements often provide for different distribution rights upon liquidation than
21 during operations. However, distributions under this subsection (or otherwise under the
22 partnership agreement) are subject to Section 504 (charging orders). As to the extent the
23 partnership agreement can be amended to affect the distribution rights of persons already
24 transferees, see Section 107(b).

25
26 **Subsection (b)(1) – Distributions made before dissolution of a partnership normally**
27 **are not considered a return of contributions for purposes of this subsection. Instead,**
28 **subject to agreements among the partners, course of conduct and other evidence of intent,**
29 **only those distributions made before dissolution that have been made in proportion to how**
30 **contributions were made to the partnership would be treated as returns of contributions.**

31
32 **Subsection (c)**—This section applies obligation by obligation, because a person—*qua*
33 partner or person dissociated as a partner—is required to contribute to the partnership to satisfy a
34 partnership obligation only if, when the obligation was incurred: (i) the person was a partner; and
35 (ii) the partnership was not an LLP. See Section 306(b), (c). As for when a partnership obligation
36 is incurred, see Section 306(b) and (c), comments. **Section 703(c) and (d) provide independent**

1 ways in which a person dissociated as a partner may be released from liability for a debt,
2 obligation, or other liability of the partnership.

3
4 ~~The allocation of contribution obligations parallels the default rule stated in Section~~
5 ~~401(a) (providing that, “except in the case of a limited liability partnership, [each partner]~~
6 ~~is chargeable with a share of the partnership losses in proportion to the partner’s share of~~
7 ~~the profits”).~~ The partnership agreement can change the allocation rules in this section *inter se*
8 partners and persons dissociated as partners but cannot prejudice the rights of non-partner
9 creditors.

10
11 EXAMPLE: The A-B Partnership (the “Partnership”) owes Creditor \$150, an obligation
12 incurred when Partners A and B were the only partners, sharing distributions equally, and
13 the Partnership was not an LLP. The Partnership has no funds to pay Creditor. Although
14 Subsection (c)(1) would require Partners A and B each to contribute equally (*i.e.*, \$75),
15 the A-B Partnership Agreement provides that Partner A has the entire contribution
16 obligation and Partner B has none. As between Partners A and B, Partner A is obligated to
17 contribute \$150 and Partner B nothing. However, as to Creditor, Partner B still has a
18 contribution obligation of \$75.

19
20 This formal distinction will have practical consequences only if A does not
21 contribute the full \$150. Also, Creditor may have problems establishing standing. *Cf.* the
22 comment to Section 407.

23
24 **Subsection (c)(2) and (3)**—These provisions are analogous to buy-sell provisions that:
25 (i) provide that an owner’s effort to sell the ownership interest triggers an option to purchase
26 allocated among all the other owners; (ii) make the option conditional on the entire interest being
27 purchased; and (iii) provide for successive allocations to take up any previous allocations that
28 were not unexercised.

29
30 **Subsection (e)**—If a partnership has been a limited liability partnership throughout the
31 partnership’s existence, this subsection is consistent with this act’s approach to loss sharing. If a
32 partnership has been a limited liability partnership during only part of the partnership’s existence,
33 the issue of loss sharing upon dissolution: (i) can be exceedingly complicated, varying radically
34 depending on the circumstances; (ii) is therefore not amenable to a statutory “gap filler”; and (iii)
35 thus should always be addressed in the partnership agreement.

36
37 However, in case the partnership agreement does not address the issue, this act must
38 provide a default rule. *See* the comment to Section 105(b) (“To the extent the partnership
39 agreement does not determine an *inter se* matter, this act determines the matter.”). This
40 subsection applies to fill the gap. This approach has the virtues of simplicity and certainty but in
41 no way resembles what “typical” partners might agree if they were to consider the matter *ab*
42 *initio*, especially if the partnership was never an LLP. *Cf.* Robert W. Hillman, *Private Ordering*
43 *Within Partnerships*, 41 U. MIAMI L. REV. 425, 448 (1987) (“[T]he various norms established by
44 the Act, applicable in the absence of agreements to the contrary, represent the supposed
45 understandings partners most likely reach if they choose to bargain on the various issues.”).

1 **SECTION 807. KNOWN CLAIMS AGAINST DISSOLVED LIMITED**
2 **LIABILITY PARTNERSHIP.**

3 (a) Except as otherwise provided in subsection (d), a dissolved limited liability
4 partnership may give notice of a known claim under subsection (b), which has the effect
5 provided in subsection (c).

6 (b) A dissolved limited liability partnership may in a record notify its known claimants of
7 the dissolution. The notice must:

8 (1) state that the partnership was a limited liability partnership at the time of
9 dissolution;

10 (2) identify the date the dissolved partnership became a limited liability
11 partnership;

12 (3) specify the information required to be included in a claim;

13 (2) (4) state that a claim must be in writing and provide a mailing address to
14 which the claim is to be sent;

15 (3) (5) state the deadline for receipt of a claim, which may not be less than 120
16 days after the date the notice is received by the claimant;

17 (4) (6) state that ~~the a~~ claim for an obligation incurred by the partnership
18 while a limited liability partnership will be barred if not received by the deadline; ~~and;~~

19 ~~(5) unless the partnership has been throughout its existence a limited liability~~
20 ~~partnership, state that the barring of a claim against the partnership will also bar any~~
21 ~~corresponding claim against any partner or person dissociated as a partner which is based~~
22 ~~on Section 306.~~

23 (c) A claim against a dissolved limited liability partnership for an obligation incurred

1 **by the partnership while a limited liability partnership** is barred if the requirements of
2 subsection (b) are met and:

3 ***{Source: Issue 9.}***

4 (1) the claim is not received by the specified deadline; or

5 (2) if the claim is timely received but rejected by the limited liability partnership:

6 (A) the partnership causes the claimant to receive a notice in a record
7 stating that the claim is rejected and will be barred unless the claimant commences an action
8 against the partnership to enforce the claim not later than 90 days after the claimant receives the
9 notice; and

10 (B) the claimant does not commence the required action not later than
11 90 days after the claimant receives the notice.

12 (d) This section does not apply to a claim based on an event occurring after the date of
13 dissolution or a liability that on that date is contingent.

14 **Comment**

15 ~~**Source—Added during the Harmonization Project, this section is derived almost**~~
16 ~~**verbatim from Model Business Corporation Act section 14.06.**~~

17
18 ~~**Subsection (b)(5)—For additional information on when a claim against a**~~
19 ~~**partnership is barred, see Section 810, comment.**~~
20

21 **If the procedures in this section are followed properly by a partnership, a claim**
22 **incurred by the partnership while it is a limited liability partnership will be barred upon**
23 **the completion of those procedures, meaning that the claim can no longer be brought at**
24 **that point. A claim against a partnership incurred by the partnership while it was not a**
25 **limited liability partnership will be subject to the other provisions of this act governing the**
26 **liability of the partnership and its partners, as well as any applicable statute of limitations.**
27

28 **SECTION 808. OTHER CLAIMS AGAINST DISSOLVED LIMITED LIABILITY**
29 **PARTNERSHIP.**

30 (a) A dissolved limited liability partnership may publish notice of its dissolution and

request persons having claims against the partnership to present them in accordance with the notice.

(b) A notice under subsection (a) must:

(1) be:

(A) published at least once in a newspaper of general circulation in the [county] in this state in which the dissolved limited liability partnership's principal office is located or, if the principal office is not located in this state, in the [county] in which the office of the partnership's registered agent is or was last located; and

(B) posted conspicuously for at least 30 days on the dissolved partnership's website, if any;

(2) state that the partnership was a limited liability partnership at the time of its dissolution;

(3) identify the date on which the dissolved partnership became a limited liability partnership;

(4) describe the information required to be contained in a claim, state that the claim must be in writing, and provide a mailing address to which the claim is to be sent; and

~~(3)~~ (5) state that a claim against the partnership for an obligation incurred by the partnership while it is a limited liability partnership is barred unless an action to enforce the claim is commenced not later than three years after publication of the notice; and

~~(4) unless the partnership has been throughout its existence a limited liability partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any partner or person dissociated as a partner which is based on Section 306.~~

(c) If a dissolved limited liability partnership publishes a notice in accordance with subsection (b), the claim **for an obligation incurred by the partnership while a limited liability partnership** of each of the following claimants is barred unless the claimant commences an action to enforce the claim against the partnership not later than three years after the publication date of the notice:

(1) a claimant that did not receive notice in a record under Section 807;

(2) a claimant whose claim was timely sent to the partnership but not acted on;

and

(3) a claimant whose claim is contingent at, or based on an event occurring after, the date of dissolution.

(d) A claim not barred under this section or Section 807 may be enforced:

(1) against a dissolved limited liability partnership, to the extent of its undistributed assets; and

(2) except as otherwise provided in Section 809, if assets of the partnership have been distributed after dissolution, against a partner or transferee to the extent of that person's proportionate share of the claim or of the partnership's assets distributed to the partner or transferee after dissolution, whichever is less, but a person's total liability for all claims under this paragraph may not exceed the total amount of assets distributed to the person after dissolution; ~~and~~

~~(3) against any person liable on the claim under Sections 306, 703, and 805.~~

{Source: Issue 9.}

Comment

~~Source—Added during the Harmonization Project, this section is derived almost verbatim from Model Business Corporation Act section 14.07.~~

1
2 **Subsection (b)(4)**—For additional information on when a claim against a partnership is
3 barred, see Section 810, comment
4

5 **Subsection (d)(2)**—Liability under this paragraph extends to those who have received
6 distributions under a charging order. *See* the comment to Section 504(a) (explaining that the
7 beneficiary of a charging order is a transferee). Unlike Section 407(c) (recapture of improper
8 distributions), this paragraph contains no “knowledge” element.
9

10 **Subsection (d)(3)**—The referenced sections address the vicarious liability of partners and
11 persons dissociated as partners for obligations of a partnership that is not an LLP.
12

13 **SECTION 809. COURT PROCEEDINGS.**

14 (a) A dissolved limited liability partnership that has published a notice under Section 808
15 may file an application with [the appropriate court] in the [county] where the partnership’s
16 principal office is located or, if the principal office is not located in this state, where the office of
17 its registered agent is or was last located, for a determination of the amount and form of security
18 to be provided for payment of claims that are reasonably expected to arise after the date of
19 dissolution based on facts known to the partnership and:

20 (1) at the time of the application:

21 (A) are contingent; or

22 (B) have not been made known to the partnership; or

23 (2) are based on an event occurring after the date of dissolution.

24 (b) Security is not required for any claim that is or is reasonably anticipated to be barred
25 under Section 807.

26 (c) Not later than 10 days after the filing of an application under subsection (a), the
27 dissolved limited liability partnership shall give notice of the proceeding to each claimant
28 holding a contingent claim known to the partnership.

29 (d) In any proceeding under this section, the court may appoint a guardian ad litem to

1 represent all claimants whose identities are unknown. The reasonable fees and expenses of the
2 guardian, including all reasonable expert witness fees, must be paid by the dissolved limited
3 liability partnership.

4 (e) A dissolved limited liability partnership that provides security in the amount and form
5 ordered by the court under subsection (a) satisfies the partnership's obligations with respect to
6 claims that are contingent, have not been made known to the partnership, or are based on an
7 event occurring after the date of dissolution, and such claims may not be enforced against a
8 partner or transferee on account of assets received in liquidation.

9 **Comment**

10 **Source**—Added during the Harmonization Project, this section is derived almost
11 verbatim from Model Business Corporation Act section 14.08.

12 ~~**SECTION 810. LIABILITY OF PARTNER AND PERSON DISSOCIATED AS**~~
13 ~~**PARTNER WHEN CLAIM AGAINST PARTNERSHIP BARRED. If a claim against a**~~
14 ~~**dissolved partnership is barred under Section 807, 808, or 809, any corresponding claim**~~
15 ~~**under Section 306, 703, or 805 is also barred.**~~

16 *{Source: Issue 9.}*

17 **Comment**

18 ~~**A partner's liability under Sections 306, 703 and 805 is vicarious liability—liability**~~
19 ~~**solely by status and solely for the “debts, obligations, and other liabilities of the**~~
20 ~~**partnership.” To the extent a claim pertaining to the underlying debt, obligation, or other**~~
21 ~~**liability is barred, a claim pertaining to the corresponding vicarious liability should**~~
22 ~~**likewise be barred.**~~

23 24 **[ARTICLE] 9**

25 **LIMITED LIABILITY PARTNERSHIP**

26 **SECTION 901. STATEMENT OF QUALIFICATION.**

27 (a) A partnership may become a limited liability partnership pursuant to this section.

1 (b) The terms and conditions on which a partnership becomes a limited liability
2 partnership must be approved by the affirmative vote or consent necessary to amend the
3 partnership agreement except, in the case of a partnership agreement that expressly addresses
4 obligations to contribute to the partnership, the affirmative vote or consent necessary to amend
5 those provisions.

6 (c) After the approval required by subsection (b), a partnership may become a limited
7 liability partnership by delivering to the [Secretary of State] for filing a statement of
8 qualification. The statement must contain:

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

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

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

14 (4) a statement that the partnership elects to become a limited liability partnership.

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

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

22 (f) A limited liability partnership may amend or cancel its statement of qualification by
23 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.

(g) A partnership becomes a limited liability partnership at the time of its formation

if:

(1) all persons that agreed to become initial partners in the partnership agree that the partnership will become a limited liability partnership at the time of its formation;

and

(2) on the date of formation of the partnership under Section 202(a):

(A) the partnership delivers to the [Secretary of State] for filing a statement of qualification under subsection (c); and

(B) the statement of qualification includes a statement that the partnership has become a limited liability partnership at the time of its formation.

{Source: Issues 6 and 7.}

Comment

Subsection (a)—Every partnership governed by this act may become a limited liability partnership, and the necessary formalities are straightforward: approval of the decision by the partners and delivering to the filing office for filing a simple statement of qualification. A partnership becomes a limited liability partnership when the filing office files the statement of qualification and the statement takes effect. For the consequences of LLP status, see Section 306(c), comment.

Subsection (b)—In the default mode, becoming a limited liability partnership requires the agreement of all partners, because in the default mode amending the partnership agreement requires the affirmative vote or consent of all partners, Section 401(k) (stating the voting/consent requirement to amend the partnership agreement). The unanimous vote/consent default rule reflects the significance of the transformation *inter se* the partners. See the comment to Section 306(c) (Effect of LLP Status on Relations Inter Se the Partners).

1 In the event a partnership agreement provides different quanta of consent for different
2 matters, this subsection chooses (as a default rule) “the affirmative vote or consent necessary to
3 amend those provisions” of “partnership agreement that expressly addresses obligations to
4 contribute to the partnership.” This choice makes good sense, given the effect of LLP status on
5 contribution obligations. *See* the comment to Section 306(c).
6

7 **Subsection (c)**—Although a statement of qualification does not create a new entity,
8 Section 201(b), the requirements stated here are comparable to the requirements for a certificate
9 of formation for a limited liability company, ULLCA (2006) (Last Amended 2013), and a
10 certificate of limited partnership, ULPA (2001) (Last Amended 2013). The liability shield—a
11 privilege granted by state—justifies requiring an LLP to meet these requirements.
12

13 **Subsection (d)**—Under some early LLP statutes, an LLP’s failure to file an annual
14 renewal ended LLP status and terminated the shield. This subsection eschews that draconian
15 result. However, an LLP’s failure to file an annual/biennial report, Section 913, is grounds for
16 administrative revocation. *See* Section 903(d); *see also* Section 306(c)(2) (stating that the
17 liability shield continues despite dissolution).
18

19 Neither this subsection nor Section 306(c)(2) expressly addresses the effect of an LLP’s
20 termination on the liability shield. However, neither logic nor policy supports the retroactive
21 destruction of the shield.

22 **Subsection (f)**—The unanimity requirement for amending a statement of qualification is
23 a default rule. The unanimity requirement for cancelling a statement of qualification is
24 mandatory. Section 105(c)(13). The difference reflects the very different consequences of
25 amendment and cancellation. Subsection (b) requires very little information in a statement of
26 qualification and does not contemplate additional information. *Compare* Section 901(f), *with*
27 ULLCA (2006) (Last Amended 2013) § 201(c) (authorizing a certificate of formation to include
28 additional information) *and* ULPA (2001) (Last Amended 2013) § 201(c) (same). Therefore, an
29 amendment can do no substantial harm to any partner’s interest. In contrast, cancelling a
30 statement of qualification makes every partner vicariously liable for all partnership obligations.
31 *Compare* Section 901(f), *with* Section 105(c)(14) (stating that the partnership agreement may not
32 “vary the right of a partner to approve a merger, interest exchange, conversion, or domestication”
33 the result of which is to impose vicarious liability on the person for the obligations of the
34 resulting entity).

35 **Subsection (g)—Subsection (g) provides a way for the persons forming a**
36 **partnership to make clear their intention that the partnership be an LLP beginning**
37 **simultaneously with the formation of the partnership. Following the procedure in**
38 **subsection (g) will avoid any concern about whether the partnership may have incurred a**
39 **liability before its statement of qualification has taken effect.**
40

41 **Subsection (g) was added to the act in 2024 to provide an express way for the**
42 **partners to confirm their intention for their partnership to be an LLP at the time of**
43 **formation. The addition of subsection (g) was intended as a confirmation of existing**
44 **practice and does not imply that it previously was not possible for a partnership to become**
45 **an LLP at the time of formation if, but only if, the necessary formalities set forth in this**

1 **Subsection were satisfied at that time. A statement of qualification as an LLP cannot be**
2 **backdated without making a false and inaccurate statement in violation of Section 205.**
3

4 **SECTION 902. PERMITTED NAMES.**

5 (a) The name of a partnership that is not a limited liability partnership may not contain
6 the phrase “Registered Limited Liability Partnership” or “Limited Liability Partnership” or the
7 abbreviation “R.L.L.P.”, “L.L.P.”, “RLLP” , or “LLP”.

8 (b) The name of a limited liability partnership must contain the phrase “Registered
9 Limited Liability Partnership” or “Limited Liability Partnership” or the abbreviation “R.L.L.P.”,
10 “L.L.P.”, “RLLP”, or “LLP”.

11 (c) Except as otherwise provided in subsection (f), the name of a limited liability
12 partnership, and the name under which a foreign limited liability partnership may register to do
13 business in this state, must be distinguishable on the records of the [Secretary of State] from any:

14 (1) name of an existing person whose formation required the filing of a record by
15 the [Secretary of State] and which is not at the time administratively dissolved;

16 (2) name of a limited liability partnership whose statement of qualification is in
17 effect;

18 (3) name under which a person that is registered to do business in this state by the
19 filing of a record by the [Secretary of State];

20 (4) name that is reserved under Section 903 or other law of this state providing for
21 the reservation of a name by a filing of a record by the [Secretary of State];

22 (5) name that is registered under Section 904 or other law of this state providing
23 for the registration of a name by a filing of a record by the [Secretary of State]; and

24 (6) a name registered under [this state’s assumed or fictitious name statute].

25 (d) If a person consents in a record to the use of its name and submits an undertaking in a

1 form satisfactory to the [Secretary of State] to change its name to a name that is distinguishable
2 on the records of the [Secretary of State] from any name in any category of names in subsection
3 (c), the name of the consenting person may be used by the person to which the consent was
4 given.

5 (e) Except as otherwise provided in subsection (f), in determining whether a name is the
6 same as or not distinguishable on the records of the [Secretary of State] from the name of another
7 person, words, phrases, or abbreviations indicating a type of entity, such as “corporation”,
8 “corp.”, “incorporated”, “Inc.”, “professional corporation”, “PC”, “P.C.”, “professional
9 association”, “PA”, “P.A.”, “Limited”, “Ltd.”, “limited partnership”, “LP”, “L.P.”, “limited
10 liability partnership”, “LLP”, “L.L.P.”, “registered limited liability partnership”, “RLLP”,
11 “R.L.L.P.”, “limited liability limited partnership”, “LLLLP”, “L.L.L.P.”, “registered limited
12 liability limited partnership”, “RLLLLP”, “R.L.L.L.P.”, “limited liability company”, “LLC”, or
13 “L.L.C.”, “limited cooperative association”, “limited cooperative”, “LCA”, or “L.C.A.” may not
14 be taken into account.

15 (f) A person may consent in a record to the use of a name that is not distinguishable on
16 the records of the [Secretary of State] from its name except for the addition of a word, phrase, or
17 abbreviation indicating the type of person as provided in subsection (e). In such a case, the
18 person need not change its name pursuant to subsection (d).

19 (g) The name of a limited liability partnership or foreign limited liability partnership may
20 not contain the words [insert prohibited words or words that may be used only with approval by
21 an appropriate state agency].

22 (h) A limited liability partnership or foreign limited liability partnership may use a name
23 that is not distinguishable from a name described in subsection (c)(1) through (6) if the

1 partnership delivers to the [Secretary of State] a certified copy of a final judgment of a court of
2 competent jurisdiction establishing the right of the partnership to use the name in this state.

3 **Comment**

4 This section adopts the “distinguishable on the records” test for name availability and
5 rejects the “deceptively similar” test widely used in the past in business entity statutes.

6
7 For name requirements for foreign registered limited partnerships, see Section 1003(1).

8 **SECTION 903. ADMINISTRATIVE REVOCATION OF STATEMENT OF** 9 **QUALIFICATION.**

10 (a) The [Secretary of State] may commence a proceeding under subsection (b) to
11 revoke the statement of qualification of a limited liability partnership administratively if the
12 partnership does not:

13 (1) pay any fee, tax, interest, or penalty required to be paid to the [Secretary of
14 State] not later than [six months] after it is due;

15 (2) deliver [an annual] [a biennial] report to the [Secretary of State] not later
16 than [six months] after it is due; or

17 (3) have a registered agent in this state for [60] consecutive days.

18 (b) If the [Secretary of State] determines that one or more grounds exist for
19 administratively revoking a statement of qualification, the [Secretary of State] shall serve the
20 partnership with notice in a record of the [Secretary of State’s] determination.

21 (c) If a limited liability partnership, not later than [60] days after service of the notice
22 under subsection (b), does not cure or demonstrate to the satisfaction of the [Secretary of State]
23 the nonexistence of each ground determined by the [Secretary of State], the [Secretary of State]
24 shall administratively revoke the statement of qualification by signing a statement of
25 administrative revocation that recites the grounds for revocation and the effective date of the

1 revocation. The [Secretary of State] shall file the statement and serve a copy on the partnership
2 pursuant to Section 116.

3 (d) An administrative revocation under subsection (c) affects only a partnership's status as
4 a limited liability partnership and is not an event causing dissolution of the partnership.

5 (e) The administrative revocation of a statement of qualification of a limited liability
6 partnership does not terminate the authority of its registered agent.

7 **(f) The administrative revocation of a statement of qualification of a limited liability**
8 **partnership does not change the standards of conduct for the partners from the standards**
9 **applicable under this [act] and the organic rules before the administrative revocation.**

10 *{Source: Issue 31.}*

11 **Comment**

12 Many failures to comply with statutory requirements that may give rise to
13 administrative revocation occur because of oversight or inadvertence and are usually
14 corrected promptly when brought to the LLP's attention. Subsections (b) and (c) therefore
15 provide a mandatory notice by the filing office to each LLP whose statement of qualification
16 is subject to administrative revocation and a sixty-day grace period following the notice
17 before the statement of administrative revocation may be filed.

18
19 In most instances, the issue whether a statement of qualification is subject to
20 administrative revocation will not be controverted. If an LLP's statement of qualification is
21 administratively revoked, the statement is no longer in effect. However, the partnership may
22 petition the filing office for reinstatement under Section 904 and, if reinstatement is denied,
23 the company may appeal to the courts under Section 905.

24
25 As a practical matter, administrative revocation permits the filing office to clear the
26 record of "dead wood" and free up names.

27
28 However, the consequences for the partners can be quite serious. The liability shield
29 remains effective for debts, liabilities, and other obligations incurred before revocation but
30 disappears as to those incurred subsequently. A reinstated statement of qualification has
31 retroactive effect generally, but exceptions can exist with regard to partnership obligations
32 incurred before reinstatement. *See* Section 904(d)(3). For a discussion of when a partnership
33 obligation is incurred, see the comment to Section 304(c) (The Temporal Nexus – When
34 Claim Incurred).

1 **Subsection (d)**—This rule follows from Section 201(b) (“A partnership is the same
2 entity regardless of whether the partnership has a statement of qualification in effect under
3 Section 901.”).

4
5 **SECTION 904. REINSTATEMENT.**

6 (a) A partnership whose statement of qualification has been revoked administratively
7 under Section 903 may apply to the [Secretary of State] for reinstatement of the statement of
8 qualification [not later than [two] years after the effective date of the revocation]. The
9 application must state:

10 (1) the name of the partnership at the time of the administrative revocation of its
11 statement of qualification and, if needed, a different name that satisfies Section 902;

12 (2) the address of the principal office of the partnership and the name and street
13 and mailing addresses of its registered agent;

14 (3) the effective date of administrative revocation of the partnership’s statement
15 of qualification; and

16 (4) that the grounds for revocation did not exist or have been cured.

17 (b) To have its statement of qualification reinstated, a partnership must pay all fees,
18 taxes, interest, and penalties that were due to the [Secretary of State] at the time of the
19 administrative revocation and all fees, taxes, interest, and penalties that would have been due to
20 the [Secretary of State] while the partnership’s statement of qualification was revoked
21 administratively.

22 (c) If the [Secretary of State] determines that an application under subsection (a)
23 contains the required information, is satisfied that the information is correct, and determines
24 that all payments required to be made to the [Secretary of State] by subsection (b) have been
25 made, the [Secretary of State] shall:

1 (1) cancel the statement of revocation and prepare a statement of reinstatement
2 that states the [Secretary of State's] determination and the effective date of reinstatement; and

3 (2) file the statement of reinstatement and serve a copy on the partnership.

4 (d) When reinstatement under this section has become effective, the following rules
5 apply:

6 (1) The reinstatement relates back to and takes effect as of the effective date of
7 the administrative revocation.

8 (2) The partnership's status as a limited liability partnership continues as if the
9 revocation had not occurred.

10 (3) The rights of a person arising out of an act or omission in reliance on the
11 revocation before the person knew or had notice of the reinstatement are not affected.

12 **Comment**

13 This section is analogous to statutes authorizing reinstatement following administrative
14 dissolution. *See* ULLCA (2006) (Last Amended 2013) § 709; ULPA (2001) (Last Amended
15 2013) § 812. In that context:

- 16
- 17 • some states require that reinstatement be sought within two years of administrative
- 18 dissolution;
- 19 • other states provide a longer time, or do not impose any time limit;
- 20 • imposing no limit risks abuse by unscrupulous people seeking to reinstate and
- 21 appropriate for improper ends a dormant entity that has been abandoned by its owners;
- 22 but
- 23 • on the other hand, reinstatement is intended as a safety net for the inattentive and, if the
- 24 deadline comes too soon, the safety net may be gone before the inattentive even learn
- 25 that administrative dissolution has occurred.
- 26

27 **Subsection (a)(1)**—This provision will apply if, before the statement of qualification is
28 reinstated, another entity has taken the company's name. *See* Section 902(c)(2).
29

30 **Subsection (d)(3)**—This paragraph provides an exception to the retroactive effect
31 provided by Paragraphs (1) and (2). The greatest risk resulting from the exception is a creditor's
32 claim of having entered into a contract with the partnership, knowing of the revocation and
33 relying on the vicarious liability of each partner. The exception could also preclude a reinstated
34 LLP's use of its own name. *See* Section 902(c)(2) (indirectly permitting an LLP to use the name

1 of another partnership whose statement of qualification has been administratively revoked).
2 Comparable provisions exist in other uniform acts pertaining to entities. *E.g.*, ULLCA (2006)
3 (Last Amended 2013) § 112(b)(1) .
4

5 **SECTION 905. JUDICIAL REVIEW OF DENIAL OF REINSTATEMENT.**

6 (a) If the [Secretary of State] denies a partnership's application for reinstatement
7 following administrative revocation of the partnership's statement of qualification, the [Secretary
8 of State] shall serve the partnership with a notice in a record that explains the reasons for the
9 denial.

10 (b) A partnership may seek judicial review of denial of reinstatement in [the appropriate
11 court] not later than [30] days after service of the notice of denial.

12 **Comment**

13
14 Because the grounds for administrative revocation under Section 904 are limited and
15 straight forward, it is unlikely there will be a dispute about whether a partnership has corrected
16 the reasons for the administrative revocation of the partnership's statement of qualification. But
17 in the event a partnership disagrees with a determination by the filing office to deny the
18 partnership's application for reinstatement, this section gives the partnership a limited right to
19 seek judicial review of the denial of reinstatement.
20

21 **SECTION 906. RESERVATION OF NAME.**

22 (a) A person may reserve the exclusive use of a name that complies with Section 902 by
23 delivering an application to the [Secretary of State] for filing. The application must state the
24 name and address of the applicant and the name to be reserved. If the [Secretary of State] finds
25 that the name is available, the [Secretary of State] shall reserve the name for the applicant's
26 exclusive use for [120] days.

27 (b) The owner of a reserved name may transfer the reservation to another person by
28 delivering to the [Secretary of State] a signed notice in a record of the transfer which states the
29 name and address of the person to which the reservation is being transferred.

30 **Comment**

1 This section does not provide for the renewal of a name reservation for successive 120-
2 day periods. A new reservation may be filed upon the expiration of a reservation, but by
3 requiring a new filing this section creates the possibility that another party may timely submit a
4 reservation for the same name. It was considered appropriate to allow for that possibility so that
5 the procedure in this section cannot be used to block a name indefinitely. *Compare* Section 906,
6 *with* Section 907(d) (authorizing a renewable registration of certain names).
7

8 **SECTION 907. REGISTRATION OF NAME.**

9 (a) A foreign limited liability partnership not registered to do business in this state under
10 [Article] 10 may register its name, or an alternate name adopted pursuant to Section 902, if the
11 name is distinguishable on the records of the [Secretary of State] from the names that are not
12 available under Section 902.

13 (b) To register its name or an alternate name adopted pursuant to Section 902, a foreign
14 limited liability partnership must deliver to the [Secretary of State] for filing an application
15 stating the partnership's name, the jurisdiction and date of its formation, and any alternate name
16 adopted pursuant to Section 902. If the [Secretary of State] finds that the name applied for is
17 available, the [Secretary of State] shall register the name for the applicant's exclusive use.

18 (c) The registration of a name under this section is effective for [one year] after the date
19 of registration.

20 (d) A foreign limited liability partnership whose name registration is effective may renew
21 the registration for successive [one-year] periods by delivering, not earlier than [three months]
22 before the expiration of the registration, to the [Secretary of State] for filing a renewal
23 application that complies with this section. When filed, the renewal application renews the
24 registration for a succeeding [one-year] period.

25 (e) A foreign limited liability partnership whose name registration is effective may
26 register as a foreign limited liability partnership under the registered name or consent in a signed
27 record to the use of that name by another person that is not an individual.

1 **Comment**

2 Unlike the reservation of a name under Section 906, a registration of a name under this
3 section may be renewed for successive periods thus permitting a name to be protected for a
4 period longer than the initial registration period. Use of the procedure in this section is limited,
5 however, to the names of foreign limited partnerships, which are not registered to do business in
6 the state. The purpose of this section is to permit a foreign entity to make sure its name will be
7 available if the entity chooses to register in the state in the future.

8
9 **SECTION 908. REGISTERED AGENT.**

10 (a) Each limited liability partnership and each registered foreign limited liability
11 partnership shall designate and maintain a registered agent in this state. The designation of a
12 registered agent is an affirmation of fact by the partnership or foreign partnership that the agent
13 has consented to serve.

14 (b) A registered agent for a limited liability partnership or registered foreign limited
15 liability partnership must have a place of business in this state.

16 (c) The only duties under this [act] of a registered agent that has complied with this [act]
17 are:

18 (1) to forward to the limited liability partnership or registered foreign limited
19 liability partnership at the address most recently supplied to the agent by the partnership or
20 foreign partnership any process, notice, or demand pertaining to the partnership or foreign
21 partnership which is served on or received by the agent;

22 (2) if the registered agent resigns, to provide the notice required by Section 907(c)
23 to the partnership or foreign partnership at the address most recently supplied to the agent by the
24 partnership or foreign partnership; and

25 (3) to keep current the information with respect to the agent in the statement of
26 qualification or foreign registration statement.

27 **Comment**

1 This section is limited to prescribing the duties of a registered agent under this act. The
2 partnership agreement cannot vary this section. Section 105(c)(16)(A). However, an agent may
3 undertake other responsibilities to a represented limited liability partnership or foreign limited
4 liability partnership, such as by contract or course of dealing, but those duties will be determined
5 under other law.
6

7 **SECTION 909. CHANGE OF REGISTERED AGENT OR ADDRESS FOR**
8 **REGISTERED AGENT BY LIMITED LIABILITY PARTNERSHIP.**

9 (a) A limited liability partnership or registered foreign limited liability partnership may
10 change its registered agent or the address of its registered agent by delivering to the [Secretary of
11 State] for filing a statement of change that states:

12 (1) the name of the partnership or foreign partnership; and

13 (2) the information that is to be in effect as a result of the filing of the statement of
14 change.

15 (b) The partners of a limited liability partnership need not approve the delivery to the
16 [Secretary of State] for filing of:

17 (1) a statement of change under this section; or

18 (2) a similar filing changing the registered agent or registered office, if any, of the
19 partnership in any other jurisdiction.

20 (c) A statement of change under this section designating a new registered agent is an
21 affirmation of fact by the limited liability partnership or registered foreign limited liability
22 partnership that the agent has consented to serve.

23 (d) As an alternative to using the procedure in this section, a limited liability partnership
24 may amend its statement of qualification.

25 **Comment**

26 A change in the identity of the registered agent of an LLP or registered foreign LLP or a
27 change of the office address of a partnership's registered agent are usually routine matters that do

1 not affect the rights of the partners of the represented LLP. This section permits those changes to
2 be made without: (i) amendment of an LLP's statement of qualification or a registered foreign
3 LLPs registration; and (ii) any approval by an LLP's partners. For the registered agent's power to
4 resign, see Section 910. For the registered agent's power to change its name, address, or both, see
5 Section 911.

6
7 **Subsection (c)**—This subsection avoids the need to file with a statement of change
8 consent of the new registered agent being designated.

9
10 **Subsection (d)**—This subsection makes clear that the procedures in this section are not
11 exclusive. A common way in which a limited liability partnership changes its registered agent is
12 to include the change in its annual/biennial report. *See* Section 913(e).

13 14 **SECTION 910. RESIGNATION OF REGISTERED AGENT.**

15 (a) A registered agent may resign as an agent for a limited liability partnership or
16 registered foreign limited liability partnership by delivering to the [Secretary of State] for filing a
17 statement of resignation that states:

18 (1) the name of the partnership or foreign partnership;

19 (2) the name of the agent;

20 (3) that the agent resigns from serving as registered agent for the partnership or
21 foreign partnership; and

22 (4) the address of the partnership or foreign partnership to which the agent will
23 send the notice required by subsection (c).

24 (b) A statement of resignation takes effect on the earlier of:

25 (1) the 31st day after the day on which it is filed by the [Secretary of State]; or

26 (2) the designation of a new registered agent for the limited liability partnership or
27 registered foreign limited liability partnership.

28 (c) A registered agent promptly shall furnish to the limited liability partnership or
29 registered foreign limited liability partnership notice in a record of the date on which a statement
30 of resignation was filed.

1 (d) When a statement of resignation takes effect, the registered agent ceases to have
2 responsibility under this [act] for any matter thereafter tendered to it as agent for the limited
3 liability partnership or registered foreign limited liability partnership. The resignation does not
4 affect any contractual rights the partnership or foreign partnership has against the agent or that
5 the agent has against the partnership or foreign partnership.

6 (e) A registered agent may resign with respect to a limited liability partnership or
7 registered foreign limited liability partnership whether or not the partnership or foreign
8 partnership is in good standing.

9 **Comment**

10 Resignation under this section may be accomplished solely by action of the registered
11 agent and does not require the cooperation or consent of the represented LLP or registered
12 foreign LLP. Whether a resignation violates a contract between the registered agent and the
13 partnership is beyond the scope of this act, and Subsection (d) preserves whatever claims a
14 represented LLC may have against its registered agent for a wrongful termination. Even if a
15 resignation were to violate such a contract, the resignation would still be effective if the
16 provisions of this section were followed.

17
18 **Subsection (b)**—This subsection delays the effectiveness of a statement of resignation
19 for thirty-one days to allow the notice of the resignation that must be sent under Subsection (c) to
20 reach the represented LLP or registered foreign LLP and to allow the represented LLP to arrange
21 for a substitute registered agent.

22
23 **Subsection (e)**—This subsection makes clear that a registered agent may resign with
24 respect to an LLP or registered foreign LLP that is not in good standing and supersedes the
25 contrary administrative practice in some states of refusing to accept any filings with respect to an
26 entity that is not in good standing until the problem with the entity's standing is cured.

27 28 **SECTION 911. CHANGE OF NAME OR ADDRESS BY REGISTERED AGENT.**

29 (a) If a registered agent changes its name or address, the agent may deliver to the
30 [Secretary of State] for filing a statement of change that states:

31 (1) the name of the limited liability partnership or registered foreign limited
32 liability partnership represented by the registered agent;

(2) the name of the agent as currently shown in the records of the [Secretary of State] for the partnership or foreign partnership;

(3) if the name of the agent has changed, its new name; and

(4) if the address of the agent has changed, its new address.

(b) A registered agent promptly shall furnish notice to the represented limited liability partnership or registered foreign limited liability partnership of the filing by the [Secretary of State] of the statement of change and the changes made by the statement.

Legislative Note: Many registered agents act in that capacity for many entities, and the Model Registered Agents Act (2006) (Last Amended 2013) provides a streamlined method through which a commercial registered agent can make a single filing to change its information for all represented entities. The single filing does not prevent an enacting state from assessing filing fees on the basis of the number of entity records affected. Alternatively the fees can be set on an incremental sliding fee or capitated amount based upon potential economies of costs for a bulk filing.

Comment

This section permits a registered agent to change the name and address of the agent that appears in the registered agent filing of an LLP or registered foreign LLP represented by the agent. This act does not provide for commercial registered agents, *contra* UBOC (2011) (Last Amended 2013) §§ 1-405, 1-406, 1-409. As a result, a registered agent will need to make a separate filing under this section for each LLP and registered foreign LLP represented by the agent, unless, if authorized by rule or administrative policy, the filing office establishes procedures for a bulk filing with one filing listing the names of all the registered agent's represented entities.

SECTION 912. SERVICE OF PROCESS, NOTICE, OR DEMAND.

(a) A limited liability partnership or registered foreign limited liability partnership may be served with any process, notice, or demand required or permitted by law by serving its registered agent.

(b) If a limited liability partnership or registered foreign limited liability partnership ceases to have a registered agent, or if its registered agent cannot with reasonable diligence be served, the partnership or foreign partnership may be served by registered or certified mail,

1 return receipt requested, or by similar commercial delivery service, addressed to the partnership
2 or foreign partnership at its principal office. The address of the principal office must be as
3 shown in the partnership's or foreign partnership's most recent [annual] [biennial] report filed by
4 the [Secretary of State]. Service is effected under this subsection on the earliest of:

5 (1) the date the partnership or foreign partnership receives the mail or delivery by
6 the commercial delivery service;

7 (2) the date shown on the return receipt, if signed by the partnership or foreign
8 partnership; or

9 (3) five days after its deposit with the United States Postal Service, or with the
10 commercial delivery service, if correctly addressed and with sufficient postage or payment.

11 (c) If process, notice, or demand cannot be served on a limited liability partnership or
12 registered foreign limited liability partnership pursuant to subsection (a) or (b), service may be
13 made by handing a copy to the individual in charge of any regular place of business of the
14 partnership or foreign partnership if the individual served is not a plaintiff in the action.

15 (d) Service of process, notice, or demand on a registered agent must be in a written
16 record.

17 (e) Service of process, notice, or demand may be made by other means under law other
18 than this [act].

19 **Comment**

20 **Subsection (b)**—This subsection offers three alternative methods for establishing the
21 date service is effected, a date important for determining the time within which an LLP or
22 registered foreign LLP must respond to the process, notice, or demand served. Under Subsection
23 (b)(1), service is effected on the date of receipt by the partnership of the mail or commercial
24 delivery. Under Subsection (b)(2), service is effected on the date shown on the return receipt, if
25 signed on behalf of the partnership. Under Subsection (b)(3), service is effected five days after it
26 is deposited with the Postal Service or with a similar commercial delivery service, if correctly
27 addressed and with correct postage or payment. Service is effective at the earliest of the three

1 listed circumstances.

2
3 However, for the party effecting service there are difficulties of proof under the first two
4 circumstances. Under Subsection (b)(1) the exact date of the receipt by the LLP or registered
5 foreign LLP of mail or commercial delivery is peculiarly within the knowledge of the
6 partnership. Under Subsection (b)(2) the return receipt must be signed on behalf of the
7 partnership. That requirement is designed to assure that the service is actually received by the
8 partnership, but the signature on the return receipt may not always show unambiguously that the
9 signer was acting for the partnership and was authorized to do so. As a practical matter,
10 therefore, parties effecting service under Subsection (b) may find it most convenient to rely on
11 Subsection (b)(3) and to maintain their own records so that the date of deposit in the mails or
12 with a commercial delivery service can easily be established.

13
14 **Subsection (c)**—This subsection provides a means for serving process on an LLP or
15 registered foreign LLP that cannot be served under Subsection (a) or (b). In such circumstances,
16 some statutes require or permit service of process to be made on the filing office.

17 **Subsection (e)**—For an example, see, *e.g.*, FED. R. CIV. P. 4(h)(1)(B) (authorizing service
18 on “a domestic or foreign corporation, or a partnership or other unincorporated association that is
19 subject to suit under a common name” to be made on “an officer, a managing or general agent, or
20 any other agent authorized by appointment or by law to receive service of process”).

21
22 **SECTION 913. [ANNUAL] [BIENNIAL] REPORT FOR [SECRETARY OF**
23 **STATE].**

24 (a) A limited liability partnership or registered foreign limited liability partnership shall
25 deliver to the [Secretary of State] for filing [an annual] [a biennial] report that states:

26 (1) the name of the partnership or registered foreign partnership;

27 (2) the name and street and mailing addresses of its registered agent in this state;

28 (3) the street and mailing addresses of its principal office;

29 (4) the name of at least one partner; and

30 (5) in the case of a foreign partnership, its **governing** jurisdiction ~~of formation~~

31 and any alternate name adopted under Section 1006.

32 **{Source: Issue 1.}**

33 (b) Information in the [annual] [biennial] report must be current as of the date the report
34 is signed by the limited liability partnership or registered foreign limited liability partnership.

1 (c) The first [annual] [biennial] report must be delivered to the [Secretary of State] for
2 filing after [January 1] and before [April 1] of the year following the calendar year in which the
3 limited liability partnership's statement of qualification became effective or the registered
4 foreign limited liability partnership registered to do business in this state. Subsequent [annual]
5 [biennial] reports must be delivered to the [Secretary of State] for filing after [January 1] and
6 before [April 1] of each [second] calendar year thereafter.

7 (d) If [an annual] [a biennial] report does not contain the information required by this
8 section, the [Secretary of State] promptly shall notify the reporting limited liability partnership
9 or registered foreign limited liability partnership in a record and return the report for
10 correction.

11 (e) If [an annual] [a biennial] report contains the name or address of a registered agent
12 which differs from the information shown in the records of the [Secretary of State]
13 immediately before the report becomes effective, the differing information is considered a
14 statement of change under Section 909.

15 **Comment**

16 In some states, an annual or biennial report by a limited liability partnership or a
17 registered foreign limited liability partnership will be a new requirement.
18

19 **Subsection (a)(4)**—The requirement that the report include the name of at least one
20 partner will be a new requirement in some states. There has been increasing pressure from law
21 enforcement agencies for access to more information about the ownership and control of legal
22 entities. This requirement will enable law enforcement to contact a person with some knowledge
23 about the affairs of the limited liability partnership. Members of the public will also have that
24 ability.
25

26 **[ARTICLE] 10**

27 **FOREIGN LIMITED LIABILITY PARTNERSHIP**

28 **SECTION 1001. GOVERNING LAW.**

(a) The law of the **governing** jurisdiction **of formation** of a foreign limited liability partnership governs:

(1) the internal affairs of the partnership; and

(2) the liability of a partner as partner for a debt, obligation, or other liability of the foreign partnership.

(b) A foreign limited liability partnership is not precluded from registering to do business in this state because of any difference between the law of its **governing** jurisdiction **of formation** and the law of this state.

{Source: Issue 1.}

(c) Registration of a foreign limited liability partnership to do business in this state does not authorize the foreign partnership to engage in any business or exercise any power that a limited liability partnership may not engage in or exercise in this state.

Comment

For the purposes of this section, “**governing** jurisdiction **of formation**” refers to the jurisdiction under whose law a foreign partnership became a limited liability partnership. Strictly speaking, becoming an LLP involves transforming an already existing entity, not forming a new one. *Cf.* Section 201(b) (making this point as to domestic LLPs).

Subsection (a)—This subsection provides that the laws of the **governing** jurisdiction **of formation** of a foreign LLP, rather than the laws of this state, govern both the internal affairs of the foreign LLP and the liability of its partners for the obligations of the LLP. A partnership agreement cannot change this provision. Section 105(c)(17).

This subdivision parallels Section 104(1) (pertaining to the governing law for domestic LLPs). *See* the comment to Section 104(1).

Subsections (b) and (c)—These sections together make clear that, although a foreign LLP may not be denied registration simply because of a difference between the laws of its **governing** jurisdiction **of formation** and the laws of this state, the foreign limited liability partnership “may not engage in any activity or exercise any power a domestic LLP may not engage in or exercise in this state.” Subsection (c).

SECTION 1002. REGISTRATION TO DO BUSINESS IN THIS STATE.

1 (a) ~~A~~ **Except as provided in subsection (f), a** foreign limited liability partnership may
2 not do business in this state until it registers with the [Secretary of State] under this [article].

3 (b) A foreign limited liability partnership doing business in this state may not maintain
4 an action or proceeding in **a court of** this state unless it has registered to do business in this
5 state.

6 {Source: Issue 25.}

7 (c) The failure of a foreign limited liability partnership to register to do business in this
8 state does not impair the validity of a contract or act of the foreign partnership or preclude it
9 from defending an action or proceeding in this state.

10 (d) A limitation on the liability of a partner of a foreign limited liability partnership is not
11 waived solely because the foreign partnership does business in this state without registering to
12 do business in this state.

13 (e) Section 1001(a) and (b) applies even if a foreign limited liability partnership fails to
14 register under this [article].

15 **(f) A foreign limited liability partnership registered or otherwise authorized by law**
16 **to do business in this state on [insert the effective date of this subsection] is subject to this**
17 **[act], is deemed to be registered to do business in this state, and is not required to deliver**
18 **to the [Secretary of State] for filing a foreign registration statement under this [article].**

19 {Source: Issue 30.}

20 Comment

21
22 **Subsection (a)**—Following a long-established tradition, this act does not state what
23 constitutes “do[ing] business in this state.” Instead, Section 1005 provides a non-exhaustive list
24 of “[a]ctivities of a foreign limited liability partnership which do not constitute doing business in
25 this state.”

26
27 **Subsection (b)**—The purpose of this subsection is to induce foreign limited liability

1 partnerships to register without imposing harsh or erratic sanctions. Often the failure to register
2 is a result of inadvertence or bona fide disagreement as to the scope of Section 1005, which is
3 necessarily imprecise. Thus, the imposition of harsh sanctions in those situations is
4 inappropriate. The sanction of closing the courts of the state to suits brought by foreign LLPs
5 that should have registered is not a punitive one. If a foreign LLP should have registered and
6 failed to do so, it may still enforce its contractual and other rights simply by registering.

7
8 However, if a court dismisses a case under this subsection rather than staying the
9 proceedings pending the foreign LLP's registration, a statute of limitations problem may occur.
10 *Corco, Inc. v. Ledar Transport, Inc.* 946 P.2d 1009, 1010 (Kan. Ct. App. 1997) (“[T]he proper
11 remedy was to dismiss [the unregistered entity's] counterclaim without prejudice rather than with
12 prejudice. This would leave [the entity] the opportunity to comply with the statutes and then
13 reassert its claim against [the defendant]. On the other hand, it would also leave the risk that the
14 statute of limitations might run against [the entity].”).

15
16 This subsection does not prevent a foreign LLP that has failed to register from
17 “defending” an action or proceeding. The distinction between “maintaining” an action or
18 proceeding under this subsection and “defending” an action or proceeding under Subsection (c)
19 is determined on the basis of whether affirmative relief is sought. A nonregistered foreign LLP
20 may interpose any defense or permissive or mandatory counterclaim to defeat a claimed
21 recovery, but may not obtain an affirmative judgment based on the counterclaim without first
22 registering.

23
24 **Subsection (c)**—In addition to permitting a non-registered foreign LLP doing business in
25 this state to defend (but not maintain) an action or proceeding, this section makes clear that
26 failure to register does not impair the validity of a foreign LLP's acts.

27
28 **Subsection (d)**—This subsection preserves the effectiveness of a foreign LLP's liability
29 shield applicable under the LLP's governing law.

30
31 **SECTION 1003. FOREIGN REGISTRATION STATEMENT.** To register to do
32 business in this state, a foreign limited liability partnership must deliver a foreign registration
33 statement to the [Secretary of State] for filing. The statement must state:

34 (1) the name of the partnership and, if the name does not comply with Section 902, an
35 alternate name adopted pursuant to Section 1006(a);

36 (2) that the partnership is a foreign limited liability partnership;

37 (3) the partnership's **governing** jurisdiction ~~of formation~~;

38 (4) the street and mailing addresses of the partnership's principal office and, if the law

of the partnership’s **governing** jurisdiction ~~of formation~~ requires the partnership to maintain an office in that jurisdiction, the street and mailing addresses of the required office; and

{Source: Issue 1.}

(5) the name and street and mailing addresses of the partnership’s registered agent in this state.

Comment

The foreign registration statement provides certain basic information about the foreign limited liability partnership to ensure that citizens of the state have access to that information in their dealings with the foreign partnership. The statement also facilitates making the foreign partnership subject to the jurisdiction of the courts of the state.

Once registered, a foreign limited liability partnership must file an annual/biennial report. Section 913.

For the purposes of this section, “**governing** jurisdiction ~~of formation~~” refers to the jurisdiction under whose law a foreign partnership became a limited liability partnership. Strictly speaking, becoming an LLP involves transforming an already existing entity, not forming a new one. *See* Section 201(b).

SECTION 1004. AMENDMENT OF FOREIGN REGISTRATION STATEMENT.

A registered foreign limited liability partnership shall deliver to the [Secretary of State] for filing an amendment to its foreign registration statement if there is a change in:

(1) the name of the partnership **or the alternate name adopted under Section 1006;**

{Source: Issue 27.}

(2) the partnership’s **governing** jurisdiction ~~of formation~~;

(3) an address required by Section 1003(4); or

(4) the information required by Section 1003(5).

{Source: Issue 1.}

Comment

This section works in tandem with the annual/biennial report required by Section 913 to

1 keep up to date the information of record in the filing office about a registered foreign limited
2 partnership.
3

4 **SECTION 1005. ACTIVITIES NOT CONSTITUTING DOING BUSINESS.**

5 (a) Activities of a foreign limited liability partnership which do not constitute doing
6 business in this state under this [article] include:

7 (1) maintaining, defending, mediating, arbitrating, or settling an action or
8 proceeding;

9 (2) carrying on any activity concerning its internal affairs, including holding
10 meetings of its partners;

11 (3) maintaining accounts in financial institutions;

12 (4) maintaining offices or agencies for the transfer, exchange, and registration of
13 securities of the partnership or maintaining trustees or depositories with respect to those
14 securities;

15 (5) selling through independent contractors;

16 (6) soliciting or obtaining orders by any means if the orders require acceptance
17 outside this state before they become contracts;

18 (7) creating or acquiring indebtedness, mortgages, or security interests in
19 property;

20 (8) securing or collecting debts or enforcing mortgages or security interests in
21 property securing the debts and holding, protecting, or maintaining property;

22 (9) conducting an isolated transaction that is not in the course of similar
23 transactions;

24 (10) owning, **protecting, or maintaining,** without more, property; and

25 ***{Source: Issue 32.}***

1 (11) doing business in interstate commerce.

2 (b) A person does not do business in this state solely by being a partner of a foreign
3 limited liability partnership that does business in this state.

4 (c) This section does not apply in determining the contacts or activities that may subject
5 a foreign limited liability partnership to service of process, taxation, or regulation under law of
6 this state other than this [act].

7 **Comment**

8 This act does not attempt to formulate an inclusive definition of what constitutes doing
9 business in a state. Rather, the concept is defined in a negative fashion by Subsections (a) and
10 (b), which state that certain activities do not constitute doing business.

11
12 In general terms, any conduct more regular, systematic, or extensive than that described
13 in Subsection (a) constitutes doing business and requires the foreign limited liability partnership
14 to register to do business. Typical conduct requiring registration includes maintaining an office to
15 conduct local intrastate business, selling personal property not in interstate commerce, entering
16 into contracts relating to the local business or sales, and owning or using real estate for general
17 purposes. But the passive owning of real estate for investment purposes does not constitute doing
18 business. *See* Subsection (a)(10).

19
20 The test of “doing business” defined in a negative way in Subsections (a) and (b) applies
21 only to the question whether a foreign limited liability partnership ’s contacts with the state are
22 such that it must register under this section. The test is not applicable to other questions such as
23 whether the foreign LLP is amenable to service of process under state “long-arm” statutes or
24 liable for state or local taxes. A foreign LLP that has registered (or is required to register) will
25 generally be subject to suit and state taxation in the state, while a foreign LLP that is subject to
26 service of process or state taxation in a state will not necessarily be required to register.

27
28 **Subsection (a)**—The list of activities set forth in this subsection is not exhaustive.
29

30 **Subsection (a)(1)**—A foreign limited liability partnership is not “doing business” solely
31 because it resorts to the courts of the state to recover an indebtedness, enforce an obligation,
32 recover possession of personal property, obtain the appointment of a receiver, intervene in a
33 pending proceeding, bring a petition to compel arbitration, file an appeal bond, or pursue
34 appellate remedies. Similarly, a foreign LLP is not required to register merely because it files a
35 complaint with a governmental agency or participates in an administrative proceeding within the
36 state.

37
38 **Subsection (a)(2)**—A foreign limited liability partnership does not “do business” within
39 a state under this section merely because some of its internal affairs occur within a state. Thus, a

1 foreign LLP may hold meetings of its partners within a state without first registering. A foreign
2 LLP also may maintain offices or agencies within a state relating solely to the transfer, exchange
3 or registration of its interests without registering. Other activities relating to the internal affairs of
4 the foreign LLP that do not constitute doing business under this section include having officers
5 or representatives who reside within or are physically present in the state; while there, the
6 officers or representatives may make executive decisions relating to the internal affairs of the
7 foreign LLP without imposing on the foreign LLP the requirement that it register, if these
8 activities are not so regular and systematic as to cause the residence to be viewed as a business
9 office.

10
11 **Subsection (a)(5)**—Under this paragraph, a foreign limited liability partnership need not
12 register if it sells goods in the state through independent contractors. These transactions are
13 viewed as transactions by the independent contractors, not by the foreign LLP itself even though
14 the foreign LLP sets some limits or ground rules for its contractors. If these controls are
15 sufficiently pervasive, however, the foreign LLP may be deemed to be selling for itself in
16 intrastate commerce, and not through the independent contractors and therefore engaged in doing
17 business in the state.

18
19 **Subsection (a)(7) and (8)**—The mere act of making a loan by a foreign limited liability
20 partnership that is not in the business of making loans does not constitute doing business in the
21 state in which the loan is made. On the same theory, a foreign LLP may obtain security for the
22 repayment of a loan, and foreclose or enforce the lien or security interest to collect the loan,
23 without being deemed to be doing business. Similarly, a refunding or “roll over” of a loan or its
24 adjustment or compromise does not involve doing business.

25
26 **Subsection (a)(9)**—The concept of “doing business” involves regular, repeated, and
27 continuing business contacts of a local nature. A single agreement or isolated transaction within a
28 state does not constitute doing business if there is no intention to repeat the transaction or engage
29 in similar transactions. This act does not impose the limitation found in some statutes, such as
30 Section 15.01(b)(10) of the Model Business Corporation Act, that the isolated transaction be
31 completed within thirty days. A foreign LLP should not be required to register simply because it
32 engages in an isolated transaction that takes longer than thirty days to complete.

33
34 **Subsection (a)(11)**—A foreign limited liability partnership is not “doing business” within
35 the meaning of this section if it is transacting business in interstate commerce. *See* Subsection
36 (a)(6) (stating that soliciting or obtaining orders that must be accepted outside the state before
37 they become contracts is not “doing business” within the meaning of this section).

38
39 These exclusions reflect the provisions of the United States Constitution that grant to the
40 United States Congress exclusive power over interstate commerce, and preclude states from
41 imposing restrictions or conditions upon this commerce. This subsection should be construed in a
42 manner consistent with judicial decisions under the United States Constitution. Under these
43 decisions, a foreign entity is not required to register even though it sells goods within the state if
44 they are shipped to the purchasers in interstate commerce. Thus a foreign LLP need not register
45 even if it also does work and performs acts within the state incidental to the interstate business
46 (*e.g.*, if it takes or enforces a security interest incidental to these transactions). Nor is it required

1 to register merely because it sends traveling salespeople or solicitors into a state so long as
2 contracts are not made within the state. Similarly, an office may be maintained by a foreign LLP
3 in this state without registering if the office's functions relate solely to interstate commerce.
4 Purchases of goods may of course be in interstate commerce as readily as sales. Thus, the
5 purchase of personal property in this state by a foreign limited liability partnership for shipment
6 in interstate commerce out of the state does not require the entity to register.

7
8 **SECTION 1006. NONCOMPLYING NAME OF FOREIGN LIMITED LIABILITY**
9 **PARTNERSHIP.**

10 (a) A foreign limited liability partnership whose name does not comply with Section 902
11 may not register to do business in this state until it adopts, for the purpose of doing business in
12 this state, an alternate name that complies with Section 902. A partnership that registers under an
13 alternate name under this subsection need not comply with [~~this~~ cite to the state's assumed or
14 fictitious name statute] regarding the alternate name. After registering to do business in this
15 state with an alternate name, a partnership shall do business in this state under:

16 **{Source: Issue 28.}**

17 (1) the alternate name;

18 (2) the partnership's name, with the addition of its governing jurisdiction ~~of~~
19 ~~formation~~; or

20 **{Source: Issue 1.}**

21 (3) a name the partnership is authorized to use under [this state's assumed or
22 fictitious name statute].

23 (b) If a registered foreign limited liability partnership changes its name to one that does
24 not comply with Section 902, it may not do business in this state until it complies with
25 subsection (a) by amending its registration to adopt an alternate name that complies with Section
26 902.

27 **Comment**

1 A foreign limited liability partnership must register under its true name if that name
2 satisfies the requirements of Section 902. If the true name is unavailable because it is not
3 distinguishable upon the records of the filing office from a name already in use or reserved or
4 registered, the foreign LLP may use an alternate name.

5
6 A foreign limited liability partnership that registers to do business in the state may do
7 business under a fictitious name to the same extent as a domestic entity.

8
9 **SECTION 1007. WITHDRAWAL DEEMED ON CONVERSION TO DOMESTIC**
10 **FILING ENTITY OR DOMESTIC LIMITED LIABILITY PARTNERSHIP.** A registered
11 foreign limited liability partnership that converts to a domestic limited liability partnership or to
12 a domestic entity whose formation requires the delivery of a record to the [Secretary of State] for
13 filing is deemed to have withdrawn its registration on the effective date of the conversion.

14 **Comment**

15 When a registered foreign limited liability partnership has converted to a domestic “filing
16 entity” or domestic limited liability partnership, information about the entity in its capacity as a
17 domestic entity will continue to be of record in the filing office. At that point, there is no further
18 reason for the entity to be registered as a foreign LLP, and this section automatically treats its
19 prior registration as withdrawn.

20
21 **SECTION 1008. WITHDRAWAL ON DISSOLUTION OR CONVERSION TO**
22 **NONFILING ENTITY OTHER THAN LIMITED LIABILITY PARTNERSHIP.**

23 (a) A registered foreign limited liability partnership that has dissolved and completed
24 winding up or has converted to a domestic or foreign entity whose formation does not require
25 the public filing of a record, other than a limited liability partnership, shall deliver a statement
26 of withdrawal to the [Secretary of State] for filing. The statement must state:

27 (1) in the case of a partnership that has completed winding up:

28 (A) its name and **governing jurisdiction ~~of formation~~**;

29 (B) that the partnership surrenders its registration to do business in this
30 state; and

(2) in the case of a partnership that has converted:

(A) the name of the converting partnership and its governing jurisdiction ~~of formation~~;

(B) the type of entity to which the partnership has converted and its governing jurisdiction ~~of formation~~;

{Source: Issue 1.}

(C) that the converted entity surrenders the converting partnership's registration to do business in this state and revokes the authority of the converting partnership's registered agent to act as registered agent in this state on behalf of the partnership or the converted entity; and

(D) a mailing address to which service of process may be made under subsection (b).

(b) After a withdrawal under this section becomes effective, service of process in any action or proceeding based on a cause of action arising during the time the foreign limited liability partnership was registered to do business in this state may be made pursuant to Section 909.

Comment

When a registered foreign limited liability partnership has dissolved and completed winding up, or has converted to a "nonfiling entity" other than a limited liability partnership, there is no further reason for information about the entity to appear in the records of the filing office. This section thus requires delivery of a statement of withdrawal for the purpose of removing the foreign LLP from the rolls of registered foreign entities.

Subsection (a)—The exclusion of limited liability partnerships from this provision is merely technical; Section 1007 covers conversion to a domestic LLP.

SECTION 1009. TRANSFER OF REGISTRATION.

(a) ~~When a registered foreign limited liability partnership has merged into a~~

~~foreign entity that is not registered to do business in this state or has converted to a~~
~~foreign entity required to register with the [Secretary of State] to do business in this state,~~
the A registered foreign entity shall deliver to the [Secretary of State] for filing an application
for transfer of registration if the foreign entity:

(1) is a party to a merger in which the surviving entity is a nonregistered
foreign entity;

(2) converts to another type of foreign entity in the same or a different state;
or

(3) is the domesticating entity in a domestication in which the governing
jurisdiction of the domesticated entity is a jurisdiction other than this state.

(b) The application for transfer of registration must be signed by the surviving,
converted, or domesticated entity and state:

(1) the name of the registered foreign limited liability partnership before the
merger ~~or~~ conversion, or domestication;

(2) that before the merger ~~or~~ conversion or domestication the registration
pertained to a foreign limited liability partnership;

(3) the name of the applicant foreign entity into which the foreign limited
liability partnership has merged or to which it has been converted and, if the name does not
comply with Section 902, an alternate name adopted pursuant to Section 1006(a);

(4) the type of entity of the applicant foreign entity and its governing
jurisdiction ~~of formation~~;

(5) the street and mailing addresses of the principal office of the applicant
foreign entity and, if the law of that entity's governing jurisdiction ~~of formation~~ requires the

entity to maintain an office in that jurisdiction, the street and mailing addresses of that office;
and

(6) the name and street and mailing addresses of the applicant foreign entity's
registered agent in this state.

~~(b)~~ (c) When an application for transfer of registration takes effect, the registration of
the foreign limited liability limited partnership to do business in this state is transferred without
interruption to the surviving, converted, or domesticated foreign entity ~~into which the~~
~~partnership has merged or to which it has been converted.~~

{Source: Issue 29.}

Comment

The purpose of this section is to clarify the status of the foreign limited liability
partnership in the public records of the state. A filing under this section has the two-fold effect of
canceling the authority of the foreign LLP to do business in the state while at the same time
reregistering the former foreign LLP as the new type of foreign entity. If the reregistered foreign
entity subsequently wishes to cancel its registration to do business in the state, it may do so under
the statute of this state pertaining to the registration of the new type of foreign entity.

SECTION 1010. TERMINATION OF REGISTRATION.

(a) The [Secretary of State] may terminate the registration of a registered foreign
limited liability partnership in the manner provided in subsections (b) and (c) if the partnership
does not:

(1) pay, not later than [60] days after the due date, any fee, tax, interest, or
penalty required to be paid to the [Secretary of State] under this [act] or law other than this
[act];

(2) deliver to the [Secretary of State] for filing, not later than [60] days after the
due date, [an annual] [a biennial] report required under Section 913;

(3) have a registered agent as required by Section 908; or

(4) deliver to the [Secretary of State] for filing a statement of a change under Section 909 not later than [30] days after a change has occurred in the name or address of the registered agent.

(b) The [Secretary of State] may terminate the registration of a registered foreign limited liability partnership by:

(1) filing a notice of termination or noting the termination in the records of the [Secretary of State]; and

(2) delivering a copy of the notice or the information in the notation to the partnership's registered agent or, if the partnership does not have a registered agent, to the partnership's principal office.

(c) A notice or information in a notation under subsection (b) must include:

(1) the effective date of the termination, which must be at least [60] days after the date the [Secretary of State] delivers the copy; and

(2) the grounds for termination under subsection (a).

(d) The authority of a registered foreign limited liability partnership to do business in this state ceases on the effective date of the notice of termination or notation under subsection (b), unless before that date the partnership cures each ground for termination stated in the notice or notation. If the partnership cures each ground, the [Secretary of State] shall file a record so stating.

Comment

This section is analogous to the procedures for administrative revocation under Section 903.

SECTION 1011. WITHDRAWAL OF REGISTRATION OF REGISTERED FOREIGN LIMITED LIABILITY PARTNERSHIP.

1 (a) A registered foreign limited liability partnership may withdraw its registration by
2 delivering a statement of withdrawal to the [Secretary of State] for filing. The statement of
3 withdrawal must state:

4 (1) the name of the partnership and its **governing** jurisdiction ~~of formation~~;

5 ***{Source: Issue 1.}***

6 (2) that the partnership is not doing business in this state and that it withdraws
7 its registration to do business in this state;

8 (3) that the partnership revokes the authority of its registered agent to accept
9 service on its behalf in this state; and

10 (4) an address to which service of process may be made under subsection (b).

11 (b) After the withdrawal of the registration of a foreign limited liability partnership,
12 service of process in any action or proceeding based on a cause of action arising during the time
13 the partnership was registered to do business in this state may be made pursuant to Section 909.

14 **Comment**
15

16 The statement of withdrawal must set forth an address where service of process may be
17 made on the foreign limited liability partnership pursuant to Section 912. There is no limit on
18 how long the withdrawn partnership must keep that address up to date.
19

20 **SECTION 1012. ACTION BY [ATTORNEY GENERAL].** The [Attorney General]
21 may maintain an action to enjoin a foreign limited liability partnership from doing business in
22 this state in violation of this [article].

23 **Comment**

24 The authority stated here has been part of corporate law for more than a century and has
25 been carried over into the law of unincorporated business entities. Nowadays, the authority is
26 rarely if ever invoked in either realm of entity law.
27

28 **[ARTICLE] 11**

MERGER, INTEREST EXCHANGE, CONVERSION, AND DOMESTICATION

Introductory Comment

This article deals comprehensively with both same-type and cross-type mergers and interest exchanges and with conversions and domestications. For this article to apply, at least one participant organization must be a domestic general partnership (regardless of whether the partnership is an LLP). For a foreign organization to be involved, its organic law must permit the organization's participation.

Part 1 contains definitions specific to this article as well as provisions applicable to all transactions authorized by this article.

Part 2 governs mergers and is an amalgamation of existing entity law, both unincorporated and incorporated.

Part 3 governs interest exchanges, previously a feature only of corporate law. Part 3 is derived from the share exchange provisions in Chapter 11 of the Model Business Corporation Act.

Part 4 governs conversions, a one-step procedure by which an entity changes from one type of entity to another type while nonetheless continuing in existence as the same legal entity.

Part 5 governs domestications, a procedure by which a domestic limited liability partnership can become a foreign limited liability partnership or vice versa, in each instance with the partnership remaining the same legal entity.

Part 2 sets the paradigm for Parts 3, 4, and 5, because mergers are long established, and merger rules and concepts are familiar to business lawyers. Moreover, conversions and domestications could formerly be accomplished via mergers (with a new entity), and an interest exchange produces the same result as a triangular merger. The comments to Part 2 are thus relevant to understanding Parts 3, 4, and 5.

This article contemplates transactions in which the surviving entity is neither a filing entity nor otherwise of record in the filing office (*e.g.*, the merger of an LLC into a non-LLP general partnership). As a result, a filing under this article may be the first time that a filing office takes cognizance of an entity's existence.

[PART] 1

GENERAL PROVISIONS

SECTION 1101. DEFINITIONS.

~~In~~ (a) Except as provided in subsections (b) and (c), in this [article]:

1 {Source: Issue 4.}

2 (1) “Acquired entity” means the entity, all of one or more classes or series of
3 interests of which are acquired in an interest exchange.

4 (2) “Acquiring entity” means the entity that acquires all of one or more classes or
5 series of interests of the acquired entity in an interest exchange.

6 (3) “Conversion” means a transaction authorized by:

7 **(A) [Part] 4; or**

8 **(B) a similar law of another jurisdiction, however the transaction is**
9 **denominated, if:**

10 **(i) the transaction involves a single entity; and**

11 **(ii) the entity becomes a different type of entity when records**
12 **delivered to both the [Secretary of State] and a similar office in the other jurisdiction**
13 **become effective.**

14 (4) “Converted entity” means the converting entity as it continues in existence
15 after a conversion.

16 (5) “Converting entity” means the domestic entity that approves a plan of
17 conversion pursuant to Section 1143 or the foreign entity that approves a conversion pursuant to
18 the law of its **governig** jurisdiction **~~of formation~~**.

19 {Source: Issue 1.}

20 (6) “Distributional interest” means the right under an unincorporated entity’s
21 organic law and organic rules to receive distributions from the entity.

22 (7) “Domestic”, with respect to an entity, means governed as to its internal affairs
23 by the law of this state.

1 (8) “Domesticated limited liability partnership” means a domesticating limited
2 liability partnership as it continues in existence after a domestication.

3 (9) “Domesticating limited liability partnership” means the domestic limited
4 liability partnership that approves a plan of domestication pursuant to Section 1153 or the foreign
5 limited liability partnership that approves a domestication pursuant to the law of its **governing**
6 **jurisdiction of formation.**

7 ***{Source: Issue 1.}***

8 (10) “Domestication” means a transaction authorized by:

9 **(A) [Part] 5; or**

10 **(B) a similar law of another jurisdiction, however the transaction is**
11 **denominated, if:**

12 **(i) the transaction involves a single entity;**

13 **(ii) the transaction does not change the entity’s type; and**

14 **(iii) the internal affairs of the entity become governed by the**
15 **law of the other jurisdiction when records delivered to both the [Secretary of State] and a**
16 **similar office in the other jurisdiction become effective.**

17 ***{Source: Issue 4.}***

18 (11) “Entity”:

19 (A) means:

20 (i) a business corporation;

21 (ii) a nonprofit corporation;

22 (iii) a general partnership, including a limited liability partnership;

23 (iv) a limited partnership, including a limited liability limited

1 partnership;

2 (v) a limited liability company;

3 [(vi) a general cooperative association;]

4 (vii) a limited cooperative association;

5 (viii) an unincorporated nonprofit association;

6 (ix) a statutory trust, business trust, or common-law business trust;

7 or

8 (x) any other person that has:

9 (I) a legal existence separate from any interest holder of

10 that person; or

11 (II) the power to acquire an interest in real property in its

12 own name; and

13 (B) does not include:

14 (i) an individual;

15 (ii) a trust with a predominantly donative purpose or a charitable

16 trust;

17 (iii) an association or relationship that is not an entity listed in

18 subparagraph (A) and is not a partnership under the rules stated in [Section 202(c) of the

19 Uniform Partnership Act (1997) (Last Amended 2013)] [Section 7 of the Uniform Partnership

20 Act (1914)] or a similar provision of the law of another jurisdiction;

21 (iv) a decedent's estate; or

22 (v) a government or a governmental subdivision, agency, or

23 instrumentality.

1 (12) “Filing entity” means an entity whose formation requires the filing of a
2 public organic record. The term does not include a limited liability partnership.

3 (13) “Foreign”, with respect to an entity, means an entity governed as to its
4 internal affairs by the law of a jurisdiction other than this state.

5 (14) “Governance interest” means a right under the organic law or organic rules of
6 an unincorporated entity, other than as a governor, agent, assignee, or proxy, to:

7 (A) receive or demand access to information concerning, or the books and
8 records of, the entity;

9 (B) vote for or consent to the election of the governors of the entity; or

10 (C) receive notice of or vote on or consent to an issue involving the
11 internal affairs of the entity.

12 (15) “Governor” means:

13 (A) a director of a business corporation;

14 (B) a director or trustee of a nonprofit corporation;

15 (C) a general partner of a general partnership;

16 (D) a general partner of a limited partnership;

17 (E) a manager of a manager-managed limited liability company;

18 (F) a member of a member-managed limited liability company;

19 [(G) a director of a general cooperative association;]

20 (H) a director of a limited cooperative association;

21 (I) a manager of an unincorporated nonprofit association;

22 (J) a trustee of a statutory trust, business trust, or common-law business
23 trust; or

(K) any other person under whose authority the powers of an entity are exercised and under whose direction the activities and affairs of the entity are managed pursuant to the organic law and organic rules of the entity.

(16) “Interest” means:

- (A) a share in a business corporation;
- (B) a membership in a nonprofit corporation;
- (C) a partnership interest in a general partnership;
- (D) a partnership interest in a limited partnership;
- (E) a membership interest in a limited liability company;
- [(F) a share in a general cooperative association;]
- (G) a member’s interest in a limited cooperative association;
- (H) a membership in an unincorporated nonprofit association;
- (I) a beneficial interest in a statutory trust, business trust, or common-law business trust; or
- (J) a governance interest or distributional interest in any other type of unincorporated entity.

(17) “Interest ~~Exchange~~ exchange” means a transaction authorized by:

- (A) [Part] 3; or
- (B) a similar law of another jurisdiction, however the transaction is denominated, one effect of which is that all of one or more classes or series of interests of an entity are acquired by another entity when a record delivered to the [Secretary of State] or similar office in the other jurisdiction becomes effective.

{Source: Issue 4.}

1 (18) “Interest holder” means:

2 (A) a shareholder of a business corporation;

3 (B) a member of a nonprofit corporation;

4 (C) a general partner of a general partnership;

5 (D) a general partner of a limited partnership;

6 (E) a limited partner of a limited partnership;

7 (F) a member of a limited liability company;

8 [(G) a shareholder of a general cooperative association;]

9 (H) a member of a limited cooperative association;

10 (I) a member of an unincorporated nonprofit association;

11 (J) a beneficiary or beneficial owner of a statutory trust, business trust, or

12 common-law business trust; or

13 (K) any other direct holder of an interest.

14 (19) “Interest holder liability” means:

15 (A) personal liability for a liability of an entity which is imposed on a

16 person:

17 (i) solely by reason of the status of the person as an interest holder;

18 or

19 (ii) by the organic rules of the entity which make one or more

20 specified interest holders or categories of interest holders liable in their capacity as interest

21 holders for all or specified liabilities of the entity; or

22 (B) an obligation of an interest holder under the organic rules of an entity

23 to contribute to the entity.

1 (20) “Merger” means a transaction authorized by:

2 **(A) [Part] 2; or**

3 **(B) similar laws of one or more other jurisdictions, however the**
4 **transaction is denominated, under which two or more entities are combined into one of the**
5 **entities or a newly created entity when records delivered to the [Secretary of State] and**
6 **similar offices in the other jurisdictions become effective.**

7 *{Source: Issue 4.}*

8 (21) “Merging entity” means an entity that is a party to a merger and exists
9 immediately before the merger becomes effective.

10 (22) “Organic law” means the law of an entity’s **governing** jurisdiction ~~of~~
11 **formation governing that governs** the internal affairs of the entity.

12 *{Source: Issue 1.}*

13 (23) “Organic rules” means the public organic record and private organic rules of
14 an entity.

15 (24) “Plan” means a plan of merger, plan of interest exchange, plan of conversion,
16 or plan of domestication.

17 (25) “Plan of conversion” means a plan under Section 1142.

18 (26) “Plan of domestication” means a plan under Section 1152.

19 (27) “Plan of interest exchange” means a plan under Section 1132.

20 (28) “Plan of merger” means a plan under Section 1122.

21 (29) “Private organic rules” means the rules, whether or not in a record, that
22 govern the internal affairs of an entity, are binding on all its interest holders, and are not part of
23 its public organic record, if any. The term includes:

- (A) the bylaws of a business corporation;
- (B) the bylaws of a nonprofit corporation;
- (C) the partnership agreement of a general partnership;
- (D) the partnership agreement of a limited partnership;
- (E) the operating agreement of a limited liability company;
- [(F) the bylaws of a general cooperative association;]
- (G) the bylaws of a limited cooperative association;
- (H) the governing principles of an unincorporated nonprofit association;

and

- (I) the trust instrument of a statutory trust or similar rules of a business trust or common-law business trust.

(30) “Protected agreement” means:

- (A) a record evidencing indebtedness and any related agreement in effect on ~~[the effective date of this {act}]~~ insert date];

- (B) an agreement that is binding on an entity on ~~[the effective date of this {act}]~~ insert date];

- (C) the organic rules of an entity in effect on ~~[the effective date of this {act}]~~ insert date]; or

- (D) an agreement that is binding on any of the governors or interest holders of an entity on ~~[the effective date of this {act}]~~ insert date].

Legislative Note: If the state chooses to use the concept of protected agreements, the date that should be inserted in this definition is the date on which conversions, domestications, and interest exchanges were first authorized by the law of the state. If those three types of transactions were not all effective on the same date, the state should decide whether to use (1) different dates based on when each type of transaction was first authorized, (2) a single date, which could be the first date on which any of the three transactions was first authorized, or (3)

1 another date.

2
3 {Source: Issue 11.}

4
5 (31) “Public organic record” means the record the filing of which by the
6 [Secretary of State] is required to form an entity and any amendment to or restatement of that
7 record. The term includes:

8 (A) the articles of incorporation of a business corporation;
9 (B) the articles of incorporation of a nonprofit corporation;
10 (C) the certificate of limited partnership of a limited partnership;
11 (D) the certificate of organization of a limited liability company;
12 [(E) the articles of incorporation of a general cooperative association;]
13 (F) the articles of organization of a limited cooperative association; and
14 (G) the certificate of trust of a statutory trust or similar record of a
15 business trust.

16 (32) “Registered foreign entity” means a foreign entity that is registered to do
17 business in this state pursuant to a record filed by the [Secretary of State].

18 (33) “Statement of conversion” means a statement under Section 1145.

19 (34) “Statement of domestication” means a statement under Section 1155.

20 (35) “Statement of interest exchange” means a statement under Section 1135.

21 (36) “Statement of merger” means a statement under Section 1125.

22 (37) “Surviving entity” means the entity that continues in existence after or is
23 created by a merger.

24 (38) “Type of entity” means a generic form of entity:

25 (A) recognized at common law; or

(B) formed under an organic law, whether or not some entities formed under that organic law are subject to provisions of that law that create different categories of the form of entity.

(b) A reference in this [article] to an entity or type of entity includes a domestic entity and foreign entity, unless the reference is expressly only to a domestic entity or foreign entity.

(c) A term used in the law of a foreign jurisdiction applicable to a transaction that has a meaning comparable to the meaning of a different term used in this [article] to refer to a party to, documentation for, or other matter relating to a conversion, domestication, interest exchange, or merger must be treated as referring to the term used in this [article].

Comment

~~This section Subsection (a)—Subsection (a)~~ defines the terms that are used in this article. Many of the definitions describe attributes that are significant in some forms of entity and not in others. For example, the concept of separate “distributional” and “governance” interests are inherent in unincorporated entities but have no counterpart in corporations. ~~In addition, because some statutes use different terms to describe the same transaction, the definitions are intended to be broad enough to encompass those similar transactions, regardless of how described. See, e.g., the comment to Paragraph 8.~~

“Acquired entity” [(1)]—This definition recognizes that an interest exchange may involve only the acquisition of a particular “class” or “series” of interests in an entity. Model Business Corporation Act section 6.01 does not expressly define “classes” or “series.” Because the interests of members in an unincorporated business organization often tend to be distinctive, it may be that each member’s interest will comprise a separate class or series. For an explanation of a new and different meaning of the word “series,” see Section 1131, comment. The term “acquired entity” does not encompass series under that new meaning.

“Acquiring entity” [(2)]—An “acquiring entity” is an entity that acquires the interests of the acquired entity in an interest exchange governed by Part 3 of this article.

“Conversion” [(3)]—The term “conversion” means a transaction authorized by Part 4 pursuant to which an entity of one type is converted into an entity of another type. As used in this act, the term “conversion” does not include a transaction in which an entity changes the jurisdiction in which it is organized but does not change to a different form of entity; that type of transaction is referred to in this act as a “domestication” and is governed by Article 5.

1
2 **“Converted entity” [(4)]**—This term is used in Part 4 to refer to the entity that results
3 from a conversion.
4

5 **“Converting entity” [(5)]**—A converting entity is the entity that becomes the converted
6 entity under Part 4.
7

8 **“Distributional interest” [(6)]**—This term is similar to the concept of a “transferable
9 interest” found in this act and the organic laws of several other types of unincorporated entities,
10 but has a broader meaning because the scope of this act includes entities in addition to those
11 whose organic law uses the term “transferable interest.”
12

13 **“Domestic” [(7)]**—The term “domestic”, when used in this article with respect to an
14 entity, refers to an entity whose internal affairs are governed by the organic laws of this state. In
15 the case of a general partnership organized under UPA (1997) (Last Amended 2013), the term
16 will mean a general partnership whose governing law under UPA (1997) § 104 is the law of the
17 adopting state. Under that section, the governing law is determined by the location of the
18 partnership’s principal office, except for limited liability partnerships whose governing law is the
19 law of the state where the LLP’s statement of qualification is filed.
20

21 **“Domesticated limited liability partnership” [(8)]**—This term is used in Part 5 and
22 means the entity limited liability partnership that is domesticated pursuant to Part 5. By the
23 nature of the transaction, the domesticated entity will be of the same type as the domesticating
24 entity – *i.e.*, a limited liability partnership.
25

26 **“Domesticating limited liability partnership” [(9)]**—This term is used in Part 5 and
27 means the entity that is domesticated pursuant to Part 5.
28

29 Sections 1101(8) and (9) and 1151(a) exclude non-LLP general partnerships from
30 domestications. However, a non-LLP general partnership that seeks to change its governing law
31 may obtain that result through other means. *See* the comment to Section 1151(a).
32

33 **“Domestication” [(10)]**—The term “domestication” means a transaction of the kind
34 authorized by Part 5 pursuant to which an entity may change its **governing jurisdiction of**
35 **formation** *but not its type* so long as the laws of the foreign jurisdiction permit the
36 domestication. The legal effect of the domestication of an LLP out of this state will be governed
37 by the laws of both this state and the foreign jurisdiction. Some statutes include what is described
38 in this act as “domestication” in their definition of a “conversion.” *See, e.g.*, COLO. REV. STAT. §
39 7-90-201. It is intended that the domestication provisions of this act will apply to a transaction
40 that may be characterized under another act as a “conversion” if the transaction meets the
41 definition of “domestication” under this act.
42

43 **“Entity” [(11)]**—This definition determines the overall scope of the act because only an
44 “entity” may participate in the transactions authorized by Parts 2 (mergers), 3 (interest
45 exchanges), 4 (conversions), and 5 (domestications). *See* Sections 1121 (authorization of
46 mergers), 1131 (authorization of interest exchanges), 1141 (authorization of conversions), 1151

1 (authorization of domestications).

2
3 Subparagraph (A)(x) is a “catch-all” provision that includes within the definition of
4 “entity” any type of organization recognized under the law of this state which is not listed
5 specifically in the preceding paragraphs of this definition. Subparagraph (A)(x) is intended to
6 include all forms of private organizations, regardless of whether organized for profit, and
7 artificial legal persons other than those excluded by Subparagraph (B). This definition does not
8 exclude regulated entities such as public utilities, banks, and insurance companies. Should a state
9 desire to exclude certain types of regulated entities or any of the entities listed in Subparagraph
10 (A)(i)–(x) from participating in transactions permitted by this act for policy reasons, that may be
11 done by listing those types of entities in Section 1107(a), or by permitting those type of entities
12 to engage in transactions under this act generally but prohibiting certain types of transactions by
13 listing those transactions in Section 1107(b).

14
15 Unincorporated nonprofit associations are treated as a type of entity in Subparagraph
16 (A)(viii) because Section 5 of the Uniform Unincorporated Nonprofit Association Act (2008)
17 (Last Amended 2013) specifically states that an unincorporated nonprofit association is an entity.
18 In many states, the status of a nonprofit association may not be clear. Nevertheless, in most states
19 a nonprofit association has the power to acquire an interest in real property in its own name and
20 therefore would qualify as an “entity” under Subparagraph (A)(x). *See* UUNAA § 6 (giving an
21 unincorporated nonprofit association the power to acquire in its own name an interest in real
22 property).

23
24 Subparagraph (B)(i) of this definition excludes a sole proprietorship from the concept of
25 an “entity.”

26
27 Trusts with a predominately donative purpose, such as inter vivos and testamentary trusts
28 and charitable trusts, are treated in many states as having a separate legal existence, but they
29 have been excluded from the definition of “entity” (and thus are not within the scope of this
30 article) under Subparagraph (B)(ii) because they should not be able to engage in transactions
31 under this act as a matter of public policy. Trusts that carry on a business, however, such as
32 business and statutory entity trusts, are “entities.” *See* Subparagraph (A)(ix).

33
34 Subparagraph (B)(iii) of this definition excludes from the concept of an “entity” any form
35 of co-ownership of property or sharing of returns from property that is not listed in Subparagraph
36 (A) and is not a partnership under this act. In that connection, Section 202(c) of this act provides
37 in part:

38
39 In determining whether a partnership is formed, the following rules apply:

40
41 (1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property,
42 common property, or part ownership does not by itself establish a partnership, even
43 if the co-owners share profits made by the use of the property.

44 (2) The sharing of gross returns does not by itself establish a partnership, even
45 if the persons sharing them have a joint or common right or interest in property
46 from which the returns are derived.

1
2 Limited liability partnerships and limited liability limited partnerships are “entities”
3 because they are general partnerships and limited partnerships respectively that have taken the
4 necessary steps to obtain LLP or LLLP status. A limited liability partnership is not, therefore, a
5 separate type of entity from the underlying general or limited partnership that has elected limited
6 liability partnership status. Thus, for example, the election of a general partnership to become a
7 limited liability partnership is not a conversion subject to Article 4.
8

9 Under Subparagraph (B)(iv), decedent’s estates are excluded from the definition of an
10 entity for the same policy reason as trusts with a predominately donative purpose and charitable
11 trusts.
12

13 This same public policy rationale is the justification for the exclusion of governmental
14 subdivisions, agencies, or instrumentalities in Subparagraph (B)(v).
15

16 **“Filing entity” [Paragraph (12)]**—Whether an entity is a filing entity is determined by
17 reference to whether its legal existence requires the filing of a document with the state filing
18 officer. To fit within this definition, the filing must be necessary but need not be sufficient to
19 form the entity. *See, e.g.*, ULLCA (2006) (Last Amended 2013) § 201(d) (“A limited liability
20 company is formed when the company’s certificate of organization becomes effective *and* at
21 least one person becomes a member.”) (emphasis added).
22

23 While the statute refers to the “formation” of an entity, the term is intended to encompass
24 corporations that are “incorporated,” as well as other filing entities whose statutes refer to them
25 as being “organized.” Business trusts present a special problem. In some states a business trust
26 could be a filing entity or a common law relationship, while in other states business trusts are
27 only recognized at common law. A statutory trust entity formed under the Uniform Statutory
28 Trust Entity Act (2009) (Last Amended 2013) § 201(a) is a filing entity, because a statutory trust
29 entity is formed by the filing office filing a certificate of trust pertaining to the entity.
30

31 The term “filing entity” does not include a limited liability partnership because, while a
32 filed document is precondition to LLP status, that document (a statement of qualification under
33 Section 901) does not form the underlying entity. A limited liability limited partnership, on the
34 other hand, is a filing entity because the underlying limited partnership is formed by filing a
35 certificate of limited partnership. ULPA (2001) (Last Amended 2013) § 201(a).
36

37 **“Foreign” [(13)]**—The term “foreign entity” includes any non-domestic entity of any
38 type. Where a foreign entity is a filing entity, the entity is governed by the laws of the state of
39 filing. A nonfiling foreign entity is governed by the laws governing its internal affairs. It is a
40 factual question whether a general partnership whose internal affairs are governed by UPA
41 (1914) is a domestic or foreign partnership. A UPA (1914) partnership will likely be deemed to
42 be a domestic entity where the greatest nexus of contacts are found. The domestic or foreign
43 characterization of partnerships under this act that are not limited liability partnerships will be
44 governed by Section 104(2) (“the law of the jurisdiction in which the partnership has its principal
45 office”) or the partnership agreement. (Section 104(2) is a default rule.)
46

1 **“Governance interest” [(14)]**—A governance interest is typically only part of the
2 interest that a person will hold in an unincorporated entity and is usually coupled with a
3 distributional interest (or economic rights). Memberships in some nonprofit corporations and
4 unincorporated nonprofit associations consist solely of governance interests and memberships in
5 other nonprofit entities may not include either governance interests or distributional interests. In
6 some unincorporated business entities, including partnerships, there is a more limited right to
7 transfer governance interests than there is to transfer distributional interests. An interest holder in
8 such an unincorporated business entity who transfers only a distributional interest and retains the
9 governance interest will also retain the status of an interest holder. Whether a transferee who
10 acquires only a distributional interest will acquire the status of an interest holder is determined
11 by the definition of “interest holder.”
12

13 Governors of an entity have the kinds of rights listed in the definition of “governance
14 interest” by reason of their position with the entity. For a governor to have a “governance
15 interest,” however, requires that the governor also have those rights for a reason other than the
16 governor’s status as such. A manager who is not a member in a limited liability company, for
17 example, will not have a governance interest, but a manager who is a member will have a
18 governance interest arising from the ownership of a membership interest.
19

20 **“Governor” [(15)]**—This term has been chosen to provide a way of referring to a person
21 who has the authority under an entity’s organic law to make management decisions regarding the
22 entity that is different from any of the existing terms used in connection with particular types of
23 entities. Depending on the type of entity or its organic rules, the governors of an entity may have
24 the power to act on their own authority, or they may be organized as a board or similar group and
25 have only the power to act collectively, and then only through a designated agent. In other words,
26 a person having only the power to bind the organization pursuant to the instruction of the
27 governors is not a governor. Under the organic rules, particularly those of unincorporated
28 entities, most or all of the management decisions may be reserved to the members or partners.
29 Thus, if a manager of a limited liability company were limited to having authority to execute
30 management decisions made by the members and did not have any authority to make
31 independent management decisions, the manager would not be a governor under this definition.
32

33 **“Interest” [(16)]**—In the usual case, the interest held by an interest holder will include
34 both a governance interest and a distributional interest. Members in nonprofit corporations or
35 unincorporated nonprofit associations generally do not have any distributional interest because
36 they do not receive distributions, but they nonetheless may hold a governance interest in which
37 case they would have the status of interest holders under this article.
38

39 **“Interest exchange” [(17)]**—The term “interest exchange” means a transaction
40 authorized by Part 3 pursuant to which an entity may acquire interests in another entity. The
41 consideration that may be provided to the interest holders whose interests are being acquired in
42 an exchange may consist in whole or part of interests in a third party that is not one of the two
43 parties to the exchange itself. *See* Section 1131(a).
44

45 **“Interest holder” [(18)]**—This article does not refer to “equity” interests or “equity”
46 owners or holders because the term “equity” could be confusing in the case of a nonprofit entity

1 whose members do not have an interest in the assets or results of operations of the entity but
2 have only a right to vote on its internal affairs.

3
4 **“Interest holder liability” [(19)]**—This term is used to describe the vicarious liability of
5 an interest holder, by virtue of being an interest holder, for liabilities of the entity. The term
6 includes only personal liability of an interest holder for a debt of the entity imposed on the
7 interest holder either by statute or by the organic rules to the extent authorized pursuant to the
8 organic law. Liabilities that an interest holder incurs in any other fashion are not interest holder
9 liabilities for purposes of this act. Thus, for example, if a state’s business corporation law makes
10 shareholders personally liable for unpaid wages because of their status as shareholders, that
11 liability would be an “interest holder liability.” If, on the other hand, a shareholder were to
12 guarantee payment of an obligation of a corporation, that liability would not be an “interest
13 holder liability” because it is a direct liability and not based on the status of being a shareholder.
14 Similarly, the liability to return an improper distribution is not an interest holder liability because
15 it is a direct liability of the interest holder based on receipt of the distribution.

16
17 **“Merger” [(20)]**—The term means a transaction in which two or more entities are
18 combined into a single entity pursuant to a filing by the filing office. The term “merger” in this
19 act includes the transaction known as a consolidation in which a new entity results from the
20 combination of two or more pre-existing entities.

21
22 **“Merging entity” [(21)]**—The term “merging entity” refers to each entity that is in
23 existence immediately before a merger and is a party to the merger. It will include the surviving
24 entity if the surviving entity exists before the merger becomes effective. It does not include an
25 entity that provides consideration to be received by interest holders if that entity is not a party to
26 the merger.

27
28 **“Organic law” [(22)]**—Organic law means statutes that govern the internal affairs of an
29 entity. For example, this act is the organic law of a limited liability partnership whose statement
30 of qualification is filed under this act.

31
32 Entity laws in a few states purport to require that some of their internal governance rules
33 applicable to a domestic entity also apply to a foreign entity with significant ties to the state. *See,*
34 *e.g.,* CAL. CORP. CODE § 2115 (Foreign Corporations); N.Y. NOT-FOR-PROFIT-CORP. §§ 1318–21
35 (Liabilities of Directors and Officers of Foreign Corporations); 15 PA.CON.S. STAT. § 6145
36 (Applicability of Certain Safeguards to Foreign Corporations). Such a “sticky fingers” law is not
37 included within the definition of “organic law” for purposes of this act because those laws are
38 not part of the law of the entity’s **governing** jurisdiction **~~of formation~~**.

39
40 **“Organic rules” [(23)]**—The term “organic rules” means an entity’s public organic
41 record and the private organic rules. The organic rules, together with this act, the organic law,
42 and the common law, provide the rules governing the internal affairs of the entity. For example,
43 this act and the partnership agreement comprise the organic rules of a limited liability partnership
44 formed under this act.

45
46 **“Plan” [(24)]**—The term “plan” is a short-hand way of referring to the plan of merger,

1 interest exchange, conversion, or domestication, as the case may be, depending on which form of
2 transaction is taking place. *See* Sections 1122 (plan of merger), 1132 (plan of interest exchange),
3 1142 (plan of conversion), 1152 (plan of domestication).
4

5 **“Private organic rules” [(29)]**—The term private “organic rules” is intended to include
6 all governing rules of an entity that are binding on all of its interest holders, whether or not in
7 record form, except for the provisions of the entity’s public organic record, if any. The term is
8 intended to include agreements in “record” form such as corporate bylaws, as well as oral
9 partnership agreements and oral operating agreements among LLC members.
10

11 **“Protected agreement” [(30)]**—The term “protected agreement” refers to evidences of
12 indebtedness and agreements binding on the entity or any of its governors or interest holders that
13 are unpaid or executory in whole or in part on the **effective date of the act stated**. Thus a
14 revolving line of credit from a bank to a corporation would constitute a protected agreement even
15 if advances were not made until after the **effective date of the act stated**. Likewise, a partnership
16 agreement in effect under this act or a predecessor to this act is a “protected agreement.”
17

18 **The purpose of the protected agreement concept is to protect persons that agreed to**
19 **contracts or organic rules before conversions, domestications, and interest exchanges are**
20 **authorized by the state and thus did not think to consider the consequences of the**
21 **partnership engaging in one of those transactions. If To protect those persons, the concept**
22 **of a protected agreement looks at whether the agreement** has provisions that apply if ~~an entity~~
23 **merges the partnership is a party to a merger. If that is the case, those the** provisions
24 **regarding mergers** will **also** apply if the ~~entity~~ **partnership** enters into an interest exchange,
25 conversion, or domestication even though the agreement does not mention those other types of
26 transactions. *See* Sections 1131(c) (interest exchange), 1141(c) (conversion), 1151(c)
27 (domestication).
28

29 **The underlying theory, although something of a blunt instrument, assumes that**
30 **because conversions, domestications, and interest exchanges are similar to mergers, and**
31 **their result can be accomplished through the use of a merger, it is appropriate to assume**
32 **that the parties would want the same rules to apply to all of the transactions. Because**
33 **protected agreements are only intended to operate in the context of contracts and organic**
34 **rules adopted when conversions, domestications, and interest exchanges are not authorized**
35 **under state law, once the state permits those transactions, the protected agreement concept**
36 **is no longer needed with respect to contracts and organic rules first adopted after the**
37 **transactions are available.**
38

39 **A contract or organic rule that includes a provision applying to a merger of the**
40 **entity that makes the contract or organic rule a protected agreement will lose the status of a**
41 **protected agreement after the provision applying to a merger is amended after the date**
42 **stated in this section. See Sections 1131(c) (interest exchange), 1141(c) (conversion), and**
43 **1151(c) (domestication).**
44

45 **“Public organic record” [(31)]**—A “public organic record” is a record that is filed
46 publicly to form, organize, incorporate, or otherwise create an entity. The term does not include a

1 statement of authority under this act or any of the other statements that may be filed under this
2 act since those statements do not create a new entity. Thus, a statement of qualification filed
3 under Section 1003 is not a “public organic record.” The limited liability partnership that results
4 from the filing is the same entity as the partnership that delivered the statement to the filing
5 office.
6

7 Similarly, the term does not include a statement of authority filed under Section 7 of the
8 Revised Uniform Unincorporated Nonprofit Association Act (2008) (Last Amended 2013), a
9 statement appointing a registered agent filed under Section 31 of that act, or any of the various
10 statements filed under the ULLCA (2006) (Last Amended 2013).
11

12 In those states where a deed of trust or other instrument is publicly filed to create a
13 business trust, that filing will constitute a public organic record. But in those states where a
14 business trust is not created by a public filing, the deed of trust or similar record will be part of
15 the private organic rules of the business trust.
16

17 Where a public organic document has been amended or restated, the term means the
18 public organic document as last amended or restated.
19

20 **“Registered foreign entity” [(32)]**—This term refers to a foreign entity that is registered
21 to transact business in this state pursuant to a public filing.
22

23 **“Surviving entity” [(37)]**—The term “surviving entity” refers to either a merging entity
24 that survives the merger or the new entity created by the merger.
25

26 **“Type of entity” [(38)]**—The term “type of entity” has been developed in an attempt to
27 distinguish different legal forms of entities. It is sometimes difficult to decide whether one is
28 dealing with a different form of entity or a variation of the same form. For example, a limited
29 partnership, although it has long been characterized or even defined as a partnership, is a
30 different type of entity from a general partnership, while a limited liability partnership is not a
31 different type of entity from a general partnership. In some states cooperatives are categories of
32 business corporations or nonprofit corporations, while in other states cooperatives are a separate
33 type of entity.
34

35 **Subsection (c) – Some states use different terms to refer to the types of transactions**
36 **authorized in this article. For example, Delaware uses the terms “transfer” and**
37 **“continuance,” as well as the term “domestication” to refer to a transaction in which a**
38 **Delaware limited liability company becomes a limited liability company under the law of a**
39 **foreign country. 6 Del. Code § 18-213. Similarly, Delaware uses the term “conversion” to**
40 **refer to a transaction in which a Delaware limited liability company becomes a limited**
41 **liability company under the law of another state. 6 Del. Code § 18-216. Those transactions**
42 **under Delaware law would all be considered a “domestication” under Part 5.**
43

44 **When a foreign jurisdiction uses a different name for a transaction that has a**
45 **similar substantive effect as a transaction under this article, other terms used in this article**
46 **with respect to that type of transaction have corresponding meanings. For example, Part 5**

1 requires the filing of a certificate of domestication, while Delaware refers to the document
2 as a certificate of transfer (if the company is domesticating to another country) or a
3 certificate of conversion (if the company is domesticating to another state).

4
5 When the definitions in subsection (a) of conversion, domestication, interest
6 exchange and merger refer to a transaction under the law of a foreign jurisdiction
7 “however the transaction is denominated,” those provisions should be applied broadly. The
8 law of the foreign jurisdiction may authorize a transaction that includes two or more
9 transactions that this article treats separately, or the law of the foreign jurisdiction may
10 authorize two or more transactions that this article encompasses within one transaction. In
11 both cases, the transactions under the foreign law are intended to be included in the
12 terminology of this article.

13 14 **SECTION 1102. RELATIONSHIP OF [ARTICLE] TO OTHER LAWS.**

15 (a) This [article] does not authorize an act prohibited by, and does not affect the
16 application or requirements of, law other than this [article].

17 (b) A transaction effected under this [act] may not create or impair a right, duty, or
18 obligation of a person under the statutory law of this state relating to a change in control,
19 takeover, business combination, control-share acquisition, or similar transaction involving a
20 domestic merging, acquired, converting, or domesticating business corporation unless:

21 (1) if the corporation does not survive the transaction, the transaction satisfies any
22 requirements of the law; or

23 (2) if the corporation survives the transaction, the approval of the plan is by a vote
24 of the shareholders or directors which would be sufficient to create or impair the right, duty, or
25 obligation directly under the law.

26 **Comment**

27 This section preserves existing regulatory law in an adopting state in general terms.
28 Adopting states should consider more carefully integrating this act with their various regulatory
29 laws. For example, in some states certain professions are limited in their use of limited liability
30 entities. *See* Section 1103.

31
32 Laws other than this act that will apply to transactions under the act include, for example,
33 uniform fraudulent transfer and fraudulent conveyance acts, state insolvency statutes, federal

1 bankruptcy law, and Articles 8 and 9 of the Uniform Commercial Code.

2
3 **Subsection (b)**—Many states have enacted “antitakeover” statutes intended to make it
4 more difficult to acquire control of a publicly traded corporation. Those statutes often provide
5 that their application to a particular corporation cannot be changed unless the corporation obtains
6 certain specified approvals, such as a vote of disinterested directors or a supermajority vote by
7 the shareholders. The purpose of the special requirements in this subsection on varying the
8 application of an antitakeover statute is to protect against a hostile acquirer or group of
9 shareholders seeking to use the act to avoid the application of the antitakeover statute.

10
11 This subsection protects the application of antitakeover statutes from being affected by a
12 transaction under this act by requiring that the transaction be approved in a manner that would be
13 sufficient to approve changing the application of the antitakeover statute. If a transaction is
14 approved in that manner, there is no policy reason to prohibit the application of the antitakeover
15 statute from being varied by a transaction under this act. If the application of an antitakeover
16 statute cannot be varied by action of an entity subject to it, then a transaction under this act will
17 be permissible only if the antitakeover provision continues to apply after the transaction or the
18 transaction itself is permissible under the antitakeover statute.

19
20 **SECTION 1103. REQUIRED NOTICE OR APPROVAL.**

21 (a) ~~A~~ **If a** domestic or foreign entity ~~that~~ is required to give notice to, or obtain the
22 approval of, a governmental agency or officer of this state to be a party to a merger, **and the**
23 **applicable statutes or regulations do not specifically address an interest exchange,**
24 **conversion, or domestication, the entity** must give the notice or obtain the approval to be a
25 party to an interest exchange, conversion, or domestication.

26 (b) Property held ~~for a charitable purpose under the law of this state~~ by a domestic or
27 foreign entity **for a charitable purpose under the law of this state, whether in trust or**
28 **otherwise,** immediately before a transaction under this [article] becomes effective may not, as a
29 result of the transaction, be diverted from the objects for which it was donated, granted, devised,
30 or otherwise transferred ~~unless, to the extent required by or pursuant to,~~ **except in**
31 **compliance with** the law of this state concerning cy pres or other law dealing with nondiversion
32 of charitable assets, ~~the entity obtains an appropriate order of [the appropriate court] [the~~
33 ~~Attorney General] specifying the disposition of the property.~~

Subsection (b)—This act applies generally to nonprofit corporations and unincorporated nonprofit associations. As in the case of laws regulating particular industries, a state’s laws governing the nondiversion of charitable property to other uses may not cover some of the transactions authorized by this act. To prevent the procedures in this act from being used to avoid restrictions on the use of such charitable property, this subsection requires approval of the effect of transactions under this act by the appropriate arm of government having supervision of nonprofit entities.

An approval or order obtained under this section may impose conditions or specify the disposition of assets or liabilities in a manner different than would otherwise be the case. In such an instance, the approval or order will control over the provisions of this act specifying the effects of a transaction. *See* Sections 1126 (effect of merger), 1136 (effect of interest exchange), 1146 (effect of conversion), 1156 (effect of domestication).

Subsection (c)—This subsection clarifies the legal effect of a merger on bequests, etc. that were originally made to an entity that does not survive the merger. This issue does not arise in an interest exchange, conversion, or domestication transaction because the entity to which the bequest, etc. was made survives in some form after the transaction.

SECTION 1104. NONEXCLUSIVITY. The fact that a transaction under this [article] produces a certain result does not preclude the same result from being accomplished in any other manner permitted by law other than this [article].

Comment

This section allows a transaction that has the same end result as one of the transactions governed by this act, but that is accomplished in a manner not within the scope of this act, to be exempt from this act. For example, a sale of assets and transfer of liabilities by two entities to a third entity followed by the liquidation of the two transferring entities can be accomplished pursuant to statutory provisions pertaining to sale of assets rather than under Part 2 of this article, even though the end result of the transaction is essentially the same as if the two entities had merged into a third entity.

SECTION 1105. REFERENCE TO EXTERNAL FACTS. A plan may refer to facts ascertainable outside the plan if the manner in which the facts will operate upon the plan is specified in the plan. The facts may include the occurrence of an event or a determination or action by a person, whether or not the event, determination, or action is within the control of a party to the transaction.

Comment

1 This section is based on, but more concise than, section 1.20(k) of the Model Business
2 Corporation Act.

3
4 **SECTION 1106. APPRAISAL RIGHTS.** An interest holder of a domestic merging,
5 acquired, converting, or domesticating partnership is entitled to contractual appraisal rights in
6 connection with a transaction under this [article] to the extent provided in:

7 (1) the partnership's organic rules; or

8 (2) the plan.

9 **Comment**

10 In corporate law, appraisal rights developed when corporate statutes were amended to
11 permit mergers with less than unanimous consent of the shareholders. This article provides no
12 appraisal rights, because as a default rule transactions under this article require the consent or
13 affirmative vote of all the partners. Where the partnership agreement changes this default rule,
14 parties may wish to consider contractual appraisal rights.

15
16 This subsection validates the grant of such contractual appraisal rights. *Cf.* 6 DEL. CODE
17 ANN. §§ 15-120 (general partnerships), 17-212 (limited partnerships), 18-210 (limited liability
18 companies) (validating “contractual appraisal rights”); MODEL BUS. CORP. ACT § 13.02(5)
19 (permitting the articles of incorporation, bylaws, or a resolution of the board of directors to
20 confer appraisal rights in contexts in which they would otherwise not be available). Legislative
21 authorization in this subsection of the grant of contractual appraisal rights removes any question
22 as to whether a court would have jurisdiction to hear a case in which the parties were attempting
23 to create jurisdiction in the court by private agreement.

24
25 In this section, the term “appraisal rights” refers to any arrangement, either in the
26 partnership agreement or the plan, providing for the buy-out of partners that object to a
27 transaction under this article.

28
29 **[SECTION 1107. EXCLUDED ENTITIES AND TRANSACTIONS.**

30 (a) The following entities may not participate in a transaction under this [article]:

31 (1)

32 (2).

33 (b) This [article] may not be used to effect a transaction ~~that~~:

34 (1)

1 Alternative A

2 that is prohibited by [Section 602 or 603 of the Uniform Protected
3 Series Act]; or

4 Alternative B

5 in which a series entity or a series, protected series, protected cell,
6 segregated account, or similar part of an arrangement, configuration, or other structure
7 established by a series entity that associates assets, liabilities, and interest holders among
8 various parts of the structure, however a part of the entity is denominated under the
9 organic law of the entity, is to be a party to, result from, or be formed, organized,
10 established, or created by:

11 (A) a conversion, domestication, interest exchange, or merger under
12 this [act] or the law of a foreign jurisdiction, however the transaction is denominated under
13 that law; or

14 (B) that has the substantive effect of a conversion, domestication,
15 interest exchange, or merger under the law of this state or a foreign jurisdiction; or

16 End of Alternatives

17
18 (2).]

19 {Source: Issue 21.}

20 *Legislative Note:* Subsection (a) may be used by states that have special statutes
21 restricted to the organization of certain types of entities. A common example is banking statutes
22 that prohibit banks from engaging in transactions other than pursuant to those statutes.
23

24 *Nonprofit entities may participate in transactions under this act with for-profit entities,*
25 *subject to compliance with Section 1103. If a state desires, however, to exclude entities with a*
26 *charitable purpose or to exclude other types of entities from the scope of this article, that may be*
27 *done by referring to those entities in Subsection (a).*
28

29 There are two alternative approaches to the issue in subsection (b)(1). Alternative A

refers to the prohibitions in Sections 602 and 603 of the Uniform Protected Series Act, which specify that a protected series or series limited liability company is restricted from participating in transactions such as those authorized by this act. A state that has enacted the Uniform Protected Series Act should enact Alternative A. If the state does not authorize the creation of protected series, it should consider whether to prohibit a foreign series from engaging in transactions under this act. If it wishes to do so, it should enact Alternative B.

*Subsection (b) **also** may be used to exclude certain types of transactions governed by more specific statutes. A common example is the conversion of an insurance company from mutual to stock form. There may be other types of transactions that vary greatly among the states.*

[PART] 2

MERGER

SECTION 1121. MERGER AUTHORIZED.

(a) By complying with this [part]:

(1) one or more domestic partnerships may merge with one or more domestic or foreign entities into a domestic or foreign surviving entity; and

(2) two or more foreign entities may merge into a domestic **surviving** partnership **created in the merger.**

{Source: Issue 21.}

(b) By complying with the provisions of this [part] applicable to foreign entities, a foreign entity may be a party to a merger under this [part] or may be the surviving entity in such a merger if the merger is authorized by the law of the foreign entity's **governing** jurisdiction **of formation.**

{Source: Issue 1.}

Comment

The merger transaction authorized by this act involves the combination of one or more domestic general partnerships with or into one or more other domestic or foreign entities. It also contemplates the consolidation of two or more foreign entities into a single domestic general partnership **created in the transaction.** Upon the effective date of the merger, all the assets and

1 liabilities of the constituent entities vest in the surviving entity as a matter of law. As such,
2 mergers require the existence of at least two separate entities before the transaction and only one
3 entity may survive the merger. If independent existence of the constituent entities is desired
4 following the conclusion of the transaction, a restructuring transaction other than a merger must
5 be used to accomplish the transfer of assets and liabilities.

6
7 This act authorizes a merger for state entity law purposes. Federal law and other state law
8 will independently determine how a merger transaction will be taxed.

9
10 **Subsection (a)(1)**—This paragraph states the general rule that subject to Subsection (b)
11 one or more domestic general partnerships may merge with or into a domestic or foreign
12 surviving entity. The surviving entity may be one of the merging partnerships (either
13 domestic or foreign) or a new entity (again, either domestic or foreign) created by the
14 merger.

15
16 **Subsection (a)(2)**—This paragraph provides that two or more foreign entities may merge
17 into a domestic surviving general partnership created in the merger so long as the requirements
18 of Subsection (b) are met. A merger in which the surviving entity is created in the merger
19 was often described in older statutes as a consolidation. Section 1101(37) defines a surviving
20 entity as “the entity that continues in existence after or is created by a merger” and thus a
21 merger under Part 2 includes a consolidation in which a new surviving entity is created in
22 the transaction.

23
24 **Subsection (b)**—This subsection provides that a foreign entity may be a party to a
25 merger or may be the surviving entity in a merger only if the merger is authorized by the laws of
26 the foreign entity’s governing jurisdiction ~~of formation~~.

27 28 **SECTION 1122. PLAN OF MERGER.**

29 (a) A domestic partnership may become a party to a merger under this [part] by approving
30 a plan of merger. The plan must be in a record and contain:

31 (1) as to each merging entity, its name, governing jurisdiction ~~of formation~~, and
32 type of entity;

33 {Source: Issue 1.}

34 (2) if as to the surviving entity, its name, governing jurisdiction, and type of
35 entity, and whether the surviving entity is to be created in the merger, ~~a statement to that~~
36 ~~effect and the entity’s name, jurisdiction of formation, and type of entity;~~

37 {Source: Issue 22.}

1 (3) the manner of converting the interests in each party to the merger into
2 interests, securities, obligations, money, other property, rights to acquire interests or securities, or
3 any combination of the foregoing;

4 (4) if the surviving entity exists before the merger, any proposed amendments to:

5 (A) its public organic record, if any; or

6 (B) its private organic rules that are, or are proposed to be, in a record;

7 (5) if the surviving entity is to be created in the merger:

8 (A) its proposed public organic record, if any; and

9 (B) the full text of its private organic rules that are proposed to be in a
10 record;

11 (6) the other terms and conditions of the merger; and

12 (7) any other provision required by the law of a merging entity's governing
13 jurisdiction ~~of formation~~ or the organic rules of a merging entity.

14 {Source: Issue 1.}

15 (b) In addition to the requirements of subsection (a), a plan of merger may contain any
16 other provision not prohibited by law.

17 Comment

18 **Subsection (a)**—This subsection states the requirements for the plan of merger. They are
19 similar to plan of merger provisions in corporation statutes. *See* MODEL BUS. CORP. ACT §
20 11.02(c). The requirements stated in ~~this~~ subsection **(a)** are mandatory. *See* Section 105(c)(15).

21
22 **Subsection (a)(1)**—This paragraph requires that the plan of merger identify the merging
23 entities parties to the merger. **Section 1101(21) defines a merging entity as “an entity that is**
24 **a party to a merger and exists immediately before the merger becomes effective.”** The name
25 of a merging entity as it appears in the plan of merger will be its name in its governing
26 jurisdiction ~~of formation~~.

27
28 **Subsection (a)(2) – Separately from the identification of the merging entities in**
29 **subsection (a)(1), the plan of merger is also required by subsection (a)(2) to identify the**

1 surviving entity. The surviving entity may either be one of the merging entities identified in
2 subsection (a)(1) or a new entity created in the merger. The information described in
3 subsection (a)(2) is not only required for a surviving entity created in the merger, but also
4 for a surviving entity that is also a merging entity. If a merging entity is the surviving
5 entity, the information required by subsection (a)(2) will reflect the effects of the merger on
6 the merging entity and may differ from the information provided in response to subsection
7 (a)(1).
8

9 **Subsection (a)(3)**—The language of this paragraph is similar to Model Business
10 Corporation Act § 11.02(c)(3). What may be done under this paragraph with respect to providing
11 for continuing interests in the surviving entity for some holders of interests of a class or series of
12 a party to the merger while paying some other form of consideration to other holders of the same
13 class or series of interests in that entity will vary depending on the type of entity involved and the
14 extent to which its organic rules provide for non-uniform treatment of interest holders in a
15 manner that is permissible under its organic law. Similarly the ability to use a merger to
16 reorganize the capital structure of the surviving entity will vary depending on the type of entity
17 involved and whether the entity has appropriately adopted relevant provisions in its organic
18 rules.
19

20 If the organic law and organic rules of an unincorporated entity permit a non-uniform
21 “equity shuffle” to be accomplished in a merger involving the unincorporated entity, the minority
22 owners of the unincorporated entity will not necessarily be entitled to the statutory appraisal
23 rights currently afforded to minority stockholders in merging corporate entities. Any perceived
24 unfairness in the shuffle would be addressed either: (i) under principles of fiduciary duties and
25 the contractual obligations of good faith and fair dealing, assuming, of course, that such duties
26 and obligations have not been contractually modified or eliminated to the extent permitted by the
27 applicable organic law, or (ii) by the exercise of whatever rights the minority owners may have to
28 veto the transaction or to withdraw or to dissociate and be paid the value of their interests.
29

30 The Model Business Corporation Act generally requires that shares of the same class or
31 series be treated in the same manner in a merger unless the corporation has adopted an applicable
32 provision of its articles of incorporation pursuant to section 6.01(e) of that act providing for
33 variations in the treatment of holders of the same class or series of shares. Thus, a determination
34 of what may be done by way of an equity shuffle in the case of a corporation will require
35 reference to its organic law and organic rules.
36

37 The consideration paid to the interest holders of the merging parties may be supplied in
38 whole or part by a person who is not a party to the merger.
39

40 **Subsection (b)**—This subsection provides the statutory authority for a merging party to
41 include a provision in a plan of merger that is not specifically listed in Subsection (a). One such
42 possibility is contractual appraisal rights as provided in Section 1106(2).
43

44 **SECTION 1123. APPROVAL OF PLAN OF MERGER.**

45 *{Source: Issue 23.}*

1 (a) A plan of merger is not effective unless it has been approved:

2 (1) by a domestic merging partnership, by all the partners of the partnership
3 entitled to vote on or consent to any matter; and

4 (2) in a record, by each partner of a domestic merging partnership which will have
5 interest holder liability for debts, obligations, and other liabilities that are incurred after the
6 merger becomes effective, unless:

7 (A) the partnership agreement of the partnership provides in a record for
8 the approval of a merger in which some or all of its partners become subject to interest holder
9 liability by the affirmative vote or consent of fewer than all the partners; and

10 (B) the partner consented in a record to or voted for that provision of the
11 partnership agreement or became a partner after the adoption of that provision.

12 (b) A merger involving a domestic merging entity that is not a partnership is not effective
13 unless the merger is approved by that entity in accordance with its organic law.

14 (c) A merger involving a foreign merging entity is not effective unless the merger is
15 approved by the foreign entity in accordance with the law of the foreign entity's **governing**
16 **jurisdiction of formation.**

17 ***{Source: Issue 1.}***

18 **Comment**

19 **Subsection (a)**—In the uniform acts pertaining to unincorporated business organizations,
20 unanimity is the default rule for approving a merger. The partnership agreement certainly can
21 change this rule, but care should be taken in doing so. For example, a merger can revise the
22 partnership agreement. Section 1122(a)(4). Thus, if a merger requires less-than-unanimous
23 consent, the partnership agreement is subject to amendment by the same quantum of consent.
24 “Exit rights” also require consideration. This act does not provide appraisal rights, because those
25 rights are inapposite when unanimous consent is required. *See* the comment to Section 1106.
26

27 **Subsection (a)(2)**—This provision is not a default rule, Section 105(c)(14), and deals
28 with the situation in which a partner of a general partnership that is a party to a merger will have

1 “interest holder liability” for the liabilities of the surviving entity which are incurred after the
2 merger becomes effective. This provision applies regardless of whether the partnership is an
3 LLP. The issue is not whether the partners have “interest holder liability” in their current
4 partnership but rather whether they will have that liability in the surviving entity. Thus, for
5 example, if general partnership Alpha merges into general partnership Beta, which is not an LLP,
6 the special approval requirement in Subsection (a)(2) will be applicable to each Alpha partner
7 who will become a Beta partner—regardless of whether Alpha is a limited liability partnership.
8

9 The consent of a partner required by Subsection (a)(2)(B) may be given either by: (i)
10 signing or agreeing generally to the terms of a partnership agreement that includes the required
11 provision permitting less than unanimous approval of a merger in which partners become subject
12 to “interest holder liability,” or (ii) voting for or consenting to an amendment to the partnership
13 agreement to add such a provision.
14

15 **Subsection (b)**—Where a domestic entity other than a general partnership is a party to a
16 merger under this act, this subsection defers to that entity’s organic law for the requirements for
17 approval of the merger by that entity.
18

19 **Subsection (c)**—Where a foreign entity is a party to a merger under this act, this
20 subsection defers to the laws of the foreign jurisdiction for the requirements for approval of the
21 merger by the foreign entity. Those laws will include the organic law of the foreign entity and
22 other applicable laws. The laws of the foreign jurisdiction will also control the application of any
23 special approval requirements found in the organic rules of the foreign entity.
24

25 **SECTION 1124. AMENDMENT OR ABANDONMENT OF PLAN OF MERGER.**

26 (a) A plan of merger may be amended only with the consent of each party to the plan,
27 except as otherwise provided in the plan.

28 (b) A domestic merging partnership may approve an amendment of a plan of merger:

29 (1) in the same manner as the plan was approved, if the plan does not provide for
30 the manner in which it may be amended; or

31 (2) by its partners in the manner provided in the plan, but a partner that was
32 entitled to vote on or consent to approval of the **merger plan** is entitled to vote on or consent to
33 any amendment of the plan that will change:

34 **{Source: Issue 23.}**

35 (A) the amount or kind of interests, securities, obligations, money, other

1 property, rights to acquire interests or securities, or any combination of the foregoing, to be
2 received by the interest holders of any party to the plan;

3 (B) the public organic record, if any, or private organic rules of the
4 surviving entity that will be in effect immediately after the merger be effective, except for
5 changes that do not require approval of the interest holders of the surviving entity under its
6 organic law or organic rules; or

7 (C) any other terms or conditions of the plan, if the change would
8 adversely affect the partner in any material respect.

9 (c) After a plan of merger has been approved and before a statement of merger becomes
10 effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a
11 domestic merging partnership may abandon the plan in the same manner as the plan was
12 approved.

13 (d) If a plan of merger is abandoned after a statement of merger has been delivered to the
14 [Secretary of State] for filing and before the statement becomes effective, a statement of
15 abandonment, signed by a party to the plan, must be delivered to the [Secretary of State] for
16 filing before the statement of merger becomes effective. The statement of abandonment takes
17 effect on filing, and the merger is abandoned and does not become effective. The statement of
18 abandonment must contain:

19 (1) the name of each party to the plan of merger;

20 (2) the date on which the statement of merger was filed by the [Secretary of
21 State]; and

22 (3) a statement that the merger has been abandoned in accordance with this
23 section.

1 **Comment**

2 This section sets out the requirements for amending or abandoning the plan of merger.
3 They are similar to provisions for amending or abandoning mergers found in existing corporation
4 merger statutes. *See* MODEL BUS.CORP. ACT §§ 11.02(e), 11.08.
5

6 **SECTION 1125. STATEMENT OF MERGER; EFFECTIVE DATE OF MERGER.**

7 (a) A statement of merger must be signed by each merging entity and delivered to the
8 [Secretary of State] for filing.

9 (b) A statement of merger must contain:

10 (1) the name, governing jurisdiction ~~of formation~~, and type of entity of each
11 merging entity ~~that is not the surviving entity~~;

12 **{Source: Issues 1 and 24.}**

13 (2) the name, governing jurisdiction ~~of formation~~, and type of entity of the
14 surviving entity;

15 (3) a statement that the merger was approved by each domestic merging entity, if
16 any, in accordance with this [part] and by each foreign merging entity, if any, in accordance with
17 the law of its governing jurisdiction ~~of formation~~;

18 **{Source: Issue 1.}**

19 (4) if the surviving entity exists before the merger and is a domestic filing entity,
20 any amendment to its public organic record approved as part of the plan of merger;

21 (5) if the surviving entity is created by the merger and is a domestic filing entity,
22 its public organic record, as an attachment; and

23 (6) if the surviving entity is created by the merger and is a domestic limited
24 liability partnership, its statement of qualification, as an attachment.

25 (c) In addition to the requirements of subsection (b), a statement of merger may contain

any other provision not prohibited by law.

(d) If the surviving entity is a domestic entity, its public organic record, if any, must satisfy the requirements of the law of this state, except that the public organic record does not need to be signed.

~~(e) A plan of merger that is signed by all the merging entities and meets all the requirements of subsection (b) may be delivered to the [Secretary of State] for filing instead of a statement of merger and on filing has the same effect. If a plan of merger is filed as provided in this subsection, references in this [article] to a statement of merger refer to the plan of merger filed under this subsection. (Reserved).~~

{Source: Issue 16.}

(f) If the surviving entity is a domestic partnership, the merger becomes effective when the statement of merger is effective. In all other cases, the merger becomes effective on the later of:

(1) the date and time provided by the organic law of the surviving entity; and

(2) when the statement is effective.

Comment

The filing of a statement of merger makes the transaction a matter of public record.

Subsection (a)—This subsection pertains to all merging entities involved in a merger, not merely any merging domestic general partnership. Other filings may be required by the organic law of other entities participating in the merger.

Subsection (b)(1) and (2)—The names of foreign entities set forth in the statement of merger will generally be their names in their governing jurisdiction ~~of formation before the merger~~, except that if a foreign entity has been required to adopt a different name in order to register to do business in this state, the foreign qualification or registration statute will likely require that, when the entity does business in this state, the entity must use the name adopted for the purposes of registering to do business. Engaging in a merger under this act will be part of the business done by the entity in this state and the name of the entity set forth in the statement of merger will thus need to be the name under which the entity has registered to do business. Use of

1 the name under which the entity has registered to do business will allow the records in the filing
2 office to associate the registration of the entity to do business with the statement of merger.

3
4 **If one of the merging entities is also the surviving entity, it will appear in the**
5 **statement of merger under both subsection (b)(1) and (2). Where there is no change to the**
6 **information about the surviving entity in subsection (b)(2), the information in subsection**
7 **(b)(2) will be redundant but must nonetheless be included. Where the information changes**
8 **as a result of the merger, or where the surviving entity is created by the merger, the**
9 **information required in subsection (b)(1) and (2) will make the public record clearer.**

10
11 **Subsection (b)(3)**—For more information on the statement of merger, see Subsection (f),
12 comment.

13
14 **Subsection (b)(4)**—The statement in this paragraph that the plan of merger was approved
15 by each entity in accordance with this article necessarily presupposes that the plan was approved
16 in accordance with any valid, special requirements in the organic rules of each merging entity.

17
18 **Subsection (b)(5) and (6)**—The public organic record of a domestic surviving entity
19 created by the merger that is attached to the statement of merger becomes the original, officially
20 filed text of the public organic record of the surviving entity when the statement of merger takes
21 effect. It is not necessary, or appropriate, to make any other filing to create the surviving entity.

22
23 Similarly, a statement of qualification for a domestic limited liability partnership created
24 by the merger that is attached to the statement of merger does not need to be filed separately.

25
26 **Subsection (d)**—Organic laws typically require that an initial filing that creates an entity
27 be signed by the person serving as the incorporator or other organizer. This subsection, however,
28 provides that the public organic record of the surviving entity does not need to be signed since
29 the record is attached to a signed record.

30
31 This subsection also permits the public organic record of the surviving entity to omit any
32 provision that is not required to be included in a restatement of the public organic record.
33 Pursuant to this provision, for example, the public organic record of a business corporation
34 created as the surviving entity in the merger would not need to state the name and address of
35 each incorporator even though that information would be required by section 2.02(a)(4) of the
36 Model Business Corporation Act if the corporation were being incorporated outside the context
37 of the merger.

38
39 ~~**Subsection (e)**—A plan of merger that contains all the information required in the~~
40 ~~**statement of merger may be filed instead of the statement of merger. The plan must be in a**~~
41 ~~**record and signed by each merging party.**~~

42
43 **Subsection (f)**—A merger in which the surviving entity is a domestic general partnership
44 takes effect when the statement of merger takes effect. A merger in which the surviving entity is
45 a foreign entity will usually also take effect when the statement of merger takes effect because
46 the practice is to coordinate the filings that need to be made when a merger involves both a

1 domestic entity and also a foreign entity so that the filings in each jurisdiction take effect at the
2 same time.

3
4 However, when the surviving general partnership is a foreign general partnership, it is
5 possible that the filing in the foreign jurisdiction will take effect at a different time. For that
6 reason, this subsection provides that the merger will take effect at the later of: (i) when the
7 statement of merger takes effect; and (ii) when the merger takes effect under the law of the
8 foreign jurisdiction. This rule avoids the possibility that the merger will take effect in this state
9 before it takes effect in the foreign jurisdiction, which would produce the undesirable result that
10 the merging domestic general partnership would cease to appear as an active entity on the
11 records of this state before the records of the foreign jurisdiction reflect a completed merger.

12
13 It is necessary for the filing office to record only the effective date of the statement of
14 merger, and the filing office does not need to be concerned with the effective date of the merger
15 itself. Persons wishing to determine the effective date of a merger involving both a domestic and
16 a foreign entity will be able to do so by consulting the records of the filing offices in each
17 jurisdiction.

18
19 **SECTION 1126. EFFECT OF MERGER.**

20 (a) When a merger becomes effective:

21 (1) the surviving entity continues or comes into existence;

22 (2) each merging entity that is not the surviving entity ceases to exist;

23 (3) all property of each merging entity vests in the surviving entity without
24 transfer, reversion, or impairment;

25 (4) all debts, obligations, and other liabilities of each merging entity are debts,
26 obligations, and other liabilities of the surviving entity;

27 (5) except as otherwise provided by law or the plan of merger, all the rights,
28 privileges, immunities, powers, and purposes of each merging entity vest in the surviving entity;

29 (6) if the surviving entity exists before the merger:

30 (A) all its property continues to be vested in it without transfer, reversion,
31 or impairment;

32 (B) it remains subject to all its debts, obligations, and other liabilities; and

1 (C) all its rights, privileges, immunities, powers, and purposes continue to
2 be vested in it;

3 (7) the name of the surviving entity may be substituted for the name of any
4 merging entity that is a party to any pending action or proceeding;

5 (8) if the surviving entity exists before the merger:

6 (A) its public organic record, if any, is amended as provided in the
7 statement of merger; and

8 (B) its private organic rules that are to be in a record, if any, are amended
9 to the extent provided in the plan of merger;

10 (9) if the surviving entity is created by the merger, its private organic rules
11 become effective and:

12 (A) if it is a filing entity, its public organic record becomes effective; and

13 (B) if it is a limited liability partnership, its statement of qualification
14 becomes effective; and

15 (10) the interests in each merging entity which are to be converted in the merger
16 are converted, and the interest holders of those interests are entitled only to the rights provided to
17 them under the plan of merger and to any appraisal rights they have under Section 1106 and the
18 merging entity's organic law.

19 (b) Except as otherwise provided in the organic law or organic rules of a merging entity,
20 the merger does not give rise to any rights that an interest holder, governor, or third party would
21 have upon a dissolution, liquidation, or winding up of the merging entity.

22 (c) When a merger becomes effective, a person that did not have interest holder liability
23 with respect to any of the merging entities and becomes subject to interest holder liability with

1 respect to a domestic entity as a result of the merger has interest holder liability only to the extent
2 provided by the organic law of that entity and only for those debts, obligations, and other
3 liabilities that are incurred after the merger becomes effective.

4 (d) When a merger becomes effective, the interest holder liability of a person that ceases
5 to hold an interest in a domestic merging partnership with respect to which the person had
6 interest holder liability is subject to the following rules:

7 (1) The merger does not discharge any interest holder liability under this [act] to
8 the extent the interest holder liability was incurred before the merger became effective.

9 (2) The person does not have interest holder liability under this [act] for any debt,
10 obligation, or other liability that is incurred after the merger becomes effective.

11 (3) This [act] continues to apply to the release, collection, or discharge of any
12 interest holder liability preserved under paragraph (1) as if the merger had not occurred and the
13 surviving entity were the domestic merging entity.

14 (4) The person has whatever rights of contribution from any other person as are
15 provided by this [act], law other than this [act], or the partnership agreement of the domestic
16 merging partnership with respect to any interest holder liability preserved under paragraph (1) as
17 if the merger had not occurred.

18 (e) When a merger has become effective, a foreign entity that is the surviving entity may
19 be served with process in this state for the collection and enforcement of any debts, obligations,
20 or other liabilities of a domestic merging partnership as provided in Section 119.

21 (f) When a merger has become effective, the registration to do business in this state of
22 any foreign merging entity that is not the surviving entity is canceled.

23 **Comment**

1 With the exception of Subsections (c) and (d), this section is similar to statutory
2 provisions on the effect of a merger of a corporation with a corporation. *See* MODEL BUS. CORP.
3 ACT § 11.07.
4

5 **Subsection (a)**—This subsection states the general understanding that in a merger the
6 assets and liabilities of the merging entities automatically vest in the surviving entity. The
7 surviving entity becomes the owner of all real and personal property of the merged entities and is
8 subject to all debts, obligations, and liabilities of the merging entities. A merger does not
9 constitute a transfer, assignment, or conveyance of any property held by the merging entities
10 before the merger. A merger also does not give rise to a claim that a contract with a merging
11 entity is no longer in effect on the ground of nonassignability, unless the contract specifically
12 provides that it does not survive a merger. The contract rights that are vested in the surviving
13 entity include the right to enforce subscription agreements for interests and obligations to make
14 capital contributions entered into or incurred before the merger. *See* Section 1103(c) (dealing
15 with the surviving entity's rights in trust obligations of a nonsurviving party in a merger and
16 transactions such as bequests made to a nonsurviving party to a merger that take effect after the
17 merger).
18

19 After a merger has become effective, the law of the surviving entity's **governing**
20 jurisdiction ~~of formation~~ governs the surviving entity. *See* Sections 1103(a) and (b) (modifying
21 the provisions of this section with respect to the effects of a merger to the extent a regulatory law
22 provides otherwise or any of the parties holds property committed to charitable purposes).
23

24 **Subsection (a)(2)**—A merger cannot have the effect of making an interest holder of a
25 domestic merging general partnership subject to interest holder liability for the debts,
26 obligations, or other liabilities of any other person or entity unless the interest holder has signed
27 a separate written consent to become subject to such liability or previously agreed to the
28 effectuation of a transaction having that effect without the interest holder's consent. The
29 partnership agreement cannot change this provision. Section 105(c)(14).
30

31 **Subsection (a)(7)**—All pending proceedings involving either the survivor or a party
32 whose separate existence ceased as a result of the merger are continued. Under this paragraph,
33 the name of the survivor may be, but need not be, substituted in any pending proceeding for the
34 name of a party to the merger whose separate existence ceased as a result of the merger. The
35 substitution may be made whether the survivor is a complainant or a respondent, and may be
36 made at the instance of either the survivor or an opposing party. That substitution has no
37 substantive effect because, whether or not the survivor's name is substituted, the survivor
38 succeeds to the claims, and is subject to the liabilities, of any party to the merger whose separate
39 existence ceased as a result of the merger.
40

41 **Subsection (a)(8)(B)**—The private organic rules of an unincorporated entity typically
42 may be either oral or written. The plan of merger is not required to set forth amendments to oral
43 provisions of the private organic rules of the surviving entity, and thus this provision is limited in
44 scope to amendments to the private organic rules that are to be in a record, if any.
45

46 **Subsection (a)(10)**—For more information on appraisal rights, see Section 1106,

comment.

Subsections (c) and (d)—These subsections set forth rules for two circumstances that typically do not exist in a merger where all the entities involved are corporations. Subsection (c) deals with the situation where an interest holder that does not have vicarious liability for the obligations of a merging entity before the merger has interest holder liability after the merger. An example would be a corporate shareholder who agrees to be the general partner in a limited partnership that is the surviving entity in a merger between a corporation and a limited partnership that is not a limited liability limited partnership. Subsection (d) deals with the situation where an interest holder has vicarious liability for the obligations of one of the merging parties before the merger but ceases to have any interest holder liability for the obligations of the surviving entity after the merger becomes effective. An example would be a general partner in a general partnership that merges into a corporation.

The effects of Subsections (c) and (d) will depend on when a liability is incurred, which is determined by other law. For a discussion of the issue, see the comment to Section 404(c) (The Temporal Nexus – When Claim Incurred).

These subsections apply not only to merging domestic general partnerships but also to any other domestic entity involved in the merger.

Subsection (c)—This subsection sets forth the general rule that an interest holder that was not liable for the liabilities of a merging entity before the merger but will have personal liability for the obligations of the surviving entity after the merger will be personally liable only for the liabilities of a domestic surviving entity that are incurred after the effective date of a merger.

Subsection (d)—This subsection uses “arose” as its term of art, while Section 306(b) and (c) use “incur.” The difference is historical, and no difference in meaning is intended. For a discussion of case law interpreting “incurred,” see Section 306(b), comment.

This subsection provides four rules with respect to an interest holder who ceases to have interest holder liability after the effective date of the merger:

- (1) the interest holder remains personally liable for any obligations that were incurred before the effective date of the merger;
- (2) the interest holder does not have any personal liability for obligations of the surviving entity;
- (3) the pre-existing personal liability of the interest holder is enforced against the interest holder on the same basis as if the merger had not taken place; and
- (4) the interest holder has the same rights of contribution from other interest holders of the merging entity as the interest holder would have had if the merger had not occurred.

1
2 See the comment to Section 1146(d).
3

4 **Subsection (e)**—When a merger has become effective, this subsection provides that a
5 foreign entity that is the surviving entity may be served with process in this state. The
6 proceedings covered by this subsection include a proceeding to enforce the rights of any interest
7 holders of each domestic merging entity who are entitled to and exercise appraisal rights. One of
8 the liabilities that a foreign surviving entity succeeds to is the obligation of a merging entity to
9 pay the amount, if any, to which its interest holders who assert appraisal rights are entitled.
10

11 **[PART] 3**

12 **INTEREST EXCHANGE**

13 **SECTION 1131. INTEREST EXCHANGE AUTHORIZED.**

14 (a) By complying with this [part]:

15 (1) a domestic partnership may acquire all of one or more classes or series of
16 interests of another domestic entity or a foreign entity in exchange for interests, securities,
17 obligations, money, other property, rights to acquire interests or securities, or any combination of
18 the foregoing; or

19 (2) all of one or more classes or series of interests of a domestic partnership may
20 be acquired by another domestic entity or a foreign entity in exchange for interests, securities,
21 obligations, money, other property, rights to acquire interests or securities, or any combination of
22 the foregoing.

23 (b) By complying with the provisions of this [part] applicable to foreign entities, a
24 foreign entity may be the acquiring or acquired entity in an interest exchange under this [part] if
25 the interest exchange is authorized by the law of the foreign entity's **governing** jurisdiction ~~of~~
26 **formation.**

27 **{Source: Issue 1.}**

28 (c) If a protected agreement contains a provision that applies to a merger of a domestic

1 partnership but does not refer to an interest exchange, the provision applies to an interest
2 exchange in which the domestic partnership is the acquired entity as if the interest exchange
3 were a merger until the provision is amended after [~~the effective date of this [act]~~ insert date].

4 **Legislative Note: See the Legislative Note to Section 1101.**

5 ***{Source: Issue 11.}***

6 **Comment**

7 An interest exchange is the same type of transaction as the share exchange provided for
8 in section 11.03 of the Model Business Corporation Act. The effect of an interest exchange is
9 that: (i) the separate existence of the acquired entity is not affected; and (ii) the acquiring entity
10 acquires all of the interests of one or more classes **or series** of the acquired entity. An interest
11 exchange also allows an indirect acquisition through the use of consideration in the exchange
12 that is not provided by the acquiring entity (*e.g.*, consideration from another or related entity).
13

14 Neither share exchanges nor interest exchanges are universally recognized in either
15 corporation or unincorporated entity laws. The effect of an interest exchange can be achieved
16 through a triangular merger in which the acquiring entity forms a new subsidiary and the
17 acquired entity is then merged into the new subsidiary. Part 3 allows the interest exchange to be
18 accomplished directly in a single step, rather than indirectly through the triangular merger route.
19

20 The “series” referenced in Subsection (a) are not the series contemplated by the Uniform
21 Statutory Entity Trust Act §§ 401-405 and some LLC statutes. *See, e.g.*, DEL. CODE ANN. tit. 6, §
22 18-215 (2012); 805 ILL. COMP. STAT. 180/37-40 (2012). Instead, in this context “series” refers to
23 a subset of a class **of interests**, which is a meaning commonly found in corporation law. *See,*
24 *e.g.*, MODEL BUS. CORP. ACT § 6.02. Specific provisions authorizing classes and series are less
25 common in unincorporated entity law but do exist. *See, e.g.*, MINN. STAT. § 322B.155 (2012). In
26 any event, a partnership agreement certainly has the power to create classes and series as
27 contemplated by this section.
28

29 ***{Source: Issue 10.}***

30
31 **Subsection (a)**—For this section to apply, a domestic limited liability partnership must
32 be either the acquiring or acquired entity.
33

34 The acquiring entity is not required to acquire all of the interests in the acquired entity.
35 For example, assume that a general partnership with three classes of partnership interests enters
36 into an interest exchange with an acquiring entity. The acquiring entity need acquire only all of
37 the partnership interests of one or more classes of the partnership interests.
38

39 **Subsection (b)**—This subsection allows a foreign entity to effectuate an interest
40 exchange with a domestic general partnership if the interest exchange is authorized by the

1 organic law of the foreign entity.

2
3 **Subsection (c)**—This subsection deals with rights of parties to protected agreements,
4 Section 1101(30), when an interest exchange takes place. Because the concept of an interest
5 exchange is relatively new, a person contracting with a domestic general partnership or loaning it
6 money who drafted and negotiated special rights relating to the transaction before the enactment
7 of this article should not be charged with the consequences of not having dealt with the concept
8 of an interest exchange in the context of those special rights. Similarly, when the governance
9 structure of an entity has been negotiated before the enactment of this act, the concept of an
10 interest exchange may not have been reflected in any special governance arrangements; for
11 example, special approval rights may have been provided for fundamental transactions, but those
12 rights fail to include language that would make them applicable to an interest exchange.
13

14 Accordingly, this subsection provides a transitional rule that is intended to protect those
15 special rights. If, for example, a general partnership is a party to a contract that provides that the
16 partnership cannot participate in a merger without the consent of the other party to the contract,
17 the requirement to obtain the consent of the other party will apply also to an interest exchange in
18 which the partnership is the acquired entity. If the partnership fails to obtain the consent, the
19 result will be that the other party will have the same rights it would have had if the entity were to
20 participate in a merger without the required consent.
21

22 The transitional rule in this subsection ceases to make sense at the time the provisions of
23 the agreement giving rise to the special rights are first amended after the effective date of this
24 article because at that time the provision may be amended to address expressly an interest
25 exchange. The transitional rule will continue to apply, however, if a provision other than the
26 specific provisions giving rise to the special rights is amended.
27

28 **SECTION 1132. PLAN OF INTEREST EXCHANGE.**

29 (a) A domestic partnership may be the acquired entity in an interest exchange under this
30 [part] by approving a plan of interest exchange. The plan must be in a record and contain:

31 (1) the name of the acquired entity;

32 (2) the name, **governing** jurisdiction ~~of formation~~, and type of entity of the
33 acquiring entity;

34 ***{Source: Issue 1.}***

35 (3) the manner of converting the interests in the acquired entity into interests,
36 securities, obligations, money, other property, rights to acquire interests or securities, or any
37 combination of the foregoing;

(4) any proposed amendments to the partnership agreement that are, or are proposed to be, in a record of the acquired entity;

(5) the other terms and conditions of the interest exchange; and

(6) any other provision required by the law of this state or the partnership agreement of the acquired entity.

(b) In addition to the requirements of subsection (a), a plan of interest exchange may contain any other provision not prohibited by law.

Comment

This section sets forth the requirements for the plan of interest exchange, which must be approved by the acquired entity in accordance with Section 1131. The content of the plan of interest exchange is similar to the content of a plan of merger. *See* Section 1122.

The plan of interest exchange may, but need not, be filed instead of the statement of interest exchange, Section 1135, so long as the plan contains all the information required to be in the statement and is delivered to the filing office for filing after the plan has been adopted and approved. *See* Section 1135(d).

Subsection (a)—The requirements stated in this subsection are mandatory. *See* Section 105(c)(15).

Subsection (a)(3)—Under this paragraph, interest holders in the acquired entity may receive interests or securities of the acquiring entity or of a party other than the acquiring entity, obligations, rights to acquire interests or securities, cash, or other property. *See* the comment to Section 1122(a)(3).

Subsection (b)—This subsection authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

SECTION 1133. APPROVAL OF INTEREST EXCHANGE.

(a) A plan of interest exchange is not effective unless it has been approved:

(1) by all the partners of a domestic acquired partnership entitled to vote on or consent to any matter; and

(2) in a record, by each partner of the domestic acquired partnership that will have interest holder liability for debts, obligations, and other liabilities that are incurred after the

1 interest exchange becomes effective, unless:

2 (A) the partnership agreement of the partnership provides in a record for
3 the approval of an interest exchange or a merger in which some or all its partners become subject
4 to interest holder liability by the affirmative vote or consent of fewer than all the partners; and

5 (B) the partner consented in a record to or voted for that provision of the
6 partnership agreement or became a partner after the adoption of that provision.

7 (b) An interest exchange involving a domestic acquired entity that is not a partnership is
8 not effective unless it is approved by the domestic entity in accordance with its organic law.

9 (c) An interest exchange involving a foreign acquired entity is not effective unless it is
10 approved by the foreign entity in accordance with the law of the foreign entity's **governing**
11 jurisdiction **~~of formation~~**.

12 ***{Source: Issue 1.}***

13 (d) Except as otherwise provided in its organic law or organic rules, the interest holders
14 of the acquiring entity are not required to approve the interest exchange.

15 **Comment**

16 This section sets forth the required approval of an interest exchange. An interest exchange
17 transaction governed by this article requires approval only by the acquired entity, unless the
18 applicable organic law or the organic rules of the acquiring entity otherwise provide, Subsection
19 (d), a condition that rarely exists.

20
21 **Subsection (a)(2)**—For an explanation of this interest holder liability provision, see
22 Section 1123(a)(2), comment.
23

24 **SECTION 1134. AMENDMENT OR ABANDONMENT OF PLAN OF INTEREST** 25 **EXCHANGE.**

26 (a) A plan of interest exchange may be amended only with the consent of each party to
27 the plan, except as otherwise provided in the plan.

1 (b) A domestic acquired partnership may approve an amendment of a plan of interest
2 exchange:

3 (1) in the same manner as the plan was approved, if the plan does not provide for
4 the manner in which it may be amended; or

5 (2) by its partners in the manner provided in the plan, but a partner that was
6 entitled to vote on or consent to approval of the interest exchange is entitled to vote on or consent
7 to any amendment of the plan that will change:

8 (A) the amount or kind of interests, securities, obligations, money, other
9 property, rights to acquire interests or securities, or any combination of the foregoing, to be
10 received by any of the partners of the acquired partnership under the plan;

11 (B) the partnership agreement of the acquired partnership that will be in
12 effect immediately after the interest exchange becomes effective, except for changes that do not
13 require approval of the partners of the acquired partnership under this [act] or the partnership
14 agreement; or

15 (C) any other terms or conditions of the plan, if the change would
16 adversely affect the partner in any material respect.

17 (c) After a plan of interest exchange has been approved and before a statement of interest
18 exchange becomes effective, the plan may be abandoned as provided in the plan. Unless
19 prohibited by the plan, a domestic acquired partnership may abandon the plan in the same
20 manner as the plan was approved.

21 (d) If a plan of interest exchange is abandoned after a statement of interest exchange has
22 been delivered to the [Secretary of State] for filing and before the statement becomes effective, a
23 statement of abandonment, signed by the acquired partnership, must be delivered to the

[Secretary of State] for filing before the statement of interest exchange becomes effective. The statement of abandonment takes effect on filing, and the interest exchange is abandoned and does not become effective. The statement of abandonment must contain:

(1) the name of the acquired partnership;

(2) the date on which the statement of interest exchange was filed by the

[Secretary of State]; and

(3) a statement that the interest exchange has been abandoned in accordance with this section.

Comment

This section parallels provisions in Parts 2 (mergers), 4 (conversions), and 5 (domestications). *See* Sections 1124, 1144, 1154.

SECTION 1135. STATEMENT OF INTEREST EXCHANGE; EFFECTIVE DATE OF INTEREST EXCHANGE.

(a) A statement of interest exchange must be signed by a domestic acquired partnership and delivered to the [Secretary of State] for filing.

(b) A statement of interest exchange must contain:

(1) the name of the acquired partnership;

(2) the name, **governing** jurisdiction **~~of formation~~**, and type of entity of the acquiring entity; and

{Source: Issue 1.}

(3) a statement that the plan of interest exchange was approved by the acquired partnership in accordance with this [part].

(c) In addition to the requirements of subsection (b), a statement of interest exchange may contain any other provision not prohibited by law.

(d) ~~A plan of interest exchange that is signed by a domestic acquired partnership and meets all the requirements of subsection (b) may be delivered to the [Secretary of State] for filing instead of a statement of interest exchange and on filing has the same effect. If a plan of interest exchange is filed as provided in this subsection, references in this [article] to a statement of interest exchange refer to the plan of interest exchange filed under this subsection.~~ (Reserved).

{Source: Issue 16.}

(e) An interest exchange becomes effective when the statement of interest exchange is effective.

Comment

This section applies only when the acquired entity is a domestic general partnership. The filing makes the transaction a matter of public record.

This act has no filing requirement when the only domestic general partnership involved is the acquiring entity.

Subsection (b)—This subsection states the requirements for a statement of interest exchange, which are essentially the same as the requirements for a statement of merger under Section 1125(b).

~~**Subsection (d)**—A plan of interest exchange can be used as a substitute for the statement of interest exchange so long as the plan satisfies the requirements in Subsection (b).~~

Subsection (e)—This subsection applies when the acquiring entity is a domestic general partnership, and Section 114 determines when a record delivered for filing under this act becomes effective. A statement of interest exchange may specify a delayed effective time and date, subject to the ninety-day limit stated in Section 114(3) and (4).

If the acquiring entity is not a domestic general partnership, the effectiveness of the interest exchange will occur when provided by the law of the **governing** jurisdiction ~~of formation~~ of the acquiring entity.

SECTION 1136. EFFECT OF INTEREST EXCHANGE.

(a) When an interest exchange in which the acquired entity is a domestic partnership

1 becomes effective:

2 (1) the interests in the acquired partnership which are the subject of the interest
3 exchange are converted, and the partners holding those interests are entitled only to the rights
4 provided to them under the plan of interest exchange and to any appraisal rights they have under
5 Section 1106;

6 (2) the acquiring entity becomes the interest holder of the interests in the acquired
7 partnership stated in the plan of interest exchange to be acquired by the acquiring entity; and

8 (3) the provisions of the partnership agreement of the acquired partnership that are
9 to be in a record, if any, are amended to the extent provided in the plan of interest exchange.

10 (b) Except as otherwise provided in the partnership agreement of a domestic acquired
11 partnership, the interest exchange does not give rise to any rights that a partner or third party
12 would have upon a dissolution, liquidation, or winding up of the acquired partnership.

13 (c) When an interest exchange becomes effective, a person that did not have interest
14 holder liability with respect to a domestic acquired partnership and becomes subject to interest
15 holder liability with respect to a domestic entity as a result of the interest exchange has interest
16 holder liability only to the extent provided by the organic law of the entity and only for those
17 debts, obligations, and other liabilities that are incurred after the interest exchange becomes
18 effective.

19 (d) When an interest exchange becomes effective, the interest holder liability of a person
20 that ceases to hold an interest in a domestic acquired partnership with respect to which the person
21 had interest holder liability is subject to the following rules:

22 (1) The interest exchange does not discharge any interest holder liability under
23 this [act] to the extent the interest holder liability was incurred before the interest exchange

1 became effective.

2 (2) The person does not have interest holder liability under this [act] for any debt,
3 obligation, or other liability that is incurred after the interest exchange becomes effective.

4 (3) This [act] continues to apply to the release, collection, or discharge of any
5 interest holder liability preserved under paragraph (1) as if the interest exchange had not
6 occurred.

7 (4) The person has whatever rights of contribution from any other person as are
8 provided by this [act], law other than this [act], or the partnership agreement of the domestic
9 acquired partnership with respect to any interest holder liability preserved under paragraph (1) as
10 if the interest exchange had not occurred.

11 **Comment**

12 This section applies only when the *acquired* entity is a domestic general partnership, and
13 this part states no rule for the effect of an interest exchange when the only domestic general
14 partnership involved is the *acquiring* entity. For that situation, other provisions of this act must
15 be consulted, because this act is the organic law of the acquiring entity.

16
17 **Subsection (a)**—In contrast to a merger, an interest exchange does not in and of itself
18 affect the separate existence of the parties, vest in the acquiring entity the assets of the acquired
19 entity, or render the acquiring entity liable for the liabilities of the acquired entity. Thus,
20 Subsection (a) is significantly simpler than Section 1126(a) with respect to the effects of a
21 merger.

22
23 When an interest exchange becomes effective: (i) the interests of the acquired domestic
24 general partnership are exchanged, converted, or canceled as provided in the plan; (ii) the only
25 rights of the former partners and transferees of the acquired partnership whose interests are
26 affected by the interest exchange are those rights related to the exchange, conversion, or
27 cancellation; (iii) the acquiring entity becomes the owner of the acquired partnership's interests
28 as provided in the plan; and (iv) the provisions of the partnership agreement of the acquired
29 partnership that are to be in a record, if any, are amended to the extent provided in the plan of
30 interest exchange.

31
32 **Subsection (c)**—This subsection provides the rule for future interest holder liability
33 pertaining to domestic entities and parallels analogous provisions in Parts 2 (mergers), 4
34 (conversions), and 5 (domestications). *See* the comment to Section 1126.

1 **Subsection (d)**—This subsection provides the rule for past interest holder liability and
2 parallels analogous provisions in Parts 2 (mergers), 4 (conversions), and 5 (domestications). *See*
3 the comments to Sections 1126(d) and 1146(d).
4

1 [PART] 4

2 CONVERSION

3 SECTION 1141. CONVERSION AUTHORIZED.

4 (a) By complying with this [part], a domestic partnership may become:

5 (1) a domestic entity that is a different type of entity; or

6 (2) a foreign entity that is a different type of entity, if the conversion is authorized
7 by the law of the foreign entity's governing jurisdiction ~~of formation~~.

8 (b) By complying with the provisions of this [part] applicable to foreign entities, a
9 foreign entity that is not a foreign partnership may become a domestic partnership if the
10 conversion is authorized by the law of the foreign entity's governing jurisdiction ~~of formation~~.

11 {Source: Issue 1.}

12 (c) If a protected agreement contains a provision that applies to a merger of a domestic
13 partnership but does not refer to a conversion, the provision applies to a conversion of the
14 partnership as if the conversion were a merger until the provision is amended after [~~the effective~~
15 ~~date of this [act]~~ insert date].

16 Legislative Note: See the Legislative Note to Section 1101.

17 {Source: Issue 11.}

18 Comment

19 This part of Article 11 permits an entity to change to a different type of entity. A
20 transaction in which an entity changes its governing jurisdiction ~~of organization~~ but does not
21 change its type is a domestication and is the subject of Part 5.

22
23 **Subsection (a)(2)**—For this provision to apply, this type of conversion must be
24 authorized by the law of the foreign jurisdiction. If this is not the case, it may be possible to
25 achieve the same result by forming an entity of the type desired in the foreign jurisdiction and
26 then merging the domestic entity into the new foreign entity under Part 2 of Article 11.

27
28 **Subsection (b)**—This subsection allows a foreign entity to effectuate a conversion into a

domestic general partnership, but only if the conversion is permitted by the laws of the foreign entity's governing jurisdiction ~~of formation~~. When a foreign entity becomes a domestic general partnership pursuant to this part of Article 11, the effect of the conversion will be as provided in Section 1146. The procedures by which the conversion is approved, however, will be determined by the laws of the foreign entity's governing jurisdiction ~~of formation~~. See Section ~~102(8)~~ 102(7) for the definition of "governing jurisdiction ~~of formation~~."

~~Subsection (c)—For more information on an authorized interest exchange, see Section 1131(c), comment.~~

SECTION 1142. PLAN OF CONVERSION.

(a) A domestic partnership may convert to a different type of entity under this [part] by approving a plan of conversion. The plan must be in a record and contain:

(1) the name of the converting partnership;

(2) the name, governing jurisdiction ~~of formation~~, and type of entity of the converted entity;

{Source: Issue 1.}

(3) the manner of converting the interests in the converting partnership into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) the proposed public organic record of the converted entity if it will be a filing entity;

(5) the full text of the private organic rules of the converted entity which are proposed to be in a record;

(6) the other terms and conditions of the conversion; and

(7) any other provision required by the law of this state or the partnership agreement of the converting partnership.

(b) In addition to the requirements of subsection (a), a plan of conversion may contain

1 any other provision not prohibited by law.

2 **Comment**

3 This section sets forth the requirements for the plan of conversion, which must be
4 approved by the converting entity in accordance with Section 1143. The content of a plan of
5 conversion is similar to the content of a plan of merger. *See* Section 1122.

6
7 **Subsection (a)**—The requirements stated in this subsection are mandatory. *See* Section
8 105(c)(15).
9

10 **Subsection (a)(3)**—Interest holders in the converting entity may receive interests or
11 other securities of the converted entity or of any other person, obligations, rights to acquire
12 interests or other securities, cash, or other property. *See* Sections 1122(a)(3) (mergers),
13 1132(a)(3) (interest exchanges), 1152(a)(3) (domestications).
14

15 **Subsection (b)**—This subsection authorizes the plan to contain any other provision the
16 parties wish to include, unless the provision is prohibited by law.
17

18 **SECTION 1143. APPROVAL OF CONVERSION.**

19 (a) A plan of conversion is not effective unless it has been approved:

20 (1) by a domestic converting partnership, by all the partners of the partnership
21 entitled to vote on or consent to any matter; and

22 (2) in a record, by each partner of a domestic converting partnership which will
23 have interest holder liability for debts, obligations, and other liabilities that are incurred after the
24 conversion becomes effective, unless:

25 (A) the partnership agreement of the partnership provides in a record for
26 the approval of a conversion or a merger in which some or all of its partners become subject to
27 interest holder liability by the affirmative vote or consent of fewer than all the partners; and

28 (B) the partner voted for or consented in a record to that provision of the
29 partnership agreement or became a partner after the adoption of that provision.

30 (b) A conversion involving a domestic converting entity that is not a partnership is not
31 effective unless it is approved by the domestic converting entity in accordance with its organic

1 law.

2 (c) A conversion of a foreign converting entity is not effective unless it is approved by the
3 foreign entity in accordance with the law of the foreign entity's **governing** jurisdiction ~~of~~
4 **formation.**

5 **Comment**

6 **Subsection (a)(1)**—This provision is a default rule, subject to change in the partnership
7 agreement.

8 **Subsection (a)(2)**—This provision is not a default rule. Section 105(c)(14). For an
9 explanation of this interest holder liability provision, see Section 1123(a)(2), comment.

10
11 **SECTION 1144. AMENDMENT OR ABANDONMENT OF PLAN OF**
12 **CONVERSION.**

13 (a) A plan of conversion of a domestic converting partnership may be amended:

14 (1) in the same manner as the plan was approved, if the plan does not provide for
15 the manner in which it may be amended; or

16 (2) by its partners in the manner provided in the plan, but a partner that was
17 entitled to vote on or consent to approval of the conversion is entitled to vote on or consent to
18 any amendment of the plan that will change:

19 (A) the amount or kind of interests, securities, obligations, money, other
20 property, rights to acquire interests or securities, or any combination of the foregoing, to be
21 received by any of the partners of the converting partnership under the plan;

22 (B) the public organic record, if any, or private organic rules of the
23 converted entity which will be in effect immediately after the conversion becomes effective,
24 except for changes that do not require approval of the interest holders of the converted entity
25 under its organic law or organic rules; or

26 (C) any other terms or conditions of the plan, if the change would

adversely affect the partner in any material respect.

(b) After a plan of conversion has been approved by a domestic converting partnership and before a statement of conversion becomes effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic converting partnership may abandon the plan in the same manner as the plan was approved.

(c) If a plan of conversion is abandoned after a statement of conversion has been delivered to the [Secretary of State] for filing and before the statement becomes effective, a statement of abandonment, signed by the converting entity, must be delivered to the [Secretary of State] for filing before the statement of conversion becomes effective. The statement of abandonment takes effect on filing, and the conversion is abandoned and does not become effective. The statement of abandonment must contain:

(1) the name of the converting partnership;

(2) the date on which the statement of conversion was filed by the [Secretary of State]; and

(3) a statement that the conversion has been abandoned in accordance with this section.

Comment

This section parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 5 (domestications). *See* Sections 1124, 1134, 1154.

SECTION 1145. STATEMENT OF CONVERSION; EFFECTIVE DATE OF CONVERSION.

(a) A statement of conversion must be signed by the converting entity and delivered to the [Secretary of State] for filing.

(b) A statement of conversion must contain:

(1) the name, governing jurisdiction ~~of formation~~, and type of entity of the converting entity;

(2) the name, governing jurisdiction ~~of formation~~, and type of entity of the converted entity;

(3) if the converting entity is a domestic partnership, a statement that the plan of conversion was approved in accordance with this [part] or, if the converting entity is a foreign entity, a statement that the conversion was approved by the foreign entity in accordance with the law of its governing jurisdiction ~~of formation~~;

{Source: Issue 1.}

(4) if the converted entity is a domestic filing entity, its public organic record, as an attachment; and

(5) if the converted entity is a domestic limited liability partnership, its statement of qualification, as an attachment.

(c) In addition to the requirements of subsection (b), a statement of conversion may contain any other provision not prohibited by law.

(d) If the converted entity is a domestic entity, its public organic record, if any, must satisfy the requirements of the law of this state, except that the public organic record does not need to be signed.

(e) ~~A plan of conversion that is signed by a domestic converting partnership and meets all the requirements of subsection (b) may be delivered to the [Secretary of State] for filing instead of a statement of conversion and on filing has the same effect. If a plan of conversion is filed as provided in this subsection, references in this [article] to a statement of conversion refer to the plan of conversion filed under this subsection. (Reserved).~~

{Source: Issue 16.}

(f) If the converted entity is a domestic partnership, the conversion becomes effective when the statement of conversion is effective. In all other cases, the conversion becomes effective on the later of:

(1) the date and time provided by the organic law of the converted entity; and

(2) when the statement is effective.

Comment

This section applies regardless of whether a domestic general partnership is the converting or converted entity. A foreign entity seeking to convert to a domestic general partnership must therefore comply with this section.

If either the converting or converted entity is a foreign entity, the organic law of the foreign entity's **governing** jurisdiction must also be consulted.

The filing of a statement of conversion makes the transaction a matter of public record.

Subsection (b)—This subsection sets forth the requirements for a statement of conversion. They are essentially the same as the requirements for a statement of merger in Section 1125.

~~Subsection (e) — A plan of conversion can be used as a substitute for the statement of conversion so long as the plan satisfies the requirements in Subsection (b).~~

Subsection (f)—Section 114 determines when a record delivered for filing under this act becomes effective. A statement of conversion may specify a delayed effective time and date, subject to the ninety-day limit stated in Section 114(3) and (4).

When the statement of conversion has become effective under this subsection, the conversion transaction occurs if the converted entity is a domestic general partnership. A conversion in which the converted entity is a foreign entity will usually also take effect when the statement of conversion takes effect because the best practice will be to coordinate the filings that need to be made when a conversion involves both a domestic entity and also a foreign entity so that the filings in each jurisdiction take effect at the same time.

However, when the converting general partnership is a foreign general partnership, it is possible that the filing in the foreign jurisdiction will take effect at a different time. For that reason, this subsection provides that the conversion will take effect at the later of: (i) when the statement of conversion takes effect; and (ii) when the conversion takes effect under the law of the foreign jurisdiction. This rule avoids the possibility that the conversion will take effect in this

1 state before it takes effect in the foreign jurisdiction, which would produce the undesirable result
2 that the converting domestic general partnership would cease to appear as an active entity on the
3 records of this state before appearing as its active, converted self on the records of the foreign
4 jurisdiction.

5
6 It is necessary for the filing office to record only the effective date of the statement of
7 conversion, and the filing office does not need to be concerned with the effective date of the
8 conversion itself. Persons wishing to determine the effective date of a conversion involving both
9 a domestic general partnership and a foreign entity will be able to do so by consulting the records
10 of the filing offices in each jurisdiction.

11
12 **SECTION 1146. EFFECT OF CONVERSION.**

13 (a) When a conversion becomes effective:

14 (1) the converted entity is:

15 (A) organized under and subject to the organic law of the converted entity;

16 and

17 (B) the same entity without interruption as the converting entity;

18 (2) all property of the converting entity continues to be vested in the converted
19 entity without transfer, reversion, or impairment;

20 (3) all debts, obligations, and other liabilities of the converting entity continue as
21 debts, obligations, and other liabilities of the converted entity;

22 (4) except as otherwise provided by law or the plan of conversion, all the rights,
23 privileges, immunities, powers, and purposes of the converting entity remain in the converted
24 entity;

25 (5) the name of the converted entity may be substituted for the name of the
26 converting entity in any pending action or proceeding;

27 (6) if the converted entity is a limited liability partnership, its statement of
28 qualification becomes effective;

29 (7) the provisions of the partnership agreement of the converted entity which are

1 to be in a record, if any, approved as part of the plan of conversion become effective; and

2 (8) the interests in the converting entity are converted, and the interest holders of
3 the converting entity are entitled only to the rights provided to them under the plan of conversion
4 and to any appraisal rights they have under Section 1106.

5 (b) Except as otherwise provided in the partnership agreement of a domestic converting
6 partnership, the conversion does not give rise to any rights that a partner or third party would
7 have upon a dissolution, liquidation, or winding up of the converting entity.

8 (c) When a conversion becomes effective, a person that did not have interest holder
9 liability with respect to the converting entity and becomes subject to interest holder liability with
10 respect to a domestic entity as a result of the conversion has interest holder liability only to the
11 extent provided by the organic law of the entity and only for those debts, obligations, and other
12 liabilities that are incurred after the conversion becomes effective.

13 (d) When a conversion becomes effective, the interest holder liability of a person that
14 ceases to hold an interest in a domestic converting partnership with respect to which the person
15 had interest holder liability is subject to the following rules:

16 (1) The conversion does not discharge any interest holder liability under this [act]
17 to the extent the interest holder liability was incurred before the conversion became effective.

18 (2) The person does not have interest holder liability under this [act] for any debt,
19 obligation, or other liability that is incurred after the conversion becomes effective.

20 (3) This [act] continues to apply to the release, collection, or discharge of any
21 interest holder liability preserved under paragraph (1) as if the conversion had not occurred.

22 (4) The person has whatever rights of contribution from any other person as are
23 provided by this [act], law other than this [act], or the organic rules of the converting entity with

1 respect to any interest holder liability preserved under paragraph (1) as if the conversion had not
2 occurred.

3 (e) When a conversion has become effective, a foreign entity that is the converted entity
4 may be served with process in this state for the collection and enforcement of any of its debts,
5 obligations, and other liabilities as provided in Section 119.

6 (f) If the converting entity is a registered foreign entity, its registration to do business in
7 this state is canceled when the conversion becomes effective.

8 (g) A conversion does not require the entity to wind up its affairs and does not constitute
9 or cause the dissolution of the entity.

10 **Comment**

11 A converted entity is the same entity as it was before the conversion; the entity just has a
12 different legal form.

13
14 **Subsection (a)**—This subsection states the principal legal effects of a conversion. The
15 converted entity remains the owner of all real and personal property and remains subject to all
16 the liabilities, actual or contingent, of the converted entity. A conversion is not a conveyance,
17 transfer, or assignment. A conversion does not give rise to: (i) claims of reverter or impairment of
18 title based on a prohibited conveyance or transfer; or (ii) to a claim that a contract with the
19 converting entity is no longer in effect on the ground of nonassignability, unless the contract
20 specifically provides that it does not survive a conversion. The contract rights that remain in the
21 converted entity include, without limitation, the right to enforce subscription agreements for
22 interests and obligations to make capital contributions entered into or incurred before the
23 conversion.

24
25 When a conversion becomes effective, the internal affairs of the converting entity are no
26 longer governed by its former organic law but instead by the organic law of the converted entity.
27 As a result, filings that may have been made under the organic law of the converting entity, such
28 as the following, will no longer be effective: a statement of qualification as a limited liability
29 partnership under UPA (1997) (Last Amended 2013) § 901, a statement of partnership authority
30 under Section 303 of that act, a statement of authority under Section of the ULLCA (2006) (Last
31 Amended 2013) § 302, or under Uniform Unincorporated Nonprofit Association Act (2008)
32 (Last Amended 2013) § 7.

33
34 **Subsection (a)(5)**—All pending proceedings involving the converting entity are
35 continued. The name of the converted entity may be, but need not be, substituted in any pending
36 proceeding for the name of the converting entity.

Subsection (c)—This subsection provides the rule for future interest holder liability and parallels provisions in Parts 2 (mergers), 3 (interest exchanges), and 5 (domestications). *See* the comment to Section 1126(c).

Subsection (d)—Subsection (d) provides the rule for past interest holder liability and parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 5 (domestications). *See* the comment to Section 1126(d).

Subsection (e)—For this provision to apply, the converting entity must have been a domestic general partnership. When a domestic general partnership becomes a foreign entity as a result of a conversion, some mechanism is needed to facilitate the enforcement of claims by the creditors and interest holders of the converting partnership. This subsection, which parallels analogous provisions in Parts 2 (mergers) and 5 (domestications), authorizes service of process for all such claims in this state.

Subsection (g)—When a conversion takes effect, the entity continues to exist—simply in a different form. This subsection thus makes clear that the conversion does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

[PART] 5

DOMESTICATION

SECTION 1151. DOMESTICATION AUTHORIZED.

(a) By complying with this [part], a domestic limited liability partnership may become a foreign limited liability partnership if the domestication is authorized by the law of the foreign jurisdiction.

(b) By complying with the provisions of this [part] applicable to foreign limited liability partnerships, a foreign limited liability partnership may become a domestic limited liability partnership if the domestication is authorized by the law of the foreign limited liability partnership's **governing jurisdiction of formation**.

{Source: Issue 1.}

(c) If a protected agreement contains a provision that applies to a merger of a domestic limited liability partnership but does not refer to a domestication, the provision applies to a

domestication of the limited liability partnership as if the domestication were a merger until the provision is amended after [~~the effective date of this [act]~~ insert date].

Legislative Note: See the Legislative Note to Section 1101.

{Source: Issue 11.}

Comment

A domestication authorized by Part 5 of Article 11 differs from a conversion in that a domestication requires that the domesticating entity be the same type of entity as the domesticated entity. In a conversion, by contrast, the converting entity changes its type.

As with a conversion, all rights and privileges, debts, obligations and other liabilities, and actions or proceedings of a domesticating entity remain vested in the domesticated entity. A domestication is not a sale, transfer, assignment, or conveyance and does not give rise to a claim of reverter or impairment of title. *See* the comment to Section 1146(a).

Part 5 of Article 11 governs the legal effect of a foreign limited liability partnership domesticating in this state. On the other hand, the organic laws of the foreign jurisdiction, and not Part 5, will govern the legal effect of most aspects of a domestication of a domestic limited liability partnership in another jurisdiction. In the latter scenario, Part 5 authorizes the domestication of the domestic entity in the foreign jurisdiction, but Part 5 does not create a right in the domestic entity to be received in the foreign jurisdiction. Similarly, this section does not provide a right on the part of a foreign limited liability partnership to become a domestic limited liability partnership if the domestication is not authorized by the laws of the foreign jurisdiction. If the foreign jurisdiction does not authorize a domestication transaction, the same results can be accomplished by forming a new limited liability partnership in this state and merging the existing foreign limited liability partnership into the new domestic limited liability partnership.

Subsection (a)—Unlike the Parts 2 (merger), 3 (interest exchange), and 4 (conversion), Part 5 applies only to limited liability partnerships. However, a non-LLP general partnership that seeks to change its governing law may:

- amend its partnership agreement to specify the governing law of the desired jurisdiction, if the partnership intends to remain non-LLP; or
- deliver to the filing office in the desired jurisdiction a statement of qualification, if the partnership intends not only to change its governing law but also to become an LLP.

Subsection (c)—For the parallel provision pertaining to mergers, see Section 1131(c).

SECTION 1152. PLAN OF DOMESTICATION.

(a) A domestic limited liability partnership may become a foreign limited liability partnership in a domestication by approving a plan of domestication. The plan must be in a

record and contain:

(1) the name of the domesticating limited liability partnership;

(2) the name and **governing** jurisdiction ~~of formation~~ of the domesticated limited liability partnership;

{Source: Issue 1.}

(3) the manner of converting the interests in the domesticating limited liability partnership into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) the proposed statement of qualification of the domesticated limited liability partnership;

(5) the full text of the provisions of the partnership agreement of the domesticated limited liability partnership that are proposed to be in a record;

(6) the other terms and conditions of the domestication; and

(7) any other provision required by the law of this state or the partnership agreement of the domesticating limited liability partnership.

(b) In addition to the requirements of subsection (a), a plan of domestication may contain any other provision not prohibited by law.

Comment

This section sets forth the requirements for the plan of domestication for a domestic limited liability partnership seeking to become a limited liability partnership existing under the law of another jurisdiction. For a foreign limited liability partnership seeking to become a domestic limited liability partnership, the organic law of the foreign limited liability partnership governs the requirements for a plan of domestication. The content of a plan of domestication is similar to the content of a plan of merger. *See* Section 1122.

Subsection (a)—The requirements stated in this subsection are mandatory. *See* Section 105(c)(15).

1 **Subsection (a)(3)**—Interest holders in the domesticating limited liability partnership may
2 receive interests or other securities of the domesticated limited liability partnership or any other
3 entity, obligations, rights to acquire interests or other securities, cash, or other property. *See* the
4 comment to Section 1122(a)(3).
5

6 **Subsection (b)**—This subsection authorizes the plan to contain any other provision the
7 parties wish to include, unless the provision is prohibited by law.
8

9 **SECTION 1153. APPROVAL OF DOMESTICATION.**

10 (a) A plan of domestication of a domestic domesticating limited liability partnership is
11 not effective unless it has been approved:

12 (1) by all the partners entitled to vote on or consent to any matter; and

13 (2) in a record, by each partner that will have interest holder liability for debts,
14 obligations, and other liabilities that are incurred after the domestication becomes effective,
15 unless:

16 (A) the partnership agreement of the domesticating partnership in a record
17 provides for the approval of a domestication or merger in which some or all of its partners
18 become subject to interest holder liability by the affirmative vote or consent of fewer than all the
19 partners; and

20 (B) the partner voted for or consented in a record to that provision of the
21 partnership agreement or became a partner after the adoption of that provision.

22 (b) A domestication of a foreign domesticating limited liability partnership is not
23 effective unless it is approved in accordance with the law of the foreign limited liability
24 partnership's **governing** jurisdiction ~~of formation~~.

25 **{Source: Issue 1.}**

26 **Comment**

27 **Subsection (a)(1)**—This provision is a default rule, subject to change in the partnership
28 agreement.

1
2 **Subsection (a)(2)**—This provision is mandatory. Section 105(c)(14). For an explanation
3 of the provision, see Section 1123(a)(2), comment.
4

5 **Subsection (b)**—In the case of a foreign limited liability partnership that is domesticating
6 in this state, this subsection provides that the required approval is determined by the laws of the
7 foreign limited liability partnership’s **governing** jurisdiction ~~of formation~~ (which in this context
8 means the jurisdiction in which the foreign LLP’s statement of qualification is filed).
9

10 **SECTION 1154. AMENDMENT OR ABANDONMENT OF PLAN OF**
11 **DOMESTICATION.**

12 (a) A plan of domestication of a domestic domesticating limited liability partnership may
13 be amended:

14 (1) in the same manner as the plan was approved, if the plan does not provide for
15 the manner in which it may be amended; or

16 (2) by its partners in the manner provided in the plan, but a partner that was
17 entitled to vote on or consent to approval of the domestication is entitled to vote on or consent to
18 any amendment of the plan that will change:

19 (A) the amount or kind of interests, securities, obligations, money, other
20 property, rights to acquire interests or securities, or any combination of the foregoing, to be
21 received by any of the partners of the domesticating limited liability partnership under the plan;

22 (B) the partnership agreement of the domesticated limited liability
23 partnership that will be in effect immediately after the domestication becomes effective, except
24 for changes that do not require approval of the partners of the domesticated limited liability
25 partnership under its organic law or partnership agreement; or

26 (C) any other terms or conditions of the plan, if the change would
27 adversely affect the partner in any material respect.

28 (b) After a plan of domestication has been approved by a domestic domesticating limited

1 liability partnership and before a statement of domestication becomes effective, the plan may be
2 abandoned as provided in the plan. Unless prohibited by the plan, a domestic domesticating
3 limited liability partnership may abandon the plan in the same manner as the plan was approved.

4 (c) If a plan of domestication is abandoned after a statement of domestication has been
5 delivered to the [Secretary of State] for filing and before the statement becomes effective, a
6 statement of abandonment, signed by the domesticating limited liability partnership, must be
7 delivered to the [Secretary of State] for filing before the statement of domestication becomes
8 effective. The statement of abandonment takes effect on filing, and the domestication is
9 abandoned and does not become effective. The statement of abandonment must contain:

- 10 (1) the name of the domesticating limited liability partnership;
11 (2) the date on which the statement of domestication was filed by the [Secretary
12 of State]; and
13 (3) a statement that the domestication has been abandoned in accordance with this
14 section.

15 **Comment**

16 This section parallels provisions in Parts 2 (mergers), 3 (interest exchanges), and 4
17 (conversions). *See* Sections 1124 (mergers), 1134 (interest exchanges), 1144 (conversions).

18 **SECTION 1155. STATEMENT OF DOMESTICATION; EFFECTIVE DATE OF** 20 **DOMESTICATION.**

21 (a) A statement of domestication must be signed by the domesticating limited liability
22 partnership and delivered to the [Secretary of State] for filing.

23 (b) A statement of domestication must contain:

- 24 (1) the name and **governing** jurisdiction ~~of formation~~ of the domesticating
25 limited liability partnership;

1 (2) the name and governing jurisdiction ~~of formation~~ of the domesticated limited
2 liability partnership;

3 (3) if the domesticating limited liability partnership is a domestic limited liability
4 partnership, a statement that the plan of domestication was approved in accordance with this
5 [part] or, if the domesticating limited liability partnership is a foreign limited liability
6 partnership, a statement that the domestication was approved in accordance with the law of its
7 governing jurisdiction ~~of formation~~; and

8 {Source: Issue 1.}

9 (4) the statement of qualification of the domesticated limited liability partnership,
10 as an attachment.

11 (c) In addition to the requirements of subsection (b), a statement of domestication may
12 contain any other provision not prohibited by law.

13 (d) The statement of qualification of a domesticated domestic limited liability partnership
14 must satisfy the requirements of this [act], but the statement does not need to be signed.

15 (e) ~~A plan of domestication that is signed by a domesticating domestic limited~~
16 ~~liability partnership and meets all the requirements of subsection (b) may be delivered to~~
17 ~~the [Secretary of State] for filing instead of a statement of domestication and on filing has~~
18 ~~the same effect. If a plan of domestication is filed as provided in this subsection, references~~
19 ~~in this [article] to a statement of domestication refer to the plan of domestication filed~~
20 ~~under this subsection. (Reserved).~~

21 {Source: Issue 16.}

22 (f) If the domesticated entity is a domestic partnership, the domestication becomes
23 effective when the statement of domestication is effective. If the domesticated entity is a foreign

partnership, the domestication becomes effective on the later of:

(1) the date and time provided in the organic law of the domesticated entity; and

(2) when the statement is effective.

Comment

Regardless of whether a domestic limited liability partnership is the domesticating or domesticated entity:

- This section applies and, therefore, a foreign limited liability partnership seeking to domesticate and thereby become a domestic LLP must comply with this section.
- The organic law of the foreign LLP's **governing** jurisdiction must also be consulted.

The filing of a statement of domestication makes the transaction a matter of public record.

Subsection (b)—This subsection sets forth the requirements for a statement of domestication. They are essentially the same as the requirements for a statement of merger in Section 1125.

~~**Subsection (c)**—A plan of domestication can be used as a substitute for the statement of domestication so long as the plan satisfies the requirements in Subsection (b).~~

Subsection (f)—Section 114 determines when a record delivered for filing under this act becomes effective. A statement of domestication may specify a delayed effective time and date, subject to the ninety-day limit stated in Section 114(3) and (4).

When the statement of domestication becomes effective under this subsection, the domestication transaction occurs if the domesticated entity is a domestic limited liability partnership. A domestication in which the domesticated entity is a foreign limited liability partnership will usually also take effect when the statement of domestication takes effect because the best practice will be to coordinate the filings that need to be made in each jurisdiction so that they take effect at the same time.

However, when the domesticated general partnership is a foreign general partnership, it is possible that the filing in the foreign jurisdiction will take effect at a different time. For that reason, this subsection provides that the domestication will take effect at the later of: (i) when the statement of domestication takes effect; and (ii) when the domestication takes effect under the law of the foreign jurisdiction. This rule avoids the possibility that the domestication will take effect in this state before it takes effect in the foreign jurisdiction, which would produce the undesirable result that the domesticating domestic general partnership would cease to appear as an active entity on the records of this state before appearing as its active, domesticated self on the records of the foreign jurisdiction.

1 It is necessary for the filing office to record only the effective date of the statement of
2 domestication, and the filing office does not need to be concerned with the effective date of the
3 domestication itself. Persons wishing to determine the effective date of a domestication will be
4 able to do so by consulting the records of the filing offices in each jurisdiction.
5

6 **SECTION 1156. EFFECT OF DOMESTICATION.**

7 (a) When a domestication becomes effective:

8 (1) the domesticated entity is:

9 (A) organized under and subject to the organic law of the domesticated
10 entity; and

11 (B) the same entity without interruption as the domesticating entity;

12 (2) all property of the domesticating entity continues to be vested in the
13 domesticated entity without transfer, reversion, or impairment;

14 (3) all debts, obligations, and other liabilities of the domesticating entity continue
15 as debts, obligations, and other liabilities of the domesticated entity;

16 (4) except as otherwise provided by law or the plan of domestication, all the
17 rights, privileges, immunities, powers, and purposes of the domesticating entity remain in the
18 domesticated entity;

19 (5) the name of the domesticated entity may be substituted for the name of the
20 domesticating entity in any pending action or proceeding;

21 (6) the statement of qualification of the domesticated entity becomes effective;

22 (7) the provisions of the partnership agreement of the domesticated entity that are
23 to be in a record, if any, approved as part of the plan of domestication become effective; and

24 (8) the interests in the domesticating entity are converted to the extent and as
25 approved in connection with the domestication, and the partners of the domesticating entity are
26 entitled only to the rights provided to them under the plan of domestication and to any appraisal

1 rights they have under Section 1106.

2 (b) Except as otherwise provided in the organic law or partnership agreement of the
3 domesticating limited liability partnership, the domestication does not give rise to any rights that
4 a partner or third party would otherwise have upon a dissolution, liquidation, or winding up of
5 the domesticating partnership.

6 (c) When a domestication becomes effective, a person that did not have interest holder
7 liability with respect to the domesticating limited liability partnership and becomes subject to
8 interest holder liability with respect to a domestic limited liability partnership as a result of the
9 domestication has interest holder liability only to the extent provided by this [act] and only for
10 those debts, obligations, and other liabilities that are incurred after the domestication becomes
11 effective.

12 (d) When a domestication becomes effective, the interest holder liability of a person that
13 ceases to hold an interest in a domestic domesticating limited liability partnership with respect to
14 which the person had interest holder liability is subject to the following rules:

15 (1) The domestication does not discharge any interest holder liability under this
16 [act] to the extent the interest holder liability was incurred before the domestication became
17 effective.

18 (2) A person does not have interest holder liability under this [act] for any debt,
19 obligation, or other liability that is incurred after the domestication becomes effective.

20 (3) This [act] continues to apply to the release, collection, or discharge of any
21 interest holder liability preserved under paragraph (1) as if the domestication had not occurred.

22 (4) A person has whatever rights of contribution from any other person as are
23 provided by this [act], law other than this [act], or the partnership agreement of the domestic

domesticating limited liability partnership with respect to any interest holder liability preserved under paragraph (1) as if the domestication had not occurred.

(e) When a domestication becomes effective, a foreign limited liability partnership that is the domesticated partnership may be served with process in this state for the collection and enforcement of any of its debts, obligations, and other liabilities as provided in Section 119.

(f) If the domesticating limited liability partnership is a registered foreign entity, the registration of the partnership is canceled when the domestication becomes effective.

(g) A domestication does not require a domestic domesticating limited liability partnership to wind up its business and does not constitute or cause the dissolution of the partnership.

Comment

Subsection (a)(1)—The domesticated entity is the same entity as the domesticating entity; it has merely changed its **governing** jurisdiction ~~of formation~~.

Subsection (a)(2)—A domestication is not a sale, conveyance, transfer, or assignment and does not give rise to claims of reverter or impairment of title that may be based on a prohibition on transfer, assignment, or conveyance.

Subsection (a)(4)—All pending proceedings involving the domesticating entity are continued. The name of the domesticated entity may be, but need not be, substituted in any pending proceeding for the name of the domesticating entity.

Subsection (a)(8)—The interests of the domesticating limited liability partnership are reclassified into whatever rights were negotiated in the domestication and the partners and transferees of the domesticating LLP are entitled only to those rights. Paragraph 8, on its face, allows for certain partners of the domesticating LLP to be entitled to a continuing equity interest in the domesticated LLP whereas other partners of the domesticating LLP may be cashed out as a result of the transaction.

Subsection (c)—This subsection provides the rule for future interest holder liability and parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 4 (conversions). *See the comment to Section 1126(c).*

Subsection (d)—This subsection provides the rule for past interest holder liability and parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 4 (conversions).

1 *See* the comments to Sections 1126(d) and 1146(d).

2
3 **Subsection (e)**—When a domestic domesticating limited liability partnership becomes a
4 foreign LLP as a result of a domestication, some mechanism is needed to facilitate the
5 enforcement of claims by the creditors and interest holders of the domesticating LLP. This
6 subsection, which parallels analogous provisions in Parts 2 (mergers) and 4 (conversions),
7 authorizes service of process for all such claims in this state.
8

9 **Subsection (g)**—When a domestication takes effect, the entity continues to exist—
10 simply as a domestic entity under the laws of a different state. This subsection thus makes clear
11 that the domestication does not require the limited liability partnership to wind up its affairs and
12 does not constitute or cause the dissolution of the limited liability partnership.
13

14 [ARTICLE] 12

15 MISCELLANEOUS PROVISIONS

16 **SECTION 1201. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
17 applying and construing this uniform act, consideration must be given to the need to promote
18 uniformity of the law with respect to its subject matter among states that enact it.

19 **SECTION 1202. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**
20 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the
21 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but
22 does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
23 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
24 U.S.C. Section 7003(b).
25

26 **Comment**

27 This section responds to specific language of the Electronic Signatures in Global and
28 National Commerce Act and is designed to avoid preemption of state law under that federal
29 legislation.
30

31 **SECTION 1203. SAVINGS CLAUSE.** This [act] does not affect an action
32 commenced, proceeding brought, or right accrued before [the effective date of this [act]].

1 **Comment**

2 This section continues prior law after the effective date of this act with respect to rights
3 accrued and proceedings. But for this section, the new law of this act would displace the old laws
4 in some circumstances. The power of a new act to displace the old statute with respect to conduct
5 occurring before the new act’s enactment is substantial. Millard H. Ruud, *The Savings Clause—*
6 *Some Problems in Construction and Drafting*, 33 TEX. L. REV. 285, 286–93 (1955). A court
7 generally applies the law that exists at the time it acts.
8

9 Eventually, this act will apply all to pre-existing general partnerships—whether by choice
10 under Section 110(a)(2) (permitting an early opt-in), or without choice on the “all-inclusive
11 date.” Section 110(b). In this context, the phrase “before [the effective date of this [act]]” should
12 be understood as referring to the date upon which this act becomes applicable to the particular
13 general partnership at issue.
14

15 **[SECTION 1204. SEVERABILITY CLAUSE.** If any provision of this [act] or its
16 application to any person or circumstance is held invalid, the invalidity does not affect other
17 provisions or applications of this [act] which can be given effect without the invalid provision or
18 application, and to this end the provisions of this [act] are severable.]

19 ***Legislative Note:*** *Include this section only if this state lacks a general severability statute or*
20 *decision by the highest court of this state stating a general rule of severability.*
21

22 **SECTION 1205. REPEALS.** The following are repealed:

23 (1) [the state partnership act as [amended, and as] in effect immediately before [the
24 effective date of this [act]]].

25 (2)

26 (3)

27 **SECTION 1206. EFFECTIVE DATE.** This [act] takes effect

28 **Comment**

29 For the effect of the act’s effective date on pre-existing partnerships, see Section 110.