

WISCONSIN REVISED UNIFORM PARTNERSHIP ACT

Report of Partnership Committee Business Law Section State Bar of Wisconsin

Prefatory Note

This is the Report of the Partnership Committee of the Business Law Section of the State Bar of Wisconsin (the “Committee”) regarding legislation prepared by the Wisconsin Legislative Reference Bureau as draft LRB-4229/P1 (ARG:wlj&amn) (the “proposed bill”) to restate Chapter 178 of the Wisconsin Statutes, the current Wisconsin Uniform Partnership Act (“WUPA”) and make other related changes to the Wisconsin Statutes. The primary purpose of the proposed bill is to update WUPA, which was based on the Uniform Partnership Act (1914) (“UPA”), in order to reflect the Revised Uniform Partnership Act (1997, last amended 2013) (“RUPA”) approved and recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). The purpose of this Report is to facilitate adoption and application of the proposed bill.

In general, the proposed bill follows the substantive lead of RUPA. However, there are a number of procedural provisions in the proposed bill that vary from the corresponding RUPA language in order to better align the state’s procedures for partnerships with those for other Wisconsin entities, and in particular those for corporations under Chapter 180. The intent is to provide consistency and to facilitate better integration with the Department of Financial Institutions’ existing recording systems. These variations relate to a number of items, such as filing requirements, forms, effective dates and times, confirmations of status, administrative revocations, reservations of name, registered agent and registered office procedures, annual reports, and other matters. Appendix A to this Report provides a cross reference chart listing procedural provisions contained in the proposed bill, along with their counterpart corporate provisions in Chapter 180.

In addition, as explained in more detail in the comments relating to proposed Subchapter XI dealing with merger, interest exchange, conversion, and domestication transactions, the current Wisconsin Statutes already contain more flexible and modern provisions relating to these transactions, including so-called “cross-species” transactions involving more than one type of entity. Therefore, the provisions of that Subchapter were adjusted so as to better integrate those provisions with the corresponding existing provisions relating to such transactions for other Wisconsin entities, including limited partnerships (Chapter 179), business corporations (Chapter 180), nonstock corporations (Chapter 181) and limited liability companies (Chapter 183), and to provide the same level of flexibility for Wisconsin general partnerships.

In most other areas, the provisions of the proposed bill are based upon the current RUPA language. However, as explained below, there are a limited number of other instances where provisions in the proposed bill vary somewhat from RUPA in order to avoid unnecessary disruption to Wisconsin law and practice and/or to accommodate specific statutory and policy concerns noted in these comments. This Report is intended to explain the rationale for non-editorial variations between RUPA and the proposed bill, as well as to highlight certain matters relating to RUPA and the proposed bill that may be of relevance to legislators and practitioners. However, the comments are intended only to supplement, and not to repeat or displace, the official comments of NCCUSL with respect to RUPA.

Subchapter I General Provisions

Proposed section 178.0102(4) containing the definition of the term “distribution” reflects a variation from RUPA. The RUPA definition specifically excludes “compensation for present or past service,” as well as “payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program.” The proposed bill specifies that “other payments made to partners for good and valuable consideration other than in their capacity as partners” are also excluded from the definition of the term “distribution.” This change was intended to make it clear that non-service payments unrelated to partnership contributions and distributions, such as rents, guarantee fees and the like, should also not be treated as partnership distributions.

Sections 178.0102(6) and (11) of the proposed bill define “foreign partnership” and “partnership,” respectively, by reference to whether the “governing law” is or is not the law of this state. This is a slight variation from the corresponding language in sections 102(6) and (11) of RUPA, which define those terms by reference to whether the entity is “formed under the law of a jurisdiction other than this state” or “formed under this [act] or that becomes subject to this [act].” The Committee’s variant language is intended to make it clear that the jurisdiction in which an entity may have been originally “formed” should be irrelevant to its domestic or foreign status if, for example, the partners modify the partnership agreement to adopt another state’s law as its governing law.

Consistent with the change described in the preceding paragraph, section 178.0102(6m) of the proposed bill defines the term “governing law” as “the law of the jurisdiction that collectively governs its internal affairs and the liability of the persons associated with the entity for a debt, obligation, or other liability of the entity,” which, in turn, is based on section 104 of RUPA. This is in lieu of the definition for “jurisdiction of formation” contained in section 102(8) of RUPA, which should no longer be necessary in the proposed bill. This change also eliminates any implication that this definition of “jurisdiction of formation,” when read in conjunction with section 102(11) of RUPA (which defines a “partnership” as an association “formed under this [act]”), could somehow be interpreted to mean that the “governing law” of a domestic partnership only included Chapter 178, i.e., without reference to the common law and even other statutory law of the state of Wisconsin that may still be involved in governing the internal affairs and outside liabilities of partnerships and partners under section 178.0104 of the proposed bill.

Section 178.0102(9) of the proposed bill defines the terms “limited liability partnership” and “domestic limited liability partnership” as a partnership “that has filed a statement of qualification under s. 178.0901 and does not have a similar statement in effect in any other jurisdiction.” This language raises the question as to what happens when a partnership intentionally or inadvertently files a statement of qualification in Wisconsin and another state. Would either of those filings be treated as invalid? Is it possible that doing so might eliminate the liability shield in both states? Obviously, counsel would be well advised to avoid having to face the situation. However, the Committee thought that, in the interests of uniformity, no attempt should be made to resolve these issues in the proposed bill, especially in light of the fact that another state’s law would unavoidably be implicated.

Sections 178.0102(10) and (11) of the proposed bill define the terms “partner” and “partnership,” respectively. In addition to the differences discussed above in the comment regarding sections 178.0102(6) and (11) of the proposed bill, these definitions reflect two minor variations from the corresponding provisions of RUPA. First, both definitions specifically confirm that entities that “became” or “become” “subject to this chapter” are included. The corresponding language in RUPA adds the prepositional phrases “under Section 110 [the RUPA transitional provision relating to pre-existing partnerships]” and “under [Article 11] [the RUPA provisions relating to mergers, conversions and other potentially ‘cross-species’ transactions] or Section 110” in the definitions of “partner” and “partnership,” respectively. These additional prepositional phrases suggested that becoming subject to Chapter 178 via another means, such as by a partnership changing the location of its principal office or modifying its partnership agreement, might not trigger inclusion within this definition. The Committee, therefore, eliminated the prepositional phrase in both definitions in order to make it clear that such inclusion was triggered for all entities that “became” or “become” “subject to this chapter.” Second, the Committee added a specific exception to the “2 or more persons” requirement to confirm that the term “partnership” may include an entity that has fewer than 2 partners for a brief 90-day period under section 178.0801(6) of the proposed bill (and the corresponding provision of RUPA).

Proposed section 178.0102(12) of the proposed bill defines a “partnership agreement” as an agreement “of all the partners of a partnership.” The Committee thought that this language should not preclude any such agreement from providing that it may be amended with the consent of fewer than all of the partners, as many such agreements do, for example, in connection with a merger. In light of this, the Committee decided not to vary from the RUPA language for this definition.

Proposed section 178.0102(13), based on the corresponding section 102(13) of RUPA, specifies that a partnership is classified as a “partnership at will” unless the partners have agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking. This definition is relevant, for example, for purposes of determining whether a partner’s withdrawal is wrongful under proposed section 178.0602(2)(b). This definition clearly implies that a partnership could not have perpetual existence like a corporation and raises a question as to whether or not a partnership could be automatically renewed on a year-to-year basis in the absence of an intervening event, such as the unanimous agreement of all partners to dissolve. However, since these provisions are not among those as to which amendment is

restricted under proposed section 178.0105(3), it appears that a partnership agreement could, if properly drafted, provide for all of those alternatives (though proposed section 178.0105(3)(i) would prohibit elimination of a partner's power to dissociate from a partnership other than a limited liability partnership, even if doing so would be wrongful under proposed section 178.0602). In light of the above, the Committee decided not to vary from the RUPA language for this provision.

The definition of "transfer" contained in proposed section 178.0102(22) provides that the term "includes" "[a]n assignment" and various other types of conveyance. The use of the term "includes" in this definition differs from the terminology used in most of the other definitions contained in section 102 of RUPA. For example, the definition of "property" contained in section 101(16) of RUPA (and proposed section 178.0102(16)) provides that the term "means" "all property, whether real, personal, or mixed or tangible or intangible, or any right or interest therein." This suggests that the term "transfer" may actually be broader than the specific items listed in proposed section 178.0102(22). The only other definition that contains comparable language is the one for the term "business" contained in proposed section 178.0102(1), which "includes every trade, occupation, and profession." The Committee chose not to vary from the RUPA language in either case, because the implication of broader coverage appears to have been intended.

Proposed section 178.0103(3) provides that "[s]ubject to s. 178.0117(6)," a person can notify another person "by taking steps reasonably required to inform the other person in ordinary course." This is based on the corresponding language of RUPA without modification. The provision referred to, proposed section 178.0117(6), which provides that the department "may" deliver a record in certain specified ways, is also based on the corresponding RUPA language without substantive modification. Technically, the two provisions do not appear to be in conflict so that one would be "subject" to the other. However, it was not thought necessary to vary from the RUPA language in this instance.

Proposed section 178.0103(4) specifies when "a person not a partner" is deemed to have knowledge or notice of certain items. Presumably, a partner would be deemed to have such knowledge or notice in the same circumstances, though the opposite could be argued. In most situations, this issue should be irrelevant, because the partners themselves are the first to know of the items in question. Note that proposed section 178.0103(5) imputes knowledge or notice of a partner to the partnership itself in many cases. However, this could be less true for larger partnerships. Nonetheless, in the interests of uniformity, the Committee decided not to make any change from the RUPA language for this provision.

Proposed section 178.0103(5) adds an additional introductory clause making it clear that a partnership is not charged with knowledge or notice of a transfer or withdrawal merely because the transferring or withdrawing partner has such knowledge or notice. Although this is a variation from the corresponding RUPA language, proposed sections 178.0503(4) and 178.0601(1), and the corresponding RUPA provisions, clearly suggest this result in any event. Proposed section 178.0104 differs somewhat from the corresponding language of section 104 of RUPA, but the changes are intended to be clarifying in nature. The first difference relates to a potential "chicken or egg" problem that the Committee perceived.

Section 102(11) of RUPA defines a partnership as an association that is either “formed under” or “becomes subject to” the Act, and section 104 of RUPA specifies that the internal affairs of a “partnership” are governed by “the laws of this state” if it is a limited liability partnership (i.e., it has filed a statement of qualification in this state) or by “the law of the jurisdiction in which the partnership has its principal office.” This was thought to be somewhat circular in that the definition of “partnership” seems to pivot upon the association’s “governing law,” whereas section 104 prescribing which state’s governing law applies is only applicable to an association that is “a partnership” to begin with. Therefore, proposed section 178.0104 adjusts this language to apply to “an association that would be a partnership if its governing law were the law of this state.”

Proposed section 178.0104(1), providing that the law of this state shall apply to a domestic limited liability partnership, does raise some questions regarding partnerships that are not exclusively domestic. Technically, only a “domestic partnership” is supposed to file a statement of qualification in Wisconsin under proposed section 178.0901(1), and the same “domesticity” requirement would also apply in other states that have adopted provisions corresponding to sections 901(a) and 102(11) of RUPA. However, both proposed section 178.0102(9) and section 102(9) of RUPA define a “limited liability partnership” as one “that has filed a statement of qualification under [the appropriate state’s equivalent of proposed section 178.0901] and does not have a similar statement in effect in any other jurisdiction,” and proposed section 178.0104(1), as well as the corresponding section 104(1) of RUPA, provide that local law applies to any domestic limited liability partnership. The combination of these provisions would appear to suggest that a foreign partnership that does not have a statement of qualification filed in any other state may be able to file a statement of qualification in Wisconsin and thereby simultaneously become “domestic” and “limited liability” in Wisconsin. However, this result would be even more uncertain if, for example, the partnership agreement for the foreign partnership specifically designated the law of another state as its governing law, and the agreement was not amended in accordance with its terms to adopt Wisconsin law. *See also* the comments for proposed section 178.0102(9) (regarding the possible implications of filing two statements of qualification).

A change was made in proposed section 178.0104(2). That section explicitly states that the internal affairs and other matters of such an association (other than a limited liability partnership) are governed by Chapter 178 if “the partnership agreement designates the law of this state as its governing law.” This certainly seems to be the result under RUPA also, because section 105(c)(1) of RUPA prohibits modification of the governing law rules relating to limited liability partnerships contained in section 104(1) of RUPA, but not those relating to other partnerships contained in section 104(2). However, given its fundamental significance, the Committee thought that this should be explicit. Just as provided in RUPA, proposed section 178.0104(2) provides that Chapter 178 will also apply “in the absence of such designation” if “the association has its principal office in this state.”

After consultation with the Department of Financial Institutions, the Committee decided to not include in proposed section 178.0105(1) the following sentence contained in section 105(a) of RUPA: “A certified copy of a statement that is filed in an office in another state may be filed with the Department.” The Department questioned whether it was appropriate

to mandate filing of statements from other states that did not satisfy the relatively lenient standards for filing in Wisconsin. The Committee also thought that retaining the sentence would still create an ambiguity, inasmuch as proposed section 178.0101(13) defines “statements” by reference to the applicable provisions in the proposed bill, thereby creating the implication that all “statements” would have to satisfy the minimum requirements under Wisconsin law in any event. The final sentence of proposed section 178.0105(1), which does not vary substantively from the corresponding RUPA language, clearly implies that statements, in order to be effective with respect to all partnership business, must be filed in all states in which any partnership property is located or any partnership transactions occur, but it is expected that Wisconsin’s relatively lenient filing requirements will not prevent statements from being drafted in such a way that they satisfy the substantive requirements applicable in both Wisconsin and other states.

Proposed section 178.0105(3) specifies the limits to the partners’ contractual freedom to modify the provisions of Chapter 178 via the partnership agreement. In general, the proposed bill follows RUPA in this regard. However, there are some variations. First, proposed sections 178.0105(3)(e) and (f), which limit the ability of the partners to alter or eliminate the duties of loyalty and care and the contractual obligation of good faith and fair dealing, respectively, have been modified to make it clear that the partnership agreement could also not “restrict remedies for the breach of” such obligations. It was thought that otherwise such restrictions could be used to undermine the purpose of such contractual freedom limitations.

Proposed section 178.0105(3)(e) provides that the partnership agreement cannot “[a]lter or eliminate” the duties of loyalty and care, whereas corresponding language of proposed section 178.0105(3)(f), dealing with the contractual obligation of good faith and fair dealing, varies from this language slightly, providing that the partnership agreement cannot “[e]liminate” that obligation, but it “may prescribe the standards, if not manifestly unreasonable, by which the performance of the obligation is to be measured.” With the exception of the change noted above, both of these provisions are substantively identical to the corresponding RUPA provisions. One could argue that the absence of the term “alter” in subsection (f) suggests that partners are free to “alter” the contractual obligation of good faith and fair dealing in the partnership agreement, as long as they do not “eliminate” it. However, this language difference seems only intended to accommodate the possibility of prescribing standards that are “not manifestly unreasonable” pursuant to the remainder of that provision. In any event, it was not thought necessary to modify the RUPA language in this regard.

Proposed section 178.0105(3)(h), which sets forth the type of behavior for which there can be no exoneration under the partnership agreement, deviates from the corresponding RUPA provision in order to accommodate current Wisconsin practice. Section 105(c)(8) of RUPA describes such behavior as “conduct involving bad faith, willful or intentional misconduct, or knowing violation of law.” Instead, proposed section 178.0105(3)(h) covers the following categories of activities, which have come to characterize the so-called “bad boy” activities proscribed under Wisconsin business entity law:

1. A willful failure to deal fairly with the partnership or its partners in connection with a matter in which the partner has a material conflict of interest.

2. A violation of the criminal law, unless the partner had reasonable cause to believe that the partner's conduct was lawful or no reasonable cause to believe that the partner's conduct was unlawful.
3. A transaction from which the partner derived an improper personal profit.
4. Willful misconduct.

In considering proposed section 178.0105(3)(i) regarding modification of the power to withdraw pursuant to the partnership agreement, the Committee carefully considered the rule contained in section 105(c)(9) of RUPA prohibiting modification of that power (though not the corresponding right) in light of the fact that the existence of such a non-waivable power is no longer important for purposes of an entity qualifying as a "partnership" under the Internal Revenue Code. *Compare* Treas. Reg. § 301.7701-3(c) (1996), *with* Treas. Reg. § 301.7701-1(c) (1977). While this ability to dissociate oneself from a partnership can be critical for general partnerships where each general partner is liable for all liabilities incurred by any of the other general partners, there is a question as to whether such a blanket prohibition is necessary for limited liability partnerships. As a consequence, the Committee decided to deviate from RUPA in order to allow limited liability partnerships to restrict or even eliminate the power to voluntarily dissociate, which is similar to the situation that exists for corporate shareholders. Practitioners drafting such clauses, however, should take into consideration the fact that doing so could, for example, unfairly restrict a partner from quitting and getting another job in some situations.

Proposed section 178.0105(3)(m) is based on section 105(3)(13) of RUPA, which understandably provides that a partnership agreement cannot vary the right of all partners to vote on or consent to the cancellation of a statement of qualification for limited liability partnership status. Presumably, an amendment of the statement of qualification so that it no longer contains the "statement that the partnership elects to become a limited liability partnership" would be treated as a cancellation still requiring unanimity.

The Committee also decided to propose a slight expansion of the "notice" exception to the prohibition against modifying the dissociation power for partnerships other than limited liability partnerships. The RUPA prohibition against varying a partner's power to dissociate from the partnership contains an exception allowing the partnership to nonetheless require that notice of such dissociation be "in a record." The Committee decided to expand this exception in proposed section 178.0105(3)(i) to also allow a partnership agreement to specify how such notice must be given, provided that it is "not unreasonably" so specified. For example, the partnership agreement might require that such notice be sent by certified mail or electronically to one or more specified e-mail addresses.

Proposed section 178.0105(3)(p)1. contains a slight variation from RUPA's general prohibition against modifying any requirement, procedure, or other provision pertaining to registered agents in that it allows the partnership agreement to provide that some form of partner approval may be required for the filing of a statement changing the registered agent or registered office of the partnership.

Proposed section 178.0105(4)(c), dealing with modifying the duties of partners among themselves, differs from the corresponding language of RUPA section 105(d)(3) in two respects. First, it expands application of the limit contained in proposed section 178.0105(3)(h), prohibiting exoneration for certain “bad boy” behavior, to apply not only to modifications relating to the duty of care as provided in RUPA, but also to modifications with respect to the duty of loyalty and “any other fiduciary duty.” Second, it specifically allows the partnership agreement to identify specific types or categories of activities that do not violate the contractual obligation of good faith and fair dealing, subject to that same limitation.

As noted above and explained in more detail in the comments relating to proposed Subchapter XI, the provisions of the proposed bill relating to mergers, interest exchanges, conversions and domestications integrate the RUPA provisions with Wisconsin’s current statutes regarding such transactions, as well as Delaware corporation law regarding domestications. Moreover, as explained in the comments to section 178.1161, that section is intended to provide the minimum level of protection for “dissenting” partners in such transactions. Accordingly, proposed section 178.0105(3)(n) varies from RUPA in that it allows a partnership agreement to modify the partners’ approval rights for such transactions as long as such modifications are in a “written provision” of the partnership agreement and do “not impair the rights of a partner under s. 178.1161.”

The language of proposed section 178.0107, dealing with the impact of amendments to the partnership agreement upon transferees and dissociated partners, was adjusted from the corresponding language in section 107 of RUPA, both to conform to Wisconsin legislative drafting standards and to make it clear that the limitations upon that impact (namely that they cannot impose a “new debt, obligation, or other liability” on a transferee or dissociated partner or prejudice the rights of a dissociated partner under section 178.0701) are exceptions to the general rule that such post-transfer and post-dissociation amendments are effective.

The language of section 178.0107(2)(b), which provides that such amendments cannot impose “any new debt, obligation, or other liability” on a transferee or dissociated partner or prejudice the rights of a dissociated partner under section 178.0701, appears to raise a question as to what impact a partnership agreement amendment may have on a transferee (as long as it doesn’t impose “any new debt, obligation, or other liability”). For example, could the partnership agreement be amended to eliminate distributions with respect to the transferor partner’s interest? In this regard, it is important to note that this entire provision is “[s]ubject . . . to a court order issued under s. 178.0504(2)(b) to effectuate a charging order.” This suggests that it may be important for a transferee to take this additional step in order to protect its rights. In interests of uniformity, the Committee did not recommend any change to the standard RUPA language in order to address these issues.

Proposed section 178.0108(1)(b) contains cross-references to the relevant provisions of proposed section 178.0802, which differ slightly from those in the corresponding provisions of RUPA. The RUPA cross-references appear incorrect, and will likely be updated in the future.

The language of proposed sections 178.0109(2) and (3) has been modified slightly in order to conform to long-standing terminology and practice of the Department of Financial Institutions to allow non-officials of entities to sign as “an attorney-in-fact.” Based on the language and comments for the corresponding sections of RUPA, this should not create any substantive differences.

Proposed section 178.0110 contains the transitional rules for applicability of the proposed bill, and is only loosely based on the corresponding provision of RUPA. These transitional rules are designed to apply to all genuinely new Wisconsin partnerships, as well as to transition existing partnerships to these new uniform provisions subject to exceptions so as not to disrupt the reasonable expectations of existing partnerships, partners and third parties. Partnerships that are successors to existing WUPA partnerships are treated as pre-existing partnerships for this purpose. For example, a partnership that is technically dissolved but continues under section 178.36 of WUPA is not treated as a new partnership. This is consistent with the corresponding transitional provisions in RUPA.

In general, the proposed bill will apply to all Wisconsin partnerships as of January 1, 2018. With respect to partnerships formed on or after such date, there are no exceptions unless they are successors to prior law partnerships (for example, as the result of a technical dissolution under prior law). With respect to prior law partnerships, there are the following exceptions:

1. A prior law partnership can elect “in a manner allowed by law for amending the partnership agreement” to continue to have prior law apply as long as it files a statement of applicability to that effect with the department prior to January 1, 2018.
2. Even after a prior law partnership becomes subject to the proposed bill, obligations incurred by the partnership prior to such applicability shall continue to be governed by prior law instead of under Subchapter III of the proposed bill.
3. Finally, any provisions in the partnership agreement of a partnership that were valid and in effect immediately prior to it becoming subject to the proposed bill shall continue to be valid and applicable to the same extent as under prior law.

The proposed bill also confirms that limited liability partnership filings under the prior law shall continue to be effective under the proposed bill.

Under the proposed bill, partnerships that are not yet subject to it can also elect to become so immediately by filing a statement of applicability to that effect with the department. Also, current partnerships that elected to continue to be subject to prior law could subsequently elect to become subject to the proposed bill. Once made, such “opt in” elections would be irrevocable.

Proposed section 178.0112 regarding petitioning the court to order persons to sign and deliver documents only applies to filings with the Department of Financial Institutions. For example, it would not apply to a refusal to record a grant or limitation of authority to transfer real property under proposed sections 178.0303(6) and (7), respectively. Presumably, persons

aggrieved by refusals to perform those and other ministerial acts not involving the Department would still have a remedy under other applicable law. Accordingly, and in the interests of uniformity, no change was recommended from the corresponding language of section 112 of RUPA on which this provision was based.

Proposed section 178.0112(2) reflects a variation from the corresponding language in section 112(b) of RUPA that appears to better reflect the policy behind both sections. Both provisions require the partnership itself to be named as a party to an action to order the signing or delivery of a record to the department when it is not the petitioner. However, the RUPA provision only applies when the petitioner “is not the partnership or foreign limited liability partnership,” whereas the Wisconsin provision would apply to all foreign partnerships.

Proposed section 178.0113(1)(c), which is based on the corresponding RUPA provision, requires that all words in a record to be filed with the Department must be in English, though the name of an entity need not be in English as long as it is written in English letters or Arabic or Roman numerals. This would presumably mean that relevant information relating to a foreign entity, such as one being domesticated under proposed section 178.1151 et seq., would have to be translated.

Proposed section 178.0117(6) is based on the corresponding section 117(f) of RUPA, except that the cross-reference has been corrected to refer to proposed section 178.0912.

The proposed bill does not contain any provision corresponding to section 118 of RUPA, which specifically confirms that the legislature continues to have the power to amend or repeal all or any part of the partnership statutes. It was felt that many specific and wholesale revisions to Wisconsin’s business entity statutes have been and will be enacted without comparable language, and it seems clear that the legislature does reserve the right to make such changes in the future. Obviously, no suggestion otherwise is intended by the failure to include such a provision in the proposed bill.

Subchapter II Nature of Partnership

Proposed section 178.0202(2) provides that an “association whose governing law is other than the law of this state” is not a partnership under Chapter 178. To some extent, this provision is axiomatic, given the fact that, under proposed section 178.0102(11), one of the elements in the definition of “partnership” is that the association’s governing law must be the law of this state. However, the corresponding language of section 202(b) of RUPA seems similarly axiomatic in that it provides that an “association formed under a statute other than this [act], a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this [act].” In fact, language comparable to the RUPA language would have seemed to imply that a partnership “formed under” the statutes of another state might also be a “partnership” under this chapter, even though, under section 102(11) of RUPA, a “partnership” must be an association “formed under this [act] or that becomes subject to this [act].” The differing Wisconsin language is merely intended to clear up this ambiguity, and to avoid any more significant implication that

might result from failing to include any language corresponding to section 202(b) of RUPA in the proposed bill. *See also* the comments to proposed section 178.0102(11).

Proposed section 178.0204(1)(b), which is based on section 204(a)(2) of RUPA, provides that property acquired in the name of one or more partners with “an indication in the instrument transferring title to the property of the person’s capacity as a partner or of the existence of a partnership but without an indication of the name of the partnership” nonetheless constitutes “partnership property.” This language creates an ambiguous situation when the same person may, for example, be a partner in more than one partnership. The Committee did not see an obvious way of resolving this ambiguous situation without changing the substantive rule, thereby jeopardizing the objective of uniformity. As a consequence, no variation from the RUPA language was recommended for this provision.

Subchapter III Relations of Partners to Persons Dealing with Partnership

Proposed section 178.0301(2), which is based on section 301(2) of RUPA, provides that “[a]n act of a partner which is not apparently for carrying on in the ordinary course the partnership’s business or business of the kind carried on by the partnership binds the partnership only if the act was authorized by all the other partners.” This section should be read in conjunction with proposed section 178.0401(11), which provides that “[a] difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners,” but that “[a]n act outside the ordinary course of business of a partnership . . . may be undertaken only with the affirmative vote or consent of all the partners.” These provisions are indicative of some of the difficult issues faced by NCCUSL in drafting RUPA. For example, in the absence of a formal written partnership agreement (which would normally be unanimously agreed to), would the partners themselves (presumably, by majority vote in the absence of a differing provision in a partnership agreement) ultimately decide what the “ordinary course of business of a partnership” is? Or would the fundamental act of determining what is in such “ordinary course” be “outside the ordinary course of business of a partnership” and therefore require unanimous consent? In any event, it seems reasonable that the “ordinary course of business” test under proposed section 178.0401(11) and the “apparently for carrying on in the ordinary course” test under proposed section 178.0301(1) should both be determined by reference to what activities the partnership had previously carried on, which is the result of the partners’ decisions, but not the same. In light of these considerations, and in the interests of uniformity, the Committee decided not to make any changes to the RUPA language in this respect.

Sections 302(a)(2) and (3) of RUPA provide that partnership property “held in the name of one or more partners with an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, but without an indication of the name of the partnership” or “in the name of one or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership,” may still be transferred by an instrument of transfer executed by all of the persons in whose name the property is held. Technically, these provisions do not cover the entire universe of related transactions. For example, partnership property held

in the name of one or more persons, including at least one or more non-partners, but with an indication in the conveyance document of their capacity as such or of the existence of the partnership would not be covered. Nonetheless, an instrument of transfer executed by all of the persons in whose name such property is held should be sufficient to transfer title. Consequently, no variation from the RUPA language was thought necessary for purposes of corresponding proposed sections 178.0302(1)(b) and (c).

Proposed sections 178.0302(2) and (3) do contain a slight variation from the RUPA language. Section 302(b) of RUPA provides that a partnership can recover partnership property from a transferee only if it proves that the transferee or subsequent transferee “knew or had been notified” that “the person who signed the instrument of initial transfer lacked authority to bind the partnership” (and in the case of a subsequent transferee, that “the property was partnership property” to begin with). RUPA section 302(c) further provides that “[a] partnership may not recover partnership property from a subsequent transferee if the partnership would not have been entitled to recover the property, under subsection (b), from any earlier transferee of the property.” The Committee thought that these two provisions unintentionally suggested that such transfers would be valid whenever the “apparent” authority requirements were met, even if other provisions of applicable law, such as the Wisconsin Uniform Fraudulent Transfer Act, Chapter 242 of the Wisconsin Statutes (“WUFTA”), would call for recovery of the transfer. Accordingly, proposed section 178.0302(2) provides that “[a] partnership may recover partnership property from a transferee, *as a result of the lack of authority under this subchapter to make the transfer*, only if” the partnership proves lack of authority and lack of knowledge and notification as required by the statute. Similarly, proposed section 178.0302(3) provides that “[a] partnership may not recover partnership property from a subsequent transferee, *for lack of authority under this subchapter*” unless it would have been entitled to recover such property from all earlier transferees (italicized language added). This additional language is merely intended to confirm that other statutes not relating to a partner’s actual or apparent authority, such as WUFTA, are not intended to be overruled by these provisions.

Proposed section 178.0302(2)(b) also contains an additional slight variation from the corresponding RUPA language. Section 302(b)(2) of RUPA requires a partnership, in order to recover property from a transferee, to prove that “the transferee knew or had been notified that the property was partnership property and that the person who signed the instrument of initial transfer lacked authority to bind the partnership.” There seems to be no question under this language that such a partnership would have to prove “that the transferee knew or had received a notification that the property was partnership property.” However, the language is unclear as to whether it would require such a partnership to also prove “that the transferee knew or had received a notification . . . that the person who executed the instrument of initial transfer lacked authority to bind the partnership,” or whether the partnership would merely have to prove “that the person who executed the instrument of initial transfer lacked authority to bind the partnership,” regardless of whether the transferee “knew or had received a notification” of such lack of authority. The Committee thought that having to prove transferee knowledge or notification of both the fact of partnership property and the lack of authority reflected better policy and was likely the intended result. Accordingly, the language of proposed section 178.0302(2)(b) was modified slightly to make that clear.

Section 302(d) of RUPA provides that if a single person “holds all the partners’ interests in the partnership,” then “all the partnership property vests in that person,” and the person may sign, file and/or record a record confirming such title. Technically, if a single person were to acquire all of the partners’ interests in a partnership, the partnership would only dissolve if it “at no time during the following 90 days has at least 2 partners” under proposed section 178.0801(6). Accordingly, proposed section 178.0302(4) adds language to the effect that it only applies to such a partnership “that is dissolved under subch. VIII.”

Proposed section 178.0303 is based on section 303 of RUPA, with one small substantive exception. Both proposed section 178.0303(5) (dealing with persons giving value in reliance upon grants of authority other than for transfers of real property) and proposed section 178.0303(6) (dealing with persons giving value in reliance upon grants of authority to transfer real property) provide that they do not apply if certain facts are true (e.g., the grant of authority has been canceled) “when” the person gives value. This language matches the language contained in section 303(f) of RUPA, but varies from the corresponding language in section 303(e) of RUPA, which uses “if” instead of “when.” It was thought that the “when” language was more consistent with the policy behind both provisions in that it required the relevant state of facts to be true when the value was given. As a consequence, proposed section 178.0305(5) was modified to conform to the “when” language.

In addition to the significant modification relating primarily to professional limited liability partnerships explained below, proposed section 178.0306(3)(a) contains a slight variation from the corresponding language contained in section 306(c) of RUPA. That RUPA section provides that “[a] debt, obligation, or other liability of a partnership incurred while the partnership is a limited liability partnership” is “solely” the debt, obligation, or other liability of the partnership, and goes on to state that a partner is not personally liable for “a” debt, obligation, or other liability of the limited liability partnership solely by reason of being or acting as a partner. This latter provision was modified to refer to “such” a debt, obligation, or other liability of the limited liability partnership to make it clear that the provision would not apply to, for example, a debt incurred prior to when the partnership became a limited liability partnership. This may very well be consistent with how RUPA will eventually be applied. No other substantive result is intended.

As noted above, proposed section 178.0306 also deviates significantly from section 306 of RUPA in order to avoid disrupting current arrangements that exist under Wisconsin law. In particular, section 178.12(3) of WUPA specifically excepts from the limited liability partnership protection certain liability arising from omissions, negligence, wrongful acts, misconduct or malpractice of a partner or someone acting under his or her actual supervision and control. This exception could be important for certain professional entities, such as medical, law or accounting firms that may only be able to conduct business through a limited liability entity if such an exception is applicable. *See, e.g.*, Wis. Stats. § 448.08(4); Wis. SCR 20:5.7; Wis. Admin. Code § Accy 1.405. Thus, proposed section 178.0306 would continue to apply this exception for limited liability partnerships formed under the current law, though the exception would not automatically apply to partnerships becoming limited liability partnerships after the proposed bill becomes effective on January 1, 2018. In either case, the limited liability partnership could elect into or out of this exception on a prospective basis by filing a statement of election.

Proposed section 178.0306 does not retain the language contained in section 178.12(3)(c) of WUPA confirming that a partner was still liable for acts or conduct other than as a partner. No substantive change was intended, but it was thought that this language was now unnecessary, because the language exempting partners from personal liability is now specifically limited to liability “solely by reason of being or so acting as a partner.” Moreover, the Committee thought that uniformity was especially important in this critical area of personal liability.

Proposed section 178.0306(1), as well as proposed section 178.0308(1), which are based on sections 306(a) and 308, respectively, of RUPA, explicitly state that partners and purported partners, respectively, are liable “jointly and severally,” which is a departure from the current statutory language. UPA and WUPA provided that the partners were liable “[j]ointly and severally” for certain wrongful acts or omissions and breaches of trust by partners, but only “[j]ointly for all other debts and obligations of the partnership.” *See* Wis. Stat. §§ 178.10-178.12 (2011-13). Moreover, the new uniform language contained in proposed section 178.0307(4) (based on section 307(d) of RUPA) provides that one or more partnership asset exhaustion requirements must be satisfied before the assets of a partner may be levied upon to satisfy claims against the partnership. Prior case law was not as clear on this point. In order to avoid any inadvertent disruption of contract rights, proposed section 178.0110(2)(d)1 provides that sections 178.0306, 178.0307 and 178.0308 [Subchapter III] will only be effective with respect to obligations incurred by a partnership after the revised Chapter 178 contained in the proposed bill becomes effective with respect to that partnership.

Proposed section 178.0306(3) relating to limited liability partnerships does reflect a change from current Wisconsin law. Current section 178.12(3)(d) of WUPA contains an exception to the limited liability of partners in a limited liability partnership for the penalty for lobbying violations under section 13.69(1) of the Wisconsin Statutes. For other organizations, this penalty is only imposed on the principal, but “[i]n the case of a partnership, each of the partners is jointly and severally liable.” This joint and several liability seems appropriate for general partnerships that are not limited liability partnerships where each partner is jointly and severally liable for all liabilities of the partnership. However, the Committee thought that limited liability partnerships should be treated the same as corporations and other limited liability entities in this regard. A corresponding change is proposed for section 13.69(1) itself.

Section 307(e) of RUPA provides that section 307, which deals with actions by and against partnerships and partners, also applies to “any debt, liability, or other obligation of a partnership which results from a representation by a partner or purported partner under Section 308.” However, section 308 of RUPA appears to cover not only “a person [who], by words or conduct, purports to be a partner,” but also “a person [who] . . . consents to being represented by another as a partner.” Nonetheless, section 308 is titled “Liability of *Purported Partner*” (emphasis added), and section 308(b) of RUPA clearly appears to use the phrase “purported partner” to refer to both “a person [who] . . . purports to be a partner,” as well as “a person [who] . . . consents to being represented by another as a partner.” Thus, the Committee concluded that the reference to “purported partner” in proposed section 178.0307(5) should be sufficient, so no change was proposed.

Section 308(e) of RUPA provides that “persons who are not partners as to each other are not liable as partners to other persons,” except as otherwise provided in section 308 regarding purported partners. Proposed section 178.0308(5) adds an additional explicit exception to this clause for Subchapter VII of new Chapter 178 dealing with dissociated partners. The Committee thought that this cross reference was appropriate in order to confirm that a dissociated partner could still create, and be liable for, partnership obligations under proposed sections 178.0702 and 178.0703, even though he, she or it on the one hand, and the remaining partners on the other, would technically be “persons who *are not* partners as to each other” (emphasis added). This change was only intended to clarify the operation of these provisions and should not represent a substantive change from RUPA.

Subchapter IV Relations of Partners to Each Other and to Partnership

Proposed section 178.0401(2), which is based on section 401(b) of RUPA, provides that a partnership “shall reimburse a partner for any payment made by the partner in the course of the partner’s activities on behalf of the partnership” as long as the partner complied with proposed section 178.0401 (dealing with a partner’s rights and duties) and proposed section 178.0409 (dealing with standards of conduct for partners). Similarly, proposed section 178.0401(6), which is based on section 401(d) of RUPA, provides that a partnership shall also “reimburse a partner for” advances to the partnership “beyond the amount of capital the partner agreed to contribute.” Proposed section 178.0401(7), which is based on section 401(g) of RUPA, provides that any such reimbursement obligation “constitutes a loan to the partnership which accrues interest from the date of the payment or advance.” Also, proposed section 178.0410(2) (based on section 410(b) of RUPA) would now, for the first time, explicitly provide that a partner may sue the partnership to enforce his, her or its rights under this chapter. However, there is nothing in these provisions that specifies when such loans are to be paid off. Proposed section 178.0806(1) (based on section 806(a) of RUPA) does provide that, in winding up the business of the partnership, its assets must be applied first to discharge obligations to its creditors, “including partners that are creditors,” but there is nothing to indicate whether such obligations should be paid before then. However, the use of the term “reimburse” in both RUPA-based sections 178.0401(3) and (4) implies that a more current payoff is contemplated. The Committee thought that the combination of all of these provisions could be interpreted to mean that all such loans are payable upon demand. However, the Committee decided not to recommend any change to the standard RUPA language in order to confirm that result, because it was thought best, in the interests of uniformity, for these provisions to conform to the uniform language in RUPA so as to allow the Wisconsin rules regarding these issues to develop in conformity with the law in other states.

Proposed section 178.0401(10) contains additional language to clear up an ambiguity that has arisen under RUPA regarding whether a partnership can pay its partners compensation for services rendered as an employee or independent contractor, or whether all payments to partners must be treated as distributions, which are potentially more easily recovered by creditors in bankruptcy and other insolvency settings. It has been argued that the combination of RUPA sections 401(j) (which provides that “[a] partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in

winding up the business of the partnership”) and 103(b)(17) (which provides that a partnership agreement may not “restrict the rights under this [act] of a person other than a partner”) means that a partnership could not, for example, hire one of its partners as an employee when doing so would cause compensation paid to such partner to be less recoverable by creditors of the partnership. *See generally* William McGrane, *Bankruptcy Pitfalls of Big Law LLPs for Big Law Firms and Suggested Alternative(s)*, 30 *The LLC & Partnership Rep.*, Sept. 2013, at 45. This argument ignores the provisions of section 404 of the prior version of RUPA, which provided that “[a] partner may lend money to or transact other business with the partnership, and as to each loan or transaction, the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.” The Committee felt that there was no reason to preclude a partnership from contracting with one of its partners to provide services for compensation, the same as for any other employee or independent contractor, or for any loan, lease or other non-services transaction. This seems especially true for large limited liability partnerships, where the relationship between an individual partner and partnership is much the same as that between an employee and a publicly held corporation. Accordingly, proposed section 178.0401(10) provides that the rule that “a partner is not entitled to remuneration for services performed for the partnership” will not apply if such compensation is “authorized by the partnership agreement or otherwise in accordance with this chapter” to make it clear that a partnership could engage any or all of its partners to provide services for compensation on the same basis as non-partners.

Finally with respect to proposed section 178.0401, subsection (11) was adjusted to add mergers, interest exchanges, conversions, and domestications to the list of items for which unanimous consent was required. Given the potentially far-reaching impact of such transactions under current law and the proposed bill, it was thought best for unanimity, rather than majority, to be the default rule. However, as noted above, proposed section 178.0105(3)(n) would allow this unanimous approval requirement to be modified, but only “by written provision in the partnership agreement that does not impair the rights of a partner under s. 178.1161.”

Section 408(c) of RUPA provides that “the partnership shall furnish to each partner” any “information concerning the partnership’s business, financial condition, and other circumstances” without demand if the information is known to the partnership and “material to the proper exercise of the partner’s rights and duties” or any other information demanded which is not “unreasonable or otherwise improper under the circumstances.” Proposed section 178.0408(3) contains the same operative language. Section 408(d) of RUPA provides that this duty to furnish information “also applies to each partner to the extent the partner knows any of the information.” Proposed section 178.0408(4) modifies this latter provision to make it applicable only to a partner “on whom a demand is made.” This should prevent a partner from being liable for failure to provide information when he, she or it was never even aware of the need to produce it (except to the extent that all partners are liable for the obligations of a partnership that is not a limited liability partnership). It also alleviates the circularity involved in the original RUPA language, wherein “[e]ach partner,” including presumably the recipient partner, is obligated to “furnish to a partner” the information specified.

Proposed section 178.0409(1) specifies that the duties set forth in the remainder of section 178.0409 are owed “to the partnership and the other partners.” This raises a question as

to whether there are any such duties owed to, for example, creditors and transferees. However as the comments to corresponding section 409 of RUPA make clear, these sections are not intended to be exhaustive. Therefore, no modification was proposed for this provision.

Proposed section 178.0409(2), which is based on section 409(b) of RUPA, creates, for the first time, certain statutory restrictions on the outside activities of partners. In particular, proposed section 178.0409(2)(a)3. provides that a partner is obligated to account to the partnership and hold as trustee for it any property, profit or benefit from “[t]he appropriation of a partnership opportunity,” and proposed section 178.0409(2)(c) further provides that a partner has a “duty to refrain from competing with the partnership in the conduct of the partnership’s business” before dissolution. Moreover, proposed section 178.0409(2)(b), which is based on section 409(b)(2) of RUPA, provides that a partner’s duty of loyalty also includes an obligation “to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a person having an interest adverse to the partnership.” As explained above, proposed section 178.0105(4)(c) would allow these duties to be modified by the partnership agreement as long as such modifications were not “manifestly unreasonable” and did not relieve or exonerate a person from liability for violation of the Wisconsin “bad boy” rules under proposed section 178.0105(3)(h). In addition, proposed section 178.0409(6), which is based on section 409(f) of RUPA, provides that “[a]ll” of the partners may authorize or ratify a specific act or transaction after full disclosure of all material facts. Proposed section 178.0409(6) goes one step further to provide that such authorization or ratification could be by “one or more disinterested partners with authority to act in the matter,” even though fewer than all of the partners, again only “after full disclosure of all material facts.” It was thought that this would provide useful flexibility for large partnerships and in other appropriate circumstances. These new statutory rules raise other questions. For example, could a partner set up an entity that competes with a partnership as long as it is not the partner himself, herself or itself that is “competing” with the “partnership,” even though the partner is the sole owner of that competing entity? Also, there is the issue as to how this restraint would be applied in the case of large partnerships, having, for example, 100 or more small percentage partners. In the interests of uniformity, the proposed bill does not include any other changes from the standard RUPA language setting forth the statutory fiduciary duty of loyalty, other than to provide the additional flexibility to deal with those situations in the partnership agreement as provided in proposed sections 178.0105(4)(c) and 178.0409(6).

The Committee also recommended a slight variation from RUPA for proposed section 178.0409(4). In particular, the word “thereunder” was added to clarify that the obligation of good faith and fair dealing applies only to rights under the proposed bill and the partnership agreement. The exercise of other rights, such as those under an arms-length lease of property to the partnership, would only be subject to whatever rules would normally apply to such transactions.

Proposed section 178.0410 is based upon section 410 of RUPA, a new provision that specifically confirms that a partnership “may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership.” This language appears to raise a slight question as to the exact scope of the partnership enforcement rights under that section. In particular, it provides that a partnership may maintain an action against a

partner for the violation of a “duty” to the partnership. It seems clear that this provision would apply to both the “duty” of loyalty and the “duty” of care specifically set forth in sections 409(b) and (c) of RUPA. However, section 404(d) refers instead to an “obligation” of good faith and fair dealing. Moreover, there are other provisions of RUPA which impose obligations on partners, but do not use the “duty” terminology. *See, e.g.*, RUPA sections 401(a) (partner “chargeable” with his, her or its share of partnership losses, though the entire section is entitled “Partner’s Rights *and Duties*” (emphasis added)), and 806(c)(1) (partner “shall contribute to the partnership” for the purpose of enabling it to satisfy its obligations). However, there is nothing in section 410 or elsewhere in RUPA that would appear to preclude actions on such other obligations, even though they might not have been specifically labeled “duties.” As a consequence, the Committee decided not to recommend any statutory change from the RUPA language for proposed section 178.0410(1) in this respect.

Subchapter V Transferable Interests and Rights of Transferees and Creditors

Proposed section 178.0503(5), which provides that a “transfer of a transferable interest in violation of a valid restriction on transfer contained in the partnership agreement is ineffective if the intended transferee has knowledge or notice of the restriction at the time of transfer,” contains one technical change to the RUPA section 503(e) language. The word “valid” was added to modify the word “restriction.” The comments to this provision in RUPA clearly indicate that the statutory language was not intended to make otherwise invalid restrictions enforceable, and the Committee thought that this change would highlight this limitation for practitioners relying only on the statutory language itself.

Section 503(a)(3) of RUPA provides that the transferee of a partnership interest is not entitled to “participate in the management or conduct of the partnership’s business” or to “have access to records or other information concerning the partnership’s business,” except after dissolution and certain limited rights in the case of a deceased partner. Moreover, RUPA section 503(c) provides that, upon dissolution and winding up, “a transferee is entitled to an account of the partnership’s transactions only from the date of dissolution.” However, sections 504(a) and (b) of RUPA provide that, upon “application by a judgment creditor . . . or transferee,” a court, in addition to entering a charging order, “may appoint a receiver of the distributions subject to the charging order, with the power to make all inquiries the judgment debtor might have made” and to “make all other orders necessary to give effect to the charging order.” This suggests that a court could order an accounting, at least on a discretionary basis, prior to a dissolution. For the most part, these RUPA provisions parallel the corresponding provisions in UPA, with the exception that section 504 of RUPA specifically provides that a judgment creditor of a transferee (and not just a judgment creditor of a partner) may now apply to the court for a charging order. Again, in the interest of uniformity, the Committee did not recommend any variation from the standard RUPA language for proposed section 178.0504.

Subchapter VI Dissociation

Proposed sections 178.0601(2) and (3), which are based on RUPA sections 601(2) and (3), respectively, cover somewhat overlapping categories of events. Section 601(3) of RUPA provides for automatic dissociation of a partner when “the person is expelled as a partner pursuant to the partnership agreement,” whereas section 601(2) of RUPA provides that dissociation occurs whenever “an event stated in the partnership agreement as causing the person’s dissociation occurs.” Subsection (2) is a new provision in RUPA, and appears to explicitly provide additional flexibility to partners in structuring their partnership arrangements, whereas subsection (3) is based on a prior provision of UPA. It might be difficult to determine whether a provision in a partnership agreement is one that merely specifies an event that triggers a partner’s dissociation under subsection (2) or instead provides for his, her or its expulsion as a partner under subsection (3). However, since the net effect of both provisions appears to be the same, the Committee thought it best to leave both provisions intact in order to assure that the intended continuity and additional flexibility were preserved.

For the reasons explained in the comments with respect to proposed section 178.0104, proposed section 178.0601(4)(c)1. refers to “the jurisdiction of the person’s governing law,” instead of the “person’s jurisdiction of formation.” As explained in those comments, no fundamental substantive difference is intended.

Proposed section 178.0601(5) would both expand and contract the discretion of the court to order dissolution of a partnership. For example, there is no specific counterpart to current sections 178.27(1)(e) and (f) of WUPA mandating that a partnership shall be dissolved by court decree when “[t]he business of the partnership can only be carried on at a loss” or “other circumstances render a dissolution equitable.” Although several provisions of UPA relating to court-decreed dissolution were retained in section 601 of RUPA dealing with partner dissociation by court decree, these two provisions were not. On the other hand, under section 601(5)(A) of RUPA, court discretion to order dissociation of a partner was specifically expanded to include not only willful or persistent breach of the partnership agreement and conduct making it not reasonably practicable to carry on the business with that partner, but also “wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the partnership’s business.” Although there are policy arguments both for and against each of these changes to the prior UPA language, the Committee chose not to vary from the uniform language now contained in RUPA.

Proposed section 178.0601(6)(a), which is based on section 601(6)(A) of RUPA, provides that a partner would be dissociated from a partnership whenever he, she, or it becomes a “debtor in bankruptcy.” Proposed section 178.0102(3) defines “debtor in bankruptcy” to include “an order for relief under Title 11, USC or a comparable order under a successor statute or a comparable order under federal, state, or foreign law governing insolvency.” Proposed section 178.0602(2)(b)3. further provides that a partner’s dissociation as a result of bankruptcy would be wrongful “[i]n the case of a partnership for a definite term or particular undertaking.” Since these provisions are statutory, and not contractual, there is a question as to whether section 365(e)(1) of the United States Bankruptcy Code would apply. That section provides that “an

executory contract or unexpired lease of the debtor” or “any right or obligation under such contract or lease, may not be terminated or modified” solely pursuant to a provision in such contract or lease conditioned upon, among other things, a bankruptcy filing. For purposes of section 365(e)(1), the partnership agreement itself may be considered an executory contract. *See, e.g., In re Catron*, 158 B.R. 629 (E.D. Va. 1993), *aff’d* 25 F.3d 1038 (4th Cir. 1994) (“[T]he court will assume . . . that a partnership agreement is an executory contract, a position followed by the majority of cases.”) Moreover, note that in order for proposed section 178.0602(2)(b)3. to even apply, the partnership agreement would be required to specify “a definite term or particular undertaking.” However, proposed sections 178.0601(6)(a) and 178.0602(2)(b)3. are statutory provisions and would not appear to be “an executory contract or unexpired lease.” The Committee did not recommend any modification in regard to these issues, anticipating that they would be dealt with through the state and federal courts under the uniform law.

RUPA section 601 contains subsections (11) through (14) specifically providing that dissociation occurs whenever a partnership engages in a conversion, merger, interest exchange, or domestication transaction and, in the latter three cases, the person in question “ceases to be a partner” as a result. Under the proposed bill, the respective rights and obligations of the partnership and its partners in such transactions are intended to be governed by Subchapter XI, and in particular proposed section 178.1161. Thus, the general provisions relating to dissociation in Subchapter VI would only be applicable to the extent specifically provided in proposed Subchapter XI.

As noted above in the comments with respect to proposed section 178.0105(3)(i), given the adoption of the “check the box” regulations at the federal level, the unalterable power of a partner to withdraw from a partnership “rightfully or wrongfully” under proposed section 178.0602 is no longer a critical factor in qualifying for partnership status for federal or state income tax purposes. It may also be less essential for partners in a limited liability partnership than for those in other partnerships. As explained in those comments, the rule that a partner has the power to withdraw, even in the face of a contractual provision which would trigger damages for exercising it, is a fundamental principle reflected in RUPA and should be preserved in the interests of uniformity for regular general partnerships. However, as noted above, proposed section 178.0105(3)(i) would allow the elimination of this power with respect to limited liability partnerships.

Proposed section 178.0602(2)(a) provides that a partner’s dissociation is wrongful if it “is in breach of an express provision of the partnership agreement.” Proposed section 178.0102(12) provides that a partnership agreement may be “oral, implied, in a record, or in any combination thereof.” Clearly, a written provision in a partnership agreement should satisfy the “express provision” requirement of proposed section 178.0602(2)(a). On the other hand, an “implied” provision should not satisfy this “express provision” requirement. An “oral” agreement among the partners, however, might be found to satisfy this “express provision” requirement in certain circumstances, although the burden would seem to be on the party attempting to assert such a provision was part of the agreement. In any event, in the interests of uniformity, no recommendation was made to vary from the RUPA language in this regard.

Proposed section 178.0602(2)(b) provides that certain withdrawals, expulsions, and other dissociations would be wrongful, even in the absence of an express provision in the partnership agreement, but only “[i]n the case of a partnership for a definite term or particular undertaking.” The Committee noted that the application of this particular provision could be unclear in certain circumstances. For example, a partnership agreement that provided for a ten-year term for the partnership, subject to earlier termination with the agreement of a majority of the partners, would presumably be “for a definite term.” However, an agreement that simply provides that the partnership will not be dissolved unless all of the partners agree presumably would not be “for a definite term.” What about a partnership agreement that called for dissolution only upon six months’ notice from one of the partners? However, again in the interests of uniformity, the Committee did not attempt to further define this concept, thinking that this set of issues should be left to case law.

Proposed section 178.0602(2)(b)4. provides that, “[i]n the case of a partnership for a definite term or particular undertaking,” a partner’s dissociation would be “wrongful” if the partner “is not a trust other than a business trust, an estate, or an individual” (i.e., is a business entity) and the partner “is expelled or otherwise dissociated because it willfully dissolved or terminated.” There is an issue as to whether the term “willfully” means something more than merely intentional. Presumably, involuntary dissolutions would not trigger this provision, even though they could be triggered by ministerial failures, such as the failure to file an annual report. *See, e.g.*, Wis. Stat. § 180.1420. In the interests of uniformity, no variation from the uniform RUPA language was recommended.

Subchapter VII

Person’s Dissociation as a Partner when Business Not Wound Up

Sections 701(a) and (b) of RUPA provide that, in the absence of an agreement to the contrary, a partnership is obligated to purchase a dissociated partner’s interest in a partnership at a price determined under the statute. In particular, section 701(b) provides that the default buyout price will be “the greater of . . . the liquidation value . . . or . . . the value based on a sale of the entire business as a going concern without the person” dissociated as a partner. This language raises a number of questions. For example, does the “going concern” value need to take into account the continued services of the other partners, even if they are not contractually bound to continue providing such services? Conversely, do any contractual noncompetition or other competitive restrictions applicable to either the dissociating or other partners need to be taken into account? The Committee felt that these and other issues relating to this valuation determination should be resolved through case law under the uniform provisions, and, therefore, it did not recommend any substantive change in this respect for sections 178.0701(1) and (2) of the proposed bill.

However, section 701(c) of RUPA raises a number of issues. First, it specifies that the partnership is entitled to offset against any purchase price otherwise payable both “damages for wrongful dissociation” and “all other amounts owing, whether or not presently due, from the person dissociated as a partner to the partnership.” The comment to this section of RUPA indicates that this right of setoff “may result in a net sum due to the partnership from the person

dissociated as a partner,” so the Committee added a sentence to proposed section 178.0701(3) to make this explicit.

Second, it is not clear whether excess liabilities of the partnership itself to outside creditors might be recoverable under this provision. Proposed section 178.0806(3) (based on RUPA section 806(c)) is clear that each partner is to contribute his, her or its share of any insufficiency of a non-limited liability partnership’s assets to satisfy its obligations upon dissolution and wind up. However, it is unclear whether any such net insufficiency would be recoverable when there is only dissociation of a partner without any dissolution or wind up. In fact, proposed section 178.0701(4), which provides that “a partnership shall defend, indemnify, and hold harmless a person dissociated as a partner whose interest is being purchased against all partnership liabilities, whether incurred before or after the dissociation, except liabilities incurred by an act of the person under s. 178.0702,” suggests otherwise. Therefore, in appropriate circumstances, it may be prudent for the other partners to agree to have the partnership go through the dissolution and wind up process and start up a new partnership in order to ensure that the dissociating partner bears an appropriate share of the overall net liabilities. However, doing so may trigger contract, tax and other consequences. In the interests of uniformity, no changes were recommended in this regard. However, as a consequence, this is an area where provisions in the partnership agreement could be critical.

Third, the RUPA language quoted above provides for the offset of “all other amounts owing, whether or not presently due, from the person dissociated as a partner to the partnership,” but does not allow for offset of amounts due from the dissociated partner to other partners or third parties. In order to prevent other partners or third parties from transferring debt to the partnership so as to take advantage of this automatic acceleration and offset right, a dissociated partner could be well-advised to insert non-transferability provisions in outside debt instruments to the extent feasible.

Fourth, proposed section 178.0701(3) adds language to make the offset of all other amounts owing, whether or not presently due from the person dissociated as a partner to the partnership, “at the option of the partnership,” rather than mandatory for both parties. It was thought that this could allow the partnership to avoid difficult issues with respect to quantifying contingent debt and dealing with high-interest, non-prepayable debt and other situations where the advantage of such an offset might be questionable, such as where the prepayment of debt could have significant tax consequences.

Finally, as the comment to section 701 of RUPA makes clear, these provisions are intended to accelerate payment of amounts not yet due and payable to offset the amount of the buyout price, with discounting as appropriate. If there is more than one such amount due from the person dissociated as a partner, some determination would have to be made as to which one was being paid off. However, under the change noted above, the partnership could avoid this problem by simply choosing the portion of the dissociated partner’s debt that was to be offset.

Section 701(e) of RUPA, on which proposed section 178.0701(5) is based, appears to require that the partnership pay what it estimates to be the net amount due the dissociated partner in cash within 120 days of written demand. However, RUPA section 701(h) contains an

exception to this rule for partners wrongfully dissociating before expiration of a definite term or completion of a particular undertaking. It provides that such payment may be deferred until such expiration or completion unless the dissociated partner is able to establish “that earlier payment will not cause undue hardship to the business of the partnership.” Moreover, any such “deferred payment must be adequately secured and bear interest.” It is also important to note that section 701(i) of RUPA empowers a court to “assess reasonable attorney’s fees and the fees and expenses of appraisers or other experts” if it finds that one of the parties “acted arbitrarily, vexatiously, or not in good faith.” Although these RUPA provisions are much more explicit than UPA, and could obviously have significant repercussions in contested circumstances, the Committee chose not to recommend any changes from the uniform RUPA provisions with respect to these matters for corresponding proposed sections 178.0701(5), (8) and (9).

Section 701(g) of RUPA requires any payment or tender of payment to a dissociated partner to be accompanied by “a statement of partnership assets and liabilities as of the date of dissociation,” in addition to “the latest available partnership balance sheet and income statement, if any.” Note that the statement of partnership assets and liabilities must be “as of the date of dissociation,” which could obviously be in the middle of a month. In the interests of uniformity, the Committee did not recommend any change to this language for corresponding proposed section 178.0701(7), though this may be something to consider when drafting partnership agreements.

Proposed section 178.0701(9), which is based on section 701(i) of RUPA, contains detailed provisions regarding a dissociated partner’s rights with respect to the partnership. However, it does not specifically contain language corresponding to current section 178.38 of WUPA regarding the procurement of an accounting. There is nothing in the official comment to RUPA to indicate that the dissociated partner would not still be entitled to an accounting in appropriate circumstances, though perhaps the financial information required under RUPA section 701(g) was intended to be in lieu of such an accounting. In the interests of uniformity, the Committee did not recommend any changes from the RUPA language regarding these issues.

The Committee did recommend a small clarification in proposed section 178.0701(9), which is based on section 701(i) of RUPA. This change added language that specified that only the tender of payment or an offer to pay that is “in accordance with subs. (5) to (8) to the extent applicable” will trigger the shortened 120-day period for the dissociated partner to commence an action against the partnership to enforce his, her or its rights. This clarification seems consistent with the purpose of proposed section 178.0701(7)(d), which requires the payment or tender to include “[w]ritten notice that the payment is in full satisfaction of the obligation to purchase unless, not later than 120 days after the written notice, the person dissociated as a partner commences an action to determine the buyout price, any offsets under sub. (3), or other terms of the obligation to purchase.”

Proposed section 178.0702(1), which deals with the power of a person dissociated as a partner to still bind a non-dissolving partnership, reflects a change intended to clarify the standard RUPA language. In particular, it provides that “the partnership is bound by an act of the person *with respect to a transaction with another party*” if, among other things, “the other party enters into the transaction” within two years and without knowledge or notice. The

italicized language was merely added to the uniform law text in order to provide a back reference for the standard language contained in proposed sections 178.0702(1)(b) and (c), which both refer to “the other party” and “the transaction.” No substantive change was intended. With or without this additional Wisconsin text, these provisions seem to imply that the power of a person dissociated as a partner to bind the partnership is limited to transactional matters, and do not appear to cover negligence and other tort liabilities.

Section 702(b) of RUPA provides that a person dissociated as a partner is strictly liable “for any damage caused to the partnership arising from the obligation incurred” by the partnership as a result of any act of that person after dissociation. The language of proposed section 178.0702(2) tracks this RUPA language. However, the Committee thought it appropriate to point out that there is no corresponding specific provision confirming that current partners are liable to the partnership for entering into transactions in excess of their respective authority. Presumably, they could be held liable for any such acts in excess of their actual authority to the extent that such acts ran afoul of the Wisconsin “bad boy” provisions (i.e., certain acts involving willful failure to deal fairly, violation of criminal law, improper personal profit, or willful misconduct) or the contractual obligation of good faith and fair dealing under proposed sections 178.0409 (3) and (4), respectively. However, any further such liability might have to be specified in the applicable partnership agreement. Provisions specifically prohibiting acts in excess of authorized activities and/or providing for liability to the partnership or other partners for such unauthorized acts should be sufficient.

Proposed section 178.0702(1)(c) (dealing with knowledge or notice of dissociation of a person as a partner on the part of a third party that would preclude any acts of such dissociated person from triggering liability on behalf of the partnership to such third-party) and proposed section 178.0703(2)(c) (dealing with the corresponding knowledge or notice of a third party as precluding liability to such third party on the part of the dissociated person) contain slightly different language. Proposed section 178.0702(1)(c) provides that liability of the partnership is possible if the third party “does not know or have notice” of the dissociation, whereas proposed section 178.0703(2)(c) provides that the dissociated partner’s liability is possible if the third party “does not have knowledge or notice.” No substantive difference seems to have been intended by this slight difference in language, which is based on the uniform RUPA provisions, and, therefore, no language change was recommended for either of the corresponding sections of the proposed bill.

Section 703(a) of RUPA provides that “a person dissociated as a partner is not liable for a partnership obligation incurred after dissociation,” except as otherwise provided in subsection (b), which contains a special rule for liability in limited circumstances for two years after a partner’s dissociation. Proposed section 178.0703(1) adds additional language to clarify that a dissociated partner may also be liable under the “partnership by estoppel” provision contained in proposed section 178.0308(1) for representations made after the dissociation. This is clear under current section 178.30(4) of WUPA, and the Committee thought that there was no intention to change the law to actually make it less likely for a dissociated partner to be liable to partnership creditors than a completely independent third party who had never been a partner in the first place.

Section 703(b) of RUPA provides for liability on the part of a person dissociated as a partner only with respect to “a transaction entered into by the partnership after the dissociation” under certain circumstances. The use of the term “transaction” suggests that this post-dissociation liability on the part of a former partner only applies to contractual liability, and thus the dissociated partner should probably not be held liable for tort or other non-contractual liabilities incurred by the partnership after dissociation. This conclusion is supported by the fact that section 703(a) of RUPA refers to non-liability for any “partnership obligation incurred after dissociation,” “except as otherwise provided in subsection (b).” The term “obligation” appears to be broader than the “transaction” language contained in the subsection (b) exception. Also, subsection (b) requiring that “the other party” attempting to impose such liability “does not have knowledge or notice of the dissociation and reasonably believes that the person is a partner” seems much more appropriate in the contractual, as opposed to the tort, context. The Committee also recommended adding the phrase “to a party” in the standard RUPA prefatory language of proposed section 178.0703(2) in order to provide a back reference for the phrase “the other party” contained in both proposed sections 178.0703(2)(b) and (c). *See also* the comment to proposed section 178.0702(1).

The Committee also recommended a change to proposed section 178.0703(2)(a). Corresponding section 703(b)(1) of RUPA provides that a dissociated partner will be liable on a post-dissociation transaction “only if a partner would be liable on the transaction.” The Committee recommended that this language of proposed section 178.0703(2) be adjusted so that liability would accrue to a dissociated partner “only if the person would have been liable on the transaction had the person not been dissociated.” It was thought that this language more closely delineates exactly when a dissociated partner should be held liable. For example, if another partner might be held liable other than in his, her or its capacity as such, as a result of the negligence of an individual under his, her or its actual supervision (under the Wisconsin exception to limited liability partnership protection) or for other reasons not applicable to the dissociated partner, the mere fact that “a partner” might be held liable on the transaction should not be sufficient to impose liability on the dissociated partner. This revised language also parallels corresponding language in proposed section 178.0702(1)(a) and section 702(a)(1) of RUPA itself.

Section 703(c) of RUPA provides that a dissociated partner may be released from liability for a partnership obligation “[b]y agreement with a creditor of a partnership and the partnership.” This new provision does not include language comparable to that contained in current section 178.31(2) of WUPA to the effect that “such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.” In the interests of uniformity, the Committee did not recommend any change in this substantive language for proposed section 178.0703(3). Presumably, such an agreement could still be inferred and/or unwritten, but that may be more difficult to establish under the new law.

Proposed section 178.0703(4), which is based on section 703(d) of RUPA, provides that a person dissociated as a partner is released from liability for a partnership obligation to a creditor if the creditor “with knowledge or notice of the person’s dissociation but without the person’s consent, agrees to a material alteration in the nature or time of payment of the debt, obligation, or

other liability.” The Committee noted that apparently both a favorable and an unfavorable “material alteration” would serve to release the dissociated partner under this provision. However, in the interests of uniformity, no change from the RUPA wording was recommended for this provision.

Section 704(b) of RUPA provides that a statement of dissociation (presumably one filed under section 704(a) of RUPA) “is a limitation on the authority of a person dissociated as a partner for the purposes of Section 303” (dealing with statements of partnership authority). Presumably, the statement of dissociation must still be recorded in order to be effective as a limitation with respect to real estate under proposed section 178.0303(7). The Committee did not recommend any substantive change in this language for proposed section 178.0704.

Proposed section 178.0705, which is based on section 705 of RUPA, provides that “[c]ontinued use of a partnership name, or the name of a person dissociated as a partner as part of the partnership name, by partners continuing the business does not *of itself* make the person dissociated as partner liable for an obligation of the partners or the partnership continuing the business” (emphasis added). This provision would presumably preclude an argument to the effect that such a partnership name, in and of itself, might constitute the former partner as “being represented by another as a partner” under proposed section 178.0308(1) regarding “[I]iability of purported partner.” However, while such partnership name might not “of itself” constitute such a representation, it perhaps could be taken into account to bolster other facts indicating that “partnership by estoppel” was appropriate.

Subchapter VIII Dissolution and Winding Up

Section 801(1) of RUPA provides that a partnership at will “is dissolved, and its business must be wound up” upon knowledge or notice of a person’s express will to withdraw as a partner, other than a partner that has “dissociated under Section 601(2) through (10)” of RUPA. These latter provisions, as well as corresponding sections 178.0601(2) through (10) of the proposed bill, provide for automatic dissociation upon, among other things, expulsion, bankruptcy, death, incompetence, termination of a partner, or the distribution of the trust’s or estate’s entire interest in the partnership. These provisions include proposed section 178.0601(2), which allows the partnership agreement to specify other events which would trigger automatic dissociation of a partner. Thus, for example, a partnership agreement could specify that a partner’s withdrawal automatically causes dissociation of that partner and does not require dissolution and wind up of the entire partnership. In the absence of such a provision, a partner who thought that bankruptcy, expulsion or other dissociation was imminent might have an incentive to withdraw before dissociation occurred in order to trigger dissolution and winding up of the partnership. Given a partnership’s ability to define in its partnership agreement precisely when dissociation and/or dissolution should occur, the Committee did not see any need to vary from the standard RUPA language in proposed section 178.0801(1) in this regard.

The Committee did recommend a clarification in the language of proposed section 178.0801(1) for a different reason. Section 801(2)(B) of RUPA, as well as corresponding proposed section 178.0801(2)(b), dealing with partnerships “for a definite term or particular

undertaking,” i.e., a partnership not “at will,” specifically provide that dissolution and wind up will occur upon “the affirmative vote or consent of all the partners to wind up the partnership business.” It would appear that this should also be the case for at-will partnerships. While this would seem to be the case even in the absence of a statutory provision, the Committee recommended that this language be added to proposed section 178.0801(1), dealing with at-will partnerships, to make it clear that such partnerships could also terminate at any time upon the “affirmative vote or consent of all the partners to wind up the partnership business.” This additional clarification may also be helpful, for example, in the event that all of the partners of an at-will partnership become subject to automatic dissociation and wind up (e.g., as a result of bankruptcy) or otherwise not eligible to withdraw and trigger dissolution of the partnership under proposed section 178.0801(1).

Section 801(2)(A) of RUPA, dealing with non-at-will partnerships, provides for dissolution and winding up upon “the affirmative vote or consent of at least half of the remaining partners” to do so within 90 days after one of the partners dies or is otherwise disassociated under sections 601(6) through 601(10) (dealing with bankruptcy, death, guardianship, distribution, etc.) or section 602(b) (dealing with wrongful dissociation, whether voluntary or otherwise). There is a question as to whether “at least half of the remaining partners” is determined on a per capita basis, on the basis of majority in interest or otherwise. Significantly, a prior version of RUPA used the language “a majority in interest of the remaining partners.” In the interests of uniformity, the Committee did not recommend any language change for corresponding section 178.0801(2)(a) of the proposed bill. However, this is something that practitioners may want to adjust in partnership agreements. For example, if a partnership had one 97% partner and three 1% partners, and one of the 1% partners died, this provision could be interpreted to enable the two remaining 1% partners to cause dissolution and winding up of a partnership over the objection of the 97% partner. This language is in contrast to that of proposed section 178.0802(4) (which is also based on the corresponding RUPA provision) regarding persons entitled to appoint someone to wind up the partnership’s business. There, authority is granted to “transferees owning a majority of the rights to receive distributions at the time the consent is to be effective.” As can be seen from the above discussion, sections 178.0801(1) and (2) of the proposed bill provide somewhat different rules regarding requirements to dissolve and wind up, depending upon whether a partnership is an at-will partnership or one for a definite term or particular undertaking. However, as noted above in the comment with respect to proposed section 178.0602(2)(b), it may not always be completely clear whether a particular partnership is at-will or for a definite term or particular undertaking. Nonetheless, section 178.0801(3) of the proposed bill, which is based on section 801(3) of RUPA, provides that any partnership can be required to be dissolved and wound up upon the occurrence of “an event or circumstance that the partnership agreement states causes dissolution.” Therefore, to the extent that it is deemed important for a particular partnership to be treated as one having a definite term, the partnership agreement could simply provide for a very long period of existence, and utilize this provision to trigger dissolution and winding up upon an earlier event. In light of the flexibility afforded to partnerships in their partnership agreements both to classify whether or not they are “at will” and to specify when dissolution and wind up must occur, and in the interests of uniformity, no change to the standard RUPA language was recommended in this regard.

A related issue arises because proposed section 178.0801(5), which is based on section 801(5)(B) of RUPA, provides that a transferee may apply to the circuit court for an order dissolving the partnership at any time for an at-will partnership, but must wait until after “the expiration of the term or completion of the undertaking” for other partnerships. Thus, in order to minimize interference by outsiders, partnerships may have another incentive to specify a term, even a long term, for partnership existence, and provide for dissolution and wind up only as desired by the partners themselves pursuant to the partnership agreement. Again, in light of the flexibility afforded to partnerships under their partnership agreements and in the interests of uniformity, no change was recommended.

Proposed section 178.0801(6) is based on section 801 of RUPA, which provides that a partnership will automatically dissolve if there is a “passage of 90 consecutive days during which the partnership does not have at least 2 partners.” This provision raises a number of questions, such as what happens when there are two partners, and one of them dies? Technically, under proposed section 178.0102(11), it appears that the partnership will cease to be a “partnership” at the expiration of the 90-day period when it no longer consists of “an association of 2 or more persons . . . to carry on as co-owners a business for profit.” No changes were proposed for this section, as it was thought that such issues should be resolved on a uniform basis through case law in the various states.

Section 802(d) of RUPA provides that, if a dissolved partnership does not have any partners or persons who dissociated on a non-wrongful basis that would otherwise be entitled to conduct the wind up process, then “the personal or legal representative of the last person to have been a partner may” do so. It goes on to state that, if “the representative” does not exercise that right, then another person may be appointed to do so by the affirmative vote or consent of transferees owning a majority of the rights to receive distributions at the time the consent is to be effective. Proposed section 178.0802(4) actually expands the scope of the RUPA provision to cover all circumstances where “no person has or exercises the right to participate in winding up,” such as when all of the partners have gone into bankruptcy, which could be treated as wrongful dissociation in the absence of a partnership agreement provision to the contrary.

Proposed section 178.0802(5), which is based on section 802(e) of RUPA, provides that wind up may be conducted under court supervision “[o]n the application of any partner or person entitled under sub. (3) to participate in winding up” if either the partnership does not have a partner and no person is appointed under proposed section 178.0802(4) (i.e., by transferees owning a majority of the rights to receive distributions) or for “other good cause.” This provision raises a number of questions. For example, it would apply even if a person dissociated as a partner was entitled to conduct the wind up under proposed section 178.0802(3). Conversely, the entire provision would not apply if there was no partner or person dissociated as a partner “entitled under sub. (3) to participate in winding up.” Nonetheless, it would seem that the circuit court would have authority to both decline jurisdiction in appropriate cases, as well as to exercise its general supervisory powers in cases not specifically covered by the statute. In light of this, as well as in the interests of uniformity, no change was recommended for this provision.

Proposed section 178.0803 is based, without substantive change, on section 803 of RUPA. It provides for cancellation of the wind up process if all of the partners unanimously decide to do so. Persons who had dissociated from the partnership, even those doing so rightfully, as well as the estates of deceased partners, would not be entitled to participate in this decision, in the absence of a partnership agreement provision enabling them to do so. In the interests of uniformity, and given the fact that potential issues could be addressed in the partnership agreement, no change was recommended.

Also under proposed section 178.0803(3)(c), the rights of wind up creditors “may not be adversely affected” by this cancellation of the wind up process. In fact, such rights could actually be enhanced because proposed section 178.0803(3)(b) would provide that “any liability incurred by the partnership after the dissolution and before the rescission” would be “determined as if dissolution had never occurred,” i.e., with liability being imposed for any act “apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership” under proposed section 178.0301(1), rather than only if “appropriate for winding up the partnership business” under proposed section 178.0804(1)(a).

Proposed section 178.0804(1)(a), which provides that an act “appropriate for winding up the partnership business” binds the partnership during the wind up process, is based on section 804(a)(1) of RUPA. However, an additional clause is added to provide that the unauthorized act of a partner in connection with the wind up would not bind the partnership if “the partner did not have authority to act for the partnership in the particular matter and the person with which the partner was dealing knew or had notice that the partner lacked authority.” This language corresponds to the limitation on a partner’s apparent authority under proposed section 178.0301(1) (based on corresponding RUPA section 301) dealing with apparent authority for pre-dissolution matters. The Committee thought that such a limitation on apparent authority was also appropriate during the wind up process.

A clarification was also made in proposed section 178.0804(2). In particular, the phrase “with respect to a transaction with another party” was added in order to provide a back-reference for “the transaction” and “the other party” referred to later in that section. No substantive change was intended. *See also* the comment to proposed section 178.0702(1).

Section 805(a)(2) of RUPA, dealing with the liability of a partner wrongfully incurring an “obligation” of the partnership after dissolution, provides that the partner is liable to another partner or person dissociated as a partner who is liable for the obligation for any damage arising from the “liability.” Section 805(b)(2) of RUPA, dealing with such liability on the part of a person dissociated as a partner, provides that such former partner is liable for any damage arising from the “obligation.” Proposed sections 178.0805(1)(b) and (2)(b) use the term “liability” in both subsections to make it clear that the liability of both a partner and a person dissociated as a partner to other partners and persons dissociated as partners is the same in both circumstances. The substantive result should be the same under both this language and under RUPA.

Section 806 of RUPA, and corresponding proposed section 178.0806, specify how the accounts of a dissolving partnership should be wound up and settled. They do not purport to resolve various issues relating to marshaling of assets as between partner and partnership

creditors. RUPA also does not contain any provision corresponding to current section 178.36(9) of WUPA, which provides that “[n]othing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.” It does not appear that any substantive change was intended by this omission. Therefore, in the interests of uniformity, the Committee did not attempt to provide any more specificity relating to Wisconsin partnerships.

Also, in the interests of uniformity, the Committee did not recommend any changes with respect to proposed section 178.0806(3)(a), which covers partners’ obligations to contribute to pay off unsatisfied liabilities. However, there are a few points worth noting. First, “[e]ach person that was a partner when the obligation was incurred” may be held liable. Thus, persons previously dissociated as partners are not exempt unless they have been released from liability with respect to the particular creditor involved. *See* comments relating to proposed sections 178.0703(3) and (4). Second, proposed section 178.0806(2)(b) provides that the distribution of excess assets to persons holding transferable interests upon dissolution is to be “in proportion to their respective rights to share in distributions,” which is in contrast to prior versions of RUPA, Internal Revenue Service regulations under section 704(b) of the Internal Revenue Code and common practice, under which distributions are to be made in accordance with capital accounts. Third, under proposed section 178.0806(3)(a), capital contributions to cover partnership obligations are to be “in proportion to the right to receive distributions” at the time such obligations were incurred, which perhaps could differ from the obligation to cover losses under the partnership agreement and may actually vary, depending upon the type of distribution, timing, and other factors. Finally, these internal arrangements among partners should be able to be varied by partnership agreement, because the liability of partners to outside creditors appears to be effectively joint and several, which means proposed section 178.0105(3)(q), which does not allow a partnership agreement to “restrict the rights under this chapter of a person other than a partner,” should not be applicable.

Section 806 of RUPA appears to have two editorial references, which appear to be based upon a prior version of RUPA. The first is section 806(e), which appears to reference a prior version of section 806(c) of RUPA. The second is a cross reference to subsection (c) in section 806(f) of RUPA. In order to correct for this, proposed section 178.0806 does not contain a provision corresponding to RUPA section 806(e) and the cross-reference to the equivalent of subsection (c) in proposed subsection 178.0806(7) has been omitted.

Proposed section 178.0807, which is based on section 807 of RUPA (entitled “Known Claims Against Dissolved Limited Liability Partnership”), specifies the procedure for resolving the known claims against a limited liability partnership. In the interests of uniformity, the proposed Wisconsin provision does not contain any significant substantive variations from the RUPA language. However, proposed section 178.0807(3) does contain two clarifying changes. First, it confirms that the procedure for barring claims under this section only applies “if the claim is a known claim,” which is consistent with the title of the section and the fact that it only applies if “the notice requirements of sub. (2) [which only applies to a limited liability partnership’s ‘known claimants’] are met.” Second, the proposed Wisconsin provision clarifies that these notice requirements must only be met “with respect to the claim” in question (rather than with respect to all known claimants) in order for that claim to be barred.

Additionally, the actual dates that notices from and to the limited liability partnership are actually “received” are critical for purposes of applying proposed section 178.0807, but RUPA does not specify when such notices are considered “received.” This is in contrast to RUPA section 103(d) and corresponding proposed section 178.0103(4), which specify when a person not a partner in a partnership is deemed to have notice of dissociation, dissolution, termination and the partnership’s participation in a merger, interest exchange, conversion, or domestication. Accordingly, proposed section 178.0807(4r) specifically incorporates the special Wisconsin procedural rule contained in proposed section 178.0103(6), including its five-day mailbox rule, for purposes of determining when creditor notices are treated as being received under proposed section 178.0807.

Proposed section 178.0808 deals with the procedure for cutting off claims through publication. It reflects only one substantive variation from the uniform RUPA language. Section 808(c) of RUPA prescribes a three-year period for the commencement of an action against a dissolved partnership, whereas proposed section 178.0808(3) adopts a two-year period for this purpose, which matches the corresponding period for corporations under Chapter 180 and is more consistent with current Wisconsin practice.

In the interests of uniformity, the Committee did not recommend any other changes with respect to proposed section 178.0808(3). However, the following points are worth noting. First, even though the heading for this section is entitled “*Other* claims against dissolved limited liability partnership” (emphasis added), which presumably is intended to distinguish such claims from claims covered by proposed section 178.0807 (entitled “*Known* claims against dissolved limited liability partnership” (emphasis added)), proposed section 178.0808 could clearly apply to “known” claims as well. For example, proposed section 178.0808(3)(a) provides that the two-year cut-off period specified in that section would also apply to any “claimant that did not receive notice in a record under s. 178.0807.” Proposed section 178.0807(2) does not require that such notice be given to all known creditors; it merely provides that such notice “may” be given. Second, proposed section 178.0808(3)(b) provides that “[a] claimant whose claim was timely sent to the partnership but not acted on” is also barred under this cutoff rule. In addition to obviously applying to known claimants, this provision also raises the question of what constitutes being “acted on.” It is possible that a limited liability partnership that had done nothing would be protected, but that one that had taken some, but not all, steps to resolve a claim could be held liable after expiration of this two-year period. Third, proposed section 178.0808(3)(c) provides that the two-year cut-off period also applies to “[a] claimant whose claim is contingent at, or based on an event occurring after, the date of dissolution.” Thus, it appears that a claimant whose claim was “acted on,” but was also “contingent at . . . the date of dissolution,” would still be barred under the cutoff rule. Finally, under proposed section 178.0803(3)(c), persons dealing with the partnership after dissolution should also be wary, because, as noted above, the two-year cut-off period also applies to any claim “based on an event occurring after . . . the date of dissolution.”

The Committee also did not recommend any changes from RUPA to proposed section 178.0808(4), again in the interests of uniformity. However, it did note several issues. First, proposed section 178.0808(4)(b) provides for the recovery of distributions from a limited liability partnership, but only if the assets “have been distributed after dissolution.” Presumably,

the rules contained in proposed section 178.0406 (entitled “Limitations on distributions by limited liability partnership”) would apply to assets distributed by a partnership prior to dissolution. Second, proposed section 178.0808(4)(b) also provides that a partner or transferee may be liable “to the extent of that person’s proportionate share of the claim or of the partnership’s assets distributed to the partner or transferee after dissolution, whichever is less.” There is a question as to whether or not a partner’s “proportionate share” of any such claim is determined in the same way that a partner’s obligation to contribute is determined under proposed section 178.0806(3)(a), dealing with general partnerships. That section uses slightly different language, and provides that “[t]he contribution due from each of those persons is in proportion to the right to receive distributions in the capacity of a partner in effect for each of those persons when the obligation was incurred.” It would seem that the two tests should be the same. *See also* the comments regarding proposed section 178.0806(3)(a). Finally, proposed section 170.0808(4)(b) also provides that “a person’s total liability for all claims under this paragraph may not exceed the total amount of assets distributed to the person after dissolution.” This does have the potential for creating a “first-come, first-serve” dynamic in certain situations. For example, if a distributee received only \$10,000 from the partnership after dissolution, but his, her or its aggregate proportionate share of all claims was \$100,000, only those creditors first seeking recovery of such distributions would likely be successful.

Proposed section 178.0809 (dealing with court proceedings to establish security arrangements for contingent and unknown claims) conforms to corresponding section 809 of RUPA, with several adjustments intended to clarify the provision. First, there are some editorial differences so that it more closely parallels the language of section 14.08 of the Model Business Corporation Act, which the NCCUSL comments to that section indicate was the intent. Second, the reference in the Model Business Corporation Act to claims “reasonably estimated to arise” after dissolution was changed to read “reasonably expected to arise,” because that seems to better reflect the intent. Third, the phrases “known” and “not known” to the partnership, which is the terminology used in section 809(c) of RUPA and proposed section 178.0809(3), are also used in proposed sections 178.0809(1) and (5) where the intent appears to be to classify claims in a similar manner. This is in lieu of the phrases “have not been made known to” or “shown on the records of” the entity used in the corresponding references contained in the Model Business Corporation Act and RUPA.

Subchapter IX Limited Liability Partnership

Proposed section 178.0901(3) provides that a “partnership may become a limited liability partnership by delivering to the department for filing a statement of qualification,” which matches the corresponding language in section 901(c) of RUPA. However, note that the term “partnership” is defined in proposed section 178.0102(11) (which, in this respect, is also based on the corresponding provision of RUPA) to include only an entity “whose governing law is the law of this state, and which is subject to this chapter.” Thus, it appears that a foreign partnership could not become a limited liability partnership under proposed section 178.0901(3). However, *see also* the comments above with respect to proposed section 178.0104(1) (regarding the possible implications of a foreign partnership filing a statement of qualification in Wisconsin)

and proposed section 178.0102(9) (regarding the possible implications of a partnership filing statements of qualification in more than one state).

Proposed section 178.0901(4) includes an additional clause that the corresponding section of RUPA does not. It provides that a “partnership’s status as a limited liability partnership begins when its statement of qualification becomes effective as provided in s. 178.0114.” This change is intended to be clarifying, rather than substantive.

Proposed section 178.0901(5r) provides that “a partnership that becomes, or ceases to be, a limited liability partnership is for all purposes the same partnership that existed before such change in status and continues to be a partnership under this chapter.” There is no corresponding provision in RUPA. However, current section 178.41(2)(a) of WUPA specifically provides that such is the case with respect to partnerships becoming registered limited liability partnerships under current Chapter 178, and it was thought that the language should be carried over into the new Chapter 178 in order to confirm that no change in the law was intended. However, the language was updated to confirm that such continuity applied with respect to both commencement and termination of limited liability partnership status. This concept is implicit in RUPA itself, and therefore this provision seems unlikely to cause any lack of uniformity within the states.

Proposed section 178.0901(6) contains a slight variation from the corresponding section 901(f) of RUPA in that unanimity is required for the cancellation of a statement of qualification, but not for other amendments, such as changes in the name of the partnership and the street and mailing addresses of various partnership offices. The Committee thought that these ministerial changes should not automatically require the vote or consent of all the partners, but that unanimity should be retained as the default rule for an amendment electing out of limited liability partnership status or other cancellation of the statement of qualification. *See also* the comment to proposed section 178.0105(3)(m). Note also that, similar to the corresponding provisions of RUPA, proposed section 178.0901(6) is permissive in the sense that a domestic limited liability partnership “may amend or cancel” its statement of qualification, but that proposed section 178.1004 dealing with the amendment or cancellation of foreign limited liability partnership registration statements is mandatory in that it provides that a limited liability partnership “shall deliver” an amendment or cancellation of its registration statement if certain changes occur.

Sections 178.0902(3)(d) and (e), 178.0907(2) and 178.0908(3)(b) of the proposed bill vary slightly from the corresponding RUPA provisions. These changes were designed to correct what appear to be incorrect cross reference and other editorial discrepancies. No substantive change is intended.

No provision corresponding to RUPA section 902(f) was included in the proposed bill. This is because current Department of Financial Institutions procedures do not allow any business entity to adopt a name distinguishable from another entity only by “the addition of a word, phrase, or abbreviation indicating the type of person,” even with consent. Proposed sections 178.09031 through 178.0905 provide for administrative revocation and reinstatement of statements of qualification. They are based on the corresponding provisions in Wisconsin

Chapter 180 relating to administrative dissolution and essentially supplant corresponding sections 903 through 905 of RUPA. This was done in order to facilitate standardization of procedures for all business entities for the Department of Financial Institutions, and because the Wisconsin corporate law provisions are more comprehensive, especially as with respect to reinstatement. As a consequence, for example, revocation is allowed by the Department of Financial Institutions not only on account of filing failures, but also because of failures to maintain required registered offices and agents, as well as violation of Wisconsin's human trafficking laws. Although the latter seem unlikely to have any effect on the vast majority of Wisconsin partnerships, it was thought that partnerships should be afforded no special treatment in this regard. The language of these provisions corresponds quite closely with that of sections 180.1420 through 180.1423 of the Wisconsin Statutes applicable to corporations. These new provisions do not adopt the two-year limited period in which reinstatement can occur for limited liability partnerships that is contained in RUPA. The Wisconsin corporate reinstatement provisions are not subject to that limit, and the Committee did not think that there was sufficient policy justification to impose a more restrictive rule for Wisconsin limited liability partnerships.

Proposed section 178.0913 was adjusted to conform more closely with section 180.1622 of Chapter 180 relating to corporate annual reports, and therefore differs from the corresponding language of section 913 of RUPA. As noted in the prefatory comments, this was done in order to standardize the various filing requirements of business entities with the Department of Financial Institutions. No significant substantive changes were intended. However, it should be noted that there is no annual report filing requirement for limited liability partnerships under current Wisconsin law, so this adjustment does involve a change to current Wisconsin practice. Notably, domestic and foreign limited liability partnerships are not required to list all of their respective partners in their annual reports, which is in contrast to the corresponding rule for service corporations. *See Wis. Stat. § 180.1921(2).*

Subchapter X Foreign Limited Liability Partnership

Proposed section 178.1001(1) specifies that “[t]he governing law of a foreign limited liability partnership governs . . . [t]he internal affairs of the partnership [and t]he liability of a partner as [a] partner for a debt, obligation, or other liability of the foreign partnership.” As noted in the comments under proposed section 178.0104(1), this governing law provision should mean that a limited liability partnership will be able to choose the state laws that will govern the partnership merely by filing its statement of qualification with that state. Presumably, the governing law could be changed from time to time also. *See also* the comments to proposed section 178.0102(9).

Also in regard to proposed section 178.1001(1), it should be noted that the section designates the governing law for foreign limited liability partnerships only with respect to “[t]he internal affairs of the partnership” and “[t]he liability of a *partner as partner* for a debt, obligation, or liability of the foreign partnership” (emphasis added). Thus, by its terms, this provision does not refer to the liability of the partnership itself for obligations. This raises the question as to which state's law would apply in determining the apparent authority of a person allegedly acting on behalf of a foreign limited liability partnership doing business in Wisconsin.

Because this would involve the liability of the partnership itself, rather than “[t]he liability of a partner as partner for . . . obligation[s] . . . of the foreign partnership,” proposed section 178.1101(1) and the corresponding provision of RUPA might be inapplicable unless such apparent authority to bind the partnership against outside creditors were somehow found to constitute “[t]he internal affairs of the partnership.” Given the fact that such issues unavoidably involve the law of both Wisconsin and at least one other state, the Committee thought it best to leave the relevant RUPA language unchanged for uniformity reasons.

Proposed section 178.1002(2) provides that “[a] foreign limited liability partnership doing business in this state may not maintain an action or proceeding in this state unless it has registered to do business in this state,” which corresponds to current section 178.45(4)(a) of the Wisconsin Statutes. However, proposed section 178.1002 does not contain any language corresponding to current sections 178.45(4)(b) and (c) of the Wisconsin Statutes, which essentially elaborate regarding this inability to maintain an action or proceeding in situations involving successors and assignees, as well as stays in proceedings while such issues are resolved. No change in Wisconsin law should result, except to the extent that such was intended under RUPA.

Proposed section 178.1002(3) contains a slight variation from the corresponding section 1002(c) of RUPA in that proposed section 178.1002(3) provides that the failure of a foreign limited liability partnership to register to do business in this state does not impair “its title to property in this state,” in addition to not impairing the validity of its contracts or acts and not precluding it from defending an action or proceeding in this state. This variation was made simply to conform this section to the corresponding provision relating to foreign corporations doing business in Wisconsin, namely section 180.1502(4).

Similarly, proposed section 178.1002(5m) adds a provision, not found in the corresponding RUPA section 1002, imposing liability to the Department of Financial Institutions upon any foreign limited liability partnership that does business in this state without registration. This section corresponds to section 180.1502(5) of the Wisconsin Statutes imposing comparable liability on foreign corporations doing business in this state without registration, and is another provision intended to harmonize the procedural requirements for business entities conducting activities in Wisconsin.

Proposed section 178.1004 contains several modifications that are intended to clarify and improve the Department of Financial Institutions procedures for amending foreign limited liability partnership registration statements. First, language was added to allow both cancellation and amendment of such statements, whereas RUPA section 1004 only includes language regarding amendments. This addition better parallels the corresponding procedures for amending or canceling statements of qualification for domestic limited liability partnerships under proposed section 178.0901(6). *See also* the comments relating to proposed section 178.0901(6). Second, in addition to requiring amendment filings for changes in a foreign limited liability partnership’s name, governing law, addresses or registered office or agent, proposed section 178.1004(1r) also requires such a filing upon “[t]he cessation of the partnership’s status as a foreign limited liability partnership.” The Committee felt that such a change, which is not listed in the corresponding RUPA section 1004, was at least as important to disclose as the other

listed items. Finally, proposed section 178.1004(4) makes clear that a foreign limited liability partnership is not required to file an amendment to its registration statement to reflect a change in its registered office or agent if it previously filed a statement of change to that effect under proposed section 178.0909 or filed an annual report reflecting such change, which is treated as a statement of change under section 178.0913(5).

Proposed section 178.1006(1) (dealing with the adoption of a fictitious name by a foreign limited liability partnership to comply with the “distinguishable name” requirement) differs from the corresponding RUPA section 1006 to more clearly conform its language with the procedural practice of the Department of Financial Institutions with respect to such names. First, proposed section 178.1006(1) does not contain a completely separate procedure for the adoption of an “alternate name” that is unique to limited liability partnerships. Rather, a foreign limited liability partnership may adopt a “fictitious name,” the same as corporations do under current section 180.1506(1) of the Wisconsin Statutes. Second, proposed section 178.1006(1) does not include the language of section 1006(a)(2) of RUPA to specifically allow a foreign limited liability partnership to use its own name “with the addition of its jurisdiction of formation.” Such a name is already allowed as an acceptable “fictitious name” under the Department of Financial Institutions’ current procedures. The language was not included in the proposed bill only to avoid any negative implication that such “jurisdiction of formation” names were not permissible as fictitious names under the Wisconsin Statutes relating to corporations and other types of business entities.

The language of proposed section 178.1007, dealing with deemed withdrawal of a foreign limited liability partnership’s registration upon its conversion or merger to or into “a domestic limited liability partnership or . . . [other] entity whose formation requires the delivery of a record to the department,” has been adjusted to make clear that such withdrawal shall not be deemed to have occurred when such registration is transferred to such partnership or entity as allowed under proposed section 178.1009.

Proposed sections 178.1007 and 178.1008 (dealing with withdrawal of a foreign limited liability partnership’s registration upon certain entity structure transactions) provide that such withdrawal is appropriate, not only in conversion transactions, but also with respect to mergers. To the extent that such transactions are allowed under RUPA, this adjustment should not cause any change in result. This change is also more important under the proposed bill, because, as explained in the comments to Subchapter XI, Wisconsin allows a broader array of cross-species transactions.

Proposed section 178.1008 reflects some variations from the corresponding RUPA section 1008 that are intended to simplify the procedural administration of these provisions by the Department of Financial Institutions. First, proposed section 178.1008(1)(a) requires the filing of a statement of withdrawal for all conversion and merger transactions unless formation of the converted or surviving entity “does not require the delivery of a record for filing by the department” in Wisconsin, whereas section 1008(a) of RUPA exempts all such transactions whenever such “formation does not require the public filing of a record” anywhere. For example, both RUPA and the proposed bill would require the filing of a statement of withdrawal in the event of the conversion to an ordinary (i.e., non-limited liability) partnership, whose

formation does not require filing with any state authorities, but the proposed bill would also require the filing of a statement of withdrawal in Wisconsin for a conversion to a foreign state corporation, whose formation would require a filing with such foreign state, but not with the Department of Financial Institutions in Wisconsin. Second, rather than having a completely separate statement of withdrawal procedure for conversions and mergers, proposed section 178.1008(1)(a) simply requires a regular statement of withdrawal under proposed section 178.1011. Third, proposed section 178.1008(2), regarding the service of process, as well as proposed section 178.1011(2) to which it refers, corrects and changes cross-references to proposed section 178.0912.

Proposed sections 178.10101, 178.10102 and 178.10103, dealing with revocation of a foreign limited liability partnership's registration and possible appeal, are based on current sections 180.1530, 180.1531 and 180.1532 of the Wisconsin Statutes to conform these procedures with the corresponding Department of Financial Institutions procedures for corporations. Proposed sections 178.10101, 178.10102, and 178.10103 supplant section 1010 of RUPA.

Similarly, proposed section 178.1011 (dealing with the withdrawal of registration by a foreign limited liability partnership) is based primarily on corresponding current section 180.1520 of the Wisconsin Statutes relating to corporations. However, the RUPA concept of requiring a foreign limited liability partnership to maintain an address to which service of process can be made, even if the partnership no longer has a principal office, was preserved.

Subchapter XI Merger, Interest Exchange, Conversion, and Domestication

General Comments

Subchapter XI of the proposed bill deals with mergers, interest exchanges, conversions, and domestications, including so-called "cross-species" transactions where such entity structure changes involve other types of entities. In addition, as explained in the Prefatory Note, none of these four types of transactions are currently available to Wisconsin general partnerships under Chapter 178, although partnerships can accomplish many of the effects of such transactions in other ways. The statutes relating to other types of business entities, including limited partnerships (Chapter 179), corporations (Chapter 180), nonstock corporations (Chapter 181), and limited liability companies (Chapter 183) do explicitly allow for many of these same-type and cross-species transactions. Therefore, Subchapter XI of the proposed bill is designed to both update the partnership statutes to explicitly allow for such entity structure transactions as RUPA does, while at the same time integrating these new provisions with the corresponding provisions of the other four Chapters and minimizing any unnecessary disruptions in existing law or practice.

Like Article 11 of RUPA, Subchapter XI of the proposed bill applies to both same-type and cross-species mergers and interest exchanges and authorizes conversions and domestications in which at least one pre-transaction or post-transaction entity is a Wisconsin general partnership (including a limited liability partnership). If an entity (any person except an individual) other than a Wisconsin general partnership is also involved in the transaction, the governing law

applicable to the other entity must not prohibit the transaction, though in some cases it need not explicitly authorize the transaction.

Existing Wisconsin statutes that authorize cross-species mergers, interest exchanges, and conversions for particular business entities limit the constituents to corporations, nonstock corporations, limited liability companies, and limited partnerships. Both RUPA and proposed Subchapter XI are broader, including partnerships, most business and statutory trusts and other legal persons. However, RUPA expressly excludes donative or charitable trusts, decedents' estates, governments, and governmental subdivisions, agencies or instrumentalities from its definition of an "entity" for purposes of the provisions regarding mergers, interest exchanges, conversions, and domestications. The RUPA comments indicate that such entities were excluded because it would be contrary to public policy for them to engage in such transactions under the partnership law. Section 178.0102(4p) of the proposed bill is broader than the RUPA provision. It defines an "entity" for this and other purposes under the proposed bill as any person other than an individual, and proposed section 178.0102(14) defines "person" quite broadly to include (among other things) any estate, trust, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity. The Committee believed it was appropriate for this enabling statute to be broadly permissive with respect to merger, interest exchange, conversion, and domestication transactions. Entities that lack a profit motive may not meet the requirements for some transactions with partnerships that are otherwise authorized by this Subchapter, but may meet the requirements for others, all depending upon the facts of a particular transaction. Moreover, all transactions involving such changes in entity structure may have tax or other significant consequences, of which owners and practitioners need to be aware. However, it was thought best not to completely prohibit all such transactions with certain types of entities when they may be entirely appropriate in some situations.

The proposed bill also repeals current section 73.14 of the Wisconsin Statutes, a provision requiring all acquired or converted entities engaging in merger and conversion transactions to file a separate report with the Wisconsin Department of Revenue listing all fee simple real estate ownership interests in Wisconsin. This provision poses a potentially cumbersome burden, especially in larger transactions. Provisions related to this unique Wisconsin requirement requiring the reporting of the existence of such interests in articles of merger and articles of conversion (Wisconsin Statutes sections 179.76(5)(bm), 179.77(5)(bm), 180.1161(5)(bm), 181.1161(5)(bm), 183.1204(1)(cm), and 183.1207(5)(bm)) are also being repealed.

As explained in more detail in the comments relating to proposed sections 178.1151 to 178.1155, the proposed bill defines "domestication" transactions much differently than in RUPA. RUPA uses the term to refer only to a change of domicile to or from Wisconsin by a limited liability partnership, a transaction that would be treated as a "conversion" under Wisconsin's current merger and conversion provisions. Instead, the proposed bill defines "domestication" as a transaction whereby an entity can be simultaneously governed both by Chapter 178 and by the law applicable to a non-United States entity. In this regard, the proposed bill is based upon (and generally similar to) the domestication provisions of the Delaware General Corporation Law.

Proposed section 178.1161 contains special protections for minority partners in connection with a merger, interest exchange, conversion, and domestication transactions, which

cannot be impaired in a partnership agreement. This provision is in lieu of section 1106 of RUPA, which expressly authorizes (but does not require) contractual appraisal rights in connection with partnership mergers, interest exchanges, conversions and domestications, and is intended for consideration where the partnership agreement changes the default rule that would otherwise require the consent or affirmative vote of all of the partners for these transactions. For more explanation, *see* the comments relating to proposed sections 178.0105(3)(n) and 178.1161.

General Provisions

Like its counterpart under RUPA, proposed section 178.1101 contains additional definitions applicable specifically to Subchapter XI. However, it also adds the following definitions:

1. Proposed section 178.1101(2m) defines a “constituent entity,” a term which is not used in RUPA.
2. Proposed sections 178.1101 (8) and (9) define a “domesticated entity” and a “domesticating entity,” respectively, which are in lieu of the terms “domesticated limited liability partnership” and “domesticating limited liability partnership” under RUPA. As explained in the comments for proposed sections 178.1151 to 178.1155 with respect to “domestications,” these definitional changes are intended to accommodate a broader scope for cross-species transactions under the proposed bill.
3. Similarly, proposed section 178.1101(22m) defines a “non-United States entity,” a term which is also used for “domestication” transactions, as defined under the proposed bill.
4. Proposed section 178.1101(23m) defines “organizational documents,” a term which is not used in RUPA but replaces and corresponds generally to the terms “organic rules,” “private organic rules,” and “public organic record” used in RUPA. Just as in the definitions for these corresponding RUPA terms, the definition in the proposed bill confirms that an entity’s “organizational documents” need not be in a record (i.e., in writing) if that is permitted under the entity's governing law.

The proposed bill also deletes or relocates certain other definitions that are used in RUPA, including the following:

1. The term “distributional interest” is not used in proposed Subchapter XI.
2. The definition of the term “domestic” is moved to proposed section 178.0102(4c).
3. The definition of the term “entity” is moved to proposed section 178.0102(4p) and, as noted above, is given a broader meaning than its RUPA counterpart.
4. The term “filing entity” is not used in proposed Subchapter XI.
5. The definition of the term “foreign” is moved to proposed section 178.0102(4t).
6. The terms “governance interest” and “governor” are not used in proposed Subchapter XI.
7. The term “organic law” is generally replaced by the term “governing law” defined in proposed section 178.0102(6m).
8. The terms “organic rules,” “private organic rules,” “protected agreement,” “public organic record,” and “registered foreign entity,” are not used in proposed Subchapter XI, but, as noted above, proposed Subchapter XI uses the term “organizational documents” in a way that corresponds generally to the terms “organic rules,” “private organic rules,” and “public organic record” used in RUPA.

Finally, some of the terms that are used both in this Subchapter and in RUPA are defined differently.

1. As noted above and as explained in the comments for proposed sections 178.1151 to 178.1155, a “domestication” under proposed Subchapter XI is significantly different from a “domestication” as defined under RUPA. Under RUPA, a domestication refers to a transaction whereby a limited liability partnership changes its governing law to that of another state, a type of transaction which is already defined as a “conversion” under current Wisconsin law. However, as explained in the comments noted above, a domestication under proposed Subchapter XI is a transaction causing an entity to be simultaneously governed both by Chapter 178 and by the law applicable to a non-United States entity (whether or not of the same type). The definitions of the terms “domesticated entity” and “domesticating entity” in proposed sections 178.1101(9) and (10) have been adjusted accordingly.
2. As noted above, the definition of “entity” in proposed section 178.0102(4p) is broader under the proposed bill (including proposed Subchapter XI) than under RUPA.
3. The definition of an “interest” under proposed section 178.1101(16) is similar to the definition of the corresponding term under the corresponding section of RUPA. Although both sections contain a catchall provision for other types of interests in an “unincorporated entity,” the scope of the term “interest” is unavoidably broader under proposed Subchapter XI, given the broader definition of the term “entity” in section 178.0102(4p) noted above.

Proposed section 178.1102 is based upon section 1102 of RUPA. RUPA section 1102(b) is intended to prevent any transaction under RUPA from being subjected to or relieved from any “statutory law of this state relating to a change in control, takeover, business combination, control-share acquisition, or similar transaction involving a domestic merging, acquired, converting, or domesticating business corporation,” but it includes express exceptions to allow such transactions to “create or impair a right, duty, or obligation” under such statutory law if “the transaction satisfies any requirements of the law” (when the corporation does not survive the transaction) or “the approval of the plan is by a vote of the shareholders or directors which would be sufficient to create or impair the right, duty, or obligation directly under the law” (when the corporation survives the transaction). The Wisconsin business corporation law does, for example, include takeover, business combination, and control share voting provisions (*see* sections 180.1130 to 180.1134, 180.1140 to 180.1144 and 180.1150 of the Wisconsin Statutes). Also, Wisconsin law, as noted above, already authorizes cross-species mergers, share exchanges and conversions of corporations with other business entities, but does not include any provision specifically preventing such cross-species provisions from somehow impairing the application of the takeover, business combination and control share voting provisions.

In light of the above, proposed section 178.1102(2) contains several variations from the corresponding RUPA language in order to clarify its application under current Wisconsin law. First, instead of only referring to laws relating to change in control, takeover, business combination, control-share acquisition, or similar transactions involving a “business corporation,” it specifically applies this general “no impact” rule to such laws relating to any “entity.” Second, proposed section 178.1102(2) does not include the express exceptions noted above. The Committee felt the those exceptions were unnecessary and potentially confusing,

and wanted to avoid any implication that they were somehow necessary in order to avoid unintentionally restricting the application of the corporate takeover provisions described above or any other comparable statutes under current Wisconsin law. Third, proposed section 178.1102(2) does not refer to a “domesticating business corporation,” because such provisions should not apply to domestications, as defined in the proposed bill. *See* comments relating to proposed sections 178.1151 to 178.1155. In sum, proposed section 178.1102(2), the same as section 1102(b) of RUPA, is intended merely to confirm that a transaction under proposed Subchapter XI may not create or impair a right, duty or obligation under other Wisconsin laws relating to a change in control, takeover, business combination, control-share acquisition or similar transaction.

Proposed section 178.1103 does not include any provision corresponding to section 1103(a) of RUPA. RUPA section 1103(a) provides that any domestic or foreign entity that is required to give notice to, or obtain the approval of, a governmental agency or officer in order to be a party to a merger must also give or obtain such notice or approval in order to be a party to an interest exchange, conversion or domestication. Proposed section 178.1103 intentionally omits that provision. Each of the four types of transactions authorized by Subchapter XI differs from the other three, and the Committee concluded it would be inappropriate to assume that such merger notice or approval requirements should automatically be the same for all four different types of transactions. The Committee also believed such an expanded application of regulatory notification and approval requirements could easily be overlooked if it is located in these general transactional provisions. If a specially regulated partnership (or other entity) is to be required to give a particular notice or obtain a particular approval with respect to some or all interest exchanges, conversions, or domestications, an appropriate statute, regulation or order specifically applicable to a regulated entity should expressly delineate that requirement, just as may already be done for mergers.

RUPA section 1103(b) appears to create a new statutory requirement with respect to transactions affecting property held for a charitable purpose. The Committee concluded that a new requirement was unnecessary. Proposed section 178.1103 merely notes that an entity that plans to be engaged in a transaction pursuant to proposed Subchapter XI may apply to the circuit court for a determination of the transaction’s compliance with *cy-près* or other law dealing with the non-diversion of charitable assets. However, there may be tax consequences. *See* the comments to proposed section 178.1145.

Proposed section 178.1104, which is based on section 1104 of RUPA, specifically provides that “[t]he fact that a transaction under proposed Subchapter XI produces a certain result does not preclude the same result from being accomplished in any other manner permitted by law.” For example, a non-limited liability partnership of one state could change its governing law to that of another state simply by amending its partnership agreement, even though it could also accomplish the same result through a conversion under proposed sections 178.1141 to 178.1145.

Proposed section 178.1105 explicitly provides that “[a] plan may refer to facts ascertainable outside the plan if the manner in which the facts will operate upon the plan is specified in the plan.” This is based verbatim upon corresponding section 1105 of RUPA. This should enable terms of a filed plan of merger, interest exchange, conversion, or domestication to

simply refer to a corresponding agreement relating to the transaction which is not made a matter of public record.

As noted in the general comments above, proposed Subchapter XI does not include any provision comparable to section 1106 of RUPA (expressly authorizing contractual appraisal rights). Nothing in this Subchapter should be construed to prohibit contractual provisions granting appraisal rights to partners or other holders of interests in connection with transactions authorized by the Subchapter. However, since the proposed bill does not prohibit partnership agreement provisions creating appraisal rights, it was thought that such an express authorization was unnecessary, and the Committee wanted to avoid any unintended implication that this express authorization might imply that other types of partnership agreement provisions designed to protect partners from oppression in other ways might somehow not be allowed because not similarly specifically authorized.

The proposed bill also does not contain any provision corresponding to section 1107 of RUPA, which is a placeholder intended to itemize exceptions related to specially regulated entities (excluding specified entities from relying on the Subchapter or prohibiting transactions governed by more specific statutes). Just as with notice and approval requirements discussed above in connection with proposed section 178.1103, such restrictions may and should be included in appropriate statutes, regulations, or orders specifically applicable to regulated entities. No implication one way or the other is intended by the failure to also list any restrictions in the proposed bill.

Finally, it should be noted that there are many instances where proposed Subchapter XI refers to a constituent entity's governing law. Such governing law presumably includes requirements under provisions of the entity's organizational documents which are valid under its governing law.

Merger

Although the provisions in proposed Subchapter XI for mergers involving general partnerships are based on and intended to be broadly comparable to the corresponding RUPA provisions, the proposed bill used the current Wisconsin Statutes for corporate mergers as a key reference for the authority, plan, approval, and effect provisions for mergers involving partnerships, as well as for the corresponding provisions for interest exchanges, conversions, and domestications authorized by the Subchapter. Although, as noted in the general comments above, proposed Subchapter XI relating to entity structure transactions uses somewhat differing defined terms, and some of the specific verbiage relating to mergers vary from the corresponding provisions of RUPA in order to maximize consistency with the corresponding provisions of Chapter 180 of the Wisconsin statutes relating to corporations and the current cross-species provisions in Wisconsin Chapters 179, 180, 181 and 183, the provisions of the proposed bill are generally still substantively consistent with those of RUPA, though there are some exceptions as noted below.

Proposed section 178.1121, authorizing mergers involving domestic partnerships, is based on section 1121 of RUPA. The proposed provision states that the transaction must comply with both the Chapter 178 statutory provisions regarding mergers by domestic partnerships and the plan of merger (required by proposed section 178.1122). A merger involving a domestic

partnership can be accomplished if it is “permitted” under the governing law of each constituent entity and each constituent entity approves the plan of merger in the manner required by its governing law. The use of the term “permitted” seems somewhat more permissive than the corresponding term “authorized” used in section 1121(b) of RUPA. However, “permitted” is the term used in corresponding section 180.1101 of the Wisconsin corporate statutes, and the Committee thought it more important to conform to that terminology, which has been in effect for corporations in Wisconsin and other states for some time. However, certain things should be clear, even under this more permissive standard. For example, if the surviving entity in a merger is to be a partnership, it must fit within the definition of “partnership” under proposed section 178.0102(11), and therefore must be “an association of two or more persons” and “for-profit.”

Proposed section 178.1122 describes the requirements for a plan of merger and is based on RUPA section 1122. Note that the plan of merger must be in a record and that the required contents of a plan of merger cannot be varied by the partnership agreement (*see* proposed section 178.0105(3)(o)). Section 178.1123 addresses both the requirements to approve a merger that includes a domestic partnership as a constituent entity and also the provisions for amendment or abandonment of a merger after it has been approved but before it becomes effective, thus addressing the basic concepts of both sections 1123 and 1124 of RUPA. As with RUPA, the default rule requires the unanimous vote or consent of all of the partners for a merger of any domestic partnership. This requirement can be changed only by a written provision of the partnership agreement that does not impair the rights of a partners under proposed section 178.1161 (*see* proposed section 178.0105(3)(n)), but note that the plan of merger itself may specify the manner and the vote or consent required to amend or abandon the plan of merger. As with RUPA, since the plan of merger can create or amend the organizational documents of the surviving entity (*see* proposed section 178.1122(1)(d) and (e)), if a plan of merger can be approved or amended with less-than-unanimous approval or consent, the partnership agreement of the surviving entity can also be amended by the same less-than-unanimous approval or consent. Unlike under RUPA, the approval itself is not required to be in a record even for a plan of merger in which the partners of a constituent domestic partnership will have interest holder liability for debts, obligations, and other liabilities that arise after the merger, but note that (also unlike under RUPA) proposed section 178.1161 prohibits any merger, interest exchange, conversion, or domestication that will materially increase the current or potential obligations of a partner, unless the partner consents or the partnership offers to have the partner’s interest purchased in the manner applicable to a dissociation that is not wrongful under the RUPA default rule without modification by the partnership agreement.

Proposed section 178.1124 addresses the public filings required for a merger that includes a domestic partnership and is based on section 1125 of RUPA. As is suggested in the comments to RUPA, if a foreign constituent entity that is registered to do business in Wisconsin has adopted a fictitious name (under proposed section 178.1006 or similar statutes for other types of foreign entities registered to do business in Wisconsin), the name of the foreign entity set forth in the articles of merger should be the fictitious name under which it has registered to do business in Wisconsin so that the Department of Financial Institutions can associate the articles of merger with the registration to do business. The Committee understands that Wisconsin corporations often list both names, and partnerships may wish to do that also. Approval of a constituent entity in accordance with its governing law necessarily includes approval in accordance with any valid requirements of its organizational documents. As with mergers under

Wisconsin's current corporation law (but unlike RUPA section 1125), proposed section 178.1124 requires that the articles of merger state that the plan of merger is on file at the principal office of the surviving entity and that a copy of it will be provided upon request to any interest holder of a constituent entity. A merger takes effect at the effective date and time of the articles of merger (*see* proposed section 178.0114) without regard to the governing law of the surviving entity.

Proposed section 178.1125 addresses the effect of a merger that includes a domestic partnership. It is generally based on section 1126 of RUPA. Proposed section 178.1125(1)(b) provides, for example, that, when a merger becomes effective, “[t]he title to all property owned by each constituent entity is vested in the surviving entity without transfer, reversion, or impairment.” However, it still may be appropriate to update the public records for real estate, vehicles and other titled property.

The merger effects specified in proposed section 178.1125(am) are similar to RUPA section 1126(c) and (d) with respect to interest holder liability and associated contribution or other rights before and after the merger. The Wisconsin statutory provisions differ from RUPA in that a partner in a merging general partnership can be made subject to additional liabilities without a separate written consent of that partner, but proposed section 178.1161 (which has no direct counterpart under RUPA) prohibits any merger, interest exchange, conversion, or domestication that will materially increase the current or potential obligations of a partner unless the partner consents or the partnership offers to have the partner's interest purchased under the non-wrongful dissociating partner RUPA default rule without modification by the partnership agreement.

Proposed section 178.1125(am)1., similar to corresponding section 180.1106(am)3. of Wisconsin corporation law, provides that “[t]his paragraph does not affect liability under any taxation laws.” This seems implicit under RUPA also. *See also* comments to proposed section 178.1145 relating to tax consequences of changes in type of entity.

Proposed section 178.1125(1)(e) provides that “organizational documents” of the surviving entity may be amended or created as part of the merger process. Under proposed section 178.1101(23m), the term “organizational documents” includes the articles and bylaws of a corporation, the partnership agreement of a partnership, and the operating agreement of a limited liability company. However, it would not include, for example, a shareholder agreement among the shareholders of a corporation.

Proposed section 178.1125(1)(f) provides that, just as with corporate mergers, “[t]he interests of each constituent entity that are to be converted into interests, securities, or obligations of the surviving entity, rights to acquire such interests or securities, money, other property, or any combination of the foregoing, *are converted* as provided in the plan of merger” (emphasis added). Thus, the conversion of ownership interests of a merged entity into ownership interests in the surviving entity would appear to be automatic upon the merger, i.e., even in the absence of an actual exchange of certificates, whereas other obligations, such as the payment of cash, may need to be affirmatively enforced. There are other issues that arise by virtue of the potential “cross-species” nature of mergers allowed under both RUPA and the proposed bill. For example, how would a “transferee” of an interest in a partnership be treated if it is merged into a

corporation? RUPA and the proposed bill carefully distinguish the rights and obligations of “transferees” via a vis “partners” in a partnership, but there is no corresponding distinction for corporations. In the interests of uniformity, no attempt was made in the proposed bill to address all such “cross-species” transactions issues, it being thought that such issues were better addressed and resolved in the common law of the adopting states.

Proposed section 178.1125(1)(g) states the non-controversial proposition that “all of the rights, privileges, immunities, powers and purposes of each constituent entity vest in the surviving entity” upon the merger. However, it should be noted, that this means, for example, that the attorney-client privilege attaching to prior communications between the management and/or shareholders of any merged entities shall be able to be asserted, or waived, by the management of the surviving entity after the merger, in the absence of an agreement to the contrary.

Proposed section 178.1125(2) makes the Department of Financial Institutions the agent of any foreign surviving entity with respect to enforcement of obligations to dissenting shareholders or other interest holders of domestic constituent entities under specified provisions of Wisconsin law applicable to domestic partnerships, limited partnerships, and corporations or corresponding provisions of the entity's other governing law.

Interest Exchange

Proposed section 178.1131, authorizing interest exchanges involving domestic partnerships, is based on RUPA section 1131. It allows the parties to accomplish in a single step a structural outcome that could otherwise be accomplished by forming a new subsidiary and then engaging in a triangular merger. Although the comments to RUPA section 1131 say that it applies only if a domestic limited liability partnership is either the acquiring or acquired entity, proposed section 178.1131 is intended to apply to any domestic partnership (not just to limited liability partnerships).

Like section 1131(a) of RUPA, proposed section 178.1131(1) provides that an interest exchange must include all of the outstanding interests of one or more classes or series of interests of the acquired entity, but there may be outstanding interests of another class or series that are not being acquired. This means that such “exchange” transactions can occur even when there is no complete “acquisition” of the “acquired entity,” just as they may under corresponding section 180.1102 of the Wisconsin corporate statutes. Also, neither RUPA nor the proposed statute includes any definition of the terms “class” and “series,” but presumably those terms are used in the same sense as under statutory and case law applicable to corporations and care, but they may also include, for example, all of the outstanding interests of a “series LLC” under the limited liability company statutes of some states.

Proposed section 178.1131 does not include a provision corresponding to RUPA section 1131(c) (a transition rule applicable if certain agreements refer to a merger but not to an interest exchange). Instead, as explained above, proposed section 178.0110(2)(d)1. contains a broader transitional rule intended to protect all creditors with respect to pre-existing obligations from adverse consequences brought about solely from enactment of the proposed bill. Also, because both mergers and interest exchanges are new for Wisconsin partnerships, and because of the

fundamental differences between a merger and an interest exchange, the proposed bill does not assume that any restrictions in contracts or organizational documents that may be applicable to mergers would necessarily be intended to apply to interest exchanges. Entities that intend to condition or restrict interest exchanges should create or modify appropriate documents to do so expressly.

Proposed section 178.1132 describes the requirements for a plan of interest exchange and is based on RUPA section 1132. The principal difference is that proposed section 178.1132 requires the plan of interest exchange to include specified information for the acquiring entity as well as for the acquired entity. The requirements of this section are mandatory (*see* proposed section 178.0105(3)(o)), although the plan may also include any other provisions relating to the interest exchange unless prohibited by law.

Proposed section 178.1133 addresses both the requirements to approve an interest exchange that includes a domestic partnership as a constituent entity and also the provisions for amendment or abandonment of an interest exchange after it has been approved, but before it becomes effective, thus addressing the basic concepts covered by RUPA sections 1133 and 1134. As with RUPA, the default rule requires unanimity of the partners of any domestic partnership, except as that may be varied by a written provision in the partnership agreement that does not impair the rights of a partner under proposed section 178.1161 (*see* proposed section 178.0105(3)(n)). The RUPA provisions apply only if a domestic partnership is the acquired entity while proposed section 178.1133 applies whether the domestic partnership is the acquired entity or the acquiring entity. In this respect, proposed section 178.1133 parallels the corresponding provisions for merger, conversion, and domestication transactions. *See* the comments to proposed section 178.1123 regarding approval requirements, revisions to organizational documents of the constituent entities, interest holder liability, and the effects of proposed section 178.1161, all of which should be generally applicable to interest exchanges also.

Proposed section 178.1134 describes the requirement to file articles of interest exchange for a plan of interest exchange that includes a domestic partnership. It is based on RUPA section 1135 (which applies only when a domestic partnership is the acquired entity), but proposed section 178.1134 applies whether a domestic partnership is the acquired entity or the acquiring entity. Proposed section 178.1134 also parallels similar provisions in Subchapter XI relating to merger, conversion, and domestication entity structure transactions. *See* the comments to proposed section 178.1124 regarding references in the public filing to fictitious names, the requirement that the articles state that the plan is on file at the principal office of the surviving entity and that a copy of it will be provided upon request to an interest holder of a constituent entity, and the effective date and time of the transaction, all of which should also be generally applicable to interest exchanges.

Proposed section 178.1135 describes the effect of an interest exchange that includes a domestic partnership. It is based on RUPA section 1136 (which applies only when a domestic partnership is the acquired entity), but proposed section 178.1135 applies whether a domestic partnership is the acquired entity or the acquiring entity. Proposed section 178.1135 also parallels the corresponding provisions in Subchapter XI relating to merger, conversion, and domestication transactions. As the comments to RUPA section 1136 emphasize, an interest

exchange is unlike a merger in that it does not directly affect the separate existence of the parties, vest in the acquiring entity any assets of the acquired entity, or render the acquiring entity liable for any of the existing liabilities of the acquired entity. Interest holder liability with respect to debts, obligations, and other liabilities of either the acquiring or acquired entity is addressed in proposed section 178.1135(3), which is substantively similar to sections 1136(c) and (d) of RUPA. As is the case with respect to share exchanges under the Wisconsin corporation law, proposed section 178.1135 (5) makes the Department of Financial Institutions the agent for service of process against any foreign acquiring entity in specified matters and requires any foreign acquiring entity to pay the former owners of any acquired domestic partnership any amounts required under specified statutory provisions or other governing law. There is no counterpart under RUPA to proposed section 178.1135(5).

Conversion

Proposed section 178.1141, authorizing conversions involving domestic partnerships, is based on RUPA section 1141. This provision enables a domestic partnership to change into another type of domestic entity or into a foreign entity, as well as enabling another type of domestic entity or a foreign entity to change into a domestic partnership that will satisfy the definition of a partnership immediately after the conversion. This definition of “conversion” is based upon the current Wisconsin law cross-species transaction provisions, and differs from that contained in RUPA in one respect. Transactions whereby a domestic limited liability partnership “converts” to a foreign limited liability partnership and vice versa are called “domestications” and treated separately as such under RUPA. However, as explained in more detail below, the proposed bill defines “domestications” completely differently as a “dual domicile” status based upon the corresponding provisions under Delaware law.

Under both RUPA and the proposed bill, a conversion must be permitted under the governing law that applies to the converting entity, as well as the governing law that is to apply to the converted entity. Proposed section 178.1141 does not include a provision corresponding to RUPA section 1141(c) (a transition rule applicable if certain agreements refer to a merger but not to a conversion). *See* the comments to proposed section 178.1131 regarding the non-adoption of a provision corresponding to section 1131(c) of RUPA relating to interest exchanges, which are also relevant to non-adoption of the corresponding RUPA section 1141(c) transition rule relating to conversions. In other respects also, proposed section 178.1141 parallels the corresponding provisions relating to mergers, interest exchange, and domestication in the proposed bill.

Proposed section 178.1142 describes the requirements for a plan of conversion and is based on RUPA section 1142. The principal difference is, as explained above, that the RUPA section 1142 conversion rules apply only when a domestic partnership is converting to a different type of entity or vice versa, and not when a partnership is merely changing its state of domicile (which is treated as a conversion under current Wisconsin law).

The plan of conversion must include the organizational documents of the converted entity that are to be in a record immediately after the conversion becomes effective. Note that if a plan of conversion can be approved or amended with less-than-unanimous approval or consent of the owners of the converting entity (proposed section 178.0105(3)(n) allows a written provision in

the partnership agreement to provide for less-than-unanimous approval as long as it does not impair the rights of a partner under proposed section 178.1161), the organizational documents of the converted entity can be established by the same less-than-unanimous approval or consent. The requirements of this section are mandatory (*see* proposed section 178.0105(3)(o)), although the plan may also include any other provision relating to the conversion that is not prohibited by law.

Proposed section 178.1143 addresses both the requirements to approve a conversion in which a domestic partnership is the converting or converted entity and also the requirements for amendment or abandonment of a conversion after it has been approved but before it becomes effective. Thus, proposed section 178.1143 covers the same basic concepts addressed in RUPA sections 1143 and 1144, although the RUPA provisions apply only if a domestic partnership is the converting entity. As with RUPA, the Wisconsin default rule requires unanimous approval of all of the partners of any converting domestic partnership. However, as noted above, this unanimity requirement may be varied by a written provision in the partnership agreement that does not impair the rights of a partner under proposed section 178.1161 (*see* proposed section 178.0105(3)(n)). In other respects also, proposed section 178.1143 parallels the corresponding provisions in the proposed bill relating to mergers, interest exchanges and domestications. *See* the comments to proposed section 178.1123 regarding interest holder liability and the effects of section 178.1161, which are also relevant for conversions.

Proposed section 178.1144 describes the requirement to file articles of conversion for a plan of conversion in which a domestic partnership is the converting or converted entity. It is based on RUPA section 1145. Proposed section 178.1144 also parallels similar provisions in the proposed bill relating to mergers, interest exchanges and domestications. *See* the comments to proposed section 178.1124, which is analogous, regarding the use of fictitious names in the public filing, the requirement that the articles state that the plan is on file at the principal office of the converted entity and that a copy of it will be provided upon request to any person that was an interest holder of the converting entity, and the effective date and time of the transaction.

Proposed section 178.1145 describes the effect of a conversion in which a domestic partnership is the converting or converted entity. It is based on RUPA section 1146. Section 178.1145 also parallels the corresponding provisions in the proposed bill relating to mergers, interest exchanges, and domestications. *See* the comments related to proposed section 178.1125 (relating to mergers). Just as with mergers, conversions can have very significant tax consequences. For example, the conversion of a corporation into a partnership would normally be a fully taxable transaction at both the corporate and shareholder level. *See* I.R.C. §§ 311(b), 336(a). It may also trigger taxability to the partners of any income earned by the surviving partnership entity. *See* I.R.C. § 721. Similarly, the conversion of a charitable chapter 181 nonstock corporation into a four-profit partnership can have different, but also very serious, tax consequences. *See, e.g., Caracci v. Comm'r of Internal Revenue*, 456 F.3d 444, No. 02-60912 (5th Cir. July 11, 2006). Again, just as with mergers, no attempt is made in chapter 178 to address the tax consequences of the entity structure transactions covered by Subchapter XI. In fact, consistent with current Wisconsin law for other entities, proposed section 178.1145(1)(am)4. specifically provides that the paragraph defining the corporate law impact of a conversion “does not affect liability under any taxation laws.” Business owners and practitioners are obviously well advised to engage competent professional tax assistance.

As the comments to RUPA section 1146 emphasize, a conversion is not a conveyance, transfer or assignment, does not require the entity to wind up its affairs and does not constitute or cause dissolution of the entity. The converted entity is the same entity as the converting entity. Interest holder liability with respect to debts, obligations, and other liabilities of the entity under the governing law applicable to the converting or converted entity is addressed in proposed section 178.1145(1)(am), which is similar to RUPA sections 1146(c) and (d). Proposed section 178.1145 (2)(a), which is based on section 1146(e) of RUPA, makes the Department of Financial Institutions the agent for service of process against any foreign converted entity in specified matters. Proposed section 178.1145(2)(b) provides that any foreign converted entity must pay any amount to which dissenting shareholders or other interest holders of a domestic converting entity are entitled.

Domestication

Proposed sections 178.1151 to 178.1155 authorize a “domestication” whereby a Wisconsin partnership can be simultaneously governed both by Chapter 178 and by the law applicable to a non-United States entity (whether or not it is the same type of entity under its non-United States governing law), provided the domesticated entity meets the definition of a “partnership” under this chapter and the transaction is not prohibited by the governing law applicable to the non-United States entity. As noted in the general comments to proposed Subchapter XI, these provisions are based on (and generally similar to) the domestication provisions (sections 388 to 390) of the Delaware General Corporation Law and are an expansion of existing Wisconsin business entity law. As also noted in those comments, this “domestication” concept has no counterpart under RUPA section 1151, which uses the term “domestication” to refer to a change of a domestic limited liability partnership into a foreign limited liability partnership or vice versa.

The actual language of proposed section 178.1151 itself parallels the corresponding provisions relating to mergers, interest exchanges, and conversions. Therefore, the comments relative to those provisions are also relevant to domestications. In addition, it is important to note that, after domestication under these provisions, the “governing law” of the domesticated entity includes both Wisconsin law and the law of the jurisdiction from which or to which the entity is domesticated.

Proposed section 178.1152 describes the requirements for a plan of domestication. The plan must include “[t]he organizational documents of the domesticated entity that are to be in a record immediately after the domestication becomes effective.” Note that if a plan of domestication can be approved or amended with less-than-unanimous approval or consent of the domesticating entity (proposed section 178.0105(3)(n) authorizes less-than-unanimous approval pursuant to a written provision in the partnership agreement that does not impair the rights of a partner under proposed section 178.1161), this means that the organizational documents of the domesticated entity can be established by the same less-than-unanimous approval or consent. The requirements of proposed section 178.1152 are mandatory (*see* proposed section 178.0105(3)(o)), although the “plan of domestication may contain any other provision relating to the domestication not prohibited by law.”

Proposed section 178.1153 addresses the requirements to approve a domestication by a domesticating Wisconsin partnership (whereas a plan of domestication by a non-United States domesticating entity must be approved pursuant to its governing law). Proposed section 178.1153 also provides procedures for amending or abandoning a plan of domestication after it has been approved but before it becomes effective. The Wisconsin default rule under proposed section 178.1153(1) requires unanimous approval of the partners of any domesticating domestic partnership, although, as noted above, this unanimity requirement may be varied by a written provision in a partnership agreement that does not impair the rights of a partner under proposed section 178.1161 (*see* proposed section 178.0105(3)(n)). Proposed section 178.1153 parallels the corresponding proposed provisions relating to mergers, interest exchanges, and conversions. *See* the comments to proposed sections 178.1123 and 178.1161, which are also relevant to domestications.

Proposed section 178.1154 describes the requirement to file articles of domestication for a plan of domestication subject to Chapter 178. Proposed section 178.1154 also parallels similar provisions in Subchapter XI relating to mergers, interest exchanges, and conversions. *See* the comments to proposed section 178.1124, which is analogous to proposed section 178.1154, regarding the use of fictitious names in the public filing, the requirement that the articles state “that the plan . . . is on file at the principal office of the domesticated entity” and that a copy of the plan is available upon request “to any person that was an interest holder in the domesticating entity,” and the “effective date and time of the articles of domestication.”

Restrictions on Approval

Proposed section 178.1161 prohibits a merger, interest exchange, conversion, or domestication of a Wisconsin partnership that would cause specified material adverse effects or impose disparate treatment on a partner unless either (1) “[t]he partner consents to the merger, interest exchange, conversion or domestication” or (2) “[t]he partnership offers to have the partner’s interest in the partnership purchased . . . in the manner provided in s. 178.0701 for a partner who has not wrongfully dissociated without taking into account any modification . . . under the partnership agreement.” The specified material adverse effects under proposed section 178.1161(1)(a) include a material increase in the partner’s “current or potential obligations . . . whether as a result of becoming subject to interest holder liability . . . becoming subject to affirmative or negative obligations under the organizational documents of the entity, becoming subject to tax on the income of the entity, or otherwise.” As a consequence, becoming subject to fiduciary obligations as a general partner of a surviving partnership, or as a member in a member-managed limited liability company, could be sufficient to trigger this provision. Disparate treatment from other partners holding the same class of interests also triggers the application of proposed section 178.1161(1)(b).

Proposed section 178.0701(2) provides for a buyout “price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the [dissociated partner].” Thus, proposed section 178.1161 gives nonconsenting partners specified protective rights (somewhat akin to dissenters rights in corporate transactions) in merger, interest exchange, conversion, or domestication transactions where they might be subjected to a material increase in their potential obligations and/or treated differently from other

partners of the same class. Partners' rights under proposed section 178.1161 cannot be impaired by a partnership agreement (*see* proposed section 178.0105(3)(n)).

Respectfully submitted this 8th day of January, 2016.

**Partnership Committee
Business Law Section
State Bar of Wisconsin**

Thomas J. Nichols, Chairman
Joseph D. Masterson
James N. Phillips
Leslie M. Van Buskirk

APPENDIX A

**Procedural Provisions Crosswalk
Department of Financial Institutions**

<u>Subject</u>	<u>Proposed Chapter 178</u>	<u>Chapter 180</u>
Definition of Department of Financial Institutions.	178.0102 (3m)	180.0103 (6m)
Definition of domestic.	178.0102 (4c)	180.0103 (5)
Definition of foreign.	178.0102 (4t)	180.0103 (9)
Knowledge; notice.	178.0103 (6) (a)-(c)	180.0141
Operating documents.	178.0105	180.0206
Filing requirements.	178.0113 (1)-(1m), (3), (5)	180.0120
Signing of records filed with the department.	178.0108(1)-(3)	180.0120(3)
Forms.	178.0113 (5)	180.0121
Filing and service fees.	178.0120 (1)-(2)	180.0122
Effective date and time.	178.0114 (1)-(3)	180.0123
Effect of department's filing or refusal to file.	178.0117(5)	180.0125(4)
Evidentiary effect of copy of filed document.	178.0120 (3)	180.0127
Confirmation of status.	178.0121	180.0128
Penalty for false document.	178.0120 (4)	180.0129
Formation documents.	178.0105	180.0202
Statement of authority.	178.0303	180.0202(2)-(4); 180.0302; 180.0303
Claims against dissolved entity.	178.0807; 178.0808	180.1407
Recognition status change.	178.0901	180.1503
Amendment or cancellation.	178.0901(6)	180.1001
Permitted names.	178.0902(4r)-(8r)	180.0401
Grounds for administrative revocation.	178.09031	180.1420
Administrative revocation procedure.	178.09032	180.1421
Reinstatement after administrative revocation.	178.0904	180.1422
Appeal from denial of reinstatement.	178.0905	180.1423
Reservation of name.	178.0906	180.0402
Registration of name.	178.0907	180.0403
Registered agent and registered office.	178.0908	180.0501
Change of registered agent or registered office.	178.0909	180.0502
Resignation of registered agent.	178.0910	180.0503
Change registered agent's name or address.	178.0911	180.0502(3)

Annual report.	178.0913	180.1622
Foreign entity registration requirement.	178.1002(1)	180.1501(1)
Filing registration statement as a foreign entity.	178.1003	180.1503
Amending foreign entity registration requirements.	178.1004	180.1504
Foreign entity name.	178.1006(1)	180.1506(1)
Withdrawal of foreign entity's registration.	178.1007; 178.1008; 178.1011	180.1520
Grounds for administrative revocation of foreign entity's registration.	178.10101	180.1530
Procedure for administrative revocation of foreign entity's registration.	178.10102	180.1531
Reinstatement after administrative revocation of foreign entity's registration.	178.10103(2)	180.1532(2)
Appeal from denial of reinstatement of foreign entity's registration.	178.10103	180.1532
Registered agent and registered office of foreign entity.	178.0908	180.1507
Change of registered agent or registered office of foreign entity.	178.0909	180.1508
Resignation of registered agent of foreign entity.	178.0910	180.1509
Merger authorized.	178.1121	180.1101(1)
Plan of merger.	178.1122	180.1101(2)-(3)
Amendment or abandonment of merger.	178.1123(3)	180.1103(6)
Filings required for merger.	178.1124(1)-(3)	180.1105(1)
Effective date of merger.	178.1124(4)	180.1105(2)
Effect of merger: Agent for service of process for claims from dissenters.	178.1125(2)(a)	180.1106(3)(a)
Interest exchange authorized.	178.1131	180.1102(1)
Plan of interest exchange.	178.1132	180.1102(2)-(4)
Amendment or abandonment of plan of interest exchange.	178.1133(3)	
Filings required for interest exchange.	178.1134(1)-(2)	180.1105(1)
Effective date of interest exchange.	178.1134(3)	180.1105(2)
Interest Exchange: Agent for service of process for claims from dissenters.	178.1135(5)(a)	180.1106(3)(a)
Conversion authorized.	178.1141	180.1161(1)
Plan of conversion.	178.1142	180.1161(3)
Amendment or abandonment of plan of conversion.	178.1143(3)	-
Filings required for conversion.	178.1144(1)-(3)	180.1161(5)
Effective date of conversion.	178.1144(4)	180.0123; 180.1161(3)(e)

Conversion: Agent for service of process for claims from dissenters.	178.1145(2)(a)	-
Domestication authorized.	178.1151	-
Plan of domestication.	178.1152	-
Amendment or abandonment of plan of domestication.	178.1153(3)	-
Filings required for domestication.	178.1154(1)-(2)	-
Effective date of domestication.	178.1154(3)	-
Restrictions.	178.1161	180.1141