LIMITED PARTNERSHIPS—EXPANDED OPPORTUNITIES UNDER DELAWARE’S 1988 REVISED UNIFORM LIMITED PARTNERSHIP ACT

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In 1988, Delaware adopted significant changes to its Revised Uniform Limited Partnership Act (the "1988 Delaware Act") which reflect Delaware’s continuing role in the conceptual and practical modernization of the law of limited partnerships.

Amendments made in 1985 to the Delaware Revised Uniform Limited Partnership Act (the "1985 Delaware Act") had substantially clarified the prior law, codified practices that had developed in the limited partnership area, and increased flexibility in the structuring of limited partnerships. As a result, the 1985 Delaware Act in many respects provided a clearer and more workable statute for the drafters of limited partnership agreements to work with than the 1985 Revised Uniform Limited Partnership Act (the "1985 RULPA") approved later that same year by the National Conference of Commissioners on Uniform State Laws.

The 1988 amendments, which became effective September 1, 1988, provide still greater clarity, flexibility, and protection from liability for limited partners. For example, the 1988 Delaware Act facilitates the issuance and transfer of limited partner interests in publicly-traded limited partnerships by permitting persons, including assignees, to be admitted as limited partners without signature. Partners in research and development and venture capital partnerships can structure smoother exits by taking advantage of the revised

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4. Id. at 573.
merger and consolidation provisions allowing limited partnerships to merge into or consolidate with corporations, trusts, or other business entities, as well as other limited partnerships. Persons drafting agreements for Delaware limited partnerships will appreciate the clarification and expansion of the activities a limited partner may engage in without incurring liability as a general partner, the new limitations on limited partner liability for return of distributions, and various other administrative changes made by the 1988 amendments.

In addition to amending its limited partnership laws, Delaware also adopted amendments to its General Corporation Law to coordinate partnership and corporate name reservation and registration and to permit for the first time the merger or consolidation of Delaware corporations with domestic or foreign limited partnerships.

This article discusses the significant changes in Delaware limited partnership law made by the 1988 amendments and compares them to relevant provisions in the 1985 RULPA and to the limited partnership laws of certain other states.

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7. 66 Del. Laws ch. 352, §§ 1, 12 (codified at Del. Code Ann. tit. 6, §§ 102(a)(1), 371(c) (Supp. 1988)).
I. ORGANIZATIONAL CHANGES

A. Certificates and Agreements

The certificate of limited partnership filed in the state of organization and the partnership agreement have together been the traditional organizational documents of limited partnerships. The 1985 Delaware Act introduced significant changes in the nature of these documents that reduced administrative burdens and permitted greater contractual flexibility in the organization of the partnership.9 Additional changes made by the 1988 Delaware Act in certificate

9. See Basile, supra note 3, at 573-75.
requirements and in the concept of the partnership agreement promote the same objectives.

1. The Partnership Agreement

The 1988 amendments make it easier to enter into and to change the partnership agreement, and thereby facilitate the transfer of partnership interests and permit greater flexibility in the arrangements among the partners.

The definition of "partnership agreement" in the 1988 Delaware Act has been revised to allow a written partnership agreement to contain provisions for the admission of a limited partner, or the recognition of the assignment of a partnership interest or of other rights or powers of a limited partner to the extent assigned, without signature if conditions prescribed by the partnership agreement are met. Compliance with the conditions, or the signing of the partnership agreement by a representative, also binds the partner or assignee to the terms of the written partnership agreement.

The alternatives to signing the partnership agreement are: (i) execution of "any other writing evidencing the intent of such person to become a limited partner or assignee" by the partner, assignee or representative, or (ii) "compliance with the conditions for becoming a limited partner or assignee as set forth in the partnership agreement or any other writing and request[ ] (orally, in writing or by other action such as payment for a partnership interest) that the records of the limited partnership reflect such admission or assignment." 

The alternatives to signature set forth in the partnership agreement can be invoked either by a person seeking admission as a limited partner or recognition as an assignee or by "a representative authorized by such person orally, in writing or by other action such as payment for a partnership interest."

Oral authorization of representatives and requests for admission or recognition of assignment and the deeming of an action, such as payment for a partnership interest, as a functional equivalent, permit publicly-traded limited partnerships to take advantage of trading procedures similar to the procedures regularly used for trading cor-

11. Id.
12. Id.
13. Id.
porate securities. The 1988 amendments facilitate and potentially eliminate the need for structuring of depositary and assignee relations frequently seen in publicly traded partnerships.\textsuperscript{14}

To eliminate any concern that the statute of frauds might invalidate a written partnership agreement to which a person had become a party by an alternative to executing the agreement, the 1988 Delaware Act expressly provides that a written partnership agreement is not unenforceable either because it was not signed by a person admitted as a limited partner or becoming an assignee, or because the agreement was signed by a representative whose authorization was oral or by other action.\textsuperscript{15}

Provision in the written partnership agreement for admission of limited partners without signature may also permit simplification of the power of attorney included in most subscription agreements in connection with offerings of limited partnership interests. Such powers typically authorize one or more of the general partners to sign the partnership agreement and other documents on behalf of the limited

\textsuperscript{14} To facilitate trading in publicly-held limited partnership interests, depositary receipts or assignments are customary. Both are techniques to avoid continual amendment to the partnership agreement or certificate of limited partnership to reflect admission and withdrawal of limited partners. Depositary receipts are receipts for limited partnership interests deposited with and held of record by a depositary institution. The depositary appears as the limited partner of record. Receipt holders have beneficial ownership of the interests. The depositary receipt is transferrable and typically is listed for trading. An alternative method is the use of assignee units. A limited partner, usually affiliated with the general partner, assigns to investors the limited partner's economic interests in the partnership and certain rights. The assignee units are transferrable and may be listed for trading. See generally L. Wertheimer, Securities and Partnership Law for MLP's and Other Investment Limited Partnerships § 11.02 (1988). Under the 1985 Delaware Act, as under the 1985 RULPA, it was possible to structure the partnership agreement to avoid the need for signature. Under § 301(b)(1) of the 1985 RULPA, and § 17-301(1) of the 1985 Delaware Act, a person acquiring an interest directly from the partnership could be admitted upon compliance with the partnership agreement. Similarly, an assignee could also be admitted upon terms specified in the partnership agreement. 6 U.L.P.A. § 704 (1976) (amended 1985); § 17-704(a)(1) (Supp. 1986). Not all were comfortable with such arrangements. Section 17-204(b) of the 1985 Delaware Act, like § 204(b) of the 1985 RULPA, contemplates written powers of attorney. Id. § 17-204(b); 6 U.L.P.A. § 704 (1976) (amended 1985). A statute of frauds problem potentially existed with respect to such oral arrangements. Section 17-101(10) of the 1988 Delaware Act clearly eliminates such concerns and provides express authority for signatureless transactions. Del. Code Ann. tit. 6, § 17-101(10) (Supp. 1988). Problems may still exist under the rules and regulations of the National Association of Securities Dealers and under the Blue Sky laws of some states. See Wertheimer, supra, § 1102(5).

partner. Under the 1988 Delaware Act, if a written partnership agreement so provides, a person's signing of the subscription agreement, or payment of an initial contribution, will bind the person and make the partnership agreement enforceable against that person.\(^{16}\) In some circumstances it may still be advisable, however, to obtain the signature of each limited partner on a power of attorney authorizing the general partner to sign documents other than the partnership agreement on behalf of the limited partner. If the nature of the partnership's business may require the execution of additional documents by limited partners, and if counsel believes that such a power of attorney included in the partnership agreement made binding on the limited partners without signatures pursuant to the 1988 Delaware Act would not be sufficient under applicable law, a separate executed power of attorney may be desirable.

2. Signature Requirements

In addition to the new provisions permitting signatureless transactions, the 1988 amendments clarify or eliminate other signature requirements for certificates of limited partnership, amendments and restatements of certificates of limited partnership, certificates of merger or consolidation, and other partnership documents.

a. Certificates

The 1988 Delaware Act amends the execution requirements for a certificate of amendment to the certificate of limited partnership to provide that where the amendment reflects the withdrawal of a general partner as a general partner, such withdrawing general partner need not sign the certificate.\(^ {17}\)

The 1985 Delaware Act also did not require a certificate of amendment to be signed by a withdrawing general partner. Many practitioners nonetheless preferred to obtain the signature of a withdrawing general partner to avoid later disputes. Moreover, because a certificate of amendment had to be signed by at least one existing general partner, problems arose where a sole general partner withdrew under circumstances in which that general partner either refused to sign or was unavailable or incapacitated and could not sign the certificate of amendment. The 1988 amendment, by eliminating the

\(^{16}\) Id. § 17-101(10)(a).
\(^{17}\) Id. § 17-204(a)(2).
need for a withdrawing general partner to execute a certificate of amendment, avoids the need for a judicially directed execution by, or on behalf of, the withdrawing general partner under such circumstances.

With the introduction of procedures for appointing liquidating trustees, a certificate of cancellation must be signed by all liquidating trustees if the general partners are not winding up the partnership, or by a majority of the limited partners if the limited partners are themselves winding up the partnership. In the event of a merger or consolidation, the 1988 Delaware Act replaces the certificate of cancellation formerly called for by the 1985 Delaware Act with a certificate of merger or consolidation. The certificate of merger or consolidation must be signed by one general partner if a domestic limited partnership is filing the certificate, or by an authorized person if any other business entity is filing the certificate.

Although the 1988 amendments provide for persons other than general partners to sign certificates, such persons are not statutorily liable for false statements contained in certificates they sign. The 1988 Delaware Act continues to provide only that execution of any certificate by a general partner constitutes the general partner's oath or affirmation of the truth of statements in the certificate and that a general partner is liable for false statements contained in the certificate. Furthermore, the 1988 amendments expressly provide that a liquidating trustee (which includes a limited partner who participates in winding up the partnership) does not have liability as a general partner for actions taken in winding up the affairs of the partnership.

b. Signature by Agent

The 1985 Delaware Act allowed a person to sign any certificate of limited partnership or partnership agreement or amendments thereto by an agent, including an attorney-in-fact. A power of attorney did not have to be sworn to, verified, or acknowledged, or filed in

18. Id. §§ 17-803 to -804.
19. Id. § 17-204(a)(3).
20. Id. § 17-204(a)(4).
21. Id. §§ 17-202(b), -207(a).
22. Id. §§ 17-202(f)(2), -804(b).
the Office of the Secretary of State, but was required to be kept by a general partner. With express recognition of signatureless transactions, it became necessary to recognize also oral authorizations to sign certificates. The 1988 Delaware Act thus provides that an authorization, including a power of attorney, to sign any certificate need not be written. Where such authorization is in writing, however, the 1988 Delaware Act continues the requirement that the written authorization be retained by a general partner. Finally, express authority is granted to limit in the partnership agreement the power to execute certificates by an agent.

c. Facsimile Signatures

The 1988 amendments provide that any signature on any certificate authorized to be filed with the Secretary of State may be a facsimile.

3. Amending the Certificate of Limited Partnership

Although the 1988 amendments generally reduce administrative burdens, it was considered appropriate to add a requirement to amend the certificate of limited partnership to provide information about those who are winding up the partnership following dissolution if the general partners are not so doing. This serves to put creditors on notice that the persons winding up the affairs are not general partners and will not be liable as general partners, and protects liquidating trustees from a creditor later arguing that the trustees' actions misled the creditor into reasonably believing the person to be a general partner.

An amendment must be filed setting forth the name and the business, residence or mailing address of each person who is winding up the limited partnership's affairs after the withdrawal of all the general partners or when a person shown on the certificate as a general partner is not winding up the limited partnership's affairs. Each such liquidating trustee or, when the limited partners are

26. Id.
27. Id. § 17-206(a).
28. Id. § 17-202(f).
winding up the partnership, a majority of the limited partners must sign the certificate of amendment setting forth such information. The amendment constitutes legal notice of the information required to be included, but the liquidating trustees are expressly excluded from liability as general partners.29

The new filing requirement and the exculpation from general partner liability should clarify the liabilities that may be incurred by persons other than general partners who wind up a limited partnership's affairs, thereby encouraging competent and qualified persons to undertake the duties of a liquidating trustee.

B. Mergers and Consolidations

The 1985 Delaware Act provided for the first time an express statutory basis for Delaware limited partnerships to merge or consolidate with or into other limited partnerships, whether domestic or foreign.30 The 1988 Delaware Act introduces clearer procedures and guidelines for mergers and consolidations, while retaining flexibility by allowing either the merger agreement or the partnership agreement to modify the statutory procedures. In addition, the 1988 Delaware Act permits a Delaware limited partnership to merge or consolidate not only with other limited partnerships, domestic or foreign, but also with corporations and other business entities.31

The expansion of the merger or consolidation possibilities under Delaware law lends an extra degree of flexibility in structuring reorganizations and other transactions. The merger or consolidation with a Delaware limited partnership could be an initial, interim or final step in a traditional roll-up of limited partnerships into a corporation or master limited partnership, or a reorganization or transaction of any kind which heretofore has not used a limited partnership form. Provisions of the 1988 Delaware Act and the Delaware General Corporation Law regarding mergers and consolidations should also make Delaware limited partnerships an attractive form of organization for limited purpose joint ventures between existing businesses (whether

29. Id. §§ 17-202(f)(1), (2), -803(b), -804(b). A limited partner may serve as liquidating trustee. Id. § 17-101(8).
31. Del. Code Ann. tit. 6, § 17-211(a)-(g) (Supp. 1988). The Delaware legislature adopted a corresponding amendment to the Delaware General Corporation Law to permit, for the first time, the merger or consolidation of Delaware corporations with limited partnerships. 66 Del. Laws ch. 352, § 10 (codified at Del. Code Ann. tit. 8, § 263 (Supp. 1988)).
corporations or partnerships), such as technology development arrangements. Provision for a structured termination of the joint venture is often a crucial concern of the parties at the outset. Such a structured termination by merger into one of the corporate partners or by merger or consolidation with a third corporation (perhaps created for that purpose) can now be outlined in the original agreements between the parties. Correspondingly, these new provisions may facilitate hostile takeovers or other changes in control, including the takeover of a corporation by a limited partnership or the takeover of a limited partnership by partners or third parties.

A substantial body of case law has developed in Delaware dealing with mergers and consolidations of corporations, and the Delaware courts are familiar with the issues that arise in mergers and consolidations. Although the Delaware courts recognize that limited partnerships are different in many respects from corporations, Delaware limited partnerships and corporations considering merger or consolidation and the Delaware courts that come to hear cases in this area will have a starting point for analysis of many of the issues that may be expected to arise.\(^\text{32}\)

1. Delaware Limited Partnerships

Under the 1988 Delaware Act, a Delaware limited partnership may merge or consolidate with or into one or more Delaware limited partnerships or "other business entities" whether organized under Delaware law or the law of any other jurisdiction.\(^\text{33}\) The 1988 Delaware Act broadly defines the term "other business entity" to include corporations, business trusts or associations, real estate investment trusts, common law trusts, or any unincorporated business, including a partnership (whether general or limited).\(^\text{34}\) Whether an "other business entity" will be able to merge or consolidate with or into a Delaware limited partnership pursuant to this provision will depend upon the laws of the jurisdiction under which that entity is organized.

Prior to the 1988 Delaware Act, a merger or consolidation of a limited partnership was effected pursuant to an agreement of merger

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32. For example, when dealing with the powers of a liquidator winding up a limited partnership's affairs, the Delaware Court of Chancery looked to corporate law analogies in deciding the issues. Boesky v. CX Partners, L.P., No. 9739 (Del. Ch. Apr. 28, 1988), reprinted in 14 Del. J. Corp. L. 230 (1989). See infra text accompanying notes 160-84.
34. Id. § 17-211(a).
or consolidation and no statutory vote of partners was required. With the 1988 amendments, unless otherwise provided in the partnership agreement, a merger or consolidation must be approved by all general partners and by a majority of each class or group of limited partners, or a majority of the limited partners as a group if there are no individual classes or groups.\textsuperscript{35} The requisite majority is defined as "limited partners who own more than 50 percent of the then current percentage or other interests in the profits of the . . . partnership" held by each such class or group of limited partners.\textsuperscript{36} The partnership agreement may alter the statutory vote in any respect or eliminate it altogether.\textsuperscript{37} No statutory appraisal rights are granted to partners. Any right to appraisal must be granted in the partnership agreement or in the agreement of merger.\textsuperscript{38}

The 1988 amendments add a provision similar to that contained in the merger and consolidation provisions of the Delaware General Corporation Law, permitting the termination or amendment of an agreement of merger or consolidation prior to its effectiveness pursuant to a provision permitting such termination or amendment contained in the agreement of merger or consolidation.\textsuperscript{39}

The 1985 Delaware Act required a Delaware limited partnership that did not survive a merger or consolidation simply to file a certificate of cancellation with the Office of the Secretary of State.\textsuperscript{40} The information contained in a certificate of cancellation is not necessarily sufficient to provide a legal record of the surviving entity that assumes the debts, liabilities and duties of the nonsurviving entities. The filing of a certificate of cancellation also may imply that the merger or consolidation of a partnership is a dissolution and liquidation because that is the usual import of such a certificate. Because of these problems, the introduction of the power to merge with business entities other than other limited partnerships, and the desire to use one certificate to effect filings under both the partnership

\textsuperscript{35} Id. § 17-211(b).
\textsuperscript{36} Id.
\textsuperscript{37} Not only does the "[u]nless otherwise provided in the partnership agreement" language of § 17-211(b) support alteration or elimination of the vote, § 17-302(a) also allows action without limited partner approval. Id. §§ 17-211(b), -302(a).
\textsuperscript{38} The absence of appraisal rights was intentional. The draftsmen believed that through enforcement of the general partners' fiduciary duties limited partners had adequate protection. Indeed, absence of appraisal rights may make injunctive relief easier to obtain where fair price is at issue.
\textsuperscript{39} Del. Code Ann. tit. 6, § 17-211(b) (Supp. 1988).
\textsuperscript{40} Del. Code Ann. tit. 6, § 17-211(b) (Supp. 1986).
and corporation laws, the 1988 Delaware Act adopts a more detailed filing procedure.

The surviving limited partnership or other entity must file a certificate of merger or consolidation with the Secretary of State stating: (i) the name and jurisdiction of formation or organization of each of the entities; (ii) that an agreement of merger or consolidation has been approved and executed by each of the entities; (iii) the name of the surviving or resulting entity; (iv) the future effective date or time (which must be a date or time certain) of the merger or consolidation if it is not to be effective upon filing of the certificate; (v) that the agreement of merger or consolidation is on file at a place of business of the surviving or resulting entity and the address thereof; (vi) that a copy of the agreement of merger or consolidation will be furnished by the surviving or resulting entity on request and without cost to any person holding an interest in any of the entities, and a consent to service of process by a surviving or resulting entity which is not a Delaware limited partnership or corporation. The filing of the certificate of merger or consolidation serves as a certificate of cancellation for any domestic limited partnership which does not survive the merger or transaction. The certificate of merger or consolidation must be signed by one general partner if it is filed by a Delaware limited partnership, or by an authorized person of any other business entity filing the certificate.

As under the 1985 Delaware Act, the surviving or resulting entity in a merger or consolidation has all the rights and is subject to all of the liabilities of the merging or consolidating entities. In addition, the 1988 Delaware Act makes clear that, unless otherwise agreed, the merger or consolidation of the Delaware limited partnership does not constitute a dissolution or require the limited partnership to wind up its affairs.

In addition to Delaware, nine other states have adopted statutory merger provisions. The District of Columbia and Maryland have

42. Id. § 17-211(f).
43. Id. § 17-204(a)(4).
44. Id. § 17-211(g).
45. Id.
provisions comparable in scope to the 1988 Delaware Act. The principal substantive differences are that both Maryland and the District of Columbia grant a statutory right of appraisal to partners, and the statutory vote called for by the District of Columbia is a two-thirds vote of the general partners and of the limited partners. Maryland, like Delaware, calls for the unanimous consent of the general partners and a majority in interest of the limited partners. The remaining states, Georgia, Indiana, Kansas, Mississippi, South Carolina, Tennessee, and Texas, authorize mergers only of limited partnerships; mergers of limited partnerships and other types of business organizations are not authorized. The 1985 RULPA contains no merger provisions.

2. Delaware Corporations

The 1988 amendments to the Delaware General Corporation Law add a new section 263 providing for the merger or consolidation of one or more Delaware corporations with or into one or more partnerships organized in the State of Delaware or any other state in the United States or the District of Columbia unless the laws of the jurisdiction of organization forbid such merger or consolidation.

The merger or consolidation must be made pursuant to a written agreement of merger or consolidation. The General Corporation Law, however, unlike the 1988 Delaware Act provision enabling mergers and consolidations of limited partnerships, requires that certain matters be covered by the agreement. The written agreement of merger or consolidation where a Delaware corporation is a participating entity must state: (i) the terms and conditions of the merger or consolidations; (ii) the mode of carrying the same into effect; (iii) the manner of converting the shares of stock of each participating constituent corporation and the partnership interest of each participating constituent limited partnership into shares; (iv) partnership interests or other securities of the surviving or resulting entity, the cash, property, rights or securities of any other entity which the holders of such shares or partnership interests are to receive in exchange for, or upon conversion of such shares or partnership interests and the surrender of any certificates evidencing them; (v)

such other details or provisions as are deemed desirable, such as a provision for the payment of cash in lieu of the issuance of fractional shares or interests in the surviving or resulting entity.\textsuperscript{50} Cash, property, rights, or securities of other entities may be in addition to or in lieu of securities of the surviving or resulting entity. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of the agreement provided that the manner in which such facts operate upon the terms of the agreement is clearly and expressly set forth in the agreement.\textsuperscript{51} The written agreement of merger and consolidation must be adopted, approved, certified, executed, and acknowledged by each domestic corporation in the same manner as the General Corporation Law provides for the merger or consolidation of domestic corporations. The agreement of merger and consolidation is also to be filed and recorded in the same manner as is provided for mergers or consolidations of domestic corporations.\textsuperscript{52} In lieu of filing and recording the entire agreement of merger or consolidation, however, the surviving entity may file a certificate of merger or consolidation containing essentially the same information as the certificate of merger or consolidation permitted to be filed by merging or consolidating domestic corporations and which parallels the certificate to be filed under the 1988 Delaware Act for limited partnerships.\textsuperscript{53} A surviving or resulting entity which is not a Delaware corporation or limited partnership must consent to service of process either in a certificate or by other agreement if a certificate is not filed.\textsuperscript{54} By cross-reference, new section 263 applies certain of the provisions of the General Corporation Law governing mergers and consolidations of domestic corporations to mergers and consolidations of domestic corporations and limited partnerships.\textsuperscript{55} The agreement

\textsuperscript{50} Id. § 263(b).
\textsuperscript{51} Id.
\textsuperscript{52} Id. § 263(c).
\textsuperscript{53} Id.
\textsuperscript{54} Id. § 263(d).
\textsuperscript{55} Id. § 263(e). The provisions cross-referenced include § 251 (manner of approval of merger); § 251(d) (termination and amendment of merger agreement); § 251(e) (amendments to certificate of incorporation of surviving corporation); § 251(f) (mergers not requiring a vote of stockholders); §§ 259-261 (status of constituent and surviving corporations, powers of surviving corporation, and effect of merger on pending actions); and § 328 (merger does not impair liabilities of corporation, stockholders, directors, and officers or remedies of creditors). Id. §§ 251, 259-61, 328.
of merger or consolidation may contain a provision which permits the board of directors to terminate or amend the agreement prior to filing, provided, however, that no such amendment may alter the amount or type of consideration to be received in the merger, alter the certificate of incorporation of the surviving corporation, or alter the terms or conditions of the agreement if such alteration would adversely affect the holders of stock of the constituent corporation. Such restrictions on amendment of the agreement are not contained in the 1988 Delaware Act provision enabling mergers of limited partnerships and corporations. However, it would be advisable to include such provisions in the merger agreement.

In the case of a merger, the certificate of incorporation of a surviving entity which is a Delaware corporation is automatically amended to the extent set forth in the agreement of merger.

As in the case of other mergers involving Delaware corporations, unless the certificate of incorporation requires, no vote of stockholders of the surviving corporation is necessary to authorize a merger if the agreement of merger does not amend in any respect the certificate of incorporation of the surviving corporation. Each share of stock of the surviving corporation outstanding immediately prior to the effective date of the merger is to be an identical outstanding or treasury share of the surviving corporation after the effective date of the merger, and either (1) no shares of common stock of the surviving corporation (or no securities convertible into such stock) are to be issued or delivered under the plan of merger or (2) the shares of stock to be issued or delivered plus those shares which will be issued upon conversion of securities to be issued or delivered under the plan of merger do not exceed twenty percent of the shares of common stock of the surviving corporation outstanding immediately prior to the effective date of the merger. In addition, no vote of stockholders of any constituent corporation is necessary to authorize a merger or consolidation if no shares of such corporation’s stock were issued prior to the adoption by the board of directors of the resolution approving the agreement of merger or consolidation.

Provision is also made for the survival of the rights and liabilities of the constituent entities in the surviving or resulting corporation,

56. *Id.* § 263(e).
57. *Id.* § 263(c).
58. *Id.* § 263(e).
59. *Id.*
the right of a surviving or resulting corporation to issue stocks, bonds or other indebtedness in order to effect such merger or consolidation, and the continuation of any pending actions against a party to a merger or consolidation or the substitution of the surviving corporation in such action or proceeding. 60

Finally, appraisal rights are available to dissenting stockholders of a Delaware corporation which merges or consolidates with a limited partnership. 61 As earlier noted, no such appraisal rights are provided to partners by the 1988 Delaware Act.

3. Fees

The 1988 Delaware Act imposes a $200 fee for the filing of a certificate of merger and consolidation of a Delaware limited partnership. 62 The fee is separate from and in addition to any fees payable by a Delaware corporation.

4. Effective Dates

Like the other 1988 amendments to the Delaware Revised Uniform Limited Partnership Act, the amendments regarding mergers and consolidations of limited partnerships became effective on September 1, 1988. 63 The amendments expressly state that any merger or consolidation that was effective prior to that date is valid and effective despite any failure to file a certificate of merger or consolidation as required pursuant to the amendments. 64

New section 263 of the Delaware General Corporation Law, permitting mergers or consolidations between Delaware corporations and domestic or foreign limited partnerships, was delayed in effectiveness, becoming effective December 1, 1988. 65

II. Limited Partners

A. Admission, Assignment, and Withdrawal

In addition to revising the definition of ‘‘partnership agreement’’ to allow admission of limited partners to the partnership without the

60. Id.
63. 66 Del. Laws ch. 316, § 71.
65. 66 Del. Laws ch. 352, § 19.
execution of any writing\textsuperscript{66} and to clarify and limit the liabilities of assignors and assignees of partnership interests,\textsuperscript{67} the 1988 amendments also clarified two provisions relating to the admission, assignment of interests, and withdrawal of limited partners.

The 1988 amendments delete two separate sections relating to the admission of additional limited partners and the time of admission of limited partners, and replace them with a single section that clearly sets forth the prerequisites for admission as a limited partner and the time when such admission is effective.\textsuperscript{68} In connection with the formation of a limited partnership, a person is admitted upon the later of the formation of the partnership or the time provided in and upon compliance with the partnership agreement.\textsuperscript{69} Following formation, a person who acquires an interest directly from the partnership is admitted at the time provided in and upon compliance with the partnership agreement. Absent such provisions, a person is admitted upon the consent of all partners and when the person’s admission is reflected in the partnership’s records.\textsuperscript{70} Assignees are admitted at the time provided in and upon compliance with the partnership agreement or, in the absence of such provisions, when the person’s admission is reflected in the partnership’s records.\textsuperscript{71}

The 1988 amendments also expressly authorize a partnership agreement to provide that a limited partner cannot withdraw from the partnership or assign such limited partner’s interest in the partnership.\textsuperscript{72}

\textbf{B. Voting, Safe Harbor Activities, and Liability to Third Parties}

The Delaware Revised Uniform Limited Partnership Act, which became effective January 1, 1983, introduced voting powers and other safe harbor activities in which limited partners might participate without incurring liability to third parties for partnership obliga-

\textsuperscript{66} See supra text accompanying notes 10-15.
\textsuperscript{67} See infra text accompanying notes 154-59.
\textsuperscript{68} Sections 17-301 and 17-306 of the 1985 Delaware Act were deleted in their entireties and replaced by § 17-301 of the 1988 Delaware Act. Del. Code Ann. tit. 6, § 17-301 (Supp. 1988).
\textsuperscript{69} Id. § 17-301(a).
\textsuperscript{70} Id. § 17-301(b)(1).
\textsuperscript{71} Id. § 17-301(b)(2). In addition, admission of assignees is subject to § 17-704(a) of the 1988 Delaware Act, which provides that an assignee may become a limited partner if and to the extent that the partnership agreement so provides or if all partners consent. Id. § 17-704(a).
\textsuperscript{72} Id. § 17-603.
The 1985 Delaware Act significantly expanded the safe harbor activities. The 1988 amendments both clarify and further expand the activities that limited partners may engage in without incurring general partner liability. Consequently, the 1988 Delaware Act is significantly more permissive in this area than the 1985 RULPA and the limited partnership statutes in effect in most other states.

1. Voting

The 1988 amendments expand on the 1985 Delaware Act provision, which referred only to a "per capita or any other" basis, to provide that voting by limited partners may be on a per capita, number, financial interest, class, group or any other basis. The amendment thus gives express authority for voting mechanisms that have been used and that were undoubtedly authorized by the 1985 Delaware Act.

Any voting of limited partners permitted under the safe harbor provision of section 17-303(b) is also permitted under the voting provision. This confirms that voting rights, like other safe harbor limited partner powers, may be granted to limited partners, and avoids potential conflict or inconsistency between the voting provisions and the safe harbor provisions. Significantly, however, this allows for voting rights to be granted in writings other than the partnership agreement.

The 1988 amendments also allow a partnership agreement to provide for the taking of any action without the vote or approval of any general partner or class or group of general partners. Such actions specifically may include either amending the partnership agreement or taking action to create under provisions of the partnership agreement a class or group of partnership interests that was not previously outstanding. In the latter case, the creation of a new class or group of interests must be pursuant to existing provisions in the partnership agreement. However, there is no apparent reason

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75. Id. § 17-302(d).
76. This is because, under § 17-303(b)(8)(1) of the 1988 Delaware Act, limited partners may vote on other matters stated in "the partnership agreement or in any other agreement or in writing." Id. § 17-303(b)(8)(l).
77. Id. § 17-405(a).
78. Id.
79. Id.
why the limited partners could not first amend the agreement to create the necessary provisions, and then create the new class or group.

This provision parallels another of the 1988 amendments, which permits a partnership agreement to provide for the taking of an action by the general partners without the vote or approval of any limited partner or class or group of limited partners, including the amendment of the partnership agreement or the creation under the provisions of the partnership agreement of a class or group of partnership interests not previously outstanding.\(^2^9\)

Under the 1985 Delaware Act, as under the 1985 RULPA, the general partners had the rights, including the right to manage the business of the partnership, of partners in a partnership without limited partners, except as limited by relevant provisions of the 1985 Delaware Act or the partnership agreement.\(^3^1\) Many partnership agreements restrict the actions of general partners in managing the partnership, frequently confining them to the defined business purposes of the limited partnership. Even before the introduction of safe harbor activities, the approval of limited partners was required in certain circumstances, such as the election of an additional or new general partner or the withdrawal of the last remaining general partner. Many partnership agreements provide for the passive role of one or more general partners and designate one partner as the managing general partner. More rarely, limited partners have been given the power to act as a group without general partner approval, such as provisions permitting the limited partners to wind up the partnership in the absence of the general partner following dissolution.

The 1988 Delaware Act, while not altering the rights and powers of general partners, now expressly permits partnership actions to be taken exclusively by a decision of the limited partners or a class or group of limited partners, requiring only that the power to make such decisions be provided for in the partnership agreement. This is not as significant and broad a departure from existing limited partnership law as it might seem. It is only a logical extension of the current trend in limited partnership law generally to permit limited partners to engage in voting and other safe harbor activities without jeopardizing their limited liability. This expanded limited partner power remains limited by the safe harbor provisions. It is

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80. Id. § 17-302(a).
not a carte blanche to limited partners to conduct the business and affairs to the exclusion of the general partners. Unless the safe harbor provisions of the 1988 Delaware Act cover the taking of an action by limited partners in the conduct of the partnership business, the limited partners cannot carry out their decisions on behalf of the partnership without potentially incurring liability to third parties. Likewise, limited partners cannot take actions on behalf of the partnership that the 1988 Delaware Act requires the general partners to take, such as the signing of the certificate of limited partnership. In addition, the limited partners cannot create a class or group of partnership interests not previously outstanding unless the partnership agreement already permits such action or unless the limited partners first act to amend the agreement to so permit. Although this may be a subtle limitation, it preserves the traditional "contract" character of the partnership form by making it one degree more difficult for a group of partners to alter the relative economic positions of their fellow partners by admitting new partners to the partnership. It highlights, however, the need to review partnership agreement provisions governing amendments to the agreement to make sure they include appropriate limitations.

The provision for decisions to be made exclusively by certain groups or classes of limited or general partners adds another degree of flexibility in the structuring of limited partnerships. A limited partnership with only one or a few limited partners who each have a substantial economic stake in the partnership will have greater flexibility in structuring limited partner participation in crucial decisions of the partnership. Partnerships with a large number of limited partners may wish to designate a small group of limited partners who have a special interest or special expertise to make decisions regarding certain partnership matters.

2. Safe Harbor Activities and Liability to Third Parties

The 1988 amendments also revised provisions regarding safe harbor activities of limited partners. Most of these amendments are in the nature of clarifications, but considering the importance of limited liability to the limited partners who join a limited partnership, and to counsel asked to opine on limited liability, additional clarity in this area is beneficial. Many of the clarifications are express inclusions, as safe harbor activities, of actions that are the legal equivalents of activities expressly permitted by the 1985 Delaware Act.
The 1985 Delaware Act protected limited partners who processed or exercised enumerated "powers." Recognizing that some safe harbor provisions related to the status of a limited partner, the 1988 amendments broaden the introductory language of the safe harbor provision to include the words "having or acting in [one] or more of the following capacities."\(^{82}\)

Under the 1988 Delaware Act, a limited partner may be an independent contractor for, or transact business with, the limited partnership or a general partner, may be a partner of a partnership that is a general partner of the limited partnership, or may be a fiduciary or beneficiary of an estate or trust that is a general partner.\(^{63}\) A limited partner may also be a contractor for, or an agent or employee of, a limited partnership or a general partner, or an officer, director or stockholder of a corporate general partner, as was permitted by the 1985 Delaware Act.\(^{84}\)

Under the 1985 Delaware Act, a limited partner could transact business with the limited partnership, lend money to the limited partnership, and guarantee or assume one or more specific obligations of the partnership.\(^{85}\) The 1988 amendments expand those powers to include borrowing money from the partnership and engaging in such transactions not only with the partnership but also with a general partner, and further provide that guarantees or assumptions need not be with respect to specific obligations.\(^{66}\) In addition, the permission to act as a surety, guarantor or endorser for, or to provide collateral for, the limited partnership is extended to permit these acts with respect to a general partner.\(^{87}\)

The 1985 Delaware Act permitted limited partners to take any actions required or permitted by law to bring or pursue a derivative action in the right of a limited partnership. The 1988 amendments clarify that limited partners may also settle or otherwise terminate such actions.\(^{88}\)

Section 17-303(b)(8) of the 1988 Delaware Act, the safe harbor provision permitting proposal and approval or disapproval, by voting or otherwise, of certain matters by the limited partners, has been

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83. Id. § 17-303(b)(1).
84. Id.
87. Id. § 17-303(b)(3).
88. Id. § 17-303(b)(6).
amended to add as appropriate matters: the election to continue the limited partnership or to continue the business of the limited partnership;\(^8^9\) the merger or consolidation of the limited partnership;\(^9^0\) any matter required by the Investment Company Act of 1940, as amended, or the rules or regulations of the Securities and Exchange Commission thereunder, to be approved by the holders of beneficial interests in an investment company;\(^9^1\) and the indemnification of any partner or other person.\(^9^2\)

In addition, the catch-all provision, permitting limited partners to propose, approve or disapprove of "such other matters as are stated in the partnership agreement" has been revised to permit as well the approval, disapproval or voting on such other matters as are stated "in any other agreement or in writing."\(^9^3\) The "such other matters" language does raise, however, the question of whether matters expressly covered by the safe harbor provisions of section 17-303(b)(8)a-k can instead be covered in some other agreement or other writing.

Finally, the introductory language of section 17-303(b)(8) has been broadened to read "[t]o act or cause the taking or refraining from the taking of any action, including by proposing, approving, consenting or disapproving, by voting or otherwise," and to permit the taking of action by the limited partners by consent (which was only implicit, not express in the 1985 Delaware Act) or by other means.\(^9^4\)

In accordance with other 1988 amendments permitting the use of a limited partner's name in the name of the partnership, the safe harbor section has been revised to state that a limited partner does not participate in the control of the business, and is therefore not liable for the obligations of a limited partnership, by virtue of the fact that all or any part of the name of the limited partner is included in the name of the partnership.\(^9^5\)

Finally, a new subsection has been added that confirms that the safe harbor provisions of section 17-303(b) are not self-executing. The provision states that limited partner "rights and powers may

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89. Id. § 17-303(b)(8)(a).
90. Id. § 17-303(b)(8)(i).
91. Id. § 17-303(b)(8)(j).
92. Id. § 17-303(b)(8)(k).
93. Id. § 17-303(b)(8)(l).
94. Id. § 17-303(b)(8).
95. Id. § 17-303(d).
be created only by a certificate of limited partnership, a partnership agreement or any other agreement or in writing, or other sections of this chapter.\textsuperscript{96} Some safe harbor activities enumerated in section 17-303(b) are in fact expressly created by other sections of the 1988 Delaware Act. For example, the 1988 amendments provide for the voting of the limited partners to approve a merger or consolidation.\textsuperscript{97}

As another example, under section 17-107 a partner may lend money to, borrow money from, act as a surety, guarantor or endorser for, guarantee or assume one or more specific obligations of, provide collateral for, and transact other business with the limited partnership, except as otherwise provided in the partnership agreement.\textsuperscript{98} However, such sections may not be coextensive with the safe harbor activities provision itself. For example, section 17-107, the business transactions provision, refers to guaranty or assumption of “specific obligations” of a limited partnership, whereas the corresponding part of the safe harbor activities provision has been amended to permit guaranty or assumption of obligations of a limited partnership, whether or not specific.\textsuperscript{99} In addition, the safe harbor provision, but not the business transactions provision, permits the limited partner to act in these capacities with respect to a general partner as well as the limited partnership itself.\textsuperscript{100} Finally, the business transactions provision refers to transactions permitted “except as provided in the partnership agreement”; the safe harbor provision provides that the limited partner’s powers may be created by the partnership agreement, the certificate of limited partnership, or other agreements or writings.\textsuperscript{101} These differences illustrate the need for careful examination of the partnership agreement, other partnership documents and writings, and the 1988 Delaware Act in order to determine which actions by limited partners are protected in a specific set of circumstances.

Similarly, the 1988 Delaware Act permits a partnership agreement to provide for decisions to be made exclusively by one or more groups or classes of limited or general partners.\textsuperscript{102} The safe harbor section permits the creation of limited partner voting and approval rights with regard to matters stated “in the partnership agreement

\textsuperscript{96} Id. § 17-303(e).
\textsuperscript{97} Id. § 17-211(b).
\textsuperscript{98} Id. § 17-107.
\textsuperscript{99} Id. § 17-303(b)(3).
\textsuperscript{100} Id.
\textsuperscript{101} Id. § 17-303(l).
\textsuperscript{102} Id. § 17-302(a).
or in any other agreement or in writing."\textsuperscript{103} Therefore, it may be advisable to include in the partnership agreement, and not in some other agreement or writing, any provisions relating to matters to be decided exclusively by one or more groups or classes of limited partners pursuant to section 17-302(a).

The provision in the 1988 Delaware Act that limited partners' rights and powers may be created only by the certificate of limited partnership, a partnership agreement or any other agreement or in writing, or by other sections of the Act, argues strongly against use of oral partnership agreements. The partnership agreement or "other agreement" may, of course, be oral. But the difficulty of proving such oral agreements, especially when liability to third parties is at issue and avoidance of such liability depends on the express provisions of the agreement, clearly suggests that prudent parties will reduce to writing the safe harbor provisions protecting limited partners.

In the final analysis, under the 1988 Delaware Act, a limited partner can incur liability as a general partner only in unusual circumstances. The liability provisions originally adopted by Delaware, effective in 1983, and subsequently adopted in the 1985 RULPA, provide that a limited partner who does participate in control of the business is liable only to persons who transact business with the limited partnership "reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner."\textsuperscript{104}

Considering that the 1988 Delaware Act itself provides for limited partners to be involved in winding up the limited partnership, pursuing derivative actions, and acting as independent contractors, agents or employees of a limited partnership, and that the name of the limited partnership may contain the name of a limited partner, arguably a third party can no longer persuasively assert a reasonable belief that any person acting on behalf of the partnership or any person whose name is included in the limited partnership's name is a general partner. The Act itself (and the fact that the certificate of limited partnership is constructive notice of who is a general partner)\textsuperscript{105} may put third parties on notice that any person with whom they are dealing on behalf of the limited partnership in fact may be a limited partner and may be properly authorized to act on behalf of the limited partnership without exposing such person to liability.

\textsuperscript{103} Id. § 303(b)(8)(l).
\textsuperscript{104} Id. § 17-303(a); 6 U.L.P.A. § 303(a) (1976) (amended 1985).
The requirement that the name of a limited partnership contain the words “Limited Partnership” or the abbreviation “L.P.” should also put third parties on notice. Creditors and third parties entering into a transaction with a limited partnership and relying on the credit of general partners (or apparent general partners) would be well-advised to examine the certificate of limited partnership and to take any of the actions they would ordinarily take in dealing with any limited liability entity, such as a corporation, to obtain financial assurances by way of express guarantees of partnership obligations.

C. Access to Information

The 1985 Delaware Act provided that certain specified information be made available to limited partners, subject to reasonable standards established in the partnership agreement or by the general partners.106 The 1988 amendments add more detailed guidelines for such access, which are in keeping with the current practice of limited partnerships.

The 1988 amendments provide that reasonable standards imposed by the partnership on limited partner access to information may include standards governing what information and documents are to be furnished, at what time and location and at whose expense.107 The general partners need only supply to limited partners copies of partnership agreements which are written and powers of attorney which are written, since either may be oral.108

More significantly, the 1988 Delaware Act authorizes general partners to keep confidential from limited partners: (1) information which the general partners reasonably believe to be in the nature of trade secrets, (2) other information the disclosure of which the general partners in good faith believe is not in the best interests of the limited partnership, (3) information the disclosure of which the general partners in good faith believe could damage the limited partnership or its business, or (4) information which the limited partnership is required by law or by agreement with a third party to keep confi-

106. Del. Code Ann. tit. 6, § 17-305 (Supp. 1986). The material which must be made available includes: full information regarding the status of the business and financial condition of the partnership, the tax returns, a list of partners, the partnership agreement and certificate of limited partnership with all amendments and powers of attorney, value of property or services contributed or to be contributed by any partner, and such other information as may be just and reasonable. Id.


108. Id. §§ 17-101(10), -204(b), -305(a)(4).
The general partners may keep information confidential for such period of time as the general partners deem reasonable. Moreover, it is arguable that because the statute provides that the general partner “shall have the right” to keep material confidential, the right may not be limited by the partnership agreement.

Equally significant, a limited partner must now make a written demand for access to information, stating the purpose of the demand. Any action to enforce any right of inspection must be brought in the Court of Chancery of the State of Delaware.

In contrast, the comments to the corresponding 1985 RULPA section concerning limited partner access to information state merely that “[i]t is assumed that courts will protect limited partnerships from abuses and attempts to misuse Section 305 for improper purposes.” The 1988 amendments to the Delaware Act provide a framework for protecting both access to information and abuse of the right to information, and set forth standards to be used in resolving disputes concerning limited partner access to information. In addition to the standards provided by the statute itself, in interpreting this provision, the chancery court will have available to it the well-developed body of Delaware case law regarding access to books and records by stockholders of corporations.

The 1988 Delaware Act also provides that the limited partnership may maintain its records in non-written form, as long as they can be converted into written form within a reasonable period of time.

III. General Partners

A. Admission and Withdrawal

Under the 1985 Delaware Act, unless the partnership agreement provided otherwise, additional general partners could be admitted
only with the "specific" written consent of each partner.\textsuperscript{116} The 1985 Act also provided that certain events of withdrawal would not constitute a withdrawal of a general partner if specific written consent were given by all partners.\textsuperscript{117} The reference to "specific written consent" could have been interpreted to preclude the giving of consent in advance and require the consent to be contemporaneous in time and to relate to the specific admission of an identified person as a general partner or the specific bankruptcy or insolvency of an identified general partner. To eliminate such concerns, the 1988 amendments delete the word "specific" in these cases, thus clarifying that consent of the partners can be given in advance for a class of cases rather than only contemporaneously with respect to a particular case.\textsuperscript{118}

In order to avoid inadvertent withdrawal of a corporate general partner that has its charter revoked, the 1988 Delaware Act provides that when a general partner that is a corporation experiences an event of withdrawal upon the revocation of its charter, the event of withdrawal takes effect only if the corporation has not reinstated its charter within 90 days after the date of notice to the corporation of revocation.\textsuperscript{119}

The 1985 Delaware Act, like the 1985 RULPA, mandated withdrawal of a general partner that is an estate when the estate's fiduciaries distributes its entire interest in the limited partnership.\textsuperscript{120} In some circumstances, particularly with closely-held limited partnerships, situations arise in which, for estate administration purposes, it is necessary or convenient to distribute partnership interests before a new general partner can be located. Accordingly, the 1988 Delaware Act amends the automatic withdrawal provision for estates to permit the partnership agreement to provide that such a distribution is not an event of withdrawal or, alternatively, that all partners may consent in writing to the estate continuing as a general partner.\textsuperscript{121}

The 1988 amendments require a general partner who suffers an event of bankruptcy or insolvency that with the passage of time

\begin{footnotes}
\footnote{117. \textit{Id. §§ 17-402(4), (5). The specific events relate to the bankruptcy or insolvency of a general partner or the commencement of bankruptcy or insolvency proceedings against a general partner. Id.}}
\footnote{119. \textit{Id. § 17-402(a)(9).}}
\end{footnotes}
becomes an event of withdrawal to give to all other general partners, or, if there are no other general partners, to each limited partner, notice of the event within thirty days after the date of occurrence of the event of withdrawal.122 Experience with the 1985 Delaware Act suggested that in some cases, particularly where there was a sole general partner, limited partners were not made aware of an event of bankruptcy or insolvency, and the subsequent automatic withdrawal of the general partner, in sufficient time to take steps, including election of a successor general partner, to avoid dissolution of the partnership.123 Consequently, the 1988 Delaware Act now imposes an affirmative duty to give notice within thirty days after the event of withdrawal (not the date of occurrence of the event that, with the passage of time, becomes an event of withdrawal).

Although many partnership agreements provide that a general partner may not withdraw, it was not clear that a partnership agreement could validly preclude such withdrawal in light of section 17-602 of the 1985 Delaware Act, which provided that a general partner could withdraw at any time.124 The 1988 amendments expressly authorize a partnership agreement to provide that a general partner cannot withdraw.125 Although a general partner may still withdraw, notwithstanding such a provision, by giving written notice to the other partners, the withdrawal would violate the partnership agreement and give rise to a cause of action for breach of the agreement.

B. Classes and Voting

Paralleling the treatment of limited partner voting provisions, the 1988 amendments expand voting by general partners to include voting on a per capita, number, financial interest, class, group or any other basis.126 Similarly, the general partner voting provisions have been amended to allow the partnership agreement to provide for the taking of any action without the vote or approval of any

122. Id. § 17-402(b).
123. For example, under § 17-801(3) of the 1988 Delaware Act and § 801(4) of the 1985 RULPA, a limited partnership is dissolved upon the withdrawal of the sole general partner unless within 90 days of such withdrawal all partners agree to continue the business and elect a new general partner. Id. § 17-801(3); 6 U.L.P.A. § 801(4) (1976) (amended 1985).
126. Id. § 17-405(b).
general partner or class or group of general partners. The amendment specifically states that such actions may include amending the partnership agreement and creating, as provided by the partnership agreement, a class or group of partnership interests that was not previously outstanding.

IV. Finance

Perhaps the most significant of the 1988 amendments to the 1985 Delaware Act are the changes in the provisions regarding contributions of partners to the partnership, distributions from the partnership to the partners, and liability of the partners for returns of contributions and distributions. These changes affect creditors as well as limited partnerships and their partners.

The 1988 amendments delete the concept of "return of contributions" as a separate category of distributions to partners, and eliminate liability to the partnership for returns of contributions. Instead, the 1988 Delaware Act treats all distributions to partners in the same manner for the purposes of specifying when such distributions must be returned to the partnership. It also limits substantially the liability of partners to return distributions and the enforceability of a limited partner's obligation to make a contribution or return a distribution by a creditor. However, the partnership agreement may impose independent obligations to return distributions. Many partnership agreements contain provisions that track the language of the 1985 Delaware Act regarding liability for return of distributions or contributions. Existing limited partnerships may wish to review their partnership agreements because the agreement may now create a liability exceeding the statutory liability under the 1988 Delaware Act.

A. Contributions

The 1985 Delaware Act provided that a limited partnership could require a limited partner who defaulted on a promise to contribute property or services to the partnership to contribute cash

127. Id. § 17-405(a).
128. Id.
130. See infra notes 141-48 and accompanying text (discussing distributions).
equal to the agreed value of the contribution.\textsuperscript{131} The 1988 Delaware Act clarifies that such right is in addition to, and not in lieu of, any other rights that the limited partnership may have against such partner under the partnership agreement or applicable law, including the right to specific performance.\textsuperscript{132}

The 1985 Delaware Act introduced a provision expressly permitting a limited partnership to subject partners who fail to make a contribution to specific penalties or consequences.\textsuperscript{133} The 1988 amendments expressly permit the penalty or consequence for failure to make a contribution to take the form of complete forfeiture of the defaulting partner’s proportionate interest in the limited partnership.\textsuperscript{134} While the 1985 Delaware Act permitted the reduction of the defaulting partner’s interest, it was not clear whether courts would recognize a forfeiture of such interests as being within the scope of the statute.

The 1988 amendments also add a provision dealing expressly with conditional obligations to make contributions or return money or other property to a limited partnership. Contingent contribution obligations have become more common since 1984 when the Securities and Exchange Commission adopted Rule 3a12-9 under the Securities Exchange Act of 1934, as amended, permitting registered broker-dealers to participate in offerings of direct participation programs that include mandatory deferred contributions.\textsuperscript{135} Such participation was previously considered a violation of the “arranging credit” provisions of the margin regulations.

Under the 1988 Delaware Act, a conditional obligation may not be enforced against a limited partner unless the conditions to the obligation have been satisfied as to such partner or the condition has been waived by such partner.\textsuperscript{136} Conditional obligations expressly include “contributions payable upon a discretionary call of a limited partnership or a general partner prior to the time the call occurs.”\textsuperscript{137} The change is declaratory of existing law and makes express what

\textsuperscript{133} Del. Code Ann. tit. 6, § 17-502(c) (Supp. 1986). There is no comparable provision in the 1985 RULPA.
\textsuperscript{134} Del. Code Ann. tit. 6, § 17-502(c) (Supp. 1988).
\textsuperscript{135} 17 C.F.R. § 240.3a12-9 (1988).
\textsuperscript{136} Del. Code Ann. tit. 6, § 17-502(b) (Supp. 1988).
\textsuperscript{137} Id.
was implicit in the "unless otherwise provided in the partnership agreement" lead-in to the 1985 Delaware Act provision.

The 1985 Delaware Act provided that both a creditor of a limited partnership who extended credit and a creditor whose claim arose after the creation of an obligation of a partner to make a contribution or to return money or other property paid or distributed in violation of the chapter, and prior to any compromise of such obligation by the consent of all the partners being reflected in the partnership records, could enforce the original obligation to the extent that such creditor reasonably relied on the obligation of a partner to make a contribution in extending credit.138 The "whose claim arises" phrase in the 1985 Delaware Act was a potential source of mischief. Although a creditor had to have relied on the obligation in extending credit, the statute did not necessarily require the claim to be related to the credit extended. That is, if the creditor satisfied the status test, he was arguably protected on any claim arising after the initial extension of credit. Following the lead of the 1985 RULPA,139 the 1988 amendments eliminate the reference to "whose claim arises," thus making clear that the obligations to make a contribution or return money may be enforced only in relation to credit extended in reliance on such obligation.140

B. Distributions and Return Obligations

The 1988 amendments make two changes with respect to a partner's right to receive distributions from the partnership. First, the 1988 Delaware Act now expressly authorizes a partnership agreement to provide for establishing a record date for distributions.141 Second, a partnership agreement now may provide that a limited partner does not have the status of a creditor with respect to distributions such partner has become entitled to receive.142 This amendment would seem to permit the inclusion in the partnership agreement of a provision allowing a general partner or liquidating trustee to withhold a distribution from a partner if he reasonably believes the partnership has a right of set off or claim against such partner. The

141. Id. § 17-605.
142. Id. In all events, the right to a distribution is subject to § 17-607 (precluding distributions if the partnership is, or will be, rendered thereby insolvent) and § 17-804 (priority of distributions on dissolution). Id. §§ 17-607, -804.
Delaware Court of Chancery recently held that in the absence of such a provision in the partnership agreement, and in light of the presence in the partnership agreement of the usual provision requiring the equal treatment of all limited partners, a liquidating trustee could not limit a partial liquidating distribution to those limited partners not associated, in his opinion, with a breach of fiduciary duty by the general partner.\textsuperscript{143}

The 1988 amendments also significantly restructure the obligations of a partner to return a distribution that has been wrongfully made and redefine the circumstances under which a distribution can properly be made. Under the 1985 Delaware Act, a partner could not receive a wrongful distribution.\textsuperscript{144} The 1988 Delaware Act provides instead that a limited partnership may not make such a distribution, putting the initial burden for determining whether a distribution should be made where it properly belongs, on the general partner.\textsuperscript{145}

Under the 1985 Delaware Act, as under the 1985 RULPA, a distribution was wrongful if at the time of the distribution, or after giving effect to the distribution, the liabilities of the partnership (other than to partners on account of their partnership interests) exceed the fair value of the partnership’s assets.\textsuperscript{146} The 1988 Delaware Act amends the solvency test to take into account nonrecourse obligations. Liabilities for which a creditor has recourse only to specified partnership property are excluded as liabilities for purposes of the insolvency test, but the property subject to such liability may be included as an asset only to the extent that the fair value of such property exceeds the nonrecourse liability to which it is subject.\textsuperscript{147}

In another significant change from the 1985 Delaware Act and the 1985 RULPA, the 1988 Delaware Act limits liability of limited partners for return of a distribution made in violation of the solvency requirement to limited partners who knew at the time of the dis-

\textsuperscript{147} Del. Code Ann. tit. 6, § 17-607(a) (Supp. 1988).
tribution that it was wrongful.\textsuperscript{143} The standard is one of actual knowledge, although courts may well adopt an objective standard of actual knowledge rather than relying on a limited partner's assertion or denial of actual knowledge. This limitation does not affect any obligation or liability for return imposed upon a limited partner under a partnership agreement, nor does it prevent a limited partner from being liable under any other applicable law for the amount of the distribution.\textsuperscript{149} Consequently, this provision does not preempt fraudulent conveyances acts or any other similar applicable state laws.

The 1985 Delaware Act created, and the 1985 RULPA creates, liability for return of a distribution, even if lawful at the time made, for a period of one year, and liability for return of an unlawful distribution for a period of six years.\textsuperscript{150} Because the 1988 Delaware Act creates liability only when the limited partner knows at the time of a distribution that it is unlawful,\textsuperscript{151} prospective liability for return of a lawful distribution has been eliminated. The one- and six-year periods of limitation have been replaced with a single three-year limitations period for enforcement of an obligation to return a distribution.\textsuperscript{152} However, the three-year limitation period may be extended by agreement.\textsuperscript{153} Thus, partnership agreements that currently track the 1985 Delaware Act's one-year and six-year limitation periods for return of distributions may be imposing by agreement greater liability on limited partners (and correspondingly greater benefit on general partners) than is imposed by the 1988 Delaware Act.

C. Assignor and Assignee Liabilities

The 1988 amendments clarify the liabilities of assignors and assignees for contributions and returns of distributions. Under new section 17-702(c) of the 1988 Delaware Act, an assignee has no liability as a partner solely as a result of the assignment until the


\textsuperscript{149} \textit{Id. Code Ann. tit. 6, § 17-607(b) (Supp. 1988).}

\textsuperscript{150} \textit{Id. Code Ann. tit. 6, §§ 17-608(a), (b) (Supp. 1986); 6 U.L.P.A. §§ 608(a), (b) (1976) (amended 1985).}

\textsuperscript{151} \textit{Id. Code Ann. tit. 6, § 17-607(b) (Supp. 1988).}

\textsuperscript{152} \textit{Id.} § 17-607(c).

\textsuperscript{153} \textit{Id.}
assignee becomes a partner, unless such liability is both provided for in the partnership agreement and is expressly assumed by the assignee by agreement. Although such a limitation was implicit in section 17-704(b) of the 1985 Delaware Act, new section 17-702(c) eliminates any ambiguity.

Additional subtle, but important, revisions were made to an assignee’s liability for capital contributions and for returns of distributions. Under the 1985 Delaware Act, an assignee was subject to the liabilities of a limited partner under the partnership agreement and under the 1985 Delaware Act, and was expressly made liable for the assignor’s obligation to make capital contributions. No liability was imposed for obligations unknown to the assignee and which could not be determined from the partnership agreement. Thus, an assignee could have been liable for a return of a distribution if he knew of the distribution, and in all events was liable for capital contribution obligations.

The 1988 amendments introduce two changes. First, the partnership agreement may alter or eliminate an assignee’s liability for the assignor’s obligation to make capital contributions. Second, an assignee is expressly not liable for the assignor’s obligation to return distributions, unless the partnership agreement provides otherwise. In addition, an assignee is expressly not liable for the assignor’s capital contribution obligations if they are unknown to the assignee and could not be ascertained from the partnership agreement. The effect of the 1988 amendments is to limit further assignee liability

154. Id. § 17-702(c).
155. Section 17-704(b) of the 1985 Delaware Act, like § 704(b) of the 1985 RULPA, imposed liability on “[a]n assignee who has become a limited partner,” thus implying that an assignee has no liability prior to admission as a limited partner. Del. Code Ann. tit. 6, § 17-704(b) (Supp. 1986); 6 U.L.P.A. § 704(b) (1976) (amended 1985). New § 17-702(c) of the 1988 Delaware Act restates the concept affirmatively. Del. Code Ann. tit. 6, § 17-702(c) (Supp. 1988). In addition, however, new § 17-702(c) makes clear that the parties can by agreement make an assignee liable before admission as a limited partner, something not clear under the 1985 Delaware Act. Id.
156. Del. Code Ann. tit. 6, § 17-704(b) (Supp. 1986). By comparison, the 1985 RULPA imposes liability for both distributions and capital contribution obligations. 6 U.L.P.A. § 704(b) (1976) (amended 1985). On the other hand, under § 704(b) of the 1985 RULPA, an assignee is not liable for obligations unknown to the assignee at the time of admission as a limited partner without regard to whether the obligation could be ascertained from any partnership documents. Id.
158. Id.
159. Id.
under the statute but expand the ability of the partners, through the partnership agreement, to impose liability on assignees.

V. DISSOLUTION AND WINDING UP

Many partnership agreements include provisions for the winding up of a partnership by the limited partners or by a liquidating agent, recognizing that this may be a practical necessity in certain situations where the general partner has resigned or is otherwise unable to wind up the affairs of the partnership. Such provisions, of course, were permissible under the 1985 Delaware Act. However, questions remained concerning the liability of such liquidating agents, or limited partners winding up the partnership’s affairs. To eliminate such concerns, the 1988 amendments to the Delaware Act introduce an alternative mechanism for appointing a liquidating trustee to wind up the partnership and clarify the role and liabilities of a liquidating trustee or of the limited partners if they wind up the partnership.

A. LIQUIDATING TRUSTEES

Under the 1985 Delaware Act, the general partners, or if none, the limited partners, were authorized to wind up a dissolved limited partnership’s affairs. Although the Delaware Chancery Court was authorized by statute to appoint a liquidating trustee, experience suggested that limited partners should be able to appoint one or more liquidating trustees if the partnership agreement did not itself confer such a power on the limited partners. Liquidating trustees could act more quickly and efficiently than could the limited partners as a group. There was no apparent policy reason for not allowing limited partners to choose liquidating trustees when there were no general partners able or willing to handle the liquidation. Accordingly, under the 1988 Delaware Act, unless the partnership agreement otherwise provides, a liquidating trustee may be appointed by a vote of limited partners owning fifty percent or more of the then current percentage or other interest in profits owned by all limited partners,

161. Id.
162. Id.
or of each class of limited partners, if there is more than one class or group, as appropriate.\textsuperscript{163}

In order to provide appropriate notice to creditors, the 1988 Delaware Act requires that a certificate of limited partnership be amended to set forth the name and the business, residence or mailing address of each person (other than a general partner) winding up the limited partnership's affairs, each of whom must execute and file such certificate of amendment.\textsuperscript{164} In addition, the certificate of cancellation required to be filed upon the completion of the winding up of the partnership must be signed by all of the liquidating trustees or by a majority of the limited partners if the limited partners are winding up the partnership.\textsuperscript{165}

The 1985 Delaware Act assured limited partners that they would not lose their limited liability by reason of engaging in the winding up of the partnership.\textsuperscript{166} That protection remains, and the 1988 amendments further provide expressly that a liquidating trustee (who may be a limited partner) is not liable as a general partner for actions taken in winding up the partnership.\textsuperscript{167} Likewise, a liquidating trustee does not have statutory liability for false statements contained in the certificate of limited partnership, including, presumably, errors in the information about the liquidating trustee contained in the required amendment.\textsuperscript{168} Liquidating trustees are, however, subject to personal jurisdiction and service of process in Delaware under section 17-109 of the 1988 Delaware Act, which provides for service of process on general partners and liquidating trustees.\textsuperscript{169}

\textsuperscript{163} Del. Code Ann. tit. 6, § 17-803(a) (Supp. 1988). A liquidating trustee is defined as any person, other than a general partner, but including a limited partner, winding up the affairs of a limited partnership. Id. § 17-101(8). Thus, any person performing that function who is not a general partner will be protected by the liquidating trustee provisions, regardless of whether the person becomes the liquidating trustee under the terms of the partnership agreement or, in the absence of such provisions, is elected by the limited partners under § 17-803(a). Id. § 17-803(b).

\textsuperscript{164} Id. § 17-202(f)(2). Under the new provision, if the limited partners are winding up the affairs, all limited partners must be identified. Id.

\textsuperscript{165} Id. § 17-204(a)(3).


\textsuperscript{167} Del. Code Ann. tit. 6, §§ 17-803(b), 17-804(b) (Supp. 1988).

\textsuperscript{168} Section 17-207(a) of the 1988 Delaware Act imposes liability only on general partners for false statements contained in the certificate of limited partnership. Id. § 17-207(a).

\textsuperscript{169} Id. § 17-109. Because limited partners winding up the partnership's affairs come within the statutory definition of liquidating trustees, such limited partners subject themselves to the jurisdiction of the Delaware courts in connection with their activities in winding up the partnership. See id.
Although the liquidating trustee cannot be held liable as a general partner for actions taken in winding up the limited partnership, the liquidating trustee is limited to winding up the partnership and must also comply with new guidelines for distribution of assets, discussed below, in order to avoid potential personal liability. Although the 1988 Delaware Act does not address fraud by the liquidating trustee, a liquidating trustee is subject to the fiduciary duties normally imposed on persons holding comparable positions of trust.

B. Distribution Procedures

The 1985 Delaware Act went beyond the 1985 RULPA in establishing standards and procedures for winding up a limited partnership.\(^\text{170}\) The 1988 Delaware Act introduces several more specific guidelines.

The need for guidelines for winding up a limited partnership is highlighted by the Delaware Chancery Court decision in *Boesky v. CX Partners, L.P.*\(^\text{171}\) In the *Boesky* case, several limited partners and creditors of a limited partnership (which was one of several related partnerships though which large-scale stock arbitrage transactions had been conducted) sought to enjoin a partial liquidation distribution proposed by the liquidating partner appointed to wind up the partnership pursuant to the partnership agreement.\(^\text{172}\) The liquidating partner sought to distribute the partnership’s assets to those limited partners whom he believed were not connected with transactions which the liquidating partner believed had damaged the partnership and for which he believed the partnership had a cause of action. In fact, a suit was pending in another court with respect to such claims.\(^\text{173}\)

The chancery court held that the provisions of the partnership agreement giving the liquidating partner all of the rights and powers

\(^{170}\) Section 17-803(b) of the 1985 Delaware Act conferred on the persons winding up a limited partnership the express power to prosecute and defend suits, settle and close the partnership’s affairs, dispose of and convey the partnership’s property, discharge its liabilities, and distribute remaining assets to the partners. *Del. Code Ann.* tit. 6, § 17-803(b) (Supp. 1986). Section 17-804(1) of the 1985 Delaware Act allowed claims to be satisfied either by payment or by establishment of reserves. *Id.* § 17-804(a).


\(^{172}\) *Id.*, slip op. at 1, *reprinted in* 14 Del. J. Corp. L. at 234.

\(^{173}\) *Id.*, slip op. at 9, *reprinted in* 14 Del. J. Corp. L. at 239.
over the assets and liabilities of the partnership that the general partner had during the term of the partnership did not permit the liquidating partner to make a non-pro rata distribution to limited partners in violation of a specific provision of the partnership agreement requiring equal treatment of all limited partners, nor to approve an amendment to the partnership agreement that would permit such distribution.\(^\text{174}\) The partnership agreement amendment provision did not provide for the liquidating trustee to act in lieu of the general partner in approving an amendment to the agreement.\(^\text{175}\)

In attempting to fashion a remedy and suggest a compromise solution, the Court noted that the 1985 Delaware Act was more flexible than the 1985 RULPA in that it permitted a distribution to partners upon the establishment of reserves for contingent liabilities.\(^\text{176}\) But the court further observed that the 1985 Delaware Act provided substantially less guidance for the winding up of a limited partnership than the Delaware General Corporation Law provided for the dissolution of a corporation,\(^\text{177}\) complex nonjudicial procedures having been added to the Delaware Corporation Law by amendment in 1987.\(^\text{178}\) The liquidation procedures adopted by the 1988 amendments, while not as elaborate as those in the Delaware General Corporation Law, provide substantial guidance for a liquidating trustee or general partner who is winding up the affairs of the limited partnership.\(^\text{179}\)

The 1988 amendments substitute the phrase "make reasonable provision for payment" in place of the "establishment of reserves" provision introduced in the 1985 Delaware Act, and should be read more broadly than that former provision.\(^\text{180}\) It should permit the use of insurance, assumption of liability, and similar methods to provide for existing or contingent liabilities so long as such provisions are "reasonable."

In addition, the 1988 amendments provide that a liquidating trustee who has complied with the statutory provisions in the winding up of the partnership will not be personally liable to any claimants of the dissolved partnership by reason of the liquidating trustee’s

\(\text{174. Id., slip op. at 29-30, reprinted in 14 Del. J. Corp. L. at 250.}\)
\(\text{175. Id., slip op. at 25, reprinted in 14 Del. J. Corp. L. at 248.}\)
\(\text{176. Id., slip op. at 41, reprinted in 14 Del. J. Corp. L. at 257.}\)
\(\text{177. Id., slip op. at 42, reprinted in 14 Del. J. Corp. L. at 257.}\)
\(\text{180. Id. §§ 17-803(b), -804(a)(1).}\)
actions in winding up the partnership. These standards include paying, or making reasonable provisions to pay, all claims and obligations (including all contingent, conditional or unmatured claims and obligations) known to the limited partnership and all claims and obligations which are known to the limited partnership but for which the identity of the claimant is unknown.

If there are sufficient assets in the limited partnership, all such claims and obligations must be paid in full and any provision for payment must also be made in full. If there are insufficient assets to satisfy all claims and obligations of the limited partnership, claims and obligations are to be paid or provided for according to the priority set forth in the statute, which is unchanged from the 1985 Delaware Act. If claims and obligations have equal priority, they are to be paid or provided for ratably to the extent of assets available. Unless otherwise provided in the partnership agreement, any remaining assets are to be distributed to partners and former partners.

Although these provisions are not as elaborate as those contained in the General Corporation Law, they provide guidelines that protect the partners and allow the liquidating trustee who winds up the partnership to avoid liability.

VI. MISCELLANEOUS PROVISIONS

A. Partnership Name

The 1988 amendments delete the prohibition that a partnership name contain a word or phrase indicating or implying that it is organized other than for a purpose stated in the partnership agreement. This amendment is consistent with 1985 RULPA.

In a departure from 1985 RULPA, the 1988 Delaware Act permits the name of the limited partnership to contain the name of

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181. Id. § 17-804(b).
182. Id.
183. Id.
184. 6 U.L.P.A. § 804 (1976) (amended 1985). The principal difference is the provision for satisfying liabilities by "reasonable provision for payment" as opposed to actual payment. See id.
185. Id. § 17-804(b) (Supp. 1988).
186. Id.
187. Id. § 17-102(4).
a partner and provides that a limited partner is not deemed to participate in the control of the business by virtue of the fact that all or any part of the name of the limited partner is included in the name of the limited partnership. This change carries forward the policy that creditors and potential creditors should obtain assurances from the partnership agreement and from other information furnished by the partnership concerning financial and other matters. Considering that the limited partnership name must contain the words "Limited Partnership" or the abbreviation "L.P.," and that third parties are on notice that they are dealing with a limited liability entity, there appears to be no reason to permit them to predicate personal liability on the name of the partnership.

The Delaware General Corporation Law was amended in 1988 to fully integrate the reservation and use of names by domestic corporations and limited partnerships and registered foreign corporations and limited partnerships. Corporations and limited partnerships, whether organized in the State of Delaware or registered as foreign corporations or foreign limited partnerships doing business in Delaware, may not reserve or register under a name unless it can be distinguished from the names of other domestic and foreign corporations and limited partnerships organized, reserved or registered in Delaware, or unless written consent of such corporation or limited partnership with a similar name is obtained and filed with the Secretary of State.

B. Service of Process on General Partners and Liquidating Trustees

To resolve any doubts concerning the amenability of a nonresident general partner or liquidating trustee to an action in Delaware

189. Del. Code Ann. tit. 6, §§ 17-102(2), -303(d) (Supp. 1988). By comparison, the 1985 RULPA prohibits use of a limited partner's name in the partnership name, subject to exceptions when the name is that of a general partner or a corporate general partner or the business was carried on under the name prior to admission of the limited partner, and subjects a limited partner to liability for knowingly allowing his name to be used in the partnership name. 6 U.L.P.A. §§ 102(2), 303(d) (1976) (amended 1985).

190. Del. Code Ann. tit. 8, §§ 102(a)(1), 371(c) (Supp. 1988). Under corporate law, even if a limited partnership had reserved a name, a corporation with the same name could be organized, with the result that the limited partnership could not thereafter use the name it had reserved. Del. Code Ann. tit. 8, §§ 102(a)(1), 371(c) (1974). The amendments to §§ 102(a)(1) and 371(c) of the General Corporation Law cure this anomaly. Del. Code Ann. tit. 8, §§ 102(a)(1), 371(c) (Supp. 1988).

involving a limited partnership or a breach of fiduciary duty, a new provision was added subjecting general partners and liquidating trustees to personal jurisdiction in Delaware and substituted service in Delaware. Modelled after the corporate law counterpart for directors of Delaware corporations, the statute assures limited partners, creditors and others dealing with the limited partnership that at least one jurisdiction exists where the general partners can be joined and required to account for the conduct of the partnership or for their own conduct.

The 1988 Delaware Act provides for service of process on general partners and liquidating trustees in all civil actions or proceedings brought in Delaware involving or relating to the business of the limited partnership, or the violation by a general partner or liquidating trustee of a duty to the limited partnership, or to any partner of the limited partnership. Service of process may be made whether or not such person is a general partner or liquidating trustee at the time suit is commenced.

The filing with the Secretary of State of a certificate of limited partnership or amendment thereto, which names a resident or non-resident of Delaware as a general partner or liquidating trustee and is executed by such person, constitutes consent to the appointment of the limited partnership’s resident agent or, if no resident agent is named, the Secretary of State as that person’s agent upon whom service can be made.

Although it is modeled on its corporate counterpart, the 1988 Delaware Act consent provision is broader than the director consent provision, and may present new issues to the Delaware courts. The director consent statute is limited to suits in which the nonresident director is a necessary party or to suits that involve a breach of

195. Id.
fiduciary duty to the corporation or its stockholders.\textsuperscript{196} The general partner/liquidating trustee consent provision includes suits that relate to the business of the limited partnership as well as suits for breach of fiduciary duty to the partnership or to any partner. For example, should a Delaware limited partnership enter into a contract with a Texas company to be performed entirely in Texas, general partners residing outside of Delaware could be sued in Delaware along with the partnership in the event of a breach of the contract. Although this may seem to stretch concepts of minimum contacts, a cause of action would exist against the general partners in their capacity as general partners because of their personal liability for partnership obligations. So long as a cause of action against the general partners exists by virtue of their being or having been general partners, the statute should not offend constitutional standards.\textsuperscript{197}

\textbf{C. Business Transactions With the Partnership}

The 1988 Delaware Act expands permissible business transactions of partners with the partnership to permit a partner, unless otherwise provided in the partnership agreement, to borrow money from, act as a surety, guarantor or endorser for, guarantee or assume one or more specific obligations of and provide collateral for a limited partnership. A partner who engages in any of these transactions, or who lends money to, or transacts other business with, the limited partnership (activities which were expressly permitted by the previous version), has the same rights and obligations as a person who is not a partner.\textsuperscript{198}

\textsuperscript{196} Thus, mere status as a director of a Delaware corporation does not itself create a basis for personal jurisdiction. Pestolite, Inc. v. Cordura Corp., 449 A.2d 263 (Del. Super. 1982). Personal jurisdiction is predicated on a director's acts performed in his capacity as a director. \textit{Id.;} Hana Ranch, Inc. v. Lent, 424 A.2d 28 (Del. Ch. 1980).

\textsuperscript{197} \textit{Cf.} Hana Ranch, Inc. v. Lent, 424 A.2d 28 (Del. Ch. 1980). Far less certain is the validity of the general partner consent statute with respect to persons who became general partners prior to enactment of the statute. Unlike the Delaware director consent statute, which was applicable to directors elected or appointed after a prospective date, the general partner consent statute applies immediately to all existing nonresident general partners. DE\textsuperscript{L. CODE ANN.} tit. 10, § 3114(a) (Supp. 1988); DE\textsuperscript{L. CODE ANN.} tit. 6, § 17-109(a) (Supp. 1988).

\textsuperscript{198} DE\textsuperscript{L. CODE ANN.} tit. 6, § 17-107 (Supp. 1988). The activities permitted by § 17-107 are not, however, as broad as the activities permitted under the § 17-303(b)(3) safe harbor activities provision. \textit{Id.} § 17-303(b)(3).
D. Annual Tax

The 1988 Delaware Act imposes for the first time an annual tax on all limited partnerships organized in Delaware and foreign limited partnerships registered in Delaware.\(^\text{199}\) The tax is in the flat amount of $100 and is due and payable on the first day of June for the preceding calendar year.\(^\text{200}\) The tax for the current calendar year is payable during such calendar year upon the filing of a certificate of cancellation.\(^\text{201}\)

Tax not paid by the due date bears interest at the rate of one percent for each month or portion thereof until fully paid.\(^\text{202}\) Notice of the tax, addressed to the partnership's registered agent in the State of Delaware, is to be mailed by the Secretary of State to each domestic and registered foreign limited partnership at least sixty days prior to the first day of June.\(^\text{203}\)

In addition to interest, a partnership which does not pay the tax by the due date is subject to a penalty in the amount of $100.\(^\text{204}\) In case of default in payment of the tax by a partnership which no longer has a registered agent in the State of Delaware, the act provides for service upon the Secretary of State.\(^\text{205}\) The annual tax is a debt due from the partnership to the State of Delaware, for which the State may maintain an action at law after the tax is in arrears for a period of one month. The tax is also a preferred debt in the case of insolvency.\(^\text{206}\)

\(^{199}\) Id. § 17-1109. Other states having such fees include Florida, Georgia, Illinois, Kansas, Nevada, New Jersey, North Dakota, Oregon, and Virginia. The amount of the annual fee varies; some are based on capitalization and others are a flat fee. The highest is Kansas, with a maximum fee of $2,500 per year, and the lowest is North Dakota, with a $25 fee payable every five years. See FLA. STAT. § 620.182(5) (West Supp. 1989) (capital-based fee, $30 minimum, $250 maximum); GA. CODE ANN. § 14-9-1101(3) (1989) ($15 annual fee); ILL. ANN. STAT. ch. 106-1/2, para. 161-2, § 1102(6) (Smith-Hurd Supp. 1989) ($15 fee every two years); KAN. STAT. ANN. § 56-1a606(d) (Supp. 1989) (capital-based fee, $20 minimum, $2,500 maximum); NEV. REV. STAT. § 88.415(4) (1987) ($30 annual fee); N.J. STAT. ANN. § 42:2A-68(i) (West Supp. 1989) ($20 annual fee); N.D. CENT. CODE § 45-10.1-15 (Supp. 1989) ($25 fee every five years); OR. REV. STAT. § 70.460(5) (1988) ($50 annual fee for domestic limited partnerships, $200 annual fee for foreign limited partnerships); VA. CODE ANN. § 50-73.67 (1989) ($50 annual fee).

\(^{200}\) DEL. CODE ANN. tit. 6, §§ 17-1109(a), (b) (Supp. 1988).

\(^{201}\) Id. § 17-1109(b).

\(^{202}\) Id.

\(^{203}\) Id. § 17-1109(c).

\(^{204}\) Id. § 17-1109(d).

\(^{205}\) Id. § 17-1109(e).

\(^{206}\) Id. § 17-1109(f).
A limited partnership which has not paid the annual tax when due will be sent a written demand on or before the first day of September of the year in which the tax is due. If the tax, and all penalties and interest thereon, is not paid in full after such written notice is sent and before the first day of November of the year in which the tax is due, the partnership ceases to be in good standing as a domestic limited partnership or duly registered as a foreign limited partnership in Delaware. Good standing or registration may be restored by paying the tax and all penalties and interest thereon for all years for which payment has not been made.

After the tax has been in arrears for a period of three months, the Delaware Attorney General (either on his own motion or upon request of the Secretary of State) may apply to the court of chancery for an injunction to restrain a defaulting partnership from the transaction of business in Delaware or elsewhere, to be effective upon five days notice made in such manner as the court directs, until the tax, all penalties and interest due and the cost of the Attorney General’s petition are paid. The cost of the petition is to be fixed by the court.

A domestic limited partnership which has ceased to be in good standing by a failure to pay the tax remains a domestic limited partnership. However, the Secretary of State will not accept for filing any certificate required or permitted to be filed under the Delaware Act and will not issue any certificate of good standing for a domestic or foreign limited partnership which has ceased to be in good standing or duly registered.

A domestic or foreign limited partnership which has ceased to be in good standing or duly registered for failure to pay the tax cannot maintain any action, suit or proceeding in any court of Delaware. Nor can any successor or assignee of a limited partnership which has ceased to be in good standing or duly registered maintain any action, suit or proceeding on any right, claim or demand arising out of the transaction of business by the partnership. Such suits may be maintained after taxes, interest and penalties are paid,

207. Id. § 17-1109(g).
208. Id.
209. Id. § 17-1109(h).
210. Id. § 17-1109(i).
211. Id. § 17-1109(j).
212. Id.
213. Id. § 17-1109(k).
and, in the case of an existing partnership, the partnership is restored to good standing or registration.\textsuperscript{214} Failure to pay the tax does not impair the validity of contracts, deeds, mortgages, security interests, liens, or acts of limited partnerships or prevent a partnership from defending any action, suit, or proceeding in the courts of Delaware.\textsuperscript{215}

To preclude harsh consequences to limited partners, the statute clearly states that loss of good standing does not terminate the partnership's status as a limited partnership so as to transform limited partners into general partners or trigger adverse tax consequences.\textsuperscript{216} Thus, a limited partner of a domestic limited partnership or foreign limited partnership does not become liable as a general partner because the partnership has failed to pay the annual tax or because the partnership has ceased to be in good standing or duly registered.

\section*{E. Other New Fees}

The 1988 amendments provide, in addition to the introduction of the annual tax, for a $200 fee to be paid upon filing of a certificate of merger or consolidation for a limited partnership.\textsuperscript{217} This is in addition to any fees required to be paid by a corporation surviving or resulting from such merger or consolidation under the General Corporation Law.

The 1988 amendments also provide for a $100 fee for services by the Secretary of State that are required to be completed within the same day as the request, and a $50 fee for services of the Secretary of State that are requested to be completed within twenty-

\begin{itemize}
\item \textsuperscript{214} Id.
\item \textsuperscript{215} Id. § 17-1109(1).
\item \textsuperscript{216} Id. § 17-1109(m). By comparison, in some states, failure to pay the annual tax results in forfeiture of the certificate of limited partnership, with the potential for exposing limited partners to general partner liability, effecting an inadvertent dissolution of the partnership, or similarly harsh result. \textit{See}, e.g., \textsc{Fla. Stat.} §§ 620.178(1), (3) (Supp. 1989) (authority to transact business revoked, certificate may be revoked); \textsc{Ga. Code Ann.} § 14-9-206.7 (1989) (transferred to inactive status, limited partners expressly not liable); \textsc{Ill. Ann. Stat.} ch. 106-1/2, para. 161-2, § 1109 (Smith-Hurd Supp. 1989) ($100 penalty plus shown as delinquent); \textsc{Kan. Stat. Ann.} §§ 56-1a606(e), -1a607(e) (Supp. 1989) (certificate revoked); \textsc{Nev. Rev. Stat.} § 88.400(3) (1987) (certificate forfeited); \textsc{N.J. Stat. Ann.} §§ 42:2A-69(c), -70(c), (d) (West Supp. 1989) (domestic limited partnership transferred to inactive list, certificate of foreign limited partnership to transact business revoked, limited partners expressly not liable); \textsc{N.D. Cent. Code} § 45-10.1-14 (Supp. 1989) (certificate cancelled); \textsc{Or. Rev. Stat.} § 70.460(8) (1988) (transferred to inactive status); \textsc{Va. Code Ann.} § 50-73.69 (1989) ($25 penalty).
\item \textsuperscript{217} \textsc{Del. Code Ann. tit. 6}, § 17-1107(a)(3) (Supp. 1988).
\end{itemize}
four hours of the request. The Secretary of State is directed to establish a schedule of services available on an expedited basis on payment of these fees.\footnote{218}

\textit{F. Foreign Limited Partnerships}

The 1988 amendments provide that a foreign corporation or limited partnership is not deemed to be doing business in Delaware merely by reason of its being a partner in a Delaware limited partnership.\footnote{219} General constitutional principles govern whether a foreign corporation or limited partnership must register to transact business in Delaware.

\footnote{218. Id. § 17-1107(b).} \footnote{219. Id. § 17-902(b).}
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