Drafting and Understanding Limited Liability Company Operating Agreements

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DRAFTING AND UNDERSTANDING LIMITED LIABILITY COMPANY OPERATING AGREEMENTS

UNIT ONE - OVERVIEW

I. Introduction

A. What is the nature of an LLC?

1. The limited liability company ("LLC") is a statutory creation.

2. A limited liability company it is a hybrid form of business organization that combines the limited liability of a corporation with the flexibility of structure and the pass through taxation of a partnership.

3. The owners of an LLC are referred to as members, and their ownership interests are referred to as "membership interests".

4. A limited liability company is an entity distinct from its member or members, and has perpetual duration.

5. Effective April 1, 2017, all limited liability companies in Pennsylvania are governed by Uniform Limited Liability Company Act of 2016 (the "Act").[1]

6. The operation of a limited liability company is controlled by the Act, its certificate of organization, and its operating agreement.

B. S Corp v LLC

1. Overview

When choosing a form of business, business owners, particularly startup businesses, will consider either an S corporation or a limited liability company as the form of ownership.

2. LLCs vs. S Corps

Limited liability companies and S corporations share both similarities and differences.

a. Both LLCs and S corporations offer their owners limited liability protection.

[1]References in this outline are to Uniform Limited Liability Company Act of 2016, as adopted by the Commonwealth of Pennsylvania, effective April 1, 2017. Practitioners in states which have not adopted the Uniform Limited Liability Company Act of 2016, should reference the statute in their state.

b. S Corps and LLCs are both taxed in a similar way - income and losses are not taxed at the entity -level, but "pass-through" to the owners and are reported on their individual tax returns.

c. In terms of taxation however, LLC's generally more flexible than S corporations, which have strict requirements on proportionality of distributions of income and loss – can only have 100 shareholders – must be a domestic corporation – and can only have one class of stock. These rules do not apply to LLCs.

d. Owners of LLCs can allocate losses disproportionately among owners; while an S corporation's profits and losses must be allocated strictly based upon ownership percentage.

f. On the other hand, LLC owners must pay self-employment tax on the pass-through profit of the LLC reported on their individual tax returns - S corporation shareholders do not.[2]

g. An alternative is a LLC taxed as an S Corporation.

3. LLC as a Disregarded Entity

a. Overview

(1) A domestic LLC with at least two members is classified as a partnership for federal income tax purposes unless it files Form 8832 and elects to be treated as a corporation.

(2) For income tax purposes, an LLC with only one member is treated as an entity disregarded as separate from its owner, unless it files Form 8832 and affirmatively elects to be treated as a corporation.

(3) However, for purposes of employment tax and certain excise taxes, an LLC with only one member is still considered a separate entity.

b. Owner of Single-Member LLC

(1) If Owned by Husband and Wife

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[2] The self-employment tax rate is 15.3%. The rate consists of two parts: 12.4% for social security (old-age, survivors, and disability insurance) and 2.9% for Medicare (hospital insurance). For 2020, the first $137,700 of your combined wages, tips, and net earnings is subject to any combination of the Social Security part of self-employment tax, Social Security tax, or railroad retirement (tier 1) tax. The amount increased to $142,800 for 2021. (For SE tax rates for a prior year, refer to the Schedule SE for that year). All net earnings in the current year are subject to any combination of the 2.9% Medicare part of Self-Employment tax, Social Security tax, or railroad retirement (tier 1) tax.

(a) If an LLC is owned by husband and wife in a non-community property state, the LLC should file as a partnership.

(b) If there is a qualified entity owned by a husband and wife as community property owners, and they treat the entity as a: (i) disregarded entity for federal tax purposes, the Internal Revenue Service will accept the position that the entity is disregarded for federal tax purposes, or (ii) partnership for federal tax purposes, the Internal Revenue Service will accept the position that the entity is partnership for federal tax purposes.

(2) Required Tax Returns

(a) If a single-member LLC does not elect to be treated as a corporation, the LLC is a "disregarded entity," and the LLC's activities should be reflected on its owner's federal tax return.

(b) If the owner is an individual, the activities of the LLC will generally be reflected on:

- Form 1040 or 1040-SR Schedule C, Profit or Loss from Business (Sole Proprietorship)
- Form 1040 or 1040-SR Schedule E, Supplemental Income or Loss
- Form 1040 or 1040-SR Schedule F, Profit or Loss from Farming

(3) If by a Corporation or Partnership

If the single-member LLC is owned by a corporation or partnership, the LLC should be reflected on its owner's federal tax return as a division of the corporation or partnership.

II. Function and Contents of Operating Agreement.

A. Overview

1. The operation of a limited liability company is controlled by the Act, its certificate of organization, and the operating agreement.

2. As defined in the Uniform Limited Liability Company Act, the “operating agreement” is the agreement of all the members of the limited liability company relating to the following matters [15 Pa. Cons. Stat. § 8812(a); 15 Pa. Cons. Stat. § 8815(a)]:

a. The relations among the members as members and between the members and the limited liability company.

b. The rights and duties under the Act of a person in the capacity of a member or manager.

c. The activities and affairs of the company and the conduct of those activities and affairs.

d. The means and conditions for approving a transaction under Chapter 3 transaction (i.e., a merger, interest exchange, conversion, division or domestication),

e. The means and conditions for amending the operating agreement; and

3. With certain exceptions as discussed in IC, below, only in areas that the operating agreement does not provide for a particular will the Uniform Limited Liability Company Act provisions control. As a result, the Operating Agreement overrides the provisions of the Act, in areas that it addresses. The Act can be said to provide the "default" provisions in areas not adequately addressed by the Operating Agreement.

4. The Operating Agreement may be written, oral, or implied.

B. Binding Effect of Operating Agreement.

1. A limited liability company is bound by and may enforce the operating agreement, whether or not the company has itself manifested assent to the agreement [15 Pa. Cons. Stat. § 8816(a)].

2. A person that becomes a member of a limited liability company is deemed to assent to the operating agreement [15 Pa. Cons. Stat. § 8816(b)].

C. Statutory Limitations

1. In most cases the provisions of the certificate of organization and the Operating Agreement may override the provisions of the Act

2. However, the § 8815(c) of the Act provides certain areas that the Operating Agreement may not override the Act. As a result, the Operating Agreement may not vary:

a. A provision of Chapter 1 - relating to general provisions of the Act, including the following:

– Application of chapter.

– Definitions.

– Knowledge and notice.

– The application of the governing law.

– Contents of operating agreement.

– Application of operating agreement.

– Amendment and effect of operating agreement.

– Characteristics of limited liability company.

– Powers

b. Vary Subchapter A of Chapter 2 relating to names.

c. Vary the right of a member to approve a merger, interest exchange, conversion, division or domestication

d. Vary the required contents of a plan of merger, a plan of interest exchange, a plan of conversion, a plan of division, or a plan of domestication.

e. Vary the provisions of the Act relating to application of the Act, before April 1, 2017, and on and after April 1, 2017, the full effective date.

f. Vary the provisions of the Act applicable relating to the governing law.

g. Vary a provision of the Act relating to the fundamental characteristics of limited liability company.

h. Vary a provision of section 8819 relating to powers of the limited liability company to do all things necessary or convenient to carry on its activities and affairs (including the capacity to sue of be sued in its own name).

i. Vary any requirement, procedure or other provision of this title pertaining to registered offices; or the department, including provisions pertaining to documents authorized or required to be delivered to the department for filing under this title.

j. Provide indemnification or exoneration in violation of the limitations in:

– relating to reimbursement, indemnification, advancement and insurance.

– relating to standards of conduct for members); and

– relating to standards of conduct for managers.

k. Eliminate the duty of loyalty or the duty of care of a member in a member-managed company, with limited exceptions.

l. Eliminate the duty of loyalty or the duty of care of a manager, with limited exceptions.

m. Vary the contractual obligation of good faith and fair dealing

n. Restrict the duties and rights of members and managers to information.

o. Vary the causes of dissolution of the LLC specified in the Act.

p. Vary the requirements to wind up the company's activities and affairs relating to winding up and filing of certificates.

q. Unreasonably restrict the right of a member to maintain an action under provisions of the Act.

r. Vary the provisions of the Act relating to special litigation committee except that the operating agreement may provide that the company may not have a special litigation committee.

s. Restrict the rights under the Act of a person other than a member or manager.

3. Permitted terms - Subject to the indemnification limitation under subsection 2.j., above the following rules apply:

a. The operating agreement may:

(1) specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one or more disinterested and independent persons after full disclosure of all material facts;

(2) alter the prohibition stated in section 8845(a) (2) (relating to limitations on distributions) so that the prohibition requires only that the company's total assets not be less than the sum of its total liabilities; and

(3) impose reasonable restrictions on the availability and use of information obtained under section 8850 and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use.

b. To the extent the operating agreement of a member- managed limited liability company expressly relieves a member of a responsibility that the member would otherwise have under this title and imposes the responsibility on one or more other members, the operating agreement also may eliminate or limit any fiduciary duty of the member relieved of the responsibility that would have pertained to the responsibility.

c. If not manifestly unreasonable, the operating agreement may:

(1) alter the aspects of the duty of loyalty;

(2) prescribe the standards, if not manifestly unreasonable, by which the performance of the contractual obligation of good faith and fair dealing is to be measured;

(3) identify specific types or categories of activities that do not violate the duty of loyalty;

(4) alter the duty of care; and

(5) alter or eliminate any other fiduciary duty.

d. Determination of manifest unreasonableness.

(1) The court shall decide as a matter of law whether a term of an operating agreement is manifestly unreasonable.

(2) The court: (a) shall make its determination as of the time the challenged term became part of the operating agreement and by considering only circumstances existing at that time; and (b) may invalidate the term only if, in light of the purposes, activities and affairs of the limited liability company, it is readily apparent that the objective of the term is unreasonable; or the term is an unreasonable means to achieve the term's objective.

UNIT TWO – PRELIMNARY PROVISIONS

I. Overview

A. The preliminary provisions of the Operating Agreement should set the table for the more substantive provisions of the Agreement.

B. The Operating Agreement serves as a reference point not only for the operational provisions but also serves as a reference for the particulars of formation, such as name, effective date of the agreement, etc., which might come into issue at some point in the future.

C. These provisions should state the following:

1. The name of the LLC, and the state of formation;

2. The effective date of the Operating Agreement;

3. The legal name of the LLC;

4. That the LLC was properly formed under the provisions of the applicable statute; i.e., in Pennsylvania the Uniform Limited Liability Company Act;

5. The principal place of business location and registered office;

6. The term of the LLC; and

7. The purpose of the LLC.

II. Introductory Provisions

A. Overview

1. The introductory provisions of the Operating Agreement are generally fairly straight forward. They should identify the LLC by name, state the effective date of the Agreement, and often also identify the original members.

2. Recitals generally state background information and the general purpose of forming the LLC; remember although these provisions.

3. Remember when drafting these provisions that they may be referenced as admissions of the parties at a later date.

B. Sample Provision

"THIS AMENDED AND RESTATED LIMITED LIABILITY COMPANY AGREEMENT OF APPLE, LLC, a Pennsylvania limited liability company (together with the Exhibits attached hereto, this "Agreement"), effective September 1, 2017, ("Effective Date") is adopted, executed and agreed to by JOSEPH MILLER, the Original Member upon his execution of this Agreement.

RECITALS

WHEREAS, Apple, LLC (the "Company") was originally formed as a Pennsylvania limited liability company on June 17, 1997 (the "Formation Date"), by the filing of the certificate of formation with the Pennsylvania Secretary of State; and

WHEREAS, the Member now desires to enter into this Agreement to amend the existing limited liability company agreement governing the Company in its entirety as set forth herein.

NOW, THEREFORE, in consideration of the promises and mutual covenants stated in this Agreement, the parties agree as follows:"

III. Organizational Provisions

A. Procedural Requirements for Formation

1. Under the Act, one or more persons may act as organizers to form a limited liability company by delivering to the Department of State for filing a certificate of organization [15 Pa. Cons. Stat. § 8821(a)].

2. The certificate must comply with the statutory requirements [see 15 Pa. Cons. Stat. § 8821(b); see § 42.32].

3. At the time, the certificate is delivered to the Department, it is marked with a receipt date. If the certificate is determined to conform with the requirements of law, the Department will file it as of the receipt date. The limited liability company is formed when the certificate becomes effective, that is, on the date it is filed by the Department or any later date stated in the certificate [see 15 Pa. Cons. Stat. § 8821(f)].

4. Until the limited liability company has its first member, the organizer is deemed to be a manager of the company [see 15 Pa. Cons. Stat. § 8841(c); see § 42.40[2] (admission of members)].

B. Certificate of Organization

1. Contents.

a. Under the Act the certificate of organization must state the name of the limited liability company, which must comply with the legal requirements for names

b. The certificate must also give the address, including street and number, if any, of the company's registered office, or the name of the commercial registered office provider if one is used in lieu of registered address.

c. The organizers may include in the Certificate of Organization any other statements they wish. However, they are bound by the same rules that apply to the operating agreement in terms of what provisions of the law may not be varied

d. Any provision in the certificate of organization is deemed to be a provision of the operating agreement for purposes of any statutory provision that refers to a rule as set forth in the operating agreement.

e. If a member of a member-managed limited liability company, or a manager of a manager-managed limited liability company, knows that any

information in the filed certificate of organization is inaccurate, the member or manager is required to either cause the certificate to be amended or, if appropriate, deliver a statement of correction to the Department

2. Filing.

a. The company's initial certificate of organization must be signed by each organizer, and it must be delivered to the Department of State, Bureau of Corporations and Charitable Organizations, for filing.

b. It may be submitted to the Department by mail, in person, by facsimile, or electronically.

c. At the time the certificate is delivered to the Department, it is marked with a receipt date. If the certificate is determined to conform with the requirements of law, the Department will file it as of the receipt date.

d. The limited liability company is formed when the certificate becomes effective, that is, on the date it is filed by the Department or any later date stated in the certificate.

3. Sample Provision

A provision stating the obligation of the manager or other organizer to file the certificate of organization in conformity of the Act and stating the premise that the members are bound by the terms of the Operating Agreement, and the Company will operate under the terms of the Agreement and the Act, is merely restating the applicable provision of the Act but is often included in the Agreement.

"ARTICLE II FORMATION

2.1. <u>Formation</u>.

a. The Members join together pursuant to this Agreement as a "Limited Liability Company" as of the Effective Date.

b. The Managing Member shall deliver or cause to be delivered to the Department of State for filing a certificate of organization, in accordance with the Act, as soon as reasonably possible after the execution of this Agreement.

c. The Limited Liability Company shall conduct business as a limited liability company pursuant to the terms of this Agreement and the provisions of all applicable law."

B. Name

1. Definitions Related to Name Requirements

a. The proper name of a domestic limited liability company or registered foreign limited liability company must contain the term "company," "limited" or "limited liability company," or an abbreviation of one of those terms, or words or abbreviations of like import used in a jurisdiction other than Pennsylvania [15 Pa. Cons. Stat. § 204(c)].

b. The term "proper name" is used in the provisions stating the requirements for names. "Proper name" means the name set forth in the public organic record for a domestic filing association [15 Pa. Cons. Stat. § 302(a)].

c. The "public organic record" is the document the public filing of which is required to form an association [15 Pa. Cons. Stat. § 102(a). The public organic record for a limited liability company is the certificate of organization [15 Pa. Cons. Stat. § 102(a).

2. Sample Provision

"2.2. Name. The business and affairs of the Limited Liability Company shall be conducted under the name APPLE, LLC and such name shall be used at all times in connection with the business and affairs of the Limited Liability Company."

C. Purpose

1. In General

a. A limited liability company may be organized for any lawful purpose other than acting as an insurer, regardless of whether the purpose is for profit [15 Pa. Cons. Stat. § 8818(b); but see § 42.82[4] (special restrictions on purpose of restricted professional companies).

b. A general-purpose clause will permit the LLC to engage in activity which may not have been contemplated at the time of formation.

"2.4. Purpose. The purpose of the Limited Liability Company shall be to engage in any business or activity that Limited Liability Companies are permitted to engage in under the laws of the Commonwealth of Pennsylvania."

c. If the members wish to limit the activity of the LLC to a more specific and limited purpose the purpose clause should provide for that limitation:

"2.4. Purpose. The purpose of the Limited Liability Company shall be limited to the ownership and management of that certain real estate property, commonly known as the "Lambert Building", located at 2020 N. 3rd Street, Elverson, New Jersey, and matters directly related thereto and shall engage in no other business or activity."

d. If a limited liability company has a purpose that is not for profit, that purpose must be stated in its certificate of organization [see 15 Pa. Cons. Stat. § 8818(d)(1)].

e. A not for profit limited liability company is also subject to restrictions regarding the distribution of its income and profits and holding property [see 15 Pa. Cons. Stat. § 8818(d)(2)–(5)].

2. Powers and Authority

a. A limited liability company has the power to do all things necessary or convenient to carry on its activities and affairs [15 Pa. Cons. Stat.

§ 8819(a)], and it has the capacity to sue and be sued in its own name [15 Pa. Cons. Stat. § 8819(b)].

b. Under the Act the company's operating agreement, which spells out the company's business, managerial and financial rights and duties, and may not limit these powers [15 Pa. Cons. Stat. § 8815(c)(8)].

c. The following provision acknowledges that Members may have other business interests. Note that the provision limits those activities to those that do not "*directly or indirectly, compete with the business of the Limited Liability Company."*

d. Also note the proviso that the provision does not override the member's duty of loyalty and the duty of care as provided in 15 Pa. Cons. State. Ann as discussed § 8849.1(b), and (c); Unit Three.[3]

"2.5. Other Businesses.

(a) This Agreement shall not prohibit any Member from conducting other businesses or activities not related to the Limited Liability Company without accounting to the Limited Liability Company or the other Members, whether or not such other businesses or activities, directly or indirectly, compete with the business of the Limited Liability Company.

(b) Further, no Member shall be liable or accountable to the Limited Liability Company or the other Members for failure to disclose or make available to the Limited Liability Company any business opportunity that such Member becomes aware of in its capacity as a Member or otherwise.

(c) The provisions of this paragraph shall not be interpreted to reduce or eliminate a Members duty of loyalty as provided in 15 Pa. Cons. State. Ann as discussed § 8849.1(b), or the duty of care as provided in 15 Pa. Cons. State. Ann as discussed § 8849.1(b), unless specifically ratified by the other Members."

3. Title to Property

This provision essentially restates 15 Pa. Cons. Stat. Ann. § 8818(a)].

"2.6. Title of Property.

(a) All tangible and intangible, real and personal property owned by the Limited Liability Company shall be owned by the Limited Liability Company as an entity and, insofar as permitted by applicable law, no Member shall have any ownership interest in such property in its individual name or right."

4. Membership Interest - Personal Property

This provision essentially restates 15 Pa. Cons. Stat. Ann. § 8841(f)].

(b) Each Member's interest in the Limited Liability Company shall be personal property for all purposes."

[3] See Sec IIB3, of Unit Three.

D. Registered Office

1. Selection of Registered Office.

a. A limited liability company (LLC) is required to have and continuously maintain a registered office in Pennsylvania. The office may, but need not, be the same as its place of business [15 Pa. Cons. Stat. Ann. § 8825(a)].

b. In lieu of maintaining a registered office, a company may use the services of a commercial registered office provider [15 Pa. Cons. Stat. Ann. § 8825(c); see also 15 Pa. Cons. Stat. Ann. § 109]. If a commercial registered office provider is used the name of the provider must be included in the certificate of organization [15 Pa. Cons. Stat. Ann. § 8821(b)(2)].

c. A "registered office" is the location at which a LLC may validly be served process. Service at such and service at the last validity registered office cannot be attacked by the LLC, even it is in fact no longer an office location maintained by the LLC.

2. Reporting Change in Registered Office.

a. A LLC may change its registered office at any time after organization.

b. Before the change becomes effective, it must be reported to the Department of State.

c. Reporting may be accomplished by either amending the certificate of organization [see § 42.32 [3]], or filing a certificate of change of registered office [15 Pa. Cons. Stat. Ann. § 8825(b)].

d. A certificate of change must state: (1) the name of the company; (2) the address, including street and number, if any, of its then registered office; and (3) the address, including street and number, if any, to which the registered office is to be changed [15 Pa. Cons. Stat. Ann. § 8825(b)].

3. Sample Provision.

The following provision is intended to put the Managing Member on notice that first the principal business location of the LLC, and its registered office may be two separate locations, and of the need under the Act to amend the office registration if it changes.

"2.3. Office.

a. The Company shall maintain its principal office at such location as may be designated by the Managing Member.

b. The original registered office of the Company is as provided in certificate of organization.

c. In the event that the registered office is no longer occupied as an office location of the Company, the Managing Member shall have the duty of reporting the change of registered office by either amending the certificate of organization or filing a certificate of change of registered office with the Pennsylvania Department of State."

E. Term

1. Under the Act an LLC has a perpetual existence, see 15 Pa. Cons. Stat. Ann. § 8818(c).

2. If the Operating Agreement intends to limit the existence of the LLC, language like the following should be considered:

"2.7. Term. The term of the Limited Liability Company shall commence on the Effective Date and shall continue until the winding up and liquidation of the Limited Liability Company in accordance with Section 10.1."

UNIT THREE – OPERATIONAL PROVISIONS

I. Overview

The provisions discussed in this Unit deal with management of the LLC when it is a member managed LLC, and alternatively when it is a manager managed LLC.

II. Operational Provisions

A. Member v. Manager

1. Under the Act, an LLC may be either managed by its members, or by a designated manager or managers.

2. The default under the Act is that the management and conduct of the company are vested in the members.

3. Under the Act a limited liability company is a member-managed limited liability company unless the operating agreement expressly provides that:

a. The company is or will be manager-managed;

b. The company is or will be managed by managers; or

c. Management of the company is or will be vested in managers; or

d. Includes words of similar import.

4. The decision as to whether management the LLC should be managed by its members or a manager will depend on whether the LLC is essentially functioning as a substitute entity for a general partnership in which each of its members is actively involved in the business of the entity, or established for the benefit of passive investors with the day to day business operation to be entrusted to a managing member or manager.

5. As a rule, LLCs which contain larger and more complex business operations tend to be manager managed.

B. Member-Managed Company.

1. Overview

a. A member -managed LLC is analogous to a general partnership, i.e., any member, absent restraints imposed by the Operating Agreement, has the ability to act on behalf of and bind the LLC

b. Under the Act, member-managed limited liability company, the following default rules apply:

(1) A member is not an agent of a limited liability company solely by reason of being a member.

(2) In a member-managed limited liability company, except as expressly provided in the Act, the management and conduct of the company are vested in the members. and

(3) Each member has equal rights in the management and conduct of the company's activities and affairs.

(4) If a difference arises among members as to a matter in the ordinary course of the activities and affairs of the company, it may be decided by a majority of the members

(5) With respect to a merger, interest exchange, conversion, division or domestication, an act outside the ordinary course of the activities and affairs of the company may be undertaken only with the affirmative vote or consent of all members

(6) Similarly, the company's certificate of organization may be amended only with the affirmative vote or consent of all members

(7) In addition, the company's operating agreement may be amended only with the affirmative vote or consent of all members [15 Pa. Cons. Stat. § 8847(b)(6)].

(8) A member is not entitled to remuneration for services performed for a member-managed limited liability company. The only exception to this rule is that a member may receive reasonable compensation for services rendered in winding up the activities of the company [15 Pa. Cons. Stat. § 8847(h)].

2. Duties of a Member in a Member Managed LLC

Under the Act a member in a member managed LLC has the following duties to his or her fellow members, and the company:

a. Duty of loyalty - The fiduciary duty of loyalty of a member in a member-managed limited liability company includes the duties:

(1) To account to the company and to hold as trustee for it any property, profit or benefit derived by the member:

(a) in the conduct or winding up of the company's activities and affairs.

(b) from a use by the member of the company's property; or

(c) from the appropriation of a company opportunity.

(2) To refrain from dealing with the company in the conduct or winding up of the company's activities and affairs as or on behalf of a person having an interest adverse to the company; and

(3) To refrain from competing with the company in the conduct of the company's activities and affairs before the dissolution of the company.

b. Duty of Care — The duty of care of a member of a member-managed limited liability company in the conduct or winding up of the company's activities and affairs is to refrain from engaging in gross negligence, recklessness, willful misconduct or knowing violation of law.

c. Good faith and Fair Dealing — A member shall discharge the duties and obligations under this title or under the operating agreement and exercise any rights consistent with the contractual obligation of good faith and fair dealing.

d. Self-serving Conduct — A member does not violate a duty or obligation under this title or under the operating agreement solely because the member's conduct furthers the member's own interest.

e. No Mention of Fiduciary Duty

(1) The Act does not refer to the duty of care as a fiduciary duty, because: (i) the duty of care applies in many non-fiduciary situations; and (ii) breach of the duty of care is remediable in damages while breach of a fiduciary duty gives rise also to equitable remedies, including disgorgement, constructive trust, and rescission.

(2) That change in label is consistent with the Restatement (Third) of Agency § 8.02 (2006), which refers to the agent's "fiduciary duty to act loyally but eschews the word "fiduciary" when stating the agent's duties of "care, competence, and diligence." However, the change in label is merely semantics; no change in the law is intended.

(3) The operating agreement can raise the standard of care, lower it.

(4) A person's practical exposure for breaching the duty of care involves not only the standard of care but also any operating agreement provision that: (i) exonerates the person from liability for breach of the duty of care; or (ii) entitles the person to indemnification despite the breach

3. Sample Provisions

a. Management and Control

This provision vests management and control of the LLC in the members:

ARTICLE ONE MANAGEMENT AUTHORITY

"Management Rights

1.01. The members of the Company reserve entirely the right to exercise the powers of the Company and to manage the business and affairs of the Company.

Execution of Documents

1.02. Any document or instrument shall be valid and binding on the Company if executed by any one or more of the members.

b. Approval by the Members

Here is a more detailed provision places certain limitation on the actions of the members by requiring the approval of the members in regard to certain actions on behalf of the LLC:"

ARTICLE 6.

CONTROL AND MANAGEMENT

"6.1. Power and Authority of the Members.

(1) Management of the business and affairs of the Company shall be vested in the Members.

(2) Except as specifically provided herein, each Member shall be bound by, and hereby consents to, any and all actions taken and decisions made by the Members in accordance with the terms of this Agreement. Any person designated by the Members, including a Member so designated, shall have the authority to bind the Company.

6.2 Actions Requiring Majority Member Approval

The foregoing notwithstanding, no Member shall have authority to bind the Company, without approval of Members holding a majority of the Voting Interests in regard to an action on behalf of the Company:

(1) to appoint, and remove with or without cause, a President, one or more Vice Presidents, a Secretary, a Treasurer and such other officers of the Company as the Members deem appropriate to carry out and execute the decisions and instructions of the Members in the day-to-day operations of the business of the Company, with such duties and powers as are from time to time specified by the Members;

(2) to retain all or any part of the Company's assets as long as the Members deem advisable, and to invest, reinvest, and keep invested all or any part thereof, without being restricted in any way with respect to the type of assets retained or invested in or with respect to the portion of the assets devoted to any investment;

(3) to purchase, lease, or otherwise acquire the ownership, use, or benefit of assets, properties, rights, or privileges, real or personal, tangible or intangible, of any kind or description, whether income producing or not;

(4) to sell, pledge, mortgage, lease, exchange, or to grant options for the purchase, lease, or exchange of any Company assets, on such terms and conditions as the Members may determine;

(5) to institute any legal action or proceeding on behalf of the Company;

(6) to assign, transfer, pledge, compromise, or release any claims or debts due the Company;

(7) to make, execute, or deliver any assignment for the benefit of creditors or any confession of judgment, mortgage, deed, guarantee, indemnity, or surety bond;

(8) to borrow money for any purpose that the Members consider to be for the benefit of the Company or to facilitate its administration, and to mortgage or pledge Company assets to secure the repayment thereof;

(9) to retain and pay custodians, accountants, counsel, and other agents and to incur any other expenses which are reasonably related to the operation of the Company;

(10) to enter into agreements with, and to fix and adjust the compensation of, employees of the Company;

(11) to invest in time deposits and savings accounts and to maintain banking accounts in any institutions determined by the Members; and

(12) to vote at any election or meeting of any corporation, partnership, limited liability company, joint venture, or other entity, in person or by proxy, to appoint agents to do so in the place and stead of the Members, and to exercise all rights (including without limitation approval and consent rights) that the Company may have with respect to such entity, whether pursuant to applicable law, governing documents, contracts, or otherwise."

c. Major Decisions

The following clause provides that certain "Major Decisions" must be approved by a "super majority" (i.e., 75%) of the Members:

"6.3 Major Decisions. Notwithstanding any other provision of this Agreement, unless approved by Members holding 75% of the Voting Interests, the Company may not:

(a) engage in a merger or consolidation with or into any corporation, partnership, limited liability company, or any other entity, whether or not the Company shall be the surviving entity of such merger or consolidation.

(b) sell all or substantially all of its assets to any person or entity;

(c) divide into two or more limited liability companies; or

(d) engage in any similar business transaction."

d. Meetings of the Members

The following provision establishes the protocol for holding member meetings:

> **"6.4. Meetings, Manner of Voting; Certain Rights to Require Vote**
>
> **A. Meetings of the Members may be called by any Managing Member and shall be called upon the written request of Members holding ten percent (10%) or more of the Percentage Interests held by all Members.**
>
> **(1) The call shall state the nature of the business to be transacted.**
>
> **(2) Notice of any such meeting shall be given to all Members not less than ten (10) Business Days nor more than thirty (30) days prior to the date of such meeting. Members may vote in person or by proxy at such meeting.**
>
> **(3) Whenever the vote or consent of Members is permitted or required under the Agreement, such vote or consent may be given at a meeting of Members or may be given in accordance with the procedure prescribed in subsection 6.4.C hereof.**
>
> **(4) Except as otherwise expressly provided in the Agreement, the vote of a majority of the Members shall control.**
>
> **B. The Members shall have the right to vote on the matters specifically reserved for their approval or consent that are set forth in this Agreement, and as required by the Act.**
>
> **C. In any case in which this Agreement requires or permits a vote of the Members, a meeting may be called by the Managing Member upon ten (10) days written no-tice, and where the Members holding 75% of the Membership Interests acts by written notice or consent, such a vote shall be taken by written consent signed by all Members or at a meeting called for that purpose by the Managing Member.**
>
> **D. Any Member who does not attend such meeting may vote by proxy or by written ballot submitted to the Managing Member at or prior to such meeting.**
>
> **E. The determination date for calculating the Percentage Interests of all Members shall be the date of the notice to the Managing Member and of the vote of the Members, as appropriate."**

C. Manager Managed Company

1. Authority of Managers.

a. Under the Act a limited liability company is a manager-managed liability company only if the operating agreement expressly provides for management by managers [15 Pa. Cons. Stat. § 8847(a)].

b. If the company is manager-managed, certain rules apply.

(1) Except as expressly provided by statute, any matter relating to the activities and affairs of the company is decided exclusively by the manager, or, if there is more than one manager, by a majority of the managers, and each manager has equal rights in the management and

conduct of the company's activities and affairs [15 Pa. Cons. Stat. § 8847(c)(1)–(2)].

(2) The affirmative vote or consent of all members is required:

(a) With respect to a Chapter 3 transaction (i.e., a merger, interest exchange, conversion, division or domestication), to undertake any act outside the ordinary course of the activities and affairs of the company [see 15 Pa. Cons. Stat. § 325 (exception)];

(b) To amend the company's certificate of organization [see 15 Pa. Cons. Stat. § 8822(d) (exception)], or

(c) To amend the company's operating agreement [15 Pa. Cons. Stat. § 8847(c)(3)].

2. Powers of the Manger

In a manager managed LLC, provisions like the following should also be included:

"4.1. Managing Member. Except as otherwise provided in this Agreement, the Managing Member shall be responsible for the operation of the Limited Liability Company's business in the ordinary course of business, and shall have the authority to do all things, without the consent of the Members, that it determines, in its sole discretion, to be in furtherance of the purpose of the Limited Liability Company. The Managing Member shall have all rights, powers and privileges available to a "manager" under the Act. The Managing Member shall have the right to enter into and execute all contracts, documents and other agreements on behalf of the Limited Liability Company and shall thereby fully bind the Limited Liability Company."

"Section 4.4 Members. No Member, solely in its capacity as a Member, shall have any power or authority to manage or control the business, affairs or properties of any of the Company Entities or the Business, to bind any of the Company Entities in any way, to pledge any of the Company Entities' Assets, to enter into agreements on behalf of any Company Entity or to otherwise render any Company Entity liable for any purpose.

3. Restriction on Managers Authority

Since the manager in a manger managed LLC is granted broad powers, the Operating Agreement sometimes places restrictions on the authority of the manager as provided in the following provision:

"5.2. Approval. The Managing Member and the Members shall not do any of the following without the express written consent of the Members (other than the Defaulting Members):

(1) Obtain financing from an Affiliate of a Member, except as otherwise provided in Section 3.5.

(2) Pay fees, commissions or other compensation to a Member, or an Affiliate of a Member, except as otherwise provided in Section 4.4.

(3) Increase the Reserves in an amount greater than the increase permitted by Section 7.3.

(4) Dissolve or wind up the Limited Liability Company.

(5) Amend this Agreement.

(6) Admit any other Members to the Limited Liability Company.

(7) Sell, assign or otherwise transfer or dispose of any of the assets of the Limited Liability Company, other than in the ordinary course of the Limited Liability Company's business.

(8) Transfer a Limited Liability Company Interest, except as provided in Section 9.1.

(9) Resign, dissolve or otherwise withdraw from the Limited Liability Company, except as provided in Section 9.2.

4. Certificate of Authority.

a. Another way to clarify the authority of managers, and also the members, of a limited liability company is to deliver to the Department of State for filing a certificate of authority [15 Pa. Cons. Stat. Ann. § 8832].

b. With respect to any position that exists in or with respect to the company, the certificate may state the authority, or limitations on the authority, of all persons holding the position to: (i) transfer real property held in the name of the company, including signing an instrument of transfer; or (ii) enter into other transactions on behalf of, or otherwise act for or bind, the company [15 Pa. Cons. Stat. Ann. § 8832(a)(2)].

c. Similarly, with respect to any specific person, the certificate may state authority, or limitations on the authority, of a specific person to: (i) transfer real property held in the name of the company, including signing an instrument of transfer; or (ii) enter into other transactions on behalf of, or otherwise act for or bind, the company [15 Pa. Cons. Stat. Ann. § 8832(a)(3)].

d. The certificate affects only the power of a person to bind a limited liability company with respect to persons that are not members. It supersedes any inconsistent provision of the certificate of organization in effect at the time the certificate of authority becomes effective [15 Pa. Cons. Stat. Ann. § 8832(c)].

e. The certificate may be amended or cancelled by delivering an amendment or cancellation to the Department of State for filing [15 Pa. Cons. Stat. Ann. § 8832(b)].

f. Unless earlier canceled, an effective certificate of authority that names an individual as having authority is canceled by operation of law five years after the date on which the certificate, or its most recent amendment, becomes effective [15 Pa. Cons. Stat. Ann. § 8832(i)].

g. If a person named in a filed certificate of authority granting that person authority does not wish to be given the authority, that person may deliver to the Department of State for filing a certificate of denial [15 Pa. Cons. Stat. Ann. § 8833(a)].

5. Authority Not Pertaining to Real Property.

a. In general, a grant of authority not pertaining to transfers of real property and contained in an effective certificate of authority is conclusive in favor of a person that gives value in reliance on the grant.

b. However, the grant is not conclusive to the extent that when the person gives value: (1) the person has knowledge to the contrary; (2) the certificate has been canceled or restrictively amended; or (3) a limitation on the grant is contained in another certificate of authority that became effective after the certificate containing the grant became effective [15 Pa. Cons. Stat. Ann. § 8832(e)].

6. Authority to Transfer Real Property.

a. In general, an effective certificate of authority or certificate of organization that grants authority to transfer real property held in the name of a limited liability company, a certified copy of which is recorded in the office of the recorder of deeds for the county in which the property is located, is conclusive in favor of a person that gives value in reliance on the grant without knowledge to the contrary.

b. However, the grant is not conclusive to the extent that (1) the certificate has been canceled or restrictively amended, and a certified copy of the cancellation or restrictive amendment has been recorded in the office of the recorder of deeds; or (2) a limitation on the grant is contained in another certificate of authority that became effective after the certificate containing the grant became effective, and a certified copy of the later-effective certificate is recorded in the office of the recorder of deeds [15 Pa. Cons. Stat. Ann. § 8832(f)].

7. Effect of Dissolution on Certificate of Authority.

a. An effective certificate of dissolution does not cancel a filed certificate of authority for the purposes of the authority, or limitation on the authority, to transfer real property.

b. However, an effective certificate of termination cancels a filed certificate of authority [15 Pa. Cons. Stat. § 8832(h)].

8. Certificate of Denial.

A person named in a filed certificate of authority granting that person authority may deliver to the department for filing a certificate of denial that:(1)

states: (i) the name of the limited liability company; (ii) the address, including street and number, if any, of the registered office of the company; and (iii) the date the certificate of authority to which the certificate of denial pertains was filed; and (2) denies the grant of authority.

9. Selection of Manager and Term of Office.

a. Under the Act the following default provisions apply:

(1) Under the Act default provision, a manager may be chosen at any time by the affirmative vote or consent of a majority of the members [15 Pa. Cons. Stat. § 8847(c)(4)].

(2) A person need not be a member to be a manager. However, the dissociation of a member that is also a manager removes the person as a manager. If a person that is both a manager and a member ceases to be a manager, that cessation does not by itself dissociate the person as a member [15 Pa. Cons. Stat. § 8847(c)(5)].

(3) Once chosen, a manager remains a manager until a successor has been chosen, unless the manager at an earlier time resigns, is removed or dies, or, in the case of a manager that is not an individual, terminates.

(4) A manager may be removed at any time by the affirmative vote or consent of a majority of the members without notice or cause [15 Pa. Cons. Stat. § 8847(c)(4)].

(5) A person's ceasing to be a manager does not discharge any debt, obligation or other liability to the limited liability company or members which the person incurred while a manager [15 Pa. Cons. Stat. § 8847(c)(6)].

b. The Operating Agreement should include specific provisions for both appointment and the removal of the manager:

(1) Sample Appointment Provision

"4.1. Managing Member. DONALD SMITH ("Manager") is hereby designated, and accepts such designation, as the "manager" of the Limited Liability Company.

4.2 Except as otherwise provided in this Agreement, the Manager shall be responsible for the operation of the Limited Liability Company's business in the ordinary course of business, and shall have the authority to do all things, without the consent of the Members, that it determines, in its sole discretion, to be in furtherance of the purpose of the Limited Liability Company.

4.3 The Manager shall have all rights, powers and privileges available to a "manager" under the Act.

4.4 The Manager shall have the right to enter into and execute all contracts, documents and other agreements on behalf of the Limited Liability Company and shall thereby fully bind the Limited Liability Company."'

(2) A second provision which provides or the annual election of the Manager, by the Members:

"5.6 Tenure.

(a) Term. The Manager will serve until the earlier of (1) the Manager's resignation; (2) the Manager's removal; (3) as to a Manager who is a natural person, the Manager's death or adjudication of incompetency; and (4) one year from the date of the Manager's election.

(b) Upon the occurrence of any such event, Members representing a majority of the Units outstanding shall promptly elect a successor as Manager.

(c) Resignation. The Manager at any time may resign for any reason (or no reason) by written notice delivered to the Members at least thirty (30) days prior to the effective date of the resignation.

(3) Sample Removal Provision

"(c) Removal.

(1) The Members may remove the Manager, upon the written approval of a majority of the outstanding Units, but only if (i) the Manager commits an act of gross negligence or willful misconduct which materially adversely damages the LLC, or (ii) the Manager enters Bankruptcy, and such proceeding is not dismissed within ninety (90) days of its initial filing.

(2) Prior to such removal being effective, the Members must provide the Manager with thirty (30) days' written notice of their intention to remove the Manager pursuant to the foregoing.

(3) The notice to the Manager shall contain a detailed description of the acts and omissions of the Manager that constitute the basis for the proposed removal of the Manager."

(4) A second Removal Provision more detailed removal provision:

"(b) Removal Event.

(1) A " Removal Event " shall be deemed to have occurred if:

(A) there is willful misconduct or a material breach by Managing Member or any of its affiliates, principals, officers, general partners or members, agents or employees in the discharge of its duties and obligations as Managing Member hereunder, including under the then applicable Development Budget, which is not cured (including, without

limitation, by reimbursing the Company and/or any other Member for any loss, damage, cost or expense incurred as a result of such conduct) within thirty (30) days after written notice thereof has been given; provided , however , that if such cure has commenced but cannot reasonably be completed within such thirty (30) day period, then said thirty (30) day period may be extended for such additional time as may be reasonably required to complete such cure provided that such cure is being diligently pursued but in any event such cure must be completed with ninety (90) days of commencement of such cure or receipt of notice, whichever is earlier;

(B) Managing Member causes a material breach by the Company or any Subsidiary of its obligations to any lender under a Loan or any of the applicable Loan Documents (provided that Company funds are available to satisfy such obligations), which material breach is not cured prior to the expiration of any notice and cure periods in such Loan Documents;

(C) Fraud, gross negligence, material misrepresentation or willful misconduct occurs on the part of Managing Member, its principals or any affiliate thereof concerning (i) the Property or the business of the Company or (ii) the performance by Managing Member of its obligations or covenants under this Agreement or under any provision of applicable law that materially affects the Property, the Project or the Company, including, without limitation, misappropriation or improper distribution of funds (including improper distributions to the Members in violation of this Agreement), and improper removal or disposal of any material portion of the Property by Managing Member or its affiliates;

(D) The Managing Member is convicted of or pleads guilty or no contest to a felony (other than driving-related offenses) or is convicted of or pleads guilty or no contest to a crime involving an intent to defraud or intent to steal as an element of such crime;

(E) Managing Member (i) files a voluntary bankruptcy, insolvency or reorganization petition, institutes insolvency proceedings or otherwise seeks relief under any laws relating to the relief from debts or protection of debtors, (ii) seeks or consents to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian or any similar official for Managing Member or all or any portion of such Managing Member's assets, (iii) makes any assignment for the benefit of such Person's creditors or (iv) fail to have dismissed an involuntary bankruptcy filing against Managing Member within ninety (90) days after such filing (except if such involuntary action is brought by any other Member or its affiliate); or

(F) A Transfer (as defined below) by Managing Member which is not expressly permitted hereunder occurs.

(2) Upon the occurrence of a Removal Event, the Members shall have the right to remove the then serving Managing Member as Managing Member by delivering written notice to the then Managing Member.

10. Standard of Conduct for Managers.

a. A manager of a manager-managed limited liability company owes to the company and the other members the duties of loyalty and care as defined by statute [see 15 Pa. Cons. Stat. § 8849.2(a)–(c)].

b. In addition, a manager is required to discharge the statutory duties of a manager set forth by law or under the operating agreement and exercise any rights consistent with the contractual obligation of good faith and fair dealing [15 Pa. Cons. Stat. § 8849.2(d)].

11. Reimbursement, Advancement, and Insurance

a. A limited liability company is required to reimburse a member of a member-managed company or manager of a manager-managed company for any payment made by the member or in the course of the member's or manager's activities on behalf of the company.

b. Reimbursement is only required if the member or manager complied with the applicable provisions of Uniform Limited Liability Act related to management of the company, standards of conduct for members, or standards of conduct for managers.

c. In the ordinary course of its activities and affairs, a limited liability company may advance expenses, including attorney fees and costs, incurred by a person in connection with a claim or demand against the person by reason of the person's former or present capacity as a member or manager. Advancement may only be made on the condition that the person promises to repay the company if the person ultimately is determined not to be entitled to be indemnified.

d. Sample Provision

"4.2. Payment of Expenses. At all times prior to the termination or dissolution of the Limited Liability Company, the cash proceeds of the Limited Liability Company, together with any net reduction in the reserves of the Limited Liability Company, shall be applied first to the payment of all taxes, debts and other obligations and liabilities (including the interest on and the principal of any loan owing to any Member) of the Limited Liability Company which are then due and owing, and the establishment of reasonable reserves for contingent and future liabilities and distributions of the Limited Liability Company, as determined by the Managing Member."

12. Personal Liability of Members and Managers

a. Liability in General.

(1) Under the Act, as a general rule, any debt, obligation, or other liability of a limited liability company is solely the debt, obligation, or other liability of the company.

(2) A member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation or other liability of the company solely by reason of being or acting as a member or manager [15 Pa. Cons. Stat. § 8834(a)].

(3) This freedom from liability applies regardless of whether the company has a single member or multiple members; and regardless of the dissolution, winding up, or termination of the company. There is no shield from professional malpractice claims.

b. Indemnification

(1) In General

Under certain conditions, a limited liability company is required to indemnify and hold harmless any person with respect to any claim or demand against the person and any debt, obligation or other liability incurred by the person by reason of the person's former or present capacity as a member or manager.

(2) Indemnification Not Required

(a) Indemnification is not required if the claim, demand, debt, obligation or other liability arose from the person's breach of the statutory limitation on distributions [15 Pa. Cons. Stat. Ann. § 8848(b); see 15 Pa. Cons. Stat. Ann. § 8845].

(b) Indemnification is also not required if the claim, demand, debt, obligation or other liability arose from the person's breach of the provisions of the Uniform Limited Liability Act related to management of the company, standards of conduct for members, or standards of conduct for managers [15 Pa. Cons. Stat. Ann. § 8848(b); see 15 Pa. Cons. Stat. Ann. §§ 8847, 8849.1, 8849.2].

(c) Indemnification may not be made in any case where the act giving rise to the claim for indemnification is determined by a court to constitute recklessness, willful misconduct, or a knowing violation of law [15 Pa. Cons. Stat. Ann. § 8848(g)].

(3) Insurance

With regard to insurance, a limited liability company may purchase and maintain insurance on behalf of a member or manager of the company against liability asserted against or incurred by the member or manager in that capacity or arising from that status.

(4) Sample Provision

In spite of the limitation of liability provision provided in the Act an indemnification provision like the following should be included in the Agreement:

"(c) Indemnification of Managers in Actions by or in the Right of the Company. Subject to the other provisions of this Section 11, the Company shall indemnify, to the fullest extent permitted by applicable law, as now or hereinafter in effect, any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the Company to procure a judgment in its favor by reason of the fact that such person is or was a member, manager or officer of the Company, or is or was a member, manager or officer of the Company serving at the request of the Company as a director, member, manager, partner, officer, employee or agent of another corporation, limited Liability company, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection with the defense or settlement of such action or suit if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Company; except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the Company unless and only to the extent that the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the court shall deem proper."

c. Professional Companies.

(1) The general rule regarding freedom from personal liability for members and managers of limited liability companies does not afford members of a professional company with greater immunity than is available to the officers, shareholders, employees or agents of a professional corporation.

(2) A professional company remains subject to the applicable rules and regulations adopted by, and all the disciplinary powers of, the court, department, board, commission or other government unit regulating the profession in which the company is engaged.

(3) In general, except as provided by a statute, rule or regulation applicable to a particular profession, a professional company may lawfully render professional services only through licensed persons.

(4) With regard to medical professional liability, a professional company is deemed a partnership for purposes of the Medical Care Availability and Reduction of Error (Mcare) Act].

13. Delegation Provision

The following provision makes clear the Manager may delegate authority to designated officers or employees of the LLC, but still is responsible for their supervision, and control.

"5.01. Delegation.

(a) The Manager may delegate the right, power and authority to manage the day-to-day business, affairs, operations and activities of the Company to any officer, employee or agent of the Company, subject to the ultimate direction, control and supervision of the Manager.

(b) If the Manager appoints an officer of the Company with a title that is commonly used for officers of a business corporation; the assignment of such title shall constitute the delegation of the authority and duties that are normally associated with that office, subject to any specific delegation of authority and duties made by the Manager."

UNIT FOUR – MEMBERSHIP INTERESTS

I. Overview

This Unit will address the nature of a membership interest under the Act, as well as the appropriate provisions establishing the rights and obligations of the members under the Operating Agreement.

II. Members and Membership Interests

A. Nature of a Membership Interest

1. A "member" of a limited liability company (LLC) is a person who has been admitted to membership in a limited liability company and who has not dissociated from the company [15 Pa. Cons. Stat. Ann. § 8812(a); see 15 Pa. Cons. Stat. § 8861 (events of dissociation); see also § 42.45].

2. The interest of a member in a limited liability company is personal property and is a transferable interest [15 Pa. Cons. Stat. Ann. § 8841(f)].

3. A person may not transfer to a person not a member any rights in a limited liability company other than a transferable interest.

4. A person becomes a member after the formation of the LLC:

a. By action of the organizer if the company does not have any members;

b. As provided in the operating agreement;

c. As the result of a transaction effective under Chapter 3 (relating to entity transactions);

d. With the affirmative vote or consent of all the members.

B. Defining the Rights of Ownership

1. Overview.

a. If defining the ownership rights of a member in an LLC, the Act is somewhat imprecise in terms of how to those rights are allocated among the members. For example, the Act provides that each member is entitled to share in distributions, but the Act doesn't define on what basis that sharing is to be made.

b. Also, the Act provides that a difference arising among members as to a matter in the ordinary course of the activities and affairs of the company is to be decided by a "majority" of the members, but the Act does not provide how a "majority" is to be determined.

c. In addition, although the Act does provide certain rules as to how decisions are to be made and distributions are to be allocated, the Act also these provisions to be overridden by the Operating Agreement.

d. Therefore, the Operating Agreement is free, with limited exceptions, to define the ownership rights and obligations of the members and parcel them out to the members in almost any way the members wish them to be defined.

2. Areas to be Addressed by the Act.

As result, a well drafted Operating Agreement, should provide clear definition of those rights and obligations, addressing at least the following areas of concern:

_ The obligation of the members to make capital contributions;

_ The voting rights of the members;

_ The authority of the members to act on behalf of the LLC;

_ The right to a member to current distributions;

_ The right of a member to distributions in dissolution;

_ The basis for allocation of taxable income and losses;

_ The member's right to transfer his or her membership interest;

_ The member's right to dissociate from the LLC.

3. The Determination of the Measure of Ownership

a. <u>Overview</u>

(1) The LLC ownership equivalent to the share of stock of a corporation, is not defined by the Act except in the general terms as described in the preceding material.

(a) Even the commonly used term "membership interest" does not appear in the statute.

(b) Rather the stature makes reference to a "transferable interest", which represents "the right, as initially owned by a person in the person's capacity as a member, to receive distributions from a limited liability company..."

(2) Therefore, it is up to the Operating Agreement to provide the basis upon which not only distributions, but also the other rights and obligations to be allocated among the Members.

(3) Since in most if not all cases, the basis upon these rights and obligations are determined is intended to reflect proportional shares of ownership in the LLC – the questions are: *"What is the best measure of ownership?" "Should that measure be static or dynamic?"*, i.e., should it be fixed at a specific point in time, or be allowed to fluctuate to reflect later changes in economic investment.

b. Percentage Interests.

(1) One commonly method of allocation is the "percentage interests" of the members.

(a) A "percentage interest" is intended to reflect each member's relative owner's economic investment and by logical extension their relative ownership share in the LLC.

(b) There are several ways the percentage interest can be determined.

(c) One way is by calculating the ratio of a member's initial capital contribution as compared to the total initial capital contribution of all members:

"The Members shall have the percentage ownership interests ("Percentage Interest") in the Company determined based on the ratio of the Initial Capital Contributions of a Member to the total Initial Capital Contributions of all Members provided for on Exhibit A, attached hereto."

(2) The problem with the foregoing provision is that it is only based upon the relative amount of the initial investment in the LLC, and does not account for later capital contributions or later distributions of capital. The following provision would take those capital adjustments into account.

"The Percentage Interests of the Members in the Company shall be adjusted monthly, and if appropriate to reflect any pending adjustments that have been determined but not yet effected, prior to any request for Additional Capital Contributions or any distributions to Members pursuant to Section 6.1 or any determinations, so that the respective Percentage Interests of the Members at any time shall be in proportion to their respective cumulative Total Investment."

(3) Another approach designed to provide what may provide a more precise measure of the level of investment of a member at particular point in time is a provision which bases the percentage interest of each member on the relative amount of the member's capital account.

(4) The capital account of a member in an LLC is basically determined by the following formula:

(a) Add (i) the total amount of capital contributions made by the member and (ii) the total amount of income allocated to that member,

(b) Then subtract from that sum: (i) the amount of any cash and the fair market value of any property distributed to the member, and (ii) the amount of expenses or losses, allocated to that member.

(5) The percentage interest of a member to be determined under a provision like the following:

"The Percentage Interests of a Member shall be determined by determining the ratio of a Member's Capital Account on the Determination Date to the total amount of all Member's Capital Accounts."

(6) Under the Act, in addition to money or property, the contribution of a member may consist of services performed for, or another benefit provided to the limited liability company. If percentage interests are determined under one of the preceding provisions, language like the following should be included to ensure that proper credit is allowed by the contribution of services to the LLC.

"The term "Capital Contribution" shall mean, with respect to any Member, the aggregate amount of (i) cash, and (ii) the fair market value of any services and any other property contributed by such Member to the capital of the Company net of any liability secured by such property that the Company assumes or takes subject to."

c. Membership Units

(1) In some Operating Agreements, ownership interests are defined in terms of a "Membership Unit" or simply a "Unit". The Unit is an artificial construct not provided in the Act which is analogous to a share of stock in a corporation.

"The Member Interests in the Company are divided into units (the "Units"). The Company has authorized an aggregate of up to 1,000 Units that may be held by the Members (the "Authorized Units"). The Units that are held by the Members as of the Closing are as set forth on the Member Schedule attached as Appendix II."

(2) When Units are used to reflect ownership the number of Units held by each member relative to other members will determine right and obligation allocations, and the terms of the Operating Agreement will determine on what basis the Membership Units are to be issued:

"3.1 Initial Members

The initial Members of the Company and the number of Units issued to each are as set forth on the Member Schedule.

3.2 Additional Members

Additional Persons may be admitted to the Company as Members only after Approval of the Board after such Person executes an Adoption Agreement and any other agreements and instruments in form and substance as the Board may require, and shall be issued the number of Units as the Board shall determine based upon the fair market value of any money, property, or services contributed by such Member to the capital of the Company.[4]"

(3) One issue in Operating Agreements which use Units as the measure of ownership is that they tend to be static in the sense that once they are issued the number of Units to remains fixed -there generally being no adjustment for later capital transactions.

4. The Obligation of the Members to Make Capital Contributions.

a. The Act

Under the Act, the contribution of each member to the limited liability company may consist of property transferred to, services performed for, or another benefit provided to the limited liability company, or an agreement to transfer property.

(1) If a person does not fulfill an obligation to make a contribution other than money, the person is obligated at the option of the limited liability company to contribute money equal to the value of the part of the contribution that has not been made.

(2) The obligation to make a contribution is not excused by the person's death, disability, termination or other inability to perform personally to, perform services for or provide another benefit to the company.

(3) The obligation of a person to make a contribution may be compromised only by the affirmative vote or consent of all the members.

b. Terms of the Operating Agreement

Alternatively, the obligation to make contributions and the amount of such contributions may be determined by the terms of the Operating Agreement. Here is an example of a typical provision:

"Section 3.3 Capital Contributions.

(a) Initial Capital Contributions by the initial Members. Pursuant to the Contribution Agreement and in exchange for their respective initial Member

[4] This provision assumes a Board of Members or Board of Managers is appointed under the terms of the agreement.

Interests, each of the initial Members has made an initial Capital Contribution to the Company as provided on Exhibit A, hereto."

c. Additional Contributions

Just as important as the level of the initial required capital contributions is whether the Operating Agreement anticipates members being required to make any additional contributions of capital to the Company. The following provision like the following should be included in the Operating Agreement if no additional capital contributions will be required:

"(b) Additional Member Capital Contributions. No Member shall be obligated to make or commit to make any Capital Contributions to the Company without its prior written consent."

d. Loan Provisions

(1) In Operating Agreements, that do not require additional capital contributions, a loan provision should be included. The idea being that if the LLC requires additional funding by the Members, such funding will not disturb equity percentages, but rather be treated as a third-party loan. In these cases, language like the following should be included:

"Section 3.09 Loans from Members. Loans by Members to the Company shall not be considered Capital Contributions. Subject to the provisions of Section 3.01(c) , the amount of any such advances shall be a debt of the Company to such Member and shall be payable or collectible in accordance with the terms and conditions upon which such advances are made."

(2) Another alternative, is as expressed in this paragraph:

"5.1 Future Financing. The Members anticipate that in the future the Company may require additional funds for capital expenditures or working capital requirements, and any such additional funding shall be obtained from any of the following sources as may unanimously be approved by the Members:

(a) cash reserves of the Company;

(b) loans to be obtained from banks and other such independent sources, in which event, the Members shall exert reasonable efforts to assist the Company in obtaining any such loans;

(c) additional Capital Contributions made to the Company by the Members, in proportion to their Percentage Interests, in amounts determined by mutual agreement of the Members;

(d) loans to be made to the Company by (i) the Members and/or (ii) a Related Company of either of the Members; or

(e) any other funding source mutually agreed upon by the Members."

e. Increased Equity

If it is anticipated that additional capital contributions may be required a provision like the following should be considered. This provision allows for increased equity for those members who actually make the required contributions.

"(b) From time to time, the Members may be required to make additional Capital Contributions in amounts that the Board may determine. Any such additional Capital Contributions shall be made in proportion to each Member's respective Percentage Interests. To the extent one or more Members do not make additional Capital Contributions pursuant to this Section 3.3(b), or such additional Capital Contributions are not made in proportion to such Member's respective Percentage Interests (in each case, other than in the event of a Default as provided in Section 3.4), then in connection with any Capital Contributions so made, the Company shall issue Units to the Members in respect thereof in accordance with Section 3.2. and each Member's Percentage Interest shall be adjusted based on the Units issued in exchange for such Capital Contributions and the application of the formula contained in the definition of "Percentage Interest" set forth herein."

f. Default

The preceding provision anticipates that some members may not make the required additional contribution when requested and provides that in that case contributing members will realize an increase in the relative ownership percentage in the LLC. If such a provision is utilized, a provision which also addresses how the defaulting members are treated should also be included. Here is an example:

"Section 3.4 Defaults.

In the event that a Member provides its written consent to make a Capital Contribution in accordance with Section 3.3(b)or is required to make a Capital Contribution (each, a "Supplemental Capital Contribution") but fails to make such Capital Contribution to the Company in full when due in accordance with the terms of this Agreement and such failure is not cured within 15 Business Days of such Member's receipt of written notice from the Company in respect thereof (such event a "Default" and such Member a "Defaulting Member"), then the amount of the Capital Contribution that is in default ("Defaulted Commitment") shall accrue interest at the Default Rate from the date due until the earlier of (i) the date such Member pays the

full amount of the Defaulted Commitment or (ii) the date Default Loans are made to such Member as provided herein (following which time such Default Loans shall bear interest in the manner described below).”

5. Voting Rights of the Members.

a. Overview

(1) Under the Act the default rule is that a difference arising among members as to a matter in the ordinary course of the activities and affairs of the company is decided by a majority of the members.

(2) On the other hand, the Act provides an act outside the ordinary course of the activities and affairs of the company, an amendment to the certificate of organization, or the operating agreement may be undertaken only with the affirmative vote or consent of all members.

(3) In drafting the Operating Agreement to override these default rules in regard to voting, there are two basic issues: (a) on what basis are the voting rights of the members determined, and (b) on what basis are particular matters approved or disapproved.

b. The Basis of Determining Vote

(1) The first question on what basis the vote is allocated to the individual members. Generally, vote is allocated based on ownership, i.e., percentage interest or membership units.

6.2. Voting Interests. Each Member shall have that number of Voting Interests as equals such Member’s Percentage Interest in the Company (e.g., a Member who has a 5% Membership Interest in the Company has 5 Voting Interests).

or

“Each holder of a Unit shall be entitled to one (1) vote for each Unit held for all matters which are subject to approval by the Members.”

(2) The Operating Agreement may also divide the membership interest into voting and non-voting interests as provided in the following clause:

“Each holder of a Class A Unit shall be entitled to one (1) vote for each Class A Unit held for all matters which are subject to approval by the Members.

Holder of Class B Units shall not be entitled to vote on any matter requiring approval of the Members

In regard to all other rights and obligations hereunder Class A and Class B Members shall be entitled to the same rights and shall be required to perform the same obligations without distinction as to Class of Membership Unit.”

c. How are Particular Matters Approved or Disapproved.

(1) A second consideration in drafting voting right provisions is the question of on what basis a particular matter or transaction is approved or disapproved. The options include: (a) a majority vote – 50% or more; (b) a super majority – in excess of a majority say 75% or more vote; and (c) unanimous consent.

(2) The determination of whether and in regard to what particular matters or transactions a greater than majority vote should be required, will depend on the facts and circumstances of each case.

(a) As a general rule however matters which are considered within the ordinary course of business would be of the type which would be subject to majority approval.

(b) On the other hand matters considered outside the ordinary course, such as borrowing in excess of a stated amount, or the bulk sale of assets outside the ordinary course of business or matters such as merger, consolidation, or dissolution, or the members investment in the LLC, or which would alter the original capital structure of the LLC, such as authorization of a new class of membership interest, or requiring an additional capital contribution are the type which would be subject to a super majority or unanimous approval of the members.

(3) Here are some examples of these types of provisions:

"Section 8.1 Matters Requiring Approval of the Members

Unless otherwise specifically provided herein, all matters requiring approval of the Members shall be require a vote of the Members

Section 8.2 Matters Requiring Super Majority of the Members

Notwithstanding Section 8.2, or any other contrary provision contained herein, the Company shall no take any of the following actions (each, a "Major Decision") without the approval of a Super Majority of the Members:

(1) To purchase or acquire, or contract or commit to purchase or acquire, any property or asset other than in the ordinary course of business (including any loan or any equity interests of any kind) with expenditure in excess of more than fifty thousand dollars ($50,000);

(2) (A) To borrow any money, enter into any credit facility, or enter into any financing, refinancing or loan transaction, or grant a security interest in all or any portion of the assets of the LLC, or (B) amend the terms and conditions of any existing financing or make

elections with respect to interest periods, interest rates, prepayment or other material provisions under any financing;

(3) To enter into or amend any contract between the Company, on the one hand, and the Manager(s) or an affiliate of the Manager(s), on the other hand;

(4) To institute, prosecute, defend or settle any legal, arbitration or administrative actions or proceedings on behalf of or against the LLC, subject to the provisions of; provided that with respect to any such action or proceeding involving a claim or series of related claims against the LLC totaling more than fifty thousand dollars ($50,000) and not covered by insurance;

(5) To commit the LLC to any capital or operating expenditures in excess of $50,000;

(6) To execute or consent to any material adverse change or waiver in or any amendment to any loan agreements pursuant to which the LLC is the borrower;

(7) To change the name of the LLC;

(8) To require or permit any Member to make a Capital Contribution as provided in Section 4.2;

(9) To consolidate or merge with or into any other entity, or purchase or otherwise acquire all or substantially all of the assets or any stock or shares of any class of any entity, or otherwise engage in any recapitalization, joint venture or other business combination;

(10) To dispose of the assets of the LLC other than in the ordinary course of business;

(11) To the fullest extent permitted by law, dissolve or liquidate, in whole or in part, make an assignment for the benefit of any creditor, file or otherwise initiate on behalf of the LLC a petition in bankruptcy, petition or apply to any tribunal for the appointment of a custodian, receiver or any trustee for it or for a substantial part of its property, commence any proceeding under any bankruptcy, insolvency, reorganization, arrangement, readjustment of debt, dissolution or liquidation law or statute of any jurisdiction, whether now or hereinafter in effect, consent or acquiesce in the filing of (or invoke or cause any person to file) any such petition, application or proceeding, or taking possession by a custodian, receiver, liquidator, assignee, trustee, sequestrator (or other similar official) of the LLC or any substantial part of its property, or admit its inability to pay its debts generally as they become due or authorize any of the foregoing to be done or taken on behalf of the LLC, or consent to or acquiesce in (A) the filing or other initiation of an involuntary petition for relief against the LLC under any Chapter of the Bankruptcy Code, or (B) the appointment of any trustee, receiver, conservator, assignee, sequestrator, custodian, liquidator (or other

similar official) for the LLC of all or substantially all of its respective assets;

Section 8.3 Definition of Super Majority- For purposes of this Agreement a Super Majority of the Members shall require a vote in favor of *such matter of seventy-five (75%) of the votes of the Units eligible to vote on such matter."*

(4) Here is another example of this type of provision:

"Section 8.2 -Matters Constituting Unanimous Approval Matters.

Notwithstanding anything in this Agreement or the Act to the contrary, and subject to the provisions of Section 8.3(c), each of the following matters, and only the following matters, shall constitute a "Unanimous Approval Matter" which requires the prior approval of all of the Members pursuant to Section 8.3(c) :

(a) sale, lease, transfer, pledge or other disposition of any of the Company's ownership interests in any of its assets, other the in the ordinary course of business;

(b) other than equity securities issued upon exercise of convertible or exchangeable securities approved pursuant to this Section 8.2 , the authorization, and/or issuance by the Company of equity securities, including the issuance of any additional Company Interests, whether in a private or public offering, including an initial public offering, or the grant, sale or issuance of other securities (including rights, warrants and options) convertible into, exchangeable for or exercisable for any of their respective limited liability company interests or other equity securities, whether or not presently convertible, exchangeable or exercisable;

(c) incurring any Indebtedness of the Company in excess of $100,000;

(d) any repurchase or redemption by the Company of equity securities;

(e) approval of the merger, consolidation, or participation in a share exchange or other statutory reorganization with, or voluntary or involuntary sale, exchange, assignment, transfer, conveyance, bequest, devise, merger, consolidation, gift or any other alienation, with or without consideration, of all or substantially all of the assets of the Company to, any Person;

(f) dissolution of the Company pursuant to Section 12.1 or the filing of any bankruptcy or reorganization petition on behalf of the Company and acquiescence in such a petition filed by others;

(g) approval of any capital contributions to the Company, including pursuant to any of their respective limited liability company agreements or other organizational documents;

(h) approval of the Company's annual budget, including the amount of cash reserves to be set aside before the payment of any distribution to the Members."

6. The Right to a Member to Current Distributions.

a. The Uniform Act

The default provisions as provided in the Act, are as follows:

(1) Each member is entitled to share in distributions of the limited liability company.

(2) A "distribution" is defined in the Uniform Limited Liability Company Act as a direct or indirect transfer of money or other property or incurrence of indebtedness by a limited liability company to a person on account of a transferable interest or in the person's capacity as a member [15 Pa. Cons. Stat. § 8812(a)]

(3) A person has a right to a distribution before the dissolution and winding up of a company only if the company decides to make an interim distribution [15 Pa. Cons. Stat. § 8844(b)].

(4) Any distribution made by a limited company before its dissolution and winding up must be in equal shares among members and persons dissociated as members [15 Pa. Cons. Stat. § 8844(a)].

(5) No person has the right to demand or receive a distribution from a company in any form other than money [15 Pa. Cons. Stat. § 8844(c)].

b. Limitation on Distributions.

(1) The Act further provides that no distribution may be made if after the distribution the limited liability company would not be able to pay its debts as they become due in the ordinary course of the company's activities and affairs [15 Pa. Cons. Stat. § 8845(a)].

(2) Moreover, no distribution may be made if after the distribution the company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights of members and transferees whose preferential rights are superior to the rights of persons receiving the distribution [15 Pa. Cons. Stat. § 8845(a)].

c. Valuation.

Under the Act a limited liability company may base a determination that a distribution is not otherwise prohibited on:

(1) The book values of the assets and liabilities of the company, as reflected on its books and records;

(2) A valuation that takes into consideration unrealized appreciation and depreciation or other changes in value of the assets and liabilities of the company;

(3) The current value of the assets and liabilities of the company, either valued separately or valued in segments or as an entirety as a going concern; or

(4) Any other method that is reasonable in the circumstances.

d. Liability for Improper Distributions.

(1) General rule - The Act provides that if a member of a member-managed limited liability company or manager of a manager-managed limited liability company consents to a distribution made not in conformity with the Act provisions relating to limitations on distributions and in consenting to the distribution fails to comply to provisions relating to standards of conduct for members or relating to standards of conduct for managers, the member or manager is personally liable to the company for the amount of the distribution which exceeds the amount that could have been distributed without the violation of the Act.

(2) Members without authority. — To the extent the operating agreement of a member-managed limited liability company relieves a member of the authority and responsibility to consent to distributions and imposes that authority and responsibility on one or more other members, the liability stated in subsection (1), above applies to the other members and not the member that the operating agreement relieves of authority and responsibility.

(3) Recipients. — A person that receives a distribution knowing that the distribution violated the Act is personally liable to the limited liability company but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid.

(4) Contribution. — A person against which an action is commenced because the person is liable under subsection (1) may:

(a) join any other person that is liable under subsection (1) or otherwise seek to enforce a right of contribution from the person; and

(b) join any person that is liable under subsection (3) or otherwise seek to enforce a right of contribution from the person in the amount the person is liable for under subsection (c).

(c) Statute of repose. — An action under this section is barred unless commenced within two years after the distribution.

e. Drafting Distributions Provisions

(1) Overview

(a) Distribution provisions generally address under what circumstances the LLC will make non-liquidating distributions to the members. In most cases, such distributions will consist of a share of operating profit, and in some cases the proceeds of financing transactions.

(b) In drafting distribution provisions, the essential issues to be addressed are: (i) who decides, (ii) how much, (iii) when are they made, and (iv) what is the source of the distributions.

(2) The Distribution Decision

(a) In member- managed LLCs generally the members will decide based on a majority vote of the members. In manager managed LLC, typically the manager will hold the discretion to determine when the distributions will be made.

(b) As a rule, the decision maker will also decide when distributions are made and the level of the aggregate distribution.

(c) Alternatively, the Operating Agreement may provide that certain mandatory distribution in certain circumstances. An example is the Minimum Tax Distribution provision in subsection (3)(b), below.

(d) The terms of the Operating Agreement should also provide as to how the aggregate distribution is allocated among the individual members.

(i) In most cases the distributions will be made along the lines of relative ownership shares, e.g., percentage interests.

(ii) However, in certain cases, a preferred distribution which favors one class of member over another, might be appropriate.

(iii) This may be the case when there are members who are making a passive investment in the LLC. See an example in subsection 3(c), below.

(3) Distribution Provisions

(a) Basic Provision

(i) The following an example of a typical distribution clause: Note in this provision the Manager makes the determination as to whether distributions are to be made subject to the limitations on distributions provided in the Act, and also after providing for reasonable "Reserves", defined as amounts deemed sufficient by the Manager for working capital, taxes, insurance, debt service, repairs, replacements or renewals, or other costs and expenses.

(ii) Note also the source of the distributions is also specified as "Distributions of Net Cash Flow", "Sale Proceeds", and "Refinancing Proceeds"; basically, the net cash proceeds from operations, sale or disposition of assets not in the ordinary course of business, and any borrowing or mortgage refinancing. Also note that distributions are allocated among the members based on the Membership Interests.

"DISTRIBUTIONS; ALLOCATION OF PROFITS AND LOSSES

4.01. Distributions. Subject to limitations on distributions provided under the Act, and further subject to maintaining the Company in a sound financial and cash position (which, without limiting the generality of the foregoing, shall include the provision for losses affecting the cash position of the Company and the payment or provision for payment, when due, of obligations of the Company) and establishing such Reserves as are determined by the Manager, in his sole discretion, to be reasonably required, the Manager shall make in each Accounting Period such Distributions of Net Cash Flow, and all Sale Proceeds or Refinancing Proceeds, as the Manager may reasonably determine.

4.02. Distributions of Net Cash Flow and Sale Proceeds or Refinancing Proceeds. Such distributions shall be made according

to respective Membership Interest to the holder of record of the Membership Interest on the date of distribution.

4.03. Time of Distributions. The foregoing notwithstanding, for any calendar year, the Company shall distribute in cash no less than the "Tax Distribution Amount" (as defined in Section 4.04).

4.04 Definitions

(a) "Net Cash Flow" means the funds provided from Company operations, without deduction for noncash expenses, but after deducting all cash funds used to pay all other expenses, capital improvements or replacements, and debt payments, if any, and after adjustment for changes in Reserves.

(b) "Reserve" or "Reserves" means amounts deemed sufficient by the Manager, as of the date of determination, for working capital and to pay taxes (specifically including the Manager's authority to retain Reserves for purposes of paying tax obligations of the Members on their behalf), insurance, debt service, repairs, replacements or renewals, or other costs and expenses, incident to the operation of the Company.

(c) "Sale" or "Refinancing" mean, as the case may be, any Company transaction (other than the receipt of Capital Contributions) not in the ordinary course of its business, including, without limitation, sales, exchanges or other dispositions of real or personal property, condemnations, recoveries or damage awards and insurance proceeds (other than business or rental interruption insurance proceeds) or any borrowing or mortgage refinancing.

(d) "Sale Proceeds" or "Refinancing Proceeds" means all cash funds resulting from a Sale or Refinancing, as the case may be, less (i) expenses incurred in the Sale or Refinancing, (ii) debts and obligations related to the Sale or Refinancing, (iii) other payments for Company expenses (including costs and improvements or additions to properties and amounts as may be required to purchase underlying land or any joint venture interest) and (iv) additions to Reserves in the discretion of the Manager."

(b). Minimum Tax Distribution

(i) Most LLCs elect to be treated as partnerships for federal income tax purposes. As a result, the members must report their allocable share of the taxable income of the LLC on their personal income tax returns whether or not it is actually distributed to them or not.

(ii) In order to eliminate the negative impact of the having to report income without cash to pay the tax, another commonly included distribution provision is one that provides at a minimum the members are to receive a

distribution which approximates the tax imposed on the member by reason of their holding membership interests in the LLC. The following provision is an example of this type of provision:

"4.05. Tax Distribution Amount. For purposes of this Agreement, the "Tax Distribution Amount" for any calendar year shall be an amount equivalent to all U.S., state and foreign taxes imposed upon a Member (taking into account the highest tax rates applicable to such Member) as a result of his or her Membership in the Company.

(a) The Tax Distribution Amount shall be determined by the Accountants based upon such information as shall be provided to the Accountants by the Company and each Member.

(b) The Company shall endeavor to make such minimum distributions at such times during the calendar year and during the 75 days following the end of the calendar year as shall enable the Members to use such distributions to satisfy their estimated and final income tax liabilities for the calendar year."

(c) Preferred Distributions

Not all LLCs allocate distributions strictly along the lines of relative percentage interests. In some cases, particularly if passive investors are involved a preferred distribution may be provided for. Here is an illustrative provision:

"The Manager shall make in each Accounting Period the following distributions of Net Distributable Cash:

(i) First, to the Class A Members pro rata in proportion to, but no more than, the amount of their Unreturned Capital;

(ii) Thereafter, the balance to all Members pro rata in accordance with their respective Membership Interests."

7. The Basis for Allocation of Taxable Income and Losses

a. Overview

(1) The majority of LLCs elect to be taxed as partnerships for federal income tax purposes. Under IRC Sec 701 partnership operate under the so called "pass-through tax principle", i.e., a partnership is not subject to tax, but the partners or in the case of LLCs the members report the income (or loss) of the entity on their individual tax returns.

(2) IRC Sec. 704 begins by stating the general principle that a partner's distributive share of items of partnership income, gain, deduction, loss and credit are determined under the partnership agreement, according to each partner's "interest in the partnership."

(3) This basically means according to relative partnership shares of ownership, for example based on "percentage interests". IRC Sec. 704, also allows a partnership or LLC another option, and that is to make special allocations the tax losses realized by the entity in a manner that is different from the allocation of profits, and different than "interests in the partnership.

(4) These allocations are what are known as "special allocations" IRC Sec 704 allows for "special allocations" as long as they meet the "substantial economic effect" test

b. Definitions

The Operating Agreement should include a definition of the items which are be allocated pursuant to the provision, which is consistent with the pas through of the taxable income or taxable loss generated by the LLC. The following is an example:

"Profits" and "Losses" shall mean amounts equal to the corresponding items of income, gain, deductions and losses computed for federal income tax purposes.

Profits shall also include tax-exempt income of the Limited Liability Company under Code Section 705(a)(1)(B); and

Losses shall include expenditures of the Limited Liability Company described in Code Section 705(a)(2)(B) and expenditures which are characterized as Section 705(a)(2)(B) expenditures pursuant to Regulation Section 1.704-1(b) or any successor thereto."

c. Straight Allocation

If allocations of taxable income and loss are made strictly according to membership interests, then a provision like the following is generally adequate:

8.1. Allocations. Except as otherwise provided in Sections 8.2, 8.3 and 8.4, all items of Profits and Losses shall be allocated to the Members, to all of the Members in proportion to their Percentage Interests.

d. Summary of Special Allocation Rules.

(1) Overview.

(a) As noted previously, IRC Sec. 704 of the Code generally allows the allocation of tax losses which differ from a partner's interest in the partnership, or an LLC's member's membership interest in the LLC. For example, assume Mr. A owns

75% of Apple, LLC and Mr. B owns 25%, In Year 1 of the LLC a $100,000 loss is incurred. Based upon partnership interests Mr. A would report a $75,000 loss and Mr. B will report a $25,000 loss, on the individual tax returns. However, what if Mr. A wants to report the entire $100,000 loss on his tax return? This "special allocation" is permitted under IRC Sec. 704 as long as the allocations has what is termed a "substantial economic effect".

(b) This generally means that in order to meet the requirements of IRC Sec. 704, a special allocation of tax benefits must ultimately have an economic effect to the partners[5] in addition to its tax effect.

(c) The mechanism employed by the regulations to ensure that "substantial economic" effect is achieved, is through a required maintenance of capital accounts in a manner consistent with requirements in the Regulations, and a further requirement that liquidation distributions must ultimately be based on a positive balance of those capital accounts.

(d) In order to test an agreement to see whether the allocations made in the agreement meet the "substantial economic" effect standard, the Regulations set forth the so-called "Basic Test", and then two alternative tests; the "Alternate Test" and the "Economic Equivalence Test".

(e) Also provided in the Regulations are two additional sets of rules in regard to specific types of allocations, i.e., (i) allocations attributable to "non- recourse" debt" and, (ii) allocations related to appreciate property contributed to the partnership.

(2) <u>The Basic Test</u>.

(a) Under the Basic Test, the following requirements must be met for an allocation to have "substantial economic" effect:

(i) Capital accounts must be maintained in accordance with the rules under Reg.§ 1.704-1(b) (2) (iv).

(ii) Upon liquidation of the partnership, distributions must be made in accordance with positive capital account balances; and

[5] All references in this letter will be to "partners" and "partnerships", because that is how LLCs are taxed under the IRC, given the proper election.

(iii) Partners with capital account deficits, must be unconditionally obligated to restore any deficit in their capital account within 90 days of liquidation of the Partnership.

(b) In order to illustrate the application of this three part test, please consider the following example:

Example 1 (Part 1)

A and B form a partnership, each contributing $5,000 to the partnership. Each partner owns a 50% "interest" in the partnership. In Year 1 the partnership realizes a $3,000 tax loss. The allocation of tax loss, consistent with partnership interests, would result in an allocation of a $1,500 loss to each partner. Assume, however, that in our Example, partner A wants to be allocated the entire tax loss for Year 1, and partner B agrees. Sec. 704 allows for such a "special" allocation as long as the allocation has "substantial economic effect". At the end of Year One after the "special" allocation of tax losses - A and B have capital accounts which stand as follows:

	A Cap Account	B Cap Account
Contribution	$5,000	$5,000
Tax Loss Yr 1	<3,000>	-0-
Ending Balance	$2,000	$5,000

At the end of Year 1, the Partnership has Cash of $7,000, and no liabilities.

Example 1 (Part 2):

Assume an additional tax loss of $3,500 is realized in Year 2, and is also allocated 100% to partner A. At the end of Year 2, the Partnership is liquidated. At the end of Year Two after the allocation of tax losses - A and B have Capital Accounts which stand as follows:

	A Cap Account	B Cap Account
BegBalCA	$2,000	$5,000

Tax Loss Yr 1	<3,500>	-0-
Ending Balance	<1,500>	$5,000

At this point assume the partnership has $3,500 in Cash and no liabilities. In order for the allocation to have "substantial economic effect" the partnership agreement would have to require partner A to restore the negative capital account balance of $1,500, to the partnership within 90 days of the liquidation. This would increase the Cash held by the Partnership to $5,000. After the restoration of the deficit to partner A's capital account, that capital account would be zero. The partnership upon liquidation, would distribute $5,000 to partner B, i.e., an amount equal to B's capital account balance. Nothing would be distributed to partner A because partner A's capital account would be zero, at that point. The allocation of tax losses to partner A has had an "economic effect".

(3) The Alternate Test.

(a) The Regulations provide an alternative test which can be met in order to satisfy the "substantial economic effect" test. Under this test, the so—called "Alternate Test", partners with negative capital accounts are not required to make contributions in order to make up the deficit. In fact, under this test, allocations are not permitted to create deficits in capital accounts in the first place. Under the Alternate Test, the following requirements must be met:

(i) As with the Basic Test, capital accounts must be maintained in accordance with the rules under Reg.§ 1.704-1(b) (2) (iv);

(ii) As with the Basic Test, upon liquidation of the partnership distributions must be made in accordance with positive capital account balances; and

(iii) Instead of containing a requirement that deficits in capital accounts be restored - the partnership agreement must contain what is called a "qualified income offset" provision.

(b) A "qualified income offset" provision requires that should a deficit capital account result for an "unexpected event", such as an unexpected distribution from the partnership, the partner must be allocated items of income to eliminate the deficit as soon as possible.

Example 2:

Same facts as in Example 1, but assume in Year 2 the partnership had zero taxable income. Also assume, the partnership made an unexpected distribution of $3,500 to partner A at the end of Year 2. This distribution created a deficit capital account balance for partner A of $1,500. At the end of Year 1:

	A Cap Account	B Cap Account
Contribution	$5,000	$5,000
Tax Loss Yr 1	<3,000>	-0-
Ending Balance	*$2,000*	*$5,000*

At the end of Year 2:

	A Cap Account	B Cap Account
BegBalCA	$2,000	$5,000
Tax Loss Yr 1	<3,500>	-0-
Ending Balance	<1,500>	$5,000

Assume further, that in Year 3 the partnership has taxable income of $1,500. In Year 3 that item of income must be allocated to partner A, to eliminate the deficit in the CA under a "qualified income offset" provision. At the end of Year 3:

	A Cap Account	B Cap Account
BegBalCA	<1,500>	$5,000
Tax Alloca Yr 3	<1,500>	-0-
Ending Balance	-0-	$5,000

(4) Economic Equivalence.

Allocations which do not have economic effect under the Basic Test or the Alternate Test will be deemed to have economic effect, if at the end of each

partnership year a liquidation of the partnership would produce the same result as the Basic Test.

(5) Addition Special Allocation Rules.

(a) Allocations in re: Contributed Property

Sec. 704 (c) provides that income, gain and deduction items with respect to property contributed by a partner to a partnership shall be shared among the partners so as to take into account the variation between the basis of the contributed property in the hands of the partnership and its fair market value at the time of contribution. The purpose of this rule is to prevent the shifting of pre- contribution gains and losses among partners. If no partner has contributed property to the partnership these provisions are not particularly relevant but should be included in the operating agreement nevertheless.

(b) Allocations in re: Non-recourse Debt

A liability is non-recourse to the extent that no partner bears the economic risk for the liability. Because no partner bears the economic risk of loss, an allocation of deductions generated by such liability cannot have economic effect. If there is no non-recourse debt in the partnership, then these provisions are irrelevant. If non-recourse debt is present in the partnership the regulations provide generally a four part test. Under that test the following criteria must be met:

(i) Capital accounts must be maintained in accordance with the rules under Reg. § 1.704-1 (b) (2) (iv);

(ii) Upon liquidation of the partnership distributions must be made in accordance with positive capital account balances;

(iii) The agreement must provide for either a deficit restoration obligation, or a qualified income offset provision, as discussed above;

(iv) The agreement must allocate deductions related to non-recourse liabilities in a manner consistent with allocations of deductions that have substantial economic effect; and

(v) The agreement must contain a "minimum gain charge back" provision.[6]

(c) The following provides the clauses that should be included if a "special allocation" of tax losses is contemplated:

1.1. Capital Accounts

A. A separate Capital Account will be maintained for each Member in accordance with Section 704(b) of the Code and Regulation §1.704-1(b)(2)(iv).

(1) Each Member's capital account will be increased by

(a) the amount of money contributed by him to the Company;

(b) the fair market value of property contributed by him to the Company (net of liabilities secured by such contributed property that the Company is considered to assume or take subject to under Section 752 of the Code); and

(c) allocations to him of income and gain (or items thereof) as set forth in such Regulation, taking into account adjustments to reflect book values including adjustments to Gross Asset Value.

(2) Each Member's Capital Account will be decreased by

(a) the amount of money distributed to him by the Company;

(b) the fair market value of property distributed to him by the Company (net of liabilities secured by such distributed property that he is considered to assume or take subject to under Section 752 of the Code);

(c) allocations to him of expenditures described in Section 705(a)(2)(B) of the Code; and

(d) allocations to his account of Company Loss and deduction (or items thereof) as set forth in such Regulation, taking into account adjustments to reflect book value including adjustments in Gross Asset Value.

B. In the event of a permitted Transfer of a Company Interest, the Capital Account of the transferor shall become the Capital Account of the transferee to the extent it relates to the transferred interest.

C. The manner in which Capital Accounts are to be maintained pursuant to this Section is intended to comply with the requirements of Section 704(b) of the Code and the Regulations promulgated thereunder, and they shall be determined and maintained in a manner consistent with

[6]"Minimum gain" is the hypothetical gain that would be realized if partnership property subject to non-recourse liability were to be sold for the face value of the debt obligation. If there is a net decrease in the partnership minimum gain (i.e., the gain that would be realized is the partnership disposed of the partnership property for the face of the nonrecourse liability secured by such property) for a particular year each partner must be allocated items of income and gain equal to that partner's share of net decrease in partnership minimum gain. 9.01(a) and 9.01(b), address the allocation requirements of the Regulations as they relate to these requirements. If there is no non-recourse debt, the provisions are no-applicable.

Section 704(b) and such Regulations at all times throughout the full term of the Company.

1.2. Allocations of Profits and Losses

A. Subject to the provisions of Section 1.3, Profits and Losses shall be allocated to the Members as follows:

(1) Profits together with each item of income and gain which must be separately stated pursuant to Code Section 702(a) shall be allocated to the Members as follows:

(a) First, to the Members until the cumulative Profits allocated pursuant to this subsection 1.2.A(1)(a) are equal to the cumulative Losses allocated to the Members pursuant to subsection 1.2.A(2) for all prior periods.

(b) Second, to the Members in accordance with their Percentage Interests

(2) Losses together with each item of deduction or credit which must be separately stated pursuant to Code Section 702(a) shall be allocated to the Members as follows:

(a) Except as provided in subsections 1.2.A(2)(b) and 1.2.B, Losses shall be allocated in accordance with the Members' Percentage Interests.

(b) To the extent that Profits have been allocated pursuant to subsection 1.2.A for any prior year, Losses shall be allocated first to offset any cumulative Profits allocated pursuant to subsection 1.2.A(1)(b) and then subsection 1.2.A(1)(a), in each case pro rata among the Members in proportion to their share of the Profits being offset. To the extent that any allocations of Profits are offset pursuant to this subparagraph, such allocations shall be disregarded for purposes of computing subsequent allocations pursuant to this subparagraph.

B. The foregoing notwithstanding, Losses and separately stated items allocated to any Member pursuant to 1.2.A(2) shall not exceed the maximum amount of Losses that can be so allocated without causing any Member to have an Adjusted Capital Account Deficit at the end of any Accounting Period which would be in excess of the amount that such Member is obligated to restore pursuant to this Agreement. In the event that some, but not all of the Members would have an have an Adjusted Capital Account Deficit in excess of the amount that such Member is obligated to restore pursuant to this Agreement as a consequence of an allocation of Losses pursuant to 1.2.A(2), the limitation set forth in this subsection 1.2.B shall be applied on a Member by Member basis so as to allocate the maximum permissible Losses to each Member without causing any Member to have an Adjusted Capital Account Deficit in excess of the amount that such Member is obligated to restore pursuant to this Agreement

C. Notwithstanding anything contained herein to the contrary, the Managing Member shall not be allocated less than one percent (1%) of the

Profits and Losses. If the Managing Member would otherwise be allocated less than one percent (1%) of Profits and Losses of the Company as determined under subsection 1.2.A, the Managing Member shall be allocated (1%) of Profits and Losses and each Limited Member's share of the Profits and Losses determined under subsections 1.2.A(1) and 1.2.A(2) shall be reduced by a pro-rata amount of the difference between the amount of Profits and Losses the Managing Member is entitled to under subsections 1.2.A(1) and 1.2.A(2) and the 1% allocated to the Managing Member under this subsection 1.2.C.

1.3. Special Allocations

Notwithstanding any other provisions of this Section, the following special allocations shall be made in the following order:

A. Minimum Gain Chargeback.

(1) Notwithstanding any other provision of this Section Error! R eference source not found.**, except to the extent that Section 1.704-2(f) of the Regulations (or any other applicable authority) provides an exception to the operation of the minimum gain chargeback requirement of the Regulations, if there is a net decrease in Company Minimum Gain during any Accounting Period, each Member shall be specially allocated items of income and gain for such Accounting Period in an amount equal to such Member's share of the net decrease in the Company's Minimum Gain (within the meaning of Section 1.704- 2(g)(2) of the Regulations, determined in accordance with Section 1.704-2(g) of the Regulations.**

(2) In the event that the minimum gain chargeback requirement imposed by this subsection and Section 1.704-2(f) of the Regulations exceeds the Company's income and gains for the Accounting Period, the excess shall be treated as a minimum gain chargeback, and shall be specially allocated under this subsection, in the immediately succeeding Accounting Periods until fully charged back.

(3) Allocations pursuant to this subsection shall be made in proportion to the respective amounts required to be allocated to each Member pursuant hereto.

(4) The items to be allocated shall be determined in accordance with Sections 1.704-2(f)(6) and 1.704-2(j) of the Regulations. This subsection 1.3.A is intended to comply with the minimum gain chargeback requirement in the Regulations and shall be interpreted consistently therewith.

B. Member Nonrecourse Debt Minimum Gain Chargeback.

(1) Notwithstanding any other provision of this, except to the extent that Section 1.704-2(i)(4) of the Regulations (or any other applicable authority) provides an exception to the operation of the Member nonrecourse debt minimum gain chargeback requirement of the Regulations, if there is a net decrease in Member Nonrecourse Debt Minimum Gain attributable to a Member Nonrecourse Debt during any Accounting Period, each Member who has a share of the Member

Nonrecourse Debt Minimum Gain attributable to such Member Nonrecourse Debt, determined in accordance with Section 1.704-2(i)(5) of the Regulations, as of the beginning of that Accounting Period, shall be specially allocated items of income and gain for such Accounting Period (and, if necessary, succeeding Accounting Periods) in an amount equal to such Member's share of the net decrease in Member Nonrecourse Debt Minimum Gain.

(2) A Member's share of the net decrease in Member Nonrecourse Debt Minimum Gain shall be determined in a manner consistent with the provisions of Sections 1.704-2(j)(2) and 1.704-2(i)(4) of the Regulations.

(3) Allocations pursuant to this subsection shall be made in proportion to the respective amounts required to be allocated to each Member pursuant to this subsection and Section 1.704-2(i)(4) of the Regulations. The items to be so allocated shall be determined in accordance with Sections 1.704- 2(i)(4) and (j)(2) of the Regulations.

(4) This subsection 1.3.B is intended to comply with the Member Nonrecourse Debt Minimum Gain chargeback requirement in the Regulations and shall be interpreted consistently therewith.

C. Adjustments Pursuant to Code Section 754 Election.

(1) To the extent an adjustment to the adjusted tax basis of any asset of the Company pursuant to Code Section 734(b) or Code Section 743(b) is required, pursuant to Section 1.704- 1(b)(2)(iv)(m)(2) or (4) of the Regulations, to be taken into account in determining Capital Accounts as a result of a distribution to a Member in complete liquidation of its interest in the Company, the amount of such adjustment to the Capital Accounts of the Members shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis).

(2) Such gain or loss shall be specially allocated to the Members in accordance with their interests in the Company in the event Section 1.704-1(b)(2)(iv)(m)(2) of the Regulations applies, or to the Member to whom such distribution was made in the event Section 1.704-1(b)(2)(iv)(m)(4) of the Regulations applies.

D. Nonrecourse Deductions.

Nonrecourse Deductions for any Accounting Period shall be allocated to the Members in accordance with the allocation of Losses pursuant to subsection 1.2.A(2).

E. Member Nonrecourse Deductions.

Any Member Nonrecourse Deductions for any Accounting Period shall be specially allocated to the Member who bears the economic risk of loss with respect to the Member Nonrecourse Debt to which such Member Nonrecourse Deductions are attributable in accordance with Section 1.704-2(i) of the Regulations.

1.4. Code Section 704(c).

A. In accordance with Code Section 704(c) and the Regulations thereunder, income, gain, loss and deduction with respect to any property contributed to the capital of the Company, solely for tax purposes, shall be allocated among the Members so as to take account of any variation between the adjusted basis of such property to the Company for Federal income tax purposes and its initial Gross Asset Value.

B. If the Gross Asset Value of any asset of the Company is revalued pursuant to Section, subsequent allocations of income, gain, loss and deduction with respect to such asset shall take account of any variation between the adjusted basis of such asset for federal income tax purposes and its Gross Asset Value in the same manner as under Code Section 704(c) and the Regulations thereunder.

C. Any elections or other decisions relating to allocations made under this Section 1.4 shall be made in any manner that reasonably reflects the purpose and intention of this Agreement. Allocations pursuant to this Section 1.4 are solely for income tax purposes and shall not affect, or in any way be taken into account in computing, any Member's Capital Account or share of Profits, Losses, other separately stated items or distributions pursuant to any provision of this Agreement.

D. The provisions of this Section 1.4 are intended to comply with Code Section 704(c) and the Regulations promulgated there under. The Members shall make any modifications to this Agreement as may be required to comply with Section 704(c) and the Regulations thereunder.

1.5. Other Allocation Rules.

A. Except as otherwise provided in this Agreement, items of income, gain, loss, deduction and credit shall be allocated among the Members for income tax purposes in a manner consistent with the allocations made for "book purposes" under this Section.

(1) Specifically, items of taxable income or loss corresponding to items which have been specially allocated pursuant to Section 1.3 shall be allocated for tax purposes in the same manner as those items are allocated for book purposes.

(2) Taxable income or loss for any Accounting Period which is not allocated pursuant to the preceding sentence and which is not otherwise allocated pursuant Section 1.3 shall be allocated among the Members for tax purposes in the same proportion that Profit or Loss has been allocated for that Accounting Period under Section 1.2

B. For purposes of determining the Profits, Losses or any other items allocable to any Accounting Period, Profits, Losses and any such other items shall be determined on a daily, monthly or other basis, as determined by the Members using any permissible method under Code Section 706 and the Regulations thereunder.

C. Notwithstanding the other provisions of this Section Error! Reference source not found.**, the Members are authorized to make any adjustment in the allocation of Profits or Losses provided for in such**

Section if the Members consider in good faith that the adjustment is necessary and equitable to correct errors in allocations caused by errors in unaudited financial information or to correct inequities which may arise under this Agreement, including those which may result from there being multiple Accounting Periods during a single Fiscal Year or during the term of this Agreement rather than a single Accounting Period.

D. Solely for purposes of determining each Member's share of "excess nonrecourse liabilities" of the Company, as such term is defined in Section 1.752-3(a)(3) of the Regulations; excess nonrecourse liabilities shall be allocated among the Members in accordance with the manner in which it is reasonably expected that the deductions attributable to nonrecourse liabilities will be allocated.

E. To the extent permitted by Section 1.704-2(h)(3) of the Regulations, the Company shall endeavor to treat distributions as having been made from the proceeds of a Nonrecourse Liability or a Member Nonrecourse Debt only to the extent that such distributions would not cause or increase an Adjusted Capital Account Deficit for any Member that exceeds the amount the Member is otherwise obligated to restore within the meaning Section 1.704-1(b)(2)(ii)(c) of the Regulations.

1.6. Generally Accepted Accounting Principles

The Profits and Losses of the Company shall be determined in accordance with generally accepted accounting principles applied on a consistent basis. The Company will elect those permissible accounting methods which provide the Members with the greatest tax benefits.

(6) In the liquidation section of the Agreement, include the following:

C. The Liquidator shall be responsible for overseeing the winding up and dissolution of the Membership, shall take full account of the Membership's liabilities and Membership Property, shall cause the Membership Property to be liquidated as promptly as is con-sistent with obtaining the fair value thereof unless by Managing Members holding 100% of the Percentage Interests held by all of the Managing Members, and Members hold-ing 75% of the Percentage Interests held by all of the Members consent to distributions of all or any part of the Membership Property in kind, and shall cause the Membership Property or the proceeds therefrom, to the extent sufficient therefore, to be applied and distributed in the following order:

(1) First, to creditors of the Membership, including Members, but excluding Managing Member(s), in satisfaction of all of the Membership's debts and liabilities;

(2) Second, to the payment and discharge of all of the Membership's debts and liabilities to the Managing Member(s);

(3) The balance, if any, to the Members in accordance with their positive Capital Accounts, after giving effect to all contributions,

distributions, and allocations for all periods however, that no distribution shall be made pursuant to this Section 11.4.C that creates or increases an Adjusted Capital Account Deficit for any Member that exceeds such Member's obligation (deemed and actual) to re-store such deficit, determined as follows: Distributions shall first be determined tentatively pursuant to this Section 11.4.C without regard to the Members' Capital Accounts, and then the allocation provisions of Section 8 shall be applied tentatively as if such tentative distributions had been made. If any Member shall thereby have an Adjusted Capital Account Deficit that exceeds his obligation (deemed and actual) to restore such deficit, the actual distribution to such Member pursuant to this Section 11.4.C shall be equal to the tentative distribution to such Member less the amount of the excess to such Member; and

(7) In the Definitions section of the Agreement, include the following:

1. Definitions

1.1. "Adjusted Capital Account" means, with respect to any Member, the balance, if any, in such Member's Capital Account as of the end of the relevant Accounting Period, after giving effect to the following adjustments:

A. Credit to such Capital Account any amounts which such Member is obligated to restore or is deemed to be obligated to restore pursuant to the next to the last sentences of Section 1.704-2(g)(1) and Section 1.704-2(i)(5) of the Regulations, if applicable.

B. Debit to such Capital Account the items described in Section 1.704- 1(b)(2)(ii)(d)(4), Section 1.704-1(b)(2)(ii)(d)(5) and Section 1.704- 1(b)(2)(ii)(d)(6) of the Regulations, if applicable.

1.2. "Adjusted Capital Account Deficit" means, with respect to any Member, the deficit balance, if any, in such Member's Capital Account as of the end of the relevant Accounting Period, after giving effect to the following adjustments:

A. Credit to such Capital Account any amounts which such Member is obligated to restore or is deemed to be obligated to restore pursuant to the next to the last sentences of Section 1.704-2(g)(1) and Section 1.704-2(i)(5) of the Regulations, if applicable.

B. Debit to such Capital Account the items described in Section 1.704- 1(b)(2)(ii)(d)(4), Section 1.704-1(b)(2)(ii)(d)(5) and Section 1.704- 1(b)(2)(ii)(d)(6) of the Regulations, if applicable.

The foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of Section 1.704-1(b)(2)(iv), and, if applicable, Section 1.704-1(b)(2)(ii)(d) of the Regulations and shall be interpreted consistently therewith.

1.3. "Capital Account" with respect to any Member as of any given date means the Capital Contribution to the Company by a Member as adjusted pursuant to Section 2 hereof.

1.4. "Gross Asset Value" means, with respect to any asset, the asset's adjusted basis for federal income tax purposes, except as follows:

A. The initial Gross Asset Value of any asset contributed by a Member to the Company shall be the gross fair market value of such asset, as determined by the contributing Member and the Company;

B. The Gross Asset Values of all Company assets shall be adjusted to equal their respective gross fair market values in connection with (and to be effective immediately prior to) the following events:

(1) the acquisition of any additional Company Interest in the Company by any new or existing Member in exchange for more than a de minimis Capital Contribution;

(2) the distribution by the Company to a Member of more than a de minimis amount of Company property other than money, unless all Members receive simultaneous distributions of undivided interests in the distributed property in proportion to their interests in the Company; and

(3) the liquidation of the Company within the meaning of Section 1.704-1(b)(2)(ii)(g) of the Regulations; provided, however, that an adjustment pursuant to subsections 1.16.B(1) and 1.16.B(2) above shall be made only if such adjustment is necessary or appropriate to reflect the relative economic interests of the Members in the Company;

C. If the Gross Asset Value of an asset has been determined or adjusted pursuant to subsections 1.16.B(1) or 1.16.B(2) hereof, such Gross Asset Value shall thereafter be adjusted by the Depreciation taken into account with respect to such asset for purposes of computing Profits and Losses; and

D. The Gross Asset Values of Company assets shall be increased (or decreased) to reflect any adjustments to the adjusted basis of such assets pursuant to Code Section 734(b) or Code Section 743(b), but only to the extent that such adjustments are taken into account in determining Capital Accounts pursuant to Section 1.704-1(b)(2)(iv)(m) of the Regulations; provided, however, that Gross Asset Values shall not be adjusted pursuant to this subsection to the extent that an adjustment pursuant to subsection 1.16.B(2) above is made in connection with a transaction that would otherwise result in an adjustment pursuant to this subsection.

1.5. "Nonrecourse Deductions" has the meaning set forth in Section 1.704- 2(b)(1) of the Regulations. The amount of Nonrecourse Deductions for an Accounting Period shall be determined in accordance with Section 1.704-2(c) of the Regulations.

1.6. "Nonrecourse Liability" has the meaning set forth in Sections 1.704-2(b)(3) and 1.752-1(a)(2) of the Regulations.

1.7. "Notice of Transfer" means the notice required to be provided pursuant to subsections 4.2.A(1) or 4.3.A(1) by a Member who wishes to Transfer, either voluntarily or involuntarily, their Company Interest.

1.8. "Member Nonrecourse Debt" has the meaning set forth in Section 1.704- 2(b)(4) of the Regulations.

1.9. "Member Nonrecourse Debt Minimum Gain" means an amount, with respect to each Member Nonrecourse Debt, equal to the Company Minimum Gain that would result if such Member Nonrecourse Debt were treated as a Nonrecourse Liability, determined in accordance with Section 1.704-2(i)(3) of the Regulations.

1.10. "Member Nonrecourse Deductions" has the meaning set forth in Sections 1.704-2(i)(1) and 1.704-2(i)(2) of the Regulations. The amount of Member Nonrecourse Deductions with respect to a Member Nonrecourse Debt for any Accounting Period shall be determined in accordance with Section 1.704-2(i)(2) of the Regulations.

1.11. "Profits and Losses" means the Company's taxable income or taxable loss, as the case may be, for each Accounting Period, as determined under Section 703(a) of the Code and Section 1.703-1 of the Regulations, but with the following adjustments:

A. any tax-exempt income, as described in Section 705(a)(1)(B) of the Code, realized by the Company during such Accounting Period shall be taken into account as if it were taxable income in computing such taxable income or taxable loss;

B. any expenditures of the Company described in Section 705(a)(2)(B) of the Code for such Accounting Period, including any items treated under Section 1.704-1(b)(2)(iv)(i) of the Regulations as items described in Section 705(a)(2)(B) of the Code, shall be taken into account as if they were deductible items in computing such taxable income or taxable loss;

C. any items of income recognized by the Company during such Accounting Period that are required to be allocated to the Members under Section 3.3 hereof shall be excluded from such taxable income or taxable loss;

D. gain or loss resulting from any disposition of Company Property with respect to which gain or loss is recognized for federal income tax purposes shall be computed by reference to the Gross Asset Value of the property disposed of, notwithstanding that the adjusted tax basis of such property differs from its Gross Asset Value; and

E. in lieu of the depreciation, amortization, and other cost recovery deductions taken into account in computing such taxable income or loss, there shall be taken into account Depreciation for such Accounting Period, computed in accordance with Section 1.11, hereof.

If the Company's taxable income or taxable loss for such Accounting Period, as adjusted in the manner provided in subsections 1.35.A through 1.35.E above, is a positive amount, such amount shall be the "Profits" of the Company for such Accounting Period; and if negative, such amount shall be the "Losses" of the Company for such Accounting Period.

1.12. "Regulations" means the Regulations promulgated by the Department of Treasury and set forth in Title 26 of the Code of Federal Regulations. "Regulation" used in the singular shall mean any specific section of the Regulations set forth in Title 26 of the Code of Federal Regulations.

8. The Right of a Members to Distributions in Dissolution

a. Dissolution

(1) Under the Act, A limited liability company is dissolved, and its activities and affairs must be wound up, by the consent of all the members.

(2) A domestic limited liability company may dissolve by domesticating itself under the laws of another jurisdiction.

(3) The Act further provides the following in regard to the disposition of assets in dissolution of the LLC:

(a) In winding up its activities and affairs, a limited liability company shall apply its assets to discharge its obligations to creditors, including members that are creditors.

(b) After a limited liability company discharges its creditors, any surplus shall be distributed in the following order:

(i) to each owner of a transferable interest that reflects contributions made and not previously returned, an amount equal to the value of the unreturned contributions; and

(ii) among owners of transferable interests in proportion to their respective rights to share in distributions immediately before the dissolution of the company.

(c) If a limited liability company does not have sufficient surplus to return unreturned contributions, any surplus must be distributed among the owners of transferable interests in proportion to the value of the respective unreturned contributions.

(d) All distributions must be paid in money.

(4) Certificate of Termination. — When all debts, obligations and other liabilities of the limited liability company have been paid and discharged or adequate provision has been made therefor and all of the remaining property and assets of the company have been distributed to the members, a certificate of termination shall be delivered to the department for filing along with the certificates required by section 139 (relating to tax clearance of certain fundamental transactions).

b. Sample Provision

(1) This provision establishes events which trigger dissolution of the LLC:

"5. Dissolution and Termination

5.1. Liquidating Events.

A. The Members hereby agree that, notwithstanding any provision of the Agreement or the Act, the Company shall not dissolve except on the occurrence of a Liquidating Event.

B. The Company shall dissolve and commence winding up and liquidating upon the first to occur of any of the following ("Liquidating Events"):

(1) The sale of 90% or more of the Company Property determined by value;

(2) The vote by Members holding 75% of the Percentage Interests held by all of the Members to dissolve, wind up, and liquidate the Company;

(3) The happening of any other event that makes it unlawful, impossible, or impractical to carry on the business of the Company; or

(4) The occurrence of (i) an Event of Withdrawal of a Managing Member, (ii) the Removal of a Managing Member, or (iii) any other event that causes a Managing Member to cease to be a Managing Member under the Act. The foregoing notwithstanding, any such event shall not constitute a Liquidating Event if the Company is continued pursuant to Section5.2.

(2) This provision established the procedure to be followed in order to formally dissolve the LLC:

5.4. Winding Up.

A. Upon the occurrence of a Liquidating Event, the Company shall continue solely for the purposes of winding up its affairs in an orderly manner, liquidating its assets, and satisfying the claims of its creditors and Members and no Member shall take any action that is inconsistent with, or not necessary to or appropriate for, the winding up of the Company's business and affairs.

B. To the extent not inconsistent with the foregoing, all covenants contained in this Agreement and obligations provided for in this Agreement shall continue to be fully binding on the Members until such time as the Company Property has been distributed pursuant to this Section 5.4 and the Certificate has been canceled in accordance with the Act.

C. The Liquidator shall be responsible for overseeing the winding up and dissolution of the Company, shall take full account of the Company's liabilities and Company Property, shall cause the Company Property to be liquidated as promptly as is consistent with obtaining the fair value thereof unless by Managing Members holding 100% of the Percentage Interests held by all of the Managing Members, and Members holding 75% of the Percentage Interests held by all of the Members consent to distributions of all or any part of the Company Property in kind, and shall cause the Company Property or the proceeds therefrom, to the extent sufficient therefore, to be applied and distributed in the following order:

(1) First, to creditors of the Company, including Members, but excluding Managing Member(s), in satisfaction of all of the Company's debts and liabilities;

(2) Second, to the payment and discharge of all of the Company's debts and liabilities to the Managing Member(s);

(3) The balance, if any, to the Members in accordance with their positive Capital Accounts, after giving effect to all contributions, distributions, and allocations for all periods however, that no distribution shall be made pursuant to this Section 5.4.C that creates or increases an Adjusted Capital Account Deficit for any Member that exceeds such Member's obligation (deemed and actual) to restore such deficit, determined as follows: Distributions shall first be determined tentatively pursuant to this Section 5.4.C without regard to the Members' Capital Accounts, and then the allocation provisions of Section 3 shall be applied tentatively as if such tentative distributions had been made. If any Member shall thereby have an Adjusted Capital Account Deficit that exceeds his obligation (deemed and actual) to restore such deficit, the actual distribution to such Member pursuant to this Section 5.4.C shall be equal to the tentative distribution to such Member less the amount of the excess to such Member; and

(4) No Managing Member shall receive any additional compensation for any services performed pursuant to this Section 5.4. Each Managing Member understands and agrees that by accepting the provisions of this Section 5.4 setting forth the priority of the distribution of the assets of the Company to be made upon its liquidation, such Managing Member expressly waives any right that it, as a creditor of the Company, might otherwise have under the Act to receive distributions of assets pari passu with the other creditors of the Company in connection with a distribution of assets of the Company in satisfaction of any liability of the Company, and hereby subordinates to said creditors any such right.

5.5. Reserves for Company Obligations

In the discretion of the Liquidator, a pro rata portion of the distributions that would otherwise be made to the Members pursuant to this Section 5 may be:

A. Distributed to a trust established for the benefit of Members solely for the purposes of liquidating Company Property, collecting amounts owed to the Company, and paying any contingent or unforeseen liabilities or obligations of the Company or of the Managing Member(s) arising out of or in connection with the Company.

B. The assets of any such trust shall be distributed to the Members from time to time, in the reasonable discretion of the Liquidator, in the same proportions as

the amount distributed to such trust by the Company would otherwise have been distributed to the Members pursuant to Section 5.4; or

C. Withheld to provide a reasonable reserve for Company liabilities (contingent or otherwise) and to allow for the collection of the unrealized portion of any installment obligations owed to the Company, provided that such withheld amounts shall be distributed to the Members as soon as practicable.

D. The portion of the distributions that would otherwise have been made to each of the Members that is instead distributed to a trust pursuant to Section 5.5.A or withheld to provide a reserve pursuant to Section 5.5.B shall be determined in the same manner as the expense or deduction would have been allocated if the Company had realized an expense equal to such amounts immediately prior to distributions being made pursuant to Section 5.4

5.6. Deemed Contribution and Distribution.

A. In the event the Company is liquidated within the meaning of Section 1.704-1(b)(2)(ii)(g) of the Regulations but no Liquidating Event has occurred, the Company Property shall not be liquidated, the Company's liabilities shall not be paid or discharged, and the Company's affairs shall not be wound up.

B. Instead, solely for federal income tax purposes, the Company shall be deemed to have contributed all Company Property and liabilities to a new limited Company in exchange for an interest in such new limited Company and, immediately thereafter, the Company will be deemed to liquidate by distributing interests in the new limited Company to the Members.

5.7. Rights of Members

Each Member shall look solely to the assets of the Company for the return of his Capital Contribution and shall have no right or power to demand or receive property other than cash from the Company, and no Limited Member shall have priority over any other Limited Member as to the return of his Capital Contributions, distributions, or allocations.

5.8. Notice of Dissolution.

In the event a Liquidating Event occurs or an event occurs that would, but for provisions of Section 5.1, result in a dissolution of the Company, the Managing Member(s) shall, within 30 days thereafter, provide written notice thereof to each of the Members and to all other parties with whom the Company regularly conducts business (as determined in the discretion of the Managing Member(s)) and shall publish notice thereof in a newspaper of general circulation in each place in which the Company regularly conducts business (as determined in the discretion of the Managing Member(s)).

5.9. Character of Liquidating Distributions.

All payments made in liquidation of the interest of a retiring Member pursuant to Section 5 shall be made in exchange for the interest of such Managing Member or Limited Member in Company Property pursuant to Code Section 736(b)(1) , including the interest of such Members or Interest Holder in Company goodwill.

(3) The following provision should be included if a special allocation of tax losses is contemplated as discussed in this section.

"5.5. Deficit Capital Accounts.

In the event the Company is "liquidated" within the meaning of Section 1.704-1(b)(2)(ii)(g) of the Regulations, (i) distributions shall be made pursuant to this Section 5 to the Members who have positive Capital Accounts in compliance with Section 1.704-1(b)(2)(ii)(b)(2) of the Regulations and (ii) if any Member's Capital Account has an Adjusted Capital Account Deficit (after giving effect to all contributions, distributions, and allocations for all taxable years, including the taxable year during which such liquidation occurs), such Member shall contribute to the capital of the Company the amount necessary to restore such deficit balance to zero in compliance with Section 1.704-1(b)(2)(ii)(b)(3) of the Regulations."

9. Right to Transfer Membership Interest

a. The Uniform Act

(1) Under the Act a membership interest is a transferable interest, and a transfer, in whole or in part, a membership interest is permissible;

(2) The transfer does not by itself cause the dissociation of the transferor as a member or a dissolution and winding up of the limited liability company's activities and affairs.

(3) The transfer does not entitle the transferee to: (A) participate in the management or conduct of the company's activities and affairs; or (B) have access to records or other information concerning the company's activities and affairs.

(4) The transferee: (A) does have the right to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled, and (B) in a dissolution and winding up of a limited liability company, is entitled to an account of the company's transactions only from the date of dissolution.

(5) A limited liability company need not give effect to a transferee's rights under this section until the company knows or has notice of the transfer.

(6) A transfer of a transferable interest in violation of a restriction on transfer contained in the operating agreement is ineffective if the intended transferee has knowledge or notice of the restriction at the time of transfer.

(7) If a member transfers a transferable interest, the transferor retains the rights of a member other than the transferable interest transferred and retains all the duties and obligations of a member.

(8). A person that becomes a member of a limited liability company is deemed to assent to the operating agreement.

(9) A transferable interest may be evidenced by a certificate of the interest issued by the limited liability company in record form and, subject to this section, the interest represented by the certificate may be transferred by a transfer of the certificate.

b. Restrictions on Transfer

(1) Overview

By restricting the transfer of a membership interest except as provided within the terms of the Operating Agreement, an Operating Agreement can insure that members control and restrict who is part of the membership group.

(2) Defining the Triggering Events and the Purchase Rights.

(a) The Operating Agreement, of course, should define the precise events that will trigger the purchase rights. Generally, these would include the death or the attempt to voluntarily or involuntarily transfer the membership interest of a Member.

(b) Once the triggering event has occurred, the Operating Agreement should also provide whether the other members, or in certain cases the entity, have an option or obligation to purchase the membership interest of the affected Member.

(c) If members are also employed in an active role by the LLC, termination of employment and disability may also be triggering events.

(3) Determination of the Purchase Price.

The Operating Agreement should provide either the price or a method for determining the price of the membership interest to be purchased.

(4) Payment Terms and Funding Mechanisms.

Finally, the Operating Agreement should set the terms of the purchase, i.e. when the closing will take place, and how the purchase price will be paid, whether lump sum or in installments. In addition, the

Operating Agreement should also address the source of the payment. For purchases triggered by the death of the Member, life insurance is often purchased in order to fund the buyout.

c. Sample Provisions

(1) This sample provision first provides that transfers of Membership interests except as provided in the Operating Agreement are void and without effect.

"ARTICLE IX TRANSFERS OF LIMITED LIABILITY COMPANY INTERESTS

9.1. Transfers of Limited Liability Company Interests.

a. No Member may transfer all or any part of its Limited Liability Company Interest (including without limitation any transfer between Members) unless and until such transfer has been approved in writing by all of the Members (other than Defaulting Members).

b. Any purported transfer made in violation of this Section 9.1 shall be void ab initio and without effect.

c. Any Member who purports to transfer all or any part of its Limited Liability Company Interest in violation of this Section 9.1 shall be deemed to be a "Defaulting Member."

(2) This next section establishes what a Member must do if they are contemplating a transfers of Membership interests. The section requires they first must be offered to the other Members, pursuant to a right of first refusal. Note, that it is commonly provided that in the event of the death of a Member, the other Members or the LLC, have the obligation not the option to purchase the Membership interest of the deceased Member.

"9.2. Right To Transfer Membership Interest

A. Except by operation of law, no Member shall have the right to Transfer its Membership Interest except as follows:

(1) A Member who (i) wishes to make any Voluntary Transfer or (ii) who has any information that would reasonably lead him or her to expect that an Involuntary Transfer is foreseeable, must promptly send a Notice of Transfer to the Manager and the other Members, or (iii) in the event of the death of a Member, or in the case of an Entity holding a Membership Interest, in the event of the death of an individual owning a majority of the issued and outstanding stock, membership interests or Membership interests of such Entity, determined by percentage of membership of such interests in the Entity, the Personal Representative of such Member, or such individual, must promptly send a Notice of Transfer to the Manager and to the Members.

(2) The Notice of Transfer pursuant to subsection 9.2.A(1) shall include: (i) a statement of the type of proposed Transfer, (ii) the name, address (both home and office), and (iii) business or occupation of the person to whom such Membership Interest would be Transferred, and (iv) any other facts that are or would reasonably be deemed material to the proposed transfer.

Upon issuance of the Notice of Transfer, such Member or the Member's Personal Representative, as the case may be, shall be deemed to have offered to sell his or her Membership Interest otherwise to be Transferred as provided herein, at the Sale Price, determined in Section 9.3, and on the Sale Terms determined in Section 9.4.

(3) Upon issuance of the Notice of Transfer, the other Members shall have thirty (30) days from receipt in which to elect to buy all or any of the offered Membership Interest. The other Members may elect to buy the offered Membership Interest in proportion to their respective Percentage Interests (excluding the offered Membership Interest) or in such other proportion as they shall agree upon.

(4) If the other Members do not agree to buy or redeem in the aggregate all of the offered Membership Interest within such option periods, such Transfer may be completed.

B. If a Transfer is not consummated within thirty (30) days after the final expiration of such option period provided in subsection Error! Reference source not found., the provisions of this Agreement will again apply to such offered Membership Interest as if no such Transfer had been contemplated and no notice had been given.

C. A Transfer is consummated when the Membership has been given notice that legal title to the Membership Interest has been Transferred, subject to recordation on its books."

(3) In many Agreements certain transfers are permitted as long as they are made to so-called "permitted transferees." Here is some sample language:

"4.9.4 As provided above, the following exempt transfers may be made:

4.9.4.1 Transfers to the spouse or a lineal ancestor or descendent of such Member (whether by adoption, blood or marriage), or

4.9.4.2 Transfers to a trust for the exclusive benefit of such Member or a spouse or lineal ancestor or descendent of such Member (whether by adoption, blood, or marriage); and, provided further, that a change in the beneficial interests of such trust to include anyone other than the spouse or a lineal ancestor or descendent of such Member (whether by adoption, blood, or marriage) shall be considered a Transfer of the Shares held by such trust, subject to the same restrictions, rights, and obligations otherwise provided hereunder in regard to such Shares.

4.9.4.3 Transfers to a corporation, partnership, or limited liability company, which is wholly owned by such Member or a spouse or lineal ancestor or descendent of such Member (whether by adoption, blood, or marriage); and, provided further, that the Transfer of an ownership

interest of such corporation, partnership, or limited liability company to anyone other than the spouse or a lineal ancestor or descendent of such Member (whether by adoption, blood, or marriage) shall be considered a Transfer of Shares held by such corporation, partnership, or limited liability company, subject to the same restrictions, rights, and obligations otherwise provided hereunder in regard to such Shares.

4.9.5 The term "valid testamentary transfer" shall be defined as any testamentary transfer which legally transfers title to a decedent's property by reason of his/her death, including, but not limited to, transfers by will, trust, intestacy, designation of beneficiary, and right of survivorship."

(4) The following provision provides how the Sale Price is determined, in this case by appraisal. Other commonly used methods in determining the purchase price include price determined by formula, and price determined by agreement of the members.

"9.3. The Sale Price

In the event a Membership Interest is to be offered for purchase under either Section 9.2, above, the Sale Price shall be determined by the following procedure:

A. The Sale Price to be paid for the offered Membership Interest shall be the "fair market value" of such Membership Interest.

B. "Fair market value" of such Membership Interest will be determined in a manner consistent with the methods used for determining such Membership Interest's value for federal estate tax purposes, ignoring any alternate valuation date (under Internal Revenue Code Section 2032) or special use valuation (under Internal Revenue Code Section 2032A).

C. If the purchasing party or parties and the offering Member are unable to agree mutually upon the "fair market value" of the Membership Interest within sixty (60) days from the date of the final acceptance of the offer, the fair market value of the interest will be determined by one or more Qualified Appraisers, selected under the procedures set forth in this Section 4.4.

D. If the "fair market value" of the Membership Interest is to be determined by Qualified Appraisers, the offering Member and buyer or buyers collectively will each appoint a Qualified Appraiser, within ten (10) days following the expiration of the sixty (60) day period within which the offering Member and the buyer or buyers could not mutually agree on the fair market value.

E. If the parties shall fail to appoint a Qualified Appraiser within this ten (10) day period, any appointed Qualified Appraiser shall unilaterally establish the "fair market value" of the Membership Interest by delivering a written opinion thereof, and delivering the same to each of the parties to this Agreement.

F. If the parties both appoint Qualified Appraisers within the said ten (10) day period, these two (2) Qualified Appraisers shall establish the "fair market value" of the Membership Interest in a single written opinion agreed to by both of them.

G. If these two (2) Qualified Appraisers cannot agree on the "fair market value" of the Membership Interest within sixty (60) days of the appointment of the

latter of them, they shall together appoint a third Qualified Appraiser whose sole written opinion shall establish the "fair market value" of such interest.

H. The reasonable fees and reimbursed expenses charged by the Qualified Appraisers in the valuation under this Section shall be borne solely by the Membership.

I. The Membership will provide such data as any Qualified Appraiser deems necessary or useful to make a determination of the "fair market value" of such interest."

(5) The determination of the terms of the purchase should be addressed in the Agreement, i.e., when the closing on the ownership interest will take place and on what terms the purchase price is to be paid.

"9.4. The Sales Terms

In the event a Membership Interest is to be offered for purchase under either Section 4.2 or 4.3, above, the Sale Terms shall be as follows:

A. Within fifteen (15) days of the final determination of the fair market value of the offered Membership Interest, the purchasing party or parties, as the case may be, shall tender to the Member or Personal Representative of a deceased Member who has offered the offered Membership Interest a promissory note in the amount of the fair market value determined pursuant to Section 4.4.

B. The promissory note shall be payable in One-Hundred and Twenty equal monthly principal installments together with annual interest calculated at the "prime interest rate" charged by a composite of lending institutions as determined and reported by the Wall Street Journal."

(6) The following provides definitions of the some of the relevant terms:

"Definitions

1.17. "Involuntary Transfer" means any Transfer made (i) on account of a court order or otherwise by operation of law, including any Transfer incident to any divorce or marital property settlement or any Transfer pursuant to applicable community property, quasi-community property or similar state law, and also (ii) including a Member filing a voluntary petition under any federal or state bankruptcy, insolvency or related law or a petition for the appointment of a receiver, or making an assignment for the benefit of creditors, or being subjected involuntarily to such petition or assignment or to an attachment or other legal or equitable interest with respect to his or her Membership Interest and such involuntary petition, assignment or attachment is not discharged within thirty (30) days after its effective date.

1.43. "Transfer" shall mean, any disposition including, but not limited to, gifts, sales, assignments, pledges, encumbrances, bequests, and all other inter vivos or testamentary dispositions, whether voluntary, involuntary or pursuant to court order or by operation of law. For the purposes of this definition, in the case of Entity serving as a Member, or holding a Membership Interest, Transfer shall include the Transfer of a majority of the issued and outstanding stock, membership interests or

Membership interests of such Entity, determined by percentage of membership of such interests in the Entity.

1.44. "Voluntary Transfer" " means any Transfer that is not an Involuntary Transfer.

(7) Although the Act establishes that a person that becomes a member of a limited liability company is deemed to assent to the operating agreement this provision reestablishes that premise.

1.4. Persons Acquiring a Membership Interest Are Bound

Any person who acquires in any manner whatsoever any Membership Interest, irrespective of whether such person has accepted and adopted in writing the terms and provisions of this Agreement, shall be deemed by the acceptance of the benefit of the acquisition thereof, to have agreed to be subject to and bound by all the obligations of this Agreement to or by which any predecessor in interest of such person was subject or bound.

1.5. Additional Provisions and Restrictions on Transfer

The forgoing notwithstanding the following provisions shall also apply to the Transfer of Membership Interests hereunder:

A. No Transfer of a Membership Interest shall be made if such transfer would violate the provisions of the regulations of the Internal Revenue Service.

B. Without the consent of the Members holding 100% of the Percentage Interest held by all of the Members, no transfer shall be made which would require registration under the Securities Act of 1933, as amended, pursuant to the rules and regulations of the Securities and Exchange Commission, qualifying for sale with state securities regulatory authorities, or perfecting exemptions from such registration or qualification.

C. In no event shall all or any part of a Membership Interest be transferred to a minor or to an incompetent.

D. Any transfer in contravention of any of the provisions of this Section 4.7 shall be void and ineffectual and shall not bind, or be recognized by the Company.

1.6. Section 743 Adjustment

A. In the event of a Transfer of all or part of a Membership Interest, the Manager may in its sole discretion, upon request of a Member, cause the Membership to elect, pursuant to Code Section 754, or the corresponding provisions of subsequent law, to adjust the basis of the Membership's property as provided by Section 743 of the Code.

B. All other elections required or permitted to be made by the Membership under the Code shall be made by the Manager in such manner as will, in the sole and absolute discretion of the Manager, be most advantageous to those Members holding the majority of the Percentage Interests."

Also

"2.1 Admission of Members

(1) In order to admit a new Member who is not an assignee, transferee, donee, legatee or distribute of an existing Member, the consent of the Manager and the Members holding 75% of the Percentage Interests held by all Members shall be required and such Person shall execute and deliver a copy of this Agreement, as amended, and such other documents and takes such other actions as the Manager shall reasonably deem necessary or advisable to cause him to become a Member, makes any required Capital Contribution as determined by the Manager, and pays all reasonable expenses required by the Manager to be paid in connection therewith, which may include, without limitation, the cost of preparing and filing an amended Certificate of Membership. In all cases, the Manager shall have the right to withhold its consent for any reason in its sole discretion.

(2) In order to admit a new Member who is an assignee, transferee, donee, legatee, or distributee (by conveyance, operation of law, or otherwise) of all or part of a Member's Membership Interest shall be admitted to the Membership as a Member unless (i) the Manager consents in writing thereto and (ii) such assignee, transferee, donee, legatee, or distributee executes and delivers a copy of this Agreement, as amended, and such other documents and takes such other actions as the Manager shall reasonably deem necessary or advisable to cause him to become a Member, and pays all reasonable expenses required by the Manager to be paid in connection therewith, which may include, without limitation, the cost of preparing and filing an amended Certificate of Membership. In all cases, the Manager shall have the right to withhold its consent for any reason in its sole discretion.

2.2. Assignees

A. An Assignee of a Membership Interest who does not comply with either subsection 4.1.B(2), or 4.2.B(2) shall have the right to receive the same share of Profits, Losses and distributions of the Membership pursuant to Section 8 to which the assigning Member would have been entitled if no such assignment had been made by such Member but, except as otherwise required under the Act, shall have no other rights granted to the Members under this Agreement.

B. Any Member who shall assign all of its Membership interest shall cease to be a Member of the Membership, and shall no longer have any rights or privileges or obligations of a Member except that, unless and until the Assignee of such Member is admitted to the Membership as a Member, said assigning Member shall retain the statutory rights and be subject to the statutory obligations of an assignor Member under the Act as well as the obligation to make the Capital Contributions attributable to the Membership Interest in question, if any portion thereof remains unpaid.

C. In the event of any assignment of a Membership Interest, there shall be filed with the Membership a duly executed and acknowledged counterpart of the instrument making such assignment; such instrument must evidence the written acceptance by the Assignee of all terms and provisions of this Agreement; and if such instrument is not so filed, the Membership need not recognize any such assignment for any purpose.

D. In addition to the above, the Manager may require as a condition to any Transfer of a Membership interest that the Assignor:

(1) Assume all costs incurred by the Membership in connection therewith; and

(2) Furnish it with an opinion of counsel satisfactory to counsel to the Membership that such transfer complies with applicable federal and state securities laws.

An Assignee of a Membership Interest who does not become a Member and who desires to make a further assignment of its Membership Interest shall be subject to the provisions of this Agreement to the same extent and in the same manner as any Member desiring to make an assignment of its Membership Interest."

(8) Drag Along Provisions.

A drag along provision generally will provide that if the majority of the members decide to sell their equity interest in the LLC, the majority members have the right to require each of the other members to sell their interest on the same terms and conditions. The following is a sample:

"(d) Drag-Along.

(1) Upon the Managing Member receiving an offer acceptable to the Managing Member to sell some or all of the Managing Member's interest in the Company (such interests proposed to be sold, the "Managing Member Transfer Interests ") to a Bona Fide Purchaser, the Managing Member shall have the right (the "Drag-Along Right "), exercisable in the Managing Member's sole discretion, to require each Non-Managing Member to sell to such Bona Fide Purchaser a share of such Non-Managing Member's interests in the Company (such share of the Non-Managing Member's interests, its " Drag/Tag Interests ") proportionate to the share of the Managing Member's interests in the Company represented by the Managing Member Transfer Interests, pursuant to and in accordance with such terms and conditions agreed between the Managing Member and such Bona Fide Purchaser.

(2) If the Managing Member elects to exercise the Drag-Along Right, then the Managing Member shall provide each Non-Managing Member with a notice which shall include (i) a statement that the Managing Member is exercising the Drag-Along Right, (ii) the share of the Managing Member's interest in the Company proposed to be sold, (iii) the purchase price at which such Bona Fide Purchaser has proposed to purchase the Managing Member Transfer Interests and a calculation of the purchase price to be paid by such Bona Fide Purchaser for such Non-Managing Member's Drag/Tag Interests, and (iv) the closing date for such sale (which shall be no sooner than ten (10) days following the date of such notice).

(3) The purchase price for each Non-Managing Member's Drag/Tag Interests shall equal the distributions that such Non-Managing Member would have received, assuming that the aggregate purchase price for the Managing Member Transfer Interests and all Drag/Tag Interests was distributed to the Managing Member and the Non- Managing Members *pro rata* and *pari passu* in accordance with their respective Percentage Interests (subject to Section 9(c)), for the Managing Member to have received distributions equal to the purchase price that the Managing Member is receiving from the Bona Fide Purchaser for the Managing Member Transfer Interests."

(9) Tag Along - A "tag along" provision generally provides that if an owner agrees to a sale of his or her interest in the business the other owners have the right to participate in the transaction on the same basis.

"(e) Tag-Along.

(1) Upon the Managing Member receiving an offer acceptable to the Managing Member to sell Managing Member Transfer Interests to Bona Fide Purchaser, the Managing Member shall provide Member and, if the Managing Member has not exercised the Drag-Along Right with respect to any Transfer described in Section 20(c)(iii)above, each Non-Managing Member with written notice of its intent to effect such Transfer, and Other Members and, as applicable, each such Non-Managing Member shall have the right (the " Tag-Along Right "), exercisable by the delivery of written notice during the ten (10) day period (the " Tag-Along Option Period ") immediately following the date that such notice from the Managing Member is received by Other Members and, as applicable, such Non-Managing Member, to require the Bona Fide Purchaser to purchase Other Members or, as applicable, such Non-Managing Member's share of Other Members or, as applicable, such Non-Managing Member's interests in the Company (such share of Other Members or, as applicable, the Non- Managing Member's interests, its " Tag Interests " and, together with the Drag Interests, collectively and generally, " Drag/Tag Interests ") proportionate to the share of the Managing Member's interests in the Company represented by the Managing Member Transfer Interests, in addition to the Managing Member Transfer Interests.

(2) If (i) If any Non-Managing Member fails to exercise the Tag-Along Right during the Tag-Along Option Period, or (ii) any Non-Managing Member notifies the Managing Member in writing, during the Tag Along Option Period, that Other Members or such Non-Managing Member, as applicable will not exercise the Tag-Along Right, then the Managing Member may sell the Managing Member Transfer Interests to the Bona Fide Purchaser free of Other Members or such Non- Managing Member's Tag-Along Right, as applicable."

(10) Covenant Not to Compete

The agreement should provide that a Member whose interest is purchased is bound by Covenant Not to Compete, Non- Solicitation, and Non- Disclosure provisions with the entity.

"XXIV. Covenant Not to Compete.

A. During the term of this Agreement and for a period of three (3) years after termination of a Shareholder's employment by the Company, a Shareholder or former Shareholder as the case may be shall not engage in any direct or indirect competition with the Company through the solicitation of the business of any of the Company's customers on the Date of Termination or hire any employee of the Company, whether such competition is as an individual, partner, joint venture, employee, or agent for any person or entity.

B. These covenants shall be construed as an agreement independent of any other provision of this Agreement; and the existence of any claim or

cause of action of the terminating Shareholder against the Company, whether predicated on this Agreement or otherwise, shall not constitute a defense to the enforcement by the Company of this covenant."

(11) Non-Solicitation

"Non-Solicitation.

(a) During my membership in the Company, and for a period of twenty-four months following termination of my membership, whatever the reason for such termination, I will not (i) directly or indirectly, or as a stockholder, partner, employee, consultant or participant in any business entity, engage in or assist any other person or entity to engage in any business in which the Company is engaging or actively planning to engage in at the time of my termination, or (ii) solicit or attempt to entice away from the Company any person who is, or was during the term of my membership, a customer or employee of, consultant or supplier to, or other person or entity having material business relations with, the Company.

(b) To the extent that any part of this provision may be invalid, illegal or unenforceable for any reason, the provision shall be modified to the extent necessary to make it enforceable and the Agreement as modified shall remain in full force and effect."

(12) Non- Disclosure

"Proprietary Information.

I understand and acknowledge that:

a. My membership interest creates a relationship of confidence and trust between me and the Company with respect to certain information applicable to the business of the Company or the Company's clients.

b. The Company possesses and will continue to possess information that has been created, discovered or developed by, or otherwise known to, the Company (including, without limitation, information created, discovered, developed or made known to me during the period or arising out of my membership interest in the Company, whether before or after the date hereof), which information has commercial value in the business in which the Company is engaged or any prospective business of the Company and is considered by the Company to be of a confidential, proprietary or trade secret nature.

c. All such information is hereinafter called "Proprietary Information," which term, as used herein, shall also include, but shall not be limited to, trade secrets, processes, formulae, data, computer programs, know-how, improvements, inventions, marketing plans, strategies, forecasts, new products, financial statements, projections, prices, costs, customer and prospect contacts, and customer, prospect and supplier lists.

d. "Proprietary Information" as used herein shall also include, but shall not be limited to, information of third parties made known to me during the period of my membership in the Company, whether before or after the

date hereof, which was provided to the Company under the expectation that the Company would protect the confidentiality thereof."

10. Dissociation

a. Events Causing Dissociation Under the Act.

Under the Act person is dissociated as a member when any of the following occurs:

(1) The limited liability company knows or has notice of the person's express will to withdraw as a member, except that, if the person specified a withdrawal date later than the date the company knew or had notice, on that later date.

(2) An event stated in the operating agreement as causing the person's dissociation occurs.

(3) The person's entire interest is transferred in a foreclosure sale under section 8853(f) (relating to charging order).

(4) The person is expelled as a member pursuant to the operating agreement.

(5) The person is expelled as a member by the affirmative vote or consent of all the other members if:

(a) it is unlawful to carry on the company's activities and affairs with the person as a member;

(b) there has been a transfer of all the person's transferable interest in the company, other than:

(i) a transfer for security purposes; or

(ii) a charging order in effect under section 8853 which has not been foreclosed;

(c) the person is an entity and:

(i) the company notifies the person that it will be expelled as a member because:

(A) the person has filed a certificate of dissolution or the equivalent;

(B) the person has been administratively dissolved;

(C) the person's charter or its equivalent has been revoked; or

(D) the person's right to conduct business has been suspended by the person's jurisdiction of formation; and

(ii) within 90 days after the notification:

(A) the certificate of dissolution or the equivalent has not been withdrawn, rescinded or revoked;

(B) the person has not been reinstated;

(C) the person's charter or the equivalent has not been reinstated; or

(D) the person's right to conduct business has not been reinstated; or

(iii) the person is an unincorporated entity that has been dissolved and whose activities and affairs are being wound up.

(6) On application by the company or a member in a direct action under section 8881 (relating to direct action by member), the person is expelled as a member by judicial order because the person:

(a) has engaged or is engaging in wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the company's activities and affairs;

(b) has committed willfully or persistently, or is committing willfully or persistently, a material breach of the operating agreement or a duty or obligation under section 8849.1 (relating to standards of conduct for members); or

(c) has engaged or is engaging in conduct relating to the company's activities and affairs which makes it not reasonably practicable to carry on the activities and affairs with the person as a member.

(7) In the case of an individual:

(a) the individual dies; or

(b) in a member-managed limited liability company:

(i) a guardian for the individual is appointed; or

(ii) a court orders that the individual has otherwise become incapable of performing the individual's duties as a member under this title or the operating agreement.

(8) In a member-managed limited liability company, the person:

(a) becomes a debtor in bankruptcy;

(b) executes an assignment for the benefit of creditors; or

(c) seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of the person or of all or substantially all the person's property.

(9) In the case of a person that is a testamentary or inter vivos trust or is acting as a member by virtue of being a trustee of such a trust, the trust's entire transferable interest in the company is distributed.

(10) In the case of a person that is an estate or is acting as a member by virtue of being a personal representative of an estate, the estate's entire transferable interest in the company is distributed.

(11) In the case of a person that is not an individual, the existence of the person terminates.

(12) The company participates in a merger (relating to entity transactions) and:

(a) the company is not the surviving entity; or

(b) otherwise as a result of the merger, the person ceases to be a member.

(13) The company participates in an interest exchange under Chapter 3 and, as a result of the interest exchange, the person ceases to be a member.

(14) The company participates in a conversion.

(15) The company participates in a division and:

(a) the company is not a resulting association; or

(b) as a result of the division, the person ceases to be a member.

(16) The company participates in a domestication as a result of the domestication, the person ceases to be a member.

(17) The company dissolves and completes winding up.

b. Power to dissociate and wrongful dissociation.

(1) Power to dissociate. — A person has the power to dissociate as a member at any time, rightfully or wrongfully, by withdrawing as a member by express will under section 8861(1) (relating to events causing dissociation).

(2) Wrongful dissociation. — A person's dissociation as a member is wrongful only if the dissociation:

(a) is in breach of an express provision of the operating agreement; or

(b) occurs before the completion of the winding up of the limited liability company and:

(i) the person withdraws as a member by express will;

(ii) the person is expelled as a member by judicial order;

(iii) the person is dissociated under section 8861(8); or

(iv) the person is expelled or otherwise dissociated as a member because it willfully dissolved or terminated, except that this subparagraph does not apply to a person that is: (A) a trust that is not a business or statutory trust; (B) an estate; or (C) an individual.

(3) Damages for wrongful Dissociation.— A person that wrongfully dissociates as a member is liable to the limited liability company and, subject to section 8881 (relating to direct action by member), to the other members for damages caused by the dissociation. The liability is in addition to any debt, obligation or other liability of the member to the company or the other members.

c. Effects of Dissociation.

(1) General rule. — If a person is dissociated as a member:

(a) the person's rights as a member terminate;

(b) if the company is member-managed, the person's duties and obligations under section 8849.1 (relating to standards of conduct for members) as a member end with regard to matters arising and events occurring after the person's dissociation; and

(c) subject to sections 8844(e) (relating to sharing of and right to distributions before dissolution) and 8854 (relating to power of personal representative of deceased member) and Chapter 3 (relating to entity transactions), any transferable interest owned by the person in the person's capacity as a member immediately before dissociation as a member is owned by the person solely as a transferee.

(2) Existing obligations not discharged. — A person's dissociation as a member does not of itself discharge the person from any debt, obligation or other liability to the company or the other members which the person incurred while a member.

d. Sample Provision

(1) The following provision prohibits withdrawal of members

"1.1. Withdrawals. No Member may resign, dissolve or otherwise withdraw from the Limited Liability Company unless and until such resignation, dissolution or withdrawal has been approved in writing by all of the Members (other than Defaulting Members). Any other provision of this Agreement to the contrary notwithstanding, if a Member resigns, dissolves or otherwise withdraws from the Limited Liability Company without such approval, such Member shall thereafter be deemed to be a "Defaulting Member."

(2) The following provision allows withdrawal of a Managing Member with Member approval:

"C. Voluntary Withdrawal of a Managing Member

(1) If a Managing Member wishes to voluntarily withdraw as the Managing Member of the Company, it must first (i) receive the prior written consent of Members holding at least 75% of the Percentage Interests of all Members, and (ii) the Managing Member must deliver to the Company an opinion of counsel acceptable to the Members that such withdrawal will not adversely affect the classification of the Company as a Company for federal income tax purposes; otherwise the Managing Member may not voluntarily withdraw as a Managing Member.

(2) In the event that the Managing Member attempts to withdraw from the Company without complying with the requirements of the preceding Section, it shall be liable for all damages caused to the Company and the Members by such attempted withdrawal."

(3) The following provision prohibits withdrawal of members contributions of capital:

1.2. No Withdrawal of Member's Contribution

A. A Member may not withdraw from the Company prior to its dissolution, nor may a Member withdraw any part of his Capital Contribution (except to the

extent that distributions made or deemed to be made are considered as such by law), and no such return of Capital Contributions shall be made unless all liabilities of the Company, except liabilities to the Managing Member and to the Members on account of their Capital Contributions, have been paid, or unless there remains sufficient property in the Company to pay them.

B. No Member shall have the right to demand and receive property of the Company in return for its Capital Contribution.

C. No Member shall be paid interest on any Capital Contribution.

11. Tax Matters Partner/ Partnership Representative

a. TEFRA Partnership Audit Rules (For Returns Filed For Tax Years Beginning Before 2018)

(1) Overview

In 1982, Congress established a primarily entity approach to partnership (and LLCs taxed as partnerships) audits, known as the TEFRA audit provisions. Under the TEFRA audit provisions, for most partnerships, partners are required to be consistent with the partnership return in filing their returns. Partnership audits, conducted at the partnership level, generally bind the partners. A designated partner, known as the Tax Matters Partner (TMP), plays an important role in the audit and in any resulting administrative proceedings, conducts judicial proceedings, and is obligated to keep the partners informed. In a reversion to aggregate principles, the IRS has a duty to issue certain notices, and partners have a right to participate in the administrative proceedings unless they waive or fail to exercise their rights.

(2) Pre -2018 Rule

Pre-2018 §6222 requires all partners to report their distributive shares of partnership income and losses consistently with the partnership tax return unless the partner specifically notifies the IRS of the inconsistency. If not, the IRS can conform the partner's treatment to the partnership treatment and assess any additional tax without further proceedings.

Under the TEFRA audit rules, the IRS conducts a single administrative proceeding to resolve audit issues concerning items that are more appropriately determined at the partnership level than at the partner level. Once the audit is complete, the IRS recalculates the tax liability of each partner for the audited tax year based on the partner's share of the partnership level adjustments.

(3) Unified Partnership Audit Determines All Partnership Items

The TEFRA procedures also involve a unified partnership level audit that determines all partnership items for all partners. The audit is conducted by the TMP, although other partners have the opportunity to participate, but they must take the initiative to do so. Audit results are contained in a final partnership administrative adjustment (FPAA) — the equivalent of a deficiency notice — that binds all partners unless the TMP (or another partner, if the TMP does not) seeks administrative or judicial review. Since partners may be pass-through entities ("pass-thru partners") distributive shares of partnership income may be taxed to their owners, who are designated indirect partners, who are also bound by the TEFRA audit proceedings.

(4) Application

The TEFRA audit procedures apply to all entities that are tax partnerships, except those electing out, and to any entity that actually filed a partnership return, even if improperly. There is an important exception for small partnerships, those with 10 or fewer partners, all of whom are natural persons (U.S. citizens or residents), estates of deceased natural persons, or C corporations. Qualified small partnerships can elect to be covered by the TEFRA audit procedures. The TEFRA audit procedures only govern partnership items, that is, those pass-through items more appropriately determined at the partnership level. This leaves few items outside, primarily those relying on partner information that does not affect the partnership.

(5) Sample Provision

The following is a Tax Matters Partner provision applicable under the TEFRA Audit Procedure:

"A. The Tax Matters Partner (referred to hereafter as the "Tax Matters Member") for the Membership shall be the Managing Member serving in such capacity from time to time.

B. The Tax Matters Member shall have the right to resign as the Tax Matters Member by giving sixty (60) days' written notice to each Member. Upon the resignation, death, legal incompetency, or Bankruptcy of the Person serving as the Tax Matters Member, any successor to the interest of the Tax Matters Member pursuant to the applicable provisions of this Agreement shall be designated as the successor Tax Matters Member, but such de-signee shall not become the Tax Matters Member until the designation of such Person has been approved by the consent of the Members holding the majority of the Percentage Interests held by all of the Members, which consent shall not be unreasonably withheld or delayed.

C. The Tax Matters Member shall employ experienced tax counsel to represent the Membership in connection with any audit or investigation of the Membership by the Internal Revenue Service, in connection with all subsequent administrative and judicial proceedings arising out of such audit. The fees and expenses of such counsel shall be a Member-ship expense and shall be paid by the Membership. Such counsel shall be responsible for representing the Membership; it shall be the responsibility of the Managing Member and of the Members, at their expense, to employ tax counsel to represent their respective separate interests.

D. The Tax Matters Member shall keep the Members informed of all administrative and judicial proceedings, as required by Section 6623(g) of the Code, and shall furnish to each Member, who so requests in writing, a copy of each notice or other communication received by the Tax Matters Member from the Internal Revenue Service (except such no-tices or communications as are sent directly to such requesting Member by such agency).

E. The Membership shall indemnify the Tax Matters Member (including the officers and directors of a corporate Tax Matters Member) against judgments, fines, amounts paid in settlement, and expenses (including attorneys' fees) reasonably incurred by it in any civil, criminal, or investigative proceeding in which it is involved or threatened to be involved by reason of being the Tax Matters Member, provided that the Tax Matters Member acted in good faith, within what is reasonably believed to be the scope of its authority, and for a purpose which it reasonably believed to be the scope of its authority, and for a purpose which it reasonably believed to be in the best interests of the Membership or the Members.

F. The Tax Matters Member shall not be indemnified under this provision against any liability to the Membership or its Members to any greater extent than the indemnification al-lowed by Section 5.7 of this Agreement.

G. The indemnification provided hereunder shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any applicable statute, agreement, vote of the Members, or otherwise.

(b) 2018 Partnership Audit Rules (For Returns Filed for Tax Years Beginning After 2017).

(1) Overview

Legislation enacted in 2015 makes significant changes to partnership audit provisions for partnership returns filed for partnership tax years beginning after December 31, 2017, and, if the partnership elects, for partnership returns filed for partnership tax years beginning after November 2, 2015, and before January 1, 2018.

(2) Streamlined Partnership Audit Rules

Under the new streamlined partnership audit rules added by the Bipartisan Budget Act, the IRS will audit the partnership's items of income, gain, loss, deduction, and credit and the partners' distributive shares for a particular year of the partnership (the “reviewed year”) and

any audit adjustment will be made at the partnership level and taken into account by the partnership in the year that the audit or any judicial review is completed (the "adjustment year"). Thus, the partnership generally is required to pay the tax, interest, and penalties on any imputed underpayment resulting from the audit adjustment, with the tax assessed and collected in the adjustment year. However, the partnership may instead make an election to pass through the audit adjustment to persons that were partners in the reviewed year.

(3) Application

The new partnership audit rules apply to all entities filing a partnership return. There is no small partnership exception as there is under the TEFRA rules. Thus, all partnership and LLCs classified as partnerships are generally subject to the new partnership audit rules, regardless of their size. However, such entities may affirmatively elect out of the new rules if they furnished 100 or fewer Schedules K-1 for the review year and each partner was an individual, a C corporation, a foreign entity that would be a C corporation under U.S. rules, an S corporation, or the estate of a deceased partner.

(4) Partnership Representative

For purposes of partnership representation in audit proceedings, the new partnership audit rules replace the TMP under the TEFRA rules with a Partnership Representative (PR) who is given much broader powers than the TMP. The PR is the only person who may act on behalf of the partnership and may bind all partners with respect to all actions taken by the partnership in the audit proceeding and any judicial proceeding. The eligibility rules for the PR are also much simpler than the rules for a TMP, with the only statutory requirement being that the PR must have a substantial presence in the United States. Thus, the PR need not be a partner and need not have a stake in the outcome.

Note: Under the TEFRA rules, the TMP must be a general partner. Because LLCs do not have general partners, this has raised a question about who qualifies as the TMP of an LLC classified as a partnership. Under the new partnership audit rules, this question is moot. The PR can be any person with a substantial presence in the United States and need not even be a partner.

(5) Sample Provision

The following is a Partnership Representative provision applicable under the 2018 Audit Procedure:

Partnership Representative. The Members shall take all reasonable actions to avoid the application to the Company of the centralized partnership audit provisions of sections 6221 through 6241 of the Code, as amended by the Bipartisan Budget Act of 2015. If, however, such provisions are found to apply to the Company, a member of the Manager or another appointed individual shall act as the Partnership Representative for the purposes of IRS Code section 6221 through 6241. In the event the member of the Manager is no longer a Member in the Company, and no other individual has been appointed as the Partnership Representative, the Partnership Representative shall be the Majority Interest owner from amongst the Members. If the Majority Member is unable or unwilling to serve, the Partnership Representative shall be appointed from amongst the remaining Members by a Majority of Interests of the Members.

The Partnership Representative shall be authorized and required to represent the Company with all examinations of the Company's affairs by tax authorities, including resulting administrative and judicial proceedings. The Partnership Representative shall have the sole authority to (1) sign consents, enter into settlement and other agreements with such authorities with respect to any such examinations or proceedings and (ii) to expend the Company's funds for professional services incurred in connection therewith. In the event of an adjustment resulting in an underpayment of tax, the Partnership Representative shall duly and timely elect under section 6226 of the IRS Code that each Person who was a Member during the taxable year that was audited personally bear any tax, interest, addition to tax, and penalty resulting from such adjustments and, if for any reason, the Company is liable for a tax, interest, addition to tax, or penalty as a result of such an audit, each Person who was a member during the taxable year that was audited shall pay to the Company an amount equal to such Person's proportionate share of such liability, as determined by the Manager, based on the amount each such Person should have borne (computed at the rate used to compute the Company's liability) had the Company's tax return for such taxable year reflected the audit adjustment. The expenses for the Company's payment of such tax, interest, addition to tax, or penalty shall be specially allocated to such Persons in such proportions.

The Partnership Representative shall have the final decision-making authority with respect to all federal income tax matters involving the Company. The Members agree to cooperate with the Partnership Representative and to do or refrain from doing any or all things reasonably required by the Partnership Representative to conduct such proceedings. Any reasonable direct out-of-pocket expense incurred by the Partnership Representative in carrying out its obligations hereunder shall be allocated to and charged to the Company as an expense of the Company for which the Partnership Representative shall be reimbursed.

UNIT FIVE – MISCELLANEOUS PROVISIONS

I. Overview

This Unit outlines the various miscellaneous provisions which should be considered.

II. Miscellaneous Provisions

13.1. Notices

Any and all notices provided for herein shall be given in writing by registered mail or certi-fied mail, return receipt requested which shall be addressed to the last address known to the sender or hand delivered to the recipient in person.

13.2. Governing Law

This agreement shall be subject to and governed by the laws of the Commonwealth of Pennsylvania, exclusive of that state's choice of law provisions.

13.3. Entire Agreement

This Agreement includes and incorporates all investment letters, letters of intent, and all other documents, contracts and agreements entered into by the parties hereto.

13.4. Execution in Counterparts

This Operating Agreement may be executed in any number of counterparts, each of which shall be taken to be an original. Valid execution shall be deemed to have occurred when a Membership signature page is executed by the Member in question and countersigned by the Gen-eral Member.

13.5. Waiver of Action for Partition

Each of the parties to this Agreement irrevocably waives for the duration of the term of the Membership any right that he, she, or it may have to maintain any action for partition with respect to the property of the Membership.

13.6. Amendments

A. Any Managing Member or Members holding ten percent (10%) or more of the Percentage Interests held by all Members may propose amendments to this Agreement.

B. Following such proposal, the Managing Member(s) shall submit to the Members a verbatim statement of any proposed amendment, providing that counsel for the Membership shall have approved of the same in writing as to form, and the Managing Part-ner(s) shall include in any such submission a recommendation as to the proposed amendment.

C. The Managing Member(s) shall seek the written vote of the Members on the pro-posed amendment or shall call a meeting to vote thereon and to transact any other busi-ness that it may deem appropriate.

D. A proposed amendment shall be adopted and be effective as an amendment to this Agreement if it approved by Managing Members holding 100% of the Percentage Interests held by all of the Managing Members, and Members holding 75% of the Percentage Interests held by all of the Members.

E. Notwithstanding this Section 13.6, or any other provision contained herein, this Agreement shall not be amended without the consent of each Member adversely affected if such amendment would convert a Limited Member's interest in the Membership into a Managing Member's interest,

modify the limited liability of a Limited Member, or alter the in-terest of a Member in Profits, Losses, other items, or in any Membership distributions.

F. This Agreement may be amended by the Managing Member(s), without the consent of any of the Members to:

(1) Add to the representations, duties, or obligations of the Managing Part-ner(s), or surrender any right or power granted to the Managing Member(s) herein, for the benefit of the Members;

(2) Cure any ambiguity, to correct or supplement any provision hereof that may be inconsistent with any other provisions hereof, or to make any other provision with respect to matters or questions arising under this Agreement not inconsistent with the intent of this Agreement.

13.7. Execution of Additional Instruments

This Agreement shall be binding upon the parties hereto and upon their heirs, executors, administrators, successors or assigns, and the parties hereto agree for themselves and their heirs, executors, administrators, successors and assigns to execute any and all instruments in writing which are or may become necessary or proper to carry out the purpose and intent of this agree-ment.

13.8. Construction

As used herein, unless the context clearly indicates the contrary, the singular number shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders.

13.9. Headings

Titles of the paragraphs and subparagraphs are placed herein for convenient reference only and shall not to any extent have the effect of modifying, amending or changing the express terms and provisions of this Operating Agreement.

13.10. Waiver

No waiver of any provision of this Agreement shall be valid unless in writing and signed by the person or party against whom charged.

13.11. Rights and Remedies Cumulative

The rights and remedies provided by this Agreement are cumulative and the use of any one right or remedy by any party shall not preclude or waive the right to use any or all other remedies. Said rights and remedies are given in addition to any other rights the parties may have by law, statute, ordinance, or otherwise.

APPENDIX A

Operating Agreement—Member-Managed LLC

OPERATING AGREEMENT OF [NAME OF LLC]
(A Pennsylvania Limited Liability Company)

THIS OPERATING AGREEMENT (this "Agreement") of [name of LLC] (the "Company"), dated as of , is by and among those members of the Company ("Members") who execute a joinder in this Agreement and thereby agree to be bound by its terms and to become a Member hereunder.

BACKGROUND

The Company [has been organized] [is to be organized] as a Pennsylvania limited liability company by the filing of a certificate of organization with the Department of State of the Commonwealth of Pennsylvania under and pursuant to the Act (as defined below).

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein, and intending to be legally bound hereby, the Members agree as follows:

ARTICLE 1.
DEFINITIONS.

Terms that are used in this Agreement that are not otherwise defined herein shall have the meanings set forth below, unless the context requires otherwise:

"Act" means the Pennsylvania Limited Liability Company Law of 1994, 15 Pa.C.S.A. § 8901 *et seq.*, as amended and as it may be hereafter amended from time to time, and any successor statute.

"Affiliate" means, as to any Person, any other Person that directly or indirectly controls, is controlled by, or is under common control with such Person or, if such Person is an individual, the Immediate Family of such Person or trusts solely for the benefit of such Immediate Family. As used in this definition, the term "control" means the possession, directly or indirectly, or as trustee or executor, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, as trustee or executor, by contract or credit arrangement or otherwise.

"Agreement" means this Operating Agreement, as the same may from time to time be amended, modified and/or restated.

"Capital Account" means the individual account maintained by the Company with respect to each Member.

"Capital Contribution" means the aggregate amount of cash and the agreed value of any property or services (as determined by the Member and the Company) contributed by each

Member to the Company as provided herein. In the case of a Member that acquires a Membership Interest in the Company by an assignment or transfer in accordance with the terms of this Agreement, "Capital Contribution" means the Capital Contribution of that Member's predecessor proportionate to the acquired Membership Interest.

"Certificate" means the certificate of organization of the Company and any and all amendments thereto and restatements thereof filed on behalf of the Company with the Department of State of the Commonwealth of Pennsylvania pursuant to the Act.

"Code" means the Internal Revenue Code of 1986, as amended.

"Covered Person" means a Member, any Affiliate of a Member, any officer, director, shareholder, partner, employee, representative, or agent of a Member, or their respective Affiliates, or any officer, employee, or agent of the Company or its Affiliates.

"Losses" has the meaning given to it in Section 21(a).

"Immediate Family" means, with respect to any individual, such individual's parents, spouse, issue, and adopted children, or any of them.

"Laws" means (i) all constitutions, treaties, laws, statutes, codes, ordinances, orders, decrees, rules, regulations, and municipal bylaws, whether domestic, foreign, or international; (ii) all judgments, orders, writs, injunctions, decisions, rulings, decrees, and awards of any governmental body; (iii) all policies, practices, and guidelines of any governmental body; and (iv) any amendment, modification, re-enactment, restatement, or extension of any of the foregoing.

"Member" means a Person who at the time is a member of the Company. "Members" means two or more Persons when acting in their capacities as members of the Company. For purposes of the application of a provision of the Act to the Company, the Members shall constitute one class or group of members. Appendix Ashall be amended from time to time to show the current Members.

"Membership Interest" means the interest of a Member in the Company, including, without limitation, interests in the profits and losses, rights to distributions (liquidating or otherwise), allocations and information, and rights to consent to or approve actions by the Company, all in accordance with the provisions of this Agreement and the Act.

"Percentage Interest" means the proportionate Membership Interest of a Member expressed as a percentage as shown on Appendix A.

"Person" means a natural person, corporation, general or limited partnership, limited liability company, joint venture, trust, estate, association, or other legal entity or organization.

"Profits and Losses" means, for each taxable year or other period, an amount equal to the Company's taxable income or loss for that year or period, determined in accordance with Code § 703(a) (for these purposes, all items of income, gain, loss, or deduction required to

be stated separately pursuant to Code § 703(a)(1) shall be included in taxable income or loss), with the following adjustments:

(1) Any income of the Company that is exempt from federal income tax and not otherwise taken into account in computing Profits and Losses pursuant to the foregoing shall be added to such taxable income or loss;

(2) Any expenditures of the Company described in Code § 705(a)(2)(B) or that are treated as Code § 705(a)(2)(B) expenditures pursuant to Treas. Reg. § 1.704-1(b)(2)(iv)(i) and not otherwise taken into account in computing Profits and Losses pursuant to the foregoing shall be subtracted from such taxable income or loss;

(3) In the event the Gross Asset Value of any Company asset is adjusted pursuant to paragraph (2), (3), or (4) of the definition of Gross Asset Value, the amount of the adjustment shall be taken into account as gain or loss from the disposition of the asset for purposes of computing Profits and Losses;

(4) Gain or loss resulting from any disposition of Company property with respect to which gain or loss is recognized for federal income tax purposes shall be computed by reference to the Gross Asset Value of the property disposed of, notwithstanding that the adjusted tax basis of the property differs from its Gross Asset Value;

(5) In lieu of the depreciation, amortization, and other cost recovery deductions taken into account in computing such taxable income or loss, there shall be taken into account Depreciation for the taxable year or other period, computed in accordance with the definition of Depreciation under this Agreement; and

(6) Notwithstanding the above, any items that are specially allocated to certain Members shall not be taken into account in computing Profits and Losses.

"Voting Interests" means the number of votes of each Member (as set forth in Section 6.2 below) for the purpose of voting on any matter arising under this Agreement.

ARTICLE 2.
ORGANIZATION AND PURPOSE

2.1 Formation. The Members [hereby authorize] [have heretofore authorized] the organization of the Company as a limited liability company under and pursuant to the provisions of the Act and agree that the rights, duties, and liabilities of the Members shall be as provided in the Act, except as otherwise provided in this Agreement. [, as an authorized person, shall execute, deliver, and file the Certificate.]

2.2. Purpose. The Company is formed for the object and purpose of, and the nature of the business to be conducted and promoted by the Company is, [and] [optional: engaging in any lawful act or activity for which limited liability companies may be organized under the Act and engaging in any and all activities necessary, convenient, desirable, or incidental to the foregoing].

2.3. Term. The existence of the Company [shall commence/commenced] on the date the Certificate [is/was] filed in the office of the Department of State of the Commonwealth of Pennsylvania and shall continue until the Company is dissolved in accordance with the provisions of this Agreement.

2.4. Principal Office. The principal office of the Company shall be located at , or at such other location as may be determined, from time to time, by the Members. The Company may also have such other offices at such other locations as, from time to time, may be determined by the Members.

ARTICLE 3.
COMPANY CAPITAL AND PERCENTAGE INTERESTS.

3.1. Initial Capital Contributions. The initial Capital Contribution that each Member has made or is deemed to have made to the Company is set forth opposite the Member's name in Appendix A.

3.2. Additional Capital Contributions. A Member shall not be required to make any capital contribution to the Company not specifically agreed to in writing between the Member and the Company, or be obligated or required under any circumstances to restore any negative balance in the Member's Capital Account.

3.3. No Interest. Interest shall not be paid on or with respect to the Capital Contribution or Capital Account of any Member.

3.4. No Right to Return of Capital Contributions. Although the Company may make distributions to the Members from time to time as a return of their Capital Contributions, a Member shall not have the right to withdraw or demand a return of any of the Member's Capital Contribution or Capital Account, except upon dissolution or liquidation of the Company.

3.5. Percentage Interests. The Percentage Interest of each Member shall be as set forth in Appendix A.

ARTICLE 4.
CAPITAL ACCOUNTS AND ALLOCATIONS

4.1. Tax Provisions. The allocation and capital account maintenance provisions of Treasury Regulations under Section 704 of the Code are hereby incorporated by reference, including a "qualified income offset" within the meaning of Treas. Reg. § 1.704-1(b)(2)(ii)(d), the rules regarding allocation of "partner nonrecourse deductions" under Treas. Reg. § 1.704-2(i)(1), "minimum gain chargeback" under Treas. Reg. § 1.704-2(f) and "partner nonrecourse debt minimum gain chargeback" under Treas. Reg. § 1.704-2(i)(4), and the limitation on allocation of losses to any Member that would cause a deficit capital account in excess of such Member's capital contribution obligations and share of minimum gain and partner nonrecourse debt minimum gain under Treas. Reg. § 1.704-1(b)(2)(ii)(d) as modified by Treas. Reg. §§ 1.704-2(g)(1) and 1.704-2(i)(5).

4.2. Contributed Property. To the extent contributed property has a fair market value at the time of contribution that differs from the contributing Member's basis in the property, and to the extent the carrying value of property of the Company for Capital Account purposes otherwise differs from the Company's basis in such property, depreciation, gain, and loss for capital account purposes shall be computed by reference to such carrying value rather than such tax basis. In accordance with Section 704(c) of the Code, income, gain, loss, and deduction with respect to such property shall, solely for tax purposes, be shared among the Members so as to take account of the variation between the basis of the property to the Company and its fair market value at the time of contribution, or at the time that the carrying value of such property is adjusted under Treas. Reg. § 1.704-1(b)(2)(iv)(f), as the case may be.

4.3. Allocation of Profits or Losses. At all times while there is more than one Member, Profits or Losses shall be allocated to the Members in accordance with Percentage Interests, [except as otherwise provided in this Article 4.].

ARTICLE 5.
DISTRIBUTIONS

5.1. Generally. Subject to subsection (b), distributions of cash and/or other assets or property of the Company, from whatever source (including, without limitation, net proceeds of Company operations and sale, and financing or refinancing of Company assets) shall be made to the Members in accordance with their respective Percentage Interests at such times, and in such amounts, as the Members shall determine. In making determinations regarding distributions, the Members may set aside funds and establish reserves for such items as the Members shall determine, including, without limitation, working capital, maintenance of bonding capacity, capital expenditures, acquisition of other assets by the Company, and the satisfaction of liabilities (including, without limitation, contingent liabilities).

5.2. Tax Distributions. [*This tax distribution provision is favorable to the members. For a tax distribution provision that is more favorable to the company, see FORM 11.14-6, Section A.4.(b) of the Membership Interests Designations*]. With respect to any taxable year of the Company in which Members are allocated taxable income for federal income tax purposes (and for this purpose all items of income, gain, loss, or deduction required to be separately stated pursuant to Section 703 of the Code shall be included in the calculation of taxable income (other than the amount, if any, by which capital losses exceed capital gains)), the Company shall distribute to the Members, within 90 days after the close of that taxable year, no less than the amount determined by multiplying the Company's taxable income (computed as set forth in this sentence) by the highest composite federal, state, and local income tax rate applicable to any Member. For purposes of the preceding sentence, the Company's taxable income for a year shall be reduced by any net loss of the Company in prior years that has not previously been so taken into account under this Section 5.2. Nothing herein shall require the Company to borrow money or reduce its cash flow so as to restrict its ability to operate the day-to-day activities of the business in order to make such distributions.

ARTICLE 6.
CONTROL AND MANAGEMENT

6.1. Power and Authority of the Members. Management of the business and affairs of the Company shall be vested in the Members. Except as otherwise provided in this Agreement, any decision, determination, or other action to be made or taken by the Members shall be made or taken by [the affirmative vote of Members who hold, in the aggregate, a majority of the Voting Interests (a "Majority Vote"]. The Members shall have all rights and powers relating to the Company, including, but not limited to, the following:

(a) to appoint, and remove with or without cause, a President, one or more Vice Presidents, a Secretary, a Treasurer and such other officers of the Company as the Members deem appropriate to carry out and execute the decisions and instructions of the Members in the day-to-day operations of the business of the Company, with such duties and powers as are from time to time specified by the Members;

(b) to retain all or any part of the Company's assets as long as the Members deem advisable, and to invest, reinvest, and keep invested all or any part thereof, without being restricted in any way with respect to the type of assets retained or invested in or with respect to the portion of the assets devoted to any investment;

(c) to purchase, lease, or otherwise acquire the ownership, use, or benefit of assets, properties, rights, or privileges, real or personal, tangible or intangible, of any kind or description, whether income producing or not;

(d) to sell, pledge, mortgage, lease, exchange, or to grant options for the purchase, lease, or exchange of any Company assets, on such terms and conditions as the Members may determine;

(e) to institute any legal action or proceeding on behalf of the Company;

(f) to assign, transfer, pledge, compromise, or release any claims or debts due the Company;

(g) to make, execute, or deliver any assignment for the benefit of creditors or any confession of judgment, mortgage, deed, guarantee, indemnity, or surety bond;

(h) to borrow money for any purpose that the Members consider to be for the benefit of the Company or to facilitate its administration, and to mortgage or pledge Company assets to secure the repayment thereof;

(i) to retain and pay custodians, accountants, counsel, and other agents and to incur any other expenses which are reasonably related to the operation of the Company;

(j) to enter into agreements with, and to fix and adjust the compensation of, employees of the Company;

(k) to invest in time deposits and savings accounts and to maintain banking accounts in any institutions determined by the Members; and

(l) to vote at any election or meeting of any corporation, partnership, limited liability company, joint venture, or other entity, in person or by proxy, to appoint agents to do so in the place and stead of the Members, and to exercise all rights (including without limitation

approval and consent rights) that the Company may have with respect to such entity, whether pursuant to applicable law, governing documents, contracts, or otherwise;

6.2. Voting Interests. Each Member shall have that number of Voting Interests as equals such Member's Percentage Interest in the Company (e.g., a Member who has a 5% Membership Interest in the Company has 5 Voting Interests).

6.3. Voting Procedures. Members may vote in person or by proxy at a meeting of Members (which may be held by conference telephone), or by consent in lieu of a meeting. Proxies and consents shall be in writing or communicated by electronic means.

6.4 Binding Effect of Actions. Each Member shall be bound by, and hereby consents to, any and all actions taken and decisions made by the Members in accordance with the terms of this Agreement. Any person designated by the Members, including a Member so designated, shall have the authority to bind the Company. Any act taken by, or any document executed by, Members holding a majority of the Voting Interests shall be binding on the Company with the same force and effect as if the action, or the execution of the document, were approved by a vote of the Members. Except as provided in this Section 6.4, no Member shall have authority to bind the Company.

6.5 Major Decisions. Notwithstanding any other provision of this Agreement, unless approved by Members holding [%] of the Voting Interests, the Company may not:

(a) engage in a merger or consolidation with or into any corporation, partnership, limited liability company, or any other entity, whether or not the Company shall be the surviving entity of such merger or consolidation;

(b) sell all or substantially all of its assets to any person or entity;

(c) divide into two or more limited liability companies; or

(d) engage in any similar business transaction.

ARTICLE 7.
TRANSFERS OF INTERESTS AND ADMISSION OF MEMBERS

7.1. Restrictions on Transfer. *[See FORM 11.14-4. Article 3 for alternative ways to address rights and restrictions with respect to the transfer of membership interests.]* Membership Interests constitute the personal estate of Members and may be transferred or assigned; provided, however, unless all of the other Members of the Company other than the Member proposing to dispose of his or her interest approve of the proposed transfer or assignment by unanimous written consent, (i) the transferee of the interest of the Member shall have no right to participate in the management of the business and affairs of the Company or to become a Member, and (ii) the transferee shall only be entitled to receive the distributions and the return of contributions to which that Member would otherwise be entitled.

7.2. Transfers of Interests. Notwithstanding the restriction in Section 7.1 above, upon the death or judicial adjudication of mental incompetence of any Member [or upon the

termination of employment with the Company of any Member (either voluntarily by such Member or for cause by the Company)], *[include desired procedure for transfer—see FORM 11.14-4, Article 3, for examples]*.

7.3. Admission of Additional Members. *[Include desired procedure for admission of additional Members. For one example, see FORM 11.14-4, Article 2]*.

ARTICLE 8.
FINANCIAL AND TAX MATTERS

8.1. Establishment of Reserves. The Members shall have the right and obligation to establish reasonable reserves for maintenance, improvements, acquisitions, capital expenditures, and other contingencies, such reserves to be funded with such portion of the operating revenues of the Company as the Members may deem necessary or appropriate for that purpose.

8.2. Tax Returns. The Members shall arrange for the preparation of all tax returns required to be filed for the Company. Each Member shall be entitled to receive copies of all federal, state, and local income tax returns and information returns, if any, which the Company is required to file. All information needed by the Members and other Persons who were Members during the applicable taxable year for income tax purposes shall be prepared by the Company's accountants and furnished to each such Person after the end of each taxable year of the Company.

8.3 Tax Elections.

(a) Elections to be Made. To the extent permitted by applicable tax law, the Company may make the following elections on the appropriate tax returns:

(1) to adopt the calendar year as the Company's taxable year;

(2) to adopt the cash method of accounting and to keep the Company's books and records on the income-tax method;

(3) if a transfer of a Membership Interest as described in Section 743 of the Code occurs, on written request of the transferee, or if a distribution of Company property is made on which gain described in Section 734(b)(1)(A) of the Code is recognized or there is an excess of adjusted basis as described in Section 734(b)(1)(B) of the Code, to elect, pursuant to Section 754 of the Code, to adjust the basis of Company properties;

(4) to elect to amortize the organizational expenses of the Company and the start-up expenditures of the Company ratably over a period of 60 months as permitted by Sections 195 and 709(b) of the Code; and

(5) any other election the Members may deem appropriate and in the best interests of the Members.

8.3. No Corporate Taxation. Neither the Company nor any Member may make an election for the Company to be taxable as a corporation for federal income tax purposes or to be excluded from the application of the provisions of subchapter K of chapter 1 of subtitle A of

the Code or any similar provisions of applicable state law, and no provision of this Agreement shall be construed to sanction or approve such an election.

8.4. Tax Matters Partner. If the Company is subject to the consolidated audit procedures of Sections 6221 to 6234 of the Code, the "tax matters partner" of the Company pursuant to Section 6231(a)(7) of the Code shall be a Member that is designated as such by vote of the Members. Any Member who is designated "tax matters partner" shall take such action as may be necessary to cause each other Member to become a "notice partner" within the meaning of Section 6223 of the Code. Any Member who is designated "tax matters partner" shall inform each other Member of all significant matters that may come to its attention in its capacity as "tax matters partner" by giving notice thereof on or before the fifth Business Day after becoming aware thereof and, within that time, shall forward to each other Member copies of all significant written communications it may receive in that capacity. The Company shall reimburse the tax matters partner for any costs incurred representing the interests of the Members in respect of Company tax matters.

8.5. Tax Withholding. Unless treated as a Tax Payment Loan, any amount paid by the Company for, or with respect to, any Member on account of any withholding tax or other tax payable with respect to the income, profits, or distributions of the Company pursuant to the Code, the Treasury Regulations, or any state or local statute, regulation, or ordinance requiring such payment (each a "Withholding Tax Act") shall be treated as a distribution to the Member for all purposes of this Agreement. To the extent that the amount required to be remitted by the Company under a Withholding Tax Act exceeds the amount then otherwise distributable to the Member, the excess shall constitute a loan from the Company to the Member (a "Tax Payment Loan"). Each Tax Payment Loan shall be payable upon demand and shall bear interest, from the date that the Company makes the payment to the relevant taxing authority, at the applicable federal short-term rate under Section 1274(d)(1) of the Code, determined and compounded semiannually. So long as any Tax Payment Loan or the interest thereon remains unpaid, the Company shall make future distributions due to the Member under this Agreement by applying the amount of any such distribution first to the payment of any unpaid interest on all Tax Payment Loans of the Member and then to the repayment of the principal of all Tax Payment Loans of the Member. The Members shall take all actions necessary to enable the Company to comply with the provisions of any Withholding Tax Act applicable to the Company and to carry out the provisions of this Section.

ARTICLE 9.
BOOKS AND RECORDS

9.1. General Rule. The Members shall cause to be kept full and accurate books and records of the Company. All books and records of the Company shall be kept at the Company's principal office and shall be available at such location at reasonable times for inspection and copying by the Members or their duly authorized representatives. This shall include, at a minimum: (i) a current list of the full name and last known mailing address of each Member; (ii) a copy of the Certificate and all amendments thereto; (iii) copies of the Company's federal, foreign, state, and local income tax returns and reports; (iv) a copy of this Agreement and all amendments thereto; and (v) financial statements of the Company.

9.2. Annual Statements. The Company shall furnish to its Members annual financial statements, including a balance sheet as of the end of each fiscal year and a statement of income and expenses for the fiscal year. The financial statements shall be prepared on the basis of generally accepted accounting principles, if the Company prepares financial statements for the fiscal year on that basis for any purpose. The financial statements shall be mailed by the Company to each of the Members within 120 days after the close of each fiscal year. Statements that are not audited or reviewed by a certified public accountant shall be accompanied by a statement of the person in charge of the Company's financial records: (i) stating his or her reasonable belief as to whether or not the financial statements were prepared in accordance with generally accepted accounting principles and, if not, describing the basis of presentation; and (ii) describing any material respects in which the financial statements were not prepared on a basis consistent with those of the previous year.

ARTICLE 10.
DISSOLUTION

10.1 Events of Dissolution. The Company shall dissolve, and its affairs shall be wound up, only upon the first to occur of the following: (i) the vote, consent, or agreement of Members [holding at least % of the Voting Interests]; or (ii) the entry of an order of judicial dissolution of the Company under Section 8972 of the Act.

10.2. Distributions upon Dissolution. In the event of the dissolution of the Company, the assets of the Company shall be liquidated in such manner as the Members shall determine and, after the obligations of the Company to third parties have been discharged or provided for in accordance with applicable law, the net proceeds of the liquidation shall be distributed in accordance with the following procedure:

(a) The net proceeds shall be distributed first, among the Members, if any, who have made unrepaid loans or advances to the Company, in an amount up to the aggregate amount of such unrepaid loans and advances, and in proportion to the amount of such loans and advances and the unpaid interest thereon;

(b) The Company may sell any or all Company property, including to Members, and any resulting gain or loss from each sale shall be computed and allocated to the Capital Accounts of the Members;

(c) With respect to all Company property that has not been sold, the fair market value of that property shall be deemed and the Capital Accounts of the Members shall be adjusted to reflect the manner in which the unrealized income, gain, loss, and deduction inherent in property that has not been reflected in the Capital Accounts previously would be allocated among the Members if there were a taxable disposition of that property for the fair market value of that property on the date of distribution; and

(d) After completion of the steps in paragraphs (a) and (b), the remaining assets shall be distributed to the Members in an amount equal to the credit balance in each of their Capital Accounts, after giving effect to all contributions, distributions, and allocations for all periods.

10.3. Procedure. A reasonable time shall be allowed for the liquidation of the Company in order to minimize the losses normally attendant upon a liquidation. On completion of the liquidation of Company assets as provided herein, the Members (or such other person or persons as the Act may require or permit) shall file a Certificate of Dissolution with the Department of State of the Commonwealth of Pennsylvania and take such other actions as may be necessary to terminate the existence of the Company. In connection with the Company's liquidation, the Company's accountants shall compile and furnish to each Member a statement setting forth the assets and liabilities of the Company as of the date of complete liquidation.

ARTICLE 11.
LIABILITY; CONFLICTS OF INTEREST; INDEMNIFICATION

11.1. Liability of Members Generally. The Members, as such, shall not be liable for the debts, obligations, or liabilities of the Company except to the extent required by the Act.

11.2. Other Business Interests. *[Consider this paragraph very carefully.]* Any Member or Affiliate thereof may engage in or possess an interest in other business ventures 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. No Member or Affiliate thereof shall be obligated to present any particular investment opportunity to the Company even if the opportunity is of a character that, if presented to the Company, could be taken by the Company, and any Member or Affiliate thereof shall have the right to take for its own account (individually or as a partner or fiduciary) or to recommend to others any such particular investment opportunity.

11.3. Interested Transactions. A contract or transaction between the Company and one or more of its Members or between the Company and another domestic or foreign association in which one or more of its Members have a management role or a financial or other interest, shall not be void or voidable solely for that reason, or solely because the Member is present at or participates in the meeting of the Members that authorizes the contract or transaction, or solely because the vote of the Member is counted for that purpose, if: (i) the material facts as to the relationship or interest and as to the transaction are disclosed or known to the Members entitled to vote thereon and the contract or transaction is specifically approved in good faith by vote of those Members; or (ii) the contract or transaction is fair to the Company as of the time it is authorized, approved, or ratified by the Members.

11.4. Indemnification of Covered Persons. To the fullest extent permitted by Law, the Company shall indemnify, defend, and hold harmless each Covered Person from and against any and all debts, losses, claims, damages, costs, demands, fines, judgments, contracts (implied and expressed, written and unwritten), penalties, obligations, payments, liabilities of every type and nature (whether known or unknown, fixed or contingent), including, without limitation, those arising out of any lawsuit, action, or proceeding (whether brought by or on behalf of a party to this Agreement or by any third party), together with any reasonable costs and expenses (including, without limitation, reasonable attorneys' fees,

out-of-pocket expenses, and other reasonable costs and expenses incurred in investigating, preparing, or defending any pending or threatened lawsuit, action, or proceeding) incurred in connection with the foregoing (collectively "Losses") suffered or sustained by such Covered Person by reason of any act, omission, or alleged act or omission by such Covered Person arising out of such Covered Person's activities taken primarily on behalf of the Company, or at the request or with the approval of the Company, or primarily in furtherance of the interests of the Company. Notwithstanding the foregoing, indemnification shall not be available under this Section where the acts, omissions, or alleged acts or omissions upon which an actual or threatened action, proceeding, or claim is based constituted willful misconduct or recklessness.

11.5. Indemnification Procedure. The procedure under which indemnification shall be provided under this Section shall be as follows:

(a) A party seeking indemnification from the Company pursuant to subsection (a) (an "Indemnified Party") shall give prompt notice to the Company of the assertion of any claim, including any claim brought by a third party, in respect of which indemnity may be sought (a "Claim") and shall give the Company such information with respect thereto as the Company may reasonably request, but no failure to give such notice shall relieve the Company of any liability hereunder except to the extent the Company has suffered actual prejudice thereby.

(b) Except as provided in paragraph (3), the Company shall have the right, exercisable by written notice (the "Notice") to the Indemnified Party (which Notice shall state that the Company expressly agrees that as between the Company and the Indemnified Party, the Company shall be solely obligated to satisfy and discharge the Claim) within 30 days of receipt of notice from the Indemnified Party of the commencement of or assertion of any Claim, to assume the defense of the Claim, using counsel selected by the Company and reasonably acceptable to the Indemnified Party. If the Company fails to give the Indemnified Party the Notice within the stated time period, the Indemnified Party shall have the right to assume control of the defense of the Claim and all Losses in connection therewith shall be reimbursed by the Company upon demand of the Indemnified Party.

(c) The Company shall not have the right to assume the defense of a Claim if the named parties to the action (including any impleaded parties) include both the Indemnified Party and the Company and there are one or more bona fide legal or equitable defenses available to the Indemnified Party that are different from those available to the Company.

(d) A party defending a Claim shall not have the right to compromise or settle any claim for non-monetary relief against any other party without the other party's consent. A party defending a Claim shall not have the right to compromise or settle any claim for monetary relief against any other party without the other party's consent unless the monetary relief is paid in full by the settling party. A party shall not unreasonably withhold or deny its consent under this paragraph, but an Indemnified Party shall not be required to consent to a compromise or settlement of a Claim if in the reasonable judgment of the Indemnified Party the compromise or settlement would have a continuing material adverse effect on the Indemnified Party's business (including any material impairment of its relationships with customers and suppliers).

(e) If at any time after the Company assumes the defense of a Claim the situation changes such that the Company would not be able to assume the defense of the Claim under paragraph (3) if the Claim were newly filed at that time, the Indemnified Party shall have the same rights as if the Company never assumed the defense of the Claim.

(f) The Company or the Indemnified Party, as the case may be, shall have the right to participate, at its own expense, in the defense of any Claim that the other is defending.

(g) Whether or not the Company chooses to defend or prosecute a Claim involving a third party, the Company and the Indemnified Party shall cooperate in the defense or prosecution thereof and shall furnish such records, information, and testimony, and attend such conferences, discovery proceedings, hearings, trials, and appeals as may be reasonably requested in connection therewith.

11.6. Right to Advancement of Expenses. Except as expressly prohibited by Law, expenses (including legal fees) incurred by a Covered Person in defending any claim, demand, action, suit, or proceeding shall, from time to time, be advanced by the Company prior to the final disposition of such claim, demand, action, suit, or proceeding upon receipt by the Company of an undertaking by or on behalf of the Covered Person to repay such amount if it shall be determined that the Covered Person is not entitled to be indemnified as authorized in subsection (a).

11.7. Insurance. The Company may purchase and maintain insurance, to the extent and in such amounts as the Members shall deem reasonable, on behalf of Covered Persons and such other Persons as the Members shall determine, against any liability that may be asserted against or expenses that may be incurred by any such Person in connection with the activities of the Company or such indemnities, regardless of whether the Company would have the power to indemnify such Person against such liability under the provisions of this Agreement. The Company may enter into indemnity contracts with Covered Persons and such other Persons as the Members shall determine and adopt written procedures pursuant to which arrangements are made for the advancement of expenses and the funding of obligations under this Section 21 and containing such other procedures regarding indemnification as are appropriate.

11.8. Applicability. The indemnification provisions of this Article 11 shall be applicable to all actions, suits, or proceedings commenced after its adoption, whether such arise out of acts or omissions which occurred prior or subsequent to such adoption and shall continue as to a person who has ceased to be a Covered Person, and shall inure to the benefit of the heirs and personal representatives of such person.

ARTICLE 12
MISCELLANEOUS

12.1. Notices to Members. Any notice required to be given to a Member under the provisions of this Agreement or by the Act shall be given either personally or by sending a copy thereof: (i) by first class or express mail, postage prepaid, or courier service, charges prepaid, to the postal address of the Person appearing on the books of the Company for the purposes of notice. Notice pursuant to this paragraph shall be deemed to have been given to the Person entitled thereto when deposited in the United States mail or with a courier

service for delivery to that Person; or (ii) by facsimile transmission, e-mail, or other electronic communication to the Person's facsimile number or address for e-mail or other electronic communications supplied by the Person to the Company for the purpose of notice. Notice pursuant to this paragraph shall be deemed to have been given to the Person entitled thereto when sent.

12.2. Entire Agreement. This Agreement constitutes the entire agreement among the Members with respect to the subject matter hereof and supersedes all prior agreements, express or implied, oral or written, with respect thereto. The express terms of this Agreement control and supersede any course of performance or usage of trade inconsistent with any of the terms hereof.

12.3. Effect of Waiver or Consent. A waiver or consent, express or implied, to or of any breach or default by any Person in the performance by that Person of its obligations with respect to the Company is not a consent or waiver to or of any other breach or default in the performance by that Person of the same or any other obligations of that Person with respect to the Company. Failure on the part of a Person to complain of any act of any Person or to declare any Person in default with respect to the Company, irrespective of how long that failure continues, does not constitute a waiver by that Person of its rights with respect to that default until the period of the applicable statute of limitations has run.

12.4. Amendments. The Certificate may be amended only if the amendment is approved by the vote, consent, or agreement of [Members holding at least % of the Voting Interests, except that any provision of this Agreement requiring a higher vote may only be amended or repealed by at least that higher vote]. An amendment to this Agreement must be in writing and shall take effect when executed by [Members holding at least the number of the Voting Interests required to approve the amendment].

12.5. Binding Effect; No Third Party Rights. This Agreement has been adopted to govern the operation of the Company, and shall be binding on and inure to the benefit of the Members and their respective heirs, personal representatives, successors, and assigns. This Agreement is expressly not intended for the benefit of any creditor of the Company or any other Person, except a Person entitled to indemnification or advancement of expenses under Section 21. Except and only to the extent provided by applicable statute, no such creditor or other Person shall have any rights under this Agreement.

12.6. Governing Law. This Agreement shall be governed by and interpreted and enforced in accordance with the substantive laws of the Commonwealth of Pennsylvania (including, without limitation, provisions concerning limitations of actions), without reference to conflicts of laws rules.

12.7. Severability. If any provision of this Agreement or the application thereof to any Person or circumstance is held invalid or unenforceable to any extent, the remainder of this Agreement and the application of that provision to other Persons or circumstances shall not be affected thereby and that provision shall be enforced to the greatest extent permitted by law.

12.8. Arbitration. All disputes arising under this Agreement shall promptly be submitted to arbitration in , before one arbitrator in accordance with the rules of the American

Arbitration Association. The arbitrator may assess costs, including counsel fees, in such manner as the arbitrator deems fair and equitable. The award of the arbitrator shall be final and binding upon all parties, and judgment upon the award may be entered in any court of competent jurisdiction.

12.9. Construction. Whenever the context requires, the gender of any word used in this Agreement includes the masculine, feminine, or neuter, and the number of any word includes the singular or plural. All references to articles and sections refer to articles and sections of this Agreement, and all references to annexes are to annexes attached hereto, each of which is made a part hereof for all purposes. The headings in this Agreement are for convenience only; they do not form a part of this Agreement and shall not affect its interpretation.

12.10. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original as against any party whose signature appears thereon, and all of which shall together constitute one and the same instrument. If executed in multiple counterparts, this Agreement shall become binding when any counterpart or counterparts, individually or taken together, bear the signatures of all of the parties.

IN WITNESS WHEREOF, the undersigned have executed and delivered this Agreement as of the date first above written.

APPENDIX B

Operating Agreement—Manager-Managed LLC

OPERATING AGREEMENT OF [NAME OF LLC]
(A Pennsylvania Limited Liability Company)

THIS OPERATING AGREEMENT (this "Agreement") is dated as of , 20, by and between , a organized under the laws of the Commonwealth of Pennsylvania (the "Manager"); and those persons whose names appear on the attached Schedule A (the "Members").

In consideration of the mutual covenants contained herein, and intending to be legally bound hereby, the Manager and the other Members do hereby agree as follows:

ARTICLE I
NAME OF COMPANY

1.1. The Manager and the other Members shall form a limited liability company under the name of , LLC (the "Limited Liability Company"), pursuant to this Operating Agreement (the "Agreement") and the Pennsylvania Limited Liability Company Law, as amended (the "Act").

1.2. The Manager may change the name of the Company or adopt such trade or fictitious names as it may determine and shall notify the Members of any change in the name of the Company.

ARTICLE II
PURPOSES

2.1. The purposes of the Company are as follows:

2.1.1. To purchase, own, maintain, improve, manage and sell or otherwise dispose of that certain real property, with apartment building situated thereon, located at , , Pennsylvania and known as "" (the "Real Estate").

2.1.2. To lease space within the building situated on the Real Estate (the "Building") to qualified tenants for residential apartment units.

2.1.3. To execute and perform an assignment and assumption agreement between , as assignor (the "Assignor"), and the Company, as assignee, pursuant to which (i) the Assignor shall assign to the Company all of Assignor's rights and obligations under that certain [Agreement of Sale] dated as of , relating to the Real Estate (the "Agreement of Sale"), and (ii) the Company shall accept all such rights and assume all such obligations.

2.1.4. To perform and comply with the Agreement of Sale.

2.1.5. To do any and all other acts and things which may be necessary, incidental or convenient to carry on the foregoing purposes of the Company.

2.2. The purposes described in Section 2.1 are collectively referred to herein as the "Business" of the Company.

ARTICLE III
PRINCIPAL PLACE OF BUSINESS

3.1. The principal place of business of the Company shall be in County, Pennsylvania and the mailing address of the Company shall be , , PA or such other location(s) as the Member may determine.

ARTICLE IV
TERM; FILING OF CERTIFICATES

4.1. The Company shall be deemed to have commenced as of the date of filing of the Certificate (as defined below) (the "Commencement Date") and shall continue until terminated in accordance with the provisions of this Agreement.

4.2. The Manager represents that it has caused a Certificate of Organization (the "Certificate") to be prepared and filed in accordance with the Pennsylvania Limited Liability Company Act. The Manager shall file and record any amendments to the Certificate required by applicable law, any fictitious name certificates and any other documents required by or appropriate under the laws of any jurisdiction in which the Company shall carry on its Business or necessary or appropriate in connection with the preservation of the limited liability of the Members.

ARTICLE V
CAPITAL CONTRIBUTIONS, CAPITAL ACCOUNTS AND FUNDING REQUIREMENTS

5.1. Set forth in Schedule A hereto (the "Company Capitalization Schedule") opposite the name and address of each Member is his/her (i) initial capital contribution ("Initial Contribution") and (ii) initial percentage share in the profits and losses and capital of the Company ("Profit and Loss Percentage"). The Initial Contributions have been heretofore made or shall be made not later than three (3) business days prior to the closing of the purchase of the Real Estate pursuant to the Agreement of Sale. The Company Capitalization Schedule may, in the discretion of the Manager, be kept and maintained as part of the Company records separate and apart from tins Agreement.

5.2. A capital account (a "Capital Account") shall be established for each Member in the amount of such Member's Initial Contribution. A Member's Capital Account shall be maintained in accordance with Treasury Regulation Section 1.704-1(b)(2)(iv).

(b) Each Member's Capital Account shall be increased by (i) the amount of money contributed by such Member to the Company, (ii) the fair market value of property contributed by such Member to the Company (net of liabilities secured by such contributed property that the Company is considered to assume or take subject to under I.R.C. Section 752), and (iii) the allocations to such Member of Net Profits and the amount of any items of income and gain allocated to such Member pursuant to Article VI hereof.

(c) Each Member's Capital Account shall be decreased by (i) the amount of money distributed to such Member by the Company (which do not include payments made to the Member for goods or services as described in Section 6.3), (ii) the fair market value of property distributed to such Member by the Company (net of liabilities secured by such distributed property that such Member is considered to assume or take subject to under I.R.C. Section 752), and (iii) such Member's distributive share of Net

Losses and the amount of any items of deduction or loss allocated to such Member pursuant to Article VI hereof.

[*Optional Provision*: (d) The value of all items of property reflected in the Capital Accounts of the Members shall be adjusted to their fair market values and such adjustment shall be reflected in the Capital Accounts of the Members as part of Net Profits or Net Losses or under Section 6.3.6, as the case may be, as of the following times:

(i) In connection with a contribution of money or other property (other than a de minimis amount) to the Company by a new or existing Member as consideration for an Interest in the Company;

(ii) In connection with a liquidation of the Company within the meaning of Regulations Section 1.704-1(b)(2)(ii)(g) or a distribution of money or other property by the Company to a retiring or continuing Member as consideration for an interest in the Company;

(iii) In connection with adjustments to the basis of property of the Company pursuant to I.R.C. Sections 734(b)(1) or 743(b)(2), but only to the extent that the Capital Ac-counts of the Members are adjusted as required in Regulations Section 1.704-1(b)(2)(iv)(m), provided, however, that the value of property reflected in the Capital Accounts of the Members shall not be adjusted pursuant to this subparagraph (iii) to the extent that an adjustment pursuant to subparagraph (ii) is required in connection with a transaction that would otherwise result in an adjustment pursuant to this subparagraph (iii).]

[*Optional Provision*: (e) The value in the Capital Accounts of the Members of an item of property of the Company that is distributed to a Member shall, immediately prior to such distribution, be adjusted to its fair market value and such adjustment shall be reflected in the Capital Accounts of the Members as part of Net Profits or Net Losses.]

(f) Any Member who shall receive a Membership Interest (or whose Membership Interest shall be increased) by means of a transfer to him or her of all or part of the Membership Interest of another Member, shall have a Capital Account which reflects the Capital Account of the transferred Membership Interest (or the applicable percentage thereof in the case of a transfer of a part of a Membership Interest).

(g) Notwithstanding any provision of this Agreement to the contrary, the Members intend that each Member's Capital Account shall be maintained and adjusted in accordance with the I.R.C., including (without limitation) the adjustments permitted or required by I.R.C. Section 704(b), the principles expressed in I.R.C. Section 704(c) (to the extent applicable), and the adjustments required to maintain Capital Accounts in accordance with the "substantial economic effect test" set forth in the Regulations promulgated under IRC Section 704(b).

5.3. Except as otherwise provided by law, the liability of each Member shall be limited to the aggregate amount of the capital contributions which such Member is required to make in accordance with the provisions of Section 5.1 hereof and each such Member shall have no further personal liability to contribute money to, or in respect of, the debts, liabilities, contracts or any other obligations of the Company, nor shall any Member be personally liable for any obligations of the Company.

5.4. No Member shall be required to lend any funds to the Company or to make any further capital contribution to the Company after his Initial Contribution is paid. A Member shall not have any obligation to the Company or to any other Member to restore any negative balance in his capital account. No Member may withdraw capital or receive any distributions except as specifically provided herein.

Unless otherwise provided herein, no interest shall be paid by the Company on any capital contributions to the Company.

5.5. The Manager shall have no personal liability for the repayment of any capital contribution made by the Members.

ARTICLE VI
ALLOCATIONS OF PROFITS AND LOSSES

6.1. The "Net Profits" and "Net Losses" of the Company shall be the net profits and losses of the Company for Federal income tax purposes as shown on the returns filed by the Company with the Internal Revenue Service. [*Use this Section 6.1 or the Alternate Section 6.1 below*]

[*Alternate Section 6.1—See paragraphs (a)–(e):* The "Net Profits" and "Net Losses" of the Company for each tax period shall mean the Company's taxable income or loss for such period determined under I.R.C. Section 703(a) and adjusted as follows:

(a) Taxable income shall increase and taxable loss shall decrease by tax-exempt income of the Company.

(b) Taxable income shall decrease and taxable loss shall increase by expenditures described in Regulations Section 1.704-1(b)(2)(iv)(i), and not otherwise taken into account in computing taxable income and losses.

(c) If the value of property of the Company reflected in the Members' Capital Accounts is adjusted in accordance with Sections 5.2(d) or (e), the amount of such adjustment shall be treated as a gain or loss in determining Net Profits or Net Losses.

(d) If the value of property of the Company reflected in the Members' Capital Accounts is adjusted pursuant to Section 5.2(d) or (e), the Company disposes of such property, and such disposition results in a gain or loss that is recognized for federal income tax purposes, then such gain or loss shall be computed by using the value of such property as it is reflected in the Members' Capital Accounts in lieu of the tax basis of such property.

(e) If the value of property of the Company as reflected in the Members' Capital Accounts is adjusted in accordance with Section 5.2(d), the amount of depreciation, depletion, or amortization for such property shall be the Revised Depreciation. "Revised Depreciation" shall mean, if the value of property of the Company as reflected in the Capital Accounts of the Members differs from its adjusted basis for federal income tax purposes because of an adjustment pursuant to Section 5.2(d) or (e), in lieu of the amount of depreciation, cost recovery deduction, or amortization prescribed under the Code for any period, such depreciation, cost recovery deduction, or amortization shall be the amount that bears the same relationship to the adjusted value of such property as reflected in the Capital Accounts of the Members as the depreciation, cost recovery deduction, or amortization computed for federal income tax purposes with respect to such property for such period bears to the adjusted tax basis of such property. If such property has a zero adjusted tax basis, Revised Depreciation may be determined under any reasonable method selected by the Company. [End of Alternate Section 6.1]

6.2. The "Net Profits" and "Net Losses" of the Company shall be allocated as follows:

6.2.1. For all tax periods the Net Profits of the Company shall be allocated as follows:

(a) In Proportion to Prior Net Losses. First, if Net Losses have previously been allocated to the Members, to the Members in the reverse order that such Net Losses were allocated to the Members, until the cumulative Net Profits allocated under this Subsection 6.2.1(a)(1) for the current and all prior periods equals the cumulative Net Losses allocated for all prior periods.

(b) In Proportion to Cash Distributions. Second, until the cumulative Net Profits allocated under this Subsection 6.2.1(a) for the current period and all prior periods equals the cumulative cash distributions previously made to all Members by the Company, to the Members so that (i) the proportions in which the cumulative Net Profits for the current period and all prior periods are allocated among the Members are as close as possible to (ii) the proportions in which the cumulative cash distributions previously made by the Company have been allocated among the Members.

(c) In Proportion to Profit and Loss Percentages. The balance of the Net Profits shall be allocated to the Members pro rata in accordance with their respective Profit and Loss Percentages as set forth on Schedule A hereto.

6.2.2. For all tax periods, the Net Losses of the Company shall be allocated among all Members pro rata in accordance with their respective Profit and Loss Percentages as set forth on Schedule A hereto.

6.3. Notwithstanding the provisions of Section 6.2, the following special tax allocations shall be made in the following order:

6.3.1. Minimum Gain Chargeback. If there is a net decrease in Limited Liability Company Minimum Gain (as defined in Treasury Regulation Section 1.704-1) for any year, each Member shall be specially allocated items of Limited Liability Company income and gain for such year (and, if necessary, subsequent years) in an amount equal to that Member's share of the net decrease in Limited Liability Company Minimum Gain. This paragraph is intended to comply with the minimum gain chargeback requirement in Treasury Regulation Section 1.704-2(f), and shall be interpreted consistently therewith.

6.3.2. Qualified Income Offsets. In the event a Member unexpectedly receives any adjustments, allocations or distributions described in Treasury Regulation Section 1.704-1(b)(2)(ii)(d)(4), (5) or (6), and such Member has an Adjusted Capital Account Deficit, items of Limited Liability Company income and gain shall be specially allocated to such Member in an amount and manner sufficient to eliminate the Adjusted Capital Account Deficit as quickly as possible. This paragraph is intended to constitute a "qualified income offset" under Treasury Regulation Section 1.704-1(b)(2)(ii)(d), and shall be interpreted consistently therewith. The "Adjusted Capital Account Deficit" of a Member is the deficit balance (if any) in such Member's capital account at the end of the year after giving effect to the adjustments needed to comply with the alternate test for economic effect contained in Treasury Regulation 1.704-1(b)(2)(ii)(d).

6.3.3. Any deductions attributable to interest paid or accrued on Member Loans (as hereinafter defined) shall be allocated to the lending Member.

[*Sections 6.3.4 through 6.3.6 are Optional Provisions:*] 6.3.4 Gross Income Allocation. In the event that any Member has a deficit Capital Account at the end of any fiscal year in excess of the amount that such Member is deemed obligated to restore pursuant to Regulations Sections 1.704-2(g)(1) and—2(i)(5), each such Member shall be allocated items of income and gain in the amount of such excess. The allocations made pursuant to this Section 6.3.4 shall be made after all other allocations pursuant to Sections 6.3.1, 6.3.2, and 6.4.5 have been made.]

[*Optional* 6.3.5 Allocation of Certain Adjustments. If an adjustment to the Capital Accounts of the Members is required by Regulations Section 1.704-1(b)(2)(iv)(m)(2) or (4) because of a distribution in complete liquidation of a Member's LLC Interest, the amount of such adjustment shall be treated as an item of gain, if it increases the tax basis of property of the Company, or as an item of loss, if it decreases the tax basis of property of the Company. If Regulations Section 1.704-1(b)(2)(iv)(m)(2) applies to the adjustment to the Capital Accounts, such items of gain or loss shall be allocated to the Members in accordance with their Percentage Interests. If Regulations Section 1.704-1(b)(2)(iv)(m)(4) applies to the adjustment to the Capital Accounts, such items of gain or loss shall be allocated to the Member receiving the distribution.]

[*Optional* 6.3.6 Tax Allocations. Except as otherwise provided in this Agreement, all items of income, gain, loss and deductions shall be allocated for tax purposes among the Members in the same manner as the corresponding items of Net Profit and Net Loss are allocated in Sections 6.2 and 6.3. Solely for tax purposes, and in accordance with IRC Section 704(c), income, gain, loss, and deductions with respect to property contributed to the Company by a Member shall be shared among the Members so as to take account of the variation between the basis of the property to the Company for federal income tax purposes and its fair market value at the time of its contribution. If the value of any property of the Company reflected in the Members' Capital Accounts is adjusted pursuant to Section 5.2(d)(i) or (ii), thereafter, allocations of depreciation, depletion, amortization, and gain or loss with respect to such property shall be determined so as to take into account the variation between the adjusted tax basis and the adjusted value of such property as reflected in the Members' Capital Accounts in the same manner as under I.R.C. Section 704(c). The Limited Liability Company will use the traditional method with curative allocations as provided Regulations Section 1.704-3(c) to take into account income, gain, loss and deduction with respect to property described in this Section 6.3.6.]

ARTICLE VII
DISTRIBUTIONS

7.1. The Manager, after payment of all liabilities of the Company (including without limitation Member Loans (as defined in Section 9.3 hereof) and legal fees payable to the Company's counsel), shall cause the Company to distribute to the Members such amounts of the cash flow which the Manager shall at any time reasonably determine to be in excess of the reasonable needs and obligations of the Company within thirty (30) days following the date of such determination. [*Alternative Provisions—First Alternative is "basic" distribution rule*: All such amounts to be distributed to the Members shall be distributed pro rata in accordance with the Member's Profit and Loss Percentages set forth in Schedule A hereto.]

[*Second Alternative is based on a more customized arrangement. Distribution provisions should track the negotiated business terms of each deal:]* All such amounts to be distributed to the Members shall be distributed in the following strict order of priority:

7.1.1. First, an amount to each Member equal to % per annum of the amount of such Member's Initial Contribution as shall not have been returned to such Member pursuant to paragraph 7.1.3 below or otherwise, i.e., % per annum of the amount of each Member's Initial Contribution at any time outstanding. Such amount shall be prorated for partial years. Interest shall accrue on each Member's Initial Contribution, as reduced by any partial return of such Initial Contribution, until paid. If such amounts are not sufficient to return the full amount of distributions pursuant to this paragraph 7.1.1, distributions shall be made to the Members pro rata in accordance with their respective Initial Contributions;

7.1.2. Second, management fees payable to the Manager as described in Section 9.1 below;

7.1.3. Third, return of the Initial Contributions of the Members. If such amounts are not sufficient to return the full amount of all Initial Contributions of the Members, the Initial Contributions shall be returned to the Members pro rata in accordance with their respective Initial Contributions; and

7.1.4. Fourth, the balance to the Members pro rata in accordance with their Profit and Loss Percentages set forth in Schedule A hereto.]

ARTICLE VIII
MANAGEMENT: RIGHTS AND OBLIGATIONS OF MANAGER

8.1. Except as specifically provided in this Agreement, the business and affairs of the Company shall be managed and controlled exclusively by the Manager.

8.2. The Manager shall have full, exclusive and complete discretion in the management and control of the Business of the Company, and shall have all such other powers of a manager in a limited liability company formed under Pennsylvania law, the exercise of which are consistent with the Business of the Company. The Manager is hereby authorized to take any action and do anything it deems necessary or appropriate to carry out the purposes of the Company in accordance with the provisions of this Agreement and applicable law.

8.3. The Manager shall use good faith efforts to: (i) continue the Company's existence as a limited liability company under the laws of the Commonwealth of Pennsylvania and of every other jurisdiction in which such existence is necessary to protect the limited liability of the Members or to enable the Company to conduct the business in which it is engaged; and (ii) carry out the Business in accordance with the provisions of this Agreement and applicable laws and regulations.

8.4. Except as provided herein, the Manager shall not be required to devote all of its time or business efforts to the affairs of the Company, but shall devote so much time and attention as the Manager deems reasonably necessary or advisable to manage the affairs of the Company to the best advantage of the Company. [*Modify this Section as necessary to reflect the expectations relative to the Member's devotion of time to the Company*].

8.5. In addition to the other rights and powers granted to the Manager, the Manager shall have the right, upon such terms and conditions as the Manager, in its sole and absolute discretion, may deem advisable: [*Any of the provisions below may be made subject to the consent of e.g., a majority or super-majority in interest of the Members*.]

8.5.1. To cause the Company (i) to execute and deliver any contract, amendment, supplement or other document relating to the Business and (ii) subject to the terms of this Agreement, to exercise the rights and fulfill the obligations of the Company under applicable law;

8.5.2. To borrow money on the general credit of the Company for use in the Company's Business;

8.5.3. To make any reasonable expenditures in respect of the Business of the Company and take all action reasonably necessary in connection with the maintenance, operation and management thereof, and to establish reserves for any purpose consistent with the purpose and Business of the Company;

8.5.4. To apply the capital contributions of the Members to pay the expenses of the Company;

8.5.5. To retain, engage or employ at the expense of, and for the benefit of, the Company such persons, firms or corporations (whether or not the Manager is employed by or is directly or indirectly, connected with such person, firm or corporation), as employees, consultants, accountants, attorneys, brokers, agents, and other professionals as it, in its sole and absolute discretion, shall deem advisable in connection with the Business of the Company;

8.5.6. To bring, defend, pay, collect, compromise, arbitrate, resort to legal action or otherwise adjust claims or demands of or against the Company;

8.5.7. Subject to the prior written approval of [a majority in interest] of the Members, to deal in any Company assets, whether real estate or personalty (collectively, "Company Property"), including, sell, assign, exchange or convey title to, and grant options for the sale of portions of the Company Property, or other realty or personalty which may be acquired by the Company at market price. The Member may lease or sublease, as the case may be, all of any portion of the Company Property without limit as to the term thereof;

8.5.8. To borrow money, and as security therefor, encumber all or any part of the Company Property (and in connection therewith to authorize the holder of the note or bond evidencing such debt or the mortgage securing the same to confess judgment for damages and/or possession in the event of default thereunder);

8.5.9. To obtain refinancing of any mortgage or mortgages or any deed of trust or deeds of trust placed on the Company Property; or repay them in whole or in parts;

8.5.10. To increase, modify, consolidate or extend any mortgage or mortgages or deed of trust or deeds of trust on the Company Property;

8.5.11. To invest any surplus or reserve funds of the Company in certificates of deposit issued by state or federally insured institutions;

8.5.12. Wherever financing is to be obtained it shall be non-recourse as to the Members, and the liability of each Member shall not, under any circumstances, exceed such Member's cash capital contributions made to date, but such financing is not required to be non-recourse as to the Company;

8.5.13. To employ from time to time, persons, firms, or corporations for the operation and management of the Company Property, including without limitation, sales/rental agents, general contractor, subcontractors, and independent contractors on such terms and for such compensation as are standard and prevailing in the industry;

8.5.14. To execute, acknowledge and deliver any and all instruments to effectuate the foregoing, including, without limitations, deeds, assignments, mortgages, notes, mortgage papers, agreements of sale, leases and other contracts;

[*Optional* 8.5.15 To make any tax election which may be made by the Company (including, without limitation, any election under I.R.C. 754); and]

8.5.16. To possess, without limitation, all of the power and rights of a Member in a Limited Liability Company formed under the Limited Liability Company Law of Pennsylvania.

8.6. Except as set forth herein, or as otherwise authorized by the Manager, the Members shall take no part in the management of, shall not contribute any services to, and shall have no authority to act on behalf of, or to bind, the Company.

8.7. Any Member may engage in or possess an interest in other business ventures of any nature or description, independently or with others, including but not limited to the real estate business in all its phases, whether or not competitive with the business of the Company, including, without limitation, acquisition, ownership, financing, operations, leasing, management, syndication, brokerage, sale, construction and development of real property or interests therein, and neither the Company nor any Member shall have any right in or to such independent ventures or the income or profits derived therefrom and any such activity shall not be, or be deemed, a breach of any duty owed by any Member to the Company or any other Member.

8.8. The liabilities of the Company or of the Members as part of or arising out of the activities of the Company shall be covered by appropriate policies of public liability insurance to be purchased by the Company from carriers approved by the Manager. Except as set forth in Article V hereof, no Member shall be liable, responsible or accountable in damages or otherwise to the Company or to any other Member for any act or failure to act by it, unless such act or failure to act is attributable to willful misconduct, gross negligence, fraud or an intentional violation of any term of this Agreement, in which case such Member shall indemnify and hold harmless the Company and each other Member from any loss, damage, liability, cost or expense (including reasonable attorney's fees and expenses) arising from such act or failure to act. The Company (to the extent of its assets) shall indemnify and hold harmless the Member from any loss, damage, liability, cost or expense (including reasonable attorney's fees and expenses) arising out of any act or failure to act by the Member or matters relating to the Company, to the fullest extent permitted by applicable law, except that the Company shall not indemnify the Member against any loss, damage, liability, cost or expense arising out of the willful misconduct, gross negligence, fraud or any intentional violation of any term of this Agreement.

ARTICLE IX
FEES AND EXPENSES; LOANS

9.1. [*This Section 9.1 is a customized provision that may or may not have applicability to a particular situation.]* The Manager shall be paid for its management services an amount equal to % of [gross revenues] of the Company in each year. Such amount shall be paid [monthly/quarterly/annually]; [provided, however, all fees to be paid to the Member shall accrue, but shall not be paid, unless and until all amounts to be paid to the Members pursuant to paragraph 7.1.1 shall have first been paid.] These management fees shall be treated by the Company and the Member as fees for services and as partnership operating expenses under Code Section 707(a), not as "guaranteed payments" under Code Section 707(c) or as partnership distributions under Code Section 731. Accordingly, the Manager's capital account balance shall not be reduced by the amount of these management fees.

9.2. The Company shall promptly reimburse the Manager for any reasonable out-of-pocket expenses incurred by it in connection with the performance of its obligations to, or the obligations of, the Company.

9.3. Subject to the prior written approval of the Manager [and a majority in interest of all other Members], any Member may, at its option, make loans ("Member Loans") or additional capital contributions to the Company from time to time; [*provided, that the Manager may, in its sole discretion, make Member Loans or additional capital contributions of up to $50,000 in the aggregate without the approval of any other Member*.] Member Loans shall bear interest and contain such terms and conditions as are approved by the

Manager [*and a majority in interest of all other Members*]. In the event that any Member makes additional capital contributions to the Company, the Member shall appropriately adjust the Capitalization Schedule to reflect such additional capital contributions, and such additional capital contributions shall be added to and treated as Initial Contributions.

ARTICLE X
TRANSFER OF A MANAGER's PARTNER'S INTEREST AND RIGHT TO CONTINUE THE BUSINESS OF THE COMPANY

10.1. The Manager resign or withdraw from the Company without the prior written consent of [two-thirds (2/3)] in interest of the Members (based upon such Members' Profit and Loss Percentages).

10.2. In the event of the death, removal, dissolution, bankruptcy, incompetency, legal incapacity or other event of dissociation of the Manager, the Company shall not be terminated or dissolved for the balance of the term specified in Article IV hereof. All the obligations of the Manager hereunder shall be assumed by the members unless and until a successor Manager is approved by a majority in interest of the Members (based upon such Members' Profit and Loss Percentages).

10.3. The admission of any person as a successor Manager shall be conditioned in each case upon such person's written acceptance and adoption of all of the terms and provisions of this Agreement.

ARTICLE XI
TRANSFER OF MEMBERSIP INTEREST

11.1. The Members shall not have the right to sell, assign, dispose of, hypothecate or otherwise transfer all or any part of their interest in the capital and profits of the Company ("Membership Interest") without prior written approval of the Manager and subject to Sections 11.3, 11.4 and 11.5 hereof. The transferee of such interest shall become a substitute Member only upon the terms and conditions set forth in Sections 11.3, 11.4 and 11.5 hereof. No sale, assignment, disposition or other transfer in violation of this Article XI shall be effective.

11.2. The death, withdrawal, retirement, resignation, removal, dissolution, bankruptcy, insanity, incompetency or legal incapacity of any Member shall not dissolve or terminate the Company. In the event of such death, dissolution, bankruptcy, insanity, incompetency or other legal incapacity, the legal representative of such Member shall be deemed to be the assignee of such Member's Membership Interest and may become a substitute Member upon the terms and conditions set forth in Section 11.3 and 11.4 hereof. Such representative shall be responsible for all the obligations to the Company of such Member.

11.3. The Manager shall have the power, in its sole and absolute discretion, to admit as a substitute or additional Member any person who acquires the Membership Interest, or any part thereof, of a Member. The Manager's failure or refusal to admit a transferee as a substitute or additional Member shall not affect the right of such transferee to receive the share of net profits and losses pursuant to Article VI and distributions of proceeds pursuant to Article VII hereof to which his predecessor in interest was entitled.

11.4. The admission of any person as a substitute or additional Member shall be conditioned upon such person's written acceptance and adoption of all of the terms and provisions of this Agreement.

11.5. The Members shall not have the right to sell, assign, dispose of, hypothecate or otherwise transfer all or any part of their Membership Interest without first offering to sell the entire Membership Interest to the other Members, who shall have the option to purchase all or any portion of such Interest. In the event

the other Members do not elect to purchase all of such Membership Interest, the selling Member may sell the unpurchased portion of the Membership Interest to a third party on terms and conditions not more favorable than those offered to the other Members.

11.6. Subject to the provisions of Section 11.4 above and Article XII below, a Member may at any time or from time to time assign all or any part of his or her Membership Interest to a spouse, child or grandchild, or trust for the benefit of any of the foregoing.

ARTICLE XII
TRANSFERS

12.1. Any person who acquires in any manner whatsoever any interest in the Company, irrespective of whether such person has accepted and adopted in writing the terms and provisions of this Agreement, shall be deemed by the acceptance of the benefit of the acquisition thereof to have agreed to be subject to and bound by all the obligations of this Agreement to or by which any predecessor in interest of such person was subject or bound.

12.2. Any transferee of any interest in the Company shall have no right to have the value of his interest ascertained or to receive the value of such interest or, in lieu thereof, profits attributable to any right in the Company, except as herein set forth.

12.3. In the event of a transfer of all or part of the interest of a Member, the Manager may in its sole discretion, upon request of a Member, cause the Company to elect, pursuant to Section 754 of the Internal Revenue Code of 1986, as amended from time to time (the "IRC"), or the corresponding provisions of subsequent law, to adjust the basis of the Company's Property as provided by Section 743 of the IRC. All other elections required or permitted to be made by the Company under the Code shall be made by the Manager in such manner as will, in the sole and absolute discretion of the Manager, be most advantageous to a majority in interest of the Company.

12.4. Upon the transfer of all or any part of the interest of a Member as hereinabove provided, the net income and losses attributable to the interest so transferred shall be allocated between the transferor and transferee as of the effective date of the transfer, and such allocation shall be based upon the number of days during the applicable fiscal year of the Company that the interest so transferred was held by each of them, either with or without regard to the results of Company activities during the period in which each was the holder. Distributions shall be made to the holder of record of the Membership Interest on the date of distribution.

12.5. No sale or exchange of any interest in the Company may be made if the interest sought to be sold or exchanged, when added to the total of all other interests sold or exchanged, would result in the termination of the Company under Section 708 of the Code or any successor statute. No sale or other disposition of an interest in the Company may be made except in compliance with all Federal, state and other applicable laws, including Federal and state securities laws.

ARTICLE XIII
DISSOLUTION AND TERMINATION

13.1. The Limited Liability Company shall be dissolved and its business wound up upon the [*unanimous written consent of the Members—or—written consent of the Member and not less than [75%] in interest of the Members*].

13.2. Upon the termination and dissolution of the Company, the Manager or, if there is no Manager, any person elected to perform such liquidation by the written consent of a [majority in interest] of the Members shall proceed with the liquidation of the Company, and the proceeds of such liquidation shall be applied and distributed as follows:

(a) [*If applicable, include (a); otherwise, exclude (a) and begin with (b) as the first priority*] First, to the payment of any accrued but unpaid management fees owed to the Manager under Section 9.1;

(b) Second, to those Members who have positive capital account balances, in proportion to such positive balances, and in an aggregate amount not exceeding the aggregate of such positive balances; and

(c) Any remaining proceeds shall be distributed in accordance with the provisions of Article VII hereof.

It is intended that such distributions shall result in the Members' receiving aggregate distributions equal to the amount of distributions that would have been received if the liquidating distributions were made in accordance with Section 7.1. However, if the balances in the Capital Accounts do not result in such intention being satisfied, items of Net Income and Net Loss shall be reallocated among the Members for the taxable year of the liquidation (and, at the election of the Member, if necessary, prior taxable years) so as to cause the balances in the Capital Accounts to be in the amounts necessary to assure that such result is achieved.

13.3 In the event it becomes necessary to make a distribution of Limited Liability Company Property in kind, such Property shall be transferred and conveyed to the Member and Members or their assignees so as to vest in each of them an interest in the whole of said Property equal to their interests in the distribution of proceeds in accordance with Article VII hereof Any valuation of Limited Liability Company Property shall be made by a firm of certified public accountants, appraisers or investment bankers selected by the Member in its sole discretion.

ARTICLE XIV
ACCOUNTING AND RELATED MATTERS

14.1. The fiscal year of the Company shall end on [*December 31*] of each year.

14.2. The Manager, at the expense of the Company, shall keep, or cause to be kept, full and accurate records of all transactions of the Company.

14.3. All such records shall at all times be maintained at any office designated by the Member, and such office shall be open during reasonable business hours for the inspection and examination by the Members and their agents, who shall have the right to make copies thereof and of any correspondence or other materials relating to or arising out of the Business of the Company.

14.4. The Manager shall cause to be prepared the tax returns of the Company and a balance sheet and a report of the receipts, disbursements, net profits and losses and cash flow of the Company, and the share of the net profits and losses of each of the Members for such fiscal year. The Manager shall, promptly upon receipt of such balance sheet and report, transmit a copy thereof to the Members. The Limited Liability Company may retain such firm of independent certified public accountants as the Manager shall reasonably select.

14.5. All property of the Company shall be held in the name of the Company or in the names of one or more nominees designated by the Manager.

14.6. The funds of the Company shall be deposited in the name of the Company in such bank account or accounts as shall be designated by the Manager or invested in such short term obligations as the Manager shall determine.

14.7. The Manager shall be the "tax matters" member for purposes of the Internal Revenue Code.

ARTICLE XV
INDEMNIFICATION OF THE MANAGER

15.1. To the fullest extent permitted by law, the Manager and all agents, employees and representatives of the Company or the Manager (individually, an "Indemnitee") shall be indemnified and held harmless by the Company from and against any and all losses, claims, damages, liabilities, whether joint or several, expenses (including legal fees and expenses), judgments, fines, settlements and other amounts arising from any and all claims, demands, actions, suits or proceedings, civil, criminal, administrative or investigative, in which the Indenmitee may be involved, or threatened to be involved, as a party or otherwise, by reason of its status as a Manager or an officer, director, agent or employee of a Manager at the time any such liability or expense is paid or incurred if (a) the Indemnitee acted in good faith and in a manner it reasonably believed to be in, or not opposed to, the best interests of the Company and, with respect to any criminal proceeding, had no reasonable cause to believe its conduct was unlawful, and (b) the Indemnitee's conduct did not constitute gross negligence or willful or wanton misconduct. The termination of any action, suit or proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere, or its equivalent, shall not, of itself, create a presumption that the Indemnitee acted in a manner contrary to that specified in (a) or (b) above.

15.2. To the fullest extent permitted by law, expenses incurred by an Indemnitee in defending any claim, demand, action, suit or proceeding subject to this Article XV shall, from time to time, be advanced by the Company prior to the final disposition of such claim, demand, action, suit or proceeding upon the receipt by the Company of an undertaking by or on behalf of the Indemnitee to repay such amount unless it shall be determined that such person is entitled to be indemnified as authorized in this Article XV.

15.3. The indemnification of this Article XV shall be in addition to any other rights of an Indemnitee under any agreement, pursuant to any vote of the Members, as a matter of law or otherwise, both as to action in the Indemnitee's capacity as a Manager or as an officer, director, agent or employee of a Manager, and shall continue as to an Indemnitee who has ceased to serve in such capacity and shall inure to the benefit of the heirs, successors, assigns and personal representatives of the Indemnitee.

15.4. Any indemnification under this Article XV shall be satisfied solely out of the assets of the Company. In no event may an Indemnitee subject any Manager to personal liability by reason of these indemnification provisions. An Indemnitee shall not be denied indemnification under this Article XV because the indemnitee had an interest in the transaction with respect to which the indemnification applies if the transaction was otherwise permitted by the terms of this Agreement.

ARTICLE XVI
GENERAL

16.1. Each Member represents and warrants to each other Member and the Company that (i) his Membership Interest is being acquired solely for its own account, for investment, and is not being purchased with a view to or for the resale, distribution, subdivision or factionalization thereof, (ii) he has no contract, undertaking, understanding, agreement or arrangement, formal or informal, with any person

to sell, transfer or pledge all or any portion of its interest in the Company, and (iii) he has no plans to enter into any such contract undertaking, understanding, agreement or arrangement.

16.2. Whenever any notice, request or consent is required or permitted to be given hereunder, such notice, request or consent shall be in writing, signed by or on behalf of the person giving the notice, and shall be deemed to have been given when delivered by personal delivery or five days after it was mailed by registered mail, postage prepaid, addressed to the Member to whom such notice or request is to be given at its address set forth on Schedule A hereto, or at such other address as shall be stated on a notice similarly given to the Company and all the Members.

16.3. Except as herein otherwise provided to the contrary, this Agreement shall be binding upon and inure to the benefit of the parties hereto, their personal representatives, successors and assigns. None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditor of the Company.

16.4. Each Manager hereby constitutes and appoints the Manager as his true and lawful attorney-in-fact, to make, execute, sign, acknowledge, record or file with respect to the Company:

16.4.1. The Certificate of Organization, any amendment or supplement thereto required as a result of any amendment to this Agreement;

16.4.2. All instruments, documents or certificates which may be deemed necessary or desirable by the Member to effect the admission of a substitute Manager in accordance with the terms hereof or the termination of the limited liability company upon its dissolution;

16.4.3. Any fictitious name or similar certificate required by law to be filed on behalf of the Company; and

16.4.4. All such other instruments, documents and certificates which may from time to time be required by the laws of any jurisdiction, domestic or foreign, to effectuate, implement, continue and defend the valid and subsisting existence of the Company and its power to carry out its purposes as set forth in this Agreement. Provided, however, that the Manager shall not have any authority to take any action as such attorneys-in-fact which could in any way increase the liability of the Manager beyond that expressly set forth herein.

16.5. This Agreement may be amended and/or restated by the Members upon the affirmative vote or written consent of [*75% in interest of the Members*]. Any amendment to this Agreement that is adopted or approved in accordance with the terms of the preceding sentence shall be valid, effective and binding upon the Manager and each Member, regardless whether such Member voted for or consented to the amendment. No waiver of this Agreement or any part hereof and no notice of consent required or permitted to be given pursuant to the terms of this Agreement shall be valid or effective unless in writing and signed by the party or parties sought to be charged therewith; and no waiver of any breach of condition of this Agreement shall be deemed to be a waiver of any other subsequent breach of conditions, whether of like or different nature.

16.6. Whenever the context may require, any pronouns used herein shall include the corresponding masculine, feminine or neuter forms, and the singular form of nouns and pronouns shall include the plural and vice versa. For the purpose of this Agreement:

16.6.1. The term “person” shall include any individual, corporation, partnership, association, trust, joint stock company or unincorporated organization;

16.6.2. The “bankruptcy” of the Member or of a Manager shall be deemed to have occurred upon the happening of any of the following: (i) the filing of an application by such person for, or a consent to, the appointment of a trustee of its or his assets; (ii) the filing by such person of a voluntary petition in bankruptcy or the seeking of relief under Title 11 of the United States Code, as now constituted or hereafter amended, or the filing of a pleading in any court of record admitting in writing its or his inability to pay its or his debts as they come due; (iii) the making by such person of a general assignment for the benefit of creditors; (iv) the filing by such person of an answer admitting the material allegations of, or its or his consenting to, or defaulting in answering, a bankruptcy petition filed against it or him in any bankruptcy proceeding or petition seeking relief under Title 11 of the United States Code, as now constituted or as hereafter amended; or (v) the entry of an order, judgment or decree by any court of competent jurisdiction adjudicating such person a bankrupt or for relief in respect of such person or appointing a trustee of its or his assets, and such order, judgment or decree continued unstayed and in effect for any period of 60 consecutive days.

16.6.3. Except as otherwise defined in this Agreement, the term “majority in interest of the Members” means Members owning Membership Interests constituting more than 50% of the Profit and Loss Percentage of the Company.

16.7. This Agreement shall be construed in accordance with and governed by the laws and decisions of the Commonwealth of Pennsylvania without regard to the conflicts of law principles thereof.

16.8. This Agreement constitutes the entire agreement among the parties pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings of the parties in connection therewith. No covenant, representation or condition not expressed in this Agreement, shall affect, or be effective to interpret, change or restrict, the express provisions of this Agreement.

16.9. This Agreement may be executed in counterparts which when taken together shall constitute one agreement binding on all the parties notwithstanding that all the parties are not signatories to the same counterpart.

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement as of the date and year first above written.