

**LIMITED LIABILITY COMPANY FORMATION WORKSHEETS<sup>1</sup>**

<b>SECTION I. GENERAL INFORMATION AND INTAKE CONSIDERATIONS</b>			
<b>A. PARTIES:</b>			
1. Member(s)			
<i>Member</i>			
Name: <sup>2</sup>		Taxpayer Identification No.:	
Form and jurisdiction of organization:			
Address:	Telephone No.:		
	Fax No.:		
	E-mail:		
<i>Member</i>			
Name:		Taxpayer Identification No.:	
Form and jurisdiction of organization:			
Address:	Telephone No.:		
	Fax No.:		
	E-mail:		
<i>Member</i>			
Name:		Taxpayer Identification No.:	
Form and jurisdiction of organization:			
Address:	Telephone No.:		
	Fax No.:		
	E-mail:		
2. Manager(s)			
Name:	Address:	Telephone No.:	
		Fax No.:	
		E-mail:	
Name:	Address:	Telephone No.:	
		Fax No.:	
		E-mail:	
3. Other			
Position:	Name:	Address:	Ph.: Fax: E-mail:
Position:	Name:	Address:	Ph.: Fax: E-mail:

<sup>1</sup> These worksheets are designed to assist counsel in focusing on structuring considerations in order to enable an operating agreement to be compliant with Pennsylvania law. A number of Delaware-relevant references are included for convenience. Users should be cognizant of state-specific issues if the LLC is to be formed in another jurisdiction. See also Appendix A for a sample checklist of formation documents and tasks.

<sup>2</sup> If a member is (a) an estate, provide name of legal representative, date of death if applicable, and certified copy of appointing court; (b) a trust, provide name of trustee and date of trust document and review the document to confirm (i) that membership in an LLC, and its anticipated business activities, are permitted, and (ii) the trustee's power and scope of authority; or (c) an agent, provide name of principal, copy of appointing document, and affidavit of effect.

(continued...)

<b>B. NAME AND PRINCIPAL ADDRESS OF LLC:<sup>3</sup></b>		
Name:	Address:	Ph.: Fax: E-mail:
<b>C. CLIENT ENGAGEMENT MATTERS:</b>		
1. Who is client? <sup>4</sup>	<input type="checkbox"/> Member(s): _____ <input type="checkbox"/> Manager(s): _____ <input type="checkbox"/> LLC: _____ <input type="checkbox"/> Other: _____	
2. Engagement letter and conflict waivers sent to: <sup>5</sup>	<input type="checkbox"/> _____ <input type="checkbox"/> _____ <input type="checkbox"/> _____	
<b>D. BUSINESS ALREADY IN OPERATION AS A GENERAL OR LIMITED PARTNERSHIP, SOLE PROPRIETORSHIP, OR OTHER ENTITY:</b>		
1. Transfer documents:	<input type="checkbox"/> Contribution/exchange agreement <input type="checkbox"/> Bill of sale for assets (request listing from client) <input type="checkbox"/> Assignment for intangible assets and other assets <input type="checkbox"/> Assignment/assumption of executory contracts	
2. Tax considerations for initial contribution:	<input type="checkbox"/> Book up <input type="checkbox"/> Taxable event <input type="checkbox"/> Other: _____	
<b>E. TRADEMARK AND TRADE NAME ISSUES:</b>		
1. Registrations with secretaries of state/PTO:	_____ _____ _____	
2. Trade name and trademark searches:	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<b>SECTION II. INFORMATION FOR CERTIFICATE OF ORGANIZATION<sup>6</sup> AND OTHER GENERAL CONSIDERATIONS</b>		
<b>A. NAME AND PRINCIPAL ADDRESS OF LLC:<sup>7</sup> (see section I.B, above)</b>		
<b>B. STATE OF ORGANIZATION:</b>	_____	
<input type="checkbox"/> Is full waiver of fiduciary duty desired? <input type="checkbox"/> Will series be used? (If the answer to either question is "yes," consider forming under the laws of Delaware or another jurisdiction that		

<sup>3</sup> Most states require certain designators for a limited liability company name, such as "limited liability company" or "LLC" or "Company." See 15 Pa.C.S. §§ 204(c) and 8821(b)(1); 6 Del.C. § 18-102. Consider also name "distinguishability" requirements imposed by the laws of the jurisdiction of organization and of states in which the LLC anticipates transacting business (15 Pa.C.S. § 202(b); 6 Del.C. § 18-103), as well as state and federal trademark and service mark protections.

<sup>4</sup> It is critical that counsel (a) clearly identify who is the client, particularly if the client is the LLC, which does not yet exist and (b) understand and comply with applicable state law and rules of professional conduct with respect to multiple-client representations and conflicts issues.

<sup>5</sup> See Appendix B for a sample of important engagement letter considerations.

<sup>6</sup> 15 Pa.C.S. § 8821(b)(1)-(2). Delaware designates this initial filing a "Certificate of Formation." 6 Del.C. § 18-201.

<sup>7</sup> 15 Pa.C.S. § 8821(b)(2); 6 Del.C. § 18-201(a)(1)-(2).

(continued...)

permits such provisions.) <sup>8</sup>							
<b>C. MANAGEMENT:</b> <sup>9</sup>	<input type="checkbox"/> Member-managed <input type="checkbox"/> Manager-managed						
<b>D. NAME OF REGISTERED OFFICE/AGENT:</b> <sup>10</sup>	<input type="checkbox"/> Professional Service Corporation: _____ <input type="checkbox"/> Law Firm Services Company: _____ <input type="checkbox"/> Other: _____						
<b>E. CONTACT INFORMATION/ADDRESS OF REGISTERED OFFICE/AGENT (IN STATE OF FORMATION):</b>							
	<table border="1"> <tr> <td>Telephone No.:</td> <td></td> </tr> <tr> <td>Fax No.:</td> <td></td> </tr> <tr> <td>E-mail:</td> <td></td> </tr> </table>	Telephone No.:		Fax No.:		E-mail:	
Telephone No.:							
Fax No.:							
E-mail:							
<b>F. NAME AND ADDRESS OF ORGANIZER (if applicable):</b> <sup>11</sup>							
	<table border="1"> <tr> <td>Telephone No.:</td> <td></td> </tr> <tr> <td>Fax No.:</td> <td></td> </tr> <tr> <td>E-mail:</td> <td></td> </tr> </table>	Telephone No.:		Fax No.:		E-mail:	
Telephone No.:							
Fax No.:							
E-mail:							
<b>G. PROFESSIONAL COMPANY:</b> <sup>12</sup>	<input type="checkbox"/> Yes <input type="checkbox"/> No If so, what type: _____						
<b>H. FORMED BY CONVERSION OF A GP, LP, OR OTHER DOMESTIC ENTITY:</b> <sup>13</sup>	<input type="checkbox"/> Yes <input type="checkbox"/> No If yes, date of written agreement: _____ Prior certificate filed? (and date): _____						
<b>I. EFFECTIVE DATE OF ORGANIZATION:</b> <sup>14</sup>	_____						
<b>J. SINGLE-MEMBER LLC:</b> <sup>15</sup>	<input type="checkbox"/> Yes <input type="checkbox"/> No						
<b>K. OTHER PROVISIONS:</b>	<input type="checkbox"/> Certificated interests election <sup>16</sup> <input type="checkbox"/> Perpetual existence <input type="checkbox"/> Other: _____						
<b>L. WAIVERS OF LIMITED</b>	<input type="checkbox"/> Yes <input type="checkbox"/> No						

<sup>8</sup> See 6 Del.C. § 18-215 (series); 6 Del.C. § 18-1101 (operating agreement may eliminate duties other than implied contractual covenant of good faith and fair dealing). Pennsylvania does not permit a full waiver of fiduciary duties for members or managers. See 15 Pa.C.S. § 8815(c)(11) as to member-managed LLCs and § 8815(c)(12) as to manager-managed LLCs.

<sup>9</sup> Some states require a designation in the company’s articles of organization as “manager-managed.” Neither Pennsylvania nor Delaware has such a requirement.

<sup>10</sup> 15 Pa.C.S. § 8821(b)(2); 6 Del.C. § 18-201(a)(2). Unlike most states, Pennsylvania only requires a registered office and not a registered agent.

<sup>11</sup> See 15 Pa.C.S. § 8823(a)(2) for the requirement that each organizer sign the certificate of organization.

<sup>12</sup> Most states permit the use of LLCs for structuring a professional practice, including legal and medical practices. See 15 Pa.C.S. § 8995(c). Professional companies are generally governed by the Pennsylvania LLC Act (see 15 Pa.C.S. § 8834(c)–(e)), but are subject also to the restrictions and requirements set forth in 15 Pa.C.S. §§ 8995–8998.

<sup>13</sup> Prior to the enactment of the Pennsylvania Association Transactions Act in 2014, Act 2014-172, conversions of other entities into LLCs were permitted under various other statutory provisions. See, e.g., 15 Pa.C.S. § 8908 (now repealed). Conversions of domestic associations into LLCs are now governed by subchapter E of the Association Transactions Act, 15 Pa.C.S. §§ 351–356.

<sup>14</sup> 15 Pa.C.S. § 8821(f) specifies that an LLC is formed when its certificate of organization becomes effective. See 15 Pa.C.S. § 135(a)(1) as to the requirements of documents filed with the Department of State, which permit the designation of the effective date of the creation of the LLC. See also 6 Del.C. § 18-206 as to Delaware LLCs.

<sup>15</sup> All states permit the formation of a single-member LLC. See 15 Pa.C.S. § 8841(a); 6 Del.C. § 18-101(6).

<sup>16</sup> See footnote 33.

(continued...)

<b>LIABILITY:</b> <sup>17</sup>	
<b>M. LLC TO BE TAXED UNDER:</b> <sup>18</sup>	<input type="checkbox"/> Subchapter K <input type="checkbox"/> Subchapter C <input type="checkbox"/> Subchapter S <input type="checkbox"/> Other
<b>N. FICTITIOUS NAME FILINGS:</b> <sup>19</sup>	Name: _____ File in state(s): _____
<b>O. FOREIGN QUALIFICATIONS:</b>	<input type="checkbox"/> Yes <sup>20</sup> <input type="checkbox"/> No State: _____ Registered Office/Registered Agent _____ State: _____ Registered Office/Registered Agent _____ State: _____ Registered Office/Registered Agent _____
<b>P. CERTIFICATE OF AUTHORITY</b>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Real Property: <sup>21</sup> Designated Position(s): _____ <input type="checkbox"/> Other Matters: <sup>22</sup> Designated Position(s): _____ Limitations on Power of Specific Persons: <sup>23</sup> _____
<b>Q. FOR-PROFIT OR NOT-FOR-PROFIT</b> <sup>24</sup>	<input type="checkbox"/> For-Profit <input type="checkbox"/> Not-For-Profit <input type="checkbox"/> Benefit Company <sup>25</sup>
<b>R. AMENDMENT OF CERTIFICATE OF ORGANIZATION</b>	<input type="checkbox"/> Operating agreement to require that all amendments require unanimous approval of members <sup>26</sup> <input type="checkbox"/> "Minor amendments" may be approved by majority of managers in manager-managed company or by majority of members in member-managed company
<b>SECTION III. OPERATING AGREEMENT INFORMATION</b> <sup>27</sup>	

<sup>17</sup> While not addressed specifically in the Pennsylvania LLC Act, limited liability could presumably be waived by the members with respect to certain obligations by a provision in the articles of organization. Other states permit by statute that such an election may be set forth in either the articles of organization or in another written agreement. See 6 Del.C. § 18-303(b).

<sup>18</sup> This question focuses only on federal tax classification. Some states, including Pennsylvania, treat LLCs as corporations and members as shareholders. See 15 Pa.C.S. § 8835(a). See also 15 Pa.C.S. § 8997 (taxation of restricted professional corporations); 6 Del.C. § 18-1107 (taxation of limited liability companies).

<sup>19</sup> If the LLC intends or is required to conduct business using a name different from its registered name, it may be necessary to file a certificate of fictitious/assumed name or similar document with the appropriate secretary of state. See 54 Pa.C.S. § 303; 6 Del.C. § 18-904.

<sup>20</sup> If yes, note where and registered agent/office. Confirm law of each state to ascertain if state registration is required and, if so, whether the company may transact business under its domestic name.

<sup>21</sup> See 15 Pa.C.S. § 8832(a)(2)(i).

<sup>22</sup> See 15 Pa.C.S. § 8832(a)(2)(ii).

<sup>23</sup> See 15 Pa.C.S. § 8832(a)(3).

<sup>24</sup> A limited liability company may be formed for a not-for-profit purpose. Such purpose must be stated in its certificate of organization. See 15 Pa.C.S. § 8818(d).

<sup>25</sup> See 15 Pa.C.S. §§ 8891–8898 for the requirement of becoming, and the limitations on, a benefit company. Consider using noneconomic members pursuant to 15 Pa.C.S. § 8841(e).

<sup>26</sup> Certain amendments to the operating agreement that are characterized in the Act as "minor amendments" may be authorized by a majority of managers in a manager-managed operating company or by a majority of members in a member-managed company. 15 Pa.C.S. § 8847(j) and (k). If the organizers want to require unanimous approval for all amendments, including "minor amendments," the operating agreement should so state.

<sup>27</sup> LLCs are primarily contractual entities and are heavily dependent on the contract (operating agreement) that governs the entity's operation. Many states, including Pennsylvania and Delaware, provide that the operating agreement need not be in  
(continued...)

<b>A. PARTIES:</b>	See sections I.A.1, I.A.2 for identity of/information regarding members and managers.		
<b>B. GENERAL PROVISIONS:</b>			
1. Effective date:	_____		
2. Statement of purpose: <sup>28</sup>	_____		
3. Fiscal year: <sup>29</sup>	<input type="checkbox"/>	Calendar year	<input type="checkbox"/> Other: _____
<b>C. CLASSES OF MEMBERS:</b> <sup>30</sup>	<input type="checkbox"/>	One class	
	<input type="checkbox"/>	Multiple classes, with:	
	<input type="checkbox"/>	Differing voting rights	
	<input type="checkbox"/>	Differing economic rights	
	<input type="checkbox"/>	Other: _____	
	<input type="checkbox"/>	Initial voting rights: <sup>31</sup>	
		<u>Member</u>	<u>Class of Voting Rights</u>
	_____	_____	_____
	_____	_____	_____
	_____	_____	_____
	_____	_____	_____
	_____	_____	_____
<b>D. FINANCIAL STATEMENTS; ACCOUNTING; AUDIT:</b>			
1. Financial statements to members:	<input type="checkbox"/>	Periodic financial reports provided to members <sup>32</sup>	
	<input type="checkbox"/>	Audited financial reports provided to members	
	<input type="checkbox"/>	Any one or more of the foregoing provided to member, upon request	
2. Accounting method: <sup>33</sup>	<input type="checkbox"/>	Cash	<input type="checkbox"/> Accrual

writing. See 15 Pa.C.S. § 8812, definition of “operating agreement”; 6 Del.C. § 18-101(7). As LLC acts typically serve as “defaults” where no operating agreement exists, it is crucial that an operating agreement be drafted that reflects the parties’ agreement in cases in which the parties desire to depart from the statutory provisions.

<sup>28</sup> While it is common to provide that the company may conduct “any lawful business,” consider other statutory purpose limitations. See 15 Pa.C.S. § 8818(b) (LLCs may not have the purpose of acting as an insurer); 6 Del.C. § 18-106(a) (LLCs may not be formed for the purpose of banking). A Delaware LLC may be organized on a nonprofit basis. 6 Del.C. § 18-106(a). A Pennsylvania LLC may be organized for profit or not for profit. 15 Pa.C.S. § 8818(b).

<sup>29</sup> See IRC § 444 regarding the availability of a fiscal year other than the calendar year.

<sup>30</sup> Prior Pennsylvania law expressly allowed LLCs to have classes of members with different rights and powers. 15 Pa.C.S. § 8944(b) (now repealed); 6 Del.C. § 18-302. This right has not changed under the current Pennsylvania Uniform LLC Act. See 15 Pa.C.S. § 8815(a)(1)–(2), providing expansive rights to establish and provide for the relations and rights among members in the operating agreement, except for provisions of the LLC Act that may not be altered under 15 Pa.C.S. § 8815(c).

<sup>31</sup> Some states impose a per capita default voting rule (one vote per member, even with unequal ownership). See, e.g., 15 Pa.C.S. § 8847(b)(2) (generally, each member has equal rights in the management of the company’s activities and affairs). But see 6 Del.C. § 18-302(b) (voting by member may be on a per capita, number, financial interest, class, group, or other basis). Counsel should consider whether the agreement must override state law to provide a different voting arrangement.

<sup>32</sup> Consider specifying (a) delivery of periodic reports after the end of certain fiscal periods, (b) which documents (e.g., balance sheet, profit and loss statement, comparisons against budget, etc.) to include in the financial statements to be delivered, and (c) whether these financial statements will be GAAP-compliant. State-specific requirements regarding the delivery of information should also be considered. See 15 Pa.C.S. §§ 8850(a)–(b). Delaware requires delivery of certain information on demand by a member. 6 Del.C. § 18-305.

<sup>33</sup> See IRC § 446(c).

(continued...)

3. Audit or review:	<input type="checkbox"/> Audit <input type="checkbox"/> Review																		
	<input type="checkbox"/> Required <input type="checkbox"/> At option of managers (if manager-managed) <input type="checkbox"/> At option of members <input type="checkbox"/> At whose cost? _____																		
4. Certificated interests: <sup>34</sup>	<input type="checkbox"/> Yes <input type="checkbox"/> No																		
5. Power of attorney to file composite return: <sup>35</sup>	<input type="checkbox"/> Yes <input type="checkbox"/> No																		
<b>E. CAPITAL CONTRIBUTIONS:</b> <sup>36</sup>																			
1. Initial contributions:	<table border="1"> <thead> <tr> <th><u>Member</u></th> <th><u>Form of Contribution</u><sup>37</sup></th> <th><u>Value</u></th> </tr> </thead> <tbody> <tr><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>_____</td><td>_____</td><td>_____</td></tr> </tbody> </table>	<u>Member</u>	<u>Form of Contribution</u> <sup>37</sup>	<u>Value</u>	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
<u>Member</u>	<u>Form of Contribution</u> <sup>37</sup>	<u>Value</u>																	
_____	_____	_____																	
_____	_____	_____																	
_____	_____	_____																	
_____	_____	_____																	
_____	_____	_____																	
2. Representations and warranties regarding title related to contributions: <sup>38</sup>	_____ _____ _____ _____																		
<b>F. ADDITIONAL CONTRIBUTIONS:</b>																			
1. Additional contributions mandatory?	<input type="checkbox"/> Yes <input type="checkbox"/> No																		
2. If mandatory:	<table border="1"> <thead> <tr> <th><u>Form of Contribution</u></th> <th><u>Value</u></th> <th><u>Date/Conditions to Contribution</u></th> </tr> </thead> <tbody> <tr><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>_____</td><td>_____</td><td>_____</td></tr> </tbody> </table>	<u>Form of Contribution</u>	<u>Value</u>	<u>Date/Conditions to Contribution</u>	_____	_____	_____	_____	_____	_____									
<u>Form of Contribution</u>	<u>Value</u>	<u>Date/Conditions to Contribution</u>																	
_____	_____	_____																	
_____	_____	_____																	

<sup>34</sup> Most LLC acts expressly permit membership interests to be represented by a physical certificate. See 15 Pa.C.S. § 8852(d) (transferable interests in the LLC may be evidenced by certificates) and § 8924(b). If an LLC desires physical certificates to be governed by and have the effect of a certificated security under Article 8 of the Uniform Commercial Code (UCC), it must so elect in its operating agreement. Absent such election, interests in an LLC are general intangibles and payment intangibles governed by UCC Article 9.

<sup>35</sup> Many states require partnerships (including LLCs treated as partnerships for federal tax purposes) to withhold and remit, on behalf of each nonresident equity owner, income taxes on that equity owner’s allocable share of the partnership’s or LLC’s income attributable or sourced to that state.

<sup>36</sup> Most state acts permit members’ contributions to be made in cash, property, services rendered, promissory notes, agreements to contribute cash or property, or contracts for services to be performed or other benefits to be provided. See 15 Pa.C.S. § 8842; 6 Del.C. § 18-501. In at least some jurisdictions, if a member fails to make a required contribution of property or services, the member is obligated to contribute cash equal to the value of the stated contribution that was not made. See 15 Pa.C.S. § 8843(b); 6 Del.C. § 18-502(a). Drafters should consult tax counsel for tax implications of contributions of non-cash property. Also, consider whether a separate contribution agreement will be required. If contributions include non-cash items, such agreements are recommended. Cash contribution agreements often are evidenced by subscription agreements. Both the operating agreement and such subscription documents should disclose that the interests are not registered; should include restrictions on transferability; and, in at least one such document, must include standard representations and warranties, including as to investor suitability and similar standards, non-foreign person status and residence, that all requested information was made available, and as to investment intent.

<sup>37</sup> Consider issues of (a) subscriptions/“commitment” to provide capital and (b) valuing non-cash contributions.

<sup>38</sup> Consider preparation of separate contribution agreement.

(continued...)

	<p>_____</p> <p>_____</p> <p>_____</p>
3. Capital calls: <sup>39</sup>	<input type="checkbox"/> Yes <input type="checkbox"/> No If yes, then: <input type="checkbox"/> Timing: <sup>40</sup> _____ <input type="checkbox"/> Who controls: <sup>41</sup> _____ <input type="checkbox"/> Limited to certain circumstances (e.g., to cover shortfalls or meet liabilities)? If so, describe: _____ _____
4. Consequences of failure to fund (elect some or all): <sup>42</sup>	<input type="checkbox"/> Reduction in share of profits and reallocation of capital <input type="checkbox"/> Reallocation of capital/capital account to other member <input type="checkbox"/> Preferential distributions to other members <input type="checkbox"/> Dilution/forfeiture of ___ % of defaulting member's interest <input type="checkbox"/> Loan from company/other members at ___% interest rate <input type="checkbox"/> Other members contribute and defaulting member is diluted <input type="checkbox"/> Personal liability on the part of member <input type="checkbox"/> Suspension of management authority/voting rights <input type="checkbox"/> Right of other members to purchase defaulting member's interest <input type="checkbox"/> Suit for specific performance or other equitable remedy
<b>G. WILL THE LLC SEEK ADDITIONAL INVESTORS?</b>	<input type="checkbox"/> Antidilution protection? _____ _____ <input type="checkbox"/> Preemptive rights? <sup>43</sup> _____ _____
<b>H. MEMBER GUARANTEES OF LLC OBLIGATIONS:<sup>44</sup></b>	

<sup>39</sup> If members are not required to participate in such contributions, allocation and distribution schemes may be difficult to manage, particularly if ownership interests are not based on capital accounts. Members who contribute will want their relative ownership interest to increase. It is common, therefore, to include a provision reducing or diluting the ownership interest of noncontributing members where contribution to capital will be discretionary.

<sup>40</sup> E.g., within [number] days/weeks/months; or within the time period specified in the call notice.

<sup>41</sup> If member-managed, consider whether any member or some percentage of members can make capital calls; if manager-managed, typically the manager would determine, but consider whether certain level of member consent is desired.

<sup>42</sup> Consider (a) whether forfeiture provisions are enforceable, and (b) potential tax consequences (capital shift), including transfer of unrealized appreciation/depreciation.

<sup>43</sup> In Delaware, unless the operating agreement so provides, no member has preemptive rights. 6 DEL. C. § 18-301(e). Pennsylvania provides no statutory preemptive rights to existing members upon the admission of a new member.

<sup>44</sup> Members, as members, generally are not personally liable for the debts and obligations of the LLC absent a specific waiver of limited liability (see 15 Pa.C.S. § 8834(a); 6 Del.C. § 18-303). Certain creditors may require personal guarantees from some or all of the members as a condition to providing credit. It may be prudent to include in the operating agreement some combination of (a) a commitment by each member to guarantee some or all obligations of the LLC, (b) an undertaking, in particular circumstances, to execute and deliver a personal guarantee, and/or (c) a power of attorney affording an agent to bind the member to guarantee a LLC obligation. In addition, the operating agreement should address contribution and indemnity obligations among the members when fewer than all guarantors satisfy the obligation.

(continued...)

<b>I. DISTRIBUTIONS:</b>											
1. Tax distributions? <sup>45</sup>	<p>If yes,</p> <p><input type="checkbox"/> Automatically at ___% of taxable income</p> <p><input type="checkbox"/> Upon request—individually for such requesting member</p> <p><input type="checkbox"/> Upon request—for all members</p>										
2. Basis for operating income distributions: <sup>46</sup>	<p><input type="checkbox"/> Percentage interests/number of units</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left; width: 60%;">Member</th> <th style="text-align: left; width: 40%;">Percentage Interests/Number of Units</th> </tr> </thead> <tbody> <tr> <td>1.</td> <td>_____</td> </tr> <tr> <td>2.</td> <td>_____</td> </tr> <tr> <td>3.</td> <td>_____</td> </tr> <tr> <td>4.</td> <td>_____</td> </tr> </tbody> </table> <p><input type="checkbox"/> In accordance with capital accounts</p> <p><input type="checkbox"/> As a preferred return on capital contributions</p> <p><input type="checkbox"/> Other: _____</p>	Member	Percentage Interests/Number of Units	1.	_____	2.	_____	3.	_____	4.	_____
Member	Percentage Interests/Number of Units										
1.	_____										
2.	_____										
3.	_____										
4.	_____										
3. Guaranteed payments: <sup>47</sup>	_____										
4. Preferred returns:	<p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p>If yes, then:</p> <p><input type="checkbox"/> Basis of such preference: _____</p> <p><input type="checkbox"/> _____ to receive preference</p> <p><input type="checkbox"/> _____ to receive catch-up thereafter</p>										
5. Distribution of proceeds from capital transactions/liquidity events:	<p><input type="checkbox"/> Defined:</p> <p><input type="checkbox"/> Sales of capital assets</p> <p><input type="checkbox"/> Refinance</p> <p><input type="checkbox"/> Change of control events</p> <p><input type="checkbox"/> Other: _____</p> <p><input type="checkbox"/> Paid:</p> <p><input type="checkbox"/> In accordance with capital accounts</p> <p><input type="checkbox"/> In accordance with percentage interests/number of units</p> <p><input type="checkbox"/> Other: _____</p>										
6. Distributions upon dissolution: <sup>48</sup>	<p><input type="checkbox"/> In accordance with capital accounts</p> <p><input type="checkbox"/> In accordance with percentage interests/number of units</p>										

<sup>45</sup> Operating agreements may provide for special distributions to members for the payment of tax liabilities related to the LLC. These distributions generally are considered an advance of amounts otherwise distributable to the members and will reduce the amount of distributions the member is otherwise entitled to receive. Also, in addition to regular federal income taxes, an equity owner may be subject to state and local taxes, as well as other federal taxes, such as excise taxes, withholding taxes, alternative minimum taxes, and self-employment taxes.

<sup>46</sup> It is often both easier and more reflective of the parties' intended economic deal to make distributions based on percentage ownership interests rather than on capital account balances.

<sup>47</sup> Guaranteed payments to members are used when the parties desire to ensure that a member will receive a certain minimum amount for certain services rendered or for the use of capital. The member wants to ensure receipt of this distribution and not have it contingent upon earnings of the company such as operating profits would be. The payments are "guaranteed" in the sense that they are first-priority distributions and will be made even if they create a net loss for the LLC; they are ordinary income to the member. The member who receives the guaranteed payment is not considered to be an employee of the company for purposes of withholding taxes, FICA, or deferred compensation plans. As these provisions are tax-focused, experienced tax counsel should be consulted when the guaranteed payment concept is desired.

<sup>48</sup> See section VII.C. for dissolution distribution protocol.

(continued...)



	<input type="checkbox"/> Other: _____ _____
7. Distributions in kind: <sup>49</sup>	<input type="checkbox"/> Prohibited (all distributions must be in cash) <input type="checkbox"/> Permitted if pro rata among the members
<b>J. ALLOCATIONS OF PROFITS AND LOSSES:</b> <sup>50</sup>	<input type="checkbox"/> Per capita <input type="checkbox"/> Other: <input type="checkbox"/> In an amount equal to a preferred return <input type="checkbox"/> In accordance with sharing rights <input type="checkbox"/> In accordance with number of units <input type="checkbox"/> In accordance with capital accounts <input type="checkbox"/> Using targeted capital accounts <input type="checkbox"/> Other: _____
<b>K. LOANS FROM MEMBERS</b>	
1. May loans be made to the LLC?	Mandatory: <input type="checkbox"/> Yes <input type="checkbox"/> No Optional: <input type="checkbox"/> Yes <input type="checkbox"/> No If permitted/required: Maximum amount:                    \$ _____ Maximum interest rate:            _____ Maximum term:                        _____ Circumstances: _____ _____ Description of collateral: _____ _____ Remedies upon default: _____ _____ <input type="checkbox"/> Recourse <input type="checkbox"/> Nonrecourse
<b>L. TRANSFERS OF MEMBERSHIP INTERESTS:</b> <sup>51</sup>	
1. Voluntary transfers:	<input type="checkbox"/> Absolutely prohibited <input type="checkbox"/> Permitted, but transferee is not admitted without consent of ___% of

<sup>49</sup> Some LLC acts preclude distributions in kind. Both Pennsylvania and Delaware permit distributions in kind but provide that no member is required to accept a non-pro rata distribution. See 15 Pa.C.S. § 8844(c); 6 Del.C. § 18-605. Prohibiting distributions in kind limits flexibility and may compel the sale of an illiquid asset or a sale in a declining market. However, distributing an asset in common tenancy among the members following dissolution may force members who did not want to continue to be in business with one another to continue to so act, although now outside of an LLC. Some situations may justify permitting non-pro rata distributions subject to appropriate valuation and allocation requirements.

<sup>50</sup> 15 Pa.C.S. § 8844(a) provides a default rule that distributions by an LLC shall be made to the members in equal shares, which could be altered in the operating agreement. See 6 Del.C. § 18-504 (if not otherwise provided in the limited liability company agreement, distributions shall be made on the basis of the agreed value (as stated in the records of the company) of the contributions made by each member). If special allocations are desired, provisions authorizing specialized allocations should be added. The Pennsylvania LLC Act does not provide a default structure for maintaining or allocating to member capital accounts.

<sup>51</sup> Two features of an LLC interest may be transferred: the full membership interest or the “transferable” (economic) interest. See 15 Pa.C.S. § 8852(a) regarding transferable interests generally. Operating agreements may restrict transfer of LLC interests to reflect the intent of the parties to be able to veto new members. Transfer of the economic interest only in an LLC is generally permitted as it does not affect the operations of the LLC. Under most state LLC acts, the transfer of an interest merely transfers the member’s right to receive distributions (the economic interest), and the transferee does not have an automatic right to become a member or to participate in the management of the LLC without a further vote or consent. See 15 Pa.C.S. § 8852(b) and (g); 6 Del.C. §§ 18-702, 18-704.

(continued...)

	<p>other members<sup>52</sup></p> <p><input type="checkbox"/> Permitted only with consent of ___% of the other members</p> <p><input type="checkbox"/> “Estate planning” transfers permitted to: <sup>53</sup></p> <p><input type="checkbox"/> Spouse</p> <p><input type="checkbox"/> Children</p> <p><input type="checkbox"/> Other relatives: _____</p> <p>_____</p> <p><input type="checkbox"/> Trust for any of the above</p> <p><input type="checkbox"/> Controlled business entities but only under these conditions:</p> <p><input type="checkbox"/> Transferee automatically becomes member</p> <p><input type="checkbox"/> Transferee is not admitted without consent</p> <p><input type="checkbox"/> Permitted only with consent of ___% of the members</p> <p><input type="checkbox"/> Permitted; transferee accepted as a member automatically</p>
2. Involuntary transfers:	<p><input type="checkbox"/> Transferee is not admitted without consent of all other members</p> <p><input type="checkbox"/> Permitted only with consent of ___% of the other members</p> <p><input type="checkbox"/> Exercisable by members but not economic interest holders</p>
3. Remedies for impermissible transfer: <sup>54</sup>	<p><input type="checkbox"/> Personal liability on the part of member</p> <p><input type="checkbox"/> Defaulting member is diluted</p> <p><input type="checkbox"/> Suspension of management authority/voting rights</p> <p><input type="checkbox"/> Right to purchase defaulting members’ interest in the LLC</p> <p><input type="checkbox"/> Forfeiture of defaulting member’s interest in the LLC</p> <p><input type="checkbox"/> Suit for specific performance</p> <p><input type="checkbox"/> Grounds for removal of member</p>

<sup>52</sup> 15 Pa.C.S. § 8851(b) prohibits the transfer of any rights in the LLC other than the “transferable interests.” Presumably, other transfer rights, and the required member consents thereto, would be set forth in the operating agreement. The default rule in Delaware is essentially the same. 6 Del.C. §§ 18-702, 18-704(a).

<sup>53</sup> Some members may wish to provide an absolute right to transfer to permitted transferees (e.g., spouse or children), particularly if transfers otherwise trigger rights of first refusal or other similar provisions. Such a provision could also be made applicable only in the event of the death or other involuntary transfer. However, in a member-managed LLC, to avoid the issue of members ending up with other members not of their choice, it may be preferable to limit such transfers to economic interests only. The rule is essentially the same for “transferees” (holders of economic interests only). See 15 Pa.C.S. § 8852(b) and (g); 6 Del.C. §§ 18-702, 18-704(a).

<sup>54</sup> Consider enforceability of remedies—in particular, those involving forfeiture of rights and/or property .

(continued...)

<p>4. Right of members in respect of certain transfers:</p>	<p><input type="checkbox"/> Right of first refusal:<sup>55</sup> _____          _____</p> <p><input type="checkbox"/> Exceptions:<sup>56</sup> _____          _____</p> <p><input type="checkbox"/> Co-sale or tagalong rights:<sup>57</sup> _____          _____</p> <p><input type="checkbox"/> Drag-along rights:<sup>58</sup> _____          _____</p>
<p><b>M. DISENGAGEMENT ARRANGEMENTS:<sup>59</sup></b></p>	
<p>1. Type of arrangement:</p>	<p><input type="checkbox"/> Put <span style="margin-left: 200px;"><input type="checkbox"/> Drag</span></p> <p><input type="checkbox"/> Call <span style="margin-left: 180px;"><input type="checkbox"/> Tag</span></p> <p><input type="checkbox"/> Buy/Sell <span style="margin-left: 150px;"><input type="checkbox"/> Other: _____</span></p> <p><input type="checkbox"/> "Shoot-out"<sup>60</sup></p>
<p>2. Circumstances for exercise of dissociation:</p>	<p><input type="checkbox"/> Any time</p> <p><input type="checkbox"/> Any time after: _____</p> <p><input type="checkbox"/> In the event of deadlock</p> <p><input type="checkbox"/> In the event of certain deadlocks: _____          _____</p> <p><input type="checkbox"/> Upon the dissociation of a member</p>
<p>3. Price:<sup>61</sup></p>	<p><input type="checkbox"/> Set by agreement by the members or managers on a regular basis</p> <p><input type="checkbox"/> "Book" value<sup>62</sup></p> <p><input type="checkbox"/> "Fair market" determined by appraisal periodically or at time of call</p> <p><input type="checkbox"/> "Booked up" to fair market value of company assets</p>
<p><b>N. DISSOCIATION:</b></p>	
<p>1. Voluntary dissociation of</p>	<p><input type="checkbox"/> A member may not voluntarily dissociate</p>

<sup>55</sup> This is the right of an existing member to purchase the interest of another member before such interest is offered to a non-member. Typically, the selling member would be required to have received a bona fide offer from a third party.

<sup>56</sup> Typical exceptions include estate planning transfers, interests issued pursuant to option plans, certain interests issued in connection with bona fide institutional financings, and interests issued to key executives as an inducement for hire.

<sup>57</sup> If a member sells its interest, another member has the right to join into the transaction and sell its interests as well. Often, these rights are triggered when a significant member is seeking to sell a control position. Many formulations of such provisions include proportionality, in the event not all of the membership interests are being sold.

<sup>58</sup> This is the right of a majority member to force a minority member to participate in an exit transaction. All members must receive the same price, terms, and conditions for the sale of the interest.

<sup>59</sup> To avoid deadlock, the operating agreement should include exit provisions, including the economic ramifications thereof. Any exit provision should require the departing member's interest to be completely separated from the LLC (mandatory purchase provisions, covenant not to compete, admission of new members). Members and managers leaving an LLC may continue to have fiduciary duties to the company through the winding up of the company.

<sup>60</sup> A "shoot-out" is a fairly common mechanism in which the offeror offers a stated price to the offeree, which price may either be (a) accepted by the offeree for his/her ownership interest, or (b) paid by the offeree for the offeror's interest, at the option of the offeree. This process is thought to elicit a fair offer without requiring an expensive and time-consuming appraisal/contest mechanism because the offeror does not know whether the offeree will sell or buy at the stated price.

<sup>61</sup> It is critical that the operating agreement specify how the LLC will be valued upon disengagement of a member. The enterprise may be valued according to a price established by the selling member, determined through an appraisal, or decided by an arbitrator. If appraisal or arbitration is used, the operating agreement should provide a mechanism for selecting a single appraiser or independent body for arbitration.

<sup>62</sup> Typically, as computed under GAAP.

(continued...)

a member: <sup>63</sup>	<input type="checkbox"/> Member becomes a transferee <input type="checkbox"/> Member's interest is repurchased (pursuant to terms set forth in disengagement agreement section, above)
2. Death, disability, dissolution, or bankruptcy of a member: <sup>64</sup>	<input type="checkbox"/> Member's representative/heir becomes a member without further action <input type="checkbox"/> Member's representative/heir continues as a transferee <input type="checkbox"/> Member's interest is repurchased from the representative/heir <sup>65</sup> <input type="checkbox"/> Member's representative/heir becomes a member only with consent of ____% of members <input type="checkbox"/> Definition of disability: <sup>66</sup> _____ _____
3. Dissociation of member:	A member may be removed by _____ for: <sup>67</sup> <input type="checkbox"/> Impermissible transfer <input type="checkbox"/> Other cause: <sup>68</sup> _____ <input type="checkbox"/> Other: _____ Compensation? <sup>69</sup> _____
4. Dissolution/termination of LLC: <sup>70</sup>	<input type="checkbox"/> Member's interests are repurchased <input type="checkbox"/> Member becomes a transferee
<b>O. EQUITY INTERESTS TO BE ISSUED AS COMPENSATION</b>	<input type="checkbox"/> For services by members

<sup>63</sup> Some state statutes permit a member to voluntarily withdraw from an LLC and receive the financial value of his or her interest, while others take a very restrictive approach. Pennsylvania allows members to voluntarily withdraw (dissociate), whether rightfully or wrongfully, and such dissociation would be prohibited only if the operating agreement so provides. See 15 Pa.C.S. §8862(a). In the event of a wrongful dissociation, the withdrawing member is liable to the LLC and, potentially, the other members for damages caused by the dissociation. See 15 Pa.C.S. §8862(c). Delaware precludes resignation prior to dissolution unless expressly permitted by the operating agreement (6 Del.C. § 18-603). There are competing interests in play—states are generally interested in ensuring some liquidity for LLC members (and avoiding forfeitures) while still protecting the company from the economic strain and management disruption caused by dissociation. Most LLC statutes provide for some type of payment to a withdrawing member (even if such withdrawal is prohibited) under various state-specific formulations.

<sup>64</sup> It generally is preferable for the operating agreement to provide that upon the death of a member, only the member's interest in the LLC, and not specific LLC property or voting rights, passes to the member's estate. But see 6 Del.C. § 18-705 (providing the deceased member's personal representative with the right to exercise all of the member's rights, including "any power under a limited liability company agreement of an assignee to become a member"). See also 15 Pa.C.S. § 8861(7)(i) (death of a member triggers dissociation of the member). Consider similar issues for divorce of spouses.

<sup>65</sup> The operating agreement should specify purchase price. See section III.M.3. for some pricing alternatives.

<sup>66</sup> The definition might include one or more of the following: (i) member has not performed business functions for [number] consecutive days, or [number] days in a [number]-day period, (ii) primary care physician or designee determines inability to manage business affairs, (iii) guardian/conservator appointed by court, (iv) agent pursuant to power of attorney notices company, (v) as defined in the company's long-term disability policy.

<sup>67</sup> Removal of a member is an extraordinary event. Consider who should have the right to remove a member and under what circumstances. Typically, the thresholds are stringent and a supermajority vote of members, or a combination of members' and managers' consents, is required. Then consider the removed member's right to compensation for such removal. In addition to the grounds specified in the operating agreement, Pennsylvania provides two statutory bases for expulsion of a member. See 15 Pa.C.S. § 8861(5)–(6).

<sup>68</sup> Consider one or more of the following: (i) fraud, (ii) gross negligence, (iii) bankruptcy/insolvency, (iv) disability (if so, include definition of disability (see footnote 60)), (v) willful misconduct, (vi) conviction of a crime/a crime against the company/crime of moral turpitude/crime with adverse consequences to company, (vii) breach/material breach of fiduciary duty (if any), (viii) breach/material breach of operating agreement, (ix) other.

<sup>69</sup> See section III.M.3 for certain pricing options.

<sup>70</sup> The operating agreement should specify the events that will result in dissolution of the LLC. Common dissolution events include member withdrawal, death, and expulsion of a member, but these events do not, per se, result in a dissolution in Pennsylvania. See 15 Pa.C.S. § 8871 for statutory events causing dissolution of an LLC. But see 6 Del.C. § 18-801(b) (unless the operating agreement so provides, death, retirement, resignation, bankruptcy, or other events that may terminate a member's membership do *not* cause dissolution of the company).

(continued...)

<b>FOR SERVICES?</b> <sup>71</sup>	<input type="checkbox"/> For services by non-members <input type="checkbox"/> Profits interests? <sup>72</sup>
<b>P. INTERESTS TO BE OFFERED TO THE PUBLIC?</b> <sup>73</sup>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<b>Q. DISSENTERS' RIGHTS IN THE EVENT OF MERGER:</b> <sup>74</sup>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<b>R. DERIVATIVE ACTIONS:</b> <sup>75</sup>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<b>S. TAX MATTERS REPRESENTATIVE:</b> <sup>76</sup>	_____
<b>SECTION IV. PROVISIONS FOR OPERATING AGREEMENT OF MEMBER-MANAGED LLC</b> <sup>77</sup>	
<b>A. PROCEDURE FOR CONSENT:</b> <sup>78</sup>	<input type="checkbox"/> Meetings with formal rules <input type="checkbox"/> Resolution/written consent <input type="checkbox"/> Informal consent
<b>B. DUTIES OF MEMBERS:</b> <sup>79</sup>	
1. Duty of care: <sup>80</sup>	<input type="checkbox"/> Gross negligence <input type="checkbox"/> Ordinary prudence

<sup>71</sup> Consult tax advisors for the tax consequences for a new member to the LLC who receives an interest in the company in exchange for a contribution of services, past or future.

<sup>72</sup> Consider vesting and forfeiture issues.

<sup>73</sup> If offered to the public, consider securities matters, corporate structure, and publicly traded partnership issues. It is important to note that membership interests will constitute securities for purposes of Pennsylvania securities laws if (a) the LLC is manager-managed, or (b) the LLC is member-managed and all members participate in the management.

<sup>74</sup> A few LLC acts provide statutory dissenters' rights to the members in the event of certain transactions. Many other states provide that dissenters rights are not available unless set forth in the operating agreement. See 6 Del.C. § 18-210. If dissenters' rights are sought and they are not statutorily provided, as in Pennsylvania, they must be expressed in the operating agreement. See 15 Pa.C.S. § 317.

<sup>75</sup> Some LLC acts expressly provide for derivative actions (see 15 Pa.C.S. § 8882; 6 Del.C. § 18-1001 et seq.).

<sup>76</sup> For partnership tax years beginning before January 1, 2018, a partnership with more than 10 members, any partnership having a nonresident alien as a partner, and any partnership having other than a natural person as a partner will generally be subject to the comprehensive unified audit proceedings, which are designed to facilitate all partnership audits by determining adjustments at the partnership level rather than requiring that the IRS audit each individual partner. Code § 6231(a)(1) (prior to amendment by the Bipartisan Budget Act of 2015). Any partnership subject to the comprehensive unified audit proceedings is required to have a tax matters partner. Code § 6231(a)(7). The tax matters partner must be a "general partner," and it is either the general partner so designated by the partnership or the partner with the largest profits interest where no designation has been made. The operating agreement should refer to such partner as a tax matters representative. This designation is not required for LLCs electing to be taxed as corporations. The Bipartisan Budget Act of 2015 changed these procedures for partnership tax years beginning after December 31, 2017. Under the new procedures, a unified partnership proceeding applies to most partnerships aside from certain limited categories of partnerships that can elect out. In the unified proceeding, the partnership is represented by a "partnership representative," who can be any person so designated and is not required to be a partnership member. Code § 6223(a). In the event of an adjustment to partnership items, the partnership itself may be responsible for paying the resulting income tax liability unless the partners elect to be liable or the partnership follows procedures to cause the liability to be borne by the partners.

<sup>77</sup> A limited liability company is presumed to be a member-managed company, unless the operating agreement provides for management by one or more managers. 15 Pa.C.S. § 8847(a).

<sup>78</sup> Unlike corporate statutes, LLC acts generally do not include default provisions for meetings of the members and other formal governance procedures. These items must be addressed in the operating agreement if the members desire clarity.

<sup>79</sup> If the company will engage a non-member manager, consider entering into a separate management agreement that would cover such issues as duties, compensation, qualifications, conflicts, rights to compete, etc.

<sup>80</sup> Pennsylvania imposes duties of loyalty and care and a contractual obligation of good faith and fair dealing on members of member-managed LLCs (15 Pa.C.S. § 8849.1(b), (c), and (d)).

(continued...)



<p><b>C. SELECTION OF MANAGERS:</b></p>	<p><input type="checkbox"/> Unanimously selected by members</p> <p><input type="checkbox"/> Selected by a majority of members consisting of ___%</p> <p><input type="checkbox"/> Managers selected by particular members or classes of membership interests:</p> <table border="0" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: center; border-bottom: 1px solid black;">Member/Class</th> <th style="text-align: center; border-bottom: 1px solid black;">Number of Managers that Member/Class Can Appoint</th> </tr> </thead> <tbody> <tr><td style="border-bottom: 1px solid black;"> </td><td style="border-bottom: 1px solid black;"> </td></tr> <tr><td style="border-bottom: 1px solid black;"> </td><td style="border-bottom: 1px solid black;"> </td></tr> <tr><td style="border-bottom: 1px solid black;"> </td><td style="border-bottom: 1px solid black;"> </td></tr> <tr><td style="border-bottom: 1px solid black;"> </td><td style="border-bottom: 1px solid black;"> </td></tr> <tr><td style="border-bottom: 1px solid black;"> </td><td style="border-bottom: 1px solid black;"> </td></tr> </tbody> </table> <p><input type="checkbox"/> Managers selected by cumulative voting<sup>86</sup></p> <p><input type="checkbox"/> Other: _____</p> <p>_____</p>	Member/Class	Number of Managers that Member/Class Can Appoint										
Member/Class	Number of Managers that Member/Class Can Appoint												
<p><b>D. ELECTION OR APPOINTMENT OF MANAGERS:</b></p>	<p><input type="checkbox"/> Periodic election of managers</p> <p style="padding-left: 20px;"><input type="checkbox"/> Annual</p> <p style="padding-left: 20px;"><input type="checkbox"/> Other: _____</p> <p><input type="checkbox"/> Election or appointment only on the removal or departure of a manager</p> <p><input type="checkbox"/> Specific succession provided in operating agreement: _____</p> <p>_____</p>												
<p><b>E. REMOVAL OF MANAGERS:</b></p>													
<p>1. Who determines removal of manager?</p>	<p><input type="checkbox"/> All of the members</p> <p><input type="checkbox"/> All or ___% of the members other than the member who appointed the manager</p> <p><input type="checkbox"/> ___% of the members</p> <p><input type="checkbox"/> All or ___% of the managers other than the manager being removed</p> <p><input type="checkbox"/> Other: _____</p> <p>_____</p>												
<p>2. Conditions under which manager may be removed?</p>	<p><input type="checkbox"/> Only for cause?      <input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p style="padding-left: 20px;">If yes, definition of "cause":<sup>87</sup></p> <p>_____</p> <p>_____</p> <p style="padding-left: 20px;">Who determines cause? _____</p> <p><input type="checkbox"/> Other circumstances? _____</p> <p>_____</p>												
<p><b>F. PROCEDURE FOR CONSENT:</b><sup>88</sup></p>	<p><input type="checkbox"/> Meetings with formal rules</p> <p><input type="checkbox"/> Resolution/written consent</p> <p><input type="checkbox"/> Informal consent</p>												

<sup>86</sup> If cumulative voting is desired, the operating agreement should clearly detail what is meant by cumulative voting, as it may not be desirable or practical to use the corporate law concepts of cumulative voting.

<sup>87</sup> See footnote 68.

<sup>88</sup> Unlike corporate statutes, LLC acts generally do not include default provisions for meetings of the members and other formal governance procedures. These items must be addressed in the operating agreement if the members desire clarity.

(continued...)

<b>G. DUTIES OF MANAGERS:</b> <sup>89</sup>	
1. Duty of care: <sup>90</sup>	<input type="checkbox"/> Gross negligence <input type="checkbox"/> Ordinary prudence <input type="checkbox"/> Other: _____ _____
2. Right to compete: <sup>91</sup>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> No, but may invest in entities competing with the company if no management rights and investment in other entity does not exceed ___% <input type="checkbox"/> Manager permitted to engage in other activities during term
3. Duty to offer opportunities to the LLC:	<input type="checkbox"/> Yes <input type="checkbox"/> No
4. Alteration of duties <sup>92</sup>	<input type="checkbox"/> Alteration of aspects of duty of loyalty <input type="checkbox"/> Standards to measure contractual obligations of good faith and fair dealing
<b>H. APPROVAL OF CONFLICT OF INTEREST TRANSACTION:</b>	Member approval: <input type="checkbox"/> Unanimous <input type="checkbox"/> Other Judicial approval: <input type="checkbox"/> Entire fairness <input type="checkbox"/> Arm's length <input type="checkbox"/> Other: _____
<b>I. MANAGEMENT FEE AND ARRANGEMENT:</b>	_____ _____ _____
<b>J. TITLE OF CERTAIN MANAGERS, IF ANY:</b>	_____ _____ _____
<b>K. COMPENSATION OF MANAGERS, IF ANY:</b>	_____ _____ _____
<b>SECTION VI. MANNER OF ACTING</b>	
<b>L. PROCEDURE FOR CONSENTING GENERALLY:</b>	<input type="checkbox"/> Meetings with formal rules

<sup>89</sup> If the company will engage a non-member manager, consider entering into a separate management agreement that would cover such issues as duties, compensation, qualifications, conflicts, rights to compete, etc.

<sup>90</sup> Pennsylvania imposes duties of loyalty and care and a contractual obligation of good faith and fair dealing on managers of LLCs (15 Pa.C.S. § 8849.2(b), (c), and (d)), while members in such entities have no duties to each other except for a duty of good faith and fair dealing. See 15 Pa.C.S. § 8849.1(i). The manager's duties of loyalty and care may not be unreasonably altered by an operating agreement. 15 Pa.C.S. § 8815(c) and (d). The default duty of care in Delaware for imposing liability is gross negligence.

<sup>91</sup> The enforceability of covenants not to compete is largely dependent on state law. If a manager is managing more than one entity, care should be given to properly address permitted competitive activities during the term of any management engagement, as well as prohibited competitive activity following termination of such engagement.

<sup>92</sup> 15 Pa.C.S. § 8815(d) permits the alteration of aspects of the duty of loyalty as provided in 15 Pa.C.S. §§ 8849.1(d) and 8849.2(d) and the prescribing of standards to measure the contractual obligation of good faith and fair dealing, provided that the alterations are not manifestly unreasonable. "Manifest unreasonableness" is determined by a court as a matter of law. 15 Pa.C.S. § 8815(e).

(continued...)



	<input type="checkbox"/> Informal consent <sup>93</sup> <input type="checkbox"/> Unanimous consent of the members <input type="checkbox"/> Vote of members otherwise sufficient to act <input type="checkbox"/> Other: _____												
<b>M. LEVEL OF CONSENT OR ACTION:</b>	<p>If member-managed:</p> <p>[A] Majority of members  [B] Supermajority of members ___%  [C] Unanimous consent of members  [D] Managing member(s)  [E] Management committee  [O] Other: _____</p> <p>If manager-managed:</p> <p>[A] Single manager if there is only one manager  [B] Majority of managers  [C] Supermajority of managers ___%  [D] Unanimous consent of managers  [E] Ratification required by majority/supermajority of members  [F] Majority of members  [G] Supermajority of members ___%  [H] Unanimous Consent of members  [O] Other:<sup>94</sup> _____</p>												
<b>N. METHODOLOGY FOR MEASURING LEVEL OF CONSENT:</b>	<input type="checkbox"/> Per capita <input type="checkbox"/> Members <input type="checkbox"/> Managers <input type="checkbox"/> By percentage interest/number of units <input type="checkbox"/> By capital account balances <sup>95</sup> <input type="checkbox"/> Other: _____												
<b>O. CONSENT REQUIRED FOR ALL ACTIONS OTHER THAN AS SPECIFIED IN E., BELOW:</b>	<hr/>												
<b>P. ITEMS REQUIRING DIFFERENT LEVELS OF CONSENT:</b>	<table border="0" style="width: 100%;"> <thead> <tr> <th style="text-align: left;"><u>Action</u><sup>96</sup></th> <th style="text-align: right;"><u>Consent Required</u></th> </tr> </thead> <tbody> <tr> <td>Execution of documents/entering into agreements on behalf of LLC .....</td> <td style="text-align: right;"><input type="checkbox"/></td> </tr> <tr> <td>Opening bank accounts .....</td> <td style="text-align: right;"><input type="checkbox"/></td> </tr> <tr> <td>Signing checks [&gt; \$_____] .....</td> <td style="text-align: right;"><input type="checkbox"/></td> </tr> <tr> <td>Employment of professionals and other agents .....</td> <td style="text-align: right;"><input type="checkbox"/></td> </tr> <tr> <td>Maintaining records .....</td> <td style="text-align: right;"><input type="checkbox"/></td> </tr> </tbody> </table>	<u>Action</u> <sup>96</sup>	<u>Consent Required</u>	Execution of documents/entering into agreements on behalf of LLC .....	<input type="checkbox"/>	Opening bank accounts .....	<input type="checkbox"/>	Signing checks [> \$_____] .....	<input type="checkbox"/>	Employment of professionals and other agents .....	<input type="checkbox"/>	Maintaining records .....	<input type="checkbox"/>
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Employment of professionals and other agents .....	<input type="checkbox"/>												
Maintaining records .....	<input type="checkbox"/>												

<sup>93</sup> Pennsylvania specifically permits an action requiring the vote of members to be taken without a meeting. 15 Pa.C.S. § 8847(d). Alternatives include permitting consent to be by a unanimous written consent, by the vote of the members sufficient to pass on the matter in question at a convened meeting of the members, or by a threshold higher than that required at a convened meeting but below unanimous.

<sup>94</sup> For example, a “managing partner” designation.

<sup>95</sup> If voting rights are based on capital accounts, to the extent distributions are not pro rata but rather weighted toward a particular class of members, their voting rights will be disproportionately reduced as distributions are made.

<sup>96</sup> For each action in which a threshold amount is at issue, consider whether lesser amounts would fall within the consent level noted in section D, above, or whether an alternative consent level is desired.

	<p>Doing other acts to carry on business in the ordinary course ..... <input type="checkbox"/></p> <p>Borrowing of funds [&gt; \$ _____] ..... <input type="checkbox"/></p> <p>Causing the LLC to guarantee/pledge property to secure the obligation of any person ..... <input type="checkbox"/></p> <p>Lending money of the LLC to any person ..... <input type="checkbox"/></p> <p>Investment of funds [&gt; \$ _____] ..... <input type="checkbox"/></p> <p>Acquisition of property [with a value &gt; \$ _____] ..... <input type="checkbox"/></p> <p>Other capital expenditures [&gt; \$ _____] ..... <input type="checkbox"/></p> <p>Other LLC expense [&gt; \$ _____] ..... <input type="checkbox"/></p> <p>Cause the LLC to call capital from its members ..... <input type="checkbox"/></p> <p>Determining the time and amounts of distributions to members ..... <input type="checkbox"/></p> <p>Admission of new member and modification of members' economic relationships in connection therewith ..... <input type="checkbox"/></p> <p>Approving reimbursement of expenses of managers/members ..... <input type="checkbox"/></p> <p>Determining to expel member for cause ..... <input type="checkbox"/></p> <p>Admission of a transferee as a member ..... <input type="checkbox"/></p> <p>Making tax elections ..... <input type="checkbox"/></p> <p>Commencing litigation in the name of the LLC ..... <input type="checkbox"/></p> <p>Causing the LLC to reorganize ..... <input type="checkbox"/></p> <p>Voluntarily dissolving the LLC ..... <input type="checkbox"/></p> <p>Instituting an action for judicial dissolution and winding up ..... <input type="checkbox"/></p> <p>Selling all or substantially all of the property of the LLC outside of the ordinary course of business ..... <input type="checkbox"/></p> <p>Causing the LLC to commence an action in bankruptcy ..... <input type="checkbox"/></p> <p>Other:</p> <p>[ _____ ] ..... <input type="checkbox"/></p> <p>[ _____ ] ..... <input type="checkbox"/></p> <p>[ _____ ] ..... <input type="checkbox"/></p>
<p><b>Q. CONSENTS REQUIRED TO AMEND OPERATING AGREEMENT:</b><sup>97</sup></p>	<p><input type="checkbox"/> Unanimous consent of the members for all amendments</p> <p><input type="checkbox"/> Consent of ____% of the members is required for all amendments other than:</p> <p><input type="checkbox"/> Those that adversely affect less than all members or all classes, or disparately affect some members or members within a class, as to which _____ is required</p> <p><input type="checkbox"/> Those that change the rights to appoint managers<sup>98</sup></p> <p><input type="checkbox"/> Certain financial rights, as to which _____ is required</p> <p><input type="checkbox"/> Liquidity events, as to which _____ is required</p> <p><input type="checkbox"/> Other: _____</p> <p><input type="checkbox"/> If manager-managed, consent of manager required for:</p> <p><input type="checkbox"/> Any amendment affecting rights, duties, obligations, or liability</p>

<sup>97</sup> Absent a provision in the operating agreement to the contrary (see 15 Pa.C.S. § 8815(a)(4)), amendments to the operating agreement require the affirmative vote or consent of all members. 15 Pa.C.S. § 8847(b)(6) and (c)(3)(iii). In determining the appropriate level of consent for amendments of the operating agreement, consider how best to effect (a) avoiding unfairness or excessive bias against a minority member by requiring a large enough approval, and (b) ensuring that the agreement is sufficiently flexible to be practical. To accord the varying degree of protection needed, or concert achieved, it may be desirable to require a higher percentage or even a unanimous vote for certain types of amendments.

<sup>98</sup> See sections V.C. and V.D., above, regarding selection and appointment of managers.

	of manager <input type="checkbox"/> The following actions: <input type="checkbox"/> _____ <input type="checkbox"/> _____ <input type="checkbox"/> _____ <input type="checkbox"/> _____
<b>SECTION VII. DISSOLUTION AND TERMINATION</b>	
<b>R. EVENTS OF DISSOLUTION:<sup>99</sup></b>	
1. Consent of members:	<input type="checkbox"/> Unanimous consent of the members <input type="checkbox"/> Consent of ___% of the members <input type="checkbox"/> Other: _____
2. Specific event:	<input type="checkbox"/> Upon sale of substantially all assets of the LLC <input type="checkbox"/> Death, disability, bankruptcy, or similar event as to a member <input type="checkbox"/> Other: _____
3. Involuntary dissolution:	<input type="checkbox"/> Statutory causes <input type="checkbox"/> Permit judicial dissolution and, if so, for what reasons: <sup>100</sup> _____ _____
<b>S. RIGHT TO CONTINUE UPON EVENT OF DISSOLUTION:</b>	<input type="checkbox"/> Unanimous consent of the members <input type="checkbox"/> Consent of ___% of the members <input type="checkbox"/> Other: _____
<b>T. DISTRIBUTIONS UPON DISSOLUTION:<sup>101</sup></b>	<input type="checkbox"/> First, creditors other than members, then to members as creditors <i>[or]</i> <input type="checkbox"/> Creditors (including members, as creditors) <input type="checkbox"/> Reserves for contingent claims <input type="checkbox"/> Returns of unreturned contributions to holders of transferable interests <input type="checkbox"/> Proportionate distributions to holders of transferable interests <input type="checkbox"/> Other: _____ <input type="checkbox"/> Then, to members pursuant to section III. I.6.

<sup>99</sup> See 15 Pa.C.S. § 8871(a) (dissolution occurs upon (a) the occurrence of events specified in the operating agreement, (b) the unanimous consent of the members (except if the operating agreement provides a lower threshold—see 15 Pa.C.S. § 8815(c)(15)), (c) the passage of 180 consecutive days after the company ceases to have any members unless before the end of the period the members take certain actions, or (d) entry of a judicial dissolution); 6 Del.C. § 18-801 (dissolution occurs upon first to occur of (a) the time specified in the operating agreement, (b) the occurrence of events specified in the operating agreement, (c) the affirmative vote or consent of the requisite members, (d) at the time there are no members).

<sup>100</sup> The Pennsylvania act provides for judicial dissolution under specified circumstances, including circumstances where it is not practicable to carry on the business in conformity with the operating agreement. see 15 Pa.C.S. § 8871(a)(4). See also 6 Del.C. § 18-802.

<sup>101</sup> Under most state LLC acts, assets must first be applied to discharge obligations to creditors (including contingent, conditional, or unmatured claims) (15 Pa.C.S. § 8877(a) expressly includes members who are creditors). The Pennsylvania act provides for distribution as follows: (1) to creditors, (2) 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 (3) to owners of transferable interests in proportion to their respective rights to share in distributions immediately before the dissolution of the company (see 15 Pa.C.S. § 8877(b)). Delaware law is substantially similar. 6 Del.C. § 18-804(a).

(continued...)

<b>SECTION VIII. DISPUTE RESOLUTION</b>	
<b>U. NON-BINDING MEDIATION:</b>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<b>V. ARBITRATION:<sup>102</sup></b>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Single arbitrator    or <input type="checkbox"/> Panel Required written decision: <input type="checkbox"/> Yes <input type="checkbox"/> No
<b>W. WAIVER OF JURY TRIAL:<sup>103</sup></b>	<input type="checkbox"/> Yes <input type="checkbox"/> No

<sup>102</sup> The operating agreement should provide that, if arbitration is used, it is an exclusive remedy and is binding; how arbitration may be initiated; what evidentiary, procedural, and substantive rules apply to the arbitrators; in which location it shall be conducted; and whether there are limitations on damages. Some practitioners consider arbitration as too expensive, time-consuming, and less likely to lead to a “true” result, in which case a choice of forum clause should be included.

<sup>103</sup> Waivers of jury trial clauses generally are enforceable in Pennsylvania and Delaware, if mutual.

**APPENDIX A**  
**LLC FORMATION DOCUMENT AND TASK CHECKLIST**

#	Document	Responsible Party	Required Signatures	Status
<b>A.</b>	<b>Pre-formation Diligence</b>			
1.	Trademark/trade name searches		n/a	
2.	Patent/intellectual property searches		n/a	
3.	Real property title searches		n/a	
4.	Lien searches on assets to be transferred		n/a	
5.	Name availability searches and reservation in state of formation and jurisdictions of foreign qualification		n/a	
6.	If conversion, review documentation for entity converting to LLC			
<b>B.</b>	<b>Filing Activity</b>			
1.	Articles/certificate of organization		<input type="checkbox"/> _____	
2.	Articles/certificate of conversion, if applicable		<input type="checkbox"/> _____	
3.	Docketing statement		<input type="checkbox"/> _____	
4.	Fictitious name filings		<input type="checkbox"/> _____	
5.	Foreign jurisdiction qualifications, including registered agent/office where applicable		<input type="checkbox"/> _____	
6.	Fictitious name filings in foreign jurisdictions		<input type="checkbox"/> _____	
<b>C.</b>	<b>Formation Documentation and Funding</b>			
1.	Operating agreement		<input type="checkbox"/> _____ <input type="checkbox"/> _____ <input type="checkbox"/> Company	
2.	Issuance of member certificates, if any			
	a.	Class A interests	<input type="checkbox"/> Company	
	b.	Class B interests	<input type="checkbox"/> Company	

#	Document	Responsible Party	Required Signatures	Status
3.	Contribution agreements and related documentation			
	a. Bills of sale		<input type="checkbox"/> _____	
	b. Assignment/assumption agreements		<input type="checkbox"/> _____ <input type="checkbox"/> Company	
	c. Deeds and other real property transfer documents; FIRPTA Certs.		<input type="checkbox"/> _____	
	d. Registrations of intellectual property (trademarks, trade names, patents, copyrights, etc.)		<input type="checkbox"/> _____	
4.	Subscription agreements		<input type="checkbox"/> _____ <input type="checkbox"/> _____ <input type="checkbox"/> Company	
5.	If a conversion, consents from the parties to the existing entity to effect the conversion		<input type="checkbox"/> _____ <input type="checkbox"/> _____ <input type="checkbox"/> _____	
<b>D.</b>	<b>Commencement of Operations</b>			
1.	Employment agreements			
	a. Manager		<input type="checkbox"/> Company <input type="checkbox"/> Manager	
	b. Employees		<input type="checkbox"/> Company <input type="checkbox"/> Employees	
2.	Initial appointment of officers		<input type="checkbox"/> _____ <input type="checkbox"/> _____	
3.	Tax ID number (SS-4)		<input type="checkbox"/> _____	
4.	Opening of bank accounts		<input type="checkbox"/> _____ <input type="checkbox"/> _____	
5.	State revenue/taxing agency initial filing/registration		<input type="checkbox"/> _____ <input type="checkbox"/> _____	
6.	Company minute book			
7.	Required business licenses, permits, and governmental approvals			
8.	Securities laws filings		<input type="checkbox"/> _____ <input type="checkbox"/> _____	
9.	Franchise tax payments		n/a	
10.	Obtain insurance			
11.	Creation/implementation of benefit plans			

**APPENDIX B**  
**FORM OF ENGAGEMENT LETTER**

*[firm letterhead]*

\_\_\_\_\_ - \_\_, 20\_\_

*[member 1 name]*

*[member 2 name]*

*[address]*

*[address]*

Re: Engagement Letter

Dear *[members' names]*:

We are delighted to be representing you in connection with the proposed formation, documentation, and operations of a new company, *[insert proposed name, if available]* (the "Company"), which will be a *[insert state of formation]*<sup>104</sup> limited liability company and certain related entities (the "Transaction"). As part of this engagement, we will negotiate and document relationship agreements with certain employees and consultants and work with you on various documents, matters, and issues relating to the operations of the Company. We understand that once this engagement has been completed, and the Company and its affiliates are formed, we will represent the Company and *[insert name of key entity affiliate entities, if applicable]*. We will send a separate letter at that time to confirm our continuing engagement.

It is our firm's policy to discuss with clients at the beginning of new engagements the basis or rate of the fees to be charged. In this letter we briefly describe our billing policies, procedures, and rates. Should you retain our firm for subsequent matters, the specifics of this agreement will remain the same unless otherwise communicated.

***[insert standard firm billing procedures, policies, and rates]***

***[insert standard file retention and destruction procedures or other loss-prevention provisions required by applicable insurance carriers or firm policy]***

In connection with this engagement, we will be representing *[both of]* you with respect to the formation of the Company and other related entities in the designated Transaction. Where one law firm is being asked to represent more than one party in an engagement, the Rules of Professional Conduct governing lawyers allow the firm to undertake the joint representation, but require the firm to explain to both parties the implications of the joint representation and obtain the consent of both parties to that representation. You should carefully consider these risks before agreeing to the joint representation.

A client is entitled to the undivided loyalty of his or her attorney. A client is also entitled to be assured that information furnished to his or her attorney in furtherance of the representation will be kept in confidence by the attorney. If each of you had separate counsel, all information that you would give to your separate lawyer would be confidential, and each would receive independent and confidential advice from *[his] [her] [his or her]* own lawyer. None of that information could be disclosed to the other party without your consent. This is not the case, however, when one firm advises you both, as we explain below.

Clients, if they have been appropriately informed, may waive the maximum protections and consent to the joint representation. In addition, the lawyers must reasonably believe that the joint representation will not adversely affect the representation of either of the clients.

The request that we represent both of you in connection with the Transaction reflects your determination that there is a mutuality of interest in a common representation. We understand that neither of you is aware of any conflict of interest or position with respect to the other. We agree that based on the facts made known to us at this time, there is a mutuality of interest and there is no conflict that would compromise our representation of each of you. Please understand that we cannot be an advocate for one of you against the other. Our effort will be to assist you in developing a coordinated overall structure, and to encourage the resolution of any differences of opinion or conflicting interests in an equitable or logical manner. Each of you should feel free to call me at any time with any questions or concerns.

<sup>104</sup> This engagement letter has been prepared to comply with the Pennsylvania Rules of Professional Conduct. Please consult the rules of the state of the practitioner's admission for compliance with such rules.

A significant implication of a joint representation is the sharing of confidential information. The attorney/client privilege applies to communications between counsel and jointly represented clients—here, each of you. Those communications are privileged as against third parties. However, the general rule is that communications between counsel and jointly represented clients are not privileged as between those clients. Thus, any communications and information we receive from each of you may be shared with the other during our representation.

Another significant implication of a joint representation is the possibility that a conflict of interest will arise in the future with respect to this joint representation. In that event, each of you acknowledges that if either of you or the firm determines that a conflict of interest has arisen between you, it may no longer be possible or appropriate for the firm to continue representing you jointly. Under such circumstances, we will, at your instructions, cease representing each of you, individually;<sup>105</sup> however, each of you agrees that the firm will continue to represent the Company and the related entities.

By signing this letter, each of you confirms that you have requested and consented to our representation of you in connection with the Transaction after having been informed about and waiving the possible conflict of interest issues described above. Each of you also confirms the understanding that communications and information that we receive from each of you will not be kept confidential from the other, and confirms the understanding of what will occur should a conflict of interest arise in the future.

I encourage you to discuss with me any questions you may have concerning any of these arrangements. In addition, we specifically encourage each of you to seek independent counsel to advise you regarding the import of this consent and to assess any need for you to secure independent counsel.

We are most pleased that you have engaged us for this matter, and we will make every reasonable effort to assist in achieving your objectives. Please confirm your agreement with this letter by signing as provided below and returning the signed copy to us. Thank you very much.

Sincerely,

*[law firm]*

By: \_\_\_\_\_

*[partner]*

ACCEPTED AND AGREED TO:

\_\_\_\_\_  
*[member 1]*

\_\_\_\_\_  
*[member 2]*

<sup>105</sup> Alternatively, you can provide that the firm will continue to represent one party, as long as all parties consent.