# New York State Bar Association®



November 9, 1994

Hon. Stuart L. Brown
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

Re: Conformity of New York Partnership Law to RULPA

Dear Stu:

Enclosed is a Report by the New York State Bar Association Tax Section requesting that the Service issue a published ruling that the New York Revised Limited Partnership Act "corresponds" to the Revised Uniform Limited Partnership Act. Such correspondence has significance in providing assurance to taxpayers that the favorable presumptions for partnership classification under Treas. Reg. § 301.7701-2 apply to partnerships formed under the New York statute.

The Report analyzes the relevant provisions of the New York statute and concludes that a favorable published ruling on this issue can and should be issued. We note that the Service has issued favorable published rulings with respect to the partnership laws of 33 other states. See Rul. 94-2, 1994-1 IRB 8; Rev. Rul. 94-10, 1994-6 IRB 12.

While it is not addressed in the Report, we also believe that the Service should issue a ruling relatively quickly stating that the recently adopted New York State limited liability company (and limited liability partnership) statutes permit an entity to be classified as a partnership under Treas. Reg. § 301.7701-2. Numerous rulings of this type have been issued as to various state statutes, and we believe (assuming the practice of issuing such

rulings will continue) that the New York statute is deserving of such a ruling.

We would be happy to provide any further information or analysis you would consider useful concerning either the New York Revised Limited Partnership Act or the New York limited liability company (and limited liability partnership) legislation.

Sincerely,

Michael Schler

Michael L. Schler
Chair, Tax Section

NEW YORK STATE BAR ASSOCIATION

TAX SECTION

COMMITTEE ON PARTNERSHIPS

# REPORT ON THE CONFORMITY OF NEW YORK'S REVISED LIMITED PARTNERSHIP ACT TO THE R.U.L.P.A. FOR PURPOSES OF ENTITY CLASSIFICATION UNDER TREASURY REGULATION § 301.7701-2

November 8, 1994

TABLE OF CONTENTS


I. Introduction and Summary of Conclusions . . . . . 1

II. Discussion . . . . . 2
A. Continuity of Life . . . . . 4
B. Centralization of Management . . . . . 13
C. Limited Liability for Organizational Debts . 15
D. Free Transferability of Interests . . . . . 19

NEW YORK STATE BAR ASSOCIATION
TAX SECTION
COMMITTEE ON PARTNERSHIPS*

# Report on the Conformity of New York's Revised Limited Partnership Act to the R.U.L.P.A. for Purposes of Entity Classification under Treasury Regulation § 301.7701-2

## I. Introduction and Summary of Conclusions

This Report analyzes the provisions of New York's Revised Limited Partnership Act (the "NY Statute")[1] that are relevant to determining whether the NY Statute is a statute "corresponding" to the Revised Uniform Limited Partnership Act adopted by the National Conference of Commissioners on Uniform State Laws in 1976, as amended in 1985 (the "RULPA"). Regulation § 301.7701-2 accords to entities formed under statutes corresponding to the RULPA certain favorable presumptions germane to determining whether an entity is taxable as an association or a partnership. This

---

* The principal authors of this report are Andrew N. Berg, William B. Brannan, and Laura J. Lutjen. Helpful comments were provided by Carolyn Joy Lee and Michael Schler.

1. McKinney's Partnership Law §§ 121-101 to 121-1300. New York enacted the Revised Limited Partnership Act of 1976 without repealing the 1916 Limited Partnership Act. Domestic limited partnerships formed prior to the effective date of the revised act remain subject to the prior act unless they elect otherwise. All references herein to the NY Statute refer only to the Revised Limited Partnership Act of 1976.

Report concludes that, in relevant part, the NY Statute is substantially the same as the RULPA in all material respects, subject to a few minor differences that generally tend to make the NY Statute a stronger case for the applicability of such presumptions. Accordingly, we believe that the Internal Revenue Service should rule that the NY Statute "corresponds" to the RULPA and that partnerships formed under the NY Statute are entitled to the entity classification presumptions contained in Regulation § 301.7701-2.

II. Discussion

Section 7701(a)(3) of the Internal Revenue Code defines the term corporation to include an "association". Regulation § 301.7701-3(b)(1) provides that an organization which qualifies as a limited partnership under state law may be classified as an association for federal income tax purposes, if, applying the principles set forth in Regulation § 301.7701-2(a)(1), which define the term "association", the organization more nearly resembles a corporation than an ordinary partnership or other business entity.

Under the Regulation, six primary characteristics are to be used to test whether an unincorporated organization should be treated for federal tax purposes as a corporation or a partnership. Two of these characteristics, associates and an objective to carry on business and divide the gains therefrom, are common to both corporations and

partnerships and are effectively disregarded. The presence of more than two of the remaining four characteristics, continuity of life, centralization of management, limited liability, and free transferability of interests, indicates that the organization is taxable as an association.

Each of these four characteristics is discussed in Regulation § 301.7701-2, and in the first three of those discussions (continuity of life, centralization of management and limited liability), the Regulation grants certain favorable presumptions to partnerships formed under partnership statutes which "correspond" to the RULPA.[2] This Report analyzes each of those references, comparing the relevant statutory provisions under the NY Statute and the RULPA, and concludes that for the purposes of Regulation § 301.7701-2, the NY Statute does, in fact, correspond in all material respects to the RULPA.

---

2. The substantive portions of the Regulation actually refer to statutes which correspond to the Uniform Limited Partnership Act (adopted in 1916). However, Regulation § 301.7701-2(a)(5) provides that all references to the Uniform Limited Partnership Act will be deemed to refer to that Act both as originally promulgated and as revised in 1976. All RULPA cites herein refer to the RULPA as amended in 1985. The 1985 revisions to the 1976 Act did not substantively change any provision relevant to this Report. It should be noted that the term "correspond" is not defined in the Regulation, but presumably means is substantially the same in all respects that are material to analyzing the three applicable characteristics.

A. Continuity of Life

Regulation § 301.7701-2(b)(1) provides that "if the death, insanity, bankruptcy, retirement, resignation, expulsion, or other event of withdrawal of a general partner of a limited partnership causes a dissolution of the partnership, continuity of life does not exist; furthermore, continuity of life does not exist notwithstanding the fact that a dissolution of the limited partnership may be avoided, upon such an event of withdrawal of a general partner, by the remaining general partners agreeing to continue the partnership or by at least a majority in interest of the remaining partners agreeing to continue the partnership."

Regulation § 301.7701-2(b)(3) further provides that if "any member has the power under local law to dissolve the organization, [notwithstanding the partnership agreement,] the organization lacks continuity of life. Accordingly, . . . a limited partnership subject to a statute corresponding to the RULPA lack[s] continuity of life." The latter sentence must mean that if any general partner has the power under local law to dissolve the organization, the organization will lack continuity of life, since the RULPA does not provide this power to limited partners. The RULPA and the NY Statute provisions relevant to the power to dissolve are substantially the same in all material respects, as shown below.

| RULPA § 801† | NY Statute § 121-801† |
| --- | --- |
| A limited partnership is dissolved and its affairs shall be wound up upon the happening of the first to occur of the following: | A limited partnership is dissolved and its affairs shall be wound up upon the happening of the first to occur of the following: |
| (4) an event of withdrawal of a general partner unless at the time there is at least one other general partner and the written provisions of the partnership agreement permit the business of the limited partnership to be carried on by the remaining general partner and that partner does so, but the limited partnership is not dissolved and is not required to be wound up by reason of any event of withdrawal, if, within 90 days after the withdrawal, all partners agree in writing to continue the business of the limited partnership and to the appointment of one or more additional general partners if necessary or desired; | (d) an event of withdrawal of a general partner unless (1) at the time 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 that partner does so, or (2) if within ninety days after the withdrawal, all partners agree in writing to continue the business of the limited partnership and to the appointment, effective as of the date of withdrawal, of one or more additional general partners if necessary or desired; |

An "event of withdrawal of a general partner" is defined in both statutes as an event that causes a person to cease to be a general partner.

---

† All brackets and the language within the brackets in the columned cites are included in the original text of the cited statute.

RULPA § 402

Except as approved by the specific written consent of all partners at the time, a person ceases to be a general partner of a limited partnership upon the happening of any of the following events:

(1) the general partner withdraws from the limited partnership as provided in Section 602;

(2) the general partner ceases to be a member of the limited partnership as provided in Section 702;

(3) the general partner is removed as a general partner in accordance with the partnership agreement;

(4) unless otherwise provided in writing in the partnership agreement, the general partner: (i) makes an assignment for the benefit of creditors; (ii) files a voluntary petition in bankruptcy; (iii) is adjudicated a bankrupt or insolvent; (iv) files a petition or answer seeking for himself [or herself] any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law, or regulation; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against him [or her]

NY Statute § 121-402

A person ceases to be a general partner of a limited partnership upon the happening of any of the following events:

(a) the general partner withdraws from the limited partnership as provided in section 121-602;

(b) the general partner ceases to be a member as provided in section 121-702 of this article;

(c) the general partner is removed as a general partner [as may be provided] in the partnership agreement;

(d) unless otherwise provided in writing in the partnership agreement or approved by all partners, the general partner (i) makes an assignment for the benefit of creditors, (ii) is the subject of an order for relief under Title 11 of the United States Code, (iii) files a petition or answer seeking for himself any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, (iv) files an answer or other pleading, admitting or failing to contest the material allegations of a petition filed against him in any proceeding of this nature, or (v) seeks, consents to, or acquiesces

in any proceeding of this nature; or (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his [or her] properties;

(5) unless otherwise provided in writing in the partnership agreement, [120] days after the commencement of any proceeding against the general partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law, or regulation, the proceeding has not been dismissed, or if within [90] days after the appointment without his [or her] consent or acquiescence of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his [or her] properties, the appointment is not vacated or stayed or within [90] days after the expiration of any such stay, the appointment is not vacated;

(6) in the case of a general partner who is a natural person,

(i) his [or her] death; or

(ii) the entry of an order by a court of competent jurisdiction adjudicating him [or her] incompetent to manage his [or her] person or his [or her] estate;

in the appointment of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his properties;

(e) unless otherwise provided in writing in the partnership agreement or approved by all partners, (i) if within one hundred twenty days after the commencement of any proceeding against the general partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, the proceeding has not been dismissed or stayed, or within ninety days after the expiration of any such stay, the proceeding has not been dismissed, or (ii) if within ninety days after the appointment without his consent or acquiescence of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his properties, the appointment is not vacated or stayed, or within ninety days after the expiration of any such stay, the appointment is not vacated;

(f) in the case of a general partner who is a natural person, (i) his death or (ii) the entry of a judgment by a court of competent jurisdiction adjudicating him incompetent to manage his person or his property;

(7) in the case of a general partner who is acting as a general partner by virtue of being a trustee of a trust, the termination of the trust (but not merely the substitution of a new trustee);

(8) in the case of a general partner that is a separate partnership, the dissolution and commencement of winding up of the separate partnership;

(9) in the case of a general partner that is a corporation, the filing of a certificate of dissolution, or its equivalent, for the corporation or the revocation of its charter; or

(10) in the case of an estate, the distribution by the fiduciary of the estate's entire interest in the partnership

(g) in the case of a general partner who is acting as a general partner by virtue of being a trustee of a trust, the termination of the trust (but not merely the substitution of a new trustee);

(h) in the case of a general partner that is a partnership, unless the partnership agreement of such partnership provides for the right of any one or more of the partners of such partnership to continue the business of such partnership and such partnership is so continued, the dissolution and commencement of winding up of such partnership;

(i) in the case of a general partner that is a corporation, the filing of a certificate of dissolution, or its equivalent, for the corporation or the revocation of its charter; or

(j) in the case of a general partner that is an estate, the distribution by the fiduciary of the estate's entire interest in the limited partnership.

The RULPA § 801(4) and the NY Statute § 121-801(d) are substantively the same -- the differences are merely stylistic. The RULPA § 402 and the NY Statute § 121-402 are also substantively the same in all relevant respects. Regu-

lation § 301.7701-2(b)(1) states that where the death, insanity, bankruptcy, retirement, resignation, expulsion, or other event of withdrawal of a general partner causes a dissolution of the partnership, the entity lacks continuity of life. Under both the RULPA § 402 and the NY Statute § 121-402, each of the above enumerated events generally are considered events of withdrawal resulting in such dissolution.

The Regulation provides further that such an entity will lack continuity of life notwithstanding the fact that dissolution may be avoided by at least a majority in interest of the remaining partners agreeing to continue the partnership or by any remaining general partner so agreeing. Both the RULPA and the NY Statute contain provisions to this effect.

RULPA § 801 and the NY Statute § 121-801 each provide that an event of withdrawal of a general partner will cause a dissolution unless (i) there is at least one other general partner, the partnership agreement permits the remaining general partner to continue the partnership and the general partner does so, or (ii) all partners consent in writing within 90 days to the continuation of the limited partnership and the appointment of a substitute general partner. RULPA § 402 and the NY Statute § 121-402, both enumerating events of withdrawal, provide that a person ceases to be a general partner upon the occurrence of sub-

stantially the same events. RULPA § 402, however, allows a general partner to remain a general partner upon the occurrence of any of these events if such continuation is approved by the written consent of all partners. The NY Statute § 121-402, in contrast, permits the general partner to remain a general partner (with the consent of all partners) only upon the occurrence of a bankruptcy/insolvency type withdrawal event. The NY Statute, by providing fewer circumstances where consent may prevent a general partner from withdrawing and thereby dissolving the partnership, offers at least as strong a case that an entity subject to its terms lacks continuity of life.

Since the RULPA and the NY Statute provisions are substantially the same in all material respects, we believe that the NY Statute corresponds to the RULPA for purposes of determining whether continuity of life exists.

The other termination provisions of the two statutes (as shown below), while relevant to the termination of the partnership, do not bear upon whether "any member has the power under local law to dissolve the organization." Consequently, the differences between the two provisions should not be relevant to determining whether the NY Statute corresponds to the RULPA.

| RULPA § 801 | NY Statute § 121-801 |
| --- | --- |
| A limited partnership is dissolved and | A limited partnership is dissolved and |

| | |
|---|---|
| its affairs shall be wound up upon the happening of the first to occur of the following: | its affairs shall be wound up upon the happening of the first to occur of the following: |
| (1) at the time specified in the certificate of limited partnership; | (a) at the time, if any, provided in the certificate of limited partnership; |
| (2) upon the happening of events specified in writing in the partnership agreement; | (b) at the time or upon the happening of events specified in the partnership agreement; |
| (3) written consent of all partners; | (c) subject to any requirement in the partnership agreement requiring approval by any greater or lesser percentage of limited partners and general partners, upon the written consent (1) of all of the general partners and (2) of two-thirds in interest of each class of limited partners; |
| * * * | * * * |
| (5) entry of decree of judicial dissolution under Section 802. | (e) entry of a decree of judicial dissolution under section 121-802 of this article. |

These provisions differ substantively in two ways. First, the NY Statute states that the limited partnership will be dissolved at the time, if any, provided in the certificate of the limited partnership. The RULPA omits the words "if any." This language difference implies that the NY Statute does not require a limited partnership to state an outside date by which it must dissolve. However, § 121-201 of the NY Statute, enumerating the information to

be filed in the certificate of limited partnership, does include the latest date upon which the limited partnership is to dissolve. In any event, whether or not the NY Statute requires an outside date for dissolution should not affect a determination of whether the NY Statute corresponds to the RULPA. While the Regulation states that an agreement may establish a date of termination of the organization, such a date is not required to finding a lack of continuity of life.

The second manner in which the NY Statute differs from the RULPA is that while the RULPA provides that a partnership will dissolve upon the written consent of all partners, the NY Statute allows dissolution upon the written consent of less than all the partners. Accordingly, an entity formed under the NY Statute may dissolve under this provision in circumstances where a RULPA entity would not. It is, therefore, more likely that an entity formed under the NY Statute will lack continuity of life.

As explained above, the foregoing two differences are not of particular relevance to determining whether the two statutes correspond. Under Regulation § 301.7701-2(b)(1), if any member has the power under local law to dissolve the organization (notwithstanding the partnership agreement) the organization lacks continuity of life. Since the NY Statute, like the RULPA, provides the general partner with the power to dissolve the partnership through with-

drawal, we believe the NY Statute conforms to the RULPA for purposes of determining whether an entity lacks continuity of life.

B. Centralization of Management

Regulation § 301.7701-2(c)(4) provides that a limited partnership subject to a statute corresponding to the RULPA generally does not have centralized management, but centralized management ordinarily does exist in such a limited partnership if substantially all of the interests in the partnership are owned by the limited partners. This statement reflects the position that the powers of mutual agency inherent in a partnership generally preclude a finding of centralized management, so long as the general partner's interest in the partnership is significant enough to ensure that he acts in his own proprietary interest (in addition to his representative capacity).[3] Mutual agency, the power to bind the partnership as against third parties, is addressed in the following provisions:

| RULPA § 403 | NY Statute § 121-403 |
| --- | --- |
| (a) Except as provided in this Act or in the partnership agreement, | (a) Except as provided in this article or in the partnership agree- |

3. See Brannan, Lingering Partnership Classification Issues (Just When You Thought It Was Safe to Go Back Into the Water), 1 Fla. Tax. Rev. 197, 243-4 (1993); and McKee et al., Federal Taxation of Partnerships and Partners, ¶ 3.06[4][b] (1993).

| | |
|---|---|
| a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners. | ment, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners. |

The RULPA and the NY Statute provisions are identical, except for the substitution of the word "article" for "Act".

The Regulation goes on to state that if all or a specified group of the limited partners may remove a general partner, all the facts and circumstances must be taken into account in determining whether the partnership possesses centralized management. A substantially restricted right to remove a general partner will not itself cause the partnership to possess centralized management. Regulation § 301.7701-2(c)(4). The RULPA and the NY Statute provisions on removal of a general partner are also virtually identical (except for minor stylistic differences).

| RULPA § 402 | NY Statute § 121-402 |
|---|---|
| (3) the general partner is removed as a general partner in accordance with the partnership agreement; | (c) the general partner is removed as a general partner as may be provided in the partnership agreement; |

Since the relevant provisions are the same in all substantive respects, we believe that the NY Statute corresponds to the RULPA for purposes of determining whether

centralized management exists in accordance with Regulation § 301.7701-2(c).

C. Limited Liability for Organizational Debts

Regulation § 301.7701-2(d) provides that in a limited partnership subject to a statute corresponding to the RULPA, personal liability exists with respect to each general partner, except where the general partner has no substantial assets which could be reached by a creditor of the organization and where he is merely a "dummy" acting as the agent of the limited partners. There is one provision in the RULPA and two provisions in the NY Statute which concern the liability of the general partner for the debts of an organization. Both the RULPA and the NY Statute contain provisions which provide for the liability of a general partner to third parties; the NY Statute also contains a provision which allows for indemnification of the general partner by the partnership.

The RULPA and the NY Statute provisions dealing with a general partner's liability to third parties are identical, except for the substitution of the word "article" for "Act" and the addition in the NY Statute of the word "limited" before "partnership".

| RULPA § 403 | NY Statute § 121-403 |
| --- | --- |
| (b) Except as provided in this Act, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners. Except as provided in this Act or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners. | (b) Except as provided in this article, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the limited partnership and the other partners.<br><br>(c) Except as provided in this article or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the limited partnership and to the other partners. |

Since these provisions are substantively the same, we believe that the NY Statute § 121-403(b) corresponds to the RULPA § 403(b) for purposes of determining whether a partnership possesses the characteristic of limited liability.

The second relevant provision, included only in the NY Statute and not in the RULPA, deals with indemnification of a general partner:

NY Statute § 121-1004

(a) No provision made to indemnify general partners for the defense of a derivative action, brought pursuant to section 121-1002 of this article, whether contained in the partnership agreement or otherwise, nor any award of indemnification by a court, shall be valid unless consistent with this section. Nothing contained in this section shall affect any rights to indemnification to which limited part-

ners, employees and agents of the limited partnership who are not general partners may be entitled by contract or otherwise under law.

(b) A limited partnership may indemnify, and may advance expenses to, any general partner, including a general partner made a party to an action in the right of a limited partnership to procure a judgment in its favor by reason of the fact that he, his testator or intestate, is or was a general partner in the limited partnership, provided that no indemnification may be made to or on behalf of any general partner if a judgment or other final adjudication adverse to the general partner establishes that his acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated, or that he personally gained in fact a financial profit or other advantage to which he was not legally entitled.

RULPA does not contain any comparable provision. In the absence of any provision dealing with indemnification, the parties should be free to contractually agree to indemnify the general partner, subject to any applicable common law or statutory limitations. We believe the foregoing provision of the NY Statute is a statutory limitation on the ability of a general partner to obtain contractual indemnification and, therefore, is not more permissive than the RULPA.[4]

---

4. The NY Statute provides that a general partner may not be indemnified if an adverse judgement establishes his or her misconduct. Even absent this provision, a general partner may not be entitled to indemnification under such circumstances. Indemnity is generally unavailable for intentional misconduct. See Globus v. Law Research Service, Inc., 418 F.2d 1276, 1288 (2d Cir. 1969) ("It is well established that one cannot insure himself against his own reckless, willful or criminal misconduct."), cert. denied, 397 U.S. 913, 25 L. Ed. 2d 93, 90 S. Ct. 913 (1970); Anderson v. Local 3, International Brotherhood of Electrical Workers, 582 (continued...)

Even if this provision of the NY Statute were viewed as permitting expanded rights of indemnification for general partners, we still believe, for two reasons, that the NY Statute corresponds to the RULPA for purposes of determining whether an entity formed under the NY Statute lacks the characteristic of limited liability. First, the NY Statute provides that general partners have personal liability for the obligations of the limited partnership. The indemnification provision does not limit this liability. The provision simply acknowledges that the parties may by contract alter the normal liabilities of the general and limited partners, but any such arrangement would in no way limit the recourse of third parties against the general partner. Second, Regulation § 301.7701-2(d)(1) states that a member of an organization who is personally liable for the obligations of the organization may make an agreement with another person who agrees to indemnify such member for any such liability. If such member remains liable to creditors under local law notwithstanding such agreement, there exists personal liability with respect to such member.

In addition, similar indemnification provisions are contained at section 14-9-108 of the Georgia Revised Uniform Limited Partnership Act, Ga. Code Ann. §§ 14-9-100

---

4.(...continued)
F. Supp. 627, 633 (S.D.N.Y. 1984); Friedman v. Hartmann 787 F. Supp. 411 (S.D.N.Y. 1992).

through 14-9-1204 (Supp. 1987), and section 79-14-108 of the Mississippi Limited Partnership Act, Miss. Code Ann. Chapter 14, sections 79-14-101 through 79-14-1107 (Supp. 1988), each of which acts the Service has determined corresponds to the RULPA. See Rev. Rul. 94-2, 1994-1 I.R.B. 8.

Since the RULPA § 403(b) and the NY Statute § 121-403(b) are substantively identical and the NY Statute's indemnification provision does not alter the general partner's liability to third parties, we believe that the NY Statute corresponds to the RULPA for purposes of determining whether limited liability exists in accordance with Regulation § 301.7701-2(d).

D. Free Transferability of Interests

The following discussion, which analyzes the provisions of the NY Statute and the RULPA that concern the transferability of partnership interests, is included for informational purposes only. Regulation § 301.7701-2(e)(1) states that free transferability exists when a member is able, without the consent of other members, to confer upon his substitute all the attributes of his interest. The regulation further states that free transferability does not exist where a member can assign, without the consent of other members, only his rights to profits in the organization. Regulation § 301.7701-2(e)(1), which addresses the characteristic of free transferability of interests, does

not refer to the RULPA nor does it contain any presumptions for entities subject to a statute corresponding to the RULPA. Presumably the Regulation does not refer to the RULPA because the RULPA defers to the relevant partnership agreement or the consent of all partners to determine whether an assignee may become a limited partner, thereby succeeding to all of the attributes of the assignor's interest.[5] Thus, it is not more likely that a partnership formed under the RULPA will lack the characteristic of free transferability than one that is not. Therefore, the NY Statute's correspondence to the RULPA is irrelevant to determining whether the corporate characteristic of free transferability will exist. In the interest of completeness, we have nonetheless determined that the NY Statute provisions concerning transferability conform to the RULPA.

Regulation § 301.7701-2(e)(1) states than an organization has the corporate characteristic of free transferability where a member is able, without the consent of other members, to confer upon his substitute all the attributes of his interest in the organization. Two sets of provisions in the RULPA and the NY Statute address the transfer of partnership interests. The first set of provisions, § 704(a) and § 121-704(a), concerning the right of an assignee to become a limited partner, reads as follows:

---

5. RULPA § 704.

| RULPA § 704 | NY Statute § 121-704 |
| --- | --- |
| (a) An assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if and to the extent that (i) the assignor gives the assignee that right in accordance with authority described in the partnership agreement, or (ii) all other partners consent. | (a) An assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if (i) the assignor gives the assignee that right in accordance with authority granted in the partnership agreement, or (ii) all partners consent in writing, or (iii) to the extent that the partnership agreement so provides. |

The second and third paragraphs of the RULPA section and the second paragraph of the NY Statute section deal with the respective obligations of the assignee and the assignor:

| | |
|---|---|
| (b) An assignee who has become a limited partner has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a limited partner under the partnership agreement and this Act. An assignee who becomes a limited partner also is liable for the obligations of his or her assignor to make and return contributions as provided in Articles 5 and 6. However, the assignee is not obligated for liabilities unknown to the assignee at the time he or she became a limited partner. | (b) An assignee who has become a limited partner has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a limited partner under the partnership agreement and this article. Notwithstanding the foregoing, unless otherwise provided in the partnership agreement, an assignee who becomes a limited partner is liable for the obligations of his assignor to make contributions as provided in section 121-502 of this article, but shall not be liable for the obligations of his assignor under sections 121-603 and 121-607 of this article. However, the assignee is not obligated for liabilities, including the obligations of his assignor to make contributions as provided in section 121-502 of this article, unknown to the assignee at the time he becomes a limited partner. |
| (c) If an assignee of a partnership interest becomes a limited partner, the assignor is not released from his or her liability to the limited partnership under Sections 207 and 502. | |

The NY Statute § 121-704(a) differs from the RULPA § 704(a) by providing that, in addition to the circumstances enumerated in the RULPA, an assignee may become a limited partner "to the extent the partnership agreement so provides." We do not believe this difference is material. Both statutes allow the transfer of interests, without the consent of other members, if the partnership agreement

accords such authority to the assignor. By also allowing an assignee to become a limited partner "to the extent that the partnership agreement so provides," the NY Statute eliminates the requirement of intermediary authority or action of an assignor. Nonetheless, since both acts enable a partnership agreement to contain provisions allowing transfer without the consent of other members, it is the partnership agreement itself which will determine whether or not a partnership possesses the characteristic of free transferability. Additionally, the NY Statute provision is consistent with section 74-14-704 of the Mississippi Revised Limited Partnership Act, Miss. Code Ann. Chapter 14 section 79-14-101 through 79-14-1107 (Supp. 1988), which the Service has determined corresponds to the RULPA. See Revenue Ruling 94-2, 1994-1 I.R.B. 8.

The second provision relevant to free transferability in the RULPA and the NY Statute deals with the assignment of economic rights in a partnership.

| RULPA § 702 | NY Statute § 121-702 |
| --- | --- |
| Except as provided in the partnership agreement, a partnership interest is assignable in whole or in part. An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights of a partner. An assignment | (a) Except as provided in the partnership agreement,<br><br>(1) A partnership interest is assignable in whole or in part;<br><br>(2) An assignment of a partnership interest does not dissolve a limited partnership or entitle the |

entitles the assignee to receive, to the extent assigned, only the distribution to which the assignor would be entitled. Except as provided in the partnership agreement, a partner ceases to be a partner upon assignment of all his or her partnership interest.

assignee to become or to exercise any rights or powers of a partner;

(3) The only effect of an assignment is to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses which the assignor would be entitled; and

(4) A partner ceases to be a partner and to have the power to exercise any rights or powers of a partner upon assignment of all of his partnership interest. Unless otherwise provided in the partnership agreement, the pledge of, or granting of a security interest, lien or other encumbrance in or against, any or all of the partnership interest of a partner shall not cause the partner to cease to be a partner or to have the power to exercise any rights or powers of a partner.

(b) The partnership agreement may provide that a limited partner's interest may be evidenced by a certificate issued by the partnership and may also provide for the assignment or transfer of any of the interest represented by such a certificate. A limited partner's interest may be a certificated security or an uncertificated security within the meaning of section 8-102 of the uniform commercial code if the requirements of such section are met, and if the requirements are not met

> shall be deemed to be a general intangible.
>
> (c) Unless otherwise provided in a partnership agreement and except to the extent assumed by agreement, until an assignee of a partnership interest becomes a partner, the assignee shall have no liability as a partner solely as a result of the assignment.

These provisions differ in several ways. First, the NY Statute § 121-702(a)(3) states that the only effect of an assignment is to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses to which the assignor would be entitled. The RULPA omits the words "and allocations of profits and losses." Second, the NY Statute provides that the pledge or granting of a security interest or any other encumbrance against a partnership interest shall not cause the partner to cease to be a partner. The RULPA does not contain such a provision. Third, unlike the RULPA, the NY Statute provides that a certificate may evidence a limited partner's interest in the partnership.[6] Fourth, the NY Statute provides that, unless otherwise provided in the partnership agreement and except to the extent assumed by agreement, until an assignee

---

6. Alabama and Washington limited partnership statutes, which have been determined to correspond to RULPA, contain such provisions. See Code of Ala. § 10-9A-121 (1993); RCW 25.10.400 (1993); Rev. Rul. 94-2.

of a partnership interest becomes a partner, the assignee shall have no liability as a partner solely as a result of assignment. The RULPA does not contain such a provision.

Regulation § 301.7701-2(e)(1) states that free transferability exists when a member is able, without the consent of other members, to confer upon his substitute all the attributes of his interest.[7] The regulation further states that free transferability does not exist where a member can assign, without the consent of others, only his rights to profits in the organization.[8] RULPA § 702 provides that an assignment entitles the assignee to receive only the distributions to which the assignor is entitled. An assignment of rights to distributions presumably carries with it the allocation of related profits and losses. The NY Statute § 121-702 makes this point explicit, providing that the assignee is entitled to receive the distributions

---

7. See Rev. Rul. 93-81, 1993-2 C.B. 314 (stating that "the characteristic of free transferability does not exist [in a limited liability company] if each member can assign the right to share in the profits without the consent of other members, but cannot assign the members right to participate in the management of the company."); See also Rev. Rul 93-53, 1993-2 C.B. 312 and Rev. Rul. 93-50, 1993-2 C.B. 310.

8. Although free transferability will not exist in such circumstances for entity classification purposes, the Service has ruled that an assignee acquiring dominion and control over the interest of a limited partner will be treated as a limited partner for Federal income tax purposes, even where the partnership agreement provides that an assignee may not become a limited partner without the consent of the general partner and such consent is withheld. See Rev. Rul. 77-137, 1977-1 C.B. 178.

and allocations of profits and losses to which the assignor would be entitled. Accordingly, we believe the differences between the RULPA and the NY Statute with respect to the assignment of interests are not material for purposes of determining whether free transferability of interests exists.[9]

* * *

Based upon the foregoing analysis, the Committee believes that New York's Revised Limited Partnership Act "corresponds" to the Revised Uniform Limited Partnership Act for purposes of entity classification under Regulation § 301.7701-2. The Committee has reviewed both statutes and is unaware of any differences between the respective statutes not discussed herein that would be relevant to

---

9. We note that the RULPA provision discussed in the text refers to an assignment of distribution rights while the NY Statute provision refers to an assignment of distributions and allocations of profits and losses. Regulation § 301.7701-2(e) provides generally that free transferability does not exist unless members owning substantially all of the interest in the organization have the power to assign "all the attributes" of membership in the organization. The regulation goes on to note that the mere right to assign a profit share without rights to participate in management does not constitute free transferability. Although the regulation refers only to the right to transfer a share in profits, we believe this language to be merely illustrative of the main rule referring to a transfer of all attributes of ownership.

determining whether the NY Statute corresponds to the RULPA for purposes of Regulation § 301.7701-2.