

**ANALYSIS OF 2004 AMENDMENTS TO THE
DELAWARE REVISED UNIFORM
LIMITED PARTNERSHIP ACT**

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Introduction

The Delaware Revised Uniform Limited Partnership Act, 6 Del. C. § 17-101 et seq. (the "LP 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 LP Act were contained in Delaware State Senate Bill No. 273, and became effective August 1, 2004. *See* 74 Del. Laws, c. 265. Senate Bill No. 273 amended provisions of the LP Act concerning (among other things): the partnership agreement; merger and consolidation; transfer and domestication; conversion; series; protection of limited partners; and duties (including fiduciary duties) and exculpation.

Partnership Agreement [§§ 17-101 and 17-302]. Amendments to Sections 17-101 and 17-302 of the LP Act, set forth in Senate Bill No. 273, confirm the flexibility permitted in drafting a partnership agreement. Section 17-101(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. Further, subsection (f) of Section 17-302, 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 (provided 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 [§ 17-211]. **Senate Bill No. 273** added language to Section 17-211(b) of the LP Act to provide that, in connection with a merger or consolidation thereunder, rights or securities of or interests in a Delaware limited 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 limited partnership, the surviving or resulting other business entity, or another Delaware limited partnership or other business entity, but also may be cancelled. This amendment confirms the flexibility permitted in the LP Act regarding a merger or consolidation. Additional amendments to Section 17-211 enacted in 2004 permit a change of the name of a surviving Delaware limited partnership to be effected by a certificate of merger. A new paragraph was added to Section 17-211(c) to provide that, in the case of a merger in which a Delaware limited partnership is the surviving entity, the certificate of merger filed under that Section may set forth such amendments to the certificate of limited partnership of such surviving limited partnership (and in the case of a surviving Delaware limited partnership that is a limited liability limited partnership, to the statement of qualification of such surviving limited partnership filed under Section 15-1001 of the Delaware Revised Uniform Partnership Act) to change its name as are desired to be effected

by the merger. Under newly amended Section 17-211(f), a certificate of merger that sets forth any such amendment in accordance with Section 17-211(c) shall be deemed to be an amendment to the certificate of limited partnership (and if applicable to the statement of qualification) of the limited partnership, and the limited partnership shall not be required to take any further action to amend its certificate of limited partnership under Section 17-202 of the LP Act (or if applicable its statement of qualification under Section 15-105 of the Delaware Revised Uniform Partnership Act) with respect to such amendments set forth in the certificate of merger.

Transfer and Domestication [§§ 17-215 and 17-216]. The 2004 amendments to Sections 17-215 and 17-216 of the LP Act confirm the flexibility permitted in the LP Act regarding the domestication of a “non-United States entity” as a Delaware limited partnership and regarding the transfer or domestication out of Delaware of a limited partnership. Section 17-215(j), as amended, provides that, in connection with the domestication of a non-United States entity as a Delaware limited partnership under Section 17-215, 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 limited partnership, another Delaware limited partnership, or another entity, but also may be cancelled. Similarly, Section 17-216(f) was amended by Senate Bill No. 273 to confirm that rights or securities of or interests in a Delaware limited partnership may be cancelled in connection with a transfer or domestication of such limited partnership to or in another jurisdiction pursuant to Section 17-216. Also, a new subsection (g) was added to Section 17-216, confirming the treatment under Delaware law of a limited 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 limited partnership has transferred or domesticated out of the State of Delaware pursuant to Section 17-216, the transferred or domesticated business form shall be deemed to be the same entity as the limited partnership, the rights, privileges, powers, and property of the limited partnership that has transferred or domesticated shall remain vested in the transferred or domesticated business form, the debts, liabilities, and duties of such limited partnership shall remain attached to such transferred or domesticated business form, and the rights, privileges, powers and interests in property of such limited partnership, as well as its debts, liabilities and duties, shall not be deemed, as a consequence of such transfer or domestication, to have been transferred to such transferred or domesticated business form.

Conversion [§§ 17-217 and 17-219]. Section 17-217(i) of the LP Act, as amended by Senate Bill No. 273, confirms the flexibility permitted in the LP Act regarding the conversion of an “other entity” to a Delaware limited partnership. Section 17-217(i) now provides that in connection with the conversion of an other entity to a Delaware limited partnership under Section 17-217, 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 limited partnership or another Delaware limited partnership or other entity, but also may be cancelled. Similarly, Section 17-219(d), as amended in 2004, confirms the flexibility permitted in the LP Act regarding the conversion of a Delaware limited partnership, providing that, in connection with such a conversion, rights or securities of or interests in such limited partnership may be cancelled. Further, a new subsection added to Section 17-219 in 2004 confirms the treatment under Delaware law of a limited partnership that has converted to another business form. New subsection (h) of Section 17-219 provides among other things that, for all purposes

of the laws of the State of Delaware, when a limited partnership has converted to another business form pursuant to Section 17-219, the other business form shall be deemed to be the same entity as the limited partnership, the rights, privileges, powers, and property of the limited partnership that has converted shall remain vested in the other business form to which such limited partnership has converted, the debts, liabilities, and duties of such limited partnership shall remain attached to such other business form, and the rights, privileges, powers and interests in property of such limited 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.

Series [§ 17-218]. Section 17-218(b) of the LP Act, as amended by Senate Bill No. 273, confirms the manner in which assets associated with a series may be held and accounted for pursuant to Section 17-218, namely, in separate and distinct records maintained for such series.

Protection of Limited Partners [§ 17-303]. Senate Bill No. 273 amended Section 17-303 of the LP Act, specifically, subsections (b)(1) and (b)(9) thereof, to expand the protections of limited partners consistently with the policy of that Section.

Duties and Exculpation [§ 17-1101]. The 2004 amendments to Section 17-1101 of the LP Act amended subsection (d) in its entirety, re-designated the existing subsection (e) as subsection (g), and inserted new subsections (e) and (f). As amended by Senate Bill No. 273, subsection (d) clarifies that duties, including fiduciary duties, of a partner or other person to a limited partnership or to another partner or to another person that is a party to or otherwise bound by a partnership agreement, may be eliminated, as well as expanded or restricted, by provisions in the partnership agreement. Subsection (d) as amended, however, also confirms that a partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing. New subsection (e) of Section 17-1101 clarifies that the default exculpation provision in the LP Act applies only with respect to breach of fiduciary duty. It states that, unless otherwise provided in the partnership agreement, a partner or other person shall not be liable to the limited 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. New subsection (f) confirms the flexibility permitted in the LP Act regarding exculpation, stating 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 limited partnership or to another partner or to another person that is a party to or is otherwise bound by the partnership agreement; subsection (f) additionally provides, 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.