PROSKAUER ROSE LLP®

Client Alert

A report for clients and friends of the Firm

11 September 2008

UK Limited Partnerships: Time for Reform?

Overview

The UK Government is, after more than 100 years, proposing to update and modernise the law relating to limited partnerships. The use of limited partnerships today has far exceeded the purposes contemplated by the legislation in 1907 and the UK Government believe change is needed. The aim of the proposed changes is to remove doubts about the way in which limited partnerships may validly operate and correct legal uncertainties that have developed over time.

The key changes relate to:

- Establishment and registration of a Limited Partnership;
- Liability of Limited Partners to third parties; and
- Rights and obligations of General and Limited Partners.

The UK is the preferred choice of jurisdiction for many investment funds using the Limited Partnership structure. The Government wishes to ensure that the correct legislative framework is in place to ensure that this position is retained. The UK's number one slot can no longer be presumed as Fund Managers are increasingly "jurisdiction shopping".

Background

A joint report by the Law Commission and the Scottish Law Commission was published in November 2003 recommending the reform of limited partnership law. The Department of Trade and Industry (now the Department for Business, Enterprise and Regulatory Reform ("BERR")) carried out a regulatory and economic impact assessment in 2004 on the Law Commissions' proposals for limited partnership law reform. In August 2008, BERR published a consultation document called, "Reform of Limited Partnership Law: Legislative Reform Order". Responses to this consultation paper are to be submitted by no later than 21 November 2008. The Government expects these changes to take effect from 1 October 2009.

Key proposed changes include:

1. Establishment, Registration and Deregistration of a Limited Partnership

- A limited partnership will exist from the date of its registration at Companies House. The registrar's certificate will be conclusive of registration notwithstanding any errors the general partners may have made in the registration formalities. Limited partners acquire the benefit of limited liability on the date of registration. Importantly, as this clarifies an ambiguity which has perturbed limited partnership lawyers for many years, faults in any registration formalities will not in themselves prejudice or remove that limited liability. This may have an impact on the structuring of English limited partnerships and, in particular, the use of Scottish limited partnerships as limited partners.
- The key address for a limited partnership will be its registered office (as with a limited company) instead of its principal place of business.
- There will be a new procedure for de-registering limited partnerships. De-registration can either be voluntary (if the partners agree) or by Companies House on their own initiative in certain cases.

2. Liability of Limited Partners to third parties

- The key characteristic of a limited partnership is that the liability of the limited partners is limited to the amount of their capital contribution, provided they have taken no part in the management of the limited partnership. What exactly constitutes taking part in the management of the limited partnership has been a matter of considerable, and often heated, debate. Significant changes to this general area are proposed.

- Most importantly, there will be a list of activities that limited partners will be allowed to undertake without jeopardising their limited liability cover; for example, limited partners can take part in decisions about (i) the variation of the limited partnership agreement and/or (ii) whether to approve or veto a type of investment by the limited partnership. (For ease of reference, the current draft list of permitted actions is attached to this client alert.)

- The proposed permitted activities will allow limited partners a strategic role on the investment side without fear of losing their limited liability status. This could lead to further investor activism and will provide limited partners with greater power to monitor their fund investments.

- Limited partners will no longer be obliged to make any capital contribution to join the limited partnership, principally because BERR feels that the protection to creditors of limited partners being liable up to the amounts of their capital contributions is illusory in view of the negligible amounts of capital actually contributed. Limited partners, nonetheless, will be able to contribute capital if they so wish.

- Limited partners should be able to withdraw capital during the life of the limited partnership (subject to any agreement between the limited partners). Such withdrawal must be registered at Companies House and any limited partner doing so will remain liable for the debts and liabilities of the limited partnership up to the amount of capital withdrawn until the end of the period of twelve months after the registration date. The current position, that capital cannot be returned until the limited partnership is wound up, has resulted in the very small capital to very large loan commitment structure. If capital can now be returned before a winding-up, this may change.

3. Rights and Obligations of General and Limited Partners

- A limited partner will not owe certain statutory duties which a normal partner owes (for example, a limited partner will not have to account to other limited partners for profits made elsewhere).

- An assignee of a limited partner can replace the assignor as a limited partner if all the general partners agree or the substitution is made in accordance with the limited partnership agreement.

English-registered limited partnerships will continue, under the proposed changes, not to have their own separate legal personality. Scottish-registered limited partnerships will continue to have their own legal personality.

4. Transitional Arrangements

BERR state that all limited partnerships must re-register under the new regime. On re-registration, the limited partnership will receive a new certificate but it will retain its original identity and its registration number. Companies House will write to the address held for the limited partnership inviting it to re-register. If a limited partnership does not respond, Companies House will write again, but if it has not responded after a total of four letters over a two year period, then Companies House will proceed to de-register the limited partnership.

The information contained in this guide is offered for general guidance only and may be changed from time to time.

Please contact Proskauer Rose LLP for specific advice before acting on any matter referred to in this guide.

BERR CONSULTATIVE PROPOSALS
Permitted activities of Limited Partners
SCHEDULE 2 Article 5(2)
Schedule to be inserted in the 1890 Act

Strategic decisions

1. Taking part in a decision about the variation of the limited partnership agreement.

2. Taking part in a decision about whether to approve or veto a type of investment by the limited partnership.

3. Taking part in a decision about whether the general nature of the limited partnership business should change.

4. Taking part in a decision about whether to dispose of the limited partnership business or to acquire another business.

5. Taking part in a decision about whether a person should become or cease to be a limited partner.

6. Taking part in a decision about whether the limited partnership should end.

7. Taking part in a decision about how the limited partnership should be wound up.

Enforcement of rights

8. Enforcing his rights under the limited partnership agreement (unless those rights are to carry out management functions).

Approving accounts of limited partnership

9. Approving the accounts of a limited partnership.

Contract work

10. Being engaged under a contract by the limited partnership or by a general partner in the limited partnership (unless the contract is to carry out managerial functions).

Directorships etc.

11. Acting in his capacity as a director or employee of, or a shareholder in, a corporate general partner.

Conflicts of interest between limited and general partners

12. Taking part in a decision which involves an actual or potential conflict of interest between a limited partner (or limited partners) and a general partner (or general partners).

Consultation and advice

13. Discussing the prospects of the limited partnership business.

14. Consulting or advising a general partner, or the general partners, about the activities of the limited partnership or about its accounts (including doing so as a member of an advisory committee of the limited partnership).

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Further Information

Should you require any further information on the matters referred to in this bulletin, please call your usual point of contact at Proskauer Rose LLP or:

Matthew D.J. Hudson, London
+44.(0).20.7016.3601 – mhudson@proskauer.com

Mary B. Kuusisto, London
+44.(0).20.7016.3611 – mkuusisto@proskauer.com

Daniel Schmidt, Paris
+33.1.53.05.68.30 – dschmidt@proskauer.com

Bruce Lieb, New York
+1.212.969.3320 – blieb@proskauer.com

Robin Painter, Boston
+1.617.526.9790 – rpainter@proskauer.com