

**DRAFTING LLC DOCUMENTS UNDER THE BUSINESS
ORGANIZATIONS CODE**

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State Bar of Texas
ADVANCED BUSINESS LAW STRATEGIES
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CHAPTER 6.2

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STATE BAR OF TEXAS
CONTINUING LEGAL EDUCATION

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UNDER
THE BUSINESS ORGANIZATIONS CODE**

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DRAFTING LLC DOCUMENTS

✓ On Jan 1, 2010, the BOC applies to:

- All domestic entities existing on January 1, 2006;
- All foreign entities registered on or before January 1, 2006;
- All old entity statutes are repealed.

DRAFTING LLC DOCUMENTS (cont.)

✓Limited Liability Companies

✓Issues:

- What needs to be done?
- Is the prior entity still valid and functioning?
- Can you still give opinions?
- Have the ground rules changed?

✓BOC §§ 402.005(a)(2) & (3) – provide that a domestic non-Code entity is not considered to fail to comply if entity certificate does not comply – however, at time of next amendment (for other purposes), must amend to comply.

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DRAFTING LLC DOCUMENTS (cont.)

✓BOC § 402.006 – BOC applicable to all actions, contracts, transactions, managerial officials, owners after 1/1/2010.

✓BOC § 402.007 – Indemnification – “Chapter 8 governs any proposed indemnification by a domestic entity after ...[1/1/2008], regardless of ... [when] events occurred....”

✓BE CAREFUL – BOC § 8.002 provides that Chapter 8 does not apply to an LLC. Section does provide that LLC may adopt provisions of Chapter 8 or other provisions relating to indemnification, advancement of expenses, or insurance or other arrangements to indemnify governing persons. Note: Must check indemnity provisions in existing LLCs.

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DRAFTING LLC DOCUMENTS (cont.)

- ✓BOC § 1.006, “Synonymous terms” – to extent not inconsistent with the provisions of Governing Documents where such term may be found, in any Governing Documents using any listed term includes the BOC term – *i.e.*, reference to “Articles of Organization” includes “Certificate of Formation”; “stock” includes “shares”; “Regulations” includes “Company Agreement”.
- ✓Comment – Unless you need to otherwise amend LLC Articles of Organization - I believe they continue with full validity.

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DRAFTING LLC DOCUMENTS (cont.)

- ✓Possible amendments to Articles of Organization:
 - “Articles of Organization” to “Certificate of Formation” - See BOC § 1.002(6), BOC § 3.005
 - Statement of type of entity: “Limited Liability Company” - See BOC § 3.005
 - “Incorporator” to “Organizer” – requirement to have legal ability to contract - See BOC § 3.004
 - Perpetual existence is default rule, not required in certificate - See BOC § 3.003
 - Statement as to type of management – See BOC § 3.010
 - Statement as to indemnification – See BOC § 8.002

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DRAFTING LLC DOCUMENTS (cont.)

✓Possible amendments to Articles of Organization (cont.):

- Change any references in articles to “Regulations” to “Company Agreement”
- See BOC § 101.054. Be careful that your prior articles or regulations don’t contain modifications to the statutory law that cannot be modified.
 - requirements for an enforceable promise – See BOC § 101.151
 - prohibited distributions and the duty to return – See BOC § 101.206
 - supplemental records required for LLCs – See BOC § 101.502
 - rights to examine records & certain information – See BOC § 101.502

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DRAFTING LLC DOCUMENTS (cont.)

✓BOC § 101.054 – Be aware that waiver or modification of certain statutory provisions is prohibited with respect to the following provisions:

- 101.101(b), 101.151, 101.206, 101.501, 101.502;
- Chapter 1, if provision is used to interpret a provision or define a word or phrase;
- Chapters 4,5,7,10,11,or 12 other than 11.056;
- Chapter 3, except Subchapters C and E;
- Chapter 2, except 2.104(c)(2), 2.104(c)(3), or 2.113.

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DRAFTING LLC DOCUMENTS (cont.)

✓The Company Agreement

- The following is an outline of a Company Agreement.
- The outline contains comments that relate to the provisions normally contained in that article.

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DRAFTING LLC DOCUMENTS (cont.)

✓Article 1 – Definitions

- Make sure that “Agreement” is defined as the Company Agreement and make sure that references to “Regulations” are changed.
- Note that BOC § 1.001(54) “Membership Interest” definition includes only economic rights and excludes management rights.
- Question: When drafting, if the LLC is to have a manager, the Membership Interest should not include management rights; however, if the LLC is a member managed LLC, then Membership Interests may include management rights.

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 2 – Organizational Matters
 - ✓ 2.1 Formation
 - ✓ 2.2 Name
 - ✓ 2.3 Name and Address of Members
 - ✓ 2.4 Registered Office and Registered Agent
 - ✓ 2.5 Principal Office and Other Offices
 - ✓ 2.6 Purpose
 - ✓ 2.7 Certificate; Foreign Qualification
 - ✓ 2.8 Term
 - ✓ 2.9 Merger, Conversion, Interest Exchange

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 2 – Organizational Matters
 - LLCs are formed when filing of Certificate of Formation is effective. See BOC § 3.001(c)
 - Company Agreements may be oral; however, promises to make a capital contribution must be in writing and signed. See BOC § 101.151
 - BOC requires that a Texas entity have a registered office and registered agent in Texas. See BOC 5.201
 - Filing entities have perpetual existence unless Governing Documents state otherwise. So, no need to include a stated term in Certificate of Formation.

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 3 – Membership
- ✓ 3.1 Initial Members
- ✓ 3.2 Sharing Ratio
- ✓ 3.3 Limitations on Members' Rights
- ✓ 3.4 New Members

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 3 – Membership
 - BOC § 101.101 – requires at least one member – however– if LLC has managers, LLC may not have members during a reasonable period after formation and before first member is admitted. Also, not required to have members during period from date of termination of membership of last remaining member and the date of an agreement to continue is executed.
 - BOC § 101.102 – a person is not required to become a member to make a contribution or assume an obligation to make a contribution. Also, if others own interests, Company Agreement may provide admission as a member without acquiring a membership interest.

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DRAFTING LLC DOCUMENTS (cont.)

✓Article 3 – Membership (cont.)

- BOC § 101.105 – After formation, additional interests may be issued with approval of all members. This provision may be modified or waived.
- BOC § 101.107 – member may not withdraw or be expelled.
- BOC § 101.112 – charging orders:
 - New provision in 2007 – “entry of charging order is the exclusive remedy by which judgment creditor of a member or of any owner *** may be satisfied a judgment out of the ***debtor’s membership interest.”
 - Comment: Veil piercing is used sometimes to reverse pierce the veil.

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DRAFTING LLC DOCUMENTS (cont.)

✓Article 4 – Capital Contributions

- ✓4.1 Contribution
- ✓4.2 Additional Contribution
- ✓4.3 No Additional Contributions
- ✓4.4 Return of Contributions
- ✓4.5 Loans by Members
- ✓4.6 Capital Accounts
- ✓4.7 Other Provisions With Respect to Capital Contributions

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DRAFTING LLC DOCUMENTS (cont.)

✓ Article 4 – Capital Contributions

- Capital contributions in kind require special handling and documentation.
- BOC § 101.153(b) provides a wide list of remedies for a failure to make an additional capital contribution.
- Additional capital contributions are not required unless agreement specifies. Must have a signed agreement to make promise to pay enforceable. Language for additional contribution must be precise.

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DRAFTING LLC DOCUMENTS (cont.)

✓ Article 5 – Distributions and Allocations of Profit & Loss

- ✓5.1 Distributions of Distributable Cash
- ✓5.2 Prohibited Distributions
- ✓5.3 Reserve
- ✓5.4 Distribution in Kind
- ✓5.5 Withholding
- ✓5.6 Allocation of Profits and Losses

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DRAFTING LLC DOCUMENTS (cont.)

✓ Article 5 – Distributions and Allocations of Profit & Loss

- BOC § 101.201 – default distribution is on basis of agreed value of contributions made as stated in records.
- Cash distributions only unless provided in agreement.
- BOC § 101.206 – distribution prohibited if afterward total liabilities, other than membership interest liability and non-recourse liability, exceed the fair value of total assets. Remedy is return of distribution if member had knowledge of violation.

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DRAFTING LLC DOCUMENTS (cont.)

✓ Article 6 – Management; Rights and Duties of Managers

- ✓6.1 Management of Company Affairs
- ✓6.2 Specific Powers
- ✓6.3 Limitations on Powers and Authority of the Managers
- ✓6.4 Reliance on Authority
- ✓6.5 Compensation
- ✓6.6 Reimbursement
- ✓6.7 Standards of Performance
- ✓6.8 Waiver of Liability for Certain Actions

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DRAFTING LLC DOCUMENTS (cont.)

✓ Article 6 – Management; Rights and Duties of Managers

▪ Limitation on Liability – Fiduciary Duties

- BOC § 101.401 provides that the Company Agreement may expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, officer or other person has to the company or to a member or manager.
- BOC § 7.001 limits the liability of governing persons, BUT subsections (b) and (c) do not apply to LLCs. However, subsection (d) does apply and it permits the restriction or limitation of liability of a governing person to the extent permitted under § 101.401.

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DRAFTING LLC DOCUMENTS (cont.)

- To my knowledge, the Texas courts have not come out and said that managers and officers have duties which are then defined as fiduciary duties to the limited liability company or its members.
- The BOC does not define the duties of managers, members, officers or other persons to a limited liability company or to its members.
- Under the BOC, managers, officers and each other person vested with authority is an agent of the company for the purpose of carrying out the company's business.
- An act taken by an agent for the purpose of apparently carrying out the company's ordinary course of business binds the company. The agent owes a fiduciary duty to its principal.

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DRAFTING LLC DOCUMENTS (cont.)

- In my judgment, it should not be long before a Texas court clearly holds that managers have fiduciary duties to the LLC.
- The question becomes, what is the standard of discharge of the duty of care? Is it gross negligence or something less.
- Also, what is not clear is the extent to which the courts will import fiduciary duty concepts from Texas corporate case law into their consideration of LLC cases. Will it be the same as courts in Texas have used for director liability?

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 7 – Appointment and Meetings of Managers
 - ✓ 7.1 Voting Rights of a Manager
 - ✓ 7.2 Number; Qualification; Election; Term
 - ✓ 7.3 Change in Number
 - ✓ 7.4 Removal
 - ✓ 7.5 Vacancies
 - ✓ 7.6 Election
 - ✓ 7.7 Meetings
 - ✓ 7.8 Place of Meetings

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 7 (cont.)
- ✓ 7.9 Quorum; Vote of a Majority of Managers
- ✓ 7.10 Notice of Meetings
- ✓ 7.11 Waiver of Notice
- ✓ 7.12 Minutes of Meeting
- ✓ 7.13 Action Without Meeting
- ✓ 7.14 Action by Communications Equipment
- ✓ 7.15 Proxies

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 7 – Appointment and Meetings of Managers
 - BOC § 101.355 – The affirmative vote of the majority of the governing persons, members or committee members of an LLC present at a meeting at which a quorum is present constitutes an act of the governing authority, members, or committee of the company, as appropriate.
 - BOC § 101.354 – Each governing person, member, or committee member of an LLC has an equal vote at a meeting of the governing authority, members, or committee of the LLC.
 - Comment: When reviewing your Company Agreement, make sure that the voting provisions reflect the wishes of your client. Unless otherwise specified, the votes are by number of persons not by percentages.

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DRAFTING LLC DOCUMENTS (cont.)

✓ Article 7 – Appointment and Meetings of Managers (cont.)

- BOC § 101.358 – (i) applies to actions required to be taken at an annual or special meeting of the governing authority, the members, or a committee of the governing authority of an LLC; and (ii) an action may be taken without holding a meeting, providing notice, or taking a vote if a written consent or consents stating the action to be taken is signed by the number of persons voting necessary to have at least the minimum number of votes to approve the matter.

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DRAFTING LLC DOCUMENTS (cont.)

✓ Article 7 – Appointment and Meetings of Managers (cont.)

- BOC § 101.359 – members or managers may take action with or without a meeting in any manner permitted by this title, Title 1 or the governing documents. Unless otherwise provided by the governing documents, an action is effective if it is taken: (1) by an affirmative vote of those persons having at least the minimum number of votes necessary to take action at a meeting; (2) with consent of each member of LLC, which may be established by: (A) the member's failure to object to the action in a timely manner; (B) consent to the action in writing; or (C) any other means reasonably evidencing consent.

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DRAFTING LLC DOCUMENTS (cont.)

✓Article 7 – Appointment and Meetings of Managers (cont.)

- BOC § 101.359 – Comment: This section presents possible novel solution to the requirements of BOC § 101.358 for a manual signature on a consent.
- Suppose that you were to provide in the Company Agreement that the Members could evidence their consent by an electronic affirmation (but not requiring a signature) or requiring an “opt out” to vote against a proposal.

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DRAFTING LLC DOCUMENTS (cont.)

✓Article 8 – Officers and Agents

- ✓8.1 Number; Qualification; Election; Term
- ✓8.2 Removal
- ✓8.3 Vacancies
- ✓8.4 Authority
- ✓8.5 Chief Executive Officer
- ✓8.6 President
- ✓8.7 Vice Presidents
- ✓8.8 Secretary
- ✓8.9 Treasurer
- ✓8.10 Compensation

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DRAFTING LLC DOCUMENTS (cont.)

✓ Article 8 – Officers and Agents

- Limitation on liability – Standards of discharge of duty
 - BOC § 101.401 provides that the Company Agreement may expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, officer or other person has to the company or to a member or manager.
 - BOC § 7.001 limits the liability of governing persons, BUT subsections (b) and (c) do not apply to LLCs. However, subsection (d) does apply and it permits the restriction or limitation of liability of a governing person to the extent permitted under § 101.401.

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DRAFTING LLC DOCUMENTS (cont.)

✓ Article 8 – Officers and Agents (cont.)

- Limitation on liability (cont.)
 - The case law has not yet come out and said that managers and officers have duties which are then defined as fiduciary duties.
 - The questions become, what is the standard of discharge of the duty of care, “gross negligence” or something less? Will it be the same as the courts in Texas have held for directors?

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DRAFTING LLC DOCUMENTS (cont.)

✓ Article 8 – Officers and Agents (cont.)

- Limitation on liability (cont.)
 - See also BOC § 3.102 “Rights of Governing Persons in Certain Cases” and § 3.105 “Rights of Officers in Certain Cases” which provide that a governing person and an officer in discharging a duty or exercising a power, may, in good faith and with ordinary care, rely on information, opinions, reports and other financial data prepared by an officer, legal counsel, cpa, investment banker, a professional, or a committee.
 - This provision is new to LLCs.

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DRAFTING LLC DOCUMENTS (cont.)

✓ Article 8 – Officers and Agents (cont.)

- Limitation on liability (cont.)
 - Careful thought should be given to drafting the standards for officers and managers to discharge their duties, as well as the standard for liability, and finally, when a manager or officer will be indemnified against liability.

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 9 – Meetings and Consents of Members
 - ✓ 9.1 Voting Rights
 - ✓ 9.2 Voting List
 - ✓ 9.3 Record Date
 - ✓ 9.4 Method of Voting
 - ✓ 9.5 Meetings
 - ✓ 9.6 Notice
 - ✓ 9.7 Waiver of Notice
 - ✓ 9.8 Place of Meetings
 - ✓ 9.10 Action Without Meeting
 - ✓ 9.11 Action by Conference Equipment

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 9 – Meetings and Consents of Members
 - See Notes under Article 7.
 - See BOC § 6.002 – electronic meetings including conference telephone, other suitable electronic communications systems including internet and videoconferencing so that each person can participate in the meeting and communicate with all other persons participating in the meeting.

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DRAFTING LLC DOCUMENTS (cont.)

✓Article 9 – Meetings and Consents of Members (cont.)

- Notice -- BOC § 6.051(a)(2) provides that the notice must state the date and time of the meeting and if the meeting is held solely or in part by using a conference telephone or other communications system authorized by Section 6.002, the form of communications system to be used *** and the means of accessing the communications system.
- Be careful; if the form of communications system is not authorized by Section 6.002, the notice must contain the location of the meeting.
- Notice – BOC § 6.051(b)(2) provides that if notice is sent by facsimile or electronic message, it is considered given when “transmitted to a facsimile number or an electronic message address provided by the person, or to which the person consents, for the purpose of receiving notice.” Probably good idea to have rule in Company Agreement so not overlooked.

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DRAFTING LLC DOCUMENTS (cont.)

✓Article 9 -- Meetings – Alternative Forms:

- BOC § 6.202 provides the Certificate of Formation may authorize the owners to take action without holding a meeting, providing notice or taking a vote if the owners having at least the minimum number of votes that would be necessary to take action sign a written consent stating the action taken.
- In addition, the consent must include the date each owner signs the consent and is effective to take the action only if the consents are delivered not later than the 60th day after the earliest dated consent.
- The entity must promptly notify each owner who did not sign a consent.

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DRAFTING LLC DOCUMENTS (cont.)

✓Article 9 -- Meetings – Alternative Forms:

- BOC § 101.358 – Notwithstanding Sections 6.201 and 6.202, (i) § 101.358 applies to actions required to be taken at an annual or special meeting of the governing authority, the members, or a committee of the governing authority of an LLC; and (ii) an action may be taken without holding a meeting, providing notice, or taking a vote if a written consent or consents stating the action to be taken is signed by the number of persons voting necessary to have at least the minimum number of votes to approve the matter.

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DRAFTING LLC DOCUMENTS (cont.)

✓Article 9 -- Meetings – Alternative Forms:

- BOC § 101.359 – members or managers may take action with or without a meeting in any manner permitted by this title, Title 1 or the governing documents. Unless otherwise provided by the governing documents, an action is effective if it is taken: (1) by an affirmative vote of those persons having at least the minimum number of votes necessary to take action at a meeting; (2) with consent of each member of LLC, which may be established by: (A) the member's failure to object to the action in a timely manner; (B) consent to the action in writing; or (C) any other means reasonably evidencing consent.

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 10 – Contracts with Members and Indemnification of Members, Managers and Officers
 - ✓ 10.1 Interested Managers, Officers and Members
 - ✓ 10.2 Disclosure, Approval; Fairness
 - ✓ 10.3 Indemnifications

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 10 – Contracts with Members and Indemnification of Members, Managers and Officers
 - Indemnification
 - The indemnification provisions of any existing LLC, particularly those formed before 1/1/2006, should be reviewed because of the changes made by the BOC.
 - BOC § 8.002(a) provides that Chapter 8 does not apply to LLCs.
 - On the other hand, BOC § 8.002(b) provides that an LLC may adopt provisions of the chapter which relate to indemnification, advancement of expenses or insurance or other arrangements. What this means is that after 1/1/2010, there is no general body of law providing for indemnification in LLCs.

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DRAFTING LLC DOCUMENTS (cont.)

✓Article 10 – Contracts with Members and Indemnification of Members, Managers and Officers (cont.)

- Indemnification (cont.)
 - So, a provision which says that “indemnification is permitted to the extent provided by law” or some similar language is no longer effective.
 - BOC § 101.402 confirms that an LLC may indemnify a person, pay in advance or reimburse expenses incurred by a person and purchase insurance. Person includes managers and officers.
 - The choices are, (i) adopt Chapter 8 or (ii) prepare your own language based on Chapter 8. Chapter 8 is taken from the TBCA.

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DRAFTING LLC DOCUMENTS (cont.)

✓Article 11 – Rights, Obligations and Representations of Members

- No comments

✓Article 12 – Bank Accounts, Investments, General Accounting, Reports, and Determination of Fair Value

- No comments

✓Article 13 – Taxes

- No comments

✓Article 14 – Restrictions on Certain Transfers and Competition

- No comments

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DRAFTING LLC DOCUMENTS (cont.)

- ✓Article 15 – Buy-Out Rights
 - ✓15.1 Right to Purchase Upon Death
 - ✓15.2 Right to Purchase Upon Divorce
 - ✓15.3 Fair Value Determination
 - ✓15.4 Securities Laws Compliance
 - ✓15.5 Closing
 - ✓15.6 Third Party Offer

✓No comments

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DRAFTING LLC DOCUMENTS (cont.)

- ✓Article 16 – Competition
 - No comments

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 17 – Default by Member
- ✓ 17.1 Default of a Member
- ✓ 17.2 Terminations of Defaulting Member
- ✓ 17.3 Right to Purchase Upon Default
- ✓ 17.4 Closing
- ✓ 17.5 Cumulative Remedies
- ✓ 17.6 Cure of Default

✓ No Comments

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 18 – Winding Up
- ✓ 18.1 Event Requiring a Winding Up
- ✓ 18.2 Revocation
- ✓ 18.3 Cancellation
- ✓ 18.4 Interim Manager
- ✓ 18.5 Effect of Event Requiring a Winding Up

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DRAFTING LLC DOCUMENTS (cont.)

✓ Article 18 – Winding Up

- Under the Code, the language has been changed.
- Definitions – New
 - “Event requiring a winding up” – an event specified by BOC § 11.051.
 - “Terminated entity” – a domestic entity the existence of which has been (A) terminated *** unless the entity has been reinstated in the manner provided by this code; or (B) forfeited pursuant to the Tax Code, unless forfeiture has been set aside.
 - “Winding Up” – the process of winding up the business and affairs of a domestic entity as a result of the occurrence of an event requiring winding up.

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DRAFTING LLC DOCUMENTS (cont.)

- “Voluntary winding up” – winding up as a result of a voluntary decision to wind up.
- “Voluntary decision to wind up” – winding up by vote of authorized persons.
- Events Requiring Winding Up
 - Five events plus special events LLCs. BOC §§ 11.051, 11.056, 11.057, and 11.058.

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DRAFTING LLC DOCUMENTS (cont.)

- The 5 events (BOC § 11.051) are:
 - ❑ expiration of duration;
 - ❑ voluntary decision;
 - ❑ occurrence of event provided for in governing documents requiring winding up;
 - ❑ event specified in code; or
 - ❑ judicial decree.
- LLC Supplemental Event (BOC § 11.056). Termination of last remaining member unless not later than 90 days after event, the legal representative, or successor agrees to continue and become a member effective as of the date of termination.

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DRAFTING LLC DOCUMENTS (cont.)

- Winding Up Procedure
 - Unless the event is revoked (BOC § 11.151) or cancelled (BOC § 11.152), the persons governing shall as soon as reasonably practicable, wind up the business and affairs of the domestic entity. See BOC § 11.052

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DRAFTING LLC DOCUMENTS (cont.)

- Upon occurrence of the event requiring winding up, the entity shall cease to:
 - ❑ carry on its business, except to winding up;
 - ❑ send notice to each claimant (except for partnerships);
 - ❑ collect and sell its property; and
 - ❑ perform other acts required.
- An entity in winding up may continue its business for the period necessary to avoid unreasonable loss of business. BOC § 11.054

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DRAFTING LLC DOCUMENTS (cont.)

- The entity must apply its property to discharge or make adequate provision for the discharge of all of its liabilities and obligations. BOC § 11.053(a)
- If the property is not sufficient to discharge all of the liabilities, the property shall be applied, to extent possible, to the just and equitable discharge of its liabilities and obligations. BOC § 11.053(b)

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DRAFTING LLC DOCUMENTS (cont.)

- BOC §§ 11.351 through 11.359 provide for resolution of claims on termination, including the ability to:
 - ❑ deposit with Comptroller amounts due to unknown or not located owners or creditors; BOC § 11.352; such deposit discharges depositor from liability to owner or creditor but only to extent of money received.
- Any claim against a terminated entity is extinguished on third anniversary of date of termination if no action is brought. BOC § 11.359

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DRAFTING LLC DOCUMENTS (cont.)

- A claim against a terminated entity may be extinguished on an accelerated basis using notice procedure under BOC § 11.358;
 - ❑ if creditor fails to properly present the claim in writing under BOC §§ 11.358(c) and (d); or
 - ❑ if creditor fails to bring an action on a rejected claim under BOC § 11.358(e) before the earlier of
 - 180th day after date of mailing of notice of rejecting claim; or
 - the 3rd anniversary of the effective date of the entity's termination.
- See BOC § 11.359

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DRAFTING LLC DOCUMENTS (cont.)

- Certificate of Termination.
 - The BOC requires that a Certificate of Termination be filed for a filing entity with the SOS to terminate the existence of the entity. The Certificate is filed at the time of the entity if fully liquidated. BOC § 11.101 The filing entity is terminated upon the filing of the Certificate of Termination with the filing officer.
 - A filing entity continues in existence for 3 years for the purpose of defending lawsuits and conveying property. BOC § 11.356
 - Note that BOC § 11.356 provides that if a claim is brought before the expiration of the 3 year period after the date of the entity's termination and the claim was not extinguished under BOC § 11.359, the terminated entity continues to survive for purposes of defending or prosecuting the claim.

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DRAFTING LLC DOCUMENTS (cont.)

- Revocation and Cancellation of Events
 - The BOC provides that a domestic entity may revoke a voluntary decision to wind up before termination and may cancel the event requiring winding up (an event specified in the Governing Documents or an event specified in the BOC requiring a winding up) (See BOC §§ 11.151 and 11.152) Compare with TLLCA Art. 6.01
 - ❑ Special limited partnership provisions (BOC § 153.501) – partners may cancel certain events requiring winding up within 90 days after the event
 - ❑ Special general partnership provisions (BOC § 152.709) – partners may continue business of partnership in certain circumstances

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DRAFTING LLC DOCUMENTS (cont.)

- If an entity goes into a state of winding up, its power may be limited for the period it is winding up.
- BOC § 11.151(b) provides that “A domestic entity may continue its business following the revocation of a voluntary decision to wind up under Subsection (a).” In addition, BOC § 11.152(c) provides that “On cancellation of an event requiring winding up under this section, the domestic entity may continue its business.”

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 19 – Winding Up and Termination
- ✓ 19.1 Winding Up and Termination
- ✓ 19.2 Cancellation of Certificate

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DRAFTING LLC DOCUMENTS (cont.)

✓ Article 19 – Winding Up and Termination

- As pointed out in Article 18, the occurrence of an event requiring a winding up does not terminate the LLC but merely puts it into a state of winding up.
- BOC § 101.551 defines the persons who are eligible to wind up the company: (i) the company's governing authority or one or more persons designated by the governing authority, the members or the governing documents; (ii) the legal representative or successor of the last remaining members or one or more person designated by the legal representative or successor; or (iii) a person appointed by the court to carry out the winding up.

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 20 – Miscellaneous
- ✓ 20.1 Amendment or Modification
- ✓ 20.2 Notices
- ✓ 20.3 Failure to Pursue Remedies
- ✓ 20.4 Section Headings
- ✓ 20.5 Severability of Provisions
- ✓ 20.6 Governing Law; Venue
- ✓ 20.7 Counterparts
- ✓ 20.8 Successors and Assigns

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 20 – Miscellaneous (cont.)
- ✓ 20.9 Construction, Sections, Exhibits, Etc
- ✓ 20.10 Further Assurances
- ✓ 20.11 Waiver of Certain Rights
- ✓ 20.12 Attorneys' Fees
- ✓ 20.13 Entire Agreement
- ✓ 20.14 Third Party Beneficiaries

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DRAFTING LLC DOCUMENTS (cont.)

- ✓ Article 20 – Miscellaneous
 - Amendment – Often contains provisions for amendment of Company Agreement. BOC §101.053 provides that a Company Agreement may only be amended with the consent of all members. Probably want to provide for less than all member approval. May want to change to provide that Managers may amend.
 - Notice – BOC § 101.352, General Notice Requirements (LLC chapter), BOC § 6.051, General Notice Requirements (Spoke provision) set up the basic framework for notice.
 - BOC § 6.051(b) provides for transmittal of notice by facsimile or electronic message – sent to a facsimile number or an electronic message address provided by the person, or to which the person consents, for the purpose of receiving notice.

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DRAFTING LLC DOCUMENTS (cont.)

✓ Article 20 – Miscellaneous (cont.)

▪ Notice (cont.)

- Consider providing for electronic notice – make sure that you provide for consent. Note that facsimile notice requires consent.
- BOC § 6.053 is an exception to notice if (i) notice of two consecutive annual meetings and any intermediate meetings is mailed, or (ii) all, but in no event less than two, payments or distributions or interest on securities during a 12-month period if the payments are sent by first class mail.