

# COMPARISON OF LIMITED PARTNERSHIP LAWS OF TEXAS AND DELAWARE

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## **CHAPTER 4.2**



## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	LIMITATIONS ON LIABILITY .....	1
	A. Piercing Limited Partnership Liability Shield.....	1
	B. Liability for Unlawful Distributions. ....	2
	C. Reliance on Reports and Opinions. ....	3
	D. Claims by Judgment Creditors. ....	4
III.	FORMATION REQUIREMENTS .....	4
	A. Filing of Certificate of Formation; Existence.....	4
	B. Partnership Agreement.....	5
IV.	VARIANCE OF STATUTORY PROVISIONS.....	6
V.	DUTIES AND LIABILITIES OF PARTNERS TO PARTNERSHIP .....	6
VI.	INDEMNIFICATION.....	8
VII.	INSPECTION OF RECORDS .....	9
VIII.	CONTRIBUTIONS AND DISTRIBUTIONS .....	10
	A. Contributions.....	10
	B. Distributions.....	12
IX.	PARTNERS AND PARTNERSHIP INTERESTS.....	13
	A. Requirement, Qualification and Admission of Partners.....	13
	B. Assignments of Partnership Interests. ....	14
	C. Series Limited Partnership Structures. ....	15
X.	MANAGEMENT.....	15
XI.	MEETINGS AND VOTING .....	16
XII.	FUNDAMENTAL BUSINESS TRANSACTIONS .....	18
	A. Mergers. ....	18
	B. Conversions.....	21
	C. Interest Exchange.....	23
	D. Sale of Assets. ....	23
	E. Dissenters' Appraisal Remedy.....	24
	F. Domestication of Non-United States Entities. ....	24
	G. Transfer or Continuance Transactions. ....	24
XIII.	WINDING UP AND TERMINATION .....	25
XIV.	CONCLUSION.....	27



# COMPARISON OF LIMITED PARTNERSHIP LAWS OF TEXAS AND DELAWARE

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## I. INTRODUCTION

Choosing the applicable law under which to form the modern day limited partnership can be a crucial decision, and many lawyers and business people fail to appreciate the impact that the choice of law can have on future operations and transactions involving the limited partnership. Incorporating under the Delaware General Corporation Law has long been the dominant choice for public corporations. It is wise to examine the differences between Delaware and Texas law applicable to limited partnerships before automatically deferring to the choice of Delaware law for formation.

The statutory provisions governing limited partnerships in Texas are located in the Texas Business Organizations Code (the “TBOC”). Title 1 of the TBOC contains 12 Chapters that are generally applicable to all types of domestic entities formed under Texas law, including limited partnerships. The provisions of Chapters 151, 153 and 154 of the TBOC are applicable to limited partnerships. Chapters 151 and 154 of the TBOC also apply to general partnerships, which are separately governed by Chapter 152 of the TBOC. The provisions of Chapter 151, 153 and 154 and the provisions of Title 1 and Chapter 152 to the extent applicable to limited partnerships may be cited as the “Texas Limited Partnership Law.”

The statutory provisions governing a Delaware limited partnership are found in the Delaware Revised Uniform Limited Partnership Act (the “DRULPA”). The DRULPA constitutes Chapter 17 of Subtitle II of Title 6 of the Delaware Laws.

While I have attempted to prepare a fairly comprehensive comparison of what I view as the more important aspects of these limited partnership laws, the comparison is not complete. There are other provisions in each of the statutes that I have not attempted to address and compare. Any reader, of course, should review the statutory provisions himself or herself in order to make his or her own analysis and to compare other provisions that I have not addressed.

## II. LIMITATIONS ON LIABILITY

### A. Piercing Limited Partnership Liability Shield.

Texas. One of the primary considerations in choosing applicable law is the shield provided by the

limited partnership for its limited partners with respect to obligations and liabilities of the limited partnership. Under the Texas Limited Partnership Law, a limited partner is not liable for the obligations of a Texas limited partnership unless the limited partner is also a general partner or, in addition to the exercise of the limited partner’s rights and powers as a limited partner, the limited partner participates in the control of the business. If the limited partner participates in the control of the business, the limited partner is liable only to a person who transacts business with the limited partnership reasonably believing, based on the limited partner’s conduct, that the limited partner is a general partner.<sup>1</sup> A limited partner does not participate in the control of the business because the limited partner has acted in one of numerous capacities or possesses or exercise one or more numerous powers listed in the TBOC.<sup>2</sup> Examples of such powers include calling, requesting, attending or participating in a meeting of the partners or the limited partners and consulting with or advising the general partner on any matter, including the business of the limited partnership, and acting as an officer, director or stockholder of a corporate general partner or as a member or manager of a limited liability company that is a general partner.<sup>3</sup>

Texas court cases have generally observed the liability shield for limited partners in most circumstances. In most cases, the court has decided that regular corporate veil-piercing principles are inapplicable to a Texas limited partnership because the general partner is always liable for the limited partnership’s debts.<sup>4</sup> Some Texas courts have also stated that allowing the application of veil-piercing theories to limited partnerships would essentially disregard formal statutory rules on liability of limited partners.<sup>5</sup> For an excellent discussion of most of the Texas court cases addressing, and other relevant background information concerning, the topic of piercing the limited partnership veil, one should refer to Professor Elizabeth Miller’s excellent CLE paper titled “*Governing Persons and Owners in Action*.”

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<sup>1</sup> TBOC §153.102.

<sup>2</sup> TBOC §153.103.

<sup>3</sup> Id.

<sup>4</sup> See, e.g., Pinebrook Properties, Ltd. V. Brookhaven Lake Property Owners Ass’n, 77 S.W.3d 487, 449-500 (Tex. App. – Texarkana 2002, pet denied); Peterson Group, Inc. v. PLTQ Lotus Group, L.P., 2013 WL 6081451 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2013, no pet. h.).

<sup>5</sup> See, e.g., Waller v. DB3 Holdings, Inc., 2008 WL 373155 (N.D. Tex. 2008).

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*Liability Protection and Piercing the Veil of Texas Business Entities.*"<sup>6</sup>

**Delaware.** The Delaware statute on liability of limited partners provides that a limited partner is not liable for the obligations of a limited partnership unless he or she is also a general partner or, in addition to the exercise of the rights and powers of the limited partner, he or she participates in the control of the business. If the limited partner does participate in control of the business, he or she is liable only to persons who transact business with the limited partnership reasonably believing, based on the limited partner's conduct, that the limited partner is a general partner.<sup>7</sup> A limited partner does not participate in the control of the business by virtue of possessing or exercising or attempting to exercise certain specified rights or powers. The listing of rights and powers substantially all of the rights and powers listed in the TBOC plus several additional specific rights and powers.<sup>8</sup> The additional rights and powers include, among other things: (a) to transact business with the limited partnership, (b) to borrow money from or to lend money to the limited partnership or a general partner, (c) to provide collateral for a general partner, (d) to act or cause a general partner or any other person to take or refrain from taking any action with respect to any matter, including the business of the limited partnership, (e) to appoint, elect or otherwise participate in the choice of a representative or another person to serve on any committee of the limited partnership and to act as a member of any such committee directly or through any such representative or other person, or (f) to propose, approve, consent or disapprove, by voting or otherwise, (i) the making of or other determinations in connection with contributions, (ii) the making of or other determinations in connection with investments by the limited partnership, or (iii) the appointment, election or removal of an independent contractor for, or an agent or employee of, the limited partnership or a general partner or an officer, director or stockholder of a corporate general partner or other managerial official of another type of a general partner.<sup>9</sup> On the other hand, the DRULPA provisions fail to exclude any right or power of the limited partners to approve, propose or disapprove a conversion or interest exchange with respect to a

limited partnership, which is specifically mentioned in the TBOC provisions. The listing of the rights and powers in the Delaware statute does not create such rights or powers but such rights and powers can only be created in the certificate of limited partnership, the partnership agreement or another agreement or in writing.<sup>10</sup>

## B. Liability for Unlawful Distributions.

**Texas.** The TBOC prohibits a limited partnership from making a distribution to its partners if, immediately after giving effect to the distribution, the limited partnership's liabilities exceed the fair value of the limited partnership's total assets. For the purposes of that calculation, the liabilities do not include a liability related to a partner's partnership interest or the liability for which the recourse of creditors is limited to specific property of the limited partnership unless the fair value of that property exceeds the liability (in which case the fair value of that property subject to such non-recourse liability is also included in the total assets of the Limited partnership).<sup>11</sup> A limited partner who receives a prohibited distribution is not required to return the distribution to the limited partnership unless the limited partner had knowledge of the violation. In addition to the foregoing provisions, a limited partner may be required to return a distribution to the limited partnership if required under the partnership agreement or other applicable law.<sup>12</sup> This latter reference is primarily intended to refer to the Uniform Fraudulent Transfer Act as adopted in Texas.<sup>13</sup>

Subsection (b) was added to Section 153.210 in 2009 to define "distribution" to exclude amounts constituting reasonable compensation for past or present services, or reasonable payments made in the ordinary course of business under a bona fide retirement plan or other benefits program. Subsection (f) was modeled on Section 17-607(a) of the DRULPA. Thus, a partner who receives payments as compensation for services or under a bona fide retirement plan would be protected from claims that such payments constituted distributions in violation of the statutory limitation.

**Delaware.** The Delaware statutory provisions are essentially the same as Texas with respect to the prohibition against making unlawful distributions by a limited partnership to its partners.<sup>14</sup> As with the TBOC, the Delaware statute clarifies that the term

<sup>6</sup> Presented at *Essentials of Business Law* conference sponsored by the State Bar of Texas CLE on March 6-7, 2014 in Houston, Texas. The article can also be found on the Baylor Law School website on the webpage for Professor Miller at <http://www.baylor.edu/law>.

<sup>7</sup> DRULPA §17-303(a).

<sup>8</sup> DRULPA §17-303(b), (f).

<sup>9</sup> DRULPA §17-303(b).

<sup>10</sup> DRULPA §17-303(e).

<sup>11</sup> TBOC §153.210(a).

<sup>12</sup> TBOC §153.112.

<sup>13</sup> Texas Business & Commerce Code §§ 24.001 et seq.

<sup>14</sup> DRULPA §17-607(a).

“distribution” does not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program

The Delaware statute has a provision similar to the Texas provision on return of an unlawful distribution but speaks in terms of the limited partner being liable to the limited partnership for the amount of the distribution. The DRULPA provision also states the negative, which is only inferred in the Texas statute, that the limited partner has no liability if the limited partner did not know at the time of the distribution that the distribution violated the statutory limitation.<sup>15</sup>

The Delaware statute also clarifies that these provisions do not affect any obligation or liability of a limited partner under any agreement (not simply the partnership agreement, as under the Texas statute) or other applicable law for the amount of a distribution.<sup>16</sup> Unlike the Texas statute, the Delaware statute requires that any action to recover an unlawful distribution from a limited partner must be commenced prior to the expiration of three years from the date of the distribution.<sup>17</sup> The Texas Limited Partnership Law does not have an explicit statute of limitations in this area.

### C. Reliance on Reports and Opinions.

*Texas.* Under Texas law, governing persons and officers of a limited partnership, in discharging a duty or exercising a power, may, in good faith and with ordinary care, rely on information, reports, opinions or statements, including financial statements and other financial data, concerning the limited partnership or another person and prepared or presented by an officer or employee of the limited partnership, its legal counsel, a certified public accountant, an investment banker, a person who the governing person or officer reasonably believes possesses professional expertise in the matter, or a committee of a governing authority of which the governing person is not a partner.<sup>18</sup> The governing person or officer may not in good faith rely on this information if the governing person or officer had knowledge of a matter that makes the reliance unwarranted.<sup>19</sup> These rules can be varied by the provisions of the partnership agreement. Nevertheless, they provide protection to general partners or officers

in situations where their reliance on information, opinions, reports or statements is in question.

Because the TBOC provisions are in Title 1 of that statute, they speak in terms of “governing persons” and “governing authority.” Under the Texas Limited Partnership Law, those references are interpreted to mean the general partners in the case of a limited partnership but not the limited partners.<sup>20</sup>

*Delaware.* In general, the Delaware statutory provisions are similar in many ways to the TBOC provisions, but specifically apply to limited partners as well as general partners.<sup>21</sup> The Delaware statute also allows liquidating trustees to rely on the provision. A court might interpret the concept of “governing authority” or “governing persons” to include a liquidating trustee who took over management of a limited partnership that was in the process of winding up under Texas law but that concept does not include limited partners. The protection of limited partners by the Delaware statutory provisions is beneficial and should be considered for Texas.

The Texas statute imposes an ordinary care obligation on the part of the relying governing person or officer, which is not explicit in the Delaware provision but might be implicit from applicable case law. Both the Texas and Delaware provisions require the relying person to act in good faith. The Delaware provision also allows the partner, manager or liquidating trustee to rely on the records of the limited partnership, although that concept could be implied in the phraseology of the Texas provisions. Unlike the Delaware statute, the Texas statute does not limit the information, reports, opinions or statements to just those “presented by” the other party upon whom the reliance is placed but allows for the information, report, opinion or statement to be “prepared” by such other party. This concept of “prepared by” broadens the Texas provision in a useful manner.

The Texas statute broadly allows reliance on financial statements and other financial data. The Delaware statute, on the other hand, includes, in a more detailed fashion, information, opinions, reports or statements as to the value and amount of the assets, liabilities, profits or losses of the limited partnership, or the value and amount of assets or reserves or contracts, agreements or other undertakings that would be sufficient to pay claims and obligations of the limited partnership or to make reasonable provision to pay such claims and obligations, or any other facts pertinent to the existence and amount of assets from which distributions to partners or creditors might properly be paid. This broad recitation of potential items appears to be intended to protect partners or

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<sup>15</sup>DRULPA §17-607(b).

<sup>16</sup>*Id.*

<sup>17</sup>DRULPA §17-607(c).

<sup>18</sup>TBOC §§3.102(a) and 3.105(a).

<sup>19</sup>TBOC §§3.102(b) and 3.105(b).

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<sup>20</sup>See, TBOC §1.102(35).

<sup>21</sup>DRULPA §17-407.

liquidating trustees in making decisions relating to the distribution of assets while the limited partnership is in the winding up process or otherwise. While the Texas statute does not specifically address the same long list of concepts, undoubtedly one of the primary purposes of the protective provision is to allow for reliance by general partners in making distribution decisions.

#### **D. Claims by Judgment Creditors.**

*Texas.* As a result of changes made to the TBOC by House Bill 1737 in 2007, the charging order provisions for limited partnerships were amended to add provisions similar to the charging order provisions in the Delaware statute. The changes clarified that the charging order is the exclusive remedy of a judgment creditor of a partner of a limited partnership, or of any other owner of a partnership interest (such as an assignee), in order to satisfy a judgment out of the partnership interest of such partner or other owner. The bill also clarified that the charging order constitutes a lien on the partnership interest of the partner or other owner and that the creditor only has the right to receive any distribution to which the partner or other owner would otherwise be entitled in respect of the partnership interest.<sup>22</sup> In addition, the 2007 amendments went beyond the Delaware provisions and specifically provided that a creditor of a partner or of any other owner of a partnership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership. As a result, a judgment creditor cannot reach the assets of the limited partnership.<sup>23</sup>

In 2009, Senate Bill 1442 clarified that the lien of a charging order may not be foreclosed on under the TBOC or any other law.<sup>24</sup> Questions had been raised as to whether the lien of a charging order was subject to foreclosure under various provisions of Texas law.

*Delaware.* The Delaware provisions relating to charging orders are located in DRULPA §17-703. In addition to similar provisions to those contained in the TBOC, the DRULPA specifies that the Delaware Court of Chancery shall have jurisdiction to hear and determine any matter relating to any charging order. To address the remedies and foreclosure issues, the DRULPA was amended, effective August 1, 2013, to provide that attachment, garnishment, foreclosure or other legal or equitable remedies are not available to the judgment creditor.<sup>25</sup> The remedies of attachment and garnishment are not addressed explicitly in the

TBOC, although can be implied from the reference to “legal or equitable remedies.”

### **III. FORMATION REQUIREMENTS**

#### **A. Filing of Certificate of Formation; Existence.**

*Texas.* A limited partnership in Texas is formed by the partners entering into a partnership agreement and filing a certificate of formation with the Texas Secretary of State a certificate of formation signed by each general partner.<sup>26</sup> The certificate of formation may be filed as an original signed version or a photocopy or facsimile. The certificate of formation must state the name of the filing entity being formed, the type of filing entity being formed, the name of the initial registered agent and the street address of the initial registered office of the filing entity, and the name and address of each general partner of the limited partnership.<sup>27</sup> Unlike other Texas filing entities, the certificate of formation for a Texas limited partnership need not state the purpose or purposes for which it is formed and the period of duration if it is not formed to exist perpetually. The certificate of formation must also state the address of the principal office of the limited partnership in the United States where records are to be kept or made available under TBOC Section 153.551.<sup>28</sup> The certificate of formation may contain other provisions not inconsistent with law relating to the organization, ownership, governance, business or affairs of the limited partnership.<sup>29</sup>

Section 3.001 of the TBOC states the general rule for all filing entities, including limited partnerships, that the existence of a filing entity commences when the filing of the certificate of formation take effect. An acknowledgement of the filing of a certificate of formation issued by the Texas Secretary of State is conclusive evidence of the formation and existence of the filing entity and the satisfaction of all conditions to the formation of the filing entity. Section 3.003 of the TBOC specifies that a Texas entity exists perpetually unless otherwise provided in its governing documents and until terminated in accordance with the TBOC or the Texas Tax Code. Section 11.102 of the TBOC states that the existence of a filing entity terminates on the filing of a certificate of termination with the Texas Secretary of State.

*Delaware.* To form a Delaware limited partnership, Section 17-201 of the DRULPA requires all general partners to execute and file with the Delaware Secretary of State a certificate of limited partnership. The original or a facsimile or photocopy

<sup>22</sup>TBOC §153.256.

<sup>23</sup> TBOC §153.256(f).

<sup>24</sup> TBOC §153.256(c).

<sup>25</sup> DRULPA §17-703(d).

<sup>26</sup> TBOC §§3.004(b), 3.011(a).

<sup>27</sup>TBOC §3.005(a).

<sup>28</sup>TBOC §3.011.

<sup>29</sup>TBOC §3.005(b).



of the certificate of limited partnership may be filed.<sup>30</sup> The certificate of limited partnership must set forth the name of the limited partnership, the address of the registered office and the name and address of the registered agent for service of process. The limited partnership is formed when the certificate is filed or at any later date or time specified in the certificate of limited partnership if, in either case, there has been substantial compliance with the statutory requirements. The limited partnership constitutes a separate legal entity, whose existence continues until cancellation of the certificate of limited partnership.<sup>31</sup>

The Delaware certificate of limited partnership, unlike Texas, does not require a statement as to type of filing entity. Although missing from the Texas provision, the substantial compliance standard in Delaware seems somewhat meaningless in light of the limited requirements for content in and execution of the certificate of limited partnership. The Texas provision requires the existence of a partnership agreement among the partners in order to form a limited partnership. While not expressly required by Delaware, it could be implied that a partnership agreement among the partners is required to form a limited partnership. However, leaving that crucial issue ambiguous in the statute could be criticized.

## B. Partnership Agreement.

*Texas.* The TBOC provides that the partnership agreement of a limited partnership may be any agreement, written or oral, between the partners concerning a partnership.<sup>32</sup> Section 152.002 of the TBOC specifies that the partnership agreement of a general partnership governs the relations among the partners and between the partners and the partnership.<sup>33</sup> In the absence of a provision in the partnership agreement of a general partnership, TBOC Chapter 152 governs the relationship of the partners and between the partners and the partnership. While these provisions are directly applicable to general partnerships, the provisions of Chapter 152 governing general partnerships apply to limited partnerships in a case not provided for by Chapter 153 and the provisions of Title I and Chapters 151 and 154 to the extent applicable to limited partnerships.<sup>34</sup> See the discussion below in Part IV concerning the waiver or modification of the Texas Limited Partnership Law by

the partnership agreement.<sup>35</sup> In the absence of provisions governing amendment in the partnership agreement, the partnership agreement may be amended only if each partner consents to the amendment.<sup>36</sup> Unlike the DRULPA, the TBOC does not address when the partnership agreement becomes effective.

*Delaware.* The Delaware statute provides that a partnership agreement may be entered into either before, after or at the time of filing of a certificate of limited partnership and, whether entered into before, after or at the time of such filing, may be made effective as of the effective time of such filing or at such other time or date as provided in the limited partnership agreement.<sup>37</sup> This provides flexibility as to the timing and dating of the partnership agreement, and the Texas law has no express counterpart. However, the provisions also create issues as to when exactly the limited partnership is formed and when it actually has partners.

The DRULPA has a lengthy definition of what constitutes a “partnership agreement.”<sup>38</sup> The definition states that it includes any agreement, written, oral and implied, of the partners as to the affairs of a limited partnership and the conduct of its business. The partnership agreement may be “implied” under the Delaware statute, unlike the TBOC. The agreement binds a partner or an assignee of a partnership interest whether or not that party executes the agreement. As with Texas, the agreement may provide rights to any person, including a person who is not a party to the agreement, to the extent set forth therein. In addition, while only implied in the Texas statute, the Delaware statute specifically states that the limited partnership need not execute the partnership agreement and that the limited partnership is bound by the agreement whether or not it executes the agreement. The Business Law Section of the State Bar of Texas is expected to recommend adding similar language to the TBOC in preparing a bill for the 2017 Texas Legislature.

The DRULPA contains additional provisions in the definition of “partnership agreement” to authorize that agreement or another written agreement or writing to provide that a person can be admitted as a limited partner or become an assignee if the person orally, in writing or by other action (such as payment) executes the partnership agreement or any other writing evidencing the intent of the person becoming a limited partner or assignee, or without such execution if the person complies with the conditions for becoming a

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<sup>30</sup> DRULPA §17-206(a).

<sup>31</sup> DRULPA §17-201(b).

<sup>32</sup> TBOC §151.001(5).

<sup>33</sup> TBOC §152.002(a).

<sup>34</sup> TBOC §153.003(a). See also TBOC §152.051(d).

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<sup>35</sup> TBOC §153.004.

<sup>36</sup> TBOC §152.208.

<sup>37</sup> DRULPA §17-201(d).

<sup>38</sup> DRULPA §17-101(12).

limited partner or assignee as set forth in the partnership agreement or any other writing. The partnership agreement or another written agreement is not unenforceable by reason of its not having been signed by a person being admitted as a partner or who is becoming an assignee.<sup>39</sup> These more expansive authorization provisions are missing from the definition of “partnership agreement” in the TBOC but can be implied from various other TBOC provisions.

If a partnership agreement provides for the manner in which it may be amended, it may be amended only in that manner or as otherwise permitted by law, including as permitted by a merger agreement or plan of merger under Section 17-211(g) of the DRULPA. If the partnership agreement does not provide for the manner in which it may be amended, the partnership agreement may be amended only with the approval of all the partners or as otherwise permitted by law, including a merger agreement or plan of merger authorized pursuant to Section 17-211(g).<sup>40</sup>

#### IV. VARIANCE OF STATUTORY PROVISIONS

*Texas.* The TBOC is more clear than Delaware as to what statutory provisions may be waived or modified by the partnership agreement of the limited partnership. TBOC §153.004 specifically lists the portions of Title I of the TBOC that may not be waived or modified in the partnership agreement, although it does not list any provisions in Chapter 153. The provisions listed in that section may be waived or modified in the partnership agreement if the statutory provision authorizes the limited partnership to waive or modify the provision in the partnership’s governing documents.

A provision in the Texas Limited Partnership Law that grants a right to a person, other than a partner or assignee of a partnership interest, may be waived or modified in the partnership agreement only if the person consents to the waiver or modification.<sup>41</sup> In 2013, Section 154.104 was added to explicitly recognize that a partnership agreement may provide rights to any person, including a person who is not a party to the partnership agreement. These provisions in the TBOC are useful for financing parties that want to impose enforceable conditions or covenants on a borrowing limited partnership.

*Delaware.* Throughout the DRULPA, each waivable provision specifies that it is subject to change by the limited partnership by the phrase “unless otherwise provided in the limited partnership

agreement” or similar language. Where not explicit, the reader of the Delaware statute is sometimes left guessing as to whether a particular provision might be interpreted by a court to allow for modification or waiver by the limited partnership agreement. Although the language is less clear than the Texas provision, Section 17-302(f) of the DRULPA provides that third persons who are the intended beneficiaries of a provision in a limited partnership must give their waiver in order to amend that provision.

#### V. DUTIES AND LIABILITIES OF PARTNERS TO PARTNERSHIP

*Texas.* Chapter 153 of the TBOC does not specify any particular duties that are owed by limited partners. The provisions of Chapter 152 governing general partnerships also apply to limited partnerships, except that the powers and duties of a limited partner are not governed by a provision of Chapter 152 that would be inconsistent with the nature and role of a limited partner as contemplated by Chapter 153. A limited partner does not have any obligation or duty of a general partner solely by reason of being a limited partner.<sup>42</sup> The provisions of Chapter 152 specify that a general partner owes to the partnership and other partners a duty of loyalty and a duty of care and the obligation to discharge those duties in good faith and in a manner the partner reasonably believes to be in the best interests of the partnership.<sup>43</sup> As a result of these provisions, it is clear that the general partners of a limited partnership have express duties as specified in Chapter 152, but it is unclear as to what duties, if any, are owed by limited partners to the limited partnership or other partners. The foregoing duties of loyalty and care and the obligation of good faith of a general partner cannot be eliminated by a partnership agreement, but the agreement may (i) identify specific types of activities or categories of activities that do not violate the duty of loyalty if the types or categories are not manifestly unreasonable, (ii) may determine the standards by which the performance of the obligation is to be measured for purposes of the duty of care if the standards are not manifestly unreasonable, or (iii) determine the standards by which the performance of the obligation of good faith is to be measured if the standards are not manifestly unreasonable.<sup>44</sup> Thus, under a partnership agreement for a Texas limited partnership, the duties of a limited partner cannot be eliminated but reasonable standards governing the performance of those duties can be included in the partnership agreement. Presumably, any duties of a

<sup>39</sup>Id..

<sup>40</sup> DRULPA §17-302(f).

<sup>41</sup>TBOC §153.005.

<sup>42</sup> TBOC §153.003.

<sup>43</sup> TBOC §152.204(a) and (b).

<sup>44</sup> TBOC §152.002(b).

limited partner can be, to the extent such duties exist, can also have standards of performance established by the partnership agreement.

In 2013, Senate Bill 847 revised TBOC Section 7.001(d) to clarify that the liability of a governing person of a limited partnership may be “limited or eliminated” by its partnership agreement to the same extent subsections 7.001(b) and (c) permit the limitation or elimination of liability of a governing person of a for-profit corporation (or other organization to which these subsections apply).<sup>45</sup> In addition, the liability of the governing person of the limited partnership may be limited or eliminated to the additional extent permitted under Chapter 153 and, to the extent applicable to limited partnerships, Chapter 152.

In a relatively recent Texas Court of Appeals case, *Strebel v. Wimberley*, the court concluded that the status as a limited partner alone does not give rise to a fiduciary duty to other limited partners. However, a limited partner may owe fiduciary duties to other limited partners when the limited partner acts in a different capacity and exerts operating control over the affairs of the limited partnership. Such a different role might be acting as an officer of the limited partnership or its general partner. In that situation, the existence and scope of the duties will be defined not by the law governing limited partners but rather than by the relevant laws and contracts governing the role under which the party is exercising authority.<sup>46</sup> A different, older Texas Courts of Appeals found a fiduciary duty to exist between limited partners based on the general proposition that a partnership is a fiduciary relationship, although the *Strebel* court was able to distinguish the facts in the case.<sup>47</sup> The U.S. Fifth Circuit Court of Appeals in another case was able to conclude that a general partner and certain limited partners owed fiduciary duties to other limited partners as a result of their actions in controlling the limited partnership.<sup>48</sup> For an excellent discussion of most of the Texas court cases addressing the duties of limited partners, one should refer to Professor Elizabeth Miller’s excellent CLE paper titled “*Fiduciary Duties in LLCs and Partnerships in Texas and Delaware, including 2015 Legislative Changes and Drafting Considerations*.”<sup>49</sup>

In summary, unlike the Delaware statute, which specifically allows for elimination of duties and liabilities (other than with respect to the contractual covenant of good faith and fair dealing), it is unclear under the TBOC whether the duties, if any, of a limited partner can be completely eliminated. Chapter 153 of the TBOC does not confirm, other than by way of negative implication, that any duties of limited partners actually exist, although as discussed above, some Texas court cases have stated that a limited partner owes no duties in that capacity alone.

*Delaware.* The Delaware statute provides that to the extent that, at law or in equity, a partner or other person has duties (including fiduciary duties) to a limited partnership or to another partner or to another person that is a party to or otherwise bound by a limited partnership agreement, the duties of the partner or other person may be expanded or restricted or eliminated by provisions in the partnership agreement. However, the agreement may not eliminate the implied contractual covenant of good faith and fair dealing.<sup>50</sup> In another parallel provision, the statute goes on to provide that the partnership agreement may limit or eliminate any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to the limited partnership or another partner or another person that is a party to or otherwise bound by the partnership agreement. However, the partnership agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.<sup>51</sup> The Delaware statute also confirms that the policy of the DRULPA is to give the maximum effect to the principal of freedom of contract and to the enforceability of partnership agreements.<sup>52</sup> Finally, the Delaware statute also specifies that a partner or other person who relies in good faith on the provisions of the partnership agreement cannot be liable to the limited partnership or another partner or another person that is a party to or otherwise bound by the partnership agreement for breach of fiduciary duty, unless otherwise provided in the partnership agreement.<sup>53</sup>

<sup>45</sup> TBOC §7.001(d)(2).

<sup>46</sup> *Strebel v. Wimberley*, 371 S.W.3d 267 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2012, pet. denied).

<sup>47</sup> *Zinda v. McCann Street, Ltd.*, 178 S.W.3d 883 (Tex. App. – Texarkana 2005, pet. denied).

<sup>48</sup> *McBeth v. Carpenter*, 565 F.3d 171 (5<sup>th</sup> Cir. 2009).

<sup>49</sup> Presented at *Choice & Acquisition of Entities*

2015 conference sponsored by the State Bar of Texas CLE on May 22, 2015 in San Antonio, Texas. The article can also be found on the Baylor Law School website on the webpage for Professor Miller at <http://www.baylor.edu/law>.

<sup>50</sup> DRULPA §17-1101(d).

<sup>51</sup> DRULPA §17-1101(f).

<sup>52</sup> DRULPA §17-1101(c).

<sup>53</sup> DRULPA §17-1101(e).

## VI. INDEMNIFICATION

*Texas.* The TBOC contains detailed provisions governing indemnification in connection with limited partnerships. Chapter 8 of the TBOC relates to indemnification of governing persons, officers and other persons by domestic entities, including limited partnerships, and is divided into four subchapters. Subchapter A contains definitions used in Chapter 8<sup>54</sup> and authorizes limitations on the power to indemnify in the certificate of formation (or partnership agreement for a limited partnership).<sup>55</sup> The Subchapter also states that, with one exception, a provision for an enterprise to indemnify a governing person is valid only to the extent consistent with Chapter 8.<sup>56</sup> Subchapter B contains provisions regarding mandatory or court-ordered indemnification.<sup>57</sup>

Subchapter C of Chapter 8 addresses the standards and procedures for permissive indemnification and advancement of expenses for governing persons, former governing persons and delegates. Section 8.101 specifies that a determination must be made in accordance with Section 8.103 that the person being indemnified acted in good faith and with reasonable belief that the person's conduct was in the enterprise's best interest and, in the case of criminal proceeding, that the person did not have reasonable cause to believe the person's conduct was unlawful. Section 8.103 specifies that the disinterested and independent governing persons may make the determination required by Section 8.101. In addition, other parties that may make the determination are special legal counsel selected by the governing authority of the enterprise, a majority vote of a committee of the governing authority, the owners or members of the enterprise in a vote that excludes the ownership or membership interest held by each governing person who is not disinterested and independent, or a unanimous vote of the owners or members of the enterprise.<sup>58</sup> For a limited partnership, the limited partners, by a vote of a majority in interest, may make a determination approving an indemnification.<sup>59</sup> The vote excludes the interest held by each general partner who is not disinterested and independent.

Section 8.102(b) contains limitations on when a person cannot be indemnified, including in particular,

when a person is found liable to the enterprise or is found liable because the person improperly received a personal benefit. Section 8.104 contains provisions relating to when an enterprise may pay or reimburse reasonable expenses of a present governing person or delegate. Section 8.105 specifies when an enterprise may indemnify in advance expenses to a person who is not a governing person of the enterprise, including an officer, employee or agent.<sup>60</sup> Finally, an enterprise may pay or reimburse reasonable expenses incurred by any person in connection with his or her appearance as a witness.<sup>61</sup>

Subchapter D authorizes entities, including limited partnerships, to purchase insurance and make other funding arrangements to provide protection to governing persons and other persons who might otherwise be indemnified.<sup>62</sup> Reports on indemnification and advances of expenses must also be made to owners on an annual basis.<sup>63</sup>

Chapter 8 provides detailed standards and procedures for permissive and mandatory indemnification of general partners, delegates and officers of limited partnerships and other persons. The combination of the broad authority for indemnification, expense advancement and reimbursement, insurance and other indemnification arrangements, allows for a broad range of enforceable approaches for a Texas limited partnership.

*Delaware.* The DRULPA's provisions on indemnification are very short. The Delaware statute merely provides that, subject to any standards and restrictions set forth in the partnership agreement, a limited partnership may, and has the power to, indemnify and hold harmless any partner or other person from and against any and all claims and demands whatsoever.<sup>64</sup>

The DRULPA is entirely mute on the subject of advancement of legal expenses. The provisions of the DRULPA have been interpreted by the Delaware Chancery Court to give the power to the limited partnership to have provisions in the partnership agreement authorizing advancement of legal expenses.<sup>65</sup> It is important in Delaware to draft carefully the indemnification provision in the partnership agreement to allow for advancement of expenses and other forms of indemnification

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<sup>54</sup> TBOC §8.001.

<sup>55</sup> TBOC §8.003.

<sup>56</sup> TBOC §8.004.

<sup>57</sup> TBOC §§8.051-8.052.

<sup>58</sup> See TBOC §§1.003 and 1.004 for definitions of what kinds of persons are considered to be "disinterested" and "independent."

<sup>59</sup> TBOC §§8.103(d), 8.104(b)

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<sup>60</sup> TBOC §8.105.

<sup>61</sup> TBOC §8.106.

<sup>62</sup> TBOC §8.151.

<sup>63</sup> TBOC §8.152.

<sup>64</sup> DRULPA §17-108.

<sup>65</sup> See, e.g., *Stockman v. Heartland Indus. Partners, L.P.*, 2009 WL 2096213 (Del. Ch. 2009).

arrangements, if those benefits are desired by the partners or managers. Unlike Delaware, the Texas statute clearly authorizes advancement of expenses, insurance and contractual arrangements requiring indemnification. The Texas provisions would seem preferable in this regard.

## VII. INSPECTION OF RECORDS

*Texas.* Section 3.151 of the TBOC specifies the books and records required to be kept by a Texas filing entity, including a limited partnership. Each filing entity must keep (1) books and records of accounts, (2) a current record of the name and mailing address of each owner or member of the filing entity at its registered office or principal place of business or at the office of its transfer agent or registrar, and (3) any other books and records as required by the title of the TBOC governing the entity. In addition, filing entities other than limited partnerships or limited liability companies must maintain minutes of the proceedings of their owners, members or governing authorities and any committees thereof.<sup>66</sup> For limited partnerships or limited liability companies, however, this requirement may be imposed by their governing documents.<sup>67</sup> The foregoing books and records may be in written paper form or another form capable of being converted into written paper form within a reasonable time.<sup>68</sup>

Section 153.551 of the TBOC specifies the supplemental books and records required to be maintained by a Texas limited partnership. This information includes the following: (1) a current list that states the name and mailing address of each partner, separately identifying in alphabetical order the general partners and the limited partners; the last known street address of the business or residence of each general partner; the percentage or other interest in the partnership owned by each partner; and the names of the partners who are members of each class or group of partners if one or more classes or groups are established under the partnership agreement; (2) a copy of the limited partnership's federal, state and local information or income tax returns for each of its six most recent tax years, the partnership agreement and certificate of formation and all amendments or restatements thereof; (3) copies of any document that creates classes or groups of partners in the manner provided by the partnership agreement; (4) an executed copy of any powers of attorney under which the partnership agreement, certificate of formation and any amendments or restatements thereto have been executed; (5) unless contained in a written partnership

agreement, a written statement of the cash contribution and a description and statement of the agreed value of any other contribution made by each partner or that each partner has agreed to make in the future, the events requiring or the date on which additional contributions to be made, the events requiring the winding up of the limited partnership and the date on which each partner became a partner; and (6) books and records of the accounts of the limited partnership.<sup>69</sup> The foregoing records must be retained in written form or in another form capable of being converted to a written form in a reasonable time.<sup>70</sup> In addition, a limited partnership must keep in its registered office in Texas a street address of its principal office in the United States in which the required records are maintained.<sup>71</sup>

Under Section 153.552 of the TBOC, on written request stating a proper purpose, a partner or an assignee of a partnership interest may examine and copy, in person or through a representative, records required to be kept by a limited partnership (as described above) and other information regarding the business, affairs and financial condition of the limited partnership as is just and reasonable for the person to examine and copy.<sup>72</sup> The foregoing records may be examined and copied at a reasonable time and at the partner's (or assignee's) sole expense.<sup>73</sup> The records required to be maintained by the limited partnership must be made available in the partnership's principal office in the United States no later than the fifth day after the date on which the written request is received by the limited partnership.<sup>74</sup> A limited partnership must also make available to a partner upon reasonable request the street address of its principal office in the United States in which such records are maintained.<sup>75</sup> In addition to the foregoing examination right, on written request by a partner or an assignee of a partnership interest, the partnership must provide to the requesting partner or assignee without charge copies of the partnership agreement and certificate of formation of the limited partnership, and all amendments or restatements thereof, and any tax return required to be maintained by the limited partnership.<sup>76</sup> This request must be made to a person who is designated to receive the request in the partnership agreement at the address

<sup>66</sup> TBOC §3.151(a).

<sup>67</sup> TBOC §3.151(c).

<sup>68</sup> TBOC §3.151(d).

<sup>69</sup> TBOC §153.551.

<sup>70</sup> TBOC §153.551(b).

<sup>71</sup> TBOC §153.552(c).

<sup>72</sup> TBOC §153.552(a).

<sup>73</sup> TBOC §153.552(b).

<sup>74</sup> TBOC §153.551(a).

<sup>75</sup> TBOC §153.551(c).

<sup>76</sup> TBOC §153.552(c).

designated therein or, if there is no such designation, a general partner at the partnership's principal office in the United States.<sup>77</sup>

A limited partnership agreement may include restrictions on the access or inspection rights of a partner or an assignee of a partnership interest, so long as the agreement does not "unreasonably restrict a partner's right."<sup>78</sup> Many limited partnership agreements include a confidentiality obligation with respect to information obtained through the exercise of the inspection right, and that kind of restriction appears to be reasonable.

Delaware. The Delaware statutory provisions are much more detailed than the Texas provisions. Each limited partner has the right to obtain from the general partners from time to time upon reasonable demand for any purpose reasonably related to the limited partner's interest as a limited partner true and full information regarding the status of the business and financial condition of the limited partnership, including a list of specified information, as well as any other information regarding the affairs of the limited partnership as is just and reasonable. The other information includes tax returns, current list of the name and last known address of each partner, copy of the written partnership agreement and certificate of limited partnership and all amendments thereof, and information regarding the amount of cash and agreed value of any other property or services contributed by each partner and which each partner has agreed to contribute in the future, and the date on which each became a partner.<sup>79</sup> The right of the limited partner to obtain the information is subject to such reasonable standards (including standards regarding what information and documents are to be furnished at what time and location and at what expense) as may be set forth in the partnership agreement or otherwise established by the general partners.<sup>80</sup>

Any demand by a limited partner under the Delaware statute must be in writing and must state the purpose of such demand.<sup>81</sup> The rights of a partner or manager to obtain information may be restricted in an original partnership agreement or in any subsequent amendment approved or adopted by all of the partners or in compliance with any applicable requirements of the partnership agreement. This provision is not to be construed to limit the ability to impose restrictions on the rights of a limited partner to obtain information by

any other means permitted under the DRULPA.<sup>82</sup> A general partner of a Delaware limited partnership has the right to keep confidential from limited partners, for such period of time as the general partner deems reasonable, any information which the general partner reasonably believes to be in the nature of trade secrets or other information the disclosure of which the general partner in good faith believes is not in the best interest of the limited partnership or could damage the limited partnership or its business for which the limited partnership is required by law or by agreement with a third party to keep confidential.<sup>83</sup> The Delaware statute also contains detailed provisions authorizing the enforcement of the rights of a limited partner by an action brought in the Delaware Court of Chancery.<sup>84</sup>

Comparison of Texas to Delaware. Viewed from the standpoint of a limited partner, the Texas provisions have certain advantages. First, they clearly address the rights of an assignee of a partnership interest to obtain information from the limited partnership. Second, a limited partner or assignee can obtain a copy of the more important partnership records, namely the names, addresses and percentage interests of each partner and any tax returns, without any potential unreasonable restriction in the partnership agreement. The Texas statute also does not allow for the inspection rights of limited partners to be unreasonably restricted through the partnership agreement. The Delaware statute allows these rights to be restricted by the partnership agreement or a properly adopted amendment, but without a general objective reasonableness standard. Thus, the inspection rights of limited partners in a Delaware limited partnership can be severely restricted. The general partners of a Delaware limited partnership also have broad rights to keep confidential from limited partners any trade secrets or other information whose disclosure could damage the limited partnership. The more detailed court enforcement provisions in the Delaware statute might be helpful, to both the parties seeking the information and the limited partnership, to clarify their respective rights and obligations in connection with a demand for information.

## VIII. CONTRIBUTIONS AND DISTRIBUTIONS

### A. Contributions.

Texas. The TBOC provides that a contribution by a partner may consist of a tangible or intangible benefit to the limited partnership or other property of any kind or nature, including cash, a promissory note, services performed, a contract for services to be

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<sup>77</sup> TBOC §153.552(d).

<sup>78</sup> TBOC §153.004(a)(3).

<sup>79</sup> DRULPA §17-305(a).

<sup>80</sup> Id.

<sup>81</sup> DRULPA §17-305(d).

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<sup>82</sup> DRULPA §17-305(f).

<sup>83</sup> DRULPA §17-305(b).

<sup>84</sup> DRULPA §17-305(e).

performed and another interest in or security of the limited partnership, another domestic or foreign limited partnership, or another entity.<sup>85</sup> Under Texas law, a promise to make a contribution or otherwise pay cash or transfer property to a limited partnership is not enforceable unless the promise is in writing and signed by the limited partner.<sup>86</sup> That enforceable promise must be performed without regard to the death, disability or other change in circumstances of the partner.<sup>87</sup> A non-performing partner, or the partner's legal representative or successor, is obligated, at the request of the limited partnership, to pay in cash the agreed value of the contribution as stated in the partnership agreement or the partnership's records less any amount already paid for the contribution and the value of any property already transferred.<sup>88</sup> The partnership agreement may also provide that the defaulting partner's partnership interest may be (i) reduced, (ii) subordinated to other partnership interests of non-defaulting partners, (iii) redeemed or sold at a value determined by appraisal or other formula, or (iv) made the subject of a forced sale, forfeiture, a loan from other partners of the limited partnership in an amount necessary to satisfy the enforceable promise, or another penalty or consequence.<sup>89</sup>

As a default rule, the consent of each partner of the limited partnership is needed to compromise or settle the obligation of a partner, or the partner's legal representative or successor, to make a contribution or otherwise pay cash or transfer property to the limited partnership. Similarly, the release or settlement of the obligation to return cash or property to the limited partnership paid or distributed to the partner in violation of the TBOC or the partnership agreement requires the consent of each partner.<sup>90</sup> The Texas statute specifically authorizes a creditor of the limited partnership who extends credit or otherwise acts in reasonable reliance on an enforceable obligation of a partner that is released or compromised may enforce the original obligation if the obligation is stated in a document that is signed by the partner and not amended or cancelled to evidence the release or compromise of the obligation.<sup>91</sup> Conditional obligations, including a discretionary call for a contribution, of a limited partner may not be enforced

by the limited partnership or a creditor unless the condition is satisfied or waived with respect to the limited partner.<sup>92</sup> Notwithstanding the compromise or release by the limited partnership of a contribution obligation of a general partner, the general partner remains liable to persons other than the partnerships and the other partners in its status as a general partner pursuant to other provisions of the TBOC.<sup>93</sup>

Delaware. Under the Delaware statute, the contribution of a partner to a limited partnership may be in cash, property or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services.<sup>94</sup> A limited partner is obligated to perform any promise to contribute cash or property or to perform services, even if the partner is unable to perform because of death, disability or any other reason. If a partner does not make the required contribution of property or services, the partner is obligated, at the option of the limited partnership, to contribute cash equal to that portion of agreed value (as stated in the records of the limited partnership) of the contribution that has not been made. The foregoing option is in addition to, and not in lieu of any other rights, including the rights of specific performance that the limited partnership may have against such partner under the partnership agreement or applicable law.<sup>95</sup> The obligation of a partner to make a contribution or return money or other property paid or distributed in violation of the DRULPA may be compromised only by consent of all of the partners unless otherwise provided in the partnership agreement. Notwithstanding the compromise, a creditor of a limited partnership who extends credit, after the entering into of a partnership agreement or an amendment thereto which reflects the obligation, and before the amendment to reflect the compromise, may enforce the original obligation to the extent that, in extending credit, the creditor reasonably relied on the obligation of a partner to make a contribution or return. The Delaware provisions regarding conditional obligations are similar to those in the Texas statute but apply to both general and limited partners.<sup>96</sup>

As with Texas, the partnership agreement may provide that the defaulting partner's interests in a Delaware limited partnership may be subject to specified penalties for, or specified consequences of, the failure to make any contribution. The penalty or consequence may take the form of reducing or eliminating the defaulting partner's proportionate

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<sup>85</sup> TBOC §153.201.

<sup>86</sup>TBOC §153.202(a).

<sup>87</sup>TBOC §153.202(b).

<sup>88</sup>TBOC §153.202(c).

<sup>89</sup>TBOC §153.202(d).

<sup>90</sup>TBOC §153.203.

<sup>91</sup>TBOC §153.204(a).

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<sup>92</sup>TBOC §153.205.

<sup>93</sup> TBOC §153.204(b).

<sup>94</sup>DRULPA §17-501.

<sup>95</sup>DRULPA §17-502(a).

<sup>96</sup>DRULPA §17-502(b).

interest in the limited partnership, subordinating the partnership interest to that of nondefaulting partners, a forced sale of that interest, forfeiture of the defaulting partner's partnership interest, the lending by other partners of the amount necessary to meet the defaulting partner's commitment, a fixing of the value of the defaulting partner's interest by appraisal or by formula and redemption or sale of the interest at such value, or other penalty or consequence.<sup>97</sup>

## B. Distributions.

*Texas.* Under the TBOC, the default sharing among partners of a distribution that is not a return of capital is in accordance with the agreed value of the partners' contributions to the limited partnership as stated in the partnership's records, and a distribution that is not a return of capital must be paid in proportion to the allocation of profits as determined under TBOC Section 153.206.<sup>98</sup> The term "return of capital" means a distribution to a partner to the extent that the partner's capital account, immediately after the distribution, is less than the amount of that partner's contribution to the partnership as reduced by a prior distribution that was a return of capital.<sup>99</sup> A distribution of cash or another asset of a limited partnership must be made to a partner in the manner provided by a written partnership agreement.<sup>100</sup> So long as the distribution is not prohibited by the TBOC, a partner is entitled to receive a distribution from the limited partnership to the extent and at the time or on the occurrence of an event specified in the partnership agreement before the partner withdraws from the partnership and the winding up of the partnership business.<sup>101</sup> When a partner is entitled to receive a distribution from the limited partnership, the partner has the same status as a creditor of the limited partnership with respect to the distribution and is entitled to all remedies available to a creditor, so long as the distribution is not prohibited by the Texas statute.<sup>102</sup>

Except as provided by the partnership agreement, a partner, regardless of the nature of the partner's contribution, is not entitled to demand or receive from a limited partnership a distribution in any form other than cash. Except as provided by the partnership agreement, a partner may not be compelled to accept a disproportionate distribution of an asset in kind from a

limited partnership to the extent that the percentage portion of assets distributed to the partner exceeds the percentage of those assets that equals the percentage in which the partner shares in distributions.<sup>103</sup>

*Delaware.* The Delaware statute provides that distributions of cash or other assets are to be allocated among the partners, and among classes or groups of partners, in the manner provided in the partnership agreement. If the agreement is silent, distributions must be made on the basis of the agreed value (as stated in the records of the limited partnership) of the contributions made by each partner to the extent they have been received and not returned by the limited partnership.<sup>104</sup>

To the extent and at the times or upon the happening of the event specified in the partnership agreement, a partner is entitled to receive from a Delaware limited partnership distributions before withdrawing from the limited partnership and before the dissolution or winding up of the partnership.<sup>105</sup> Upon withdrawal, any withdrawing partner is entitled to receive any distribution to which the partner is entitled under the partnership agreement and, if not otherwise provided in the partnership agreement, such partner is entitled to receive, within a reasonable time after withdrawal, the fair value of such partner's partnership interest as of the date of withdrawal based on the partner's right to share in distributions.<sup>106</sup>

Section 17-605 of the DRULPA states that a partner is not entitled to receive or demand distributions in any form other than cash, regardless of the form of the partner's contribution to the limited partnership. A partner may not be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed exceeds the partner's percentage share in distributions. However, a partner may be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed is equal to the percentage that the partner shares in distributions.<sup>107</sup> At the time a partner becomes entitled to receive a distribution, the partner has a status of, and is entitled to all remedies available to, a creditor of a limited partnership with respect to the distribution. A partnership agreement may provide for the establishment of a record date with respect to distributions.<sup>108</sup>

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<sup>97</sup>DRULPA §17-502(c).

<sup>98</sup>TBOC §153.208(b).

<sup>99</sup> TBOC §153.208(c).

<sup>100</sup> TBOC §153.208(a).

<sup>101</sup> TBOC §153.209.

<sup>102</sup>TBOC §153.207.

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<sup>103</sup> TBOC §154.203.

<sup>104</sup>DRULPA §17-504.

<sup>105</sup> DRULPA §17-601.

<sup>106</sup>DRULPA §17-604.

<sup>107</sup> DRULPA §17-605.

<sup>108</sup>DRULPA §17-606.



## IX. PARTNERS AND PARTNERSHIP INTERESTS

### A. Requirement, Qualification and Admission of Partners.

*Texas.* A Texas limited partnership must have one or more general partners and one or more limited partners.<sup>109</sup> To form a limited partnership, the partners must enter into a partnership agreement and file a certificate of formation with the Texas Secretary of State.<sup>110</sup> In connection with the formation of a limited partnership, a person acquiring a limited partnership interest becomes a limited partner on the later of the date on which the limited partnership is formed or the date stated in the records of the limited partnership as the date on which the person becomes a limited partner or, if that date is not stated in those records, the date on which the person's admission is first reflected in the records of the limited partnership.<sup>111</sup> The certificate of formation for the limited partnership must specify the name and address of each general partner of the limited partnership when filed with the Texas Secretary of State.<sup>112</sup>

Any person can be a partner in a Texas limited partnership unless the person lacks the capacity apart from the TBOC.<sup>113</sup> To be admitted as a general partner or acquire a partnership interest, a written partnership agreement may provide that a person is not required to make, or assume an obligation to make, a contribution to the limited partnership. The written partnership agreement may provide for a person to be admitted as a general partner without acquiring a partnership interest.<sup>114</sup>

After the limited partnership is formed, a person who acquires a partnership interest directly from the limited partnership becomes a new limited partner on compliance with the provisions of the partnership agreement governing admission of new limited partners or if the partnership agreement does not contain relevant admission provisions, the written consent of all partners.<sup>115</sup> After a limited partnership is formed, additional general partners may be admitted in the manner provided by a written partnership agreement or if a written partnership agreement does not so provide, with the written consent of all partners.<sup>116</sup> After the formation of a limited

partnership, an assignee of partnership interest becomes a new limited partner upon consent of all partners or if and to the extent the partnership agreement provides.<sup>117</sup>

*Delaware.* In connection with the formation of a Delaware limited partnership, a person is admitted as a partner upon the latter to occur of the formation of the limited partnership or the time provided in and upon compliance with the partnership agreement or, if the partnership agreement does not so provide, when the person's admission is reflected in the records of the limited partnership.<sup>118</sup> A person may be admitted to a Delaware limited partnership as a limited partner and may receive a limited partnership interest without making a contribution or being obligated to make a contribution to the limited partnership. In addition, a person may be admitted as a limited partner without acquiring a partnership interest. Finally, unless otherwise provided in the partnership agreement, a person may be admitted as the sole limited partner of a limited partnership without making a contribution or being obligated to make a contribution or without acquiring a partnership interest.<sup>119</sup> As a result of these provisions, unlike Texas, Delaware explicitly allows the limited partnership to have a sole limited partner without any partnership interest owned and any contribution being made by such limited partner.

The DRULPA defines a "limited partnership" to mean a partnership formed under the laws of the State of Delaware consisting of two or more persons and having one or more general partners and one or more limited partners.<sup>120</sup> While the circularity of this definition is troubling and unclear, it is clear that Delaware requires at least two partners to form a limited partnership. The DRULPA allows for formation of a Delaware limited partnership even before the date the first limited partner is admitted to the limited partnership. DRULPA §17-201 provides that, to form a limited partnership, one or more persons must execute a certificate of limited partnership, and the limited partnership is formed at the time of filing of the certificate of limited partnership with the Delaware Secretary of State or at any later date or time specified in the certificate of limited partnership. This flexibility, however, raises theoretically troublesome issues under Delaware law as to which occurs first -- the formation of the limited partnership or the admission of a limited partner to the limited partnership.

<sup>109</sup> TBOC §1.002(50).

<sup>110</sup> TBOC §3.011(a).

<sup>111</sup> TBOC §153.101(a).

<sup>112</sup> TBOC §3.005(a).

<sup>113</sup> TBOC §§153.101(d), 153.151(b).

<sup>114</sup> TBOC §153.151(c), (d).

<sup>115</sup> TBOC §153.101(b).

<sup>116</sup> TBOC §153.151(a).

<sup>117</sup> TBOC §§153.101(c), 153.253(a).

<sup>118</sup> DRULPA §17-301(a).

<sup>119</sup> DRULPA §17-301(d).

<sup>120</sup> DRULPA §17-101(9).

**B. Assignments of Partnership Interests.**

Texas. The TBOC provides that, except as otherwise provided in the partnership agreement, a partnership interest may be wholly or partly assigned, and such an assignment does not require the winding up of the partnership or entitle the assignee to become a partner of the limited partnership or to exercise any rights or powers of a partner.<sup>121</sup> The Texas statute specifies that an assignee of a partnership interest is entitled to: (i) be allocated income, gain, loss, deduction, credit or other similar item that the assignor is entitled to receive to the extent the allocation of the item is assigned, and (ii) receive any distribution the assignor is entitled to receive to the extent the distribution is assigned.<sup>122</sup> If all of the partners approve or the partnership agreement provides, an assignee may become a partner of the limited partnership.<sup>123</sup> An assignee is not liable as a partner until the assignee becomes a partner.<sup>124</sup>

After an assignee becomes a partner, the assignee is entitled to the same rights and powers granted or provided to a partner by the partnership agreement or the TBOC, and is subject to the same restrictions and liabilities imposed on a partner by the partnership agreement or the TBOC.<sup>125</sup> In addition, unless otherwise provided in the partnership agreement, the assignee who becomes a limited partner is liable for the assignor's obligation to make contributions, except that the assignee is not obligated for a liability that is unknown at the time the assignee became a limited partner and could not be ascertained from a written partnership agreement.<sup>126</sup> Such assignee also is not liable for the obligations of the assignor under the TBOC with respect to wrongful distributions.<sup>127</sup> Until an assignee becomes a partner, the assignor continues to be a partner and is entitled to exercise any unassigned rights or powers of a partner.<sup>128</sup> The assignor is also not released from the assignor's liability to the limited partnership to make contributions and return unlawful distributions.<sup>129</sup> Except as otherwise provided by the partnership agreement, on the assignment by a general partner of all of the general partner's rights as a general partner,

the general partner may be terminated by the affirmative vote of a majority-in-interest of the limited partners.<sup>130</sup>

Delaware. The Delaware statute provides that a limited partnership interest is assignable in whole or in part except as provided in the partnership agreement.<sup>131</sup> Unless otherwise provided in the partnership agreement, an assignment entitles the assignee to share in profits and losses, to receive distributions and to receive allocations of income, gain, loss, deduction or credit or similar item to which the assignor was entitled, to the extent assigned.<sup>132</sup> A partner ceases to be, and to have the power to exercise any rights or powers of, a partner upon assignment of all of the partner's partnership interest. The pledge or granting of a lien on the partnership interest of a partner does not cause the partner to cease to be a partner or to have the power to exercise any rights or powers of a partner.<sup>133</sup> Except to the extent assumed by agreement, until an assignee becomes a partner, the assignee has no liability as a partner solely as a result of the assignment.<sup>134</sup>

An assignee may become a partner as provided in a partnership agreement or upon the affirmative vote or written consent of all of the partners, unless otherwise provided in the partnership agreement.<sup>135</sup> Section 17-704(b) of the DRULPA provides that an assignee who becomes a partner has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a partner under the partnership agreement and the DRULPA. Unless otherwise provided in the partnership agreement, an assignee who becomes a partner is liable for the obligations of the assignor to make contributions as provided in Section 17-502 of the DRULPA, but is not liable for the obligations of the assignor under Subchapter VI of the DRULPA (i.e., obligation to return unlawful distributions). However, the assignee is not obligated for such liabilities that are unknown to the assignee at the time the assignee became a partner and which could not be ascertained from the partnership agreement.<sup>136</sup> Whether or not the assignee becomes a limited partner, the assignor is not released from liability to the limited partnership under Subchapter V (i.e., obligation to make contributions) and Subchapter VI of the DRULPA.<sup>137</sup>

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<sup>121</sup>TBOC §153.251(a), (b).

<sup>122</sup> TBOC §153.251(b)(3).

<sup>123</sup> TBOC §153.253(a).

<sup>124</sup>TBOC §153.254(a).

<sup>125</sup> TBOC §153.203(b).

<sup>126</sup>TBOC §153.254(b).

<sup>127</sup> *Id.*

<sup>128</sup>TBOC §153.252(a).

<sup>129</sup> TBOC §153.255.

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<sup>130</sup> TBOC §153.252(b).

<sup>131</sup> DRULPA §17-702(a)(1).

<sup>132</sup> DRULPA §17-702(a)(3).

<sup>133</sup>DRULPA §17-701(a)(4).

<sup>134</sup>DRULPA §17-701(c).

<sup>135</sup>DRULPA §17-704(a).

<sup>136</sup>DRULPA §17-704(b).

<sup>137</sup>DRULPA §17-704(c).

While Texas has a simple statutory provision governing admission of a new partner after formation, the Delaware provisions are more complicated. After formation of a limited partnership, a person is admitted as a partner of the Delaware limited partnership in the case of an assignee of a partnership interest at the time provided in and upon compliance with the partnership agreement or, if the partnership agreement does not so provide, when any such person's permitted admission is reflected in the records of the limited partnership.<sup>138</sup> The assignee must also obtain the approval of all of the partners for admission as a partner if the partnership agreement does not have procedures specifying how an assignee can be admitted as a partner.<sup>139</sup> For a person acquiring a partnership interest directly from the limited partnership or a person who is admitted as a partner without acquiring a partnership interest, the person is admitted at the time provided in and upon compliance with the partnership agreement or, if the partnership agreement does not so provide, upon the consent of all partners and when the person's admission is reflected in the records of the limited partnership.<sup>140</sup>

### C. Series Limited Partnership Structures.

Delaware. Section 17-218 of the DRULPA permits and authorizes the establishment of designated series of general partners, limited partners, limited partnership interests or assets. Such series may have separate rights, powers or duties with respect to specified property or obligations of the limited partnership or profits and losses associated with specified property or obligations. Such series may also have a separate business purpose or investment objective. One might view these series almost like separate limited partnerships within a single overall limited partnership. Under these provisions, the Delaware limited partnership can allocate assets and related liabilities, including a specific investment or business, to one series and other assets and liabilities, including a different investment or business, to another series. It is an open question as to whether other states will respect the allocation of assets and liabilities among the separate series of a single limited partnership doing business in those other states.

The DRULPA does not clearly address the issue of whether a series should be treated as a separate entity. Most legal commentators have concluded that, in a Delaware limited partnership or limited liability

company, a series should not be treated as a separate legal entity.<sup>141</sup>

Texas. Although the Texas Limited Partnership Law allows for different classes or groups of partners with different relative rights, powers and duties,<sup>142</sup> it does not specifically authorize series of Texas limited partnerships by which separate assets, liabilities, businesses and investments can be allocated to different partners. To the extent the series concept is crucial to the formation of the Texas entity, it should be formed as a limited liability company. Subchapter M of Chapter 101 of the TBOC specifically recognizes and authorizes the establishment of series within a Texas limited liability company.

### X. MANAGEMENT

Texas. The TBOC has the general concept of management of a domestic entity by its "governing authority," which means a person or group of persons who are entitled to manage and direct the affairs of an entity under the TBOC and the governing documents of the entity. For a Texas limited partnership, the term includes the general partners of a limited partnership.<sup>143</sup> Except as provided by the TBOC or a partnership agreement, a general partner has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners and has the liabilities of a partner in a partnership without limited partners to the partnership and its other partners.<sup>144</sup> The governing authority has the power to elect officers of the limited partnership for purposes of carrying out the limited partnership's business, and an officer has the duties in the management of the limited partnership and the authority as provided by the partnership agreement or the general partner.<sup>145</sup>

Section 153.155 provides a long list of events and circumstances that result in a person ceasing to be a general partner of a limited partnership and that constitutes "events of withdrawal." A general partner may also withdraw at any time from a limited partnership and cease to be a general partner by giving a written notice to the other partners. The general partner may also be removed as a general partner in accordance with the partnership agreement.

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<sup>141</sup> See, e.g., Allen Sparkman, "Series LLC," 53 Real Estate, Probate and Trust Reporter, No. 3, 55 (concluding series of a series LLC is not a separate legal entity in Delaware); Ann E. Conaway, "A Business Review of the Delaware Series: Good Business of the Informed," 1677 PLI/Corp 645 (2008).

<sup>142</sup> TBOC §154(a).

<sup>143</sup> TBOC §1.002(35).

<sup>144</sup> TBOC §153.152(a).

<sup>145</sup> TBOC §§3.103 and 151.004.

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<sup>138</sup> DRULPA §17-301(b)(2).

<sup>139</sup> DRULPA §17-704(a).

<sup>140</sup> DRULPA §17-301(b)(1).

*Delaware.* Except as otherwise provided in the DRULPA or in the partnership agreement, a general partner of a Delaware limited partnership has the rights and powers and is subject to restrictions of a partner in a partnership that is governed by the Delaware Uniform Partnership Law.<sup>146</sup> While not explicit in this provision, and unlike the TBOC, the foregoing provisions imply that the general partners manage and direct the affairs of the Delaware limited partnership. A general partner has the power and authority to delegate to one or more other persons the general partner's rights and powers to manage and control the business and affairs of a limited partnership, including to delegate to agents, officers and employees of the general partner or the limited partnership and to delegate by a management agreement or another agreement with other persons. Such delegation by a general partner will be irrevocable if it states that it is irrevocable. Unless otherwise provided in the partnership agreement, such delegation by a general partner does not cause the general partner to cease to be a general partner or cause the person to whom any such rights and powers have been delegated to be a general partner of the limited partnership.<sup>147</sup>

The DRULPA specifies that a person ceases to be a general partner of a limited partnership on the happening of any of several specified events. Included in those events is the removal of the general partner as a general partner in accordance with the general partnership agreement. The general partner may also withdraw from the limited partnership as provided by DRULPA Section 17-602.<sup>148</sup>

Unlike the Texas statute, the Delaware statute provides that a partnership agreement may provide that a general partner who fails to perform in accordance with or to comply with the terms and conditions of the partnership agreement may be subject to specified penalties and specified consequences.<sup>149</sup> In addition, at the time and upon the happening of events specified in the partnership agreement, a general partner will be subject to specified penalties or specified consequences as set forth in the partnership agreement. The penalties can include the same penalties as provided for a partner who fails to make any required contribution to the limited partnership.<sup>150</sup>

## **XI. MEETINGS AND VOTING**

*Texas.* If the partnership so specifies, the provisions of Chapter 6 of the TBOC will govern the

meetings and voting of partners.<sup>151</sup> Chapter 6 of the TBOC contains general provisions applicable to meetings and voting by owners, members and governing persons of domestic entities other than partnerships unless the partnership agreement specifies that they apply. These provisions were loosely modeled on the provisions applicable to business corporations in the old Texas Business Corporation Act. Chapter 153 does not contain any supplemental provisions for Texas limited partnerships that apply only to a meeting of or voting by the limited partnership's partners.

Subchapter A of Chapter 6 the TBOC specifies rules for locations and communication media for meetings of partners or governing persons.<sup>152</sup> Use of conference telephone or other communications equipment for the holding of meetings is authorized.<sup>153</sup> Examples of other communications equipment include videoconferencing technology or the internet. If used, such communications equipment or system must permit each person participating in the meeting to communicate with all the other persons participating in the meeting. If voting is to take place at the meeting, the limited partnership must implement reasonable measures to verify that each person voting at the meeting by means of remote communication is sufficiently identified and must keep a record of any vote or other action taken.<sup>154</sup> Participation in a meeting constitutes presence at the meeting unless the participation is for the express purpose of objecting to the meeting on the basis that it has not been lawfully called or convened.<sup>155</sup>

Subchapter B of Chapter 6 sets forth the general notice requirements for meetings. The location of the meeting must be specified in the notice of the meeting if it is not held solely by using a conference telephone or other communication system authorized by Section 6.002. If the meeting is held solely or in part by using a conference telephone or other communication system, the form of communication system to be used for the meeting and the means of accessing the communication system must be included in the notice. Notices of meetings that are transmitted by facsimile or electronic message are considered to be given when the facsimile or electronic message is transmitted to a facsimile number or an electronic message address provided by the person, or to which

<sup>146</sup> DRULPA §17-403(a).

<sup>147</sup> DRULPA §17-403(c).

<sup>148</sup> DRULPA §17-402.

<sup>149</sup> DRULPA §17-406.

<sup>150</sup> *Id.*

<sup>151</sup> TBOC §6.301

<sup>152</sup> TBOC §§6.001-6.003.

<sup>153</sup> TBOC §6.002.

<sup>154</sup> TBOC §6.002(b).

<sup>155</sup> TBOC §6.003.

the person consents for the purpose of receiving notice.<sup>156</sup>

Meeting notices may be waived. Participation in or attendance at the meeting can constitute a waiver of notice.<sup>157</sup> In addition, notices need not be given if they have been returned undelivered to a person's address, in general, with respect to two consecutive annual meetings. In addition, notice of a meeting is not required to be given to a partner when the notice requirements are subject to the Securities Exchange Act of 1934, as amended, and the person entitled to notice of the meeting is considered a lost security holder under that Act and its related regulations.<sup>158</sup>

Record dates for meetings and for actions by written consent are addressed by Subchapter C of Chapter 6.<sup>159</sup> Subchapter D refers to the governing documents of the entity for the manner of voting of interests in a domestic entity.<sup>160</sup> In addition, Subchapter D sets forth rules for voting of pledged ownership interests,<sup>161</sup> ownership interests held by a receiver, estate or trust,<sup>162</sup> or with respect to ownership interests owned by the issuer entity or by another entity.<sup>163</sup>

If Chapter 6 applies, Subchapter E of Chapter 6 authorizes written consents of partners of limited partnerships. Any action may be taken without holding a meeting if a written consent stating the action to be taken is signed by all persons entitled to vote on the action.<sup>164</sup>

In addition, the certificate of formation of a limited partnership may authorize the partners of the entity to take action without holding a meeting, providing notice or taking a vote if partners having at least the minimum number of votes that would be necessary to take the action that is the subject of the

consent at a meeting in which each partner entitled to vote on the action is present and votes, sign a written consent stating the action taken.<sup>165</sup>

Delaware. The DRULPA provides that a partnership agreement may contain provisions relating to the notice of the time, place or purpose of any meeting at which any matter is to be voted on by any partners, waiver of any such notice, action by consent without a meeting, the establishment of a record date, quorum requirements, voting in person or by proxy, or any other matter with respect to the exercise of any such right to vote.<sup>166</sup> A partnership agreement may provide for the taking of an action, including an amendment of the partnership agreement, without the vote or approval of any limited partner or class or group of limited partners, including an action to create under the partnership agreement a class or group of partnership interests that was not previously outstanding.<sup>167</sup> The partnership agreement may also grant to all or certain identified limited partners or a specified class or group of the limited partners the right to vote separately or with all or any class or group of the limited partners or the general partners on any matter. Voting by limited partners may be on a per capita, number, financial interest, class, group or any other basis.<sup>168</sup> The foregoing provisions relating to taking of an action, class or group of voting rights and voting by limited partners have parallel provisions for general partners in the Delaware statute.<sup>169</sup>

The Delaware statute allows for written consents of partners similar to Chapter 6 of the TBOC. As with Chapter 6 of the TBOC, meetings of partners can be held by conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other. Unlike the TBOC, partners may vote by proxy unless otherwise provided in the partnership agreement. Chapter 6 does not have any specific authorization for owners to vote by proxy. As with the Texas statute, a consent transmitted by electronic transmission by a partner is deemed to be written and signed for purposes of the consent provisions. However, the DRULPA specifically states that the transmission can be by a person or persons authorized to act for the partner.<sup>170</sup>

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<sup>156</sup>TBOC §6.051. This provision was clarified in 2007 by H.B. 1737 to specify that the facsimile number or electronic address must be provided or consented to by the recipient for the purpose of receiving notice. With this amendment, notices by consented to electronic transmission, including facsimile, are generally treated like notices by mail, and need not actually be received by the person to whom a notice is directed. This change makes the language parallel the source provisions in the TBCA giving notices to shareholders and directors. TBOC §6.051(b).

<sup>157</sup>TBOC §6.052.

<sup>158</sup>TBOC §6.053.

<sup>159</sup>TBOC §§6.101-6.103.

<sup>160</sup>TBOC §6.151.

<sup>161</sup>TBOC §6.156.

<sup>162</sup>TBOC §§6.154-6.155.

<sup>163</sup>TBOC §§6.152-6.153.

<sup>164</sup>TBOC §6.201(b).

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<sup>165</sup> TBOC §6.202(b).

<sup>166</sup>DRULPA §§17-302(c) and 17-405(c).

<sup>167</sup> DRULPA §17-302(a).

<sup>168</sup> DRULPA §17-302(b).

<sup>169</sup> DRULPA §17-405(a), (b).

<sup>170</sup>DRULPA §§17-302(d) and 17-405(d).

## XII. FUNDAMENTAL BUSINESS TRANSACTIONS

### A. Mergers.

Texas. Chapter 10 of the TBOC contains general provisions that apply to all mergers of any domestic entity, including limited partnerships. The TBOC does not have the concept of “consolidation” of entities, as in the DRULPA. That concept is subsumed within the definition of “merger” in the TBOC.<sup>171</sup> That definition includes the combination of one or more domestic entities with one or more domestic entities or non-code organizations resulting in the creation of one or more new domestic entities or non-code organizations. “Non-code organization” is defined to mean an organization other than a domestic entity.<sup>172</sup> The term essentially includes either a foreign entity or an organization formed under a Texas law other than the TBOC, including for example banks and insurance companies.

A Texas limited partnership may effect a merger if each domestic entity that is a party to the merger acts on and approves the plan of merger in the manner prescribed in the TBOC for the approval of mergers by the domestic entity.<sup>173</sup> The partnership agreement of each domestic limited partnership that is a party to the merger must contain provisions that authorize the merger provided for in the plan of merger adopted by the partnership. Each domestic limited partnership that is a party to the merger must approve the plan of merger in the manner prescribed in its partnership agreement.<sup>174</sup> The notice of the meeting at which the merger is approved must include an additional notice if the domestic entity is subject to dissenter’s rights.<sup>175</sup> If one or more non-Code organizations is a party to the merger or is to be created by the plan of merger, the merger must be permitted by the laws of the state or country under whose law each non-Code organization is incorporated or organized, or the governing documents of each non-Code organization if the documents are not inconsistent with the law under which a non-Code organization is incorporated or organized. In addition, each non-Code organization that is a party to the merger must comply with the applicable laws under which it is incorporated or organized and the governing documents of the non-Code organization. A domestic entity that is a party to the merger may not merge if an owner or member of that entity will, as a result of the merger, become subject to owner liability, without that owner’s or

member’s consent, for a liability or other obligation of any other person.<sup>176</sup> In 2015, SB 860 clarified the personal liability concept by adding a new definition of “owner liability” based on provisions contained in the Model Business Corporation Act (the “MBCA”).<sup>177</sup> The TBOC also contains a special partnership provision that confirms a partner of a domestic limited partnership that is a party to a merger does not become liable as a result of the merger for the liability or obligation of another person who is a party to the merger unless the partner consents to becoming personally liable by action taken in connection with the specific plan of merger approved by the partner.<sup>178</sup>

The plan of merger must include, among other things, the manner and basis of converting or exchanging any of the ownership or membership interests of each organization that is a party to the merger into: (A) ownership interests, membership interests, obligations, rights to purchase securities, or other securities of one or more of the surviving or new organizations; (B) cash; (C) other property, including ownership interests, membership interests, obligations, rights to purchase securities, or other securities of any other person or entity; or (D) any combination of the foregoing items. A 2011 amendment to the TBOC clarified that the plan of merger can also provide for cancellation of any ownership or membership interest in lieu of its conversion or exchange. In 2015, S.B. 860 amended TBOC Section 10.002 to clarify (a) that a plan of merger can employ a formula to specify the manner and basis of converting or exchanging ownership or membership interests and can provide that specified ownership or membership interests in an organization remain outstanding rather than being converted or exchanged if the organization survives the merger, and (b) that any of the terms of the plan of merger may be made dependent on facts ascertainable outside of the plan of merger if the manner in which those facts will operate on the terms of the merger is clearly and expressly stated in the plan.<sup>179</sup> In addition, the plan of merger must include: (1) the certificate of formation of each new domestic filing entity and the governing documents of each new domestic nonfiling entity to be created by the merger, and (2) the governing documents of each non-Code organization that is to survive the merger or to be created by the plan of merger and that is not organized under the laws of any state or the United States or required to file its certificate of formation or similar document under which the entity is organized with the

<sup>171</sup>TBOC §1.002(55).

<sup>172</sup>TBOC §1.002(56).

<sup>173</sup> TBOC §10.001(b).

<sup>174</sup> TBOC §10.009(f), (g).

<sup>175</sup>TBOC §§10.001(c), 10.355.

<sup>176</sup>TBOC §10.001.

<sup>177</sup>TBOC §1.002(63-a)).

<sup>178</sup> TBOC §10.009(a).

<sup>179</sup> TBOC §10.002(a), (d).

appropriate governmental authority.<sup>180</sup> Unlike Delaware, the TBOC provides that a plan of merger may treat differently the owners or members in the same class or series.<sup>181</sup>

If more than one organization is to survive or to be created by the plan of merger, the plan of merger must include: (1) the manner and basis of allocating and vesting the property of each organization that is a party to the merger among one or more of the surviving or new organizations; (2) the name of each surviving or new organization that is primarily obligated for the payment of the fair value of an ownership or membership interest of an owner or member of a domestic entity subject to dissenter's rights that is a party to the merger and who complies with the requirements for dissent and appraisal under the TBOC; and (3) the manner and basis of allocating each liability and obligation of each organization that is a party to the merger, or adequate provisions for the payment and discharge of each liability and obligation, among one or more of the surviving or new organizations.<sup>182</sup>

Upon effectiveness of the merger, all rights, title and interest to all real estate and other property owned by each organization that is a party to the merger is allocated to and vested, subject to any existing liens or other encumbrances on the property, in one or more of the surviving or new organizations as provided in the plan of merger without reversion or impairment, any further act or deed or any transfer or assignment having occurred. In addition, all of the liabilities and obligations of each organization that is a party to the merger are allocated to one or more of the surviving or new organizations in the manner provided by the plan of merger, and that organization is the primary obligor for the liability or obligation and, except as otherwise provided by the plan of merger or by law or contract, no other party to the merger, other than a surviving domestic entity or non-Code organization liable or otherwise obligated at the time of the merger, and no other new domestic entity or non-Code organization created under the plan of merger is liable for the debt or other obligation. The surviving or new organization named in the plan of merger as primarily liable to pay the fair value of an ownership or membership interest to a dissenting owner or member is the primary obligor for that payment and all other surviving or new organizations are secondarily liable for that payment.<sup>183</sup> Other effects of a merger are specified in Section 10.008(a) of the TBOC.

If the plan of merger does not allocate a property, liability or obligation to any party of the merger, the unallocated property is owned in undivided interest by, and the liability or obligation is the joint and several liability and obligation of, each of the surviving and new organizations, pro rata to the total number of surviving and new organizations resulting from the merger.<sup>184</sup> If the surviving organization in a merger is not a domestic entity, the organization must register to transact business in Texas if the entity is required to register for the purpose by another provision of the TBOC.<sup>185</sup> In addition, such surviving organization that is not a domestic entity is considered to have appointed the Texas Secretary of State as its agent for service of process in a proceeding to enforce any obligation of a domestic entity that is a party to the merger and to have agreed to promptly pay to the dissenting owners or partners of each domestic entity that is a party to the merger who have the right of dissent and appraisal under the TBOC, any amount to which they are entitled under the TBOC.<sup>186</sup> The TBOC does not provide rights of dissent and appraisal to partners in Texas limited partnerships. A partnership agreement, however, may provide that the partners are entitled to the rights of dissent and appraisal provided by the TBOC, subject to any modification of the rights as provided in the partnership agreement.<sup>187</sup>

The filing of a certificate of merger in the state of Texas is required if any domestic entity that is a party to the merger is a filing entity or any domestic entity to be created under the plan of merger is a filing entity.<sup>188</sup> The certificate of merger that must be filed in the state of Texas must contain a copy of the plan of merger or alternative required statements. The alternative required statements include for a merger, among other things, the amendments or changes to the certificate of formation of each filing entity that is a party to the merger or, if no amendments are desired to be effected by the merger, a statement to that effect. In addition, the certificate of merger, if the plan of merger is not attached, must state that a signed plan of merger is on file with the principal place of business of each surviving, acquiring or new domestic entity or non-Code organization, and the address of each principal place of business and that a copy of the plan of merger will be on written request furnished without cost to any owner or member of any domestic entity that is a party to or created by the plan of merger. If the merger has multiple surviving domestic entities or non-Code

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<sup>180</sup>TBOC §10.002(a).

<sup>181</sup>TBOC §10.002(c).

<sup>182</sup>TBOC §10.003.

<sup>183</sup>TBOC §10.008(a).

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<sup>184</sup>TBOC §10.008(b).

<sup>185</sup>TBOC §10.008(d).

<sup>186</sup>TBOC §10.008(c).

<sup>187</sup> TBOC §10.351(b), (c).

<sup>188</sup>TBOC §10.151(a).

organizations, the plan of merger must also be provided to any creditor or obligee of the parties to the merger at the time of the merger if a liability or obligation is then outstanding. If no approval of the owners or members of any domestic entity that was a party to the merger is required by the TBOC, a statement to that effect must be included in the certificate of merger in any event. Finally, the certificate of merger must state that the plan of merger has been approved as required by the laws of the jurisdiction of formation and the governing documents of each organization that is a party to the merger.<sup>189</sup> Consistent with Delaware, S.B. 860 in 2015 amended TBOC Sections 10.004 and 10.008(a) to provide that an amended and restated or a restated certificate of formation can be adopted as part of a plan of merger and filed in connection with the certificate of merger with the Texas Secretary of State.

The TBOC has several special provisions for domestic limited partnerships to determine when a partner becomes a partner or withdraws as a partner as a result of a merger. A partner in a nonsurviving limited partnership that is a party to the merger will be treated as a partner who withdrew from the nonsurviving limited partnership as of the effective date of the merger.<sup>190</sup> If a limited partnership is to be formed under a plan of merger, the existence as a partnership begins when the merger takes effect, and the persons to be partners become partners at that time.<sup>191</sup> The TBOC also has special rules governing when a partner of a domestic limited partnership can be held liable for a debt or obligation of the partnership that is a party to a merger or to be created in the merger and in which the partner was not a merger, as well as the ability of a general partner to bind the surviving organization for a period of time after the merger if the partnership no longer exists after the merger.<sup>192</sup>

*Delaware and Comparison.* Unlike its counterpart provisions in the Delaware General Corporation Law, which consist of a confusing array of multiple sections, the DRULPA consolidates all of its merger provisions into one section.<sup>193</sup> On the other hand, like its corporate counterpart, the DRULPA retains the antiquated, undefined concept of “consolidation,” which historically has been interpreted to mean the combination of two entities to form a new third entity, with the two original entities not surviving the consolidation. In Texas, this kind of transaction is folded into the definition of “merger.”

The Delaware statute fails to include a definition of “merger” or “consolidation” that might be useful to clarify their meaning. The Texas statute contains a detailed definition of “merger.” Unlike the DRULPA, the TBOC’s definition of “merger” permits a limited partnership to enter into a merger transaction where there are multiple surviving or new limited partnerships or other organizations created in the merger.

The Texas statute is broader than the DRULPA because it allows a bigger range of organizations to merge with a Texas limited partnership than those that are permitted to merge with a Delaware limited partnership under the Delaware statute. The Delaware statute uses the term “other business entity” but limits the definition of that term to a corporation, a statutory trust, a business trust or association, a real estate investment trust, a common law trust, a limited liability company, or any other unincorporated business, including a partnership (whether general or limited) and a foreign limited partnership.<sup>194</sup> The TBOC’s definition of “organization” is much broader and includes a joint venture, joint stock company, cooperative, bank, insurance company, credit union, savings and loan association or other organization, and regardless of whether the organization is for profit, nonprofit, domestic or foreign.<sup>195</sup>

The Delaware statute does not allow for multiple surviving entities in a merger or the division of a limited partnership through a merger. The TBOC permits a single limited partnership to adopt a plan of merger and divide itself into multiple limited partnerships or other organizations. In those situations, its assets and liabilities are allocated among the surviving or new limited partnerships or other organizations in accordance with the plan of merger by operation of law and without any transfer or assignment being made. In Delaware, similar transactions must be effected through multiple steps with conveyances of assets, assumptions of liability and distributions to partners.

Unlike the Texas statute, the Delaware statute is not clear that the vesting of assets in the surviving entity is considered to be accomplished by operation of law and without an actual transfer or assignment occurring.<sup>196</sup> The TBOC, on the other hand, specifically states that when a merger takes effect, all rights, title and interest to all real estate and other property owned by each organization that is a party to the merger vests in the surviving or new organizations

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<sup>189</sup>TBOC §10.151.

<sup>190</sup> TBOC §10.009(e).

<sup>191</sup> TBOC §10.009(d).

<sup>192</sup> TBOC §10.009(b), (c).

<sup>193</sup>DRULPA §17-211.

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<sup>194</sup>DRULPA §17-211(a).

<sup>195</sup>TBOC §1.002(62).

<sup>196</sup>DRULPA §17-211(h).



as provided in the plan of merger without “any transfer or assignment having occurred.”<sup>197</sup>

The DRULPA requires the agreement or plan of merger to be approved by all general partners and by limited partners who own more than 50% of the then current percentage or other interest in the profits of the domestic limited partnership owned by all of the limited partners, unless otherwise provided in the limited partnership agreement. For limited partnerships formed on or before July 31, 2015, if there is more than one class or group of limited partners, then each class or group of limited partners must also approve the merger or consolidation by a similar majority vote based on the then current percentage or other interest in the profits of the limited partnership owned by all of the limited partners in that class or group.<sup>198</sup> As previously explained, the TBOC simply provides that each domestic limited partnership that is a party to the merger must approve the plan of merger in the manner provided in its partnership agreement.<sup>199</sup>

Unlike the TBOC, the DRULPA does not have a short form merger provision that allows for a parent limited partnership that owns 90% of the outstanding ownership interests in a subsidiary organization to merge without the vote or approval of the minority owners in the subsidiary organization. The Texas statute allows this type of merger to occur through a general provision in Chapter 10 that applies to all types of organizations other than transactions in which the subsidiary is a partnership.<sup>200</sup> The DRULPA does provide for a short form merger where a Delaware limited partnership owns more than 90% of the outstanding shares of each class of a corporation.<sup>201</sup>

The DRULPA is ambiguous as to whether the partners of one class or series of limited partnership interests may be treated differently in the merger or consolidation. The language of the statute does not specifically address the issue of equal treatment for similarly situated partners. The TBOC contains a clear provision that allows for differing treatment of the partnership interests of the same class or series pursuant to the merger.<sup>202</sup> The plan of merger must set forth the manner and basis for the conversion or exchange of partnership interests that are to be treated differently.

## B. Conversions.

Texas. Chapter 10 of the TBOC contains general provisions governing conversions by all types of domestic entities, including limited partnerships. A Texas limited partnership may convert into a different type of domestic entity or a non-Code organization by adopting a plan of conversion.<sup>203</sup> The partnership agreement of a domestic limited partnership that is converting must contain provisions that authorize the conversion provided for in the plan of conversion adopted by the partnership.<sup>204</sup> In addition, a domestic limited partnership that is converting must approve the plan of conversion in the manner provided in its partnership agreement.<sup>205</sup> A conversion may not take effect if the conversion is prohibited by or inconsistent with the laws of the jurisdiction of formation of the entity resulting from the conversion (i.e., the “converted entity”), and the formation, incorporation or organization of the converted entity under the plan of conversion must be effected in compliance with those laws pursuant to the plan of conversion.<sup>206</sup> A domestic entity may not convert if an owner or member, as a result of the conversion, becomes subject to owner liability, without the consent of the owner or member, for a liability or other obligation of the converted entity.<sup>207</sup> In 2015, SB 860 clarified the personal liability concept by adding a new definition of “owner liability” based on provisions contained in the MBCA.<sup>208</sup>

A non-Code organization may convert into a Texas limited partnership by adopting a plan of conversion and taking any action that may be required for a conversion under the law of the organization’s jurisdiction of formation and the organization’s governing documents.<sup>209</sup> The conversion must be permitted by the laws under which the non-Code organization is incorporated or organized or by its governing documents, which may not be inconsistent with the laws of the jurisdiction in which the non-Code organization is incorporated or organized.<sup>210</sup>

The plan of conversion must include, among other things, the manner and basis of converting the ownership or membership interests of the converting entity. It also must include any certificate of formation

<sup>197</sup>TBOC §10.008(a)(2).

<sup>198</sup>DRULPA §17-211(b).

<sup>199</sup> TBOC §10.009(g).

<sup>200</sup>TBOC §10.006.

<sup>201</sup>DRULPA §17-211(i).

<sup>202</sup>TBOC §10.002(c).

<sup>203</sup>TBOC §10.101(a).

<sup>204</sup> TBOC §10.107(b).

<sup>205</sup> TBOC §10.107(c).

<sup>206</sup>TBOC §10.101(d).

<sup>207</sup>TBOC §10.101(f).

<sup>208</sup>TBOC §1.002(63-a)).

<sup>209</sup>TBOC §10.102(a) and (b).

<sup>210</sup>TBOC §10.102(c).

required to be filed under the TBOC if the converted entity is a filing entity.<sup>211</sup> In 2015, S.B. 860 amended TBOC Section 10.103 to clarify (a) that a plan of conversion can employ a formula to specify the manner and basis of converting or exchanging ownership or membership interests, and (b) that any of the terms of the plan of conversion may be made dependent on facts ascertainable outside of the plan of conversion if the manner in which those facts will operate on the terms of the conversion is clearly and expressly stated in the plan.<sup>212</sup> Upon the effectiveness of the conversion, the converting entity continues to exist without interruption in the organizational form of the converted entity rather than in the organizational form of the converting entity, and all rights, title and interest to all property owned by the converting entity continues to be owned, subject to any existing liens or other encumbrances on the property, by the converted entity in the new organizational form without (i) reversion or impairment; (ii) further act or deed; or (iii) any transfer or assignment having occurred. All liabilities and obligations of the converting entity continue to be liabilities and obligations of the converted entity in the new organizational form without impairment or diminution because of the conversion.<sup>213</sup>

After approval of a plan of conversion, a certificate of conversion must be filed for the conversion to become effective if any domestic entity that is a party to the conversion is a filing entity or any domestic entity to be created under the plan of conversion is a filing entity. The certificate of conversion must include either the plan of conversion or alternative required statements. The alternative required statements must include that a signed plan of conversion is on file at the principal place of business of the converted entity and will be on file after the conversion at the principal place of business of the converted entity and, in each case, the address of the principal place of business, and that a copy of the plan of conversion will be on written request furnished without cost by the converting entity before the conversion, or by the converted entity after the conversion, to any owner or member of the converting entity or the converted entity. The certificate of conversion must also state that the plan of conversion has been approved as required by the laws of the jurisdiction of formation and the governing documents of the converting entity.<sup>214</sup>

*Delaware.* The DRULPA contains two separate sections relating to conversions. Section 17-217 governs the conversion of “other entities” into a Delaware limited partnership. Section 17-219 governs the conversion of a Delaware limited partnership into certain specified types of entity forms or a foreign limited partnership. In either section, the types of entities into which the Delaware limited partnership may be converted, or that can convert into a Delaware limited partnership, are limited to a corporation, a statutory trust, a business trust, an association, a real estate investment trust, a common-law trust, a limited liability company or any other unincorporated business or entity including a general partnership or a limited liability partnership or a foreign limited partnership.<sup>215</sup> This language is similar to the language in the DRULPA merger provisions. Thus, the Texas statute is broader in the types of entities into which the Texas limited partnership may be converted in a conversion transaction or that may be converted into a Texas limited partnership. The Texas definition of “organization” is much broader than the Delaware “other entity” definition. Accordingly, greater uncertainty exists under the DRULPA when the conversion transaction involves these other types of organizations that are not specifically listed in the Delaware provisions.

Section 17-219(b) of the DRULPA provides that the conversion must be authorized in the manner specified in the limited partnership agreement. If the limited partnership agreement is silent and does not prohibit a conversion, the conversion must be authorized in the same manner as is specified in the limited partnership for authorizing a merger or consolidation. If the limited partnership does not specify the manner of authorizing a conversion or a merger or a consolidation and does not prohibit the conversion, the conversion must be authorized by all general partners and by limited partners who own more than 50% of the then current percentage or other interest in the profits of the partnership owned by all of the limited partners. For limited partnerships formed on or before July 31, 2015, if the limited partnership has more than one class or group of limited partners, then the approval of limited partners in each class or group of limited partners that own more than 50% of the then current percentage or other interest in the profits owned by such class or group is required.<sup>216</sup> In comparison, the TBOC simply provides that the domestic limited partnership that is converting must approve the plan of conversion in the manner provided in its partnership agreement.<sup>217</sup>

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<sup>211</sup>TBOC §10.103.

<sup>212</sup> TBOC §10.103(a), (c).

<sup>213</sup>TBOC §10.106.

<sup>214</sup>TBOC §10.154.

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<sup>215</sup>DRULPA §§17-217(a), 17-219(a).

<sup>216</sup>DRULPA §17-216(b).

<sup>217</sup> TBOC §10.107(c).

### C. Interest Exchange.

Texas. The TBOC also permits domestic entities, including limited partnerships, and non-Code organizations to adopt a plan of exchange pursuant to which the entities would effect an “interest exchange” in which all of the outstanding ownership or membership interests in one or more classes or series of one or more domestic entities are acquired. If a non-Code organization is to acquire ownership or membership interests in the exchange, the non-Code organization must take all action that is required under the laws of the organization’s jurisdiction of formation and the organization’s governing documents to effect the exchange. The issuance of the ownership or membership interests in any non-Code organization must also be permitted by the laws under which the non-Code organization is incorporated or organized and not inconsistent with those laws. A plan of exchange may not be effected if a partner of a Texas limited partnership that is a party to the interest exchange will, as a result of the plan, become subject to owner liability, without the consent of the partner, for the liabilities or obligations of any other person or organization.<sup>218</sup>

The plan of exchange must include the manner and basis of exchanging the ownership or membership interests to be acquired for (A) ownership or membership interests, obligations, rights to purchase securities, or other securities of one or more of the acquiring organizations is a party to the plan of exchange; (B) cash; (C) other property, including ownership or membership interests, obligations, rights to purchase securities, or other securities of any other person or entity; or (D) any combination of those items. The manner and basis of exchanging an ownership or membership interest of an owner or member that is exchanged in a manner or basis different from any other owner or member having ownership or membership interests of the same class or series must be included in the plan of exchange.<sup>219</sup> In 2015, S.B. 860 amended TBOC Section 10.052 to clarify (a) that a plan of exchange can employ a formula to specify the manner and basis of converting or exchanging ownership or membership interests, and (b) that any of the terms of the plan of exchange may be made dependent on facts ascertainable outside of the plan of exchange if the manner in which those facts will operate on the terms of the exchange is clearly and expressly stated in the plan.<sup>220</sup>

Upon effectiveness of an interest exchange, the ownership or membership interest of each acquired

organization is exchanged as provided in the plan of exchange, and the former owners or members whose interests are exchanged under the plan of exchange are entitled only to the rights provided in the plan of exchange or, if dissenters’ rights are applicable, a right to receive the fair value of the ownership interests. In addition, the acquiring organization has all rights, title and interests with respect to the ownership or membership interest to be acquired by it subject to the provisions of the plan of exchange.<sup>221</sup>

The provisions relating to filing of a certificate of exchange are generally parallel to those for filing a certificate of merger under the TBOC.<sup>222</sup>

Delaware. Unlike the Texas statute, the DRULPA has no provisions allowing for exchanges of limited partnership interests. Accordingly, the Texas statute provides significantly more flexibility by allowing those interest exchange transactions.

### D. Sale of Assets.

Texas. For property transfers and dispositions, the TBOC contains broad, enabling provisions that authorize a domestic entity, including a Texas limited partnership, to sell, lease, assign or otherwise transfer or convey an interest in its property, including real property. The transfer and conveyance may be made with or without the goodwill of the entity on any terms and conditions and for any consideration and may be made by a deed with or without the seal of the entity. Similarly, a domestic entity may grant a pledge, mortgage or deed of trust with respect to an interest in its property including real property with or without the seal of the entity.<sup>223</sup> No approval of the partners of the domestic limited partnership is required except as otherwise provided in the TBOC, the governing documents of the domestic limited partnership or specific limitations established by its governing authority.<sup>224</sup>

The TBOC specifically provides that a disposition of all or part of the property of a domestic limited partnership, regardless of whether the disposition requires the approval of its partners, is not a merger or conversion for any purpose. Except as otherwise expressly provided by another statute, a person acquiring property may not be held responsible or liable for a liability or obligation of the transferring domestic limited partnership that is not expressly assumed by the person.<sup>225</sup>

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<sup>221</sup>TBOC §10.055.

<sup>222</sup>TBOC §§10.151 and 10.153.

<sup>223</sup>TBOC §10.251.

<sup>224</sup>TBOC §10.252.

<sup>225</sup>TBOC §10.254.

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<sup>218</sup>TBOC §10.051.

<sup>219</sup>TBOC §10.052.

<sup>220</sup> TBOC §10.052(a), (c).

*Delaware.* The DRULPA does not have any provisions specifically addressing the sale or transfer of assets by a limited partnership. Presumably, the power to cause the limited partnership to effect a sale and transfer of its assets is held by the general partner by virtue of its power to manage the limited partnership.<sup>226</sup> In the absence of specific provisions in the limited partnership agreement, the Delaware statute provides little guidance in this area. The statute also provides no protection against a constructive merger or conversion theory by creditors who attempt to cause a purchaser or transferee of assets to assume liabilities of the selling or transferring limited partnership. This protection is clearly provided in the Texas statute.<sup>227</sup>

#### E. Dissenters' Appraisal Remedy.

*Texas.* Neither the TBOC nor the DRULPA provides any form of appraisal remedy to a dissenting partner in a merger, conversion, interest exchange or sale of assets transaction involving a limited partnership. The TBOC does permit the governing documents of a limited partnership to provide that its partners are entitled to the rights of dissent and appraisal provided by Subchapter H of Chapter 10 of the TBOC.<sup>228</sup> These rights of dissent and appraisal are the same as provided to a shareholder of a Texas for-profit corporation, but can be modified by the limited partnership's governing documents.

*Delaware.* Section 17-212 of the DRULPA specifically authorizes a limited partnership agreement or merger or consolidation agreement or plan of merger to provide for contractual appraisal rights with respect to a limited partnership interest or any class or group of partners. These rights may be available in connection with any amendment of a limited partnership agreement, any merger or consolidation, any conversion, the sale of all or substantially all of the limited partnership's assets, or any transfer to or domestication or continuance in any jurisdiction by the limited partnership.

#### F. Domestication of Non-United States Entities.

*Delaware.* The DRULPA authorizes the domestication of a "non-United States entity" as a limited partnership in Delaware by complying with certain steps.<sup>229</sup> The term "non-United States entity" means a foreign limited partnership formed under a law outside the United States or another type of entity formed, incorporated or otherwise created under the

laws of any foreign country or other foreign jurisdiction other than any state.

*Texas.* This type of transaction in Texas would be treated as a conversion transaction. Accordingly, the TBOC does not have a separate concept of "domestication" of a non-United States entity.

#### G. Transfer or Continuance Transactions.

*Delaware.* The Delaware statute allows a Delaware limited partnership to transfer to or domesticate or continue in any jurisdiction other than any state in the United States and, in connection therewith, may elect to continue its existence as a limited partnership in Delaware.<sup>230</sup>

*Texas.* TBOC Section 10.1025 authorizes a converting entity to elect to continue its existence in its current organizational form and jurisdiction of formation in connection with a conversion under Chapter 10. This election is only available to a domestic entity of one organizational form that is converting into a non-United States entity of the same organizational form or to a non-United States entity of one organizational form converting into a domestic entity of the same organizational form. A "non-United States entity" is defined as a foreign entity formed under, and the internal affairs of which are governed by, the laws of a "non-United States jurisdiction," which in turn is defined as any foreign country or other foreign jurisdiction other than the United States, the District of Columbia, or any other possession or territory of the United States. The election must be adopted and approved as part of the plan of conversion for the converting entity and permitted by, or not prohibited by or inconsistent with, the laws of the applicable non-United States jurisdiction. The converting entity continues to exist both in its current organizational form and jurisdiction of formation and in the same organizational form in the new jurisdiction of formation, as a single entity subject to the laws of both jurisdictions. The property interests, liabilities and obligations of the entity remain unchanged.<sup>231</sup> Because the converting entity continues to exist both in the non-United States jurisdiction and in Texas, Chapter 9 of the Code, relating to registration of foreign filing entities to do business in Texas, would not apply to the entity after its conversion and continuance.

The certificate of conversion must be titled a "certificate of conversion and continuance" and must include a statement certifying that the converting entity is electing to continue its existence in its current organizational form and jurisdiction of formation.<sup>232</sup>

<sup>226</sup> DRULPA §17-403.

<sup>227</sup> TBOC §10.254.

<sup>228</sup> TBOC §10.351(c).

<sup>229</sup> DRULPA §17-215.

<sup>230</sup> DRULPA §17-216.

<sup>231</sup> TBOC §10.109.

<sup>232</sup> TBOC §10.154(c).

### XIII. WINDING UP AND TERMINATION

*Texas.* Under Chapter 11 of the TBOC, the rules for winding up and termination are standardized across all types of domestic entities, including Texas limited partnerships. Much of the content of Chapter 11 is based on corporate law provisions from the prior Texas Business Corporation Act.

Subchapter B of Chapter 11 specifies what events will require the winding up of a domestic entity.<sup>233</sup> The five categories of events requiring winding up, which correspond to subdivisions in Section 11.051, are: (1) expiration of any period of duration specified in domestic entity's governing documents, (2) a voluntary decision to wind up the domestic entity, (3) an event specified in the governing documents of a domestic entity requiring the winding up, dissolution or termination of the domestic entity, (4) an event specified in other sections of this TBOC requiring the winding up or termination of the domestic entity, or (5) a decree by a court requiring the winding up, dissolution or termination of the domestic entity rendered under the TBOC or other law. The winding up procedures<sup>234</sup> and the priority of application of liquidation proceeds are also specified in Subchapter B.<sup>235</sup> Supplemental events requiring winding up of limited partnerships are also included.<sup>236</sup> Under these provisions, an event of withdrawal of a general partner of a limited partnership is an event requiring winding up unless otherwise provided by the partnership agreement. In addition, an event requiring winding up of the limited partnership includes when there are no limited partners in the partnership. These events requiring winding up may be canceled in accordance with the provisions of the TBOC.<sup>237</sup>

The limited partnership may cancel an event requiring winding up arising from an event of withdrawal of the general partner if there remains at least one general partner and the partnership agreement permits the business of limited partnership to be carried on by the remaining general partners and those remaining general partners carry on the business or, not later than one year after the event, all remaining partners agree in writing to continue the business of limited partnership and, if there are no remaining general partners, agree to the appointment of one or more new general partners.<sup>238</sup> In addition, the limited partnership may cancel an event requiring winding up

arising when there are no limited partners in the limited partnership if, not later than the first anniversary of the date of the event requiring winding up, the legal representative or successor of the last remaining limited partner and all of the general partners agree to continue the business of the limited partnership and admit the legal representative or successor of the last remaining partner or the person's nominee or designee to the limited partnership as a limited partner, or another limited partner is admitted to the limited partnership in a manner provided by the partnership agreement, in either case effective as of the date of the event causing the last remaining limited partner to cease to be a limited partner.<sup>239</sup> If an event requiring winding up has arisen due to the expiration of the period of duration of the limited partnership or the occurrence of an event specified in the partnership agreement, the limited partnership may cancel such event requiring winding up if, not later than the ninetieth day after the event, all remaining partners, or another group or percentage of partners as specified by the partnership agreement, agree in writing to continue the business of the limited partnership.<sup>240</sup>

Subchapter C of Chapter 11 provides the requirements for the information to be contained in a certificate of termination to be filed by a filing entity, including a limited partnership, upon completion of the winding up process.<sup>241</sup> The effective date of termination of the existence of a filing entity and nonfiling entity are also specified.<sup>242</sup>

Subchapter D of Chapter 11 authorizes revocation of a voluntary decision to wind up and the continuation of a domestic entity without winding up in certain circumstances.<sup>243</sup> A voluntary decision to wind up a limited partnership requires the written consent of all partners in the limited partnership unless otherwise provided by the partnership agreement.<sup>244</sup> To approve a revocation by a limited partnership of a voluntary decisions to wind up, all remaining partners, or another group or percentage of partners as specified by the partnership agreement, must agree in writing to revoke the voluntary decision to wind up and continue the business of the limited partnership.<sup>245</sup>

Subchapter E of Chapter 11 permits reinstatement of the existence of a terminated domestic entity in

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<sup>233</sup>TBOC §11.051.

<sup>234</sup>TBOC §11.052.

<sup>235</sup>TBOC §11.053.

<sup>236</sup>TBOC §§11.058.

<sup>237</sup> TBOC §11.058(b) and (c).

<sup>238</sup> TBOC §153.501(b).

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<sup>239</sup> TBOC §153.501(e).

<sup>240</sup> TBOC §153.501(a).

<sup>241</sup>TBOC §11.101.

<sup>242</sup>TBOC §§11.102-11.103.

<sup>243</sup>TBOC §§11.151-11.152.

<sup>244</sup> TBOC §11.058(a).

<sup>245</sup> TBOC §153.501(d).

certain circumstances.<sup>246</sup> The procedures for reinstatement of nonfiling entities and filing entities and the effective date of the reinstatement are set forth.<sup>247</sup>

Subchapter F of Chapter 11 contains the procedures for termination of a filing entity by action of the Secretary of State<sup>248</sup> and reinstatement after an involuntary termination after correction of the circumstances that led to the involuntary termination.<sup>249</sup> Subchapter G of Chapter 11 sets forth the rules and procedures for an involuntary winding up and termination of a filing entity by state action.<sup>250</sup> Specific grounds for termination are required. The domestic entity has a number of opportunities to cure the specific grounds.<sup>251</sup>

Subchapter H of Chapter 11 requires a terminating domestic entity to deposit with the Texas Comptroller any cash distribution to owners, including partners of a limited partnership, and creditors who are unknown or cannot be located.<sup>252</sup> Notices of the escheat must be published, and the Comptroller is responsible to pay the escheated amount upon the filing of a proper claim.<sup>253</sup> A terminated domestic entity also survives for certain limited purposes, including defending actions, liquidating property, distributing property or its proceeds and settling affairs not completed before termination.<sup>254</sup> A procedure is also established for accelerating the resolution of existing claims and extinguishing existing claims following compliance with the required procedures.<sup>255</sup>

Subchapter I of Chapter 11 contains provisions relating to receivership of specific property or the entire business of domestic entities.<sup>256</sup> The provisions for ancillary receiverships of foreign entities are also included.<sup>257</sup>

Delaware. The Delaware statute has similar provisions triggering dissolution as in the Texas statute.<sup>258</sup> Unlike other types of domestic filing

entities, the specified time for the period of duration of a Texas limited partnership does not need to be set forth in the certificate of formation. The Delaware statute only requires the provision be set forth in the limited partnership agreement. If there is no specified period of duration in the partnership agreement, the default rule is perpetual existence in either statute.<sup>259</sup> The Delaware statute speaks in terms of “dissolution” rather than “winding up.” Unlike the unanimous partner vote under the Texas statute, a voluntary dissolution of a Delaware limited partnership requires the approval of the affirmative vote or written consent of all general partners and of limited partners holding 2/3rds of the then current percentage or other interests in the profits of the limited partnership owned by all of the limited partners. For limited partnerships formed on or before July 31, 2015, if there are multiple classes or groups of limited partners, then each class or group of limited partners must approve or consent to the dissolution by the same 2/3rds vote of all of the limited partners of the respective class or group.<sup>260</sup>

The Delaware statute specifically provides that a limited partnership is dissolved, among other events, upon the happening of events specified in a partnership agreement or upon the entry of a decree of judicial dissolution.<sup>261</sup> A partner may apply to the Court of Chancery for a court ordered decree of dissolution when it is not reasonably practicable to carry on the business of the limited partnership in conformity with the partnership agreement.<sup>262</sup> The Delaware statute has provisions similar to the TBOC that require dissolution upon an event of withdrawal of a general partner or at the time when there are no limited partners.<sup>263</sup> The dissolution can be prevented upon an event of withdrawal of a general partner if there is at least one other general partner and the partnership agreement permits the business of the limited partnership to be carried on by the remaining general partner and the partner does so or, if the partnership agreement so provides, the then current percentage or other interest in the profits of the limited partnership specified in the partnership agreement owned by the remaining partners agree to continue the business of the limited partnership and to appoint, effective as of the date of withdrawal, one or more additional general partners. If no such right is provided in the limited partnership agreement, then the majority of the then current percentage or other interest in the profits of the limited

<sup>246</sup>TBOC §11.201.

<sup>247</sup>TBOC §§11.202, 11.204-11.205.

<sup>248</sup>TBOC §§11.251-11.252.

<sup>249</sup>TBOC §11.253.

<sup>250</sup>TBOC §§11.301-11.305.

<sup>251</sup>TBOC §§11.306-11.307.

<sup>252</sup>TBOC §11.352.

<sup>253</sup>TBOC §§11.354-11.355.

<sup>254</sup>TBOC §§11.356-11.357

<sup>255</sup>TBOC §§11.358-11.359.

<sup>256</sup>TBOC §§11.401-11.408, 11.411-11.414.

<sup>257</sup>TBOC §§11.409-11.410.

<sup>258</sup>DRULPA §17-801(a).

<sup>259</sup>TBOC §§3.005(a), 11.051(1); DRULPA §17-801(a)(1).

<sup>260</sup>DRULPA §17-801(a)(2).

<sup>261</sup> DRULPA §17-801(5), (6).

<sup>262</sup>DRULPA §17-802.

<sup>263</sup> DRULPA §17-801(3) and (4).

partnership owned by the remaining partners may agree to continue the business of the limited partnership and to appoint, effective as of the date of withdrawal, one or more additional general partners. As another alternative, the business of the limited partnership can be continued pursuant to a right to continue stated in the partnership agreement and the appointment effective as of the date of withdrawal of one or more additional general partners if necessary or desired.<sup>264</sup>

When there are no limited partners, the dissolution can be prevented if, within 90 days or such other period as provided for in the partnership agreement, the personal representative of the last remaining limited partner and all the general partners agree to continue the business of the limited partnership and to the admission of the personal representative or its nominee or designee as a limited partner effective as of the occurrence of the event that caused the last remaining limited partner to cease to be a limited partner. In the alternative, a limited partner may be admitted to the limited partnership in a manner provided for in the partnership agreement effective as of the occurrence of the event that caused the last remaining limited partner to cease to be a limited partner if that occurs within 90 days or such other period as is provided for in the partnership agreement.<sup>265</sup> The Texas provision has an advantage in this area because it specifies a period of one year instead of 90 days for the appointment of a new general partner or new limited partner.

The Delaware statute has slightly different provisions regarding revocation of dissolution than the Texas statute. Prior to the filing of a certificate of cancellation with the Delaware Secretary of State, in the case of a dissolution effected by an event of withdrawal of a general partner or when the last remaining limited partner ceases to be a limited partner, the dissolved limited partnership may revoke the dissolution and continue its business upon the affirmative vote or written consent of all the remaining general partners and limited partners who own more than 2/3rds of the then-current percentage or other interest in the profits of the limited partnership by all of the limited partners, or the personal representative of the last remaining limited partner of the limited partnership if there is no remaining limited partner. However, if the dissolution was caused by a vote or written consent, the dissolution may not be revoked unless each partner or other person who voted in favor of or consented to the dissolution has voted or consented in writing to continue the limited partnership.<sup>266</sup>

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<sup>264</sup> DRULPA §17-801(3).

<sup>265</sup> DRULPA §17-801(4).

<sup>266</sup> DRULPA §17-806.

The Delaware statute does not have the beneficial provisions in the Texas statute regarding survival of the limited partnership for a period after the filing of the certificate of cancellation to effect transfers of property, prosecution of claims and other specific matters.<sup>267</sup> After the filing of a certificate of cancellation, however, the Court of Chancery, on application of any creditor or partner, or any other person who shows good cause, may appoint one or more of the general partners to be trustees or one or more persons to be receivers of the limited partnership to take charge of the limited partnership's property and to collect debts and property due and belonging to the limited partnership. The trustee or receiver has the power to prosecute and defend suits and to do other acts that may be done by the limited partnership that may be necessary for the final settlement of the unfinished business of the limited partnership.<sup>268</sup>

#### XIV. CONCLUSION

The Texas Limited Partnership Law is clearly more flexible than the DRULPA in its provisions relating to fundamental business transactions. The Texas statute's provisions on mergers and conversions are broader and more flexible than their Delaware counterparts, while the DRULPA lacks any counterpart at all to the TBOC provisions on interest exchanges and protections for sales of assets.

The DRULPA allows limited partners more rights and powers than the TBOC with respect to their activities in relation to the limited partnership without being deemed to be participating in the control of the business of the limited partnership. The DRULPA has a 3 year statute of limitations for claims against a limited partner for recovery of an unlawful distribution, while the TBOC has no stated statute of limitations. The DRULPA allows limited partners and liquidating trustees to rely in good faith on reports and opinions, while the TBOC does not expressly, but may implicitly, allow such reliance.

The DRULPA has troublesome ambiguities and issues relating to formation of a limited partnership. It requires partners to exist in one provision but also states that formation occurs upon filing of a certificate of limited partnership and without any admission of any partners.

The TBOC has generally clearer statements of what statutory rules can be modified or waived in the partnership agreement.

For those interested in disclaiming duties of partners, the DRULPA allows the duties of partners, other than the implied contractual covenants of good faith and fair dealing, to be eliminated. The TBOC

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<sup>267</sup>TBOC §11.356.

<sup>268</sup>DRULPA §17-805.

does not impose any explicit covenants of good faith and fair dealing, as imposed by Delaware, and there is Texas case law supporting the notion that limited partners do not have duties to the partnership or other partners solely in their role as limited partners. The DRULPA also allows the liability for breach of duties of a partner to be eliminated other than liability for the implied contractual covenants of good faith and fair dealing. The Texas statute explicitly allows liability of general partners of limited partnerships to be eliminated to at least the extent permitted in for-profit corporations for directors and to the additional extent permitted by Chapter 153 and, to the extent applicable to limited partnerships, Chapter 152. Presumably, limited partners under Texas law would have at least similar rights to limit their liability for a breach of any duty.

The DRULPA has limited provisions on the topic of indemnification of general partners and no provisions relating to advancement of expenses. Unlike the DRULPA statute, the TBOC has detailed provisions that specifically allow a broader range of enforceable approaches for indemnification, insurance, expense advancement and other contractual arrangements for protection of general partners, officers and delegates from liability for the limited partnership's obligations. The Texas provisions would seem to be preferable and more defining in all respects.

The provisions governing the rights of limited partners to inspect partnership records are more beneficial to limited partners under the TBOC than under the DRULPA. The DRULPA gives greater latitude to general partners to keep information confidential and allows a partnership agreement agreed to by all partners to impose restrictions on the inspection rights of limited partners without a reasonableness requirement.

The DRULPA authorizes the establishment of series limited partnerships, but the Texas Limited Partnership Law has no such provision.

While the TBOC has detailed provisions in Chapter 6 relating to meetings and voting of owners and governing persons that can be adopted by the partnership agreement of a Texas limited partnership, the DRULPA authorizes a limited partnership to contain provisions relating to meetings and voting of partners.

The TBOC has more extensive and detailed provisions relating to winding up of limited partnerships than the DRULPA. It also has various special provisions relating to receivership and bankruptcy that have no express counterparts in the DRULPA. The DRULPA is also missing provisions similar to those in the TBOC regarding survival of the limited partnership for certain purposes.

Overall, after reviewing the foregoing analysis, I conclude that the Texas Limited Partnership Law

stands up well in a side-by-side comparison to the DRULPA. Legal practitioners should think twice before automatically deferring to the choice of Delaware law in forming limited partnerships for their clients.