CHAPTER 7

Organizing a Massachusetts Business

James R. Burke, Esq.
Hinckley, Allen & Snyder LLP, Boston

Robert D. Burke, Esq.
Proskauer Rose LLP, Boston

David A. Parke, Esq.
Bulkley, Richardson and Gelinas LLP, Springfield

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Scope Note

This chapter outlines essential steps in organizing a Massachusetts business. The first section addresses choice of entity, describing the elements of sole proprietorships, corporations, general partnerships, limited liability partnerships, limited liability companies, and business trusts and comparing the advantages and disadvantages of each option. The second section describes how to organize a Massachusetts corporation, providing guidance on selecting a corporate name, drafting articles of organization and bylaws, issuing shares, and fulfilling reporting and filing requirements. The final section discusses the formation of a limited liability company (LLC) and the preparation of an LLC operating agreement.

§ 7.1 CHOICE OF BUSINESS ENTITY

§ 7.1.1 Introduction

In assisting a client to select the appropriate form of business organization, a number of factors need to be evaluated and balanced. The most significant issues to be considered are

- the number of participants in the business and the nature of their participation (e.g., active employee owner, passive investors);
- the degree to which the participants are averse to risk;

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- the nature of the business and its strategic plan, including future expectations about financing and exit strategy; and
- tax consequences to the business and its participants.

The purpose of this part of the chapter is to introduce the alternative forms of business organization that are generally available and to describe briefly how a lawyer might evaluate the characteristics of each of them to identify the entity that best suits the client's business needs.

Most large and widely held companies are organized as corporations. Indeed, many small businesses, particularly those with strong growth potential or the need to attract financing, are organized as corporations as well. Questions as to the appropriateness of corporate structure arise primarily in the case of small closely held businesses or entities organized for a specific purpose. Limited liability companies are becoming more popular due to their flexibility and tax advantages.

As in most areas, the lawyer's principal role in selecting a form of business structure is to listen carefully to the client's needs and expectations and to be prepared to explain compromises and suggest alternatives that will most nearly satisfy the client's objectives.

Practice Note

In reviewing this chapter, practitioners should take into account Chapter 173 of the Acts of 2008, which "changed the way unincorporated businesses are classified and treated for purposes of the Massachusetts corporate excise and personal income taxes, resulting in general conformity with federal entity classification and filing rules, effective with the first taxable year beginning on or after January 1, 2009. By [2008 Mass Acts c. 173], Massachusetts adopt[ed] the federal 'check-the-box' rules, which permit unincorporated businesses generally to elect how they will be classified." 830 C.M.R. § 63.30.3(1)(a). Detailed guidance on this legislation is set forth at 830 C.M.R. § 63.30.3.

Practitioners should also be aware of I.R.C. § 199A (enacted in 2017 and amended in 2018). Among other provisions, Section 199A generally permits a deduction of up to 20 percent of qualified business income from a domestic business operated as a sole proprietorship or through a partnership, S corporation, trust, or estate, subject to certain significant limitations on availability.

§ 7.1.2 Forms of Business Organization

(a) *Sole Proprietorship*

A sole proprietorship is an unincorporated form of business in which one person owns all of the assets and liabilities of the business. A sole proprietor is personally liable for all obligations of the business to the full extent of his or her personal assets, as well as the business assets. The owner's entire interest in a sole proprietorship is

transferable, subject to restrictions on fraudulent conveyance and applicable bulk transfer statutes. A sole proprietorship terminates upon the death of the sole proprietor.

No Massachusetts statute governs the organization of a sole proprietorship. Under Massachusetts law, any person (including a corporation) engaged in business under an assumed name must file a business certificate in the office of the clerk of every town or city in which an office of the business is located. *See* G.L. c. 110, § 5. The certificate is in effect for four years from the date of issue and must be renewed each four years thereafter. The nature and type of fictitious name filings required differ from jurisdiction to jurisdiction, and in some states fictitious name filings are made at the state or county level rather than the local level.

(b) *Corporation*

A corporation is a legal entity created by state statute existing separate and apart from its owners, the stockholders. Under Massachusetts law, a corporation formed for the purpose of carrying on a business for profit may be a business corporation organized under G.L. c. 156D or a professional corporation organized under G.L. c. 156A.

Increasingly, professionals are taking advantage of the limited liability partnership statute, rather than incorporating as a professional corporation. Certain specialized corporations, such as banks, insurance companies, and utilities, are governed by other chapters of the Massachusetts General Laws. Not-for-profit corporations are governed by G.L. c. 180.

A corporation has centralized management, and the statutes of most states prescribe the basic structure for a corporation's internal organization and management. A corporation may make an election under Subchapter S of the Internal Revenue Code to be taxed as a partnership, subject to a number of limitations, including restrictions on the number and type of stockholders and on the classes of stock that may be issued by the corporation.

In 2012, Massachusetts became the eleventh state to adopt a "benefit corporation" statute. The Massachusetts Benefit Corporation Act, which is embodied in G.L. c. 156E, became effective as of December 1, 2012, and allows corporations organized under either G.L. c. 156D or G.L. c. 156A to elect to be benefit corporations. Although a benefit corporation is a for-profit business entity, it must have as one of its purposes the creation of a "general public benefit," which is defined as "a material, positive impact on society and the environment, taken as a whole, as measured by a third-party standard, from the business and operations of a benefit corporation." G.L. c. 156E, § 2. A benefit corporation may also have as one of its purposes the creation of "specific public benefits," such as the provision of beneficial services to low-income communities or the promotion of the arts and sciences. A benefit corporation is governed by its organizing statute (G.L. c. 156D or G.L. c. 156A), as further modified by G.L. c. 156E, and its articles of organization must make clear reference that it is a benefit corporation.

(c) *General Partnership*

A general partnership is an unincorporated association of two or more persons who carry on their business for the joint benefit and profit of all partners. General partnerships pay no tax at the entity level; the partners pay taxes on their respective shares of partnership income. This "single level" of taxation makes general partnerships attractive from a tax standpoint.

In Massachusetts, general partnerships are governed by the Massachusetts Uniform Partnership Act, G.L. c. 108A; in Delaware, they are governed by the Delaware Revised Uniform Partnership Act, Del. Code Ann. tit. 6, c. 15. A general partnership may be formed by written or oral agreement or by the conduct of the parties. Although no written agreement is necessary to establish a general partnership, it is customary and desirable to define clearly the rights and duties of the partners. In the absence of contractual provisions to the contrary, the applicable Massachusetts or Delaware statute prescribes certain fundamental rights and duties of the partners of a general partnership.

Except as otherwise agreed, each partner of a general partnership has an equal voice in the management and control of the partnership. Each partner has unlimited personal liability for all partnership obligations, and each partner has the implied authority to bind the other partners. A partner's economic interest in a general partnership is assignable but, without the agreement of the other partners, the assignment does not entitle the assignee to participate in the management of the partnership. In a Massachusetts general partnership, when a partner ceases to be a partner the partnership automatically dissolves, although it is customary to provide in the partnership agreement that the remaining partners will continue the business of the partnership. In contrast, in a Delaware general partnership, the loss of a partner may not automatically dissolve the partnership.

(d) *Limited Liability Partnership*

A limited liability partnership is a general partnership that has filed an election with the secretary of state of its jurisdiction of formation to take advantage of certain statutory provisions that limit the liability of the general partners. *See* G.L. c. 108A, § 45. In general, partners in a limited liability partnership are liable for the partnership's debts only to the extent of their own capital contributions. In addition, partners in a limited liability partnership have unlimited personal liability for their own negligence, wrongful acts, errors, or omissions, but they are liable only to the extent of their own capital contributions for the negligence, wrongful acts, errors, or omissions of other partners. A limited liability partnership is treated as a general partnership in all other respects.

(e) *Limited Partnership*

A limited partnership is a partnership consisting of one or more general partners, who are jointly and severally liable for the partnership's debts, and one or more limited

partners, who generally are liable for the partnership's debts only to the extent of their capital contributions and their share of the partnership's assets and profits. Limited partnerships pay no tax at the entity level; the partners pay taxes on their respective shares of the partnership income. This "single level" of taxation makes limited partnerships attractive from a tax standpoint.

A limited partnership is formed only upon the filing of a certificate of limited partnership with the state in which it is formed. In Massachusetts, limited partnerships are governed by the Massachusetts Uniform Limited Partnership Act (G.L. c. 109); in Delaware, they are governed by the Delaware Revised Uniform Limited Partnership Act, Del. Code Ann. tit. 6, c. 17. As with general partnerships, in the absence of contractual provisions to the contrary, certain fundamental rights and duties of the partners in a limited partnership are prescribed by the applicable statute.

Limited partnerships are managed and controlled by their general partners, and limited partners have limited rights to participate in the management or control of the partnership without risking the loss of limited liability. The profits and losses of a limited partnership are allocated, and cash and other assets are distributed, among the general partners and limited partners of a limited partnership in the manner provided in the partnership agreement. The provisions allocating profits and losses and governing distributions are typically very complex and should be prepared only with the assistance of a tax attorney.

Except as provided in the partnership agreement, a limited partner's economic interest in a limited partnership is transferable, but an assignee may become a substituted limited partner only if given that right by the assignor in accordance with authority described in the partnership agreement or only if all other partners agree. In most states, a limited partnership dissolves upon the written consent of all partners or upon a time specified in the partnership agreement. In addition, the withdrawal of a general partner automatically dissolves a limited partnership except in certain circumstances.

(f) *Limited Liability Company*

Massachusetts, Delaware, and all other states have adopted limited liability company statutes. Both Delaware and Massachusetts permit limited liability companies to have a single member. The Massachusetts statute, which went into effect on January 1, 1996, is set forth at G.L. c. 156C.

Limited liability companies offer their owners, who are referred to as "members," limited liability (like the stockholders of a corporation) and pass-through tax treatment (like a partnership). Unlike S corporations, limited liability companies

- may have very specific and complicated management, economic, and tax arrangements;
- may have more than one class of stock; and
- have no restrictions on the type or number of owners.

(g) *Massachusetts Business Trust*

A business trust is an unincorporated association in which property is transferred to a trustee or trustees who manage such property for the benefit of the trust's beneficiaries. Most Massachusetts business trusts were originally organized for the purpose of investing in real estate. Business trusts are now also used for the organization of investment companies (i.e., mutual funds).

Massachusetts business trusts are governed in limited respects by G.L. c. 182. The statute is mostly procedural in nature and is not comprehensive. Accordingly, it is usually necessary to consider Massachusetts case law, as well as the law of other jurisdictions, when advising a Massachusetts business trust. A business trust is formed under a written declaration of trust, which is recorded with the Massachusetts secretary of state and the clerk of every municipality where the trust has a usual place of business. The declaration of trust should also be recorded with the local registry of deeds if the trust owns real estate. Massachusetts business trusts are controlled and managed by their trustees.

Unlike corporations, limited liability companies, and limited partnerships, there is no statutory limited liability provision for Massachusetts business trusts. Fortunately, Massachusetts courts, and those of other states applying Massachusetts law, have generally recognized limited liability of Massachusetts business trust trustees and shareholders at common law. However, in the event that shareholders exercise significant managerial authority, a court may view a business trust as a general partnership and impose personal liability on shareholders. Therefore, care should be taken to include in the trust instrument itself—and in all contracts entered into on behalf of the trust—a clear disclaimer to the effect that the trustees and shareholders of the trust will not have personal liability to third parties for obligations of the trust and that all parties dealing with the trust may look only to trust assets for satisfaction of such obligations.

A business trust cannot own property or make contracts; legal title to all trust property is held by the trustees, and the trustees alone have the power to enter into contracts. Unless the trust instrument provides otherwise, a business trust is not dissolved by the death or withdrawal of one of its beneficiaries. Beneficial interests in a business trust are freely transferable, except as otherwise provided in the declaration of trust.

§ 7.1.3 Comparing the Choices

(a) *Limited Liability*

Persons organizing a business enterprise will generally wish to limit the extent to which their personal assets, unrelated to the business itself, are subject to the claims of business creditors. In general, persons organizing their businesses as corporations, limited partnerships, limited liability partnerships, limited liability companies, or Massachusetts business trusts will enjoy at least some measure of limited liability,

while persons organizing their businesses as sole proprietorships or general partnerships will not. Regardless of the actual form of business selected, however, the persons organizing the business may be able to achieve the desired level of limited liability through insurance.

Sole Proprietorship

In a sole proprietorship, the personal liability of the sole proprietor generally is unlimited; both the business assets and the personal assets of the sole proprietor are subject to the claims of the sole proprietorship's creditors. The sole proprietor's personal liability for debts incurred in his or her business is not limited to the amount of capital set aside for the business. Moreover, existing liabilities of the sole proprietor will not be extinguished upon the dissolution or sale of the sole proprietorship.

Corporation

Absent an express agreement to the contrary, corporate shareholders generally are not personally liable for their corporation's debts or liabilities. Accordingly, the losses of corporate shareholders arising from the business of their corporation generally will be limited to the shareholders' individual investments in the stock of the corporation. As a practical matter, however, significant shareholders of start-up companies may be required to provide their personal guarantees with respect to the repayment of loans or leases made to the corporation.

General Partnership

In a general partnership, the personal liability of the individual partners generally is unlimited; both their business assets and their personal assets are subject to the claims of all creditors. Liability for debts incurred in the business generally is not limited to the amount of capital contributed to the business.

Upon dissolution of a general partnership, each partner remains liable for the partnership's obligations. *See* G.L. c. 108A, § 15. A general partner is also liable for the wrongful acts of his or her partners. *See* G.L. c. 108A, §§ 13–15.

Limited Liability Partnership

Partners in a limited liability partnership are not liable for the debts and liabilities of the limited liability partnership in excess of their capital contributions and their share of the partnership's assets and profits, except that each partner has unlimited personal liability for his or her own negligence, wrongful acts, errors, or omissions.

Limited Partnership

Limited partners in a limited partnership, provided they do not participate in the actual control or management of the limited partnership, are not liable for the debts and liabilities of the limited partnership in excess of their capital contributions. *See* G.L. c. 109, § 19. General partners of a limited partnership, however, generally are subject

to the same level of liability as are the partners in a general partnership. *See* G.L. c. 109, § 24.

Limited Liability Company

A limited liability company generally is treated as a corporation for limited liability purposes. A limited liability company, unlike a limited partnership, provides all members with limited liability, including those that participate in management.

Massachusetts Business Trust

Trustees generally have liability for obligations of the business trust, although by contract they may limit that liability to the assets of the trust. Assuming that they do not participate in the management of the trust's business, the holders of beneficial shares of the trust are generally not personally liable for the debts and obligations of the business trust.

(b) *Separate Legal Entity*

Persons organizing a business enterprise will also want to consider whether the business will be treated as a separate legal entity having the right to sue or be sued, enter into contracts, and hold and dispose of property in its own name.

Sole Proprietorship

A sole proprietorship is not a separate legal entity apart from its sole proprietor.

Corporation

A corporation is a separate legal entity having the right to sue or be sued, enter into contracts, and hold and dispose of property in its own name. This allows the corporation to insulate itself from its stockholders' finances, reputations, and prior business failures and to develop a public identity separate from that of its stockholders.

General Partnership

Under common law, a partnership was not a separate legal entity. Many jurisdictions, however, have enacted statutes that permit partnerships to sue or be sued in their own names. Section 10 of G.L. c. 108A permits a partnership to hold or convey title to real property in its own name.

Limited Partnership

A limited partnership generally is afforded the same recognition as a general partnership.

Limited Liability Company

In most jurisdictions, a limited liability company generally is treated as a separate legal entity having the right to sue or be sued, enter into contracts, and hold and dispose of property in its own name.

Massachusetts Business Trust

General Laws c. 182, § 6 allows suit against a business trust as though it were a corporation.

(c) *Management and Control*

Another significant consideration in selecting a business entity is the manner in which it can be managed and controlled. The management of a business corporation is controlled by its board of directors and elected officers. This is quite different from a general partnership, in which each partner can bind his or her partners and the partnership.

(Delaware law provides for an unusual entity called a "close corporation." The certificate of incorporation of a "close corporation" may provide that the business of the corporation shall be managed by its stockholders rather than a board of directors.)

Sole Proprietorship

In a sole proprietorship, the sole proprietor has total flexibility in managing and controlling their business.

Corporation

In a corporation, management and control reside in a board of directors elected by the corporate stockholders. A by-product of the corporate management structure is that the operation of the corporation will involve certain managerial formalities that are not necessary in the operation of other business entities, including the periodic election of directors and the approval of certain corporate actions by the board or the stockholders.

Stockholders of closely held Massachusetts corporations are allowed to enter into agreements among themselves that reorder typical corporate management structures, even if such structures are inconsistent with G.L. c. 156D (e.g., an agreement to eliminate the board of directors). These arrangements can be set forth in the articles of organization, the bylaws, or a separate written agreement and must be approved by all persons who are stockholders at the time of the agreement. *See* G.L. c. 156D, § 7.32.

General Partnership

The management of a general partnership (including a limited liability partnership) is conducted in accordance with the partnership agreement. Absent a provision in the

partnership agreement to the contrary, the vote of a majority of the partners will govern the partnership's routine business affairs. *See* G.L. c. 108A, § 18(h).

Limited Partnership

In a limited partnership, management and control of the entity is vested in the general partners, thus affording the limited partnership some degree of centralized management. *See* G.L. c. 109, § 24. The limited partners, however, sacrifice any significant involvement in the management of the limited partnership in exchange for their own limited liability.

Limited Liability Company

The members of a Massachusetts or Delaware limited liability company can either designate "managers" or reserve the management responsibility for themselves. Limited liability company members will, in any case, have the opportunity to participate in management without risking their limited liability status; in contrast, limited partners who participate in the management of a limited partnership may lose their protected status as limited partners.

Massachusetts Business Trust

The trustees are responsible for the control and management of the business trust. The trust instrument may provide that control or management duties may be delegated to employees or third parties. Holders of beneficial shares of the trust, like limited partners in a limited partnership, risk losing the limitations on liability that the business trust affords if they elect to participate in control and management.

(d) *Continuity of Existence*

Persons organizing a business enterprise will also want to consider its ability to continue operating in its present form after the occurrence of certain events.

Sole Proprietorship

The death, withdrawal, or bankruptcy of a sole proprietor will typically cause a termination of their sole proprietorship. To maintain the value of such a business, however, the sole proprietor may provide, by will, for example, for the temporary operation of the business until it can be sold or liquidated.

Corporation

A corporation exists perpetually unless otherwise specified in its charter. The death, withdrawal, or bankruptcy of a shareholder will not cause dissolution of the corporation.

General Partnership

The death or bankruptcy of a partner in a general partnership (including a limited liability partnership) will result in the dissolution of the partnership. *See* G.L. c. 108A, § 31. It is customary, however, for the partnership agreement to include a provision allowing the remaining partners to continue the business of the partnership.

Limited Partnership

A limited partnership may be dissolved by

- the terms of the partnership agreement;
- the written consent of all partners;
- the entry of a decree of judicial dissolution; or
- the withdrawal of one or more general partners necessary for the partnership to continue unless, at the time, there is at least one other general partner, the partnership agreement permits the business of the limited partnership to be carried on by the remaining general partner, and that partner does so, or unless all partners agree in writing within ninety days to continue the business of the partnership and to appoint any necessary general partners.

See G.L. c. 109, § 44.

Limited Liability Company

A limited liability company may be dissolved by

- the terms of the operating agreement;
- the written consent of all members;
- the entry of a decree of judicial dissolution; or
- with respect to a limited liability company formed prior to January 1, 1997, except as provided in the operating agreement, the death, insanity, retirement, resignation, expulsion, bankruptcy, or dissolution of a member, or the occurrence of an event that terminates the membership of a member, unless the business of the limited liability company is continued either by the consent of all remaining members within ninety days of the occurrence of any such event or pursuant to a right to continue in the operating agreement.

See G.L. c. 156C, § 43.

Massachusetts Business Trust

A business trust remains in effect until terminated in accordance with the declaration of trust establishing it. The death or withdrawal of a trustee or beneficiary does not cause its termination.

(e) *Transferability of Interests*

The ability to sell or transfer an interest in the business will also be relevant in selecting among business entities.

Sole Proprietorship

A sole proprietor generally has the ability to sell or transfer any portion of their business interest at will.

Corporation

In theory, corporate stock is freely transferable, subject to applicable federal and state securities law restrictions. As a practical matter, however, shares of privately held companies often are illiquid due to the absence of a trading market and the presence, in some cases, of restrictions on transfer imposed by contract or by a corporation's charter or bylaws. An S corporation shareholder must also be wary of the various statutory restrictions on S corporation stock ownership (e.g., no more than 100 shareholders total, each of whom, with limited exceptions, must be individuals and none of whom may be nonresident aliens).

General Partnership

Unlike the cases of the above business entities, absent an agreement to the contrary, a partner in a general partnership (including a limited liability partnership) usually will be required to obtain the consent of all of the other partners prior to the transfer of a partnership interest and the granting to the transferee of all of the rights to which the transferor-partner had been entitled, other than merely the right to a contractual portion of the profits. *See* G.L. c. 108A, § 27. This rule may be disadvantageous to partners wishing to be able to dispose of their interests, but it may also serve to protect the other partners from having an unwanted partner forced upon them.

Limited Partnership

General partners in a limited partnership are treated like partners in a general partnership. Except as provided in the partnership agreement, limited partners may freely assign their limited partnership interests. However, absent authority given to the assignor in the partnership agreement or the consent of all of the other members of the limited partnership, the assignee generally will have only the assignor's right to share in the profits of the limited partnership and will not be a full substitute limited partner. *See* G.L. c. 109, §§ 40, 42.

Limited Liability Company

In general, members of a limited liability company are treated like partners in a general partnership, although the limited liability company's operating agreement may provide for the transfer of a member's interest without the consent of the other members.

Massachusetts Business Trust

Shares of beneficial interest in a business trust are substantially the same as shares of stock in a corporation. Provided that there has been compliance with federal and state securities laws, shares of a business trust are transferable, subject to any restrictions on transfer contained in the declaration of trust.

(f) *Ease and Expense of Organization*

The organizational expense and the level of formality required in setting up a business under the various forms of organization will also be relevant in selecting a particular business form.

Sole Proprietorship

A sole proprietor typically can organize a sole proprietorship with minimal expenses and formalities. Under Massachusetts law, any party (including a corporation) engaged in business under an assumed name must file a business certificate in the office of the clerk of every town or city in which an office of the business is located and must renew the certificate every four years. *See* G.L. c. 110, § 5.

Corporation

The expenses and formalities required in the organization of a corporation may be significant. For example, incorporation expenses include the filing of governance documents, and most states have minimum annual maintenance fees, including excise or franchise taxes. Benefit corporations must also prepare an annual benefit report, which describes, among other things, the ways in which the benefit corporation has pursued and created a general public benefit. *See* G.L. c. 156E, § 15.

General Partnership

A general or limited liability partnership may be organized with little expense or formality. As a practical matter, however, a partnership agreement usually is necessary, which can be complicated to draft. A partnership generally is required to file an election with the secretary of state of its jurisdiction of formation in order to qualify as a limited liability partnership. Massachusetts limited liability partnerships are required to file annual reports with the secretary of state.

Limited Partnership

The organizers of a limited partnership typically will incur significant expenses and be required to comply with strict formalities. A certificate of limited partnership must be filed, and a written limited partnership agreement will be required, both of which involve legal fees and filing fees. Massachusetts limited partnerships are required to file annual reports with the secretary of state.

Limited Liability Company

The organization of a limited liability company may be expensive and time consuming. A limited liability company is formed by filing a certificate of organization with the secretary of state. The members of a limited liability company may also be required to enter into an operating agreement. Massachusetts limited liability companies are required to file annual reports with the secretary of state.

Massachusetts Business Trust

A Massachusetts business trust is organized by the filing of a declaration of trust with the Massachusetts secretary of state and with the clerk of every municipality where the trust has a usual place of business. Massachusetts business trusts are required to file an annual report each year with the secretary of state.

(g) *Sources of Operating Capital*

Another significant consideration in choosing a business entity, especially for organizers with limited funds, is the source of the business's operating capital.

Sole Proprietorship

For working capital, a sole proprietorship generally is limited to the individual funds of the sole proprietor, plus any loans from outsiders willing to provide extra funding.

Corporation

A corporation can issue various types of equity and debt instruments to raise working capital. It can also obtain loans from both shareholders and outsiders. Although mere incorporation does not ensure access to capital markets, the corporate form facilitates the raising of equity capital because potential investors are more familiar with corporate entities and the corporate form provides greater flexibility than other forms in structuring equity arrangements. S corporations may not have more than 100 stockholders, each of whom (with limited exceptions) must be individuals and none of whom can be nonresident aliens. S corporations are not allowed to have more than one class of stock.

Partnership

Sources of working capital for a partnership include partner contributions to capital, loans from partners, and loans from outsiders.

Limited Liability Company

Sources of working capital for a limited liability company include member contributions to capital, loans from members, and loans from outsiders.

§ 7.2 ORGANIZING A MASSACHUSETTS CORPORATION

§ 7.2.1 Introduction

Effective July 1, 2004, a new Massachusetts Business Corporation Act, G.L. c. 156D, was enacted. The act is based on the American Bar Association's Revised Model Business Corporation Act and changes the procedures and options available for Massachusetts business corporations. The act is significantly different from G.L. c. 156B, the law that governed Massachusetts business corporations prior to July 1, 2004.

The act modernizes the business corporation law that had been in place in Massachusetts, with no significant change, since the early 1900s by, among other things,

- explicitly recognizing and permitting various types of notices and electronic communications in conducting corporate business;
- permitting participation in meetings by remote means;
- permitting Massachusetts corporations to have a single director or no directors, regardless of the number of shareholders; and
- permitting actions by less than unanimous written consent of the shareholders.

In addition, the act provides for new corporate transactions, such as share exchanges, conversions, and domestications, and imposes duties that did not exist under G.L. c. 156B. Some of these duties are discussed below.

Because the American Bar Association's model act is the basis of the business corporation law in most other states, there is a greater body of jurisprudence available to help interpret the act's provisions. In addition, the act is published with drafters' comments that compare its provisions to G.L. c. 156B, the Delaware General Corporation Law, and the Revised Model Business Corporation Act and provide helpful background.

The major steps in organizing a Massachusetts corporation include

- selection of a corporate name;
- preparation of the articles of organization and bylaws;
- actions of the incorporators, including approval of the articles of organization;
- initial organizational actions by the directors;
- issuance of shares and other interests to the founders and investors; and
- organization of tax and corporate reporting procedures.

These steps are discussed below.

Practice Note

Keep in mind that there may be considerations that, while not strictly part of the corporate formation process and therefore not addressed in detail in this chapter, may need to be addressed by attorneys counseling Massachusetts corporations and their incorporators. Examples include federal and state stock registration requirements and exemptions; tax issues arising when stock or stock options are used to compensate employees; and certain tax-related options available to corporations, such as manufacturing corporation status and benefits available under I.R.C. § 1244 (relating to small business corporation stock).

§ 7.2.2 Name

One of the earliest tasks is to determine the availability of the proposed name of the corporation. There are various restrictions on the name of a Massachusetts corporation. The name must include

- the word "Corporation," "Incorporated," "Company," or "Limited";
- the abbreviation "Corp.," "Inc.," or "Ltd."; or
- words or abbreviations of like import in another language.

The name may not be the same as, or confusingly similar to,

- the corporate name or trade name of another corporation, not-for-profit corporation, partnership, business trust, or other entity organized or authorized to do business in Massachusetts;
- a corporate name under reservation; or
- a trademark or service mark registered with the Corporations Division of the secretary of the Commonwealth.

Under appropriate circumstances, a conflicting name may be used by a proposed corporation if the other user consents in writing. G.L. c. 156D, § 4.01(c).

The Corporations Division regulations indicate that an applicant may determine the availability of a proposed name by searching the division's website, available at http://www.sec.state.ma.us, which has a corporate database and a name reservation summary. Applicants should not rely on a telephone inquiry for anything more than a preliminary check of a corporate name; names cannot be reserved by telephone. 950 C.M.R. § 113.18.

A name, if available, may be reserved with the Corporations Division for sixty days for a fee, currently $30. The reservation may be extended for sixty additional days with payment of an additional fee, currently $30. To continue a name reservation thereafter, an applicant must let one day lapse after the second reservation period expires. The Corporations Division has an application form available online (listed under the "Domestic Profit Corporations" link) that may be used to reserve a name.

Practice Note

The availability of a proposed name with the Corporations Division does not mean that its use will not infringe another person's trademark or trade-name rights. If the client plans to invest significantly in a particular name, it may be advantageous to perform a trademark and trade-name search and consider seeking trademark protection for the name. Various commercial search firms, for a fee, will perform a search of a proposed name to determine the likelihood that the proposed name will conflict with a trade name or the registered trademark of another person. Such search results will often show names that are similar to, or the same as, the proposed name, as well as names that are used for different purposes or in different geographic locations. Professional judgment may be necessary to determine if the client's proposed name will conflict with another person's rights.

If the corporation wants to conduct business under a name other than its actual corporate name, it should file a business certificate locally where required. General Laws c. 110, § 5 requires that for any person conducting business in the Commonwealth under any title other than its real name, a business certificate must be filed, with the appropriate fee, with the city or town clerk of each city or town where an office of such person is situated. The certificate is effective for four years from filing.

§ 7.2.3 Actions of the Incorporators

The incorporators are the first group to take action to form a Massachusetts corporation. Under the Massachusetts Business Corporation Act, the existence of a Massachusetts corporation begins only when articles of organization, signed by an incorporator or incorporators, are properly filed with the secretary of the Commonwealth with the appropriate fee and become effective. One or more individuals or entities may serve as incorporators. The responsibilities of the incorporators under the act are

- to sign articles of organization,
- to cause the articles of organization to be filed, and
- to complete formation of the corporation.

Before shares of stock are initially issued, the incorporators have the powers of the shareholders. G.L. c. 156D, § 2.01.

Under the act, the incorporators may, before or after incorporation,

- adopt initial bylaws,
- elect initial directors and officers, and
- transact any other proper business.

The incorporators may take those actions either at an organizational meeting called by a majority of the incorporators, of which minutes should be recorded, or by a written consent describing the action taken and signed by each incorporator. The act

also permits that, in place of the incorporators, the initial directors may adopt the initial bylaws and elect officers. There are other actions that may be necessary or desired as part of organizing the corporation that may, under the act, be taken by either the incorporators or the initial directors. These are discussed below in § 7.2.6 in connection with the initial directors' actions.

The new act provides more flexibility than the old law over who can complete the formation of a corporation (incorporators or directors) and when the formation may be completed (before incorporation, by the incorporators, or after incorporation, by the incorporators or directors). Under G.L. c. 156B, the law that governed Massachusetts business corporations prior to July 1, 2004, the incorporators were required to adopt initial bylaws and elect initial directors and officers before the articles of organization were filed. Because, under the new act, the articles of organization must name the initial directors and the initial president, treasurer, and secretary, it still may make sense for the incorporators to elect the initial directors and those officers before the articles of organization are filed.

A sample incorporator's consent is included as **Exhibit 7A**.

§ 7.2.4 Articles of Organization

(a) *Use of Forms; Filing*

The Corporations Division publishes a form for the articles of organization. Use of the form is optional, however, as long as the articles of organization submitted for filing include the required information and comply in appearance with the secretary of the Commonwealth's regulations. Any document not on an official form must be on standard size 8½ x 11 paper and have a minimum font size of ten. No document submitted for filing may be handwritten. Sample articles of organization, using the state form, are included as **Exhibit 7B**.

Articles of organization may be mailed or delivered to the division or submitted by fax or electronically in the manner set forth on the division's website (available at http://www.sec.state.ma.us). Articles of organization are effective when received, "unless the filing is rejected and written notice is provided to the submitter within five days of receipt." 950 C.M.R. § 113.10. The secretary of the Commonwealth's website provides a "Corporation Rejected Filings Viewer" (https://corp.sec.state.ma.us/corp/corpreject/corprejectionslist.asp) that allows users of the site to search for rejected items. Alternatively, the articles of organization may specify a later effective date, up to ninety days from filing.

Practice Note

Specification of a later effective date might be advantageous where, for example, an initial short tax year may be avoided by delaying the effective date until after the fiscal year end.

The minimum filing fee for articles of organization is currently $275, plus an additional fee ($100 for each additional 100,000 shares or fraction thereof) if the authorized shares exceed 275,000.

> **Practice Note**
> For many privately held corporations, except those corporations with a large number of potential investors, 275,000 should be a sufficient number of authorized shares.

(b) *Contents*

The act provides that certain information is either required or permitted to be included in the articles of organization and that later changes to this information will require the filing of articles of amendment. In addition, the act calls for certain supplemental information to be included in the articles of organization. Supplemental information may be changed with appropriate filings, but without the expense of a filing fee for articles of amendment; however, there is a modest (currently $25) filing fee for filing a paper copy or a fax copy of a statement of supplemental change.

Required Information

The following information is required to be included in articles of organization:

- the corporate name,
- the number of shares that are authorized and descriptions of different classes or series of shares, and
- the name and address of each incorporator.

The act includes new options, addressed more fully below, with respect to the description of different classes or series of shares.

Optional Provisions

There are a number of provisions that may be considered for inclusion in the articles of organization but are not statutorily required. Note that with respect to some of these provisions—such as allowing the election of directors by cumulative voting—the corporation will be unable to take the specified action unless the appropriate provisions are included in the articles of organization. Thus, care should be taken to include the provisions that will be necessary for the corporation's future operations.

> **Practice Note**
> Some options that the former law (G.L. c. 156B) required to be in the articles of organization—such as the power of the corporation to be a partner or to hold shareholder meetings outside of Massachusetts—are not required by the new act.

Purposes

Under Section 2.02 of the act, the purposes for which a corporation is organized may be stated in the articles of organization, though they are not required. Unless a more limited purpose is stated in the articles of organization, the corporation has the purpose of engaging in any lawful business. G.L. c. 156D, § 3.01. (This is a change from G.L. c. 156B, which required that the purposes be stated in the articles of organization.)

Practice Note

There may be reasons to specify narrower purposes for organization of the corporation, such as when required by a regulating authority for the type of business to be conducted.

Par Value for Authorized Shares or Classes of Shares

Unlike G.L. c. 156B, the new act does not call for a choice between par-value and no-par-value shares. However, a corporation may specify a par value for a class of authorized shares. Although par value is a concept that is generally obsolete in Massachusetts, specification may be useful if any other jurisdiction in which the corporation will conduct business assesses taxes based on par value.

Preferences, Limitations, and Rights of Any Class of Shares

If more than one class or series of shares are authorized, the articles of organization must set forth the preferences, limitations, and relative rights of each class or series. There can be many differences between classes or series of shares, including differences in voting rights, rights to dividends, and rights on liquidation. These differences depend on the objectives of the founders and investors as to control and management of, and return on investment in, the corporation.

Practice Note

The Internal Revenue Code prohibits an S corporation from having more than one class of shares.

While, under the new act, the designation of a par value does not, by itself, establish the minimum consideration for which such shares may be issued, the articles of organization may specify the minimum consideration for which shares of any class or series may be issued.

Restrictions Imposed by the Articles on the Transfer of Shares of Any Class or Series

Share transfer restrictions may be included in the articles of organization, the bylaws, or a separate shareholders' agreement. The effect of including share transfer restrictions in the articles of organization is that such restrictions are more publicly available. The expense of a charter amendment is generally required to modify the restrictions.

Minimum Number of Directors

The number of directors must be specified or fixed in the articles of organization or bylaws. Section 8.03 of the act provides that any corporation with three or more shareholders must have at least three directors. (Corporations with fewer than three shareholders must have at least as many directors as shareholders.) These minimums may be changed by the articles of organization. Therefore a corporation may, if it includes an appropriate provision in its articles of organization, limit the minimum number of directors to one, regardless of the number of shareholders.

Practice Note

This option, which was not permitted under G.L. c. 156B, may be advantageous where there is more than one owner of the business but the corporation does not have more than one or two individuals who are available to serve on the board of directors.

Action by Less-than-Unanimous Shareholder Consent

In general, shareholder action may be taken by either the appropriate number of votes of the voting group being cast at a shareholders' meeting (duly called with proper notice or waivers of notice) or a written consent signed and dated by all shareholders entitled to vote on the proposed action.

Under G.L. c. 156B, a written consent by shareholders had to be signed in any event by *all* shareholders entitled to vote. Under the new act, if the articles of organization include a provision permitting action by less-than-unanimous consent, shareholder action may be taken by written consent merely of shareholders having the minimum number of votes needed to take the proposed action at a meeting.

Such a provision in the articles of organization will permit the corporation to have shareholder action taken by consent without having to obtain consents from all the shareholders, some of whom may not be available in any particular instance.

Another advantage of taking action by consent, without a meeting, is the ability to take action on short notice, which is often important in completing corporate transactions. Under Section 7.04 of the act, however, if action is to be taken pursuant to the written consent of shareholders, the corporation must give notice, at least seven days before the action is taken, to nonvoting shareholders if notice would be required if the action were to be taken at a meeting, and to shareholders entitled to vote who did not consent. This requirement of notice, currently in the act, reduces the advantage of being able to take shareholder action with less-than-unanimous written consent.

Power of Directors to Amend Bylaws

The shareholders have the power to adopt and amend the bylaws of the corporation. If authorized by the articles of organization or by a bylaw provision authorized by the articles of organization, the directors may also adopt and amend bylaws, except for any provision for which the act, articles of organization, or bylaws requires action

by the shareholders. In the case of corporations with many shareholders, including publicly held corporations, the ability of the directors to amend bylaws will be convenient, if not essential.

Majority Shareholder Approval of Extraordinary Actions

Under the act, amendments to the articles of organization, mergers and share exchanges, and sales of assets outside of the usual and regular course of business generally must be approved by two-thirds of the shares entitled to vote. The articles of organization may provide for approval of such transactions by a fraction that is lower than two-thirds, but in no event may such transactions be approved by less than a majority of the eligible shares. G.L. c. 156D, § 7.27(b).

Personal Liability of Directors

Section 2.02(b)(4) of the act permits the articles of organization to include a provision eliminating or limiting the personal liability of directors for monetary damages to the corporation for breach of fiduciary duties. Such an exculpatory provision may not limit the director's liability for

- breach of his or her duty of loyalty,
- actions not taken in good faith,
- intentional misconduct,
- distributions to shareholders that do not meet the standards of Section 6.40 of the act, or
- transactions from which the director derived an improper personal benefit.

G.L. c. 156D, § 2.02(b)(4).

Practice Note

A similar exculpatory provision was also permitted under G.L. c. 156B. These provisions may be helpful in attracting persons to serve as directors of Massachusetts business corporations.

Indemnification

Sections 8.50 through 8.59 of the act address the circumstances under which a corporation may indemnify its directors and officers from liabilities incurred as a result of serving in such capacities. A corporation may provide in advance for indemnification of its directors and officers, and agree to reimburse expenses permitted by the act, in its articles of organization or bylaws or in a separate agreement. The effect of including indemnification provisions in the articles of organization is that an amendment to the articles of organization generally would be needed to change the indemnification terms.

Power of Directors to Create Classes or Series of Stock

The articles of organization must set forth the number of authorized shares. G.L. c. 156D, § 2.02(a). If the corporation has more than one class or series of shares, the articles of organization must—before the issuance of any shares of a class or series—prescribe the number of authorized shares as well as the preferences, limitations, and relative rights of the class or series. (The articles of organization may include a provision that permits the directors to approve the number of shares and each of these attributes of the class or series. G.L. c. 156D, § 6.02(a).) The articles of organization may also include a provision that permits the directors to reclassify any unissued shares into one or more existing or new classes or series. G.L. c. 156D, § 6.02(b).

The aggregate number of shares designated by the board of directors may not exceed the total number of shares authorized by the articles of organization. If the directors determine the preferences, limitations, or relative rights of a class or series of shares, or reclassify any unissued shares, the corporation must file articles of amendment with the secretary of the Commonwealth. G.L. c. 156D, § 6.02(c), (d).

Practice Note

These provisions would permit the directors to finalize arrangements for the capitalization of the corporation after the corporation is organized.

Miscellaneous Other Provisions

The act contains a number of other options that are available only if appropriate provisions are included in the articles of organization. *See* Comments of the Working Group of the Task Force on the Revision of the Massachusetts Business Corporation Law (hereinafter "Drafters' Comments") § 2.02. These include

- giving the shareholders power to issue shares (G.L. c. 156D, § 6.21);
- allowing the election of directors by cumulative voting (G.L. c. 156D, § 7.28), which permits minority shareholders to increase their voting power to elect directors;
- allowing the election of certain directors by classes or series of shares (G.L. c. 156D, § 8.04), which likewise permits minority shareholders or certain investors to obtain representation on, or at least influence the composition of, the board of directors;
- allowing the staggering of terms of directors (G.L. c. 156D, § 8.06); and
- providing for more than one vote or less than one vote per share (G.L. c. 156D, § 7.21).

Supplemental Provisions

The following supplemental information is included in, but is not a permanent part of, the articles of organization.

- *Street Address of the Initial Registered Office and Name of the Initial Registered Agent at the Registered Office*. Under the new act, unlike G.L. c. 156B, every Massachusetts corporation must have a registered office in Massachusetts and a registered agent at that office. The registered agent may be an individual, a domestic corporation, or a qualified foreign corporation. The registered agent is the corporation's agent for service of process and notices. G.L. c. 156D, § 5.04.
- *Name and Address of the Initial Directors, President, Treasurer, and Secretary*. An individual may hold more than one office. The address to be included in the articles of organization must be a home or business street address. Post office boxes are not sufficient. If the corporation has eliminated the board of directors under Section 7.32 of the act (an option that is discussed below), the articles of organization must specify the persons who will exercise the powers of the directors.
- *Initial Fiscal Year End of the Corporation*. The corporation may elect a fiscal year that accommodates its business cycle. (Note that under the Internal Revenue Code, S corporations and personal service corporations are limited in selecting a fiscal year other than the calendar year, unless they establish a business purpose for the noncalendar year.)
- *Brief Description of the Type of Business in Which the Corporation Is to Be Engaged*. This is not the same as the description of the purposes of the corporation, which, as discussed above, is no longer required.
- *Street Address Where the Records Required to Be Kept in the Commonwealth Are Located*. Section 16.01 of the act requires a corporation to keep certain records within the Commonwealth, including
  - the corporation's current articles of organization and current bylaws;
  - resolutions of the directors creating one or more classes or series of shares and fixing their relative rights, preferences, and limitations, if shares pursuant to those resolutions are outstanding;
  - minutes and consents showing shareholder action for the past three years;
  - written communications, including financial statements, provided to shareholders generally for the past three years;
  - names and business addresses of directors and officers; and
  - the most recent annual report filed with the secretary of the Commonwealth.

G.L. c. 156D, § 16.01(e).

The supplemental information described above can ordinarily be changed by filing appropriate statements of change with the secretary of the Commonwealth. *See* 950 C.M.R. § 113.17.

§ 7.2.5 Bylaws

The bylaws, which set forth provisions for the operation of the corporation, "may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of organization." G.L. c. 156D, § 2.06(b). Bylaws have been described in case law as a contract or in the nature of a contract among the shareholders, directors, and the corporation. *See Bushway Ice Cream Co. v. Fred H. Bean Co.*, 284 Mass. 239, 244–45 (1933); *ER Holdings, Inc. v. Norton Co.*, 735 F. Supp. 1094, 1097 (D. Mass. 1990).

The act contains some options that are available to a corporation only if included in the articles of organization or bylaws. If a particular matter is not covered in the bylaws, in many cases the act will provide the default rule.

Subjects commonly addressed by bylaws include

- the election of directors and officers,
- the manner in which shareholders and directors take their respective actions,
- matters relating to share ownership, and
- indemnification of directors and officers.

The following matters are often addressed in bylaws.

(a) *Shareholders*

The bylaws ordinarily address

- when and how the annual and special meetings of shareholders will be held,
- voting requirements to take shareholder action,
- proxies, and
- shareholder action by written consent.

Under the act, the bylaws must include the date, or method of fixing the date, of the annual shareholders' meeting. (That date no longer must be within six months after the end of the fiscal year, as was required by G.L. c. 156B.) The bylaws may specify the place, or manner of determining the place, of the annual meeting or special shareholders' meeting. If no place is specified or fixed under the bylaws, such meetings are to be held at the principal office of the corporation. G.L. c. 156D, §§ 7.01, 7.02.

Under the act, shareholders may participate in shareholders' meetings by remote communication—for example, by conference telephone—as authorized by the board of directors. G.L. c. 156D, § 7.08. Meetings of shareholders of a nonpublic Massachusetts corporation may be held completely by remote means if the directors approve. If shareholders do participate in a meeting by remote means, the corporation must implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a shareholder

or proxyholder. The corporation must also provide shareholders and proxyholders participating remotely in the meeting with a reasonable opportunity to participate in the meeting and vote on matters submitted to the shareholders, including an opportunity to read or hear the proceedings substantially concurrently with the proceedings. G.L. c. 156D, § 7.08.

The statute does not specify what might be considered "reasonable measures" for verification or a "reasonable opportunity" for participation. The drafters of the act indicated their intention to incorporate a certain degree of flexibility in the application of Section 7.08, to accommodate the development of new conferencing technologies:

> [I]t is not required that shareholders be able to hear the proceedings at a meeting if they can read them, which would allow for the use of Internet chat rooms or their equivalent. The specific procedures to be used at such meetings are to be determined by the directors. Because appropriate technologies are certain to evolve constantly, flexibility to take advantage of new developments is implicit in the language of the section.

Drafters' Comments § 7.08.

With respect to voting by shareholders, the new act speaks in terms of "voting groups" of shareholders. A voting group is all shares of one or more classes or series that are entitled to vote on a matter. For matters other than the election of directors, if a quorum of a voting group is present, the group's vote on an action will be considered favorable if the votes favoring the action exceed the votes opposing the action, unless a greater number of affirmative votes is required by the act, the articles of organization, the bylaws, or an appropriate resolution of the directors. G.L. c. 156D, § 7.25(c). (The new act differs from G.L. c. 156B in that abstentions are ordinarily not counted as negative votes.)

Unless otherwise provided by the articles of organization or bylaws, directors are elected by a plurality of the votes cast at a meeting at which a quorum is present. G.L. c. 156D, § 7.28. That is, the candidates with the largest number of votes are elected as directors.

Shareholders may vote in person or by proxy. Under the new act, proxies are valid for eleven months unless the bylaws provide otherwise, or unless a longer or shorter period is provided in the proxy. Under the act, if the shareholders take action by one or more written consents, the consents must bear the date of the shareholders' signatures and be delivered to the corporation within sixty days of the earliest dated consent delivered to the corporation. G.L. c. 156D, § 7.04(a).

(b) *Directors*

The bylaws ordinarily address

- the method of fixing the number of directors and their election,

- where and how regular and special meetings of the directors are held,
- voting requirements to take director action,
- director action by written consent,
- removal of directors and the filling of vacancies on the board of directors, and
- establishment of committees by the board of directors.

Section 8.25 of the act contains a list of powers that may not be delegated to a committee. According to Section 8.25, a committee may not

- authorize distributions;
- approve actions that the act requires be approved by shareholders;
- change the number of directors, remove directors, or fill vacancies on the board;
- adopt certain amendments to the articles of organization that may be adopted by the board;
- amend bylaws; or
- approve a reacquisition of shares by the corporation, except pursuant to a method prescribed by the board.

G.L. c. 156D, § 8.25(e).

(c) *Officers*

The bylaws ordinarily identify the officers of the corporation, describe their duties, and address how they are elected, appointed, removed, and replaced.

The corporation must have a president, a treasurer, a secretary, and any other officers described in the bylaws or appointed by the board in accordance with the bylaws. G.L. c. 156D, § 8.40(a). If authorized by the bylaws or the board, an officer may appoint one or more other officers. G.L. c. 156D, § 8.40(b). Each officer has the duties set forth in the bylaws or, if consistent with the bylaws, the duties prescribed or directed by the board of directors or by an officer authorized to prescribe duties.

(d) *Indemnification*

The bylaws may include provisions for indemnification of directors or officers for claims against them in their capacities as directors or officers. (The act contains, in Sections 8.50 through 8.59, more detailed provisions and different standards for indemnification than those set forth in G.L. c. 156B.)

Section 8.51 of the act sets forth the standard of conduct that would permit the corporation to indemnify a director or officer. The section indicates that a corporation may indemnify a person who is a party to a proceeding because he or she was a director or an officer if the person

- conducted himself or herself in good faith;
- reasonably believed that his or her conduct was in, or at least not opposed to, the best interests of the corporation; and
- had no reasonable cause, in a criminal proceeding, to believe his or her conduct was unlawful.

G.L. c. 156D, §§ 8.51(a), 8.56(a).

The corporation may also indemnify a director for conduct covered by an exculpatory provision in the articles of organization pursuant to G.L. c. 156D, § 2.02(b)(4), which permits charter provisions eliminating directors' personal liability for monetary damages for certain breaches of fiduciary duty. Through bylaws, articles of organization, or a directors' resolution or contract, the corporation may indemnify its officers to a further extent than is permitted for directors, except that it may not indemnify officers for liability arising out of acts or omissions not in good faith or involving intentional misconduct or a knowing violation of law. G.L. c. 156D, § 8.56(a).

The act requires indemnification of a director who is "wholly successful . . . in the defense of any proceeding to which he was a party because he was a director." G.L. c. 156D, § 8.52. Indemnification is limited to the amount of the director's "reasonable expenses."

The corporation may advance expenses incurred by a director or an officer if the director or officer has delivered

- an affidavit that he or she has met the applicable standard of conduct under G.L. c. 156D, § 8.51 or the proceeding involves conduct for which liability has been eliminated pursuant to a charter provision under G.L. c. 156D, § 2.02(b)(4); and
- an undertaking to repay any advances if it is later determined that the director or officer is not entitled to indemnification.

G.L. c. 156D, §§ 8.53, 8.56.

The corporation may not indemnify a director or an officer under Section 8.51 unless the corporation determines in a specific proceeding that indemnification is permissible because the director or officer has met the relevant standard of conduct under Section 8.51. In addition, the act requires that indemnification or advancement of expenses be authorized, and in each case specifies who (disinterested directors, disinterested shareholders, special legal counsel) may make such determination or authorize the indemnity or advancement. G.L. c. 156D, §§ 8.53, 8.55. The corporation may also obligate itself in advance to provide indemnification or advance expenses, either through its articles of organization or bylaws or by a resolution or contract approved by the directors or shareholders. G.L. c. 156D, § 8.58.

(e) *Other Bylaw Provisions*

The bylaws may include provisions addressing share certificates, such as how share certificates may be transferred and how lost or destroyed certificates may be replaced. The act indicates that if the corporation has share certificates, the share certificates shall be signed by two officers designated in the bylaws or by the board of directors. G.L. c. 156D, § 6.25(d).

The bylaws usually include provisions regarding how the bylaws may be amended. The shareholders have the power to amend the bylaws. The articles of organization or bylaws adopted pursuant to an authorization in the articles of organization also may permit the directors to amend bylaws, except with respect to any provision that, under the act, the articles of organization, or the bylaws, requires action by the shareholders. G.L. c. 156D, § 10.20(a). If the directors act to amend the bylaws, notice must be given to all shareholders entitled to vote on amending the bylaws. G.L. c. 156D, § 10.20(b). Such notice must be given not later than the time of giving notice of the shareholders' meeting next following the amendment. The shareholders may amend or repeal any action taken by the directors.

> **Practice Note**
> Section 1.41 of the act expressly permits various types of notices, including notices by electronic transmission, telephone, and voice mail, in addition to traditional forms of personal delivery and mail by the postal service. The act also permits consents by shareholders and directors to be given by electronic transmission. G.L. c. 156D, §§ 7.29, 8.21. Bylaws should be drafted to permit as much flexibility in giving notices and obtaining consents as the client wishes.

See **Exhibit 7C** for sample bylaws.

§ 7.2.6 Actions of the Initial Directors

There are several actions that the initial directors may consider as part of the organization of a new corporation. These include

- adoption of bylaws,
- election of initial officers,
- approval of a form of share certificate,
- authorization of the issuance of shares and debt instruments,
- approval of a corporate seal (although a seal is not required by the act),
- approval of resolutions with respect to bank accounts,
- authorization of an S corporation election (only if S corporation status is desired), and
- other initial business.

Unlike G.L. c. 156B, which more strictly prescribed the organizational actions to be taken by the incorporators and the actions to be taken by the directors, the new act allows flexibility in determining whether the incorporators or directors will take many of these actions. The directors may take these actions through a directors' meeting, of which notice should be given and minutes kept, or by unanimous written consent of the directors.

As part of their initial actions, the directors may need to consider the amounts and types of investments to be received by the corporation, as well as whether shares of stock or debt instruments will be issued in exchange for such investments. The corporation may acquire an ongoing business, or business assets, or enter into specific financing arrangements that should be considered by the directors and authorized as part of their initial actions. The directors' actions may include setting preferences and relative rights of authorized shares and other actions to accommodate the corporation's initial investment and financing transactions.

The corporation will usually wish to establish with a bank, as early as possible, a depository account, a checking account, and possibly a borrowing relationship. As part of opening the account, the bank will usually require that the corporation submit a secretary's certificate documenting that certain banking resolutions have been adopted that address, among other things, who on behalf of the corporation may have access to the bank account or negotiate checks. The directors may want to adopt these bank resolutions as part of their initial actions.

If the shareholders wish to elect S corporation status, discussed below, the shareholders and the corporation need to execute an IRS Form 2553 (Election by a Small Business Corporation), available at http://www.irs.gov.

Practice Note

If the election is to be effective with the tax year that begins upon incorporation, Form 2553 must be filed within a very short time after incorporation. Therefore, the directors should consider whether to make this election as part of their initial actions.

A sample directors' consent is included as **Exhibit 7D**.

§ 7.2.7 Capital; Share Certificates

The number of authorized shares is set forth in the articles of organization. If the corporation has more than one class or series of shares, the distinguishing description and preferences, limitations, and relative rights may be described in the articles of organization, or the articles of organization may permit the directors to do so. G.L. c. 156D, § 6.02. If the directors determine the preferences, limitations, or relative rights of a class or series of shares, the corporation must file articles of amendment before any such shares are issued. If a corporation has more than one class or series of shares, there at least must be one or more classes or series that together have unlimited voting rights, and one or more classes or series that together may receive the net assets of the corporation upon dissolution. G.L. c. 156D, § 6.01.

The board of directors authorizes the issuance of shares, except to the extent such power is reserved to the shareholders in the articles of organization. G.L. c. 156D, § 6.21. As part of this authorization, the directors must determine the consideration for which the shares are to be issued. The act permits shares to be issued for almost any type of tangible or intangible property or benefit to the corporation, including cash, notes, services performed, or contracts for services to be performed. In order for the shares to be validly issued, it is important that the directors determine that the consideration received or to be received is adequate. G.L. c. 156D, § 6.21(c). The directors may, as part of the initial actions described above, authorize the initial issuance of shares and consideration for such shares, or accept a subscription agreement.

There are a number of tax issues that the client should consider when planning for the capitalization of the corporation, a detailed discussion of which is beyond the scope of this publication. One issue to consider is the status of any gain or loss on the contribution of property to the corporation in exchange for shares. Internal Revenue Code Section 351 provides that no gain or loss is recognized if property is transferred to a corporation by one or more persons solely in exchange for stock and immediately after the exchange such persons are in control of the corporation. Control means the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of the corporation. I.R.C. §§ 351(a), 368(c). For this purpose, property transferred to the corporation does not include services by the transferor and certain other assets. If the transferor is not part of the control group, or if property other than stock is received, there may be recognition of gain.

There are other income tax issues that must be considered in connection with the issuance of shares. If shares of stock are to be issued for services or to an employee, attention must be given to the possibility of compensation income. Special attention must be given to the tax rules and elections available to any service provider who gets shares subject to restrictions that may lead to forfeiture. If an S corporation plans to issue debt, consideration must be given to the safe harbor rules under the federal Internal Revenue Code to avoid having a disqualifying second class of stock.

Shares may be represented by certificates or may be uncertificated. Under the act, any stock certificate must, at a minimum, name the issuing corporation, state that it is organized under the laws of the Commonwealth of Massachusetts, and identify the person to whom the certificate is issued and number of shares and description of class or series of shares represented by the certificate. G.L. c. 156D, § 6.25.

If there is more than one class or series of shares, the certificate must summarize the variations in rights, preferences, and limitations applicable to each class and series or the power of the directors to determine variations for any future class or series. G.L. c. 156D, § 6.25(c). Instead of a summary, the certificate may state conspicuously that the corporation will furnish such information on written request and without charge. Any share transfer restrictions also must be noted conspicuously on the share certificates. G.L. c. 156D, § 6.27(b); G.L. c. 106, § 8-204. Certificates must be signed by two officers designated in the bylaws or by the directors.

The directors may authorize issuance of shares without certificates. In such a case, the corporation must send a written information statement to the shareholder with the information described above, including relative rights and transfer restrictions. G.L. c. 156D, § 6.26.

§ 7.2.8 Shareholder Agreements

Shareholders may, other than in the bylaws or in the articles of organization, agree on various matters relating to ownership of shares, including voting, distributions, and transfer restrictions. The act permits the establishment of voting trusts, conferring on a trustee the right to vote shares. G.L. c. 156D, § 7.30. The act contains no specific term limitation for such voting trusts. The act also permits some or all of the shareholders to enter into a voting agreement with respect to voting of their shares. G.L. c. 156D, § 7.31. Such an agreement would be specifically enforceable.

Investors may wish to keep the ownership of the corporation within the founding group or to avoid having their ownership interests diluted. The act permits the adoption of share transfer restrictions, which may appear in the articles of organization, the bylaws, or a shareholders' agreement. A restriction may also be desirable, for example, to maintain the corporation's status if it is dependent on the number or identity of shareholders (e.g., S corporation status) or to preserve exemptions under federal or state securities laws. The act specifically permits share transfer restrictions that would require a shareholder to offer the shares to the corporation or other persons first or obligate the corporation or other person to acquire the shares. G.L. c. 156D, § 6.27. If not manifestly unreasonable, a restriction may require the corporation's shareholders of any class or another person to approve a proposed transfer of shares, or prohibit the transfer of shares to a designated person or class of persons. G.L. c. 156D, § 6.27.

Practice Note

As mentioned above, share transfer restrictions must be conspicuously noted on the certificate. G.L. c. 156D, § 6.27(b).

Under the act, shareholders ordinarily do not have preemptive rights—that is, rights given to existing shareholders to acquire a proportional amount of shares to be issued by the corporation—unless provided in the articles of organization or a contract to which the corporation is a party.

Practice Note

While preemptive rights can protect an existing shareholder from being diluted in voting or economic rights, care should be taken in any preemptive rights provision to clearly address how and when preemptive rights may be exercised, as well as those issuances to which preemptive rights will not apply.

The act permits the corporation to issue options to purchase shares on terms approved by the directors. G.L. c. 156D, § 6.24. Development of a stock option plan requires consideration of various tax and securities law issues and limitations that are

beyond the scope of this publication, in connection with which approval by the shareholders may also be required.

§ 7.2.9 Section 7.32 Agreements

The new act includes a provision, Section 7.32, which permits shareholders of closely held corporations to agree on any matters relating to the operation of the corporation that are not addressed in the act. This section permits the corporation to adopt a management structure of almost any type, subject to public policy, including one that is typical of a partnership.

Among the things that are expressly permitted in a Section 7.32 agreement are provisions

- to eliminate the board of directors;
- to establish who will be directors or officers;
- that govern the exercise by directors of voting power, including use of director proxies; and
- that require dissolution at the request of one or more shareholders.

The agreement may be contained in the articles of organization, in the bylaws, or in an agreement signed and approved by all persons who are shareholders at the time of the agreement. To the extent these agreements include provisions that are not otherwise permitted under the act, Section 7.32 requires that the agreement expire in ten years, unless otherwise provided for in the agreement, and that the existence of the agreement be included in legends on share certificates.

§ 7.2.10 Maintenance, Operation, and Compliance

(a) *Federal Employer Identification Number*

After the corporation is organized, it may apply for a Federal Employer Identification Number on IRS Form SS-4. It is advantageous for the corporation to have such a number at the time the corporation establishes its bank account, which a corporation usually needs or wants to have as early as possible. The Internal Revenue Service has procedures to obtain a Federal Employer Identification Number on an expedited basis.

(b) *S Corporation Status*

The corporation and its shareholders must decide whether to elect S corporation status for federal income tax purposes. Income of corporations that are S corporations is ordinarily not taxed at the entity level, but instead at the shareholder level, for federal income tax purposes, and tax attributes can generally be passed through to the shareholders.

Practice Note

S corporation status can be attractive to a corporation that may at some point sell its assets, including goodwill, because of the single level of federal income taxation.

The tax treatment of S corporations is not the same for Massachusetts tax purposes. Depending on receipts, an S corporation may be taxed in Massachusetts on its net income.

There are a number of restrictions on eligibility for S corporation status under the federal Internal Revenue Code. These include limitations on the number and type of shareholders, and the requirement that there be a single class of stock. Shareholders of an S corporation may not include nonresident aliens.

If a corporation wishes to be an S corporation from the date of incorporation, the S corporation election on IRS Form 2553, properly signed by the corporation and its present and former shareholders, must be filed within two months and fifteen days after incorporation.

(c) *Annual Reports*

A Massachusetts corporation must file an annual report with the secretary of the Commonwealth, along with the appropriate filing fee, currently $125 (if filed electronically, $100 plus a $10 expedite fee), within two and one-half months after the end of the corporation's fiscal year. The information in the annual report, which can be on a form supplied by the secretary of the Commonwealth, must be current as of the date the report is executed. Failure to timely file annual reports can lead to the involuntary dissolution of the corporation.

(d) *Qualification in Foreign Jurisdictions*

A Massachusetts corporation that is transacting business in another state may be required to qualify to do business there. Most state foreign-corporation statutes require application for authority to do business, which will likely require a standing certificate from the secretary of the Commonwealth and payment of an appropriate fee.

Many foreign corporation statutes include a list of activities that in and of themselves would not require qualification. There is also a body of common law that addresses activities, for example, in interstate commerce, that do not require qualification.

Practice Note

A Massachusetts corporation qualified in a foreign state must comply with the foreign state's requirements for corporate and tax reporting. Foreign-state statutes that require qualification impose various consequences for failure to qualify when required to do so, ranging from inability to use the foreign state's courts to more serious consequences.

(e) *Maintenance of Records; Provision of Financial Statements*

The new Massachusetts Business Corporation Act requires that a Massachusetts corporation keep as permanent records all minutes of meetings or other records of actions by the shareholders, directors, and committees of the board of directors, as well as a record of the corporation's shareholders, showing the number and class of shares held by each shareholder. G.L. c. 156D, § 16.01. These records may be maintained in a nonwritten format if they are capable of conversion to a written form within a reasonable time.

The act permits a copy, a facsimile, or other reliable reproduction of a vote, a consent, or a waiver of a shareholder, or proxy appointment, to be substituted in lieu of the original in the corporate records. G.L. c. 156D, § 7.29(b). These records are typically assembled in a corporate record book. Share transfer information may be assembled in a corporate record book or kept as part of a separate stock ledger.

The act lists certain records that must be kept in the Commonwealth at the corporation's principal office or the office of its transfer agent, secretary, or registered agent. Such records include the corporation's current

- articles of organization;
- bylaws;
- director resolutions creating one or more classes of shares and fixing their relative rights, preferences, and limitations if such shares are outstanding;
- minutes and other records of shareholder actions for the prior three years;
- written communications to shareholders within the prior three years;
- names and business addresses of directors and officers; and
- annual report filed with the Massachusetts secretary of state.

G.L. c. 156D, § 16.01(e). These records must be available for inspection by shareholders. G.L. c. 156D, § 16.02.

The new act requires the corporation to furnish annual financial statements to shareholders upon request. *See* G.L. c. 156D, § 16.20. Such financial statements may consist of copies of federal tax returns or other reasonable comparable information where the corporation does not prepare balance sheets and income statements. If reported on by an independent accountant, the financial statements must include an accountant's report. Otherwise, there must be a certificate from the president or person responsible for the corporation's accounting records stating his or her reasonable belief that the statements were prepared in accordance with generally accepted accounting principles. If prepared on some other basis, the certificate must describe the basis of preparation and any respects in which the statements were not prepared on a basis consistent with the preceding year's statements. The corporation must deliver the statements or notice regarding their availability to each shareholder prior to the earlier of the annual shareholders' meeting or 120 days after the close of the fiscal year.

Practice Note

Section 16.20(d) of the act exempts a corporation from furnishing statements if it can demonstrate a proper purpose for withholding information in those statements. This may be applicable, for example, with respect to a shareholder who is a competitor.

§ 7.2.11 Ongoing Corporate Duties

It is important for the client to understand that for the corporation to continue to provide the benefits of limited liability, the shareholders, directors, and officers must observe corporate formalities. These include making sure that any officer executing agreements or taking other actions clearly does so in his or her capacity as an officer of the corporation. It is wise for the corporation to hold annual shareholder and director meetings to elect directors and officers and to conduct other annual business, with minutes kept, or document such actions by written consent. All corporate minutes, consents, stock records, charter documents, and bylaws should be kept in appropriate corporate record books.

The corporation should maintain bank accounts, corporate books, and accounting records that are separate from those of its principals. To the extent that the corporation transacts business with any director, officer, or shareholder, clear records should be kept showing the parties' respective duties. Any loans made to the corporation by shareholders should be properly documented.

The corporation should make sure it timely files its annual reports with the secretary of the Commonwealth, maintains its registered office and registered agent in Massachusetts, and otherwise complies with its reporting responsibilities.

Directors and officers must be aware of their duties, which arise under the act and under common law, when they take actions on behalf of the corporation. A director or officer must act in good faith, with the care that a person in a like position would reasonably believe appropriate or would reasonably exercise under similar circumstances and in a manner believed to be in the best interests of the corporation. G.L. c. 156D, §§ 8.30, 8.42. Directors and officers without independent knowledge may rely on information from officers, employees, and certain professionals under appropriate circumstances. G.L. c. 156D, §§ 8.30, 8.42.

The act includes new provisions, in Section 8.31, indicating that a transaction between the corporation and any director who has an interest in the transaction is not voidable if certain requirements are satisfied; these requirements generally involve disclosure and approval by disinterested directors or shareholders. A director who approves a distribution to shareholders must be aware of the new standards in the act, in Section 6.40, governing when distributions may be authorized. A director who does not exercise the appropriate care in authorizing distributions may be liable for amounts that exceed the amounts that could properly be distributed. G.L. c. 156D, § 6.41.

There can often be an overlap of the record-keeping and reporting responsibilities performed by the corporation's counsel, accountant, and officers. It is important to be clear from the outset who will perform such responsibilities as

- filing annual reports,
- obtaining tax identification numbers,
- making tax registrations and elections,
- maintaining corporate and stock records, and
- notifying shareholders regarding financial statements.

Practice Note
Accountability is particularly important for actions, such as S corporation elections, that are deadline sensitive. It is important to communicate clearly to all interested parties as to each party's expected duties.

§ 7.2.12 Professional Responsibility

Because the organization of a business entity will typically involve more than one person, each with differing interests, it is important for counsel to identify whose interests are represented and when others should be advised to obtain independent counsel.

A lawyer retained by a corporation represents the corporation acting through its representatives, including directors and officers. Rule 1.13(g) of the Massachusetts Rules of Professional Conduct indicates that under appropriate conditions, which may include the need for consent pursuant to Mass. R. Prof. C. 1.7, a lawyer representing the corporation may represent any of its shareholders, directors, or other constituents. Under Rule 1.7, a lawyer generally may not represent a client if that representation will be directly adverse to another client or if the representation may be materially limited by the lawyer's responsibilities to another client. Such representation is permitted, however, if the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and each client gives informed consent, confirmed in writing.

Rule 1.13(f) of the Massachusetts Rules of Professional Conduct indicates that in dealing with a corporation's directors, officers, or shareholders, the lawyer for the corporation must explain the identity of the client when it is apparent that the corporation's interests are adverse to those of the constituents with whom the lawyer is dealing. Rule 1.13 also indicates that if a lawyer for a corporation

> knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a

> violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Mass. R. Prof. C. 1.13(b). Measures to be taken in such a situation may include referring the matter to a higher authority within the corporation.

There are other rules that bear on various aspects of a lawyer's representation of a corporate client, including those relating to protection of the attorney-client privilege. It is important that counsel be sensitive to the potentially conflicting interests of others and be clear in advising others where separate representation is appropriate.

§ 7.3 ORGANIZING A MASSACHUSETTS LIMITED LIABILITY COMPANY

§ 7.3.1 Introduction

The Massachusetts Limited Liability Company Act, G.L. c. 156C (the Act), like the limited liability company statutes of most states, offers tremendous flexibility in structuring the economic and management arrangements among the members of an LLC. The Act does not require that the members of an LLC have a written agreement or "charter" document, other than a certificate of organization that does not usually contain a comprehensive statement of the rights and duties of the members. However, the Act contains "default provisions" that define certain rights and duties should the members fail to do so, and such provisions are often inconsistent with the arrangements the members would desire in a particular circumstance. Furthermore, the Act provides that certain types of obligations among the members and managers of an LLC must be embodied in a written agreement or other instrument. Accordingly, it is advisable in nearly all cases for the members to adopt a comprehensive agreement (known as an "operating agreement" or "limited liability company agreement") that reflects a collective understanding of the relationships among the members and the managers, and how the LLC will operate.

This chapter discusses the formation of an LLC and the preparation of the operating agreement and includes four sample operating agreements. As will become apparent, formation of a limited liability company in Massachusetts and drafting its certificate of organization are simple matters, but defining the relationships among the members and, if applicable, the managers, and drafting the operating agreement that embodies such arrangements are not.

§ 7.3.2 Forming a Limited Liability Company

A Massachusetts limited liability company is a creature of statute, and does not have a legal existence until a "certificate of organization" for the LLC is executed and filed in the Office of the Secretary of the Commonwealth. This certificate must be executed

by one or more "authorized persons," who do not have to be members or managers of the entity. The certificate of organization must be filed in duplicate (at least one manually signed copy and one either duplicate original or photocopy) with a filing fee of $500.

The LLC is formed when the initial certificate of organization is filed or at a later date specified in the certificate, once the LLC has substantially complied with the requirements of Section 12 of the Act. An LLC formed under the Act is a separate legal entity, the existence of which continues until cancellation of the LLC's certificate of organization.

The information required in a certificate of organization is very limited, but a certificate of organization may contain any additional information as the organizers deem appropriate. See § 7.3.2(b), Certificates of Organization, below, for a description of the information required in the certificate.

(a) *Drafting Considerations*

Preparing the operating agreement for an LLC presents many challenges for the drafter, because the members have many options to choose from for structuring the economic and management arrangements of the LLC and its members. Because the practitioner has the ability to include provisions traditionally associated with either partnerships or corporations, it is extremely important to consider the particular needs of each entity and its owners, as well as applicable tax considerations. In most cases, it is the drafter of the operating agreement who describes for clients the many alternatives available to clients. In this way, the drafter is actively involved in structuring the entity, and the economic, tax, and business arrangements of its owners.

Certain fundamental tax principles must be considered when advising clients and preparing an operating agreement. In nearly all cases, the owners of an LLC want it to be classified as a partnership rather than an association that is taxable as a corporation for federal and state income tax purposes. On January 1, 1997, the so-called check-the-box rules became effective, enabling many types of unincorporated business entities, including LLCs, to elect pass-through tax classification for federal income tax purposes. Prior to the adoption of the check-the-box rules, to be classified as a partnership, an LLC was required to have no more than two of the following four "corporate characteristics":

- limited liability,
- continuity of life,
- centralization of management, and
- free transferability of interests.

In some cases, the members had to modify business arrangements in order to assure that the LLC lacked at least two of these characteristics.

Practice Note

Practitioners should be aware that several states employ different schemes for taxing LLCs and their members (e.g., entity-level taxation on income), so for LLCs that expect to conduct operations in states other than Massachusetts, it is always important to check the laws of those states to determine how they tax LLCs.

This chapter provides examples of LLC organizational documents and discusses some of the numerous issues that must be considered by the drafter of an operating agreement. Each of the agreements is annotated to highlight items of particular concern, explain underlying tax and business considerations associated with certain provisions, and describe some of the default provisions in the Act.

Four LLC operating agreements and their associated certificates of organization are included as **Exhibits 7E** through **7H**. All four operating agreements assume a common fact pattern and describe LLCs intended to be classified as partnerships for tax purposes. Each agreement assumes that there are four LLC members. The business of each LLC is to own, operate, and develop real estate and related interests. However, with the exception of the purpose clauses in the sample operating agreements and certificates of organization, the agreements are not customized to any particular type of business and, with minor modifications, may be used in almost any other context.

Following the four operating agreements are three additional items: a list of the default provisions in the Act (**Exhibit 7I**), a list of certain mandatory provisions in the Act (**Exhibit 7J**), and a list of arrangements among the members that must be embodied in a writing (**Exhibit 7K**).

(b) *Certificates of Organization*

Each of the sample certificates of organization contains only the minimum amount of information required by the Act and the regulations promulgated thereunder (950 C.M.R. § 112.00), as follows:

- the federal employer identification number for the LLC, if available;
- the name of the LLC;
- the street address of the office of the LLC in the Commonwealth where its records are maintained;
- the business of the LLC;
- the date of dissolution of the LLC;
- the name and business address of the LLC's agent for service of process;
- the name and business address of the managers (if any) of the LLC;
- the name and business address of those persons authorized to execute, deliver, and file on behalf of the LLC instruments with the secretary of the Commonwealth; and

- if desired, the name and business address of those persons authorized to execute, deliver, and file on behalf of the LLC instruments affecting the LLC's real estate interests.

As a result, the certificates for all four LLCs are similar and brief. Additional information may be included in a certificate of organization, but in most cases that is undesirable. First, the members may not want to disclose the arrangements among themselves as a matter of public record. Second, the Act requires the certificate of organization to be amended to reflect any changes in the information contained therein: the more information that is contained in the certificate, the more likely it is that the certificate will need to be amended.

In limited circumstances, optional information is included to put third parties "on notice" of particular facts or circumstances. For example, if certain actions may not be taken by the LLC without the prior approval of certain members, those members may wish to reflect such restrictions on the LLC's authority as a matter of public record.

In rare cases, members may wish to file the entire operating agreement to ensure that any amendments thereto would necessitate filing with the government. Additionally, in such cases the secretary of the Commonwealth can certify copies of the operating agreement.

§ 7.3.3 The Operating Agreements

(a) *Partnership Model LLC*

The first model operating agreement in this chapter is for a "Partnership Example LLC," included as **Exhibit 7E**. Partnership Example LLC is owned by four members, one of whom is the manager. The manager controls the day-to-day business and operation of the LLC, and functions in a capacity that is substantially similar to that of a general partner in a limited partnership. Accordingly, the operating agreement resembles a limited partnership agreement in many respects.

Each of the members has contributed cash to the LLC and has no further capital contribution obligations. Distributions of available funds are made to the members in the following order: first, to pay to them a "priority return" on their capital contributions; second, to return their capital to them; and third, in accordance with their respective "percentage interests." The operating agreement contains comprehensive tax allocation provisions to ensure that profits and losses of the LLC for tax purposes are allocated in a manner that will effect the foregoing cash distributions.

The members have approval rights over a few specifically enumerated actions, but otherwise they do not participate in the business of the LLC.

Interests of the members can only be transferred with the approval of the manager, while the manager's interest may be transferred only with the approval of the other members.

In Partnership Example LLC, the manager's interest was structured for business reasons to look like the general partner's interest in a limited partnership. Depending on the LLC's business terms, the manager's interest could be structured differently. For example, the manager does not need to have any economic interest in the LLC.

(b) *Corporate Model LLC*

The second example operating agreement for "Corporate Model LLC" is included as **Exhibit 7F**. Management of Corporate Model LLC is intended to be substantially similar to the management of a corporation. The members elect a board of managers, much as stockholders elect a board of directors in the corporate context. The members of the board of managers are not required to be members of the LLC (although here, one of them is). The board of managers manages the business and operations of the LLC, and may elect officers (president, treasurer, clerk, etc.). The members are not entitled to participate in the conduct of the LLC or its business, except for the exercise of veto rights in limited circumstances.

Article VI of the agreement contains provisions for the election and removal of officers and managers. It also cross-refers to the Delaware General Corporation Law to define the authority of the managers, comparing their duties and authority to those of corporate directors. Article VI also defines the authority of the officers, and contains numerous provisions modeled after corporate bylaws. Because the Act does not address the concept of LLC "officers," the operating agreement must precisely define their roles and authority.

The managers of Corporate Model LLC are parties to the operating agreement, so that they can acknowledge their contractual obligations to the LLC and its members and the restrictions on the managers' authority contained in the operating agreement. It may not be strictly necessary for managers to be parties to the operating agreement. To be more analogous to the corporate model, managers would not be parties to the agreement (just as directors are not parties to charters, bylaws, stockholder agreements, and similar organizational documents of a corporation). However, persons serving as directors of corporations have duties that are well defined by statutory and case law. By contrast, the law governing the operation of LLCs is less well developed and the case law is sparse. Accordingly, it may be beneficial—although not technically required—for managers to execute and deliver the operating agreement.

Each of the members of Corporate Model LLC has contributed cash to the LLC. Distributions of available funds are made to the members: first, to pay to them a "priority return" on their capital contributions; second, to return their capital to them; and third, in accordance with their respective "percentage interests." In Corporate Model LLC, the managers do not share in distributions of available cash. The operating agreement has comprehensive tax allocation provisions, and profits and losses of the LLC for tax purposes are allocated in a manner intended to give effect to the above-described cash distributions.

Interests of the members may be transferred only with the approval of the board of managers. Special restrictions apply when the transferring member is a manager.

(c) *Shortform Associates LLC*

Shortform Associates LLC is a member-managed LLC controlled by members owning a majority of the "percentage interests" therein (see **Exhibit 7G**). Certain decisions require the approval of a greater number or percentage of the members. Because Shortform Associates LLC is a member-managed entity, its operating agreement looks much like a general partnership agreement, with all of the owners of the entity participating in the day-to-day management and operation of its business.

Each of the members has made certain initial capital contributions, and has an obligation to make additional contributions in the future. If a member fails to make a subsequent installment, the other members have an option to purchase the interest of the defaulting member for a discounted purchase price.

Distributions of available funds are made to the members: first, to pay to them a "priority return" on their capital contributions; second, to return their capital to them; and third, in accordance with their respective "percentage interests." The operating agreement has abbreviated tax allocation provisions, and profits and losses of the LLC for tax purposes are allocated in a manner intended to give effect to the foregoing cash distributions.

Interests in the LLC may not be transferred without the prior approval of a majority in interest of the nontransferring members; however, without such consent, transfers may be made (1) to certain "permitted transferees," (2) pursuant to a "put provision" exercisable by the estate or legal representative of a deceased member, and (3) pursuant to a "shotgun buy/sell" exercisable by any member after a certain date.

(d) *Shell LLC*

Shell LLC is a member-managed LLC (see **Exhibit 7H**). The operating agreement for Shell LLC is intended to be used as an "interim" agreement that is adopted upon formation of the LLC with the expectation that the agreement would be superseded upon either the admission of investors or the consummation of a negotiated transaction (which would include a more thorough and detailed operating agreement).

In addition, the Shell LLC agreement could be used for the simplest of LLCs: a member-managed LLC in which profit and loss allocations, and cash distributions, are made to the members pro rata, based on their respective capital contributions. However, because the Shell LLC operating agreement does not include any meaningful tax allocation provisions, it is inadequate to use in many contexts, and is certainly unsuitable for a transaction in which special tax allocations of any kind will be made. Note that a tax adviser should be consulted in connection with the organization of any LLC—even one that will operate as simply as Shell LLC.

The management decisions of Shell LLC must be approved by a majority in number of the members (except for certain extraordinary matters, such as continuation of the LLC following dissolution and amendments to the agreement, which require approval by a larger number or majority in interest of the members).

Each of the members has contributed cash to the LLC. No additional capital contributions are required. Distributions of available funds (and profit and loss allocations for tax purposes) are generally made to the members in proportion to their respective capital contributions.

Interests of the members may be transferred only with the unanimous approval of all other members.

§ 7.3.4 Other Provisions

(a) *Default Provisions*

The list of default provisions contained in the Act (see **Exhibit 7I**) is a useful checklist of some of the many items that should be considered when preparing an operating agreement and advising clients as to the many options available to them. It is also helpful to the drafter who is advising clients about how the Act would operate, absent an overriding provision in the operating agreement. It may even be advisable to include provisions in the operating agreement when the arrangements are the same as those contemplated by the default provisions of the Act, because it is possible that in the future the provisions of the Act will be amended. Such an amendment could result in an inadvertent modification of the business arrangements among the members of the LLC.

(b) *Mandatory Provisions*

Although LLCs offer their owners tremendous structural flexibility, there are some limitations on the arrangements that can be used (see **Exhibit 7J**). Certain provisions of the Act are essentially nonnegotiable, and drafters of operating agreements should keep such limitations in mind and advise their clients accordingly.

(c) *Provisions That Must Be in a Writing*

Finally, included as **Exhibit 7K** is a list of the matters the Act requires to be provided in a writing. In some cases the writing must be part of the operating agreement; in other cases, any written instrument is acceptable. In either case, absent a writing, any of the provisions listed may be unenforceable. Such provisions of the Act should always be considered when preparing the operating agreement.

§ 7.3.5 Conclusion

One of the most attractive features of an LLC, its flexibility in the options it offers its owners, can also be one of its most unattractive features—particularly for the careless drafter. Because the operating agreement in most cases defines the economic and management arrangements among the LLC's owners, the drafter must document all such arrangements, anticipate issues and problems before they arise, and provide mechanisms for their resolution. The drafter's task can be daunting, but if the task is

diligently pursued, the drafter can provide a tremendous service to clients, enabling them to achieve their business goals in a tax-efficient manner.

MCLE thanks Joseph C. Hogan III, Virginia Kingsley Kapner, and Sarah A. Rothermel for their earlier contributions to this chapter.

EXHIBIT 7A—Sample Consent of Sole Incorporator

The forms that are included as exhibits in this chapter are prepared for a simple, privately held corporation. They illustrate some, but not all, of the matters discussed in the text. They do not include all of the options available under the Massachusetts Business Corporation Act and may not fit all incorporation situations.

ABC CORPORATION

Consent of Sole Incorporator

The undersigned, acting as sole incorporator to form a Massachusetts business corporation to be known as ABC Corporation, pursuant to the provisions of Massachusetts General Laws Chapter 156D, Section 2.05(b), hereby consents to the following votes:

VOTED: That bylaws in the form attached to this consent be, and such bylaws hereby are, adopted as the bylaws of the corporation.

VOTED: That the number of directors for purposes of incorporation be fixed at two, and that the following directors and officers be, and they hereby are, elected to serve in accordance with law and the bylaws:

Directors: John Doe
James Smith

President: John Doe

Treasurer: James Smith

Secretary: James Smith

VOTED: That the articles of organization of this corporation in the form attached to this consent be executed and filed by the incorporator in accordance with law, and that the board of directors of this corporation heretofore and hereafter elected or appointed be, and such board of directors hereby is, authorized to adopt one or more forms of certificate for the capital stock of this corporation, cause such stock to be issued and otherwise authorize or direct performance of any act or acts deemed by them to be necessary or desirable to effectuate this corporation as a going concern, to secure its capital and any sums which the corporation may desire to borrow and to acquire such assets and to assume or incur such liabilities in such manner as may be necessary or desirable.

Date of Signature: _____

_____
John Doe, Incorporator

EXHIBIT 7B—Sample Articles of Organization

The forms that are included as exhibits in this chapter are prepared for a simple, privately held corporation. They illustrate some, but not all, of the matters discussed in the text. They do not include all of the options available under the Massachusetts Business Corporation Act and may not fit all incorporation situations.

D

The Commonwealth of Massachusetts
William Francis Galvin
Secretary of the Commonwealth
One Ashburton Place, Boston, Massachusetts 02108-1512

FORM MUST BE TYPED **Articles of Organization** FORM MUST BE TYPED
(General Laws Chapter 156D, Section 2.02; 950 CMR 113.16)

ARTICLE I
The exact name of the corporation is:

ABC Corporation

ARTICLE II
Unless the articles of organization otherwise provide, all corporations formed pursuant to G.L. Chapter 156D have the purpose of engaging in any lawful business. Please specify if you want a more limited purpose:

Not applicable

ARTICLE III
State the total number of shares and par value, * if any, of each class of stock that the corporation is authorized to issue. All corporations must authorize stock. If only one class or series is authorized, it is not necessary to specify any particular designation.

WITHOUT PAR VALUE		WITH PAR VALUE		
TYPE	NUMBER OF SHARES	TYPE	NUMBER OF SHARES	PAR VALUE
	275,000			

*G.L. Chapter 156D eliminates the concept of par value, however a corporation may specify par value in Article III. See G.L. Chapter 156D, Section 6.21, and the comments relative thereto.

P.C.

ARTICLE IV

Prior to the issuance of shares of any class or series, the articles of organization must set forth the preferences, limitations and relative rights of that class or series. The articles may also limit the type or specify the minimum amount of consideration for which shares of any class or series may be issued. Please set forth the preferences, limitations and relative rights of each class or series and, if desired, the required type and minimum amount of consideration to be received.

Not applicable

ARTICLE V

The restrictions, if any, imposed by the articles of organization upon the transfer of shares of any class or series of stock are:

None

ARTICLE VI

Other lawful provisions, and if there are no such provisions, this article may be left blank.

See Attached Other Lawful Provisions

Note: The preceding six (6) articles are considered to be permanent and may be changed only by filing appropriate articles of amendment.

ATTACHED OTHER LAWFUL PROVISIONS

The board of directors of the corporation shall consist of one or more individuals. The number of directors shall be specified in or fixed in accordance with the bylaws, and unless otherwise provided in the bylaws, shall not be dependent on the number of shareholders.

Action required or permitted by the Massachusetts Business Corporation Act to be taken at a shareholders' meeting may be taken without a meeting by one or more written consents (1) by all shareholders entitled to vote on the action or (2) by shareholders having not less than the minimum number of votes necessary to take the action at a meeting at which all shareholders entitled to vote on the action are present and voting.

If any provision of the Massachusetts Business Corporation Act requires the affirmative vote of more than a majority of the shares in any voting group on a matter unless a lesser percentage of shares is provided for in the articles of organization, favorable action on the matter may be taken by the affirmative vote of not less than a majority of all the shares in the voting group eligible to vote on the matter.

The board of directors may make, amend or repeal bylaws in whole or in part, except with respect to any provision of the bylaws which by virtue of an express provision of the Massachusetts Business Corporation Act, these articles of organization or the bylaws, requires action by the shareholders.

A director of the corporation shall not be personally liable to the corporation for monetary damages for breach of fiduciary duty as a director notwithstanding any provision of law imposing such liability, but this provision shall not eliminate or limit the liability of a director (1) for any breach of the director's duty of loyalty to the corporation or its shareholders, (2) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (3) for improper distributions under the Massachusetts Business Corporation Act, or (4) for any transaction from which such director derived an improper personal benefit.

290115

ARTICLE VII

The effective date of organization of the corporation is the date and time the articles were received for filing if the articles are not rejected within the time prescribed by law. If a later effective date is desired, specify such date, which may not be later than the 90th day after the articles are received for filing:

Not applicable

ARTICLE VIII

The information contained in this article is not a permanent part of the articles of organization.

a. The street address of the initial registered office of the corporation in the commonwealth:
123 Main Street, Anytown, MA 12345

b. The name of its initial registered agent at its registered office:
John Doe

c. The names and addresses of the individuals who will serve as the initial directors, president, treasurer and secretary of the corporation (an address need not be specified if the business address of the officer or director is the same as the principal office location):

President: John Doe 123 Main Street, Anytown, MA 12345

Treasurer: James Smith 123 Main Street, Anytown, MA 12345

Secretary: James Smith 123 Main Street, Anytown, MA 12345

Director(s): John Doe 123 Main Street, Anytown, MA 12345
James Smith 123 Main Street, Anytown, MA 12345

d. The fiscal year end of the corporation:
December 31

e. A brief description of the type of business in which the corporation intends to engage:
Sale and Service of Widgets

f. The street address of the principal office of the corporation:
123 Main Street, Anytown, MA 12345

g. The street address where the records of the corporation required to be kept in the commonwealth are located is:

123 Main Street, Anytown, MA 12345 , which is
(number, street, city or town, state, zip code)

☒ its principal office;

☐ an office of its transfer agent;

☐ an office of its secretary/assistant secretary;

☐ its registered office.

Signed this _____ day of _____ , _____ by the incorporator(s):

Signature: _____

Name: John Doe

Address: 123 Main Street, Anytown, MA 12345

COMMONWEALTH OF MASSACHUSETTS

William Francis Galvin
Secretary of the Commonwealth
One Ashburton Place, Boston, Massachusetts 02108-1512

Articles of Organization
(General Laws Chapter 156D, Section 2.02; 950 CMR 113.16)

I hereby certify that upon examination of these articles of organization, duly submitted to me, it appears that the provisions of the General Laws relative to the organization of corporations have been complied with, and I hereby approve said articles; and the filing fee in the amount of $_____ having been paid, said articles are deemed to have been filed with me this _____ day of _____, 20_____, at _____ a.m./p.m.
time

Effective date: _____
(must be within 90 days of date submitted)

WILLIAM FRANCIS GALVIN
Secretary of the Commonwealth

_____
Examiner

_____
Name approval

_____
C

_____
M

Filing fee: $275 for up to 275,000 shares plus $100 for each additional 100,000 shares or any fraction thereof.

TO BE FILLED IN BY CORPORATION
Contact Information:

A.B. Attorney
456 Court Street
Anytown, MA 12345

Telephone: (617) 555-1234

Email: ABAttorney@LawFirm.com

Upon filing, a copy of this filing will be available at www.sec.state.ma.us/cor.
If the document is rejected, a copy of the rejection sheet and rejected document will be available in the rejected queue.

EXHIBIT 7C—Sample Bylaws

The forms that are included as exhibits in this chapter are prepared for a simple, privately held corporation. They illustrate some, but not all, of the matters discussed in the text. They do not include all of the options available under the Massachusetts Business Corporation Act and may not fit all incorporation situations.

BYLAWS
OF
ABC CORPORATION

SECTION 1

Articles of Organization

The name of the corporation shall be as set forth in the articles of organization. These bylaws, the powers of the corporation and of its directors and shareholders, and all matters concerning the conduct and regulation of the business of the corporation shall be subject to the articles of organization. All references in these bylaws to the articles of organization shall mean the articles of organization of the corporation, as from time to time in effect. All references in these bylaws to the Massachusetts Business Corporation Act shall mean Massachusetts General Laws Chapter 156D, as from time to time in effect.

SECTION 2

Shareholders

2.1 *Annual Meeting*

The annual meeting of the shareholders shall be held on the *[third Tuesday of March]* if it is not a legal holiday, and if it is a legal holiday, then on the next succeeding day not a legal holiday, at the hour stated in the written notice of such meeting, or on such other date as may be determined by the board of directors. Except as otherwise may be provided in the articles of organization, purposes for which an annual meeting is to be held, in addition to the election of directors, may be specified by the board of directors or by the President and stated in the notice of the meeting.

2.2 *Special Meetings*

Special meetings of the shareholders may be called by the President or the board of directors. A special meeting of the shareholders shall be called by the Secretary, or in the case of the death, absence, incapacity, or refusal of the Secretary, by any other officer, if the holders of at least 10 percent of the votes entitled to be cast on any issue to be considered at the proposed special meeting sign, date, and deliver to the Secretary one or more demands for the meeting describing the purpose for which it is to be held. Such call shall state the date, time, place, and purposes of the meeting.

2.3 *Place of Meetings; Remote Participation*

All meetings of the shareholders shall be at the principal office of the corporation or at such other place as the board of directors, the President, or the person or persons calling the meeting may determine. If authorized by the directors, any meeting of shareholders need not be held at any place but instead may be held solely by remote communication. Shareholders and proxyholders not physically present at a meeting of shareholders may participate in a meeting of shareholders, be deemed present in person, and vote at a meeting of shareholders, by means of remote communication, subject to such guidelines and procedures as the board of directors may adopt. Such guidelines and procedures shall include reasonable measures (1) to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a shareholder or proxyholder, and (2) to provide such shareholders and proxyholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the shareholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings. If any shareholder or proxyholder votes or takes other action at the meeting by means of remote communication, the corporation shall maintain a record of such vote or other action.

2.4 *Notice of Shareholder Meetings*

A written notice of each meeting of shareholders, stating the place, day, and hour of such meeting and the purposes for which the meeting is called, shall be given by the Secretary, Assistant Secretary, President, or such person designated by the board of directors, at least seven and no more than 60 days before the meeting, to each shareholder entitled to such notice. A shareholder may waive any notice required by the Massachusetts Business Corporation Act, the articles of organization, or the bylaws, before or after the date and time stated in the notice. The waiver shall be in writing, signed by the shareholder entitled to the notice, and delivered to the corporation for inclusion with the records of the meeting. A shareholder's attendance at a meeting waives objection to lack of notice or defective notice of the meeting, unless the shareholder at the beginning of the meeting objects to holding the meeting or transacting business at the meeting. A shareholder's attendance at a meeting waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the shareholder objects to considering the matter when it is presented.

2.5 *Action at Meeting*

Unless otherwise provided by the Massachusetts Business Corporation Act, the articles of organization, or these bylaws, at any meeting of the shareholders, a majority of the votes entitled to be cast upon a matter by a voting group at the meeting shall constitute a quorum of that voting group for action on that matter, but a lesser interest may adjourn any meeting from time to time, and the meeting may be held as adjourned without further notice. A share once represented

for any purpose at a meeting is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless: (1) the shareholder attends solely to object to lack of notice, defective notice, or the conduct of the meeting on other grounds, and does not vote the shares or otherwise consent that they are to be deemed present; or (2) in the case of an adjournment, a new record date is or shall be set for that adjourned meeting. Unless otherwise required by Massachusetts Business Corporation Act, the articles of organization, or these bylaws, if a quorum of a voting group exists, (1) favorable action on a matter, other than the election of directors, is taken by a voting group if the votes cast within the group favoring the action exceed the votes cast opposing the action, and (2) directors shall be elected by a plurality of the votes cast by the shares entitled to vote in the election at the meeting.

2.6 *Voting and Proxies*

Unless otherwise provided in the articles of organization, each share shall have one vote on any matter to be considered at the meeting. Shareholders may vote either in person or by proxy, which shall be filed with the Secretary or Temporary Secretary at the meeting, or any adjournment of the meeting, before being voted. Unless otherwise provided in the appointment form, a proxy is valid for 11 months from the date the shareholder signed the form or, if it is undated, from the date of its receipt by the officer or agent of the corporation. Such proxy shall entitle the holder thereof to vote at any adjournment of such meeting, but shall not be valid after the final adjournment of such meeting.

2.7 *Action by Consent; Electronic Transmission*

a. Any action required or permitted to be taken at a shareholders' meeting may be taken without a meeting if the action is taken either by all shareholders entitled to vote on the action, or to the extent permitted by the articles of organization, by shareholders having not less than the minimum number of votes necessary to take the action at a meeting at which all shareholders entitled to vote on the action are present and voting. The action shall be evidenced by one or more written consents that describe the action taken, are signed by shareholders having the requisite votes, bear the dates of the signatures of such shareholders, and are delivered to the corporation for inclusion with the records of meetings within 60 days of the earliest dated consent delivered to the corporation. Such consents shall be treated as a vote of shareholders for all purposes. If the shareholders take action by written consent, the corporation shall give such notice of the action to shareholders who have not signed such consent as is required by the Massachusetts Business Corporation Act.

b. Any vote, consent, waiver, proxy appointment, or other action by a shareholder or by the proxy or other agent of any shareholder shall be considered given in writing, dated, and signed if it consists of an electronic transmission that sets forth or is delivered with information from which the corporation can determine (1) that the electronic transmission was transmitted

by the shareholder, proxy, or agent or by a person authorized to act for the shareholder, proxy, or agent; and (2) the date on which such shareholder, proxy, agent, or authorized person transmitted the electronic transmission. The date on which the electronic transmission is transmitted shall be considered the date on which it was signed. The electronic transmission shall be considered received by the corporation if it has been sent to any address specified by the corporation for that purpose or, if no address has been specified, to the principal office of the corporation, addressed to the Secretary or other officer or agent having custody of the records of proceedings of shareholders.

SECTION 3

Directors

3.1 *Number and Election*

The corporation shall have a board of directors consisting of one or more individuals. The board of directors shall be elected by such shareholders as have the right to vote at the annual meeting of the shareholders or at a special meeting held in place thereof. No ballot shall be required for such election unless requested by a shareholder present or represented at the meeting and entitled to vote in the election. Subject to any minimum number of directors required by the Massachusetts Business Corporation Act, the number of directors shall be fixed by vote at the meeting at which they are elected, but the shareholders, at any special meeting held for the purpose, or a majority of the directors then in office, may increase the number of directors as thus fixed and elect new directors to complete the number so fixed, and the shareholders, at any such special meeting, may decrease the number of directors as thus fixed and remove directors to reduce the number of directors to the number so fixed. Subject to the articles of organization and these bylaws, each director shall hold office until the next annual meeting and until his or her successor is elected and qualified.

3.2 *Resignation, Removal, and Vacancy*

A director may resign at any time by delivering written notice of resignation to the board of directors, its chairman, or the corporation. Except as otherwise provided by the Massachusetts Business Corporation Act, the articles of organization, or these bylaws: (1) the shareholders may remove one or more directors with or without cause, (2) the directors may remove a director for cause by vote of a majority of the directors then in office, and (3) the shareholders or board of directors may fill any vacancy, or if the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

3.3 *Powers of Directors*

Subject to law and the articles of organization, all corporate power shall be exercised by or under the authority of, and the business and affairs of the corporation shall be managed under the direction of, its board of directors.

3.4 *Regular Meetings*

Regular meetings of the board of directors may be held without call or formal notice at such places and at such times as the board may by vote from time to time determine. A regular meeting of the board of directors may be held without call or formal notice immediately after and at the same place as the annual meeting of the shareholders, or the special meeting of the shareholders held in place of such annual meeting.

3.5 *Special Meetings*

Special meetings of the board of directors may be held at any time and at any place when called by the President, Treasurer, or two or more directors, or the sole director if there is only one director. Notice of such meeting shall be given to each director by the Secretary or, if there is no Secretary, or in case of the death, absence, incapacity, or refusal of the Secretary, by the officer or directors calling the meeting. Such notice (1) must be given at least two days prior to the date of the special meeting, and (2) need not describe the purpose of the meeting unless otherwise required by the articles of organization or these bylaws.

3.6 *Waiver of Notice*

A director may waive notice of any directors' meeting before or after the date of the meeting. The waiver shall be in writing, signed by the director entitled to the notice, or in the form of an electronic transmission by the director to the corporation, and filed with the minutes or corporate records. A director's attendance at or participation in a meeting waives any required notice to such director of the meeting unless the director, at the beginning of the meeting or promptly upon his or her arrival, objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting.

3.7 *Quorum and Voting*

A majority of the directors then in office shall constitute a quorum for the transaction of business, but a lesser number may adjourn any meeting from time to time, and the meeting may be held as adjourned without further notice. If a quorum is present when a vote is taken, the affirmative vote of a majority of the directors present is the act of the board of directors, unless the vote of a greater number of directors is required by the articles of organization or these bylaws.

3.8 *Action by Consent*

Any action by the board of directors may be taken without a meeting by unanimous consent by the directors and filed with the records of the directors' meetings. The action must be evidenced by one or more consents describing the action taken, in writing, signed by each director, or delivered to the corporation by electronic transmission, to the address specified by the corporation for the purpose or, if no address has been specified, to the principal office of the corporation, addressed to the Secretary or other officer having custody of the records of proceedings of directors. Such consent shall be treated as a vote of the board of directors for all purposes.

3.9 *Remote Participation*

Members of the board of directors or any committee designated by the board of directors may participate in a meeting of the board or such committee, or conduct any such meeting, through the use of any means of communication by which all directors participating may simultaneously hear each other during the meeting and participation by such means shall constitute presence in person at the meeting.

3.10 *Committees*

Except as otherwise provided in the articles of organization the board of directors may, by vote of a majority of the directors, appoint from its own number a committee or committees, consisting of one or more members who shall serve at the pleasure of the board of directors and which may exercise such authority of the board of directors as is delegated by the board, except for those powers which, pursuant to the Massachusetts Business Corporation Act, may not be delegated to any such committee. Subject to the Massachusetts Business Corporation Act, the provisions of such Act, and these bylaws governing meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board of directors shall apply to committees and their members.

SECTION 4

Officers

4.1 *Identity, Election, and Appointment of Officers*

The officers of the corporation shall consist of a President, Treasurer, and Secretary, who shall be elected by the board of directors, and such other officers as the board of directors may appoint.

4.2 *Duties and Powers; Qualification and Tenure*

Subject to these bylaws, each officer shall have, in addition to the duties and powers specifically set forth in these bylaws, such duties and powers as are customarily incident to his or her office and such duties and powers as the board of

directors may from time to time designate. Any officer may, but need not, be a shareholder or director. Any two or more offices may be held by the same person. Any officer may be required by the board of directors to give bond for the faithful performance of his or her duties to the corporation in such amount and with such sureties as the board of directors may determine. Except as otherwise provided by law, the articles of organization, these bylaws, or the directors' resolution electing or appointing such officer, the President, Treasurer, and Secretary shall hold office until the first meeting of the board of directors following the annual meeting of shareholders and thereafter until his or her successor is elected and qualified, and all other officers shall hold office until the respective successor of each is elected and qualified.

4.3 *President*

The President shall be the chief executive officer of the corporation and shall, subject to the direction of the board of directors, have general supervision and control of its business. Unless otherwise provided by the board of directors, the President shall preside, if present, at all meetings of shareholders and of the board of directors.

4.4 *Treasurer*

The Treasurer, subject to the direction and under the supervision of the board of directors, shall have general charge of the financial concerns of the corporation and the care and custody of the funds and valuable papers of the corporation, except his or her own bond. The Treasurer shall keep, or cause to be kept, accurate books of account, which shall be the property of the corporation.

4.5 *Secretary*

The Secretary shall keep a record of the meetings of shareholders, the board of directors, and any executive and other committees. In the absence of the Secretary from any such meetings, an Assistant Secretary, if one has been elected, otherwise a Temporary Secretary, designated by the person presiding at the meeting, shall perform the duties of the Secretary.

4.6 *Removal and Vacancies*

The board of directors may remove any officer at any time with or without cause, and may fill any vacancy in any office.

SECTION 5

Capital Shares

5.1 *Share Certificates*

Each shareholder shall be entitled to a share certificate in such form as is prescribed by law and approved from time to time by the board of directors. The

certificates shall be signed by the President or any Vice President and by the Treasurer or any Assistant Treasurer. Such signatures may be facsimiles. If any officer who has signed or whose facsimile signature has been placed on such certificate no longer holds office when the certificate is issued, the certificate nevertheless shall be valid.

5.2 *Transfer of Shares*

Subject to restrictions, if any, imposed by the articles of organization, title to a share certificate and to the shares represented thereby shall be transferred only by delivery of the certificate properly endorsed, or by delivery of the certificate accompanied by a written assignment of shares represented by such certificate, or a written power of attorney to sell, assign, or transfer the certificate or the shares represented thereby, properly executed. The person registered in the records of the corporation as the owner of shares shall have the exclusive right to receive dividends thereon and to vote thereon as such owner, shall be held liable for such calls and assessments, if any, as may lawfully be made thereon, and, except only as may be required by law, may in all respects be treated by the corporation as the exclusive owner thereof unless and to the extent that the corporation has established a procedure by which the beneficial owner of shares that are registered in the name of a nominee will be recognized by the corporation as the shareholder.

5.3 *Transfer Records*

Unless a transfer agent is appointed, the Secretary shall keep or cause to be kept, at the principal office of the corporation or at the office of the Secretary, the share and transfer records of the corporation, in which are contained the names of all shareholders and the record address and the amount of shares held by each. The transfer records of the shares of the corporation may be closed for such period from time to time in anticipation of shareholders' meetings or the declaration or payment of dividends as the board of directors may determine.

5.4 *Lost or Destroyed Certificates*

In case of the alleged loss, destruction, or mutilation of a share certificate, a new share certificate may be issued in place of the lost, destroyed, or mutilated certificate upon such terms as the board of directors may determine.

SECTION 6

Fiscal Year

Except as from time to time otherwise determined by the board of directors, the fiscal year of the corporation shall end on [*December 31*].

SECTION 7

Indemnification

The corporation shall indemnify and hold harmless each present or former director or officer of the corporation to the fullest extent permitted by law, subject to such determination as the law may require that indemnification is permissible, for any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, arbitrative, or investigative, and whether formal or informal ("Proceeding"), against such director or officer in his or her capacity as such or in his or her capacity as a director, officer, partner, trustee, manager, employee, or agent of another domestic or foreign corporation, partnership, joint venture, trust, limited liability company, employee benefit plan, or other entity, if the corporation requested him or her to so serve. A director or officer is considered to be serving an employee benefit plan at the corporation's request if his or her duties to the corporation also impose duties on, or otherwise involve services by, him or her to the plan or to participants in or beneficiaries of the plan. The corporation may, before final disposition of any Proceeding, advance funds to pay for or reimburse the reasonable expenses incurred by a director or officer who is a party to a Proceeding to the extent permitted by law. Nothing in this Section shall affect any rights to indemnification to which any person may be entitled by contract or otherwise under law. No amendment or repeal of any provision of this Section shall adversely affect the right of a person to indemnification under this Section with respect to his or her acts or omissions that occurred at any time prior to such amendment or repeal.

SECTION 8

Other Provisions

8.1 *Notices*

Notices to or from any shareholder, director, officer, or the corporation may be given in any manner permitted under the Massachusetts Business Corporation Act.

8.2 *Voting of Securities*

Except as the board of directors may otherwise designate, the President may waive notice of, or vote for this corporation or appoint any person or persons to act as proxy or attorney in fact for this corporation with or without power of substitution at, any meeting of shareholders of any other corporation or organization, the securities of which may be held by this corporation.

SECTION 9

Amendments

These bylaws may be amended or repealed by the shareholders. If authorized by the articles of organization, the board of directors may also make, amend, or repeal the bylaws in whole or in part, except with respect to this Section and any provision of

these bylaws which, by an express provision in the Massachusetts Business Corporation Act, the articles of organization, or these bylaws, requires action by the shareholders. Not later than the time of giving notice of the meeting of shareholders next following the making, amending, or repealing by the board of directors of any bylaw, notice stating the substance of the action taken by the board of directors shall be given to all shareholders entitled to vote on amending the bylaws. Any action taken by the board of directors with respect to the bylaws may be amended or repealed by the shareholders.

EXHIBIT 7D—Sample Consent of Directors

The forms that are included as exhibits in this chapter are prepared for a simple, privately held corporation. They illustrate some, but not all, of the matters discussed in the text. They do not include all of the options available under the Massachusetts Business Corporation Act and may not fit all incorporation situations.

ABC CORPORATION

Consent of Directors

The undersigned, being all the directors of ABC Corporation, pursuant to Massachusetts General Laws Chapter 156D, Section 8.21, and the bylaws of the corporation, hereby consent to the following votes:

VOTED: That the form of stock certificate for the corporation attached to this consent be, and such form hereby is, approved. [*Attach specimen stock certificate*].

VOTED: That there be issued to the persons listed below the number of shares of common stock of this corporation set forth beside each person's respective name, as follows:

John Doe:	1,000 shares
James Smith:	1,000 shares

in exchange for receipt by the Treasurer of the corporation of cash or other property with a total value of $10 per share, hereby determining that such consideration received or to be received for such shares is adequate.

VOTED: That the following resolutions be, the same hereby are, adopted with respect to [*Bank*]:

[*Insert Bank Resolutions*]

[*Other votes to consider:*

1. *approve corporate seal (a corporate seal is not required under the Massachusetts Business Corporation Act)*

2. *authorize S corporation election (<u>only</u> if S corporation status is desired; also need consent of shareholders to S corporation election).*]

Dated: _____

_____
John Doe, Director

_____
James Smith, Director

EXHIBIT 7E—Partnership Example LLC

CERTIFICATE OF ORGANIZATION

Pursuant to the provisions of the Massachusetts Limited Liability Company Act (the Act), the undersigned, desiring to organize a Massachusetts limited liability company, hereby certify as follows:

1. *Federal Employer Identification Number*. The limited liability company organized hereby has applied for (but not yet received) a federal employer identification number.

Practice Note

The regulations issued by the office of the secretary of the Commonwealth require the employer identification number for the LLC to be included in the certificate of organization, if available. This requirement is technically impossible to comply with, because the employer identification number application requires the inclusion of the date the entity was organized. Thus, each of the certificate of organization and the federal employer identification number application assumes that the other has already been filed!

2. *Name of the Limited Liability Company*. The name of the limited liability company formed hereby (the "LLC") is Partnership Example LLC.

Practice Note

The name must be available and permitted under Section 3 of the Massachusetts Limited Liability Company Act (G.L. c. 156C, hereinafter referred to as the Act) and other applicable law, including the law of any jurisdictions other than Massachusetts in which the limited liability company will do business. Under the Act, the name must include the words "limited liability company," "limited company," or the abbreviations "L.L.C.," "L.C.," "LLC," or "LC."

3. *Office of the Limited Liability Company*. The address of the office of the LLC for purposes of Section 5 of the Act is _____, Massachusetts _____.

Practice Note

A Massachusetts LLC must maintain an office in the Commonwealth. Certain records of the LLC must be maintained at this office. See G.L. c. 156C, § 9 and the notes to Section 7.01 of Partnership Example LLC's operating agreement, below.

4. *Business of the LLC*. The general character of the business of the LLC is to engage in *[specify here the nature of the LLC's business—for example: investment in, and ownership and development of, real estate and interests therein, including buying, acquiring, owning, operating, selling, financing, refinancing, disposing of and otherwise dealing with interests in real estate, directly or indirectly through joint ventures,*

partnerships or other entities]; and to engage in any activities directly or indirectly related or incidental thereto.

Practice Note

The purpose clause must be tailored to the particular needs of the LLC. The purpose clause could be more broadly drafted (i.e., by including language such as "and to engage in any other activity in which a limited liability company organized under the laws of the Commonwealth of Massachusetts may lawfully engage"), as is often the case in a corporate context.

5. *Date of Dissolution*. The LLC shall have no fixed date on which it shall dissolve.

Practice Note

The Act does not require an LLC to have a finite term. Absent a provision of the operating agreement to the contrary, a Massachusetts LLC formed after January 1, 1997 will have perpetual existence (unless it has no members). However, in some contexts (particularly where the LLC is intended to "look like" a partnership), it may be desirable to specify a date certain on which the LLC will dissolve.

6. *Agent for Service of Process*. The name and address of the resident agent for service of process for the LLC is _____, Massachusetts _____.

Practice Note

The resident agent for service of process must be an individual resident of the Commonwealth, a Massachusetts corporation, or a foreign corporation qualified to do business in Massachusetts.

7. *Manager*. The LLC has one manager, whose name and address are as follows: Joe Manager, _____.

Practice Note

An LLC does not need a manager, but it may have one or a group of managers, some or all of whom are members of the LLC. Sometimes it may be appropriate for an LLC to use a corporation as a manager, either to achieve maximum privacy for its individual members or to achieve an additional level of protection from liability. Partnership Example LLC is intended to look like and operate in a manner similar to a limited partnership, and the LLC's manager is a member whose role and function are substantially similar to those of a general partner in a limited partnership.

8. *Execution of Documents (Secretary of the Commonwealth)*. Any manager of the LLC is authorized to execute on behalf of the LLC any documents to be filed with the Secretary of State of the Commonwealth of Massachusetts.

Practice Note

In an LLC that has no manager, it is necessary to name a person authorized to execute documents to be filed with the secretary of the Commonwealth.

However, even if the LLC has managers, it may be useful to designate one or more such agents (so that, for instance, such documents can be signed by a lawyer, legal assistant, or other representative).

9. *Execution of Recordable Instruments*. Any manager of the LLC is authorized to execute, acknowledge, deliver and record any recordable instrument purporting to affect an interest in real property.

Practice Note

This provision is optional, but helpful if the LLC owns interests in real estate that may be mortgaged or transferred.

IN WITNESS WHEREOF, the undersigned hereby affirms under the penalties of perjury that the facts stated herein are true, as of the _____ day of _____, 20__.

Practice Note

Section 15(c) of the Act provides that execution of a certificate constitutes an affirmation, under the penalties of perjury, that the facts stated therein are true.

_____

Authorized Person

Practice Note

Section 15(a)(2) of the Act provides that any person, whether or not authorized in the text of the certificate, may execute the initial certificate of organization. In this regard, the signer of the LLC certificate of organization is similar to a sole incorporator signing articles of organization of a Massachusetts corporation.

PARTNERSHIP EXAMPLE LLC
OPERATING AGREEMENT

THIS OPERATING AGREEMENT, dated as of the ____ day of _____, 20__, is by and among the persons identified as Members on *Schedule A* (each such person being individually referred to as a "Member" and all such persons being referred to collectively as the "Members"). Joe Manager, one of the Members, also serves as, and is signing this Agreement in his capacity as, a Manager of the limited liability company formed hereby.

Practice Note

An LLC need not have a written operating agreement, but one is strongly recommended, particularly if the parties wish to deviate from the "default rules" provided in the Act (see **Exhibit 7I**). Certain provisions of the Act specifically require a writing in order to create enforceable obligations of the members and managers. For example, an obligation to contribute cash or property to, or to perform services for, an LLC must be embodied in a written operating agreement.

Practitioners will need to determine whether adoption of a written agreement is appropriate for one-member LLCs. Some practitioners have suggested that failure to adopt an operating agreement could be construed as a failure to observe "corporate" formalities. Analogies to corporate law suggest that an operating agreement is appropriate—even a one-stockholder corporation has a charter and bylaws. For practical reasons (demonstrating authority in transactions, for example), an operating agreement may be desirable. However, many have argued that an "agreement" with only one party does not make sense and cannot be relied on anyway (particularly because it may be amended at any time the one member determines to do so).

The definition of the term "limited liability company" in the Act specifically provides that the LLC must have one or more members. A Massachusetts LLC is automatically dissolved (subject to a right to continue) if, at any time, it has no members.

A manager of an LLC need not be a member of the LLC. In Partnership Example LLC, the manager is also a member.

WHEREAS, Partnership Example LLC (the "LLC") has been formed as a limited liability company under the Massachusetts Limited Liability Company Act (the "Act") by the filing on the date hereof of a Certificate of Organization (the "Certificate") in the office of the Secretary of State of the Commonwealth of Massachusetts; and

Practice Note

An LLC is formed at the time the certificate of organization is filed, or at any later date specified in the certificate of organization. If the entity conducts business prior to the effective date, it may be deemed to be doing so as a general partnership. Accordingly, prior to the effective date, the members or managers can be treated as "general partners," and, therefore, have general liability for the debts and obligations of the entity.

WHEREAS, the Manager and the Members wish to set out fully their respective rights, obligations and duties with respect to the LLC and its business, management and operations.

NOW, THEREFORE, in consideration of the mutual agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

ARTICLE I
Definitions

The following capitalized terms used in this Agreement shall have the respective meanings ascribed to them below:

"Act" means the Massachusetts Limited Liability Company Act, in effect at the time of the initial filing of the Certificate with the Office of the Secretary of State of the Commonwealth of Massachusetts, and as thereafter amended from time to time.

"Adjusted Capital Account" means, for each Member, such Member's Capital Account balance increased by such Member's share of "minimum gain" and of "partner nonrecourse debt minimum gain" (as determined pursuant to Treasury Regulation Sections 1.704-2(g) and 1.704-2(i)(5), respectively).

"Affiliate" shall mean, with respect to any specified person or entity, (i) any person or entity that directly or indirectly controls, is controlled by, or is under common control with such specified person or entity; (ii) any person or entity that directly or indirectly controls 10 percent or more of the outstanding equity securities of the specified entity or of which the specified person or entity is directly or indirectly the owner of 10 percent or more of any class of equity securities; (iii) any person or entity that is an officer of, director of, manager of, partner in, or trustee of, or serves in a similar capacity with respect to, the specified person or entity or of which the specified person or entity is an officer, director, partner, manager or trustee, or with respect to which the specified person or entity serves in a similar capacity; or (iv) any person that is a member of the Immediate Family of the specified person.

"Agreement" means this Operating Agreement as it may be amended, supplemented, or restated from time to time.

"Bankruptcy" means the occurrence of any of the following events:

(i) a Member makes an assignment for the benefit of creditors;

(ii) a Member files a voluntary petition in bankruptcy;

(iii) a Member is adjudged a bankrupt or insolvent, or has entered against it an order for relief, in any bankruptcy or insolvency proceeding;

(iv) a Member files a petition or answer seeking for itself any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation;

(v) a Member files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against it in any proceeding of this nature;

(vi) a Member seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of the Member or of all or any substantial part of his or her properties; or

(vii) One hundred and twenty days after the commencement of any proceeding against a Member seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation, if the proceeding has not been dismissed, or if, within 90 days after the appointment without its consent or acquiescence of a trustee, receiver or liquidator of the Member or of all or any substantial part of its properties, the appointment is not vacated or stayed, or within 90 days after the expiration of any such stay, the appointment is not vacated.

Practice Note

This definition is essentially identical to the definition of the same term contained in Section 2 of the Act. It may be modified if so desired by the parties.

"Capital Account" means a separate account maintained for each Member and adjusted in accordance with Treasury Regulations under I.R.C. § 704. To the extent consistent with such Treasury Regulations, the adjustments to such accounts shall include the following:

(i) There shall be credited to each Member's Capital Account the amount of any cash (which shall not include imputed or actual interest on any deferred contributions) actually contributed by such Member to the capital of the LLC, the fair market value (without regard to I.R.C. § 7701(g)) of any property contributed by such Member to the capital of the LLC, the amount of liabilities of the LLC assumed by the Member or to which property distributed to the Member was subject, and such Member's share of the Net Profits of the LLC and of any items in the nature of income or gain separately allocated to the Members, and there shall be charged against each Member's Capital Account the amount of all cash distributions to such Member, the fair market value (without regard to I.R.C. § 7701(g)) of any property distributed to such Member by the LLC, the amount of liabilities of the Member assumed by the LLC or to which property contributed by the Member to the LLC was subject, and such Member's share of the Net Losses of the LLC and of any items in the nature of loss or deduction separately allocated to the Members.

(ii) In the event any interest in the LLC is transferred in accordance with the terms of this Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent it relates to the transferred interest.

Practice Note

Capital accounts are the primary mechanism in regulations adopted under I.R.C. § 704 to ensure that the allocation of profits and losses will be respected for federal income tax purposes and ultimately result in the member who receives allocations receiving more (or less) value from his or her interest in the LLC. To comply with the regulations, the operating agreement should provide that, upon liquidation of the LLC, liquidation proceeds will be distributed among the members based on their positive capital account balances. However, providing that liquidating distributions will be made to the members in accordance with their respective capital account balances results in the allocation of income and loss for tax purposes controlling the ultimate economic sharing among the members. Because many attorneys and clients do not want the "tax tail wagging the business dog," many LLC agreements deliberately do not comply with the safe harbor set forth in the regulations under I.R.C. § 704 by not providing that liquidation distributions will be made in accordance with capital account balances. Nevertheless, even those agreements typically employ "capital accounts" and provide that to the extent possible,

the allocations of income and loss of the LLC will be made so that the capital account balances of the members correspond to the amounts the members would be distributed in liquidation of the LLC if the LLC sold all of its assets for no gain or loss and liquidated.

"*Capital Transaction*" means a sale or other disposition of all or a portion of the LLC's property in a single transaction or in a series of related transactions, other than such a sale or disposition in the ordinary course of the LLC's business and any refinancing.

"*Carrying Value*" means, with respect to any asset, the asset's adjusted basis for federal income tax purposes, *provided*, *however*, that (i) the initial Carrying Value of any asset contributed to the LLC shall be adjusted to equal its gross fair market value (as determined by _____) at the time of its contribution and (ii) the Carrying Values of all assets held by the LLC shall be adjusted to equal their respective gross fair market values (taking I.R.C. § 7701(g) into account) upon an election by the LLC to revalue its property in accordance with Treasury Regulation Section 1.704-1(b)(2)(iv)(f) and upon liquidation of the LLC. The Carrying Value of any asset whose Carrying Value was adjusted pursuant to the preceding sentence thereafter shall be adjusted in accordance with the provisions of Treasury Regulation Section 1.704-1(b)(2)(iv)(g).

Practice Note

Regulations adopted under I.R.C. § 704 provide that for purposes of maintaining the partners' (or members' in the case of LLCs) capital accounts, in certain circumstances, the partnership (or LLC) is allowed (and sometimes required) to adjust the partners' capital accounts to reflect the unrealized appreciation or depreciation in some or all of the partnership's assets. Following such an adjustment, the income and loss of the partnership (solely for purposes of maintaining capital accounts) has to be computed based on the fair market value of the assets whose unrealized appreciation or depreciation was reflected in the capital accounts rather than on the adjusted tax basis of those assets. The concept of "carrying value" is used in lieu of "adjusted tax basis" for purposes of such computations with respect to the "booked up" (or "booked down") assets.

"Certificate" means the Certificate of Organization creating the LLC, as it may, from time to time, be amended in accordance with the Act.

"Consent" means the written consent or approval of more than 50 percent in interest, based on Percentage Interests, of those Members entitled to participate in giving such Consent, and if more than one class or group of Members is so entitled, then more than 50 percent shall be so required with respect to each such class or group.

"Designated Individual" has the meaning set forth in Section 7.05(a).

"Distributable Cash" means, with respect to any fiscal period, the excess of all cash receipts of the LLC from any source whatsoever, including normal operations, sales of assets, proceeds of borrowings, capital contributions of the Members, proceeds

from a Capital Transaction, and any and all other sources over the sum of the following amounts:

(i) cash disbursements for advertising and promotion expenses, salaries, employee benefits (including profit-sharing, bonus and similar plans), fringe benefits, accounting and bookkeeping services and equipment, costs of sales of assets, utilities, rental payments with respect to equipment or real property, management fees and expenses, insurance, real estate taxes, legal expenses, costs of repairs and maintenance, and any and all other items customarily considered to be "operating expenses";

(ii) payments of interest, principal and premium, and points and other costs of borrowing under any indebtedness of the LLC, including, without limitation, (A) any mortgages or deeds of trust encumbering the real property or other assets owned or leased by the LLC, and (B) any Voluntary Loans;

(iii) payments made to purchase inventory or capital assets, and for capital construction, rehabilitation, acquisitions, alterations and improvements; and

(iv) amounts set aside as reserves for working capital, contingent liabilities, replacements or for any of the expenditures described in clauses (i), (ii) and (iii), above, deemed by the Manager to be necessary to meet the current and anticipated future needs of the LLC.

Practice Note

Although this definition is fairly generic, it should be tailored to fit the particular business in which the LLC is engaged. In some cases, it may be appropriate to create subcategories of cash distributions (e.g., cash from a sale or refinancing versus ordinary cash flow), so that the various types of net revenue can be distributed among the members in various ways.

"Immediate Family" (i) with respect to any individual, means his or her ancestors, spouse, issue, spouses of issue, any trustee or trustees, including successor and additional trustees, principally for the benefit of any one or more of such individuals, and any entity or entities, all of the beneficial owners of which are such trusts and/or such individuals, but (ii) with respect to a Legal Representative, means the Immediate Family of the individual for whom such Legal Representative was appointed and (iii) with respect to a trustee, means the Immediate Family of the individuals who are the principal beneficiaries of the trust.

"Imputed Underpayment" means the amount payable as a tax by the LLC with respect to a Partnership Adjustment and computed in accordance with I.R.C. § 6225.

"Invested Capital" means, at any point in time, for any Member, the excess of (i) the aggregate amount of the capital contributed to the LLC by such Member over (ii) the aggregate amount distributed (or deemed distributed) to such Member pursuant to Section 4.01(b), below.

"I.R.C." means the Internal Revenue Code of 1986, as amended from time to time.

"Legal Representative" means, with respect to any individual, a duly appointed executor, administrator, guardian, conservator, personal representative or other legal representative appointed as a result of the death or incompetency of such individual.

"LLC" means the limited liability company formed pursuant to the Certificate and this Agreement, as it may from time to time be constituted and amended.

"Manager" shall refer to any person named as a Manager in this Agreement and any person who becomes an additional, substitute or replacement Manager as permitted by this Agreement, in each such person's capacity as (and for the period during which such person serves as) a Manager of the LLC. "Managers" shall refer collectively to all of such persons in their capacities as (and for the period during which such persons serve as) Managers of the LLC.

"Member" shall refer severally to any person named as a Member in this Agreement and any person who becomes an additional, substitute or replacement Member as permitted by this Agreement, in such person's capacity as a Member of the LLC. "Members" shall refer collectively to all such persons in their such capacities as Members.

"*Net Profits*" and "*Net Losses*" mean the taxable income or loss, as the case may be, for a period as determined in accordance with I.R.C. § 703(a) computed with the following adjustments:

(i) items of gain, loss and deduction shall be computed based upon the Carrying Values of the LLC's assets (in accordance with Treasury Regulation Sections 1.704-1(b)(2)(iv)(g) and/or 1.704-3(d)) rather than upon the assets' adjusted bases for federal income tax purposes;

(ii) any tax-exempt income received by the LLC shall be included as an item of gross income;

(iii) the amount of any adjustment to the Carrying Value of any LLC asset pursuant to I.R.C. § 734(b) or I.R.C. § 743(b) that is required to be reflected in the Capital Accounts of the Members pursuant to Treasury Regulation Section 1.704-1(b)(2)(iv)(m) shall be treated as an item of gain (if the adjustment is positive) or loss (if the adjustment is negative), and only such amount of the adjustment shall thereafter be taken into account in computing items of income and deduction;

(iv) any expenditure of the LLC described in I.R.C. § 705(a)(2)(B) (including any expenditures treated as being described in I.R.C. § 705(a)(2)(B) pursuant to Treasury Regulations under I.R.C. § 704(b)) shall be treated as a deductible expense;

(v) the amount of items of income, gain, loss or deduction specially allocated to any Members pursuant to Section 5.02 shall not be included in the computation;

(vi) the amount of any unrealized gain or unrealized loss attributable to an asset at the time it is distributed in-kind to a Member shall be included in the computation as an item of income or loss, respectively; and

(vii) the amount of any unrealized gain or unrealized loss with respect to the assets of the LLC that is reflected in an adjustment to the Carrying Values of the LLC's assets pursuant to clause (ii) of the definition of "Carrying Value" shall be included in the computation as items of income or loss, respectively.

Practice Note

Net profits and net losses are generally determined using federal income tax principles. However, certain adjustments need to be made to accommodate economic profits and losses not recognized for tax purposes. Thus, for example, tax-exempt interest and nondeductible expenses need to be included. Similarly, as discussed in connection with the definition of "carrying value," if the capital accounts have been adjusted to reflect the fair market value of some or all of the LLC's assets, subsequent computations of net profits and net losses must use the "booked up/down" value of those assets rather than their adjusted tax bases.

"*Partnership Representative*" means the Person designated to act as the "partnership representative" pursuant to I.R.C. § 6223.

"*Partnership Adjustment*" has the meaning set forth in I.R.C. § 6241(2) and generally means any adjustment to any partnership-related item or amount with respect of income, gain, loss, deduction, or credit of the LLC or any Member's distributive share thereof.

"*Percentage Interest*" shall be the percentage interest of a Member set forth in *Schedule A*, as amended from time to time *[and subject to adjustment pursuant to Section 3.02]*.

Practice Note

This provision will be subject to modification (or elimination), depending on the business arrangements among the members.

"*Reviewed Year*" has the meaning set forth in I.R.C. § 6225(d)(1), and generally means the partnership taxable year to which a Partnership Adjustment relates.

"*Priority Return*" means, at any point in time, for any Member, that amount which, when considered together with all amounts previously distributed (or deemed distributed) to such Member pursuant to Section 4.01(a), will result in such Member having received a _____% cumulative return, compounded annually, on such Member's weighted average Invested Capital.

Practice Note

This provision will be subject to modification (or elimination), depending on the business arrangements among the members.

"Securities Act" means the Securities Act of 1933, as amended.

"Target Balance" means, for each Member at any point in time, either (i) a positive amount equal to the net amount, if any, the Member would be entitled to receive or (ii) a negative amount equal to the net amount the Member would be required to pay or contribute to the LLC or to any third party, assuming, in each case, that (A) the LLC sold all of its assets for an aggregate purchase price equal to their aggregate Carrying Value (assuming for this purpose only that the Carrying Value of any asset that secures a liability that is treated as "nonrecourse" for purposes of Treasury Regulation Section 1.1001-2 is no less than the amount of such liability that is allocated to such asset in accordance with Treasury Regulation Section 1.704-2(d)(2)); (B) all liabilities of the LLC were paid in accordance with their terms from the amounts specified in clause (A) of this sentence; (C) any Member that was obligated to contribute any amount to the LLC pursuant to this Agreement or otherwise (including the amount a Member would be obligated to pay to any third party pursuant to the terms of any liability or pursuant to any guaranty, indemnity, or similar ancillary agreement or arrangement entered into in connection with any liability of the LLC) contributed such amount to the LLC; (D) all liabilities of the LLC that were not completely repaid pursuant to clause (B) of this sentence were paid in accordance with their terms from the amounts specified in clause (C) of this sentence; and (E) the balance, if any, of any amounts held by the LLC was distributed in accordance with Section 4.01 hereof.

Practice Note

Target balances are used in allocating the income and loss of the LLC among the members. Generally, the income and loss of an entity such as an LLC that is treated as a partnership for federal income tax purposes is allocated among the members in accordance with I.R.C. § 704. As discussed above in the note following the definition of "capital account," I.R.C. § 704 generally requires that the allocation of income and loss be reflected in the members' capital accounts and that liquidating distributions be made to the members based on their respective capital account balances. A member's target balance is the balance that you would like the member to have in the member's capital account so that the member's capital account balance would correspond to the amount the member would be entitled to receive if the LLC sold all of its assets for no gain or loss and distributed the proceeds in accordance with the regular distribution "waterfall." The allocation provisions of the LLC agreement (contained in Article V) are then drafted to provide that all allocations of income and loss are made to get the capital account balances of the members to equal their respective target balances. This approach maximizes the probability that the liquidation distribution made in accordance with capital account balances will precisely correspond to the desired economic arrangement among the members. It also minimizes the potential for drafting errors by the attorney.

"Transfer" and any grammatical variation thereof shall refer to any sale, exchange, issuance, redemption, assignment, distribution, encumbrance, hypothecation, gift,

pledge, retirement, resignation, transfer, or other withdrawal, disposition or alienation in any way (whether voluntarily, involuntarily or by operation of law) as to any interest as a Member. Transfer shall specifically, without limitation of the above, include assignments and distributions resulting from death, incompetency, bankruptcy, liquidation and dissolution.

"Voluntary Loan" shall mean a loan made pursuant to Section 3.05 of this Agreement.

ARTICLE II
General

2.01 *Name of the Limited Liability Company*. The name of the limited liability company formed hereby is Partnership Example LLC. The name of the LLC may be changed at any time, or from time to time, with the approval of the Manager and the Consent of the Members.

2.02 *Office of the Limited Liability Company; Agent for Service of Process.* The address of the registered office of the LLC for purposes of Section 5 of the Act is _____, Massachusetts _____. The name and address of the resident agent for service of process for the LLC is Joe Manager, _____, Massachusetts _____. The Manager may establish places of business of the LLC within and without the Commonwealth of Massachusetts, as and when required by the LLC's business and in furtherance of its purposes set forth in Section 2.04 hereof, and may appoint agents for service of process in all jurisdictions in which the LLC shall conduct business. The Manager may cause the LLC to change from time to time its resident agent for service of process, or the location of its registered office in Massachusetts, *provided, however*, that the Manager shall promptly notify all Members in writing of any such change.

Practice Note

The designation of a registered office and registered agent are fairly routine matters, but ones that are required by the Act. Failure to make such designations may delay receipt of applicable notices or service of process. In addition, some commentators have suggested that failure to designate an office or agent could constitute a failure to observe appropriate "corporate" formalities, thereby possibly subjecting the members or managers to personal liability for the entity's debts and obligations. Some operating agreements go so far as to allow the members to file a notice of change of agent or office if the managers fail to take such actions on a timely basis.

2.03 *Organization.* The Manager shall cause to be filed such certificates and documents as may be necessary or appropriate to comply with the Act and any other applicable requirements for the operation of a limited liability company in accordance with the laws of the Commonwealth of Massachusetts and any other jurisdictions in which the LLC shall conduct business, and shall continue to do so for so long as the LLC conducts business therein.

2.04 *Purposes and Powers.* The general character of the business of the LLC, as set forth in the Certificate, is to engage in the business of *[investment in, and ownership and development of, real estate and interests therein, including buying, acquiring, owning, operating, selling, financing, refinancing, disposing of and otherwise dealing with interests in real estate, directly or indirectly through joint ventures, partnerships or other entities]*; and to engage in any activities directly or indirectly related or incidental thereto.

Practice Note

This provision should conform to the purpose clause in the LLC's certificate of organization.

Subject to all other provisions of this Agreement, in furtherance of the conduct of its business, the LLC is hereby authorized:

(a) to enter into, execute, modify, amend, supplement, acknowledge, deliver, perform and carry out contracts of any kind, including operating agreements of limited liability companies (whether as a member or manager), joint venture agreements, limited partnership and general partnership agreements, contracts with Affiliates, including other contracts establishing business arrangements or organizations necessary to, in connection with, or incidental to the accomplishment of, the purposes of the LLC;

(b) to borrow money and issue evidences of indebtedness or guarantees in furtherance of any or all of the purposes of the LLC, and to secure the same by mortgages, pledges or other liens on the property of the LLC;

(c) to the extent that funds of the LLC are available therefor, to pay all expenses, debts and obligations of the LLC;

(d) to enter into or engage in any kind of activity necessary to, in connection with, or incidental to, the accomplishment of the purposes of the LLC, so long as said activities may be lawfully carried on or performed by an LLC under the laws of the Commonwealth of Massachusetts; and

(e) to take any other action not prohibited under the Act or other applicable law.

2.05 *Members.* The Members of the LLC are identified on *Schedule A* hereto. Additional Members may be admitted to the LLC (i) pursuant to and in accordance with *[Section 3.02(c) and]* Article VIII hereof, *[or (ii) with the approval of Members holding not less than two-thirds of the Percentage Interests held by all Members, which approval shall specify the capital contribution, Percentage Interest, economic interest and any other rights and obligations of such additional Member. Such approval shall bind all Members. In connection with any such admission, this Agreement (including Schedule A) shall be amended to reflect the additional Member, his, her or its capital contribution, if any, his, her or its Percentage Interest, and any other rights and obligations of the additional Member.]*

Practice Note

It may not be appropriate to include this provision. Alternatively, the percentage of members required to approve the admission of new members may need to be higher or lower or may need to provide that no member may be disproportionately adversely affected by the admission of the new member. See Section 3.02(c), below, for a variation on this theme. In any event, the drafter must consider when new members may be admitted, upon what terms, and what member approvals are required in connection therewith.

The admission of a new member or the grant of a larger interest to an existing member can have significant tax consequences for the member, especially if the member is a service provider to the LLC. Accordingly, the terms of any such admission or grant should be carefully reviewed by a qualified tax adviser.

2.06 *Designation of Managers.* Joe Manager is hereby designated as the Manager of the LLC. Any Manager may withdraw or be removed as a manager of the LLC, and other persons may be added or substituted as Managers, only in the manner specified in Sections 8.02 and 8.03.

Practice Note

The agreement may prohibit the resignation of a manager. See Section 8.02. In many cases, the members may wish to provide that they can remove the manager, with or without cause, and designate one or more new managers, all without the approval of the existing manager. See Article VIII, below.

2.07 *Managers as Members.* Any Manager may hold an interest in the LLC as a Member, and such person's rights and interest as a Manager shall be distinct and separate from such person's rights and interest as a Member.

2.08 *Liability of Members.* The liability of the Members for the losses, debts and obligations of the LLC shall be limited to their capital contributions, *provided, however*, that under applicable law, the Members may under certain circumstances be liable to the LLC to the extent of previous distributions made to them in the event that the LLC does not have sufficient assets to discharge its liabilities. Without limiting the foregoing, (i) no Member, in his, her or its capacity as a Member (or, if applicable, as a Manager) shall have any liability to restore any negative balance in his, her or its Capital Account and (ii) the failure of the LLC to observe any formalities or requirements relating to exercise of its powers or management of its business or affairs under this Agreement or the Act shall not be grounds for imposing personal liability on the Members or Managers for liabilities of the LLC.

Practice Note

Section 22 of the Act provides that, except as otherwise provided, the debts, obligations, and liabilities of an LLC in contract, tort, or otherwise, shall be solely the debts, obligations, and liabilities of the LLC, and no

member or manager shall be personally liable, directly or indirectly, including without limitation by way of indemnification, contribution, assessment, or otherwise, for such debts, obligations, and liabilities by reason of being a member or manager. See also the notes contained in Sections 6.01, 8.01(a), and 9.01(b) of this agreement.

Section 35 of the Act provides for returning "wrongful distributions" to the LLC under certain circumstances. Specifically, a member or manager who votes for or assents to a distribution in violation of the operating agreement shall be personally liable to the LLC for the portion of the distribution exceeding the amount that could have been distributed without violating the agreement. Any proceeding with respect to such wrongful distribution must be commenced within two years of the date of the distribution.

It is not clear whether, as a practical matter, the language contained in clause (ii), above, adds anything to the provisions of the Act. Section 22 of the Act clearly provides that members are not liable for the debts and obligations of the LLC.

2.09 *Notices of Default.* No Member or Manager shall be obliged to give notice of an existing or potential default of any obligation of the LLC to any of the Members, nor *[subject to the provisions of Section 3.02(b)]* shall any Member or Manager be obligated to make any capital contributions or loans to the LLC or otherwise supply or make available any funds to the LLC, even if the failure to do so would result in a default of any of the LLC's obligations or the loss or termination of all or any part of the LLC's assets or business.

Practice Note

Section 3.02(b) provides for optional capital contributions to fund the LLC's operating deficits. If mandatory contributions are required to fund the LLC's deficits, this could constitute a serious "end-run" around the limitation on member liability normally found in an LLC.

2.10 *Investment Representations.* Each Member, by execution of this Agreement or an amendment hereto reflecting such Member's admission to the LLC, hereby represents and warrants to the LLC the following:

(a) It is acquiring an interest in the LLC for its own account for investment only, and not with a view to, or for sale in connection with, any distribution thereof in violation of the Securities Act, or any rule or regulation thereunder.

(b) It understands that (i) the interest in the LLC it is acquiring has not been registered under the Securities Act or applicable state securities laws and cannot be resold unless subsequently registered under the Securities Act and such laws, or unless an exemption from such registration is available; (ii) such registration under the Securities Act and such laws is unlikely at any time in the future and neither the LLC nor the Members or Managers are obligated to file a registration statement under the Securities Act or such laws; and (iii) the assignment, sale,

transfer, exchange or other disposition of the interests in the LLC is restricted in accordance with the terms of this Agreement.

(c) It has had such opportunity as it has deemed adequate to ask questions of and receive answers from the Manager or other representatives of the LLC concerning the LLC, and to obtain from representatives of the LLC such information that the LLC possesses or can acquire without unreasonable effort or expense, as is necessary to evaluate the merits and risks of an investment in the LLC.

(d) It has, either alone or with its professional advisers, sufficient experience in business, financial and investment matters to be able to evaluate the merits and risks involved in investing in the LLC and to make an informed investment decision with respect to such an investment.

(e) It can afford a complete loss of the value of its investment in the LLC and is able to bear the economic risk of holding such investment for an indefinite period.

(f) If it is an entity, (i) it is duly organized, validly existing and in good standing under the laws of its jurisdiction of organization; (ii) it has full organizational power to both execute and deliver this Agreement and perform its obligations hereunder; (iii) its execution, delivery and performance of this Agreement has been authorized by all requisite action on behalf of the entity; and (iv) it has duly executed and delivered this Agreement.

Practice Note

The representations contained in clauses (a) through (e), above, are intended to provide minimal compliance with federal securities laws in connection with the LLC's issuance of interests to its members. In some cases, the membership interests may not be characterized as securities (particularly in the context of member-managed LLCs) because the members act more as "general partners," do not delegate management responsibilities to others, and profit from their own efforts as opposed to the efforts of others. In general, most state and federal securities laws do not specifically classify LLC interests as securities, and the traditional *Howey* analysis (see *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946)) will probably be applied on a case-by-case basis, taking into account the particular facts and circumstances surrounding the LLC interest.

ARTICLE III
Capital Contributions; Additional Financing

3.01 *Capital Accounts.* For each Member (and each permitted assignee), the LLC shall establish and maintain a separate Capital Account.

Practice Note

An LLC that is intended to be classified as a partnership for federal income tax purposes should establish and maintain capital accounts in accordance with the Internal Revenue Code and applicable Treasury Regu-

lations. (See the definition of "Capital Account" in Article I, above.) The operating agreement should also contain provisions for the allocation of income and loss for tax purposes that comply with the Code and such regulations. See Article V, below. However, to avoid distorting the economic relationships among LLC members, in many circumstances, strict compliance with the requirements of the applicable Treasury Regulations may be undesirable. Consultation with a tax adviser is essential for determining the tax and economic consequences of whether or not to comply with the regulations.

3.02 *Capital Contributions.*

(a) Each Member has contributed to the capital of the LLC the amount set forth opposite its name on *Schedule A* attached hereto.

(b) If the Manager determines at any time, or from time to time, that the LLC requires funds to carry out its purposes, conduct its business, meet its obligations, or make any expenditure authorized by this Agreement in excess of the amounts generated from the LLC's operations and the amounts specified on *Schedule A* hereto, and such funds are not available from third-party lenders on terms acceptable to the Manager in its sole discretion, the Members may, but shall not be required to, contribute any such additional capital. Members electing to contribute such additional capital shall contribute such portions thereof as they may agree upon, or, if they are unable to agree, each such Member shall contribute a portion of the total amount required based on its Percentage Interest and the Percentage Interests of all other contributing Members. *[Include specific procedures for notice and calls for capital, indicating whether written notice is required, the times by which the contributions must be made, and any other appropriate provisions reflecting logistical and business considerations.]*

In connection with any such contribution of additional capital by the Members, the Percentage Interests of the Members shall be modified as follows:

[(i) Include applicable dilution formula, indicating how any adjustment to one Member's interest would be allocated among the other members, if applicable.]

Practice Note

Instead of adjusting the members' percentage interests, it may be preferable to repay voluntary capital contributions (or an interest-like return thereon) on a priority basis. Alternatively, this provision can be eliminated entirely, with the additional funds provided as "voluntary loans." See Section 3.05, below.

This Agreement, including *Schedule A* hereto, shall be amended to reflect any such adjustment of the Members' Percentage Interests; and each Member, and each person who is hereinafter admitted to the LLC as a Member, hereby consents to any such amendment and the modification of his, her or its Percentage Interest in the manner

provided herein, and acknowledges that, in connection with any such amendment, such Member's Percentage Interest may be diluted.

[(c) If the Members elect not to contribute additional capital pursuant to Section 3.02(b), the Manager shall be permitted to obtain additional equity financing in the amount required on such terms and conditions as it deems appropriate in its sole discretion, from third parties unaffiliated with any Member. In connection with any such admission of additional Members, the Percentage Interests of the Members shall be diluted proportionately, based on their respective Percentage Interests immediately prior to any such dilution. Without in any way limiting the foregoing, the interest of any third party admitted to the LLC pursuant to this Section 3.02(c) in the Net Profits, Net Losses and distributions of cash or property of any nature, may have such priority or priorities in relationship to the interests therein of the Members as the Manager may in its sole discretion determine, provided that the relative priorities of the Manager and the other Members in the Net Profits, Net Losses and cash distributions of any nature of the LLC shall not be altered as a result of the admission of any such investor.]

Practice Note

Any provision requiring contribution of additional capital and any readjustment of the members' percentage interests as a result of such contributions (or the failure to make them) must be carefully drafted to fit the specific facts and circumstances. Often, such capital contributions are either repaid on a priority basis or earn special returns. If such priorities are desired, Article IV must be modified. Section 28(c) of the Act specifically permits the reduction, subordination, and forfeiture of a member's interest in the event of a default with respect to an obligation to make a capital contribution.

[Each Member, and each person who is hereinafter admitted to the LLC as a Member, hereby (i) consents to the admission of any such third party on such terms as the Manager may determine (subject to the provisions of this Section 3.02(c)), and to any amendment to this Agreement that may be necessary or appropriate to reflect the admission of any such third party and the terms on which it invests in the LLC; and (ii) acknowledges that, in connection with any admission of any such person, such a Member's interest in allocations of Net Profits, Net Losses and distributions of cash and property of the LLC, and net proceeds upon liquidation of the LLC, may be diluted or otherwise altered (subject to the provisions of this Section 3.02(c)).

(d) Each Member hereby constitutes and appoints the Manager and its partners and officers, if any, and each of them acting singly; any person or entity that becomes a substitute or additional Manager of the LLC, and each partner or officer thereof as such a Member's agent and attorney in fact for the purpose of amending this Agreement, including Schedule A hereto, in such manner as may be necessary or appropriate from time to time to reflect the modifications of the Members' Percentage Interests pursuant to Section 3.02(b) and the admission of any additional Member pursuant to Section 3.02(c). Any such amendment, when prepared by said attorney in fact, shall be deemed a part of this Agreement and incorporated herein by reference, as of the

effective date of such amendment, to the same extent as if attached hereto and incorporated herein by this reference on the date hereof. The power of attorney contained in this Section 3.02(d) is coupled with an interest and, therefore, is irrevocable and shall survive the death, dissolution, Bankruptcy or incapacity of any Member.]

> **Practice Note**
> Such a power of attorney makes it far easier to effectuate the provisions of Sections 3.02(b) and (c), which contemplate amendments to the operating agreement.

3.03 *No Withdrawal of or Interest on Capital.* Except as otherwise provided in this Article III, no Member shall be obligated or permitted to contribute any additional capital to the LLC. No interest shall accrue on any contributions to the capital of the LLC, and no Member shall have the right to withdraw or to be repaid any capital contributed by the Member, or to receive any other payment in respect to the Member's interest in the LLC, including, without limitation, payment received as a result of the withdrawal or resignation of such Member from the LLC, except as specifically provided in this Agreement.

> **Practice Note**
> This provision differs from the default rule contained in Section 32 of the Act, which provides to a resigning member the right to receive the fair value of his or her interest in the LLC unless the operating agreement provides otherwise.

3.04 *Third-Party Loans.* In the event that the LLC requires additional funds to carry out its purposes, conduct its business or meet its obligations, or to make any expenditure authorized by this Agreement, the LLC may borrow funds from such third-party lender(s) on such terms and conditions as may be acceptable to the Manager.

3.05 *Voluntary Loans.* In the event the LLC requires additional funds to carry out its purposes, conduct its business, meet its obligations or make any expenditure authorized by this Agreement, and additional funds are not available from third parties pursuant to Section 3.04 on terms acceptable to the Manager in its sole discretion *[or from the Members or a third party pursuant to Section 3.02]*, any Member may, but shall not be obligated to, loan such funds to the LLC. Any loan made pursuant to this Section 3.05 (a "Voluntary Loan") shall be nonrecourse to the Members; shall be evidenced by a promissory note; shall be *[unsecured] [collateralized by such assets of the LLC as the lending Member and the Manager shall determine]*; shall not violate the LLC's other loan or contractual arrangements; shall bear interest, compounded monthly, at a rate of interest equal to the prime rate of interest announced from time to time by *The Wall Street Journal*; shall be repaid out of the first funds available therefor after payment of LLC expenses to third parties and in any event prior to any distribution to any Member of Distributable Cash; and shall become due and payable in full not more than five years after the date such loan is made.

Practice Note

This provision clearly specifies the terms of a loan that may be made by a member to the LLC. Such loans tend to be made in emergency situations, and such a provision often helps to prevent protracted negotiation of loan terms in such circumstances. Subject to other legal constraints (e.g., usury laws, provisions in loan agreements with third parties, etc.), the parties may specify such terms for future loans by members as desired. This provision would require modification depending on the additional capital contribution obligations specified in Section 3.02, above.

ARTICLE IV
Cash Distributions

4.01 *Distribution of Distributable Cash.* Except as provided in [Section 4.03 and] Section 9.02, Distributable Cash shall be distributed to the Members *[at such times and in such amounts as the Manager may approve]* as follows:

(a) first, to the Members in proportion to their respective amounts of Priority Return until the Priority Return of each Member has been reduced to zero;

(b) second, to the Members in proportion to their respective amounts of Invested Capital until the Invested Capital of each Member has been reduced to zero; and

(c) third, the balance, if any, to the Members in accordance with their Percentage Interests.

Practice Note

Cash distributions made by the LLC can be made in a variety of ways. The above is just one example. Cash could be distributed more simply, e.g., all cash could be distributed to the members according to their percentage interests, regardless of their respective capital contributions. The timing of cash distributions should also be considered. In some cases, mandatory distributions (to the extent the LLC has funds available therefor) are desirable, especially to the extent of the tax liabilities the members have arising out of their ownership of interests in the LLC.

[4.02 Distributions Among Members. *Distributable Cash and net proceeds upon liquidation of the LLC distributable hereunder to the Members (or to any group of Members) as a group shall be distributed among them based on their respective Percentage Interests in the LLC, as set forth on Schedule A.]*

Practice Note

This provision is unnecessary in this particular operating agreement, but it is required if the agreement provides for distributions to be made to classes or groups of recipients.

[*4.03* Tax Distributions. *Except as provided in Section 9.02, during, or within 90 days following the end of, each fiscal year of the LLC, the LLC shall distribute to each Member in cash an amount equal to the aggregate federal and state income tax*

liability such Member would have incurred for such year as a result of such Member's ownership of an interest in the LLC determined as if (i) each Member was a natural person residing in [the Commonwealth of Massachusetts]; (ii) all taxes were imposed at the maximum potentially applicable marginal rate of tax applicable to income taking into account the nature of the income (e.g., as ordinary income or long term capital gain; and (iii) taking into account all carryovers of losses or credits from prior years. Notwithstanding the foregoing, such distributions may be reduced or not made with respect to any fiscal year if the funds of the LLC are not available therefor (and the LLC shall not be obligated to borrow money, call for capital contributions from the Members or sell assets in order to generate sufficient cash to make any such distribution). Amounts otherwise distributable to a Member pursuant to this Section 4.03 with respect to a fiscal year shall be reduced by any amounts distributed to such Member pursuant to any provision of this Agreement during such year (other than amounts distributed pursuant to this Section 4.03 with respect to a prior fiscal year). Amounts distributed to a Member pursuant to this Section 4.03 shall be treated as advances against amounts otherwise distributable to the Member pursuant to this Agreement and, accordingly, shall reduce the amount of any subsequent distribution to the Member.]

Practice Note

Because LLCs that are treated as partnerships for tax purposes are "pass-through" entities, this type of provision (commonly referred to as a "tax distribution") is often included to ensure that, to the extent the LLC has available funds, each member is distributed an amount sufficient to allow the member to pay the income tax liability associated with the taxable income allocated to him, her, or it from the LLC. Tax distributions formulations can vary greatly depending on such things as (i) whether the type of income (e.g., ordinary income or capital gains) is taken into account; (ii) whether the computation of tax liabilities takes into account tax losses from other years; (iii) whether the amount is computed on a cumulative basis or on a year-by-year basis; (iv) the tax rates assumed to apply to the income from the LLC; (v) the proportions in which tax distributions are made to the members; and (vi) the discretion of the manager(s) regarding whether the distribution will be made and, if so, its amount.

4.04 *Withholding and Other Taxes.* If the Manager determines in good faith that there is a material possibility that the LLC may be obligated to pay (or collect and pay over) the amount of any tax with respect to any Member's share of any income or distributions from the LLC, the LLC shall pay (or collect and pay over) the amount of such tax to the appropriate taxing authority. Any amount so paid with respect to a Member shall reduce the amount of any distribution that the Member would otherwise be entitled to receive at the time of the payment. If the amount paid with respect to a Member exceeds the amount of distributions then payable to such Member, such excess shall be treated as a loan to the Member from the LLC, payable with interest [at the rate of the prime rate of interest announced from time to time by *The Wall Street Journal* plus three percent (3%)] within ten (10) days after such time that the

LLC makes payment to the appropriate taxing authority. If for any reason the amount of such loan is not timely paid, then such unpaid amount plus any accrued but unpaid interest thereon shall be set off against any future distributions to which such Member otherwise would have been entitled. For purposes of this Agreement, the amount of any reduction in a distribution that would otherwise be made to a Member pursuant to this Section 4.04 shall be treated as if distributed to such Member at the time it otherwise would have been distributed.

4.05 *Distribution of Assets in Kind.* No Member shall have the right to require any distribution of any assets of the LLC in kind. If any assets of the LLC are distributed in kind, such assets shall be distributed on the basis of their fair market value [as determined by the Manager]. Any Member entitled to any interest in such assets shall, unless otherwise determined by the Manager, receive separate assets of the LLC and not an interest as a tenant in common with other Members entitled to any asset being distributed.

Practice Note

This provision differs from the default rule contained in Section 33 of the Act, which provides that, except as specified in a written operating agreement, a member may not be compelled to accept a distribution of any asset in kind from an LLC to the extent that the percentage of the asset distributed to the member exceeds the percentage in which he or she shares in distributions from the LLC. Accordingly, Section 33 of the Act contemplates distributions of any asset in kind to all members as tenants in common, in proportion to their percentage interests. This agreement provides for distributions of separate assets to each member.

ARTICLE V
Allocation of Net Profits and Net Losses

5.01 *Basic Allocations.*

(a) Except as provided in Section 5.02, below (which shall be applied first), the Net Profits and Net Losses of the LLC from operations for any year (or other fiscal period) shall be allocated among the Members in accordance with their Percentage Interests.

(b) Except as provided in Section 5.02, below (which shall be applied first), any Net Profits or Net Losses arising from a Capital Transaction or upon liquidation of the LLC shall be allocated to the Members, in such proportions and in such amounts as may be necessary so that following such allocations, the Adjusted Capital Account balance of each Member equals such Member's then Target Balance.

(c) If the amount of Net Profits or Net Losses allocable to the Members pursuant to Section 5.01(b) for a period is insufficient to allow the Adjusted Capital Account balance of each Member to equal such Member's Target Balance, such Net Profits or Net Losses shall be allocated among the Members in such a manner as to decrease the differences between the Members' respective Adjusted Capital Account balances and their respective Target Balances in proportion to such differences.

Practice Note

Applicable Treasury Regulations require allocations of income and loss among the partners of a partnership for tax purposes to reflect the manner in which the partners share the economic profits and economic losses of the partnership. To accomplish this, the regulations require that each allocation of income or loss to a partner be reflected by a corresponding credit or debit to the partner's capital account and, upon liquidation of the partnership, that each partner receive the balance in the partner's capital account. Assuming these rules are followed, the capital account of a partner would control the amount of economic profit or loss a partner would receive. To mitigate the possibility that the tax rules will distort the economic deal among partners (i.e., members), Sections 5.01(b) and 5.01(c), herein, essentially provide that net profits and net losses are allocated in whatever manner is necessary for the capital accounts of the members to reflect the economic deal among the members, as set forth in Section 4.01, above. To completely eliminate such a possibility, many LLC agreements do not follow the requirement of the applicable Treasury Regulations that liquidating distributions be made in accordance with the members' respective capital account balances. Although such agreements will not fall within the "safe harbor" for allocating income and loss of the LLC, since they generally should reach the same result, most tax advisers believe that such an approach would be respected for federal income tax purposes.

5.02 *Regulatory Allocations*. Notwithstanding the provisions of Section 5.01 above, the following allocations shall be made in the following order of priority:

(a) Items of income or gain (computed with the adjustments contained in paragraphs (i), (ii), (iii), (vi) and (vii) of the definition of "Net Profits and Net Losses") for any taxable period shall be allocated to the Members in the manner and to the minimum extent required by the "minimum gain chargeback" provisions of Treasury Regulation Section 1.704-2(f) and Treasury Regulation Section 1.704-2(i)(4).

(b) All "nonrecourse deductions" (as defined in Treasury Regulation Section 1.704-2(b)(1)) of the LLC for any year shall be allocated to the Members in accordance with their respective Percentage Interests, *provided, however*, that nonrecourse deductions attributable to "partner nonrecourse debt" (as defined in Treasury Regulation Section 1.704-2(b)(4)) shall be allocated to the Members in accordance with the provisions of Treasury Regulation Section 1.704-2(i)(1).

Practice Note

Because no member will bear an economic loss attributable to nonrecourse debt (other than partner nonrecourse debt) or receive any economic benefit from any income or gain arising from satisfaction of nonrecourse debt (other than partner nonrecourse debt), Treasury Regulations contain special provisions for how such losses and income must be allocated. These rules are very important in the case of an LLC because all debt will be "nonrecourse" unless special guaranties or similar arrange-

ments from one or more members exist. If you have not consulted a tax lawyer or accountant by now, Article V should convince you beyond a doubt that you need to do so.

(c) Items of income or gain (computed with the adjustments contained in paragraphs (i), (ii), (iii), (vi) and (vii) of the definition of "Net Profits and Net Losses") for any taxable period shall be allocated to the Members in the manner and to the extent required by the "qualified income offset" provisions of Treasury Regulation Section 1.704-1(b)(2)(ii)(d).

(d) In no event shall Net Losses of the LLC be allocated to a Member if such allocation would cause or increase a negative balance in such Member's Adjusted Capital Account (determined, for purposes of this Section 5.02(d) only, by increasing the Member's Adjusted Capital Account balance by the amount the Member is obligated to restore to the LLC pursuant to Treasury Regulation Section 1.704-1(b)(2)(ii)(c) and decreasing it by the amounts specified in Treasury Regulation Section 1.704-1(b)(2)(ii)(d)(4), (5) and (6)).

(e) In the event that items of income, gain, loss or deduction are allocated to one or more Members pursuant to subsections (c) or (d), above, subsequent Net Profits and Net Losses from operations will first be allocated (subject to the provisions of subsections (c) and (d)) to the Members in a manner designed to result in each Member having a Capital Account balance equal to what the balance would have been if the original allocation of items of income, gain, loss or deduction thereof, pursuant to subsections (c) or (d), had not occurred.

(f) For tax purposes, except as otherwise provided herein, or as required by I.R.C. § 704, all items of income, gain, loss, deduction or credit shall be allocated to the Members in the same manner as are Net Profits and Net Losses, *provided, however*, that if the Carrying Value of any property of the LLC differs from its adjusted basis for tax purposes, then items of income, gain, loss, deduction or credit related to such property for tax purposes shall be allocated among the Members so as to take account of the variation between the adjusted basis of the property for tax purposes and its Carrying Value in the manner provided for under I.R.C. § 704(c).

Practice Note

In situations in which unrealized gain or loss in one or more of the LLC's assets has previously been reflected in the capital accounts (see the Practice Note accompanying the definition of "carrying value"), the amount of such gain or loss cannot be reflected in the capital accounts for a second time when actually realized. Section 704(c) of the Internal Revenue Code and associated regulations provide special rules for allocating such realized gain or loss. Those rules are particularly complex, but generally attempt to allocate the realized gain or loss in the same manner as the unrealized gain or loss was previously reflected in the members' capital accounts. They allow for a variety of methods for allocating this gain or loss, and the method chosen can greatly affect the tax consequences to a member. Individual members may therefore wish to

have input into which method is chosen. (See Section 6.01(vii), herein.) In addition, certain methods may be used only if their use is specified in the operating agreement.

5.03 *Timing of Allocations.* Allocations of Net Profits, Net Losses and other items of income, gain, loss and deduction pursuant to this Article V shall be made for each fiscal year of the LLC as of the end of such fiscal year; *provided, however,* that if the Carrying Values of the assets of the LLC are adjusted in accordance with clause (ii) of the definition of "Carrying Value," the date of such adjustment shall be considered to be the end of a fiscal year for purposes of computing and allocating such Net Profits, Net Losses and other items of income, gain, loss and deduction.

ARTICLE VI
Management

Practice Note

Sections 24(b) through (d) of the Act includes the following default provisions concerning management of the LLC, which will apply absent applicable provisions in the operating agreement:

- If a limited liability company has at least one manager, the manager has exclusive right to manage and control the LLC, and no member has such rights.
- In a manager-managed LLC, each manager is authorized to execute documents and act for the LLC, and no member has such authority.
- If an LLC has no managers, the members manage and control the LLC, and each member may execute documents and act for the LLC.

Provisions for member consent to specified major decisions, such as annual budgeting or sale of a substantial portion of the business, or provisions for member democracy rights, such as annual meetings and the right to replace the manager, could be inserted in Article VI, if desired. See Section 6.03, below, for an example of such a provision. The Act does not provide for or mandate such rights, although it does contain a default rule in Section 21(d) that would apply when members are given a right to vote on a matter and there is no operating agreement provision specifying the requisite vote required. If detailed provisions for multiple managers are desired, pursuant to Section 26 of the Act, they should be inserted in Article VI.

6.01 *Management of the LLC.* Subject to the provisions of this Agreement, including, without limitation, Section 6.03, the overall management and control of the business and affairs of the LLC shall be vested in the Manager. If, at any time, there is more than one Manager, all decisions, approvals, actions, consents and matters to be made, granted, withheld, taken or acted upon by the Manager shall require the approval of *[a majority in number of the persons serving as Managers]* unless otherwise specifically provided herein. Any such decision, approval, action, consent or matter shall be taken at a meeting or teleconference of the requisite number of Managers, or by a writing executed by such requisite number of Managers. *[Any Manager may delegate*

its authority to another Manager as to any particular matter, or as to all matters for a specified period of time (not to exceed 45 days), by a writing duly executed by such delegating Manager.]

Practice Note

This provision should be revised as necessary to reflect the LLC's business arrangements.

All management and other responsibilities not specifically reserved to the Members in this Agreement shall be vested in the Managers, and the Members shall have no voting rights except as specifically provided in this Agreement. Each Manager shall devote *[, and shall cause its officers and directors, if any, to devote,]* such time to the affairs of the LLC as may be reasonably necessary for performance by the Manager of his, her or its duties hereunder, provided such persons shall not be required to devote full time to such affairs.

Specifically, but not by way of limitation, and subject to all other provisions of this Agreement (including without limitation, Sections 6.03 and 6.06), the Manager shall be authorized in the name of and on behalf of the LLC, or in its own name and on its own behalf, as appropriate, to do all things necessary or appropriate to carry on the business and purposes of the LLC, including, without limitation, the following:

(i) to acquire by purchase, lease, exchange or otherwise; and to sell, finance, refinance, encumber and otherwise deal with, any real or personal property;

(ii) to borrow money and issue evidences of indebtedness, or to guarantee loans and to secure the same by mortgage, deed of trust, pledge or other lien on any assets or property of the LLC, and to pay, prepay, extend, amend or otherwise modify the terms of any such borrowings;

(iii) to employ executive, administrative and support personnel in connection with the business of the LLC; to pay salaries, expense reimbursements, employee benefits, fringe benefits, bonuses and any other form of compensation or employee benefit to such persons and entities, at such times and in such amounts as may be determined by the Manager in its sole discretion; and to reimburse the Manager for expenses incurred by it (directly or indirectly) to provide executive, administrative and support services in connection with the business of the LLC;

(iv) to hire or employ such agents, employees, managers, accountants, attorneys, consultants and other persons necessary or appropriate to carry out the business and operations of the LLC; and to pay fees, expenses, salaries, wages and other compensation to such persons;

(v) to pay, extend, renew, modify, adjust, submit to arbitration, prosecute, defend or compromise, upon such terms as it may determine and upon such evidence as it may deem sufficient, any obligation, suit, liability, cause of action or claim, including taxes, either in favor of or against the LLC;

(vi) to determine the appropriate accounting method or methods to be used by the LLC;

(vii) to cause the LLC to make or revoke any of the elections referred to in I.R.C. §§ 108, 704, 709, 754 and 1017 and any similar provisions enacted in lieu thereof, and in any other section of the I.R.C.;

Practice Note

Depending on the specific facts relating to the formation and anticipated operation of the LLC, some or all of the members may want to have input into certain of these elections (most notably, elections under I.R.C. §§ 754 and 704).

(viii) to establish and maintain reserves for such purposes and in such amounts as it deems appropriate from time to time;

(ix) to pay all organizational expenses and general and administrative expenses of the LLC;

(x) to deal with, or otherwise engage in business with, or provide services to and receive compensation therefor from, any person who has provided or may in the future provide any services to, lend money to, sell property to or purchase property from the LLC, including, without limitation, any Member or Manager;

(xi) to engage in any kind of activity and to perform and carry out contracts of any kind necessary to, or in connection with, or incidental to the accomplishment of the purposes of the LLC;

(xii) to pay any and all fees and to make any and all expenditures that the manager, in its sole discretion, deems necessary or appropriate in connection with the organization of the LLC, *[the offering and sale of membership interests in the LLC,]* the management of the affairs of the LLC, and the carrying out of the LLC's obligations and responsibilities under this Agreement, including, without limitation, fees, reimbursements and expenditures payable to a Member or Manager;

(xiii) to exercise all powers and authority granted by the Act to managers, except as otherwise provided in this Agreement;

(xiv) to cause the LLC and its properties and assets to be maintained and operated in such a manner as the Manager may determine; subject, however, to obligations imposed by applicable laws or by any mortgage or security interest encumbering the LLC and such properties and assets from time to time, and by any lease, rental agreement or other agreement pertaining thereto;

(xv) to cause to be obtained and continued in force all policies of insurance required by any mortgage, lease or other agreement relating to the LLC's business or any part thereof, or determined by the Manager to be in the best interests of the LLC;

(xvi) to cause to be paid any and all taxes, charges and assessments that may be levied, assessed or imposed on any of the assets of the LLC unless the same are contested by the Manager; and

(xvii) to perform any other act the Manager may deem necessary, convenient or desirable for the LLC or the conduct of the LLC's business.

Subject to Section 6.03, below, the Manager shall be authorized, in the name and on behalf of the LLC, to hire, employ, deal with, and otherwise engage in business with, itself or any of its Affiliates to the extent the Manager determines to do so in its sole discretion.

6.02 *Certain Permitted Transactions.* Without limitation of any of the powers set forth in Section 6.01, above, the Manager is expressly authorized, for, in the name of, and on behalf of the LLC, as follows:

(i) to cause the LLC to enter into a Property Management Agreement with Joe Manager Property Management, Inc., pursuant to which Joe Manager Property Management, Inc. will provide certain property management services to the LLC, and will receive expense reimbursement and a monthly fee in the amount of $10,000; and

(ii) to cause the LLC to enter into a Sales Agency Agreement with Joe Manager Brokers, Inc., pursuant to which Joe Manager Brokers, Inc. will provide brokerage services to the LLC, and receive expense reimbursement and sales commissions with respect thereto.

Practice Note

This provision unambiguously authorizes specific transactions between the LLC and an affiliate of the manager, in which compensation is paid by the LLC to such an affiliate. Such a provision is not strictly required, but would avoid the need to obtain an approval of such transactions under Section 6.03 of the agreement. Obviously, it should be tailored to fit the particular facts and circumstances involved.

6.03 *Member Approval Requirements*. Notwithstanding the provisions of Section 6.01, without the prior written Consent of the Members, the Manager shall not cause the LLC to (and the LLC shall not) take either of the following actions:

(i) to sell all or substantially all of the assets of the LLC; or

(ii) to cause the LLC to enter into any agreement or arrangement with any Manager or an Affiliate of any Manager (except for the arrangements described in Section 6.02, above), pursuant to which any Manager or any of such Affiliates is to receive compensation of any kind.

Practice Note

This type of provision is not required, but it makes sense in many situations. It may be appropriate to include additional member approval rights as well.

6.04 *Binding the LLC.* The signature of one Manager on any agreement, contract, instrument or other document shall be sufficient to bind the LLC in respect thereof, and conclusively evidence the authority of such Manager and the LLC with respect thereto, and no third party need look to any other evidence or require the joinder or consent of any other party.

6.05 *Compensation of Managers and Members.* No payment shall be made by the LLC to any Manager or Member for such Manager or Member's services as a Manager or Member, except as provided in this Agreement. Each Manager shall be entitled to reimbursement from the LLC for all expenses incurred by such Manager in managing and conducting the business and affairs of the LLC.

Practice Note

If the manager is engaged in substantial activities that are unrelated to the LLC, it may be appropriate to specifically prohibit reimbursement for the manager's salary, overhead, and administrative expenses.

The Manager shall determine which expenses, if any, are allocable to the LLC in a manner that is fair and reasonable to the Manager and the LLC, *[and, if such allocation is made in good faith, it shall be conclusive in the absence of manifest error.]*

Practice Note

Section 7 of the Act states that, unless the written operating agreement otherwise provides, a manager may transact business with the LLC (including making or guaranteeing loans), and he or she has the same rights and obligations with respect to such arrangements as an unaffiliated person.

6.06 *Contracts with Members. [Subject to the provisions of Section 6.03(ii),]* with the approval of the Manager in each case, the LLC may engage in business with, or enter into one or more agreements, leases, contracts or other arrangements for the furnishing to or by the LLC, of goods, services or space with any Member or Affiliate of a Member, and may pay compensation in connection with such business, goods, services or space, provided in each case the amounts payable thereunder are reasonably comparable to those that would be payable to unaffiliated persons under similar agreements, *[and, if the Manager determines in good faith that such amounts are so comparable, such determination shall be conclusive absent manifest error.]*

Practice Note

Section 7 of the Act also states that, unless the written operating agreement otherwise provides, a member may transact business with the LLC (including making or guaranteeing loans), and has the same rights and obligations with respect to such arrangements as an unaffiliated person.

6.07 *Exculpation and Indemnification; Fiduciary Duty*.

Practice Note

Drafting Section 6.07 may need special attention, for instance, if there is a right of contribution among members in the event of "piercing the corporate veil" of the LLC. Note that Sections 8 and 63(b) of the Act permit significant flexibility in this area.

(a) The Members' respective obligations to each other are limited to the express obligations described in this Agreement, which obligations the Members shall carry out with ordinary prudence and in a manner characteristic of businesspersons in similar circumstances. No Member shall be a fiduciary of, or have any fiduciary obligations to, the other Members in connection with the LLC, this Agreement, or such Member's performance of its obligations under this Agreement; and each Member hereby waives to the fullest extent permitted by applicable law any rights it may have to claim any breach of fiduciary obligation under this Agreement or in connection with the LLC.

Practice Note

Section 63(b) of the Act provides that the operating agreement may either expand or restrict the members' duties and liabilities to the LLC, the other members, and the managers. The Act does not specifically provide for *elimination* of the members' duties to each other. Case law in Massachusetts is not yet available, so it is unclear whether a complete waiver of fiduciary duties would be enforceable. Delaware courts have suggested, in the limited partnership context, that the fiduciary duties of partners may be reduced but not entirely eliminated, except for waivers in specifically defined and identified contexts.

(b) No Manager or its Affiliates shall have any liability to the LLC or to any Member for any loss suffered by the LLC that arises out of any action or inaction of any Manager or its Affiliates, if such Manager or its Affiliates, as the case may be, in good faith, determined that such course of conduct was in the best interests of the LLC, and such course of conduct did not constitute *[gross]* negligence or *[willful]* misconduct of such Manager or its Affiliates.

Practice Note

Section 8(b) of the LLC Act provides that the certificate of organization or a written operating agreement may eliminate or limit the personal liability of a member or manager for breach of any duty to the LLC, another member, or a manager. Delaware courts have suggested in the partnership context that the fiduciary duties of partners may be reduced but not entirely eliminated, except for waivers in specifically identified contexts. Case law in Massachusetts is not yet available, so it is unclear whether blanket waivers of fiduciary duties will be enforceable.

(c) Each Manager and its Affiliates shall be indemnified by the LLC against any losses, judgments, liabilities, expenses and amounts paid in settlement of any claims sus-

tained by it with respect to actions taken by such Manager or its Affiliates on behalf of the LLC, provided that no indemnification shall be provided for any person with respect to any matter as to which he or she shall have been adjudicated in any proceeding not to have acted in good faith, in the reasonable belief that his or her action was in the best interests of the LLC.

Practice Note

The indemnification standard in Section 6.07(c), above, is the same as the standard contained in Section 8(a) of the Act. A higher standard may be imposed in an operating agreement. In many contexts, it is customary to deny indemnification (or exculpation) to persons who have acted negligently or with gross negligence. It may be desirable or appropriate to provide indemnification to all members, and not merely to the manager.

Without limiting the foregoing, the LLC *[shall cause] [may, acting with the Consent of the Members, exclusive of any Member seeking indemnification, elect (on a case-by-case basis) to cause]* such indemnification to include payment by the LLC of expenses incurred in defending a civil or criminal action or proceeding in advance of the final disposition of such action or proceeding, upon receipt of an undertaking by the person indemnified to repay such payment if he or she shall be adjudicated not to be entitled to indemnification under this Section 6.07, which undertaking may be accepted without reference to the financial ability of such person to make repayment. Any indemnification to be provided hereunder *[may] [shall]* be provided even if the person to be indemnified is no longer a Manager or an Affiliate of a Manager.

Practice Note

The members need to consider whether advancing expenses is automatic or discretionary. In some cases, the members may want the indemnification provision to apply to all members, and not just to the manager.

(d) Any indemnity under this Section 6.07 shall be paid from, and only to the extent of, LLC assets, and no Member shall have any personal liability on account thereof.

6.08 *Other Activities.*

(a) Except as provided in Section 6.08(b), below, the Members, Managers and any of their Affiliates may engage in and possess interests in other business ventures and investment opportunities of every kind and description, independently or with others, including serving as directors, officers, stockholders, managers, members and general or limited partners of corporations, partnerships or other LLCs with purposes similar to or the same as those of the LLC. Neither the LLC nor any other Member or Manager shall have any rights in or to such ventures or opportunities or the income or profits therefrom.

Practice Note

In some cases, adding noncompetition or similar provisions may be appropriate. See Section 6.08(b), below, for an example.

(b) No Member or Manager, or any Affiliate of any Member or Manager (as an individual proprietor, partner, stockholder, officer, employee, director, joint venturer, investor, lender, consultant, or in any other capacity whatsoever (other than as the holder of not more than 1 percent of the combined voting power of the outstanding stock of a publicly held company)) shall, without the prior Consent of the other Members, *[conduct any real estate development business (as a developer, investor or lender)]* that competes directly or indirectly with the business of the LLC or any portion thereof in any location *[within five miles of any portion of any real estate in which the LLC has an interest,]* at any time during the term of the LLC *[and for a period of two years thereafter]*.

ARTICLE VII
Fiscal Matters

7.01 *Books and Records*.

Practice Note

Section 7.01 herein contains a slightly expanded version of the requirements contained in Sections 9 and 10 of the Act. Section 9 of the Act requires each limited liability company to maintain at its registered office in Massachusetts the following: (1) a current list of the full name and last known address of each member and manager; (2) a copy of the certificate of organization and all certificates of amendment thereof, together with executed copies of any powers of attorney pursuant to which any certificate has been executed; (3) copies of the limited liability company's federal, state, and local income tax returns and reports, if any, for the three most recent years; (4) copies of any then effective written operating agreements and of any financial statements of the limited liability company for the three most recent years; and (5) unless contained in a written operating agreement, a writing setting out: (i) the capital contributions made and required to be made by each member, (ii) the times at which additional contributions are to be made, (iii) any right of a member to receive or a manager to make distributions to a member and (iv) any events that dissolve the limited liability company. Records maintained under Section 9 of the Act are open to inspection and copying at the reasonable request and expense of any member during ordinary business hours. Section 9 also requires that a list of the names and addresses of the members be made available to the secretary of the Commonwealth within five days following a written request therefor. Section 10 of the Act provides that each member or manager of an LLC has the right, subject to such reasonable standards as may be specified in the operating agreement or otherwise established by the manager or members, to obtain from the LLC "for any purpose reasonably related to the member's or manager's interest as a member or manager," (i) true and full information regarding the LLC's business and financial condition, (ii) promptly after becoming available, a copy of the LLC's federal, state, and local income tax returns for each year and (iii) other information regarding the affairs of the limited liability company as is "just and reasonable."

The Manager shall keep or cause to be kept complete and accurate books and records of the LLC in accordance with federal income tax principles and otherwise in accordance with generally accepted accounting principles consistently applied, which shall be maintained and be available, in addition to any documents and information required to be furnished to the Members under the Act, at the office of the LLC for examination and copying by any Member or Manager, or his, her or its duly authorized representative, at its reasonable request and at its expense during ordinary business hours. A current list of the full name and last known address of each Member and Manager, a copy of this Agreement, any amendments thereto, the Certificate, including all certificates of amendment thereto, executed copies of all powers of attorney, if any, pursuant to which this Agreement, any amendment, the Certificate, or any certificate of amendment, has been executed, copies of the LLC's financial statements, and federal, state and local income tax returns and reports, if any, for the three most recent fiscal years, shall be maintained at the registered office of the LLC required by Section 5 of the Act.

The LLC shall have no obligation to deliver or mail a copy of the Certificate or any amendment thereto to the Members.

7.02 *Reports.* Within 120 days after the end of each fiscal year, the Manager shall cause to be prepared and sent to all Members a financial report of the LLC, including a balance sheet and a profit and loss statement, and, if such profit and loss statement is not prepared on a cash basis, a statement of changes in financial position *[, all of which shall be certified by an independent certified public accountant]*. Within 90 days after the end of each fiscal year, the Manager shall furnish all Members with such information as may be needed to enable the Members to file their federal income tax returns and any required state income tax return. The cost of all such reporting shall be paid by the LLC as an LLC expense. Any Member may, at any time, at its own expense, cause an audit of the LLC books to be made by a certified public accountant of its own selection. All expenses incurred by such accountant shall be borne by such Member.

> **Practice Note**
>
> This agreement requires that the LLC conduct an audit of its books and records annually. In many contexts, an audit is unnecessary, and the cost therefor may be an unwanted expense. An alternative provision might require delivery of "such reports as the manager may determine to be reasonable" or delivery of financial statements certified by the manager or chief financial officer of the LLC. At a minimum, information required by the members to prepare their state and federal income tax returns must be provided.

7.03 *Bank Accounts.* The Manager shall be responsible for causing one or more accounts to be maintained in a bank (or banks) that is a member of the F.D.I.C., which accounts shall be used for the payment of the expenditures incurred by the Manager in connection with the business of the LLC, and in which shall be deposited any and all cash receipts of the LLC. All deposits and funds not needed for the operations of the LLC may be invested in short-term investments, including securities issued or

fully guaranteed by U.S. government agencies, certificates of deposit of banks, bank repurchase agreements covering the securities of the U.S. government, commercial paper rated A or better by Moody's Investors Services, Inc., money market funds, interest-bearing time deposits in banks and thrift institutions and such other similar investments as the Manager may approve. All such amounts shall be and remain the property of the LLC, and shall be received, held and disbursed by the Manager for the purposes specified in this Agreement. There shall not be deposited in any of said accounts any funds other than funds belonging to the LLC, and no other funds shall in any way be commingled with such funds. Withdrawals from any LLC bank or similar account shall be made and other activity conducted on such signature or signatures as shall be approved by the Manager.

7.04 *Fiscal Year.* The fiscal year of the LLC shall end on December 31 of each year [unless I.R.C. § 706 requires the use of a different taxable year in which case the fiscal year shall be the same as such taxable year]; provided, however, that the last fiscal year of the LLC shall end on the date the LLC liquidates.

7.05 *Tax Matters Representation.*

(a) [The Manager] shall be the LLC's initial Partnership Representative for each taxable year of the LLC. [The Manager] may revoke the designation of the Partnership Representative and designate a replacement Partnership Representative at any time. If the Person designated as the Partnership Representative is an entity, to the extent required by applicable Treasury Regulations, such Person shall designate an individual (a "Designated Individual") who meets the eligibility requirements for a Partnership Representative (as set forth in the applicable Treasury Regulations) to act as the sole individual through whom the Partnership Representative will act in fulfilling its role as the Partnership Representative.

(b) The Partnership Representative shall have the sole authority to act on behalf of the LLC for purposes of subchapter C of Chapter 63 of the I.R.C. and comparable provisions of state or local income tax laws; provided, however, that if the designation of any Person as the Partnership Representative is properly revoked in accordance with this Agreement, such Person shall not take any action as the Partnership Representative and shall not allow its Designated Individual (if applicable) to take any action in such capacity without the express written consent of [the Manager] notwithstanding that such revocation is not immediately effective under applicable Treasury Regulations. The rights, duties and obligations of the Partnership Representative shall include:

(i) Keeping all Members reasonably apprised of all material activities and developments in connection with any audit or administrative proceeding with any tax authority and any judicial proceedings related to taxes.

(ii) Unless otherwise approved by the unanimous vote of the Members, causing the LLC to timely elect pursuant to I.R.C. § 6226 to have any and all Imputed Underpayments determined with respect to the LLC passed through to the Persons who were Members during the Reviewed Year and to make a similar elec-

tion pursuant to Proposed Regulation § 301.6226-2(e) (or successor provision) to have any Partnership Adjustment that was passed through to the LLC from an entity in which the LLC held an interest passed through to the Persons who were Members during the relevant Reviewed Year.

(iii) Upon a timely request of any Person who was a Member during an applicable Reviewed Year, requesting a modification of any of such Person's share (or the share of any pass-through direct or indirect equity owner of such Person) of any Imputed Underpayment determined with respect to such year in accordance with I.R.C. § 6225(c) and using reasonable efforts to cause such request to be approved by the Internal Revenue Service.

(iv) Initiating and pursuing a request for an administrative adjustment with respect to one or more items of income, gain, loss, deduction or credit of the LLC in accordance with Treasury Regulation I.R.C. § 301.6227-1.

(c) To the extent allowable under subchapter C of Chapter 63 of the I.R.C., the amount of any Imputed Underpayment or of any Partnership Adjustment that does not give rise to an Imputed Underpayment shall be apportioned among the Members of the LLC for the taxable year in which the adjustment is finalized in such manner as may be necessary (as determined by the Partnership Representative in good faith) so that, to the maximum extent possible, the tax and economic consequences of the Imputed Underpayment or Partnership Adjustment and any associated interest and penalties are borne by the Members and former Members based upon their interests in the LLC for the Reviewed Year and any modification of an Imputed Underpayment in accordance with Section 7.05(b)(iii) is credited to the responsible Member or such Member's successor in interest. In furtherance of such objective, if the LLC is required to pay an Imputed Underpayment, each Person who was a Member during an applicable Reviewed Year shall pay to the LLC within ten (10) days of the receipt of written notice of the amount due, an amount equal to the sum of (A) the rate of tax used to determine the Imputed Underpayment multiplied by the allocable share of the associated Partnership Adjustment that such Person would have had in the Reviewed Year had the Partnership Adjustment been included in the LLC's tax return for such year and (B) a corresponding portion of any interest and penalties paid or payable by the LLC; provided, however, that the amount so payable by a Member shall be reduced to reflect any reduction in such Member's share of any Imputed Underpayment as a result of any modification of such amount obtained in accordance with I.R.C. § 6225(c). In lieu of such payment, the LLC may elect to pay all or a portion of the Imputed Underpayment from other sources and withhold the amount a Member (or such Person's predecessor in interest) would otherwise have been obligated to pay to the LLC from the amount of any distributions then to be made to such Member. In the event that a Person does not timely pay (or have withheld from its distributions) any amount due to the LLC pursuant to this subsection (c), the unpaid amount shall be treated as a demand loan that accrues interest at the prime rate published by the Wall Street Journal from time to time plus [3]% (compounded daily) from the date such payment was due, and the LLC shall be entitled to withhold all distributions from such Person and offset the withheld amounts against the amount due under the loan until the loan is repaid in full. Any amount withheld from a Mem-

ber pursuant to this Section 7.05(c) shall be treated as a distribution to such Member at the time paid by the LLC (and shall reduce the amount of any distribution to which the Member is then entitled).

(d) The Members shall cooperate with the Partnership Representative and/or the LLC to implement the provisions of this Section 7.05. Such cooperation shall include, without limitation, (A) taking such action as may be necessary or desirable (as determined by the Partnership Representative) to allow the LLC to successfully elect pursuant to I.R.C. § 6226 for any Imputed Underpayments to be taken into account by the Members rather than the LLC and (B) facilitating an election by any direct or indirect equity owner of the Member to modify the amount of such owner's share of any Imputed Understatement in accordance with I.R.C. § 6225(c).

Practice Note

For taxable years of an LLC that begin on or after January 1, 2018, the procedural rules under the I.R.C. regarding partnership audits and administrative and judicial proceedings were dramatically changed. In general, such proceedings are handled entirely by the LLC's "partnership representative" who is granted nearly unfettered ability to bind the LLC and all of its members regarding all aspects of the proceeding. The "partnership representative" need not be a member of the LLC and, in certain circumstances, can be appointed by the IRS. Under these procedural rules, absent certain elections, if the proceeding involves an increase in the taxable income of the LLC (or a decrease in any tax credits), the LLC rather than its members is obligated to pay the resulting increase in taxes (referred to as the "imputed underpayment") determined by applying the maximum effective tax rate for the year that is the subject of the proceeding (the "reviewed year"). This approach can cause significant distortions in the tax burden imposed on the members of the LLC including

- a significantly higher aggregate amount of tax being paid than would have been paid had the initial tax returns been filed correctly and
- members sharing in the resulting tax liability (indirectly through their interests in the LLC) in a dramatically different manner than had the initial tax returns been filed correctly.

Although procedures are available that can mitigate these distortions in certain circumstances, their election is almost exclusively in the discretion of the "partnership representative." Thus, in any circumstance in which a particular member is not the "partnership representative," it is important that such member contractually obligate the "partnership representative" to act in a fair manner and that the other members have obligations to pay the appropriate amount of any tax deficiency based upon their ownership in the LLC for the reviewed year. The foregoing provision is just one fairly simple example of the type of provision that should be included.

(e) The obligations of a Member pursuant to this Section 7.05 shall survive the dissolution of the LLC, the withdrawal of the Member or the transfer of such Member's

interest in the LLC. In any tax jurisdiction that has not adopted rules similar to those contained in subchapter C of Chapter 63 of the I.R.C. as enacted by the Bipartisan Budget Act of 2015 (as amended), the Managing Member (i) shall be the "tax matters partner" within the meaning of I.R.C. § 6231 as in effect prior to enactment of the Bipartisan Budget Act of 2015 if such jurisdiction is subject to rules similar to those in subchapter C of Chapter 63 of the I.R.C. as in effect prior to the Bipartisan Budget Act of 2015 or (ii) shall, to the extent allowable under applicable law, be granted the authority to conduct any tax proceeding in a manner similar to how such proceeding would have been conducted had subchapter C of Chapter 63 of the I.R.C. as in effect prior to the Bipartisan Budget Act of 2015 been applicable in such jurisdiction.

Practice Note

For taxable years beginning prior to the effective date of the BBA Amendments (generally, January 1, 2018), each partnership and LLC treated as a partnership for federal income tax purposes must have a "tax matters partner." If the manager were not a member, the manager would not be qualified to serve as the tax matters partner. Treasury Regulations provide that the "tax matters partner" must be a member. If no member is so designated, the tax matters partner generally is the member who has the largest interest in the profits of the LLC for the year (or, where there is more than one such member, the member whose last name is first, alphabetically, of all such members' last names). Under I.R.C. §§ 6221–6231, the tax matters partner of a partnership (including an LLC taxed as a partnership) controls audits and other similar administrative proceedings of the partnership relating to federal income taxes. In certain circumstances, it may be important to a member of an LLC to control such proceedings. In addition, because the actions of a tax matters partner can (in limited circumstances) bind other partners with respect to a particular tax determination, other members may wish to provide that the tax matters partner cannot bind them without their express consent. Under I.R.C. §§ 6221–6231, designation of the tax matters partner is only relevant for purposes of controlling audits and other similar administrative proceedings with the IRS; it does not authorize the designee to make tax elections, file tax returns, or handle other administrative functions relating to taxes. If the members want the tax matters partner to handle such additional tasks, they should so specify in the LLC agreement. Otherwise, such tasks will be left to the party or parties charged with the general management of the LLC.

ARTICLE VIII
Transfers of Interests

Practice Note

Provisions for certificated interests in the limited liability company could be inserted in Article VIII pursuant to Section 39(c) of the Act, if desired. However, certificates evidencing the security may suggest that the security is freely transferable (which is generally not the case).

8.01 *General Restrictions on Transfer of Interests by Members*.

(a) Except as provided in Section 8.05, below, no Member may Transfer his, her or its interest in the LLC (including without limitation, by resignation as a member of the LLC) unless:

(i) in the case of a Member that is not a Manager, the Manager shall have previously approved such Transfer in writing, the granting or denying of which approval shall be in the Manager's absolute discretion; and

(ii) in the case of a Member that is a Manager, unless such Transfer shall have been previously Consented to by the other Members, which Consent may be granted or denied in the other Members' absolute discretion.

No assignment of the interest of a Member shall be made if, in the opinion of counsel to the LLC, such assignment (i) may not be effected without registration under the Securities Act; (ii) would result in the violation of any applicable state securities laws; or (iii) unless Consented to by the Manager (or, in the case of a transfer by a Member which is a Manager, unless Consented to by the other Members), would result in the treatment of the LLC as an association taxable as a corporation or as a "publicly-traded limited partnership" for tax purposes. The LLC shall not be required to recognize any such assignment until the instrument conveying such interest has been delivered to the Manager for recordation on the books of the LLC. Unless an assignee becomes a substituted Member in accordance with the provisions of Section 8.01(b), the assignee shall not be entitled to any of the rights granted to a Member hereunder, other than the right to receive all or part of the share of the Net Profits, Net Losses and any items in the nature of income, gain, loss or deduction separately allocated to the Members, and distributions of cash or property or returns of capital to which its assignor would otherwise be entitled in respect of the interest assigned.

(b) An assignee of the interest of a Member, or any portion thereof, shall become a substituted Member entitled to all the rights of a Member if, and only if:

(i) the assignor gives the assignee such right;

(ii) in the case of a Transfer by a Member which is not a Manager, the Manager approves such substitution, the granting or denying of which consent shall be in the Manager's absolute discretion;

(iii) in the case of a Transfer by a Member that is a Manager, the other Members, acting by Consent, shall have approved such substitution, which approval shall specify whether such assignee shall assume the role and duties of Manager in respect of the assigned interest, and, if such assignee is not to assume such role and duties, that there is a least one remaining Manager; or, if there is no remaining Manager, the Members, acting by Consent, shall have elected to continue the LLC and, if they so desire, have selected a new Manager or Managers and entered into an agreement with such new Manager(s) as to their economic interests, if any, in the LLC, and their other rights, duties and responsibilities;

(iv) the assignee pays to the LLC all costs and expenses incurred in connection with such substitution, including, specifically, without limitation, costs incurred in the review and processing of the assignment and in amending the LLC's current Certificate and/or Operating Agreement, if required; and

(v) the assignee executes and delivers an Amendment to this Agreement (and to the Certificate, if required), which Amendment shall be executed by the Manager and such assignee, and such other instruments, in form and substance satisfactory to the Manager (or, if clause (iii) above is applicable, to the Members acting by Consent in connection with such substitution), as may be necessary, appropriate or desirable to effect such substitution and to confirm the agreement of the assignee to be bound by the terms and provisions of this Agreement.

(c) The LLC and the Manager shall be entitled to treat the record owner of any LLC interest as the absolute owner thereof in all respects, and shall incur no liability for distributions of cash or other property made in good faith to such owner until such time as a written assignment of such interest has been received and accepted by the Manager and recorded in the books of the LLC. The Manager may refuse to accept an assignment until the end of the next successive quarterly accounting period. In no event shall any membership interest, or any portion thereof, be sold, transferred or assigned to a minor or incompetent, and any such attempted sale, transfer or assignment shall be void and ineffectual and shall not bind the LLC or the Manager.

8.02 *Withdrawal or Termination of the Manager*. Without the prior written Consent of the Members, no Manager may voluntarily resign, withdraw or retire as Manager from the LLC. Without limiting the foregoing, no Manager may resign from, retire from, abandon or otherwise terminate his, her or its status as a Manager except after 60 days' written notice to all Members.

Practice Note

This provision relates to the manager's status as a *manager* and not as a member (see Section 8.01(b)(iii), above). Section 37 of the LLC Act provides that, despite any agreement to the contrary, a manager may resign. However, a resignation that violates the operating agreement could give rise to a claim for damages.

If a Manager has given such notice, such Manager shall not unreasonably withhold his, her or its approval of any proposed new Manager who has the Consent of the other Members.

A Manager's status as a Manager may be terminated at any time by action of the Members (acting by Consent) and, if there are at the time other Managers, the approval of *[a majority in number of] [a majority in interest of]* such other Managers shall also be required. If the terminated Manager is also a Member, no such termination shall modify such person's rights or obligations as a Member.

8.03 *Additional or Substituted Manager.* Additional or substituted Managers may be selected from among the Members (or may be admitted, as both Managers and

Members, to the LLC) at any time upon the written approval of, and with such rights, obligations, responsibilities and economic interest as may be approved by *[all other Managers, if any, with]* the *[unanimous approval]* of the Members.

Practice Note

If a new member could be admitted with the approval of fewer than all the members, it would be appropriate to include provisions reflecting the terms of the newly admitted member's interest, permitted dilution of existing members' interests, etc. (similar to the provisions of Section 3.02(b), above).

8.04 *Restrictions as to Certain Matters.* Every Transfer of an interest of a Member of the LLC permitted by this Article VIII shall be subject to the following restrictions:

(a) No Transfer of any interest in the LLC may be made if such Transfer would cause or result in a breach of any agreement binding upon the LLC or of then applicable rules and regulations of any governmental authority having jurisdiction over such Transfer. The Manager may require as a condition of any Transfer that the transferor furnish an opinion of counsel, satisfactory to the LLC (both as to counsel and as to the substance of the opinion), that the proposed Transfer complies with applicable law, including federal and state securities laws, and does not cause the LLC to be an investment company as such term is defined in the Investment Company Act of 1940, as amended.

(b) The Manager may require, as a condition to the admission to the LLC as a Member of any transferee who is not a Member, that such transferee demonstrate to the reasonable satisfaction of the Manager that he, she or it is either a financially responsible person or has one or more financially responsible persons who have affirmatively assumed the financial obligations of the transferee under this Agreement, if any, on his, her or its behalf.

Practice Note

Sections 39(d) and 41(b) of the Act contain provisions that describe the liability of assignors and assignees. Section 8.04(b), above, makes sense only if the transferring member has financial obligations to the LLC. If the member does not, this provision should be deleted.

(c) Unless the Manager has specifically approved otherwise in writing, a transferor of an interest as a Member of the LLC (if the transferee is a Member hereunder or if the transferee becomes a Member pursuant to the provisions of this Agreement) shall not be relieved of liability under this Agreement with respect to the transferred interest arising or accruing on or after the effective date of the Transfer, except to the extent of the payments made in the transferor's place by any transferee of its interest; and the LLC may proceed to collect any amount due from the transferor as and when due, together with interest thereon from the date for payment stated herein at the rate of _____ percent per annum, compounded monthly (but not exceeding the maximum rate permitted by law), and all costs and expenses of collection incurred by the LLC (including reasonable fees and disbursements of counsel).

Practice Note

This type of provision is desirable if a member transfers its interest prior to paying in full its capital contribution to the LLC.

(d) Any person who acquires in any manner whatsoever an interest (or any part thereof) in the LLC, whether or not such person has accepted and assumed in writing the terms and provisions of this Agreement or been admitted into the LLC as a Member as provided in Section 8.01(b), shall be deemed, by acceptance of the acquisition thereof, to have agreed to be subject to and bound by all of the obligations of this Agreement with respect to such interest, and shall be subject to the provisions of this Agreement with respect to any subsequent Transfer of such interest.

(e) Any Transfer in contravention of any of the provisions of this Agreement shall be null and void and ineffective to transfer any interest in the LLC, and shall not bind, or be recognized by, or be on the books of the LLC, and any transferee or assignee in such transaction shall not be, or be treated as, or deemed to be a Member for any purpose. In the event any Member shall at any time Transfer an interest in the LLC in contravention of any of the provisions of this Agreement, then each other Member shall, in addition to all rights and remedies at law and equity, be entitled to a decree or order restraining and enjoining such transaction; and the offending Member shall not plead in defense thereto that there would be an adequate remedy at law, it being expressly hereby acknowledged and agreed that damages at law would be an inadequate remedy for a breach or threatened breach of the provisions of this Agreement concerning such transactions.

Practice Note

Section 36 of the Act provides that, despite any agreement to the contrary, a member may resign as a member. As in the case of managers, a member's resignation could be a breach of this agreement and, therefore, a basis for a legal action for damages.

8.05 *Permitted Transfers*. The following Transfers shall be permitted without the approval of the Manager or Members otherwise required under Section 8.01(a), above, but such permitted Transfers shall in any event be subject to Sections 8.01(b) and 8.04 hereof:

(a) An interest as a Member of the LLC may be Transferred from time to time to any Legal Representative(s) and/or Affiliate(s) and/or member(s) of the Immediate Family of the transferring Member.

Practice Note

If desired, provisions for rights of first offer and first refusal may be included in the operating agreement, and would be appropriately inserted in Article VIII. Some practitioners believe that inclusion of a right of first offer or refusal provision is desirable so that a member will not be able to argue that the agreement is an unenforceable "unreasonable restraint on alienation." Such a provision, however, is not required and is probably inappropriate for most transactions. If the parties desire other types of

buy/sell provisions, or other provisions that might be included in a shareholders agreement (or subscription agreement in the case of a corporation), such provisions could also be included in Article VIII.

ARTICLE IX
Miscellaneous

9.01 *Events Causing Dissolution*. The LLC shall be dissolved and its affairs wound up upon the following:

(a) the sale or other disposition of all or substantially all of the assets of the LLC, unless the disposition is a transfer of assets of the LLC in return for consideration other than cash, and the Manager decides not to distribute all or substantially all of such noncash items to the Members;

(b) subject to the provisions of Section 9.02, the death, insanity, retirement, resignation, expulsion, Bankruptcy, dissolution or occurrence of any other event that terminates the membership of a Member who is also a Manager;

Practice Note
For Massachusetts LLCs formed after January 1, 1997, the disassociation of a member will not be a dissolution event unless the operating agreement otherwise specifies. Dissolution events contained in Section 9.01 may be tailored to meet the particular facts and circumstances.

(c) the election to dissolve the LLC made in writing by the Manager *[with the Consent of the Members]*;

Practice Note
In some cases, it may be appropriate to allow the manager or managers, or the members, acting alone, to make such an election.

(d) any consolidation or merger of the LLC with or into any entity, following which the LLC is not the resulting or surviving entity; or

(e) upon the occurrence of an event specified under the laws of the Commonwealth of Massachusetts as one effecting dissolution; except that where, under the terms of this Agreement or the Act, the LLC is not to terminate, the LLC shall immediately be reconstituted and reformed on all the applicable terms, conditions and provisions of this Agreement. The LLC shall not be dissolved upon the death, insanity, retirement, resignation, expulsion, Bankruptcy, dissolution or occurrence of any other event that terminates the membership of a Member, except as provided in Section 9.01(b).

9.02 *Continuation of the LLC*. Notwithstanding the occurrence of an event specified in Section 9.01(b), the LLC shall not be dissolved, and its business and affairs shall not be discontinued, and the LLC shall remain in existence as a limited liability company under the laws of the Commonwealth of Massachusetts, if the remaining Members, acting by Consent, elect within 90 days after such occurrence to continue

the LLC and the LLC's business, and designate from among the Members one or more Managers.

9.03 *Procedures on Dissolution*. Dissolution of the LLC shall be effective on the day on which occurs the event giving rise to the dissolution, but the LLC shall not terminate until its Certificate shall have been canceled and the assets of the LLC shall have been distributed as provided herein. Notwithstanding the dissolution of the LLC, prior to the termination of the LLC, as aforesaid, the business of the LLC and the affairs of the Members, as such, shall continue to be governed by this Agreement. The remaining Manager or, if there be none, a liquidator appointed with the Consent of the Members, shall liquidate the assets of the LLC, apply and distribute the proceeds thereof as contemplated by this Agreement and cause the cancellation of the Certificate.

9.04 *Distributions upon Liquidation*.

(a) After paying liabilities owed to creditors, the Manager or such liquidator shall set up such reserves as it deems reasonably necessary for any contingent or unforeseen liabilities or obligations of the LLC. Said reserves may be paid over by such Manager or such liquidator to a bank, to be held in escrow for the purpose of paying any such contingent or unforeseen liabilities or obligations and, at the expiration of such period as such Manager or such liquidator may deem advisable, such reserves shall be distributed to the Members or their assigns in the manner set forth in paragraph (b), below.

(b) After paying such liabilities and providing for such reserves, the liquidator shall cause the remaining net assets of the LLC to be distributed to all Members with positive Capital Account balances (after such balances have been adjusted to reflect all debits and credits required by applicable Treasury Regulations under I.R.C. § 704(b) for all events through and including the distribution in liquidation of the LLC), in proportion to and to the extent of such positive balances. In the event that any part of such net assets consists of notes or accounts receivable or other non-cash assets, the liquidator may take whatever steps it deems appropriate to convert such assets into cash or into any other form which would facilitate the distribution thereof. If any assets of the LLC are to be distributed in kind, such assets shall be distributed on the basis of their fair market value net of any liabilities.

> **Practice Note**
>
> Although this provision is generally required in order to qualify for the "safe harbor" provided in regulations under I.R.C. § 704(b) for the allocation of an LLC's income and loss among its members, the possibility of distorting the economic arrangement among the members must be carefully considered before this provision is included in the operating agreement. Because of that possibility, most LLC agreements do not contain this provision and provide that liquidating distributions are made in accordance with the general distribution provisions of the agreement (e.g., Section 4.01).

ARTICLE X
General Provisions

10.01 *Notices*. Any and all notices under this Agreement shall be given in writing, and shall be effective (a) on the fourth business day after being sent by registered or certified mail, return receipt requested, postage prepaid; (b) on the first business day after being sent by express mail, *[receipt confirmed telecopy,]* or commercial overnight delivery service providing a receipt for delivery; (c) on the date of hand delivery; or (d) on the date actually received, if sent by any other method. To be effective, all such notices shall be addressed, if to the LLC, at its registered office under the Act, and if to a Member or Manager, at the last address of record on the LLC books *[, and copies of such notices shall also be sent to the last address known to the sender for the recipient, if different from the address so specified]*.

Practice Note

If appropriate, the agreement may provide for delivery of notices by e-mail or other electronic means. For some or all of the notices so delivered, it may be appropriate to require some method for verifying receipt.

10.02 *Word Meanings*. Words such as "herein," "hereinafter," "hereof" and "hereunder" refer to this Agreement as a whole and not merely to a subdivision in which such words appear unless the context otherwise requires. The singular shall include the plural, and the masculine gender shall include the feminine and neuter, and vice versa, unless the context otherwise requires.

10.03 *Binding Provisions*. Subject to the restrictions on transfers set forth herein, the covenants and agreements contained herein shall be binding upon, and inure to the benefit of, the parties hereto, their heirs, Legal Representatives, successors and assigns.

10.04 *Applicable Law*. This Agreement shall be construed and enforced in accordance with the laws of the Commonwealth of Massachusetts, including the Act, as interpreted by the courts of the Commonwealth of Massachusetts, notwithstanding any rules regarding choice of law to the contrary.

10.05 *Counterparts*. This Agreement may be executed in several counterparts, and, as so executed, shall constitute one agreement binding on all parties hereto, notwithstanding that all of the parties have not signed the same counterpart.

10.06 *Separability of Provisions*. Each provision of this Agreement shall be considered separable. To the extent that any provision of this Agreement is prohibited or ineffective under the Act, this Agreement shall be considered amended to the smallest degree possible to make the Agreement effective under the Act (and, if the Act is subsequently amended or interpreted in such manner as to make effective any provision of this Agreement that was formerly rendered invalid, such provision shall automatically be considered valid from the effective date of such amendment or interpretation).

Practice Note

These provisions address issues raised by possible inconsistencies between the Act and the agreement. The agreement is controlling unless its provisions are invalid under the Act (in which case the offending provision of the agreement is modified only to the extent necessary to be permissible under the Act).

10.07 *Section Titles*. Section titles are for descriptive purposes only and shall not control or alter the meaning of this Agreement as set forth in the text.

10.08 *Amendments*. Except as otherwise specifically provided in this Agreement, including, without limitation, in Sections 2.05 *[, 3.02]* and Article VIII, this Agreement may be amended or modified only as follows.

(a) *[By the Manager] [W]*ith the Consent of the Members, and any such amendment may include, without limitation, an amendment providing for capital contributions from, distributions to, and allocations of Net Profits and Net Losses (and items thereof) to one or more additional classes of Members, provided that (x) no such amendment shall increase the liability of, increase the obligations of, or disproportionately adversely affect the interest of any Member without the specific approval of such Member (except that an amendment adopted pursuant to Section 2.05 [or Section 3.02] may reduce a Member's interest in the LLC without such Member's specific approval); (y) if any provision of this Agreement provides for the approval or consent of a greater number of Members or of Members holding a higher percentage of the total Percentage Interests of the Members, any amendment effectuated pursuant to such provision, and any amendment to such provision, shall require the approval or consent of such greater number of Members or of Members holding such higher percentage of Percentage Interests; and (z) subject to clauses (x) and (y), above, any amendment to this Section 10.08 shall require the approval of Members holding not less than *[two-thirds]* of all Percentage Interests.

(b) By the Manager acting alone, to add to the LLC's duties or obligations or surrender any right or power granted to it herein; to cure any ambiguity, to correct or supplement any provision herein that may be inconsistent with any other provision herein; or to make any other provisions with respect to matters or questions arising under this Agreement consistent with the provisions of this Agreement; and to delete or add any provision of this Agreement required to be so deleted or added by any federal agency or state "blue-sky" commissioner or similar such official, which addition or deletion is deemed by such agency or official to be for the benefit or protection of the Members.

(c) By the Manager acting alone, to modify appropriate provisions of this Agreement, if the LLC is advised at any time by its legal counsel that the allocations of profits and losses and similar items provided for in Article V hereof are unlikely to be respected for federal income tax purposes, either because of the promulgation and adoption of Treasury Regulations under I.R.C. § 704 or other developments in applicable law. In making any such amendment, the Manager shall use its best efforts to effect as little change in the economic and tax arrangements among the Members as

it shall determine in its sole discretion to be necessary to provide for allocations of profits and losses to the Members that it believes will be respected for federal income tax purposes. No such amendment shall give rise to any claim or cause of action by any Member or the LLC.

Practice Note

The amendment provision must be tailored to the specific facts and circumstances.

10.09 *Third-Party Beneficiaries*. The provisions of this Agreement, including Article III, are not intended to be for the benefit of any creditor (other than a Member or Manager, in his, her or its capacity as such, who is a creditor) or other person (other than a Member or Manager in his, her or its capacity as such) to whom any debts, liabilities or obligations are owed by (or who otherwise has any claim against) the LLC or any of the Members. Moreover, notwithstanding anything contained in this Agreement, including, without limitation, Article III, no such creditor or other person shall obtain any rights under this Agreement or shall, by reason of this Agreement, make any claim in respect of any debt, liability or obligation (or otherwise) against the LLC or any Member or Manager.

10.10 *Entire Agreement*. This Agreement embodies the entire agreement and understanding between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings relating to such subject matter. The Members and Managers hereby agree that each Member and each Manager shall be entitled to rely on the provisions of this Agreement, and no Member or Manager shall be liable to the LLC or any other Member or Manager for any action or refusal to act taken in good faith reliance on the terms of this Agreement.

10.11 *Waiver of Partition*. Each Member agrees that irreparable damage would be done to the LLC if any Member brought an action in court to dissolve the LLC. Accordingly, each Member agrees that he, she or it shall not, either directly or indirectly, take any action to require partition or appraisal of the LLC or of any of the assets or properties of the LLC, and notwithstanding any provisions of this Agreement to the contrary, each Member (and his, her or its successors and assigns) accepts the provisions of the Agreement as his, her or its sole entitlement on termination, dissolution and/or liquidation of the LLC, and hereby irrevocably waives any and all rights to maintain any action for partition or to compel any sale or other liquidation with respect to his, her or its interest, in or with respect to any assets or properties of the LLC. Each Member agrees that he, she or it will not petition a court for the dissolution, termination or liquidation of the LLC.

Practice Note

This provision may not be enforceable and, in some cases, may be undesirable. See Sections 43 and 44 of the Act, which provide, among other things, that any member or manager may apply to the trial court of the Commonwealth for a decree of dissolution of an LLC if it is not reasonably practicable to carry on the business of the LLC in conformity with the LLC's certificate of organization or operating agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement under seal as of the day and year first above written.

MANAGER:

_____

Joe Manager

MEMBERS:

_____

Joe Manager

_____

John Member

_____

Ann Member

_____

Susan Member

SCHEDULE A
TO OPERATING AGREEMENT OF PARTNERSHIP EXAMPLE LLC

MEMBERS

Names and Addresses of Members	Percentage Interest	Capital Contribution
Joe Manager	10%	$10,000
John Member	30%	30,000
Ann Member	30%	30,000
Susan Member	30%	30,000
Total:	100%	$100,000

EXHIBIT 7F—Corporate Model LLC

CERTIFICATE OF ORGANIZATION

Pursuant to the provisions of the Massachusetts Limited Liability Company Act (the Act), the undersigned, desiring to organize a Massachusetts limited liability company, hereby certify as follows.

1. *Federal Employer Identification Number*. The limited liability company organized hereby has applied for (but not yet received) a federal employer identification number.

Practice Note

The regulations issued by the Office of the Secretary of the Commonwealth require that the federal employer identification number for the LLC be included in the certificate of organization, if available. This requirement is technically impossible to comply with, because the federal employer identification number application requires the inclusion of the date of organization of the entity. Thus, both the certificate of organization and the federal employer identification number applications assume that the other has already been filed!

2. *Name of the Limited Liability Company*. The name of the limited liability company formed hereby (the "LLC") is Corporate Model LLC.

Practice Note

The name must be available and permitted under Section 3 of the Massachusetts Limited Liability Company Act (G.L. c. 156C, hereinafter referred to as the Act) and under other applicable law, including the law of any jurisdictions other than Massachusetts in which the LLC will do business. Under the Act, the name must include the words "limited liability company," "limited company," or the abbreviations "L.L.C.," "L.C.," "LLC," or "LC."

3. *Office of the Limited Liability Company*. The address of the office of the LLC for purposes of Section 5 of the Act is _____, Massachusetts _____.

Practice Note

A Massachusetts LLC must maintain an office in the Commonwealth. Certain records of the LLC must be maintained at such office. See Section 9 of the Act and the notes to Section 7.01 of this operating agreement, below.

4. *Business of the LLC*. The general character of the business of the LLC is to engage in *[specify here the nature of the LLC's business, for example: investment in, and ownership and development of, real estate and interests therein, including buying, acquiring, owning, operating, selling, financing, refinancing, disposing of and otherwise dealing with interests in real estate, directly or indirectly through joint ventures, partnerships or other entities]*; and to engage in any activities directly or indirectly related or incidental thereto.

Practice Note

The purpose clause must be tailored to the particular needs of the LLC. The purpose clause could be more broadly drafted (i.e., by inclusion of language such as "and to engage in any other activity in which an LLC organized under the laws of the Commonwealth of Massachusetts may lawfully engage"), as is often the case in a corporate context.

5. *Date of Dissolution*. The LLC shall have no fixed date upon which it shall dissolve.

Practice Note

The Act does not require an LLC to have a finite term. Absent a provision of the operating agreement to the contrary, a Massachusetts LLC formed after January 1, 1997 will have perpetual existence. However, in some contexts (particularly where the LLC is intended to "look like" a partnership), it may be desirable to specify a date certain on which the LLC will dissolve. This LLC is intended to look like a corporation, so "perpetual" existence seems more appropriate.

6. *Agent for Service of Process*. The name and address of the resident agent for service of process for the LLC is _____, Massachusetts _____.

Practice Note

The resident agent for service of process must be an individual resident of the Commonwealth, a Massachusetts corporation, or a foreign corporation qualified to do business in Massachusetts.

7. *Manager*. As of the date hereof, the LLC has a Board of Managers consisting of three persons. The name and address of each of such person are as follows:

Joe Manager

_____

Boston, Massachusetts 02110

Mary Management

_____

Boston, Massachusetts 02115

Donna Director

_____

Boston, Massachusetts 02109

Practice Note

An LLC does not need a manager, but may have one or a group of managers, some or all of whom may not be members of the LLC. Sometimes it may be appropriate to use corporations as managers to achieve maximum privacy for individuals, for instance, or possibly to achieve an additional level of protection from liability.

8. *Execution of Documents (Secretary of the Commonwealth)*. Any person serving as a Manager, or as the President, Vice President or Treasurer of the LLC is authorized to execute on behalf of the LLC any documents to be filed with the Secretary of State of the Commonwealth of Massachusetts. As of the date hereof, the following persons are serving as the President, Vice President and Treasurer of the LLC:

President:	Paula President
Vice President:	Victor Vice
Treasurer:	Martin Money

Practice Note

In an LLC with managers, it is unnecessary to name a person authorized to execute documents to file with the secretary of the Commonwealth. However, even if the LLC has managers, it may be convenient to designate one or more such agents.

It is unclear under the Act whether it is sufficient to name a category of authorized signing persons, or whether the names of authorized individuals must be reflected in the certificate. Accordingly, the names of the persons currently occupying the named offices (and therefore having signatory authority) have been listed in the certificate. The certificate will need to be amended when and if different persons occupy the named offices.

9. *Execution of Recordable Instruments*. Any Manager of the LLC or any person serving as the President, Vice President or Treasurer of the LLC is authorized to execute, acknowledge, deliver and record any recordable instrument purporting to affect an interest in real property.

Practice Note

This provision is optional, but helpful if the LLC owns interests in real estate that may be mortgaged or transferred.

IN WITNESS WHEREOF, the undersigned hereby affirms under the penalties of perjury that the facts stated herein are true, as of the _____ day of _____, 20__.

Practice Note

Section 15(c) of the Act provides that execution of a certificate constitutes an affirmation, under the penalties of perjury, that the facts stated therein are true.

_____

Authorized Person

Practice Note

Section 15(a)(2) of the Act provides that any person, whether or not authorized in the text of the certificate, may execute the initial certificate of organization. In this regard, the signer of the certificate is similar to the sole incorporator signing articles of organization of a Massachusetts corporation.

CORPORATE MODEL LLC
OPERATING AGREEMENT

THIS OPERATING AGREEMENT, dated as of the _____ day of _____, 20__, is by and among the persons identified as Members on *Schedule A* (each such person being individually referred to as a "Member" and all such persons being referred to collectively as the "Members"), and each of the persons identified as Managers on *Schedule A*, hereto (each such person being individually referred to as a "Manager" and all such persons being referred to collectively as the "Managers").

Practice Note

An LLC does not need a written operating agreement, but one is strongly recommended, particularly if the parties wish to deviate from the "default rules" provided in the Act (see **Exhibit 7I**). Certain provisions of the Act specifically require a writing to create enforceable obligations of the members and managers. For example, an obligation to contribute cash or property to, or to perform services for, an LLC must be embodied in a written operating agreement.

The definition of the term "limited liability company" in the Act specifically provides that the LLC must have one or more members. A Massachusetts LLC is automatically dissolved (subject to the right to continue) if, at any time, it has no members.

The managers of Corporate Model LLC are parties to the operating agreement, in order for them to acknowledge their contractual obligations to the LLC and its members, and the restrictions on their authority contained in the operating agreement. It may not be strictly necessary for managers to be parties to the operating agreement. To be more analogous to the corporate model, managers would not be parties to the agreement (just as directors are not parties to the charter, bylaws, stockholder agreements, or similar organizational documents of a corporation). However, persons serving as directors of a corporation have duties that are well defined by statutory and decisional law. The law governing the operation of LLCs is less developed and the case law is sparse. Accordingly, it may be beneficial—although not technically required—for managers to execute and deliver the operating agreement.

WHEREAS, Corporate Model LLC (the "LLC") has been formed as a limited liability company under the Massachusetts Limited Liability Company Act (the "Act") by the filing on the date hereof of a Certificate of Organization (the "Certificate") in the office of the Secretary of State of the Commonwealth of Massachusetts; and

Practice Note

An LLC is formed at the time the certificate of organization is filed, or at any later date specified in the certificate of organization. If the entity conducts business prior to the effective date, it may be deemed to be doing so as a general partnership. Accordingly, prior to such effective date, the

members or managers may be treated as "general partners," and might therefore have general liability for the debts and obligations of the entity.

WHEREAS, the Managers and the Members wish to set out fully their respective rights, obligations and duties with respect to the LLC and its business, management and operations.

NOW, THEREFORE, in consideration of the mutual agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows.

ARTICLE I
Definitions

The following capitalized terms used in this Agreement shall have the respective meanings ascribed to them below.

"Act" means the Massachusetts Limited Liability Company Act, in effect at the time of the initial filing of the Certificate with the office of the Secretary of State of the Commonwealth of Massachusetts, and as thereafter amended from time to time.

"*Adjusted Capital Account*" means, for each Member, such Member's Capital Account balance increased by such Member's share of "minimum gain" and of "partner nonrecourse debt minimum gain" (as determined pursuant to Treasury Regulation Sections 1.704-2(g) and 1.704-2(i)(5), respectively).

"Affiliate" shall mean, with respect to any specified person or entity, (i) any person or entity that directly or indirectly controls, is controlled by, or is under common control with such specified person or entity; (ii) any person or entity that directly or indirectly controls 10 percent or more of the outstanding equity securities of the specified entity or of which the specified person or entity is directly or indirectly the owner of 10 percent or more of any class of equity securities; (iii) any person or entity that is an officer of, director of, manager of, partner in, or trustee of, or serves in a similar capacity with respect to, the specified person or entity or of which the specified person or entity is an officer, director, partner, manager or trustee, or with respect to which the specified person or entity serves in a similar capacity; or (iv) any person that is a member of the Immediate Family of the specified person.

"Agreement" means this Operating Agreement as it may be amended, supplemented or restated from time to time.

"Bankruptcy" means the occurrence of any of the following events:

(i) a Member makes an assignment for the benefit of creditors;

(ii) a Member files a voluntary petition in bankruptcy;

(iii) a Member is adjudged a bankrupt or insolvent, or has entered against it an order for relief, in any bankruptcy or insolvency proceeding;

(iv) a Member files a petition or answer seeking for itself any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation;

(v) a Member files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against it in any proceeding of this nature;

(vi) a Member seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of the Member or of all or any substantial part of his or her properties; or

(vii) 120 days after the commencement of any proceeding against a Member seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation, if the proceeding has not been dismissed, or if, within 90 days after the appointment without its consent or acquiescence of a trustee, receiver or liquidator of the Member or of all or any substantial part of its properties, the appointment is not vacated or stayed, or within 90 days after the expiration of any such stay, the appointment is not vacated.

Practice Note

This definition is essentially identical to the definition of the same term contained in Section 2 of the Act. It may be modified if so desired by the parties.

"Board of Managers" or *"Board"* means the Board of Managers described in Article VI of this Agreement.

"*Capital Account*" means a separate account maintained for each Member and adjusted in accordance with Treasury Regulations under I.R.C. § 704. To the extent consistent with such Treasury Regulations, the adjustments to such accounts shall include the following:

(i) There shall be credited to each Member's Capital Account the amount of any cash (which shall not include imputed or actual interest on any deferred contributions) actually contributed by such Member to the capital of the LLC, the fair market value (without regard to I.R.C. § 7701(g)) of any property contributed by such Member to the capital of the LLC, the amount of liabilities of the LLC assumed by the Member or to which property distributed to the Member was subject, and such Member's share of the Net Profits of the LLC and of any items in the nature of income or gain separately allocated to the Members, and there shall be charged against each Member's Capital Account the amount of all cash distributions to such Member, the fair market value (without regard to I.R.C. § 7701(g)) of any property distributed to such Member by the LLC, the amount of liabilities of the Member assumed by the LLC or to which property contributed by the Member to the LLC was subject, and such Member's share of the Net Losses of the LLC and of any items in the nature of loss or deduction separately allocated to the Members.

(ii) In the event any interest in the LLC is transferred in accordance with the terms of this Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent it relates to the transferred interest.

Practice Note

Capital accounts are the primary mechanism in regulations adopted under I.R.C. § 704 to ensure that the allocation of profits and losses will be respected for federal income tax purposes and ultimately result in the member who receives such allocation receiving more (or less) value from his or her interest in the LLC. To comply with the regulations, it is necessary that the operating agreement provide that, upon liquidation of the LLC, liquidation proceeds will be distributed among the members based on their positive capital account balances. However, providing that liquidating distributions will be made to the members in accordance with their respective capital account balances results in the allocation of income and loss for tax purposes controlling the ultimate economic sharing among the members. Because many attorneys and clients do not want the "tax tail wagging the business dog," many LLC agreements deliberately do not comply with the safe harbor set forth in the regulations under I.R.C. § 704 by not providing that liquidation distributions will be made in accordance with capital account balances. Nevertheless, even those agreements typically employ "capital accounts" and provide that to the extent possible, the allocations of income and loss of the LLC will be made so that the capital accounts balances of the members correspond to the amounts the members would be distributed in liquidation of the LLC if the LLC sold all of its assets for no gain or loss and liquidated.

"Capital Transaction" means a sale or other disposition of all or a portion of the LLC's property in a single transaction or in a series of related transactions, other than such a sale or disposition in the ordinary course of the LLC's business and any refinancing.

"*Carrying Value*" means, with respect to any asset, the asset's adjusted basis for federal income tax purposes, *provided*, *however*, that (i) the initial Carrying Value of any asset contributed to the LLC shall be adjusted to equal its gross fair market value (as determined by _____) at the time of its contribution and (ii) the Carrying Values of all assets held by the LLC shall be adjusted to equal their respective gross fair market values (taking I.R.C. § 7701(g) into account) upon an election by the LLC to revalue its property in accordance with Treasury Regulation Section 1.704-1(b)(2)(iv)(f) and upon liquidation of the LLC. The Carrying Value of any asset whose Carrying Value was adjusted pursuant to the preceding sentence thereafter shall be adjusted in accordance with the provisions of Treasury Regulation Section 1.704-1(b)(2)(iv)(g).

Practice Note

Regulations adopted under I.R.C. § 704 provide that for purposes of maintaining the partners' (or members' in the case of LLCs) capital accounts, in certain circumstances, the partnership (or LLC) is allowed (and sometimes required) to adjust the partners' capital accounts to reflect the

unrealized appreciation or depreciation in some or all of the partnership's assets. Following such an adjustment, the income and loss of the partnership (solely for purposes of maintaining capital accounts) has to be computed based on the fair market value of the assets whose unrealized appreciation or depreciation was reflected in the capital accounts rather than on the adjusted tax basis of those assets. The concept of "carrying value" is used in lieu of "adjusted tax basis" for purposes of such computations with respect to the "booked up" (or "booked down") assets.

"Certificate" means the Certificate of Organization creating the LLC, as it may, from time to time, be amended in accordance with the Act.

"Clerk" means the persons occupying the office of Clerk (as provided in Section 6.04) at any time, or from time to time.

"Consent" means the written consent or approval of more than 50 percent in interest, based on Percentage Interests, of those Members entitled to participate in giving such Consent, and if more than one class or group of Members is so entitled, then more than 50 percent shall be so required with respect to each such class or group.

"Designated Individual" has the meaning set forth in Section 7.05(a).

"Distributable Cash" means, with respect to any fiscal period, the excess of all cash receipts of the LLC from any source whatsoever, including normal operations, sales of assets, proceeds of borrowings, capital contributions of the Members, proceeds from a Capital Transaction, and any and all other sources over the sum of the following amounts:

(i) cash disbursements for advertising and promotion expenses, salaries, employee benefits (including profit-sharing, bonus and similar plans), fringe benefits, accounting and bookkeeping services and equipment, costs of sales of assets, utilities, rental payments with respect to equipment or real property, management fees and expenses, insurance, real estate taxes, legal expenses, costs of repairs and maintenance, and any and all other items which are customarily considered to be "operating expenses";

(ii) payments of interest, principal and premium and points and other costs of borrowing under any indebtedness of the LLC, including, without limitation, (A) any mortgages or deeds of trust encumbering the real property or other assets owned or leased by the LLC and (B) any Voluntary Loans;

(iii) payments made to purchase inventory or capital assets and for capital construction, rehabilitation, acquisitions, alterations and improvements; and

(iv) amounts set aside as reserves for working capital, contingent liabilities, replacements or for any of the expenditures described in clauses (i), (ii) and (iii), above, which are deemed by the Board of Managers to be necessary to meet the current and anticipated future needs of the LLC.

Practice Note

Although this definition is fairly generic, it should be tailored to fit the particular business in which the LLC is engaged. In some cases, it may be appropriate to create subcategories of cash distributions (e.g., cash from a sale or refinancing versus ordinary cash flow), so that the various types of net revenue can be distributed among the members in different ways.

"Immediate Family" (i) with respect to any individual, means his or her ancestors, spouse, issue, spouses of issue, any trustee or trustees, including successor and additional trustees, principally for the benefit of any one or more of such individuals, and any entity or entities all of the beneficial owners of which are such trusts and/or such individuals, but (ii) with respect to a legal representative, means the Immediate Family of the individual for whom such legal representative was appointed and (iii) with respect to a trustee, means the Immediate Family of the individuals who are the principal beneficiaries of the trust.

"Imputed Underpayment" means the amount payable as a tax by the LLC with respect to a Partnership Adjustment and computed in accordance with I.R.C. Section 6225.

"Invested Capital" means, at any point in time, for any Member, the excess of (i) the aggregate amount of the capital contributed to the LLC by such Member over (ii) the aggregate amount distributed (or deemed distributed) to such Member pursuant to Section 4.01(b).

"I.R.C." means the Internal Revenue Code of 1986, as amended from time to time.

"Legal Representative" means, with respect to any individual, a duly appointed executor, administrator, guardian, conservator, personal representative or other legal representative appointed as a result of the death or incompetency of such an individual.

"LLC" means the limited liability company formed pursuant to the Certificate and this Agreement, as it may from time to time be constituted and amended.

"Manager" refers to any person named as a Manager in this Agreement and any person who becomes an additional, substitute or replacement Manager as permitted by this Agreement, in each such person's capacity as (and for the period during which such person serves as) a Manager of the LLC. "Managers" or "Board of Managers" shall refer collectively to all of such persons in their capacities as (and for the period during which such persons serve as) Managers of the LLC.

"Member" refers severally to any person named as a Member in this Agreement and any person who becomes an additional, substitute or replacement Member as permitted by this Agreement, in such person's capacity as a Member of the LLC. "Members" shall refer collectively to all such persons in their such capacities as Members.

"Member-Manager" means any Member who is also a Manager.

"*Net Profits*" and "*Net Losses*" mean the taxable income or loss, as the case may be, for a period as determined in accordance with I.R.C. § 703(a) computed with the following adjustments:

(i) items of gain, loss and deduction shall be computed based upon the Carrying Values of the LLC's assets (in accordance with Treasury Regulation Sections 1.704-1(b)(2)(iv)(g) and/or 1.704-3(d)) rather than upon the assets' adjusted bases for federal income tax purposes;

(ii) any tax-exempt income received by the LLC shall be included as an item of gross income;

(iii) the amount of any adjustment to the Carrying Value of any LLC asset pursuant to I.R.C. § 734(b) or I.R.C. § 743(b) that is required to be reflected in the Capital Accounts of the Members pursuant to Treasury Regulation Section 1.704-1(b)(2)(iv)(m) shall be treated as an item of gain (if the adjustment is positive) or loss (if the adjustment is negative), and only such amount of the adjustment shall thereafter be taken into account in computing items of income and deduction;

(iv) any expenditure of the LLC described in I.R.C. § 705(a)(2)(B) (including any expenditures treated as being described in I.R.C. § 705(a)(2)(B) pursuant to Treasury Regulations under I.R.C. § 704(b)) shall be treated as a deductible expense;

(v) the amount of items of income, gain, loss or deduction specially allocated to any Members pursuant to Section 5.02 shall not be included in the computation;

(vi) the amount of any unrealized gain or unrealized loss attributable to an asset at the time it is distributed in-kind to a Member shall be included in the computation as an item of income or loss, respectively; and

(vii) the amount of any unrealized gain or unrealized loss with respect to the assets of the LLC that is reflected in an adjustment to the Carrying Values of the LLC's assets pursuant to clause (ii) of the definition of "Carrying Value" shall be included in the computation as items of income or loss, respectively.

Practice Note

Net profits and net losses are generally determined using federal income tax principles. However, certain adjustments need to be made to accommodate economic profits and losses not recognized for tax purposes. Thus, for example, tax-exempt interest and nondeductible expenses need to be included. Similarly, as discussed in connection with the definition of "carrying value," if the capital accounts have been adjusted to reflect the fair market value of some or all of the LLC's assets, future computations of net profits and net losses must use the "booked up/down" value of those assets rather than their adjusted tax bases.

"Partnership Representative" means the Person designated to act as the "partnership representative" pursuant to I.R.C. § 6223.

"Partnership Adjustment" has the meaning set forth in I.R.C. § 6241(2) and generally means any adjustment to any partnership-related item or amount with respect of income, gain, loss, deduction, or credit of the LLC or any Member's distributive share thereof.

"Percentage Interest" shall be the percentage interest of a Member set forth in *Schedule A*, as amended from time to time *[, and subject to adjustment pursuant to Section 3.02]*.

Practice Note

This provision is subject to modification (or elimination) depending on the business arrangements among the members.

"President" means the person occupying the office of President (as provided in Section 6.04) of the LLC at any time, or from time to time.

"Priority Return" means, at any point in time, for any Member, that amount which, when considered together with all amounts previously distributed (or deemed distributed) to such Member pursuant to Section 4.01(a), will result in such Member having received a _____% cumulative return, compounded annually, on such Member's weighted average Invested Capital.

Practice Note

This provision is subject to modification (or elimination) depending on the business arrangements among the members.

"Reviewed Year" has the meaning set forth in I.R.C. § 6225(d)(1), and generally means the partnership taxable year to which a Partnership Adjustment relates.

"Securities Act" means the Securities Act of 1933, as amended.

"Target Balance" means, for each Member at any point in time, either (i) a positive amount equal to the net amount, if any, the Member would be entitled to receive or (ii) a negative amount equal to the net amount the Member would be required to pay or contribute to the LLC or to any third party, assuming, in each case, that (A) the LLC sold all of its assets for an aggregate purchase price equal to their aggregate Carrying Value (assuming for this purpose only that the Carrying Value of any asset that secures a liability that is treated as "nonrecourse" for purposes of Treasury Regulation Section 1.1001-2 is no less than the amount of such liability that is allocated to such asset in accordance with Treasury Regulation Section 1.704-2(d)(2)); (B) all liabilities of the LLC were paid in accordance with their terms from the amounts specified in clause (A) of this sentence; (C) any Member that was obligated to contribute any amount to the LLC pursuant to this Agreement or otherwise (including the amount a Member would be obligated to pay to any third party pursuant to the terms of any liability or pursuant to any guaranty, indemnity, or similar ancillary agreement or arrangement entered into in connection with any liability of the

LLC) contributed such amount to the LLC; (D) all liabilities of the LLC that were not completely repaid pursuant to clause (B) of this sentence were paid in accordance with their terms from the amounts specified in clause (C) of this sentence; and (E) the balance, if any, of any amounts held by the LLC was distributed in accordance with Section 4.01 hereof.

Practice Note

Target balances are used in allocating the income and loss of the LLC among the members. Generally, the income and loss of an entity such as an LLC that is treated as a partnership for federal income tax purposes is allocated among the members in accordance with I.R.C. § 704. As discussed above in the note following the definition of "Capital Account," I.R.C. § 704 generally requires that the allocation of income and loss be reflected in the members' capital accounts and that liquidating distributions be made to the members based on their respective capital account balances. A member's target balance is the balance that you would like the member to have in the member's capital account so that the member's capital account balance would correspond to the amount the member would be entitled to receive if the LLC sold all of its assets for no gain or loss and distributed the proceeds in accordance with the regular distribution "waterfall." The allocation provisions of the LLC agreement (contained in Article V) are then drafted to provide that all allocations of income and loss are made to get the capital account balances of the members to equal their respective target balances. This approach maximizes the probability that the liquidation distribution made in accordance with capital account balances will precisely correspond to the desired economic arrangement among the members. It also minimizes the potential for drafting errors by the attorney.

"Transfer" and any grammatical variation thereof shall refer to any sale, exchange, issuance, redemption, assignment, distribution, encumbrance, hypothecation, gift, pledge, retirement, resignation, transfer or other withdrawal, disposition or alienation in any way (whether voluntarily, involuntarily or by operation of law) as to any interest as a Member. Transfer shall specifically, without limitation of the above, include assignments and distributions resulting from death, incompetency, Bankruptcy, liquidation and dissolution.

"Treasurer" shall mean the person occupying the office of Treasurer (as provided in Section 6.04) of the LLC at any time, or from time to time.

"Voluntary Loan" shall mean a loan made pursuant to Section 3.05 of this Agreement.

ARTICLE II
General

2.01 *Name of the Limited Liability Company*. The name of the limited liability company formed hereby is Corporate Model LLC. The name of the LLC may be changed

at any time, or from time to time, with the approval of the Board of Managers and the Consent of the Members.

2.02 *Office of the Limited Liability Company; Agent for Service of Process*. The address of the registered office of the LLC for purposes of Section 5 of the Act is _____, Massachusetts _____. The name and address of the resident agent for service of process for the LLC is John Member, _____, Massachusetts _____. The Board of Managers may establish places of business of the LLC within and without the Commonwealth of Massachusetts, as and when required by the LLC's business and in furtherance of its purposes set forth in Section 2.04 hereof, and may appoint agents for service of process in all jurisdictions in which the LLC shall conduct business. The Board of Managers may cause the LLC to change, from time to time, its resident agent for service of process, or the location of its registered office in Massachusetts, *provided, however,* that the Board of Managers shall promptly notify all Members in writing of any such change.

Practice Note

The designation of a registered office and registered agent are fairly routine matters that are required by the Act. Failure to make such designations may delay receipt of applicable notices or service of process. In addition, some commentators have suggested that failure to designate an office or agent could constitute a failure to observe appropriate "corporate" formalities, thereby possibly subjecting the members or managers to personal liability for the entity's debts and obligations. Some operating agreements go so far as to allow the members to file a notice of change of the agent or office if the managers fail to take such actions on a timely basis.

Because, in this agreement, the membership of the board of managers changes from time to time, a member rather than a manager has been designated as the resident agent for service of process.

2.03 *Organization*. The Board of Managers shall cause to be filed such certificates and documents as may be necessary or appropriate to comply with the Act and any other applicable requirements for the operation of a limited liability company in accordance with the laws of the Commonwealth of Massachusetts and any other jurisdictions in which the LLC shall conduct business, and shall continue to do so for so long as the LLC conducts business therein.

2.04 *Purposes and Powers*. The general character of the business of the LLC, as set forth in the Certificate, is to engage in the business of *[investment in, and ownership and development of, real estate and interests therein, including buying, acquiring, owning, operating, selling, financing, refinancing, disposing of and otherwise dealing with interests in real estate, directly or indirectly through joint ventures, partnerships or other entities]*; and to engage in any activities directly or indirectly related or incidental thereto.

Practice Note

This provision should conform to the purpose clause in the LLC's certificate of organization.

Subject to all other provisions of this Agreement, in furtherance of the conduct of its business, the LLC is hereby authorized to do as follows:

(a) to enter into, execute, modify, amend, supplement, acknowledge, deliver, perform and carry out contracts of any kind, including operating agreements of limited liability companies (whether as a member or manager), joint venture agreements, limited partnership and general partnership agreements, contracts with Affiliates, and including other contracts establishing business arrangements or organizations, necessary to, in connection with, or incidental to the accomplishment of the purposes of the LLC;

(b) to borrow money and issue evidences of indebtedness or guarantees in furtherance of any or all of the purposes of the LLC, and to secure the same by mortgages, pledges or other liens on the property of the LLC;

(c) to the extent that funds of the LLC are available therefor, to pay all expenses, debts and obligations of the LLC;

(d) to enter into or engage in any kind of activity necessary to, in connection with, or incidental to, the accomplishment of the purposes of the LLC, so long as said activities may be lawfully carried on or performed by a limited liability company under the laws of the Commonwealth of Massachusetts; and

(e) to take any other action not prohibited under the Act or other applicable law.

2.05 *Members*. The Members of the LLC are identified on *Schedule A* hereto. Additional Members may be admitted to the LLC (i) pursuant to and in accordance with *[Section 3.02(c) and]* Article VIII hereof *[or (ii) with the approval of Members holding not less than two-thirds of the Percentage Interests held by all Members, which approval shall specify the capital contribution, Percentage Interest, economic interest and any other rights and obligations of such additional Member. Such approval shall bind all Members. In connection with any such admission, this Agreement (including Schedule A) shall be amended to reflect the additional Member, its capital contribution, if any, its Percentage Interest, and any other rights and obligations of the additional Member.]*

Practice Note

It may not be appropriate to include this provision. Alternatively, the percentage of members required to approve the admission of new members may need to be higher or lower, or the agreement may need to provide that no member may be disproportionately adversely affected by the admission of the new member. See Section 3.02(c), below, for a variation on this theme. In any event, the drafter should consider when new members may be admitted, upon what terms, and what member approvals are required in connection therewith.

It may be appropriate for the board of managers to have authority to cause new members to be admitted to the LLC without member approval, much as the board of directors of a corporation may issue shares of stock (assuming the stock is authorized and unissued) without stockholder approval. However, because any such issuance necessarily modifies the interests of the members of the LLC, the members are likely to want approval rights over such admission, or defined parameters (regarding dilution of their interests, priority of new members over the rights of existing members, etc.) with respect to admission of additional members.

The admission of a new member or the grant of a larger interest to an existing member can have significant tax consequences for the member especially if the member is a service provider to the LLC. Accordingly, the terms of any such admission or grant should be carefully reviewed by a qualified tax adviser.

2.06 *Designation of Managers*. The persons identified on *Schedule A* hereto as "Managers" are currently serving as the managers of the LLC. Managers shall be elected by the Members in accordance with the provisions of Section 6.02, below. Any Manager may withdraw or be removed as a manager of the LLC and other persons may be added or substituted as Managers, only in the manner specified in Section 6.02, below.

Practice Note

The agreement may prohibit the resignation of a manager, but such a prohibition will not prevent the resignation of the manager; instead, it would give rise to a claim for damages against the resigning manager for breach of the agreement. In many cases, the members may wish to provide that they can remove managers with or without cause, and designate one or more new managers, all without the approval of the existing managers. See Section 6.02, below.

2.07 *Managers as Members*. Any Manager may hold an interest in the LLC as a Member, and such person's rights and interest as a Manager shall be distinct and separate from such person's rights and interest as a Member.

2.08 *Liability of Members*. The liability of the Members for the losses, debts and obligations of the LLC shall be limited to the Members' capital contributions, *provided, however*, that under applicable law, the Members may, under certain circumstances, be liable to the LLC to the extent of previous distributions made to them in the event that the LLC does not have sufficient assets to discharge its liabilities. Without limiting the foregoing, (i) no Member in his, her or its capacity as a Member (or, if applicable, as a Manager) shall have any liability to restore any negative balance in his, her or its Capital Account; and (ii) the failure of the LLC to observe any formalities or requirements relating to exercise of the LLC's powers or management of its business or affairs under this Agreement or the Act shall not be grounds for imposing personal liability on the Members or Managers for liabilities of the LLC.

Practice Note

Section 22 of the Act provides that, except as otherwise provided by the Act, the debts, obligations, and liabilities of an LLC in contract, tort, or otherwise, shall be solely the debts, obligations, and liabilities of the LLC, and no member or manager shall be personally liable, directly or indirectly, including without limitation by way of indemnification, contribution, assessment, or otherwise, for such debts, obligations, and liabilities by reason of being a member or manager. See also the notes contained in Sections 6.01, 8.01(a), 8.01(b), and 9.01(b) of this agreement, below.

Section 35 of the Act provides for returning "wrongful distributions" to the LLC under certain circumstances. Specifically, a member or manager who votes for or assents to a distribution in violation of the operating agreement shall be personally liable to the LLC for the portion of the distribution that exceeds the amount that could have been distributed without violating the agreement. Any proceeding in respect of such wrongful distribution must be commenced within two years of the date of the distribution.

It is not clear whether, as a practical matter, the language contained in clause (ii), above, adds anything to the statute. Section 22 of the Act clearly provides that members are not liable for the debts and obligations of the LLC.

2.09 *Notices of Default*. No Member or Manager shall have any obligation to give notice of an existing or potential default of any obligation of the LLC to any of the Members, nor [, *subject to the provisions of Section 3.02(b),]* shall any Member or Manager be obligated to make any capital contributions or loans to the LLC, or otherwise supply or make available any funds to the LLC, even if the failure to do so would result in a default of any of the LLC's obligations or the loss or termination of all or any part of the LLC's assets or business.

Practice Note

Section 3.02(b), below, provides for optional capital contributions to fund LLC operating deficits. If mandatory contributions were required to fund deficits, it could constitute a serious "end-run" around the limitation on member liability normally found in an LLC.

2.10 *Investment Representations*. Each Member, by execution of this Agreement or an amendment hereto reflecting such Member's admission to the LLC, hereby represents and warrants to the LLC the following.

(a) It is acquiring an interest in the LLC for its own account for investment only, and not with a view to, or for sale in connection with, any distribution thereof in violation of the Securities Act, or any rule or regulation thereunder.

(b) It understands that (i) the interest in the LLC it is acquiring has not been registered under the Securities Act or applicable state securities laws and cannot be resold unless subsequently registered under the Securities Act and such laws, or unless an

exemption from such registration is available; (ii) such registration under the Securities Act and such laws is unlikely at any time in the future and neither the LLC nor the Members or Managers are obligated to file a registration statement under the Securities Act or such laws; and (iii) the assignment, sale, transfer, exchange or other disposition of the interests in the LLC is restricted in accordance with the terms of this Agreement.

(c) It has had such opportunity as it has deemed adequate to ask questions of and receive answers from representatives of the LLC concerning the LLC, and to obtain from representatives of the LLC such information that the LLC possesses or can acquire without unreasonable effort or expense, as is necessary to evaluate the merits and risks of an investment in the LLC.

(d) It has, either alone or with its professional advisers, sufficient experience in business, financial and investment matters to be able to evaluate the merits and risks involved in investing in the LLC and to make an informed investment decision with respect to such investment.

(e) It can afford a complete loss of the value of its investment in the LLC and is able to bear the economic risk of holding such investment for an indefinite period.

(f) If the Member is an entity, (i) it is duly organized, validly existing and in good standing under the laws of its jurisdiction of organization; (ii) it has full organizational power to execute and deliver this Agreement and to perform its obligations hereunder; (iii) its execution, delivery and performance of this Agreement have been authorized by all requisite action on behalf of the entity; and (iv) it has duly executed and delivered this Agreement.

Practice Note

The representations contained in clauses (a) through (e) are intended to provide minimal compliance with federal securities laws in connection with the issuance of interests by the LLC to its members. In some cases, the membership interests may not be characterized as securities (particularly in the context of member-managed LLCs) because the members act more like "general partners," do not delegate management responsibilities to others, and profit from their own efforts as opposed to the efforts of others. In general, most state and federal securities laws do not specifically classify LLC interests as securities, and the traditional *Howey* analysis (see *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946)) will probably be applied on a case-by-case basis, taking into account the particular facts and circumstances surrounding LLC interests.

ARTICLE III
Capital Contributions; Additional Financing

3.01 *Capital Accounts*. For each Member (and each permitted assignee), the LLC shall establish and maintain a separate Capital Account.

Practice Note

An LLC that is intended to be classified as a partnership for federal income tax purposes should establish and maintain capital accounts in accordance with the Internal Revenue Code and applicable Treasury Regulations. (See the definition of "Capital Account" in Article I, above.) The operating agreement should also contain provisions for the allocation of income and loss for tax purposes that comply with the Code and such regulations. See Article V, below. However, in certain circumstances, to avoid possible distortions to the economic relationships among the members of the LLC, strict compliance with the requirements of the applicable Treasury Regulations may be undesirable. Consultation with a tax adviser is essential in determining the tax and economic consequences of whether or not to comply with the regulations.

3.02 *Capital Contributions*.

(a) Each Member has contributed to the capital of the LLC the amount set forth opposite his, her or its name on *Schedule A*, attached hereto.

(b) If the Board of Managers determines at any time, or from time to time, that the LLC requires funds to carry out its purposes, conduct its business, meet its obligations or make any expenditure authorized by this Agreement, in excess of the amounts generated from the LLC's operations and the amounts specified on *Schedule A* hereto, and such funds are not available from third-party lenders on terms acceptable to the Board of Managers in its sole discretion, the Members may, but shall not be required to, contribute any such additional capital. Members electing to contribute such additional capital shall contribute such portions thereof as they may agree upon, or, if they are unable to agree, each such Member shall contribute a portion of the total amount required based on its Percentage Interest and the Percentage Interests of all other contributing Members. *[Include specific procedures for notice and calls for capital, indicating whether written notice is required, the times by which the contributions must be made, and any other appropriate provisions reflecting logistical and business considerations.]*

In connection with any such contribution of additional capital by the Members, the Percentage Interests of the Members shall be modified as follows.

(i) *[Include applicable dilution formula, indicating how any adjustment to one Member's interest would be allocated among the other members, if applicable.]*

Practice Note

Instead of adjusting the members' percentage interests, it may be preferable to repay voluntary capital contributions (or an interest-like return thereon) on a priority basis. Alternatively, this provision can be eliminated entirely, with the additional funds provided as "voluntary loans." See Section 3.05, below.

This Agreement, including *Schedule A*, hereto, shall be amended to reflect any such adjustment of the Members' Percentage Interests; and each Member, and each person who is hereinafter admitted to the LLC as a Member, hereby consents to any such amendment and the modification of his, her or its Percentage Interest in the manner provided herein, and acknowledges that, in connection with any such amendment, such Member's Percentage Interest may be diluted.

[(c) If the Members elect not to contribute additional capital pursuant to Section 3.02(b), the Board of Managers shall be permitted to obtain additional equity financing in the amount required, on such terms and conditions as it in its sole discretion deems appropriate, from third parties unaffiliated with any Member. In connection with any such admission of additional Members, the Percentage Interests of the Members shall be diluted proportionately, based on their respective Percentage Interests immediately prior to any such dilution. Without in any way limiting the foregoing, the interest of any third party admitted to the LLC pursuant to this Section 3.02(c) in the Net Profits, Net Losses and distributions of cash or property of any nature may have such priority or priorities in relationship to the interests therein of the other Members as the Board of Managers may in its sole discretion determine, provided that the relative priorities of the other Members in the Net Profits, Net Losses and cash distributions of any nature of the LLC shall not be altered as a result of the admission of any such investor.]

Practice Note

Any provision requiring contribution of additional capital and any readjustment of members' percentage interests as a result of such contributions (or the failure to make them) must be carefully crafted to fit the specific facts and circumstances. Such capital contributions are often repaid on a priority basis or earn special returns. If such priorities are desired, Article IV must be modified to include them.

Section 28(c) of the Act specifically permits a member's interest to be reduced, subordinated, and forfeited in the event the member defaults in respect to an obligation to make a capital contribution.

[Each Member, and each person who is hereinafter admitted to the LLC as a Member, hereby (i) consents to the admission of any such third party on such terms as the Board of Managers may determine (subject to the provisions of this Section 3.02(c)), and to any amendment to this Agreement that may be necessary or appropriate to reflect the admission of any such third party and the terms on which the third party invests in the LLC; and (ii) acknowledges that, in connection with any admission of any such person, such Member's interest in allocations of Net Profits and Net Losses and distributions of cash and property of the LLC, and net proceeds upon liquidation of the LLC, may be diluted or otherwise altered (subject to the provisions of this Section 3.02(c)).]

(d) Each Member hereby constitutes and appoints each person serving from time to time as a Manager, the President, any Vice President and the Treasurer, and each of them acting singly, and each partner or officer thereof as such Member's agent and

attorney in fact for the purpose of amending this Agreement, including *Schedule A* hereto, in such manner as may be necessary or appropriate from time to time, to reflect the modifications of the Members' Percentage Interests pursuant to Section 3.02(b), and the admission of any additional Member pursuant to Section 3.02(c). Any such amendment, when prepared by said attorney in fact, shall be deemed a part of this Agreement and incorporated herein by reference, as of the effective date of such amendment, to the same extent as if attached hereto and incorporated herein by this reference on the date hereof. The power of attorney contained in this Section 3.02(d) is coupled with a membership interest and, therefore, is irrevocable and shall survive the death, dissolution, bankruptcy or incapacity of any Member.

Practice Note

Such a power of attorney makes it far easier to effectuate the provisions of Sections 3.02(b) and (c), above, which contemplate amendments to the operating agreement.

3.03 *No Withdrawal of or Interest on Capital*. Except as otherwise provided in this Article III, no Member shall be obligated or permitted to contribute any additional capital to the LLC. No interest shall accrue on any contributions to the capital of the LLC, and no Member shall have the right to withdraw or to be repaid any capital contributed by it or to receive any other payment in respect of its interest in the LLC, including, without limitation, as a result of the withdrawal or resignation of such Member from the LLC, except as specifically provided in this Agreement.

Practice Note

This provision differs from the default rule contained in Section 32 of the Act, which provides to a resigning member the right to receive the fair value of its interest in the LLC unless the operating agreement provides otherwise.

3.04 *Third-Party Loans*. In the event that the LLC requires additional funds to carry out its purposes, conduct its business, meet its obligations, or make any expenditure authorized by this Agreement, the LLC may borrow funds from such third-party lender(s) on such terms and conditions as may be acceptable to the Board of Managers.

3.05 *Voluntary Loans*. In the event the LLC requires additional funds to carry out its purposes, conduct its business, meet its obligations or make any expenditure authorized by this Agreement, and additional funds are not available from third parties pursuant to Section 3.04 on terms acceptable to the Board of Managers in its sole discretion *[or from the Members or a third party pursuant to Section 3.02]*, any Member may, but shall not be obligated to, loan such funds to the LLC. Any loan made pursuant to this Section 3.05 (a "Voluntary Loan") shall be nonrecourse to the Members, shall be evidenced by a promissory note; shall be *[unsecured] [collateralized by such assets of the LLC as the lending Member and the Board of Managers shall determine]*, shall not violate the LLC's other loan or contractual arrangements; shall bear interest, compounded monthly, at a rate of interest equal to the prime rate of interest announced from time to time by *The Wall Street Journal* shall be repaid out of the first funds available therefor after payment of LLC expenses to third parties and in any

event prior to any distribution to any Member of Distributable Cash; and shall be due and payable in full on the fifth anniversary of the date on which any such loan is made.

Practice Note

This provision clearly specifies the terms of a loan that may be made by a member to the LLC. Such loans tend to be made in emergency situations, and it is often helpful to avoid protracted negotiation of loan terms in such circumstances. Subject to other legal constraints (e.g., usury laws, provisions in loan agreements with third parties, etc.), the parties may specify such terms for future loans by members as they may desire. This provision would require modification depending on the additional capital contribution obligations specified in Section 3.02.

ARTICLE IV
Cash Distributions

4.01 *Distribution of Distributable Cash and Net Proceeds upon Liquidation*. Except as provided in [Section 4.03 and] Section 9.04, Distributable Cash and net proceeds upon liquidation of the LLC shall be distributed to the Members, *[at such times and in such amounts as the Board of Managers may approve,]* as follows:

(a) first, to the Members in proportion to their respective amounts of Priority Return until the Priority Return of each Member has been reduced to zero;

(b) second, to the Members in proportion to their respective amounts of Invested Capital until the Invested Capital of each Member has been reduced to zero; and

(c) third, the balance, if any, to the Members in accordance with their Percentage Interests.

Practice Note

Cash distributions of the LLC can be made in a variety of ways. This is just one example. Cash could be distributed more simply. For example, all cash could be distributed to the members in accordance with their percentage interests, regardless of the respective capital contributions of the members. The timing of cash distributions should also be considered. In some cases, mandatory distributions (to the extent the LLC has funds available therefor) are desirable, especially to the extent of the tax liabilities of the members arising out of their ownership of interests in the LLC.

[4.02 Distributions Among Members. *Distributable Cash and net proceeds upon liquidation of the LLC distributable hereunder to the Members (or to any group of Members) as a group shall be distributed among them based on their respective Percentage Interests in the LLC, as set forth on Schedule A.]*

Practice Note

This provision is unnecessary in this particular operating agreement, but it is required if the agreement provides for distributions to be made to classes or groups of recipients.

[4.03 *Tax Distributions*. Except as provided in Section 9.04, during, or within 90 days following the end of, each fiscal year of the LLC, the LLC shall distribute to each Member in cash an amount equal to the aggregate federal and state income tax liability such Member would have incurred as a result of such Member's ownership of an interest in the LLC determined as if (i) each Member was a natural person residing in [the Commonwealth of Massachusetts]; (ii) all taxes were imposed at the maximum potentially applicable marginal rate of tax applicable to income taking into account the nature of the income (e.g., as ordinary income or long term capital gain); and (iii) taking into account all carryovers of losses or credits from prior years. Notwithstanding the foregoing, such distributions may be reduced or not made with respect to any fiscal year if the funds of the LLC are not available therefor (and the LLC shall not be obligated to borrow money, call for capital contributions from the Members or sell assets in order to generate sufficient cash to make any such distribution). Amounts otherwise distributable to a Member pursuant to this Section 4.03 with respect to a fiscal year shall be reduced by any amounts distributed to such Member pursuant to any provision of this Agreement during such year (other than amounts distributed pursuant to this Section 4.03 with respect to a prior fiscal year). Amounts distributed to a Member pursuant to this Section 4.03 shall be treated as advances against amounts otherwise distributable to the Member pursuant to this Agreement and, accordingly, shall reduce the amount of any subsequent distribution to the Member.]

Practice Note

Because LLCs that are treated as partnerships for tax purposes are "pass-through" entities, this type of provision (commonly referred to as a "tax distribution") is often included to ensure that, to the extent the LLC has available funds, each member is distributed an amount sufficient to allow the member to pay the income tax liability associated with the taxable income allocated to him, her, or it from the LLC. Tax distributions formulations can vary greatly depending on such things as

- whether the type of income (e.g., ordinary income or capital gains) is taken into account;
- whether the computation of tax liabilities takes into account tax losses from other years;
- whether the amount is computed on a cumulative basis or on a year-by-year basis;
- the tax rates assumed to apply to the income from the LLC;
- the proportions in which tax distributions are made to the members; and
- the discretion of the manager(s) regarding whether the distribution will be made and, if so, its amount.

4.04 *Withholding and Other Taxes*. If the Manager determines in good faith that there is a material possibility that the LLC may be obligated to pay (or collect and pay over) the amount of any tax with respect to any Member's share of any income or distributions from the LLC, the LLC shall pay (or collect and pay over) the amount of such tax to the appropriate taxing authority. Any amount so paid with respect to a Member shall reduce the amount of any distribution that the Member would other-

wise be entitled to receive at the time of the payment. If the amount paid with respect to a Member exceeds the amount of distributions then payable to such Member, such excess shall be treated as a loan to the Member from the LLC, payable with interest at the rate of the prime rate of interest announced from time to time by *The Wall Street Journal* plus three percent (3%) within ten (10) days after such time that the LLC makes payment to the appropriate taxing authority. If for any reason the amount of such loan is not timely paid, then such unpaid amount plus any accrued but unpaid interest thereon shall be set off against any future distributions to which such Member otherwise would have been entitled. For purposes of this Agreement, the amount of any reduction in a distribution that would otherwise be made to a Member pursuant to this Section 4.04 shall be treated as if distributed to such Member at the time it otherwise would have been distributed.

4.05 *Distribution of Assets in Kind*. No Member shall have the right to require the LLC to distribute any of its assets in kind. If any assets of the LLC are distributed in kind, such assets shall be distributed on the basis of their fair market value as determined by the Board of Managers. Any Member entitled to any interest in such assets shall, unless otherwise determined by the Board of Managers, receive separate assets of the LLC, and not an interest as a tenant in common with other Members entitled to any such asset being distributed.

Practice Note

This provision differs from the default rule contained in Section 33 of the Act, which provides that, except as specified in a written operating agreement, a member may not be compelled to accept a distribution of any asset in kind from an LLC to the extent that the percentage of the asset distributed to the member exceeds the percentage in which he or she shares in distributions from the LLC. Accordingly, Section 33 contemplates distributions of any asset in kind to all members as tenants in common, in proportion to their percentage interests. By contrast, this agreement provides for distributions of separate assets to each member.

ARTICLE V
Allocation of Net Profits and Net Losses

5.01 *Basic Allocations*.

(a) Except as provided in Section 5.02 (which shall be applied first), the Net Profits and Net Losses of the LLC from operations for any year (or other fiscal period) shall be allocated among the Members in accordance with their Percentage Interests.

(b) Except as provided in Section 5.02 (which shall be applied first), any Net Profits and Net Losses arising from a Capital Transaction or upon liquidation of the LLC shall be allocated to the Members in such proportions and in such amounts as may be necessary so that following such allocations, the Adjusted Capital Account balance of each Member equals such Member's then Target Balance.

(c) If the amount of Net Profits or Net Losses allocable to the Members pursuant to Section 5.01(b) for a period is insufficient to allow the Adjusted Capital Account balance of each Member to equal such Member's Target Balance, such Net Profits or Net Losses shall be allocated among the Members in such a manner as to decrease the differences between the Members' respective Adjusted Capital Account balances and their respective Target Balances in proportion to such differences.

Practice Note

Applicable Treasury Regulations require allocations of income and loss among the partners of a partnership for tax purposes to reflect the manner in which the partners share the economic profits and economic losses of the partnership. To accomplish this, the regulations require each allocation of income or loss to a partner to be reflected by a corresponding credit or debit to the partner's capital account and, upon liquidation of the partnership, that each partner receive the balance in the partner's capital account. Assuming these rules are followed, the capital account of a partner would control the amount of economic profit or loss a partner would receive. To mitigate the possibility that the tax rules will distort the economic deal among partners (i.e., members), Sections 5.01(b) and 5.01(c), herein, essentially provide that net profits and net losses are allocated in whatever manner is necessary for the capital accounts of the members to reflect the economic deal among the members, as set forth in Section 4.01, above. To completely eliminate such a possibility, many LLC agreements do not follow the requirement of the applicable Treasury Regulations that liquidating distributions be made in accordance with the members' respective capital account balances. Although such agreements will not fall within the "safe harbor" for allocating income and loss of the LLC, since they generally should reach the same result, most tax advisers believe that such an approach would be respected for federal income tax purposes.

5.02 *Regulatory Allocations*. Notwithstanding the provisions of Section 5.01 above, the following allocations shall be made in the following order of priority:

(a) Items of income or gain (computed with the adjustments contained in paragraphs (i), (ii), (iii), (vi) and (vii) of the definition of "Net Profits and Net Losses") for any taxable period shall be allocated to the Members in the manner and to the minimum extent required by the "minimum gain chargeback" provisions of Treasury Regulation Section 1.704-2(f) and Treasury Regulation Section 1.704-2(i)(4).

(b) All "nonrecourse deductions" (as defined in Treasury Regulation Section 1.704-2(b)(1)) of the LLC for any year shall be allocated to the Members in accordance with their respective Percentage Interests, *provided, however*, that nonrecourse deductions attributable to "partner nonrecourse debt" (as defined in Treasury Regulation Section 1.704-2(b)(4)) shall be allocated to the Members in accordance with the provisions of Treasury Regulation Section 1.704-2(i)(1).

Practice Note

Because no member will bear an economic loss attributable to nonrecourse debt (other than partner nonrecourse debt) or receive any economic benefit from any income or gain arising from satisfaction of nonrecourse debt (other than partner nonrecourse debt), Treasury Regulations contain special provisions for how such losses and income must be allocated. These rules are very important in the case of an LLC because all debt will be "nonrecourse" unless special guaranties or similar arrangements from one or more members exist. If you have not yet consulted a tax lawyer or accountant, Article V should convince you beyond a doubt that you need to do so.

(c) Items of income or gain (computed with the adjustments contained in paragraphs (i), (ii), (iii), (vi) and (vii) of the definition of "Net Profits and Net Losses") for any taxable period shall be allocated to the Members in the manner and to the extent required by the "qualified income offset" provisions of Treasury Regulation Section 1.704-1(b)(2)(ii)(d).

(d) In no event shall Net Losses of the LLC be allocated to a Member if such allocation would cause or increase a negative balance in such Member's Adjusted Capital Account (determined, for purposes of this Section 5.02(d) only, by increasing the Member's Adjusted Capital Account balance by the amount the Member is obligated to restore to the LLC pursuant to Treasury Regulation Section 1.704-1(b)(2)(ii)(c) and decreasing it by the amounts specified in Treasury Regulation Section 1.704-1(b)(2)(ii)(d)(4), (5) and (6)).

(e) In the event that items of income, gain, loss or deduction are allocated to one or more Members pursuant to subsections (c) or (d), above, subsequent items of income, gain, loss or deduction from operations will first be allocated (subject to the provisions of subsections (c) and (d)) to the Members in a manner designed to result in each Member having a Capital Account balance equal to what it would have been if the original allocation of items pursuant to subsections (c) or (d) had not occurred.

(f) Except as otherwise provided herein or as required by I.R.C. § 704, for tax purposes, all items of income, gain, loss, deduction or credit shall be allocated to the Members in the same manner as are Net Profits and Net Losses, *provided, however*, that if the Carrying Value of any property of the LLC differs from its adjusted basis for tax purposes, then items of income, gain, loss, deduction or credit related to such property for tax purposes shall be allocated among the Members so as to take account of the variation between the adjusted basis of the property for tax purposes and its Carrying Value in the manner provided for under I.R.C. § 704(c).

Practice Note

In situations in which unrealized gain or loss in one or more of the LLC's assets has previously been reflected in the capital accounts (see the Practice Note accompanying the definition of "carrying value," above), the amount of such gain or loss cannot be reflected in the capital accounts for a second time when actually realized. Section 704(c) of the In-

ternal Revenue Code and associated regulations provide special rules for allocating such realized gain or loss. Those rules are particularly complex, but generally attempt to allocate the realized gain or loss in the same manner as the unrealized gain or loss was reflected in the members' capital accounts. They allow for a variety of methods for allocating this gain or loss, and the method chosen can greatly affect the tax consequences to a member. Individual members may therefore wish to have input into which method is chosen. See Section 6.01(vii) hereof. In addition, certain methods may only be used if their use is specified in the operating agreement.

5.03 *Timing of Allocations*. Allocations of Net Profits, Net Losses and other items of income, gain, loss and deduction pursuant to this Article V shall be made for each fiscal year of the LLC as of the end of such fiscal year; *provided, however*, that if the Carrying Values of the assets of the LLC are adjusted in accordance with clause (ii) of the definition of "Carrying Value," the date of such adjustment shall be considered to be the end of a fiscal year for purposes of computing and allocating such Net Profits, Net Losses and other items of income, gain, loss and deduction.

ARTICLE VI
Management

Practice Note

Sections 24(b) through (d) of the Act include the following default provisions concerning management of the LLC, which will apply absent applicable provisions in the operating agreement:

- If a limited liability company has at least one manager, the manager has exclusive right to manage and control the LLC, and no member has such rights.
- In a manager-managed LLC, each manager is authorized to execute documents and act for the LLC, and no member has such authority.
- If an LLC has no managers, the members manage and control the LLC, and each member may execute documents and act for the LLC.

Article VI of this agreement is an attempt to overlay many of the principles of the Delaware General Corporation Law on the business, operation, and management of the LLC. Article VI contains many of the concepts commonly found in the bylaws of a corporation. In addition, it includes a few extraordinary items, such as provisions requiring member approval of certain types of major decisions. See Section 6.07, below. The Act does not provide for or mandate such rights, although it does contain a default rule in Section 21(d) that would apply when members have a right to vote and there is no operating agreement provision specifying the level of vote required.

6.01 *Management of the LLC*. The business and affairs of the LLC shall be managed by or under the direction of a Board of Managers, who may exercise all of the powers of the LLC except as otherwise provided by law or this Agreement (including,

without limitation, Section 6.07, below). In the event of a vacancy in the Board of Managers, the remaining Managers (except as otherwise provided by law) may exercise the powers of the full Board until the vacancy is filled.

All management and other responsibilities not specifically reserved to the Members in this Agreement shall be vested in the Board of Managers, and the Members shall have no voting rights except as specifically provided in this Agreement.

> **Practice Note**
>
> Section 6.01 conforms to the default rule in Section 24 of the Act, by providing exclusive management authority to the managers of a manager-managed LLC.
>
> Many operating agreements provide for election of a board of managers or oversight committee, which looks and acts in a manner that is rather different than a board of directors. In some LLCs, each member designates a board member, and certain decisions require the approval of a majority of the board while others require super-majority or unanimous approval. An LLC's options are rather extensive, and must be tailored to fit its needs. In some cases, board members merely serve as "agents" or "representatives" of the members—mouthpieces through which the members exercise voting or other participation rights. In such cases, the IRS may actually consider the LLC to be member-managed, in spite of its "board" concept.

Each Manager shall devote such time to the affairs of the LLC as may be reasonably necessary for performance by the Manager of his, her or its duties hereunder *[, provided that such persons shall not be required to devote full time to such affairs.]*

Specifically, but not by way of limitation, and subject to the provisions of Section 6.07, the Board of Managers shall be authorized in the name and on behalf of the LLC, to cause the LLC to do all things necessary or appropriate to carry on the business and purposes of the LLC, including, without limitation, the following:

(i) to acquire by purchase, lease, exchange or otherwise; and to sell, finance, refinance, encumber and otherwise deal with, any real or personal property;

(ii) to borrow money and issue evidences of indebtedness; or to guarantee loans and to secure the same by mortgage, deed of trust, pledge or other lien on any assets or property of the LLC; and to pay, prepay, extend, amend or otherwise modify the terms of any such borrowings;

(iii) to employ executive, administrative and support personnel in connection with the business of the LLC; and to pay salaries, expense reimbursement, employee benefits, fringe benefits, bonuses and any other form of compensation or employee benefit to such persons and entities, at such times and in such amounts as may be determined by the Board of Managers in its sole discretion, to provide executive, administrative and support services in connection with the business of the LLC;

(iv) to hire or employ such agents, employees, managers, accountants, attorneys, consultants and other persons necessary or appropriate to carry out the business and operations of the LLC, and to pay fees, expenses, salaries, wages and other compensation to such persons;

(v) to pay, extend, renew, modify, adjust, submit to arbitration, prosecute, defend or compromise, on such terms as it may determine and on such evidence as it may deem sufficient, any obligation, suit, liability, cause of action or claim, including taxes, either in favor of or against the LLC;

(vi) to determine the appropriate accounting method or methods to be used by the LLC;

(vii) to cause the LLC to make or revoke any of the elections referred to in I.R.C. §§ 108, 704, 709, 754 and 1017 or any similar provisions enacted in lieu thereof, and in any other section of the I.R.C.;

Practice Note

Depending on the specific facts relating to the formation and anticipated operation of the LLC, some or all of its members may want input into certain of these elections (most notably, elections under I.R.C. §§ 754 and 704).

(viii) to establish and maintain reserves for such purposes and in such amounts as it deems appropriate from time to time;

(ix) to pay all organizational expenses, and general and administrative expenses of the LLC;

(x) to deal with, or otherwise engage in business with, or provide services to and receive compensation therefor from, any person who has provided or may in the future provide any services to, lend money to, sell property to, or purchase property from the LLC, including, without limitation, any Member or Manager;

(xi) to engage in any kind of activity, and to perform and carry out contracts of any kind necessary to, in connection with or incidental to the accomplishment of the purposes of the LLC;

(xii) to pay any and all fees and to make any and all expenditures that the Board of Managers, in its sole discretion, deems necessary or appropriate in connection with the organization of the LLC, *[the offering and sale of membership interests in the LLC,]* the management of the affairs of the LLC, and the carrying out of its obligations and responsibilities under this Agreement, including, without limitation, fees, reimbursements and expenditures payable to a Member or Manager;

(xiii) to exercise all powers and authority granted by the Act to managers, except as otherwise provided in this Agreement;

(xiv) to cause the LLC and its properties and assets to be maintained and operated in such a manner as the Board of Managers may determine, subject, however, to obligations imposed by applicable laws or by any mortgage or security interest encumbering the LLC and such properties and assets from time to time, and by any lease, rental agreement or other agreement pertaining thereto;

(xv) to cause to be obtained and continued in force all policies of insurance required by any mortgage, lease or other agreement relating to the LLC's business or any part thereof, or determined by the Board of Managers to be in the best interests of the LLC;

(xvi) to cause to be paid any and all taxes, charges and assessments that may be levied, assessed or imposed on any of the assets of the LLC unless the same are contested by the LLC; and

(xvii) to perform any other act that the Board of Managers may deem necessary, convenient or desirable for the LLC or its business.

6.02 *Managers*.

(a) *Number, Election and Qualification*. The number of Managers who shall constitute the whole Board of Managers shall be determined by resolution of the Members or the Board of Managers, but in no event shall such number be less than *[three]* nor more than *[seven]* unless the Members specifically vote pursuant to Section 6.03(c) to cause the LLC to be Member-managed, in which case there shall be no Board of Managers. Subject to the preceding sentence, the number of Managers may be decreased at any time, and from time to time, either by the Members or by a majority of the Managers then in office, but only to eliminate vacancies existing by reason of the death, resignation, removal or expiration of the term of one or more Managers. The Managers shall be elected at an annual meeting of Members by such Members as have the right to vote at such election. Managers need not be Members of the LLC.

The number of members of the Board of Managers is hereby initially fixed at three, and the persons identified as "Managers" on *Schedule A*, hereto, are currently serving as the Managers.

Each person elected to serve as a Manager of the LLC shall sign this Agreement, or a counterpart hereof or amendment hereto, or other writing pursuant to which such person (i) acknowledges receipt of a copy of this Agreement, as amended and in effect as of the date of such writing; (ii) agrees that he or she is a party to and is bound by this Agreement, including the power of attorney set forth below; (iii) agrees to perform the duties of a Manager hereunder; and (iv) agrees to execute and deliver such additional agreements, instruments, certificates and documents, including, without limitation, an amendment to the Certificate, which may be necessary, appropriate or convenient to reflect the foregoing matters and the election of such person as a Manager of the LLC.

Upon the death, resignation, removal or expiration of the term of any Manager (a "Terminated Manager"), (i) such Terminated Manager shall have no further authority under this Agreement; (ii) such Terminated Manager shall have no further obligations or rights under this Agreement (except for liabilities and rights accruing prior to the date of death, resignation, removal or expiration of his or her term, such as, for example, rights to indemnification under Section 6.10 that relate to actions or omissions occurring during such person's service as a Manager), and (iii) no writing or instrument shall be required to be executed by the LLC or the Terminated Manager to reflect such cessation of service, except that the Terminated Manager (or his or her legal representative or attorney in fact, as provided in the following paragraph) shall execute and deliver any agreement, instrument, certificate or document, including an amendment to the Certificate that may be reasonably required to reflect that the Terminated Manager is no longer a Manager of the LLC.

Each person now or hereafter serving as a Manager of the LLC, by execution of this Agreement, an amendment hereto or an instrument acknowledging that such person is bound hereby, hereby constitutes and appoints each other person who may, from time to time, be serving as a Manager, and each of them acting singly, such Manager's agent and attorney in fact for the purpose of executing and delivering any and all agreements, instruments and other documents (including, without limitation, an amendment to the Certificate) as are necessary or appropriate to reflect that he, she or it is no longer a Manager of the LLC following the death, resignation, removal or expiration of the term of such Manager, which power of attorney is hereby agreed and acknowledged to be irrevocable, and shall survive the resignation, removal, expiration of the term, death, dissolution, bankruptcy or incapacity of any Manager until such time as the withdrawal of such Manager from the LLC has been reflected by all necessary or appropriate agreements, instruments and other documents.

(b) *Enlargement of the Board*. Subject to Section 6.02(a), above, the number of Managers may be increased at any time, and from time to time, by the Members or by a majority of the Managers then in office.

(c) *Tenure*. Each Manager shall hold office until the next annual meeting and until his or her successor is duly elected and qualified, or until his or her earlier death, resignation or removal.

(d) *Vacancies*. Unless and until filled by the Members, any vacancy in the Board of Managers, however occurring, including a vacancy resulting from an enlargement of the Board, may be filled by vote of a majority of the Managers then in office, although less than a quorum, or by a sole remaining Manager. A Manager elected to fill a vacancy shall be elected for the unexpired term of his or her predecessor in office, and a Manager, chosen to fill a position resulting from an increase in the number of Managers, shall hold office until the next annual meeting of Members and until his or her successor is duly elected and qualified, or until his or her earlier death, resignation or removal.

(e) *Resignation*. Any Manager may resign by delivering his or her written resignation to the LLC at its principal office or to the President or Clerk. Such resignation shall

be effective upon receipt unless it is specified to be effective at some other time or upon the occurrence of some other event.

(f) *Regular Meetings*. Regular meetings of the Board of Managers may be held without notice at such time and place, either within or without the Commonwealth of Massachusetts, as shall be determined from time to time by the Board of Managers, provided that any Manager who is absent when such a determination is made shall be given notice of the determination. A regular meeting of the Board of Managers may be held without notice, immediately after and at the same place as the annual meeting of Members.

(g) *Special Meetings*. Special meetings of the Board of Managers may be held at any time and place, within or without the Commonwealth of Massachusetts, designated in a call by the President, two or more Managers, or by one Manager in the event that there is only a single Manager in office.

(h) *Notice of Special Meetings*. Notice of any special meeting of Managers shall be given to each Manager by the Clerk or by the officer or one of the Managers calling the meeting. Notice shall be duly given to each Manager (i) by giving notice to such Manager in person or by telephone at least *[24]* hours in advance of the meeting; (ii) by sending a telegram or telex, or delivering written notice by hand, to the Manager's last known business or home address at least *[24]* hours in advance of the meeting; or (iii) by mailing written notice to the Manager's last known business or home address at least *[72]* hours in advance of the meeting. A notice or waiver of notice of a meeting of the Board of Managers need not specify the purpose of the meeting.

(i) *Meetings by Telephone Conference Calls*. Managers, or any members of any committee designated by the Managers, may participate in a meeting of the Board of Managers or such committee by means of conference telephone or similar communications equipment, by means of which all persons participating in the meeting can hear each other, and participation by such means shall constitute presence in person at such meeting.

(j) *Quorum*. A majority of the total number of the whole Board of Managers shall constitute a quorum at all meetings of the Board of Managers. In the event that one or more of the Managers shall be disqualified to vote at any meeting, then the required quorum shall be reduced by one for each such Manager so disqualified, *provided, however*, that in no case shall less than one-third of the number so fixed constitute a quorum. In the absence of a quorum at any such meeting, a majority of the Managers present may adjourn the meeting from time to time without further notice, other than announcement at the meeting, until a quorum shall be present.

(k) *Action at Meeting*. At any meeting of the Board of Managers at which a quorum is present, the vote of a majority of those present shall be sufficient to take any action unless a different vote is specified by law, the Certificate or this Agreement.

(l) *Action by Consent*. Any action required or permitted to be taken at any meeting of the Board of Managers, or of any committee of the Board of Managers, may be taken

without a meeting, if all members of the Board or committee, as the case may be, consent to the action in writing, and the written consents are filed with the minutes of proceedings of the Board or committee.

(m) *Removal*. Except as otherwise provided by the Act, any one or more or all of the Managers may be removed, with or without cause, by Members holding a majority of the Percentage Interests then held by all Members, except that the Managers elected by the holders of a particular class or series of Members may be removed without cause only by a vote of Members holding a majority in Percentage Interest of such class or series.

(n) *Committees*. The Board of Managers may, by resolution passed by a majority of the whole Board, designate one or more committees, each committee to consist of one or more of the Managers of the LLC. The Board may designate one or more Managers as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of a committee, the member or members of the committee present at any meeting, and not disqualified from voting, whether or not he, she or they constitute a quorum, may unanimously appoint another member of the Board of Managers to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the Board of Managers and subject to the provisions of the Act, shall have and may exercise all the powers and authority of the Board of Managers in the management of the business and affairs of the LLC. Each such committee shall keep minutes and make such reports as the Board of Managers may from time to time request. Except as the Board of Managers may otherwise determine, any committee may make rules for the conduct of the committee's business, but unless otherwise provided by the Managers or in such rules, its business shall be conducted as nearly as possible in the same manner as is provided in this Agreement for the Board of Managers.

(o) *Compensation of Managers*. Managers may be paid such compensation for their services and such reimbursement for expenses of attendance at meetings as the Board of Managers may from time to time determine. No such payment shall preclude any Manager from serving the LLC or any of its parent or subsidiary entities in any other capacity and receiving compensation for such service.

6.03 *Members*.

(a) *Place of Meetings*. All meetings of Members shall be held at such place within or without the Commonwealth of Massachusetts as may be designated from time to time by the Board of Managers or the President or, if not so designated, at the registered office of the LLC.

(b) *Annual Meeting*. There shall be held an annual meeting of Members for the election of Managers and for the transaction of such other business as may properly be brought before the meeting. Such annual meeting shall be held on a date to be fixed by the Board of Managers or the President (which date shall not be a legal holiday in the place where the meeting is to be held) at the time and place to be fixed by the

Board of Managers or the President, and stated in the notice of the meeting. If no annual meeting is held in accordance with the foregoing provisions, a special meeting may be held in lieu of the annual meeting, and any action taken at that special meeting shall have the same effect as if it had been taken at the annual meeting, and, in such case, all references in this Agreement to the annual meeting of the Members shall be deemed to refer to such special meeting.

> **Practice Note**
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> In this agreement, the LLC is imitating a corporation, and, therefore, an annual meeting is provided for. In many cases, the annual meeting is unnecessary (e.g., where there are only two members) or otherwise inappropriate. In any case, the costs associated with annual (or other) meetings of members must be considered. In the limited partnership context, annual meetings of the limited partners are often discouraged for business reasons.

[(c) Right to Elect to be Member-Managed. *At any annual meeting (or any special meeting, as described in Section 6.03(d), below), the Members may elect (by vote of Members holding two-thirds of the Percentage Interests held by all Members) to cause the LLC to be managed by the Members. In connection with any such election, this Agreement shall be amended by the Members to reflect appropriate provisions regarding the management and operation of the LLC by the Members.]*

(d) *Special Meetings*. Special meetings of Members may be called at any time by the President or by the Board of Managers. Business transacted at any special meeting of Members shall be limited to matters relating to the purpose or purposes stated in the notice of meeting.

(e) *Notice of Meetings*. Except as otherwise provided by law, written notice of each meeting, whether annual or special, of Members, shall be given not less than 10 nor more than 60 days before the date of the meeting to each Member entitled to vote at such meeting. The notices of all meetings shall state the place, date and hour of the meeting. The notice of a special meeting shall state, in addition, the purpose or purposes for which the meeting is called. If mailed, notice is deemed given when deposited in the U.S. mail, postage prepaid, directed to the Member at his or her address as it appears on the records of the LLC.

(f) *Voting List*. The officer who has charge of the membership ledger of the LLC shall prepare, at least 10 days before every meeting of Members, a complete list, arranged in alphabetical order, of the Members entitled to vote at the meeting, that shows the address of each Member and such Member's Percentage Interest. Such list shall be open to the examination of any Member for any purpose germane to the meeting, during ordinary business hours, for a period of at least 10 days prior to the meeting, at a place within the city where the meeting is to be held. The list shall also be produced and kept at the time and place of the meeting during the whole time of the meeting, and may be inspected by any Member who is present.

(g) *Quorum*. Except as otherwise provided by law, the Certificate or this Agreement, the holders of a majority of the Percentage Interests of the LLC who are entitled to vote at the meeting, present in person or represented by proxy, shall constitute a quorum for the transaction of business.

(h) *Adjournments*. Any meeting of Members may be adjourned to any other time and to any other place at which a meeting of Members may be held under this Agreement by the Members present or represented at the meeting and entitled to vote, although less than a quorum; or, if no Member is present, by any officer entitled to preside at or to act as Clerk of such meeting. It shall not be necessary to notify any Member of any adjournment of less than 30 days if the time and place of the adjourned meeting are announced at the meeting at which adjournment is taken unless, after the adjournment, a new record date is fixed for the adjourned meeting. At the adjourned meeting, the LLC may transact any business that might have been transacted at the original meeting.

(i) *Voting and Proxies*. Each Member of record shall be entitled to vote at a meeting of Members, or to express consent or dissent to LLC action in writing without a meeting. A Member may vote or express such consent or dissent in person or may authorize another person or persons to vote or act for him or her by written proxy executed by the Member or his or her authorized agent and delivered to any officer of the LLC. No such proxy shall be voted or acted on after three years from the date of its execution unless the proxy expressly provides for a longer period.

(j) *Action at Meeting*. When a quorum is present at any meeting, the Members representing a majority of the total Percentage Interests of all Members entitled to vote (or, if there are two or more classes of Members entitled to vote as separate classes, then in the case of each such class, the holders of a majority of the total Percentage Interests of that class entitled to vote on such matter) shall decide any matter to be voted on by the Members at such meeting, except when a different vote is required by express provision of law, the Certificate or this Agreement.

(k) *Action Without Meeting*. Any action required or permitted to be taken at any annual or special meeting of Members of the LLC may be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, is signed by the Members having not less than the minimum aggregate Percentage Interests that would be necessary to authorize or take such action at a meeting at which all Members to vote on such action were present and voted. Prompt notice of taking an action without a meeting by less than unanimous written consent shall be given to those Members who have not consented in writing.

(l) *Record Date*. The Board of Managers may fix in advance a date as a record date for the determination of the Members entitled to notice of or to vote at any meeting of Members or to express consent (or dissent) to LLC action in writing without a meeting, or entitled to receive payment of any distribution or allotment of any rights in respect of any change, conversion or exchange of interests, or for the purpose of any other lawful action. Such record date shall not be more than 60 nor less than 10 days before the date of such meeting, nor more than 10 days after the date of adop-

tion of a record date for a written consent without a meeting, nor more than 60 days prior to any other action to which such record date relates.

If no record date is fixed, the record date for determining Members entitled to notice of or to vote at a meeting of Members shall be at the close of business on the day before the day on which notice is given, or, if notice is waived, at the close of business on the day before the day on which the meeting is held. The record date for determining Members entitled to express consent to corporate action in writing without a meeting, when no prior action by the Board of Managers is necessary, shall be the day on which the first written consent is properly delivered to the LLC. The record date for determining Members for any other purpose shall be at the close of business on the day on which the Board of Managers adopts the resolution relating to such purpose.

A determination of Members of record entitled to notice of or to vote at a meeting of Members shall apply to any adjournment of the meeting, *provided, however*, that the Board of Managers may fix a new record date for the adjourned meeting.

6.04 *Officers*.

Practice Note

This agreement delineates in great detail the duties of each of the officers, and the manner in which they are elected, removed, etc. Some operating agreements merely provide that the board of managers may, from time to time, elect or designate officers of the LLC, who shall have such titles, authority, and such duties as the board may, from time to time, determine, and each of whom shall serve at the pleasure of the board. Such an approach shortens the agreement substantially; however, in some cases, it leads to confusion as to the exact authority of a person holding himself or herself out as an officer of the LLC.

(a) *Enumeration*. The officers of the LLC shall consist of a President, a Treasurer, a Clerk, and such other officers with such other titles as the Board of Managers shall determine, including a Chairman of the Board, a Vice-Chairman of the Board, and one or more Vice Presidents, Assistant Treasurers, and Assistant Clerks. The Board of Managers may appoint such other officers as it may deem appropriate.

(b) *Election*. The President, Treasurer and Clerk shall be elected annually by the Board of Managers at its first meeting following the annual meeting of Members. Other officers may be appointed by the Board of Managers at such meeting or at any other meeting.

(c) *Qualification*. No officer need be a Member or a Manager. Any two or more offices may be held by the same person.

(d) *Tenure*. Except as otherwise provided by law, by the Certificate or by this Agreement, each officer shall hold office until his or her successor is elected and qualified,

unless a different term is specified in the vote choosing or appointing him or her, or until his or her earlier death, resignation or removal.

(e) *Resignation and Removal*. Any officer may resign by delivering his or her written resignation to the LLC at the LLC's principal office or to the President, Clerk or any Manager. Such resignation shall be effective upon receipt unless it is specified to be effective at some other time or upon the happening of some other event.

Any officer may be removed at any time, with or without cause, by vote of a majority of the entire number of Managers then in office (which entire number shall be determined exclusive of any officer who is the subject of the proposed removal).

Except as the Board of Managers may otherwise determine, no officer who resigns or is removed shall have any right to any compensation as an officer for any period following his or her resignation or removal, or any right to damages on account of such removal, whether his or her compensation be by the month or by the year or otherwise, unless such compensation is expressly provided in a duly authorized written agreement with the LLC.

(f) *Vacancies*. The Board of Managers may fill any vacancy occurring in any office for any reason and may, in its discretion, leave unfilled any office for such period as it may determine. Each such successor shall hold office for the unexpired term of his or her predecessor and until his or her successor is elected and qualified, or until his or her earlier death, resignation or removal.

(g) *Chairman of the Board and Vice-Chairman of the Board*. The Board of Managers may appoint a Chairman of the Board and may designate the Chairman of the Board as Chief Executive Officer. If the Board of Managers appoints a Chairman of the Board, he or she shall perform such duties and possess such powers as are assigned to him or her by the Board of Managers. If the Board of Managers appoints a Vice-Chairman of the Board, he or she shall, in the absence or disability of the Chairman of the Board, perform the duties and exercise the powers of the Chairman of the Board and shall perform such other duties and possess such other powers as may, from time to time, be vested in him or her by the Board of Managers.

(h) *President*. The President shall, subject to the direction of the Board of Managers, have general charge and supervision of the business of the LLC. Unless otherwise provided by the Board of Managers, he or she shall preside at all meetings of the Members, and, if he or she is a Manager, at all meetings of the Board of Managers. Unless the Board of Managers has designated the Chairman of the Board or another officer as Chief Executive Officer, the President shall be the Chief Executive Officer of the LLC. The President shall perform such other duties and shall have such other powers as the Board of Managers may, from time to time, prescribe.

(i) *Vice Presidents*. Any Vice President shall perform such duties and possess such powers as the Board of Managers or the President may, from time to time, prescribe. In the event of the absence, inability or refusal to act of the President, the Vice President (or if there shall be more than one, the Vice Presidents in the order determined

by the Board of Managers) shall perform the duties of the President and when so performing shall have all the powers of and be subject to all the restrictions upon the President. The Board of Managers may assign to any Vice President the title of Executive Vice President, Senior Vice President or any other title selected by the Board of Managers.

(j) *Clerk and Assistant Clerks*. The Clerk shall perform such duties and shall have such powers as the Board of Managers or the President may, from time to time, prescribe. In addition, the Clerk shall perform such duties and have such powers as are incident to the office of the clerk of a corporation, including, without limitation, the duty and power to give notices of all meetings of Members and special meetings of the Board of Managers, to attend all meetings of Members and the Board of Managers and keep a record of the proceedings, to maintain a stock ledger and prepare lists of Members and their addresses as required, and to be custodian of the LLC records.

Any Assistant Clerk shall perform such duties and possess such powers as the Board of Managers, the President or the Clerk may, from time to time, prescribe. In the event of the absence, inability or refusal to act of the Clerk, the Assistant Clerk (or if there shall be more than one, the Assistant Clerks in the order determined by the Board of Managers) shall perform the duties and exercise the powers of the Clerk.

In the absence of the Clerk or any Assistant Clerk at any meeting of Members or Managers, the person presiding at the meeting shall designate a temporary secretary to keep a record of the meeting.

(k) *Treasurer and Assistant Treasurers*. The Treasurer shall perform such duties and shall have such powers as may, from time to time, be assigned to him or her by the Board of Managers or the President. In addition, the Treasurer shall perform such duties and have such powers as are incident to the office of the treasurer of a corporation, including, without limitation, the duty and power to keep and be responsible for all funds and securities of the LLC, to deposit funds of the LLC in depositories selected in accordance with this Agreement, to disburse such funds as ordered by the Board of Managers, to make proper accounts of such funds, and to render as required by the Board of Managers statements of all such transactions and of the financial condition of the LLC.

The Assistant Treasurers shall perform such duties and possess such powers as the Board of Managers, the President or the Treasurer may, from time to time, prescribe. In the event of the absence, inability or refusal to act of the Treasurer, the Assistant Treasurer (or if there shall be more than one, the Assistant Treasurers in the order determined by the Board of Managers) shall perform the duties and exercise the powers of the Treasurer.

(l) *Salaries*. Officers of the LLC shall be entitled to such salaries, compensation or reimbursement as shall be fixed or allowed, from time to time, by the Board of Managers.

6.05 *Interpretation of Rights and Duties of Managers and Members*. To the fullest extent permitted by the Act and other applicable law, and to the extent not inconsistent with the specific provisions of this Agreement or the Certificate, it is the intention of the parties as follows:

(i) the Board of Managers shall have the power to do any and all acts, statutory and otherwise, with respect to the LLC that the board of directors of a Delaware corporation would have with respect to such Delaware corporation; and

(ii) the Members shall have no power or authority whatsoever with respect to the management of the business and affairs of the LLC.

6.06 *Certain Permitted Transactions*. Without limitation of any of its powers set forth in Section 6.01, above, the Board of Managers is expressly authorized, for, in the name of, and on behalf of, the LLC:

(i) to cause the LLC to enter into a Property Management Agreement with Joe Manager Property Management, Inc., pursuant to which Joe Manager Property Management, Inc. will provide certain property management services to the LLC, and will receive expense reimbursement and a monthly fee in the amount of $10,000; and

(ii) to cause the LLC to enter into a Sales Agency Agreement with Mary Management Brokers, Inc., pursuant to which Mary Management Brokers, Inc. will provide brokerage services to the LLC, and receive expense reimbursement and sales commissions with respect thereto.

Practice Note

This provision unambiguously authorizes specific transactions between the LLC and certain affiliates of the managers, in which compensation is paid by the LLC to such affiliates. This provision is not strictly required, but would avoid the need to obtain an approval under Section 6.07 of the agreement. Section 7 of the Act states that, unless the written operating agreement otherwise provides, a member may transact business with the LLC (including making or guaranteeing loans), and has the same rights and obligations with respect to such arrangements as an unaffiliated person.

6.07 *Member Approval Requirements*. Notwithstanding the provisions of Section 6.01 or any other provision of this Agreement to the contrary, without the prior written Consent of the Members, the Board of Managers shall not cause the LLC to (and the LLC shall not) take any of the following actions:

(i) sell all or substantially all of the assets of the LLC;

(ii) cause the LLC to enter into any agreement or arrangement with any of the Managers or any of their respective Affiliates (except for the arrangements described in Sections 6.02(o) and 6.06, above), pursuant to which any Manager or any of such Affiliates is to receive compensation of any kind.

Practice Note

This provision is not required. Any conflict arrangements could be resolved with the approval of the board of managers acting independently of the manager who has an interest in the transaction.

The approval rights contained in Section 6.07 are somewhat inconsistent with the "corporate model" embodied in this agreement. However, member approval rights are analogous to "negative covenants" in a stockholders agreement, and may, in certain circumstances, be appropriate. It may be appropriate to include additional member approval rights, as well (for example, approval of annual budgets, business plans, expenses over certain threshold amounts, etc.).

6.08 *Binding the LLC*. Except as the Board of Managers may generally or in any particular case or cases otherwise authorize, and subject to the other provisions of this Agreement and the Certificate, all deeds, leases, contracts, bonds, notes, checks, drafts or other obligations made, accepted or endorsed by the LLC shall be signed by any Manager, the Chairman of the Board, if any, the President, any Vice President or the Treasurer, or any of them acting singly.

6.09 *Contracts with Members*. Subject to the provisions of Section 6.07(ii), with the approval of a majority in number of disinterested Managers in each case, the LLC may engage in business with, or enter into one or more agreements, leases, contracts or other arrangements for the furnishing to or by the LLC of goods, services or space with any Member or Affiliate of a Member, and may pay compensation in connection with such business, goods, services or space, provided in each case that the amounts payable thereunder are reasonably comparable to those that would be payable to unaffiliated persons under similar agreements; and, if the Board of Managers determines in good faith that such amounts are so comparable, such determination shall be conclusive absent manifest error.

6.10 *Indemnification and Exculpation*.

(a) No Manager or its Affiliates shall have any liability to the LLC or to any Member for any loss suffered by the LLC that arises out of any action or inaction of any Manager or its Affiliates if such Manager or its Affiliates, as the case may be, in good faith, determined that such course of conduct was in the best interests of the LLC and such course of conduct did not constitute *[gross]* negligence or *[willful]* misconduct of such Manager or its Affiliates.

(b) The Members' respective obligations to each other are limited to the express obligations described in this Agreement, which obligations the Members shall carry out with ordinary prudence and in a manner characteristic of businesspersons in similar circumstances. No Member shall be a fiduciary of or have any fiduciary obligations to the other Members in connection with the LLC or this Agreement or such Member's performance of its obligations under this Agreement, and each Member hereby waives to the fullest extent permitted by applicable law any rights it may have to

claim any breach of fiduciary obligation under this Agreement or in connection with the LLC.

(c) Each Manager and its Affiliates shall be indemnified by the LLC against any losses, judgments, liabilities, expenses and amounts paid in settlement of any claims sustained by it with respect to actions taken by such Manager or its Affiliates on behalf of the LLC, provided that no indemnification shall be provided for any person with respect to any matter as to which he or she shall have been adjudicated in any proceeding not to have acted in good faith in the reasonable belief that his or her action was in the best interest of the LLC. Without limiting the foregoing, the Board of Managers may elect (on a case-by-case basis) to permit such indemnification to include payment by the LLC of expenses incurred in defending a civil or criminal action or proceeding in advance of the final disposition of such action or proceeding, upon receipt of an undertaking by the person indemnified to repay such payment if he or she shall be adjudicated not to be entitled to indemnification under this Section 6.10, which undertaking may be accepted without reference to the financial ability of such person to make repayment. Any indemnification to be provided hereunder may be provided even if the person to be indemnified is no longer a Manager or an Affiliate of a Manager.

(d) Any indemnity under this Section 6.10 shall be paid from, and only to the extent of, LLC assets, and no Member shall have any personal liability on account thereof. The LLC shall not incur the cost of that portion of any insurance, other than public liability insurance, which insures any party against any liability as to which such party is herein prohibited from being indemnified.

Practice Note

Section 8(b) of the Act provides that the certificate of organization or a written operating agreement may eliminate or limit the personal liability of a member or manager for breach of any duty to the LLC, another member, or a manager. Section 63(b) of the Act provides that the operating agreement may expand or restrict the members' duties and liabilities to the LLC, the other members, and the managers. The Act does not specifically provide for *elimination* of the members' respective duties to each other. Case law in Massachusetts is not yet available, so it is unclear whether a complete waiver of fiduciary duties would be enforceable. Delaware courts have suggested that the fiduciary duties of partners may be reduced but not entirely eliminated, except for waivers in specifically defined and identified contexts.

Section 6.10 may need special attention, for instance, if there is to be a right of contribution among members in the event of "piercing the corporate veil" of the LLC. Note that Sections 8 and 63(b) of the Act permit significant flexibility in this area. It may be desirable or appropriate to provide indemnification to the members, and not merely to the managers.

The indemnification standard contained in Section 6.10(c) of this agreement is the same as that contained in Section 8(a) of the Act. A higher standard may be imposed in the operating agreement. It is customary in

many contexts to deny indemnification (or exculpation) to persons who have acted negligently or with gross negligence.

Section 6.10(c) does not automatically provide for advancing expenses pending final determination as to whether a manager is entitled to indemnity. In some cases, it may be preferable for the board of managers to determine whether to advance such expenses on a case-by-case basis; in other cases, the managers may insist that expenses be automatically advanced.

6.11 *Other Activities*.

(a) Except as provided in Section 6.11(b), below, the Members, Managers and any Affiliates of any of them, may engage in and possess interests in other business ventures and investment opportunities of every kind and description, independently or with others, including serving as directors, officers, stockholders, managers, members and general or limited partners of corporations, partnerships or other limited liability companies with purposes similar to those of the LLC. Neither the LLC nor any other Member or Manager shall have any rights in or to such ventures or opportunities or the income or profits therefrom.

Practice Note

In some cases, noncompetition or similar provisions may be desirable. See Section 6.11(b), below, for an example.

(b) No Member or Manager, nor any Affiliate of any Member or Manager (either individually, collectively or with others) shall, without the prior Consent of the other Members, conduct any real estate development business (as a developer, investor or lender) that competes with the business of the LLC or any portion thereof in any location that is within five miles of any portion of any real estate in which the LLC has an interest, at any time during the term of the LLC *[and for a period of two years thereafter]*.

ARTICLE VII
Fiscal Matters

7.01 *Books and Records*.

Practice Note

Section 7.01 contains a slightly expanded version of the requirements contained in Sections 9 and 10 of the Act. Section 9 of the Act requires each LLC to maintain at its registered office in Massachusetts the following: (1) a current list of the full name and last known address of each member and manager; (2) a copy of the certificate of organization and all certificates of amendment thereof, together with executed copies of any powers of attorney pursuant to which any certificate has been executed; (3) copies of the LLC's federal, state, and local income tax returns and reports, if any, for the three most recent years; (4) copies of any then-effective written operating agreements and of any financial statements of

> the LLC for the three most recent years; and (5) unless contained in a written operating agreement, a writing setting out (i) the capital contributions made and required to be made by each member, (ii) the times at which additional contributions are to be made, (iii) any right of a member to receive or a manager to make distributions to a member, and (iv) any events that dissolve the LLC. Records maintained under Section 9 of the Act must be open to inspection and copying at the reasonable request and expense of any member during ordinary business hours. Section 9 also requires that a list of the names and addresses of the members be made available to the secretary of the Commonwealth within five days following a written request therefor.
>
> Section 10 of the Act provides that each member or manager of an LLC has the right, subject to such reasonable standards as may be specified in the operating agreement or otherwise established by the manager or members, to obtain from the LLC "for any purpose reasonably related to the member's or manager's interest as a member or manager," (i) true and full information regarding the LLC's business and financial condition; (ii) promptly after becoming available, a copy of the LLC's federal, state, and local income tax returns for each year; and (iii) other information regarding the affairs of the LLC as is "just and reasonable."

The Board of Managers shall keep or cause the Treasurer to keep complete and accurate books and records of the LLC in accordance with federal income tax principles and otherwise in accordance with generally accepted accounting principles consistently applied, which shall be maintained and be available, in addition to any documents and information required to be furnished to the Members under the Act, at the office of the LLC for examination and copying by any officer, Member or Manager, or his, her or its duly authorized representative, at its reasonable request and at its expense during ordinary business hours. A current list of the full name and last known address of each officer, Member and Manager; a copy of this Agreement and any amendments thereto; the Certificate, including all certificates of amendment thereto; executed copies of all powers of attorney, if any, pursuant to which this Agreement, any amendment, the Certificate or any certificate of amendment has been executed; and copies of the LLC's financial statements and federal, state and local income tax returns and reports, if any, for the three most recent fiscal years, shall be maintained at the registered office of the LLC required by Section 5 of the Act.

The LLC shall have no obligation to deliver or mail a copy of the Certificate or any amendment thereto to the Members.

7.02 *Reports*. Within 120 days after the end of each fiscal year, the Board of Managers shall cause to be prepared and sent to all Members a financial report of the LLC, including a balance sheet and a profit and loss statement, and, if such profit and loss statement is not prepared on a cash basis, a statement of changes in financial position, *[all of which shall be certified by an independent certified public accountant]*. Within 90 days after the end of each fiscal year, the Board of Managers shall furnish (or cause to be furnished) to all Members with such information as may be needed to

enable the Members to file their federal income tax returns and any required state income tax return. The cost of all such reporting shall be paid by the LLC as an LLC expense. Any Member may, at any time, at its own expense, cause an audit of the LLC books to be made by a certified public accountant of its own selection. All expenses incurred by such accountant shall be borne by such Member.

Practice Note

This agreement requires that the LLC conduct an audit of its books and records annually. In many contexts, an audit will not be necessary, and the cost therefor may be an unwanted expense. An alternative provision might require delivery of "such reports as the Board of Managers may determine to be reasonable" or delivery of financial statements certified by the treasurer or other financial officer of the LLC. At a minimum, information required by the members to prepare their state and federal income tax returns must be provided.

7.03 *Bank Accounts*. The Board of Managers or the Treasurer shall be responsible for causing one or more accounts to be maintained in a bank (or banks) that is a member of the FDIC, which accounts shall be used for the payment of the expenditures incurred by the Board of Managers and the officers in connection with the business of the LLC, and in which shall be deposited any and all cash receipts of the LLC. All deposits and funds not needed for the operations of the LLC may be invested in short-term investments, including securities issued or fully guaranteed by United States government agencies; certificates of deposit of banks; bank repurchase agreements covering the securities of the United States government; commercial paper rated A or better by Moody's Investors Services, Inc.; money market funds; interest-bearing time deposits in banks and thrift institutions; and such other similar investments as the Board of Managers may approve. All such amounts shall be and remain the property of the LLC, and shall be received, held and disbursed by the Board of Managers (or the Treasurer or such other officers of the LLC, as authorized by the Board of Managers) for the purposes specified in this Agreement. There shall not be deposited in any of said accounts any funds other than funds belonging to the LLC, and no other funds shall in any way be commingled with such funds. Withdrawals from any LLC bank or similar account shall be made and other activity conducted on such signature or signatures as shall be approved by the Board of Managers.

7.04 *Fiscal Year*. The fiscal year of the LLC shall end on December 31 of each year [unless I.R.C. § 706 requires the use of a different taxable year in which case the fiscal year shall be the same as such taxable year]; provided, however, that the last fiscal year of the LLC shall end on the date the LLC liquidates.

7.05 *Tax Matters Representation.*

(a) [_____] shall be the LLC's initial Partnership Representative for each taxable year of the LLC. [The Board of Managers] may revoke the designation of the Partnership Representative and designate a replacement Partnership Representative at any time. If the Person designated as the Partnership Representative is an entity, to the extent required by applicable Treasury Regulations, such Person shall designate

an individual (a "Designated Individual") who meets the eligibility requirements for a Partnership Representative (as set forth in the applicable Treasury Regulations) to act as the sole individual through whom the Partnership Representative will act in fulfilling its role as the Partnership Representative.

(b) The Partnership Representative shall have the sole authority to act on behalf of the LLC for purposes of subchapter C of Chapter 63 of the I.R.C. and comparable provisions of state or local income tax laws; provided, however, that if the designation of any Person as the Partnership Representative is properly revoked in accordance with this Agreement, such Person shall not take any action as the Partnership Representative and shall not allow its Designated Individual (if applicable) to take any action in such capacity without the express written consent of [the Board of Managers] notwithstanding that such revocation is not immediately effective under applicable Treasury Regulations. The rights, duties and obligations of the Partnership Representative shall include:

(i) Keeping all Members reasonably apprised of all material activities and developments in connection with any audit or administrative proceeding with any tax authority and any judicial proceedings related to taxes.

(ii) Unless otherwise approved by [the Board of Managers], causing the LLC to timely elect pursuant to I.R.C. § 6226 to have any and all Imputed Underpayments determined with respect to the LLC passed through to the Persons who were Members during the Reviewed Year and to make a similar election pursuant to Proposed Regulation § 301.6226-2(e) (or successor provision) to have any Partnership Adjustment that was passed through to the LLC from an entity in which the LLC held an interest passed through to the Persons who were Members during the relevant Reviewed Year.

(iii) Upon a timely request of any Person who was a Member during an applicable Reviewed Year, requesting a modification of any of such Person's share (or the share of any pass-through direct or indirect equity owner of such Person) of any Imputed Underpayment determined with respect to such year in accordance with I.R.C. § 6225(c) and using reasonable efforts to cause such request to be approved by the Internal Revenue Service.

(iv) Initiating and pursuing a request for an administrative adjustment with respect to one or more items of income, gain, loss, deduction or credit of the LLC in accordance with Treasury Regulation I.R.C. § 301.6227-1.

(c) To the extent allowable under subchapter C of Chapter 63 of the I.R.C., the amount of any Imputed Underpayment or of any Partnership Adjustment that does not give rise to an Imputed Underpayment shall be apportioned among the Members of the LLC for the taxable year in which the adjustment is finalized in such manner as may be necessary (as determined by the Partnership Representative in good faith) so that, to the maximum extent possible, the tax and economic consequences of the Imputed Underpayment or Partnership Adjustment and any associated interest and penalties are borne by the Members and former Members based upon their interests

in the LLC for the Reviewed Year and any modification of an Imputed Underpayment in accordance with Section 7.05(b)(iii) is credited to the responsible Member or such Member's successor in interest. In furtherance of such objective, if the LLC is required to pay an Imputed Underpayment, each Person who was a Member during an applicable Reviewed Year shall pay to the LLC within ten (10) days of the receipt of written notice of the amount due, an amount equal to the sum of (A) the rate of tax used to determine the Imputed Underpayment multiplied by the allocable share of the associated Partnership Adjustment that such Person would have had in the Reviewed Year had the Partnership Adjustment been included in the LLC's tax return for such year and (B) a corresponding portion of any interest and penalties paid or payable by the LLC; provided, however, that the amount so payable by a Member shall be reduced to reflect any reduction in such Member's share of any Imputed Underpayment as a result of any modification of such amount obtained in accordance with I.R.C. § 6225(c). In lieu of such payment, the LLC may elect to pay all or a portion of the Imputed Underpayment from other sources and withhold the amount a Member (or such Person's predecessor in interest) would otherwise have been obligated to pay to the LLC from the amount of any distributions then to be made to such Member. In the event that a Person does not timely pay (or have withheld from its distributions) any amount due to the LLC pursuant to this subsection (c), the unpaid amount shall be treated as a demand loan that accrues interest at the prime rate published by the Wall Street Journal from time to time plus [3]% (compounded daily) from the date such payment was due, and the LLC shall be entitled to withhold all distributions from such Person and offset the withheld amounts against the amount due under the loan until the loan is repaid in full. Any amount withheld from a Member pursuant to this Section 7.05(c) shall be treated as a distribution to such Member at the time paid by the LLC (and shall reduce the amount of any distribution to which the Member is then entitled).

(d) The Members shall cooperate with the Partnership Representative and/or the LLC to implement the provisions of this Section 7.05. Such cooperation shall include, without limitation, (A) taking such action as may be necessary or desirable (as determined by the Partnership Representative) to allow the LLC to successfully elect pursuant to I.R.C. § 6226 for any Imputed Underpayments to be taken into account by the Members rather than the LLC and (B) facilitating an election by any direct or indirect equity owner of the Member to modify the amount of such owner's share of any Imputed Understatement in accordance with I.R.C. § 6225(c).

Practice Note

For taxable years of an LLC that begin on or after January 1, 2018, the procedural rules under the I.R.C. regarding partnership audits and administrative and judicial proceedings were dramatically changed. In general, such proceedings are handled entirely by the LLC's "partnership representative" who is granted nearly unfettered ability to bind the LLC and all of its members regarding all aspects of the proceeding. The "partnership representative" need not be a member of the LLC and, in certain circumstances, can be appointed by the IRS. Under these procedural rules, absent certain elections, if the proceeding involves an in-

crease in the taxable income of the LLC (or a decrease in any tax credits), the LLC rather than its members is obligated to pay the resulting increase in taxes (referred to as the "imputed underpayment") determined by applying the maximum effective tax rate for the year that is the subject of the proceeding (the "reviewed year"). This approach can cause significant distortions in the tax burden imposed on the members of the LLC including

- a significantly higher aggregate amount of tax being paid than would have been paid had the initial tax returns been filed correctly and
- members sharing in the resulting tax liability (indirectly through their interests in the LLC) in a dramatically different manner than had the initial tax returns been filed correctly.

Although procedures are available that can mitigate these distortions in certain circumstances, their election is almost exclusively in the discretion of the "partnership representative." Thus, in any circumstance in which a particular member is not the "partnership representative," it is important that such member contractually obligate the "partnership representative" to act in a fair manner and that the other members have obligations to pay the appropriate amount of any tax deficiency based upon their ownership in the LLC for the reviewed year. The foregoing provision is just one fairly simple example of the type of provision that should be included.

(e) The obligations of a Member pursuant to this Section 7.05 shall survive the dissolution of the LLC, the withdrawal of the Member or the transfer of such Member's interest in the LLC. In any tax jurisdiction that has not adopted rules similar to those contained in subchapter C of Chapter 63 of the I.R.C. as enacted by the Bipartisan Budget Act of 2015 (as amended), the Managing Member (i) shall be the "tax matters partner" within the meaning of I.R.C. § 6231 as in effect prior to enactment of the Bipartisan Budget Act of 2015 if such jurisdiction is subject to rules similar to those in subchapter C of Chapter 63 of the I.R.C. as in effect prior to the Bipartisan Budget Act of 2015 or (ii) shall, to the extent allowable under applicable law, be granted the authority to conduct any tax proceeding in a manner similar to how such proceeding would have been conducted had subchapter C of Chapter 63 of the I.R.C. as in effect prior to the Bipartisan Budget Act of 2015 been applicable in such jurisdiction.

Practice Note

For taxable years beginning prior to the effective date of the BBA Amendments (generally, January 1, 2018), each partnership and LLC treated as a partnership for federal income tax purposes must have a "tax matters partner." If the manager were not a member, the manager would not be qualified to serve as the tax matters partner. Treasury Regulations provide that the "tax matters partner" must be a member. If no member is so designated, the tax matters partner generally is the member who has the largest interest in the profits of the LLC for the year (or, where there is more than one such member, the member whose last

name is first, alphabetically, of all such members' last names). Under I.R.C. §§ 6221–6231, the tax matters partner of a partnership (including an LLC taxed as a partnership) controls audits and other similar administrative proceedings of the partnership relating to federal income taxes. In certain circumstances, it may be important to a member of an LLC to control such proceedings. In addition, because the actions of a tax matters partner can (in limited circumstances) bind other partners with respect to a particular tax determination, other members may wish to provide that the tax matters partner cannot bind them without their express consent. Under I.R.C. §§ 6221–6231, designation of the tax matters partner is only relevant for purposes of controlling audits and other similar administrative proceedings with the IRS; it does not authorize the designee to make tax elections, file tax returns, or handle other administrative functions relating to taxes. If the members want the tax matters partner to handle such additional tasks, they should so specify in the LLC agreement. Otherwise, such tasks will be left to the party or parties charged with the general management of the LLC.

ARTICLE VIII
Transfers of Interests

Practice Note

Provisions for certificated interests in the LLC could be inserted in Article VIII pursuant to Section 39(c) of the Act, if desired. However, certificates evidencing the security may suggest that the security is freely transferable (which is generally not the case).

8.01 *General Restrictions on Transfer of Interests by Members*.

(a) No Member may Transfer his, her or its interest in the LLC unless the Board of Managers (acting exclusive of any Manager that is, or is affiliated with, the Transferring Member) shall have previously approved such Transfer in writing, the granting or denying of which approval shall be in the Board's absolute discretion.

No assignment of the interest of a Member shall be made if, in the opinion of counsel to the LLC, such assignment (i) may not be effected without registration under the Securities Act; (ii) would result in the violation of any applicable state securities laws; or (iii) unless approved by the Board of Managers (acting exclusive of any Manager which is, or is affiliated with, the Transferring Member), would result in the treatment of the LLC as an association taxable as a corporation or as a "publicly traded limited partnership" for tax purposes. The LLC shall not be required to recognize any such assignment until the instrument conveying such interest has been delivered to the Board of Managers for recordation on the books of the LLC. Unless an assignee becomes a substituted Member in accordance with the provisions of Section 8.01(b), the assignee shall not be entitled to any of the rights granted to a Member hereunder, other than the right to receive all or part of the share of the, Net Profits, Net Losses, any items in the nature of income, gain, loss or deduction separately al-

located to the Members, cash distributions or returns of capital to which his or her assignor would otherwise be entitled.

(b) An assignee of the interest of a Member, or any portion thereof, shall become a substituted Member entitled to all the rights of a Member if, and only if:

(i) the assignor gives the assignee such right;

(ii) the following persons, as applicable, shall have consented to such substitution in writing, the granting or denying of which consent shall be in their absolute discretion:

(x) if the Board of Managers includes one or more Member-Managers (exclusive of any Member-Manager who is, or is affiliated with, the assigning Member), Member-Managers owning at least a Majority of the Percentage Interests owned by all Member-Managers shall have consented to such assignment; or

(y) if clause (x) above is inapplicable, Members (exclusive of any Member who is, or is affiliated with, the assigning Member) owning at least a majority of the Percentage Interests owned by all such Members shall have consented to such assignment;

(iii) the assignee pays to the LLC all costs and expenses incurred in connection with such substitution, including specifically, without limitation, costs incurred in the review and processing of the assignment and in amending the LLC's then current Certificate and/or Operating Agreement, if required; and

(iv) the assignee executes and delivers an Amendment to this Agreement (and to the Certificate, if required), which Amendment shall be executed by the President, Treasurer or other person authorized by the Board of Managers and by such assignee, and such other instruments, in form and substance satisfactory to the Board of Managers (acting exclusive of any Manager which is, or is affiliated with, the assigning Member), as may be necessary, appropriate or desirable to effect such substitution and to confirm the agreement of the assignee to be bound by the terms and provisions of this Agreement.

(c) The LLC, the Board of Managers and the officers of the LLC shall be entitled to treat the record owner of any LLC interest as the absolute owner thereof in all respects, and shall incur no liability for distributions of cash or other property made in good faith to such owner until such time as a written assignment of such interest has been received and accepted by the Board of Managers and recorded on the books of the LLC. The Board of Managers may refuse to accept an assignment until the end of the next successive quarterly accounting period. In no event shall any membership interest, or any portion thereof, be sold, transferred or assigned to a minor or incompetent, and any such attempted sale, transfer or assignment shall be void and ineffectual and shall not bind the LLC or the Board of Managers.

8.02 *Transfers of Interests by Members Who Serve as Managers*.

(a) A Transfer or assignment of an interest by a Member-Manager shall transfer only the economic interest, rights, duties and obligations of the transferor in its capacity as a Member, and no transferee shall obtain, as a result of such Transfer or assignment, any rights as a Manager.

(b) A Member-Manager who assigns or Transfers all (but not less than all) of his, her or its interest as a Member shall be deemed to have tendered his, her or its resignation as a Manager to the Board of Managers effective as of the date of such transfer or assignment. A majority of the Board of Managers, exclusive of the resigning member, may accept or reject such resignation. If accepted, the acceptance date shall be the effective date of the resignation. Failure to reject such resignation within *[30]* days after the tender thereof shall be deemed to constitute acceptance of such resignation.

8.03 *Restrictions as to Certain Matters*. Every Transfer of an interest of a Member of the LLC permitted by this Article VIII shall be subject to the following restrictions.

(a) No Transfer of any interest in the LLC may be made if such Transfer would cause or result in a breach of any agreement binding upon the LLC or of then applicable rules and regulations of any governmental authority having jurisdiction over such Transfer. The Board of Managers may require as a condition of any Transfer that the transferor furnish an opinion of counsel, satisfactory to the LLC (both as to counsel and as to the substance of the opinion), that the proposed Transfer complies with applicable law, including federal and state securities laws, and does not cause the LLC to be an investment company as such term is defined in the Investment Company Act of 1940, as amended.

(b) The Board of Managers may require, as a condition to the admission to the LLC as a Member of any transferee who is not a Member, that such transferee demonstrate to the reasonable satisfaction of the Board of Managers that he, she or it is either a financially responsible person or has one or more financially responsible persons who have affirmatively assumed the financial obligations of the transferee under this Agreement, if any, on his, her or its behalf.

> **Practice Note**
> Sections 39(d) and 41(b) of the Act contain provisions that describe the liability of assignors and assignees. Section 8.03(b), above, makes sense only if the transferring member has financial obligations to the LLC. If the member does not, this provision should be deleted.

(c) Unless the Board of Managers has specifically approved otherwise in writing, a transferor of an interest as a Member of the LLC, if the transferee is a Member hereunder or if the transferee becomes a Member pursuant to the provisions of this Agreement, shall not be relieved of liability under this Agreement with respect to the transferred interest arising or accruing on or after the effective date of the Transfer, except to the extent of the payments made in the transferor's place by any transferee of its interest, and the LLC may proceed to collect any amount due from the transfer-

or as and when due, together with interest thereon from the date for payment stated herein at the rate of _____ percent per annum, compounded monthly, but not exceeding the maximum rate permitted by law, and all costs and expenses of collection incurred by the LLC (including reasonable fees and disbursements of counsel).

Practice Note

This type of a provision is desirable if a member transfers its interest prior to paying in full its capital contribution to the LLC.

(d) Any person who acquires in any manner whatsoever an interest (or any part thereof) in the LLC, whether or not such person has accepted and assumed in writing the terms and provisions of this Agreement or been admitted into the LLC as a Member as provided in Section 8.01(b), shall be deemed, by acceptance of the acquisition thereof, to have agreed to be subject to and bound by all of the obligations of this Agreement with respect to such interest and shall be subject to the provisions of this Agreement with respect to any subsequent Transfer of such interest.

(e) Any Transfer in contravention of any of the provisions of this Agreement shall be null and void and ineffective to transfer any interest in the LLC, and shall not bind, or be recognized by, or on the books of, the LLC, and any transferee or assignee in such transaction shall not be or be treated as or deemed to be a Member for any purpose. In the event any Member shall at any time Transfer an interest in the LLC in contravention of any of the provisions of this Agreement, then each other Member shall, in addition to all rights and remedies at law and equity, be entitled to a decree or order restraining and enjoining such transaction, and the offending Member shall not plead in defense thereto that there would be an adequate remedy at law; it being expressly hereby acknowledged and agreed that damages at law would be an inadequate remedy for a breach or threatened breach of the provisions of this Agreement concerning such transactions.

Practice Note

Section 36 of the Act provides that, despite any agreement to the contrary, a member may resign as a member. As in the case of managers, a resignation could be a breach of this agreement and, therefore, a basis for a legal action for damages.

8.04 *Permitted Transfers*. The following Transfers shall be permitted without the approval of the Board of Managers or Members otherwise required under Section 8.01(a), above, but such permitted Transfers shall in any event be subject to Sections 8.01(b) and 8.03, hereof.

(a) An interest as a Member of the LLC may be Transferred, from time to time, to any legal representative(s) and/or Affiliate(s) and/or member(s) of the Immediate Family of the transferring Member.

Practice Note

If desired, rights of first offer and first refusal may be included in the operating agreement, and could appropriately be inserted in Article VIII.

Some practitioners believe that inclusion of a right of first offer/refusal provision is desirable so that a member will not be able to argue that the agreement is an unenforceable "unreasonable restraint on alienation." It is not required and probably not appropriate for most transactions. If the parties desire other types of buy/sell provisions or other provisions that might be included in a shareholders agreement or subscription agreement in the case of a corporation, such provisions might also be included in Article VIII.

ARTICLE IX
Miscellaneous

9.01 *Events Causing Dissolution*. The LLC shall be dissolved and its affairs wound up upon the following events:

(a) the sale or other disposition of all or substantially all of the assets of the LLC, unless the disposition is a transfer of assets of the LLC in return for consideration other than cash and the Board of Managers determines not to distribute all or substantially all of such non-cash items to the Members;

(b) subject to the provisions of Section 9.02, the death, insanity, expulsion, Bankruptcy or dissolution of a Member, except for a Transfer effected in accordance with the provisions of Article VIII;

Practice Note

Under the Act, with respect to LLCs formed after January 1, 1997, the bankruptcy, insanity, withdrawal or termination of existence of a member will not automatically dissolve the LLC.

Dissolution events contained in Section 9.01 may be tailored to meet the particular facts and circumstances.

(c) the election to dissolve the LLC made in writing by the Board of Managers *[with the Consent of the Members]*;

Practice Note

In some cases, it may be appropriate to allow the board of managers or the members, acting alone, to make such an election.

(d) any consolidation or merger of the LLC with or into any entity following which the LLC is not the resulting or surviving entity; or

(e) upon the occurrence of an event specified under the laws of the Commonwealth of Massachusetts as one effecting dissolution, except that where, under the terms of this Agreement or the Act, the LLC is not to terminate, then the LLC shall immediately be reconstituted and reformed on all the applicable terms, conditions and provisions of this Agreement.

9.02 *Continuation of the LLC*. Notwithstanding the occurrence of an event specified in Section 9.01(b), the LLC shall not be dissolved and its business and affairs shall not be discontinued, and the LLC shall remain in existence as a limited liability company under the laws of the Commonwealth of Massachusetts, if the remaining Members acting by Consent, elect within 90 days after such occurrence to continue the LLC and the LLC's business.

9.03 *Procedures on Dissolution*. Dissolution of the LLC shall be effective on the day on which occurs the event giving rise to the dissolution, but the LLC shall not terminate until the Certificate shall have been canceled and the assets of the LLC shall have been distributed as provided herein. Notwithstanding the dissolution of the LLC, prior to the termination of the LLC, as aforesaid, the business of the LLC and the affairs of the Members, as such, shall continue to be governed by this Agreement. The Board of Managers or a liquidator appointed by the Board of Managers, shall liquidate the assets of the LLC, apply and distribute the proceeds thereof as contemplated by this Agreement and cause the cancellation of the Certificate.

9.04 *Distributions upon Liquidation*.

(a) After payment of liabilities owing to creditors, the Board of Managers or such liquidator shall set up such reserves as it deems reasonably necessary for any contingent or unforeseen liabilities or obligations of the LLC. Said reserves may be paid over by the Board of Managers or such liquidator to a bank, to be held in escrow for the purpose of paying any such contingent or unforeseen liabilities or obligations, and, at the expiration of such period as the Board of Managers or such liquidator may deem advisable, such reserves shall be distributed to the Members or their assigns in the manner set forth in paragraph (b), below.

(b) After paying such liabilities and providing for such reserves, the liquidator shall cause the remaining net assets of the LLC to be distributed to all Members with positive Capital Account balances (after such balances have been adjusted to reflect all debits and credits required by applicable Treasury Regulations under I.R.C. § 704(b) for all events through and including the distribution in liquidation of the LLC), in proportion to and to the extent of such positive balances. In the event that any part of such net assets consists of notes or accounts receivable or other noncash assets, the liquidator may take whatever steps it deems appropriate to convert such assets into cash or into any other form which would facilitate the distribution thereof. If any assets of the LLC are to be distributed in kind, such assets shall be distributed on the basis of their fair market value net of any liabilities.

Practice Note

Although this provision is generally required in order to qualify for the "safe harbor" provided in regulations under I.R.C. § 704(b) for the allocation of an LLC's income and loss among its members, the possibility of distorting the economic arrangement among the members must be carefully considered before this provision is included in the operating agreement. Because of that possibility, most LLC agreements do not contain this provision and provide that liquidating distributions are made in accord-

ance with the general distribution provisions of the agreement (e.g., Section 4.01).

Practice Note

See the note contained in Section 4.05, above, regarding distribution of assets in kind.

ARTICLE X
General Provisions

10.01 *Notices*. Except for notices of meetings of Managers and Members, notice of which shall be given in the manner provided in Sections 6.02(h) and 6.03(e), respectively, any and all notices under this Agreement shall be effective (a) on the fourth business day after being sent by registered or certified mail, return receipt requested, postage prepaid; (b) on the first business day after being sent by express mail, *[receipt confirmed telecopy,]* or commercial overnight delivery service providing a receipt for delivery; (c) on the date of hand delivery; or (d) on the date actually received, if sent by any other method. To be effective, all such notices shall be addressed, if to the LLC, at its registered office under the Act, and if to a Member or Manager, at the last address of record on the LLC books *[, and copies of such notices shall also be sent to the last address that is known to the sender for the recipient, if different from the address so specified]*.

Practice Note

If appropriate, the agreement may provide for delivery of notices by e-mail or other electronic means. For some or all of the notices so delivered, it may be appropriate to require some method for verifying receipt.

10.02 *Word Meanings*. Words such as "herein," "hereinafter," "hereof" and "hereunder" refer to this Agreement as a whole, and not merely to a subdivision in which such words appear unless the context otherwise requires. The singular shall include the plural, and the masculine gender shall include the feminine and neuter, and vice versa, unless the context otherwise requires.

10.03 *Binding Provisions*. Subject to the restrictions on transfers set forth herein, the covenants and agreements contained herein shall be binding upon, and inure to the benefit of, the parties hereto, their heirs, legal representatives, successors and assigns.

10.04 *Applicable Law*. This Agreement shall be construed and enforced in accordance with the laws of the Commonwealth of Massachusetts, including the Act, as interpreted by the courts of the Commonwealth of Massachusetts, notwithstanding any rules regarding choice of law to the contrary (provided that, as set forth in Section 6.05, to the extent not inconsistent with the specific provisions of this Agreement, the Act or the Certificate, the authority of the Board of Managers shall be determined by reference to the Delaware General Corporation Law).

10.05 *Counterparts*. This Agreement may be executed in several counterparts and as so executed shall constitute one agreement binding on all parties hereto, notwithstanding that all of the parties have not signed the same counterpart.

10.06 *Separability of Provisions*. Each provision of this Agreement shall be considered separable. To the extent that any provision of this Agreement is prohibited or ineffective under the Act, this Agreement shall be considered amended to the smallest degree possible in order to make the Agreement effective under the Act (and, if the Act is subsequently amended or interpreted in such manner as to make effective any provision of this Agreement that was formerly rendered invalid, such provision shall automatically be considered to be valid from the effective date of such amendment or interpretation).

Practice Note

These provisions address issues raised by possible inconsistencies between the Act and the agreement. The agreement is controlling unless its provisions are invalid under the Act (in which case the offending provision of the agreement is modified only to the extent necessary to be permissible under the Act).

10.07 *Section Titles*. Section titles are for descriptive purposes only and shall not control or alter the meaning of this Agreement as set forth in the text.

10.08 *Amendments*. Except as otherwise specifically provided in this Agreement, including, without limitation, in Sections 2.05 *[, 3.02]* and Article VIII, this Agreement may be amended or modified only by a writing approved by the Members, acting by Consent, and any such amendment may include, without limitation, an amendment providing for capital contributions from, distributions to, and allocations of Net Profits and Net Losses (and items thereof) to one or more additional classes of Members, provided that:

(a) no such amendment shall increase the liability of, increase the obligations of or disproportionately adversely affect the interest of, any Member without the specific approval of such Member (except that an amendment adopted pursuant to Section 2.05 *[or Section 3.02]* may reduce a Member's interest in the LLC without such Member's specific approval);

(b) if any provision of this Agreement provides for the approval or consent of a greater number of Members or of Members holding a higher percentage of the total Percentage Interests of the Members, any amendment effectuated pursuant to such provision, and any amendment to such provision, shall require the approval or consent of such greater number of Members or of Members holding such higher percentage of Percentage Interests;

(c) no such amendment shall increase the liability of or increase the obligations of the Board of Managers without the prior approval of the Board of Managers; and

Practice Note

This provision is not strictly required. If a manager does not find a particular amendment acceptable, he or she may resign, as provided in Section 6.02, above, without incurring any liability to the LLC.

(d) subject to clauses (a), (b) and (c), above, any amendment to this Section 10.08 shall require the approval of Members holding not less than *[two-thirds]* of all Percentage Interests.

Practice Note

The amendment provision must be tailored to the specific facts and circumstances.

10.09 *Third-Party Beneficiaries*. The provisions of this Agreement, including Article III, are not intended to be for the benefit of any creditor (other than a Member or Manager in his, her or its capacity as such, who is a creditor) or other person (other than a Member or Manager in his, her or its capacity as such) to whom any debts, liabilities or obligations are owed by (or who otherwise has any claim against) the LLC or any of the Members or Managers. Moreover, notwithstanding anything contained in this Agreement, including, without limitation, Article III, no such creditor or other person shall obtain any rights under this Agreement or shall, by reason of this Agreement, make any claim in respect of any debt, liability or obligation (or otherwise) against the LLC or any Member or Manager.

10.10 *Entire Agreement*. This Agreement embodies the entire agreement and understanding between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings relating to such subject matter. The Members and Managers hereby agree that each Member and each Manager shall be entitled to rely on the provisions of this Agreement, and no Member or Manager shall be liable to the LLC or any other Member or Manager for any action or refusal to act taken in good faith reliance on the terms of this Agreement.

10.11 *Waiver of Partition*. Each Member agrees that irreparable damage would be done to the LLC if any Member brought an action in court to dissolve the LLC. Accordingly, each Member agrees that he, she or it shall not, either directly or indirectly, take any action to require partition or appraisal of the LLC or of any of the assets or properties of the LLC, and, notwithstanding any provisions of this Agreement to the contrary, each Member (and his, her or its successors and assigns) accepts the provisions of the Agreement as his, her or its sole entitlement on termination, dissolution and/or liquidation of the LLC and hereby irrevocably waives any and all right to maintain any action for partition or to compel any sale or other liquidation with respect to his, her or its interest, in or with respect to, any assets or properties of the LLC. Each Member agrees that he, she or it will not petition a court for the dissolution, termination or liquidation of the LLC.

Practice Note

This provision may not be enforceable, and in some cases may be undesirable. See Sections 43 and 44 of the Act, which provide, among other

things, that any member or manager may apply to the trial court of the Commonwealth for a decree of dissolution of an LLC if it is not reasonably practicable to carry on the business of the LLC in conformity with the LLC's certificate of organization or operating agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement under seal as of the day and year first above written.

MANAGERS:

_____

Joe Manager

_____

Mary Management

_____

Donna Director

MEMBERS:

_____

Joe Manager

_____

John Member

_____

Ann Member

_____

Susan Member

SCHEDULE A
TO OPERATING AGREEMENT
OF CORPORATE MODEL LLC

MEMBERS

Names and Addresses of Members	Percentage Interest	Capital Contribution
Joe Manager	10%	$10,000
John Member	30%	30,000
Ann Member	30%	30,000
Susan Member	30%	30,000
Total:	100%	$100,000

MANAGERS

Joe Manager

Mary Management

Donna Director

EXHIBIT 7G—Shortform Associates LLC

CERTIFICATE OF ORGANIZATION

Pursuant to the provisions of the Massachusetts Limited Liability Company Act (the "Act"), the undersigned, in order to form a limited liability company, hereby certify as follows:

1. *Federal Employer Identification Number*. The limited liability company to be formed hereby has applied for (but not yet received) a federal employer identification number.

Practice Note

The regulations issued by the Office of the Secretary of the Commonwealth require the employer identification number for the LLC to be included in the certificate of organization, if available. This requirement is technically impossible to satisfy, because the employer identification number application requires the inclusion of the date the entity was organized. Thus, both the certificate of organization and the federal employer identification number application assume that the other has already been filed!

2. *Name of the Limited Liability Company*. The name of the limited liability company to be formed hereby (the "LLC") is Shortform Associates LLC.

Practice Note

The name must be available and permitted under Section 3 of the Massachusetts Limited Liability Company Act (G.L. c. 156C, hereinafter referred to as the Act) and other applicable law, including the law of any jurisdictions other than Massachusetts in which the limited liability company will do business. Under the Act, the name must include the words "limited liability company," "limited company" or the abbreviations "L.L.C.," "L.C.," "LLC" or "LC."

3. *Office of the Limited Liability Company*. The address of the office of the LLC in the Commonwealth at which the LLC will maintain its records in accordance with the Act is c/o _____, Massachusetts _____.

Practice Note

A Massachusetts LLC must maintain an office in the Commonwealth. Certain records of the LLC must be maintained at this office. See Section 9 of the Act and the notes to Section 5.01 of Shortform Associates LLC's operating agreement, below.

4. *Business of the LLC*. The general character of the business of the LLC is to engage in *[specify here the nature of the LLC's business, for example: investment in, and ownership and development of, real estate and interests therein, including buying, ac-*

quiring, owning, operating, selling, financing, refinancing, disposing of and otherwise dealing with interests in real estate, directly or indirectly through joint ventures, partnerships or other entities]; and to engage in any activities directly or indirectly related or incidental thereto.

Practice Note

The purpose clause must be tailored to the particular needs of the LLC. The purpose clause could be more broadly drafted (i.e., by including language such as "and to engage in any other activity in which a limited liability company organized under the laws of the Commonwealth of Massachusetts may lawfully engage"), as is often the case in the articles of organization for a corporation.

5. *Date of Dissolution*. The LLC shall have no fixed date upon which it shall dissolve.

Practice Note

The Act does not require an LLC to have a finite term, and absent a provision of the operating agreement to the contrary, a Massachusetts LLC formed after January 1, 1997 will have perpetual existence. However, in some contexts (particularly where the LLC is intended to "look like" a partnership), it may be desirable to specify a date certain upon which the LLC will dissolve.

6. *Agent for Service of Process*. The name and address of the resident agent for service of process for the LLC is _____, Massachusetts _____.

Practice Note

The resident agent for service of process must be an individual resident of the Commonwealth, a Massachusetts corporation or a foreign corporation qualified to do business in Massachusetts.

7. *Manager*. As of the date hereof, the LLC does not have any managers.

Practice Note

Because Shortform Associates LLC is member-managed, it has no managers.

8. *Execution of Documents (Secretary of the Commonwealth)*. Any member of the LLC is authorized to execute on behalf of the LLC any documents to be filed with the Secretary of State of the Commonwealth of Massachusetts. As of the date hereof, the names and business addresses of each of the members of the LLC are as follows:

_____

_____

_____

_____

Practice Note

In an LLC with managers, it is unnecessary to name a person authorized to execute documents to be filed with the Secretary of the Commonwealth. It is unclear under the Act whether it is sufficient to name a category of authorized signing persons, or whether the names of authorized individuals must be reflected in the certificate. Accordingly, the names and business addresses of the persons who are currently members (and who therefore have signatory authority), have been listed in the certificate. The certificate will need to be amended when and if the members or their business addresses change.

9. *Execution of Recordable Instruments*. Any member of the LLC is authorized to execute, acknowledge, deliver and record any recordable instrument purporting to affect an interest in real property. The names and business addresses of each member of the LLC as of the date hereof are specified in paragraph 8, above.

Practice Note

This provision is optional, but helpful if the LLC owns interests in real estate that may be mortgaged or transferred.

IN WITNESS WHEREOF, the undersigned hereby affirms under the penalties of perjury that the facts stated herein are true, as of the _____ day of _____, 20__.

Practice Note

Section 15(c) of the Act provides that execution of a certificate constitutes an affirmation, under the penalties of perjury, that the facts stated therein are true.

_____

Authorized Person

Practice Note

Section 15(a)(2) of the Act provides that any person, whether or not authorized in the text of the certificate, may execute the initial certificate of organization. In this regard, the signer of the LLC certificate is similar to a sole incorporator signing articles of organization of a Massachusetts corporation.

SHORTFORM ASSOCIATES LLC
OPERATING AGREEMENT

THIS OPERATING AGREEMENT of Shortform Associates LLC (the "LLC"), dated as of _____, 20__, is among the persons named on *Schedule A*, attached hereto. Each of such persons is sometimes hereinafter referred to individually as a "Member," and such persons are sometimes hereinafter referred to collectively as the "Members."

Practice Note

An LLC does not need a written operating agreement, but one is strongly recommended, particularly if the parties wish to deviate from the "default

rules" provided in the Act. Certain provisions of the Act specifically require a writing to create enforceable obligations of the members and managers. For example, an obligation to contribute cash or property to, or to perform services for, an LLC must be embodied in a written operating agreement.

The definition of the term "limited liability company" in the Act specifically provides that the LLC must have one or more members. A Massachusetts LLC is automatically dissolved (subject to a right to continue) if, at any time, it has no members.

WHEREAS, the Members intend to form a limited liability company pursuant to the Massachusetts Limited Liability Company Act (the "Act"); and

WHEREAS, as soon as practicable after the date hereof, the Members shall cause to be filed in the Office of the Secretary of State of the Commonwealth of Massachusetts a Certificate of Organization for the LLC (the "Certificate"); and

Practice Note

An LLC is formed at the time the certificate of organization is filed, or at any later date specified in the certificate of organization. If the entity conducts business prior to the effective date, it may be deemed to be doing so as a general partnership. Accordingly, prior to the effective date, the members or managers may be treated as "general partners," and might therefore have general liability for the debts and obligations of the entity.

WHEREAS, the Members desire to enter into this Agreement to set forth the agreements among the Members with respect to the LLC, all as more fully set forth herein.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and in consideration of the agreements hereinafter set forth, the parties hereby agree as follows.

ARTICLE I
General Provisions

1.01 *Formation of Limited Liability Company; Foreign Qualification*. The Members hereby agree to form the LLC as a limited liability company under the Act. The term of the LLC shall commence upon the filing of the Certificate in the Office of the Secretary of State of the Commonwealth of Massachusetts.

The Members shall promptly cause the Certificate to be filed. Prior to the LLC's conducting business in any jurisdiction other than the Commonwealth of Massachusetts, the LLC shall comply, to the extent procedures are available, with all requirements necessary to qualify the LLC as a foreign limited liability company in each such jurisdiction where foreign qualification is either necessary or appropriate. Each Member shall execute, acknowledge, swear to and deliver all certificates and other instruments conforming to this Agreement that are necessary or appropriate to qualify, or, as appropriate, to continue or terminate such qualification of, the LLC as a for-

eign limited liability company in all such jurisdictions in which the LLC may conduct business.

1.02 *Name of the LLC*. The name of the LLC shall be Shortform Associates LLC.

1.03 *Business of the LLC*. The general character of the business of the LLC is to engage in *[specify here the nature of the LLC's business, for example: investment in, and ownership and development of, real estate and interests therein, including buying, acquiring, owning, operating, selling, financing, refinancing, disposing of and otherwise dealing with interests in real estate, directly or indirectly through joint ventures, partnerships or other entities]*; and to engage in any activities directly or indirectly related or incidental thereto.

Practice Note

This provision should conform to the purpose clause in the LLC's certificate of organization.

1.04 *Place of Business of the LLC; Resident Agent*. The address of the principal place of business of the LLC, and the office of the LLC in the Commonwealth at which the LLC will maintain its records in accordance with the Act, is c/o _____, Massachusetts _____. The LLC's resident agent for service of process in Massachusetts shall be _____, Massachusetts _____.

Practice Note

The designation of a registered office and registered agent are fairly routine matters, but ones that are required by the Act. Failure to make such designations may delay receipt of applicable notices and service of process. In addition, some commentators have suggested that failure to designate an office or agent could constitute a failure to observe appropriate "corporate" formalities, thereby possibly subjecting the members or managers to personal liability for the entity's debts and obligations.

1.05 *Duration of the LLC*. The term of the LLC shall commence upon filing the Certificate, and the LLC shall have perpetual existence, unless earlier terminated in accordance with Article VII hereof.

1.06 *Members' Names and Addresses*. The names and business addresses of the Members are set forth on *Schedule A*. Additional Members may be admitted in accordance with the procedures specified in Article VI. A Member may not resign from the LLC at any time.

Practice Note

Section 36 of the Act provides that, despite any agreement to the contrary, a member may resign as a member. If any such resignation violates the terms of the operating agreement, the resignation would give rise to a claim for breach and associated damages.

1.07 *No Partnership*. The LLC is not intended to be a general partnership, limited partnership or joint venture, and no Member shall be considered to be a partner or

joint venturer of any other Member for any purposes other than foreign and domestic federal, state, provincial and local income tax purposes, and this Agreement shall not be construed to suggest otherwise.

1.08 *Title to LLC Property*. All property owned by the LLC, whether real or personal, tangible or intangible, shall be deemed to be owned by the LLC as an entity, and no Member, individually, shall have any ownership of such property. The LLC may hold any of its assets in its own name or in the name of its nominee, which nominee may be one or more trusts. Any property held by a nominee trust for the benefit of the LLC shall, for purposes of this Agreement, be treated as if such property were directly owned by the LLC.

1.09 *Nature of Member's Interest*. The interests of all of the Members in the LLC are personal property and shall not, under any circumstances, be considered real property.

1.10 *Investment Representations*. Each Member, by execution of this Agreement or an amendment hereto reflecting such Member's admission to the LLC, hereby represents and warrants to the LLC as follows:

(a) It is acquiring an interest in the LLC for its own account for investment only, and not with a view to, or for sale in connection with, any distribution thereof in violation of the Securities Act of 1933, as amended (the "Securities Act"), or any rule or regulation thereunder.

(b) It understands that (i) the interest in the LLC it is acquiring has not been registered under the Securities Act or applicable state securities laws and cannot be resold unless subsequently registered under the Securities Act and such laws or unless an exemption from such registration is available; (ii) such registration under the Securities Act and such laws is unlikely at any time in the future, and neither the LLC nor the Members are obligated to file a registration statement under the Securities Act or such laws; and (iii) the assignment, sale, transfer, exchange or other disposition of the interests in the LLC is restricted in accordance with the terms of this Agreement.

(c) It has had such opportunity as it has deemed adequate to ask questions of and receive answers from representatives of the LLC concerning the LLC, and to obtain from representatives of the LLC such information the LLC possesses, or can acquire without unreasonable effort or expense, as is necessary to evaluate the merits and risks of an investment in the LLC.

(d) It has, either alone or with its professional advisors, sufficient experience in business, financial and investment matters to be able to evaluate the merits and risks involved in investing in the LLC and to make an informed investment decision with respect to such investment.

(e) It can afford a complete loss of the value of its investment in the LLC and is able to bear the economic risk of holding such investment for an indefinite period.

(f) If it is an entity, (i) it is duly organized, validly existing and in good standing under the laws of its jurisdiction of organization; (ii) it has full organizational power to

execute and deliver this Agreement and to perform its obligations hereunder; (iii) its execution, delivery and performance of this Agreement has been authorized by all requisite action on behalf of the entity; and (iv) it has duly executed and delivered this Agreement.

Practice Note

The representations contained in clauses (a) through (e) are intended to provide minimal compliance with federal securities laws in connection with the issuance by the LLC of interests to its members. In some cases, the membership interests may not be characterized as securities (particularly in the context of member-managed LLCs) because the members will act more like "general partners," will not be delegating management responsibilities to others, and will be profiting from their own efforts, as opposed to the efforts of others. In general, most state and federal securities laws do not specifically classify LLC interests as securities, and the traditional *Howey* analysis (see *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946)) will probably be applied on a case-by-case basis, taking into account the particular facts and circumstances surrounding the LLC interest.

ARTICLE II
Capital Contributions, Profits and Losses

2.01 *Capital Contributions*.

(a) Each Member has contributed in cash to the capital of the LLC in the amount set forth opposite his or her name on *Schedule A*.

Each Member has agreed to contribute in cash to the capital of the LLC in the amount of "Additional Capital" specified opposite his or her name on *Schedule A*, hereto, as and when required for the conduct of the business and operations of the LLC, as determined by the Members in accordance with Section 4.01, hereof. Upon any such determination, each Member shall be notified in writing of the need for capital and the total amount called for, and each Member shall contribute its proportionate share of the total amount called for (which share shall equal such Member's Percentage Interest, as specified on *Schedule A*, hereto) within 10 business days following such notice. In the event that any Member fails to contribute Additional Capital as and when required, such Member's interest shall be subject to purchase by the other Members, as provided in Section 2.01(b), below. Notwithstanding any other provision of this Agreement, no Member shall be obligated to contribute to the capital of the LLC an aggregate amount of Additional Capital in excess of the amount specified opposite his or her name on *Schedule A*, hereto.

(b) In the event that a Member fails to contribute all or any portion of its Additional Capital in accordance with the provisions of Section 2.01(a), above (a "Defaulting Member"), each of the other Members shall have the option to purchase the interest in the LLC of the Defaulting Member, for the purchase price specified in this Section 2.01(b). In the event that more than one of the non-Defaulting Members desire to purchase the interest of the Defaulting Member, they shall each be entitled to pur-

chase a portion thereof based on their respective Percentage Interests, unless all Members desiring to purchase such interest otherwise agree. In the event that more than one of the non-Defaulting Members purchases the interest of the Defaulting Member, each shall pay a portion of the total purchase price therefor (as specified below), which is allocable to the portion of the interest so purchased.

Each non-Defaulting Member shall have 30 days from the date on which the contribution of the Defaulting Member became due within which to exercise the option to purchase the interest of the Defaulting Member, by providing written notice of such exercise to all Members (Defaulting and non-Defaulting). If any non-Defaulting Member fails to notify all other Members of its election to purchase the interest of the Defaulting Member, such non-Defaulting Member shall be deemed to have elected not to purchase such interest. After any non-Defaulting Member has given such notice to the other Members, the Defaulting Member may not cure its default without the consent of all such electing non-Defaulting Members.

The aggregate purchase price for the interest of the Defaulting Member shall be (i) an amount, payable in cash or by delivery of an interest-bearing note, as described below, equal to the excess of (A) the amount of cash actually contributed to the capital of the LLC by the Defaulting Member over (B) the aggregate amount previously distributed by the LLC to the Defaulting Member, in each case prior to its default hereunder; and (ii) an undertaking to pay the Additional Capital installments required to be made by the Defaulting Member to the extent that such Additional Capital has not been contributed by the Defaulting Member. Any Member electing to purchase the interest of the Defaulting Member (a "Purchaser") may elect to pay all or any portion of the amount specified in clause (i), above, by delivery of a promissory note. Any such promissory note shall be unsecured, and shall provide for payment of equal annual installments over a term not to exceed five years, and shall bear interest at the then Applicable Federal Rate (as defined in the Internal Revenue Code of 1986 and regulations promulgated thereunder) for a note with the maturity date of such promissory note. Such promissory note shall be prepayable at any time without premium or penalty.

The closing of the acquisition of the interest of the Defaulting Member by the Purchaser(s) shall occur on the 15th day after the last day of the 30-day period during which the non-Defaulting Members may exercise the option, or, if such 15th day is not a business day, on the first business day after such 15th day. The closing shall occur at the offices of the LLC or at such other place as shall be agreed upon by the Purchasers and the Defaulting Member. At such closing, the Purchasers shall pay the purchase price for the interest of the Defaulting Member set forth above, and the Defaulting Member shall execute and deliver such agreements, instruments, and other documents, as are necessary to transfer to the Purchasers all of the Defaulting Member's right, title and interest in and to the Defaulting Member's interest in the LLC, free and clear of all liens, encumbrances and restrictions, other than liens, encumbrances and restrictions imposed under the terms of this Agreement.

Practice Note

It may be desirable to include a power of attorney from each member, authorizing execution of transfer documentation on its behalf should such member become a defaulting member.

Notwithstanding whether any option contained in this Section 2.01(b) is exercised, so long as a Defaulting Member remains in default, it shall have no right to vote on any matters submitted to the Members, to receive any cash distributions or to be allocated any Net Profits or Net Losses (as defined in Section 2.02 below); but any successor to such interest who shall be admitted to the LLC as a substituted Member as provided herein shall receive the benefits of the same, to the maximum extent permitted by Treasury Regulations under I.R.C. § 704(b) (as defined below).

Practice Note

Section 28(c) of the Act states that an operating agreement may provide specified remedies for or consequences of a member's failure to make a capital contribution or other payment to the LLC. Such remedies may include a forced sale, forfeiture, redemption or dilution of the defaulting member's interest.

(c) Except as provided in this Section 2.01, no Member shall be obligated or permitted to contribute any additional capital to the LLC. No interest shall accrue on any contributions to the capital of the LLC, and no Member shall have the right to withdraw or to be repaid any capital contributed by it or to receive any other payment in respect of its interest in the LLC, including, without limitation, as a result of the withdrawal or resignation of such Member from the LLC, except as specifically provided in this Agreement.

Practice Note

This provision differs from the default rule contained in Section 32 of the Act, which provides to a resigning member the right to receive the fair value of its interest in the LLC unless the operating agreement provides otherwise.

2.02 *Definitions*. For purposes of this Agreement, the following terms shall have the meanings ascribed to them in this Section 2.02:

(a) *"Capital Account"* means a separate account maintained for each Member and adjusted in accordance with Treasury Regulations under I.R.C. § 704. To the extent consistent with such Regulations, the adjustments to such accounts shall include the following: there shall be credited to each Member's Capital Account the amount of any cash or the net fair market value of any property actually contributed by such Member to the capital of the LLC and such Member's share of the Net Profits of the LLC and of any items in the nature of income or gain separately allocated to the Members; and there shall be charged against each Member's Capital Account the amount of any cash and the net fair market value of any property distributed to such Member and such Member's share of the Net Losses of the LLC and of any items in the nature of losses or deductions separately allocated to the Members.

Practice Note

Capital accounts are the primary mechanism in regulations adopted under I.R.C. § 704 to ensure that the allocation of profits and losses will be respected for federal income tax purposes and will ultimately result in the member who receives such allocations receiving more (or less) value from his or her interest in the LLC. To comply with the regulations, the operating agreement must provide that, upon liquidation of the LLC, liquidation proceeds will be distributed among the members based on their positive capital account balances. See Section 7.02(b), below. However, providing that liquidating distributions will be made to the members in accordance with their respective capital account balances results in the allocation of income and loss for tax purposes controlling the ultimate economic sharing among the members. Because many attorneys and clients do not want the "tax tail wagging the business dog," many LLC agreements deliberately do not comply with the safe harbor set forth in the regulations under I.R.C. § 704 by not providing that liquidation distributions will be made in accordance with capital account balances. Nevertheless, even those agreements typically employ "capital accounts" and provide that to the extent possible, the allocations of income and loss of the LLC will be made so that the capital accounts balances of the members correspond to the amounts the members would be distributed in liquidation of the LLC if the LLC sold all of its assets for no gain or loss and liquidated.

An LLC that is intended to be classified as a partnership for federal income tax purposes should establish and maintain capital accounts in accordance with the Code and applicable Treasury Regulations. The operating agreement should also contain provisions for the allocation of income and loss for tax purposes that comply with the Code and such regulations. See Sections 2.03, 2.04 and 2.05 of this agreement. However, in certain circumstances, to avoid possible distortions to the economic relationships among the members of the LLC, strict compliance with the requirements of the applicable Treasury Regulations may be undesirable. Consultation with a tax adviser is essential for determining the tax and economic consequences of whether or not to comply with the regulations.

(b) "*Carrying Value*" means, with respect to any asset, the asset's adjusted basis for federal income tax purposes, *provided, however*, that (i) the initial Carrying Value of any asset contributed to the LLC shall be adjusted to equal its gross fair market value (as determined by _____) at the time of its contribution and (ii) the Carrying Values of all assets held by the LLC shall be adjusted to equal their respective gross fair market values (taking I.R.C. § 7701(g) into account) upon an election by the LLC to revalue its property in accordance with Treasury Regulation Section 1.704-1(b)(2)(iv)(f) and upon liquidation of the LLC. The Carrying Value of any asset whose Carrying Value was adjusted pursuant to the preceding sentence thereafter shall be adjusted in accordance with the provisions of Treasury Regulation Section 1.704-1(b)(2)(iv)(g).

Practice Note

Regulations adopted under I.R.C. § 704 provide that for purposes of maintaining the partners' (or members' in the case of LLCs) capital accounts, in certain circumstances, the partnership (or LLC) is allowed (and sometimes required) to adjust the partners' capital accounts to reflect the unrealized appreciation or depreciation in some or all of the partnership's assets. Following such an adjustment, the income and loss of the partnership (solely for purposes of maintaining capital accounts) has to be computed based upon the fair market value of the assets whose unrealized appreciation or depreciation was reflected in the capital accounts rather than upon the adjusted tax basis of those assets. The concept of "Carrying Value" is used in lieu of "adjusted tax basis" for purposes of such computations with respect to the "booked up" (or "booked down") assets.

(c) "*Excess Negative Balance*" for a Member means the excess, if any, of (i) the negative balance in a Member's Capital Account after reducing such balance by the net adjustments, allocations and distributions described in Treasury Regulation Section 1.704-1(b)(2)(ii)(d)(4), (5) and (6) which, as of the end of the LLC's taxable year, are reasonably expected to be made to such Member, over (ii) the amount, if any, the Member is required to restore to the LLC upon liquidation of such Member's interest in the LLC (or that is so treated pursuant to Treasury Regulation Section 1.704-1(b)(2)(ii)(c)).

Practice Note

A member's capital account balance generally reflects his or her interest in the equity of the LLC at a given point in time. As a result, negative capital account balances are not generally tolerated unless the member has an obligation to contribute additional funds to the LLC or the negative balance is attributable to losses or distributions financed with indebtedness of the LLC. An "excess negative balance" is a measure of how much more negative a member's capital account balance is than the maximum amount he or she is currently obligated to contribute to the LLC (which amount is generally considered to include the member's share of the indebtedness of the LLC). Applicable Treasury Regulations provide rules for the elimination of such excess amounts as soon as possible. See Section 2.05(a), herein.

(d) "*I.R.C.*" means the Internal Revenue Code of 1986, as amended from time to time.

(e) "*Net Profits*" and "*Net Losses*" mean the taxable income or loss, as the case may be, for a period as determined in accordance with I.R.C. § 703(a) computed with the following adjustments:

(i) items of gain, loss and deduction shall be computed based upon the Carrying Values of the LLC's assets (in accordance with Treasury Regulation Sections 1.704-1(b)(2)(iv)(g) and/or 1.704-3(d)) rather than upon the assets' adjusted bases for federal income tax purposes;

(ii) any tax-exempt income received by the LLC shall be included as an item of gross income;

(iii) the amount of any adjustment to the Carrying Value of any LLC asset pursuant to I.R.C. § 734(b) or I.R.C. § 743(b) of the Code that is required to be reflected in the Capital Accounts of the Members pursuant to Treasury Regulation Section 1.704-1(b)(2)(iv)(m) shall be treated as an item of gain (if the adjustment is positive) or loss (if the adjustment is negative), and only such amount of the adjustment shall thereafter be taken into account in computing items of income and deduction;

(iv) any expenditure of the LLC described in I.R.C. § 705(a)(2)(B) (including any expenditures treated as being described in I.R.C. § 705(a)(2)(B) pursuant to Treasury Regulations under I.R.C. § 704(b)) shall be treated as a deductible expense;

(v) the amount of items of income, gain, loss or deduction specially allocated to any Members pursuant to Sections 2.04 and 2.05 shall not be included in the computation;

(vi) the amount of any unrealized gain or unrealized loss attributable to an asset at the time it is distributed in-kind to a Member shall be included in the computation as an item of income or loss, respectively; and

(vii) the amount of any unrealized gain or unrealized loss with respect to the assets of the LLC that is reflected in an adjustment to the Carrying Values of the LLC's assets pursuant to clause (ii) of the definition of "Carrying Value" shall be included in the computation as items of income or loss, respectively.

Practice Note

Net profits and net losses are generally determined using federal income tax principles. However, certain adjustments need to be made to accommodate economic profits and losses not recognized for tax purposes. Thus, for example, tax-exempt interest and nondeductible expenses need to be included. Similarly, as discussed in connection with the definition of "carrying value," if the capital accounts have been adjusted to reflect the fair market value of some or all of the LLC's assets, future computations of net profits and net losses must use the "booked up/down" value of those assets rather than their adjusted tax bases.

2.03 *General Allocations of Net Profits and Net Losses*.

(a) Net Profits and Net Losses of the LLC for any fiscal period shall be to the Members in such proportions and in such amounts as may be necessary so that following such allocations, the Capital Account balances of the Members are in proportion to their respective Percentage Interests.

(b) If the amount of Net Profits or Net Losses allocable to the Members pursuant to Section 2.03(a) for a period is insufficient to allow the Capital Account balances of

the Members to be in proportion to their respective Percentage Interests, such Net Profits or Net Losses shall be allocated among the Members in such a manner as to decrease the differences between the Members' respective Capital Account balances and the respective Capital Account balances they would have had if each Member had a Capital Account balance equal to such Member's Percentage Interest of the aggregate Capital Account balances of all Members (such allocation to be made in proportion to such differences).

Practice Note

Applicable Treasury Regulations require allocations of income and loss among the partners of a partnership for tax purposes to reflect the manner in which the partners will share the economic profits and economic losses of the partnership. To accomplish this, the regulations require that each allocation of income or loss to a partner be reflected by a corresponding credit or debit to the partner's capital account, and, upon liquidation of the partnership, that each partner receive the balance in the partner's capital account. Assuming these rules are followed, the capital account of a partner would control the amount of economic profit or loss a partner will receive. To mitigate the possibility that the tax rules will distort the economic deal among partners (i.e., members), Sections 203(a) and (b) herein, essentially provide that net profits and net losses are allocated in whatever manner is necessary for the capital accounts of the members to reflect the economic deal among the members, as set forth in Section 3.02, below. To completely eliminate such a possibility, many LLC agreements do not follow the requirement of the applicable Treasury Regulations that liquidating distributions be made in accordance with the members' respective capital account balances. Although such agreements will not fall within the "safe harbor" for allocating income and loss of the LLC, since they generally should reach the same result, most tax advisers believe that such an approach would be respected for federal income tax purposes.

2.04 *Allocations of Nonrecourse Deductions and Minimum Gain*.

Practice Note

Because no member will bear an economic loss attributable to nonrecourse debt (other than partner nonrecourse debt) or receive any economic benefit from any income or gain arising from satisfaction of nonrecourse debt (other than partner nonrecourse debt), Treasury Regulations contain special provisions for how such losses and income must be allocated. These rules are very important in the case of an LLC because all debt will be "nonrecourse" unless special guaranties or similar arrangements from one or more members exist. If you haven't consulted a tax lawyer or accountant by now, Section 2.04 should convince you beyond a doubt that you need to do so.

Notwithstanding the provisions of Section 2.03, above, if, at any time, the LLC incurs any "nonrecourse debt" (i.e., debt that is treated as nonrecourse for purposes of

Treasury Regulation Section 1.1001-2), the following provisions will apply notwithstanding anything to the contrary expressed elsewhere in this Agreement:

(a) "Nonrecourse deductions" (as defined in Treasury Regulation Section 1.704-2(b) and (c)) other than deductions attributable to "partner nonrecourse debt" (as defined in Treasury Regulation Section 1.704-2(b)(4)) shall be allocated to the Members in accordance with their respective Percentage Interests;

(b) Nonrecourse deductions attributable to partner nonrecourse debt shall be specially allocated to the Member or Members that bear the economic risk of loss associated with the debt;

(c) If, in any year, there is a net decrease in "partnership minimum gain" (as defined in Treasury Regulation Section 1.704-2(d)) or "partner nonrecourse debt minimum gain" (as defined in Treasury Regulation Section 1.704-2(i)(3), Members will be specially allocated items of income or gain for such year (and/or subsequent years to the extent necessary) in accordance with the "minimum gain chargeback" provisions of Treasury Regulation Section 1.704-2(f) and/or Treasury Regulation Section 1.704-2(i)(5); and

(d) For purposes of (i) calculating a Member's Excess Negative Balance, and (ii) making the allocations set forth in Section 2.03 hereof, each Member's Capital Account balance shall be increased by the Member's share of minimum gain and of partner nonrecourse debt minimum gain (as determined pursuant to Treasury Regulation Sections 1.704-2(g) and 1.704-2(i)(5), respectively).

2.05 *Overriding Allocations of Net Profits and Net Losses*. Notwithstanding the provisions of Section 2.03, above, but subject to the provisions of Section 2.04, above, the following allocations of items of income and loss (computed with the adjustments contained in the definition of "Net Profits" and "Net Losses") shall be made:

(a) If, during any year a Member receives any adjustment, allocation or distribution described in Treasury Regulation Section 1.704-1(b)(2)(ii)(d)(4), (5) or (6), and, as a result of such adjustment, allocation or distribution, such Member's Capital Account has an Excess Negative Balance, then items of gross income for such year (and, if necessary, subsequent years) shall be allocated to such Member in an amount equal to such Member's Excess Negative Balance.

(b) In no event shall loss or deduction of the LLC be allocated to a Member if such allocation would cause or increase an Excess Negative Balance in such Member's Capital Account.

(c) Except as otherwise provided herein or as required by I.R.C. § 704, for tax purposes, all items of income, gain, loss, deduction or credit shall be allocated to the Members in the same manner as are Net Profits and Net Losses, *provided, however*, that if the Carrying Value of any property of the LLC differs from its adjusted basis for tax purposes, then items of income, gain, loss, deduction or credit related to such property for tax purposes shall be allocated among the Members so as to take account

of the variation between the adjusted basis of the property for tax purposes and its Carrying Value in the manner provided for under I.R.C. § 704(c).

Practice Note

In situations in which unrealized gain or loss in one or more of the LLC's assets has previously been reflected in the capital accounts (see the Practice Note accompanying the definition of "carrying value"), the amount of such gain or loss cannot be reflected in the capital accounts for a second time when actually realized. I.R.C. § 704(c) and associated regulations provide special rules for allocating such realized gain or loss. Those rules are particularly complex, but generally attempt to allocate the realized gain or loss in the same manner as the unrealized gain or loss was reflected in the members' capital accounts. They allow for a variety of methods for allocating this gain or loss, and the method chosen can greatly affect the tax consequences to a member. Individual members may, therefore, wish to have input into which method is chosen. In addition, certain methods may only be used if their use is specified in the operating agreement.

2.06 *Timing of Allocations.* Allocations of Net Profits, Net Losses and other items of income, gain, loss and deduction pursuant to this Article II shall be made for each fiscal year of the LLC as of the end of such fiscal year; *provided, however*, that if the Carrying Values of the assets of the LLC are adjusted in accordance with clause (ii) of the definition of "Carrying Value," the date of such adjustment shall be considered to be the end of a fiscal year for purposes of computing and allocating such Net Profits, Net Losses and other items of income, gain, loss and deduction.

ARTICLE III
Cash Distributions

3.01 *Definitions*. For purposes of this Agreement, the term "Distributable Cash" means, with respect to any fiscal period, the excess of all cash receipts of the LLC from any source whatsoever; cash generated from normal operations; sales of assets; proceeds of borrowings; capital contributions of the Members; proceeds from a capital transaction; and any and all other sources over the sum of the following amounts:

(i) any cash disbursements for items that are customarily considered to be "operating expenses," including salary and bonus payments, employee benefits costs and rental payments for space and equipment;

(ii) payments of interest, principal and premium and points and other costs of borrowing under any indebtedness of the LLC, including, without limitation, any loans from any Member made pursuant to Section 4.08;

(iii) payments made to purchase capital assets, and for capital construction, rehabilitation and acquisitions; and

(iv) amounts set aside as reserves for working capital, contingent liabilities or replacements, or for any of the expenditures described in clauses (i), (ii) and (iii), above, that are deemed to be necessary by the Members to meet the current and anticipated future needs of the LLC.

Practice Note

Although this definition is fairly generic, it should be tailored to fit the particular business in which the LLC is engaged. In some cases, it may be appropriate to create subcategories of cash distributions (e.g., cash from a sale or refinancing versus ordinary cash flow), so that the various types of net revenue can be distributed among the members in different ways. In many LLC agreements, a detailed definition like this is not necessary, and the agreement simply provides that distributions will be made at the time and in the amount determined by whichever person or persons are in charge of managing the LLC.

3.02 *Distribution of Distributable Cash*. Except as provided in Section 7.02(b) below, Distributable Cash of the LLC shall be distributed to the Members, at such times and in such amounts as the Members may determine, in the proportions that their respective Percentage Interests bear to each other.

Practice Note

Cash distributions of the LLC can be made in a virtually limitless number of ways. This is just one example. The timing of cash distributions should also be considered. In some cases, mandatory distributions (to the extent the LLC has funds available therefor) are desirable, especially to the extent of the tax liabilities of the members arising out of their ownership of interests in the LLC. This agreement, however, is designed only for those situations in which all economic attributes are shared by the Members in proportion to their respective percentage interests.

3.03 *Distributions in Kind*. A Member, regardless of the nature of his or her contribution to the LLC, shall have no right to demand or receive any distribution from the LLC in any form other than cash. The LLC may, at any time and from time to time, make distributions in kind to the Members. If any assets of the LLC are distributed in kind, such assets shall be distributed on the basis of their fair market value as determined by the Members. Any Member entitled to any interest in such assets shall, unless otherwise determined by the Members, receive separate assets of the LLC and not an interest as a tenant in common with other Members so entitled in any asset being distributed.

Practice Note

This provision differs from the default rule contained in Section 33 of the Act, which provides that except as specified in a written operating agreement, a member may not be compelled to accept a distribution of any asset in kind from an LLC to the extent that the percentage of the asset distributed to the member exceeds the percentage in which he shares in distributions from the LLC. Accordingly, Section 33 of the Act

contemplates distributions of any asset in kind to all members as tenants in common, in proportion to their percentage interests. This agreement provides for distributions of separate assets to each member.

ARTICLE IV
Management

4.01 *Management of the LLC.*

(a) Subject to the provisions of this Agreement and the Act, all powers shall be exercised by, or under the authority of, and the business and affairs of the LLC shall be controlled by, the Members.

Practice Note

If an LLC has no managers, then unless otherwise provided in the operating agreement the members manage and control the LLC, and each member may execute documents and act for the LLC.

Shortform Associates LLC is member-managed, and the decision of a majority in interest of the members is required to make any decision. In this regard, Shortform Associates LLC is a lot like a "straight-up" general partnership.

(b) Except to the extent that this Agreement specifically provides for a higher or lower number or percentage of Members, all decisions respecting any matter set forth herein or otherwise affecting or arising out of the conduct of the business of the LLC shall be made by action of Members owning a majority of the Percentage Interests owned by all Members then entitled to vote on such action (a "Majority in Interest of the Members"). Subject to the foregoing, the Members shall have the exclusive right and full authority to manage, conduct and operate the LLC business.

Practice Note

In a member-managed LLC, "classes" of members may be established, and decisions regarding certain matters may be reserved to specified classes or groups of members. In addition, decisions may be made by a majority in number of the members (or other percentage or number of members).

Section 21(d) of the Act contains the default rule for a member-managed LLC in which no specific vote is provided for in the operating agreement. Section 21(d) provides that decisions are made by a majority in interest (based on unreturned capital contributions) of the members.

Specifically, but not by way of limitation, the Members (by action of such Majority in Interest) shall be authorized, for and on behalf of the LLC, to do as follows:

(i) to borrow money, to issue evidences of indebtedness and to guarantee the debts of others for whatever purposes they may specify, whether or not related to

the LLC or the LLC's assets, and, as security therefor, to mortgage, pledge or otherwise encumber the assets of the LLC;

(ii) to cause to be paid on or before the due date thereof all amounts due and payable by the LLC to any person or entity;

(iii) to employ such agents, employees, managers, accountants, attorneys, consultants and other persons necessary or appropriate to carry out the business and affairs of the LLC, whether or not any such persons so employed are Members or are affiliated or related to any Member; and to pay such fees, expenses, salaries, wages and other compensation to such persons as the Members shall in their sole discretion determine;

Practice Note

Section 7 of the Act states that, unless the written operating agreement otherwise provides, a member may transact business with the LLC (including making or guaranteeing loans), and the member will have the same rights and obligations with respect to such arrangements as an unaffiliated person.

(iv) to pay, extend, renew, modify, adjust, submit to arbitration, prosecute, defend or compromise, upon such terms as they may determine and upon such evidence as they may deem sufficient, any obligation, suit, liability, cause of action or claim, including taxes, either in favor of or against the LLC;

(v) to pay any and all fees and to make any and all expenditures that the Members, in their discretion, deem necessary or appropriate in connection with the organization of the LLC, and the carrying out of its obligations and responsibilities under this or any other Agreement;

(vi) to cause the LLC's property to be maintained, operated and insured in a manner that satisfies in all respects the obligations imposed with respect to such maintenance and operation by law, by any mortgages encumbering such property from time to time, and by any lease, agreement or rental arrangement pertaining to such property;

(vii) to lease, sell, finance or refinance all or any portion of the LLC's property;

(viii) to cause the LLC to make or revoke any of the elections referred to in I.R.C. §§ 108, 704, 709, 754 and 1017 or any similar provisions enacted in lieu thereof, and in any other section of the I.R.C.;

Practice Note

Depending on the specific facts relating to the formation and anticipated operation of the LLC, some or all of its members may want input into certain of these elections (most notably, elections under I.R.C. §§ 754 and 704).

(ix) to establish and maintain reserves for such purposes and in such amounts as it deems appropriate from time to time;

(x) to pay all organizational expenses and general and administrative expenses of the LLC;

(xi) to deal with, or otherwise engage in business with, or provide services to and receive compensation therefor from, any person who has provided or may in the future provide any services to, lend money to, sell property to or purchase property from the LLC, including, without limitation, a Member;

(xii) to engage in any kind of activity and to perform and carry out contracts of any kind necessary to, or in connection with, or incidental to the accomplishment of the purposes of the LLC;

(xiii) to compromise the obligation of a Member to make a contribution to the capital of the LLC or to return to the LLC money or other property paid or distributed to such Member in violation of this Agreement or the Act;

(xiv) to cause to be paid any and all taxes, charges and assessments that may be levied, assessed or imposed upon any of the assets of the LLC, unless the same are contested by the Members; and

(xv) to exercise all powers and authority granted by the Act to members, except as otherwise specifically provided in this Agreement.

(c) Any Member is authorized to execute, deliver and file on behalf of the LLC any documents to be filed with the Secretary of State of the Commonwealth of Massachusetts. Any Member is authorized to execute, acknowledge, deliver and record on behalf of the LLC any recordable instrument purporting to affect an interest in real property.

The signature of one Member on any agreement, contract, instrument or other document shall be sufficient to bind the LLC in respect thereof and conclusively evidence the authority of such Member and the LLC with respect thereto, and no third party need look to any other evidence, or require the joinder or consent of any other party.

4.04 *Tax Matters Representation*.

(a) [_____] shall be the LLC's initial Partnership Representative for each taxable year of the LLC. [The Members] may revoke the designation of the Partnership Representative and designate a replacement Partnership Representative at any time. If the Person designated as the Partnership Representative is an entity, to the extent required by applicable Treasury Regulations, such Person shall designate an individual (a "Designated Individual") who meets the eligibility requirements for a Partnership Representative (as set forth in the applicable Treasury Regulations) to act as the sole individual through whom the Partnership Representative will act in fulfilling its role as the Partnership Representative.

(b) The Partnership Representative shall have the sole authority to act on behalf of the LLC for purposes of subchapter C of Chapter 63 of the I.R.C. and comparable provisions of state or local income tax laws; provided, however, that if the designa-

tion of any Person as the Partnership Representative is properly revoked in accordance with this Agreement, such Person shall not take any action as the Partnership Representative and shall not allow its Designated Individual (if applicable) to take any action in such capacity without the express written consent of [the Members] notwithstanding that such revocation is not immediately effective under applicable Treasury Regulations. The rights, duties and obligations of the Partnership Representative shall include:

(i) Keeping all Members reasonably apprised of all material activities and developments in connection with any audit or administrative proceeding with any tax authority and any judicial proceedings related to taxes.

(ii) Unless otherwise approved by [the Members], causing the LLC to timely elect pursuant to I.R.C. § 6226 to have any and all Imputed Underpayments determined with respect to the LLC passed through to the Persons who were Members during the Reviewed Year and to make a similar election pursuant to Regulation § 301.6226-2(e) (or successor provision) to have any Partnership Adjustment that was passed through to the LLC from an entity in which the LLC held an interest passed through to the Persons who were Members during the relevant Reviewed Year.

(iii) Upon a timely request of any Person who was a Member during an applicable Reviewed Year, requesting a modification of any of such Person's share (or the share of any pass-through direct or indirect equity owner of such Person) of any Imputed Underpayment determined with respect to such year in accordance with I.R.C. § 6225(c) and using reasonable efforts to cause such request to be approved by the Internal Revenue Service.

(iv) Initiating and pursuing a request for an administrative adjustment with respect to one or more items of income, gain, loss, deduction or credit of the LLC in accordance with Treasury Regulation I.R.C. § 301.6227-1.

(c) To the extent allowable under subchapter C of Chapter 63 of the I.R.C., the amount of any Imputed Underpayment or of any Partnership Adjustment that does not give rise to an Imputed Underpayment shall be apportioned among the Members of the LLC for the taxable year in which the adjustment is finalized in such manner as may be necessary (as determined by the Partnership Representative in good faith) so that, to the maximum extent possible, the tax and economic consequences of the Imputed Underpayment or Partnership Adjustment and any associated interest and penalties are borne by the Members and former Members based upon their interests in the LLC for the Reviewed Year and any modification of an Imputed Underpayment in accordance with Section 4.04(b)(iii) is credited to the responsible Member or such Member's successor in interest. In furtherance of such objective, if the LLC is required to pay an Imputed Underpayment, each Person who was a Member during an applicable Reviewed Year shall pay to the LLC within ten (10) days of the receipt of written notice of the amount due, an amount equal to the sum of (A) the rate of tax used to determine the Imputed Underpayment multiplied by the allocable share of the associated Partnership Adjustment that such Person would have had in the Re-

viewed Year had the Partnership Adjustment been included in the LLC's tax return for such year and (B) a corresponding portion of any interest and penalties paid or payable by the LLC; provided, however, that the amount so payable by a Member shall be reduced to reflect any reduction in such Member's share of any Imputed Underpayment as a result of any modification of such amount obtained in accordance with I.R.C. § 6225(c). In lieu of such payment, the LLC may elect to pay all or a portion of the Imputed Underpayment from other sources and withhold the amount a Member (or such Person's predecessor in interest) would otherwise have been obligated to pay to the LLC from the amount of any distributions then to be made to such Member. In the event that a Person does not timely pay (or have withheld from its distributions) any amount due to the LLC pursuant to this subsection (c), the unpaid amount shall be treated as a demand loan that accrues interest at the prime rate published by the Wall Street Journal from time to time plus [3]% (compounded daily) from the date such payment was due, and the LLC shall be entitled to withhold all distributions from such Person and offset the withheld amounts against the amount due under the loan until the loan is repaid in full. Any amount withheld from a Member pursuant to this Section 4.04(c) shall be treated as a distribution to such Member at the time paid by the LLC (and shall reduce the amount of any distribution to which the Member is then entitled).

(d) The Members shall cooperate with the Partnership Representative and/or the LLC to implement the provisions of this Section 4.04. Such cooperation shall include, without limitation, (A) taking such action as may be necessary or desirable (as determined by the Partnership Representative) to allow the LLC to successfully elect pursuant to I.R.C. § 6226 for any Imputed Underpayments to be taken into account by the Members rather than the LLC and (B) facilitating an election by any direct or indirect equity owner of the Member to modify the amount of such owner's share of any Imputed Understatement in accordance with I.R.C. § 6225(c).

Practice Note

For taxable years of an LLC that begin on or after January 1, 2018, the procedural rules under the I.R.C. regarding partnership audits and administrative and judicial proceedings were dramatically changed. In general, such proceedings are handled entirely by the LLC's "partnership representative" who is granted nearly unfettered ability to bind the LLC and all of its members regarding all aspects of the proceeding. The "partnership representative" need not be a member of the LLC and, in certain circumstances, can be appointed by the IRS. Under these procedural rules, absent certain elections, if the proceeding involves an increase in the taxable income of the LLC (or a decrease in any tax credits), the LLC rather than its members is obligated to pay the resulting increase in taxes (referred to as the "imputed underpayment") determined by applying the maximum effective tax rate for the year that is the subject of the proceeding (the "reviewed year"). This approach can cause significant distortions in the tax burden imposed on the members of the LLC including

- a significantly higher aggregate amount of tax being paid than would have been paid had the initial tax returns been filed correctly and
- members sharing in the resulting tax liability (indirectly through their interests in the LLC) in a dramatically different manner than had the initial tax returns been filed correctly.

Although procedures are available that can mitigate these distortions in certain circumstances, their election is almost exclusively in the discretion of the "partnership representative." Thus, in any circumstance in which a particular member is not the "partnership representative," it is important that such member contractually obligate the "partnership representative" to act in a fair manner and that the other members have obligations to pay the appropriate amount of any tax deficiency based upon their ownership in the LLC for the reviewed year. The foregoing provision is just one fairly simple example of the type of provision that should be included.

(e) The obligations of a Member pursuant to this Section 4.04 shall survive the dissolution of the LLC, the withdrawal of the Member or the transfer of such Member's interest in the LLC. In any tax jurisdiction that has not adopted rules similar to those contained in subchapter C of Chapter 63 of the I.R.C. as enacted by the Bipartisan Budget Act of 2015 (as amended), the Managing Member (i) shall be the "tax matters partner" within the meaning of I.R.C. § 6231 as in effect prior to enactment of the Bipartisan Budget Act of 2015 if such jurisdiction is subject to rules similar to those in subchapter C of Chapter 63 of the I.R.C. as in effect prior to the Bipartisan Budget Act of 2015 or (ii) shall, to the extent allowable under applicable law, be granted the authority to conduct any tax proceeding in a manner similar to how such proceeding would have been conducted had subchapter C of Chapter 63 of the I.R.C. as in effect prior to the Bipartisan Budget Act of 2015 been applicable in such jurisdiction.

Practice Note

For taxable years beginning prior to the effective date of the BBA Amendments (generally, January 1, 2018), each partnership and LLC treated as a partnership for federal income tax purposes must have a "tax matters partner." If the manager were not a member, the manager would not be qualified to serve as the tax matters partner. Treasury Regulations provide that the "tax matters partner" must be a member. If no member is so designated, the tax matters partner generally is the member who has the largest interest in the profits of the LLC for the year (or, where there is more than one such member, the member whose last name is first, alphabetically, of all such members' last names). Under I.R.C. §§ 6221–6231, the tax matters partner of a partnership (including an LLC taxed as a partnership) controls audits and other similar administrative proceedings of the partnership relating to federal income taxes. In certain circumstances, it may be important to a member of an LLC to control such proceedings. In addition, because the actions of a tax matters partner can (in limited circumstances) bind other partners with re-

spect to a particular tax determination, other members may wish to provide that the tax matters partner cannot bind them without their express consent. Under I.R.C. §§ 6221–6231, designation of the tax matters partner is only relevant for purposes of controlling audits and other similar administrative proceedings with the IRS; it does not authorize the designee to make tax elections, file tax returns, or handle other administrative functions relating to taxes. If the members want the tax matters partner to handle such additional tasks, they should so specify in the LLC agreement. Otherwise, such tasks will be left to the party or parties charged with the general management of the LLC.

4.05 *Liability of the Members; Indemnification*.

Practice Note

Section 4.05 may need special attention, for instance, if there is to be a right of contribution among members in the event of "piercing the corporate veil" of the LLC. Note that Sections 8 and 63(b) of the Act permit significant flexibility in this area.

Neither the Members, nor any of their respective Affiliates (as hereinafter defined) shall have any liability to the LLC or to any other Member for any loss suffered by the LLC that arises out of any action or inaction of such Member or their Affiliates, if such Member or its Affiliates, as the case may be, in good faith, determined that such course of conduct was in the best interests of the LLC and such course of conduct did not constitute gross negligence or willful misconduct of such Member or its Affiliates. Each Member and its Affiliates shall be indemnified by the LLC against any losses, judgments, liabilities, expenses and amounts paid in settlement of any claims sustained by them with respect to actions taken by them on behalf of the LLC, provided that the same were not the result of gross negligence or willful misconduct on the part of such Member or their Affiliates. Any indemnity under this Section 4.05 shall be paid from, and only to the extent of, LLC assets, and no Member shall have any personal liability on account thereof.

Practice Note

Section 8(a) of the Act provides that no person is entitled to indemnity with respect to any matter as to which he or she shall have been adjudicated in any proceeding not to have acted in good faith in the reasonable belief that his or her action was in the best interest of the LLC.

For purposes of this Agreement, the term "Affiliate" shall mean, with respect to any specified person or entity, (i) any person or entity that directly or indirectly controls, is controlled by, or is under common control with such specified person or entity; (ii) any person or entity that directly or indirectly controls 10 percent or more of the outstanding equity securities of the specified entity or of which the specified person or entity is directly or indirectly the owner of 10 percent or more of any class of equity securities; (iii) any person or entity that is an officer of, director of, partner in, member in or trustee of, or serves in a similar capacity with respect to, the specified person or entity or of which the specified person or entity is an officer, director, partner,

member or trustee, or with respect to which the specified person or entity serves in a similar capacity; or (iv) any person that is a member of the immediate family of the specified person ("immediate family" as used herein shall mean spouse, mother, father, brother, sister or lineal descendant).

Practice Note

Section 8(b) of the Act provides that the certificate of organization or a written operating agreement may eliminate or limit the personal liability of a manager or member for breach of any duty to the LLC, the other members and the manager. Section 63(b) of the Act provides that the operating agreement may expand or restrict the members' or managers' duties and liabilities to the LLC, the other members and the managers. The Act does not specifically provide for *elimination* of the members' or managers' respective duties to the LLC or to each other. Case law in Massachusetts is not yet available, so it is unclear whether a complete waiver of fiduciary duties would be enforceable.

4.06 *Liability of Members*. The liability of the Members for the losses, debts and obligations of the LLC shall be limited to their capital contributions, *provided, however*, that under applicable law, the Members may under certain circumstances be liable to the LLC to the extent of previous distributions made to them in the event that the LLC does not have sufficient assets to discharge its liabilities.

Practice Note

Section 22 of the Act provides that, except as otherwise provided in the Act, the debts, obligations and liabilities of an LLC in contract, tort or otherwise shall be solely the debts, obligations and liabilities of the LLC, and no member or manager shall be liable, directly or indirectly, including without limitation by way of indemnification, contribution, assessment or otherwise, for such debts, obligations and liabilities by reason of being a member or manager.

Section 35 of the Act provides for return to the LLC of "wrongful distributions" under certain circumstances. Specifically, a member or manager who votes for or assents to a distribution in violation of the operating agreement shall be personally liable to the LLC for the portion of the distribution that exceeds the amount that could have been distributed without violating the agreement. Any proceeding in respect of such wrongful distribution must be commenced within two years of the date of the distribution.

4.07 *Certain Fees and Expenses*. All out-of-pocket expenses reasonably incurred by any Member in connection with the LLC's business (other than overhead and similar expenses of any Member) shall be paid by the LLC or reimbursed to the Member by the LLC.

4.08 *Certain Loans from the Members to the LLC*. In the event that the LLC's funds are insufficient to meet its costs, expenses, obligations, liabilities and charges, or to

make any expenditure authorized by this Agreement, and additional funds are not available from the Members (pursuant to Section 2.01(a), above) or from third parties on terms acceptable to a Majority in Interest of the Members, any Member may, but shall not be obligated to, loan such funds to the LLC. Any loan made pursuant to this Section 4.08 (a "Voluntary Loan") shall be nonrecourse to the Members; shall be evidenced by a promissory note; shall be unsecured; shall bear interest, compounded monthly, at a rate of interest equal to [the prime rate of interest announced from time to time by *The Wall Street Journal*]; shall be repaid out of the first funds available therefor after payment of LLC expenses to third parties and in any event prior to any distribution to any Member of Distributable Cash; and shall become due and payable in full not more than five years after the date such loan is made. If more than one Member desires to make a Voluntary Loan to fund a particular LLC deficit, each Member shall loan such portion of the required amount as the Members shall mutually agree upon, and, if they are unable to agree, they shall each loan such portion of the required amount in the proportions that their respective Percentage Interests in the LLC bear to each other.

Practice Note

This provision clearly specifies the terms of a loan that may be made by a member to the LLC. Such loans tend to be made in emergency situations, and it is often helpful to avoid protracted negotiation of loan terms in such circumstances. Subject to other legal constraints (e.g., usury laws, provisions in agreements with third parties, etc.), the parties may specify such terms for future loans by members as they may desire.

4.09 *Other Activities*. The Members, Managers and any of their Affiliates may engage in and possess interests in other business ventures and investment opportunities of every kind and description, independently or with others, including serving as directors, officers, stockholders, managers, members and general or limited partners of corporations, partnerships or other LLCs with purposes similar to or the same as those of the LLC. Neither the LLC, nor any other Member or Manager, shall have any rights in or to such ventures or opportunities, or the income or profits therefrom.

Practice Note

In some cases, adding noncompetition or similar provisions may be appropriate.

ARTICLE V
Books, Records and Bank Accounts

5.01 *Books and Records*. The Members shall keep, or cause to be kept, just and true books of account with respect to the operations of the LLC. Such books shall be maintained at the LLC's principal place of business, or at such other place as the Members shall determine, and all Members and their duly authorized representatives shall at all reasonable times have access to such books, as well as any information required to be made available to the Members under the Act. The Members shall not be required to deliver or mail copies of the LLC's Certificate of Organization, or copies of certificates of amendment thereto, or cancellation thereof to the Members,

although such documents shall be available for review or copying by the Members at the LLC's principal place of business.

Practice Note

Section 9 of the Act requires each LLC to maintain at its registered office in Massachusetts the following: (1) a current list of the full name and last known address of each member and manager; (2) a copy of the certificate of organization and all certificates of amendment thereof, together with executed copies of any powers of attorney pursuant to which any certificate has been executed; (3) copies of the LLC's federal, state and local income tax returns and reports, if any, for the three most recent years; (4) copies of any then-effective written operating agreements and any financial statements of the LLC for the three most recent years; and (5) unless contained in a written operating agreement, a writing setting out: (i) the capital contributions made and required to be made by each member, (ii) the times at which additional contributions are to be made, (iii) any right of a member to receive or a manager to make distributions to a member and (iv) any events that would dissolve the LLC. Records maintained under Section 9 of the Act must be open to inspection and copying at the reasonable request and expense of any member during ordinary business hours. Section 9 also requires that a list of the names and addresses of the members be made available to the Secretary of State of the Commonwealth within five days following a written request therefor.

Section 10 of the Act provides that each member or manager of an LLC has the right to obtain from the LLC "for any purpose reasonably related to the member's or manager's interest as a member or manager," subject to such reasonable standards as may be specified in the operating agreement or otherwise established by the manager or members, (i) true and full information regarding the LLC's business and financial condition; (ii) promptly after becoming available, a copy of the LLC's federal, state and local income tax returns for each year; and (iii) other information regarding the affairs of the LLC as is "just and reasonable."

5.02 *Accounting Basis and Fiscal Year*. The LLC's books shall be kept on the [accrual] method of accounting or on such other method of accounting as the Members may from time to time determine, and shall be closed and balanced at the end of each fiscal year of the LLC. The fiscal year of the LLC shall be the calendar year or such other fiscal year as the Members may from time to time determine [unless I.R.C. § 706 requires the use of a different taxable year in which case the fiscal year shall be the same as such taxable year].

5.03 *Bank Accounts*. The Members shall be responsible for causing one or more accounts to be maintained in a bank (or banks), which accounts shall be used for the payment of the expenditures incurred by the Members in connection with the business of the LLC, and in which shall be deposited any and all cash receipts of the LLC. All deposits and funds unnecessary for the operations of the LLC may be

invested in short-term investments, as the Members may determine. All such amounts shall be and remain the property of the LLC, and shall be received, held and disbursed by the Members for the purposes specified in this Agreement. There shall not be deposited in any of said accounts funds other than those belonging to the LLC, and no other funds shall in any way be commingled with such funds.

5.04 *Reports to Members*. Within 90 days after the end of each fiscal year, the Members shall cause the LLC to furnish each Member with such information as is needed to enable the Members to file their federal income tax returns and any required state income tax returns. The cost of such reporting shall be paid by the LLC as an LLC expense. Any Member may, at any time, and at its own expense, cause an audit of the LLC books to be made by a certified public accountant of the Member's own selection. All expenses incurred by such accountant shall be borne by such Member.

Practice Note

This agreement does not require the LLC to conduct an audit of its books and records annually, although in many contexts, an audit is appropriate and the cost therefor is generally an LLC expense. At a minimum, information that is required by the members to prepare their state and federal income tax returns must be provided by the LLC.

ARTICLE VI
Transfers of Interests of Members

6.01 *Substitution and Assignment of Member's Interest.*

(a) No Member may sell, transfer, assign, pledge, hypothecate or otherwise dispose of all or any part of its interest in the LLC (whether voluntarily, involuntarily or by operation of law) unless a Majority in Interest of the other Members previously consented to such assignment in writing, the granting or denying of which consent shall be in the other Members' absolute discretion. The provisions of this Section 6.01(a) shall not be applicable to (i) any transfer of an interest in the LLC pursuant to Sections 6.03 or 6.04 or (ii) any transfer of an interest to a Permitted Transferee (as hereinafter defined).

"Permitted Transferee" means (A) any Member; (B) any spouse, parent, lineal descendant, brother, sister, spouse of a brother or sister, nephew or niece of a Member; (C) any trust, corporation or partnership or other entity in which a Member or one of the persons designated in clause (B) is a principal, beneficiary, majority stockholder, member or limited or general partner with an interest in profits and losses of greater than [one-third]; (D) any grantor or beneficiary of a trust that is (or of which the trustees thereof are, in their capacities as trustees) a Member; or (E) any charitable foundation created or primarily endowed by a Member, or a member of his or her family.

(b) No assignment of the interest of a Member shall be made if, in the opinion of counsel to the LLC, such assignment (i) may not be effected without registration under the Securities Act; (ii) would result in the violation of any applicable state securities laws; or (iii) unless consented to by the Members, would result in the treat-

ment of the LLC as an association taxable as a corporation or as a "publicly traded limited partnership" for tax purposes. The LLC shall not be required to recognize any assignment until the instrument conveying such interest has been delivered to the LLC for recordation on the books of the LLC. Unless an assignee becomes a substituted Member in accordance with the provisions of Section 6.01(c), he, she or it shall not be entitled to any of the rights granted to a Member hereunder, other than the right to receive all or part of the share of the Net Profits, Net Losses, cash distributions or returns of capital to which his, her or its assignor would otherwise be entitled.

(c) An assignee of the interest or any portion thereof of a Member shall become a substituted Member entitled to all the rights of a Member, if and only if the following occurs:

(i) the assignor gives the assignee such rights;

(ii) all other Members (by action of a Majority in Interest thereof) consent to such substitution, the granting or denying of which consent shall be in the other Members' absolute discretion;

(iii) the assignee or the assignor pays to the LLC all costs and expenses incurred in connection with such substitution, including, specifically and without limitation, costs incurred in reviewing and processing the assignment and amending this Agreement; and

(iv) the assignee executes and delivers such instruments in form and substance satisfactory to the LLC, as may be necessary or desirable to effect such substitution, and to confirm the agreement of the assignee to be bound by all of the terms and provisions of this Agreement.

The provisions of clause (ii) of this Section 6.01(c) shall not apply to (A) any transfer of an interest in the LLC pursuant to Sections 6.03 or 6.04, or (B) any transfer of an interest to a Permitted Transferee.

(d) The LLC and the Members shall be entitled to treat the record owner of any interest in the LLC as the absolute owner thereof in all respects, and shall incur no liability for distributions of cash or other property made in good faith to such owner, until such time as a written assignment of such interest has been received and accepted by the Members and recorded on the books of the LLC. The Members may refuse to accept an assignment until the end of the next successive quarterly accounting period. In no event shall any interest in the LLC or any portion thereof be sold, transferred or assigned to a minor or incompetent; and any such attempted sale, transfer or assignment shall be void and ineffectual and shall not bind the LLC.

(e) If a Member who is an individual dies, or if a court of competent jurisdiction adjudges him or her to be incompetent to manage his or her person or property, the Member's executor, administrator, guardian, conservator or other legal representative may exercise all of the Member's rights hereunder solely for the purpose of settling

his or her estate or administering his or her property. In no event shall such executor, administrator, guardian, conservator or legal representative participate in any way in the conduct of the business of the LLC, or in making any decision or taking any action provided for hereunder (including, without limitation, Section 4.01(a) or (b)) for any other purpose. If a Member is a corporation, trust or other entity that is dissolved or terminated, the powers of that Member may be exercised by its legal representative or successor.

6.02 *Additional Members*. Except as provided in Sections 6.01, 6.03 and 6.04, additional Members may be admitted to the LLC only upon the written consent of Members who hold, in the aggregate, at least 75 percent of the total Percentage Interests held by all Members ("75 percent in Interest of the Members"); and any such consent shall specify the capital contribution, Percentage Interest and any other rights and obligations of such additional Member. Such approval shall bind all Members. In connection with any such admission, this Agreement (including *Schedule A*) shall be amended to reflect the additional Member; its capital contribution, if any; its Percentage Interest; and any other rights and obligations of the additional Member.

In connection with any such admission of additional Members, the Percentage Interests of the Members shall be diluted proportionately, based on their respective Percentage Interests immediately prior to any such dilution. Without in any way limiting the foregoing, the interest of any third party admitted to the LLC, pursuant to this Section 6.02, in the Net Profits, Net Losses and distributions of cash or property of any nature, may have such priority or priorities in relationship to the interests therein of the Members, as 75 percent in Interest of the Members may in their sole discretion determine, provided that the relative priorities of the Members in the Net Profits, Net Losses and cash distributions of any nature of the LLC shall not be altered as a result of the admission of any such new member.

Each Member and each person who is hereinafter admitted to the LLC as a Member hereby (i) consents to the admission of any such third party on such terms as 75 percent in Interest of the Members may determine (subject to the provisions of this Section 6.02), and to any amendment to this Agreement that may be necessary or appropriate to reflect the admission of any such third party and the terms on which it invests in the LLC; and (ii) acknowledges that, in connection with admission of any such person, such Member's interest in allocations of Net Profits and Net Losses, and distributions of cash and property of the LLC, and net proceeds upon liquidation of the LLC, may be diluted or otherwise altered (subject to the provisions of this Section 6.02). Any amendment to this Agreement that shall be made to effectuate the provisions of this Section 6.02 shall be executed by not less than 75 percent in Interest of the Members, and any such amendment shall be binding upon all of the Members.

6.03 *Put Option*.

(a) If, following the death of any Member, the LLC is continued in accordance with the provisions of Section 7.01(b) below, the estate or legal representative of such Member (the "Deceased Member") shall have the option to cause the LLC to purchase the interest of the Deceased Member. Any such election shall be made by delivery of

written notice thereof to all other Members within 120 days following the date of death of the Deceased Member (the "Termination Date"). The purchase price for such interest shall be determined in accordance with this Section 6.03. If the estate or legal representative of the Deceased Member fails to make an election within the time period specified in the preceding sentence, the option shall expire.

> **Practice Note**
> If members have outstanding loans to the LLC, the put option may be expanded to require purchase/repayment of the loans as well as the equity interest in the LLC.

(b) If the estate or legal representative of the Deceased Member elects to cause the LLC to purchase the interest of the Deceased Member, such purchase shall be made on the following terms. The purchase price for the interest shall equal (x) the Percentage Interest of the Terminated Member multiplied by (y) the Appraised Value, as hereinafter defined. The Appraised Value shall equal the fair market value of the assets of the LLC, determined by an appraiser who is a member of American Institute of Real Estate Appraisers, and who is mutually acceptable to the estate or its legal representative, and to a Majority in Interest of the other Members net of any liabilities of the LLC. Such appraiser shall estimate the fairest price (in terms of money) that could be obtained if the LLC's assets were offered for sale in the open market, allowing a reasonable time to find a purchaser who buys with knowledge of the uses to which such LLC assets in their then current condition are adapted, and for which use such assets are capable of being put at the time of the appraisal. The appraiser shall also take into consideration whether or not any debt to which the assets are subject is prepayable or callable.

(c) The purchase price for the interest of the Deceased Member shall be paid in cash, by delivery of a promissory note of the purchaser or some combination thereof, as the LLC may determine. Any such promissory note shall be unsecured, and shall provide for payment of equal annual installments over a term not to exceed five years, and shall bear interest at the then applicable federal rate (as defined in the Code and regulations promulgated thereunder) for a note with the maturity date of such promissory note. Such promissory note shall be prepayable at any time without premium or penalty.

(d) The closing of a purchase pursuant to this Section 6.03 shall be held at the principal office of the LLC within 60 days after the estate or legal representative of the Deceased Member elects to sell the interest of the Deceased Member to the LLC on a date that shall be mutually acceptable to the buyer and the seller, or as soon as practicable thereafter. The estate or legal representative of the Deceased Member shall transfer to the LLC (or its designee) the entire interest of the Deceased Member in the LLC, free and clear of all liens, security interests and competing claims, and shall deliver to the LLC or its designee such instruments of assignment, transfer, release, and evidence of due authorization, execution and delivery, and absence of any liens, security interests or competing claims, as the LLC shall reasonably request. Each Member shall execute and deliver at such closing such other instruments as shall be necessary, appropriate or convenient to effectuate such transfer.

6.04 *Buy/Sell*.

(a) Any Member (an "Electing Member") may, at any time, notify all other Members that they shall be required (i) to sell their entire interest in the LLC to the Electing Member or (ii) to purchase from the Electing Member the Electing Member's entire interest in the LLC, in accordance with the procedures specified in this Section 6.04.

(b) An Electing Member shall notify all other Members in writing of its exercising its rights under this Section 6.04. Such notice shall indicate the price for the Electing Member's interest, which shall be stated on a per percentage point basis in respect of the Electing Member's Percentage Interest. The notice shall constitute an offer to purchase from each other Member (for cash payable at closing) such other Members' interests in the LLC for the price (based on the per percentage point price described above) specified in the Electing Member's notice, or to sell the Electing Member's interest for the price specified in the Electing Member's notice. Each non-Electing Member shall have 30 days to elect in writing to purchase the Electing Member's entire interest. In the event that more than one of the non-Electing Members desires to purchase the interest of the Electing Member, each shall be entitled to purchase a portion thereof based on its respective Percentage Interests unless all non-Electing Members desiring to purchase such interest otherwise agree. In the event that more than one non-Electing Member purchases the interest of the Electing Member, each shall pay a portion of the total purchase price therefor (as specified below) that is allocable to the portion of the interest so purchased. In no event shall the non-Electing Members be permitted to purchase, pursuant to the option contained in this Section 6.04, less than all of the Electing Member's interest.

If the non-Electing Members fail to notify the Electing Member of their election to purchase the entire interest of the Electing Member, all non-Electing Members shall be deemed to have elected to sell their respective interests in the LLC to the Electing Member.

Practice Note

This provision may be modified to include a purchase of any indebtedness owed to the member by the LLC.

(c) Closing the acquisition of the interest of the Electing Member, or the non-Electing Members, as the case may be, shall occur on the 15th day after the last day of the 30-day period during which the non-Electing Members may exercise the option to purchase, or, if such 15th day is not a business day, on the first business day after such 15th day. The closing shall occur at the offices of the LLC or at such other place as shall be agreed upon by the purchasers and sellers of the interests in the LLC contemplated hereby. At such closing, the purchasing Member(s) shall pay the purchase price for the interest of the selling Member(s) set forth above, and each selling Member shall execute and deliver such agreements, instruments and other documents as are necessary to transfer to the purchasers all of the selling Members' right, title and interest in and to the selling Members' interests in the LLC, free and clear of all liens, encumbrances and restrictions, other than liens, encumbrances and restrictions imposed under the terms of this Agreement.

(d) Upon the sale of any interest in the LLC by any Member pursuant to this Section 6.04, any Voluntary Loans made by such selling Member (including accrued and unpaid interest thereon) shall also be purchased by the purchasing Members (based on the respective portions of the selling Member's interest purchased by the purchasing Members) at a price equal to the outstanding principal amount of, and accrued and unpaid interest on, such Voluntary Loans.

Practice Note

An alternative to a "shotgun" buy/sell provision is a right of first offer or refusal provision.

ARTICLE VII
Dissolution and Termination

7.01 *Events of Dissolution*.

(a) The LLC shall be dissolved:

(i) on a date designated in writing by all Members;

(ii) upon the death, retirement, expulsion, bankruptcy or dissolution of a Member;

Practice Note

For LLCs formed after January 1, 1997, the bankruptcy, withdrawal or termination of a member's existence will not automatically dissolve the LLC, unless the operating agreement specifies otherwise. Dissolution events contained in Section 7.01 must be tailored to meet particular facts and circumstances.

(iii) upon the sale or other disposition of all of the LLC's assets; or

(iv) upon the entry of a decree of judicial dissolution under Section 44 of the Act.

(b) Notwithstanding the occurrence of an event specified in Section 7.01(a)(ii), the LLC shall not be dissolved, its business and affairs shall not be discontinued, and the LLC shall remain in existence as a limited liability company under the laws of the Commonwealth of Massachusetts, if all of remaining Members elect within 90 days after such occurrence to continue the LLC and its business.

(c) Dissolution of the LLC shall be effective on the day on which the event giving rise to the dissolution occurs, but the LLC shall not terminate until the LLC's Certificate of Organization shall have been canceled, and the assets of the LLC shall have been distributed, as provided herein. Notwithstanding the dissolution of the LLC, the business of the LLC and the affairs of its Members, as such, prior to the termination of the LLC as aforesaid, shall continue to be governed by this Agreement. A liquidator appointed by the remaining Members (who may also be a Member) shall liquidate the assets of the LLC, distribute the proceeds thereof as contemplated by this Agreement and cause the cancellation of the LLC's Certificate of Organization.

7.02 *Distributions upon Liquidation*.

(a) After paying liabilities owed to creditors, the liquidator shall set up such reserves as it deems reasonably necessary for any contingent or unforeseen liabilities or obligations of the LLC. Said reserves may be paid over by such liquidator to a bank, to be held in escrow for the purpose of paying any such contingent or unforeseen liabilities or obligations, and, at the expiration of such period as such liquidator may deem advisable, such reserves shall be distributed to the Members or their assigns in the manner set forth in paragraph (b), below.

(b) After paying such liabilities and providing for such reserves, the liquidator shall cause the remaining net assets of the LLC to be distributed to all Members with positive Capital Account balances (after such balances have been adjusted to reflect all debits and credits required by applicable Treasury Regulations under I.R.C. § 704(b) for all events through and including the distribution in liquidation of the LLC), in proportion to and to the extent of such positive balances. In the event that any part of such net assets consists of notes or accounts receivable or other noncash assets, the liquidator may take whatever steps it deems appropriate to convert such assets into cash or into any other form that would facilitate the distribution thereof. If any assets of the LLC are to be distributed in kind, such assets shall be distributed on the basis of their fair market value, net of any liabilities.

Practice Note

Although this provision is generally required in order to qualify for the "safe harbor" provided in regulations under I.R.C. § 704(b) for the allocation of an LLC's income and loss among its members, the possibility of distorting the economic arrangement among the members must be carefully considered before including this provision in the operating agreement. Because of that possibility, most LLC agreements do not contain this provision and provide that liquidating distributions are made in accordance with the general distribution provisions of the agreement (e.g., Section 3.01).

ARTICLE VIII
Miscellaneous

8.01 *Notices*. Any and all notices, requests, elections, consents or demands, permitted or required to be made under this Agreement, shall be in writing; signed by the Member giving such notice, request, election, consent or demand; and shall be delivered personally, or sent by registered or certified mail, or by overnight mail, Federal Express or other similar commercial overnight courier, to the other Member or Members at their addresses set forth in *Schedule A*. Notice to the LLC should be sent to the address of the LLC's principal office as set forth in Article I, hereof, or at such other address as may be supplied by written notice given in conformity with the terms of this Section 8.01. The date of personal delivery, i.e., three days after the date of mailing or the business day after delivery to an overnight courier, or the date of actual delivery if sent by any other method, as the case may be, shall be the date of such notice.

Practice Note

If appropriate, the agreement may provide for delivery of notices by e-mail or other electronic means. For some or all of the notices so delivered, it may be appropriate to require some method for verifying receipt.

8.02 *Successors and Assigns*. Subject to the restrictions on transfer set forth herein, this Agreement and each and every provision hereof shall be binding upon and shall inure to the benefit of the Members, their respective successors, successors in title, heirs and assigns; and each and every successor in interest to any Member, whether such successor acquires such interest by way of gift, purchase, foreclosure or by any other method, shall hold such interest subject to all of the terms and provisions of this Agreement.

8.03 *Amendments*. Except as otherwise specifically provided in this Agreement (including, without limitation, Section 6.02), this Agreement may be amended or modified only by a Majority in Interest of the Members, provided that (x) no such amendment shall increase the liability of, increase the obligations of, or disproportionately adversely affect the interest of any Member, without the specific approval of such Member; (y) if any provision of this Agreement provides for the approval or consent of a greater number of Members or of Members holding a higher percentage of the total Percentage Interests of the Members, any amendment effectuated pursuant to such provision, and any amendment to such provision, shall require the approval or consent of such greater number of Members or of Members holding such higher percentage of Percentage Interests; and (z) subject to clauses (x) and (y), above, any amendment to this Section 8.03 shall require the approval of Members holding not less than two-thirds of all Percentage Interests.

8.04 *Partition*. The Members hereby agree that no Member or any successor in interest to any Member shall have the right, while this Agreement remains in effect, to have the property of the LLC partitioned, or to file a complaint or institute any proceeding at law or in equity to have the property of the LLC partitioned; and each Member, on behalf of himself or herself, his or her successors, representatives, heirs and assigns, hereby waives any such right. It is the intention of the Members that, during the term of this Agreement, the rights of the Members and their successors in interest, as among themselves, shall be governed by the terms of this Agreement; and that the right of any Member or successor in interest to assign, transfer, sell or otherwise dispose of his or her interest in the LLC shall be subject to the limitations and restrictions of this Agreement.

8.05 *No Waiver*. The failure of any Member to insist on strict performance of a covenant or any obligation hereunder, irrespective of the length of time for which such failure continues, shall not be a waiver of such Member's right to demand strict compliance in the future. No consent or waiver, express or implied, to or of any breach or default in the performance of any obligation hereunder, shall constitute a consent or waiver to or of any other breach or default in the performance of the same or any other obligation hereunder.

8.06 *Entire Agreement*. This Agreement constitutes the full and complete agreement of the parties hereto with respect to the subject matter hereof.

8.07 *Captions*. Titles or captions of Articles or sections contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provision hereof.

8.08 *Counterparts*. This Agreement may be executed in a number of counterparts, all of which together shall, for all purposes, constitute one Agreement, binding on all the Members, notwithstanding that all Members have not signed the same counterpart.

8.09 *Applicable Law*. This Agreement and the rights and obligations of the parties hereunder shall be governed by, and interpreted, construed and enforced in accordance with, the laws of the Commonwealth of Massachusetts.

8.10 *Gender, Etc*. In the case of all terms used in this Agreement, the singular shall include the plural, and the masculine gender shall include the feminine and neuter, and vice versa, as the context requires.

8.11 *Creditors*. None of the provisions of this Agreement shall be for the benefit of, or enforceable by, any creditor of any Member or of the LLC, other than a Member who is such a creditor of the LLC in his, her or its capacity as a Member.

IN WITNESS WHEREOF, the Members have signed and sworn to this Agreement under penalties of perjury as of the date first above written.

MEMBERS: _____

_____

_____

_____

SHORTFORM ASSOCIATES LLC
SCHEDULE A

Names, Addresses, Capital Contributions
and Additional Capital of the Members

Name and Business Address	Capital Contribution	Additional Capital	Percentage Interest
_____	$ _____	$ _____	25%
_____	$ _____	$ _____	25%
_____	$ _____	$ _____	25%
_____	$ _____	$ _____	25%

EXHIBIT 7H—Shell LLC

CERTIFICATE OF ORGANIZATION

Pursuant to the provisions of the Massachusetts Limited Liability Company Act (the "Act"), the undersigned, to form a limited liability company, hereby certify as follows:

1. *Federal Employer Identification Number*. The limited liability company to be formed hereby has applied for (but not yet received) a federal employer identification number.

Practice Note

The regulations issued by the Office of the Secretary of the Commonwealth require that the federal employer identification number for the LLC be included in the certificate of organization, if available. This requirement is, as a technical matter, impossible to satisfy, because the federal employer identification number application requires the inclusion of the date of organization of the entity. Thus, both the certificate of organization and the federal employer identification number application assume that the other has already been filed!

2. *Name of the Limited Liability Company*. The name of the limited liability company to be formed hereby is Shell LLC (the "LLC").

Practice Note

The name must be one available and permitted under Section 3 of the Massachusetts Limited Liability Company Act (G.L. c. 156C, hereinafter referred to as the Act) and under other applicable law, including the law of any jurisdictions other than Massachusetts in which the LLC will do business. Under the Act, the name must include the words "limited liability company," "limited company" or the abbreviations "L.L.C.," "L.C.," "LLC" or "LC."

3. *Office of the Limited Liability Company*. The address of the office of the LLC in the Commonwealth at which the LLC will maintain its records in accordance with the Act is c/o _____, Massachusetts _____.

Practice Note

A Massachusetts LLC must maintain an office in the Commonwealth. Certain records of the LLC must be maintained at such office. See Section 9 of the Act and the notes to Section 3 of Shell LLC's operating agreement, below.

4. *Business of the LLC*. The general character of the business of the LLC is to engage in *[specify here the nature of the LLC's business, for example: investment in, and ownership and development of, real estate and interests therein, including buying, acquiring, owning, operating, selling, financing, refinancing, disposing of and otherwise*

dealing with interests in real estate, directly or indirectly through joint ventures, partnerships or other entities] ; and to engage in any activities directly or indirectly related or incidental thereto.

> **Practice Note**
> The purpose clause must be tailored to the particular needs of the LLC. The purpose clause could be more broadly drafted (i.e., by inclusion of language such as "and to engage in any other activity in which a limited liability company organized under the laws of the Commonwealth of Massachusetts may lawfully engage"), as is often the case in the articles of organization for a corporation.

5. *Date of Dissolution*. The LLC shall have no fixed date upon which it shall dissolve.

> **Practice Note**
> The Act does not require an LLC to have a finite term, and absent a provision of the operating agreement to the contrary, a Massachusetts LLC formed after January 1, 1997 will have perpetual existence. However, in some contexts (particularly where the LLC is intended to "look like" a partnership), it may be desirable to specify a date certain upon which the LLC will dissolve.

6. *Agent for Service of Process*. The name and address of the resident agent for service of process for the LLC is _____, Massachusetts _____.

> **Practice Note**
> The resident agent for service of process must be an individual resident of the Commonwealth, a Massachusetts corporation or a foreign corporation qualified to do business in Massachusetts.

7. *Manager*. As of the date hereof, the LLC does not have any managers.

> **Practice Note**
> Because Shell LLC is member-managed, it has no managers.

8. *Execution of Documents (Secretary of the Commonwealth)*. Any member of the LLC is authorized to execute on behalf of the LLC any documents to be filed with the Secretary of State of the Commonwealth of Massachusetts. As of the date hereof, the name and business address of each of the members of the LLC are as follows:

Alan Associate
[business address]

Beth Business
[business address]

Chris Character
[business address]

Mary Member
[business address]

Practice Note

In an LLC that has managers, it is unnecessary to name a person authorized to execute documents to be filed with the Secretary of the Commonwealth. It is unclear under the Act whether it is sufficient to name a category of authorized signing persons, or whether the specific names of authorized individuals must be reflected in the certificate. Accordingly, the names and business addresses of the persons who are currently members (and who therefore have signatory authority), have been listed in the certificate. The certificate will need to be amended when and if the members or their business addresses change.

9. *Execution of Recordable Instruments*. Any member of the LLC is authorized to execute, acknowledge, deliver and record on behalf of the LLC any recordable instrument purporting to affect an interest in real property. The name and business address of each member of the LLC as of the date hereof are specified in paragraph 8, above.

Practice Note

This provision is optional, but helpful if the LLC owns interests in real estate (which may be mortgaged or transferred).

IN WITNESS WHEREOF, the undersigned hereby affirms under the penalties of perjury that the facts stated herein are true, as of the _____ day of _____, 20__.

Practice Note

Section 15(c) of the LLC Act provides that execution of a certificate constitutes an affirmation, under the penalties of perjury, that the facts stated therein are true.

_____
Authorized Person

Practice Note

Section 15(a)(2) of the LLC Act provides that any person, whether or not authorized in the text of the certificate, may execute the initial certificate of organization. In this regard, the signer of the certificate is similar to the sole incorporator signing articles of organization of a Massachusetts corporation.

SHELL LLC
OPERATING AGREEMENT

THIS OPERATING AGREEMENT of Shell LLC (the "LLC"), dated as of _____, 20__, is among Alan Associate, Beth Business, Chris Character and Mary Member (collectively, the "Members," and individually, a "Member"). The Members, intending

to form a limited liability company pursuant to the Massachusetts Limited Liability Company Act (the "Act"), hereby agree as follows:

> **Practice Note**
> An LLC does not need a written operating agreement, but one is strongly recommended, particularly if the parties wish to deviate from the "default rules" contained in the Act (see **Exhibit 7I**). Certain provisions of the Act specifically require a writing to create enforceable obligations of the members and managers. For example, an obligation to contribute cash or property to, or to perform services for an LLC must be embodied in a written operating agreement.
>
> The definition of the term "limited liability company" in the Act specifically provides that the LLC must have one or more members. A Massachusetts limited liability company is automatically dissolved (subject to a right to continue) if, at any time, it has no members.

1. *Name of LLC*. The name of the LLC is Shell LLC (the "LLC").

2. *Business of LLC; Purposes and Powers*.

(a) The general character of the business of the LLC is to engage in *[specify here the nature of the LLC's business—for example: investment in, and ownership and development of, real estate and interests therein, including buying, acquiring, owning, operating, selling, financing, refinancing, disposing of and otherwise dealing with interests in real estate, directly or indirectly through joint ventures, partnerships or other entities]*; and to engage in any activities directly or indirectly related or incidental thereto.

> **Practice Note**
> This provision should conform to the purpose clause in the LLC's certificate of organization.

(b) The LLC shall be member-managed. All decisions respecting any matter set forth herein or otherwise affecting or arising out of the conduct of the business of the LLC shall be made by the Members, by action of a majority in number thereof, unless pursuant to this Agreement, the Act or other applicable law, a greater number or percentage of Members is required.

> **Practice Note**
> Shell LLC is member-managed, and management rights are exercised by a majority in *number* of the members. The default rule in the Act (which applies in a member-managed LLC, where no provision is made in the agreement as to the number or percentage in interest of the members having authority to manage the LLC) states that the decision of a majority in *interest* of the members, determined with reference to unreturned capital contributions, shall be controlling.

> Shell LLC provides for management by a majority in number of the members, without regard to capital contributions or percentage interests. Such an arrangement may not be sensible, particularly if some of the members have very large interests and others have very small interests, because it may be possible for members with very small aggregate interests to bind the LLC against the wishes of members holding much larger economic interests. In such circumstances, a majority based on percentage interests or capital contributions would probably be a better arrangement.

The Members shall have the exclusive right and full authority to manage, conduct and operate the LLC's business. Specifically, but not by way of limitation, the Members shall be authorized, for and on behalf of the LLC to do the following:

(i) to borrow money, to issue evidences of indebtedness and to guarantee the debts of others for whatever purposes they may specify, whether or not related to the LLC or the LLC's assets, and, as security therefor, to mortgage, pledge or otherwise encumber the assets of the LLC;

(ii) to cause to be paid on or before the due date thereof all amounts due and payable by the LLC to any person or entity;

(iii) to employ such agents, employees, managers, accountants, attorneys, consultants and other persons necessary or appropriate to carry out the business and affairs of the LLC, whether or not any such persons so employed are Members or are affiliated or related to any Member; and to pay such fees, expenses, salaries, wages and other compensation to such persons as the Members shall in their sole discretion determine;

(iv) to pay, extend, renew, modify, adjust, submit to arbitration, prosecute, defend or compromise, upon such terms as they may determine and upon such evidence as they may deem sufficient, any obligation, suit, liability, cause of action or claim, including taxes, either in favor of or against the LLC;

(v) to pay any and all fees and to make any and all expenditures that the Members, in their discretion, deem necessary or appropriate in connection with the organization of the LLC, and the carrying out of its obligations and responsibilities under this or any other Agreement;

(vi) to cause the LLC's property to be maintained and operated in a manner that satisfies in all respects the obligations imposed with respect to such maintenance and operation by law, by any mortgages encumbering such property from time to time, and by any lease, agreement or rental arrangement pertaining to such property;

(vii) to cause necessary and proper repairs to be made, and supplies necessary for the proper operation, maintenance and repair of the LLC's property to be obtained;

(viii) to lease, sell, finance or refinance all or any portion of the LLC's property; and

(ix) to exercise all powers and authority granted by the Act to Members, except as otherwise specifically provided in this Agreement.

Practice Note

This "laundry list" is not required, but is often helpful to clarify the authority of the LLC and the members to take certain actions.

(c) Any Member of the LLC is authorized to execute on behalf of the LLC any documents to be filed with the Secretary of State of the Commonwealth of Massachusetts. Any Member is authorized to execute, acknowledge, deliver and record on behalf of the LLC any recordable instrument purporting to affect an interest in real property.

3. *Office of the Limited Liability Company*. The address of the office of the LLC for purposes of Section 5 of the Act is _____, Massachusetts _____.

Practice Note

Section 9 of the Act requires each LLC to maintain at its registered office in Massachusetts the following: (1) a current list of the full name and last known address of each member and manager; (2) a copy of the certificate of organization and all certificates of amendment thereof, together with executed copies of any powers of attorney pursuant to which any certificate has been executed; (3) copies of the LLC's federal, state and local income tax returns and reports, if any, for the three most recent years; (4) copies of any then effective written operating agreements and of any financial statements of the LLC for the three most recent years; and (5) unless contained in a written operating agreement, a writing setting out (i) the capital contributions made and required to be made by each member, (ii) the times at which additional contributions are to be made, (iii) any right of a member to receive or a manager to make distributions to a member; and (iv) any events that would dissolve the LLC. Records maintained under Section 9 of the Act must be available for inspection and copying at the reasonable request and expense of any member during ordinary business hours. Section 9 also requires that a list of the names and addresses of the members be made available to the Secretary of the Commonwealth within five days following a written request therefor.

Section 10 of the Act provides that each member or manager of an LLC has the right, subject to such reasonable standards as may be specified in the operating agreement or otherwise established by the manager or members, to obtain from the LLC "for any purpose reasonably related to the member's or manager's interest as a member or manager" (i) true and full information regarding the LLC's business and financial condition; (ii) promptly after becoming available, a copy of the LLC's federal, state

and local income tax returns for each year; and (iii) other information regarding the affairs of the LLC as is "just and reasonable."

4. *Agent for Service of Process*. The name and address of the resident agent for service of process for the LLC is Mary Member, _____, Massachusetts _____.

Practice Note

Designating a registered office and registered agent are fairly routine matters, but they are required by the Act. Failure to make such designations may delay receipt of applicable notices or service of process. In addition, some commentators have suggested that failure to designate an office or agent could constitute a failure to observe appropriate "corporate" formalities, thereby possibly subjecting the members or managers to personal liability for the entity's debts and obligations.

5. *Members' Names and Business Addresses*. The names and business addresses of the Members are set forth on *Schedule A* attached hereto.

6. *Term of the LLC.*

(a) The term of the LLC commenced [*on the date hereof*] upon filing on the date hereof a Certificate of Organization in the Office of the Secretary of State of the Commonwealth of Massachusetts. The term shall continue until the LLC is terminated by agreement of the Members unless earlier dissolved upon the occurrence of an event of dissolution under Section 43 of the Act (subject to the right to continue the LLC contained in Section 6(b), below, or pursuant to the Act).

Practice Note

An LLC is formed when the certificate of organization is filed, or at any later date specified in the certificate of organization. If the entity conducts business prior to the effective date, it may be deemed to be doing so as a general partnership. Accordingly, prior to the effective date, the members or managers may be treated as "general partners," and may therefore have general liability for the debts and obligations of the entity.

(b) The Members may continue the business of the LLC upon the occurrence of any event that constitutes an event of dissolution of an LLC under the Act by electing to do so within 90 days after the occurrence of any of such event. Any such election shall be made by Members whose capital contributions to the LLC represent at least a majority of the capital contributions made by all Members.

7. *Capital Contributions, Capital Accounts and Liability of Members*.

(a) Each Member has contributed in cash to the capital of the LLC the amount set forth opposite such Member's name on *Schedule A*, hereto. Additional capital contributions may be made by any Member if agreed to by all Members.

Except as otherwise provided in this Section 7, no Member shall be obligated or permitted to contribute any additional capital to the LLC. No interest shall accrue on any contributions to the capital of the LLC, and no Member shall have the right to withdraw or be repaid any capital contributed by it or to receive any other payment in respect of its interest in the LLC, including, without limitation, as a result of the withdrawal or resignation of such Member from the LLC, except as specifically provided in this Agreement.

Practice Note

This provision differs from the default rule contained in Section 32 of the Act, which provides to a resigning member the right to receive the fair value of its interest in the LLC unless the operating agreement provides otherwise.

(b) A "Capital Account" shall be maintained for each Member and adjusted in accordance with Regulations under Section 704 of the Internal Revenue Code of 1986, as amended ("I.R.C."). To the extent consistent with such Regulations, the adjustments to such Capital Accounts shall include the following: (i) there shall be credited to each Member's Capital Account the amount of any cash or the net fair market value of any property actually contributed by such Member to the capital of the LLC and such Member's share of the net profits of the LLC and of any items in the nature of income or gain separately allocated to the Members; and (ii) there shall be charged against each Member's Capital Account the amount of any cash and the net fair market value of any property distributed to such Member and such Member's share of the net losses of the LLC and of any items in the nature of losses or deductions separately allocated to the Members.

Practice Note

The use of capital accounts is the primary mechanism in the regulations adopted under I.R.C. § 704 for ensuring that the allocation of profits and losses will be respected for federal income tax purposes and ultimately result in the member who receives such allocations receiving correspondingly more (or less) value from the member's interest in the LLC. To comply with the regulations, the operating agreement should provide that, upon liquidation of the LLC, liquidation proceeds will be distributed among the members based on their positive capital account balances. (See Section 9(a), below.) An LLC that is intended to be classified as a partnership for federal income tax purposes should establish and maintain capital accounts in accordance with the Internal Revenue Code and applicable Treasury Regulations. However, in certain circumstances, to avoid possible distortions to the economic relationships among the members of the LLC, strict compliance with the requirements of the applicable Treasury Regulations may be undesirable. Consultation with a tax adviser is essential when attempting to determine the tax and economic consequences of whether or not to comply with the regulations.

(c) The liability of the Members for the losses, debts and obligations of the LLC shall be limited to their capital contributions, *provided, however*, that under applicable law,

the Members may under certain circumstances be liable to the LLC to the extent of previous distributions made to them in the event that the LLC does not have sufficient assets to discharge its liabilities. Without limiting the foregoing, (i) no Member, in his, her or its capacity as a Member, shall have any liability to restore any negative balance in his, her or its Capital Account and (ii) the failure of the LLC to observe any formalities or requirements relating to exercise of its powers or management of its business or affairs under this Agreement or the Act shall not be grounds for imposing personal liability on the Members or Managers for liabilities of the LLC.

Practice Note

Section 35 of the Act provides for returning "wrongful distributions" to the LLC under certain circumstances. Specifically, a member or manager who votes for or assents to a distribution in violation of the operating agreement shall be personally liable to the LLC for the portion of the distribution that exceeds the amount that could have been distributed without violating the agreement. Any proceeding in respect of such wrongful distribution must be commenced within two years of the distribution date.

8. *Return of Contributions*. The contribution of each Member is to be returned to such Member only upon the termination and liquidation of the LLC, but contributions may be returned prior to such time if agreed upon by all Members.

9. *Share of Net Profits, Net Losses and Cash Distributions*.

(a) During the term of the LLC, the net cash flow, net proceeds of any sale or refinancing of any property of the LLC, and any other distributions of cash or other property of the LLC, shall be distributed among the Members in proportion to their respective capital contributions. Subject to the foregoing, distributions to the Members shall be made at such times and in such amounts as the Members shall determine.

Distributions of net proceeds of liquidation of the LLC (whether of cash or other assets) shall be distributed to all Members with positive Capital Account balances (after such balances have been adjusted to reflect the allocation of net profits or net losses and items thereof through the date of liquidation pursuant to Section 9(b)) in proportion to and to the extent of such positive balances.

Practice Note

Although this provision is generally required in order to qualify for the "safe harbor" provided in regulations under I.R.C. § 704(b) for the allocation of an LLC's income and loss among its members, the possibility of distorting the economic arrangement among the members must be carefully considered before this provision is included in the operating agreement. Because of that possibility, most LLC agreements do not contain this provision and provide that liquidating distributions are made in accordance with the general distribution provisions of the agreement (e.g., Section 3.01).

A Member, regardless of the nature of his or her contribution to the LLC, shall have no right to demand or receive any distribution from the LLC in any form other than cash. The LLC may, at any time, and from time to time, make distributions in kind to the Members. If any assets of the LLC are distributed in kind, such assets shall be distributed on the basis of their fair market value as determined by the Members.

> **Practice Note**
>
> Section 33 of the Act provides that, except as specified in a written operating agreement, a member may not be compelled to accept a distribution of any asset in kind from an LLC to the extent that the percentage of the asset distributed to the member exceeds the percentage in which the member shares in distributions from the LLC. Accordingly, Section 33 of the Act contemplates distributions of any asset in kind to all members as tenants in common in proportion to their percentage interests. This agreement does not override the default rule. In many cases, the operating agreement will override such rule, by providing for distributions of separate assets to each member.

(b) Net profits and net losses shall, for both accounting and tax purposes, be net profits and net losses as determined for purposes of adjusting Capital Account balances as provided in Treasury Regulation Section 1.704-1(b)(2)(iv)(b). Net profits and net losses of the LLC shall be allocated among the members in proportion to their respective capital contributions. For tax purposes, all items of depreciation, gain, loss, deduction or credit shall be determined in accordance with the Treasury Regulations under I.R.C. § 704(b), and, except to the extent otherwise required by the I.R.C., allocated to and among the Members in the same percentages in which the Members share in net profits and net losses.

> **Practice Note**
>
> This provision is acceptable for purposes of the "allocation" regulations under I.R.C. § 704(b) only so long as the LLC remains "straight-up." Any deviation from the "straight-up" economic arrangement (including any disproportionate capital contributions, loans from members, guarantees of loans by members, etc.) will cause this provision to become invalid in certain circumstances. Thus, if there is any material possibility that the economic arrangement among the members will deviate from being straight-up, a more complete (and complex) provision for the allocation of profits and losses should be included.

(c) For taxable years of the LLC that commence prior to the effective date of the provisions of the of the Bipartisan Budget Act of 2015 amending subchapter C of Chapter 63 of the I.R.C. (the "BBA Amendments"), Beth Business shall be the "tax matters partner" of the LLC for purposes of the I.R.C. For taxable years of the LLC to which the BBA Amendments apply, Beth Business shall be the "partnership representative" for purposes of the I.R.C.

Practice Note

For taxable years beginning prior to the effective date of the BBA Amendments (generally, January 1, 2018), each partnership and LLC treated as a partnership for federal income tax purposes must have a "tax matters partner." The "tax matters partner" must be a member. If no member is so designated, the tax matters partner generally is the member who has the largest interest in the profits of the LLC for the year (or, where there is more than one such member, the member whose last name is first alphabetically of all such members' last names). Under I.R.C. §§ 6221–6231, the tax matters partner of a partnership (including an LLC that is taxed as a partnership) controls audits and other similar administrative proceedings of the partnership relating to federal income taxes. In certain circumstances, it may be important to a member of an LLC to control such proceedings. In addition, because the actions of a tax matters partner can (in limited circumstances) bind other partners with respect to a particular tax determination, other members may wish to provide that the tax matters partner cannot bind them without their express consent. Under I.R.C. §§ 6221–6231, designation of the tax matters partner is only relevant for purposes of controlling audits and other similar administrative proceedings with the IRS; it does not authorize the designee to make tax elections, file tax returns, or handle other administrative functions relating to taxes. If the members want the tax matters partner to handle such additional tasks, they should so specify in the LLC agreement. Otherwise, such tasks will be left to the party or parties charged with the general management of the LLC.

For taxable years of an LLC that begin on or after January 1, 2018, the procedural rules under the I.R.C. regarding partnership audits and administrative and judicial proceedings were dramatically changed. In general, such proceedings are handled entirely by the LLC's "partnership representative" who is granted nearly unfettered ability to bind the LLC and all of its members regarding all aspects of the proceeding. Unlike the tax matters partner, the "partnership representative" need not be a member of the LLC and, in certain circumstances, can be appointed by the IRS. Under these procedural rules, absent certain elections, if the proceeding involves an increase in the taxable income of the LLC (or a decrease in any tax credits), the LLC rather than its members is obligated to pay the resulting increase in taxes (referred to as the "imputed underpayment") determined by applying the maximum effective tax rate for the year that is the subject of the proceeding (the "reviewed year"). This approach can cause significant distortions in the tax burden imposed on the members of the LLC including

- a significantly higher aggregate amount of tax being paid than would have been paid had the initial tax returns been filed correctly and
- members sharing in the resulting tax liability (indirectly through their interests in the LLC) in a dramatically different manner than had the initial tax returns been filed correctly.

> Although procedures are available that can mitigate these distortions in certain circumstances, their election is almost exclusively in the discretion of the "partnership representative." Thus, for any LLC agreement that is not simply an interim agreement employed on a temporary basis like this agreement, it is important for any member who is not the "partnership representative" that provisions be included in the agreement that contractually obligate the "partnership representative" to act in a fair manner and that the other members (and prior members) have obligations to pay the appropriate amount of any tax deficiency based upon their ownership in the LLC for the reviewed year.

(d) No Member shall have any right to distributions respecting his or her membership interest (upon withdrawal or resignation from the LLC or otherwise) except as expressly set forth in this Agreement.

10. *Substitution and Assignment of a Member's Interest; Resignation; Additional Members*.

(a) No Member may sell, assign, give, pledge, hypothecate, encumber or otherwise transfer, including, without limitation, any assignment or transfer by operation of law or by order of court, such Member's interest in the LLC or any part thereof, or in all or any part of the assets of the LLC, without the unanimous written consent of all of the other Members, and any purported assignment without such consent shall be null and void and of no effect whatsoever.

(b) No assignee of the interest of a Member may be substituted as a member of the LLC without the unanimous written consent of all other Members.

(c) A Member may not resign from or otherwise terminate his or her membership in the LLC without the prior approval of all other Members.

> **Practice Note**
> Section 36 of the Act provides that, despite any agreement to the contrary, a member may resign as a member. If any such resignation violates the terms of the operating agreement, the resignation would give rise to a claim for breach of contract and associated damages.

(d) Additional Members may be admitted to the LLC if agreed to by all Members.

11. *Miscellaneous*.

(a) The Members shall cause the LLC to keep just and true books of account with respect to the operations of the LLC. Such books shall be maintained at the principal place of business of the LLC, or at such other place as the Members shall determine, and all Members and their duly authorized representatives shall, at all reasonable times, have access to such books.

(b) Such books shall be kept on the accrual method of accounting or on such other method of accounting as the Members may from time to time determine, and shall be closed and balanced as of December 31 each year. The same method of accounting shall be used for both LLC accounting and tax purposes. The fiscal year of the LLC shall be the calendar year [unless I.R.C. § 706 requires the use of a different taxable year in which case the fiscal year shall be the same as such taxable year].

(c) The Members shall cause the LLC to maintain one or more accounts in a bank (or banks) that is a member of the Federal Deposit Insurance Corporation, which accounts shall be used for the payment of the expenditures incurred by the Members in connection with the business of the LLC, and in which shall be deposited any and all cash receipts. All such amounts shall be and remain the property of the LLC, and shall be received, held and disbursed by the Members for the purposes specified in this Agreement.

(d) Subject to the restrictions on transfers set forth herein, this Agreement, and each and every provision hereof, shall be binding upon and shall inure to the benefit of the Members, their respective successors, successors in title, heirs and assigns, and each and every successor in interest to any Member, whether such successor acquires such interest by way of gift, purchase, foreclosure or any other method, and each party shall hold such interest subject to all of the terms and provisions of this Agreement.

(e) No change, modification or amendment of this Agreement shall be valid or binding unless such change, modification or amendment shall be in writing and duly executed by all of the Members.

(f) This Agreement and the rights and obligations of the parties hereunder shall be governed by and interpreted, construed and enforced in accordance with the laws of the Commonwealth of Massachusetts.

(g) This Agreement may be executed in a number of counterparts, all of which together shall for all purposes constitute one Agreement, binding on all the Members, notwithstanding that all Members have not signed the same counterpart.

(h) None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditor of any Member, or any creditor of the LLC other than a member who is such a creditor of the LLC in his, her or its capacity as a Member.

(i) The Members hereby agree that no Member or any successor in interest to any Member shall have the right while this Agreement remains in effect to have the property of the LLC partitioned, or to file a complaint or institute any proceeding at law or in equity to have the property of the LLC partitioned, and that each Member, on behalf of himself or herself, his or her successors, representatives, heirs and assigns, hereby waives any such right. It is the intention of the Members that, during the term of this Agreement, the rights of the Members and their successors in interest, as among themselves, shall be governed by the terms of this Agreement, and that the right of any Member or successor in interest to assign, transfer, sell or otherwise

dispose of his or her interest in the LLC shall be subject to the limitations and restrictions of this Agreement.

(j) This Agreement constitutes the full and complete agreement of the parties hereto with respect to the subject matter hereof.

IN WITNESS WHEREOF, the Members have signed and sworn to this Agreement under penalties of perjury as of the date first above written.

MEMBERS:

_____

Alan Associate

_____

Beth Business

_____

Chris Character

_____

Mary Member

SCHEDULE A
TO OPERATING AGREEMENT OF SHELL LLC

MEMBERS

Names and Addresses of Members	Capital Contribution
Alan Associate [business address]	$25,000
Beth Business [business address]	25,000
Chris Character [business address]	25,000
Mary Member [business address]	25,000
Total:	$100,000

EXHIBIT 7I—Default Provisions in the Massachusetts Limited Liability Company Act (G.L. c. 156C)

The following provisions of the Massachusetts Limited Liability Company Act (the "Act") apply to any LLC formed under the Act, unless such provisions are modified by agreement of the members. Section references below refer to applicable sections of the Act.

Section	Default Provision
6	Except as otherwise expressly set forth in a written operating agreement, an LLC shall have the power to make guarantees of the obligations of another person or entity.
7	Except as provided in a written operating agreement, a member or manager may lend money to, borrow money from, act as a surety, guarantor or endorser for, guarantee or assume one or more specific obligations of, provide collateral for, and transact other business with an LLC, and, subject to other applicable law, has the same rights and obligations with respect to any such matter as a person who is not a member or manager.
8(b)	The certificate of organization or a written operating agreement may eliminate or limit the personal liability of a member or manager for breach of any duty to the LLC.
12(b)	An LLC is formed at the time of filing of the initial certificate of organization, or at any later date specified in the certificate of organization.
13(e)	A certificate of amendment to a certificate of organization of an LLC shall be effective upon filing thereof, or at such later date as may be specified in the amendment (which must be a date certain).
14	A certificate of cancellation shall be effective upon filing with the Secretary of State, or at such later date as may be specified in the certificate (which must be a date certain).
15	Unless otherwise provided in the operating agreement, any person may sign any certificate or amendment thereto, or enter into the operating agreement or amendment thereto by an agent, including an attorney in fact.
19(c)	A restated (or amended and restated) certificate of organization of an LLC shall be effective upon filing thereof, or at such future effective date as may be specified therein (which must be a date certain).
20	In connection with the formation of an LLC, a person is admitted as a member of the LLC at the later to occur of (1) the date of formation of the LLC or (2) the time provided in and upon compliance with the operating agreement or, if the operating agreement does not so provide, when the person's

admission is reflected in the records of the LLC. Thereafter, a person is admitted as a member of the LLC at the time provided in and upon compliance with the operating agreement, or, if the operating agreement does not so provide, upon the consent of all members.

21(d) If an operating agreement does not provide for the voting rights of members, the decision of members who own more than 50 percent of the unreturned contributions to the LLC shall be controlling.

24 Unless otherwise provided in the operating agreement, the management of the LLC shall be vested in its members.

If an LLC has at least one manager, then unless otherwise provided in the operating agreement, the manager shall manage and control the LLC and no member shall manage or control the LLC. If an LLC has no manager then, unless otherwise provided in the operating agreement, the members shall manage and control the LLC.

If an LLC has at least one manager then, unless otherwise provided in the operating agreement, each manager may execute documents and act for the LLC and no member shall execute documents or act for the LLC. If an LLC has no manager then, unless otherwise provided in the operating agreement, each member may execute documents and act for the LLC.

Unless otherwise provided in the operating agreement, a member or manager of an LLC may delegate some or all of such member's or manager's rights and powers to execute documents and act for and manage and control the business and affairs of the LLC, including delegating to agents and employees of a member or manager of the LLC, and delegating by a management agreement or another agreement with, or otherwise to, other persons. Unless otherwise provided in the operating agreement, such delegation by a member or manager of an LLC shall not cause the member or manager to cease to be a member or manager, as the case may be, of the LLC.

26(d) If an operating agreement does not provide for the voting rights of managers, the decision of a majority in number of the managers shall be controlling.

28(a) Except as provided in a written operating agreement, a member is obligated to an LLC to perform any promise to contribute cash or property or to perform services, even if the member is unable to perform because of death, disability or any other reason.

28(b) Unless otherwise provided in a written operating agreement, the obligation of a member to make a contribution or return money or other property paid or distributed in violation of the Act may be compromised only by consent of all members.

29 If the operating agreement does not provide for allocations of profits and losses, profits and losses shall be allocated on the basis of the agreed value

of the contributions of each member, as stated in the records of the LLC, to the extent they have been received by the LLC and have not been returned.

30 If the operating agreement does not provide for distributions of cash or other assets, distributions shall be made on the basis of the agreed value of the contributions of each member, as stated in the records of the LLC, to the extent they have been received by the LLC and have not been returned.

31 If an operating agreement does not specify the times at which distributions are to be made, the members or managers, acting pursuant to Sections 21 or 26 of the Act, may determine when the members are entitled to distributions.

32 If not otherwise provided in a written operating agreement, a resigning member is entitled to receive, within a reasonable time after resignation, the fair value of his or her LLC interest as of the date of resignation, based on his or her right to share in distributions from the LLC.

33 Except as provided in a written operating agreement, a member, regardless of the nature of his or her contribution, has no right to demand and receive any distribution from an LLC in any form other than cash. Except as provided in a written operating agreement, a member may not be compelled to accept a distribution of any asset in kind from an LLC to the extent that the percentage of the asset distributed to him exceeds a percentage of the asset that is equal to the percentage in which he shares in distributions from the LLC.

34 Except as provided in the operating agreement, at the time a member becomes entitled to receive a distribution, he has the status of, and is entitled to all remedies available to, a creditor of the LLC with respect to the distribution.

36 A member may resign as a member of an LLC at the time or upon the occurrence of events specified in the operating agreement and in accordance with the operating agreement. An operating agreement may provide that a member does not have the right to resign, however, regardless of whether it so provides, a member may resign as a member upon not less than six months' prior written notice to the LLC at its office in the Commonwealth (as set forth in the certificate), and to each other member and each manager at their respective addresses (as set forth on the records of the LLC).

37 A manager may resign as a manager of an LLC at the time or upon the occurrence of events specified in the operating agreement and in accordance with the operating agreement. An operating agreement may provide that a manager shall not have the right to resign, however, regardless of whether it so provides, a manager may resign as a manager upon prior written notice to the LLC at its office in the Commonwealth (as set forth in the certificate) and to each member and each other manager at their respective addresses (as set forth on the records of the LLC).

39(a) An LLC interest is assignable in whole or in part except as provided in the

operating agreement. An assignee shall have no right to participate in the management of the business and affairs of the LLC, except upon compliance with any procedure provided for in a written operating agreement or upon the approval of all members other than the assigning member.

39(b) Unless otherwise provided in the operating agreement, (1) an assignment entitles the assignee to share in such profits and losses; to receive such distributions; and to receive allocations of income, gain, loss, deduction or credit or similar items to which the assignor was entitled, to the extent assigned; and (2) a member ceases to be a member and to have the power to exercise any rights or powers of a member upon assignment of all of his or her LLC interest. Unless otherwise provided in the operating agreement, the pledge of, or granting of, a security interest, lien, etc., in or against any or all of the LLC interest of a member shall not cause the member to cease to be a member or to have the power to exercise any rights or powers of a member.

39(d) Unless otherwise provided in the operating agreement, and except to the extent assumed by agreement, until an assignee of an LLC interest becomes a member, the assignee shall have no liability as a member solely as the result of the assignment.

41(a) An assignee may become a member upon the approval of all members (other than the assignor) or upon compliance with any procedure provided for in a written operating agreement.

41(b) Unless otherwise provided in the operating agreement, an assignee who becomes a member is liable for the obligations of his or her assignor to make contributions as provided in Section 28 of the Act (obligation to make ordinary contributions), but shall not be liable for the obligations of his or her assignor under Section 35 of the Act (obligation to return wrongful distributions). However, the assignee is not obligated for liabilities, including the obligations of his or her assignor to make contributions as provided in Section 28 of the Act, that were unknown to the assignee at the time he or she became a member, and that could not be ascertained from the operating agreement.

42 Unless otherwise provided in the operating agreement, if a member who is an individual dies or a court adjudges him or her to be incompetent to manage his or her person or his or her property, the member's executor, administrator, guardian, conservator or other legal representative may exercise all of the member's rights for the purpose of settling his or her estate or administering his or her property, including any power under the operating agreement of an assignee to become a member. Unless otherwise provided in the operating agreement, if a member is a corporation, trust or other entity, and is dissolved or terminated, the powers of that member may be exercised by its legal representative or successor.

43 With respect to an LLC formed prior to January 1, 1997, except as provided

in a written operating agreement, the death, insanity, retirement, resignation, expulsion, bankruptcy or dissolution of a member, or the occurrence of any other event that terminates the membership of a member in the LLC, dissolves the LLC, unless the LLC is continued either by the consent of all the remaining members within 90 days following the occurrence of such event, or pursuant to the right to continue stated in a written operating agreement.

45 Unless otherwise provided in an operating agreement, a manager who has not wrongfully dissolved an LLC (or, if none, the members or a person approved by the members pursuant to the operating agreement) (or if there is no operating agreement, pursuant to Section 21) may wind up the LLC's affairs.

46 Upon winding up the LLC, the assets will be distributed first to its creditors (regardless of whether the operating agreement provides otherwise); and then, except as otherwise provided in the operating agreement, to members and former members to satisfy liabilities for distributions payable during the term of the LLC and upon resignation of members; and then, unless otherwise provided in the operating agreement, to members, first for the return of their capital contributions, and second, in respect of their LLC interests.

56 Except as otherwise provided in a written operating agreement, suit on behalf of the LLC may be brought in the name of the LLC by (1) any member or members (even in an LLC with managers) with the consent of members owning more than 50 percent of the unreturned capital contributions to the LLC (exclusive of the interest of any member who has an interest in the outcome of the suit that is adverse to the interest of the LLC); or (2) any manager or managers of the LLC (if the operating agreement vests management of the LLC in one or more managers who are authorized to sue) by the vote of a majority in number of the managers (similarly excluding an interested manager).

60 Unless otherwise provided in a written operating agreement, a consolidation or merger must be approved by each Massachusetts LLC to consolidate or merge by its members; or, if there is more than one class or group of members, by each class or group of members. In either case, the consolidation or merger must be approved by members who own more than 50 percent of the unreturned contributions to the LLC, determined in accordance with Section 29, and owned by all members or by the members in each class or group, as appropriate.

61(b) Unless a future effective date or time is provided in the certificate of consolidation or merger, the consolidation or merger shall be effective upon filing the certificate or consolidation or merger with the Secretary of the Commonwealth.

EXHIBIT 7J—Mandatory Provisions in the Massachusetts Limited Liability Company Act (G.L. c. 156C)

The following provisions of the Massachusetts Limited Liability Company Act (the "Act") are applicable to any LLC formed under the Act, and cannot be waived or modified by agreement of the members or otherwise. Section references below refer to applicable sections of the Act.

Section	Mandatory Provision
2(5)	Every Massachusetts LLC must have at least one member.
3	The name of each LLC must contain the words "limited liability company" "limited company," or the letters "LLC," "L.L.C.," "LC" or "L.C." The name of any LLC may not be the same as, or deceptively similar to, the name of any corporation, limited partnership or LLC reserved or organized under the laws of Massachusetts or registered to transact business in Massachusetts, except with the written consent of such other corporation, limited partnership or LLC.
5	Every LLC must maintain an office in Massachusetts at which its records must be kept. The office need not be the place of the LLC's business.
5	Every LLC must designate an agent for service of process. The agent must be an individual resident of Massachusetts, a Massachusetts corporation or a foreign corporation qualified to transact business in Massachusetts.
6(c)	An LLC or foreign LLC that is organized to render a professional service shall (i) indicate in its certificate of organization or application for registration the specific professional services it shall render; (ii) be subject to any conditions or limitations established by an applicable regulating board; and (iii) include with its certificate of organization or application for registration a certificate from the applicable regulating board that indicates compliance, as of the date of organization or registration, by the members and managers with any eligibility standards established by such regulating board.
8	An LLC may not indemnify any person with respect to any matter as to which the person has been adjudicated in any proceeding not to have acted in good faith, in the reasonable belief that his or her actions were in the best interest of the LLC.
9(a)	Each LLC shall keep at the office it is required to maintain, pursuant to Section 5 of the Act, the following records: (1) a current list of the full name and last known address of each member and manager; (2) a copy of the certificate of organization and all certificates of amendment thereof, together with executed copies of any powers of attorney pursuant to which any certificate

has been executed; (3) copies of the LLC's federal, state and local income tax returns and reports, if any, for the three most recent years; (4) copies of any then effective written operating agreements and of any financial statements of the LLC for the three most recent years; and (5) unless contained in a written operating agreement, a writing setting out (i) the capital contributions made and required to be made by each member, (ii) the times at which additional contributions are to be made, (iii) any right of a member to receive, or a manager to make, distributions to a member; and (iv) any events that dissolve the LLC.

9(b) Records maintained under Section 9 of the Act shall be open to inspection and copying at the reasonable request and expense of any member during ordinary business hours.

9(c) A list of the names and addresses of the members must be made available to the Secretary of State of the Commonwealth within five days following a written request therefor from the Secretary of State or the director of the Massachusetts Securities Division.

10 Each member or manager of an LLC has the right, subject to such reasonable standards as may be specified in the operating agreement or otherwise established by the manager or members, to obtain from the LLC "upon reasonable demand in writing for any purpose reasonably related to the member's or manager's interest as a member or manager," (i) true and full information regarding the LLC's business and financial condition; (ii) promptly after becoming available, a copy of the LLC's federal, state and local income tax returns for each year; and (iii) other information regarding the affairs of the LLC as is "just and reasonable."

11 A member or manager shall be fully protected in relying in good faith on the provisions of the operating agreement, the records of the LLC and such other information provided by other members, managers or officers of the LLC or such other persons, as to matters such member or manager reasonably believes are within such person's expert competence and who has been selected with reasonable care.

12 The certificate of organization must be filed with the Secretary of State, and contain the following information: (i) the name of the LLC; (ii) the address of its required office in the Commonwealth; (iii) the name and address of the resident agent for service of process; (iv) if the LLC has a specific date of dissolution, the latest date on which the LLC is to dissolve, (v) the name and address of the managers, if any, (vi) the name of any other person in addition to any manager who is authorized to execute documents filed with the Secretary of the Commonwealth, and (vii) the general character of the LLC's business.

13(a) Amendments to a certificate of organization must be filed with the Secretary of the Commonwealth and contain the following information: (i) the name of

the LLC, (ii) the date of the filing of its certificate of organization and (iii) the text of the amendment to the certificate.

13(b) If any statement in the certificate of organization is found to be or becomes false in any material respect, an amendment correcting such statement must be filed promptly.

13(c) An amendment to the certificate of organization must be filed to reflect (i) the designation of managers of an LLC that did not theretofore have managers or (ii) any change in the managers or other authorized signatories.

14 A certificate of organization of an LLC must be canceled (i) upon the dissolution and completion of the winding up of the LLC's affairs, (ii) at any time when there are no members or (iii) upon the filing of a certificate of consolidation or merger if the LLC is not the surviving entity. In the case of clauses (i) and (ii) above, the certificate of cancellation must include (a) the name of the LLC, (b) the date of the filing of its certificate of organization, (c) the reason for filing the certificate of cancellation and (d) the effective date, if not effective upon filing.

15 Each certificate of organization, amendment thereto or cancellation thereof shall be executed by any manager or authorized person, or, in the case of the certificate of organization, by the person forming the LLC. An authorization, including a power of attorney, need not be in writing, need not be sworn to, verified or acknowledged, and need not be filed with the Secretary of the Commonwealth, but if in writing, must be maintained by the LLC. The execution of any certificate to be filed with the Secretary of the Commonwealth by an authorized person constitutes an affirmation under the penalties of perjury that the facts stated therein are true.

17 Each certificate of organization, amendment thereto or cancellation thereof, and certificates of merger or conversion or consolidation, must be filed in duplicate (which duplicate may be a photocopy or a duplicate original).

18 The fact that a certificate of organization is on file in the office of the Secretary of the Commonwealth shall be notice that the entity formed in connection with the filing of the certificate of organization is an LLC formed under the laws of Massachusetts, and shall be notice of all other facts set forth therein that are required to be set forth in a certificate of organization.

19 A restated certificate of organization must state the following: (i) the then current name of the LLC, and, if it has changed its name, the name under which it was originally formed; (ii) the date of filing of the original certificate of organization; (iii) the effective date of the restated certificate of organization; (iv) that it has been duly executed; and (v) that such restated certificate either merely restates or that it restates and amends any and all prior filings in regard to the LLC.

20 In connection with the formation of an LLC, a person acquiring an interest therein becomes a member upon the later to occur of the following: (i) the formation of the LLC or (ii) the time provided for in the operating agreement (or, if no time is provided in the operating agreement, when the person's admission is reflected in the records of the LLC). After the formation of the LLC, a person acquiring an interest becomes a member (i) in the case of a person acquiring an interest directly from the LLC, at the time designated in the written operating agreement, or, if the written operating agreement does not so provide, by the consent of all of the members; and (ii) in the case of an assignee, in compliance with provisions relating to the right of an assignee to become a member under the Act.

35 A member or manager who votes or assents to a distribution in violation of the operating agreement is personally liable to the LLC for the amount of the distribution that exceeds what could have been distributed without violating the operating agreement. Each such member is entitled to contribution from (i) any other member or manager who also voted for or assented to such distribution and (ii) each member for the amount received knowing that the distribution was made in violation of the operating agreement. The statute of limitations for a claim brought under the above provisions is two years from the date of the distribution.

36 Notwithstanding the provisions of the operating agreement, a member may resign upon not less than six months' prior written notice to the LLC and to each member and manager, provided that the member may be liable to the LLC for damages if such resignation violates the operating agreement.

37 Regardless of whether an operating agreement provides that a manager does not have the right to resign as a manager of the LLC, a manager may resign as a manager of an LLC at any time upon prior written notice to each member and each other manager at each member's and each other manager's address, as set forth on the records of the LLC as of the date of notice, provided that the manager may be liable to the LLC for damages if such resignation violates the operating agreement.

38 An LLC interest is personal property, and does not entitle the holder thereof to any interest in specific assets of the LLC.

39 The assignee of a member's interest shall have no right to participate in the management of the business and the affairs of the LLC, except (i) upon the unanimous consent of the members or (ii) upon compliance with the operating agreement.

40 On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the interest of the member with payment of the unsatisfied amount of the judgment with interest.

41(a) An assignee becomes a member (i) upon the unanimous consent of the members or (ii) upon compliance with the operating agreement.

41(b) An assignee who has become a member has, to the extent assigned, the rights and powers and is subject to the restrictions and liabilities of a member under the operating agreement and the Act.

41(b) An assignee is not obligated for liabilities unknown to him or her at the time he or she became a member and that could not be ascertained from the operating agreement.

41(c) Whether or not the assignee becomes a member of the LLC, the assignor is not released from his or her liability to the LLC under Sections 31 to 37 of the Act.

43 An LLC is dissolved and its affairs wound up upon the first to occur of the following: (i) the time specified in the operating agreement; (ii) the occurrence of an event as specified in the operating agreement; (iii) the written consent of all of the members, (iv) with respect to LLCs formed prior to January 1, 1997, except as provided for in the operating agreement, the death, insanity, retirement, resignation, expulsion, bankruptcy or dissolution of a member, unless the business is continued either by the consent of all of the remaining members, within 90 days following the occurrence of any such event, or pursuant to a right to continue contained in a written operating agreement; or (v) the entry of a decree of judicial dissolution under Section 44 of the Act.

46 Upon winding up the LLC, the assets of the LLC shall be distributed as follows: (i) to creditors, including managers and members to the extent permitted by law; (ii) unless otherwise provided for in the operating agreement, to members and former members in satisfaction of liabilities for interim distributions and distributions made upon the resignation of members; and (iii) unless otherwise provided in the operating agreement, to members (a) for the return of their contributions; and (b) respecting their interests, in the proportions in which the members share in distributions.

47 A foreign LLC shall not conduct a business in Massachusetts that is prohibited to an LLC organized in Massachusetts. A foreign LLC shall not be denied registration in Massachusetts by reason of any difference between the laws under which it was formed and the laws of Massachusetts.

48 A foreign LLC shall be considered to be doing business in Massachusetts if it would be considered to be doing business in Massachusetts as a foreign corporation for purposes of G.L. c. 181.

48 A foreign LLC doing business in Massachusetts must register to do business in Massachusetts within 10 days after it commences doing business in Massachusetts. The application for registration shall set forth (i) the name of the

LLC (and, if different, the name under which it proposes to do business in Massachusetts); (ii) the jurisdiction where the LLC was organized and the date of its organization; (iii) the general character of the business the LLC proposes to conduct in Massachusetts; (iv) the address of the LLC's principal office; (v) the names and addresses of the managers, if any; (vi) the address of the LLC's principal office in Massachusetts; (vii) the name and address of the LLC's resident agent; and (viii) the specific date of dissolution of the LLC, if any.

51 A foreign LLC must appoint an agent for service of process in Massachusetts. The agent may be an individual resident, domestic corporation or foreign corporation qualified to do business in Massachusetts.

52 Any false or inaccurate statement whether existing at the time of filing, or arising later due to a change in circumstances in an application for registration must be promptly corrected by filing an amendment to the application.

53 The certificate of cancellation filed by a withdrawing foreign LLC shall be identical to the certificate filed by a domestic LLC, except that, in addition, it shall set forth that all taxes and fees owed to Massachusetts have been paid or provided for.

54 A foreign LLC doing business in Massachusetts that fails to register shall be fined not more than $500 for each year that such LLC remains unregistered. In addition, such unregistered foreign LLC may not avail itself of the Massachusetts courts, but may be sued in such courts. The Secretary of State shall serve as agent for service of process for any foreign LLC that has failed to appoint an agent or whose agent refuses to act as such.

55 Suits may be brought by and against the LLC in its own name.

57 On termination of a derivative suit, the court may order (i) the LLC to pay the plaintiff's reasonable costs if the court finds that the suit resulted in a substantial benefit to the LLC or (ii) the plaintiff to pay the reasonable costs of the LLC if the court finds that the suit was commenced or maintained without reasonable cause or proper purpose.

58 The lack of authority of a member or manager to sue on behalf of the LLC may not be asserted as a defense to an action by the LLC or by the LLC as a basis for bringing a subsequent suit on the same cause of action.

60 The exclusive remedy of a member of a domestic LLC who objects to a consolidation or merger is the right to resign as a member, and to receive any distribution with respect to his or her interest in the LLC.

61 The surviving entity in a merger or consolidation must file a certificate of consolidation or merger with the Secretary of State. Such certificate shall state (i) the name and jurisdiction of the formation of each of the parties to the merger or consolidation; (ii) that an agreement of consolidation or merger

has been approved, is on file at a place of business of the surviving entity and available for inspection (and will be furnished on request and without cost to any member of any domestic LLC or other entity which is to consolidate or merge); (iii) the name of the surviving entity; (iv) the effective date of the merger or consolidation; and (v) if the surviving entity is not a domestic one, a statement that such entity has designated an agent for service of process. The certificate of consolidation or merger shall act as a certificate of cancellation of a domestic LLC that is not the surviving entity.

61 An agreement of consolidation or merger (i) may effect any amendment to the operating agreement, or (ii) effect the adoption of a new operating agreement for a domestic LLC that is the surviving or resulting entity, and any such amendment or new agreement shall be effective at the effective time of the merger.

62 When any consolidation or merger becomes effective, for all purposes of the laws of Massachusetts, all of the rights, privileges and powers of each of the merged or consolidated entities, and all property, real, personal and mixed, and all debts due to any of said entities, as well as all other things and causes of action belonging to each of them shall be vested in the resulting or surviving entity. Similarly, all debts, liabilities and duties of the constituent entities shall attach to the surviving or resulting entity.

63(b) To the extent that, at law or in equity, a member or manager has duties, including fiduciary duties, and liabilities relating thereto to an LLC or to another member or manager, any such member or manager acting under the operating agreement shall not be liable to the LLC or to any such other member or manager for the member's or manager's good faith reliance on the provisions of the operating agreement.

66 Any recordable instrument purporting to affect an interest in real property executed in the name of an LLC by any person identified in its certificate of organization as a manager or person authorized to execute, acknowledge and file the same shall be binding on the LLC, notwithstanding any inconsistent provisions of the operating agreement, side agreements among the members or managers, bylaws or rules, resolutions or votes of the LLC.

67 Any person identified in an LLC's certificate of organization as a manager or person authorized to execute, acknowledge and file an instrument with the Secretary of State may certify as to the incumbency of any manager or member and as to the authority of any person, whether or not such person is identified on the certificate of organization, to act for the LLC, and any such certification shall be binding on the LLC in favor of a person relying in good faith on such certification, notwithstanding any inconsistent provisions of the operating agreement, side agreements among the members or managers, bylaws or rules, resolutions or votes of the LLC.

69 A certificate of conversion to an LLC shall state (1) the date on which, and

jurisdiction in which, the other business entity was first created, incorporated or otherwise came into being and, if it has changed, its jurisdiction immediately prior to its conversion to a domestic LLC; (2) the name of the other business entity immediately prior to the filing of the certificate of conversion to an LLC; (3) the name of the LLC as set forth in its certificate of organization filed in accordance with subsection 69(b); and (4) the future effective date, which shall be a date certain, of the conversion to an LLC if it is not to be effective upon the filing of the certificate of conversion and certificate of organization.

Upon the effective date of the filing of the certificate of conversion and certificate of organization in the office of the state secretary, the other business entity shall be converted into a domestic LLC and the LLC shall thereafter be subject to the Act.

The conversion of any other business entity into a domestic LLC shall not be deemed to affect any obligations or liabilities of the other business entity incurred prior to such conversion or the personal liability of any person incurred prior to such conversion.

When a conversion becomes effective under this section, for all purposes of the laws of Massachusetts, all of the rights, privileges and powers of the other business entity that has converted and all property, real, personal and mixed, and all debts due to such other entity, as well as all other things and causes of action belonging to such other entity, shall be vested in the Massachusetts LLC and shall thereafter be the property of the Massachusetts LLC as they were of such other entity. The title to any real property vested by deed or otherwise under the laws of Massachusetts in such other entity shall not revert or be in any way impaired by reason of the conversion, but all rights of creditors and all liens upon any property of such other entity shall be preserved unimpaired and all debts, liabilities and duties of such other entity shall then attach to the Massachusetts LLC and may be enforced against it to the same extent as if the debts, liabilities and duties had been incurred or contracted by it.

EXHIBIT 7K—Provisions in the Massachusetts Limited Liability Company Act (G.L. c. 156C) Requiring a Writing

The Massachusetts Limited Liability Company Act (the "Act") does not require that a limited liability company operating agreement be in writing. However, the Act does provide that certain arrangements among the managers and members of a limited liability company (an "LLC") and/or other persons must be embodied in a written operating agreement or other writing. Set forth below is a list of such provisions of the Act. Section references below refer to applicable sections of the Act.

Section	Provision Requiring a Writing
3	The name of any LLC may not be the same as, or deceptively similar to, the name of any corporation, limited partnership or LLC reserved or organized under the laws of Massachusetts or registered to transact business in Massachusetts, except with the written consent of such other corporation, limited partnership or LLC.
4	A name for a to-be-formed domestic LLC or to-be-registered foreign LLC may be reserved, or such a reservation extended, only upon presentation of an application or written request.
6	Except as otherwise expressly set forth in a written operating agreement, an LLC shall have the power to make guarantees of the obligations of another person or entity.
7	Except as provided in a written operating agreement, a member or manager may lend money to, borrow money from, act as a surety, guarantor or endorser for, guarantee or assume one or more specific obligations of, provide collateral for, and transact other business with an LLC, and, subject to other applicable law, has the same rights and obligations with respect to any such matter as a person who is not a member or manager.
8(a)	Subject to such standards and restrictions, if any, as are set forth in its certificate of organization or a written operating agreement, an LLC may, and shall have the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever, provided that no indemnification shall be provided for any person with respect to any matter as to which he or she shall have been adjudicated in a proceeding not to have acted in good faith, in the reasonable belief that his or her action was in the best interest of the LLC.
8(b)	The certificate of organization or a written operating agreement may eliminate or limit the personal liability of a member or manager for breach of any duty to the LLC.
9	Each LLC shall keep at the office it is required to maintain in Section 5 of the Act the following records: (1) a current list of the full name and last

known address of each member and manager; (2) a copy of the certificate of organization and all certificates of amendment thereof, together with executed copies of any powers of attorney pursuant to which any certificate has been executed; (3) copies of the LLC's federal, state and local income tax returns and reports, if any, for the three most recent years; (4) copies of any then effective written operating agreements and of any financial statements of the LLC for the three most recent years; and (5) *unless contained in a written operating agreement, a writing setting out the following:* (i) the capital contributions made and required to be made by each member, (ii) the times at which additional contributions are to be made, (iii) any right of a member to receive or a manager to make distributions to a member and (iv) any events that dissolve the LLC.

10 Each member or manager of an LLC has the right, subject to such reasonable standards as may be specified in the operating agreement or otherwise established by the manager or members, to obtain from the LLC upon reasonable demand in writing for any purpose reasonably related to the member's or manager's interest as a member or manager, (i) true and full information regarding the LLC's business and financial condition; (ii) promptly after becoming available, a copy of the LLC's federal, state and local income tax returns for each year; and (iii) other information regarding the affairs of the LLC as is "just and reasonable."

11 A member or manager shall be fully protected in relying in good faith upon the provisions of a written operating agreement, the records of the LLC and such other information provided by other members, managers or officers of the LLC or such other persons, as to matters such member or manager reasonably believes are within such person's expert competence and who has been selected with reasonable care.

20 After the formation of the LLC, a person acquiring an interest becomes a member (i) in the case of a person acquiring an interest directly from the LLC, at the time designated in the written operating agreement, or, if the written operating agreement does not so provide, by the consent of all of the members; and (ii) in the case of an assignee, in compliance with provisions relating to the right of an assignee to become a member under the Act.

28(a) Except as provided in a written operating agreement, a member is obligated to an LLC to perform any promise to contribute cash or property or to perform services, even if he or she is unable to perform because of death, disability or any other reason.

28(b) Unless otherwise provided in a written operating agreement, the obligation of a member to make a contribution or return money or other property paid or distributed in violation of the Act may be compromised only by consent of all members.

32 Upon resignation, a resigning member is entitled to receive any distribution

to which he or she is entitled upon resignation under a written operating agreement. If not otherwise provided in a written operating agreement, a resigning member is entitled to receive, within a reasonable time after resignation, the fair value of his or her LLC interest as of the date of resignation, based on his or her right to share in distributions from the LLC.

33 Except as provided in a written operating agreement, a member, regardless of the nature of his contribution, has no right to demand and receive any distribution from an LLC in any form other than cash. Except as provided in a written operating agreement, a member may not be compelled to accept a distribution of any asset in kind from an LLC to the extent that the percentage of the asset distributed to him or her exceeds a percentage of the asset that is equal to the percentage in which he or she shares in distributions from the LLC.

36 A member may resign as a member of an LLC at the time or upon the occurrence of events specified in the operating agreement and in accordance with the operating agreement. An operating agreement may provide that a member shall not have the right to resign, but regardless of whether it so provides, a member may resign as a member upon not less than six months' prior written notice to the LLC at its office in the Commonwealth, as set forth in the certificate, and to each other member and each manager at their respective addresses as set forth on the records of the LLC.

37 A manager may resign as a manager of an LLC at the time or upon the occurrence of events specified in the operating agreement and in accordance with the operating agreement. An operating agreement may provide that a manager shall not have the right to resign, but regardless of whether it so provides, a manager may resign as a manager upon prior written notice to the LLC at its office in the Commonwealth as set forth in the certificate, and to each member and each other manager at their respective addresses as set forth on the records of the LLC.

39(a) An LLC interest is assignable in whole or in part except as provided in the operating agreement. An assignee shall have no right to participate in the management of the business and affairs of the LLC except upon compliance with any procedure provided for in a written operating agreement or upon the approval of all members other than the assigning member.

41(a) An assignee may become a member upon the approval of all members (other than the assignor), or upon compliance with any procedure provided for in a written operating agreement.

43 With respect to LLCs formed prior to January 1, 1997, except as provided in a written operating agreement, the death, insanity, retirement, resignation, expulsion, bankruptcy or dissolution of a member or the occurrence of any other event that terminates the membership of a member in the LLC dissolves the LLC, unless the LLC is continued either by the consent of all the

remaining members within 90 days following the occurrence of such event, or pursuant to a right to continue stated in a written operating agreement.

56 Except as otherwise provided in a written operating agreement, suit on behalf of the LLC may be brought in the name of the LLC by the following: (a) any member or members (even in an LLC with managers) with the consent of members owning more than 50 percent of the unreturned capital contributions to the LLC (exclusive of the interest of any member who has an interest in the outcome of the suit that is adverse to the interest of the LLC); (b) any manager or managers of the LLC, if the operating agreement vests management of the LLC in one or more managers who are authorized to sue, by the vote of a majority in number of the managers (similarly excluding an interested manager).

60 Unless otherwise provided in a written operating agreement, a consolidation or merger shall be approved by each Massachusetts LLC that is to consolidate or merge by the members, or, if there is more than one class or group of members, by each class or group of members, and in either case, by members who own more than 50 percent of the unreturned contributions to the LLC, determined in accordance with Section 29, owned by all members or by the members in each class or group, as appropriate.

EXHIBIT 7L—Ten Frequently Asked Questions

1. Should my new business be organized as a corporation, a partnership, or some other form of business entity?

Choosing a form of business entity depends to some extent on the type of business and the objectives of the founders. Corporations are the most popular and familiar form of business entity and have a number of advantages, including limited liability, separate and continuing existence, and centralized management; their disadvantages include increased regulatory requirements and the need to observe corporate formalities. While limited partnerships and limited liability companies offer some of the same advantages, as well as greater flexibility in some respects, potential investors, other businesspersons, and the public are often more comfortable dealing with corporations. Limited liability companies, however, have become increasingly more common and do provide flexibility from organizational and tax perspectives.

2. What is an S corporation and how does my business become one?

An election to be treated as an S corporation permits a corporation to be taxed generally in the same manner as a partnership—the tax attributes of income, losses, deductions, and credits are passed through to the corporation's stockholders. Under this tax treatment, the business avoids the "double tax" imposed on the earnings of C corporations and on the sale of C corporations' appreciated assets. The term "double tax" refers to the tax payable first by the corporation relating to its profits and then by the stockholders upon any distribution of earnings or proceeds. In an S corporation, only one level of tax, payable by the stockholders, is imposed on the corporation's profits. To become an S corporation, all the stockholders must sign Treasury Form 2553, which must be filed with the IRS on or before the fifteenth day of the third month of the corporation's taxable year in order for the election to be effective for that year.

3. How much money should/must I put into my corporation for its initial capital?

While a minimum level of initial capitalization is important to ensure that the corporation will be respected as a separate legal entity, there is no fixed dollar level. However, it is important that the business be properly insured against the risks normally attendant to its activities. The founders should look to the requirements of their business plan and put in (or reserve) the amount of money necessary to achieve their initial goals. This may mean setting aside enough money to both set up the business and let it operate until it begins to achieve positive cash flow or matures enough to seek an outside source of funding. Unless the founders confront this issue up front, usually through a detailed business plan, the business may quickly hit a cash crunch that may change the balance of power among the founders or, if there is no more cash to be found, sink the business.

4. Should our investments in the business be structured as debt or as equity?

The answer again depends on the corporation's level of capitalization. If the IRS deems a corporation to be too thinly capitalized and if the debt has certain other characteristics, the IRS may recharacterize debt to stockholders as equity—resulting in the loss of deductions to the corporation (e.g., the normally tax-free repayment of principal would be treated as a taxable dividend). But within the guidelines for an appropriate level of capitalization, there may well be advantages to the stockholders and the corporation from dividing their investment between debt and equity. Furthermore, because of the roles to be played by the founders and their differing levels of wealth, some founders may contribute more cash (while others bring technical expertise, etc.), even though the founders consider themselves equal "partners." It may make sense for a portion of that additional cash to be structured as debt.

5. Is a business plan really necessary?

While there is no legal requirement to have a business plan, a business plan provides an important road map of how a business should be run and what it will need to earn a profit. It is also useful for evaluating and fine-tuning the business after it is established. Although many entrepreneurs regard a business plan as a selling document they need only when courting a bank or investor, the exercise of researching and writing a detailed plan before a business is launched is crucial to the ultimate success of the business. Having said that, there are many successful businesses that were launched without a detailed business plan and many excellent business plans that produced failed businesses. The plan is more a matter of process than result; the exercise serves to reduce risk, or at least allow the founders to acknowledge risks, by critically examining all aspects of the idea.

6. Should I authorize preferred stock in my charter?

It is often a good idea to authorize "blank check" preferred stock in the corporation's charter. This class of stock is labeled "preferred" but has no specified terms. A provision in the charter expressly authorizes the board of directors to set the terms of this stock (such as voting rights, conversion features, special covenants, dividends, redemption rights, etc.) and file a charter amendment creating different series of preferred stock. A blank check provision will allow the company to negotiate with sophisticated investors (such as venture capitalists) for an infusion of capital without requiring a stockholder vote. However, remember that the issuance of preferred stock will immediately terminate the company's status as an S corporation. In Massachusetts, the blank check stock does not have to be described as preferred or common.

7. Should the founders sign a stockholders' agreement?

In most cases, especially if the corporation has elected to be an S corporation, some form of stockholders' agreement is in everyone's best interest. At a minimum, the agreement provides a framework to preserve an S election and provide for the payment of taxes; it should also address delicate questions such as the death, divorce, insolvency, or incapacity of a stockholder and may also address the particular concerns

of the founders, such as board seats, rights of first refusal, call rights, and voting arrangements.

8. Why are so many corporations formed in Delaware?

For many years Delaware has had one of the nation's most permissive and flexible corporation statutes from the standpoint of management—which is a significant advantage for start-up companies that expect to have several rounds of venture financing. Incorporation in Delaware provides a "national" corporate language for legal relations with attorneys, investors, and lenders throughout the country who are much more familiar with Delaware corporate law than Massachusetts corporate law. The Massachusetts Business Corporation Act, G.L. c. 156D, which became effective on July 1, 2004, is based on the Revised Model Business Corporation Act used in many other states. Chapter 156D retains certain aspects of existing Massachusetts practice and case law, however, and these will be unfamiliar to those not well versed in Massachusetts law.

9. What are blue sky laws and do I have to worry about them?

Blue sky laws are the state securities laws that govern the offer and sale of securities, including equity and debt of start-up companies. The laws generally apply to the offer and sale of securities to the residents of a given state. Before beginning efforts to raise capital, the business founders should consult an attorney to advise them on the available exemptions and the requirements of each state in which the company intends to offer its securities. Most states will permit offerings to a limited number of residents, but may impose information and filing requirements on the offeror. *See* G.L. c. 110A.

10. Should I obtain director and officer insurance for my business?

Director and officer insurance can be very comforting to your directors (especially outside directors) and officers but can be expensive or even unavailable to new businesses. While the business is closely held, many of the concerns your directors and officers may have can be addressed by ensuring that the corporation is properly capitalized, observes all corporate formalities, has proper ordinary liability insurance, and has adopted, in the corporation's charter or bylaws, the broadest available indemnity and exculpation provisions. In addition, some companies choose to sign indemnity agreements with each director that go somewhat further than the charter or bylaw provisions and give the director a right of action against the corporation, should he or she suffer damages as a result of his or her service as a director.

Organizing a Business in Massachusetts

Presented by: John F. Cohan, Esq.
MCLE
August 25, 2022

Organizing a Business in Massachusetts

Introduction

- General Background
- Topic Coverage

Organizing a Business in Massachusetts

Four Major Coverage Topics

- Choice of Entity
- IP/Confidentiality
- Contracts: Key Employees, Shareholders (Members), Partners, Customers
- Other Misc Areas of Concern – Business Name, Bank Account, Insurance, Employees, Certain Licenses/Permits for the Business

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Choice of Business Entity

- Corporation
- Partnership
- LLC

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Corporation

- C-Corp
- S-Corp

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C-Corp

- Filing Articles of Organization – www.mass.gov – Secretary of State (Commonwealth) (SOS)
- Bylaws
- Liability Protection
- 2-tiered tax structure
- Very little restrictions

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S-Corp

- Same SOS filing requirements as C-Corp; Bylaws
- S- Election Required
- Same Liability Protection as C-Corp
- Pass-through tax structure
- Certain restrictions

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Partnership

- General
- Limited
- Limited Liability

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General Partnership

- No SOS Filing Required
- Agreement recommended
- No Liability Protection

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Limited Partnership

- SOS Filing Required – Limited Partnership Certificate
- Agreement Recommended
- 1 GP; 1 LP
- GP has full liability; LP has limited liability

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Limited Liability Partnership

- SOS Filing Required – Limited Liability Partnership Certificate
- Agreement Recommended
- All partners have limited liability
- Mainly utilized by professionals – law firms, accounting firms

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Limited Liability Company (LLC)

- SOS Filing Required – Certificate of Formation
- Operating Agreement
- All members have limited liability
- Maximum Flexibility; Limited Governance

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Intellectual Property/Confidentiality Matters

- IP Protection – Patents, Trademarks, Copyrights
- Trade Secrets
- Non-Disclosure Agreements

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IP Protection

- Patents
  - Patentability; Cost-Benefit Analysis for Business
- Trademarks
  - Name protection; Branding
- Copyrights

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Trade Secrets

- Non-public
- Recognizing
- Ways to protect

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Non-Disclosure Agreements

- Potential Customers and Business Partners
- Employees and Independent Contractors

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Key Contracts

- Shareholders, Members, Key Employees
- Business Partners; Customers

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Miscellaneous Considerations

- Entity name
- Bank account
- Insurance
- Employees
- Applicable/relevant licenses and permits

THANK YOU!

- John F. Cohan, Esq.
- Cohanjohn@yahoo.com
- Jcohan@gaynorlawgroup.com
- (978) 621-2363 (mobile)