

ANALYSIS OF 2004 AMENDMENTS TO THE DELAWARE REVISED UNIFORM PARTNERSHIP ACT

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Introduction

The Delaware Revised Uniform Partnership Act, 6 *Del. C.* § 15-101 *et seq.* (the “Act”), was amended in 2004, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 2004 amendments to the Act were contained in Delaware State Senate Bill No. 274, and became effective August 1, 2004. *See* 74 *Del. Laws*, c. 266. Senate Bill No. 274 amended provisions of the Act concerning (among other things): the partnership agreement; merger and consolidation; transfer and domestication; conversion; and duties (including fiduciary duties) and exculpation.

Partnership Agreement [§§ 15-101 and 15-407]. Amendments enacted in 2004 to Sections 15-101 and 15-407 of the Act confirm the flexibility permitted in drafting a partnership agreement. Section 15-101(12) was amended to provide that a partnership agreement may provide rights to any person, including a person who is not a party to the partnership agreement, to the extent set forth therein. Also, subsection (e) of Section 15-407, as amended in 2004, states that if a partnership agreement provides for the manner in which it may be amended (including by requiring the approval of a person who is not a party to the partnership agreement or the satisfaction of conditions), it may be amended only in that manner or as otherwise permitted by law; subsection (e) now provides also, however, that the approval of any person may be waived by such person and that any such conditions may be waived by all persons for whose benefit such conditions were intended.

Merger and Consolidation [§ 15-902]. Senate Bill No. 274 added language to Section 15-902(b) of the Act to provide that, in connection with a merger or consolidation thereunder, rights or securities of or interests in a Delaware partnership or “other business entity” that is a constituent party to the merger or consolidation not only may be exchanged for or converted into cash, property, or rights or securities of or interests in the surviving or resulting partnership, the surviving or resulting other business entity, or another Delaware partnership or other business entity, but also may be cancelled. This amendment confirms the flexibility permitted in the Act regarding a merger or consolidation. Further amendments to Section 15-902 that became effective in 2004 permit a change of the name of a surviving Delaware partnership to be effected by a certificate of merger. A new paragraph was added to Section 15-902(c) to provide that, in the case of a merger in which a domestic partnership is the surviving entity, the certificate of merger filed under Section 15-902(c) may set forth such amendments to the statement of partnership existence of the surviving partnership (and in the case of a surviving partnership that is a limited liability partnership, to the statement of qualification of such partnership) to change its name as are desired to be effected by the merger. Under newly amended Section 15-902(f), a

certificate of merger that sets forth any such amendment in accordance with Section 15-902(c) shall be deemed to be an amendment to the statement of partnership existence (and if applicable to the statement of qualification) of the partnership, and the partnership shall not be required to take any further action to amend its statement of partnership existence (or if applicable its statement of qualification) under Section 15-105 of the Act with respect to such amendments set forth in the certificate of merger.

Transfer and Domestication [§§ 15-904 and 15-905]. The 2004 amendments to Sections 15-904 and 15-905 of the Act confirm the flexibility permitted in the Act regarding the domestication of a “non-United States entity” as a Delaware partnership and regarding a partnership's transfer or domestication out of Delaware. Section 15-904(j), as amended, provides that, in connection with the domestication of a non-United States entity as a Delaware partnership under Section 15-904, rights or securities of or interests in such non-United States entity not only may be exchanged for or converted into cash, property, or rights or securities of or interests in such Delaware partnership, another Delaware partnership, or another entity, but also may be cancelled. Similarly, Section 15-905(f) was amended by Senate Bill No. 274 to confirm that rights or securities of or interests in a Delaware partnership may be cancelled in connection with the transfer or domestication of such partnership to or in another jurisdiction pursuant to Section 15-905. Also, a new subsection (g) was added to Section 15-905, confirming the treatment under Delaware law of a partnership that has transferred or domesticated out of the State of Delaware. Among other things, this new subsection provides that, for all purposes of the laws of the State of Delaware, when a partnership has transferred or domesticated out of the State of Delaware pursuant to Section 15-905, the transferred or domesticated business form shall be deemed to be the same entity as the partnership, the rights, privileges, powers, and property of the partnership that has transferred or domesticated shall remain vested in the transferred or domesticated business form, the debts, liabilities, and duties of such partnership shall remain attached to such transferred or domesticated business form, and the rights, privileges, powers and interests in property of such partnership, as well as its debts, liabilities and duties, shall not be deemed, as a consequence of the transfer or domestication, to have been transferred to such transferred or domesticated business form.

Conversion [§§ 15-901 and 15-903]. Section 15-901(i) of the Act, as amended by Senate Bill No. 274, confirms the flexibility permitted in the Act regarding the conversion of an “other entity” to a Delaware partnership. Section 15-901(i) now provides that in connection with such a conversion under Section 15-901, rights or securities of or interests in such other entity not only may be exchanged for or converted into cash, property, or rights or securities of or interests in such Delaware partnership or another Delaware partnership or other entity, but also may be cancelled. A corresponding 2004 amendment to Section 15-903(d) confirms the flexibility permitted in the Act regarding the conversion of a Delaware partnership, providing that rights or securities of or interests in such partnership may be cancelled in connection with such a conversion. Moreover, a new subsection was added to Section 15-903 in 2004, confirming the treatment under Delaware law of a Delaware partnership that has converted to another business form. New subsection (h) of Section 15-903 provides among other things that, for all purposes of the laws of the State of Delaware, when a partnership has converted to another business form pursuant to Section 15-903, the other business form shall be deemed to be the

same entity as such partnership, the rights, privileges, powers, and property of the partnership that has converted shall remain vested in the other business form to which such partnership has converted, the debts, liabilities, and duties of such partnership shall remain attached to such other business form, and the rights, privileges, powers and interests in property of such partnership, as well as its debts, liabilities and duties, shall not be deemed, as a consequence of the conversion, to have been transferred to such other business form.

Duties and Exculpation [§§ 15-103 and 15-404]. Amendments to Sections 15-103 and 15-404 of the Act enacted in 2004 confirm that duties, including fiduciary duties, may be expanded, restricted, or eliminated in a partnership agreement, except that a partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing. Specifically, Section 15-103(b) as amended states expressly that the partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing. (A conforming amendment, namely, the deletion of existing subsection (d) thereof, was made to Section 15-404.) Also, Section 15-103(e) as amended states that a partner or other person shall not be liable to the partnership or to another partner or to another person that is a party to or is otherwise bound by the partnership agreement, for breach of fiduciary duty, for the partner's or other person's good faith reliance on the provisions of the partnership agreement. Further, a new subsection (f) was added to Section 15-103. This new subsection provides that a partnership agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to the partnership or to another partner or to another person that is a party to or is otherwise bound by the partnership agreement; subsection (f) also states, however, that a partnership agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.