

MODEL COMPANY AGREEMENTS

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State Bar of Texas
**CHOICE, GOVERNANCE & ACQUISITIONS
OF ENTITIES 2018**
May 18, 2018
San Antonio

CHAPTER 3

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EDUCATION

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PROFESSIONAL ACTIVITIES

Member: Austin Bar Association (Business, Corporate and Tax Section); American Bar Association (Business Law Section); State Bar of Texas (Business Law Section).

UT Law Continuing Legal Education, LLC's, LP's and Partnerships; Planning Committee Co-Chair, since 2014.

SELECTED HONORS, PUBLICATIONS AND PRESENTATIONS

Listed in The Best Lawyers in America® published by Woodward/White, Inc., Banking and Finance Law; Mergers & Acquisitions Law; Securities / Capital Markets Law, since 2010.

“Choice of Entities – Who Owns the Deal; Model Company Agreements for Simple LLCs,” (co-authored with Prof. Elizabeth S. Miller), State Bar of Texas, 9th Annual Advanced Real Estate Strategies Course, December, 2015.

“Model Company Agreements for Simple LLCs,” (co-authored with Prof. Elizabeth S. Miller), University of Texas CLE seminar, July, 2015.

“Top Ten ‘Gotchas’ in Drafting LLC and Partnership Agreements,” University of Texas CLE seminar, July, 2015.

“Exploring the Flexibility Offered by the TBOC Merger Provisions,” University of Texas CLE seminar, July, 2014.

“Acquisitions of Professional Firms,” State Bar of Texas, 12th Annual Choice and Acquisition of Entities Course, May, 2014.

“Primer: Nuts and Bolts of LLCs, LPs and Partnerships,” University of Texas CLE seminar, July, 2013.

“[Duties of Managers and Members of LLCs and Partners of Partnerships](#),” State Bar of Texas, Advanced Real Estate Law Course, July, 2013.

“[2012 Choice of Jurisdiction Considerations: Texas vs. Delaware](#),” University of Texas CLE seminar, July, 2012.

“Distributions, Profit and Loss Allocations and Tax Reimbursement Provisions,” University of Texas CLE seminar, July, 2012.

“Considerations Relating to Negotiating and Drafting Purchase and Sale Agreements,” State Bar of Texas, Choice and Acquisition of Entities in Texas Course, May, 2012.

“[Capital Contributions, Capital Calls, Financing, Funding and New Equity: Key Planning and Drafting Issues for LLCs, LPs and Partnerships](#),” University of Texas CLE seminar, July, 2011.

“Sale of Partnership and LLC Interests: A Walk Through Purchase and Sale Agreements,” University of Texas CLE seminar, July, 2007.

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Elizabeth S. Miller is a Professor of Law at Baylor University School of Law where she teaches Business Organizations, Business Planning, and related courses. Professor Miller speaks and writes extensively on business organizations topics, particularly partnerships and limited liability companies. She frequently appears on continuing legal education programs and is co-author of a three-volume treatise on *Business Organizations* published by Thomson/West as part of its Texas Practice Series as well as a one-volume treatise that is published in the *Texas Methods of Practice* component of the Texas Practice Series. Professor Miller has served as Chair of the LLCs, Partnerships and Unincorporated Entities Committee of the Business Law Section of the American Bar Association, as well as the Partnership and Limited Liability Company Law Committee of the Business Law Section of the State Bar of Texas. She has also served as Chair of the Council of the Business Law Section of the State Bar of Texas. Professor Miller has been involved in the drafting of legislation affecting Texas business organizations for many years and has served in an advisory or membership capacity on the drafting committees for numerous prototype, model, and uniform statutes and agreements relating to unincorporated business organizations. She is an elected member of the American Law Institute, a Fellow of the American Bar Foundation and the Texas Bar Foundation, and a recipient of the Jean Allard Glass Cutter Award of the ABA Business Law Section and the Martin I. Lubaroff Award of the ABA Business Law Section Committee on LLCs, Partnerships and Unincorporated Entities.

RECENT PUBLICATIONS AND PRESENTATIONS

BUSINESS ORGANIZATIONS, TEXAS PRACTICE SERIES (Vols. 19, 20 & 20A), West (3rd ed. 2011) (2017-2018 Supplement) (co-author)

TEXAS METHODS OF PRACTICE, TEXAS PRACTICE SERIES (Vol. 13), West (2017-2018) (co-author)

Recent Delaware Cases Interpreting LLC Agreements in Acquisition Context, Business Law Section Spring Meeting, American Bar Association (April 14, 2018)

Fiduciary Duties, Exculpation, and Indemnification in Texas Business Organizations, Business Law Section Spring Meeting, American Bar Association (April 14, 2018)

A Sampler of Recent (Non-Delaware) Partnership and LLC Cases, Business Law Section Spring Meeting, American Bar Association (April 13, 2018)

The Walking Dead: Forfeitures and Involuntary Terminations of Filing Entities, Essentials of Business Law, State Bar of Texas (March 8, 2018)

Fiduciary Duties, Exculpation, and Indemnification in Texas Business Organizations, 12th Annual Fiduciary Litigation Course, State Bar of Texas (November 30, 2017)

Recent Developments in Texas Business Organizations Law, Austin Bar Association Business, Corporate, and Tax Section (November 29, 2017)

A Potpourri of Recent (Non-Delaware) Partnership and LLC Cases, 2017 LLC Institute, Committee on LLCs, Partnerships and Unincorporated Business Entities, American Bar Association (November 7, 2017)

Miscellaneous Recent (Non-Delaware) Partnership and LLC Cases, 34 LLC & PARTNERSHIP REPORTER, No. 1, p. 83 (October 2017)

Model Company Agreements, 26th Annual LLCs, LPs and Partnerships, University of Texas School of Law (July 13, 2017)

Case Law Update: A Survey of Recent Texas Partnership and LLC Cases, 26th Annual LLCs, LPs and Partnerships, University of Texas School of Law (July 13, 2017)

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Doug also represents clients regarding tax controversies and disputes with federal, state and local tax authorities.

Doug holds an advanced legal degree in taxation from New York University and prior to moving his legal practice to Texas, Doug worked in the tax group of Shearman & Sterling LLP in New York for 6 years.

Doug is licensed to practice law in both Texas and New York.

EDUCATION

- Admitted to bar 2007, New York and 2014, Texas.
- New York University School of Law, LL.M. in Taxation, 2012.
- Pace University School of Law, J.D., 2007 (*summa cum laude*).
- Washington University in St. Louis, B.A., 2003.

Model Company Agreements

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MODEL COMPANY AGREEMENTS

I. INTRODUCTION.

Records maintained by the Texas Secretary of State indicate that the limited liability company has become the entity of choice among Texas organizations. The office of the Texas Secretary of State reports that of the 178,938 certificates of formation filed for domestic for-profit entities in 2016, 150,266 (or approximately 84%) were limited liability companies and of the 194,195 certificates of formation filed for domestic for-profit entities in 2017, 166,589 (or approximately 86%) were limited liability companies.¹

It is often stated that one of the benefits of organizing an entity as a limited liability company is that this form of entity offers the owners and governing authority of the entity the flexibility to agree to provisions for the economic terms and governance that are more flexible than available with respect to a corporation. This is true, and indeed limited liability companies are sometimes used to create highly complex structures with multiple classes of ownership interests and highly customized provisions regarding management and governance of the entity, including complicated provisions for voting and management succession. However, given the large number of entities now being created as limited liability companies in Texas and other states, it is likely that many of these new entities are not entities with complex structures with multiple classes of ownership and complex bureaucracies for governance. Statistics compiled by the Internal Revenue Service show that for the tax year 2013 (the most recent year for which statistics are currently available), over 63% of the S corporation returns are for single-shareholder S corporations and over 27% have only two shareholders.² The Internal Revenue Service does not publish similar statistics for limited liability companies, and of course single-member limited liability companies are typically disregarded entities that do not file tax returns. But if one assumes that most limited liability companies are closely held entities, then by analogy, it is likely that a large portion of limited liability companies have one or two owners. Therefore, it is much more likely that practitioners will find themselves needing to draft simple limited liability company agreements suitable for entities with one or two or a very few owners, rather than more complex documents.

The purpose of this paper is to present and discuss models for governing agreements for limited liability companies when a simple structure is needed.

II. COMPANY AGREEMENTS GENERALLY.

As with other filing entities under the Texas Business Organizations Code (“BOC”),³ a Texas limited liability company is created by the filing of a certificate of formation meeting the requirements of BOC §3.005 and §3.010. The existence of the company commences when the filing of the certificate takes effect as provided in BOC Chapter 4.⁴

The BOC does not expressly require that a Texas limited liability company have a company agreement, but it is difficult to conceive of a situation in which there would not be some skeletal agreement of the members regarding

¹ The office of the Texas Secretary of State has provided to the authors the following information about numbers of certificates of formation and initial LLP registrations filed for domestic entities:

	<u>2017</u>	<u>2016</u>
For-Profit Corporations	21,938	22,407
Professional Corporations	719	674
Professional Associations	432	537
Limited Liability Companies	166,589	150,266
Limited Partnerships	4,516	5,054
Limited Liability Partnerships	525	624

² <http://www.irs.gov/uac/SOI-Tax-Stats-Table-6>Returns-of-Active-Corporations,-Form-1120S>

³ TEX. BUS. ORGS. CODE ANN. § 1.001 ET SEQ.

⁴ TEX. BUS. ORGS. CODE ANN. § 3.001(c).

the conduct and affairs of the limited liability company.⁵ The statute expressly recognizes that a company agreement may be written or oral.⁶ However, it is obviously advisable for a limited liability company to have a written company agreement to provide certainty and avoid ambiguity about the ownership and management of the entity.

It should be noted that in the event of a conflict between the language of the certificate of formation and the company agreement, the language of the certificate of formation will govern.⁷ Most practitioners have moved away from the practice of including long substantive provisions in the certificate of formation, and indeed many are comfortable using the simple form of certificate promulgated by the Secretary of State.⁸ In the past it was more common to address issues such as indemnification or written consents in lieu of meetings in the filing made with the Secretary of State. Since the owners of the entity do not need to sign the certificate and may not see or focus on substantive provisions in the certificate, care should be given that any such provisions do not unintentionally override the provisions of the company agreement.

III. THE MODEL AGREEMENTS.

A. Introductory Paragraph.

As with almost all agreements, the introductory paragraph of a company agreement typically states the parties to the agreement and the date or effective date of the agreement. The members of the limited liability company are always parties to the company agreement.

Generally, even in a manager-managed limited liability company whose certificate of formation does not identify the initial members, the identities of one or more initial members will be understood at the time a limited liability company is formed, and it is prudent for the initial members to execute a written company agreement prior to or contemporaneously with the filing of the certificate of formation so that it is clear who the members are and what their economic and governance rights are. The BOC expressly recognizes, however, the formation of a limited liability company that does not initially have any members, sometimes referred to as a “shelf” limited liability company. Under this provision, an organizer may file a certificate of formation that identifies one or more initial managers, but the limited liability company need not have any members for a “reasonable period” after the limited liability company is formed.⁹

While it is possible to utilize a “shelf” limited liability company, there are some questions associated with such a practice. First, what is a “reasonable period” after the filing of the certificate of formation? Is it merely a temporal concept or does it also relate to the activities undertaken by the limited liability company? Presumably, the managers may undertake certain actions to facilitate the organization of the limited liability company and securing of investors, but it would be unwise to transact significant business prior to the admission of members. What is the tax classification

⁵ Inasmuch as the BOC recognizes oral as well as written company agreements, a course of dealing may reflect the company agreement of the members on some matters. Furthermore, any provision that may be contained in the company agreement may be included in the certificate of formation. TEX. BUS. ORGS. CODE ANN. § 101.051(a). Even a very basic certificate of formation would seemingly constitute a company agreement as to certain items, such as the name of the company, the type of management (i.e., member-managed or manager-managed), and the identity of the initial members or managers.

⁶ TEX. BUS. ORGS. CODE ANN. § 101.001(1) (defining “company agreement” as “any agreement, written or oral, of the members concerning the affairs of a limited liability company”).

⁷ TEX. BUS. ORGS. CODE ANN. § 101.052(d). See *Pinnacle Data Servs., Inc. v. Gillen*, 104 S.W.3d 188 (Tex. App. – Texarkana 2003, no pet.) (holding voting provision in limited liability company’s articles of organization controlled over conflicting voting provision contained in the company’s regulations). Because BOC § 101.052(d) is not listed among the provisions that cannot be waived or modified in the company agreement, the statute arguably permits the members to provide in the company agreement (or certificate of formation) that the company agreement controls over a conflicting provision in the certificate of formation. See TEX. BUS. ORGS. CODE ANN. § 101.051, 101.052, 101.054.

⁸ http://www.sos.state.tx.us/corp/forms_boc.shtml.

⁹ TEX. BUS. ORGS. CODE ANN. § 101.101(b) (stating that a limited liability company that has managers is not required to have members during a “reasonable period between the date the company is formed and the date the first member is admitted to the company”). See also TEX. BUS. ORGS. CODE ANN. § 101.356(e) (providing that member approval is not required for an action during the reasonable period that a manager-managed limited liability company is permitted not to have any members after formation).

of a limited liability company without members? If the limited liability company undertakes any significant business and there is then a failure to obtain members or a dispute as to whether there are members and who they are, this could be a thorny situation.

At the point that there are persons who desire to be members in a limited liability company that has previously been formed but has no members, may they simply execute a company agreement identifying themselves as the members and thereby become members “in connection with the formation” of the limited liability company? It would appear so, but what if there is a dispute as to who the members will be, i.e., a fight over the limited liability company? If two factions each execute a company agreement claiming to be the members, who determines which is the company agreement of the limited liability company? Inasmuch as becoming a member “in connection with the formation of the limited liability company” when one is not named as an initial member in the certificate of formation depends upon a reflection of the person’s membership in a limited liability company “record,”¹⁰ it appears that the manager or managers may have a role in determining which company agreement is the company “record” of membership.

If after the filing of the certificate of formation of a limited liability company a substantial period of time elapses without the admission of members, the question might arise whether a person who desires to become a member must do so in accordance with the statutory procedures applicable “after the formation” of the limited liability company. This result would be problematic because the statute requires that a person becoming a member after formation of the limited liability company must do so with the consent of all members unless a company agreement provides otherwise.¹¹ It would be impossible to admit a member under such circumstances because the limited liability company has no members and thus no company agreement.¹² It is more logical to interpret the statute as permitting persons to become members “in connection with the formation” of the limited liability company if the limited liability company has previously existed as a memberless shell entity, even if a substantial period of time has passed since the filing of the certificate of formation.

The model agreement presented with this paper for a company agreement for a single-member limited liability company has only one party, the single member. It is of course not customary for a person to make an agreement with oneself, but BOC § 101.001(1) anticipates this situation and provides that a company agreement of a limited liability company with only one member is not unenforceable because only one person is a party to the agreement.

BOC § 101.052 provides that the company agreement of a limited liability company governs the relationship among the members, managers and officers, assignees of interests in the company and the company itself. The managers have certain duties spelled out in the company agreement and typically are also entitled to exculpation and indemnification under the agreement. (See Section III.J. below.) The authors have not included the managers as parties to the model agreement presented with this paper for a limited liability company managed by managers. If an entity has a single manager whose duties and relationship with the entity are similar to the role of a general partner of a partnership or if the manager has specific contractual benefits and obligations (such as earning a management fee) that need to be spelled out in the agreement, then it might be appropriate to make the manager a named party and have it sign the company agreement; however, careful thought should be given to the ramifications of making the manager a “party” to the agreement. For example, the provision specifying whose consent is required to amend the agreement should be carefully drafted to make clear whether the agreement may be amended by the members without the manager’s consent. In some cases, the members may desire for the manager to sign a “joinder” acknowledging that the manager is bound by the terms of the agreement rather than having the manager sign the agreement as a party. If the manager is concerned about enforcing benefits and protections to be provided by the company and ensuring that those benefits and protections are not amended without the manager’s consent, a separate management agreement between the manager and the company may be appropriate.

The duties of officers may be spelled out in a company agreement, and often the exculpation and indemnification provisions extend to officers, if any (as do the provisions of the model agreements included with this paper). Nevertheless, it does not seem to be standard practice to make officers parties to the company agreement.

¹⁰ TEX. BUS. ORGS. CODE ANN. § 101.103(b).

¹¹ TEX. BUS. ORGS. CODE ANN. §§ 101.052, 101.103(c).

¹² The company agreement is defined as “any agreement, written or oral, of the members concerning the affairs or the conduct of the business of a limited liability company.” TEX. BUS. ORGS. CODE ANN. § 101.001(1).

The question is sometimes raised whether the company itself is or should be a party to the company agreement. As noted above, BOC § 101.052 provides that the company agreement governs the relationship among owners, management, and the company. In addition, BOC § 101.052 was amended in 2017 to expressly provide that a company agreement is enforceable by or against the limited liability company, regardless of whether the company has signed or otherwise expressly adopted the agreement.¹³ Prior to this amendment, Texas courts would likely have concluded that a Texas limited liability company is bound by and has the benefits of the company agreement, even though it is couched as an agreement among the members, absent a provision in the company agreement indicating a contrary intent on the part of the members.¹⁴ The model company agreements accompanying this paper specify the persons (including the company itself) that are bound by, and beneficiaries of, the terms of the agreement.¹⁵ That provision also states that creditors are not third-party beneficiaries.

B. Article 1: Formation.

The first article of the model agreements presented with this paper contains provisions dealing with the formation and structure of the company including its name, duration, purpose, principal office and name and address of the registered agent.

BOC § 3.003 states that a domestic entity (including a limited liability company) will have perpetual existence unless provided otherwise in its governing document or terminated by law. While it may sometimes be the desire of the parties for a limited liability company to exist for a finite time such as until the completion of a venture project or the sale of an asset, it is usually the expectation of the parties that the company will have perpetual existence unless otherwise agreed by the members. The model agreements included with this paper provide that the company will exist until terminated as provided in the agreement.¹⁶ Detailed provisions for the winding up and termination of the company are set forth later in the agreement.¹⁷

BOC § 3.005(a)(3) requires that a filing entity (including a limited liability company) state in its certificate of formation the purpose or purposes for which the entity is being formed, but a statement of “any lawful purpose” is allowed. It is standard practice for the certificate of formation to state the purpose as any lawful purpose and not contain a detailed description of the purpose or proposed business of the entity. Concerns regarding the relationship between the purpose clause and the business opportunity doctrine and the scope of an agent’s apparent authority may lead to use of a narrow or specific purpose clause in the certificate of formation, but in view of uncertainty as to how the *ultra vires* doctrine applies to limited liability companies,¹⁸ many practitioners prefer to include the standard broad purpose clause in the certificate of formation and include more specific provisions in the company agreement.¹⁹

¹³ TEX. BUS. ORGS. CODE ANN. § 101.052(f), as amended by S.B. 1517, 85th Leg., eff. Sept. 1, 2017.

¹⁴ In *Seven Hills Commercial, LLC v. Mirabal Custom Homes, Inc.*, 442 S.W.3d 706 (Tex. App. – Dallas 2014, pet. denied), the court of appeals relied on BOC § 101.052(a)(1) in concluding that a limited liability company could enforce an arbitration clause in the company agreement even though the limited liability company was not a signatory to the agreement.

¹⁵ Section 11.6 of [Appendix A](#) and [Appendix B](#) and Section 11.4 of [Appendix C](#).

¹⁶ Section 1.3 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

¹⁷ Article 10 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

¹⁸ The BOC provides that the statute does not grant authority to a domestic entity or its managerial officials to act outside the scope of the purposes of the entity. TEX. BUS. ORGS. CODE ANN. § 2.113(a).

¹⁹ There may be a concern on the part of the managers or members that stating the purpose of the limited liability company in the certificate of formation as “any lawful business” exposes them to more potential liability in the area of usurpation or appropriation of a company opportunity. Presumably, managers or managing members have a duty of loyalty similar to officers and directors of a corporation and partners in a partnership not to take for themselves a business opportunity that fairly belongs to the entity. The scope or line of business of the corporation or partnership is an important consideration in determining whether this duty has been breached. A narrowly defined purpose clause similar to the type of specific statement of the business often found in partnership agreements would certainly be relevant in defining the scope of business. It does not necessarily follow, however, that a broad purpose clause in the certificate of formation results in every opportunity being encompassed in the scope or line of the limited liability company’s business. Certainly, there is no indication in the corporate opportunity cases that a broad purpose clause in the articles of incorporation or corporate certificate of formation brings every business opportunity within the corporation’s line of business and precludes an officer or director from entering into any personal business transactions. Fiduciaries of a limited

There may be many reasons to state a more specific purpose in the company agreement, including setting clear expectations regarding the scope of business that the parties are agreeing to invest in and/or manage. Stating a specific purpose in the company agreement may also protect the owners and governing persons from later claims related to a breach of a duty of loyalty to the entity or owners. If the purpose is stated to be one of relatively narrow scope, then activities outside the scope may be less likely to provoke claims that these activities were business opportunities that should have been offered to the company.²⁰ A specific description of the company’s purpose may also be desirable with respect to interpretation of provisions of the agreement that refer to the “ordinary course of business” of the company.

The model agreements presented with this paper assume that the agreement will include a somewhat specific statement regarding the purpose and proposed business of the company along with a more general “catch-all” provision allowing related activities.²¹

Company agreements, especially those for complex transactions, may make use of numerous defined terms. Often these defined terms appear at the beginning of the governing agreement. While the model agreements included with this paper do not use a large amount of defined terms, we have placed the defined terms at the end of the agreement so that the reader does not become bogged down in pages of technical definitions before finding the parts of the agreement that spell out the business terms. Because defined terms do frequently appear at the beginning of these agreements, to avoid confusion there is a reference in the model agreements to the section at the end of the agreement where the defined terms appear.²²

C. Article 2: Members and Membership Interests.

Article 2 of the model agreements deals with matters related to members and membership interests, including admission of new members.

The model agreements presented with this paper provide that the initial members are admitted as members as of the date of formation of the company.²³ For a member-managed entity, the initial member or members are named in the certificate of formation and are therefore known when the company is formed by filing its certificate of formation. (See Section III.B. above.) If the company agreement is not being executed more or less contemporaneously with the filing of the certificate of formation, it may be appropriate to provide that founding members who sign after the filing are admitted as members effective upon their execution of the company agreement. (See Section III.A. above.) If some founding members sign the company agreement upon filing of the certificate of formation and others sign later, this may create further complexities for the drafter, including how to allocate profits and losses, if any, incurred between the date of filing and the later effective date of admission and how to document that the members who sign at filing have approved the admission of the members who sign later. In view of the scope intended for the model agreements included with this paper—a simple transaction among one or a few owners—the authors have assumed that the

liability company should be able to defeat such an argument by pointing out that courts in both the corporate and partnership context have focused on the business actually engaged in by the corporation or partnership. In view of this concern, however, a narrower purpose clause in the limited liability company’s certificate of formation may be desirable in some cases, or it may be desirable to temper an “any lawful purpose” or “any and all lawful business” purpose clause in the certificate of formation with a statement in the company agreement regarding the anticipated scope of the business and the intended bounds of the business opportunity doctrine.

Another concern that may motivate use of a narrow purpose clause in the certificate of formation is the scope of actual or apparent authority of the managers, managing members, or other agents of the company. See TEX. BUS. ORGS. CODE ANN. § 101.254. Again, however, including in the certificate of formation a purpose clause phrased in terms of “any lawful purpose” or “any and all lawful business” should not cause every transaction to be encompassed in the “ordinary course” of business. Such certainly is not the case in the corporate context. Nevertheless, an abundance of caution in this area may lead to a preference for a narrower purpose clause or, as suggested above, a statement in the company agreement as to the more specific nature of the business.

²⁰ See the discussion in the previous footnote.

²¹ Section 1.4 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

²² Section 1.7 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

²³ Section 2.1 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

founding members would be known at the time the company is formed, that they would all sign the company agreement and make their capital contributions to the company more or less simultaneously with filing the certificate of formation, and that it would be reasonable and consistent with the expectations of the parties to deem that membership commences upon the date of formation.

BOC § 101.104 permits limited liability companies to have multiple classes of membership interests with differing rights, including voting rights, as set forth in the company agreement. As mentioned at the outset of this paper, limited liability companies are often utilized to set up entities with complex tiers or classes of ownership. Because the scope of this paper is to focus on agreements for simple business structures, the model agreements included with this paper do not contemplate multiple classes of ownership interests. The model agreements assume that there will only be one class of ownership interest and that all members will have the same rights and obligations with regard to their ownership except the rights associated with owning a greater percentage than other members.

The model agreements for companies with multiple owners use the concept and defined term “Percentage” throughout the agreements to specify the relative percentage ownership of the members. The agreements contemplate the Percentages of the owners would be agreed at the time of formation and execution of the company agreement and specified in an exhibit to the agreement.²⁴ If new membership interests are issued or existing interests are transferred, the Percentages would need to be adjusted by agreement of the parties.²⁵ Although it may seem like an obvious proposition, the definition of “Percentage” in the multi-member model agreements expressly provides that the total Percentages of membership interests owned by all Members and assignees at any point in time shall equal 100%. If a member’s interest is bought out by the limited liability company, there is sometimes confusion and disagreement among the members as to whether the interest should be treated as a “treasury interest.” The concept of “treasury interests” could be created by the company agreement, but the concept is not really contemplated as a default rule in the limited liability company statute and is not intended to apply under the model agreements. It might prove useful for the drafter to review with the members some examples of various types of adjustments in percentages before the agreement is executed, or the drafter might even choose in some cases to include examples in the definition.²⁶ BOC § 101.501 requires a Texas limited liability company to maintain records of the percentage or other interest in the company owned by each member. These provisions of the model company agreements should satisfy that requirement.

²⁴ Section 2.1 of Appendix A and Appendix B.

²⁵ Section 2.2 of Appendix A and Appendix B.

²⁶ The following examples illustrate the operation of the definition of “Percentage” under the model agreements:

- (1) The Percentages of Members A, B and C are 33 1/3% each. Member C dies, and the Company purchases Member C’s interest from Member C’s estate. The Percentages of the remaining Members are as follows: Member A 50% and Member B 50%.
- (2) The Percentages of Members A, B and C are as follows: Member A 40%, Member B 20% and Member C 40%. Member C dies, and the Company does not purchase Member C’s interest from Member C’s estate; therefore, Member C’s estate (and heir(s) or devisee(s) upon distribution from the estate) is an assignee. After Member C’s death, the Percentages are as follows: Member A 40%, Member B 20% and Member C’s estate 40%. However, for purposes of Sections 3.3, 3.4, 3.5, 3.7 and 3.12 of Appendix A and Sections 3.3 and 3.7 of Appendix B, the Percentages are as follows: Member A 66 2/3% and Member B 33 1/3%.
- (3) The Percentages of Members A and B are 50% each. Members A and B vote to issue new Member C a 50% membership interest. The Percentages of Members A, B and C after the issuance of the membership interest to C are as follows: Member A 25%, Member B 25% and Member C 50%.
- (4) The Percentages of Members A and B are 50% each. Member A assigns one-half of Member A’s membership interest to Member A’s daughter. The Percentages after the assignment are as follows: Member B 50%, Member A 25%, and Member A’s daughter 25%. If the Members do not approve admission of Member A’s daughter as a Member, Member A’s Percentage for purposes of the determinations made under Sections 3.3, 3.4, 3.5, 3.7 and 3.12 of Appendix A and Sections 3.3 and 3.7 of Appendix B is 50%.

Under the BOC, a membership interest is assignable “wholly or partly,”²⁷ but assignment of a membership interest involves the transfer of economic rights, not a transfer of membership status. Assignment of a membership interest does not trigger winding up of the limited liability company, and it does not confer upon the assignee any management rights or entitle the assignee to become or exercise the rights of a member.²⁸ An assignee of a membership interest is entitled to be allocated, to the extent assigned, the income, gain, loss, deduction, credit, and similar items associated with the interest.²⁹ An assignee is also entitled to receive, to the extent assigned, distributions to which the assignor was entitled.³⁰ Finally, an assignee is entitled to require reasonable information and to make reasonable inspection of the books and records of the limited liability company.³¹ An assignee does not have liability as a member by virtue of the assignment of the interest.³²

Just as the assignee does not become a member merely by virtue of the assignment of a membership interest, the assignor member does not cease to be a member merely by assigning the member’s interest.³³ Unless otherwise provided by the company agreement, until the assignee becomes a member, the assignor member continues to be a member and have all the associated rights and powers not assigned.³⁴ Of course, a member might cease to be a member in connection with an assignment (e.g., the member’s death or voluntary withdrawal if the company agreement allows withdrawal), but assignment of a member’s interest does not itself terminate the member’s membership under the BOC.

The effect of a transfer of an interest from one member to another member is an area in which many company agreements are somewhat unclear. If a membership interest is voluntarily or involuntarily assigned (e.g., by contract, gift, devise, or descent), and the person who acquires the member’s membership interest is another member, the question sometimes arises whether the person who has acquired the membership interest is merely an assignee as to such interest or may exercise voting rights based on the ownership of the interest. If the default per capita voting rules of the BOC apply, the issue does not arise because each member has one vote, and the member who has acquired the interest continues to have one vote.³⁵ Many agreements, however, provide for voting based on a member’s ownership

²⁷ TEX. BUS. ORGS. CODE ANN. § 101.108(a) (“A membership interest of a limited liability company may be wholly or partly assigned.”). This section states a default rule that will apply if the company agreement does not otherwise provide. See TEX. BUS. ORGS. CODE ANN. § 101.052.

²⁸ TEX. BUS. ORGS. CODE ANN. § 101.108(b)(2)(B). Admission as a member is a separate and distinct issue and requires, unless otherwise provided by the company agreement, the consent of all members. TEX. BUS. ORGS. CODE ANN. §§ 101.103(c), 101.109(b). These sections state default rules that will apply if the company agreement does not otherwise provide. See TEX. BUS. ORGS. CODE ANN. § 101.052.

²⁹ TEX. BUS. ORGS. CODE ANN. § 101.109(a)(1).

³⁰ TEX. BUS. ORGS. CODE ANN. § 101.109(a)(2).

³¹ TEX. BUS. ORGS. CODE ANN. § 101.109(a)(3), (4).

³² TEX. BUS. ORGS. CODE ANN. § 101.109(c).

³³ TEX. BUS. ORGS. CODE ANN. § 101.111(a).

³⁴ TEX. BUS. ORGS. CODE ANN. § 101.111(a). The effect of BOC § 101.111 is somewhat unclear in the case of a partial assignment. By stating that a member continues to be a member “until the assignee becomes a member,” the provision implies that an assignor member will cease to be a member when and if the assignee is admitted as a member. If a member assigns only a portion of the member’s interest (e.g., a member assigns one-half of the member’s one-half interest, or a one-fourth interest in the limited liability company), and the assignee is admitted as a member, the assigning member presumably remains a member insofar as the member has retained an interest in the limited liability company, though the provision is not clear in this regard. Note that if the assignor member is still a member, the assignor member’s vote may be required to admit the assignee because the consent of all members is necessary to admit an assignee as a member as a default rule. TEX. BUS. ORGS. CODE ANN. §§ 101.103(c), 101.109(d). In *Faulkner v. Kornman*, 2012 WL 1066736 (Bankr. S.D. Tex. 2012), a judgment debtor who was a 95% limited liability company member assigned to a receiver all of his right, title, and interest in the limited liability company as well as all of the stock in a corporation that was the 5% member. The court stated that the 95% member assigned not only his 95% interest in the limited liability company, but all of his rights as a member, including his ability to approve the admission of new members. Thus, the court stated that the corporate member, which was now owned and controlled by the receiver, was the only member whose consent was necessary to approve the admission of the receiver, as assignee of the 95% interest, as a member.

³⁵ See TEX. BUS. ORGS. CODE ANN. § 101.354. However, the question of whether a member who acquires another member’s interest is considered to be an assignee who “becomes a member” could still be important for purposes of determining whether the

percentage, profit sharing ratio, or ownership units, in which case the agreement needs to be worded in a manner that makes it clear whether an assignment of a member's interest to a person who is already a member results in the acquiring member's being able to exercise voting rights based on the acquired interest or is to be treated as an assignee with respect to such interest unless admitted with respect to the assigned interest by the requisite vote.³⁶

assignor member remains a member or ceases to be a member inasmuch as the statute provides that the assignor member continues to be a member "until the assignee becomes a member." TEX. BUS. ORGS. CODE ANN. § 101.111(a). See *Bourbon Invs., LLC v. New Orleans Equity, LLC*, 207 So.3d 1088 (La. App. 4 Cir. 2016)

³⁶ An issue of this type was present in the case of *In re Delta Star Broadcasting, L.L.C.*, 2006 WL 285974 (E.D. La. 2006), but the court ultimately found it unnecessary to resolve whether a member who acquired an interest from an assignee of another member obtained the voting rights associated with the interest. Three individuals each owned a 1/3 membership interest in a Louisiana limited liability company, and one of the members (Bruno) filed a voluntary Chapter 11 bankruptcy petition on behalf of the limited liability company. Bruno argued he was authorized to file the petition because his action was approved by two of the three members (Bruno and Treen) based on a consent signed by Treen the day before the bankruptcy filing. The third member (Starr) argued that Treen had transferred his membership interest to an entity controlled by Starr eleven days prior to the filing of the bankruptcy and that Treen's consent to the bankruptcy filing was thus ineffective. Starr further argued that the bankruptcy filing was ineffective even if Treen remained a member after the transfer of his interest because the bankruptcy filing was not approved at a properly-noticed meeting of the limited liability company's members. The court first discussed the effect of the transfer of Treen's membership interest and pointed out that the Louisiana limited liability company statute provides that the assignee of a membership interest is not entitled to exercise the rights of a member until admitted by unanimous consent of the other members. Under the statute, the assignor member remains a member unless and until the assignee becomes a member. Starr argued that, because of his control of the assignee, it was not really a "new" member and was entitled to exercise the membership rights associated with the membership interest transferred. Starr also argued that if the entity that was the assignee was not entitled to exercise the membership rights, Starr was entitled to do so when the entity later transferred the interest to him. The court rejected these arguments and concluded Treen retained his membership, including his right to vote, because the entity to which Treen assigned his interest was not admitted as a member. The court did not need to reach the issue of whether Starr later acquired Treen's membership rights when the entity transferred the interest to Starr because that transfer did not occur until after the bankruptcy filing. Ultimately, the court determined that the action taken by Bruno and Treen was sufficient to authorize the bankruptcy filing.

In *Ault v. Brady*, 37 Fed. App'x 222 (8th Cir. 2002), the court interpreted provisions of a limited liability company operating agreement providing for "units" and concluded that a transfer of a member's units to another member did not entitle the transferee member to vote the units because the transferee member did not become a "substituted member" with respect to the units transferred.

In *Achaian, Inc. v. Leemon Family LLC*, 25 A.3d 800 (Del. Ch. 2011), the limited liability company agreement defined a member's interest as "the entire ownership interest" of a member and permitted a member to transfer "all or any portion of" its interest to any person at any time. The agreement also provided that no person shall be admitted as a member without the written consent of the members. After dissension among the three members of the limited liability company arose, one of the members purported to transfer its entire 30% membership interest to a 20% member. The remaining 50% member argued that the agreement did not change the default rules under the Delaware statute and that the agreement unambiguously distinguished between a member's economic interest and voting rights. Reading the limited liability company agreement as a whole, the court concluded that it allowed an existing member to transfer all of the rights accompanying an interest, including voting rights, without the written consent of the other members. The court found nothing in the Delaware limited liability company statute or secondary sources suggesting that a serial admission scheme, under which a person who is already a member must be readmitted to acquire additional voting rights, is standard practice.

In *Blythe v. Bell*, 2012 WL 6163118 (N.C. Super. 2012), the court interpreted the North Carolina Limited Liability Company Act to allow members, absent contrary agreement, to transfer both their economic and control membership rights to existing members without unanimous member consent. According to the court, this interpretation was necessary in order to reconcile the transfer provisions of the statute with the provisions on cessation of membership, which prohibited a member's withdrawal absent contrary agreement but provided that a member ceased to be a member upon assignment of the member's entire membership interest. The statutory definition of a membership interest included both economic and voting rights. The court sought an interpretation that did not leave an assigning member's control interest "inchoate" and thus concluded that the statutory default rules provided that a member would cease to be a member upon assignment of the member's entire interest (including control rights) to another member, but would continue to be a member, and thus retain control rights, unless and until admission of the

If membership interests in the company will be held in a trust, there are additional considerations for the drafter. If a member initially holds a membership interest in the member's individual capacity and then establishes a trust of which the member is trustee, has the membership interest been assigned such that the member as trustee is merely an assignee with no management or voting rights?³⁷ Similarly, if a trust or trustee is designated as a member of the limited liability company and the trustee dies, has there been an assignment of the membership interest where the interest continues to be held in the same trust by a successor trustee?³⁸ The company agreement needs to be clear regarding

member's assignee (by vote of all the members) in the case of the member's assignment of the member's entire interest to a nonmember.

In *Bourbon Investments, LLC v. New Orleans Equity, LLC*, 207 So.3d 1088 (La. App. 4 Cir. 2016), two members who had acquired the interests of two other members argued that the statute did not require unanimous consent of the members for the acquiring members to become members or participate in management with respect to the acquired interests because the acquiring members were already members. The court stated that “[t]he literal language of the statute does not support Plaintiffs’ interpretation of La. R.S. 12:1332. The plain language of the statute requires unanimous written consent of all members for an assignee to become a member of or participate in the management of the LLC. The statute does not differentiate between a third party assignee and a current LLC member assignee. The fact that the legislature did not draft a separate set of rules for membership transfers between current LLC members further supports the conclusion that the default transfer restrictions apply regardless of whether the assignee is a third party or a current member.”

³⁷ Company agreements often contain provisions restricting transfers and defining permitted transfers, but these agreements still are not always clear about the scope of permitted transfers and the effect of a transfer.

In *Clark v. Kelly*, 1999 WL 458625 (Del. Ch. 1999), the issue was whether the transfer of all of the shares of a corporate member of the limited liability company to a trust was a “transfer” of a limited liability company interest within the meaning of the operating agreement. Plaintiff Clark was the sole shareholder of one of the members of the limited liability company. The other member of the limited liability company was La Empresa De La Mar D’Oro, Inc. (La Empresa), a California corporation. The stock of La Empresa was titled in Danis at the time La Empresa became a member of the limited liability company. After formation of the limited liability company, Danis transferred the stock of La Empresa to a living trust of which Danis and his wife were the trustors and co-trustees. The issue was whether the transfer of the shares to the trust triggered a provision of the operating agreement requiring consent. If the transfer requiring consent occurred without such consent, the transferee’s status was that of a mere assignee. The definition of “transfer” under the operating agreement included a transaction whereby the equity owners of a member as of the date of the member’s admission to the limited liability company own less than 90% of the equity securities of the member after the transaction. The court determined that the transfer of the shares of La Empresa to the trust did not fall within the definition of a transfer under the operating agreement because the shares were community property under California law and Danis’s wife therefore had a 50% equitable interest in the shares before the transfer to the trust.

In *Lusk v. Elliott*, 1999 WL 644739 (Del. Ch. 1999), a limited liability company member (Elliott) assigned his 99% interest in the limited liability company to a family trust, and the 1% member (Lusk) claimed that he was the sole remaining member and manager on the basis that the assignment was not effective to transfer membership rights. The court determined that the assignment transferred Elliott’s membership along with his 99% financial interest. The operating agreement prohibited assignment of a member’s interest other than to another member; however, both members signed a consent to the transfer of Elliott’s 99% membership interest and agreed that the assignment would not constitute a prohibited assignment under the operating agreement. The parties agreed that the consent amended the prohibition on transfer in the operating agreement but disagreed as to whether the consent authorized the conveyance of Elliott’s membership along with the financial interest. Lusk relied upon provisions of the Delaware Limited Liability Company Act that characterize an assignment as carrying only the financial interest of the member. Since the operating agreement did not define “assignment,” Lusk argued the court should look to the Delaware statute for the effect of an assignment. The court disagreed. The court said that the consent and assignment indicated what was meant by the term “assignment” since the instruments referred to assignment of Elliott’s “entire undivided membership interest.” The court concluded that this language encompassed Elliott’s membership as well as his 99% ownership interest.

³⁸ Compare *Presta v. Tepper*, 102 Cal. Rptr. 3d 12 (Cal. Ct. App. 2009) (holding death of trustee partner triggered buyout provisions of the partnership agreement applicable on the death of a partner, relying heavily on the principle that an ordinary express trust is not an entity separate from its trustee) with *Dunbar v. Willis*, 2010 WL 336406 (Cal. Ct. App. 2010) (interpreting provisions of a limited liability company operating agreement and holding that the death of the trustee of a revocable living trust to which the trustee had previously transferred his entire membership interest (as permitted by the operating agreement) did not trigger the provision of the operating agreement permitting the remaining members to purchase the interest of a member on the member’s death).

these situations. The company agreement should make clear whether a change in trustees is considered an assignment and the effect of such an assignment. Even if trusts are not involved in the initial membership of the limited liability company, it will often be desirable to have provisions that address how a transfer by a member of the member's membership interest into a trust and a subsequent change in trustee will be treated under the company agreement.

The model agreements for multi-member companies presented with this paper spell out the rights of assignees, the requirements for a transferee of a membership interest to be admitted as a member of the company and the accompanying rights and obligations of an assignee, newly admitted member and transferor.³⁹

After a transfer of a membership interest to an assignee who is not admitted as a member, questions sometimes arise as to the rights of the members to amend the company agreement so as to affect adversely the rights of the assignee. If, for example, a member dies, and the remaining members amend the company agreement to increase one or more of the remaining members' share in the profits and decrease the share of the deceased member's estate, does the assignee estate have any recourse?⁴⁰ Even if members may owe one another fiduciary-type duties in some situations, members do not necessarily owe such duties to an assignee.⁴¹ The question may boil down to one of contract law.⁴² If the company agreement could have been amended over the deceased member's objections, then the estate surely has no greater rights than the member to complain.⁴³ Even if the company agreement requires unanimous consent of the members for such an amendment, the estate, being only an assignee, literally does not have any right to block the amendment.⁴⁴ It may be advisable, however, to expressly address the rights of assignees regarding changes of this

³⁹ Sections 2.5, 2.6, 2.7, 2.8 and 2.9 of Appendix A and Appendix B.

⁴⁰ Obviously, if the company agreement provides the estate of the deceased member a right to be bought out at a value fixed at the date of death, such a scenario does not become an issue. If, however, the deceased member's estate is not entitled to a buyout and the limited liability company continues with the deceased member's estate as a mere assignee, a scenario like that described could easily be imagined.

⁴¹ See *Griffin v. Box*, 910 F.2d 255, 261 (5th Cir.1990), in which the Fifth Circuit, applying Texas law, stated that general partners did not owe a fiduciary duty to transferees of partnership interests who had not been admitted as substituted partners. See also *Bauer v. Blomfield Co./Holden Joint Venture*, 849 P.2d 1365 (Alaska 1993) (holding that partners owed no duty to an assignee to act in good faith and that assignee could not challenge the payment of a large commission to a partner that eliminated income payments to the assignee); but see *Bader v. Cox*, 701 S.W.2d 677, 685 (Tex. App. – Dallas 1985, writ ref'd n.r.e.) (stating that surviving partners owed fiduciary duties to the representative of a deceased partner under the Texas Uniform Partnership Act). The Texas Revised Partnership Act was amended in 2003 to provide that partners owe duties to transferees of deceased partners. TEX. REV. CIV. STAT. ANN. art. 6132b-4.04(a) (expired), recodified in TEX. BUS. ORGS. CODE ANN. § 152.204(a).

⁴² See *Bailey v. Fish & Neave*, 868 N.E.2d 956 (N.Y. 2007) (holding that provision of partnership agreement permitting all questions relating to the partnership business to be decided by majority-in-interest vote applied to amendment of the partnership agreement and permitted agreement to be amended to change compensation of withdrawing partners without the consent of partners who had given notice of their intent to withdraw); but see *Abbott v. Schnader, Harrison, Segal & Lewis, LLP*, 805 A.2d 547 (Pa. Super. Ct. 2002) (holding that partnership agreement could not be amended by partners to reduce retirement benefits of retired partners without their consent because the benefits were vested contract rights that could not be retroactively abrogated pursuant to the general amendment provision).

⁴³ See *Aztec Petroleum Corp. v. MHM Co.*, 703 S.W.2d 290, 294 (Tex. App. – Dallas 1985, no writ) (upholding amendment of partnership agreement to authorize removal of general partner without general partner's consent because "any unanimity which may be required by contract law was met when all parties to the partnership agreement consented to be bound by amendments passed by 'the holders of seventy percent (70%) or more of the Units'"). See also *Bailey v. Fish & Neave*, 868 N.E.2d 956 (N.Y. 2007) (holding that provision of partnership agreement permitting all questions relating to the partnership business to be decided by majority-in-interest vote applied to amendment of the partnership agreement and permitted agreement to be amended to change compensation of withdrawing partners without the consent of partners who had given notice of their intent to withdraw).

⁴⁴ See TEX. BUS. ORGS. CODE ANN. § 101.052(a) (specifying that, except as provided by BOC § 101.054, the company agreement governs "the relations among members, managers, and officers of the company, assignees of membership interests in the company, and the company itself"). Cf. *Griffin v. Box*, 910 F.2d 255 (5th Cir. 1990) (holding that general partners did not owe a fiduciary duty to transferees of partnership interests so as to mandate admission of transferees as substituted limited partners); *Griffin v. Box*, 956 F.2d 89 (5th Cir. 1992) (concluding that transferees who had not been admitted as substituted limited partners in accordance with the partnership agreement had no voting rights under the agreement). Cf. *7547 Corp. v. Parker & Parsley Dev. Partners, L.P.*, 38 F.3d 211, 219 (5th Cir. 1994) ("Griffin confirms that one seeking to assert the rights of a limited partner must establish compliance with the partnership agreement's admission procedures and that the agreement controls the qualifications and

nature in the company agreement.⁴⁵ The model agreements for multi-member limited liability companies handle this situation by providing that in the event of the death of a member, the representative of the decedent is entitled to cause the company to purchase the membership interest of the decedent.⁴⁶ This would provide the representative the opportunity to exit the company rather than be faced with the perils of being treated unfairly by the surviving members who could vote to disadvantage the membership interest of the deceased member.

As discussed above, the BOC provides that “[a]n assignment of a membership interest in a limited liability company does not entitle an assignee to . . . become a member of the company or exercise any rights of a member of the company.”⁴⁷ The typical assignment instrument prepared by a practitioner will often state that the assignor is assigning “all rights, title and interest” to the assignee. If the assignment does not specifically address admission of the assignee as a member, it presents the issue of whether the parties intended for “all rights” to include the right to participate in the management of the company, which is a right that cannot be exercised by an assignee prior to admission as a member (which requires approval of all members). To attempt to address this issue, the model agreements for multi-member companies presented with this paper provide that an assignee of a membership interest who is already a member is automatically deemed admitted as a member with respect to the assigned membership interest.⁴⁸ Otherwise, the assignor of a membership interest is entitled to continue to exercise any rights or powers of the member not vested in the assignee by virtue of the assignment, including the right to vote or approve matters requiring member vote or approval.⁴⁹ Upon admission of an assignee as a member, the assignor member ceases to be a member with respect to the assigned membership interest.⁵⁰ The model agreements for multi-member companies provide that the approval of all members is necessary to admit an assignee as a member;⁵¹ therefore, the assignor member’s approval is required along with the other members. In some cases, it may be preferable to provide for admission of an assignee with the approval of all members (or some lesser portion or percentage) other than the assignor member. The definition of Percentage in the model agreements for multi-member companies addresses the treatment of an assignee’s percentage interest for purposes of determining what constitutes the requisite vote under the provisions that provide for action by a vote of members owning a majority of percentages in the company.⁵²

The BOC provides that “[a] member of a limited liability company may not withdraw . . . from the company.”⁵³ The members may change this rule in the company agreement.⁵⁴ The model agreement accompanying this paper for a

rights of limited partners.”). The agreements in those cases expressly stated that admission of an assignee required the consent of the general partner which could be granted or withheld in the general partner's sole discretion. See also *Adams v. United States*, 2001 WL 1029522 (N.D. Tex. 2001) (stating that remaining partners did not owe a fiduciary duty to assignees of the deceased partner); but see *Bader v. Cox*, 701 S.W.2d 677, 685 (Tex. App. – Dallas 1985, writ ref'd n.r.e.) (stating that surviving partners owed fiduciary duties to the representative of a deceased partner under the Texas Uniform Partnership Act). The Texas Revised Partnership Act was amended in 2003 to provide that partners owe duties to transferees of deceased partners. TEX. REV. CIV. STAT. ANN. art. 6132b-4.04(a) (expired), recodified in TEX. BUS. ORGS. CODE ANN. § 152.204(a).

⁴⁵ In a voluntary assignment where the assigning member remains a member and retains voting rights, the assignee may contract with the assignor in such a manner as to ensure the assignee’s rights are protected through the exercise of the assignor's voting rights. On the other hand, a different situation faces an assignee who has succeeded to the interest of a deceased member (or, for that matter, a former member who is in the nature of an assignee by having withdrawn as a member). To the extent that the company agreement makes clear that it may be amended to affect the rights of assignees, assignees are on notice that they take subject to such risk.

⁴⁶ Section 8.2(c) of [Appendix A](#) and [Appendix B](#).

⁴⁷ TEX. BUS. ORGS. CODE ANN. § 101.108(b).

⁴⁸ Section 2.6 of [Appendix A](#) and [Appendix B](#).

⁴⁹ Section 2.9 of [Appendix A](#) and [Appendix B](#).

⁵⁰ Section 2.9 of [Appendix A](#) and [Appendix B](#) and Section 8.2(a) of [Appendix C](#).

⁵¹ Section 2.6 of [Appendix A](#) and [Appendix B](#).

⁵² Section 11.8(a)(viii) of [Appendix A](#) and Section 11.8(a)(vii) of [Appendix B](#).

⁵³ TEX. BUS. ORGS. CODE ANN. § 101.107.

⁵⁴ TEX. BUS. ORGS. CODE ANN. §§ 101.052, 101.054.

multi-member, manager-managed limited liability company expressly incorporates the statutory default rule.⁵⁵ However, in the model agreement for a multi-member, member-managed limited liability company, there is a provision permitting a member to withdraw.⁵⁶ In the member-managed context, the members are the governing persons who are vested with the power and authority to manage the day-to-day business, and it may thus be more problematic for the members to be forced to remain in that relationship. One member may find that the relationship of the members has deteriorated and that the other members outvote the member and have marginalized the member's role in the company, yet the marginalized member is stuck in a fiduciary role with the company. In such a case, the push-pull provision in the model agreement would be available, but that option assumes the members have the liquidity to pursue that course of action, which may not always be the case as a practical matter. If the agreement allows a member to withdraw and does not address the consequence with respect to the withdrawing member's membership interest, the statutory default rule provides that the withdrawn member is entitled to be paid the fair value of the withdrawn member's interest within a reasonable time after withdrawal.⁵⁷ Thus, an unfettered withdrawal right under a company agreement is essentially a put right for cash, which could create a financial hardship on the limited liability company. A middle ground between a complete prohibition on withdrawal and the ability to withdraw with an accompanying buyout is reflected in the withdrawal provision in the model agreement for a multi-member, member-managed limited liability company, which provides for a right of withdrawal but provides that the withdrawn member will thereafter be treated as an assignee rather than having the immediate right to be paid for the membership interest. This position would not be very attractive to a member in many cases since it leaves the member's capital locked in the company and deprives the member of any vote, but it would allow the member to terminate the member's fiduciary role in the company and pursue other opportunities that compete with the company.

In addition to prohibiting withdrawal of a member, the BOC provides that “[a] member of a limited liability company may not ... be expelled from the company.”⁵⁸ The members may change this rule in the company agreement.⁵⁹ The model agreement accompanying this paper for a multi-member, manager-managed limited liability company expressly incorporates the statutory default rule.⁶⁰ However, in the model agreement for a multi-member, member-managed limited liability company, there is a provision permitting expulsion of a member for specified causes.⁶¹ In a manager-managed limited liability company, the members may remove a manager with or without cause under the statutory default rule, and company agreements commonly follow the same approach.⁶² It can be very frustrating for the members of a member-managed limited liability company to find that they have no way to terminate the status of a member as a governing person and agent of the company even though the member has proved to be a “bad actor.” The model agreement for a multi-member, member-managed limited liability company provides that a member may be expelled by the unanimous vote of the other members if the member has (a) materially breached the agreement, (b) committed fraud, theft, or gross negligence injuring the company or one or more members of the company; or (c) engaged in wrongful conduct that adversely and materially affects the business or operation of the company.⁶³ The model agreement provides that this expulsion right is in addition to, and not in lieu of, any remedies otherwise available against the expelled member. Note that the minority members may expel a majority member under this provision (as may one member of a two-member limited liability company owned 50-50) because the vote required for an expulsion under the provision is the “unanimous vote of all other Members (not including the Member to be expelled).” Once the relationship between members has broken down, there may be a race between the members to identify grounds to expel each other. Exercise of an expulsion provision may complicate the dispute, but they will

⁵⁵ Section 2.4 of [Appendix A](#).

⁵⁶ Section 2.4(a) of [Appendix B](#).

⁵⁷ TEX. BUS. ORGS. CODE ANN. § 101.205.

⁵⁸ TEX. BUS. ORGS. CODE ANN. § 101.107.

⁵⁹ TEX. BUS. ORGS. CODE ANN. §§ 101.052, 101.054.

⁶⁰ Section 2.4 of [Appendix A](#).

⁶¹ Section 2.4(b) of [Appendix B](#).

⁶² TEX. BUS. ORGS. CODE ANN. § 101.304. See also Section 3.4 of [Appendix A](#).

⁶³ Section 2.4(b) of [Appendix B](#).

likely end up at the courthouse as a practical matter with or without an expulsion provision if accusations of these types of bad acts are being made.

As with so many other provisions, there really is no “standard” approach that should be employed with respect to withdrawal and expulsion, and the approaches taken in the model agreements are only examples of possible approaches. Withdrawal and expulsion may be desirable in the context of a particular manager-managed limited liability company and may not be desirable in a particular member-managed company. The desirability of providing for withdrawal and expulsion, and the triggers and consequences, will vary depending on the circumstances and should be considered carefully.

Shares of stock in a corporation are typically certificated, i.e., represented by a physical instrument, a stock certificate. Membership interests in a limited liability company may also be certificated, but the more typical practice seems to be for limited liability company membership interests to be uncertificated, not represented by physical instruments. The model agreements included with this paper specifically state that membership interests will be uncertificated.⁶⁴ If certificated interests are desired, then the drafter should include provisions similar to those found in corporate bylaws regarding the form of the certificate, replacement of lost certificates, transfer requirements related to the certificates, etc. The drafter may also wish to provide that the membership interests be governed by Chapter 8 of the Uniform Commercial Code. Membership interests in limited liability companies are not governed by Chapter 8 unless the interests are traded on a securities exchange or the terms of the interest expressly provide that the interests will be governed by Chapter 8, often called “opting in” to Chapter 8 treatment.⁶⁵ Chapter 8 of the Uniform Commercial Code contains detailed provisions for stock and other securities. Examples of language providing for certificated membership interests and for opting in to Chapter 8 are set forth in a footnote below.⁶⁶ It should be noted that the

⁶⁴ Section 2.10 of [Appendix A](#) and [Appendix B](#) and Section 2.3 of [Appendix C](#).

⁶⁵ TEX. BUS. & COM. CODE ANN. § 8.103(d).

⁶⁶ The following provisions could be used if the drafter wished to provide that membership interests are certificated. Typically, certificated interests would be denominated in Units of Interest.

X.1 Certificates. Units of Interest of the Company shall be represented by certificates signed by a Manager or officer for and on behalf of the Company. Such certificates shall be consecutively numbered, and shall be entered in the books of the Company as they are issued. Each certificate shall state on the face thereof the Member’s name, the number of Units of Interest and such other matters as may be required by the laws of the State of Texas or hereunder. The signature of the Manager or officer upon the certificates may be facsimile.

X.2 Replacement of Lost or Destroyed Certificate. The Managers may direct a new certificate or certificates to be issued in place of any certificate or certificates theretofore issued by the Company alleged to have been lost or destroyed, upon the making of an affidavit of that fact by the holder of record thereof, or such holder's duly authorized attorney or legal representative who is claiming the certificate to be lost or destroyed. When authorizing such issue of a new certificate or certificates, the Company may require the owner of such lost or destroyed certificate or certificates or such Person's legal representative to advertise the same in such manner as it shall require or to give the Company a bond with surety and in form satisfactory to the Company in such sum as it may direct as indemnity against any claim that may be made against the Company or other obligees with respect to the certificate alleged to have been lost or destroyed.

X.3. Transfer of Units of Interest. Upon surrender to the Company of a certificate representing Units of Interest duly endorsed or accompanied by proper evidence of succession, assignment or authority to transfer, the Company shall issue a new certificate to the Person entitled thereto, cancel the old certificate and record and register the transaction upon its books and records. Upon transfer of Units of Interest pursuant to this Section X.3., the transferee shall have, to the extent of the number of Units of Interest transferred, the rights and powers and shall be subject to the restrictions and liabilities respecting assigned membership interests as set forth in Article 2.

X.4. Registered Members. The Company shall be entitled to treat the holder of any certificate or certificates representing Units of Interest of the Company registered in the books and records of the Company at any particular time as the owner thereof at that time, subject to the provisions of Article 2 and Article 8. Accordingly, the Company shall not be bound to recognize any equitable or other claim to or interest in such Units of Interest or any rights deriving from such Units of Interest on the part of any other Person other than the holder of record of the certificate for such Units of Interest.

X.5. Article 8 of the Uniform Commercial Code. The Company hereby irrevocably elects that all Units of Interest in the Company shall be securities governed by Article 8 of the Uniform Commercial Code as in effect in the State of

language for certificated membership interests in the footnote below does not attempt to provide for free transferability of management rights related to interests in the same way that voting rights would typically be transferred with the transfer of stock certificates. The language is qualified by reference to the provisions of the forms that distinguish the transfer of economic rights from transfer of management rights and the provisions that impose transfer restrictions. If the drafter wished to duplicate free transferability of management rights similar to transfers of corporate stock, additional revisions would need to be made to the language in the forms.

If the company has opted in to Chapter 8, membership interests in the company will be treated as “investment property” for purposes of perfection, whether or not certificated.⁶⁷ If the issuer has not opted in, the generally accepted view is that interests in a limited liability company will be treated as a “general intangible” for perfection purposes, although there is a minority view that a certificated interest in a limited liability company should be classified as an “instrument” for perfection purposes if the company has not opted in to Chapter 8.

The model agreements for multi-member companies contain limited representations and warranties by the members.⁶⁸ In company agreements used as financing vehicles, it is not uncommon to find expansive representations and warranties from the investor members, either as a part of the company agreement or in accompanying subscription documents. These representations often include representations related to securities laws that the promoters rely upon to establish a securities law exemption. Because the scope of this paper and the model agreements included with it is intended to be for a small privately held business, the representations and warranties included in the model agreements presented with this paper are limited to due execution and authority.

D. Article 3: Management of the Company, Meetings and Voting.

Article 3 of the model agreements deals with management of the company, meetings and voting.

The model company agreement for a company managed by managers details the number, qualifications and methods for selecting and removing managers. The BOC provides that directors of a corporation are elected at annual shareholder meetings of the corporation⁶⁹ and serve for terms starting and ending on the dates of the annual meetings⁷⁰ unless provided otherwise in the corporation’s certificate of formation or bylaws.⁷¹ Consistent with the more informal governance permitted for limited liability companies, the BOC does not call for annual elections of managers and states that a manager serves for the term elected (assuming the election specified a term) or until the manager’s successor is elected or until the manager resigns, is removed or dies.⁷² Sometimes company agreements for limited liability companies emulate the corporate model and call for annual elections of managers. The model agreement for a manager-managed company presented with this paper adopts a more informal approach and provides that managers will serve until they resign, are removed or die and that, unless a term is specified upon a manager’s selection, managers do not serve for a fixed term.⁷³ The model agreement specifies that manager vacancies may be filled by a vote of the members.⁷⁴ In the past, it was important to specify that members had the right to fill manager vacancies if no term was specified for managers because the BOC provided as a default rule that managers filled manager vacancies unless the vacancy resulted from an increase in the number of managers or the position was for a manager elected under a

Texas and each other applicable jurisdiction. Each certificate representing Units of Interest in the Company shall bear the following legend: “This certificate evidences an interest in the Company and shall constitute a security governed by Article 8 of the Uniform Commercial Code as in effect in the State of Texas and, to the extent permitted by applicable law, Article 8 of the Uniform Commercial Code of each other applicable jurisdiction.”

⁶⁷ TEX. BUS. & COM. CODE ANN. § 9.102(a)(49).

⁶⁸ Section 2.11 of [Appendix A](#) and [Appendix B](#).

⁶⁹ TEX. BUS. ORGS. CODE ANN. § 21.405(a).

⁷⁰ TEX. BUS. ORGS. CODE ANN. § 21.407.

⁷¹ TEX. BUS. ORGS. CODE ANN. § 21.408.

⁷² TEX. BUS. ORGS. CODE ANN. § 101.303.

⁷³ Section 3.3 of [Appendix A](#).

⁷⁴ Section 3.5 of [Appendix A](#).

provision of the company agreement permitting a class or group of members to elect the manager.⁷⁵ If a term was not specified, then a vacancy was the only situation in which managers would be elected, and the default rule essentially created a self-perpetuating set of managers. In 2017, BOC § 101.305 was amended to provide that a vacancy in the position of a manager may generally be filled either by a majority of the remaining managers (regardless of whether the remaining managers constitute a quorum) or the members.⁷⁶ The model agreement for a manager-managed company provides that either the remaining managers or the members may fill a manager vacancy, but alters the default rule to require the remaining managers to act unanimously in view of the fact that the model agreement contemplates a simple limited liability company with few members and managers. If the managers fill the vacancy with someone who is not acceptable to the majority member(s), the members may remove and replace the manager by a majority vote (as discussed below, the per capita voting of members provided by statute as a default rule is altered in the multi-member agreements to be based on percentages of members); however, it may be desirable in some situations to provide that the exclusive right to fill manager vacancies is vested in the members.

The vote required to elect a manager as provided in the model agreement for a manager-managed limited liability company is a majority of the percentage interests owned by the members. (Since annual elections of managers are not contemplated by the model agreement, and a manager serves indefinitely unless the members specify a term when electing the manager, the word “select” rather than “elect” is used in the model agreement.) The members of a simple limited liability company may wish to provide that a greater percentage or unanimity is required to elect managers or may wish to agree that certain members, or each member, will be allowed to designate a manager to represent the member. An example of this latter kind of provision is set forth in a footnote below.⁷⁷

Article 3 also provides for the company to have officers, if appointed by the managers (in the case of a limited liability company managed by managers) or the members (in the case of a company managed by members). Some company agreements contain detailed provisions designating officer titles and spelling out the authority and responsibilities of the various officers. In the model agreements included with this paper, the authors have opted to leave these matters to be determined by the managers or managing members when and if they designate officers.

The BOC provides that consent or approval of a majority of all members is required for fundamental business transactions (merger, interest exchange, conversion, and sale of substantially all of the limited liability company’s assets).⁷⁸ “Majority” is determined on a per capita basis, i.e., one member, one vote. In many situations, these default provisions may not reflect the expectations of the owners of the company who may assume that, as with a corporation, majority voting would be based upon the respective ownership interests of the members (i.e., a majority of the percentage interests or units owned). In keeping with the concept that the model agreements presented with this paper are designed principally for a closely held entity, we have included provisions in the model agreements for multiple-member companies to supersede the BOC voting provisions. In a company with two equal members, majority approval is the same as unanimous approval, and in a company with a few investors the authors think it is likely that the minority members will not want to be out-voted by the majority members on major decisions such as a merger that would affect the direction and value of the business and indirectly accomplish what otherwise would require unanimity as a default rule, such as issuance of additional membership interests, admission of a member, amendment of the company agreement, and amendment of the certificate of formation. We have provided in the model agreements for multi-

⁷⁵ TEX. BUS. ORGS. CODE ANN. § 101.305(a).

⁷⁶ TEX. BUS. ORGS. CODE ANN. § 101.305(a), as amended by S.B. 1517, 85th Leg., eff. Sept. 1, 2017.

⁷⁷ The following provisions could be used if the drafter wished to provide that each member will be allowed to designate a manager to represent the member:

X.x. **Right to Designate Managers.** [*Name of Member*] shall be entitled, so long as such Person is a Member, to designate one (1) individual to represent such Person as a Manager of the Company and [*Name of designee*] is hereby designated by [*Name of Member*] to serve as an initial Manager of the Company. [*Name of Member*] also shall be entitled, so long as such Person is a Member, to designate one (1) individual to represent such Person as a Manager of the Company and [*Name of designee*] is hereby designated by [*Name of Member*] to serve as an initial Manager of the Company. Each Member agrees that, so long as the Member holds the membership interest in the Company giving the Member the ability to designate a Manager, a Manager designated by the Member may only be removed or replaced by the Member who designated the Manager.

⁷⁸ TEX. BUS. ORGS. CODE ANN. § 101.356(c).

member companies that issuance of new membership interests,⁷⁹ approval of admission of an assignee of a membership interest as a member of the company,⁸⁰ an action that would make it impossible for the company to carry out its ordinary business, a merger, an interest exchange, a conversion, a sale of all or substantially all of the company's assets,⁸¹ voluntary winding up of the company,⁸² and an amendment of the certificate of formation or company agreement⁸³ require approval by all members. In the agreement for multi-member companies, we have provided that other member votes require approval by the members who own a majority of the Percentages.⁸⁴ The default voting provisions of the BOC specify that decisions of members and managers can generally be made by a majority of members or managers present at a meeting at which a quorum is present, with a majority comprising a quorum. Thus, under the default rules, members or managers who comprise barely more than one-fourth of all members or managers could take action at a meeting at which barely more than half the members or managers were present. The authors believe that this default approach, even if altered to reflect weighted voting based on percentage ownership in the case of member votes, would likely not comport with the expectations of those in a simple limited liability company with few members. Thus, in the model agreements, the authors have phrased majority approval as requiring the affirmative vote of a majority of all managers or a majority of Percentages owned by all members, as the case may be.⁸⁵ Although perhaps unnecessary under this approach, the authors included provisions specifying that a majority of all managers or a majority of Percentages owned by all members, as the case may be, constitutes a quorum⁸⁶ in the event that there arose some question as to whether a matter that did not involve or require a vote nevertheless amounted to transacting business at the meeting.

Sometimes there is confusion among members regarding the impact of a redemption, transfer, or issuance of a membership interest, and we have included a somewhat detailed definition of "Percentage" in the multi-member model agreements that attempts to eliminate some of this confusion and to call attention to the adjustments in percentages that are necessary in these situations and the shift of voting power that can result.⁸⁷ Because members owning a majority of the Percentages will directly or indirectly control all of the day-to-day decision making (by having the power to elect all the managers in the manager-managed setting and by directly making the decisions in the member-managed context), a minority member may want to bargain for a threshold higher than a majority or for protection with respect to specific matters, such as frequency and amount of distributions and decisions regarding compensation or other transactions involving members, managers or their affiliates.

The BOC provides that meetings of members of a limited liability company may be held at locations in or outside the state as provided by or fixed in accordance with the governing documents of the company, as agreed to by all persons entitled to notice of the meeting, or if the place is not provided according to the governing documents or so agreed, at the registered office or principal office of the company.⁸⁸ The BOC provides that meetings of managers or members of a committee of a limited liability company may be held at locations in or outside the state as provided by or fixed in accordance with the governing documents, as specified by the person calling the meeting, or as agreed to

⁷⁹ Section 2.2 of [Appendix A](#) and [Appendix B](#).

⁸⁰ Section 2.6 of [Appendix A](#) and [Appendix B](#).

⁸¹ Section 3.13 of [Appendix A](#) and Section 3.8 of [Appendix B](#).

⁸² Section 10.1 of [Appendix A](#) and [Appendix B](#).

⁸³ Section 11.3 of [Appendix A](#) and [Appendix B](#) and Section 11.2 of [Appendix C](#).

⁸⁴ Section 3.12 of [Appendix A](#) and Section 3.7 of [Appendix B](#). The multi-member, member-managed company agreement provides for these decisions to be made by a majority of Percentages owned by all members but allows the members to delegate decisions to a committee that can act by a majority of all committee members on a one-member, one-vote basis. Section 3.9 of [Appendix B](#). Because this could shift decision making authority to members who constitute a minority of the committee on a Percentage basis, the agreement provides that the delegation of authority to such a committee requires the unanimous vote or consent of the members.

⁸⁵ Sections 3.3, 3.4, 3.5, 3.12 and 3.14 of [Appendix A](#) and Section 3.7 of [Appendix B](#).

⁸⁶ Sections 3.7 and 3.8 of [Appendix A](#) and Section 3.3 of [Appendix B](#).

⁸⁷ Section 11.8(a)(viii) of [Appendix A](#) and Section 11.8(a)(vii) of [Appendix B](#).

⁸⁸ TEX. BUS. ORGS. CODE ANN. § 6.001(a) and (b).

by all persons entitled to notice of the meeting.⁸⁹ Typically, determining the place of a meeting only becomes divisive when there is a dispute among the members or managers on other issues. This makes it impractical to require that all of the participants agree to the meeting location and, if the company has members or managers who reside outside of Texas, holding meetings at the company offices may impose a burden or obstacle on some members. In consideration of these issues, and since virtually all meetings today include attendance by remote access, the model agreements for multi-member companies included with this paper provide that the person calling a meeting may designate the place of the meeting so long as remote attendance is allowed and provided.⁹⁰ The General Provisions, Title 1 of the BOC, do not specify that notice of a meeting must state the purpose of the meeting,⁹¹ but provisions in Chapter 21 applicable to corporations⁹² and provisions in Chapter 101 applicable to limited liability companies specify that notice of a meeting must state the purpose in some instances.⁹³ Consistent with the attempt of the authors to provide model agreements that balance the rights of the majority members with those of the minority members, and in recognition that non-manager members of a manager-managed limited liability company may not be aware of developments as they occur in the company and that the matters on which they vote as members are fairly significant, the model agreement for a manager-managed company provides that notice of a meeting of members shall state the purpose of the meeting.⁹⁴

The General Provisions, Title 1 of the BOC, which generally apply to all BOC entities, permit meetings of the owners, members, governing persons or a committee of such persons to be held by conference telephone or similar communications equipment, or another suitable electronic communications system, such as videoconferencing or the Internet, or any combination, if the system permits each person participating in the meeting to communicate with all other persons participating in the meeting.⁹⁵ By referring to meetings that are held “solely or in part” by telephonic or other electronic communications, the BOC makes clear that a meeting can be held by a combination of remote electronic participation and in-person participation.⁹⁶ A location need only be specified for a meeting that is not held solely by telephone or other electronic communication.⁹⁷ The model agreements with this paper incorporate the flexibility provided for holding meetings under the BOC by making clear that meetings of the members, managers, or a committee may be held in whole or in part by electronic communications systems.⁹⁸

In recognition of the informal nature of many limited liability companies, the BOC does not require minutes of meetings to be maintained by limited liability companies unless the company’s governing documents require minutes to be maintained.⁹⁹ Maintaining meeting minutes is advisable for numerous reasons and is a best practice recommended by the authors, but we did not include a provision in the model company agreements requiring that minutes be maintained because this type of “formality” is often neglected in small, informal businesses even when the importance of following such formalities has been stressed. When a person participates in a meeting remotely by electronic communication, the BOC specifies that the entity must keep a record of any vote or action taken.¹⁰⁰ It is not clear that BOC § 3.151 (which does not require a limited liability company to keep minutes of meetings) relieves a limited liability company from the requirement in BOC § 6.002 that a record of any vote or action be kept when participation in a meeting has occurred by remote communication. The authors have not stated in the model agreements

⁸⁹ TEX. BUS. ORGS. CODE ANN. § 6.001(c).

⁹⁰ Section 3.07 of [Appendix A](#) and Section 3.3 of [Appendix B](#).

⁹¹ TEX. BUS. ORGS. CODE ANN. § 6.051.

⁹² See, e.g., TEX. BUS. ORGS. CODE ANN. §§ 21.055(a), 21.353(b), 21.456(c).

⁹³ TEX. BUS. ORGS. CODE ANN. § 101.352(b).

⁹⁴ Section 3.11 of [Appendix A](#).

⁹⁵ TEX. BUS. ORGS. CODE ANN. § 6.002.

⁹⁶ TEX. BUS. ORGS. CODE ANN. § 6.051(a)(2)(B).

⁹⁷ TEX. BUS. ORGS. CODE ANN. § 6.051(a)(2)(A).

⁹⁸ Sections 3.7 and 3.9 of [Appendix A](#) and Sections 3.3 and 3.4 of [Appendix B](#).

⁹⁹ TEX. BUS. ORGS. CODE ANN. § 3.151(c)

¹⁰⁰ TEX. BUS. ORGS. CODE ANN. § 6.002(2).

that a record must be kept of votes or other action taken at a meeting held by electronic communication, but it is possible a court might still view the requirement as applying since it has not been specifically negated by the model agreements. In view of the obvious proof problems that may arise in the absence of records, members and managers should be counseled about the wisdom of maintaining good records of votes taken and decisions made by members and managers (and any committees with decision making authority), whatever the method of voting or decision making.

The General Provisions, Title 1 of the BOC, which generally apply to all BOC entities, provide for action by the owners, members, governing authority or a committee of the governing authority by unanimous written consent.¹⁰¹ The provisions also provide, in BOC § 6.202, that if authorized by the certificate of formation or otherwise provided in the BOC, action may be taken by less than unanimous consent.¹⁰² BOC § 6.202(d) provides that prompt notice of action by less than unanimous consent is required to be given to all persons who did not consent. Original copies are not required and any “photographic, photostatic, facsimile, or similarly reliable reproduction” of a signed written consent may be used.¹⁰³ Unless provided otherwise in the company’s governing documents, in addition to a signature, consents of members and governing persons may be evidenced by an electronic transmission of a consent if the transmission contains or is accompanied by information allowing a determination that the transmission was transmitted by the member or governing person and of the date transmitted.¹⁰⁴ Unless otherwise dated, the consent given by electronic transmission is considered signed on the date transmitted.¹⁰⁵

BOC § 101.358 in Title 3 of the BOC, specifically applicable to limited liability companies, provides that any action required or authorized to be taken at a meeting of the members, governing authority or a committee of the governing authority may be taken without a meeting, notice or taking a vote if a written consent or consents stating the action is signed by the number or persons necessary to have the minimum number of votes that would be required to take action at a meeting at which all persons entitled to vote were present. These provisions apply notwithstanding other requirements in BOC §§ 6.201 and 6.202.¹⁰⁶ Thus, non-unanimous written consents are permitted in the context of limited liability companies as a default rule, and notice to nonconsenting persons is not required. The consents do not have to be contemporaneous. The takeaway from these provisions is that the BOC allows a great deal of flexibility and informality regarding consents in the context of limited liability companies. In a three-member limited liability company, two members who hold voting control could consent to a transaction in separate email messages without copying or informing the third member. We have included a provision in the model agreements for multi-member companies tracking the BOC provisions for written consent without a meeting, including written consents accomplished by electronic communications such as email or text messaging.¹⁰⁷ In certain circumstances it may be desirable to limit the manner in which written consent is given to more formal types of writings. Drafters should also consider whether it is appropriate to include a requirement that all members or governing persons or committee members must receive prompt notice of action that has been taken without a meeting (along the lines of BOC § 6.202(d)). A provision like this might be appropriate if there are minority owners who want to remain informed of company actions.

In recognition that many limited liability companies operate quite informally, and that there may be instances where decisions are made by the members or governing persons in a manner that does not technically constitute a meeting or a written consent, BOC § 101.359 provides additional means of informal decision making in a limited liability company. Under this provision, an action is effective if taken by the affirmative vote of those persons having not fewer than the minimum number of votes that would be necessary to take the action at a meeting at which all members or managers, as the case may be, entitled to vote on the action were present and voted.¹⁰⁸ This provision thus

¹⁰¹ TEX. BUS. ORGS. CODE ANN. § 6.201.

¹⁰² TEX. BUS. ORGS. CODE ANN. § 6.202.

¹⁰³ TEX. BUS. ORGS. CODE ANN. § 6.205(a).

¹⁰⁴ TEX. BUS. ORGS. CODE ANN. § 6.205(b).

¹⁰⁵ TEX. BUS. ORGS. CODE ANN. § 6.205(c).

¹⁰⁶ TEX. BUS. ORGS. CODE ANN. § 101.358.

¹⁰⁷ Section 3.16 of [Appendix A](#) and Section 3.11 of [Appendix B](#).

¹⁰⁸ TEX. BUS. ORGS. CODE ANN. § 101.359(1).

authorizes action to be taken by informal votes (i.e., a series of phone calls or a combination of emails and conversations). In addition, an action is effective if taken with the consent of each member (i.e., unanimous consent of the members), which may be established by the member's failure to object to the action in a timely manner (if the member has full knowledge of the action), the member's signed written consent, or any other means reasonably evidencing consent.¹⁰⁹ Even in a limited liability company that is operated quite informally, this tacit-consent/failure-to-object provision may not be desirable.

Company agreements often contain provisions regarding meetings, notice of meetings, and written consents, without addressing less formal means of taking action. If certain means of taking action, such as meetings and written consents, are specified in the company agreement while less formal means (i.e., those authorized in BOC § 101.359) are neither expressly permitted nor expressly precluded, a question may arise as to whether the company agreement implicitly precludes other means of taking action set forth in the statute or whether the other means set forth in the statute are still available because the company agreement does not specifically provide otherwise.¹¹⁰ In particular, if the members do not desire for an action to be effective based on the knowledge of all members and the members' failure to object in a timely manner, the company agreement should expressly so state or otherwise clearly specify that the methods of taking action set forth in the company agreement are the exclusive methods of taking action. The multi-member model agreements presented with this paper provide that the exclusive methods by which members, managers, and committee members may act are voting at a meeting or giving written consent as provided in the agreements.¹¹¹ The agreements further provide that a member shall not be deemed to have consented or voted in favor of an action unless the member has given explicit consent.¹¹² The authors took this middle-ground approach as an illustration of an agreement that provides more flexibility than the traditional corporate paradigm but makes clear that the members have agreed to exclude the most informal decision-making methods provided under the BOC in order to limit the methods by which the minority can be excluded from the decision-making process and exclude those methods that are most susceptible to proof problems when there is a dispute. In some situations, the members may want to permit informal action under BOC § 101.359(a) but not subsection (b), or the members may want to permit informal action to the full extent described by the BOC, in which case the provisions in the model agreements could be altered to expressly permit additional flexibility consistent with BOC § 101.359.

The BOC allows members to vote by written proxy as a default rule and allows managers to vote by written proxy if the company agreement so permits.¹¹³ Careful thought should be given to these default rules when drafting the company agreement. The *delectus personae* principle reflected in the statutory default rules (i.e., an assignee is not entitled to participate in management or exercise any rights of a member, and consent of all members is required to admit an assignee as a member)¹¹⁴ may be largely undercut by a member's ability to grant another person a proxy. The multi-member model agreements permit members and managers to vote by proxy but only permit proxies to be given to another member or manager.¹¹⁵ This approach is based on the assumption that the preference in a small, closely held limited liability company would ordinarily be to limit involvement in governance of the company to members and managers. Given the ability to meet by conference telephone and to act by written consent (which may be accomplished by email, as discussed above), situations in which it is necessary to employ a proxy may be relatively rare. That is, in many situations it may be just as efficient for a member or manager to execute a written consent as it is to execute a

¹⁰⁹ TEX. BUS. ORGS. CODE ANN. § 101.359(2).

¹¹⁰ See *Paul v. Delaware Coastal Anesthesia, LLC*, 2012 WL 1934469 (Del. Ch. 2012) (operating agreement requiring vote of holders of 75% of LLC's shares to terminate member and containing provisions regarding notice of meetings and voting of shares at meetings did not preclude members from taking action by written consent, as permitted by Delaware LLC Act unless otherwise provided in a limited liability company agreement, where agreement at issue was silent as to method by which vote terminating membership must be taken and did not specifically disallow votes by written consent).

¹¹¹ Section 3.12 of [Appendix A](#) and Section 3.14 of [Appendix B](#).

¹¹² Section 3.12 of [Appendix A](#) and Section 3.14 of [Appendix B](#).

¹¹³ TEX. BUS. ORGS. CODE ANN. §101.357.

¹¹⁴ See TEX. BUS. ORGS. CODE ANN. §§101108(b)(2), 101.109(b).

¹¹⁵ Section 3.15 of [Appendix A](#) and Section 3.10 of [Appendix B](#).

proxy. The provisions in the model agreements could easily be altered to remove the restrictions on who is permitted to serve as a proxy where less restrictive proxy voting is desired.

E. Article 4: Capital Contributions.

The initial contributions by the members to the company and the obligation to make additional capital contributions to the company are among the most important economic terms of the transaction involved in the formation and operation of the entity.¹¹⁶ Article 4 of the model agreements deals with these provisions.

As discussed above in Section III.C., the authors made the assumption for purposes of the model agreements included with this paper that the members would sign the company agreement and make their capital contributions simultaneously.¹¹⁷ As a result, we did not provide that payment of the capital contribution is a condition to membership. Under the model agreements, failure to make the initial capital contribution would be a breach of the agreement giving the company a contractual remedy if a member did not contribute. There may be circumstances where it is appropriate to condition membership upon payment or to provide other remedies for failure to make the initial capital contribution.

It is not uncommon to find in a company agreement a provision to the effect that a member's liability is limited to the amount of the member's contribution or contribution obligations.¹¹⁸ Such a statement may be intended as a mere affirmation of the member's limited liability with respect to third parties, or it may be intended to embrace liability to the company or the other members for breach of duty or breach of the company agreement. The intended scope and the wording of a provision specifying that a member's liability is limited to the amount of the member's contribution or contribution obligations should be carefully considered.¹¹⁹

Provisions that require future capital contributions or permit capital calls should be carefully considered. The BOC provides for non-liability of the members to limited liability company creditors for the limited liability company's obligations, but there are nevertheless certain situations in which a member may be held liable to the limited liability company in an action by a limited liability company creditor. A creditor of a limited liability company may enforce a member's obligation to make a contribution to the limited liability company even though it has been released by the limited liability company if the creditor extended credit or otherwise reasonably relied on the obligation after the member signed a writing reflecting the obligation and before the writing was amended or canceled to reflect the release.¹²⁰ Additionally, a member is obligated to return to the limited liability company a distribution that the member knows was improperly made.¹²¹ Although the statute does not explicitly give limited liability company creditors the right to enforce this obligation, it would not be surprising if a court permitted a creditor to do so.¹²²

Sometimes it may be desirable for the company agreement to grant manager(s) or member(s) the right to call for contributions when they conclude the limited liability company needs additional cash.¹²³ These "cash call" or

¹¹⁶ See *Capital Contributions, Capital Calls, Financing, Funding and New Equity; Key Planning and Drafting Issues for LLCs, LPs and Partnerships* by Cliff Ernst, presented at The University of Texas School of Law Continuing Legal Education Program on LLCs, LPs and Partnerships, July 14-15, 2011.

¹¹⁷ Section 4.1 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

¹¹⁸ Section 4.2 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

¹¹⁹ See *Cooke v. Dykstra*, 800 S.W.2d 556 (Tex. App. – Houston [14th Dist.] 1990, no writ). In that case, a limited partnership agreement stated that the limited partners' liability with regard to the partnership was limited "in all respects" to the amount of the capital contributions they made or agreed to make. The court held that the general partner could not recover damages from the limited partners in excess of the amount of their capital contributions when the limited partners breached the partnership agreement by attempting to terminate the partnership without the ninety-day notice required under the partnership agreement, and the general partner's access to the partnership's line of credit, which was guaranteed by the limited partners, was blocked.

¹²⁰ TEX. BUS. ORGS. CODE ANN. § 101.155.

¹²¹ TEX. BUS. ORGS. CODE ANN. § 101.206(d).

¹²² If a creditor has standing to enforce the obligation at all, it would appear that the creditor should be required to proceed derivatively on behalf of the limited liability company.

¹²³ In *Potter v. GMP, L.L.C.*, 141 S.W.3d 698 (Tex. App. – San Antonio 2004, pet. dismissed), a limited liability company sued one of its members to enforce a capital call. The member argued that the regulations ("regulations" under the Texas Limited Liability Company Act were the equivalent of a company agreement under the BOC) did not obligate him to make additional

“capital call” provisions ordinarily do not give creditors any rights unless the call has already been made because a creditor may not enforce a conditional obligation to make a contribution unless the conditions or obligations have been satisfied or waived.¹²⁴ Conditional obligations include contributions payable upon a discretionary call of the limited liability company before the call occurs.¹²⁵ Nevertheless, these provisions should be carefully drafted to avoid any implication that the members have agreed to waive their limited liability.¹²⁶ Additionally, even if creditors cannot invoke a discretionary capital call provision, the members should consider carefully the extent to which they want to expose themselves to this type of obligation, at whose discretion, and with what consequences in the event of a failure to contribute.¹²⁷

capital contributions without his consent. The court of appeals concluded the regulations were susceptible to two interpretations regarding additional capital contributions. On the one hand, they could be read to require members to contribute if requested by the manager and agreed to by a majority-in-interest of the members. On the other hand, as the member argued, they could be read as providing that additional contributions were not mandatory for members who objected. Since the regulations were ambiguous, the trial court properly submitted the issue of their interpretation to the jury. The court of appeals found there was sufficient evidence (which included testimony by the lawyer who drafted the regulations) to support the jury's finding that the regulations obligated the member to make the contribution that the other two members had approved.

¹²⁴ TEX. BUS. ORGS. CODE ANN. § 101.156.

¹²⁵ TEX. BUS. ORGS. CODE ANN. § 101.156(b). Cf. *Racing Inv. Fund 2000, LLC v. Clay Ward Agency, Inc.*, 320 S.W.3d 654 (Ky. 2010) (noting that the provision of the Kentucky limited liability company statute permitting a creditor to enforce a written contribution obligation on which the creditor has relied has no application in the case of a future contribution obligation which is not for an amount certain and is at the discretion of the manager on an as-needed basis).

¹²⁶ See *Racing Inv. Fund 2000 v. Clay Ward Agency, Inc.*, 320 S.W.3d 654 (Ky. 2010). The trial court and court of appeals in this case concluded that a provision of a limited liability company operating agreement requiring the members to contribute to pay expenses as determined necessary by the manager fell within the provision of the Kentucky limited liability company statute that allows members of a limited liability company to alter their limited liability in a written operating agreement. Because other provisions of the agreement addressing the limited liability of the members contained provisos referring to the capital call provision, the court of appeals rejected the argument that these other provisions overrode the capital call provision. The court of appeals also stated that the case was not about the personal liability of the limited liability company's members, but rather involved an order against the limited liability company, a separate legal entity, to make a capital call for the purpose of complying with its obligations to pay an agreed judgment. *Racing Inv. Fund 2000 v. Clay Ward Agency, Inc.*, 2008 WL 5102151 (Ky. App. 2008), rev'd, 320 S.W.3d 654 (Ky. 2010). The Kentucky Supreme Court reversed the court of appeals, concluding that the provision was designed to assure members would contribute additional capital as deemed necessary by the manager, and that the manager could have made a capital call, but the provision was not an agreement by the members to be personally obligated to pay any of the debts, obligations, or liabilities of the limited liability company, nor was it a debt collection mechanism by which a court could order a capital call.

¹²⁷ In *Canyon Creek Development, LLC v. Fox*, 263 P.3d 799 (Kan. App. 2011), the appellate court interpreted capital call provisions of a limited liability company operating agreement and concluded that the operating agreement authorized a member to make a capital call to satisfy a current obligation under an outstanding loan notwithstanding the general requirement of majority member approval of a decision to make a capital call. The court then turned to the more difficult question of whether a member who failed to satisfy a capital call could be held personally liable for the amount of the additional contribution or whether the remedy was limited to reduction of the member's ownership interest in the limited liability company. The agreement provided for reduction of a defaulting member's interest but did not say whether that was the sole remedy. The court examined the contribution provisions of the operating agreement and the Kansas limited liability company statute and concluded that in circumstances such as those in this case, where the operating agreement prohibited withdrawal from the venture, subjecting an investor to personal liability for potentially endless capital calls to prop up a failing venture was neither contemplated by the parties nor envisioned by the limited liability company statutes. The court acknowledged that the Kansas limited liability company statute provides that a member is obligated to perform any promise to contribute cash or property in addition to any other rights the limited liability company may have against a noncontributing member under the operating agreement or other law. The capital call provisions of the operating agreement in this case did not state that reduction of a noncontributing member's interest was the sole remedy, but the provisions also did not state that additional remedies were available. The court found it significant that the remedy of damages, the most fundamental remedy for breach of contract, was conspicuously absent from the provisions of the operating agreement dealing with additional capital contributions whereas the provisions of the agreement regarding withdrawal addressed damages. Thus, the court concluded that the failure to include damages as a remedy for failure to make an additional contribution expressed a clear intent to preclude recovery of damages from a member who failed to do so.

Obviously, the likelihood that a business or entity will need additional capital will vary considerably with the type of business and expectations of the owners. Because it is often the case that owners of small or family businesses do not anticipate that they will have to invest additional capital in the business unless they agree to do so in the future, the authors have included provisions in each of the model agreements presented with this paper restricting future capital calls.¹²⁸

This article of the model agreements for companies with multiple members also includes a provision calling for the establishment and maintenance of capital accounts. These provisions should be read in conjunction with the allocation provisions set forth in the following article.

F. Article 5: Taxation and Allocations.

Article 5 of the model agreement for the single-member limited company simply states that the entity will be disregarded as an entity for federal, and to the extent applicable, state, local and foreign, income tax purposes.¹²⁹ Under the Treasury Regulations,¹³⁰ unless there is an election made to be classified as a C corporation or S corporation, a domestic entity that is not a corporation and has only one owner will be “disregarded as an entity separate from its owner,” commonly referred to as a disregarded entity. The practical effect of treatment as a disregarded entity is that the entity pays no federal income taxes and files no federal income tax return. The single owner reports the income or losses incurred by the entity on the owner’s federal income tax return and pays any associated taxes.

Limited liability companies with multiple members are typically treated for federal income tax purposes as partnerships.¹³¹ Article 5 of the model agreements for companies with multiple members deals with allocation of income and loss for federal income tax purposes.

There is some tension between the preservation of limited liability of members in a limited liability company classified as a partnership for federal income tax purposes and the “substantial economic effect” test that must be met for special allocations to be respected under the Treasury Regulations.¹³² A special allocation of income, gain, deduction, loss, or credit is one that is disproportionate to the partners’ interest in the partnership (which is determined by taking into account numerous factors and is not necessarily the percentage interest specified in the partnership agreement). This subject is quite complicated, and a detailed explanation is beyond the scope of this paper. In general, the “substantial economic effect” test stands for the proposition that an allocation must be consistent with the underlying economic arrangement of the partners and must substantially affect the dollar amounts received by the partners (i.e., members of a limited liability company treated as a partnership for federal income tax purposes) independent of the tax consequences. For an allocation to have substantial economic effect, the governing agreement must provide that liquidating distributions will be made in accordance with the partners’ positive capital account balances, and any partner with a capital account deficit at liquidation must be obligated to restore the deficit. Of course, such an obligation is inconsistent with the limited liability desired by a limited liability company member. Fortunately, there is an alternative to the deficit restoration obligation under the Treasury Regulations, i.e., a qualified income offset provision, which is generally the preferred approach in a limited liability company. Again, these tax issues are quite complicated and are beyond the scope of this paper, but the practitioner should be sensitive to the impact of language included for tax purposes on liability issues and vice versa.

Because the model company agreements for multiple members provide that distributions will be made in proportion to the Percentages (percentage interests) of the members, the authors did not include complex tax allocation provisions in the model agreements.

¹²⁸ Section 4.2 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

¹²⁹ Section 5.1 of [Appendix C](#).

¹³⁰ Treas. Reg. § 301.7701-3.

¹³¹ According to the so-called “check-the-box” rules under the Internal Revenue Code of 1986, as amended (the “IRC”), limited liability companies with more than one member are automatically classified as partnerships unless the company elects to be classified as a corporation (which is relatively rare). Treas. Reg. § 301.7701-3. See McKee, Nelson & Whitmire, *Federal Taxation of Partnerships and Partners*, ¶ 3.06 for an in-depth discussion of classification of partnerships and limited liability companies under the IRC, a topic that is beyond the scope of this outline.

¹³² See Treas. Reg. § 1.704(b).

G. Article 6: Distributions.

Article 6 of the model company agreements deals with distributions by the company, a subject that most owners will care about and be focused on. In complex transactions the distributions provisions, sometimes called the “waterfall” provisions, may be complicated and provide for several layers or tranches of distributions including paying preferred returns to one or more classes of members.¹³³ Because of the simple business focus of the model agreements, the authors have provided in the multi-member model agreements for distributions in proportion to ownership interests, defined as Percentages.¹³⁴ (See Section III.C. above.) Notice that the model agreements for multi-member companies use the defined term “Available Cash” to allow management to create reserves necessary for the prudent operation of the business in lieu of full distribution of cash generated by operations.¹³⁵

Limited liability companies taxed as partnerships for federal income tax purposes are “flow-through” entities; in other words, there is no tax at the entity level and the owners pay tax based upon their share of any income as reported on their individual returns. The possibility exists that a company could produce an income tax liability for its owners but not pay a distribution to the owners giving them the cash necessary to pay the taxes. This situation is sometimes called “phantom income.” To deal with this situation, the model agreements for multi-member companies include a provision requiring the company to make distributions equal to the income tax liabilities of the owners.¹³⁶ Because different members may be in different income tax brackets and because some members may reside in jurisdictions that assess state or local income taxes on partnership income at different levels, the tax distributions provision included in the model agreements assumes that all members will owe income tax at a rate of 40%.

H. Article 7: Bank Account, Books of Account, Reports and Fiscal Year.

Article 7 of the model agreements deals with record keeping matters. BOC § 101.502 gives members and assignees certain rights to examine and copy books and records of a limited liability company, but BOC § 101.054 makes clear that the company agreement may impose “reasonable” restrictions on a person’s right of access to records and information under BOC § 101.502. The model agreements for multi-member limited liability companies include some conditions and restrictions not contained in the BOC. For instance, although the BOC requires a member or assignee to have a proper purpose for requesting access to records and information, the statute does not require the written request to state the proper purpose.¹³⁷ The model agreements require members and assignees in a manager-managed limited liability company, and assignees in a member-managed limited liability company, to state their proper purpose in their written request similar to the requirement placed by statute on shareholders of a for-profit corporation.¹³⁸ The multi-member model agreements also draw on provisions in the corporate context to provide that access to records and information may be denied if the requesting person has improperly used information obtained through a prior examination of records of the company or another entity or has made the request in bad faith or for an improper purpose.¹³⁹ These bases for denial were added to the limited liability company provisions of the BOC in 2017.¹⁴⁰ The model agreements for multi-member limited liability companies also provide that the managers of a manager-managed company or members of a member-managed company may keep certain information, such as trade

¹³³ See *Capital Contributions, Capital Calls, Financing, Funding and New Equity; Key Planning and Drafting Issues for LLCs, LPs and Partnerships* by Cliff Ernst, presented at The University of Texas School of Law Continuing Legal Education Program on LLCs, LPs and Partnerships July 14-15, 2011.

¹³⁴ Section 6.1 of [Appendix A](#) and [Appendix B](#).

¹³⁵ Section 11.8(a)(iii) of [Appendix A](#) and [Appendix B](#).

¹³⁶ Section 6.2 of [Appendix A](#) and [Appendix B](#).

¹³⁷ Contrast TEX. BUS. ORGS. CODE ANN. § 101.502 with TEX. REV. CIV. STAT. ANN. art. 1528n, art. 2.22D (expired). This discrepancy between the prior and current statute is noted in *Texas Ear Nose & Throat Consultants, PLLC v. Jones*, 470 S.W.3d 67 (Tex. App. -- Houston [14th Dist.] 2015, no pet.).

¹³⁸ Section 7.2(c) of [Appendix A](#) and [Appendix B](#). See TEX. BUS. ORGS. CODE ANN. § 21.218(b).

¹³⁹ Section 7.2(d) of [Appendix A](#) and [Appendix B](#). See TEX. BUS. ORGS. CODE ANN. § 21.222(d).

¹⁴⁰ TEX. BUS. ORGS. CODE ANN. § 101.503(b), added by S.B. 1517, 85th Leg., eff. Sept. 1, 2017.

secrets, confidential from assignees and members (in the case of a manager-managed company) or from assignees (in the case of a member-managed company).¹⁴¹ This provision is based on a default provision contained in the Delaware Limited Liability Company Act.¹⁴² The BOC provides broad rights of access and examination to governing persons of a limited liability company;¹⁴³ therefore, the standard for a member to examine records under the model agreement for the member-managed, multi-member limited liability company is stated less restrictively (in accordance with BOC § 3.152) than the standard for members of the manager-managed company. Drafters may want to consider including additional conditions or restrictions in the company agreement, such as an explicit provision that a person can be required to sign a confidentiality agreement as a condition to access to records and information. Drafters may also want to consider addressing information rights of former members. In contrast to the partnership provisions of the BOC, which provide that a partnership shall provide a former partner access to books and records pertaining to the time period during which the former partner was a partner or for any other proper purpose with respect to another period,¹⁴⁴ the limited liability company provisions of the BOC do not expressly address the rights of former members to obtain access to records and information. One court’s discussion of the statutory definition of a member seems to suggest the possibility that the statute may literally provide a person with the information rights of a member after the person has been admitted as a member in accordance with the company agreement without regard to whether the person has ceased to be a member.¹⁴⁵ Under the model agreements, a “member” is defined as a person who has been admitted to the company as a member as provided in the agreement, excluding any such person that has ceased to be a member under the agreement or the BOC.¹⁴⁶

Until 2017, the BOC did not expressly provide for recovery of attorney’s fees by a non-manager member of a manager-managed limited liability company in the event of an improper denial of the member’s inspection rights.¹⁴⁷ In 2017, the BOC was amended to provide for a member’s recovery of attorney’s fees against the limited liability company in an action to enforce the member’s right of access to records and information.¹⁴⁸ The BOC provides for recovery of attorney’s fees by governing persons of a limited liability company – i.e., members of a member-managed company and managers of a manager-managed company – if they are improperly denied their inspection rights.¹⁴⁹

Article 7 also requires the company to provide tax reports and financial statements. The model agreements require only annual, unaudited information, again because of the scope and purpose envisioned for these agreements. Passive investors in limited liability companies will often negotiate for more frequent or more detailed reporting.

Article 7 of the model agreements for multiple members also contains provisions dealing with federal income tax audits of the company. One of two regimes of audit rules will apply to a company depending on the year being audited. For tax years ending on or before December 31, 2017, an audit rules regime enacted by the Tax Equity and

¹⁴¹ Section 7.2(d) of [Appendix A](#) and [Appendix B](#). In *Super Starr International, LLC v. Fresh Tex Produce, LLC*, 531 S.W.3d 829 (Tex. App.—Corpus Christi 2017, no pet.), the court discussed the relationship between the members’ rights of access to the LLC’s books and records under the operating agreement and the protection of the LLC’s trade secrets under the Texas Uniform Trade Secrets Act, and the court rejected the argument that the member’s inspection rights gave the member the right to take all the LLC’s confidential information without regard to trade secret protection because another provision of the operating agreement required a member to keep confidential the “private, secret and confidential information.”

¹⁴² DEL. CODE ANN. tit. 6, § 18-305(c).

¹⁴³ See TEX. BUS. ORGS. CODE ANN. § 3.152.

¹⁴⁴ TEX. BUS. ORGS. CODE ANN. § 152.212(d).

¹⁴⁵ See *Davis v. Highland Coryell Ranch, LLC*, 2016 WL 1238175 (Tex. App.—Amarillo 2016, pet. denied) (discussing the definition of a “member” under TEX. BUS. ORGS. CODE ANN. § 1.002(53)(A), which provides that a “member” is “a person who is a member or has been admitted as a member in the limited liability company under its governing documents”).

¹⁴⁶ Section 11.8(a)(vii) of [Appendix A](#), Section 11.8(a)(vi) of [Appendix B](#), and Section 11.5(a)(ii) of [Appendix C](#).

¹⁴⁷ Contrast TEX. BUS. ORGS. CODE ANN. § 101.502 with §§ 3.152, 21.222. This aspect of the limited liability company statutes is discussed in *Texas Ear Nose & Throat Consultants, PLLC v. Jones*, 470 S.W.3d 67 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

¹⁴⁸ TEX. BUS. ORGS. CODE ANN. § 101.503(a), added by S.B. 1517, 85th Leg., eff. Sept. 1, 2017.

¹⁴⁹ TEX. BUS. ORGS. CODE ANN. § 3.152(c).

Fiscal Responsibility Act (“TEFRA”) will apply. For tax years beginning on or after January 1, 2018, an audit rules regime enacted by the Bipartisan Budget Act of 2015 (“BBA”) will apply. The model agreement contains provisions to account for both the TEFRA and BBA regimes. In most situations, companies formed on or after January 1, 2018 should not require the TEFRA provisions in their company agreement.

The fundamental difference between the TEFRA and BBA regimes is that the TEFRA audit rules regime focuses on making adjustments (i.e., additions or subtractions from income) at the partner level. The Internal Revenue Service found this regime difficult to enforce, especially in the case of large partnerships. Thus, the BBA’s audit rule regime focuses on making adjustments at the partnership level.

The provisions of the model agreement dealing with the BBA audit rules regime focus mainly on allowing the company to opt out of the BBA regime and otherwise having adjustments made at the partner level. Many partnerships may find it preferable to have adjustments made at the partner level because doing so ensures that the cost of any such adjustment is borne by partners who were partners in the partnership at the time to which the adjustment relates. For example, assume a partnership has A and B as partners in 2018, and the partnership understates its income for the year 2018. In 2019, C buys B’s interest in the partnership. In 2019, the partnership’s 2018 year is audited and an adjustment to 2018 income is made. Under the BBA regime, the adjustment will be made at the partnership level and A and C will bear the cost. B, however, has a windfall in that B reaped the benefit of understated income in 2018 and will not bear the cost of the adjustment in 2019. It is for this reason that many partnerships may want to opt out of the BBA regime.

Under the TEFRA regime as applied to tax years ending on or before December 31, 2017, Section 6231(a)(7) of the Internal Revenue Code provides for any partnership to have a tax matters partner and Treasury Regulation § 301.6231(a)(7)-2 describes how Section 6231(a)(7) applies to limited liability companies. Thus, the provisions of the model agreement provide for the appointment of a tax matters partner even though a limited liability company has members instead of partners.

Under the BBA regime for tax years beginning on or after January 1, 2018, the concept of a tax matters partner is replaced with that of a “partnership representative.” Unlike the tax matters partner, the partnership representative need not be a partner in the partnership.

As stated above, in many cases, the members of a small limited liability company of the type contemplated by this paper will want to agree to opt out of the BBA regime by invoking the small-partnership election available under the BBA pursuant to Section 6221(b) of the Code (as amended by the BBA). Generally, this election is available for partnerships with no more than 100 partners if all partners are individuals, C corporations, S Corporations or estates of deceased partners.¹⁵⁰ However, restrictions on the types of partners that such a partnership may have (e.g., a trust may not be a partner if such election is to be made) may make the opt-out approach unattractive in some cases. Therefore, the model agreements include other elections that can be made to have adjustments “pushed out” to partners who were partners in the partnership in the year to which the adjustment relates and requiring such partners to bear the cost of such adjustments.¹⁵¹

The BBA audit regime raises a number of drafting issues that should be considered when drafting company agreements, such as whether to mandate, allow or preclude the small-partnership election, whether to restrict transfers so that the election remains available, and whether to require the partnership to provide information to the partners so that they may reasonably respond to an audit of partnership items. If the small-partnership election is not in place, additional issues that may need to be addressed in the agreement include allocation of tax payments to adjustment-year partners, treatment of payments for capital account maintenance, contributions by partners for their share of the liability, and distributions to cover tax and costs incurred by partners.

In the event of an understatement of income by the company, it can be desirable to include “claw-back” language requiring persons that were members in the company in the year of the understatement to bear the cost of any adjustment correcting such understatement even if such persons were not members in the company in the year in which the adjustment was made. We have included an example of such a provision in the footnote below.¹⁵²

¹⁵⁰ Section 6221(b)(1) of the IRC.

¹⁵¹ Section 6226 of the IRC.

¹⁵² The following model provision provides for past members to bear the liability for imputed underpayments of taxes:

I. Article 8: Transfer Restrictions and Push Pull Provisions.

The model agreements for multi-member companies devote substantial ink (over four pages) to transfer restriction and buy-sell provisions. This is recognition of the fact that most private business owners form these entities based upon the relationship or skills of the other owner or owners and do not contemplate or desire being in a business relationship with another party.

The provisions included in the model agreements not only call for a right of first refusal/option upon proposed sales to third parties, but also establish an option in connection with involuntary transfers such as death or divorce. The right of first refusal and options are granted first to the company and second to the other members, except that, in the case of divorce or death of a spouse, there is an additional prior option to the member spouse and, as discussed above in Section III.C., the provisions regarding death of a member first grant a right to the personal representative of the deceased member to cause the company to purchase the membership interest of the deceased member. In the case of a right of first refusal where there is a third-party offer triggering the option, the option price is the price being offered by the third party, with reference to an appraisal mechanism if the purchase consideration offered by the third party is not all cash. If there is not a third-party offer, the option price is established by the amount of cash and fair market value of property which would be received by the holder of the membership interest if the company sold its business and assets for cash at a purchase price equal to their fair market value and all remaining assets of the company were distributed to the members in accordance with the company agreement. This concept is defined in the model agreements as “Purchase Value.” Note that this is not the same as the fair market value of the membership interests and drafters should consider if this concept of “Purchase Value” is appropriate under the particular circumstances of any transaction being documented by them.¹⁵³ The provisions call for payment of the purchase price in cash or as otherwise agreed by the parties, provided that payment in the event of a third-party offer is on the terms contained in the offer, and payment in the event of exercise by a personal representative of its right to put the membership interest to the company is by a small amount of cash at closing and the balance by a long-term promissory note secured by the purchased interest. The model agreement specifies the terms of the note,¹⁵⁴ but of course these terms should be terms

Section X.x. To the extent that any “imputed underpayment” (as defined in Code Section 6241(a)(2)) is imposed on the Company (including any related interest, penalties or other additions to tax), the Members shall pay the Company their shares of such liability within thirty (30) days following the Company’s request for payments and any failure to pay such amount shall result in a subsequent reduction in distributions otherwise payable to such Member. The obligations of Members pursuant to this Section X.x to pay to the Company their shares of such liability shall survive the termination, dissolution, liquidation and winding up of the Company and the withdrawal of a Member from the Company or transfer of such Member’s membership interest.

¹⁵³ Section 8.4 of [Appendix A](#) and [Appendix B](#). If an entity is a member, there are additional issues that should be considered in drafting transfer restrictions, such as restrictions on the sale, merger, or other change in control of the entity member. Otherwise, the prohibition on transfer of the membership interest and requirement of member approval for admission of a member can in essence be avoided by simply selling or otherwise changing the ownership of the entity that is the member. The provisions of the model agreements do not address these matters, but they should be considered before an entity is admitted as a member. Below is an example of language equating a transfer of a controlling interest in an entity with a disposition of the membership interest held by the entity:

If any membership interest is held by a corporation, limited liability company, partnership or other entity, any transaction which results in change in control or change in the ownership of a controlling interest in the holding entity shall be deemed to be a disposition of the membership interest held by the entity for all purposes of this Agreement.

Other issues that should be considered are: what constitutes a “change in control” and “controlling interest”; whether a disposition of ownership in the member entity would trigger an option of the company or other members to purchase the membership interest of the member entity; if such an option is triggered, what the purchase should be (since the member entity might own other assets and the value of the member entity might vary from the value of its membership interest in the company); whether the owners of the member entity need to be parties to the agreement for purposes of agreeing to the transfer restrictions; and what additional provisions might be advisable if the owners of the member entity are themselves entities.

¹⁵⁴ Section 8.5 of [Appendix A](#) and [Appendix B](#).

that the parties are comfortable with and will vary from one company agreement to the next based upon economic conditions and the unique situation of each transaction.

The model agreements for multi-member companies provide that the right of first refusal/option provisions are not triggered by a transfer of a membership interest to a member of the transferor's immediate family, a trust or an entity for the benefit of or controlled by the transferor or the transferor's immediate family or, if the transferor is an entity, an affiliate entity.¹⁵⁵ An "Affiliate Transfer" under the provisions of the model agreement does not trigger the right of first refusal or purchase option, but the transferee would remain an assignee and not be admitted as a member unless the requirements for admission as a member set forth in Article 2 of the model agreements are satisfied. Thus, the Affiliate Transfer provision operates differently from "permitted transfer" provisions found in some agreements that result in admission of the transferee as a member in connection with the permitted transfer.

The model agreements for companies with multiple owners also include a push-pull buyout provision.¹⁵⁶ This type of provision is fairly typical in an entity with two or a small number of owners. While this arrangement may in many circumstances provide a fair exit strategy or dispute resolution mechanism, it should be noted that this kind of provision will favor a party with greater access to liquid funds if payment terms are not negotiated in advance and the total purchase price is required to be paid in cash at the closing. If one party does not have the liquidity to finance the purchase, then the push-pull provision may not be a practical and even-handed solution.

J. Article 9: Exculpation, Scope of Duties, Indemnification and Advancement.

The next article of the model agreements deals with the duties and potential related liabilities owed by managers (for the manager-managed company), members and certain other persons as well as indemnification of these persons.

The management authority of directors in a corporation and general partners in a partnership carries with it certain responsibilities and duties that are generally described as fiduciary duties and are typically broken down into two categories: the duty of care and the duty of loyalty.¹⁵⁷ The management authority of managers in a manager-managed limited liability company and members in a member-managed limited liability company would seem to carry with it similar responsibilities and duties,¹⁵⁸ but the Texas limited liability company statute is silent as to the precise duties and liabilities, and Texas courts have said relatively little in this area as of yet.

¹⁵⁵ Section 8.1 and Section 11.8(a)(i) of Appendix A and Appendix B.

¹⁵⁶ Section 8.3 of Appendix A and Appendix B.

¹⁵⁷ A third aspect of the fiduciary duty of such persons is the duty of obedience, but it arises less frequently and generally receives less treatment in the case law and literature. The duty has been described in the corporate context as forbidding *ultra vires* acts. See *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984).

¹⁵⁸ See, generally, 1 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 9:1-9:12 (2017); 2 CARTER BISHOP & DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW §§ 10.01-10.09 (2017).

Indeed, when acting as an agent of the limited liability company, a manager or managing member owes a duty of care pursuant to basic agency principles. Restatement (Third) of Agency § 8.08; see also Restatement (Second) of Agency § 379. Further, the agent status of a manager in a manager-managed limited liability company and a member in a member-managed limited liability company provides a basis under agency law to impose a duty of loyalty. See Restatement (Third) of Agency §§ 8.01-8.06; see also Restatement (Second) of Agency §§ 387-398. In *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193 (Tex. 2002), the Texas Supreme Court discussed the fiduciary nature of the agency relationship under Texas common law. Cases are beginning to recognize agency law as well as analogies to corporate or partnership law as a basis to impose fiduciary duties in the limited liability company context. See *In re Hardee*, 2013 WL 1084494 (Bankr. E.D. Tex. 2013) (concluding managing member owed limited liability company formal fiduciary duties based on agency law; managing member owed formal fiduciary duties to limited liability company based on implication of Texas limited liability company law that managers and managing members owe fiduciary duties of care, loyalty, and obedience similar to corporate directors; managing member owed no fiduciary duties to other members); *In re TSC Sieber Servs., LC*, 2012 WL 5046820 (Bankr. E.D. Tex. 2012) (finding individual who took over managerial control of limited liability company but had no formal office or ownership interest owed company a formal fiduciary duty based on agency law and an informal fiduciary duty based on circumstances giving rise to control). In *In re H & M Oil & Gas, LLC*, 514 B.R. 790 (Bankr. N.D. Tex. 2014), the court stated that a manager of a limited liability company owes fiduciary duties of care and loyalty to the company, and the court relied on case law in the corporate context to describe the standards of conduct applicable to the

Like the predecessor Texas Limited Liability Company Act, the BOC does not directly address the duties owed by managers and members. The BOC implies that managers and members may owe certain duties by virtue of other provisions that allude to the possibility of duties or are premised on the assumption that duties may exist.¹⁵⁹ For example, the BOC states that “the company agreement of a limited liability company may expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company or to a member or manager of the company.”¹⁶⁰ Additionally, the drafters of the statute apparently contemplated that managers and managing members would be subject to a duty of loyalty to the limited liability company that would be implicated in self-dealing transactions inasmuch as the statute includes provisions addressing transactions involving interested governing persons that were patterned after the interested director provisions in the corporate context.¹⁶¹ A duty of care is implied by provisions of the BOC that protect governing persons and officers of a limited liability company if they in good faith and with ordinary care rely on information provided by specified persons.¹⁶² Broad authorization to indemnify, advance expenses to, and insure managers, members, and other persons can be read to reflect some concern with liabilities to the limited liability company as well as liabilities to third parties.¹⁶³ Finally, provisions specifying procedures applicable to derivative proceedings reflect an underlying assumption that members need a mechanism to hold management accountable and a concern for balancing the rights and powers of owners and management in these circumstances.¹⁶⁴

Thus, while the BOC does not define or specify any duties, it acknowledges that such duties may be imposed by the courts and provides broad flexibility to specify contractually in the company agreement what the duties and attendant liabilities are. To date, there is scant case law in Texas dealing with fiduciary duties in the limited liability company context. A few cases have assumed or concluded that members, managing members, and officers owe fiduciary duties *to the limited liability company*, but most cases involving fiduciary duty claims thus far have involved claims that a member *owes another member* a fiduciary duty, and numerous courts have refused to find that a member necessarily owes another member a fiduciary duty.¹⁶⁵

manager pursuant to these duties. Bankruptcy courts in some cases have analyzed breach of fiduciary duty claims against limited liability company members who were also officers of the limited liability company in terms of the duties of corporate officers without indicating any recognition that a limited liability company is not actually a corporation. See *In re Supplement Spot, LLC*, 409 B.R. 187 (Bankr. S.D. Tex. 2009) (relying on corporate case law for the proposition that corporate officers have fiduciary duties to creditors in analyzing fraudulent transfer of limited liability company funds to pay mortgage debts of limited liability company officer); *In re Brentwood Lexford Partners, L.L.C.*, 292 B.R. 255 (Bankr. N.D. Tex. 2003) (discussing and relying on duties owed by corporate officers to corporation and creditors in analyzing claims against limited liability company officers arising from distributions while limited liability company was insolvent and officers’ resignation from limited liability company and formation of new limited liability company to which some business was transferred); *In re Mega Sys., L.L.C.*, 2007 WL 1643182 (Bankr. E.D. Tex. 2007) (citing corporate case law rejecting proposition that duties are owed to corporate creditors when debtor approaches zone of insolvency in addressing breach of fiduciary duty claim against limited liability company’s president/majority owner).

¹⁵⁹ Provisions addressing reliance on information and reports of others with knowledge or expertise, indemnification of managers and members, interested manager and member transactions, restriction or expansion of duties and liabilities, and derivative suits imply that certain duties may be owed without defining the duties themselves. See TEX. BUS. ORGS. CODE ANN. §§ 3.102, 3.103, 3.105, 8.002(b), 101.255, 101.401, 101.402, 101.451-101.463.

¹⁶⁰ TEX. BUS. ORGS. CODE ANN. § 101.401.

¹⁶¹ See TEX. BUS. ORGS. CODE ANN. §§ 21.418, 101.255.

¹⁶² TEX. BUS. ORGS. CODE ANN. §§ 3.102, 3.105.

¹⁶³ TEX. BUS. ORGS. CODE ANN. § 101.402.

¹⁶⁴ TEX. BUS. ORGS. CODE ANN. §§ 101.451-101.463.

¹⁶⁵ Cases are beginning to recognize agency law as well as analogies to corporate or partnership law as a basis to impose on managers’ and managing members’ fiduciary duties *to the limited liability company*. See *In re Hardee*, 2013 WL 1084494 (Bankr. E.D. Tex. 2013) (concluding managing member owed limited liability company formal fiduciary duties based on agency law; managing member owed formal fiduciary duties to limited liability company based on implication of BOC that managers and managing members owe fiduciary duties of care, loyalty, and obedience similar to corporate directors; managing member owed no fiduciary duties to other members); *In re Lau*, 2013 WL 5935616 (Bankr. E.D. Tex. 2013) (concluding that sole managing

member owed fiduciary duties to the limited liability company and its members based on BOC, which implies that certain duties may be owed without defining them, and the company's regulations, which conferred on the managing member the power and authority to act on behalf of the company subject to "the faithful performance of the Managers' fiduciary obligations to the Company and the Members"; *In re TSC Sieber Servs., LC*, 2012 WL 5046820 (Bankr. E.D. Tex. 2012) (finding individual who took over managerial control of limited liability company (but had no formal office or ownership interest) owed the company a formal fiduciary duty based on agency law and owed an informal fiduciary duty based on circumstances giving rise to control). Bankruptcy courts in some cases have analyzed breach of fiduciary duty claims against limited liability company members who were also officers of the limited liability company in terms of the duties of corporate officers without indicating any recognition that a limited liability company is not actually a corporation. See footnote 158 *supra*.

Most of the Texas cases in which fiduciary duties have been an issue involve claims by a member against a fellow member for breach of fiduciary duty *owed to the member* rather than claims based on a breach of fiduciary duty to the limited liability company. In *Pinnacle Data Services, Inc. v. Gillen*, 104 S.W.3d 188 (Tex. App. – Texarkana 2003, no pet.), the court of appeals addressed a limited liability company member's breach of fiduciary duty claim against the other two members in connection with the amendment of the limited liability company's articles of organization to change the management structure of the limited liability company. The court's discussion suggests that the duties of the limited liability company members (who were members of a member-managed limited liability company until the action to change the structure to a manager-managed limited liability company) might be comparable to those of corporate directors and officers, but the court was not clear as to whether the presence of factors supporting an informal fiduciary relationship might be required. The court of appeals concluded that the trial court erred in granting summary judgment to the defendants on the breach of fiduciary duty claim. The court rejected the defendants' argument that, because the defendants complied with the articles of organization when they amended the articles of organization to change the management of the limited liability company from member management to manager management, the plaintiff's claim was without merit. In an unpublished opinion, the Dallas Court of Appeals concluded that members of a limited liability company do not necessarily owe *one another* fiduciary duties. The court relied on Texas case law rejecting the notion that co-shareholders in a closely-held corporation are necessarily in a fiduciary relationship. That the governing documents imposed upon members a duty of loyalty *to the company* did not mandate any such duty between the members according to the court. *Suntech Processing Sys., L.L.C. v. Sun Commc'ns, Inc.*, 2000 WL 1780236 (Tex. App. – Dallas 2000, pet. denied). In *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355 (Tex. App. – Houston [1st Dist.] 2012, pet. granted, judgment vacated w.r.m.), the court declined to recognize a broad formal fiduciary duty on the part of a majority member to a minority member because Texas does not recognize such a relationship between majority and minority shareholders in closely held corporations, but the court concluded that the majority member's position as the controlling member and sole manager was sufficient to create a formal fiduciary duty to the minority member in a transaction in which the minority member's interest was being redeemed (thus increasing the ownership of the majority member). The court did not address the scope of the duty. The court also concluded that an exculpation provision in the articles of organization referring to the manager's "duty of loyalty to [the limited liability company] or its members" could be read to create a fiduciary duty to the members individually. In *Federal Insurance Co. v. Rodman*, 2011 WL 5921529 (N.D. Tex. 2011), the court stated that there is no formal fiduciary relationship created as a matter of law between limited liability company members but concluded that the plaintiff had sufficiently pled the existence of an informal fiduciary relationship. In *Cardwell v. Gurley*, 2011 WL 6338813 (E.D. Tex. 2011), *aff'd* on other grounds, 487 Fed. App'x 183 (5th Cir. 2012), the district court held that the bankruptcy court did not err in giving preclusive effect to a state court's findings that the managing member of a limited liability company owed the other member direct fiduciary duties of loyalty, care, and disclosure, comparing the fiduciary duty owed by a managing member to his fellow member to the trust-type obligation owed by partners and corporate officers. Several other courts in Texas have addressed breach-of-fiduciary-duty claims by a limited liability company member against a fellow member under Texas law. See *B Choice Ltd. v. Epicentre Dev. Ass'n LLC*, 2017 WL 1227313 (S.D. Tex. 2017), report and recommendation adopted, 2017 WL 1160512 (S.D. Tex. 2017) (discussing and relying on *Allen v. Devon Energy Holdings, LLC*, 367 S.W.3d 355, 392 (Tex. App. – Houston [1st Dist.] 2012, pet. granted, judgment vacated w.r.m.)); *In re Chiron Equities, LLC*, 552 B.R. 672 (Bankr. S.D. Tex. 2016) (concluding that manager/minority member owed limited liability company, but not other member, fiduciary duties); *Siddiqui v. Fancy Bites, LLC*, 504 S.W.3d 349 (Tex. App. – Houston [14th Dist.] 2016, pet. denied) (holding there was no evidence of informal fiduciary relationship between co-equal members and managers of limited liability company at issue); *In re Hardee*, 2013 WL 1084494 (Bankr. E.D. Tex. 2013) (concluding managing member owed no fiduciary duties to other members); *Entm't Merch. Tech., L.L.C. v. Houchin*, 720 F. Supp. 2d 792 (N.D. Tex. 2010) (stating, in response to the claim that an individual owed a fiduciary duty by virtue of his status as an officer of the limited liability company, that no Texas court has held that fiduciary duties exist between limited liability company members as a matter of law and concluding that the statute of limitations barred the breach of fiduciary duty claim in any event); *Gadin v. Societe Captrade*, 2009 WL 1704049 (S.D. Tex. 2009) (discussing formal and informal fiduciary relationships under Texas law, pointing out that the duties owed by managers and members are not directly addressed under the Texas limited liability company statute and that Texas courts have not yet held that a fiduciary duty exists as a matter of law among members in a limited liability company, and denying member's motion to dismiss fellow member's breach of fiduciary duty claim "[b]ecause the existence of a fiduciary duty is a fact-specific inquiry that takes into account the contract

The BOC broadly authorizes the company agreement of a limited liability company to “expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company or to another member or manager of the company.”¹⁶⁶ This provision was modeled after similar provisions in the Delaware limited liability company and limited partnership acts¹⁶⁷ and leaves the extent to which duties and liabilities may be limited or eliminated to be determined by the courts as a matter of public policy. There is scant case law addressing this statutory power to limit duties and liabilities in Texas limited liability companies. The only case to analyze the contractual freedom of members in this regard is *Allen v. Devon Energy Holdings, L.L.C.*¹⁶⁸ In that case, the court noted that limited liability companies are expressly excluded from the statutory restriction on the limitation or elimination of liability of governing persons in BOC § 7.001, and the court stated that the members are “free to expand or eliminate, as between themselves, any and all potential liability of” a manager of the company as the members see fit. The court also concluded that an exculpation provision in the articles of organization that largely tracked BOC § 7.001 and referred to the manager’s “duty of loyalty to [the limited liability company] or its members” could be read to create a fiduciary duty to the members individually.

BOC § 7.001(d) was amended in 2013 to clarify that the company agreement may eliminate the liability of a governing person to the limited liability company and the other members to the same extent that a corporation’s certificate of formation may eliminate a director’s liability under BOC § 7.001 and to such further extent allowed by BOC § 101.401. Although BOC § 101.401 uses the word “restrict” rather than “eliminate,” there are no express prohibitions or limitations in BOC § 101.401 with respect to the limitation or elimination of either duties or liabilities of a manager or member to the limited liability company or the members. Furthermore, BOC § 101.052 gives members complete contractual freedom to provide for the relations among members, managers, and officers of the company, assignees of membership interests, and the company itself except as constrained by BOC § 101.054, which does not specify that duties or liabilities to the members or the company may not be waived or modified by the company agreement.

It should be noted that a distinction can be drawn between the limitation or elimination of *duties* and the limitation and elimination of *liabilities*.¹⁶⁹ If the liability of a governing person for monetary damages is contractually eliminated, but the duty still exists, a breach of the duty could give rise to equitable relief (such as injunctive relief, receivership, or even rescission or disgorgement) even though the person could not be held liable for damages.¹⁷⁰ Redefining or eliminating duties, on the other hand, narrows or eliminates not only potential liability for damages by

governing the relationship as well as the particularities of the relationships between the parties”); *Doonan v. Wood*, 224 S.W.3d 271 (Tex. App. – El Paso 2005, no pet.) (stating that minority member’s spouse did not establish that she was owed a fiduciary duty by party that lent money to the limited liability company and acquired a membership interest, and, assuming a fiduciary duty was owed to the minority member, the various acts alleged, including foreclosure on limited liability company assets and enforcement of the minority member’s personal guaranty, did not raise any genuine issue of material fact as to breach of fiduciary duty because the actions were taken for legitimate business reasons rather than for the fiduciary to profit by taking advantage of its position). Several recent cases have acknowledged that an informal fiduciary relationship may arise between members of a limited liability company under particular circumstances. See *Guevara v. Lackner*, 447 S.W.3d 556 (Tex. App. – Corpus Christi-Edinburg 2014, no pet.); *Bazan v. Munoz*, 444 S.W.3d 110 (Tex. App. – San Antonio 2014, no pet.); *Vejera v. Levior Int’l, LLC*, 2012 WL 5354681 *5 (Tex. App. – San Antonio 2012, pet. denied).

¹⁶⁶ TEX. BUS. ORGS. CODE ANN. § 101.401.

¹⁶⁷ The Delaware statutes were amended in 2004 to expressly permit the elimination of fiduciary duties (but not the implied covenant of good faith and fair dealing) in a limited partnership agreement or limited liability company agreement. See Delaware Limited Liability Company Act § 18-1101. These amendments were a response by the Delaware General Assembly to a Delaware Supreme Court opinion pointing out that the prior Delaware provision did not explicitly authorize elimination of fiduciary duties. See *Gotham Partners, L.P. v. Hollywood Realty Partners, L.P.*, 817 A.2d 160 (Del. 2002) (noting, in response to Chancery Court opinions indicating that the Delaware limited partnership act permitted a limited partnership agreement to *eliminate* fiduciary duties, that the statute actually stated that fiduciary duties and liabilities could be *expanded* or *restricted*, but did not state that they could be *eliminated*).

¹⁶⁸ 367 S.W.3d 355 (Tex. App. – Houston [1st Dist.] 2012, pet. granted, judgment vacated w.r.m.).

¹⁶⁹ See *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 664 (Del. Ch. 2012).

¹⁷⁰ *Id.*

the party who would otherwise owe the duty, but determines whether there is a breach at all, thus affecting the availability of equitable relief as well. This distinction between limitation or elimination of a *duty* and limitation or elimination of a *liability* is a subtle distinction that is often conflated in the mind of the drafter. Unless litigants focus on the distinction, a court is likely to conflate the distinction as well. It is quite common for partnership agreements and company agreements to speak largely or exclusively in terms of limiting or eliminating liability without defining or modifying the duties themselves. This approach may be advisable in some cases and not in others.

The model agreements included with this paper deal with exculpation, duties and indemnification in three separate provisions. Some drafters may prefer to rely exclusively on exculpation and indemnification provisions and not to affirmatively describe, define, or confine the duties (with the possible exception of the oft-included authorization of competition and pursuit of business opportunities of the type mentioned below). After much internal debate and “soul searching,” the authors of this paper decided to provide in the model agreements that, to the extent fiduciary duties are owed, they are owed only to the company,¹⁷¹ and we have provided in the model agreements a standard for exculpation,¹⁷² duties¹⁷³ and indemnification¹⁷⁴ of refraining from gross negligence, bad faith, or willful misconduct. In the manager-managed context, the model agreements provide that a member does not owe the company any fiduciary duty in the member’s capacity as member.

The model agreements included with this paper phrase the exculpation and indemnification provisions in terms of “any loss, damage or claim incurred by the Covered Person by reason of the fact that the Covered Person is or was a Covered Person.” The phrase “by reason of the fact” is commonly used in the context of indemnification rights of corporate directors¹⁷⁵ to make clear that indemnification extends not only to acts of a director in the director’s official capacity, but also acts outside the director’s official capacity that give rise to a claim because of the director’s status as a director (e.g., a claim for insider trading, which would involve a purchase or sale of shares in the director’s personal capacity but could give rise to liability because of the director’s status as a director). In the context of a limited liability company, the indemnification and exculpation provisions of the company agreement commonly encompass members as well as managers, and there might be a concern that phrasing the indemnification and exculpation rights as arising “by reason of the fact” of the person’s status could be argued to extend to situations that would not fairly be contemplated as within the scope of the provisions, such as expenses incurred by a member in a dispute between the member and the member’s spouse over the value or disposition of the member’s membership interest in a divorce proceeding. This concern might be addressed by phrasing the exculpation and indemnification provisions in terms of “any loss, damage or claim for an act or omission performed or omitted in the Covered Person’s capacity as a Covered Person,” but that formulation might prompt an argument that claims based on acts or omissions performed in a personal capacity are not encompassed even though the claim arises because of the Covered Person’s status as such. The drafter should consider such subtleties and weigh the risks and benefits associated with the particular language chosen in each case.

The use of uppercase, boldface type and the explicit references to “negligence” in the exculpation and indemnification provisions of the model agreements reflect a concern regarding the “fair notice” requirements generally applied by Texas courts to exculpation and indemnification provisions in contracts that operate to release or indemnify a party in advance from the party’s own negligence.¹⁷⁶ It is not clear whether or to what extent the fair notice doctrine addressed in the *Dresser* line of cases applies to provisions regarding liability and indemnification of governing persons

¹⁷¹ Note that the BOC provides that a member of a closely held limited liability company (defined for these purposes as a company with less than 35 members that is not listed on an exchange), is not subject to the demand requirement and numerous other provisions that ordinarily apply to a derivative suit. Furthermore, “if justice requires,” a member asserting a derivative claim on behalf of a limited liability company may recover relief directly. TEX. BUS. ORGS. CODE ANN. § 101.463.

¹⁷² Section 9.1 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

¹⁷³ Section 9.2 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

¹⁷⁴ Section 9.3 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

¹⁷⁵ See DEL. CODE ANN. tit. 8, § 145(a).

¹⁷⁶ See, e.g., *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) (holding fair notice requirements, which include the express negligence doctrine and the conspicuousness requirement, apply to releases as well as indemnity agreements that protect a party from the party’s own negligence in advance).

in partnerships and limited liability companies. Certainly, it would be unusual to see charter and bylaw provisions in the corporate context drafted in such a way as to evidence concern with the conspicuousness and express negligence requirements applied in the *Dresser* line of cases, and it may be persuasively argued that these requirements are not applicable to provisions addressing exculpation and indemnification of governing persons in governing documents of business organizations in view of the explicit statutory standards and authorization for contractual exculpation and indemnification under the BOC. Nevertheless, practitioners may want to avoid the issue by drafting exculpatory and indemnification provisions in a manner that satisfies the conspicuousness and express negligence requirements. If this is the goal, the practitioner should carefully study the decisions addressing the conspicuousness and express negligence standards applicable under the fair notice doctrine.

As mentioned a number of times in this paper, and of particular importance with regard to drafting provisions regarding exculpation, duties and indemnification, caution should be employed in following the example in the model agreements. There is truly no “one-size-fits-all” answer. There may be situations where it is appropriate to ascribe a higher or lower standard than refraining from gross negligence, bad faith or willful misconduct. The possibilities might include acting with the care that an “ordinarily prudent manager” would employ or perhaps even language eliminating all duties, fiduciary or otherwise (recognizing that Texas case law has not yet addressed the outer limits of the contractual freedom to restrict duties).

Who owes what duties to whom should be carefully considered. Much will depend upon the unique situation involved in a particular business or a particular set of owners. The Texas Supreme Court’s explanation of the relationship of the shareholders, directors, and corporation in *Ritchie v. Rupe*,¹⁷⁷ should be borne in mind in crafting these provisions as well as other provisions of the agreement. *Ritchie v. Rupe* addressed rights of minority shareholders in a corporation but will likely be applied in certain respects in the context of limited liability companies as well. Under the default rules of the BOC and the provisions of many company agreements, the minority member is “locked in” and almost all decisions, including the approval of a fundamental business transaction, can be made by the majority alone. Coupled with limitations on duties found in many company agreements or the manner in which the duties may operate as a default rule (given the business judgment rule and the prospect that those who owe duties at all may owe them only to the company), the minority may be quite vulnerable. The requirement of unanimity in the model agreements for fundamental business transactions as well as amendment of the company agreement precludes the majority from imposing its will in transactions of this nature that could be heavy-handed or prejudicial to the minority, but requiring unanimity could lead to a scenario where the minority attempts to hold the company and the majority “hostage.” Although a unanimity requirement protects the minority owner with respect to extraordinary decisions and transactions like those mentioned above, the minority may still be quite vulnerable based on the majority threshold for approval of all other matters. A minority member may want to bargain for provisions protecting the minority with respect to compensation arrangements, the frequency and amount of distributions, and other matters that would otherwise be left to the discretion of those in control. The push-pull provision in the model agreement provides a means for a member to escape a situation that has become untenable or unsatisfactory, but such a provision may not always operate in an evenhanded fashion as discussed above. The parties may want other or additional contractual protections of their interests. If any of the members contemplate that any of the managers will act to protect that particular member’s interests (e.g., where an officer or agent of an entity member is appointed to serve as a manager), broad language disavowing all duties of the managers to any member may need to be tempered, and conflicts of interest that may arise with respect to a manager’s duty of loyalty to the company and the manager’s duty of loyalty to the member/principal should be considered and addressed. Suffice it to say that devising provisions that fit together in a manner that balances and reasonably protects the interests of the members in a closely held entity is a daunting task.

Although explicitly providing that fiduciary duties of the governing persons are owed only to the company, and not to individual members, allows for a clearly defined role on the part of the governing persons and is the paradigm many attorneys and business persons believe is generally appropriate, others would disagree. One context in particular that raises the specter of whether a fiduciary duty to an owner should be owed is the context of a buyout of an owner’s interest. Certainly the absence of fiduciary duties would not necessarily protect a person from liability for fraudulent misrepresentations made to an owner in the context of the purchase of the owner’s interest, but what about a situation in which affirmative misrepresentations or half-truths are not made, but material information regarding the value or prospects of the company is known and is not disclosed to the selling owner? If the interest that is being sold falls

¹⁷⁷ 443 S.W.3d 856 (Tex. 2014).

within the definition of a “security” under federal and state securities laws, there may be recourse under those laws, but it is not entirely clear whether common-law duties of disclosure are generally owed to an individual owner under Texas law or whether explicitly providing that duties are not owed to individual owners in a company agreement would affect duties of disclosure that might otherwise be owed. Although Texas courts have rejected the proposition that co-shareholders owe one another fiduciary duties, the First Court of Appeals in Houston concluded in 2012, in *Allen v. Devon Energy Holdings, LLC*, that a controlling insider of a corporation or limited liability company owes a formal fiduciary duty to a passive minority owner in the context of a buyout of the minority’s interest.¹⁷⁸ The court engaged in a lengthy analysis of corporate case law within and outside Texas and interpreted Texas case law in the corporate context as supporting recognition of a formal fiduciary duty on the part of an insider when purchasing a passive minority shareholder’s shares. Based on that case law, the court in *Allen* held that in the limited liability company context “there is a formal fiduciary duty when (1) the alleged-fiduciary has a legal right of control and exercises the control by virtue of his status as the majority owner and sole member-manager of a closely-held LLC and (2) either purchases a minority shareholder’s interest or causes the LLC to do so through a redemption when the result of the redemption is an increased ownership interest for the majority owner and sole manager.” Whether the court’s analysis of fiduciary duties in *Allen* will be affected by *Ritchie v. Rupe* remains to be seen. Even absent fiduciary duties owed directly to an owner, it is possible that a failure to disclose known material information that results in a buyout of a minority owner at a price that enriches a person in control of the entity may be couched as a breach of duty to the entity based on misuse of the person’s position of trust and control. As such, it might lead to direct recovery of equitable remedies in a derivative suit under the statutory provisions applicable to derivative litigation on behalf of a closely held limited liability company. This is yet another area that might merit specific coverage in the company agreement to address the concerns and interests of particular parties.

A provision not included in the model agreements, but sometimes found in limited liability company agreements, is one allowing a manager or other governing person to satisfy the standard of care by relying upon expert advice or some other outside source. The authors did not include this provision because there is such a provision in the BOC already,¹⁷⁹ and any variation seemed more appropriate for an agreement for a more complex relationship. An example of such a provision is included in a footnote below.¹⁸⁰

BOC § 101.255 contains provisions addressing approval of self-dealing transactions of a limited liability company’s governing persons (i.e., the managers of a manager-managed limited liability company or members of a member-managed limited liability company). These provisions are modeled after the interested-director provisions in the corporate context¹⁸¹ and provide that a transaction between the limited liability company and a governing person (or certain other related parties) is valid and enforceable if: (1) the material facts as to the conflict of interest and the transaction are made known to the governing authority (or a committee thereof) and the transaction is approved in good faith by a majority of the disinterested governing persons (or disinterested committee members); (2) the material facts as to the conflict of interest and the transaction are made known to the members and the members in good faith vote to approve the transaction; or (3) the transaction is fair to the company at the time the transaction is approved. Under the statute, if at least one of these conditions is met, then neither the company nor any member has a cause of action for

¹⁷⁸ *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 395-96 (Tex. App. – Houston [1st Dist.] 2012, pet. granted, judgment vacated w.r.m.).

¹⁷⁹ TEX. BUS. ORGS. CODE ANN. § 3.102.

¹⁸⁰ The following provisions could be used if the drafter wished to provide that a Covered Person could establish good faith by reliance upon experts.

A Covered Person shall be fully protected in relying in good faith upon the records of the Company and upon such information, opinions, reports or statements presented to the Company by any person or entity as to matters the Covered Person reasonably believes are within the professional or expert competence of that person or entity, including information, opinions, reports or statements as to the value and amount of the assets, liabilities, profits, losses or any other facts pertinent to the existence and amount of assets from which distributions to the Member might properly be paid. The foregoing provision shall in no way be deemed to reduce the limitation on liability of the Member provided in the exculpation provisions of this Agreement.

¹⁸¹ TEX. BUS. ORGS. CODE ANN. § 21.418.

breach of the duty of loyalty against the conflicted governing person.¹⁸² The model agreements included with this paper do not explicitly address self-dealing transactions; therefore, BOC § 101.255 will presumably apply, subject to the standards for exculpation and fiduciary duties set forth in the agreements. In other words, satisfaction of any of the statutory conditions should ensure that a self-dealing transaction between a governing person and the company is valid and that the governing person is not liable for a breach of the duty of loyalty, but interested governing persons might argue in some cases that they have not engaged in “gross negligence, bad faith or willful misconduct” in approving a self-dealing transaction even though the transaction is not fair and has not been approved by disinterested governing persons or the members. Unfairness would certainly suggest the possibility, if not likelihood, of bad faith or willful misconduct in such a case, but perhaps it is possible in unusual cases for a governing person with a “pure heart and empty head” to escape liability for an unfair conflict-of-interest transaction under a standard that limits liability to “gross negligence, bad faith, or willful misconduct.” Drafters may want to specifically address conflict-of-interest

¹⁸² In its entirety the statutory provision reads as follows:

- (a) This section applies to a contract or transaction between a limited liability company and:
 - (1) one or more governing persons or officers, or one or more affiliates or associates of one or more governing persons or officers, of the company; or
 - (2) an entity or other organization in which one or more governing persons or officers, or one or more affiliates or associates of one or more governing persons or officers, of the company:
 - (A) is a managerial official; or
 - (B) has a financial interest.
- (b) An otherwise valid and enforceable contract or transaction described by Subsection (a) is valid and enforceable, and is not void or voidable, notwithstanding any relationship or interest described by Subsection (a), if any one of the following conditions is satisfied:
 - (1) the material facts as to the relationship or interest described by Subsection (a) and as to the contract or transaction are disclosed to or known by:
 - (A) the company's governing authority or a committee of the governing authority and the governing authority or committee in good faith authorizes the contract or transaction by the approval of the majority of the disinterested governing persons or committee members, regardless of whether the disinterested governing persons or committee members constitute a quorum; or
 - (B) the members of the company, and the members in good faith approve the contract or transaction by vote of the members; or
 - (2) the contract or transaction is fair to the company when the contract or transaction is authorized, approved, or ratified by the governing authority, a committee of the governing authority, or the members of the company.
- (c) Common or interested governing persons of a limited liability company may be included in determining the presence of a quorum at a meeting of the company's governing authority or of a committee of the governing authority that authorizes the contract or transaction.
- (d) A person who has the relationship or interest described by Subsection (a) may:
 - (1) be present at or participate in and, if the person is a governing person or committee member, may vote at a meeting of the governing authority or of a committee of the governing authority that authorizes the contract or transaction; or
 - (2) sign, in the person's capacity as a governing person or committee member, a written consent of the governing persons or committee members to authorize the contract or transaction.
- (e) If at least one of the conditions of Subsection (b) is satisfied, neither the company nor any of the company's members will have a cause of action against any of the persons described by Subsection (a) for breach of duty with respect to the making, authorization, or performance of the contract or transaction because the person had the relationship or interest described by Subsection (a) or took any of the actions authorized by Subsection (d).

transactions in the company agreement to be clear about the manner and extent of operation of BOC § 101.255.¹⁸³ The drafter might replicate the provisions of the statute in the agreement, modify the provisions,¹⁸⁴ or craft entirely different provisions. In limited liability companies formed for sophisticated investment vehicles, it is common for fiduciary duties to be completely eliminated and replaced by a contractual standard of good faith, with specified procedures that create a safe harbor or conclusive presumption of good faith in the case of conflict-of-interest transactions.

Many company agreements include explicit permission to engage in competition and pursuit of business opportunities that might otherwise be claimed to constitute a breach of the duty of loyalty. Again, one size does not fit all. If the business is one in which the members or affiliates of the members own or will own and operate multiple other entities in the same line of business, then this provision might fit the expectations of the owners. On the other hand, if the business is highly unique and it is important to protect proprietary information, allowing unfettered competition might be totally inappropriate. The multi-member model agreements do not include a provision permitting competition, but such a provision is set forth in a footnote below.¹⁸⁵ The model agreement for a single-member limited liability company broadly provides that the member owes no fiduciary duties to the company and, without limiting this broad waiver, also specifically permits competition.¹⁸⁶

Regardless of the standard chosen, the authors would advise consistency in using the same standard for exculpation, duty and indemnification provisions. The case law in this area, published forms, and agreements that have come across the authors' desks are filled with examples of use of one standard for exculpation and another for indemnification, etc. This typically results in confusion, disputes and potential frustration of the expectations of parties.¹⁸⁷

The provisions on duties, exculpation, and indemnification in the model agreements apply to "Covered Persons," which are defined as any manager (for the manager-managed company), member, or officer of the

¹⁸³ In *Twenty First Century Holdings, Inc. v. Precision Geothermal Drilling, L.L.C.*, 2015 WL 1882267 (Tex. App.—Austin 2015, judgment vacated by agr.), the court held that a settlement agreement entered into on behalf of a limited liability company by the company's manager was not enforceable. Although the manager was a governing person with authority to act on behalf of the limited liability company, the court held that the manager's actions were controlled by BOC § 101.255 because the settlement agreement released the company's claims against another entity owned by the manager. The agreement did not meet any of the conditions set forth in BOC § 101.255, and the court thus held that the agreement was not enforceable.

¹⁸⁴ Note that the alternative of member approval under the statute does not include the qualifier of "disinterested" members. TEX. BUS. ORGS. CODE ANN. § 21.418(b)(1)(B). If the transaction is only approved by interested members and is shown to be unfair to the company, it may be possible to establish that the interested members were not acting in good faith, but minority members may wish to protect themselves by requiring that the alternative of member approval explicitly refer to disinterested members.

¹⁸⁵ The following provisions could be used if the drafter wished to allow Covered Persons to compete with the company and limit a duty of loyalty, including a duty of disclosure, in connection with business opportunities or competing business:

X.x. **Competing Business.** A Covered Person may engage in or possess an interest in any business venture of any nature or description, independently or with others, similar or dissimilar to the business of the Company, and the Company and the Members shall have no rights by virtue of this Agreement in and to such independent ventures or the income or profits derived therefrom, and the pursuit of any such venture, even if competitive with the business of the Company, shall not be deemed wrongful or improper. The Covered Person shall not be obligated to disclose or present any particular opportunity to the Company even if that opportunity is of a character that, if disclosed or presented to the Company, could be taken by the Company, and the Covered Person shall have the right to take for its own account (individually or as a partner, shareholder, fiduciary or otherwise) or to recommend to others any such particular opportunity.

¹⁸⁶ Section 9.2 of [Appendix C](#).

¹⁸⁷ *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451 (Del. Ch. 2009) (discussing two separate and seemingly contradictory provisions regarding fiduciary duties on the same page of the limited liability company agreement); *Kahn v. Portnoy*, 2008 WL 5197164 (Del. Ch. 2008) (limited liability company agreement contained two "arguably conflicting" exculpatory provisions, which the court was unable to explain as "anything other than poor drafting or a strategy that 'if one exculpatory provision is good, then two must be better'").

company.¹⁸⁸ The model agreements also provide that controlling persons of a member or manager are also “Covered Persons.”¹⁸⁹ The scope of these provisions should obviously be carefully considered. For example, the members may not wish to provide this type of protection to managers or officers that are not members. In the model agreement for a single-member limited liability company, the approach taken was to provide the broadest possible protection of the member in whatever capacity the member acts with respect to the company, but no exculpation, waiver of duty, or indemnification is provided for any person other than the member or a control person of the member.

The model agreements also provide for “advancement,” i.e., that the expenses of a Covered Person in defending a claim will be advanced before the final disposition of the claim if the Covered Person undertakes to repay the expenses if it is later determined that the person was not entitled to indemnification.¹⁹⁰ Again, the scope of this provision should be carefully considered. For example, the members may not wish to mandate this type of protection with respect to managers and officers that are not members, or the members may not wish to mandate this protection at all out of concern that the assertion of a claim against a bad actor may bankrupt the company before the merits of the claim can be resolved (and the Covered Person likely will not be able to fulfill the obligation to repay the expenses if it is ultimately determined that the Covered Person is not entitled to indemnification).

The model agreements permit the company to purchase and maintain insurance to fund its obligation to indemnify Covered Persons.¹⁹¹ The model agreements state that the company’s obligation to fund its indemnity obligations commences after all available insurance is exhausted. This is to avoid an argument with an insurer that the insurance is secondary to the company’s obligation to fund.¹⁹²

K. Article 10: Winding Up.

Article 10 of the model agreements provides the circumstances under which winding up of the company will occur.¹⁹³ The events triggering winding up include a vote or consent of all members. In addition to this provision for a voluntary decision to wind up, the model agreements provide several other events requiring a winding up.

BOC § 11.056 provides that the termination of membership of the last remaining member of a limited liability company is an event requiring winding up unless, not later than ninety days after the termination, the legal representative or successor of the last remaining member agrees to continue the company and agrees to become a member effective as of the date of the termination or designates another person who agrees to become a member as of such date. The model agreements simply cross reference this statutory provision, but the parties could vary this provision to provide for automatic admission of a specified party as a member in this type of situation or to provide a different procedure for designating a successor member.

BOC § 11.314 provides that a member of a limited liability company may seek a judicial decree of winding up when it is not reasonably practicable to carry on the business of the company in conformity with its governing documents, when the economic purpose of the limited liability company is likely to be unreasonably frustrated, and when another owner has engaged in conduct that makes it not reasonably practicable to carry on the business with that owner.¹⁹⁴ BOC § 11.405 provides certain grounds under which a member or other party might obtain a liquidating

¹⁸⁸ Section 9.1(a) of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

¹⁸⁹ Section 9.1 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

¹⁹⁰ Section 9.4 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

¹⁹¹ Section 9.5 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

¹⁹² See *Top Ten “Gotchas” in Drafting LLC and Partnership Agreements* by Trenton Hood and Paige Ingram Castañeda, presented at The University of Texas School of Law Continuing Legal Education Program on LLCs, LPs and Partnerships, July 9-10, 2015.

¹⁹³ Note that the BOC uses the term “winding up” and not the term “dissolution.” TEX. BUS. ORGS. CODE ANN. § 11.001(b).

¹⁹⁴ TEX. BUS. ORGS. CODE ANN. § 11.314, as amended by S.B. 1517, 85th Leg., eff. Sept. 1, 2017. Until 2017, the only ground specified in BOC § 11.314 for a limited liability company was when it was not reasonably practicable to carry on in conformity with the governing documents. In addition to that ground, the statute specified two other grounds for a judicially ordered winding up of a partnership. In 2017, the statute was amended to specify the same grounds for partnerships and limited liability companies.

receivership. These provisions cannot be waived in the company agreement;¹⁹⁵ therefore, the model agreements acknowledge that the company must be wound up upon a judicial decree requiring winding up.

Under certain circumstances, a limited liability company can be administratively or judicially involuntarily terminated by the state. The most common situations are failure to comply with filing and payment requirements associated with the Texas franchise tax or failure to maintain a registered agent or registered office.¹⁹⁶ In that situation, if the company is not reinstated as provided by law, a minority owner of the company who is not in a position to direct the management of the company might want to cause the company to be wound up in order to avoid the continuation of the business enterprise in a manner that might subject the owner to liability as a partner in a general partnership. This situation is thus addressed as an event requiring winding up in the multi-member model agreements.

BOC § 101.552 provides that a voluntary decision to wind up a limited liability company may be revoked and that a terminated company may be reinstated by a majority vote of the members. So that these provisions cannot be used as an end run around the requirement for unanimous vote to wind up the company, the model agreements override these provisions of the BOC by likewise requiring unanimous approval of revocation or termination.¹⁹⁷

The provisions of the model agreements call for a liquidation of the company by a liquidating agent (either the manager or managers, if any, or an agent appointed by the members) and a final distribution of assets according to positive capital account balances. (See Section II.F. above for a discussion of the “substantial economic effect” requirements related to capital accounts for federal income tax purposes.)

As discussed above in Section II.B., it may be appropriate in certain transactions to expand these events to include items specific to the transaction such as a sale of the company’s asset if the company is a single-asset venture.

The liquidation provisions also state that no member will be required to replenish a negative capital account balance.¹⁹⁸

In *Park Cities Corp. v. Byrd*,¹⁹⁹ the Texas Supreme Court held that the deficit capital account of the general partner of a limited partnership was an asset of the partnership and that the general partner was liable to pay to the partnership the amount of the deficit although the deficit was created by the allocation of non-cash depreciation. (The court reached this result based upon the provisions of the Texas Uniform Limited Partnership Act, the Texas Uniform Partnership Act, and the partnership agreement.) The partnership agreement provided that the limited partner would have no liability beyond its capital contribution and that the general partner would bear all of the losses. If the company agreement of a limited liability company addresses only the sharing of losses without making it clear that the members have no obligation to make up any negative capital account balance, a creditor or another member with a positive capital account balance might argue that a member whose capital account has a negative balance due to the allocation of losses must contribute an amount sufficient to eliminate the deficit. It may be persuasively argued that the reasoning in the *Park Cities* case has no application to limited partners or limited liability company members absent an express provision requiring restoration of negative capital accounts, but provisions expressly negating any obligation to make up a negative capital account balance obviously avoid the need to test the argument.

The model agreements provide that the liquidating agent will file a certificate of termination for the company after distributing assets following winding up.²⁰⁰ This provision also states that the existence of the company shall cease upon filing the certificate of termination except as otherwise provided by the BOC. BOC § 11.356 provides that notwithstanding termination, a filing entity’s existence continues for three years after the effective date of the termination for limited purposes, including prosecuting or defending an action or proceeding brought by or against the terminated entity, permitting survival of existing claims against the entity, holding title to and liquidating property that remained with the terminated entity at the time of termination or was collected by the terminated entity after termination, applying or distributing property and settling affairs not completed before termination.

¹⁹⁵ TEX. BUS. ORGS. CODE ANN. § 101.054(a)(6).

¹⁹⁶ See *The Walking Dead: Forfeitures and Involuntary Terminations of Filing Entities* by Elizabeth S. Miller, presented at the State Bar of Texas Essentials of Business Law Course, March 8, 2018.

¹⁹⁷ Section 10.2 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

¹⁹⁸ Section 10.3(c) of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

¹⁹⁹ 534 S.W.2d 668 (Tex. 1976).

²⁰⁰ Section 10.4 of [Appendix A](#), [Appendix B](#) and [Appendix C](#).

L. Article 11: Miscellaneous Provisions and Definitions.

Article 11 of the model company agreements includes miscellaneous provisions similar to those in most transaction agreements, including notice provisions and definitions of defined terms. (See Section II.B. above.)

The notice provisions for the multi-member company agreements²⁰¹ require notice to be in writing mailed or transmitted, among other methods, by electronic message. The exhibits to the multi-member company agreements setting out the addresses for notice of members recognize that a member might want to use a cell phone text number as a notice address. The model agreements contain a definition of “written” and “writing” that tracks the definition in BOC § 1.002(89), under which a “writing” includes “an expression of words ... or other textual information that is inscribed on a tangible medium or that is stored in an electronic or other medium that is retrievable in a perceivable form...”²⁰² Thus, the authors think that the notice requirements and other provisions of the agreement requiring a writing²⁰³ would encompass cell phone text messages.

Each model agreement provides that the agreement may be amended by a vote of all members except that (in the case of the agreements for multi-member companies) the list of owners may be modified to reflect changes of ownership otherwise satisfying the provisions of the agreement.²⁰⁴ The model agreements for multi-member companies also give the managers or members a limited power of attorney to execute any governmental certificates requiring the signature of the members or an amendment to the list of owners to reflect changes in ownership in accordance with the agreement.²⁰⁵ The BOC was amended in the 2015 legislative session to add a provision that creates a conclusive presumption that a power of attorney such as that included in the model agreements is coupled with an interest sufficient to support an irrevocable power.²⁰⁶

The authors did not include a provision in the model agreements providing for recovery of attorney’s fees by a prevailing party in a suit to enforce a provision of the agreement, but the drafter may want to consider doing so. Although Texas law provides for the recovery of attorney’s fees in a suit on an oral or written contract, the statute only provides for recovery from “an individual or corporation.”²⁰⁷ Under the statutory provision, any “person” may recover attorney’s fees, and a “person” includes any type of entity in addition to individuals. However, recent cases have held that the reference to recovery from “an individual or corporation” precludes recovery from partnerships and limited liability companies.²⁰⁸ Thus, the limited liability company or a member would have a statutory right to recover attorney’s fees from a member (assuming the member is an individual or a corporation) in a successful action on the company agreement, but a member who prevailed against the limited liability company in such a suit would not have a statutory right to recover attorney’s fees from the limited liability company.

²⁰¹ Section 11.1 of Appendix A and Appendix B.

²⁰² Section 11.8(x) of Appendix A and Section 11.8(ix) of Appendix B. See also TEX. BUS. ORGS. CODE ANN. § 1.002(89).

²⁰³ Section 3.19 of Appendix A and Section 3.13 of Appendix B.

²⁰⁴ Section 11.3 of Appendix A and Appendix B.

²⁰⁵ Section 11.5 of Appendix A and Appendix B.

²⁰⁶ TEX. BUS. ORGS. CODE ANN. § 101.055 (eff. Sept. 1, 2015).

²⁰⁷ TEX. CIV. PRAC. & REM. CODE ANN. § 38.001.

²⁰⁸ See, e.g., *CBIF Ltd. P’ship v. TGI Friday’s Inc.*, 2017 WL 1455407 (Tex. App. – Dallas 2017, pet. filed); *J.D. Fields & Co., Inc. v. N. Am. Fabricators, L.L.C.*, 2016 WL 7912455 (S.D. Tex. 2016); *Solid Sys. CAS Servs. v. Total Risc Tech., Ltd.*, 2016 WL 5942935 (S.D. Tex. 2016); *Varel Int’l Indus., L.P. v. Petrodrillbits Int’l, Inc.*, 2016 WL 4535779 (Tex. App.–Dallas 2016, pet. denied); *Choice! Power, L.P. v. Feeley*, 501 S.W.3d 199 (Tex. App.–Houston [1st Dist.] 2016, no pet.); *Alta Mesa Holdings L.P. v. Ives*, 488 S.W.3d 438 (Tex. App. – Houston [14th Dist.] 2016, pet. denied); *Traxxas, L.P. v. DeWitt*, 2015 WL 7777986 (E.D. Tex. 2015); *Fleming v. Kirklin Law Firm, P.C.*, 2015 WL 7258700 (Tex. App. – Houston [14th Dist.] 2015, no pet.); *Hoffman v. L & M Arts*, 2015 WL 1000838 (N.D. Tex. 2015), aff’d, 838 F.3d 568 (5th Cir. 2016); *Fleming & Assoc., L.L.P. v. Barton*, 425 S.W.3d 560 (Tex. App. – Houston [14th Dist.] 2014, pet. denied).

IV. CONCLUSION.

Limited liability companies have become the entity of choice in Texas and other states. However, unlike corporations in which many of the provisions for the ownership and management of the entity are stated in the governing statute, owners are free in many respects to make their own rules regarding the management and financial terms for a limited liability company. They do this by entering into a company agreement. This puts an added burden on the practitioner to be sure that the agreement drafted by the practitioner accurately reflects the terms of the transaction envisioned by the practitioner's client, comports with the applicable entity and tax laws and establishes a basis for a predicable outcome in the event of disputes regarding the responsibilities, obligations and benefits related to the company. The authors hope that the model agreements included and discussed in this paper will be useful as lawyers strive to accomplish these goals.

Appendix A

**Model Company Agreement for Manager-Managed, Multi-Member
Limited Liability Company**

This Model Agreement is Appendix A to an article by Cliff Ernst, Elizabeth S. Miller and Doug Jones entitled *Model Company Agreements* (the “Accompanying Article”). This Model Agreement should not be considered a form to be completed by filling in the blanks. Drafters should be certain that any agreement used by them is appropriate for the particular transaction. This Model Agreement should be read together with the Accompanying Article, including the various references to the Accompanying Article throughout this Model Agreement.

**COMPANY AGREEMENT
OF**

_____, LLC,
a Texas limited liability company

This Company Agreement (this “**Agreement**”), dated effective the ____ day of _____, 20____, is executed and agreed to, for good and valuable consideration, by the initial Members listed on **Exhibit “A”**.

Article 1

Formation

1.1 **Formation.** _____, LLC (the “**Company**”) was formed as a limited liability company under and pursuant to the Texas Business Organizations Code (the “**BOC**”) and other relevant laws of the State of Texas by the filing of a certificate of formation with the Secretary of State of the State of Texas on _____, 20____.

1.2 **Name.** The name of the Company shall be _____, LLC. The Company shall conduct business under that name or such other names complying with applicable law as the Managers may determine from time to time.

1.3 **Duration.** The Company shall exist until terminated in accordance with this Agreement.

1.4 **Purpose.** The purpose of the Company shall be to engage in the business of (insert description of business) and to engage in any other lawful business or activity necessary or convenient in pursuit of the foregoing purposes.

1.5 **Principal Office.** The Company’s principal office shall be _____ or such other place as the Managers may determine from time to time.

1.6 **Registered Office and Registered Agent.** The initial address of the registered office of the Company in the State of Texas shall be _____, and the name of the Company’s initial registered agent at that address shall be _____. The Managers may change the registered office and the registered agent of the Company from time to time. The Managers may cause the Company to qualify to do business as a limited liability company (or other entity in which the Members

have limited liability) in any other jurisdiction and to designate any registered office or registered agent in any such jurisdiction.

1.7 **Definitions.** Certain terms used in this instrument are capitalized. Such terms shall have the meaning set forth in the text or in Section 11.8.

Article 2

Members and Membership Interests

2.1 **Initial Members.** In connection with the formation of the Company, the Persons executing this Agreement as initial Members are admitted to the Company as Members effective as of the date of formation of the Company. The Percentage held by each of the Members is set forth next to such Member's name on **Exhibit "A"**.

2.2 **Issuance of Membership Interests After Formation of Company.** The Company, after the formation of the Company, may issue membership interests in the Company to any Person with the affirmative vote or Written consent of all of the Members of the Company. Any such affirmative vote or Written consent of the Members shall specify the Capital Contribution, if any, required in connection with the new membership interest, the Percentage represented by the newly issued membership interest and all changes in the Percentages represented by the membership interests outstanding prior to the issuance of the new membership interest.

2.3 **Nature of Membership Interest.** A membership interest in the Company is personal property. A Member of the Company or an assignee of a membership interest in the Company does not have an interest in any specific property of the Company. A membership interest includes a Member's or assignee's share of profits and losses or similar items and the right to receive distributions as provided in this Agreement, but does not include a Member's right to participate in management.

2.4 **Withdrawal or Expulsion of Member Prohibited.** A Member of the Company may not withdraw or be expelled from the Company except as effectuated by Section 2.9.

2.5 **Assignment of Membership Interest.** Subject to the requirements of Article 8, a membership interest in the Company may be wholly or partly assigned. An assignment of a membership interest in the Company is not an event requiring the winding up of the Company and does not entitle an assignee who is not already a Member of the Company to participate in the management and affairs of the Company, become a Member of the Company or exercise any rights of a Member of the Company.

2.6 **Admission of New Members.** Any Member of the Company who is issued a new membership interest as provided in Section 2.2 or who acquires a membership interest by assignment (including by reason of death or divorce) shall become a Member of the Company with respect to the new or assigned membership interest immediately upon the issuance or assignment of the membership interest. Approval by the Members pursuant to Section 2.2 of the issuance of a new membership interest in the Company to a Person who is not already a Member shall be deemed approval of the admission of such Person as a Member. An assignee of a membership interest in the Company who is not already a Member of the Company is entitled to become a Member of the Company on the affirmative vote or Written consent of all of the Company's Members. Any Person who desires to become a Member after the formation of the Company shall, as a condition to becoming a Member and in addition to any other conditions set forth

herein or established by the Members or Managers, execute and deliver an agreement to be bound by the terms and provisions of the Agreement. Such agreement shall also state an address for the Member for notice hereunder.

2.7 Rights and Duties of Assignee of Membership Interest Before Membership.

(a) A Person who is assigned a membership interest in the Company is entitled to:

(i) receive any allocation of income, gain, loss, deduction, credit, or a similar item that the assignor is entitled to receive to the extent the allocation of the item is assigned;

(ii) receive any distribution the assignor is entitled to receive to the extent the distribution is assigned;

(iii) subject to Article 7, require, for any proper purpose, reasonable information or a reasonable account of the transactions of the Company; and

(iv) subject to Article 7, make, for any proper purpose, reasonable inspections of the books and records of the Company.

(b) An assignee of a membership interest in the Company is not liable as a Member of the Company until the assignee becomes a Member of the Company.

2.8 Rights and Liabilities of Assignee of Membership Interest After Becoming Member.

(a) An assignee of a membership interest in the Company, after becoming a Member of the Company, is:

(i) entitled to the same rights and powers granted or provided to a Member of the Company by this Agreement; and

(ii) subject to the same restrictions and liabilities placed or imposed on a Member of the Company by this Agreement; and

(iii) except as provided by subsection (b) of this Section 2.8, liable for the assignor's obligation to make contributions to the Company.

(b) An assignee of a membership interest in the Company, after becoming a Member of the Company, is not obligated for a liability of the assignor that:

(i) the assignee did not have knowledge of on the date the assignee became a Member of the Company; and

(ii) could not be ascertained from this Agreement.

2.9 Rights and Duties of Assignor of Membership Interest. An assignor of a membership interest in the Company continues to be a Member of the Company and is entitled to exercise any rights or

powers of the Member not vested in the assignee by virtue of the assignment (including the right to vote on or consent to any matters requiring approval or consent of the Members under this Agreement) until the assignee becomes a Member of the Company. Upon admission of an assignee as a Member, the assignor shall cease to be a Member with respect to the membership interest assigned.

2.10 **Certificates.** Membership interests in the Company shall be uncertificated.

[DRAFTING NOTE: Section III.C. of the Accompanying Article includes model provisions regarding certificated membership interests.]

2.11 **Representations and Warranties.** Each Member hereby represents and warrants to the Company and each other Member that (a) the Member has duly executed and delivered this Agreement; and (b) the Member's authorization, execution, delivery, and performance of this Agreement do not conflict with any other agreement or arrangement to which that Member is a party or by which that Member is bound.

Article 3

Management of the Company, Meetings and Voting

3.1 **Managers and Management Generally.** The Managers shall have the authority to manage the business and affairs of the Company and make all decisions with respect thereto, except for those matters expressly reserved to the Members. The foregoing shall not restrict the authority of the officers of the Company as described in Section 3.6 below. By the unanimous vote of all of the Managers, the authority of the Managers to act may be delegated to a committee of less than all of the Managers. Each Manager is an agent of the Company for the purpose of carrying out the Company's business in accordance with the authority granted by action of the Managers. No Member of the Company in the Member's capacity as such shall be an agent of the Company or have any authority or right to act for or bind the Company.

3.2 **Number and Qualifications of Managers.**

(a) The Managers of the Company may consist of one or more Persons. Except as provided by subsection (b) of this Section 3.2, the number of Managers of the Company consists of the number of initial Managers listed in the Company's certificate of formation.

(b) The number of Managers of the Company may be increased or decreased by amendment to this Agreement.

(c) A Manager of the Company is not required to be a resident of Texas or Member of the Company.

3.3 **Terms for Managers.** Unless a term is specified upon selection of a Manager, as provided herein, each Manager shall serve until the resignation, removal, or death of the Manager. If a term is specified by the Members upon the selection of a Manager, the Manager shall serve for the specified term and until the Manager's successor is selected by the affirmative vote of Members owning a majority of all Members' Percentages in the Company, or until the earlier resignation, removal or death of the Manager.

3.4 Resignation and Removal of Managers. A Manager may resign at any time by giving Written notice to the Company. Such resignation shall take effect at the time specified therein, and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective. A Manager may be removed, with or without cause, by the affirmative vote of Members owning a majority of all Members' Percentages in the Company.

3.5 Manager Vacancy. A vacancy in the position of a Manager may be filled by the affirmative vote of all of the remaining managers, regardless of whether the remaining managers constitute a quorum, or the affirmative vote of Members owning a majority of all Members' Percentages in the Company.

[DRAFTING NOTE: Section III.D. of the Accompanying Article includes model provisions regarding the right of certain Members to designate Managers.]

3.6 Officers and Other Agents. The Managers may appoint such officers or other agents of the Company as the Managers may deem appropriate and may remove any such officer or agent at any time with or without cause. The Managers may delegate to the Company's officers such authority as the Managers may deem appropriate and subsequently revoke or modify that authority. The Managers also may delegate authority to other Persons and revoke that delegation as the Managers may deem appropriate including the power to delegate authority.

3.7 Meetings of Members. The Managers or any Member may call a meeting of the Members. Meetings of the Members of the Company may be held at the principal office of the Company or, if remote attendance is allowed and provided in accordance with Section 3.9, at another place in or outside Texas designated by the Person or Persons calling the meeting. Members of the Company owning a majority of all Members' Percentages in the Company constitute a quorum for the purpose of transacting business at a meeting of the Members.

3.8 Meetings of Managers or Committees of Managers. Any Manager may call a meeting of the Managers or a committee of the Managers. The Managers of the Company or a committee of the Managers may hold meetings at the principal office of the Company or, if remote attendance is allowed and provided in accordance with Section 3.9, at another place in or outside Texas designated by the Manager calling the meeting. A majority of all the Managers or members of a committee of the Managers constitutes a quorum for the purpose of transacting business at a meeting of the Managers or committee of the Managers.

3.9 Alternative Forms of Meetings.

(a) The Members, the Managers, or a committee of the Managers may hold meetings and allow attendance at meetings by using a conference telephone or similar communications equipment, or another suitable electronic communications system, including videoconferencing technology or the Internet, or any combination, if the telephone or other equipment or system permits each individual participating in the meeting to communicate with all other individuals participating in the meeting.

(b) If voting is to take place at the meeting, the Company must implement reasonable measures to verify that every Person voting at the meeting by means of remote communications is sufficiently identified, and if a proxy for a Person is voting at the meeting, to verify that the proxy requirements set forth in Section 3.15 are satisfied.

3.10 Participation Constitutes Presence. A Person participating in a meeting is considered present at the meeting unless the participation is for the express purpose of objecting to the transaction of business at the meeting on the ground that the meeting has not been lawfully called or convened.

3.11 Notice of Meetings. Notice of a meeting of the Members, the Managers, or a committee of the Managers, must be given in a manner described in Section 11.1 and state the date and time of the meeting and the location of the meeting or, if the meeting is held or attendance is allowed by using a conference telephone or other communications system authorized by Section 3.9, the form of communication used for the meeting. Notice of a meeting of the Members shall state the purpose of the meeting and shall be given not later than the tenth (10th) day or earlier than the sixtieth (60th) day before the date of the meeting. Notice of a meeting of the Managers or a committee of Managers must be given not later than the third (3rd) day before the date of the meeting. Notice of a meeting is not required to be given to a Member, Manager or committee member entitled to notice under this Agreement if the Person entitled to notice signs a Written waiver of notice of the meeting, regardless of whether the waiver is signed before or after the time of the meeting. If a Person entitled to notice of a meeting participates in the meeting, the Person's participation constitutes a waiver of notice of the meeting unless the Person participates in the meeting solely to object to the transaction of business at the meeting on the ground that the meeting was not lawfully called or convened.

3.12 Acts of Members Generally. Except as otherwise provided in this Agreement, the affirmative vote of Members owning a majority of all Members' Percentages in the Company constitutes an act of the Members.

3.13 Votes Required to Approve Certain Actions. A Fundamental Business Transaction of the Company or an action that would make it impossible for the Company to carry out the ordinary business of the Company must be approved by the affirmative vote of all of the Members. For purposes of this Agreement, the term "**Fundamental Business Transaction**" shall mean a merger, interest exchange, conversion, or sale of all or substantially all of the Company's asset.

3.14 Acts of Managers or Committees. The affirmative vote of a majority of all Managers or a majority of all members of a committee of the Managers constitutes an act of the Managers or committee of the Managers, as appropriate.

3.15 Manner of Voting. A Member of the Company may vote at a meeting in person or by a proxy executed in Writing by the Member to another Member. A Manager or member of a committee of the Managers may vote at a meeting in person or by a proxy executed in Writing by the Manager to another Manager, or a committee member to another committee member, as the case may be. Except as provided in this Section, Members, Managers and committee members may not vote by proxy.

3.16 Action by Written Consent. An action may be taken without holding a meeting, without providing notice, or without taking a vote if a Written consent or consents stating the action to be taken is obtained from the number of Members, Managers, or committee members, as appropriate, necessary to have at least the minimum number of votes that would be necessary to take the action at a meeting at which each Member, Manager, or committee member, as appropriate, entitled to vote on the action is present and votes. Any of the following shall satisfy the requirement for a Written consent: an originally signed document; a photographic, photostatic, facsimile or similarly reliable reproduction of an originally signed document; or an electronic message if the transmission contains or is accompanied by information allowing a determination (i) that the message was transmitted by the consenting Member, Manager or committee

member and (ii) of the date of the transmission. Unless otherwise dated, a consent given by electronic message is considered given on the date transmitted.

3.17 Explicit Vote or Consent Required. The exclusive methods by which Members or Managers or committee members may take action with respect to the Company are voting affirmatively at a meeting or giving Written consent as provided in this Article 3. A Member or Manager or committee member shall not be deemed to have voted in favor of, or consented to, an action unless such Person has voted affirmatively at a meeting or given explicit consent as provided in this Article 3.

Article 4

Capital Contributions

4.1 Agreed Capital Contributions. Each initial Member shall contribute to the capital of the Company the contribution set forth opposite such Member's name on the attached **Exhibit "A"**. Any Person issued a membership interest in the Company after the formation of the Company shall contribute to the capital of the Company the contribution, if any, approved as provided in Section 2.2. A Person's obligation to contribute to the capital of the Company may be released or settled only by the affirmative vote or Written consent of all Members.

4.2 Additional Capital Contributions. The Managers may request, but may not require, that the Members make additional contributions to the capital of the Company.

4.3 Capital Accounts. A capital account ("**Capital Account**") shall be established for each Member and shall be maintained in such a manner as to correspond with the rules set forth in the Treasury Regulations (the "**Allocation Regulations**") promulgated under Section 704(b) of the Code. Except as otherwise required by the Allocation Regulations or the Code, a Member's Capital Account shall be increased by (i) the amount of any contribution of capital to the Company (based on the fair market value of the cash or other assets contributed) and (ii) allocations of income or gain (for Company book purposes) to the Member pursuant to this Agreement, and shall be reduced by (i) the amount of money distributed to the Member by the Company, (ii) the fair market value of any property distributed to the Member by the Company, and (iii) allocations of deduction or loss (for Company book purposes) to the Member by the Company pursuant to this Agreement. The Capital Accounts of the Members shall not bear interest. If any additional membership interests in the Company are to be issued in consideration for a contribution of property or cash or if any Company property is to be distributed in liquidation of the Company or an interest in the Company, the Capital Accounts of the Members (and the amounts at which all Company properties are carried on its books and records other than for income tax purposes) shall, immediately prior to such issuance or distribution, as the case may be, be adjusted (consistent with the provisions of Section 704 of the Code) upward or downward to reflect any unrealized gain or unrealized loss attributable to all Company properties (as if such unrealized gain or unrealized loss had been recognized upon actual sale of the properties upon a liquidation of the Company immediately prior to issuance or distribution). Except as otherwise required by the Allocation Regulations, in the event any membership interest in the Company is transferred in accordance with the terms of this Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent it relates to the transferred interest.

Article 5

Taxation and Allocations

5.1 **General.** Unless otherwise required by the Allocation Regulations or the Code, all items of income, gain, loss, deduction and credit of the Company shall be allocated to the Members for accounting and tax purposes pro rata according to their Percentages.

5.2 **Regulatory Allocations.** To the extent the Allocation Regulations or the Code require allocations for tax purposes that differ from the foregoing allocations, the Managers may determine the manner in which such tax allocations shall be made so as to fully comply with the Allocation Regulations, the Code, other applicable law and, at the same time to the extent reasonably possible, preserve the economic relationships among the Members as set forth in this Agreement.

5.3 **Reporting.** The Members are aware of the income tax consequences of the allocations made by this Article 5 and hereby agree to be bound by the provisions of this Article 5 in reporting their shares of Company items for income tax purposes.

Article 6

Distributions

6.1 **Distributions.** Available Cash shall be distributed at least annually to all of the Members pro rata according to their Percentages.

6.2 **Required Annual Tax Distribution.** Within sixty (60) days following the end of each fiscal year, the Company shall make an additional distribution to each Member in an amount equal to (i) the income tax liability of the Member attributable to the taxable income allocable to the Member for such fiscal year with respect to such Member's membership interest, computed as set forth in Article 5, less (ii) the aggregate amount of distributions to such Member by the Company during such fiscal year, if the amount per clause (i) is greater than the amount per clause (ii); provided, however, that the Company shall only be obligated to make distributions pursuant to this Section 6.2 to the extent that it has cash available in the ordinary course of its business and this Section 6.2 shall not require the Company to liquidate non-cash assets, to borrow funds or to require additional capital contributions for the purpose of making such distributions. A Member's income tax liability for purposes of this Section 6.2 shall be computed by multiplying the taxable income allocable to the Member by forty percent (40%).

Article 7

Bank Accounts, Books of Account, Reports and Fiscal Year

7.1 **Bank Account; Investments.** The Company shall establish one or more bank or other financial institution accounts into which all Company funds shall be deposited. Funds deposited by the Company into such accounts may be withdrawn only in furtherance of the business of the Company or for distribution to the Members pursuant to this Agreement. Pending withdrawal for such purposes, Company funds may be invested in such manner as the Managers may determine.

7.2 Books and Records.

(a) The Company shall keep or cause to be kept books and records of the Company using a method consistent with that described in Treasury Regulation Section 1.704-1(b). Income, gain, loss and deduction of the Company (including income and gain exempt from tax and expenditures not deductible in computing the Company's taxable income) shall be computed based upon the book value of the Company's property using the same methods (e.g., cash or accrual accounting, or straight line or accelerated depreciation) as are used in computing the Company's taxable income. The books of the Company, for both tax and financial reporting purposes, shall be kept using the method of accounting selected by the Managers.

(b) The books and records of the Company shall be maintained at the Company's principal office.

(c) The Company shall provide a Member or an assignee of a membership interest access to the Company's books and records to the extent and as provided by this Section. A Member or an assignee of a membership interest who desires to examine or copy any of the Company's books and records (the "Requester") shall give Written notice to the Company specifying the books and records that the Requester desires to examine or copy and stating a proper purpose for examining or copying the requested books and records. Subject to this subsection and subsection (d) of this Section, within five days after the Requester submits such a Written notice, the Company will make available at its principal office the requested books and records if the requested books and records are required to be maintained by the Company under the BOC or consist of other information regarding the business, affairs and financial condition of the Company that is reasonable for the Requester to examine and copy. The requested books and records will be made available during regular business hours, and the examination and copying shall be at the expense of the Requester. The Company may deny a Requester's request for access to the Company's books and records and information if the Requester: (i) has improperly used information obtained through a prior examination of the books and records of the Company or of any other entity; or (ii) was not acting in good faith or for a proper purpose in making the Requester's request for information.

(d) The Company may keep confidential from a Requester, for such period of time as the Managers deem reasonable, any information that the Managers reasonably believe to be in the nature of trade secrets or other information the disclosure of which the Managers in good faith believe is not in the best interest of the Company or could damage the Company or its business or which the Company is required by law or by agreement with a third party to keep confidential.

7.3 **Financial Information.** As soon as is reasonably practicable after the end of each Company fiscal year, the Managers shall cause to be prepared and furnished to each Member, at Company expense, a balance sheet of the Company (dated as of the end of the fiscal year then ended), and a related statement of income, loss and change in financial position for the Company (for the same year). Such financial information shall reflect the beginning balance in each Member's Capital Account as of the first day of such year, all distributions of cash made to each Member during the year, and the ending balance in each Member's Capital Account as of the last day of the year and is not required to be audited.

7.4 Tax Returns and Information; Governing Documents.

(a) The Members intend for the Company to be treated as a partnership for tax purposes. The Managers shall prepare or cause to be prepared all federal, state and local income and other

tax returns which the Company is required to file and shall furnish each Member both a copy of such Member's Schedule K-1 and the Company's tax return as soon as is reasonably practicable after the end of each Company fiscal year. On Written request to the Company, the Company shall provide to a Member or an assignee of a membership interest a free copy of (i) the Company's certificate of formation, including any amendments to or restatements of the certificate of formation; (ii) this Agreement, including any amendments to or restatements of this Agreement; and (iii) any federal, state and local tax returns of the Company for each of the preceding six years.

(b) For tax years ending on or before December 31, 2017, _____ shall be the "**Tax Matters Partner**" for purposes of Code Section 6231(a)(7) (prior to modification by the Bipartisan Budget Act of 2015). The Tax Matters Partner shall cause to be prepared and shall sign all returns of the Company, make any election which is available to the Company, and monitor any governmental tax authority in any audit that the authority may conduct of the Company's books and records or other documents. If requested by the Tax Matters Partner, each Member shall take all actions required to authorize the Tax Matters Partner as that party with the sole authority to handle all tax matters of the Company. Each Member agrees to execute, certify, deliver, file and record at appropriate public offices or deliver to the Tax Matters Partner such documents as may be reasonably requested by the Tax Matters Partner to facilitate the handling of any tax matter as the Tax Matters Partner deems necessary.

(c) For tax years beginning on or after January 1, 2018;

(i) The "tax representative" of the Company (initially, _____) shall be the Company's designated representative within the meaning of Code Section 6223, with sole authority to act on behalf of the Company for purposes of subchapter C of Chapter 63 of the Code and any comparable provisions of state or local income tax laws. (Any person who is designated as the "tax representative" is referred to herein as the "**Tax Representative**".) For purposes of this Section 7.4(c), unless otherwise specified, all references to provisions of the Code shall be to such provisions as enacted by the Bipartisan Budget Act of 2015.

(ii) If the Company qualifies to elect pursuant to Code Section 6221(b) (or successor provision) to have federal income tax audits and other proceedings undertaken by each Member rather than by the Company, the Tax Representative shall cause the Company to make such election.

(iii) Notwithstanding other provisions of this Agreement to the contrary, if any "partnership adjustment" (as defined in Code Section 6241(a)(2)) is determined with respect to the Company, the Tax Representative, in its discretion, may cause the Company to elect pursuant to Code Section 6226 to have such adjustments passed through to the Members for the year to which the adjustment relates (i.e., the "reviewed year" within the meaning of Code Section 6225(d)(1)). In the event that the Tax Representative has not caused the Company to so elect pursuant to Code Section 6226, then any "imputed underpayment" (as determined in accordance with Code Section 6225) or "partnership adjustment" that does not give rise to an "imputed underpayment" shall be apportioned among the Members of the Company for the taxable year in which the adjustment is finalized in such manner as may be necessary (as determined by the Tax Representative in good faith) so that, to the maximum extent possible, the tax and economic consequences of the partnership adjustment and any associated interest and penalties are borne by the Members based upon their interests in the Company for the reviewed year.

(iv) Each Member agrees that, upon request of the Tax Representative, such Member shall take such reasonable actions as may be necessary or desirable (as determined by the Tax Representative) to (1) allow the Company to comply with the provisions of Code Section 6226 so that any “partnership adjustments” are taken into account by the Members rather than the Company or (2) file amended tax returns with respect to any “reviewed year” (within the meaning of Code Section 6225(d)(1)) to reduce the amount of any “partnership adjustment” otherwise required to be taken into account by the Company.

[DRAFTING NOTE: See Section III.H. of the Accompanying Article for model language that provides for past members to bear the imputed underpayment of taxes.]

7.5 **Fiscal Year.** The Company fiscal year shall be the calendar year.

Article 8

Transfer Restrictions and Push-Pull Buyout

[DRAFTING NOTE: See Section III.I of the Accompanying Article for a discussion of drafting issues that should be considered with drafting transfer restriction and buy-sell provisions.]

8.1 **Right of First Refusal.** Any Member who desires to sell, dispose of or otherwise transfer or assign all or any part of such Member’s membership interest in any transaction other than an Affiliate Transfer shall first offer to sell to the Company all of the membership interest which such Member desires to transfer. The Company shall have an option, for a period of thirty (30) days after the Company and all of the Members have been given Written notice of the Member’s desire to sell, dispose of or otherwise transfer and assign such membership interest, to elect to purchase such membership interest at the price and terms specified in the notice. If the Company does not so elect to purchase such membership interest, the selling Member shall offer the right to purchase such membership interest to the other Members, who shall have an option, for a period of thirty (30) days following the expiration of the Company’s thirty (30) day option period, to elect to purchase such membership interest at the price and terms specified in the notice. If all or any portion of the purchase price specified in the notice pursuant to this Section 8.1 is not cash, the price shall be deemed cash equal to the fair market value of the noncash consideration and if the parties are unable to reach agreement as to such fair market value, then the fair market value shall be determined by appraisal using the same methodology for determination of Purchase Value set forth in Section 8.4(b). Any purchase by the Company or the Members pursuant to this Section 8.1 shall be closed in the manner specified in Section 8.5 within thirty (30) days after (i) the end of the applicable option period or (ii) determination of the fair market value of the noncash consideration, if later. If more than one Member elect to purchase the offered membership interest pursuant to the option granted to them pursuant to this Section 8.1, they shall, absent a different agreement at the time, acquire the offered membership interest pro-rata in accordance with their respective Percentages prior to their purchase pursuant to such option. If neither the Company nor the Members elect to purchase the offered membership interest pursuant to the options granted to them pursuant to this Section 8.1, then the offering Member shall have sixty (60) days after expiration of the options of the Company and the other Members in which to sell the offered membership interest at the price and terms identified in the notice to the purchaser(s) identified in the notice; provided that such purchaser(s) shall be assignee(s) only of such membership interest unless and until such purchaser(s) are admitted as Member(s) of the Company in accordance with Article 2 of this Agreement. In no event shall the offering Member be compelled to sell less than all of the membership interest offered

by such Member. An assignee of a membership interest shall be subject to this Section 8.1 in the same manner as a Member.

8.2 **Death or Divorce of Member or Spouse.**

(a) On the death of a Member, subject to subsection (c) of this Section 8.2, the executor, administrator or personal representative (as applicable, the “**Personal Representative**”) of the Deceased Member shall be treated as an assignee. The membership interest of such Personal Representative shall be subject to all the terms and provisions of this Agreement.

(b) Subject to subsection (d) of this Section 8.2, a Member’s spouse shall become an assignee of the membership interest in the Company that the spouse succeeds to or obtains as the result of the termination of the marital relationship of the spouse and such Member.

(c) Upon the death of a Member (the “**Deceased Member**”), the Personal Representative of the Deceased Member shall have ninety (90) days after the Deceased Member’s date of death to cause the Company to purchase the Deceased Member’s membership interest for the Purchase Value (determined as set forth in Section 8.4(b)) (the “**Put Option**”). The purchase by the Company pursuant to the Put Option shall be closed in the manner specified in Section 8.5 within thirty (30) days after (i) the exercise of the Put Option or (ii) determination of the Purchase Value, if later. If the Personal Representative of the Deceased Member does not exercise its Put Option by notice to the Company within such ninety (90) day period or if a Personal Representative is not appointed within such ninety (90) day period, then the Company shall have the option within one hundred and twenty (120) days from date the Deceased Member’s date of death to elect to purchase the Deceased Member’s membership interest for the Purchase Value (determined as set forth in Section 8.4(b)). If the Company does not elect to purchase all of the Deceased Member’s membership interest, the remaining Member(s) shall have the option, for period of thirty (30) days following the expiration of the Company’s option period, to elect to purchase the Deceased Member’s membership interest not purchased by the Company for the Purchase Value (determined as set forth in Section 8.4(b)). Any purchase by the Company or the Members pursuant to this Section 8.2(c) shall be closed in the manner specified in Section 8.5 within thirty (30) days after (i) the end of the applicable option period or (ii) determination of the Purchase Value, if later. If more than one Member elect to purchase the Deceased Member’s membership interest pursuant to the option granted to them pursuant to this Section 8.2(c), they shall, absent a different agreement at the time, acquire the Deceased Member’s membership interest pro-rata in accordance with their respective Percentages prior to their purchase pursuant to such option. During the pendency of such options following the Deceased Member’s death, the remaining Member(s) may continue the business of the Company, but the estate or Personal Representative of the Deceased Member shall not be liable for any obligations incurred by the Company beyond the amount includable in the Deceased Member’s estate already invested or involved in the Company on the date of the Deceased Member’s death.

(d) In the event a Member (the “**Divorced Member**”) becomes divorced and such divorced spouse becomes the owner of or becomes entitled to any membership interest, the Divorced Member shall have an option, for a period beginning when the divorce decree becomes final and ending sixty (60) days after the Company and the remaining Member(s) of the Company have been notified of the final divorce decree, to elect to purchase the membership interest of such divorced spouse for its Purchase Value (determined as set forth in Section 8.4(b)). Any purchase by the Divorced Member pursuant to this Section 8.2(d) shall be closed in the manner specified in Section 8.5 within thirty (30) days after (i) the end of the option period or (ii) determination of the Purchase Value, if later. If the Divorced Member does not elect

to purchase all of the membership interest of the divorced spouse, then the Company shall have an option, for a period of thirty (30) days following the expiration of the Divorced Member's sixty (60) day option period, to elect to purchase such membership interest for its Purchase Value (determined as set forth in Section 8.4(b)). If neither the Divorced Member nor the Company elects to purchase all of the membership interest of the divorced spouse, the remaining Member(s) shall have an option, for a period of thirty (30) days following the expiration of the Company's thirty (30) day option period, to elect to purchase such membership interest for its Purchase Value (determined as set forth in Section 8.4(b)). Any purchase by the Company or the Members pursuant to this Section 8.2(d) shall be closed in the manner specified in Section 8.5 within thirty (30) days after (i) the end of the applicable option period or (ii) determination of the Purchase Value, if later. If more than one Member elect to purchase the membership interest of the divorced spouse pursuant to the option granted to them pursuant to this Section 8.2(d), they shall, absent a different agreement at the time, acquire the membership interest pro-rata in accordance with their respective Percentages prior to their purchase pursuant to such option. If neither the Divorced Member nor the Company nor the remaining Member(s) elect to purchase the membership interest of the divorced spouse, then such membership interest may be retained by the divorced spouse, subject to the obligations of this Agreement as an assignee. In no event shall the divorced spouse be compelled to sell less than all of such divorced spouse's membership interest.

(e) In the event of the death of a Member's spouse and such Member (the "**Surviving Member**") does not acquire by will or by operation of law all of the membership interest owned by the deceased spouse, the Surviving Member shall have an option, for a period beginning with the date of death and ending sixty (60) days after the Company and the remaining Member(s) have been notified of the death of the Surviving Member's spouse and the name and address of the duly qualified and acting Personal Representative of the deceased spouse, to elect to purchase the membership interest of the deceased spouse for its Purchase Value (determined as set forth in Section 8.4(b)). If the Surviving Member does elect to purchase the membership interest of the deceased spouse, then the Company shall have an option, for a period of thirty (30) days following the expiration of the Surviving Member's sixty (60) day option period, to elect to purchase such membership interest for its Purchase Value (determined as set forth in Section 8.4(b)). If neither the Surviving Member nor the Company elects to purchase all of the membership interest owned by the deceased spouse, then the remaining Member(s) shall have an option, for a period of thirty (30) days following the expiration of the Company's thirty (30) day option period, to elect to purchase such membership interest for its Purchase Value (determined as set forth in Section 8.4(b)). Any purchase by the Company or the Members pursuant to this Section 8.2(e) shall be closed in the manner specified in Section 8.5 within thirty (30) days after (i) the end of the applicable option period or (ii) determination of the Purchase Value, if later. If more than one Member elect to purchase the membership interest owned by the deceased spouse pursuant to the option granted to them pursuant to this Section 8.2(e), they shall, absent a different agreement at the time, acquire the membership interest pro-rata in accordance with their respective Percentages prior to their purchase pursuant to such option. If neither the Surviving Member nor the Company nor the remaining Member(s) exercise their option to purchase the membership interest owned by the deceased spouse, then such membership interest may be retained by each devisee or heir subject to the obligations of this Agreement as an assignee. In no event shall the Personal Representative or estate of the Surviving Member's deceased spouse be compelled to sell less than all of the membership interest owned by the deceased spouse.

(f) By executing this Agreement, the spouses of the Members, in addition to any other purposes for which they are executing this Agreement, agree to be bound by the terms of this Agreement with respect to any membership interests now owned or hereafter acquired in the Company. The execution of this Agreement by such spouses is not intended to alter, nor shall it be construed as altering, the existing

status and characterization of the membership interests in the Company as the separate or community property of the Members.

8.3 **Push-Pull Buyout.**

(a) Each Member (the “**Offering Member**”) may at any time give notice to all, but not less than all, of the other Members of the Offering Member’s desire to either (a) sell all of the Offering Member’s membership interest in the Company to the other Members or (b) buy all of the other Member’s membership interests in the Company, specifying therein the price per Percentage and the other terms and conditions upon which the Offering Member will buy or sell. The other Members shall have an option, for a period of sixty (60) days after receiving such notice, to elect to purchase the membership interest of the Offering Member at the same price per Percentage and upon the same terms and conditions that the Offering Member is offering to sell the Offering Member’s membership interest, the transaction to be closed in the manner specified in Section 8.5 within thirty (30) days after the end of such sixty (60) day period. If such option to purchase is not exercised by any Member within the aforementioned period of sixty (60) days, then the Offering Member shall be obligated to purchase the membership interests of the other Members at the price per Percentage and upon the terms and conditions specified in the aforementioned notice, and the Members receiving the notice shall be obligated to sell their membership interests to the Offering Member upon such terms and conditions, the transaction to be closed in the manner specified in Section 8.5 within thirty (30) days after the end of such sixty (60) day period.

(b) If more than one Member elect to purchase the Offering Member’s membership interest pursuant to the option granted to them hereunder, they shall, absent a different agreement at the time, acquire the Offering Member’s membership interest pro-rata in accordance with their respective Percentages prior to their purchase pursuant to such option. If some Members exercise their option to sell and others exercise their option to purchase, then those Members exercising the option to purchase the Offering Member’s membership interest may purchase all of the membership interests of Members opting to sell at the offered price, or, at their election, may purchase only the membership interest originally offered by the Offering Member.

(c) Any two or more Members may, if they so elect, institute the push-pull buyout under this Section as a block of membership interests by jointly commencing the offer to purchase or sell their membership interests to the other Member(s) as a block and conditioning the purchase and sale of the membership interests to the block of membership interests offered. In such event, the recipient Member(s) shall treat the membership interests as a block for purposes of exercising the offer to purchase or sell under this section.

8.4 **Determination of Purchase Value.**

(a) “**Purchase Value**” shall mean the amount of cash and fair market value of property which would be received by the holder of the membership interest to be sold hereunder if the Company sold its business and assets for cash at a purchase price equal to their fair market value as of the date of determination of the Purchase Value, and all remaining assets of the Company were distributed to the Members in accordance with this Agreement. Purchase Value shall be determined as of a date as near as reasonably practicable to the date of the occurrence of the event which results in the sale of the membership interest hereunder. The party whose membership interest is to be sold hereunder is hereafter referred to as the “**Selling Party**” and the party or parties acquiring that interest are hereafter referred to, individually or collectively, as the case may be, as the “**Acquiring Party**.” In exercising the right to purchase the

membership interests of any party, the Acquiring Party shall develop a purchase price which it reasonably believes to be the Purchase Value for the membership interest and state the purchase price in its notice. If more than one Person is acquiring an interest, the decision of the holders of a majority of the Percentages held by all such parties shall be deemed the decision of the Acquiring Party. The Selling Party shall have thirty (30) days to notify the Acquiring Party in Writing of any objection to such purchase price. If the Selling Party fails to timely object to the purchase price, then the proposed purchase price shall be the purchase price of the membership interests.

(b) If the Selling Party does timely object, the Selling Party shall have the right to engage an independent certified public accountant or certified appraiser to perform a determination of the Purchase Value of the membership interest subject to the terms hereof. Such determination shall be completed within twenty (20) days after the Selling Party has delivered notice of objection to the Acquiring Party. The determination so rendered shall be the purchase price of the membership interests unless the Acquiring Party notifies the Selling Party in Writing of any objection to such purchase price within ten (10) days after the Selling Party has delivered notice of the determination to the Acquiring Party on behalf of the Company. If the Acquiring Party so objects to the purchase price, the Acquiring Party shall have the right to engage an independent certified public accountant or certified appraiser to perform another determination of the Purchase Value of the membership interests. Such determination shall be completed within twenty (20) days after the Acquiring Party has delivered notice of objection to the Selling Party. If the second determination differs from the first, the two firms shall meet and attempt to render a joint determination within five (5) days after delivery of the second determination. If for any reason such firms fail to agree on a joint determination during such five-day period, they shall mutually agree upon and appoint a third independent certified public accountant or certified appraiser within the next five (5) days who shall perform a determination of the Purchase Value of the membership interests within twenty (20) days of appointment, which determination shall be and constitute the purchase price of the membership interests. The determination of the purchase price pursuant to this Section shall be conclusive and binding upon the parties. Each party will bear any and all expenses incurred as the result of their objections to the purchase price and the employment of a suitable firm to render a determination pursuant thereto and the Selling Party and the Acquiring Party shall bear equally the costs of any third firm required to determine the Purchase Value of the membership interests. If the Acquiring Party consists of multiple Persons, such Persons shall bear such costs, absent a different agreement at the time, pro-rata in accordance with their respective Percentages.

8.5 Closing of Sale; Payment of Purchase Price. At the closing of any sale of a membership interest pursuant to Section 8.1, 8.2 or 8.3, the Selling Party shall assign and deliver the membership interest to the Acquiring Party free and clear of all security interests, liens or other encumbrances. If the sale is pursuant to an option under Section 8.1, payment of the purchase price shall be as specified in the notice thereunder unless agreed by the parties. If the sale is being made pursuant to a Put Option of a Personal Representative pursuant to Section 8.2(c), unless otherwise agreed by the parties, the purchase price shall be payable ten percent (10%) in cash at the time of closing and the balance evidenced by a five-year promissory note executed by the Company, payable in annual amortized installments, including principal and interest, the first such installment being due one year following the closing, and bearing interest at the “Prime Rate” quoted in the “Money Rate” section of the *Wall Street Journal* on the last business day prior to the date of the note (or in the event that such prime rate quotation is not available, the prime rate quoted in another nationally distributed newspaper or periodical designated by the Selling Party), and secured by the membership interest being purchased. If the sale is pursuant to any other option, payment of the purchase price shall be in cash at the time of the closing unless agreed by the parties. ***[DRAFTING NOTE: See Section III.I. of the Accompanying Article. The drafter should give careful consideration to what***

payment terms are appropriate in a specific transaction or relationship.] Any transfer or similar taxes involved in such sale shall be paid by the Selling Party, and the Selling Party shall provide the Acquiring Party with such evidence of the Selling Party's authority to sell hereunder and such additional instruments as the Acquiring Party may reasonably request.

8.6 **Basis Adjustment.** Upon the transfer of all or part of a membership interest in the Company, at the request of the transferee of the interest, the Managers may, in their sole discretion, cause the Company to elect, pursuant to Section 754 of the Code or the corresponding provisions of subsequent law, to adjust the basis of the Company properties as provided in Sections 734 and 743 of the Code.

Article 9

Exculpation, Scope of Duties, Indemnification and Advancement

9.1 Exculpation.

(a) For purposes of this Agreement, "**Covered Person**" means (i) any Manager, (ii) any Member and (iii) any officer of the Company. The term "**Covered Person**" shall also mean any Person with the power, whether through ownership of voting securities, by contract or otherwise, to direct or cause the direction of the actions of the Manager or Member (a "**Control Person**").

(b) A Covered Person shall not be liable to the Company or the Members for any loss, damage or claim arising out of any act or omission in the Covered Person's capacity as a Covered Person or by reason of the fact that the Covered Person is or was a Covered Person (**INCLUDING ANY LOSS, DAMAGE OR CLAIM ARISING OUT OF THE COVERED PERSON'S NEGLIGENCE**), provided that such loss, damage or claim did not arise from or constitute gross negligence, bad faith, willful misconduct, or a breach of this Agreement by the Covered Person.

(c) The provisions of this Section 9.1 are intended to limit liability with regard to duties, if any, owed or asserted to be owed by Covered Persons, and such provisions shall in no way be deemed to create or impose duties on Covered Persons.

9.2 Scope of Duties of Covered Persons.

(a) The Members, in their capacity as Members, are not agents of the Company and have no agency authority on behalf of the Company. The Members, in their capacity as Members, owe no fiduciary duty to the Company, the Managers, or the other Members.

(b) The fiduciary duties of the Managers that are owed by reason of their capacity as Managers are owed to the Company, and the Managers shall owe no fiduciary duty to any individual Member or Manager. The fiduciary duty to the Company of a Manager or officer, and the fiduciary duty to the Company, if any, of a Control Person of a Manager, shall be limited to refraining from acts or omissions constituting gross negligence, bad faith or willful misconduct. *[DRAFTING NOTE: See Section III.J. of the Accompanying Article for a discussion of considerations related to articulating the duty of a Covered Person. The drafter should give careful consideration to what duty, if any, is appropriate in a specific transaction or relationship.]*

[DRAFTING NOTE: Section III.J. of the Accompanying Article includes model provisions specifically authorizing reliance on experts.]

[DRAFTING NOTE: Section III.J. of the Accompanying Article includes model provisions regarding limiting the duty of loyalty by permitting competition.]

9.3 **Indemnification.** A Covered Person shall be entitled to indemnification from the Company for any loss, damage or claim incurred by reason of the fact that the Covered Person is or was a Covered Person (**INCLUDING ANY LOSS, DAMAGE OR CLAIM ARISING OUT OF THE COVERED PERSON'S NEGLIGENCE**), except that no Covered Person shall be entitled to be indemnified in respect of any loss, damage or claim incurred by that Covered Person by reason of that Covered Person's bad faith, gross negligence, willful misconduct or breach of this Agreement. Any indemnity under this Section 9.3 shall be provided out of and to the extent of Company assets only, and no Member shall have any personal liability on account thereof.

9.4 **Expenses.** Expenses (including legal fees) incurred by a Covered Person in defending any claim, demand, action, suit or proceeding brought against the Covered Person by reason of the fact that the Covered Person is or was a Covered Person shall, from time to time, be advanced by the Company before the final disposition of the claim, demand, action, suit or proceeding upon receipt by the Company of a Written undertaking by or on behalf of the Covered Person to repay that amount if it shall be determined that the Covered Person is not entitled to be indemnified under Section 9.3. The Company may enter into indemnity contracts with any Covered Person and the Managers may adopt Written procedures pursuant to which arrangements are made for the advancement of expenses and the funding of obligations under this Section 9.4 and containing other procedures regarding indemnification as are appropriate.

9.5 **Insurance.** The Company may purchase and maintain insurance, to the extent and in amounts the Managers deem reasonable, on behalf of Covered Persons and other Persons as the Managers shall determine, against any liability that may be asserted against or expenses that may be incurred by that Person in connection with the activities of the Company, regardless of whether the Company would have the power to indemnify that Person against the liability under this Agreement. The Company shall have no obligation to fund indemnification of any Person to the extent the liability is covered by insurance. The Company's obligation to fund indemnification of any Person shall commence only after all available insurance has been exhausted.

9.6 **Duration of Protection.** All provisions of this Article 9 shall apply to any former Member or Manager or Control Person thereof for all actions or omissions taken while such Member or Manager was a Member or Manager, as applicable, to the same extent as if that Person were still a Member or Manager, as applicable.

Article 10

Winding Up

10.1 **Events Requiring Winding Up.** The Company shall be wound up only on the first to occur of any one or more of the following:

- (a) the affirmative vote or Written consent of all of the Members;

(b) the occurrence of any event that terminates the continued membership of the last remaining Member in the Company unless the legal representative or successor of the Member agrees to continue the Company and appoints a successor Member in accordance with the BOC;

(c) entry of a judicial order to wind up the Company; or

(d) the involuntary termination of the Company under the BOC or Texas Tax Code, unless the Company is reinstated as provided by law.

10.2 Revocation or Reinstatement. A vote or consent to wind up as provided in Section 10.1(a) may only be revoked upon the affirmative vote or Written consent of all of the Members. In the event of a termination of the Company under the BOC, the Company may only be reinstated upon the affirmative vote or Written consent of all of the Members.

10.3 Winding Up Affairs and Distribution of Assets.

(a) If an event requiring the winding up of the Company occurs and is not revoked, the Managers or if there are no remaining Managers a Person designated for this purpose by the Members (the remaining Manager or Managers or the Person so designated being called the “**Liquidating Agent**”), as soon as practicable shall wind up the affairs of the Company and sell and/or distribute the assets of the Company. The Liquidating Agent is expressly authorized and empowered to execute any and all documents necessary or desirable to effectuate the liquidation and termination of the Company and the transfer of any assets. The Liquidating Agent shall apply and distribute the proceeds of the sale or liquidation of the assets and property of the Company in the following order of priority, unless otherwise required by nonwaivable provisions of applicable law:

(i) to pay (or to make provision for the payment of) all creditors of the Company (including Members who are creditors of the Company), in the order of priority provided by law or otherwise, in satisfaction of all debts, liabilities or obligations of the Company due its creditors;

(ii) after the payment (or the provision for payment) of all debts, liabilities and obligations of the Company in accordance with clause (i) above, any balance remaining shall be distributed to the Members having positive Capital Accounts in relative proportion to those Capital Accounts.

(b) The Liquidating Agent shall have sole discretion to determine whether to liquidate all or any portion of the assets and property of the Company and the consideration to be received for that property.

(c) If the Company’s property is not sufficient to discharge all of the Company’s liabilities and obligations, the Liquidating Agent shall apply its property, or make adequate provision for the application of its property, to the extent possible, to the just and equitable discharge of its liabilities and obligations, including liabilities and obligations owed to the Members other than for distributions.

(d) Except as required by nonwaivable provisions of the BOC, no Member shall have any obligation at any time to contribute any funds to replenish any negative balance in the Member’s Capital Account.

10.4 **Termination.** On compliance with the distribution plan described in Section 10.3, the Liquidating Agent shall execute, acknowledge and cause to be filed a certificate of termination. Except at otherwise provided by the BOC, the Company shall cease to exist upon the filing of the certificate of termination with the Secretary of State of Texas.

Article 11

Miscellaneous Provisions and Definitions

11.1 **Notices.** Any notice to be given under this Agreement must be in Writing and mailed, transmitted by facsimile or by electronic message, or delivered personally (a) if to the Company, to the registered agent of the Company at the registered address of the Company, (b) if to any initial Member, to such Member at an address therefor set forth on **Exhibit "A"** or, (c) if to any Member subsequently admitted, to an address set forth in the document in which such Member agreed to be bound by this Agreement, or in each case at such other address as any Person entitled to notice hereunder may designate by notice to the Company and all of the Members. Notice of a meeting that is mailed is considered to be delivered on the date notice is deposited in the United States mail. Notice of a meeting that is transmitted by facsimile or electronic message is considered to be delivered when the facsimile or electronic message is successfully transmitted. Notice of a meeting that is personally delivered to the Person is considered to be delivered when received by the Person.

11.2 **Entire Agreement.** This Agreement supersedes all prior agreements and understandings among the Members with respect to the Company.

11.3 **Amendments.** The affirmative vote or Written consent of all of the Members is required to amend the certificate of formation of the Company or this Agreement; provided that upon the admission of any new Member as authorized by this Agreement, amendment of **Exhibit "A"** of this Agreement to reflect the admission of the new Member shall be deemed approved by the Members.

11.4 **Governing Law.** This Agreement shall be governed by and construed in accordance with the law of Texas.

11.5 **Power of Attorney.** Each Member constitutes and appoints the Managers, and each of them, the true and lawful attorney of such Member with full power of substitution to make, execute, sign, acknowledge and file (a) all certificates and instruments necessary to form or qualify, or continue the existence or qualification of, the Company in any jurisdiction or before any governmental authority and (b) any amendments to **Exhibit "A"** to this Agreement to reflect the admission of any new Member if the same is authorized by this Agreement. This grant of a power of attorney is coupled with an interest and shall survive a Member's disability, incompetence, death or assignment by such Member of the membership interest pursuant to this Agreement.

11.6 **Binding Effect; No Third-Party Beneficiaries.** This Agreement shall be binding upon, and, to the extent provided herein, inure to the benefit of, the signatories of this Agreement and any Members subsequently admitted, their spouses, heirs, devisees, executors, legal representatives, successors, and assigns. Article 9 of this Agreement shall also inure to the benefit of Covered Persons as defined therein. The Members acknowledge and agree that this Agreement is intended to be binding upon and to inure to the benefit of the Company and that the provisions of this Agreement shall be enforceable by and against the Company. The obligations of the Company pursuant to this Agreement are the obligations of

the Company only, and absent additional Written agreement, the Members have no personal liability for the obligations of the Company, including any obligations pursuant to Article 8 and Article 9 of this Agreement. No creditor of the Company or of a Member is entitled to or is intended to have third-party beneficiary status to enforce any obligation of any party under this Agreement.

11.7 **Counterparts.** This Agreement may be executed in any number of counterparts or with counterpart signature pages, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

11.8 **Certain Definitions and Construction.**

(a) As used in this Agreement, the following terms have the following meanings:

(i) “**Affiliate Transfer**” means, if the transferor is an individual, a gift or contribution by the transferor prior to the transferor’s death to a member of the transferor’s immediate family (i.e. parents, descendants, siblings or spouse) or to a trust, partnership or other entity controlled by or for the benefit of such transferor or such transferor’s immediate family. If the transferor is an entity, “**Affiliate Transfer**” means the transfer or contribution of the membership interest to another entity so long as the Person or Persons with the power, whether through ownership of voting securities, by contract or otherwise, to direct or cause the direction of the management and policies of the transferor entity have the power to direct or cause direction of the management and policies of the transferee entity.

(ii) “**Agreement**” means this Company Agreement as it may be amended from time to time as provided herein.

(iii) “**Available Cash**” means cash on hand held by the Company that the Managers determine is not required by operations or as a reasonable reserve for capital replacements.

(iv) “**Capital Account**” means the capital account of a Member in the Company pursuant to Section 4.3.

(v) “**Code**” means the Internal Revenue Code of 1986.

(vi) “**Managers**” means the Person or Persons listed in the Company’s Certificate of Formation and any successor Manager or Managers pursuant to Article 3.

(vii) “**Member**” means any Person admitted to the Company as a Member as provided in this Agreement but excludes any such Person that has ceased to be a Member as provided in this Agreement or the BOC.

(viii) “**Percentage**” for any Member means the membership interest of the Member expressed as a percentage. The Percentages of the initial Members as of the formation of the Company are set forth in **Exhibit “A”**. **Exhibit “A”** shall be amended as necessary to reflect any changes in Percentages as provided herein. The total Percentages of membership interests owned by all Members and assignees at any point in time shall equal 100%. Upon the purchase by the Company of a membership interest, the Percentage of the purchased membership

interest shall no longer be included in the total Percentages, and the Percentages of membership interests owned by Members and assignees shall be adjusted accordingly. Upon the issuance of an additional membership interest, the Percentages of Members and assignees who have not been issued an additional interest shall be decreased accordingly. For purposes of Sections 3.3, 3.4, 3.5, 3.7 and 3.12, the Percentage representing all or any portion of a membership interest assigned by a Member shall be attributed to the assignor Member if the assignor Member has not ceased to be a Member. If the assignor Member has ceased to be a Member and the Member's assignee has not been admitted as a Member, the Percentage of the assignee shall not be included for purposes of Sections 3.3, 3.4, 3.5, 3.7 and 3.12, and the determination of a "majority" of the Percentages referenced in those Sections shall be made on the basis of Percentages held or attributed to Persons who are at the time Members.

(ix) "**Person**" means any individual, corporation, partnership, limited liability company, business trust or other entity, series of an entity, or government or governmental agency or instrumentality.

(x) "**Writing**" or "**Written**" means an expression of words, letters, characters, numbers, symbols, figures or other textual information that is inscribed on a tangible medium or that is stored in an electronic or other medium that is retrievable in a perceivable form. Unless the context requires otherwise, the term: (1) includes stored or transmitted electronic data, electronic transmissions, and reproductions of Writings; and (2) does not include sound or video recordings of speech other than transcriptions that are otherwise "Writings."

(b) In this Agreement:

(i) Terms defined in the singular have the corresponding meaning in the plural and vice versa.

(ii) All pronouns and any variations thereof contained herein shall be deemed to refer to the masculine, feminine, neuter, singular or plural, as the identity of the Person or Persons may require.

(iii) The word "include" and its derivatives means "include without limitation."

(iv) References to Articles, Sections and Exhibits are to the specified Articles and Sections of, and Exhibits to, this Agreement unless the context otherwise requires. Each Exhibit to this Agreement is made a part of this Agreement for all purposes.

(v) References to statutes or regulations are to those statutes or regulations as currently amended and to the corresponding provisions as they may be amended or superseded in the future.

[Signature page follows]

IN WITNESS WHEREOF, the undersigned Members have duly executed this Agreement as of the day and year first above written.

MEMBERS:

ACKNOWLEDGMENT AND CONSENT OF SPOUSES

The undersigned are the spouses of the Members and are executing this Agreement in connection with the execution of this Agreement by the Members. Each of the undersigned acknowledges and represents as follows: I have been provided a copy of the Agreement and have had the opportunity to read and review the Agreement. I approve of all of the provisions of the Agreement and agree to be bound by and accept the terms of the Agreement, but I understand that I am not a Member of the Company. My execution of this Agreement does not alter the legal status, characterization or rights of management of any membership interests now or hereafter acquired by my spouse, and my spouse's membership interests are subject to my spouse's sole management, control and disposition. I understand that the Company and the Members will rely on this acknowledgment and consent in conducting the Company's activities and operations.

SPOUSES OF MEMBERS:

EXHIBIT A

**NAMES, ADDRESSES, PERCENTAGES AND CAPITAL
CONTRIBUTIONS OF INITIAL MEMBERS**

<u>Name and Address (Postal; E-mail; Cell phone text) for Notice</u>	<u>Percentage</u>	<u>Capital Contribution</u>
_____ _____ _____ _____	_____%	\$ _____ [or description of contributed asset(s)]
_____ _____ _____ _____	_____%	\$ _____ [or description of contributed asset(s)]

Appendix B

**Model Company Agreement for Member-Managed, Multi-Member
Limited Liability Company**

This Model Agreement is Appendix B to an article by Cliff Ernst, Elizabeth S. Miller and Doug Jones entitled *Model Company Agreements* (the “Accompanying Article”). This Model Agreement should not be considered a form to be completed by filling in the blanks. Drafters should be certain that any agreement used by them is appropriate for the particular transaction. This Model Agreement should be read together with the Accompanying Article, including the various references to the Accompanying Article throughout this Model Agreement.

**COMPANY AGREEMENT
OF**

_____, LLC,
a Texas limited liability company

This Company Agreement (this “**Agreement**”), dated effective the ____ day of _____, 20____, is executed and agreed to, for good and valuable consideration, by the initial Members listed on **Exhibit “A”**.

Article 1

Formation

1.1 **Formation.** _____, LLC (the “**Company**”) was formed as a limited liability company under and pursuant to the Texas Business Organizations Code (the “**BOC**”) and other relevant laws of the State of Texas by the filing of a certificate of formation with the Secretary of State of the State of Texas on _____, 20____.

1.2 **Name.** The name of the Company shall be _____, LLC. The Company shall conduct business under that name or such other names complying with applicable law as the Members may determine from time to time.

1.3 **Duration.** The Company shall exist until terminated in accordance with this Agreement.

1.4 **Purpose.** The purpose of the Company shall be to engage in the business of (insert description of business) and to engage in any other lawful business or activity necessary or convenient in pursuit of the foregoing purposes.

1.5 **Principal Office.** The Company’s principal office shall be _____ or such other place as the Members may determine from time to time.

1.6 **Registered Office and Registered Agent.** The initial address of the registered office of the Company in the State of Texas shall be _____, and the name of the Company’s initial registered agent at that address shall be _____. The Members may change the registered office and the registered agent of the Company from time to time. The Members may cause the Company to qualify to do business as a limited liability company (or other entity in which the Members

have limited liability) in any other jurisdiction and to designate any registered office or registered agent in any such jurisdiction.

1.7 **Definitions.** Certain terms used in this instrument are capitalized. Such terms shall have the meaning set forth in the text or in Section 11.8.

Article 2

Members and Membership Interests

2.1 **Initial Members.** In connection with the formation of the Company, the Persons executing this Agreement as Members are admitted to the Company as Members effective as of the date of the Company's formation. The Percentage held by each of the Members is set forth next to such Member's name on **Exhibit "A"**.

2.2 **Issuance of Membership Interests After Formation of Company.** The Company, after the formation of the Company, may issue membership interests in the Company to any Person with the affirmative vote or Written consent of all of the Members of the Company. Any such affirmative vote or Written consent of the Members shall specify the Capital Contribution, if any, required in connection with the new membership interest, the Percentage represented by the newly issued membership interest and all changes in the Percentages represented by the membership interests outstanding prior to the issuance of the new membership interest.

2.3 **Nature of Membership Interest.** A membership interest in the Company is personal property. A Member of the Company or an assignee of a membership interest in the Company does not have an interest in any specific property of the Company. A membership interest includes a Member's or assignee's share of profits and losses or similar items and the right to receive distributions as provided in this Agreement, but does not include a Member's right to participate in management.

2.4 **Withdrawal or Expulsion of Member.**

(a) A Member of the Company may withdraw as a Member at any time by providing Written notice of the Member's withdrawal to the Company. The withdrawal shall take effect at the time specified in the notice, and unless otherwise specified in the notice, acceptance of the withdrawal shall not be necessary to make it effective. When the withdrawal takes effect, the withdrawing Member shall cease to be a Member and thereafter shall be deemed an assignee of any membership interest owned by the withdrawn Member. The withdrawal of a Member shall not entitle the withdrawn Member to any distribution or payment for the withdrawn Member's membership interest other than distributions that an assignee would be entitled to receive under Section 2.7.

(b) A Member of the Company may be expelled by unanimous vote of all other Members (not including the Member to be expelled) if that Member has (a) materially breached this Agreement, (b) committed fraud, theft, or gross negligence injuring the Company or one or more Members of the Company; or (c) engaged in wrongful conduct that adversely and materially affects the business or operation of the Company. When the expulsion takes effect, the expelled Member shall cease to be a Member and thereafter shall be deemed an assignee of any membership interest owned by the expelled Member. The expulsion of the expelled Member shall not entitle the expelled Member to any distribution or payment for the expelled Member's membership interest other than distributions that an assignee would be entitled to receive under

Section 2.7. Expulsion shall be in addition to, and not in lieu of, any remedies otherwise available against the expelled Member in connection with the acts or omissions constituting grounds for expulsion.

[DRAFTING NOTE: See Section III.C. of the Accompanying Article for a discussion of considerations in connection with withdrawal and expulsion of a member.]

2.5 Assignment of Membership Interest. Subject to the requirements of Article 8, a membership interest in the Company may be wholly or partly assigned. An assignment of a membership interest in the Company is not an event requiring the winding up of the Company and does not entitle an assignee who is not already a Member of the Company to participate in the management and affairs of the Company, become a Member of the Company or exercise any rights of a Member of the Company.

2.6 Admission of New Members. Any Member of the Company who is issued a new membership interest as provided in Section 2.2 or who acquires a membership interest by assignment (including by reason of death or divorce) shall become a Member of the Company with respect to the new or assigned membership interest immediately upon the issuance or assignment of the membership interest. Approval by the Members pursuant to Section 2.2 of the issuance of a new membership interest in the Company to a Person who is not already a Member shall be deemed approval of the admission of such Person as a Member. An assignee of a membership interest in the Company who is not already a Member of the Company is entitled to become a Member of the Company on the affirmative vote or Written consent of all of the Company's Members. Any Person who desires to become a Member after the formation of the Company shall, as a condition to becoming a Member and in addition to any other conditions set forth herein or established by the Members, execute and deliver an agreement to be bound by the terms and provisions of the Agreement. Such agreement shall also state an address for the Member for notice hereunder.

2.7 Rights and Duties of Assignee of Membership Interest Before Membership.

(a) A Person who is assigned a membership interest in the Company is entitled to:

(i) receive any allocation of income, gain, loss, deduction, credit, or a similar item that the assignor is entitled to receive to the extent the allocation of the item is assigned;

(ii) receive any distribution the assignor is entitled to receive to the extent the distribution is assigned;

(iii) subject to Article 7, require, for any proper purpose, reasonable information or a reasonable account of the transactions of the Company; and

(iv) subject to Article 7, make, for any proper purpose, reasonable inspections of the books and records of the Company.

(b) An assignee of a membership interest in the Company is not liable as a Member of the Company until the assignee becomes a Member of the Company.

2.8 Rights and Liabilities of Assignee of Membership Interest After Becoming Member.

(a) An assignee of a membership interest in the Company, after becoming a Member of the Company, is:

(i) entitled to the same rights and powers granted or provided to a Member of the Company by this Agreement; and

(ii) subject to the same restrictions and liabilities placed or imposed on a Member of the Company by this Agreement; and

(iii) except as provided by subsection (b) of this Section 2.8, liable for the assignor's obligation to make contributions to the Company.

(b) An assignee of a membership interest in the Company, after becoming a Member of the Company, is not obligated for a liability of the assignor that:

(i) the assignee did not have knowledge of on the date the assignee became a Member of the Company; and

(ii) could not be ascertained from this Agreement.

2.9 Rights and Duties of Assignor of Membership Interest. An assignor of a membership interest in the Company continues to be a Member of the Company and is entitled to exercise any rights or powers of the Member not vested in the assignee by virtue of the assignment (including the right to vote on or consent to any matters requiring approval or consent of the Members under this Agreement) until the assignee becomes a Member of the Company. Upon admission of an assignee as a Member, the assignor shall cease to be a Member with respect to the membership interest assigned.

2.10 Certificates. Membership interests in the Company shall be uncertificated.

[DRAFTING NOTE: Section III.C. of the Accompanying Article includes model provisions regarding certificated membership interests.]

2.11 Representations and Warranties. Each Member hereby represents and warrants to the Company and each other Member that (a) the Member has duly executed and delivered this Agreement; and (b) the Member's authorization, execution, delivery, and performance of this Agreement do not conflict with any other agreement or arrangement to which that Member is a party or by which that Member is bound.

Article 3

Management of the Company, Meetings and Voting

3.1 **Management by Members.** The authority to manage, control and operate the Company shall be vested in the Members of the Company. The foregoing shall not restrict the authority of the officers of the Company as described in Section 3.2 below. By the unanimous vote of all of the Members, the authority of the Members to act may be delegated to a committee of less than all of the Members. Each Member is an agent of the Company for the purpose of carrying out the Company's business in accordance with the authority granted by action of the Members.

3.2 **Officers and Other Agents.** The Members may appoint such officers or other agents of the Company as the Members may deem appropriate and may remove any such officer or agent at any time with or without cause. The Members may delegate to the Company's officers such authority as the Members may deem appropriate and subsequently revoke or modify that authority. The Members also may delegate authority to other Persons and revoke that delegation as the Members may deem appropriate including the power to delegate authority.

3.3 **Meetings of Members or Committees of Members.** Any Member or Members may call a meeting of the Members or a committee of the Members. The Members of the Company or a committee of the Members may hold meetings at the principal office of the Company or, if remote attendance is allowed and provided in accordance with Section 3.4, at another place in or outside Texas designated by the Member or Members calling the meeting. Members of the Company owning a majority of all Members' Percentages in the Company constitutes a quorum for the purposes of transacting business at a meeting of the Members. A majority of all the members of a committee of the Members constitutes a quorum for the purpose of transacting business at a meeting of the committee of the Members.

3.4 **Alternative Forms of Meetings.**

(a) The Members or a committee of the Members may hold meetings and allow attendance at meetings by using a conference telephone or similar communications equipment, or another suitable electronic communications system, including videoconferencing technology or the Internet, or any combination, if the telephone or other equipment or system permits each individual participating in the meeting to communicate with all other individuals participating in the meeting.

(b) If voting is to take place at the meeting, the Company must implement reasonable measures to verify that every Person voting at the meeting by means of remote communications is sufficiently identified, and if a proxy for a Person is voting at the meeting, to verify that the proxy requirements set forth in Section 3.10 are satisfied.

3.5 **Participation Constitutes Presence.** A Person participating in a meeting is considered present at the meeting unless the participation is for the express purpose of objecting to the transaction of business at the meeting on the ground that the meeting has not been lawfully called or convened.

3.6 **Notice of Meetings.** Notice of a meeting of the Members or a committee of the Members must be given in a manner described in Section 11.1 and state the date and time of the meeting and the location of the meeting or, if the meeting is held or attendance is allowed by using a conference telephone or other communications system authorized by Section 3.4, the form of communication used for the

meeting. Notice of a meeting shall be given not later than the third (3rd) day before the date of the meeting. Notice of a meeting is not required to be given to a Member or committee member entitled to notice under this Agreement if the Person entitled to notice signs a Written waiver of notice of the meeting, regardless of whether the waiver is signed before or after the time of the meeting. If a Person entitled to notice of a meeting participates in the meeting, the Person's participation constitutes a waiver of notice of the meeting unless the Person participates in the meeting solely to object to the transaction of business at the meeting on the ground that the meeting was not lawfully called or convened.

3.7 Acts of Members Generally. Except as otherwise provided in this Agreement, the affirmative vote of Members owning a majority of all Members' Percentages in the Company constitutes an act of the Members.

3.8 Votes Required to Approve Certain Actions. A Fundamental Business Transaction of the Company or an action that would make it impossible for the Company to carry out the ordinary business of the Company must be approved by the affirmative vote of all of the Members. For purposes of this Agreement, the term "**Fundamental Business Transaction**" shall mean a merger, interest exchange, conversion, or sale of all or substantially all of the Company's asset.

3.9 Acts of Committees. The affirmative vote of a majority of all members of a committee of the Members constitutes an act of the committee of the Members.

3.10 Manner of Voting. A Member of the Company may vote at a meeting in person or by a proxy executed in Writing by the Member to another Member. A member of a committee of the Members may vote at a meeting in person or by a proxy executed in Writing by the committee member to another committee member. Except as provided in this Section, Members and committee members may not vote by proxy.

3.11 Action by Written Consent. An action may be taken without holding a meeting, without providing notice, or without taking a vote if a Written consent or consents stating the action to be taken is obtained from the number of Members or committee members, as appropriate, necessary to have at least the minimum number of votes that would be necessary to take the action at a meeting at which each Member or committee member, as appropriate, entitled to vote on the action is present and votes. Any of the following shall satisfy the requirement for a Written consent: an originally signed document; a photographic, photostatic, facsimile or similarly reliable reproduction of an originally signed document; or an electronic message if the transmission contains or is accompanied by information allowing a determination (i) that the message was transmitted by the consenting Member or committee member and (ii) of the date of the transmission. Unless otherwise dated, a consent given by electronic message is considered given on the date transmitted.

3.12 Explicit Vote or Consent Required. The exclusive methods by which Members or committee members may take action with respect to the Company are voting affirmatively at a meeting or giving Written consent as provided in this Article 3. A Member or committee member shall not be deemed to have voted in favor of, or consented to, an action unless such Person has voted affirmatively at a meeting or given explicit consent as provided in this Article 3.

Article 4

Capital Contributions

4.1 **Agreed Capital Contributions.** Each initial Member agrees to contribute to the capital of the Company the contribution set forth opposite such Member's name on the attached **Exhibit "A"**. Any Person issued a membership interest in the Company after the formation of the Company shall contribute to the capital of the Company the contribution, if any, approved as provided in Section 2.2. A Person's obligation to contribute to the capital of the Company may be released or settled only by the affirmative vote or Written consent of all Members.

4.2 **Additional Capital Contributions.** The Members may request, but may not require, that the Members make additional contributions to the capital of the Company.

4.3 **Capital Accounts.** A capital account ("**Capital Account**") shall be established for each Member and shall be maintained in such a manner as to correspond with the rules set forth in the Treasury Regulations (the "**Allocation Regulations**") promulgated under Section 704(b) of the Code. Except as otherwise required by the Allocation Regulations or the Code, a Member's Capital Account shall be increased by (i) the amount of any contribution of capital to the Company (based on the fair market value of the cash or other assets contributed) and (ii) allocations of income or gain (for Company book purposes) to the Member pursuant to this Agreement, and shall be reduced by (i) the amount of money distributed to the Member by the Company, (ii) the fair market value of any property distributed to the Member by the Company, and (iii) allocations of deduction or loss (for Company book purposes) to the Member by the Company pursuant to this Agreement. The Capital Accounts of the Members shall not bear interest. If any additional membership interests in the Company are to be issued in consideration for a contribution of property or cash or if any Company property is to be distributed in liquidation of the Company or an interest in the Company, the Capital Accounts of the Members (and the amounts at which all Company properties are carried on its books and records other than for income tax purposes) shall, immediately prior to such issuance or distribution, as the case may be, be adjusted (consistent with the provisions of Section 704 of the Code) upward or downward to reflect any unrealized gain or unrealized loss attributable to all Company properties (as if such unrealized gain or unrealized loss had been recognized upon actual sale of the properties upon a liquidation of the Company immediately prior to issuance or distribution). Except as otherwise required by the Allocation Regulations, in the event any membership interest in the Company is transferred in accordance with the terms of this Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent it relates to the transferred interest.

Article 5

Taxation and Allocations

5.1 **General.** Unless otherwise required by the Allocation Regulations or the Code, all items of income, gain, loss, deduction and credit of the Company shall be allocated to the Members for accounting and tax purposes pro rata according to their Percentages.

5.2 **Regulatory Allocations.** To the extent the Allocation Regulations or the Code require allocations for tax purposes that differ from the foregoing allocations, the Members may determine the manner in which such tax allocations shall be made so as to fully comply with the Allocation Regulations,

the Code, other applicable law and, at the same time to the extent reasonably possible, preserve the economic relationships among the Members as set forth in this Agreement.

5.3 **Reporting.** The Members are aware of the income tax consequences of the allocations made by this Article 5 and hereby agree to be bound by the provisions of this Article 5 in reporting their shares of Company items for income tax purposes.

Article 6

Distributions

6.1 **Distributions.** Available Cash shall be distributed at least annually to all of the Members pro rata according to their Percentages.

6.2 **Required Annual Tax Distribution.** Within sixty (60) days following the end of each fiscal year, the Company shall make an additional distribution to each Member in an amount equal to (i) the income tax liability of the Member attributable to the taxable income allocable to the Member for such fiscal year with respect to such Member's membership interest, computed as set forth in Article 5, less (ii) the aggregate amount of distributions to such Member by the Company during such fiscal year, if the amount per clause (i) is greater than the amount per clause (ii); provided, however, that the Company shall only be obligated to make distributions pursuant to this Section 6.2 to the extent that it has cash available in the ordinary course of its business and this Section 6.2 shall not require the Company to liquidate non-cash assets, to borrow funds or to require additional capital contributions for the purpose of making such distributions. A Member's income tax liability for purposes of this Section 6.2 shall be computed by multiplying the taxable income allocable to the Member by forty percent (40%).

Article 7

Bank Accounts, Books of Account, Reports and Fiscal Year

7.1 **Bank Account; Investments.** The Company shall establish one or more bank or other financial institution accounts into which all Company funds shall be deposited. Funds deposited by the Company into such accounts may be withdrawn only in furtherance of the business of the Company or for distribution to the Members pursuant to this Agreement. Pending withdrawal for such purposes, Company funds may be invested in such manner as the Members may determine.

7.2 Books and Records.

(a) The Company shall keep or cause to be kept books and records of the Company using a method consistent with that described in Treasury Regulation Section 1.704-1(b). Income, gain, loss and deduction of the Company (including income and gain exempt from tax and expenditures not deductible in computing the Company's taxable income) shall be computed based upon the book value of the Company's property using the same methods (e.g., cash or accrual accounting, or straight line or accelerated depreciation) as are used in computing the Company's taxable income. The books of the Company, for both tax and financial reporting purposes, shall be kept using the method of accounting selected by the Members.

(b) The books and records of the Company shall be maintained at the Company's principal office, and each Member shall be allowed reasonable access to such records for a purpose reasonably related to the Member's service to the Company in a management capacity.

(c) The Company shall provide an assignee of a membership interest access to the Company's books and records to the extent and as provided by this Section. An assignee of a membership interest who desires to examine or copy any of the Company's books and records (the "**Requester**") shall give Written notice to the Company specifying the books and records that the Requester desires to examine or copy and stating a proper purpose for examining or copying the requested books and records. Subject to this subsection and subsection (d) of this Section, within five days after the Requester submits such a Written notice, the Company will make available at its principal office the requested books and records if the requested books and records are required to be maintained by the Company under the BOC or consist of other information regarding the business, affairs and financial condition of the Company that is reasonable for the Requester to examine and copy. The requested books and records will be made available during regular business hours, and the examination and copying shall be at the expense of the Requester. The Company may deny a Requester access to the Company's books and records and information if the Requester: (i) has improperly used information obtained through a prior examination of the books and records of the Company or of any other entity; or (ii) was not acting in good faith or for a proper purpose in making the Requester's request for information.

(d) The Company may keep confidential from a Requester, for such period of time as the Members deem reasonable, any information that the Members reasonably believe to be in the nature of trade secrets or other information the disclosure of which the Members in good faith believe is not in the best interest of the Company or could damage the Company or its business or which the Company by law is required by law or by agreement with a third party to keep confidential.

7.3 Financial Information. As soon as is reasonably practicable after the end of each Company fiscal year, the Members shall cause to be prepared and furnished to each Member, at Company expense, a balance sheet of the Company (dated as of the end of the fiscal year then ended), and a related statement of income, loss and change in financial position for the Company (for the same year). Such financial information shall reflect the beginning balance in each Member's Capital Account as of the first day of such year, all distributions of cash made to each Member during the year, and the ending balance in each Member's Capital Account as of the last day of the year and is not required to be audited.

7.4 Tax Returns and Information; Governing Documents.

(a) The Members intend for the Company to be treated as a partnership for tax purposes. The Members shall prepare or cause to be prepared all federal, state and local income and other tax returns which the Company is required to file and shall furnish each Member both a copy of such Member's Schedule K-1 and the Company's tax return as soon as is reasonably practicable after the end of each Company fiscal year. On Written request to the Company, the Company shall provide to a Member or an assignee of a membership interest a free copy of (i) the Company's certificate of formation, including any amendments to or restatements of the certificate of formation; (ii) this Agreement, including any amendments to or restatements of this Agreement; and (iii) any federal, state and local tax returns of the Company for each of the preceding six years.

(b) For tax years ending on or before December 31, 2017, _____ shall be the "**Tax Matters Partner**" for purposes of Code Section 6231(a)(7) (prior to modification by the Bipartisan

Budget Act of 2015). The Tax Matters Partner shall cause to be prepared and shall sign all returns of the Company, make any election which is available to the Company, and monitor any governmental tax authority in any audit that the authority may conduct of the Company's books and records or other documents. If requested by the Tax Matters Partner, each Member shall take all actions required to authorize the Tax Matters Partner as that party with the sole authority to handle all tax matters of the Company. Each Member agrees to execute, certify, deliver, file and record at appropriate public offices or deliver to the Tax Matters Partner such documents as may be reasonably requested by the Tax Matters Partner to facilitate the handling of any tax matter as the Tax Matters Partner deems necessary.

(c) For tax years beginning on or after January 1, 2018;

(i) The "tax representative" of the Company (initially, _____) shall be the Company's designated representative within the meaning of Code Section 6223, with sole authority to act on behalf of the Company for purposes of subchapter C of Chapter 63 of the Code and any comparable provisions of state or local income tax laws. (Any person who is designated as the "tax representative" is referred to herein as the "**Tax Representative**".) For purposes of this Section 7.4(c), unless otherwise specified, all references to provisions of the Code shall be to such provisions as enacted by the Bipartisan Budget Act of 2015.

(ii) If the Company qualifies to elect pursuant to Code Section 6221(b) (or successor provision) to have federal income tax audits and other proceedings undertaken by each Member rather than by the Company, the Tax Representative shall cause the Company to make such election.

(iii) Notwithstanding other provisions of this Agreement to the contrary, if any "partnership adjustment" (as defined in Code Section 6241(a)(2)) is determined with respect to the Company, the Tax Representative, in its discretion, may cause the Company to elect pursuant to Code Section 6226 to have such adjustments passed through to the Members for the year to which the adjustment relates (i.e., the "reviewed year" within the meaning of Code Section 6225(d)(1)). In the event that the Tax Representative has not caused the Company to so elect pursuant to Code Section 6226, then any "imputed underpayment" (as determined in accordance with Code Section 6225) or "partnership adjustment" that does not give rise to an "imputed underpayment" shall be apportioned among the Members of the Company for the taxable year in which the adjustment is finalized in such manner as may be necessary (as determined by the Tax Representative in good faith) so that, to the maximum extent possible, the tax and economic consequences of the partnership adjustment and any associated interest and penalties are borne by the Members based upon their interests in the Company for the reviewed year.

(iv) Each Member agrees that, upon request of the Tax Representative, such Member shall take such reasonable actions as may be necessary or desirable (as determined by the Tax Representative) to (1) allow the Company to comply with the provisions of Code Section 6226 so that any "partnership adjustments" are taken into account by the Members rather than the Company or (2) file amended tax returns with respect to any "reviewed year" (within the meaning of Code Section 6225(d)(1)) to reduce the amount of any "partnership adjustment" otherwise required to be taken into account by the Company.

[DRAFTING NOTE: See Section III.H. of the Accompanying Article for model language that provides for past members to bear the imputed underpayment of taxes.]

7.5 **Fiscal Year.** The Company fiscal year shall be the calendar year.

Article 8

Transfer Restrictions and Push-Pull Buyout

[DRAFTING NOTE: See Section III.I of the Accompanying Agreement for a discussion of drafting issues that should be considered with drafting transfer restriction and buy-sell provisions.]

8.1 **Right of First Refusal.** Any Member who desires to sell, dispose of or otherwise transfer or assign all or any part of such Member's membership interest in any transaction other than an Affiliate Transfer shall first offer to sell to the Company all of the membership interest which such Member desires to transfer. The Company shall have an option, for a period of thirty (30) days after the Company and all of the Members have been given Written notice of the Member's desire to sell, dispose of or otherwise transfer and assign such membership interest, to elect to purchase such membership interest at the price and terms specified in the notice. If the Company does not so elect to purchase such membership interest, the selling Member shall offer the right to purchase such membership interest to the other Members, who shall have an option, for a period of thirty (30) days following the expiration of the Company's thirty (30) day option period, to elect to purchase such membership interest at the price and terms specified in the notice. If all or any portion of the purchase price specified in the notice pursuant to this Section 8.1 is not cash, the price shall be deemed cash equal to the fair market value of the noncash consideration and if the parties are unable to reach agreement as to such fair market value, then the fair market value shall be determined by appraisal using the same methodology for determination of Purchase Value set forth in Section 8.4(b). Any purchase by the Company or the Members pursuant to this Section 8.1 shall be closed in the manner specified in Section 8.5 within thirty (30) days after (i) the end of the applicable option period or (ii) determination of the fair market value of the noncash consideration, if later. If more than one Member elect to purchase the offered membership interest pursuant to the option granted to them pursuant to this Section 8.1, they shall, absent a different agreement at the time, acquire the offered membership interest pro-rata in accordance with their respective Percentages prior to their purchase pursuant to such option. If neither the Company nor the Members elect to purchase the offered membership interest pursuant to the options granted to them pursuant to this Section 8.1, then the offering Member shall have sixty (60) days after expiration of the options of the Company and the other Members in which to sell the offered membership interest at the price and terms identified in the notice to the purchaser(s) identified in the notice; provided that such purchaser(s) shall be assignee(s) only of such membership interest unless and until such purchaser(s) are admitted as Member(s) of the Company in accordance with Article 2 of this Agreement. In no event shall the offering Member be compelled to sell less than all of the membership interest offered by such Member. An assignee of a membership interest shall be subject to this Section 8.1 in the same manner as a Member.

8.2 **Death or Divorce of Member or Spouse.**

(a) On the death of a Member, subject to subsection (c) of this Section 8.2, the executor, administrator or personal representative (as applicable, the "**Personal Representative**") of the Deceased Member shall be treated as an assignee. The membership interest of such Personal Representative shall be subject to all the terms and provisions of this Agreement.

(b) Subject to subsection (d) of this Section 8.2, a Member's spouse shall become an assignee of the membership interest in the Company that the spouse succeeds to or obtains as the result of the termination of the marital relationship of the spouse and such Member.

(c) Upon the death of a Member (the “**Deceased Member**”), the Personal Representative of the Deceased Member shall have ninety (90) days after the Deceased Member’s date of death to cause the Company to purchase the Deceased Member’s membership interest for the Purchase Value (determined as set forth in Section 8.4(b)) (the “**Put Option**”). The purchase by the Company pursuant to the Put Option shall be closed in the manner specified in Section 8.5 within thirty (30) days after (i) the exercise of the Put Option or (ii) determination of the Purchase Value, if later. If the Personal Representative of the Deceased Member does not exercise its Put Option by notice to the Company within such ninety (90) day period or if a Personal Representative is not appointed within such ninety (90) day period, then the Company shall have the option within one hundred and twenty (120) days from date the Deceased Member’s date of death to elect to purchase the Deceased Member’s membership interest for the Purchase Value (determined as set forth in Section 8.4(b)). If the Company does not elect to purchase all of the Deceased Member’s membership interest, the remaining Member(s) shall have the option, for period of thirty (30) days following the expiration of the Company’s option period, to elect to purchase the Deceased Member’s membership interest not purchased by the Company for the Purchase Value (determined as set forth in Section 8.4(b)). Any purchase by the Company or the Members pursuant to this Section 8.2(c) shall be closed in the manner specified in Section 8.5 within thirty (30) days after (i) the end of the applicable option period or (ii) determination of the Purchase Value, if later. If more than one Member elect to purchase the Deceased Member’s membership interest pursuant to the option granted to them pursuant to this Section 8.2(c), they shall, absent a different agreement at the time, acquire the Deceased Member’s membership interest pro-rata in accordance with their respective Percentages prior to their purchase pursuant to such option. During the pendency of such options following the Deceased Member’s death, the remaining Member(s) may continue the business of the Company, but the estate or Personal Representative of the Deceased Member shall not be liable for any obligations incurred by the Company beyond the amount includable in the Deceased Member’s estate already invested or involved in the Company on the date of the Deceased Member’s death.

(d) In the event a Member (the “**Divorced Member**”) becomes divorced and such divorced spouse becomes the owner of or becomes entitled to any membership interest, the Divorced Member shall have an option, for a period beginning when the divorce decree becomes final and ending sixty (60) days after the Company and the remaining Member(s) of the Company have been notified of the final divorce decree, to elect to purchase the membership interest of such divorced spouse for its Purchase Value (determined as set forth in Section 8.4(b)). Any purchase by the Divorced Member pursuant to this Section 8.2(d) shall be closed in the manner specified in Section 8.5 within thirty (30) days after (i) the end of the option period or (ii) determination of the Purchase Value, if later. If the Divorced Member does not elect to purchase all of the membership interest of the divorced spouse, then the Company shall have an option, for a period of thirty (30) days following the expiration of the Divorced Member’s sixty (60) day option period, to elect to purchase such membership interest for its Purchase Value (determined as set forth in Section 8.4(b)). If neither the Divorced Member nor the Company elects to purchase all of the membership interest of the divorced spouse, the remaining Member(s) shall have an option, for a period of thirty (30) days following the expiration of the Company’s thirty (30) day option period, to elect to purchase such membership interest for its Purchase Value (determined as set forth in Section 8.4(b)). Any purchase by the Company or the Members pursuant to this Section 8.2(d) shall be closed in the manner specified in Section 8.5 within thirty (30) days after (i) the end of the applicable option period or (ii) determination of the Purchase Value, if later. If more than one Member elect to purchase the membership interest of the divorced spouse pursuant to the option granted to them pursuant to this Section 8.2(d), they shall, absent a different agreement at the time, acquire the membership interest pro-rata in accordance with their respective Percentages prior to their purchase pursuant to such option. If neither the Divorced Member nor the Company nor the remaining Member(s) elect to purchase the membership interest of the divorced spouse,

then such membership interest may be retained by the divorced spouse, subject to the obligations of this Agreement as an assignee. In no event shall the divorced spouse be compelled to sell less than all of such divorced spouse's membership interest.

(e) In the event of the death of a Member's spouse and such Member (the "**Surviving Member**") does not acquire by will or by operation of law all of the membership interest owned by the deceased spouse, the Surviving Member shall have an option, for a period beginning with the date of death and ending sixty (60) days after the Company and the remaining Member(s) have been notified of the death of the Surviving Member's spouse and the name and address of the duly qualified and acting Personal Representative of the deceased spouse, to elect to purchase the membership interest of the deceased spouse for its Purchase Value (determined as set forth in Section 8.4(b)). If the Surviving Member does elect to purchase the membership interest of the deceased spouse, then the Company shall have an option, for a period of thirty (30) days following the expiration of the Surviving Member's sixty (60) day option period, to elect to purchase such membership interest for its Purchase Value (determined as set forth in Section 8.4(b)). If neither the Surviving Member nor the Company elects to purchase all of the membership interest owned by the deceased spouse, then the remaining Member(s) shall have an option, for a period of thirty (30) days following the expiration of the Company's thirty (30) day option period, to elect to purchase such membership interest for its Purchase Value (determined as set forth in Section 8.4(b)). Any purchase by the Company or the Members pursuant to this Section 8.2(e) shall be closed in the manner specified in Section 8.5 within thirty (30) days after (i) the end of the applicable option period or (ii) determination of the Purchase Value, if later. If more than one Member elect to purchase the membership interest owned by the deceased spouse pursuant to the option granted to them pursuant to this Section 8.2(e), they shall, absent a different agreement at the time, acquire the membership interest pro-rata in accordance with their respective Percentages prior to their purchase pursuant to such option. If neither the Surviving Member nor the Company nor the remaining Member(s) exercise their option to purchase the membership interest owned by the deceased spouse, then such membership interest may be retained by each devisee or heir subject to the obligations of this Agreement as an assignee. In no event shall the Personal Representative or estate of the Surviving Member's deceased spouse be compelled to sell less than all of the membership interest owned by the deceased spouse.

(f) By executing this Agreement, the spouses of the Members, in addition to any other purposes for which they are executing this Agreement, agree to be bound by the terms of this Agreement with respect to any membership interests now owned or hereafter acquired in the Company. The execution of this Agreement by such spouses is not intended to alter, nor shall it be construed as altering, the existing status and characterization of the membership interests in the Company as the separate or community property of the Members.

8.3 **Push-Pull Buyout.**

(a) Each Member (the "**Offering Member**") may at any time give notice to all, but not less than all, of the other Members of the Offering Member's desire to either (a) sell all of the Offering Member's membership interest in the Company to the other Members or (b) buy all of the other Member's membership interests in the Company, specifying therein the price per Percentage and the other terms and conditions upon which the Offering Member will buy or sell. The other Members shall have an option, for a period of sixty (60) days after receiving such notice, to elect to purchase the membership interest of the Offering Member at the same price per Percentage and upon the same terms and conditions that the Offering Member is offering to sell the Offering Member's membership interest, the transaction to be closed in the manner specified in Section 8.5 within thirty (30) days after the end of such sixty (60) day period. If such

option to purchase is not exercised by any Member within the aforementioned period of sixty (60) days, then the Offering Member shall be obligated to purchase the membership interests of the other Members at the price per Percentage and upon the terms and conditions specified in the aforementioned notice, and the Members receiving the notice shall be obligated to sell their membership interests to the Offering Member upon such terms and conditions, the transaction to be closed in the manner specified in Section 8.5 within thirty (30) days after the end of such sixty (60) day period.

(b) If more than one Member elect to purchase the Offering Member's membership interest pursuant to the option granted to them hereunder, they shall, absent a different agreement at the time, acquire the Offering Member's membership interest pro-rata in accordance with their respective Percentages prior to their purchase pursuant to such option. If some Members exercise their option to sell and others exercise their option to purchase, then those Members exercising the option to purchase the Offering Member's membership interest may purchase all of the membership interests of Members opting to sell at the offered price, or, at their election, may purchase only the membership interest originally offered by the Offering Member.

(c) Any two or more Members may, if they so elect, institute the push-pull buyout under this Section as a block of membership interests by jointly commencing the offer to purchase or sell their membership interests to the other Member(s) as a block and conditioning the purchase and sale of the membership interests to the block of membership interests offered. In such event, the recipient Member(s) shall treat the membership interests as a block for purposes of exercising the offer to purchase or sell under this section.

8.4 Determination of Purchase Value.

(a) "**Purchase Value**" shall mean the amount of cash and fair market value of property which would be received by the holder of the membership interest to be sold hereunder if the Company sold its business and assets for cash at a purchase price equal to their fair market value as of the date of determination of the Purchase Value, and all remaining assets of the Company were distributed to the Members in accordance with this Agreement. Purchase Value shall be determined as of a date as near as reasonably practicable to the date of the occurrence of the event which results in the sale of the membership interest hereunder. The party whose membership interest is to be sold hereunder is hereafter referred to as the "**Selling Party**" and the party or parties acquiring that interest are hereafter referred to, individually or collectively, as the case may be, as the "**Acquiring Party**." In exercising the right to purchase the membership interests of any party, the Acquiring Party shall develop a purchase price which it reasonably believes to be the Purchase Value for the membership interest and state the purchase price in its notice. If more than one Person is acquiring an interest, the decision of the holders of a majority of the Percentages held by all such parties shall be deemed the decision of the Acquiring Party. The Selling Party shall have thirty (30) days to notify the Acquiring Party in Writing of any objection to such purchase price. If the Selling Party fails to timely object to the purchase price, then the proposed purchase price shall be the purchase price of the membership interests.

(b) If the Selling Party does timely object, the Selling Party shall have the right to engage an independent certified public accountant or certified appraiser to perform a determination of the Purchase Value of the membership interest subject to the terms hereof. Such determination shall be completed within twenty (20) days after the Selling Party has delivered notice of objection to the Acquiring Party. The determination so rendered shall be the purchase price of the membership interests unless the Acquiring Party notifies the Selling Party in Writing of any objection to such purchase price within ten (10) days after

the Selling Party has delivered notice of the determination to the Acquiring Party on behalf of the Company. If the Acquiring Party so objects to the purchase price, the Acquiring Party shall have the right to engage an independent certified public accountant or certified appraiser to perform another determination of the Purchase Value of the membership interests. Such determination shall be completed within twenty (20) days after the Acquiring Party has delivered notice of objection to the Selling Party. If the second determination differs from the first, the two firms shall meet and attempt to render a joint determination within five (5) days after delivery of the second determination. If for any reason such firms fail to agree on a joint determination during such five-day period, they shall mutually agree upon and appoint a third independent certified public accountant or certified appraiser within the next five (5) days who shall perform a determination of the Purchase Value of the membership interests within twenty (20) days of appointment, which determination shall be and constitute the purchase price of the membership interests. The determination of the purchase price pursuant to this Section shall be conclusive and binding upon the parties. Each party will bear any and all expenses incurred as the result of their objections to the purchase price and the employment of a suitable firm to render a determination pursuant thereto and the Selling Party and the Acquiring Party shall bear equally the costs of any third firm required to determine the Purchase Value of the membership interests. If the Acquiring Party consists of multiple Persons, such Persons shall bear such costs, absent a different agreement at the time, pro-rata in accordance with their respective Percentages.

8.5 Closing of Sale; Payment of Purchase Price. At the closing of any sale of a membership interest pursuant to Section 8.1, 8.2 or 8.3, the Selling Party shall assign and deliver the membership interest to the Acquiring Party free and clear of all security interests, liens or other encumbrances. If the sale is pursuant to an option under Section 8.1, payment of the purchase price shall be as specified in the notice thereunder unless agreed by the parties. If the sale is being made pursuant to a Put Option of a Personal Representative pursuant to Section 8.2(c), unless otherwise agreed by the parties, the purchase price shall be payable ten percent (10%) in cash at the time of closing and the balance evidenced by a five-year promissory note executed by the Company, payable in annual amortized installments, including principal and interest, the first such installment being due one year following the closing, and bearing interest at the “Prime Rate” quoted in the “Money Rate” section of the *Wall Street Journal* on the last business day prior to the date of the note (or in the event that such prime rate quotation is not available, the prime rate quoted in another nationally distributed newspaper or periodical designated by the Selling Party), and secured by the membership interest being purchased. If the sale is pursuant to any other option, payment of the purchase price shall be in cash at the time of the closing unless agreed by the parties. ***[DRAFTING NOTE: See Section III.I. of the Accompanying Article. The drafter should give careful consideration to what payment terms are appropriate in a specific transaction or relationship.]*** Any transfer or similar taxes involved in such sale shall be paid by the Selling Party, and the Selling Party shall provide the Acquiring Party with such evidence of the Selling Party’s authority to sell hereunder and such additional instruments as the Acquiring Party may reasonably request.

8.6 Basis Adjustment. Upon the transfer of all or part of a membership interest in the Company, at the request of the transferee of the interest, the Members may, in their sole discretion, cause the Company to elect, pursuant to Section 754 of the Code or the corresponding provisions of subsequent law, to adjust the basis of the Company properties as provided in Sections 734 and 743 of the Code.

Article 9

Exculpation, Scope of Duties, Indemnification and Advancement

9.1 Exculpation.

(a) For purposes of this Agreement, “**Covered Person**” means (i) any Member and (ii) any officer of the Company. The term “**Covered Person**” shall also mean any Person with the power, whether through ownership of voting securities, by contract or otherwise, to direct the actions of the Member (a “**Control Person**”).

(b) A Covered Person shall not be liable to the Company or the Members for any loss, damage or claim arising out of any act or omission in the Covered Person’s capacity as a Covered Person or by reason of the fact that the Covered Person is or was a Covered Person (**INCLUDING ANY LOSS, DAMAGE OR CLAIM ARISING OUT OF THE COVERED PERSON’S NEGLIGENCE**), provided that such loss, damage or claim did not arise from or constitute gross negligence, bad faith, willful misconduct, or a breach of this Agreement by the Covered Person.

(c) The provisions of this Section 9.1 are intended to limit liability with regard to duties, if any, owed or asserted to be owed by Covered Persons, and such provisions shall in no way be deemed to create or impose duties on Covered Persons.

9.2 **Scope of Duties of Covered Persons.** The fiduciary duties of the Members that are owed by reason of their capacity as Members are owed to the Company, and the Members shall owe no fiduciary duty to any individual Member. The fiduciary duty to the Company of a Member, and the fiduciary duty to the Company, if any, of a Control Person of a Member, shall be limited to refraining from gross negligence, bad faith or willful misconduct. *[DRAFTING NOTE: See Section III.J. of the Accompanying Article for a discussion of considerations related to articulating the duty of a Covered Person. The drafter should give careful consideration to what duty, if any, is appropriate in a specific transaction or relationship.]*

[DRAFTING NOTE: Section III.J. of the Accompanying Article includes model provisions specifically authorizing reliance on experts.]

[DRAFTING NOTE: Section III.J. of the Accompanying Article includes model provisions regarding limiting the duty of loyalty by permitting competition.]

9.3 **Indemnification.** A Covered Person shall be entitled to indemnification from the Company for any loss, damage or claim incurred by that Covered Person by reason of the fact that the Covered Person is or was a Covered Person (**INCLUDING ANY LOSS, DAMAGE OR CLAIM ARISING OUT OF THE COVERED PERSON’S NEGLIGENCE**), except that no Covered Person shall be entitled to be indemnified in respect of any loss, damage or claim incurred by that Covered Person by reason of that Covered Person’s bad faith, gross negligence, willful misconduct or breach of this Agreement. Any indemnity under this Section 9.3 shall be provided out of and to the extent of Company assets only, and no Member shall have any personal liability on account thereof.

9.4 **Expenses.** Expenses (including legal fees) incurred by a Covered Person in defending any claim, demand, action, suit or proceeding brought against the Covered Person by reason of the fact that the

Covered Person is or was a Covered Person shall, from time to time, be advanced by the Company before the final disposition of the claim, demand, action, suit or proceeding upon receipt by the Company of a Written undertaking by or on behalf of the Covered Person to repay that amount if it shall be determined that the Covered Person is not entitled to be indemnified under Section 9.3. The Company may enter into indemnity contracts with any Covered Person and the Members may adopt Written procedures pursuant to which arrangements are made for the advancement of expenses and the funding of obligations under this Section 9.4 and containing other procedures regarding indemnification as are appropriate.

9.5 Insurance. The Company may purchase and maintain insurance, to the extent and in amounts the Members deem reasonable, on behalf of Covered Persons and other Persons as the Members shall determine, against any liability that may be asserted against or expenses that may be incurred by that Person in connection with the activities of the Company, regardless of whether the Company would have the power to indemnify that Person against the liability under this Agreement. The Company shall have no obligation to fund indemnification of any Person to the extent the liability is covered by insurance. The Company's obligation to fund indemnification of any Person shall commence only after all available insurance has been exhausted.

9.6 Duration of Protection. All provisions of this Article 9 shall apply to any former Member or Control Person thereof for all actions or omissions taken while such Member was a Member to the same extent as if that Person were still a Member.

Article 10

Winding Up

10.1 Events Requiring Winding Up. The Company shall be wound up only on the first to occur of any one or more of the following:

- (a) the affirmative vote or Written consent of all of the Members;
- (b) the occurrence of any event that terminates the continued membership of the last remaining Member in the Company unless the legal representative or successor of the Member agrees to continue the Company and appoints a successor Member in accordance with the BOC;
- (c) entry of a judicial order to wind up the Company; or
- (d) the involuntary termination of the Company under the BOC or Texas Tax Code, unless the Company is reinstated as provided by law.

10.2 Revocation or Reinstatement. A vote or consent to wind up as provided in Section 10.1(a) may only be revoked upon the affirmative vote or Written consent of all of the Members. In the event of a termination of the Company under the BOC, the Company may only be reinstated upon the affirmative vote or Written consent of all of the Members.

10.3 Winding Up Affairs and Distribution of Assets.

(a) If an event requiring the winding up of the Company occurs and is not revoked, a Person designated for this purpose by the Members (the "**Liquidating Agent**"), as soon as practicable shall wind

up the affairs of the Company and sell and/or distribute the assets of the Company. The Liquidating Agent is expressly authorized and empowered to execute any and all documents necessary or desirable to effectuate the liquidation and termination of the Company and the transfer of any assets. The Liquidating Agent shall apply and distribute the proceeds of the sale or liquidation of the assets and property of the Company in the following order of priority, unless otherwise required by nonwaivable provisions of applicable law:

(i) to pay (or to make provision for the payment of) all creditors of the Company (including Members who are creditors of the Company), in the order of priority provided by law or otherwise, in satisfaction of all debts, liabilities or obligations of the Company due its creditors;

(ii) after the payment (or the provision for payment) of all debts, liabilities and obligations of the Company in accordance with clause (i) above, any balance remaining shall be distributed to the Members having positive Capital Accounts in relative proportion to those Capital Accounts.

(b) The Liquidating Agent shall have sole discretion to determine whether to liquidate all or any portion of the assets and property of the Company and the consideration to be received for that property.

(c) If the Company's property is not sufficient to discharge all of the Company's liabilities and obligations, the Liquidating Agent shall apply its property, or make adequate provision for the application of its property, to the extent possible, to the just and equitable discharge of its liabilities and obligations, including liabilities and obligations owed to the Members other than for distributions.

(d) Except as required by nonwaivable provisions of the BOC, no Member shall have any obligation at any time to contribute any funds to replenish any negative balance in the Member's Capital Account.

10.4 Termination. On compliance with the distribution plan described in Section 10.3, the Liquidating Agent shall execute, acknowledge and cause to be filed a certificate of termination. Except as otherwise provided by the BOC, the Company shall cease to exist upon the filing of the certificate of termination with the Secretary of State of Texas.

Article 11

Miscellaneous Provisions and Definitions

11.1 Notices. Any notice to be given under this Agreement must be in Writing and mailed, transmitted by facsimile or by electronic message, or delivered personally (a) if to the Company, to the registered agent of the Company at the registered address of the Company, (b) if to any initial Member, to such Member at an address therefor set forth on Exhibit "A" or, (c) if to any Member subsequently admitted, to an address set forth in the document in which such Member agreed to be bound by this Agreement, or in each case at such other address as any Person entitled to notice hereunder may designate by notice to the Company and all of the Members. Notice of a meeting that is mailed is considered to be delivered on the date notice is deposited in the United States mail. Notice of a meeting that is transmitted by facsimile or electronic message is considered to be delivered when the facsimile or electronic message

is successfully transmitted. Notice of a meeting that is personally delivered to the Person is considered to be delivered when received by the Person.

11.2 **Entire Agreement.** This Agreement supersedes all prior agreements and understandings among the Members with respect to the Company.

11.3 **Amendments.** The affirmative vote or Written consent of all of the Members is required to amend the certificate of formation of the Company or this Agreement; provided that upon the admission of any new Member as authorized by this Agreement, amendment of **Exhibit "A"** of this Agreement to reflect the admission of the new Member shall be deemed approved by the Members.

11.4 **Governing Law.** This Agreement shall be governed by and construed in accordance with the law of Texas.

11.5 **Power of Attorney.** Each Member constitutes and appoints each other Member the true and lawful attorney of such Member with full power of substitution to make, execute, sign, acknowledge and file (a) all certificates and instruments necessary to form or qualify, or continue the existence or qualification of, the Company in any jurisdiction or before any governmental authority and (b) any amendments to **Exhibit "A"** to this Agreement to reflect the admission of any new Member if the same is authorized by this Agreement. This grant of a power of attorney is coupled with an interest and shall survive a Member's disability, incompetence, death or assignment by such Member of the membership interest pursuant to this Agreement.

11.6 **Binding Effect; No Third-Party Beneficiaries.** This Agreement shall be binding upon, and, to the extent provided herein, inure to the benefit of, the signatories of this Agreement and any Members subsequently admitted, their spouses, heirs, devisees, executors, legal representatives, successors, and assigns. Article 9 of this Agreement shall also inure to the benefit of Covered Persons as defined therein. The Members acknowledge and agree that this Agreement is intended to be binding upon and to inure to the benefit of the Company and that the provisions of this Agreement shall be enforceable by and against the Company. The obligations of the Company pursuant to this Agreement are the obligations of the Company only, and absent additional Written agreement, the Members have no personal liability for the obligations of the Company, including any obligations pursuant to Article 8 and Article 9 of this Agreement. No creditor of the Company or of a Member is entitled to or is intended to have third-party beneficiary status to enforce any obligation of any party under this Agreement.

11.7 **Counterparts.** This Agreement may be executed in any number of counterparts or with counterpart signature pages, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

11.8 **Certain Definitions and Construction.**

(a) As used in this Agreement, the following terms have the following meanings:

(i) "**Affiliate Transfer**" means, if the transferor is an individual, a gift or contribution by the transferor prior to the transferor's death to a member of the transferor's immediate family (i.e. parents, descendants, siblings or spouse) or to a trust, partnership or other entity controlled by or for the benefit of such transferor or such transferor's immediate family. If the transferor is an entity, "**Affiliate Transfer**" means the transfer or contribution of the

membership interest to another entity so long as the Person or Persons with the power, whether through ownership of voting securities by contract or otherwise, to direct or cause the direction of the management and policies of the transferor entity have the power to direct or cause direction of the management and policies of the transferee entity.

(ii) “**Agreement**” means this Company Agreement as it may be amended from time to time as provided herein.

(iii) “**Available Cash**” means cash on hand held by the Company that the Members determine is not required by operations or as a reasonable reserve for capital replacements.

(iv) “**Capital Account**” means the capital account of a Member in the Company pursuant to Section 4.3.

(v) “**Code**” means the Internal Revenue Code of 1986.

(vi) “**Member**” means any Person admitted to the Company as a member as provided in this Agreement but excludes any such Person that has ceased to be a member as provided in this Agreement or the BOC.

(vii) “**Percentage**” for any Member means the membership interest of the Member expressed as a percentage. The Percentages of the initial Members as of the formation of the Company are set forth in **Exhibit “A”**. **Exhibit “A”** shall be amended as necessary to reflect any changes in Percentages as provided herein. The total Percentages of membership interests owned by all Members and assignees at any point in time shall equal 100%. Upon the purchase by the Company of a membership interest, the Percentage of the purchased membership interest shall no longer be included in the total Percentages, and the Percentages of membership interests owned by Members and assignees shall be adjusted accordingly. Upon the issuance of an additional membership interest, the Percentages of Members and assignees who have not been issued an additional interest shall be decreased accordingly. For purposes of Sections 3.3 and 3.7, the Percentage representing all or any portion of a membership interest assigned by a Member shall be attributed to the assignor Member if the assignor Member has not ceased to be a Member. If the assignor Member has ceased to be a Member and the Member’s assignee has not been admitted as a Member, the Percentage of the assignee shall not be included for purposes of Sections 3.3 and 3.7, and the determination of a “majority” of the Percentages referenced in that Section shall be made on the basis of Percentages held or attributed to Persons who are at the time Members.

(viii) “**Person**” means any individual, corporation, partnership, limited liability company, business trust or other entity, series of an entity, or government or governmental agency or instrumentality.

(ix) “**Writing**” or “**Written**” means an expression of words, letters, characters, numbers, symbols, figures or other textual information that is inscribed on a tangible medium or that is stored in an electronic or other medium that is retrievable in a perceivable form. Unless the context requires otherwise, the term: (1) includes stored or transmitted electronic data,

electronic transmissions, and reproductions of Writings; and (2) does not include sound or video recordings of speech other than transcriptions that are otherwise “Writings.”

(b) In this Agreement:

(i) Terms defined in the singular have the corresponding meaning in the plural and vice versa.

(ii) All pronouns and any variations thereof contained herein shall be deemed to refer to the masculine, feminine, neuter, singular or plural, as the identity of the Person or Persons may require.

(iii) The word “include” and its derivatives means “include without limitation.”

(iv) References to Articles, Sections and Exhibits are to the specified Articles and Sections of, and Exhibits to, this Agreement unless the context otherwise requires. Each Exhibit to this Agreement is made a part of this Agreement for all purposes.

(v) References to statutes or regulations are to those statutes or regulations as currently amended and to the corresponding provisions as they may be amended or superseded in the future.

[Signature page follows]

IN WITNESS WHEREOF, the undersigned Members have duly executed this Agreement as of the day and year first above written.

MEMBERS:

ACKNOWLEDGMENT AND CONSENT OF SPOUSES

The undersigned are the spouses of the Members and are executing this Agreement in connection with the execution of this Agreement by the Members. Each of the undersigned acknowledges and represents as follows: I have been provided a copy of the Agreement and have had the opportunity to read and review the Agreement. I approve of all of the provisions of the Agreement and agree to be bound by and accept the terms of the Agreement, but I understand that I am not a Member of the Company. My execution of this Agreement does not alter the legal status, characterization or rights of management of any membership interests now or hereafter acquired by my spouse, and my spouse's membership interests are subject to my spouse's sole management, control and disposition. I understand that the Company and the Members will rely on this acknowledgment and consent in conducting the Company's activities and operations.

SPOUSES OF MEMBERS:

EXHIBIT A

**NAMES, ADDRESSES, PERCENTAGES AND CAPITAL
CONTRIBUTIONS OF INITIAL MEMBERS**

<u>Name and Address [Postal; E-mail; Cell phone text] for Notice</u>	<u>Percentage</u>	<u>Capital Contribution</u>
_____ _____ _____ _____	_____%	\$ _____ [or description of contributed asset(s)]
_____ _____ _____ _____	_____%	\$ _____ [or description of contributed asset(s)]

Appendix C

Model Company Agreement for Single Member Limited Liability Company

This Model Agreement is Appendix C to an article by Cliff Ernst, Elizabeth S. Miller and Doug Jones entitled *Model Company Agreements* (the “Accompanying Article”). This Model Agreement should not be considered a form to be completed by filling in the blanks. Drafters should be certain that any agreement used by them is appropriate for the particular transaction. This Model Agreement should be read together with the Accompanying Article, including the various references to the Accompanying Article throughout this Model Agreement.

COMPANY AGREEMENT OF

_____, LLC,
a Texas limited liability company

This Company Agreement (this “**Agreement**”), dated effective the ____ day of _____, 20____, is executed and agreed to, for good and valuable consideration, by the initial Member listed on Exhibit “A”.

Article 1

Formation

1.1 **Formation.** _____, LLC (the “**Company**”) was formed as a limited liability company under and pursuant to the Texas Business Organizations Code (the “**BOC**”) and other relevant laws of the State of Texas by the filing of a certificate of formation with the Secretary of State of the State of Texas on _____, 20____.

1.2 **Name.** The name of the Company shall be _____, LLC. The Company shall conduct business under that name or such other names complying with applicable law as the Member may determine from time to time.

1.3 **Duration.** The Company shall exist until terminated in accordance with this Agreement.

1.4 **Purpose.** The purpose of the Company shall be to engage in the business of (insert description of business) and to engage in any other lawful business or activity necessary or convenient in pursuit of the foregoing purposes.

1.5 **Principal Office.** The Company’s principal office shall be _____ or such other place as the Member may determine from time to time.

1.6 **Registered Office and Registered Agent.** The initial address of the registered office of the Company in the State of Texas shall be _____, and the name of the Company’s initial registered agent at that address shall be _____. The Member may change the registered office and the registered agent of the Company from time to time. The Member may cause the

Company to qualify to do business as a limited liability company (or other entity in which the Member has limited liability) in any other jurisdiction and to designate any registered office or registered agent in any such jurisdiction.

1.7 **Definitions.** Certain terms used in this instrument are capitalized. Such terms shall have the meaning set forth in the text or in Section 11.5.

Article 2

Members and Membership Interests

2.1 **Initial Member.** In connection with the formation of the Company, the Person executing this Agreement as Member is admitted to the Company as of the date of formation of the Company.

2.2 **Nature of Membership Interest.** A membership interest in the Company is personal property. A Member of the Company or an assignee of a membership interest in the Company does not have an interest in any specific property of the Company. A membership interest includes a Member's or assignee's share of profits and losses or similar items and the right to receive distributions as provided in this Agreement, but does not include a Member's right to participate in management.

2.3 **Certificates.** Membership interests in the Company shall be uncertificated.

[DRAFTING NOTE: Section III.C. of the Accompanying Article includes model provisions regarding certificated membership interests.]

Article 3

Management of the Company

3.1 **Management by Member.** The exclusive authority to manage and control the Company shall be vested in the Member. The Member shall have the sole and exclusive power and authority to bind the Company except to the extent that such power and authority is expressly delegated by the Member, and the delegation of such power and authority shall not reduce the power and authority of the Member. The Member shall be authorized to act on behalf of the Company under the title "Member," "Chief Executive Officer," "President," or any other title or representative capacity deemed appropriate by the Member.

3.2 **Officers.** The Member may appoint such officers of the Company as the Member may deem appropriate and may remove any such officer at any time with or without cause. The Member may delegate to the Company's officers such authority as the Member may deem appropriate and subsequently revoke or modify that authority. The Member also may delegate authority to other Persons and revoke that delegation as the Member may deem appropriate, including the power to delegate authority.

Article 4

Capital Contributions

4.1 **Agreed Capital Contributions.** The Member shall contribute to the capital of the Company the contribution set forth opposite such Member's name on the attached **Exhibit "A"**.

4.2 **Additional Capital Contributions.** The Member may, but is not required to, make additional contributions to the capital of the Company.

Article 5

Taxation

5.1 **Tax Status.** At all times that the Company has only one Member (who owns 100% of the membership interest in the Company), it is the intention of the Member that the Company be disregarded as an entity separate and apart from the Member for federal, and, to the extent applicable, state, local and foreign income tax purposes.

Article 6

Distributions

6.1 **Distributions.** Distributions shall be made to the Member at the times and in the amounts determined by the Member, except that no distribution shall be made in violation of the BOC.

6.2 **No Distribution upon Withdrawal.** Unless otherwise determined by the Member, no distribution shall be paid to the Member upon the Member's withdrawal in connection with the voluntary assignment of the Member's entire interest pursuant to Section 8.2.

Article 7

Bank Accounts, Books of Account, Reports and Fiscal Year

7.1 **Bank Account; Investments.** The Company shall establish one or more bank or other financial institution accounts into which Company funds shall be deposited. Funds deposited by the Company into such accounts may be withdrawn in furtherance of the business of the Company or for distribution to the Member pursuant to this Agreement. Pending withdrawal for such purposes, Company funds may be invested in such manner as the Member may determine.

7.2 **Books and Records.** The books and records of the Company shall be maintained at the Company's principal office. The books of the Company, for both tax and financial reporting purposes, shall be kept using the method of accounting selected by the Member.

7.3 **Fiscal Year.** The Company fiscal year shall be the calendar year.

Article 8

Assignment

8.1 **Assignment Permitted.** The Member may transfer or assign (including as a pledge or other collateral assignment) in whole or in part the Member's membership interest in the Company.

8.2 **Assignment of Entire Interest.** In connection with a voluntary transfer or assignment by the Member of the Member's entire membership interest in the Company (not including a pledge or collateral assignment or any transfer as a result thereof):

- (a) the Member will cease to be a member of the Company;
- (b) the assignee will automatically and simultaneously be admitted as the successor Member without any further action at the time the voluntary transfer or assignment becomes effective under applicable law; and
- (c) the Company shall be continued without requiring a winding up.

8.3 **Assignment of Partial Interest.** In connection with a partial assignment or transfer by the Member of the Member's membership interest in the Company, unless this Agreement is amended to reflect the fact that the Company will have more than one Member, the assignee or transferee shall not be admitted as a Member of the Company and shall not have any rights as a Member other than the right to receive any distributions that are payable in respect of the interest transferred.

Article 9

Exculpation, Indemnification and Advancement

9.1 Exculpation.

(a) For purposes of this Agreement, "**Covered Person**" means (i) the Member, whether acting in the capacity of owner, governing person, officer, employee, creditor or other relationship to the Company, and (ii) any Person with the power, whether through ownership of voting securities, by contract or otherwise, to direct the actions of the Member.

(b) A Covered Person shall not be liable to the Company for any loss, damage or claim arising out of any act or omission in the Covered Person's capacity as a Covered Person or by reason of the fact that the Covered Person is or was a Covered Person (**INCLUDING ANY LOSS, DAMAGE OR CLAIM ARISING OUT OF THE COVERED PERSON'S NEGLIGENCE**).

9.2 Scope of Duties of Covered Persons.

(a) No Covered Person shall owe any fiduciary duty to the Company. Without limiting the scope of the preceding sentence, a Covered Person is expressly permitted to engage in or possess an interest in any business venture of any nature or description, independently or with others, similar or dissimilar to the business of the Company, and the Company shall have no rights by virtue of this Agreement in and to such independent ventures or the income or profits derived therefrom, and the pursuit of any such venture, even if competitive with the business of the Company, shall not be deemed wrongful or improper. The Covered Person shall not be obligated to disclose or present any particular opportunity to the Company even if that opportunity is of a character that, if disclosed or presented to the Company, could be taken by the Company, and the Covered Person shall have the right to take for the Covered Person's own account (individually or as a partner, shareholder, fiduciary or otherwise) or to recommend to others any such particular opportunity. *[DRAFTING NOTE: See Section III.K. of the Accompanying Article for a*

discussion of considerations related to articulating the duty of a Covered Person. The drafter should give careful consideration to what duty, if any, is appropriate in a specific transaction or relationship.]

9.3 **Indemnification.** A Covered Person shall be entitled to indemnification from the Company for any loss, damage or claim incurred by that Covered Person by reason of the fact that the Covered Person is or was a Covered Person (**INCLUDING ANY LOSS, DAMAGE OR CLAIM ARISING OUT OF THE COVERED PERSON'S NEGLIGENCE**). Any indemnity under this Section 9.3 shall be provided out of and to the extent of Company assets only, and no Member shall have any personal liability on account thereof.

9.4 **Expenses.** Expenses (including legal fees) incurred by a Covered Person in defending any claim, demand, action, suit or proceeding may, in the sole discretion of the Member, from time to time, be advanced by the Company before the final disposition of the claim, demand, action, suit or proceeding. The Company may enter into indemnity contracts with any Covered Person and the Member may adopt Written procedures pursuant to which arrangements are made for the advancement of expenses and the funding of obligations under this Section 9.4 and containing other procedures regarding indemnification as are appropriate.

9.5 **Insurance.** The Company may purchase and maintain insurance, to the extent and in amounts the Member deems reasonable, on behalf of Covered Persons and other Persons as the Member shall determine, against any liability that may be asserted against or expenses that may be incurred by that Person in connection with the activities of the Company, regardless of whether the Company would have the power to indemnify that Person against the liability under this Agreement. The Company shall have no obligation to fund indemnification of any Person to the extent the liability is covered by insurance. The Company's obligation to fund indemnification of any Person shall commence only after all available insurance has been exhausted.

9.6 **Duration of Protection.** All provisions of this Article 9 shall apply to any former Member or other Covered Person for all actions or omissions taken while such Member was a Member to the same extent as if that Person were still a Member.

Article 10

Winding Up

10.1 **Events Requiring Winding Up.** The Company shall be wound up only on the first to occur of any one or more of the following:

- (a) the Written consent of the Member;
- (b) the occurrence of any event that terminates the continued membership of the Member in the Company unless the legal representative or successor of the Member agrees to continue the Company and appoints a successor Member in accordance with the BOC; or
- (c) entry of a judicial order to wind up the Company.

10.2 **Revocation or Reinstatement.** A consent to wind up as provided in Section 10.1(a) may only be revoked upon the consent of the Member. In the event of a termination of the Company under the BOC, the Company may be reinstated upon the Written consent of the Member.

10.3 **Winding Up Affairs and Distribution of Assets.**

(a) If an event requiring the winding up of the Company occurs and is not revoked, the Member, acting as “**Liquidating Agent**,” as soon as practicable shall wind up the affairs of the Company and sell and/or distribute the assets of the Company. The Liquidating Agent is expressly authorized and empowered to execute any and all documents necessary or desirable to effectuate the liquidation and termination of the Company and the transfer of any assets. The Liquidating Agent shall apply and distribute the proceeds of the sale or liquidation of the assets and property of the Company in the following order of priority, unless otherwise required by nonwaivable provisions of applicable law:

(i) to pay (or to make provision for the payment of) all creditors of the Company (including Members who are creditors of the Company), in the order of priority provided by law or otherwise, in satisfaction of all debts, liabilities or obligations of the Company due its creditors;

(ii) after the payment (or the provision for payment) of all debts, liabilities and obligations of the Company in accordance with clause (i) above, any balance remaining shall be distributed to the Member.

(b) The Liquidating Agent shall have sole discretion to determine whether to liquidate all or any portion of the assets and property of the Company and the consideration to be received for that property.

(c) If the Company’s property is not sufficient to discharge all of the Company’s liabilities and obligations, the Liquidating Agent shall apply its property, or make adequate provision for the application of its property, to the extent possible, to the just and equitable discharge of its liabilities and obligations, including liabilities and obligations owed to the Member other than for distributions.

10.4 **Termination.** On compliance with the distribution plan described in Section 10.3, the Liquidating Agent shall execute, acknowledge and cause to be filed a certificate of termination. Except at otherwise provided by the BOC, the Company shall cease to exist upon the filing of the certificate of termination with the Secretary of State of Texas.

Article 11

Miscellaneous Provisions and Definitions

11.1 **Entire Agreement.** This Agreement supersedes all prior agreements and understandings by the Member with respect to the Company.

11.2 **Amendments.** The vote or Written consent of the Member is required to amend the certificate of formation of the Company or this Agreement.

11.3 **Governing Law.** This Agreement shall be governed by and construed in accordance with the law of Texas.

11.4 Binding Effect; No Third-Party Beneficiaries. This Agreement shall be binding upon, and, to the extent provided herein, inure to the benefit of, the Member and the spouse, heirs, devisees, executors, legal representatives, successors, and assigns of the Member. Article 9 of this Agreement shall also inure to the benefit of Covered Persons as defined therein. The Member acknowledges and agrees that this Agreement is intended to be binding upon and to inure to the benefit of the Company and that the provisions of this Agreement shall be enforceable by and against the Company. The obligations of the Company pursuant to this Agreement are the obligations of the Company only, and absent additional Written agreement, the Member has no personal liability for the obligations of the Company, including any obligations pursuant to Article 9 of this Agreement. No creditor of the Company or of a Member is entitled to or is intended to have third-party beneficiary status to enforce any obligation of any party under this Agreement.

11.5 Certain Definitions and Construction.

(a) As used in this Agreement, the following terms have the following meanings:

(i) “**Agreement**” means this Company Agreement as it may be amended from time to time as provided herein.

(ii) “**Member**” means the Person admitted to the Company as a Member as provided in this Agreement but excludes any such Person that has ceased to be a Member as provided in this Agreement or the BOC.

(iii) “**Person**” means any individual, corporation, partnership, limited liability company, business trust or other entity, series of an entity, or government or governmental agency or instrumentality.

(iv) “**Writing**” or “**Written**” means an expression of words, letters, characters, numbers, symbols, figures or other textual information that is inscribed on a tangible medium or that is stored in an electronic or other medium that is retrievable in a perceivable form. Unless the context requires otherwise, the term: (1) includes stored or transmitted electronic data, electronic transmissions, and reproductions of Writings; and (2) does not include sound or video recordings of speech other than transcriptions that are otherwise “Writings.”

(b) In this Agreement:

(i) Terms defined in the singular have the corresponding meaning in the plural and vice versa.

(ii) All pronouns and any variations thereof contained herein shall be deemed to refer to the masculine, feminine, neuter, singular or plural, as the identity of the Person or Persons may require.

(iii) The word “include” and its derivatives means “include without limitation.”

(iv) References to Articles, Sections and Exhibits are to the specified Articles and Sections of, and Exhibits to, this Agreement unless the context otherwise requires. Each Exhibit to this Agreement is made a part of this Agreement for all purposes.

(v) References to statutes or regulations are to those statutes or regulations as currently amended and to the corresponding provisions as they may be amended or superseded in the future.

[Signature page follows]

IN WITNESS WHEREOF, the undersigned Member has duly executed this Agreement as of the day and year first above written.

MEMBER:

EXHIBIT A

**NAME, ADDRESS AND CAPITAL
CONTRIBUTION OF INITIAL MEMBER**

Name and Address

Capital Contribution

\$ _____
[or description of
contributed asset(s)]