TOP TEN "GOTCHAS"
DRAFTING PASS THROUGH ENTITES

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Frank Ruttenberg studied business finance and tax law before entering the practice of commercial and real estate law in San Antonio 25 years ago. This pragmatic combination of disciplines forms the foundation for an extensive representation of businesses in the energy, construction, hospitality, sports and entertainment industries.

In general commercial law, Frank assists businesses with day-to-day operating needs, negotiating and drafting business contracts, and the formation of business entities, including limited partnerships, limited liability companies, general partnerships, registered limited liability partnerships and corporations. He prepares intra-owner agreements for commercial entities of all types and the documentation of private offerings in connection with the formation of investment capital.

Frank's real estate practice includes negotiating and preparing documents relating to the financing, lease, sale, purchase and operation of income producing properties; the finance, acquisition, development and day-to-day operations for apartment and commercial-use complexes; landlord/tenant relations; commercial transactions with governmental agencies; and the redevelopment and preservation of historic structures.

Increasingly, Frank is involved in assisting development clients with the purchase, sale or lease of groundwater and surface water rights, the development of diversion facilities, and other water development and water supply agreements.

Practices

- Real Estate Development & Investments

Bar Admissions

- Texas, 1979

Education

New York University School of Law

- LL.M., 1982

St. Mary's University School of Law

- J.D., 1979

University of Texas at Austin

- B.B.A., Finance, 1976

Professional & Community Involvement

- American Bar Association, Tax Section, Committee on Partnerships
- Texas Real Estate Commission, Broker/Lawyer Committee
- State Bar of Texas, Business Law Section, Partnership and Limited Liability Company Law Committee, Chair
- San Antonio Bar Association, Real Estate Discussion Group

Awards & Recognition

- Scene in San Antonio Monthly, Most Influential
- Super Lawyers, Corporate Counsel Edition, 2009
- Texas Super Lawyers, *Texas Monthly*, 2006-2009
- The Best Lawyers in America, Real Estate Law 2008-2010

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BACKGROUND, EDUCATION AND PRACTICE

John Ale is the partner leading the Houston office of Skadden, Arps, Slate, Meagher & Flom LLP, focusing on energy, infrastructure, finance and corporate matters. He has represented clients in the development, financing and acquisition of energy and water infrastructure projects, privatizations, and acquisitions and divestitures of whole companies or divisions. In addition, he has worked extensively with partnership and other joint-ownership formats and innovative financings, including publicly traded partnerships, or MLPs.

John received his B.A. (with highest honors) and J.D. (Order of the Coif) from the University of Virginia, where he also served as Executive Editor of the *Virginia Law Review*. Following law school, he clerked for Hon. Edward Allen Tamm of the U.S. Court of Appeals for the District of Columbia Circuit and for Hon. Warren E. Burger, then Chief Justice of the United States.

After practicing in Houston for 15 years, John was the managing partner of the London office of another US-headquartered law firm in 1997 and 1998. From late 1998 until early 2002, he was executive director and general counsel of Azurix Corp., a global water company.

John is a past Chairman of the Business Law Section of the State Bar of Texas. He previously was Vice Chair of the Section and chaired its committees on Partnership Law, Professional Ethics and Choice of Law Legislation. He was heavily involved in the preparation of Texas partnership and limited liability company statutes.

John also has written and spoken extensively on project finance and partnership issues. He is the author of *Partnership Law for Securities Practitioners*, volume 20 of the West Group's Securities Law Series. Previously he has taught as an adjunct professor at the University of Texas School of Law.

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INTRODUCTION

Partnership agreements and limited liability company agreements are, by their nature, agreements that afford a great deal of flexibility in drafting and operation. This flexibility is what makes these entities attractive for planning purposes. This same flexibility is what also requires persons drafting these agreements undertake the responsibility to fully understand the intention of the parties to the transaction and to properly reflect those intention in an agreement entered into between the parties.

As a part of preparing these agreements, practitioners should consider the purpose to be served by the agreement and remember that the agreement is intended to set out the terms and conditions between the parties for (1) the formation of the business, (2) management of the business, (3) initial and future capitalization of the business, (4) sharing of profits and losses of the business, (5) transferring their interest in the business, and (6) winding up the business upon its completion. As you draft a partnership agreement or company agreement to address your particular transaction, the agreements should be tailored, as specifically as possible, to address the needs and desires of the parties involved for each of these areas.

Often, in their zeal to begin their new business venture, the parties have not thought through all of these areas and it is up to the practitioner to bring this to the attention of the parties and assist them in walking through the issues.

This program highlights some of the issues most often overlooked by the parties as they head down the path to the formation of their new business entity.

In certain circumstances we have included sample language to illustrate one or more of these issues. As you review this outline, please remember that these sample provisions are provided only for the purpose of illustration. Also remember that the sample provisions are, by necessity, generic in nature, for illustrative purposes only, and should not be viewed as one size fits all.

The laws relating to the formation and operations of Limited Partnerships and Limited Liability Companies will vary from state to state. As you encounter these and other issues in connection with the formation of these entities please consult the application of the local laws in particular state in which you plan to have your entity formed or operate to make certain these and other issues relating to the formation of entities of this nature are properly addressed.

OVERVIEW OF "GOTCHAS"

1. **Failure to Accurately Reflect the Economics of the Deal**

2. **Failure to Properly Address the Manner in Which Phased-in Capital Is to be Contributed to a Partnership**

3. **Addressing the Appropriate Remedies for a failure to Contribute**

4. **Failure to Address the Post-Tax Nature of a Contribution and Pre-Tax Nature of a Distribution When Structuring Priority Returns**

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6. **Failure to Allow Limited Partners to Participate in any Partnership Decision Making Due to a an Overstated Fear That Any Involvement by Limited Partners Will Convert Them to General Partner Status "Don't Cross a Black Cat's Path and Other Superstitions"**

7. Failure to Limit Negative Capital Account Makeup Obligations

8. Failure to Deal with Assignee Status of Transferees Where the Assignee Is Not Admitted as an Owner

9 Failure to Build Back Doors or Exit Plans

10. Failure to Provide a Written Agreement

DISCUSSION

1. Failure to Cause Capital Accounts to Tract the Economics of the Deal *or* "The Lunatics Have Taken Charge of the Asylum"

Background

The goal in entering into a partnership or limited liability company is to make and distribute profits. The purpose of the partnership and limited liability company agreements therefore is to make certain that the documentation that defines the relationship of its principals is drafted in a manner that specifically accounts for this goal. Due to the flexibility of partnership and limited liability company documentation that allows for disproportionate contributions, distributions, and allocations of profits and losses (which, after all, is one of the great benefits of these entities), the process of accounting for the economic relationship in one of these entities can become somewhat complex. In each case, it will require the entity documentation to track several different economic events for each partner. Typically these events consist of the following:

(a) What a party contributes to the partnership or LLC

(b) A party's allocable portion of what it has earned or lost in connection with the operations of the business ; and

(c) The timing and priorities of distributions to partners or members of the entity.

This information is tracked for each party for the life of the business through what is commonly referred to as the party's "capital account".

When dealing with these capital accounts the problem practitioners often encounters is causing the distributions to match up to the capital account accounting system. If the distributions become out of sync with what is intended by the sharing of profits and losses as reflected in the capital account accounting system –

When these are out of sync **- GOTCHA!**

The practitioner should work closely with tax advisors to make certain that the distribution sections of the partnership agreement or limited liability company regulations match or properly track the capital account provision of the partnership agreement or limited liability company regulations.

The capital account operates exactly like your brokerage account for your securities portfolio; that is; its balance from day to day is the composite of:

(i) what you have deposited (contributed) to the account, increased by

(ii) the profits you may have earned in this account, reduced by

(iii) the losses that you may have recognized on your investments, and further reduced by

(iv) any distributions or withdrawals you have made from your account.

To meet the client's objectives, the partnership agreement or company agreement will need to both (i) establish these accounts, and (ii) actually govern the economics of your relationship with your other partners according to these accounts; or said another way, the partners or members must give "Economic Effect" to these accounts.

By way of example, if a partner or member overdraws its capital account, the partnership agreement or limited liability company regulations will need to address the responsibilities for making up the deficit, if any.

To accomplish this task with your client, you will need to understand what your client believes the business deal to be. It is important to emphasize that this includes an understanding of the client's participation in both the profits and the losses of the partnership. (It has been our experience that clients love to skip over the losses part of that discussion).

Also, as you walk your client through this process, make certain that you have your client focus on the difference between a return of original capital, if any was contributed, and a sharing in the actual profits of the partnership. Often, clients will not focus on this distinction, which will cause them to disregard the actual effect of the respective capital accounts.

A classic example arises in a partnership where one partner contributes all of the necessary capital (say $100,000.00) and the other contributes only a nominal sum. If the partnership is defined as a 50/50 partnership, and if the partnership makes only enough cash flow to return $100,000.00 to the partners, and all cash flow is split on a 50/50 basis, at the end of the life of the partnership, the partner who contributed the $100,000.00 will have $50,000.00 less of his capital and the partner who made a nominal capital contribution will have $50,000.00 more than he contributed to the partnership. Generally, if you ask the client, they (at least the one who contributed the funds) will confirm that this was not the intended result. The typical desired result is that, if the partnership made no more than a sum sufficient to return the initial capital, each party should receive back its initial capital contribution. Yet we see partnerships drafted every day with this conceptual flaw built in.

A second conceptual flaw that we often see arise in partnership agreements and limited liability company regulations is the failure to address how losses are to be accounted for among the partners or members. Because of the parties' unbridled optimism and desire to avoid difficult discussions, this part of the discussion, which is just as important as the discussion of profits, is frequently overlooked. The discussion will need to focus on whose capital will bear the risk of loss, and in what priority.

Many practitioners find it easier to begin this process by asking the client what they expect to receive from the partnership or limited liability company in the form of distributions and when. Having established the distribution pattern the clients desire, they can then test the profit and loss allocation provisions to assure the desired result. Or, in the alternative, practitioners can simply indicate that "profits and losses" will be allocated in a manner that will cause the "distribution" provisions to be carried out in the amounts and priorities set out in the distribution provisions.

You can test the effectiveness of your allocations by checking various scenarios against the distribution formula to determine if the intention of the parties is being met at each stage along the way.

By way of example, A and B may form partnership AB. A contributes $100 and B contributes $1 million. A and B agree that B's capital will bear the first risk of loss and thereafter losses will be shared on a 50/50 basis. A and B will be distributed sums equal to their capital contribution and then profits will be split on a 50/50 basis. To accomplish this, the agreement might provide that (i) the first $1 million of loss is allocated to Partner B, (ii) and thereafter 50/50 to each partner. When losses occur, profits will need to first be allocated to Partner B to make certain that its capital account is recharged to a level that will allow it to recover its capital that has not already been returned to it by previous distributions, then to the partners on a 50/50 basis. Under that arrangement, if losses occur in the amount of $100,000 and were allocated to the Partner B's capital account, it will be reduced to $900,000. If profits then occurred in the amount of

$150,000, B's capital account would first be allocated $100,000 to recharge its capital account for the losses previously booked to the account. The remaining $50,000 would be allocated $25,000 to A's capital account and $25,000 to B's capital account.

By comparison, would the result be the same if the language simply stated that profits will be allocated to the partners on a 50/50 basis? The answer is probably no. Under that arrangement, if losses (say $100,000) had been allocated to the partners, B's capital account will have been reduced to $900,000. If profits then occurred in the amount of $100,000, A's capital account would be increased to $50,000 and B's would be increased to $950,000. This allocation would cause the capital accounts to be out of synchronization with the intent of the distribution provisions of the agreement .

Also, by comparison, would the result be the same if the language simply stated that losses will allocated to the partners on a 50/50 basis? The answer is no. Under that arrangement, as losses (say $100,000.00) had been allocated to the partners, B's capital account will have been reduced to $950,000 and A's capital account would be reduced to a negative $50,000. This allocation would cause the capital accounts to be out of synchronization with the intent of the loss sharing provisions of the agreement, since B' s capital was to bear the first risk of loss.

2. Failure to Properly Address The Manner in Which Phased-in Capital Is to be Contributed to a Partnership *or "You've Got to Be Careful If You Don't Know Where You're Going Cause You Might Not Get There"*

Background

The very first issue that a partner or a partnership or member of an LLC may be required to address in connection with the formation of the business is how much money (or other property) will the party be required to contribute to the business, how much money (or other property) will others be required to contribute to the business, and when will the capital be required to be contributed?

While the need for additional capital may not be universal to all types of businesses, practitioners are often asked to draft partnership documentation and company agreements that will provide additional capital in stages, or in the event of a contingency.

When capital will be staged, does the agreement address:

(d) What conditions must arise before a party can be required to contribute to the business entity?

(e) When is the contribution to be made?

If not -- **GOTCHA!**

Actions to be Taken

The partnership agreement should be drafted to address the timing and conditions for additional capital. The following language sets out some of the alternatives that might be considered to address these issues.

Phased-in Capital Contribution

Capital Contributions of the Partners. Each Partner does hereby agree to contribute to the Partnership that sum of capital that is set out beside the name of such Partner on Exhibit "A" attached hereto. The initial capital contributions to the Partnership by the [General Partner and Limited Partners - Partners - Members] are as set out on Schedule "1" to Exhibit "A" (the "Initial Contribution").

*Additional Contributions. In addition to the sums contributed to the capital of the Partnership by a Partner as its Initial Contribution, as described above, each Partner does hereby unconditionally agree to contribute to the Partnership its allocable portion of additional capital as described on Exhibit "A" Schedule "2" attached hereto (the "Additional Contribution"). Such funds shall be required to be contributed to the Partnership for the purpose of providing funds to the Partnership to address its cash needs as may be determined by the General Partner [Managing Partner][**optional language**: and as described in the Approved Budget], and the General Partner [Managing Partner] shall call for such funds only to the extent necessary for these purposes or to address an unanticipated need for cash in the Partnership which, if not provided, would have the effect of causing material adverse effects to the operations of the Partnership. Each Partner [Member] shall contribute such Additional Contribution to the Partnership, in good funds payable to the Partnership, within ten (10) days following their receipt of written notice of a call for such Additional Contribution. In connection with the written notice for such Additional Contribution the General Partner [Managing Partner] shall provide a description of how such funds are to be used [**optional language**: under the terms of the Approved Budget] in connection with the business of the Partnership.*

No Partner shall be required to make additional capital contributions to the Partnership in excess of their Initial Contribution and their Additional Contribution.

3. Addressing the Appropriate Remedies for a failure to Contribute *or "Making the Punishment Fit the Crime." Gilbert & Sullivan*

Background

When capital is to be provided in the future, based on some pre defined need or decision making process for the entity and a party fails to make the contribution, the agreement should address the remedy for this failure to perform. Often the agreement will either fail to address these remedies or may spell out remedies that may not be appropriate for the nature of the default. By way of example, if a party has an obligation to contribute an addition $100,000 to a business and fails to do so can they be sued for not only the $100,000 but also the consequential damages for a failure to contribute? It might seem odd that a party can be liable for more than their capital commitment in the context of an entity that called for only a limited financial commitment to begin with, but this should be considered by the parties. In addition, should their be other pre arranged remedies which allow the business to obtain the capital from other sources and reward those other sources appropriately? The agreement should not only determine what the appropriate remedy should be for a failure to contribute but also the procedure for carrying out this remedy. *This might include*:

(f) The right to terminate the defaulting parties interest in the entity;

(g) The right to buy out the defaulting parties interest in the entity at a discount;

(h) The right to allow another party to make contributions to the entity and dilute the interest of the party failing to make the contribution; or

(i)The right to subordinate the return to the defaulting party while those who may provide the capital receive a super return on the sums advanced.

Or in the alternative the agreement might include a remedy that does not fit the situation such as:

(a) A right to sue for actual and consequential damage;

(b) A termination right which does not properly penalize the defaulting party.

If not -- **GOTCHA!**

Actions to be Taken

The agreement should be drafted to address the remedies for a failure to contribute. The following language sets out some of the alternatives that might be considered to address these issues.

Remedies

*In the event a Partner fails to deliver its Additional Contribution to the Partnership for any reason within the time period described above (the "Defaulting Partner") any other Partner not in default of this Article may notify the Defaulting Partner of the Default. If the Defaulting Partner fails to cure the Default within five (5) days of such notice (the "Cure Period"), the other [**Option "A"**: Partners] [**Option "B"**: Limited Partners] may elect to cause the Partnership Interests and all other ownership interests in the Partnership owned by the Defaulting Partner (the "Defaulting Partner's Interests") to be subject to purchase as described below. In such event, all other [**Option "A"**: Partners] [**Option "B"**: Limited Partners] shall have the right to purchase the Defaulting Partner's Interests in the Partnership at a purchase price equal to [**Option "A"**: sixty percent (60%) of its fair market value determined as of the date the Cure Period expired.] [**Option "B"**: sixty percent (60%) of the "Book Value" of the Defaulting Partner's Partnership Interests.] The [fair market value] [capital account] [Book Value] of the Defaulting Partner's Interests shall be computed in the same manner described in Article 12, below. The [**Option "A"**: Partners] [**Option "B"**: Limited Partners] who desire to participate in the purchase of any or all of the Defaulting Partner's Interests (the "Electing Partner") shall make their election to acquire any or all of the Defaulting Partner's Interests within ten (10) days after the termination of the Cure Period (the "Determination Date"). In the event there is more than one [**Option "A"**: Partner] [**Option "B"**: Limited Partner] who is an Electing Partner(s), the right to purchase the Defaulting Partner's Interests shall be allocated among all Electing Partners in proportion to the relative Voting Interests; provided, however, in no event shall an Electing Partner be allocated more of the Defaulting Partner's Interest than such Electing Partner elected to purchase. If any [**Option "A"**: Partner] [**Option "B"**: Limited Partner] fails to give notice of its election on or before the Determination Date, then it shall be deemed to have elected not to participate in the purchase of the Defaulting Partner's Interests under the terms set forth above.*

Note! The provisions of this paragraph address two different alternatives for establishing the valuation for a Defaulting Partner's interest. The two optional valuation formulas are based upon (i) a fair market value determination based upon a multiple of earnings or the fair market value of the assets, or (ii) a capital account "book value". As you assess the nature of the business to be conducted by your partnership, you should determine which of these valuation formulas (or others) you feel may be best suited to your circumstances.

Note! In addition to the remedies described above for a failure to pay a deferred capital contribution, some partnerships will secure the obligation to contribute sums to the partnership by a letter of credit issued for the benefit of the partner and/or a promissory made by the contributing partner. Some partnerships will actually make the partners sign a note to the partnership to further secure the obligation of the partner to pay the later contribution.

In the event of a default under the terms of this Article, and in the event the Electing Partner(s) elect to purchase the Defaulting Partner's Interest in this Partnership in the manner described above, the Defaulting Partner shall execute or cause to be executed and delivered such instruments as may be necessary to transfer the Defaulting Partner's Interests to such Partners and to substitute the transferee Partner(s) as Partners in respect of the transferred Defaulting Partner's Interests.

The purchase of the Defaulting Partner's Interests will close within thirty (30) days after the Determination Date. At the Closing, the Defaulting Partner will convey to the Electing Partners all of the Defaulting Partner's Interests that are elected to be purchased, free and clear of any encumbrances (other than encumbrances created in the ordinary course of the Partnership's business and permitted hereunder, and except as otherwise provided herein). The Purchase Price for the Defaulting Partner's Interests will be payable in the same manner as described in Article ___ for the buyout of a Defaulting Partner's Partnership Interest under the terms of that Article. Any payment to be made hereunder to a Defaulting Partner shall first be utilized to repay all monies owed by the Defaulting Partner to the Partnership or to any Partner.

Payment Structures

Payment. In the event the Partnership or the Non-Defaulting Partners purchase the Defaulting Partner's Interests, payment to the Defaulting Partner shall be paid in the following manner, as determined at the election of the Partnership, or Non-Defaulting Partner, as the case may be:

Alternative "A" - Payments over Time - Unsecured Note

Delivery to the Defaulting Partner of a promissory note to be paid in ten (10) consecutive annual payments sufficient to self-amortize the principal and interest of the note over a ten year period from the Closing, the first payment being 12 months after the date of Closing. The payment shall be evidenced by an unsecured promissory note made by the Partnership for the Electing Partners, as the case may be, payable to the order of the Defaulting Partner, with interest at a floating rate to be adjusted as of each payment date to the prime rate charged by CitiBank New York (or if CitiBank does not exist, a similar money center bank), but in no event greater than the highest rate allowed by applicable law. The note shall provide that upon default of any payment of principal or interest, the entire unpaid balance shall become due and payable immediately, and shall give the maker thereof the option of prepayment, in whole or in part, at any time without penalty. The note shall be upon the form provided by the Texas Bar Association and shall include no prepayment penalty. In addition, the note shall provide that it shall be (A) paid, in full, upon the sale of all or substantially all of the assets of the Partnership or, (B) in the event distributions are made in dissolution and termination of the Partnership, in connection with such dissolution and termination of the Partnership, distribution shall be made to the Defaulting Partner of non-cash assets of the Partnership with a fair market value (as computed under Section ____, above) equal to the sums due to the Defaulting Partner under the terms of the note in cancellation of the note.

Alternative "B" - Lump Sum Payment

In the event the Partnership or the Non-Defaulting Partners purchase the Defaulting Partner's Interest, payment to the Defaulting Partner of the purchase price for those Partnership Interests shall be paid in cash upon closing.

Limited Remedies

The rights of the Electing Partners to acquire any or all of the Defaulting Partner's Interests pursuant to Article ___ below shall be the sole rights and/or remedies of the Partnership or any Partner to remedy a Defaulting Partner's failure to contribute to the Partnership under the terms of this Article ___, and the Defaulting Partner shall not be responsible to specifically perform its obligations or for actual and/or consequential damages for its failure.

Unlimited Remedies

The right of the Electing Partners to acquire any or all of the Defaulting Partner's Interests shall not be the sole right or remedy of the Partnership or the Partners to recover from the Defaulting Partner for its failure to make its capital contributions hereunder and the Partnership

and/or any other Partner who is not a Defaulting Partner shall have all of those rights that may be afforded to such persons by law or equity to remedy such default including the right to recover for actual and consequential damages and the right to seek specific performance.

4. Failure to Address the Post-Tax Nature of a Contribution and Pre-Tax Nature of a Distribution When Structuring Priority Returns or "It's Like Beating Your Head Against a Dead Horse"

Background

Often, a partner who is contributing funds to a partnership or a member contributing to an LLC will insist that its contribution receive some sort of priority return and, possibly, even earn some sort of a growth factor or interest factor on the outstanding balance of its capital account until such time they receive their "money back". When concerns of this nature are raised the agreement is often drafted to provide a disproportionate distribution to the until such time as a sum equal to its capital is returned. Often, parties fail to focus on the fact that the money that they contributed is money on which they have already paid federal income tax; that is, "post-tax" monies, while some or all of the distribution they are receiving from the business may be pre-tax dollars. Was it the intention of the contributing party for the preferred distribution to remain in place until the they received the same amount of money per tax or post-tax?

By way of example, if party contributes $1 million to the business, the $1 million will have been contributed with money on which Federal income taxes have already been paid. If the party is to receive a priority distribution until it gets "its money back", is that party asking for $1 million after taxes or before? If it is the intention of the parties that the disproportionate allocation to that partner remain until the party has received the sums they originally contributed to the entity, the tax liability relating to the distribution needs to be taken into consideration.

If not -- **GOTCHA!**

Actions to be Taken

In drafting the agreement, language should be included that either (i) grosses up the distribution to make certain that it covers both the original contribution plus the Federal income tax (or other state tax) liabilities relating to the sums distributed, or (ii) if a priority tax distribution has been included in the documentation, an easy way to address this issue may be to simply exclude the priority tax distribution from the calculation of those distributions that are counted toward the preferential return of capital.

5. Failure to Address the Need for Cash to Pay Pass-Through Tax Liabilities *or* "Nothing Is Certain in Life but Death and Taxes!"

Background

Partnerships and limited liability companies are, by their nature, pass-through entities for Federal income tax purposes; that is, all of the tax attributes of these entities pass through to their principals to be included directly in their Federal income tax returns. This occurs whether or not distributions are made from the partnership or limited liability company. On occasion, the operations of a partnership or limited liability company will establish a business plan that fails to address the fact that tax attributes, including income and gain, will be passed through to the partners or members, whether or not any distributions are actually made to the partners or members. The result is to create the potential for the allocation of taxable income or gain to the partners or members and creation of tax liability in connection therewith, without a corresponding distribution of cash to address this tax liability.

This might happen by:

(A) an agreement that distributes cash on a disproportionate basis to certain partners or members (possibly those who contributed capital) while profits are allocated on a proportionate basis; or

(B) an agreement that causes cash to be used to create reserves or repay principal on indebtedness while income or gain is otherwise allocated to the partners or members.

If so - **GOTCHA!**

Actions to be Taken

Include in the agreement a first priority and required distribution to all partners or members in an amount necessary to address the tax liability created when partners or members are allocated income or gain in connection with the operation of the partnership or limited liability company. This allocation might be computed at the highest rates applicable to the income or gain based upon the character of such income or gain. In addition, in connection with the repayment terms of any indebtedness to be repaid by the partnership or limited liability company that requires large or disproportionate reductions in the principal of the indebtedness, provisions should be made with the lender to allow a portion of the revenues to be retained by the partnership or limited liability company and distributed to the partners or members for the purpose of providing for their pass-through tax liability.

A sample clause might read as follows:

> *Alternative provision for tax distributions*. First, from and after such time as a Partner has received allocations of Profits from the Partnership which, in aggregate, exceed that Partner's aggregate allocation of Losses from the Partnership (the "Taxable Profits"), each such Partner shall receive a distribution of cash, within 90 days following the end of each calendar year in which Taxable Profits have been allocated to a Partner, equal to such Partner's allocation of such Taxable Profits for such calendar year, multiplied by a factor that is equal to the highest tax rate for Federal Income Tax purposes applicable for the tax year in which the allocation of Taxable Profits occurred, for the character of income that makes up such Taxable Profits allocation (the "Tax Distribution"). In the event a distribution is to be made under this paragraph that reflects only a portion of the sums to be distributed pursuant to this Article, the sums to be distributed shall be distributed to the Partners pro rata to the distributions to otherwise be made under this paragraph. In the event all or any portion of this distribution cannot be made, it shall be carried forward to be made as soon as distributable cash flow is available.

In addition consider an allocation provision which forces allocations to follow cash. While complex in nature these allocation provision may also help to avoid an allocation between the parties which leaves one with tax liabilities and the other with the cash distribution to pay it. While the language relating to this type of allocation process can be quite complex, it may help to eliminate the issue.

6. Failure to Allow Limited Partners to Participate in any Partnership Decision Making Due to a Misplaced (or Overstated) Fear That Any Involvement by Limited Partners Will Convert Them to General Partner Status *or* "Don't Cross a Black Cat's Path and Other Superstitions"

Background

There is a standard negotiation that takes place between the general partners and limited partners in connection with the formation of a limited partnership where the limited partners attempt to limit the broad powers generally afforded a general partner. Sometimes, the limited partners do this by requiring that they have just enough involvement to assure themselves that they will not be taken advantage of by the general partner. In other circumstances, the limited partners may desire the ability to oversee the actions of the general partner to some degree and, possibly, remove the general partner under defined circumstances. In still other circumstances, the limited partners may have a desire to be deeply involved in the decision making process of the partnership.

As a part of these negotiations, you will frequently encounter a ploy by those representing the general partner that suggests the level of activity requested by the limited partners will somehow convert the status of the

limited partner to that of a general partner. Often, this fear causes the limited partners to back away from management controls that they might otherwise pursue.

If you do - **GOTCHA!**

Actions to be Taken

While not all Limited Partnership Acts are written the same many provide that a limited partner may be liable to third parties if the limited partner participates in the control of the business of the partnership.

However, in many cased the Code will go further and state:

(A) If the limited partner does participate in the control of the business the limited partner is only liable to persons who transact business with the limited partnership reasonably believing based upon the limited partner's conduct that the limited partner is a general partner; and

(B) a limited partner does not participate in the control of the business of the partnership by acting in various capacities described in the Code which often include: (1) Consulting with or advising a general partner on any matter; (2) Calling or participating in a meeting of the partners; or (3) Voting on matters relating to the business of the partner.

With these powers available to the limited partners, it would seem that a well drafted limited partnership agreement can provide the limited partners with substantial management powers, certainly as great as a board of directors of a corporation. However, in exercising these rights, the limited partners should take extra precautions when dealing with third parties. It is, of course, possible to step across a line that may cause confusion in the minds of third parties. While the agreement may be able to accomplish most, if not all, of the needs a limited partner may have to control a general partner, the limited partners should be well educated as to these limitations on their status.

7. Failure to Limit Negative Capital Account Makeup Obligations *or "If the World Were Perfect it Wouldn't Be"*

Background

For the purpose of addressing the economic benefits and burdens that are to be shared among partners, Partnerships, Limited Partnerships and LLC's create capital accounts to track and allocate these economic attributes. The capital accounts will generally be (i) increased by sums contributed by each party to the business for its account and the profits allocable to the party in accordance with the terms of the partnership agreement or company agreement and (ii) decreased by sums distributed by the business to each party and the losses allocable to the party in accordance with the terms of the partnership agreement company agreement. So, our capital accounts exist as a sort of bank account inside of the business for each owner.

By way of example, assume A, B and C were to create a new partnership, limited partnership or limited liability company in which (i) A contributes only a nominal sum ($1), and (ii) B and C, each contribute $50,000.00, (iii) profits and losses are split 1/3rd each, and (iv) the entity borrows $900,000.00 to purchase an asset for $1,000,000.00. The asset is then sold for a loss for $900,000.00 and the losses are shared 1/3rd each. The capital accounts of B and C would each be ($50,000 less 1/3 of $100,000) $16,666.66 and the capital account of A would be ($1 less $33,333.33) negative $33,332.33. What happens when a members or partner's capital account is overdrawn and it is time to terminate the business or that party's interest in the business? Is there an obligation to restore the negative balance?

This negative balance in the capital account is an asset of the entity and, absent agreement to the contrary, this negative capital account is an asset of the partnership that can be recovered by the partnership. Is that the intention of the parties?

With limited liability companies the answer may be different since a member is not responsible for a negative capital account for those entities but you need to make certain this is properly addressed in the allocations section of the profits and losses for the business.

Actions to be Taken

Include in your agreement a provision that states that the partners will have no obligation to make up their negative capital accounts should one arise as of the time of a partner's withdrawal from the business or the termination of the business.

WARNING!!!! The elimination of negative capital account responsibility may have drawbacks in the Federal income tax planning area. One of the cornerstones of the regulations under Section 704(b) of the Internal Revenue Code is that, generally speaking, a partner may not be allocated losses that will cause its capital account to become negative unless the partner has an obligation to make up that negative capital account (Note: there are some significant exceptions to this rule, which include exceptions relating to the allocation of loss generated from non-recourse debt). You should make certain to coordinate your drafting of the partnership agreement and company agreement with these Federal tax planning issues. However, in doing so, keep in mind that one of the consequences your client may face, if it elects to maximize the use of losses as a part of its tax planning benefits (by agreeing to make up a negative capital account in the business), will be an increase in the client's exposure to a real risk of loss if a negative capital account arises.

8. Failure to Deal with Assignee Status of Transferees Where the Assignee Is Not Admitted as an Owner, *or* "My Mother Always Said - Don't Make an Assignee of Yourself"

Background

Partnerships and LLC are an unusual relationship founded in contract law and, in the case of partnerships, agency principles. The partnership agreement and company agreement is itself a contract among its party's. Often the statues regulating these entities make a distinction between a person who is an assignee of an interest in these entities and a person who is admitted as a substitute partner or member . While limited liability companies are not the product of the same historical "agency" lineage, they have been created to emulate many of the characteristics of a partnership. Absent an agreement to the contrary, an assignee receives only the economic benefits and burdens relating to the assigned ownership interest but none of the management or agency rights related to the assigned ownership interest unless all of the partners or members otherwise consent. Often partnership agreements and company agreements will fail to address this distinction and may fail to address transferability or assignability all together.

If so --------- **GOTCHA!**

While no management rights are afforded the assignee, often the assignee is by statute provided some limited inspection rights to review the partnership or limited liability company books and records.

Actions to be Taken

The agreement or regulations should be drafted to include provisions that address: (i) whether transferability should be allowed or not and, if allowed, the effect of a transfer, (ii) what rights may be assigned to an assignee, (iii) what obligations should be transferred and assumed by an assignee, and (iv) what steps must be taken for an assignee to become a substitute owner. This would seem to be of particular interest to anyone who might take a security interest in a partnership interest or membership interest A sample provision that addresses assignees and the substitution of new owner might be as follows:

a. Assignee of Interest in Partnership by Death or Divorce or Other Non-Approved Transfer. In the event a Partner should die, or by way of divorce all or a portion of its interest in the Partnership (Profits Interests or otherwise) should be awarded to the spouse of a Partner or the Partner shall transfer all or a portion of its interest in the Partnership (Profits Interests or otherwise) in a manner in which the transferee is not admitted to the Partnership as a Partner, in no event shall the estate (or the beneficiaries of the estate) of the deceased Partner, the spouse of the divorced Partner or the

transferee become a partner in this Partnership unless and until a majority [**Option:** "all of"] of the other Partners based upon their Voting Interests have approved such transfer and the transferee has complied with the terms of this Agreement which are required to become a substitute Partner.

Unless and until any such transferee or assignee becomes a Partner of the Partnership in the manner herein prescribed, such transferee or assignee shall be entitled only to receive distributions of the Partnership to which the assigning Partner would otherwise be entitled and, for any proper purpose or as otherwise provided in the Code, to require reasonable information concerning the transactions of the Partnership and to make reasonable inspection of the Partnership books and records.

In the event that the Partners make additional contributions to the Partnership at any time while there is an outstanding interest in the profits of the Partnership held by a transferee or assignee who has not been admitted as a Partner to the Partnership, the Partner who assigned its interest in the Partnership (Profits Interests or otherwise) and such transferee or assignee shall be jointly and severally responsible and required to make a contribution to the Partnership in proportion to the ratio which the Profits Interests assigned to such transferee or assignee bears to all Profits Interests in the Partnership and such contribution shall otherwise be made in accordance with the other provisions of the Agreement governing contributions by Partners (if any). If the transferor Partner or such transferee or assignee does not make such contribution in accordance with the provisions of this Agreement (to the extent any such obligation may be created in the future by amendment to this Agreement), the transferor Partner and the transferee or assignee shall be treated as having breached this Agreement and the Partnership and/or its Partners shall have all of the rights that may be available at law or in equity to seek their remedies for such breach.

b. Substitute Partner. In the event an assignment or transfer of all or a part of the Profits Interests and other interest in the Partnership held by a Partner should occur and the assignee is either a permitted transferee or a majority of [**Option:** "all of"] the other Partners agree to admit such transferee or assignee as a Partner in place of the transferor for the interest in the Partnership so transferred, no transferee or assignee shall have the right to become a Partner unless and until:

(i) The transferee or assignee provides evidence of the transfer or assignment acceptable to the other Partners;

(ii) The transferee or assignee has executed an instrument reasonably satisfactory to the other Partners accepting and adopting the terms and provisions of this Agreement and agreeing to be bound by the terms and conditions hereof and expressly assuming the liability of the transferor; and

(iii) The transferee or assignee has paid or caused to be paid any reasonable expenses incurred in connection with the admission of the transferee or assignee as a Substitute Partner.

c. Liability of Transferor. In the event a transfer or assignment of an Ownership Interest is made in accordance with the terms of this Article or any other interest in the Partnership (the "Transferred Interest") and the transferee is substituted as a Partner in place of the transferor, the transferee who is substituted as a Partner shall become liable for all the terms, covenants, conditions and obligations relating to the Transferred Interest. In addition, the transferor, and its predecessors who have conveyed the Transferred Interest in the Partnership pursuant to this Article shall in no event be relieved of their liability, responsibility or obligations relating to such Transferred Interest, and such transferor and its transferee shall, at all times, remain jointly and severally liable for such liability, responsibility or obligations relating to such Transferred Interest.

9. Failure to Build Back Doors or Exit Plans *or* "What Do General Custer and Davy Crockett Have in Common?"

Background

All business relationships will, at some point in time, come to an end. When they do, it is often beneficial to have considered in advance how the parties might separate their interests. Often it is best to have considered these issues before the parties have a reason to part company since the process of parting company may be clouded by hostile emotions. An owner might be separated from the business or a business might separate from one of its owners through a number of different triggering events. Triggering events are as varied as the imagination of the participants. Common triggering events are:

Offer to purchase business that triggers a right of first refusal;
Right of first offer;
Exercise of a push-pull agreement;
Default provisions
Death of an Owner
Retirement of an Owner
Disability of an Owner

If clients create a relationship and never discuss the need or the options available for an exit, divorce, or back door -- **GOTCHA!**

Actions to be Taken

An agreement should be drafted to include provisions that anticipate how the arrangement will be undone at the time the parties to the arrangement desire to part company. That is, the agreement should include a back door that allows an owner who is no longer in sync with the business philosophy of the others to part ways in a businesslike manner. Each such back door should make certain to set out:

A. The specifics of the triggering event;

B. The price of the buyout of the interest, and

C. A procedure for the partnership or limited liability company and/or other partners or members to take over the ownership interest of the departing partner or member.

The following are examples of a common form of right of first refusal, right of first offer, and push-pull agreement.

Right Of First Refusal

Third Party Offer. If a Partner (the "Selling Partner") receives a written offer (the "Third Party Offer") to purchase all or any purchase of his, her or its Ownership Interests in this Partnership from a person, and the Selling Partner elects to sell all of such Ownership Interests, the Selling Partner shall promptly deliver a copy of the Third Party Offer to all other Partners, and shall thereafter promptly disclose all pertinent information with regard to the offer which the other Partners may reasonably request.

Other Partners' Election. The date that all of the Partners receive notice of the Selling Partner's intent to sell his Ownership Interests is the "Notification Date." Each Partner who receives the copy of the Third Party Offer made to the Selling Partner will have forty-five (45) days from the Notification Date in which to notify the Selling Partner in writing of his intention to purchase all (but not less than all) of the Selling Partner's Ownership Interests for the amount and on the terms and conditions set out in the Third Party Offer. If more than one of the Partners (the "Electing Partners") elect to purchase the Selling Partner's Ownership Interests, each Electing Partner shall purchase the

part of the Selling Partner's Ownership Interests that is proportional to the Electing Partner's Ownership Interests divided by the aggregate Ownership Interests of all Electing Partners.

Failure To Elect. If none of the Partners elect to purchase the Ownership Interests of the Selling Partner within forty-five (45) days from the Notification Date, the Selling Partner may then sell his Ownership Interests to the Third Party on the terms and conditions of the Third Party Offer.

Payment. If one or more of the Electing Partners elect to purchase the Ownership Interests, then the purchase price must be paid on the same terms and conditions as are set out in the Third Party Offer and the sale by the Selling Partner to the Electing Partner shall be closed on the date set out in Section .

Closing. If one or more Electing Partners elect to purchase the Ownership Interests of the Selling Partner, the Closing shall be on or before that date which is the later of: (i) seventy-five (75) days after all of the Notification Date, or (ii) the date set out for closing under the terms of the Third Party Offer. At the Closing, the Selling Partner will transfer the Ownership Interests to be sold to the Electing Partners, free and clear of any encumbrances (other than any encumbrances to be taken subject to or assumed under the terms of the Third Party Offer). If the sale to the Third Party is not closed within 180 days following the Notification Date the Ownership Interests to be sold shall first be reoffered to the other Partners as described in this Article.

Assignee Status. A person who purchases an Ownership Interests in the Partnership under this Article who is not yet a partner in the Partnership shall only be entitled to the right of an assignee under the Code until admitted to the Partnership as a Substituted Partner as provided in Section.

Right of First Offer

Proposed Offer. If a Partner (the "Selling Partner") desires to market all or a portion of his Ownership Interest (the "Proposed Sale Terms") to a third party the Selling Partner shall deliver to all other Partners a statement of intent to do so which shall contain the sales price and sale terms upon which he is willing to sell the Ownership Interest.

Other Partners' Election. The date that all of the Partners receive notice of the Selling Partner's intent to sell his Ownership Interests is the "Notification Date." Each Partner who receives the copy of the Proposed Sale Terms will have forty-five (45) days from the Notification Date in which to notify the Selling Partner in writing of his intention to purchase all (but not less than all) of such Ownership Interests for the amount and on the terms and conditions set out in the Proposed Sale Terms. If more than one of the Partners (the "Electing Partners") elect to purchase the Selling Partner's Ownership Interests, each Electing Partner shall purchase the part of the Selling Partner's Ownership Interests that is proportional to the Electing Partner's Ownership Interests divided by the aggregate Ownership Interests of all Electing Partners.

Failure To Elect. If none of the Partners elect to purchase the Ownership Interests of the Selling Partner within forty-five (45) days from the Notification Date, the Selling Partner may then sell his Ownership Interests to any third party provided (i) the sales price is no less than 90% of the purchase price offered to the Partners under the Proposed Sale Terms, and (ii) the sale occurs within no more than 270 days from the date the Proposed Sale Terms were offered to the other Partners.

Payment. If one or more of the Electing Partners elect to purchase the Ownership Interests, then the purchase price must be paid on the same terms and conditions as are set out in the Proposed Sale Terms and the sale by the Selling Partner to the Electing Partner shall be closed on the date set out in Section _____.

Closing. If one or more Electing Partners elect to purchase the Ownership Interests of the Selling Partner, the Closing shall be on or before that date which is sixty (60) days after all of the Notification Date. At the Closing, the Selling Partner will transfer the Ownership Interests to be sold

to the Electing Partners, free and clear of any encumbrances (other than any encumbrances to be taken subject to or assumed under the terms of the Third Party Offer).

Assignee Status. A person who purchases an Ownership Interests in the Partnership under this Article who is not yet a partner in the Partnership shall only be entitled to the right of an assignee under the Code until admitted to the Partnership as a Substituted Partner as provided in Section ____.

Often we have seen the Push/Pull - Option/ Put used in connection with a limitation that it may only be used to break a "deadlock" situation. This has proved useful where deadlock can occur, however the parties will need to carefully consider how they define "deadlock" so that a mere disagreement over an issue will not trigger this rather draconian process.

Push/Pull Arrangement

Any Partner (the "Offering Partner") at any time may offer to purchase all, but not less than all of the ownership interest of any of the other Partners (the "Offeree Partners") at such price as is stated in a written notice (the "Offer") from the Offering Partner to the Offeree Partners. Any such Offer shall indicate a price the Offering Partner is willing to pay for each percentage point of Ownership Interest owned by the Offeree Partners (the "Per Unit Price"). Upon receipt of such Offer from the Offering Partner the Offeree Partners shall have 30 days (the "Election Period") from the date of receipt of the Offer within which to elect, by written notice to the Offering Partner (the "Notice of Election") either to sell their entire Ownership Interest to the Offering Partner at the price stated in the Offer or to participate in the purchase of the entire ownership interest of the Offering Partner at the per unit price set forth in the Offer. If an Offeree Partner (the "Electing Offeree Partner") elects to participate in the purchase of the entire Ownership Interest of the Offering Partner, said election shall act as an election to purchase that portion of the Offering Partners Ownership Interest that the Electing Offeree Partner's Ownership Interest bears to the aggregate of the Ownership Interests of each of Electing Offeree Partners (that is, if an Offeree Partner elects to participate in the purchase of the entire Ownership Interest of the Offering Partner, and said Offeree Partner must stand ready to purchase all of the Offering Partners Ownership Interest where it is the only Offeree Partner to elect, or (to some lesser pro rata portion of the Offering Partners Ownership Interest where more than one Offeree Partner elects to participate.) If an Offeree Partner elects to sell its entire Ownership Interest, said election shall constitute an election to (1) not participate in any joint purchase of all of the Offering Partners Ownership Interest, and (2) sell its entire Ownership Interest to the Offering Partner if, and only if, there are no Electing Offeree Partners to purchase the Offering Partner's entire Ownership Interest. If any Offeree Partner fails to give Notice of Election to the Offering Partner by the end of election period, the Offeree Partner shall be deemed to have elected to sell its entire Ownership Interest to the Offering Partner under the terms set forth in the Offer.

Any purchase and sale of an Ownership Interest purchased pursuant to this Article shall be at the purchase price stated in the Offer such price to be payable as provided therein.

The purchase of any Ownership Interest pursuant to this Article shall be closed within thirty days after the earlier of: (1) delivery of the Notice of Election, or (2) expiration of the Election Period. At the Closing the selling Partner or Partners will transfer their respective Ownership Interest to the purchasing Partner or Partners, free and clear any encumbrances (other than encumbrances incurred by the Partnership in the ordinary course of its business.)

A person who purchases an Ownership Interests in the Partnership under this Article who is not yet a partner in the Partnership shall only be entitled to the right of an assignee under the Code until admitted to the Partnership as a Substituted Partner as provided in Section.

10. Failure to Provide a Written Agreement or "An Oral Agreement is Not Worth the Paper It's Written On"

Background

The Code allows for oral agreements for Partnership Agreement and Company Agreement. If the entity is formed before the agreement is complete, and discussions take place as to the essential terms of the agreement, the parties may have inadvertently formed an entity and reached an agreement on terms before all of the details have been worked out. This can and will invariably lead to misunderstandings between the parties as the details of the written agreement is finalized.

If oral agreement occurs - **GOTCHA!**

Actions to Be Taken

Do not file certificate before a written agreement is reached. If a form of written agreement is circulated make certain the terms state the entity will be formed on the later of the date the Agreement is signed or the date the certificate is filed. Make certain that all drafts of the proposed agreement make clear the agreement does not exist until the final agreement is fully executed by all of the parties to the agreement.

ATTACHMENT 1

ADDITIONAL PROVISIONS SECTION

COMPANY AGREEMENT

FOR

XYZ LIMITED LIABILITY COMPANY

[MULTI-MEMBER AND MULTI MANAGER

1. <u>Compensation for Managers</u>. If compensation is to be paid to the Managers for their services consider the following:

<u>Add to definitions</u>

""*Management Fee*" means, those sums set out on Exhibit "__" to be paid each calendar year in the manner and at the times set out on that Exhibit. If a payment is due with respect to only a portion of a calendar year, such amount will be prorated using the actual number of days in such portion over a 365- or 366-day year, as appropriate.

Practice Comment: If the Managers are to receive compensation, the Agreement should expressly provide for the amount or method for calculating the amount and the timing and conditions as to payment. There are several methods by which Management Fees can be computed. In some cases the fee might be fixed, a percentage of the assets under management, a percentage of the gross income or net income, or incentive based. If the fee structure is complex it may not be appropriate as a simple definition, but might be described in the body of the Agreement in the necessary detail.

.

***<u>Substitute the following for Compensation and Reimbursement Section</u>*:**

Compensation and Reimbursements". Beginning as of the date of this Agreement, the Managers will be entitled to receive a Management Fee for their services provided in managing the Company and its operations. The Management Fee will be computed and payable as follows:

_____
_____
_____
_____.

In addition, the Managers are not required to advance any funds to pay costs and expenses of the Company. If the Managers do incur out-of-pocket costs and expenses in performing their duties under this Agreement, including the portion of its overhead costs and expenses that the Managers determine are allocable to the Company, the Managers are entitled to be reimbursed by the Company for such costs and expenses.

2. ***Permitted Transferees***. If you will allow certain persons to transfer their Membership Interest without the approval of the others, you will need to list them as permitted transferees. Consider the use of the following:

Substitute in definitions:

"Permitted Transferee" shall mean (i) any Affiliate of that Member; or (ii) any other person expressly listed as a Permitted Transferee under the terms of this Agreement or on Exhibit "___" attached hereto. For purposes of this paragraph and for determining when a Person is directly or indirectly controlling, controlled by, or under control with any other Person, the term control shall refer to an interest of more that 50% of the outstanding voting interests or beneficial interest of such Person.

Practice Comment: This definition is intended to provide a definition for those persons who will be permitted transferees under the terms of the Agreement, therefore not subject to the vote of the Members. This is a broad definition of related parties. Often the parties will want to keep this to a smaller group.

3. ***Disproportionate Capital Contributions***. If capital, in the form of cash, has bee contributed on a disproportionate basis, often the Members will want the capital to be distributed to the Members in a manner which returns to the members the capital on a similar disproportionate basis. The Members may also want the contribution of this capital which is disproportionately higher to earn a return on that excess contribution while it remains outstanding.

If the members desire a preferred return on excess contributed Capital

Add to Definitions

"Preferred Return" means, with respect to any Member, an amount calculated as a cumulative, non-compounded [compounded] per annum rate equal to the Return Rate on the average daily balance of the Unreturned Capital Contributions of such Member.

"Rate of Return" means _____% per annum.

"Unreturned Capital" means the Capital Contribution made to the Company by a Member, less those sums previously distributed to such Member other than (i) the Preferred Return and (ii) Tax Distributions.

Substitute for Distributions Section the following:

(a) First, to each of the Members in an amount equal to the "tax liability" attributable to the income allocated to the Member under Article 6, which tax liability shall be calculated by applying to that income, the highest marginal tax rate applicable to income of the character allocated to any one Member as reported by the Company for Federal Income Tax purposes (the "Tax Distributions");

(b) Second, an amount equal to all accrued but unpaid Preferred Return shall be distributed to the Members in proportion to amount of the Preferred Return which has been calculated upon their Unreturned Capital;

(c) Third, an amount equal to all Unreturned Capital Contribution shall be distributed to the Members; and

(d) Fourth, any remaining Distributable Cash Flow shall be distributed to the Members pro rata in accordance with their Sharing Ratio. Fourth, any remaining Distributable Cash Flow shall be distributed to the Members pro rata in accordance with their Sharing Ratio.

Practice Comment: This term is used to determine the net result of Capital Contributions made by a Member. Often there is discussion over what distributions should and should not be included in this calculation as a prior return of capital (reducing what the return is calculated upon). By way of example, there is often debate at to whether a "tax distribution" should be calculated as a part of this return since this is not really a return of money to the contributing Member but a distribution to cove the surcharge on the available cash that must be paid to the government. By way of example, a Member contributes $10,000 which it has already paid tax on, and Company returns $10,000 which subject to a pass through tax liability associated with it of $1,500, has the Member has received back $10,000 or $8,500 of capital?

Add to the Allocations Section:

Preferred Return Allocation. The above notwithstanding, Gross Income (including each item of Gross Income), if any, of the Membership for each Fiscal Year or other period will be allocated to the Members until the aggregate cumulative amount allocated to them respectively pursuant to this Section equals the Preferred Return distributed to them respectively pursuant to this Agreement. If for any Fiscal Year or other period Gross Income is less than the amount of the cash distributions of the Preferred Return distributed to the Members pursuant to this Agreement, then additional Gross Income in the amount of such shortfall will be allocated to the Members in the next succeeding, and if necessary, subsequent Fiscal Years pro rata in accordance with such deficiencies until the total cumulative amount allocated to each Member pursuant to this Section equals the total cumulative amount of the cash distributions of Preferred Return distributed to such Member pursuant to this Agreement for all Fiscal Years.

Add to the Allocations Section:

Qualified Income Offset. In the event any Member unexpectedly receives any adjustment, allocation or distribution described in Treasury Regulations Section 1.704-1(b)(2)(ii)(d)(4), (5) or (6), such Member shall be specially allocated items of income and gain (consisting of a pro rata portion of each item of income and gain) in an amount and in the manner sufficient to eliminate any deficit in such Member's Capital Account as quickly as possible; provided, that an allocation pursuant to this Section shall be made only if and to the extent that such Member would have a deficit in such Member's Capital Account after all other allocations provided in

this Article have been tentatively made as if this Section were not a part of this Agreement. This Section is intended to be a "qualified income offset" as that term is used in Treasury Regulations Section 1.704-1(b)(2)(ii)(d) and shall be interpreted consistently therewith.

Practice Comment: In some cases the parties may desire to have a mechanism to break a dead lock in the

4. Dilution for failure to Make an Additional Capital Contributions. If additional contributions are to be made, one remedy that might be added to the Agreement is the right for other Members to make the capital contribution that was required by the defaulting Member and dilute the Membership Interest of the defaulting Member. There are many ways to compute dilution. One alternative is to dilute based upon the actual capital contributed to date, based upon a ratio of that capital, another is to revalue the assets of the Company and dilute the capital of the non contributing Member based upon the current balance sheet of the Company after reflecting the actual fair market value of all assets of the Company. The following language is an example of the former structure.

Failure to Make Additional Required Capital Contributions.

> If any Member ("Non-Advancing Member") shall fail to make any Additional Capital Contribution within "____" days following the due date for such contribution, then the amount that such Non-Advancing Member shall fail to pay shall be deemed the "Deficiency" hereunder. Each other Member ("Advancing Member") shall have the right, but not the obligation, to contribute to the Membership as an additional contribution for its own Capital Account, prorata with any other Members, if any, all or any portion of the Deficiency.
>
> An Advancing Member shall have the right, but not the obligation, by delivering a notice (a "Dilution Notice") to the Non-Advancing Member, to increase its Units in the Company and decrease the Units in the Company held by the Non-Advancing Member. Upon delivery of a Dilution Notice, the Units of the Members shall be recalculated as follows: (i) the Units of the Non-Advancing Member shall be reduced by that percentage of its then current Units which is determined by dividing (A) the Additional Capital Contribution requirement of which the Deficiency was a part, by (ii) the total capital contributions made by all Members (including the Additional Capital Contribution requirement of which the Deficiency was a part), such quotient is referred to as the "Reduction Number") and, concurrently, the Units of the Advancing Member shall be increased by the same amount. Notwithstanding the foregoing, a Member's Units shall never be less than zero nor greater than 100%.

5. Right of First Offer. . In certain cases the Members may want to include a provision in the Agreement which allows a Member to market their ownership for sale and transfer to even a non permitted transferee, provided the other Members first have the right to acquire this Membership Interest on substantially similar terms. This might be accomplished as follows:

In the event a Member (the "Selling Member") desires to sell, transfer or assign all or any portion of its Membership Interest other than an existing Member or a Permitted Transferee of the Member (the "Transferred Rights") the Selling Member hereby grants to each of the other Members a right of first offer to acquire the Transferred Rights.

Selling Member shall give written Notice to each of the other Members of its desire to convey the Transferred Rights and shall provide each of the other Members with Notice of the terms and conditions (including the purchase price) upon which it desires to convey such Transferred Rights (the "Proposal"). The other Members shall make its election to acquire the Transferred Rights within thirty (30) days following its receipt of such Proposal. In the event one of the other Members elects to acquire the Transferred Rights within the thirty (30) day period provided above, those other Members shall close on the acquisition of the Transferred Rights on the same terms and conditions as are set out in the Proposal. In the event no other Member elects to acquire the Transferred Rights pursuant to the terms of the Proposal as set out above, the Selling Member shall have the right for a period of _____ days, to convey the Transferred Rights to a third party free of any right of the other Members to acquire the Transferred Rights; provided the conveyance is made on the same terms and conditions set out in the Proposal. Any such Transferee shall be deemed a Permitted Transferee under the terms of this Agreement. In the event the other Members do not elect to acquire the Transferred Rights as set out above and the Selling Member desires to convey the Transferred Rights to another person (i) for a price which is less than that set out in the Proposal, and/or (ii) on other terms and conditions which are more favorable to the transferee than those set out in the Proposal, Selling Owner shall give Notice to the other Members of the details of the proposed transfer (the "Modified Proposal") and the other Members shall have a period of fifteen (15) days thereafter to elect to accept such Modified Proposal. If one or more of the other Members elect to accept the Modified Proposal, they shall close on the acquisition of the Transferred Rights on the same terms and conditions as are set out in the Modified Proposal. In the event other Members elect not to acquire the Transferred Rights upon the terms of the Modified Proposal, the Selling Member shall be entitled to convey the Transferred Rights to a third party upon the terms and conditions set forth in the Modified Proposal, pursuant to the terms contained herein, for any proposal which is not accepted by the other Members. Any party acquiring Transferred Rights shall acquire the rights subject to the terms of this Agreement, including the provisions required of a Substitute Member.

Practice Comment: If this is to apply to the disability of a member you may want this to apply only to a member that is a manager since the disability of a Member that is [passive may have no effect on operations. In addition the Agreement will need to include a definition of when a disability arises and a procedure to determine if a disability exist.

Practice Comment: This pro rata allocation is made on the basis of the number of Units they hold. It may be more appropriate to base it on the Sharing Ratios at the time of the purchase.

6. **Option Right on Deadlock**. In the event the Members shall be unable to agree upon any action which requires the approval of the Members under this Agreement which is necessary to protect all or substantially all of the assets of the Company from being wasted, deteriorated or taken or foreclosed upon by a lien holder or creditor ("Deadlock"), either Member may designate

the situation as a Deadlock by delivery of a Deadlock Notice to the other Member. Any such Deadlock Notice shall state (i) the nature of the Deadlock and (ii) the Members proposed resolution to the Deadlock. If a Deadlock Notice has been delivered and the Members are not able to resolve the Deadlock within twenty (20) days from the delivery of the Deadlock Notice to all of the other Members (or, if earlier, one business day prior to the date all or substantially all of the assets of the Company will be taken or foreclosed upon by a lien holder or creditor if no agreed upon actions are taken by the Company), either Member sending the Deadlock Notice (the "Electing Member) may implement a Buy Out Procedure by delivery of a written notice of a Deadlock within forty five (45) days following the delivery of the Deadlock Notice to all of the other Members set out below (the "Deadlock Election").

Purchase Price for a Deadlock. In the event a Member sends a Deadlock Election, the Members shall, as soon as reasonably possible thereafter cause the Company to determine the Fair Market Value of the Company. The valuation shall be made by an appropriate and qualified appraiser selected by agreement between the Member sending the Dead Lock Notice and each of the other Members. If no agreement as to the selection of an appraiser is reached between the parties within twenty (20) days from the Deadlock Election is delivered to all of the other Members, then the Member sending the Dead Lock Notice and the other Members and shall, within twenty (20) days thereafter, each select an appropriate and qualified appraiser for the purpose of determining the appraised value of that Membership Interest, and within thirty (30) days after the two appraisers for the Membership Interest have been selected, they shall appoint a third appropriate and qualified appraiser for the purpose of determining the appraised value of that Membership Interest, and the three Appraisers shall determine the appraised value for the Membership Interest and the Fair Market Value of that Membership Interest shall be that amount which is the average of the two appraised values which are closest in value. Once the Fair Market Value for a 50% Membership Interest in the Company has been determined, as set out above, within thirty (30) days thereafter the Electing Member will set a price at which it is either willing to buy the 50% Membership Interests in the Company, or sell the 50% Membership Interests in the Company; provided, however, in no event will the price set be less than the Fair Market Value. Within sixty (60) days thereafter, the other Members shall make an election for itself, its Affiliates in this Company to buy the 50% Membership Interest in the Company owned by the Electing Member and their Affiliates or sell the 50% Membership Interest in the Company, Hospitality and Utility owned by them and their Affiliates (the "Purchase Election"). The Purchase Election shall be made by the other Members delivering written notice of the election to the Electing Member and the closing shall occur thirty (30) days thereafter. At the time of the closing, the party selling their Membership Interests shall convey the Membership Interests be conveyed (and cause their Affiliates to convey) to the party buying, all of the Membership Interests to be conveyed in this Company on the terms and conditions set out below, free and clear of all liens other than those which are created to accommodate the business of the Company.

Payment Terms. The purchase price for the Membership Interests to be purchased in this Company shall be payable by delivering to the seller cash at closing in the amount of the purchase price for the Membership Interest.

Or

Payment Terms. The purchase price for the Membership Interests to be purchased in this Company shall be payable by delivering to the seller cash at closing in the amount of ____% of the purchase price for the Membership Interest at any time thereafter, and the balance of the purchase price paid by delivery of a secured promissory note (the "Note") payable in _____ _____ [monthly] [simi annual] [quarterly] [annual] installments of principal and interest sufficient to self amortize the principal and interest over _____ years. The interest rate shall be the lesser of (i) the rate of interest (as of the business day immediately preceding the date of closing) quoted by the *Wall Street Journal* as the "Prime Rate" of interest, less ____ percent (__%), or (ii) the highest non-usurious rate allowed by law, computed on the unpaid principal balance (the "Interest Rate"). Interest payments shall be calculated on the declining principal balance based upon a year of 365 days. The Note shall be secured by a first lien on the Membership Interests purchased. Any purchaser may, from time to time, prepay all or a portion of the unpaid principal balance owing to a seller, without penalty or premium.

Practice Comment: If this is to apply to the disability of a member you may want this to apply only to a member that is a manager since the disability of a Member that is [passive may have no effect on operations. In addition the Agreement will need to include a definition of when a disability arises and a procedure to determine if a disability exist.

Practice Comment: This pro rata allocation is made on the basis of the number of Units they hold. It may be more appropriate to base it on the Sharing Ratios at the time of the purchase.

ATTACHMENT 2

COMPANY AGREEMENT

FOR

XYZ LIMITED LIABILITY COMPANY

[MULTI-MEMBER AND MULTI MANAGER]

THE MEMBERSHIP INTERESTS THAT ARE THE SUBJECT OF THIS COMPANY AGREEMENT HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR ANY STATE SECURITIES LAWS. THE MEMBERSHIP INTERESTS MAY NOT BE OFFERED FOR SALE, SOLD, PLEDGED, TRANSFERRED, OR OTHERWISE DISPOSED OF UNTIL THE HOLDER THEREOF PROVIDES EVIDENCE SATISFACTORY TO THE MANAGERS (WHICH, IN THE DISCRETION OF THE MANAGERS, MAY INCLUDE AN OPINION OF COUNSEL SATISFACTORY TO THE MANAGERS) THAT SUCH OFFER, SALE, PLEDGE, TRANSFER, OR OTHER DISPOSITION WILL NOT VIOLATE APPLICABLE FEDERAL OR STATE SECURITIES LAWS.

THE MEMBERSHIP INTERESTS THAT ARE THE SUBJECT OF THIS COMPANY AGREEMENT ARE SUBJECT TO RESTRICTIONS ON THE TRANSFER, SALE, PLEDGE, OR OTHER DISPOSITION AS SET FORTH IN THIS COMPANY AGREEMENT.

Practice Comment: If the Limited Liability Company is formed with an investment and management structure which causes some of the Membership Interests to be categorized as securities under the Texas Securities Act or Federal laws relating to securities regulation, this legend might be used to help a Limited Liability Company comply with these regulatory requirements If the membership interests are to be certificated as authorized by §3.201(e) of the Texas Business Organizations Code ("*TBOC*"), legends similar to those appearing on this page should appear on the certificates.

Practice Comment: If the Membership Interests are to be certificated as authorized by §3.201(e) of the Texas Business Organizations Code ("*TBOC*"), legends similar to those appearing on this page should appear on the certificates as well.

Practice Comment: Confirm that this legend is consistent with any restrictions on transfer contained in the Company Agreement.

COMPANY AGREEMENT
OF
XYZ LIMITED LIABILITY company

This Company Agreement of XYZ Limited Liability Company is executed as of the Effective Date, by each of the Persons who sign this Agreement under the caption "Members" on the signature page of this Agreement.

ARTICLE 1.
DEFINITIONS

1.1 ***Certain Definitions***. As used in this Agreement, each of the following terms has the meaning given to it below:

"Affiliate" means person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified or who is an Associate of the Person. For the purpose of this definition control, ***controlling***, controlled by and under common control with means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise and ***associate***, means (1) a corporation, partnership, limited liability company, or other business entity of which such person is an officer, owner, partner, member, manager or is, directly or indirectly, the beneficial owner of 10 percent or more of any beneficial interest, (2) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar capacity, and (3) any relative or spouse of such person who is a officer, owner, partner, member, manager or is, directly or indirectly, the beneficial owner of 50 percent or more of any beneficial interest in such person.

Practice Comment: Consider use of Securities Act definition instead, in particular if a corporate model is adopted.

Practice Comment: Consider the threshold levels for control – this language sets the trigger point at 50% or more - for a more expansive application of this concept – consider lowering the trigger point to include a greater number of persons in the definition.

"*Agreed Value*" means, in the case of any contributions or distributions of property, the fair market value of that property, as that fair market value is determined by the Managers using such reasonable method of valuation as they may adopt.

"*Agreement*" means this Company Agreement, as amended from time to time.

"Assignee" means a Person who receives a Transfer of all or a portion of the Membership Interest of a Member, but who has not been admitted to the Company as a Member in connection with such Transfer.

"*Base Rate*" means a rate per annum that from day to day is equal to the lesser of (a) the prime rate of interest as cited by *The Wall Street Journal* and (b) the maximum rate permitted by applicable laws, with each change in the rate to be made on the same date as any change in (a) or (b), as appropriate.

"*Business Day*" means any day other than a Saturday, a Sunday, or a holiday on which national banks in the State of Texas are permitted to be closed.

"*Capital Account*" shall have the meaning set out in Section 4.6 below.

"*Capital Contribution*" means, with respect to each Member, the contribution of Contributed Property and the amount of such contribution shall be amount of cash and the Agreed Value of any other such Contributed Property, net of any indebtedness or other liability, whether assumed by the Company or to which the Contributed Property is subject.

"*Certificate*" means the certificate of formation of the Company filed with the Secretary of State of the State of Texas pursuant to the TBOC, as amended or restated at such time.

"*Claims*" means all losses, costs, liabilities, damages, and expenses (including court costs and fees and disbursements of counsel) incurred in connection with a Proceeding.

"*Code*" means the Internal Revenue Code of 1986, as amended from time to time.

"*Company*" means the limited liability company formed pursuant to the Certificate**.**

"*Contributed Property*" means any cash or property contributed by a Member to the capital of the Company.

Practice Comment: For non cash property consider Special provisions which relates to contributed property such as an accurate description of the Contributed Property, Title issues, condition of property, representations and warranties as to the nature and character of the Contributed Property, timing and pro ration and impact on related liabilities (ad valorem taxes, mortgages and due on sale or transfer clauses….),

"*Distributable Cash*" means all cash funds of the Company on hand at any time after payment of all expenses of the Company due as of such time, as reduced by the amount of the Reserves, if any, at such time.

Practice Comment: See Comments below in connection with distributions

"*Effective Date*" means the later of (i) the date all of the parties required to sign this Agreement have signed and delivered the Agreement, or (ii) the date the Company is formed, as set out herein.

Practice Comment: LLC's are formed upon the filing of the Certificate unless otherwise set out in the Certificate. To avoid a problem with an oral Agreement you may want to have this Agreement signed before you file the Certificate.

"*Fair Value*" means, the fair value of the item being valued, as determined by an appraiser selected in accordance with the terms of this Agreement.

"*Fiscal Year*" means the fiscal year of the Company's operations as selected by the Managers of the Company for accounting purposes.

Practice Comment: Often for Federal income tax reasons the Company may be required to select a calendar year as the fiscal year of the Company. If you are interested in a fiscal year other than a calendar year, consult your tax advisor as to when this will be required.

"*Fundamental Business Transaction*" shall mean any action which requires the approval of the Members under the terms of this Agreement.

Practice Comment: The Code provides that a fundamental business transaction is a merger, interest exchange, conversion, or sale of all or substantially all of an entity's assets. This definition allows for the drafted to include a more expansive list of transactions to fall into this category. These transactions typically require a higher degree of approval such as approval by the Members on a Super Majority Vote.

"*Liquidation Reserve*" means that reserve of Company funds held by the Company in connection with its process of winding up for the purpose of addressing obligations of the Company which may become due during the winding up process or after the termination of the Company.

Practice Comment: This is not the Reserve required for cash flow purposes but is intended to address the need for cash to address post termination obligations.

"*Majority*" means, with respect to any group entitled to vote on a matter, more than fifty percent (50%) of the votes of that group.

"*Management Fee*" means, with respect to any calendar year, an amount equal to $_____. If a payment is due with respect to only a portion of a calendar year, such amount will be prorated using the actual number of days in such portion over a 365- or 366-day year, as appropriate.

Practice Comment: If the Managers are to receive compensation, the Agreement should expressly provide for the amount or method for calculating the amount and the timing and conditions as to payment. There are several methods by which Management Fees can be computed. In some cases the fee might be fixed, a percentage of the assets under management, a percentage of the gross income or net income, or incentive based. If the fee structure is complex it may not be appropriate as a simple definition, but might be described in the body of the Agreement in the necessary detail.

"*Manager*" means any Person named in the Certificate as an initial manager of the Company and any Person hereafter elected as a manager of the Company as provided in this Agreement, but does not include any Person who has ceased to be a manager of the Company.

"*Member*" means each of the Persons who execute this Agreement as a Member and becomes a member under the terms of this Agreement as well as each Person who is otherwise admitted to the Company as a member under the terms of this Agreement.

Practice Comment: This Agreement is structured with one class of Members. To accommodate special aspects of a business arrangement there may also be multiple classes of Members. This may arise where there are persons making disproportionate contribution and, on that basis require disproportionate management rights and/or differing economic treatment. In these cases the Agreement will need to be drafted to identify these classes and define their relative rights and obligations under the terms of the Agreement. §Section 3.002 of the TBOC.

"*Membership Interest*" means, at any time, the interest of a Member in the Company, including the right to receive distributions of Company assets and the right to receive allocations of income, gain,

loss, deduction, or credit of the Company, but does not include the voting rights or management rights reserved to the Members under the terms of this Agreement (or the right to vote the Units relating thereto) until such holder of the Membership Interest has been admitted to the Company as a Member as to that Membership Interest.

Practice Comment: This generally tracks the definition of "membership interest" found in §1.001(54) of the TBOC. This definition reinforces the fact that a Membership Interest includes only the economic rights -- not management and other non-economic rights. Management and other non-economic rights are conferred by virtue of Member status and not by mere ownership of a Membership Interest. Note – the last phrase of the Agreement does not follow the Code. The last phrase is intended to incorporate those management rights into the terminology once the requirements for admission as a Member has been completed – this is intended to avoid any gap in what is transferred when a practitioner, using common terminology, addresses the sale and acquisition of all of the "Membership Interest".

"*Notice*" means any notice delivered in the manner set out in the "Miscellaneous" Section of this Agreement.

"*Officers*" means any Person who is appointed or elected as an officer of the Company in the manner set out in this Agreement.

"*Permitted Transferee*" means, with respect to each Member any Affiliate of that Member or such other person who is expressly listed as a Permitted Transferee under the terms of this Agreement.

Practice Comment: This definition is intended to provide a definition for those persons who will be permitted transferees under the terms of the Agreement, therefore not subject to the vote of the Members. This is a broad definition of related parties. Often the parties will want to keep this to a smaller group.

"*Person*" means any business entity, trust, estate, executor, administrator, or individual.

Practice Comment: On occasion, certain Members (sometimes referred to as carried Members) will contribute only a lesser or minimal portion of the aggregate capital contributions while others contribute a disproportionately larger share of such capital. In such a situation, a provision requiring a preferred return to those who have contributed a larger proportionate share may be incorporated into the Agreement. This might be structured as a preferred return of profits or a special allocation of gross revenues.

Practice Comment: In certain circumstance this preferred return structure might be established by setting up a Class A and Class B membership structure which provides special management rights to the class that have made a disproportionate contribution to the Company.

"*Proceeding*" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, arbitrative, or investigative, any appeal in such an action, suit, or proceeding, and any inquiry or investigation that could lead to such an action, suit, or proceeding.

"*Profit*" and *Loss*" — means, for each Taxable Year or other period, an amount equal to the Company's U.S. federal taxable income or loss, respectively, under Section 703(a) of the Code (but including in taxable income or loss, for this purpose, all items of income, gain, loss or deduction required to be stated separately pursuant to Section 702(a) of the Code), with the following adjustments:

(i) any income of the Company exempt from U.S. federal income tax and not otherwise taken into account in computing taxable income or loss will be added to such taxable income or loss;

(ii) any expenditures of the Company described in Section 705(a)(2)(B) of the Code (or treated as expenditures described in Section 705(a)(2)(B) of the Code pursuant to Treasury Regulations Section l.704-1(b)(2)(iv)(i)) and not otherwise taken into account in computing taxable income or loss will be subtracted from such taxable income or loss;

Practice Comment: This definition of Profits and losses assumes all contributions are pro rata allocations of cash. If contributions consist of other property please consult a tax professional for additional language or concepts that may need to be included in the Agreement.

Practice Comment: If certain Members contribute disproportionately greater capital they may require a rate of return on their excess capital until it has been returned. This raises and interesting question, what is the definition of a return of the contributed capital? See comment on un returned capital below.

"*Reserves*" means those reserves which the Managers determine to be necessary [or useful] in their [reasonable] discretion for future cost, expenses, capital investment, or contingencies which may be incurred by the Company.

Practice Comment: The benefit of setting a reserve is to retain capital in the Company to avoid a need for future capital calls from the members. This may be particularly important where there is a question as to the ability of a Member to perform. Reserves can be addressed in a number of ways. This language leaves the decision to the Manager with some options. This can also be set with built in formulas, such as a multiple of the monthly operating expenses or a set dollar amount, or a multiple of a list of certain fixed obligations such as debt services, taxes, insurance, or any combination. In a seasonal business this might also take into consideration seasonal needs of the business.

"*Section*" means a section of this Agreement, unless the text indicates otherwise.

"*Sharing Ratio*" means the ratio of Units a Member holds in the Company as a percentage of all Units held by all Members in the Company.

Practice Comment: The Sharing Ratio is the method for allocating the economics benefits and obligations for the Company. This Agreement provides for Sharing Ratios throughout the term of the Agreement which are tied to the number of Units issued. In the event this will change from time to time, based upon conditions in this Agreement (such as a shift in participation in profits after a set threshold return to certain Members has been met), these terms and conditions should be set out in Section 3, below. Where Distributions will be shared on a basis which is disproportionate to Units, this might be addressed by either (i) establishing a special class of Units and causing the Distributions allocated to that class, in proportion to their Sharing Ratios, or (ii) including language in the distribution section which provides for a shift in Sharing Ratios bases upon defined circumstances.

"*Super Majority*" means, with respect to any group entitled to vote on a matter, one or more members of that group who hold more than sixty six and 2/3rds of the votes held by that group.

"*Taxable Year*" means the Company's taxable year, which shall be the calendar year or such other taxable year required by Section 706(b) of the Code.

"*TBOC*" means, at any time, the Texas Business Organizations Code, as amended, or, from and after the date any successor statute becomes, by its terms, applicable to the Company, such successor statute, in each case as amended at such time by amendments that are, at that time, applicable to the Company. All references to sections of the TBOC include any corresponding provision or provisions of any such successor statute.

"Transfer" means (a) the direct or indirect sale, transfer, encumbrance, gift, assignment, pledge, hypothecation, conveyance or other transfer of the Membership Interest or any portion thereof or interest therein, including any transfer by operation of law, by judicial process, levy, foreclosure, or attachment, (b) execution of a contract for the foregoing; (c) if a Member is a corporation, partnership, limited liability company, trust or other business entity, the transfer (whether in one transaction or a series of transactions) of any stock, partnership interest, limited liability company or other ownership interests in such corporation, partnership, limited liability company or entity including, without limitation, changes in stockholders, partners, members, managers, trustees, beneficiaries, or their respective interests; or (d) if the Member is a corporation, partnership, limited liability company, trust or other business entity, the creation or issuance of new stock or other interest in the business entity by which an aggregate of more than 10% of the voting control in the business entity is vested in some new party.

"*Treasury Regulations*" means the income tax regulations, including temporary regulations, promulgated under the Code, as those regulations may be amended from time to time. Any reference herein to a specific section of the Treasury Regulations shall include any corresponding provisions of succeeding, similar, substitute, proposed or final Treasury Regulations.

"*Unit*" means an increment of interest in the Company assigned to each Member as set out on Exhibit "___" as may be amended from time to time, and which, in each case where any such Members, or a group of Members are entitled to vote or make a decision under the terms of this Agreement, will carry one vote.

Practice Comment: This term is used to determine the net Capital Contributions made by a Member. Often there is discussion over what distributions should and should not be included in this calculation as a prior return of capital (reducing what the return is calculated upon). By way of example, there is often debate at to whether a "tax distribution" should be calculated as a part of this return since this is not really a return of money to the contributing Member but a distribution to cover the surcharge on the available cash that must be paid to the government. By way of example, a Member contributes $10,000 which it has already paid tax on, and Company returns $10,000 which is subject to a pass through tax liability associated with it of $1,500, has the Member has received back $10,000 or $8,500 of capital?

1.2 ***Other Definitions; References to Definitions***. Other terms defined herein have the meanings so given them. Each reference in this Agreement to a definition is a reference to a definition contained in this Agreement, unless the context expressly provides otherwise.

ARTICLE 2.
ORGANIZATIONAL MATTERS

2.1 ***Formation***. The Members hereby form the Company pursuant to the Texas Limited Liability Company Law as of the Effective Date.

2.2 ***Name***. The name of the Company is "XYZ LLC." The business of the Company will at all times be conducted under such other name or names as the Managers may select, from time to time.

Practice Comment: The name of the Company must satisfy the requirements of §5.056 of TBOC and other rules which may relate to Professional Limited Liability Companies. §3.014

2.3 ***Name and Address of Members***. The name and address of the initial Members is set forth on Exhibit A. Each such Person shown on Exhibit A on the effective date of this Agreement is admitted to the Company as a Member upon its formation. Any change in the name or address of a Member of which the Company is given notice will be as set forth in the records of the Company and Exhibit A will be deemed amended appropriately. The Managers shall substitute a new Exhibit A (indicating its effective date) to reflect such additional and/or different information. The records of the Company will be *prima facie* evidence of the status of any Person as a Member.

2.4 ***Registered Office and Registered Agent***. The address of the registered office of the Company in the State of Texas will be at _____ and the name of the registered agent of the Company at such address will be_____. The Managers may at any time, and from time to time, designate a new or successor registered office or registered agent, or both.

Practice Comment: §5.201 of TBOC requires the Company to have a registered office and registered agent in Texas.

2.5 ***Principal Office and Other Offices***. The principal address and place of business of the Company will be _____ or such other place that is consistent with the purpose of the Company as the Managers may designate from time to time by notice to the Members. The Company may have such other office or offices as the Managers may designate from time to time by notice to the Members.

2.6 ***Purpose***. The purpose of the Company is to _____ and undertake all matters other purposes for which a limited liability Company may be formed under the TBOC.

Practice Comment: Often this section is limited by the phrase "that may be incidental thereto" making its purpose more narrow. If the parties desire to place some constraints on the scope of the business this phrase is useful.

2.7 ***Certificate; Foreign Qualification***. A certificate of formation that meets the requirements of the TBOC will be filed with the Secretary of State of the State of Texas and will be amended from time to time as required by the TBOC. Upon the request of the Managers, each Member will immediately execute all certificates and other documents consistent with the terms of this Agreement that the Managers believe are necessary or desirable for the Managers to accomplish all filing, recording, publishing, and other acts as may be appropriate to comply with all requirements to form, operate, qualify, and continue the Company as a (a) limited liability company under the TBOC and the laws of the

State of Texas and (b) limited liability company, or a company in which each Member has limited liability in all other jurisdictions where the Company proposes to operate.

2.8 ***Term***. The Company's existence will commence on the Effective Date and will continue until the Company terminates pursuant to the terms of this Agreement. The Company may not conduct business until the Certificate has been filed with the Secretary of State of the State of Texas.

Practice Comment: Filing entities are perpetual unless the governing documents state otherwise. §3.003 TBOC.

2.9 ***Merger, Conversion, Interest Exchange***. The Company may effect or participate in a merger, conversion, or interest exchange (as such terms are defined in the TBOC) or enter into an agreement to do so with the consent of the Managers and of a Super Majority of the Members.

ARTICLE 3.
MEMBERSHIP

3.1 ***Initial Members.*** The initial Members of the Company are the Persons set out on Exhibit "A" attached hereto who have executed this Agreement as Members, each of which is admitted to the Company as of the Effective Date.

3.2 ***Units .*** The number of Units held by each Member is set out below:

Member	Units	Sharing Ratio
_____	_____	_____
_____ _	_____	_____
_____	_____	_____
_____	_____	_____
Total	100	100%

Practice Comment: In this form, the Sharing Ratios define the manner in which the economic benefits and burdens of the Company will be shared among the Members as well as how voting rights are determined. This ratio is the cornerstone for defining the business arrangement between the Members. This form is designed with Sharing Ratios which remain the same through the term of the Agreement. If the parties intend for these ratios to change at the time of a payout of capital to certain Members, or the completion of a priority return to a select group of the Members the agreement will need to be modified accordingly.

Practice Comment: The definition of the Sharing Ratios might be modified in the definition section to be "as stated on an exhibit" if there economics are not to follow units

Practice Comment: Members are sometimes denominated in classes (the "A" Members and "B" Members), where A Members have contributed less money to the Company and "B" Members proportionately more. Distinctions of this type are often useful for the purpose of establishing priority returns among classes (.i.e. the distributions will be first made to the Class "A" Members in proportion to their Sharing Ratios until they have received a return of their Capital Contribution plus their Preferred

Return) as well as certain management rights (.i.e. determinations of Reserves will be determined by a Majority of the Class A Members until the Unreturned Capital is zero for all Class A Members).

3.3 ***Limitations on Members' Rights.*** Except as otherwise specifically provided in this Agreement to the contrary, no Member shall have the right to:

(a) participate in the control of the business affairs of the Company; transact any business on behalf of or in the name of the Company; or have any power or authority to bind or obligate the Company.

(b) have his/her capital contribution repaid except to the extent provided in this Agreement.

(c) require partition of the Company's property or to compel any sale or appraisal of the Company's assets.

3.4 ***New Members***. The Managers may cause the Company to issue additional Units, Membership Interest and admit additional Members on the terms and conditions which are approved by a Super Majority of the Members. At the time any additional Units and Membership Interest are issued and additional Members are admitted to the Company, the Sharing Ratios shall be adjusted to reflect the terms and conditions upon which the additional Units and Membership Interest have been issued.

Practice Comment: This provision gives the Members authority to admit additional Members, from time to time, with the issuance of additional Units. Without an express provision in the Company Agreement, a person who acquires an interest in the Company directly from the Company after the formation of the Company may become a Member in the Company only with the consent of all Members. *See* §101.105 of the TBOC. This should also be coordinated with the amendment provisions of the Agreement.

Practice Comment: The Agreement may also address preemptive rights to the issuance of any new Units and Membership Interest created under the terms of this Agreement.

Practice Comment: If additional Members are admitted to the Company after its formation, the determination as to what the appropriate contribution should be for the new Units should be carefully considered.

ARTICLE 4.
CAPITAL CONTRIBUTIONS AND LOANS

4.1 ***Contribution***. Simultaneously with the execution of this Agreement, the Members will contribute to the Company that property set out opposite their respective name on Exhibit B attached hereto. In consideration for such contribution, the Company has issued to each of the Members the Membership Interest in the Company, set out on Exhibit A attached hereto.

Practice Comment: While a Company Agreement can be oral, a promise to provide a capital contribution must be in writing and signed by the person making the promise. §101.151 TBOC

Practice Comment: The TBOC provides a broad list of remedies for a failure to make the capital

contribution which is similar to the Texas Limited Liability Company Act. These include the right of forfeiture, as well as any other consequence. 101.153(b) TBOC

Practice Comment: Consider the type of damages the Company or its members want to impose for a failure to contribute. Determine if it is appropriate to limit or the impact of consequential damages for a failure to contribute. Can you be liable for far greater than the aggregate of the anticipated contribution?

Practice Comment: If property in kind is to be contributed, a good description of the property is important as well as the terms and conditions of the contribution such as representations as to the nature of the property, liabilities or obligations relating to the property and proper pro ration of those obligations assumption of contracts relating to the property contributed and AS IS WHERE IS nature of contribution if appropriate.

Practice Comment: Additional capital contributions by Members may themselves involve the sale of securities so it is important to confirm compliance with all applicable securities laws at the time they are sought.

Note: The TBOC also makes clear that no contribution is required to be a Member. Section 101.103.

4.2 ***Additional Contribution.*** Each of the Members will contribute to the Company that property set out opposite their respective name on Exhibit C at the times set out therein. The contributions to be made by the Members set out on Exhibit C shall only be required on the terms and conditions set out on Exhibit ____ and no Person may otherwise require the Members to make such Capital Contributions to the Company.

Practice Comment: If additional contributions are to be made, the nature of the contribution, amount, timing and conditions of the contribution should be set out in the Agreement. Also, as set out above, the remedies and methods to secure the obligations needs to be addressed. These obligations might also be secured by some method and the remedies for the failure to make a contribution should be addressed.

4.3 ***No Additional Contributions***. No Member will be required to make any Capital Contributions to the Company beyond those described in this Agreement, otherwise agreed to in writing by a Super Majority of the Members from whom such additional Capital Contribution is sought or as may be required by a non - waivable provisions of the TBOC.

4.4 ***Return of Contributions***. No Member is entitled to the return of any part of its Capital Contributions or to be paid interest in respect of either its Capital Account or its Capital Contributions. Unreturned Capital Contributions are not a liability of the Company or of any Member.

4.5 ***Loans by Members***. Any Member, with the consent of the Managers [Members], may loan funds to or on behalf of the Company. Unless otherwise agreed by the Company and the lending Member, a loan described in this Section is payable on demand, bears interest at the Base Rate from the date of the advance until the date of payment, and is not a Capital Contribution.

Practice Comment: The Members may want to specify other terms of any such loans, including payment schedule, security, subordination, etc. The Members may also prefer to specify that all Members have a right of first refusal to make a loan rather than deferring to the Managers' discretion on who may act as a lender.

4.6 ***Capital Accounts***.

(a) The Company shall establish and maintain a capital account ("Capital Account") for each Member in accordance with the Treasury Regulations promulgated under Section 704(b) of the Code.

(b) If any additional Membership Interests are issued in exchange for a Capital Contribution or if any Company property is to be distributed in liquidation of the Company, the Capital Accounts of the Members (and the amounts at which all Company properties are carried on its books and records utilized to maintain the Capital Accounts) shall be, immediately before such issuance or distribution, as the case may be, adjusted (consistent with the provisions of Section 704(b) of the Code and the Treasury Regulations promulgated thereunder) upward or downward to reflect any Unrealized Gain or Unrealized Loss attributable to all Company properties (as if that Unrealized Gain or Unrealized Loss had been recognized upon an actual sale of those properties immediately prior to such issuance or liquidation). If the Carrying Value of any property of the Company is properly reflected on the books of the Company at a value that differs from the adjusted tax basis of that property, this Section 4.6(b) shall be applied with reference to that Carrying Value.

Practice Comment: Capital accounts are used to keep track of the economics of the Members for both tax and other business purposes.

Practice Comment: The TBOC does not provide a definition of Capital Account for LLC's– this definition is provided to comport with the requirements of the Code. Capital Accounts may also be the basis on which distributions are made if the Company Agreement and Company books and records are silent as to distributions. TBOC §101.203

4.7 ***Other Provisions With Respect to Capital Contributions***. Except as otherwise provided in this Agreement, no Member will be entitled to priority over any other Member with respect to a return of its Capital Contributions.

ARTICLE 5.
DISTRIBUTIONS

Practice Comment: The process of allocating the profits and losses of a limited liability company (Article 6 below) and the manner for making distributions, as set out in this Article, and contributions in the previous Article, are the most basic elements for the economics of the deal between the Members. In the most basic sense, provisions of the Company Agreement which address contributions and distributions define the direct economic benefits the Members are to receive and be obligated to provide. The provisions which addresses the allocation of profits and losses describes the accounting system which tracks the contributions and distributions as well as allocate to the Members their respective interest in the profits and losses actually generated from the operations of the Company. The key is to cause the Agreement to properly reflect the method the parties have adopted to share the contributions and distributions from the Company as well as the allocation of the Profits and Losses generated from the operations of the Company, as well as make certain the accounting system properly tracks and account for the sharing of these rights and obligations.

5.1 ***Distributions of Distributable Cash***. Except as set out in Section 5.2, if, and to the extent Distributable Cash will be distributed to the Members, it will be distributed at such times as the Managers determine, in their sole [reasonable] discretion. Distributions of cash or property in respect of a Company Interest will be made only to the Person who, according to the books and records of the Company, is the

holder of a Membership Interest in the Company on the date of such distribution. The date for any distribution of Distributable Cash will be determined by the Managers, in their sole discretion. When Distributions are made under the terms of this agreement they shall be made in the following priority:

(a) First, following the end of each Fiscal Year of the Company, to each of the Members in an amount equal to the "tax liability" attributable to the income allocated to the Member under Article 6, which tax liability shall be calculated by applying to the income allocated to the Member for such previous Fiscal Year multiplied by the highest marginal tax rate applicable to income of the character allocated to any one Member, as reported by the Company for Federal Income Tax purposes;

Practice Comment: Unless an election has been made to check the box for federal income taxes and treat the entity differently, LLC's are pass through entities for Federal Income Tax purposes. There may be taxable income allocated to a Member without a corresponding distribution. The Members may want to consider a special "tax" distribution which addresses this concern.

Practice Comment: This is a very simple tax distribution provision which looks only at the potential tax liability for the particular Fiscal Year. Another option is to look aggregate taxable income over the life of the Company, so that this distribution is made only for the net taxable income that has been allocated to a Member. This will take into account losses from prior years. Please consult our tax professional on issues relating to these distributions.

(b) Next, any remaining Distributable Cash shall be distributed to the Members pro rata in accordance with their Sharing Ratio.

Practice Comment: This is a very simple distribution provision that does not anticipate different priorities in either the Sharing Ratios or allocations of Profits and Losses. Please consult your tax professional on issues relating to these allocations. In certain cases, they may be as set out above, in others they may provide a priority return to certain Members before others participate, or shifting Sharing Ratios. Careful attention should be given to these provisions to confirm that they reflect your client's intent. If the Agreement is to include varying distributions due to special allocations of profits or losses, these provisions should be coordinated with a tax professional to assure that allocations of profits and losses are properly addressed.

Practice Comment: Members may want to consider requiring distributions on a regular basis.

Practice Comment: Distributions have been structured based upon Sharing Ratios not Units. Separating Sharing Ratios from Units will allow for voting to remain the same (on a per Unit basis) while the allocation of Profits and Losses and the methods of distributions are based upon the Sharing Ratios (which may vary from time to time depending on the terms of the Agreement).

5.2 ***Prohibited Distributions*.** Distributions may not be made to the Members of the Company if, immediately after the making of the distribution, the liabilities of the Company will exceed the Fair Value of the Company's assets in the manner determined in Section 101.206 of the TBOC.

5.3 ***Reserve***. From time to time, the Managers, in their sole [reasonable] discretion, may establish and maintain a Reserve or Reserves. If and to the extent the Managers determine, in its sole discretion, that funds in the Reserve that have not been utilized by the Company are no longer required to be so maintained, such funds will be released from the Reserve and distributed in the manner in which they would have been distributed had they not been set aside to fund such Reserve based upon the character of the transaction which gave rise to those funds in the reserve. The Managers will determine,

in their sole [reasonable] discretion, the periods to which any funds released from the Reserve are attributable. In the event the cash in the reserve has been raised from transactions which cause the cash to have differing character and treatment under the terms of this Agreement, unless otherwise agreed by the Members, the cash distributed from the Reserve shall be deemed distributed on a first in first out basis.

Practice Comment: The need to maintain Reserve is arguably greater if the Company does not provide for additional capital contributions. If you represent a Member who does not control management decisions, you may want some restrictions on the ability of the Managers to establish a reserve. Some examples of restrictions include linking the reserve to actual binding commitments that exist on the date the reserve is established that will come due within a specified period of time, capping the Reserve at a specified percentage of cash flow for some period or relying upon a multiple of monthly operating expressed with a capital reserve budget component.

5.4 ***Distribution in Kind***. No assets will be distributed in kind, regardless of any potential unrealized depreciation or appreciation in respect thereof. Any in-kind distributions will be made proportionately among the Members in accordance with the percentage of the distributions the Members are entitled to receive, as set out in this Agreement.

Practice Comment: §101.202 of the TBOC prohibits an in-kind distribution of assets unless the Company Agreement provides otherwise. Determine what is appropriate for the particular transaction and modify as appropriate.

5.5 ***Withholding***. Notwithstanding anything to the contrary contained in this Agreement, the Managers, in their sole discretion, may withhold from any distribution of Distributable Cash or other cash or other property to any Member contemplated by this Agreement any amounts due from such Member to the Company, or any other Member in connection with the business of the Company to the extent not otherwise paid. If any provision of the Code, the Regulations, or state or local law or regulations requires the Company to withhold any tax with respect to a Member's distributive share of Company income, gain, loss, deduction, or credit, the Company will withhold the required amount and pay the same over to the taxing authorities as required by such provision. The amount withheld will be deducted from the amount that would otherwise be distributed to that Member, but will be treated as though it had been distributed to the Member with respect to which the Company is required to withhold. If at any time the amount required to be withheld by the Company exceeds the amount of money that would otherwise be distributed to the Member with respect to which the withholding requirement applies, then that Member will make a Capital Contribution to the Company equal to the excess of the amount required to be withheld over the amount, if any, of money that would otherwise be distributed to that Member and that is available to be applied against the withholding requirement. Each of the Members represent that each such Member is not aware of any provision of the Code, the Regulations, or state or local law or regulations that currently require withholding of any tax by the Company with respect to such Member.

Practice Comment: Capital accounts are typically used to keep track of the economics of the Members for both tax and other purposes. If the Company Agreement fails to otherwise specify the manner in which profits and losses or Distributions are to be allocated to the Members and if there is no Sharing Ratio specified in the Company's books and records, profits, losses and Distributions are allocated in proportion to the "**Agreed Value of the contributions**." Sections 101.201 and 101.203

ARTICLE 6.

ALLOCATIONS OF PROFITS AND LOSSES

6.1 **General**. Except as otherwise provided herein or unless another allocation is required by the Treasury Regulations promulgated under Section 704(b) of the Code, for purposes of maintaining the Capital Accounts, Profit and Loss (and each item thereof) of the Company shall be allocated among the Members pro rata in proportion to their Sharing Ratios**.** Profit, Loss and other items of income, gain, loss or deduction shall be allocated to the Members pursuant to this Article as of the last day of each Taxable Year. For purposes of determining the Profit, Loss or any other items allocable to any period, Profit, Loss and any such other items shall be determined on a daily, monthly or other basis, as determined by the Manager, using any permissible method under Section 706 of the Code and the Treasury Regulations promulgated thereunder.

Practice Comment: This allocation provision that does not anticipate different priorities in either the Sharing Ratios or allocations of Profits and Losses. Please consult your tax professional on issues relating to these allocations. If the Agreement is to include varying allocations due to special allocations of profits or losses, or if there is property contributed which is other than cash, and may include in kind property, these provisions should be coordinated with a tax professional to assure that allocations of profits and losses are properly addressed.

ARTICLE 7.
MANAGEMENT; RIGHTS AND DUTIES OF MANAGERS

Practice Comment: The Certificate of Formation must state if the Company will be managed by Members or Managers.

Practice Comment: Pursuant to §101.252 of the TBOC, where a Certificate indicates an LLC will be managed by Managers, the Managers have the right to manage and conduct the business of the Company.

Practice Comment: This structure sets out a classic corporate management structure with Managers acting like a board of directors and the Members acting like shareholders (including a broad delegation of authority to the Managers). This may not be the desired structure. In the alternative the parties may consider a structure more like a partnership, which provides for the Managers to take on the traditional role of the general partner with certain powers to operate the Company delegated to the Managers.

7.1 ***Management of Company Affairs***. The Company will have one or more Managers. Except as expressly set out herein, the Company will be managed by Managers and the Managers shall have full, complete, and exclusive authority to manage and control the business, affairs, and properties of the Company, to make all decisions regarding those matters, and to perform any and all other acts or activities customary or incident to the management of the Company's business, all subject to any restrictions imposed by applicable law or expressly imposed by this Agreement. The above notwithstanding,, no Manager shall have the right to bind the Company without the expressed authority to do so provided in the manner set out in this Agreement.

Practice Comment: Where a broad authority is delegated to the Manages, sometimes the Agreement will also set out additional specific powers. The need for these specific powers has generally been justified on the basis of convenience, so that persons looking to the Company for authority for certain major acts would know these actions could be taken without the need for Member approval and would not

have to rely upon the general statement of authority set out in the initial section of the Agreement. This may not be necessary but seems to remain as a personal preference for some to make clear this authority. Also consider modifying the list to add actions specific to the particular transaction.

7.2 ***Specific Powers***. Subject to the limitations described in Section 7.1 and elsewhere in this Agreement, if any, but without limiting the generality of the powers and authority granted elsewhere in this Agreement, Managers will have the specific power, for and on behalf and in the name of the Company, to carry out and implement the purpose of the Company set forth in this Section and to do all things necessary or desirable or expedient in connection therewith or incidental thereto:

(a) to acquire, purchase, own, hold, maintain, develop, operate, sell, exchange, lease, sublet, assign, transfer, or otherwise dispose of tangible and intangible properties of any kind and character;

(b) to enter into, become bound by, and perform obligations under contracts and instruments and to make all decisions and waivers thereunder;

(c) to open, maintain, and close bank accounts, make withdrawals therefrom, and designate and change signatories on such accounts;

(d) to procure and maintain insurance, including general liability, bodily injury, and property damage insurance, in amounts that are necessary and available, as determined by the Managers, in their reasonable discretion;

(e) to incur all legal, accounting, investment banking, independent financial consulting, litigation, brokerage, registration, and other fees and expenses as it may deem necessary or appropriate for carrying on and performing the powers and authorities herein conferred;

(f) to collect amounts due the Company, settle claims, prosecute and defend lawsuits, and handle matters with governmental agencies;

(g) to exercise the voting rights of the Company on account of its ownership in any other Person; provided however, that if the action to be voted on is one that, if taken by the Company itself, would require the approval of the Members, such approval will be required before the Managers exercise such voting rights to approve such action;

(h) to borrow funds or otherwise commit the credit of the Company; and

(i) to make, constitute, and appoint, by written document duly executed, as the Company's true and lawful attorney and agent for it and in its name, place, and stead and for its use and benefit to perform any act or exercise any power or authority, all as specified in such document, that the Managers might perform or exercise in accordance with this Agreement; provided, however, that no such appointment will relieve the Managers of the duties and obligations imposed on them under this Agreement or the Company Act.

(j) Conduct business though any subsidiary entities

Note: This is a default position under Section 101.356 (d) of the TBOC, reserves certain rights to the Members. The list might be expanded here depending on the desires of the Parties to reserve further

rights to the Members. It also may be reduced to the following statement

7.3 ***Limitations on Powers and Authority of the Managers***. Notwithstanding the provisions of Section 6.1, the Managers may not cause the Company to do any of the following without the consent of a Super Majority of the Members:

(a) do any act in violation of this Agreement;

(b) do any act that would make it impossible to carry on the ordinary business of the Company (except in connection with the winding up of the Company's business);

Practice Comment: The parenthetical phrase eliminates any ambiguities that may exist as to authority to take actions during winding-up that are inconsistent with carrying on the ordinary course of business such as, for example, selling of assets.

(c) take any action to a merger the Company, exchange the Membership Interest in the Company, convert the Company, sell all or substantially all of the assets of the Company or take any other actions which is a Fundamental Business Transaction under the terms of this Agreement.

Note: This is a default position under Section 101.356(c) of the TBOC, which reserves this to the Members. Be sure to define what a Fundamental Business Transaction is to avoid problems in determining when this limitation applies.

(d) admit a Person as a Member except as otherwise expressly permitted by this Agreement;

Practice Comment: Unless the Company Agreement otherwise provides, after the Company is formed, the consent of all Members is required to admit a person as a Member. §§101.105(b) of the TBOC.

(e) possess Company property or assign its rights in Company property, other than for a Company purpose; or

(f) amend this Agreement except as otherwise expressly permitted by this Agreement.

Practice Comment: Often the Members do not want to authorize the Managers to do business with a Member, Manager or Affiliate of a Member or Manager without the approval of the Members, or in the alternative, prohibit such activity except on terms and conditions which are no worse than the fair market value for those services or products. The following language allows for these activities provided they are on terms and conditions no greater than the fair market value for similar products or services performed on a substantially similar basis

(g) cause the Company to hire or retain any Person who is a Member or an Affiliate of a Member to provide any services or products for sums that are greater than the fair market value for similar products or services performed on a substantially similar basis.

7.4 ***Reliance on Authority***. In its dealings with the Company, a third party may rely on the authority of the Managers to bind the Company without reviewing the provisions of this Agreement or confirming compliance with the provisions of this Agreement.

Practice Comment: This provision is intended to give comfort to a third party relying on the authority of the Managers but may be detrimental to the Members. *See* §101.254 of the TBOC provides authority for this as well.

7.5 ***Compensation and Reimbursements***. The Managers are not required to advance any funds to pay costs and expenses of the Company. If the Managers do incur out-of-pocket costs and expenses in performing their duties under this Agreement, including the portion of its overhead costs and expenses that the Managers determine are allocable to the Company, the Managers are entitled to be reimbursed by the Company for such costs and expenses. The Managers are not entitled to be paid compensation for their services under the terms of this Agreement.

Practice Comment: If you represent a Member who is not involved as a Manager of the Company, you may want to place some limits or standards on reimbursements of expenses to assure the Managers are prudent as to these expenses and you may want to expressly exclude overhead costs as reimbursable expenses.

7.6 ***Standards of Performance***. Except as otherwise provided in this Agreement, the Managers will perform their duties with respect to the Company and will devote such time and effort to the Company business and operations as the Managers believe is reasonably necessary to manage the affairs of the Company prudently but only to the extent that the Company has the funds available to permit the Managers to perform such duties. The Managers and their respective affiliates, and all officers, directors, employees and agents acting in that capacity, shall not be liable to the Company or its Members for any losses sustained or liabilities incurred as a result of any act or omission of such Person, if they acted in good faith; with the care that an ordinarily prudent person in a like position would exercise under similar circumstances; and in a manner the Managers reasonably believe to be in the best interests of the Company. In the event a question should arise as to a Manager regarding their liability in connection with their duties hereunder to the Company or another Member of the Company they shall have no more duty or liability in connection therewith than if they were acting as a member of the board of directors of a Texas company which was carrying out the duties and responsibilities of the corporation.

Practice Comment: The form sets out a standard which is substantially the business judgment rule. A standard of performance by the Managers is not required; however, the Members who are not Managers may desire to have a statement included in the Company Agreement which addresses the responsibility of the Managers. If a standard is set out in the Company Agreement the provision should be coordinated with the provisions governing indemnification of the Managers to avoid inconsistent results. Section 101.401 of the TBOC makes clear that the Agreement may expand or restrict any duties, including fiduciary duties that may be owed by a member, manager, officer or other person to the Company. An alternative provision which is oriented toward the Managers might read as follows:

> The Managers are liable for acts or omissions in performing their duties with respect to the Company ONLY if (a) such act or omission violates this Agreement and has a material adverse effect on the Company and such violation continues for 30 days after a Supermajority of the Members gives the Managers written notice of such violation (and thereafter for such longer period

of time as is reasonably necessary for the Managers to remedy such violation so long as the Managers are using commercially reasonable efforts to cure such violation) or (b) such act or omission constitutes bad faith, gross negligence, or willful misconduct that is not excused by any other provision of this Agreement. The above notwithstanding the Managers are not liable for any of their acts or omissions taken or suffered in reliance on the statements, valuations, information, or opinions that were prepared or presented by legal counsel, public accountants, investment bankers, or other Persons as to matters the Managers believed were within the Person's professional or expert competence. THE MANAGERS ARE NOT LIABLE FOR ACTS OR OMISSIONS IN PERFORMING ITS DUTIES WITH RESPECT TO THE COMPANY FOR ANY OTHER REASON, INCLUDING THE MANAGER'S SOLE, PARTIAL, OR CONCURRENT NEGLIGENCE, OR FOR TAKING ANY ACTION THAT IT IS AUTHORIZED TO TAKE BY THIS AGREEMENT UNLESS PERFORMED IN BAD FAITH OR WITH GROSS NEGLIGENCE OR WILLFUL MISCONDUCT THAT IS NOT EXCUSED BY ANY OTHER PROVISION OF THIS AGREEMENT.

Practice Comment: This provision does not hold a Manager liable for breaches of the Company Agreement. If liability were imposed on the Managers for breaches of the Company Agreement, the Managers could have liability for breaching any the specific duties or limitations in the Company Agreement, even if the breach was caused by simple negligence. That may or may not be the intended result. If this is the intention of the Parties, liability can be included in either the indemnity provision of the Agreement or a separate provision might be added to address a remedy for such actions. Managers can always be removed by the Members.

Practice Comment: If you represent a Member who is not a Manager, you may want to provide a more stringent standard which holds Managers responsible for acts of gross negligence or violations of this Agreement.

Practice Comment: This form does not include a standard of performance by members since it is manager managed. However, where Members retain a substantial amount of the decision making authority over the operations of a Manager Managed Company, there may be a reason to address a standard of care for the Members as well.

7.7 ***Waiver of Liability for Certain Actions***. Manager or officer, director, employee shall be liable, responsible or accountable to the Company in damages or otherwise for any act or omission performed or omitted by such Manager in connection with its acts carried out on behalf of the Company **SPECIFICALLY INCLUDING THE PERSON'S SOLE, PARTIAL OR CONCURRENT NEGLIGENCE**, provided, however, the Manager or officer, director, employee shall be liable for any act of fraud, willful misconduct, gross negligence conducted toward the Company.

ARTICLE 8.
APPOINTMENT AND MEETING OF THE MANAGERS

8.1 ***Voting Rights of a Manager.*** Each Manager shall have one vote on each matter which is presented to the Managers.

Practice Comment: The parties will need to decide if the management structure of the Company is intended to follow the "partnership" model where each manager is a representative of a member with the same voting rights of the member they represent **or** elected as a management team, much like a board of directors with voting rights which do not correlate to the membership voting rights of the Member. See the alternate structure set out below.

Practice Comment: Alternative – Partnership structure – Each Manager shall have that number of votes on any matters presented to or to be determined by the Managers under this Agreement which correlates to the number of Units held by the Member who appointed that Manager.

8.2 ***Number; Qualification; Election; Term.*** The Managers shall consist of at least one (1), but not more than _____(__) Managers, none of whom need to be Members or residents of any particular state. The initial Managers are set out in the Certificate. Future or additional Managers shall be elected by a Majority of the Members, except as provided in Sections 8.3 and 8.5 of this Agreement. Each Manager elected shall hold office until his successor shall be elected and shall qualify.

Practice Comment: Alternative – Partnership structure – The Managers need not be Members or residents of any particular state. The initial Managers are set out in the Certificate. Future or additional Managers shall be appointed by the Members with each Member entitled to appoint one person to act as a Manager of the Company. Each Manager shall hold office until his successor shall be appointed. A Member may remove a Manager, or replace a Manager appointed by it, from time to time, by providing the Company with at least ten (10) days prior written notice of its actions.

8.3 ***Change in Number.*** The number of Managers may be increased or decreased from time to time by amendment to this Agreement only with the vote of a Majority of all the Members, but no decrease shall have the effect of shortening the term of any incumbent Manager. Any Manager's position to be filled by reason of an increase in the number of Managers shall be filled by election of a Majority of the Members.

Practice Comment: Alternative – Partnership structure – delete this section 8.3

8.4 ***Removal***. Any Manager may be removed either for or without cause at any meeting of Members, by the affirmative vote of a Majority of the Members if notice of intention to act upon such matter shall have been given in the notice calling such meeting.

Practice Comment: Alternative – Partnership structure – delete this section 8.4

8.5 ***Vacancies***. Any vacancy occurring in the Managers by reason of the increase in the number of Managers, may be filled by vote of a Majority of the remaining Managers though less than a quorum of the Managers. A Manager elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office.

Practice Comment: Alternative – Partnership structure – delete this section 8.5

8.6 ***Election.*** Each Manager shall be elected by the vote of a Majority of the Members at a meeting of Members at which a quorum is present.

Practice Comment: Alternative – Partnership structure – delete this section 8.6

8.7 ***Meetings.*** Meetings of the Managers shall be held annually on the _____ day of _____, or more often as may be determined by the Managers, from time to time. Meetings of the Managers may be called by the President or any Manager on three (3) days' notice to each Manager, either personally or by mail or by telegram. Except as otherwise expressly provided by this Agreement, neither the business to be transacted at, nor the purpose of, any meeting need be specified in a notice or waiver of notice.

Practice Comment: Section 101.352 (b) provides that the purpose of Special Meetings is to be set out in the notice for the Meeting. Consider if the parties desire to modify this arrangement, as set out above.

8.8 ***Place of Meetings.*** Meetings of the Managers may be held within or outside of the State of Texas

8.9 ***Quorum; Vote of a Majority of Managers***. At meetings of the Managers, the presence of Managers who hold a Majority of the votes of the Manager as fixed by this Agreement shall constitute a quorum for the transaction of business. The act of a Majority of the Managers present at a meeting at which a quorum is present shall be the act of the Managers, except as otherwise specifically provided by statute, the Certificate. If a quorum is not present at a meeting of the Managers, the Managers present may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum is present.

Practice Comment: Note that the decisions of the Managers may be based upon a Majority of those present at a meeting at which a quorum is present. In the Alternate Partnership structure, this may be less than a Majority of all of the Managers .

8.10 ***Notice of Meetings***. Notice stating the place, day and hour of the meeting shall be delivered to each Manager not less than three (3), nor more than sixty (60) days before the date of the meeting, by or at the direction of the Member or Members who called the meeting, the President, or other Person calling the meeting. The actions or activities to be addressed at a meeting of the Managers (general or special) is not required to be set out in the notice.

Practice Comment: If the Members want the matters which may arise at special meetings to be required to set out in the notice this should be set out in the Agreement.

8.11 ***Waiver of Notice***. Attendance of a Manager at a meeting shall constitute a waiver of notification of the meeting, except where such Manager attends for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened. Notification of a meeting may also be waived in writing. Attendance at a meeting is not a waiver of any right to object to the consideration of matters required to be included in the notification of the meeting but not so included, if the objection is expressly made at the meeting.

8.12 ***Minutes of Meeting.*** The Managers shall keep regular Minutes of its proceedings. The Minutes shall be placed in the records of the Company.

8.13 ***Action Without Meeting***. Any action that may be taken, or that is required by law or this Agreement to be taken by the Managers, or any group thereof, may be taken without a meeting, without prior notice, and without a vote, if a consent or consents in writing, setting forth the action so taken, will have been signed by the Managers whose consent is necessary to take the action. The consent may be in

one or more counterparts. For purposes of this Section, a telegram, telex, cablegram, or similar transmission by a Person or a photographic, photostatic, facsimile, or similar reproduction of a writing signed by a Person will be regarded as signed by that Person. In any request for consent or approval from another Manager, the requesting Manager(s) may specify a response period, ending no earlier than the fifth day following the date on which the Manager whose consent or approval is sought receives the request. If the receiving Manager does not respond by the end of this period, it will be deemed to have not consented to or approved the action set forth in the request. The signed consent, or a signed copy, shall be placed in the Records of the Company.

Practice Comment: Section 101.358(b). Consider whether it would be preferable to provide that "failure to respond is the equivalent of consent being given rather than denied". Determine if this is a right that you want to provide to the Managers, or do you want to require any action taken without a meeting to be unanimous.

8.14 ***Action by Communications Equipment***. Members may participate in and hold a meeting by means of a conference telephone or similar communications equipment or other suitable electronic communications equipment, including video conferencing technology, or the internet, or a combination thereof, by means of which all Persons participating in the meeting can communicate with [hear] each other and participate in the meeting. Participation in such meeting will constitute attendance and presence in person at such meeting, except where a Person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

Practice Comment: Section 6.002. Allows internet conferences and does not require that people can hear each other, only that they can communicate with each other.

8.15 ***Proxies***. Managers are entitled to vote by and through a Person holding a valid written proxy. A telegram, telex, cablegram, or similar transmission by the Manager, or a photographic, photostatic, facsimile, e-mail or similar reproduction of a writing executed by the Manager, shall be treated as an execution in writing for the purposes of this Agreement. No proxy shall be valid after eleven (11) months from the date of its execution, unless otherwise provided in the proxy. Each proxy shall be revocable unless expressly provided therein to be irrevocable and unless otherwise made irrevocable by law. Each proxy shall be filed with the Secretary of the Company prior to or at the time of the meeting proxy.

Practice Comment: This is a new right granted to Managers under Section 101.357. Consider whether it would be preferable to prohibit the use of Proxies by Managers.

ARTICLE 9.
OFFICERS AND AGENTS

9.1 ***Number; Qualification; Election; Term***. The Company may have a Chief Executive Officer, President, Secretary; and such other officers (including any Vice Presidents and a Treasurer) and assistant officers and agents as the Managers may deem necessary.

(a) No officer or agent need be a Member, a Manager or a resident of Texas.

(b) Officers shall be elected by the Managers.

(c) Unless otherwise specified by the Managers at the time of election or appointment, or in an employment contract approved by the Managers, each officer's and agent's term shall end one year from the date of appointment or, if earlier, his death, resignation, or removal.

(d) Any two or more offices may be held by the same Person.

9.2 ***Removal***. Any officer or agent elected or appointed by the Managers may be removed by the Managers. Election or appointment of an officer or agent shall not of itself, nor shall anything in this Agreement, create contract rights.

9.3 ***Vacancies***. Any vacancy occurring in any office of the Company (by death, resignation, removal or otherwise) may be filled by the Managers.

9.4 ***Authority***. Officers and agents shall have such authority and perform such duties in the management of the Company as are provided in this Agreement or as may be determined by resolution of the Managers not inconsistent with this Agreement.

9.5 ***Chief Executive Officer***. If the Company should elect to have one, the Chief Executive Officer shall preside at all meetings of the Members and Managers, shall have general and active management of the business and affairs of the Company, and shall see that all orders and resolutions of the Members and Managers are carried into effect. He shall perform such other duties and have such other authority and powers as the Managers may from time to time prescribe.

9.6 ***President***. If the Company should elect to have one, the President shall have general and active management of the day to day business activities of the Company and shall see that all orders and resolutions of the Chief Executive Officer (if one is appointed or elected) Members and Managers are carried into effect. He shall perform such other duties and have such other authority and powers as the Managers may from time to time prescribe and, if no Chief Executive Officer exist, he shall preside at all meetings of the Members and Managers.

9.7 ***Vice Presidents***. If the Company should elect to have one, the Vice Presidents, if any, in the order of their seniority, unless otherwise determined by the Managers, shall, in the absence or disability of the President, perform the duties and have the authority and exercise the powers of the President. They shall perform such other duties and have such other authority and powers as the Managers may from time to time prescribe or as the President may from time to time delegate.

9.8 ***Secretary***. If the Company should elect to have one, the Secretary shall attend all meetings of the Managers and all meetings of the Members and record all votes, actions and minutes of all proceedings in the Records of the Company to be kept for that purpose. He shall perform such other duties and have such other authority and powers as the Managers may from time to time prescribe or as the President may from time to time delegate.

9.9 ***Treasurer***. If the Company should elect to have one, the Treasurer, if any, shall have the custody of the Company funds and securities, shall keep full and accurate accounts of receipts and disbursements of the Company, and shall deposit all funds and other valuables in the name and to the credit of the Company in depositories designated by the Managers. He shall perform such other duties and have such other authority and powers as the Managers may from time to time prescribe or as the President may from time to time delegate.

9.10 ***Compensation***. The compensation of officers and agents shall be fixed from time to time by the Managers.

ARTICLE 10.
MEETINGS AND CONSENTS OF MEMBERS

Practice Comment: The provisions of this Article generally parallel those relating to shareholders of a corporation.

10.1 ***Voting Rights***. Where Members are to make a determination under the terms of this Agreement, each Member is entitled to one vote for each Unit they hold in the Company. Only a Person who has been admitted to the Company as a Member shall be entitled to vote. A Person who receives a Transfer of all or a portion of the Membership Interest, or any other rights of a Member, shall not be entitled to vote as a Member until he has been admitted to the Company as a Member.

Practice Comment: Sections 6.251 and 6.252 of the TBOC have extended to the Members the right to create Voting Trusts and enter into Voting Agreements.

10.2 ***Voting List***. At least ten (10) days before each meeting of the Members, a complete list of the Members entitled to vote at the meeting, with the address of each and the number of Units held by each, shall be prepared by the Secretary. The list, for a period of ten (10) days prior to the meeting, shall be kept on file at the registered office of the Company and shall be subject to inspection by any Member at any time during usual business hours.

10.3 ***Record Date.*** The date upon which the notice of a meeting of the Members is mailed shall be the record date for the purpose of determining the Members entitled to vote at the Meeting. The record date for determining Members entitled to consent to action in writing without a meeting shall be the first date on which a written consent setting forth the action taken or proposed to be taken, is first delivered to the registered office, its principal place of business, or an officer or agent of the Company.

10.4 ***Method of Voting.*** At any meeting of the Members, every Member having the right to vote may vote either in person, or by proxy executed in writing by the Member. A telegram, telex, cablegram, e-mail or similar transmission by the Member, or a photographic, photostatic, facsimile, or similar reproduction of a writing executed by the Member, shall be treated as an execution in writing for the purposes of this Agreement. No proxy shall be valid after eleven (11) months from the date of its execution, unless otherwise provided in the proxy. Each proxy shall be revocable unless expressly provided therein to be irrevocable and unless otherwise made irrevocable by law. Each proxy shall be filed with the Secretary of the Company prior to or at the time of the meeting.

10.5 ***Meetings***. At any time, either the Managers or Members owning Units entitling them to at least 10% of the Units of all Members may call a meeting of the Members to transact business that the Members or any group of Members may conduct as provided in this Agreement. A meeting may be called by notice to all Members entitled to vote at such meeting on or before the tenth (10^{th}) day prior to the date of the meeting specifying the location and the time and stating the business to be transacted at the meeting. The chairperson of the meeting will be a Member selected by a Majority of the Members. At the meeting, the Members may take any action whether or not included in the notice of the meeting. Unless otherwise provided in this Agreement, all decisions of the Members shall be determined by a Majority of the Members.

10.6 ***Notice***. Written or printed Notice stating the place, day and hour of the meeting shall be delivered not less than ten (10) nor more than sixty (60) days before the date of the meeting, either

personally or by mail, by or at the direction of the President, the Secretary, or the officer or Person calling the meeting, to each Member of record entitled to vote at the meeting.

10.7 ***Waiver of Notice***. Attendance of a Member at a meeting shall constitute a waiver of Notification of the meeting, except where such Member attends for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened. Notification of a meeting may also be waived in writing. Attendance at a meeting is not a waiver of any right to object to the consideration of matters required to be included in the Notification of the meeting but not so included, if the objection is expressly made at the meeting.

10.8 ***Place of Meetings.*** Meetings of the Members may be held in or out of the State of Texas.

10.9 ***Action Without Meeting***. Any action that may be taken, or that is required by law or this Agreement to be taken, by the Members or any group thereof, may be taken without a meeting, without prior notice, and without a vote, if a consent or consents in writing, setting forth the action so taken, will have been signed by the Member(s) whose consent is necessary to take the action. The consent may be in one or more counterparts. In any request for consent or approval from another Member, the requesting Member(s) may specify a response period, ending no earlier than the fifth day following the date on which the Member whose consent or approval is sought receives the request. If the receiving Member does not respond by the end of this period, it will be deemed to have not consented to or approved the action set forth in the request.

Practice Comment: Section 6.202 indicates the ability to provide a consent by only those required to carry the vote will need to be set out in the Certificate; however this requirement is overridden by the provisions of 101.358(b). Determine if this is a right that you want to provide to the Members, or do you want to require any action taken without a meeting to be unanimous.

Practice Comment: . Consider whether it would be preferable to provide that failure to respond is the equivalent of consent being given rather than denied.

10.10 ***Action by Conference Equipment***. Members may participate in and hold a meeting by means of a conference telephone, similar communications equipment or other suitable electronic communications equipment, including video conferencing technology, or the internet, or a combination thereof, by means of which all Persons participating in the meeting can [hear each other and] participate in the meeting. Participation in such meeting will constitute attendance and presence in person at such meeting, except where a Person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

Practice Comment: The case laws relating to the fiduciary duties that may arise between Members of a Limited Liability Company remains in a stage of development. While not such duty is expressly set out in the Code, some provisions of the Code seem to suggest that such duties may exist. In the case of manager, they duties may be similar to those of members of the board of directors of a corporation, such as the traditional fiduciary duties of loyalty and care. Certain provisions of the Code allow for these duties to be expanded or restricted. See Section 101.401 of the Code.

ARTICLE 11.
CONTRACTS WITH MEMBERS AND INDEMNIFICATION OF MEMBERS, MANAGERS AND OFFICERS

Practice Comment: Section 101.255 generally governs contracts with parties related to the Company to the extent not addressed by the Agreement. The parties should consider how strict the policy of the Company should be for contracts with related parties and set out these terms in the Agreement accordingly.

11.1 ***Interested Managers, Officers and Members***. If Section 11.2 is satisfied, no contract or other transaction between the Company and any of its Members, Managers, or officers or any company or firm in which any of them are directly or indirectly interested, shall be invalid solely because of their relationship with the Company or because of the presence of the Member, Manager, or officer at the meeting authorizing the contract or transaction, or his participation or vote in the meeting or authorization.

11.2 ***Disclosure, Approval; Fairness***. Paragraph (a) of this Section shall apply only if (X) the material facts of the relationship or interest of each such Member, Manager, or officer are known or disclosed:

(a) to the Managers, and they nevertheless authorize or ratify the contract or transaction, provided however, while any such interested Manager shall be counted in determining whether a quorum is present, their vote shall not be calculated in determining the Majority necessary to carry the vote; or

(b) to the Members, and they nevertheless authorize or ratify the contract or transaction by, each such interested Person to be counted for quorum and voting purposes; or

(Y) if the contract or transaction is fair to the Company as of the time it is authorized or ratified by the Managers or the Members, as the case may be.

11.3 ***Indemnifications***. The Company agrees to indemnify, defend, and hold harmless each of the following:

(a) The Members, Managers and officers of the Company as well as their officers, managers, members, partners, owners, employees, and agents, (the "Indemnified Person") if any, from and against all Claims they may incur as a result of having been, being, or threatened to be made a named defendant or respondent in a Proceeding because it is or was a Member, Manager or officer in the Company or is performing or had performed the obligations of the Member, Manager or officer with respect to the Company, SPECIFICALLY INCLUDING CLAIMS BASED ON OR ARISING FROM THEIR SOLE, PARTIAL, OR CONCURRENT NEGLIGENCE, but excluding any such items incurred as a result of acts of gross negligence, willful or intentional acts against the Company.

(b) Each Indemnified Person from and against all Claims such Person may incur as a result of appearing as a witness or other participation in a Proceeding that involves or affects the Company.

(c) Each Indemnified Person from and against all Claims such Person may incur as a result of having performed or performing services for the Company, SPECIFICALLY INCLUDING CLAIMS BASED ON OR ARISING FROM THE INDEMNIFIED PERSON'S SOLE, PARTIAL, OR CONCURRENT NEGLIGENCE.

(d) The rights of an Indemnified Person under this Section include the right to be paid or reimbursed by the Company for reasonable expenses incurred in defending any Proceeding in advance of its final disposition.

(e) If a claim for indemnification or advancement of expenses hereunder is not paid in full by the Company within 90 days after a written claim has been received by the Company, the Person seeking a remedy under this Section may at any time thereafter bring suit against the Company to recover the unpaid amount of the claim, and if successful in whole or in part, the Person seeking a remedy under this Section will also be entitled to be paid the expenses of prosecuting such claim.

(f) The right of any Indemnified Person under this Section will survive the termination of that Person's status as an Indemnified Person and the termination of this Agreement and the dissolution of the Company.

(g) In the event of the death of a Person seeking a remedy under this Section, the right under this Section will inure to the benefit of such Person's heirs, executors, administrators, and personal representatives.

(h) The rights conferred in this Section will not be exclusive of any other right that a Person seeking a remedy under this Section may have or hereafter acquire under any statute, resolution of Members, Managers agreement, or otherwise.

Practice Comment: Certain rights to indemnification for companies are governed by Title 1, Chapter 8, of the TBOC. Limited Liability Companies are not constrained by limits that might otherwise apply to corporations. This duty to indemnify has been drafted in a manner which is expansive.

Practice Comment: If you represent a Member who is not a Manager, you may want to consider limiting the obligations of the Company to indemnify the Managers, as contemplated by §§8.003 of the TBOC, or even more so.

ARTICLE 12.
RIGHTS, OBLIGATIONS,
AND REPRESENTATIONS OF MEMBERS

12.1 ***Representations of Members***. Each Member hereby severally represents and warrants to, and agrees with, the Company and each other Member as follows:

Practice Comment: The representations and warranties of each Member, if included, might also be tailored to address any specific concerns, including, for instance, the nature of title to any property to be contributed by a Member to the Company.

(a) **Authorization and Validity of Agreement**. Such Member has full power and authority to execute and deliver this Agreement, to perform the obligations of such Member hereunder, and to consummate the transactions contemplated hereby. The execution, delivery, and performance of this Agreement by such Member, and the consummation by such Member of the transactions contemplated hereby, have been duly authorized and approved by such Member. This Agreement has been duly executed and delivered by such Member and is a valid

and binding obligation of such Member, enforceable against such Member in accordance with its terms, except to the extent that its enforceability may be subject to applicable Bankruptcy Laws and to general equitable principles. The execution and delivery of this Agreement does not, and the consummation of the transactions contemplated hereby will not, violate any provision of any agreement, instrument, order, regulation, judgment, or decree to which such Member is subject or by which such Member or any asset of such Member is bound. Such Member is under no legal disability, contractual or otherwise, that prohibits such Member from entering into this Agreement and performing the obligations of such Member hereunder. Such Member is the sole party in interest in the Units of such Member under this Agreement and, as such, is vested with all legal and equitable rights in such Units.

(b) **Investment for Members Account.** Such Member is acquiring the Units of the Company for the account of such Member and not with a view to distribution thereof within the meaning of the Securities Act of 1933, as amended, or any state securities laws. The Member will not Transfer the Units in contravention of that act or any applicable state or Federal securities laws.

Practice Comment: Because Company Membership Interest may be securities, it is likely that a representation of some sort will be necessary to confirm the exemption(s) from registration under federal and state securities laws on which the issuer is relying. The foregoing language should be modified to incorporate the relevant standards for such exemption(s).

(c) **Disclosure of Broad Authority of Managers.** Such Member acknowledges and understands that the Managers are granted broad discretion and authority under this Agreement and that the Managers' exercise of such broad discretion and authority may impair the value of such Member's Membership Interest. Such Member further acknowledges and understands that the Managers would not cause the Company to issue Membership Interest to the Member if the Managers did not have such broad discretion and authority and such Member agrees not to challenge the Manager's exercise of such discretion and authority.

Practice Comment: This language is intended to strengthen the Manager's defense against any limited Member who seeks to challenge the Manager's broad authority. If this is not the desire of the Members, this Section should be modified accordingly.

(d) **Securities Act Disclosure.** Pursuant to the Texas Securities Act, Art. 581-1 et seq. (the "Texas Securities Act"), the liability under the Texas Securities Act of a lawyer, accountant, consultant, the firm of any of the foregoing, and any other Person engaged to provide services relating to an offering of securities of the Company (such Persons, "Service Providers") is limited to a maximum of three times the fee paid by the Company or seller of the Company's securities to the Service Provider for the services related to the offering of the Company's securities, unless the trier of fact finds that such Service Provider engaged in intentional wrongdoing in providing the services. By signing below, each Member hereby acknowledges the disclosure provided in this paragraph.

Practice Comment: This language is included to take advantage of the limitation on liability permitted by the Texas Securities Act. It may be prudent to have it also included in the subscription agreement, if any, initialed in the Company agreement, or otherwise singled out to avoid a claim that the limited Member did not notice it.

ARTICLE 13.
BANK ACCOUNTS, INVESTMENTS, GENERAL ACCOUNTING PROVISIONS, REPORTS, AND DETERMINATION OF FAIR VALUE

13.1 ***Books of Account; Access; Fiscal Year***. The Managers, at the expense of the Company, shall maintain for the Company those books and records required by Section §3.151 and §101.501 of TBOC and such other books and records of account as the Managers, in their reasonable discretion, deem appropriate. Books and records of the accounts of the Company shall be maintained on a basis consistent with appropriate provisions of the Code [as well as generally accepted accounting principles], containing, among other entries, a Capital Account for each Member.

Practice Comment: If the parties do not want the minutes of meetings of the Members or Managers to be a part of the records available for review, these can be excluded. Section TBOC 3.151(b).

13.2 ***Access to Books and Records***. Books of account are to be kept at the principal office of the Company. Except as set out herein, the Managers may restrict the access of one or more Members to certain books, records, and accounts to the extent the Managers believes it to be in the best interest of the Company to do so. The Managers may require any Person to whom confidential information of the Company is provided pursuant to this Section to maintain the confidentiality of such information on such terms as the Managers may prescribe. The above notwithstanding:

(a) The Company shall make available to a Member, or Assignee, at its registered office, the address of the principal office of the Company.

(b) The Company shall make available to a Member or Assignee, within five (5) days following their delivery of written request, each of those items required to be maintained under Section 3.152 and 101.502 of the TBOC and such other information regarding the business of the Company that is reasonable for the Person to examine and copy.

(c) The Company shall make available to a Member or Assignee free of cost, the Certificate, this Agreement with all amendments, and the last 6 years Federal tax returns.

(d) The Company shall make available to a Manager all records of the Company pursuant to §3.151, 3.152 and 3.153 of the TBOC and such other information regarding the business of the Company that is reasonably related to the persons services.

Practice Comment: The Company is required to provide to Members and former Members access to the Company's books and records pursuant to §3.151, 3.152 and 3.153 of the TBOC. Under certain circumstances, Managers may believe that a Member's access to the Company's records could be detrimental to the Company, particularly if the Member is a competitor or is otherwise likely to use the information to disadvantage the Company. §3.153 of the TBOC.

Practice Comment: If you represent a Member who is not a Manager, you may want to limit the ability of the Managers to restrict access to the books and records of the Company if you are concerned the restriction is more to protect the Managers than the Company.

Practice Comment: Section 3.152 of the TBOC adds a right for governing persons to have appropriate and adequate access to those books and records set out in §3.153 of the TBOC or otherwise reasonably related to the persons services.

13.3 ***Annual Reports***. As soon as reasonably practicable after the end of each Fiscal Year, the Managers will use commercially reasonable efforts to cause the Members to be furnished with a balance sheet, an income statement, and a statement of changes in Members' capital of the Company for, and as of the end of, such year. These financial statements shall be certified by certified public accountants chosen by the Managers pursuant to a compilation [review] [audit] of the financial records of the Company conducted by the certified public accountants. The Managers also may cause to be prepared or delivered such other reports as it may deem appropriate. The Company will bear the costs of such reports.

Practice Comment: If you represent a Member who is not a Manager, you may want the Managers to have an absolute requirement to produce these reports by a date certain.

13.4 ***Periodic Reports***. As soon as reasonably practicable within fifteen (15) days following the end of each quarter [month] during the Fiscal Year, the Managers will use commercially reasonable efforts to cause the Members to be furnished with a balance sheet, and an income statement, as of the end of, such period reflecting the information for that period of the Fiscal Year, as well as, a year to date presentation of that information. These financial statements may be created internally by the Company, or, at the sole discretion of the Managers, prepared by certified public accountants chosen by the Managers. The Managers also may cause to be prepared or delivered such other reports as it may deem appropriate. The Company will bear the costs of all such reports.

13.5 ***Reliance on Third Party Reports*.** In connection with the discharge of their duties under the terms of this Agreement, or the exercise of their powers, Managers and Officers of the Company shall have the right to rely upon information, opinions, reports and statements, including financial statements and other financial data concerning the Company or another Person presented by an officer, employee, legal counsel, certified public accountant, investment banker, committee of which they are not a member, or other Person they reasonably believe possess professional expertise in the matter, unless they have knowledge of matters that would make this reliance unwarranted.

Note: This concept has been added from the TBCA language to protect the governing parties. Section 3.102 and 3.105 TBOC.

13.6 ***Bank Accounts***. The Managers will establish and maintain, in the name of the Company, one or more accounts at one or more banks. All Company funds will be deposited into such account(s). No other funds will be deposited into any such account. Funds deposited in any such account may be withdrawn only to pay Company debts or obligations, to make distributions to the Members pursuant to this Agreement, or to make Permitted Investments.

13.7 ***Permitted Investments***. Company funds may be invested in such investments as the Managers determine.

Practice Comment: If you represent a Member who is not a Manager, you may want some restrictions on the types of investments the Managers may make.

13.8 ***Audits at Request of Member***. Any Member shall have the right to have a compilation, review or audit conducted of the Company books (the "Audit"), which may be requested with respect to the annual financial statements of the Company. The cost of the Audit shall be borne by the Member or Members requesting the performance of the Audit. The Audit shall be performed by an accounting firm which provides accounting services for the Company. Not more than one (1) Audit shall be required by any or all of the Members for any Fiscal Year.

ARTICLE 14.
TAXES

14.1 ***Tax Returns***. The Managers shall cause the Company to prepare and timely file (including extensions) all federal, foreign, state and local tax returns required to be filed by the Company. Each Member shall furnish to the Company all pertinent information in its possession relating to the Company's operations that is necessary to enable the Company's tax returns to be timely prepared and filed. As soon as is reasonably practical following the end of each Taxable Year, the Company shall deliver such information as may be reasonably required by the Members in order for the Members to file their tax returns reflecting the Company's operations. The Company shall bear the costs of the preparation and filing of its tax returns.

Practice Comment: Again, if you represent a non Managing Member, you may want the Managers to have an absolute requirement to produce these returns by a date certain.

14.2 ***Tax Elections***. The Company shall make the following elections on the appropriate tax returns:

(a) to adopt the calendar year as the Company's Taxable Year to the extent permitted by Section 706 of the Code;

(b) to adopt the cash method of accounting to the extent permitted by Section 448 of the Code;

(c) upon the request of any Member, to make an election under Section 754 of the Code and the Treasury Regulations promulgated thereunder to adjust the bases of the Company's properties under Sections 734 and 743 of the Code;

(d) to elect to deduct the organizational expenses of the Company as permitted by Section 709(b) of the Code;

(e) to elect to deduct the start-up expenditures of the Company as permitted by Section 195(b) of the Code; and

(f) any other election the Managers may deem appropriate and in the best interest of the Company and the Members.

Neither the Company, the Managers nor any Member may make an election for the Company to be excluded from the application of the provisions of Subchapter K of Chapter 1 of Subtitle A of the Code or similar provisions of applicable state Law, and no provision of this Agreement shall be construed to sanction or approve such an election.

14.3 ***Tax Controversies***.

(a) The "tax matters partner" (the "TMP") of the Company pursuant to Section 6231(a)(7) of the Code shall be _____, or such other Member selected by the Managers in compliance with the Code. The TMP shall take such action as may be necessary to cause to the extent possible each other Member to become a "notice partner" within the meaning of Section 6223 of the Code. The TMP shall inform each other Member of all significant matters that may come to its attention in its capacity as TMP by giving notice thereof on or before the tenth Business Day after becoming aware thereof and, within that time, shall forward

to each other Member copies of all significant written communications it may receive in that capacity.

(b) Any cost or expense incurred by the TMP in connection with its duties, including the preparation for or pursuance of administrative or judicial proceedings, shall be paid by the Company.

(c) The TMP shall not bind any Member to a settlement agreement without obtaining the consent of such Member. Any Member that enters into a settlement agreement with respect to any Company item (within the meaning of Section 6231(a)(3) of the Code) shall notify the Board of Managers and the other Members of such settlement agreement and its terms within 90 Days from the date of the settlement.

(d) No Member shall file a request pursuant to Section 6227 of the Code for an administrative adjustment of Company items for any Taxable Year without first notifying the Board of Managers and the other Members. If the Managers and a Majority Interest consent to the requested adjustment, the TMP shall file the request for the administrative adjustment on behalf of the Members. If such consent is not obtained within 30 Days from such notice, or within the period required to timely file the request for administrative adjustment, if shorter, any Member, including the TMP, may file a request for administrative adjustment on its own behalf. Any Member intending to file a petition under Sections 6226, 6228 or other Section of the Code with respect to any item involving the Company shall notify the Managers and the other Members of such intention and the nature of the contemplated proceeding. In the case where the TMP is the Member intending to file such petition on behalf of the Company, such notice shall be given within a reasonable period of time to allow the Managers and the other Members to participate in the choosing of the forum in which such petition will be filed.

(e) If any Member intends to file a notice of inconsistent treatment under Section 6222(b) of the Code, such Member shall give reasonable notice under the circumstances to the Board of Managers and the other Members of such intent and the manner in which the Member's intended treatment of an item is (or may be) inconsistent with the treatment of that item by the other Members.

14.4 ***State, Local or Foreign Income or Franchise Taxes***. If state or foreign income or franchise taxes become applicable, the principles and procedures of this Article 14 shall apply to such taxes. References to the Code or Treasury Regulations shall be deemed to refer to corresponding provisions that may become applicable under state, local or foreign income or franchise tax statutes and regulations.

Practice Comment: If you represent a non Managing Member, you may want to place certain restrictions on what the Managers may do as a tax matters partner and to require your client to receive copies of correspondence received by the Managers in its capacity as a tax matters Member.

ARTICLE 15.
RESTRICTIONS ON CERTAIN TRANSFERS AND COMPETITIVE ACTIVITIES

15.1 ***General Prohibition***. No Person will make or suffer any Transfer of all or any part of its Membership Interest, whether now owned or hereafter acquired, except (i) with the approval of a Super

Majority of the Members, (ii) in accordance with the terms of this Agreement to Permitted Transferees, or (iii) in the case of a Member who is an individual the death of the Member, and any purported Transfer not made in compliance with this Agreement will be void and of no force and effect.

Practice Comment: The restrictions on transfer and substitution in this Article give Members comfort that they will not be forced to be Members with someone unacceptable.

Practice Comment: Note that the restriction relates to any person and not just to Members. This is necessary because of the possibility that someone will own a Membership Interest as a mere assignee.

15.2 ***Rights of an Assignee*.** Unless and until an Assignee becomes a Member of the Company in the manner herein prescribed, such Assignee shall be entitled only to receive distributions of the Company to which the assigning Member would otherwise be entitled and, as provided in the TBOC, to require reasonable access to the those books and records of the Company as set out in Section §3.151 and §101.501 of TBOC. In the event that the Members make additional contributions to the Company at any time while there is a Membership Interest held by an Assignee, the Member who assigned its Membership Interest in the Company and such Assignee, shall be jointly and severally responsible and required to make a contribution to the Company which relates to the Membership Interest. If the transferor Member or such Assignee does not make such contribution in accordance with the provisions of this Agreement, the transferor Member and the Assignee shall be treated as having Defaulted. In the event that one or more new Members are admitted into the Company, or one or more Members increase their interest in the Company while there is an outstanding interest in the Company held by an Assignee, and the Membership Interest of the then existing Members in the Company are reduced, the Membership Interest assigned to the Assignee shall be correspondingly reduced. No consent or other action on the part of such Assignee shall be required. Until an Assignee becomes a substituted Member, the voting rights relating to the Units in the Company which relate to the Membership Interest so assigned shall continue to be held in the name of the Assignor and, subject to any other provisions of this Agreement limiting or removing such voting rights rights. Moreover, any Assignee of such interest who has not been admitted as a Member of the Company shall have no rights relative to the operations or management of the Company, no voting rights relating to any Units and in no event shall be construed as a Member for any reason. In connection with the Assignee's receipt of any of the information relating to the Company, as set forth above or as otherwise provided under the Act, all assignees agree to keep all of such information strictly confidential and the Company may require that any disclosure of the same shall be subject to the same level of confidentiality which is required under the terms of this Agreement by other Members.

Practice Comment: This provision further identifies and limits the rights of an assignee under Section 101.109 of the TBOC. 101.109 would allow access to reasonable information.

15.3 ***Transferor's Responsibility.*** In the event a transfer is made in accordance with the terms of this Article and the transferee is substituted as a Member in place of the transferor, the transferee who is substituted as a Member shall become liable for all the terms, covenants, conditions and obligations relating to the Membership Interest. In addition, the transferor, and its predecessors who have conveyed the Membership Interest in the Company shall, in no event be relieved of their liability, responsibility or obligations relating to such Membership Interest for any matters which may have arisen on or prior to the date of the transfer.

15.4 ***Substituted Members***. Unless otherwise provided in this Agreement, an Assignee of a Member may become a substituted Member only with the consent of a Super Majority of the Members other than the transferring Member. In the event such a consent is provided, the Assignee shall become a Member only upon the following:

(a) The Member or the transferee has filed with the Company a written and dated instrument of such transfer, in form and substance reasonably satisfactory to the Managers, executed by both the transferor and the transferee, which instrument shall (i) contain the acceptance by the transferee of all of the terms and provisions of this Agreement, to the extent applicable to an assignee of a Membership Interest, (ii) contain such representations as the Managers may deem necessary or advisable to assure that such transfer need not be registered under any applicable federal or state securities laws, (iii) instruct the Managers as to the Membership Interest transferred and to whom and at what address Company distributions and Notices in respect of such Membership Interest should be sent;

(b) Unless expressly waived by the Managers, the transferor or transferee shall have delivered to the Company an opinion of counsel acceptable to the Managers that (i) such Disposition is exempt from the registration requirements of the Securities Act, applicable state securities laws, and any rules or regulations promulgated thereunder, and will not otherwise cause the Company to be in violation of such laws and regulations, (ii) the Disposition will not result in the termination of the Company within the meaning of Section 708(b) of the Code, and (iii) the Disposition will not adversely affect the status of the Company as a partnership under the Code; and

(c) The transferee or assignee shall have paid or caused to be paid to the Company any reasonable expenses incurred by the Company in connection with the admission of the transferee or assignee as a Substitute Member.

The above notwithstanding, in the event of a Transfer to an existing Member, the existing Member shall automatically be deemed to be a Substitute Member and shall be deemed to have agreed to those items set out in subsection (a) above.

Practice Comment: Absent a provision in the Company agreement concerning substitution of Members, unanimity of Members is required to authorize a substitution. *See* §101.103(c) and §101.105 of the TBOC. This might also be approved by a Super Majority of the Members (including the transferring Member, Members holding a Majority of the Units, or some other arrangement that best suits the needs of the parties to the transaction.
Practice Comment: If certain transfers are exempted from the restrictions on transfers, consider whether they should also be exempted from these substitution requirements.
Practice Comment: Remember that an assignment does not, by itself, cause a substitution. A substitution must be addressed as a matter separate and apart from a mere assignment. Failure to handle this issue properly can result in the "wrong" people being Members.
Practice Comment: The parties may want to consider allowing a transfer of a Membership Interest but only in connection with either a right of first refusal or right of first offer. If the other Members do not purchase the Membership Interest then the Membership Interest can be transferred. The Company Agreement may want to go so far as to also agree to admit any such transferee as a Member.

ARTICLE 16.
BUY OUT RIGHTS

16.1 ***Right to Purchase Upon Death [or Disability]***. Following a Transfer by such Member (the "Transferring Member") of its Membership Interest as a result of death or [disability], the Managers shall provide each of the other Members notice of such Transfer (the "Transfer Notice"). The other

Members will have the right to purchase all or a portion of the Transferring Member's Membership Interest (the "Transferred Interest") for its Fair Value determined as of the date of the Notification Date (as set in this paragraph). Such right may be exercised by any one or more of the other Members giving, within ninety (90) days after such Transfer, to the Transferring Member (or its heirs, representatives, or assigns) notice of its desire to purchase all or a portion of such Transferred Interest (the "Notification Date"). If a Member provides a timely notice to purchase all or any portion of the Transferred Interest, as soon as possible thereafter, the Company shall cause the Fair Value of the Transferred Interest to be determined as of the Notification Date. If there is more than one Member who desires to exercise such right (each, a "Purchasing Member"), the Transferred Interest will be allocated among all Purchasing Members as follows: First, a portion of the Transferred Interest will be allocated to each Purchasing Member to the extent of the lesser of (i) the Purchasing Member's pro rata portion (based on the number of Units owned by such Purchasing Member relative to the number of Units of all Purchasing Members) of the Transferred Interest and (ii) the portion of the Transferred Interest that such Purchasing Member expressed a desire to purchase in such notice. If, after such allocation, any portion of the Transferred Interest has not been allocated to the Purchasing Members (the "Residual Transferred Interest"), a similar allocation will be made of the Residual Transferred Interest among the Purchasing Members who have not been allocated the full portion of the Transferred Interest that such Purchasing Members expressed a desire to purchase in their respective notices. Such procedure will be continued until all of the Transferred Interest has been fully allocated, if possible.

Practice Comment: If this is to apply to the disability of a member you may want this to apply only to a member that is a manager since the disability of a Member that is [passive may have no effect on operations. In addition the Agreement will need to include a definition of when a disability arises and a procedure to determine if a disability exist.

Practice Comment: This pro rata allocation is made on the basis of the number of Units they hold. It may be more appropriate to base it on the Sharing Ratios at the time of the purchase.

16.2 ***Right to Purchase Upon Divorce***. If, as a result of divorce, a Transfer of a Membership Interest (the "Divorced Spouse Interest") takes place to the spouse of the Person who is or was a Member (the "Spouse"), the Member who was divorced will have the right to purchase the Divorced Spouse Interest for its Fair Value determined as of the date of the Transfer. Such right may be exercised by the Member who was divorced giving, to (i) Spouse and (ii) each of the other Members, notice of a desire to purchase all or a portion of such Divorced Spouse Interest within _____ months after such Transfer (the "Initial Notice"). The date of the timely delivery of that Initial Notice is hereinafter referred to as the Initial Notification Date. If, after the delivery of the Initial Notice, the Member who was divorced has not given notice to purchase all or a portion of such Divorced Spouse Interest, the other Members will have the right to purchase the portion of the Divorced Spouse Interest with respect to which the Member who was divorced did not give such notice (the "Residual Divorce Interest") for its Fair Value determined as of the date of the Transfer. Such right may be exercised by the other Members giving, within _____ months after their receipt of the Initial Notice, a written notice of their desire to purchase all or a portion of such Residual Divorce Interest. If a Member provides a timely notice to purchase all or any portion of the Divorced Spouse Interest, as soon as possible thereafter, the Company shall cause the Fair Value of the Divorce Spouse Interest to be determined as of the Transfer Date. If there is more than one Member who desires to exercise such right (each, a "Purchasing Member"), the Residual Divorce Interest will be allocated among all Purchasing Members as follows: First, a portion of the Residual Divorce Interest will be allocated to each Purchasing Member to the extent of the lesser of (i) the Purchasing Member's pro rata portion (based on the number of Units owned by such Purchasing Member relative to the number of Units of all Purchasing Members) of the Residual Divorce Interest and (ii) the portion of the Residual Divorce Interest that such Purchasing Member expressed a desire to purchase in such notice. If, after such allocation, any portion of the Residual Divorce Interest has not been allocated to the Purchasing

Members, a similar allocation will be made of the remaining Residual Divorce Interest among the Purchasing Members who have not been allocated the full portion of the Residual Divorce Interest which such Purchasing Members expressed a desire to purchase in their respective notices. Such procedure will be continued until all of the Residual Divorce Interest has been fully allocated, if possible.

Practice Comment: This pro rata allocation is made on the basis of the number of Units they hold. It may be more appropriate to base it on the Sharing Ratios at the time of the purchase.

16.3 ***Fair Value Determination***. In the event the Fair Value of a Membership Interest is to be determined under the terms of this Agreement, the Managers shall cause the Company to select a qualified appraiser for the purpose of making such determination. In connection with any determination of Fair Value, the Company will make its books and records available to the appraiser and will otherwise cooperate and cause its employees to cooperate with such appraiser. The Company will pay the fees and expenses of such appraiser. In each case, the Managers will cause the appraiser to be selected in accordance with the time frames set out in the Section of this Agreement which calls for the Fair Value determination. The determination of Fair Value, made by such independent appraiser will be final, conclusive, and binding on the Company, all Members, and all Assignees of a Membership Interest. Upon receipt of the determination of the Fair Value the Company shall cause the report or reports developed by the appraisers to be distributed to each of the Members as soon as reasonably possible thereafter.

Practice Comment: Often the parties want the ability to participate in the selection of the appraiser to assure a level of fairness to the selection process. In this case it is not uncommon for the parties to attempt to agree on one appraiser, and only if they are not able to (within a set period of time), the buyer and seller will each select an appraiser, each at their own cost, and either those appraisers will select a third appraiser who will conduct the analysis (and the cost split between the buyer and seller) or, they will all conduct the analysis and the two closest in value will be averaged to determine the Fair Value. It is also not uncommon to include some level of instruction for the appraisers, such as a requirement that they take into consideration any discounts for minority control, or lack of marketability, or a requirement that any such discounts be ignored.

16.4 ***Termination Right.*** The above notwithstanding, in the event a Member exercises an election to purchase a Membership Interest under the terms of this Article 16.1 or 16.2, the Member may terminate its purchase right within fifteen (15) days following its receipt of the determination of the Fair Value, by delivery of Notice to the party selling the Membership Interest and the Company. If such election is terminated each of the other Members electing to purchase the Membership Interest will have the pro rata right to purchase that interest in the manner set out above.

16.5 ***Securities Laws Compliance***. The Membership Interest has not been registered with the Securities and Exchange Commission under the Securities Act of 1933, as amended, or the state securities laws of Texas or any other state. Without such registration, no Member or Assignee may effect or suffer a Transfer until the Member or Assignee provides evidence satisfactory to the Managers which, in the discretion of the Managers, may include an opinion of counsel satisfactory to the Managers, that such registration is not required for such Transfer to the effect that any such Transfer will not be in violation of the Securities Act of 1933, as amended, applicable state securities laws, or any rule or regulation promulgated thereunder.

16.6 ***Closing***. If one or more Members elect to purchase the Membership Interest under the terms of this Article, the Closing shall be on or before that date which is the later of thirty (30) days after

(i) the Notification Date or (ii) the determination of the Fair Value under the terms of this Agreement. At the Closing, the Person selling the Membership Interest will transfer the Membership Interest to be sold to the Member or Members purchasing the Membership Interest, free and clear of any liens or encumbrances (other than those which may have been created to secure any indebtedness or obligations of the Company). At the Closing, the purchase price to be paid for the Membership Interest shall be paid to the Person selling their interest, in cash.

Practice Comment: You may want to consider arranging the payment in installments. If so, the Agreement will need to set out the nature of the installment payments, an interest factor for the delayed payments and security for the payment of these sums. You should also address the prepayment of the installment obligation if all or substantially all of the assets of the Company are sold.

Practice Comment: Where there are employee Members, you may want to consider a right to buy out the employee upon a termination of their employment. The terms of this buyout may be different if the buyout is in connection with a termination of employment for "cause" and "not for cause".

Practice Comment: In certain circumstances, where a deadlock might in the voting rights of the Members. Arise, you may want to include a buy out option, such as a push pull agreement to resolved the dead lock.

ARTICLE 17.
COMPETITION

Neither this Agreement nor the relationship created hereby will preclude or limit, in any respect, the right of any Member or Manager or any Affiliate of any Member or Manager to engage, directly or indirectly, through participation, investment, or otherwise, in any opportunity or business of any type, including those that may be the same as or similar to the Company or its business, those that compete with the Company, and those in which the Company has invested. No Member, Manager, or any Affiliate of a Member or Manager will have any obligation to offer to the Company or any other Member the right to participate in any such activity. Neither the Company nor any other Member or Manager or any Affiliate of a Member or Manager will have any right, by virtue of this Agreement or the relationship created by this Agreement, with respect to any such activity.

Practice Comment: While the Limited Liability Company does not have imposed upon it the same duties of loyalty and care that relate to partnerships in Texas, the special relationship of the parties, in particular those that are the Managers of the Company may give rise to certain duties that are similar in common law to those that arise in for directors of corporations. If you represent the Managers, you may want to make clear the types of activities in which the Managers may engage without violating any such duty.

Practice Comment: There may be instances in which the parties desire to limit the ability of some or all of the Members to compete with the Company. It would be prudent to spell those limitations out in the Company agreement.

Practice Comment: Consider the buyout of the Membership Interest of an employee upon termination of their employment..

Practice Comment: Consider the use of key man life insurance to fund a buy out arrangement and to potentially fix a price for the buy-out.

ARTICLE 18.
DEFAULT BY MEMBER

18.1 ***Default of a Member***. Any one of the following events shall be deemed to be an Event of Default (the "Default") by a Member:

(a) Failure to make a Capital Contribution in the manner or time periods set out herein.

(b) A violation of any other provisions of this Agreement.

(c) The gross negligence, fraud, theft or willful misconduct committed by the Member against the Company or one or more of the Members in connection with the operation of the Company.

18.2 ***Terminations of Defaulting Member***. In the event of a default by a Member, the Member shall be provided written notification to cure such Default from the Company or any one or more Members who are not in default (the "Non-Defaulting Members"). The defaulting Member (the "Defaulting Member") shall have thirty (30) days following receipt of such notice to cure said Default (the "Cure Period"). If the Defaulting Member fails to cure the Default within the Cure Period, the Company shall provide Notice to the Non-Defaulting Members (the "Default Notice") and the Non-Defaulting Members may pursue any and all remedies that may be available, at law and in equity, to cure such Default, including the remedy of specific performance if it is available.

Practice Comment: You may want to consider if notice and right to cure should be provided for a failure to make a Capital Contribution or gross negligence, fraud, theft or willful misconduct. You may also want to consider the time frame for a response to such a default.

Practice Comment: You may want to consider if remedies should be limited to only actual damages, or a forfeiture or discounted buy out.

Practice Comment: The TBOC provides a broad list of remedies for a failure to meet its obligations under the Agreement, including the failure to make a capital contribution, which is similar to the Texas Limited Liability Company Act. These include the right of forfeiture, as well as any other consequence. 101.153(b) TBOC.

18.3 ***Right to Purchase Upon Default***. In addition to each of the remedies for a Default by a Member, as set out above, should a Default occur, each of the Non-Defaulting Members shall have the right to purchase all or a portion of the Defaulting Member's Membership Interest (the "Defaulting Interest") for _____ % of its Fair Value determined as of the date of such Default Notice. Such right may be exercised by any one or more of the Non-Defaulting Members giving, within forty five (45) days after such Default Notice, to the Defaulting Member notice of its desire to purchase all or a portion of such Defaulting Interest (for the purpose of this Section the "Notification Date"). If a Member provides a timely notice to purchase all or any portion of the Defaulting Interest, as soon as possible thereafter, the Company shall cause the Fair Value of the Defaulting Interest to be determined as of the date of such Default Notice. If there is more than one Non-Defaulting Members who desires to exercise such right (each, a "Purchasing Member"), the Defaulting Interest will be allocated among all Purchasing Members as follows: First, a portion of the Defaulting Interest will be allocated to each Non-Defaulting Member to the extent of the lesser of (i) the Non-Defaulting Member's pro rata portion (based on the number of Units owned by such Non-Defaulting relative to the number of Units of all Non-Defaulting Members) of the Defaulting Interest and (ii) the portion of the Defaulting Interest that such Non-Defaulting Member expressed a desire to purchase in such notice. If, after such allocation, any portion of the Defaulting Interest has not been allocated to the Non-Defaulting Members (the "Residual Defaulting Interest"), a

similar allocation will be made of the Residual Defaulting Interest among the Non-Defaulting Members who have not been allocated the full portion of the Defaulting Interest that such Non-Defaulting Members expressed a desire to purchase in their respective notices. Such procedure will be continued until all of the Defaulting Interest has been fully allocated, if possible.

Practice Comment: This pro rata allocation is made on the basis of the number of Units they hold. It may be more appropriate to base it on the Sharing Ratios at the time of the purchase.

Practice Comment: In the case of a default for a failure to contribute, another alternative may be a dilution of the non contributing member. The metric for the dilution should be carefully considered to address the current value of the Company and risk associated with the contribution.

18.4 ***Closing***. If one or more Members elect to purchase the Defaulting Interest under the terms of this Article, the Closing shall be on or before that date which is the later of thirty (30) days after (i) the Notification Date or (ii) the determination of the Fair Value under the terms of this Agreement. At the Closing, the Defaulting Member will transfer the Membership Interest to be sold to the Non-Defaulting Members, free and clear of any liens or encumbrances (other than those which may have been created to secure any indebtedness or obligations of the Company). At the Closing, the purchase price to be paid for the Defaulting Interest shall be paid to the Defaulting Member in cash.

18.5 ***Cumulative Remedies***. Except as otherwise expressly set forth in this Agreement, the rights and remedies provided by this Agreement are cumulative and the use of any one right or remedy by any party will not preclude or constitute a waiver of its right to use any or all other remedies. Such rights and remedies are given in addition to any other rights the Members may have by law, statute, ordinance, or otherwise.

Practice Comment: If it is the intention of the Parties to limit damages to either (A) actual damages or (B) some fixed sum, (iii) a forfeiture of the Membership Interest, or (iv) a discounted buy out of the Membership Interest of the Defaulting Member, this section will need to be modified accordingly.

18.6 ***Cure of Default***. The Default of any Member may be remedied by any one or more Non-Defaulting Members; provided however, to the extent such Default has occurred a remedy shall not terminate the rights of the Company or Non-Defaulting Members under this Article. In such event, any amount paid out to cure such Default, together with all reasonable expense and interest at the highest lawful rate not to exceed the Base Rate, shall be repaid to the Non-Defaulting Members by the Defaulting Member. Such advance with interest shall be repaid out of either (i) the distributions to the Defaulting Member pursuant to this Agreement, until the Non-Defaulting Member is fully reimbursed, or (ii) shall be paid out of the proceeds from the sale of the Defaulting Member's Membership Interest pursuant to this Article. Any cure of a Default under this Article shall have no effect on the other Member's rights to acquire a Defaulting Member's Membership Interest under the terms of this Agreement.

ARTICLE 19.
WINDING UP

Practice Comment: TBOC clarifies the manner in which an entity is concluded. The procedures include a winding up and termination process. Winding up will begin with an event requiring a winding up, which may be voluntary or involuntary.

Practice Comment: **T**here is a difference between the winding up of this entity and its termination. The

Company may begin to wind up under certain circumstances set out in the TBOC and the Company Agreement, however it will continue in existence in order to complete the liquidation and winding up of the Company's affairs. If the Company continues only until the occurrence of an event requiring a winding up, the event requiring a winding up and termination must, by definition, occur at the same time, which is not practical and creates a question as to status of the Company is during the winding-up phase.

19.1 ***Event Requiring a Winding Up***. Except as set out below, upon the happening of the first to occur of the following events, the Company will begin to wind up its affairs.

(a) the execution of an instrument approving the winding up of the Company by a Super Majority of the Members.

(b) the entry of a decree of judicial dissolution under Section 11.051(5) of the TBOC.

(c) the last remaining Member discontinues being a Member of the Company.

(d) the occurrence of a non-waivable event under the terms of the TBOC which requires the winding up of the Company.

No other event will require the winding up of the Company.

Practice Comment: Unless the certificate of formation or the Company Agreement specifies a fixed date as an event requiring a winding up, the Company may continue in perpetuity. *See* §3.003 of the TBOC.

Practice Comment: §11.051(2) of the TBOC, which applies to all domestic entities and not just to limited liability companies, states that one event that requires a winding up is "a voluntary decision to wind up" the Company. However, it fails to specify who must make that voluntary decision. §11.058 of the TBOC, which relates only to limited liability companies, contains additional events that require a winding up. The written consent of all Members is one of those additional events. Therefore, it is unclear whether the voluntary decision referred to in §11.051(2) is the same as or different than a decision made by all Members.

Practice Comment: There may be other events that the parties want to trigger the winding up of the Company, including, for instance, a sale of all or substantially all of the assets of the Company. However, such a provision, if coupled with a vote of the Members to approve the sale, may create securities laws issues under Rule 145 promulgated under the Securities Act of 1933, as amended.

Practice Comment: If you represent the Managers, you may want the Managers to have the absolute right to cause the Company to begin winding up as well.

Practice Comment: If you represent a Member who is not a Manager, you may not want the Managers to have the absolute right to avoid a winding up of the affairs of the Company and may prefer, instead, to require the consent of the Managers and a Majority or Super Majority of the Members (or some other group of Members).

19.2 ***Revocation***. If an event of the type described in Section 19.1(a) occurs or any other voluntary act of the Members which require a winding up of the Company, the event may be revoked at any time prior to the termination of the Company by a determination of a Super Majority of the Members.

19.3 ***Cancellation***.

(a) If an event of the type described in Section 19.1(c) occurs, the event may be cancelled, in writing, at any time within 1 year days after the occurrence of such event if (a) the personal representative of the last Member agrees in writing to (i) a continuation of the Company and (ii) the admission of the personal representative of the Member or its nominee or designee as a Member, or (b) a new Member is admitted to the Company by either the personal reprehensive of the last Member, the Mangers, or a Majority of the Assignees (in this case only, allowing the assignees of such Membership Interest to vote the Units of the Membership Interest they have been assigned).

(b) If an event of the type described in Section 19.1(d) occurs, the event may be cancelled, in writing, at any time within 1 year after the occurrence of such event if (a).

Note: If the Agreement provides an event for winding up, the event may be cancelled within one year unless the Agreement states otherwise. 11.152(c) TBOC.

Note: If the TBOC provides an event for winding up, the event may be cancelled within one year if the Code Section expressly allows for this and Agreement does not state otherwise. 11.152(c) TBOC.

Note: If a term is specified, the event requiring the winding up may be cancelled within three years 11.152(b) TBOC.

19.4 ***Interim Manager***. If an event requiring winding up occurs and there is no remaining Managers, a Majority of the Members may appoint an interim manager of the Company, who will have and may exercise only the rights, powers, and duties of the Managers necessary to preserve the Company assets, until new Managers, if any, are elected.

19.5 ***Effect of Event Requiring a Winding Up***. If an event requiring a winding up occurs and is not canceled or revoked, the Company will begin winding up its affairs and will continue until the assets have been distributed as set out below:

Practice Comment: As noted above, it is important to understand the difference between the occurrence of an event requiring a winding up and termination. The Company needs to continue in existence following the occurrence of an event requiring a winding up in order to complete the liquidation and winding up of the Company's affairs. If the Company continues only until the occurrence of an event requiring a winding up, the occurrence of the event and termination must, by definition, occur at the same time, which is not practical and creates a question as to what the terminated Company is during the winding-up phase.

ARTICLE 20.
WINDING UP AND TERMINATION

20.1 ***Winding Up and Termination***.

(a) **General**. As expeditiously as possible following the occurrence of an event requiring a winding up, the Managers will proceed to wind up the affairs of the Company, liquidate assets, pay liabilities, and make liquidating distributions to the Members, in the following order of priority:

(i) the Managers shall cause an accounting to be made by a recognized firm of certified public accountants of the Company's assets, liabilities, and operations through the last day of the calendar month in which the event requiring winding up occurs;

(ii) the Managers will use commercially reasonable efforts to maximize the value of the Company assets and then to sell Company assets. Any resulting Profits or Losses from each sale will be computed and allocated to the Capital Accounts of the Members in the manner described in Article 6;

(iii) the Managers shall cause the notice described in article 11.052 of TBOC to be mailed to each known creditor of and claimant against the Company in the manner described in that Section.);

(iv) the Managers will pay, to the extent there are funds available therefore, all of the Company's obligations and establish such reserves as the Managers deems prudent (the "Liquidation Reserve");

(v) all remaining assets of the Company shall be distributed to the Members as follows:

(A) with respect to all Company property that has not been sold, the Fair Value of that property shall be determined and the Capital Accounts of the Members shall be adjusted to reflect the manner in which the Unrealized Gain and Unrealized Loss inherent in property that has not been reflected in the Capital Accounts previously would be allocated among the Members if there were a taxable disposition of that property for the Fair Value of that property on the date of distribution.

(B) Company property shall be distributed among the Members in accordance with the positive Capital Account balances of the Members, as determined after taking into account all Capital Account adjustments for the Taxable Year of the Company during which the liquidation of the Company occurs; and those distributions shall be made by the end of the Taxable Year of the Company during which the liquidation of the Company occurs (or, if later, 90 days after the date of the liquidation).

(C) All distributions in kind to the Members shall be made subject to the liability of each distributee for costs, expenses, and liabilities theretofore incurred or for which the Company has committed prior to the date of termination and those costs, expenses, and liabilities shall be allocated to the distributee pursuant to this Article.

(D) all remaining cash and other Company property (other than the Liquidation Reserve) will be distributed among the Members as set out in Article 6.

(E) The distribution of cash and/or property to a Member in accordance with this Article constitutes a complete return to the Member of its Capital Contributions and a complete distribution to the Member of its Membership Interest.

(b) **Powers**. Until final distribution, the Managers will continue to operate the Company properties with all of the power and authority of the Managers.

(c) **Cost of Liquidation**. The costs of liquidation will be borne as a Company expense.

(d) **Termination; Release of Liquidation Reserve**. At the time such distributions are made and the Liquidation Reserve established in accordance with subsection (a), the Company will terminate, but if at any time thereafter any of the funds in the Liquidation Reserve are released because, in the opinion of the Managers, the need for such reserve has ended, such funds will be distributed in accordance with subsection (a).

(e) **No Recourse**. No Member will have any recourse against the Company or any other Member for the return of its Capital Contributions or any distributions not required by this Agreement except.

20.2 ***Cancellation of Certificate***. On completion of the distribution of Company assets as provided herein, the Company is terminated, and the Managers (or such other Person or Persons as the TBOC may require or permit) will cause the cancellation of the Certificate and any other filings made by the Company and will take such other actions as may be necessary to terminate or reflect the termination of the Company.

Practice Comment: Remember that the Company does not terminate upon the occurrence of an event requiring a winding up.

ARTICLE 21.
MISCELLANEOUS

21.1 ***Amendment or Modification***. Except to the extent this Agreement otherwise provides for a change to be effected without the approval required in this Section, this Agreement may be amended or modified at any time and from time to time only by a written instrument approved by the Managers and a Super Majority of the Members; *provided, however,* that (a) an amendment or modification (i) reducing a Member's share of profits, losses, distributions or Units (other than as a result of the issuance of additional Company Interests or adjustments to Sharing Ratios authorized without violation of this Agreement) or (ii) increasing the obligation of a Member to make Capital Contributions, requires the additional approval of the Member affected, (b) an amendment that disproportionately and adversely affects a Member requires the additional approval of the Member affected, (c) an amendment or modification reducing the required measure for any consent or vote in this Agreement requires the additional consent or vote of Members having their rights reduced, and (d) an amendment or modification made solely to reflect the admission or withdrawal of a Member need not be approved by any Member if the requirements set forth in this Agreement with respect to such admission or withdrawal are otherwise satisfied. In the event an amendment is properly adopted under the terms of this Agreement which require an amendment to the Certificate, the parties authorized to amend the Agreement are also authorized to amend the Certificate, as well.

Practice Comment: Absent express authorization to amend the Company agreement, a unanimous vote of Members is required to amend the Agreement, which is frequently difficult to obtain. *See* §101.053 of the TBOC.

Practice Comment: Some Company agreements give the Managers more authority to amend the Company agreement without the consent of the Members to comply, for instance, with the requirements of a lender or federal or state regulatory agency.

21.2 ***Notices***. All notices required or permitted to be given pursuant to this Agreement will be in writing and will be (i) personally delivered, (ii) mailed, first class postage prepaid, or delivered by a

nationally recognized express courier service, charges prepaid, (iii) delivered by fax, or (iv) electronic message, if to the Company to the address of the Company's registered office (as reflected on the records of the Secretary of State of the State of Texas) or its email address of _____, or fax number _____and if to a Member, to the appropriate address set forth on Exhibit A to this Agreement, and if to a Manager, to the address shown on the records of the Company. Any such notice, when sent in accordance with the provisions of the preceding sentence, will be deemed to have been given and received (a) on the day personally delivered, (b) on the third day following the date mailed, (c) the date of actual delivery by a courier, and (d) the date of delivery and confirmation of delivery by the recipient if delivered by fax or electronic message. The Company or a Member may change its address, as set out above, by giving notice in writing to all other Members in the manner set forth in this Section, stating the new address.

Practice Comment: The requirement to use certified or registered mail, which is frequently seen in notice provisions, is often cumbersome and unnecessary. Consider whether notice by facsimile or electronic mail is appropriate. If so consider how the confirmation of delivery will be carried out. Some will state these methods may only be used if followed by a delivery by hard copy.

Note: Section 6.053 of the TBOC also sets out new rules for when notice to a member is not required, including circumstance when prior notices have been returned, lost security holders under the Securities Exchange Act of 1934.

21.3 ***Failure to Pursue Remedies***. The failure of any party to seek redress for violation, or to insist upon the strict performance, of any provision of this Agreement will not prevent a subsequent act, which would have originally constituted a violation, from having the effect of an original violation.

21.4 ***Section Headings***. The headings in this Agreement are inserted for convenience and identification only and are in no way intended to describe, interpret, define, or limit the scope, extent, or intent of this Agreement or any provision hereof.

21.5 ***Severability of Provisions***. Every provision of this Agreement is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity will not affect the validity of the remainder of this Agreement and the illegal or invalid provision will be enforced to the maximum extent possible to still be legal and valid.

21.6 ***Governing Law; Venue***. This Agreement, and the application or interpretation thereof, will be governed exclusively by its terms and by the laws of the State of Texas. Except for those actions, proceedings, or claims which this Agreement provides will be settled by arbitration, any action, proceeding, or claim arising out of or relating to this Agreement commenced by any Member in its individual capacity must be prosecuted in _____ County, Texas. Each Member waives any plea of privilege that might exist in the absence of such Member's agreement to prosecute such claim in _____ County, Texas, and each Member irrevocably submits to the non-exclusive jurisdiction of the state and federal courts of the State of Texas and consents to service of process upon such Member in any legal proceeding arising out of or in connection with this Agreement.

21.7 ***Counterparts***. This Agreement may be executed in any number of counterparts with the same effect as if the Members had all signed the same document. All counterparts will be construed together and will constitute one instrument. In making proof of this Agreement, it will not be necessary to account for more than one counterpart executed by the Person against whom enforcement is sought.

21.8 ***Successors and Assigns***. Each and every covenant, term, provision, and agreement herein contained will be binding upon each of the Members and their respective heirs, legal

representatives, successors, and assigns and will inure to the benefit of each of the Members. Unless and until properly admitted as a Member, no assignee will have any rights of a Member beyond those provided by the TBOC to assignees or otherwise expressly provided herein to assignees.

Practice Comment: Note that this language preserves the concept that an assignee does not succeed to all of the *rights* of a Member until it is properly substituted. However, this language does *bind* an assignee so that, for instance, restrictions on transfers of Company interests are binding on transferees even if they are not admitted as Members.

21.9 ***Construction, Sections, Exhibits, Etc.*** Whenever the context requires, the gender of all words used in this Agreement includes the masculine, feminine, and neuter. Each reference to an "Exhibit" herein is, unless specifically indicated otherwise, a reference to an exhibit attached hereto, all of which are made a part hereof for all purposes, it being understood that if any Exhibit that is to be executed and delivered pursuant to the terms hereof contains blanks, it will be completed correctly and completely in accordance with the terms and provisions hereof and as contemplated herein prior to or at the time of its execution and delivery.

21.10 ***Further Assurances***. In connection with this Agreement and the transactions contemplated by it, each Member will execute and deliver any additional documents and instruments and perform any additional acts that may be necessary or appropriate to effectuate and perform the provisions of this Agreement and those transactions.

21.11 ***Waiver of Certain Rights***. Each Member irrevocably waives any right it may have to maintain any action for dissolution of the Company (other than pursuant to Section 19.1) or for partition of the property of the Company.

21.12 ***Attorneys' Fees***. If the Company or any Member brings any legal action to enforce or interpret the provisions of this Agreement, the prevailing party will be entitled to reasonable attorneys' fees, costs, and expenses, in addition to any other relief to which such party may be entitled.

21.13 ***Entire Agreement***. This Agreement sets forth the entire Agreement among the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings, if any, related thereto.

21.14 ***Third Party Beneficiaries***. Except for the Indemnified Persons, there are no third party beneficiaries of this Agreement.

Executed on the date or dates indicated below, to be effective as of the date first set forth above.

MANAGERS:

By: _____
Name (print): _____
Title: _____
Date: _____, 2004

MEMBERS:

[Signature line to be added for each Member]

[Signature line to be added for each Member]

SPOUSES of MEMBERS:
Accepted and Approved as to the provisions relating the possible buy out under Article 16

[Signature line to be added for each Spouse of a Member]

EXHIBIT A

NAME, ADDRESS, AND UNITS OF MEMBERS

	Name	Address	Units
Members:	_____	_____	_____
		_____	
		_____	
	_____	_____	_____
		_____	
		_____	
	_____	_____	_____
		_____	
		_____	
	_____	_____	_____
		_____	
		_____	

[name, address, and number of Units to be added for each Member]

EXHIBIT B

Initial Capital Contributions

EXHIBIT C

Additional Capital Contributions

NOTES ON PROFESSIONAL LIMITED LIABILITY COMPANIES

Practice Comment: Section 2.04 of the TBOC sets out a uniform approach to Professional Organizations, such as PLLC's. These new provisions also make clear that the Organization can cover more than one profession if the regulatory laws relating to those professions allow.