*See the Note on Use for “Certain Modifications to the Form for an LLC to Be Treated as an S Corporation for Tax Purposes.”*

**OPERATING AGREEMENT**

**OF**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_LLC,**

**A COLORADO LIMITED LIABILITY COMPANY**

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

MEMBERSHIP INTERESTS OF THIS COMPANY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR THE SECURITIES LAWS OF ANY STATE, AND MAY NOT BE OFFERED FOR SALE, SOLD, OR OTHERWISE TRANSFERRED UNLESS SUBSEQUENTLY REGISTERED UNDER SUCH ACT OR APPLICABLE STATE SECURITIES LAWS OR UNLESS AN EXEMPTION FROM SUCH REGISTRATION IS AVAILABLE. THIS OPERATING AGREEMENT CONTAINS ADDITIONAL RESTRICTIONS ON SALE AND OTHER TRANSFERS OF MEMBERSHIP INTERESTS.

Table of Contents

**ARTICLE 1. DEFINITIONS 6**

1.1 “Affiliate” 6

1.2 “Agreement” 6

1.3 “Articles” 6

1.4 “Assignee” 6

1.5 “Bank” 6

1.6 “Business” 6

1.7 “Buy-Out Price” 6

1.8 “Capital Account” 6

1.9 “Capital Contribution” 7

1.10 “Class A Member” and “Class B Member” 7

1.11 “Class A Units” and “Class B Units” 7

1.12 “Code” 7

1.13 “Company” 7

1.14 “Company Representative” 7

1.15 “Confidential Information” 7

1.16 “Deficit Capital Account” 8

1.17 “Distributable Cash” 9

1.18 “Economic Interest” 9

1.19 “Economic Interest Owner” 9

1.20 “Equity Owner” 9

1.21 “Fair Market Value” 9

1.22 “Gift” 10

1.23 “Gifting Owner” 10

1.24 “Governmental Authority” 10

1.25 “LLC Act” 10

1.26 “Majority Interest 10

1.27 “Manager” 10

1.28 “Maximum Tax Liability” 10

1.29 “Member” 10

1.30 “Member Nonrecourse Debt Minimum Gain” 11

1.31 “Membership Interest” 11

1.32 “Net Profits and Net Losses” 11

1.33 “Notice” 12

1.34 “Partnership Minimum Gain” 12

1.35 “Percentage Economic Interest” 12

1.36 “Percentage Membership Interest” 12

1.37 “Person” 12

1.38 “Quorum” 12

1.39 “Restricted Period” 12

1.40 “Selling Member” 12

1.41 “Tax Obligation Equity Owner” 12

1.42 “Terminating Event” 12

1.43 “Three-Fourths Interest” 12

1.44 “Transferred Interest” 13

1.45 “Treas. Reg.” 13

1.46 “Units” 13

1.47 “Vote” 13

1.48 “2015 Act” 13

**ARTICLE 2. FORMATION OF COMPANY 14**

2.1 Formation 14

2.2 Name 14

2.3 Principal Place of Business 14

2.4 Term 14

2.5 Tax Classification as a Partnership 14

**ARTICLE 3. BUSINESS OF COMPANY 14**

3.1 Permitted Businesses 14

3.2 Specific Undertakings 14

**ARTICLE 4. NAMES AND ADDRESSES OF MEMBERS 14**

**ARTICLE 5. RIGHTS AND DUTIES OF MANAGER 15**

5.1 Management 15

5.2 Number, Tenure, and Qualifications 15

5.3 Certain Powers of Manager 15

5.4 Limitations on Authority 17

5.5 Liability for Certain Acts 18

5.6 Duty to the Company 18

5.7 Related-Party Transactions 19

5.8 Elimination of Fiduciary Duties 20

5.9 Removal and Resignation 20

5.10 Vacancies 20

5.11 Compensation, Reimbursement, and Organization Expenses 21

**ARTICLE 6. RIGHTS AND OBLIGATIONS OF MEMBERS AND ASSIGNEES 21**

6.1 Limitation of Liability 21

6.2 Company Debt Liability 21

6.3 Member Guarantee Provision 21

6.4 Loans and Interest-Bearing Advances 22

6.5 Members and Assignees Have No Agency Authority 22

6.6 Units Are Not Governed by Article 8 22

6.7 Expulsion of Members 22

6.8 Members and Assignees Duty to Provide Information 22

**ARTICLE 7. MEETINGS OF MEMBERS 22**

7.1 Meetings 22

7.2 Manner of Acting 23

7.3 Proxies 24

**ARTICLE 8. CONTRIBUTIONS TO THE COMPANY AND CAPITAL ACCOUNTS 24**

8.1 Capital Contributions 24

8.2 Additional Capital Contributions 24

8.3 Issuance of Additional Units and Options to Purchase Units 24

8.4 Capital Accounts 25

8.5 Withdrawal or Reduction of Economic Interest Owners’ Contributions to Capital 26

8.6 Limitation of Distributions 26

8.7 No Preemptive Rights 26

8.8 Carry Over Capital Account 26

**ARTICLE 9. ALLOCATIONS, INCOME TAX, DISTRIBUTIONS, AND REPORTS 26**

9.1 Allocations of Net Profits and Net Losses 26

9.2 Distributions 31

9.3 Accounting Principles 32

9.4 Interest on and Return of Capital Contributions 32

9.5 Accounting Period 32

9.6 Withholding 32

9.7 Indemnification and Reimbursement for Payments on Behalf of a Member 33

9.8 Elections 35

9.9 Inspection of Books and Records 35

9.10 Reports 35

**ARTICLE 10. DISSOLUTION 35**

10.1 Dissolution 35

10.2 Winding Up, Liquidation, and Distribution of Assets 36

10.3 Return of Contribution Nonrecourse to Other Members 37

**ARTICLE 11. BUY-SELL PROVISIONS 38**

11.1 Transfers Void; Effect 38

11.2 Effect of Termination Event 43

11.3 Buy-Out Price 43

11.4 Payment of Buy-Out Price 44

11.5 Admission of Assignees; Rights of Non-Admitted Assignees 44

11.6 Additional Conditions to Recognition of Transferee 45

11.7 Gifts of Ownership Interests 46

11.8 Voting Deadlock Buy-Sell Provision 47

**ARTICLE 12. DISPUTE RESOLUTION 47**

12.1 Disputes 47

12.2 Negotiation 48

12.3 Mediation 48

**ARTICLE 13. GENERAL PROVISIONS 48**

13.1 Amendment and Power of Attorney 48

13.2 Confidentiality 52

13.3 Unregistered Interests 53

13.4 Waivers Generally 54

13.5 Equitable Relief 54

13.6 Remedies for Breach 54

13.7 Notices 55

13.8 Deemed Notice 55

13.9 Costs 55

13.10 Indemnification 55

13.11 Partial Invalidity 56

13.12 Entire Agreement 56

13.13 Benefit 57

13.14 Binding Effect 57

13.15 Further Assurances 57

13.16 Headings 57

13.17 Terms 57

13.18 Legal Representation 58

13.19 Governing Law 58

13.20 Creditors; No Third-Party Beneficiaries 58

13.21 Counterparts; Electronic Signature 58

Exhibit A - Members, Class, Units, Capital Contributions

**OPERATING AGREEMENT**[[1]](#footnote-2)

This Agreement is entered into effective as of the \_\_\_\_\_ day of \_\_\_\_\_ 20xx, by and among the Manager and the Members of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ LLC, a Colorado limited liability company whose signatures appear on the signature page of this Agreement and supersedes all prior understandings (written or oral) with respect to the subject matter of this Agreement.

# ARTICLE

# DEFINITIONS

The following terms used in this Agreement shall have the following meanings (unless otherwise expressly provided herein):

1.1 “Affiliate” means any Person controlling, controlled by, or under common control with a Person, including a Person controlled separately by a Member or collectively by the Members.[[2]](#footnote-3)

1.2 “Agreement” means this Operating Agreement of the Company as originally adopted and as it may be amended from time to time.

1.3 “Articles” means the Articles of Organization of the Company as filed with the Secretary of State of Colorado as the same may be amended from time to time.

1.4 “Assignee” means the owner of an Economic Interest who is not a Member.

1.5 “Bank” means a commercial bank or savings and loan association or other financial institution that is in the business of making loans to commercial enterprises that is not affiliated with a Member. When used in the preceding sentence, the term “not affiliated with” means that no Member or family member living in the home of such Member is an officer or director of the Bank, or (directly or indirectly) owns more than 1% of the outstanding equity interest in such Bank.

1.6 “Business” means \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ OR [the business of the Company as it may be established from time to time in any business plan, budget, operating plan, by resolution of the Manager, or by the Company’s operations. [further description?].[[3]](#footnote-4)

1.7 “Buy-Out Price” is defined in Section 11.3 of this Agreement.

1.8 “Capital Account” means, with respect to any Member or Assignee, the Capital Account maintained for such Person in accordance with the requirements of the Code including (without limitation) § 704(b) thereof and Treas. Reg. § 1.704-1(b) thereunder.[[4]](#footnote-5) In the event the Manager shall determine that it is prudent to modify the manner in which the Capital Accounts, or any debits or credits thereto (including, without limitation, debits or credits relating to liabilities which are secured by contributions or distributed property or which are assumed by the Company or its Members) are computed in order to comply with such Regulations, the Manager may make such modification. The Manager also shall (i) make any adjustments that are necessary or appropriate to maintain equality between the Capital Accounts of the Members and Assignees and the amount of Company capital reflected on the Company’s balance sheet, as computed for book purposes, in accordance with Treas. Reg. § 1.704-1(b)(2)(iv)(g), and (ii) make any appropriate modifications in the event unanticipated events might otherwise cause this Operating Agreement not to comply with Treas. Reg. § 1.704-1(b), provided that, to the extent that any such adjustment is inconsistent with other provisions of this Operating Agreement and would have a material adverse effect on any Member, such adjustment shall require the consent of such Member.

1.9 “Capital Contribution” means any contribution to the capital of the Company in cash or property by a Member or other holder of an Economic Interest whenever made. “Initial Capital Contribution” means the initial contribution of any Member to the capital of the Company pursuant to this Operating Agreement as shown on Exhibit A, attached to this Agreement. “Additional Capital Contribution” shall include all Capital Contributions to the Company not including any Person’s Initial Capital Contribution. The Company will be responsible for the accounting for, and the identification of, Capital Contributions in the Company’s financial statements. No Member may object to the accounting for Capital Contributions more than 12 months after the date the Capital Contribution to which objection is being made was first reflected in the Company’s financial statements.[[5]](#footnote-6)

1.10 “Class A Member” and “Class B Member” are defined in Section 1.28 of this Agreement.

1.11 “Class A Units” and “Class B Units” are defined in Section 1.45 of this Agreement.

1.12 “Code” means the United States Internal Revenue Code of 1986 as amended from time to time, and any successor legislation.

1.13 “Company” means \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ LLC.

1.14 “Company Representative” means the Manager, a Member, or another person designated by the Manager for purposes of Code § 6223 (or designated in such manner as may be prescribed pursuant to Code § 6223). The Company Representative must be a Member[[6]](#footnote-7) having a substantial presence in the United States and has sole authority to act on behalf of the Company in connection with audits and adjustments proposed or required by the Internal Revenue Service.[[7]](#footnote-8) The Company Representative is also the Tax Matters Partner formerly required by Code § 6231. The Company Representative shall have the Power of Attorney described in Section 13(f) of this Agreement.

1.15 “Confidential Information”

 means any and all information of or belonging to or developed by the Company (or Persons on behalf of the Company) that is of a confidential, proprietary, or secret nature, whether copyrighted, in paper format, digital format, blueprint, spreadsheet, photograph, or other format capable of conveying information which is or may be either applicable to or related in any way to:

the Business, operations, assets, or financial condition, present or future, of the Company;

the Company’s prospective or actual debt or equity partners, investors, or participants;

Persons with whom or which the Company contracts or proposes or contemplates to contract;

due diligence information that the Company has developed or received from others with respect to actual and prospective business combinations, acquisitions, dispositions, or other business transactions involving or that may involve the Company;

operational information regarding the products, processes, or services that are being offered or that may be offered in the future as a part of the Business;

computer programs, technical drawings, algorithms, ideas, schematics, trade secrets, processes, formulas, data, know-how, improvements, inventions (whether patentable or not), techniques, marketing plans, pricing information, forecasts, and strategies, and other information concerning the operational information described in the preceding paragraphs or any aspect of the Business; and

all information of a like nature to the foregoing owned by any other Person and furnished to the Company by such other Person pursuant to an undertaking by the Company to maintain the same in confidence.

 shall not include information that a Person can reasonably demonstrate in writing is known to, or becomes generally available to, such Person or to the public without breach of any agreement imposing an obligation of confidentiality.

1.16 “Deficit Capital Account” means, with respect to any Member, the deficit balance, if any, in such Member’s Capital Account as of the end of the relevant fiscal year (or such other period at which time Capital Accounts are being determined), after giving effect to the following adjustments:

(a) increase such Capital Account by:

(i) any amount which such Member is obligated to restore pursuant to any provisions of this Agreement or is deemed obligated to restore under Treas. Reg. § 1.704-1(b)(2)(ii)(c), as well as any additions to such Capital Account pursuant to the next to last sentence of Treas. Reg. § 1.704-2(g)(1) or the next to last sentence of Treas. Reg. § 1.704-2(i)(5), after taking into account under such regulations any changes during such year in Partnership Minimum Gain and in Member Nonrecourse Debt Minimum Gain;

(ii) the amount of deductions and losses attributable to any outstanding recourse liabilities owed by the Company to such Member and for which no other Member bears any economic risk of loss (within the meaning of Treas. Reg. § 1.752-2); and

(iii) the amount of deductions and losses attributable to such Member’s share of outstanding recourse liabilities owed by the Company to Persons other than Members and for which no Member bears any economic risk of loss (within the meaning of Treas. Reg. § 1.752-2).

(b) decrease such Capital Account by the items described in Treas. Reg. § 1.704-1(b)(2)(ii)(d)(4), (5) and (6).

This definition of Deficit Capital Account is intended to comply with the provisions of Treas. Reg. §§ 1.704-1(b)(2)(ii)(d) and 1.704-2 and will be interpreted consistently with those provisions.

1.17 “Distributable Cash” means all cash, revenues, and funds received by the Company, less the sum of the following to the extent paid or set aside by the Company: (i) all principal and interest payments on indebtedness of the Company and all other sums appropriately paid to lenders; (ii) all cash expenditures incurred incident to the normal operation of the Business; (iii) compensation, reimbursements, and guaranteed payments to be made to the Manager or Members (not including distributions made or to be made pursuant to Section 9.2 of this Agreement); and (iv) such reserves as the Manager reasonably determines to be necessary to the proper operation of the Business.

1.18 “Economic Interest” means a Member’s or Assignee’s share (as a result of such person’s ownership of one or more outstanding Units) of the Company’s Net Profits and Net Losses, capital, and distributions of the Company’s assets pursuant to this Operating Agreement and the LLC Act, but shall not include any right to participate in the management or affairs of the Company, including the right to vote on, consent to, or otherwise participate in any decision of the Members or Manager unless the owner of the Economic Interest is a Member.

1.19 “Economic Interest Owner” means a Person who holds an Economic Interest but who has not been admitted as a Member. The limited rights of an Economic Interest Owner are described in Section 11.5(b) of this Agreement.

1.20 “Equity Owner” means an Economic Interest Owner or a Member.

1.21 “Fair Market Value” as to any property means the price at which a willing seller would sell and a willing buyer would buy such property having full knowledge of the relevant facts, in an arm’s-length transaction without time constraints, and without being under any compulsion to buy or sell.[[8]](#footnote-9)

1.22 “Gift” means a gift, devise, bequest, or other transfer for no consideration, whether or not by operation of law, except in the case of a transfer of an Economic Interest in connection with a case under the United States Bankruptcy Code.

1.23 “Gifting Owner” means any Assignee or Member who Gifts all or any part of such Person’s Economic Interest.

1.24 “Governmental Authority” is defined in Section 9.6 of this Agreement.

1.25 “LLC Act” means the Colorado Limited Liability Company Act at Colo. Rev. Stat. §§ 7-80-101 and following and applicable provisions of the Colorado Corporations and Associations Act at Colo. Rev. Stat. §§ 7-90-101 and following.

1.26 “Majority Interest” means Members holding more than 50% of the Percentage Membership Interests[[9]](#footnote-10) entitled to Vote that are present at a meeting in person or by proxy at which a Quorum is present or, if separate Class votes are expressly required with respect to any matter by this Agreement or the LLC Act or requested by the Manager where such request is permitted by this Agreement, Members holding more than 50% of the aggregate Percentage Membership Interestsattributable to each such Class entitled to Vote separately on such matter.

1.27 “Manager” means one or more Managers. The initial Manager is named in Section 5.2. References to the Manager in the singular or as him, her, it, itself, or other like references shall also, where the context so requires, be deemed to include the plural or the masculine or feminine reference, as the case may be. A Manager need not be a Member of the Company but must be a natural individual.[[10]](#footnote-11)

1.28 “Maximum Tax Liability” is defined in Section 9.2(b) of this Agreement.

1.29 “Member” means each of the parties who executes this Agreement as a Member either at the effective date of this Agreement or thereafter. Initially there will be two classes of Members.

The initial “Class A Members” are as set forth on Exhibit “A” to this Agreement.

There is no initial “Class B Member.”

To the extent a Manager has acquired a Membership Interest in the Company, such Manager will have all the rights of a Member with respect to such Membership Interest, and the term “Member” as used in this Agreement includes a Manager to the extent such Manager has acquired such Membership Interest in the Company. If a Person is a Member immediately prior to the acquisition by such Person of an Economic Interest assigned to such Person by a Member or Assignee, such Person shall have all the rights of a Member with respect to such acquired Economic Interest. No Member may assign an Economic Interest (or any portion thereof) while retaining the right to Vote associated with such Economic Interest.[[11]](#footnote-12)

1.30 “Member Nonrecourse Debt Minimum Gain” means “partner nonrecourse debt minimum gain” as defined in Treas. Reg. § 1.704-2(2).

1.31 “Membership Interest” means a Member’s entire interest in the Company including the Units such Member owns, the Economic Interest associated with such Units, the right to Vote associated with such Units, and such other rights and privileges that the Member may enjoy by being a Member. Class A Members will hold Class A Membership Interests; Class B Members will hold Class B Membership Interests. At the date of this Operating Agreement, there are no subsequent classes of Membership Interests.

(a) Class A Membership Interests will be entitled to Vote on all matters presented to the Company’s Members for approval. Class B Membership Interests will not be entitled to Vote on matters presented to the Company’s Members for approval except to the extent the consent of the Class B Members is specifically requested by the Manager. Subsequent classes of Membership Interests will be entitled to Vote to the extent provided in the resolutions of the Manager establishing such classes or otherwise and may dilute the Vote of the other classes then outstanding. A Member’s right to participate in the Company as a Member (including the right to exercise the right to Vote on any matter presented to the Members for consideration) shall be void to the extent the Vote exceeds the Member’s Percentage Membership Interest.[[12]](#footnote-13)

(b) The Economic Interests of Class A Membership Interests and Class B Membership Interests shall be equal to their Percentage Economic Interest. Subsequent classes of Membership Interests shall have an Economic Interest as provided in the resolutions of the Manager establishing such classes and may dilute the Economic Interest of the other classes then outstanding.[[13]](#footnote-14)

(c) With the exception of the right to Vote, it is intended that Class A Membership Interests and Class B Membership Interests will be treated equally.

1.32 “Net Profits and Net Losses” means for each taxable year of the Company an amount equal to the Company’s net taxable income or loss for such year as determined for federal income tax purposes (including separately stated items) in accordance with the accounting method and rules used by the Company and in accordance with Code § 703 with the following adjustments:

(a) Any items of income, gain, loss, and deduction allocated to all holders of Economic Interests pursuant to Section 9.1(b)[[14]](#footnote-15) of this Agreement shall not be taken into account in computing Net Profits and Net Losses;

(b) Any income of the Company that is exempt from federal income tax and not otherwise taken into account in computing Net Profits and Net Losses (pursuant to this definition) shall be added to such taxable income or loss;

(c) Any expenditure of the Company described in Code § 705(a)(2)(B) and not otherwise taken into account in computing Net Profits and Net Losses (pursuant to this definition) shall be subtracted from such taxable income or loss;

(d) Gain or loss resulting from any disposition of any Company asset contributed to the Company by a Member with respect to which gain or loss is recognized for federal income tax purposes shall be computed with reference to the Fair Market Value of the asset disposed of, determined as of the date such asset was contributed to the Company, notwithstanding that the adjusted tax basis of such asset differs from its Fair Market Value.

1.33 “Notice” means written notice actually or deemed given pursuant to Section 13.7 or Section 13.8 of this Agreement.

1.34 “Partnership Minimum Gain” has the meaning ascribed to such term in Treas. Reg. § 1.704-2(b)(2) and as computed pursuant to Treas. Reg. § 1.704-2(d).

1.35 “Percentage Economic Interest” means the number of Units held by a Person divided by the total number of Units then outstanding, multiplied by 100.

1.36 “Percentage Membership Interest” means the number of Units held by any Member divided by the total number of Units then outstanding held by all Members, multiplied by 100.[[15]](#footnote-16) If Voting is to be conducted by Class, “Percentage Membership Interest” means the number of Units in any class held by a Member divided by the total number of Units in that Class held by all Members, multiplied by 100.

1.37 “Person” means any individual or entity, and the heirs, executors, administrators, legal representatives, successors, and assigns of any Person where the context so permits.

1.38 “Quorum” means the attendance, in person or by proxy, of holders of more than one-third of the Percentage Membership Interest.

1.39 “Selling Owner” means any Member or Assignee who sells, assigns, or otherwise transfers for consideration all or any portion of the Units owned by such Person, and is specifically defined in Section 11.1(c) as used in Section 11.1.

1.40 “Tax Obligation Equity Owner” is defined in Section 9.6 of this Agreement.

1.41 “Terminating Event” is defined in Section 11.1(a) of this Agreement.

1.42 “Three-Fourths Interest” means Members holding more than 75% of the aggregate Percentage Membership Interests[[16]](#footnote-17) entitled to Vote on the matter being presented for consideration or, if separate Class votes are expressly required with respect to any matter by this Agreement or the LLC Act or requested by the Manager where such request is permitted by this Agreement, Members holding more than 75% of the aggregate Percentage Membership Interestsattributable to each such Class entitled to vote separately on such matter.

1.43 “Transferred Interest” is defined in Section 11.1(a) of this Agreement.

1.44 “Treas. Reg.” includes proposed, temporary, and final regulations promulgated under the Code in effect as of the date of filing the Articles and the corresponding sections of any regulations subsequently issued that amend or supersede such regulations.

1.45 “Units” is the measure by which each holder’s Percentage Economic Interest and Percentage Membership Interest is determined, even though such ownership may be different from (more or less than) the holder’s proportionate Capital Account.[[17]](#footnote-18) The Company is not obligated to issue certificates to represent any Units. Only Units owned by Members entitled to Vote may Vote on any matter as to which this Operating Agreement requires or permits a Vote.[[18]](#footnote-19) A transfer of Units will include a transfer of the Capital Account that is attributable to such Units as of the effective date of such transfer determined in accordance with Section 11.6(b) of this Agreement, and such will be determined on a proportionate basis if fewer than all of the Units owned by any Member or Assignee are being transferred by such Member or Assignee.

* 1. “Class A Units” means Units held by a Class A Member in the Member’s capacity as a Class A Member and shall be entitled to Vote on matters presented to the Members for approval; and
	2. “Class B Units” means Units held by a Class B Member in the Member’s capacity as a Class B Member and shall not be entitled to Vote unless the right to Vote is expressly granted by the Manager in the resolutions by which a matter is submitted to the Members for consideration.
	3. Subsequent classes of Units may be created by the Manager as provided in this Agreement and shall be designated by letters or in any other way the Manager may deem appropriate. Such Units, when authorized, shall mean Units held by a Member in such class or classes in the Member’s capacity as a Member, and shall hold such Economic Interest, right to Vote, and other rights as may be specified by the Manager in the resolutions establishing the class.

1.46 “Vote” includes not only casting a vote at a meeting but also the receipt of sufficient written consents (by facsimile, electronic mail, courier, or otherwise) to adopt a measure were it presented at a meeting.

1.47 “2015 Act” is defined in Section 9.6 of this Agreement.

# ARTICLE

# FORMATION OF COMPANY

2.1 Formation. \_\_\_\_\_\_\_\_\_\_\_ formed a Colorado limited liability company on \_\_\_\_\_\_\_\_\_, 20xx, by delivering the Articles to the Colorado Secretary of State in accordance with and pursuant to the LLC Act and the Colorado Corporations and Associations Act.[[19]](#footnote-20)

2.2 Name. The name of the Company is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ LLC.

2.3 Principal Place of Business. The principal place of Business of the Company within the State of Colorado is \_\_\_\_\_\_\_\_\_\_\_ Colorado 80\_\_\_. The Company may locate its places of Business at any other place or places as the Manager may from time to time deem advisable.

2.4 Term. The term of the Company shall be perpetual, unless the Company is earlier dissolved in accordance with either the provisions of this Agreement or the LLC Act.

2.5 Tax Classification as a Partnership. The Members intend to establish an entity that is subject to taxation as a partnership.

# ARTICLE

# BUSINESS OF COMPANY

3.1 Permitted Businesses. The Company is authorized:

(a) To accomplish any lawful business whatsoever or which shall at any time appear conducive to or expedient for the protection or benefit of the Company, its Business, and its assets;

(b) To exercise all other powers necessary to or reasonably connected with the Company’s Business which may be legally exercised by limited liability companies under the LLC Act; and

(c) To engage in all activities necessary, customary, convenient, or incident to any of the foregoing.[[20]](#footnote-21)

3.2 Specific Undertakings. [should there be any specific requirements?][[21]](#footnote-22)

# ARTICLE

# NAMES AND ADDRESSES OF MEMBERS

The names and addresses of the Members are as set forth in Exhibit A to this Agreement, as Exhibit A may be amended from time to time. The Manager is authorized to and shall amend Exhibit A from time to time as necessary to ensure its accuracy

# ARTICLE

# RIGHTS AND DUTIES OF MANAGER

5.1 Management. The Business and affairs of the Company shall be managed by its Manager.[[22]](#footnote-23) The Manager, acting as a board of managers if there is more than one Manager,[[23]](#footnote-24) shall have full and complete authority, power, and discretion to manage and control the business, affairs, and properties of the Company, to make all decisions regarding those matters, and to perform any and all other acts or activities customary or incident to the management of the Company’s business.[[24]](#footnote-25)

5.2 Number, Tenure, and Qualifications.

(a) The Company shall initially have \_\_\_\_\_ Managers. The Managers are: \_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_, and \_\_\_\_\_\_\_\_\_\_\_\_\_. The Managers shall be appointed from time to time by the affirmative Vote of the Members holding at least a Majority Interest.

(b) A Manager shall not be required to stand for election at any time. If any Manager resigns, is removed pursuant to Section 5.9 of this Agreement, or otherwise ceases to function as a Manager, the Members of the Class entitled to Vote may, by the affirmative Vote of a Majority Interest, replace such Person.

(c) Each Manager shall hold office until the Manager’s death, resignation, or removal pursuant to Section 5.9 of this Agreement.

(d) The Managers may hold meetings within or outside of the state of Colorado, in person or by telephone, internet, or other form of telecommunication, by which every participant may hear every other participant.[[25]](#footnote-26) Meetings may be called by any Manager upon at least two days’, but not more than 30 days’, written notice. Participation by a Manager in a meeting constitutes that Manager’s waiver of notice of the meeting unless that Manager, at the beginning of the meeting, objects to the holding of the meeting due to lack of proper notice.

(e) Any action that may be taken by Managers at a meeting may be taken without a meeting if such action is approved in writing by the number of Managers that would be required to approve such action at a duly held meeting, provided that the Manager gives notice of the action so taken to all other Managers not approving such action in writing within 7 days after such written action is taken.

5.3 Certain Powers of the Manager.

(a) Without limiting the generality of Section 5.1 of this Agreement (but subject to other limitations contained in this Agreement), the Manager shall have power and authority on behalf of the Company and without a Vote of the Members being necessary to do and perform all acts as the Manager determines to be necessary or appropriate to the conduct of the Business. Unless a greater percentage is required, Managers may act by Vote of a majority of the Managers then in office.[[26]](#footnote-27)

(b) The Managers may authorize the issuance of additional Units (including, without limitation, Class B Units) as contemplated in Section 8.3 of this Agreement.

(c) Notwithstanding the provisions of the LLC Act to the contrary, no Manager has the authority to act on behalf of the Company unless authorized to do so by a resolution of the Managers.[[27]](#footnote-28) Any Person dealing with the Company may rely (without duty of further inquiry) upon a certificate signed by all Managers as to:

 The identity of any Manager or owner of any Unit, and whether such owner is a Member;

 The existence or non-existence of any fact or facts which constitute a condition precedent to acts on behalf of the Company by any Manager or which are in any other manner germane to the affairs of the Company; or

 The Persons who are authorized to execute and deliver any instrument or document of the Company.

1. The Manager (or the Members in the absence of any Manager) may (but are not required to) appoint officers for the Company. When appointing officers, the Manager may delegate to any one or more of the officers such of the Manager’s authority under this Agreement as the Manager (or the Members in the absence of any Manager) may determine to be appropriate.[[28]](#footnote-29) In the absence of any Manager or any officer, the Members may elect a Manager or an officer to act on behalf of the Company pursuant to this Agreement.[[29]](#footnote-30)
2. The Manager shall, not less often than annually, prepare a budget and operating plan, which will set forth in appropriate detail the Company’s anticipated activities, expenditures, and accomplishments during such period of time. The budget and operating plan will set forth specifically the amount, payee, and timing of all anticipated payments to Affiliates. The Manager shall amend the budget and operating plan when material changes occur and otherwise as the Manager determines appropriate or necessary. The Manager shall provide a copy of the budget and operating plan and each amendment thereto or modification thereof to each Member.
3. The Manager may establish a Company advisory committee (Advisory Committee) consisting of two or more Members, beneficiaries of trusts that are Members, or legal, financial, or other advisors to the Company, the Manager or any Member. If established, the Advisory Committee may make recommendations to or otherwise advise and consult with the Manager regarding the business and operation of the Company, but the Advisory Committee may not take any action on behalf of the Company or compel the Manager or any Member to take any action. Advisory Committee members are entitled to payment from the Company for their reasonable expenses of attending Advisory Committee meetings.[[30]](#footnote-31)
4. Any Manager may take the following actions on behalf of the Company without further authorization from the Manager or the Members:[[31]](#footnote-32)

(i) Deposit any funds received by the Company in the Company’s bank accounts or accounts at other financial institutions;

(ii) Execute on behalf of the Company checks to satisfy regularly recurring obligations of the Company;

(iii) Delegate to employees responsibility for the day-to-day management and operation of the Company’s affairs in accordance with authorization previously given by the Manager;

(iv) Open, manage, and close bank accounts or accounts at other financial institutions on behalf of the Company;

(v) Execute letters of intent or memoranda of understanding regarding general business terms of transactions to be considered by the Company provided that such letters or memoranda are non-binding on the Company (except with respect to confidentiality terms, return of due diligence information, and the requirement that each party bear its own expenses);

(vi) Purchase liability or other insurance with respect to the Company’s assets and activities, including without limitation liability insurance with respect to the acts and omissions of the Manager and the officers of the Company; and

(vii) Take any action specifically authorized by the Manager or allocated to such Manager in any operating plan or budget adopted by the Manager.

(h) No Manager mayappoint another Person to act as proxy for the Manager in making decisions, casting votes, or executing statements of consent in such Person’s capacity as Manager.[[32]](#footnote-33)

(i) A Manager acting alone or with the other Managers may incur and/or cause the Company to expend, or cause the Company to be obligated for an amount (whether in a single transaction or through a series of related transactions) up to an aggregate of $\_\_\_\_\_\_ for the purpose of carrying on the Business of the Company whether or not included in the budget and operating plan without the need for a vote of Members.

5.4 Limitations on Authority.[[33]](#footnote-34) Notwithstanding any other provision of this Agreement or § 7-80-405 of the LLC Act, no Manager shall cause or commit the Company to do any of the following (whether or not for the purposes of the Business of the Company) without the Vote of the Managers then in office and a Vote of Three-Fourths Interest:

(a) sell all its assets as part of a single transaction or plan, or

(b) enter into a transaction with an Affiliate, other than a wholly owned subsidiary of the Company, where the amount to be paid to or received from the Affiliate is greater than $25,000 per year not contemplated herein or in any operating plan or budget adopted as contemplated in Section 5.3(e);[[34]](#footnote-35) or

(c) mortgage, pledge, or grant a security interest (collectively, “pledge”) in any property of the Company not in the ordinary course of Business; or

(d) lend money to or guarantee or become surety for the obligations of any Person other than a wholly owned subsidiary of the Company, except in connection with a sale/leaseback transaction.

5.5 Liability for Certain Acts.

(a) Each Manager shall perform the Manager’s duties as Manager in good faith, in a manner the Manager reasonably believes to be in the best interests of the Company, and with such care as an ordinarily prudent Person in a like position would use under similar circumstances.[[35]](#footnote-36) A Manager who so performs the duties as Manager shall not have any liability to the Company or the other Members by reason of being or having been a Manager of the Company. The Manager does not, in any way, guarantee the return of the Capital Contributions of any Member or Assignee, or a profit from the operations of the Company. The Manager shall not be liable to the Company or to any Member or Assignee for any loss or damage sustained by the Company or any Member or Assignee, unless the loss or damage shall have been the result of fraud, deceit, gross negligence, willful misconduct, a violation of the contractual duty of good faith and fair dealing, or a violation of the Manager’s obligations under Section 5.8(b) of this Agreement.

(b) If any Manager incurs a debt or obligation on behalf of the Company or takes any action beyond such Person’s authority as set forth in this Agreement, such Manager shall be solely responsible for any and all resulting damages to the Company and to the other Members.

5.6 Duty to the Company.

(a) Persons serving as Manager and officers of the Company are expected to devote such time and effort to the Business as they determine to be appropriate or necessary in the circumstances. This provision is for the benefit of the Company and may only be enforced by the Company; the Members and Assignees have no right to enforce this provision on their own behalf.

(b) Except as otherwise agreed in writing between such Person and the Manager, no Person who is a Member (other than a Manager) shall be required to devote any time to the management of the Company, and such Person may have other business interests and may engage in other activities in addition to those relating to the Company.

5.7 Related-Party Transactions.[[36]](#footnote-37)

(a) The Manager shall have the right and responsibility from time to time as necessary and appropriate to enter into transactions between the Company and related parties, including the Manager or any Member or any Affiliate of either or of the Company, provided such transactions adequately compensate the related party for the services being provided or the assets being used or acquired without unreasonable charges to the Company for such services or assets. Among the related-party transactions contemplated are the following (which list is not intended to be exclusive of other possible related-party transactions):

(i) To the extent the Company uses office or other space leased by a related party, the Company may reimburse the related party for reasonable direct and indirect costs of the space attributable to the Company’s usage;

(ii) To the extent the Company uses general or administrative services or equipment provided by a related party, the Company may reimburse the related party for reasonable direct and indirect costs of the usage of such general or administrative services, or such equipment;

(iii) To the extent the Company uses personnel employed by a related party to conduct the Business of the Company, the Company may reimburse the related party for reasonable direct and indirect costs for such personnel;

(iv) To the extent the Company provides personnel employed by it to provide services to or for the benefit of a related party, the Company may seek reimbursement from the related party for reasonable direct and indirect costs for such personnel; and

(v) To the extent the Company engages in other transactions with a related party, the Company may reimburse the related party for reasonable direct and indirect costs associated with such transactions.

(b) The parties to this Agreement intend (i) that the related party will not substantially profit from related-party transactions with the Company, and (ii) that the Company will not disproportionately benefit from related-party transactions. The parties intend that the Company will bear its share of costs for related-party transactions.

(c) The Company may negotiate fixed rates for any or all related-party transactions to avoid the necessity of calculating individual costs for each transaction, which may include hourly, daily, monthly (or other periodic) charges.

(d) When entering into related-party transactions, the Manager will provide notice of such transactions (including the economic terms thereof) to the Members, although the failure to provide such notice does not invalidate any such transaction. Upon the request of any Member, the Manager will provide information to such Member about the calculation of the reimbursement or payments between the Company and the related party. Upon the request of any Member, the Manager will provide such Member a copy of any written agreement for such related-party transactions.

5.8 Elimination of Fiduciary Duties.[[37]](#footnote-38)

(a) To the fullest extent permitted by the LLC Act, no Member or Manager has fiduciary duties[[38]](#footnote-39) or liabilities relating thereto to the Company or any other Member, Assignee, or Manager under the LLC Act § 7-80-404 or any other provision thereof. Members and Managers do owe each other and the Company the contractual obligation[[39]](#footnote-40) of good faith and fair dealing.[[40]](#footnote-41) To the extent that, under the LLC Act, the law of agency, common law, or any other law or at equity,[[41]](#footnote-42) a Member, Assignee, Manager, or officer of the Company has duties or obligations to the Company or to a Member, Assignee, Manager, or other Person who is a party to this Agreement, that Member, Assignee, Manager, or officer of the Company shall not be liable to the Company or to any such other Member, Assignee, Manager, or Person for its good faith reliance on this Agreement.[[42]](#footnote-43)

(b) Notwithstanding the waiver contained in Section 5.8(a) of this Agreement, the Manager may not compete with the business of the Company,[[43]](#footnote-44) is required to refrain from dealing with the Company in the conduct or winding up of the Company’s business as or on behalf of a party having an interest adverse to the Company,[[44]](#footnote-45) and is obligated to account to the Company and hold as trustee any property, profit, or benefit derived by the Manager in the conduct or winding up of the Company’s business or derived from the use by the Manager of property of the Company, including (without limitation) an appropriation of an opportunity of the Company.[[45]](#footnote-46)

5.9 Removal and Resignation.

(a) At a meeting called expressly for that purpose, Members holding a Three-Fourths Interest may remove all or any lesser number of Managers, with or without cause.[[46]](#footnote-47)

(b) Any Manager of the Company may resign at any time by giving written notice to the Company. The resignation shall take effect upon receipt of notice thereof unless the Manager agrees to accept such resignation to be effective at a later time as shall be specified in such notice.

(c) The removal or resignation of a Manager who is also a Member shall not affect the Manager’s rights as a Member and shall not constitute a withdrawal of a Member.[[47]](#footnote-48)

5.10 Vacancies. To the extent a vacancy occurs within the number of Managers for any reason, if the Members of the Class entitled to vote do not fill such vacancy pursuant to Section 5.2(b) of this Agreement within 30 days of the occurrence of such vacancy, the Managers may (but are not required) by a Vote of a majority of the remaining Managers fill such vacancy.

5.11 Compensation, Reimbursement, and Organization Expenses.

(a) The Manager, with the concurrence of Members holding at least a Majority Interest, may from time to time establish the compensation to be paid to any Manager and any officer, employee, or agent. Such compensation shall be paid from the Company’s revenue before the Company makes any distributions to the Members.[[48]](#footnote-49) No Person shall be prevented from receiving such compensation by reason of the fact that the Person is also a Member of the Company.[[49]](#footnote-50)

(i) Compensation paid to Persons who are Members or Assignees shall be treated as guaranteed payments as that term is defined in § 707 of the Code.[[50]](#footnote-51)

(ii) To the extent any compensation paid to any Member or Assignee by the Company is determined by the IRS not to be a guaranteed payment under Code § 707(c) or is not paid to the Member other than in that Person’s capacity as a Member within the meaning of Code § 707(a), the Member or Assignee shall be specially allocated gross income of the Company in an amount equal to that compensation, and the Member’s or Assignee’s Capital Account shall be adjusted to reflect the payment of that compensation.

(b) The Company shall reimburse the Manager, Members, and others who incur expenses on behalf of the Company as the Manager may from time to time authorize. It is not intended that the reimbursement of a Manager, Member, or other Person result in a profit; however, reimbursement may include an overhead charge not to exceed 10% of the amount of the expenses to be reimbursed.

# ARTICLE

# RIGHTS AND OBLIGATIONS OF MEMBERS AND ASSIGNEES

6.1 Limitation of Liability. Each Member’s or Assignee’s liability shall be limited to the maximum extent possible as set forth in this Operating Agreement, the LLC Act, and other applicable law, subject to the provisions of Sections 5.5(a) and 5.8(b) of this Agreement.[[51]](#footnote-52) A Member or Assignee shall not be personally liable for any debts or losses of the Company beyond his, her, or its respective Capital Contributions. Any Member may, however, voluntarily agree to be liable on a debt or obligation of the Company by entering into a separate written agreement or other undertaking with an obligee or creditor of the Company; *provided, however*, no Member may commit another Member to be liable on a debt or obligation of the Company unless authorized to do so in writing by such other Member.

6.2 Company Debt Liability. Except as otherwise required by law or contract,[[52]](#footnote-53) a Member or Assignee will not be personally liable for any debts or losses of the Company beyond the Member’s or Assignee’s respective Capital Contributions and any obligation of the Member or Assignee under Section 8.1 or 8.3 of this Agreement to make Capital Contributions.

6.3 Member Guarantee Provision. The Company (through its Manager) may, in the ordinary course of Business, request that one or more Members or Assignees guarantee all or a portion of the Company’s indebtedness to a Bank as a condition of the Bank being willing to advance funds to the Company. To the extent that one or more Members or Assignees guarantee indebtedness to any Bank, the Company may pay compensation to such guarantors as the Manager deems appropriate in the circumstances. The Company agrees that to the extent any guarantor of the Company’s indebtedness is obligated to pay any amount pursuant to such guarantee, the guarantor will have a claim against the assets of the Company that is in preference to the claim of any Member, Assignee, or other holder of Units. The Manager does not have to offer an opportunity to guarantee the Company’s indebtedness to any Member or Assignee.

6.4 Loans and Interest-Bearing Advances. Members, Assignees, and Managers may make secured or unsecured loans and interest-bearing advances to the Company. Any such loans or advances must be approved unanimously by the Managers and be segregated in a loans payable account, and shall bear interest at the prime rate prevailing from time to time while such advances are outstanding, as reflected by the prime rate established by Wells Fargo Bank, Denver, Colorado, for loans to large borrowers or at such other rate as may be approved by the Manager.[[53]](#footnote-54) Any Member, Assignee, or Manager who makes a loan to the Company which has been approved by the Manager as set forth in this Section will have the right to take a security interest in the Company’s assets, enforce loan covenants, foreclose on collateral, and take other commercially reasonable actions as a creditor without violating any statutory, fiduciary, contractual, or other duty owed to the Company.

6.5 Members and Assignees Have No Agency Authority. Except as expressly provided by resolution of the Manager, no Member or Assignee (in their capacity as Members and Assignees) shall have any agency authority to take any action on behalf of the Company.

6.6 Units Are Governed by Article 8.[[54]](#footnote-55)

(a) By execution hereof, the Member hereby acknowledges and agrees that the Units issued and to be issued by the Company, whether held by Members or Assignees, shall constitute and be deemed a “security” within the meaning of § 4-8-102(a)(15) of the Colorado Uniform Commercial Code, as from time to time amended and in effect (the “UCC”), and shall be governed by and subject to Article 8 of the UCC (Colo. Rev. Stat. §§ 4-8-101, *et seq*.) and the Uniform Commercial Code of any other applicable jurisdiction.

(b) The Company shall issue a certificate[[55]](#footnote-56) evidencing the Member’s interest in the Company in such form as may be approved by the Manager; provided that such certificate shall be stamped or otherwise imprinted with legends substantially similar to the following (in addition to any legends evidencing restrictions required under other applicable federal or state laws):

THIS CERTIFICATE REPRESENTS UNITS OF LLC MEMBERSHIP INTEREST THAT ARE “SECURITIES” AS DEFINED IN AND GOVERNED BY ARTICLE 8 OF THE COLORADO UNIFORM COMMERCIAL CODE (AND THE CORRESPONDING PROVISIONS OF ANY OTHER STATE’S UNIFORM COMMERCIAL CODE), AS THE SAME MAY BE AMENDED.

(c) The foregoing is not intended to admit that a Unit is subject to the applicability of federal or state laws regulating the offer or sale of securities as that term is defined in such laws.[[56]](#footnote-57)

(d) This Section 6.6 shall not be amended by the Company, the Manager, or the Members without the prior written consent of any lender of the Company that is a pledgee of any of the Company’s outstanding Units.

**Alternatively:** Units Are Not Governed by Article 8 of the UCC.[[57]](#footnote-58) Units representing Membership Interests and Economic Interests are not intended to be governed by Article 8 of the Uniform Commercial Code (“UCC”) as adopted in Colorado, Colo. Rev. Stat. §§ 4-8-101, *et seq*. Units will not be represented by a certificate.[[58]](#footnote-59)

6.7 Expulsion of Members. Upon recommendation by the Manager, Members holding a Three-Fourths Interest may (by consent or by vote) expel a Member from the Company, provided that the Member being expelled has no personal liability on any debt of the Company. If a Member has personal liability on any debt of the Company, the Members may not expel such Member unless the Members approving the expulsion agree in writing to indemnify and hold the Member being expelled harmless from any liability resulting from such debt. An expelled Member shall be treated for all purposes as an Assignee.[[59]](#footnote-60)

6.8 Members and Assignees Duty to Provide Information. Each Member and Assignee shall, upon request of the Manager, provide the Manager with such information, including a valid tax identification number, address, email address, and telephone number for such Member and Assignee, as the Manager reasonably may request and shall promptly notify the Manager of any change in any such information. Each Member and each Affiliate of a Member, each Manager and each Affiliate of a Manager, and each other Beneficial Owner of the Company (as that term is defined in the federal Corporate Transparency Act, 31 USC § 5336 (the “CTA”)) shall provide information as required by the Company for the purposes of filing any reports that the Company is required to file under the CTA. The Company shall provide each such person not less than 30 days to provide such information following notice to the Member, Manager, Affiliate, or other person. For the purposes of this Section 6.8 only, the term “Affiliate” as defined in Section 1.1 above also includes any person who may be a Beneficial Owner of the Company as that term is defined in the CTA.

(a) During the Non-Compliance Period (as defined below), the Company shall not make any distributions or guaranteed payments to that Member or Assignee where the Member or Assignee or Affiliate of the Member or Assignee fails to timely provide the required information to the Company for the purposes of CTA compliance. The Company **[may/shall]** accrue such distributions for future payment upon such Person’s compliance, **[or may retain such funds as working capital for the Company and such Member or Assignee shall no longer be entitled to receive such distribution or guaranteed payment.**

(b) During the Non-Compliance Period, no Manager shall be entitled to participate in the management of the Company if that Manager or its Affiliate fails to timely provide the required information to the Company for the purposes of CTA compliance.

(c) During the Non-Compliance Period, no Member or Assignee or Manager or any Affiliate of such Member, Assignee, or Manager, shall be entitled to receive any reports from the Company and shall not be entitled to vote on any matters presented to the Members, Assignees, or Managers for approval.

(d) During the Non-Compliance Period, each Member and Assignee shall retain any and all economic obligations such persons owes to the Company, including (without limitation) any obligation to contribute funds to the Company (including Contributions to Capital Accounts set forth in Article 8, below) and the obligation to receive allocations of Net Profits and Net Losses pursuant to Article 9 hereof.

(e) For the purposes of this Section 6.7, the “Non-Compliance Period” commences when the Company gives notice to the Member, Assignee, Manager, or Affiliate that such person has not provided the information necessary for the Company to file the Beneficial Ownership Information required to be filed by the Company under the CTA and will end thirty days after the Member, Assignee, Manager, or Affiliate has provided such information to the Company or, if earlier, when the Company has filed the Beneficial Ownership Information report including such information with the Financial Crimes Enforcement Network as required by the CTA.[[60]](#footnote-61)

# ARTICLE

# MEETINGS OF MEMBERS[[61]](#footnote-62)

7.1 Meetings.

 (a) The Members may meet at such times and places, either within or outside the State of Colorado, as may be determined by the Manager.

 (b) The Manager shall call[[62]](#footnote-63) a meeting of the Members promptly upon receiving the written request made by two or more Members holding Units entitled to Vote exceeding 10% of the outstanding Units entitled to Vote. Any written request will set forth the names and addresses of the Persons requesting the meeting and the subject matters that such Persons request be discussed at that meeting. The Persons requesting the meeting may present an explanation and discussion of the issues which, upon their request, the Manager will mail to the Members together with the Notice of the meeting. The subject matters requested to be discussed shall be placed on the agenda for and brought up for discussion at the meeting so called.

 (c) (i) When the Manager calls a meeting, the Manager shall provide at least 10 but no more than 60 days’ Notice of the date, time, and place of the meeting to all Members, which Notice will include a description and (if the Manager deems it necessary or appropriate) a discussion of the issues to be discussed and/or Voted upon at the meeting.

(ii) When the Manager calls a meeting, the Manager shall determine the matters to be considered at the meeting, subject to the requirements of Section 7.1(b) of this Agreement and whether any Units other than the Units with the right to Vote, will be entitled to Vote at the meeting.

(d) Meetings will be conducted in a manner the Manager determines to be fair and reasonable in the circumstances. In conducting meetings, the Manager may, but is not obligated to, refer to sources such as *The Modern Rules of Order* or other similar publication setting forth a method of parliamentary procedure.

(e) The Manager may provide that meetings be held by telephone, internet, or other form of telecommunication in which each participant may be heard by every other participant.[[63]](#footnote-64)

(f) The Company shall have no obligation to conduct annual or special meetings or to keep minutes of such meetings.

7.2 Manner of Acting.

(a) Whether at a meeting or otherwise, the affirmative Vote of Members holding a Majority Interest shall be the act of the Members unless Voting by Class or the Vote of a greater or lesser proportion or number is otherwise required by this Agreement or by the Manager.

(b) Any action that may be taken by Members at a meeting may be taken by the written consent of Members holding the Percentage Membership Interests that would be required to approve such action by Vote at a duly held meeting.

(c) Unless otherwise expressly provided in this Agreement or required under applicable law or determined by the Manager, Members who have an interest (economic or otherwise) in the outcome of any particular matter upon which the Members Vote may Vote upon any such matter and such Vote shall be counted in the determination of whether the requisite matter was approved by the Members.

7.3 Proxies. At all meetings of Members, a Member may Vote in person or by proxy executed in writing by the Member or by a duly authorized attorney-in-fact.[[64]](#footnote-65) Such proxy shall be delivered to the Manager before or at the time of the meeting. No proxy shall be valid after 11 months from the date of its execution, unless otherwise provided in the proxy.

# ARTICLE

# CONTRIBUTIONS TO THE COMPANY AND CAPITAL ACCOUNTS

8.1 Capital Contributions.

(a) Each Member has made the Member’s Initial Capital Contribution, and has received Units, which Initial Capital Contribution and Units are reflected on Exhibit A to this Agreement.

(b) Persons to whom the Manager determines to issue additional Units in the future will make Initial Capital Contributions as the Manager may require.

(c) The Manager will amend this Agreement and Exhibit A from time to time as necessary to reflect the admission of new Members (Sections 8.3 and 11.4(a) of this Agreement), issuance of additional Units (Sections 8.1(b) and 8.3 of this Agreement), Additional Capital Contributions (Section 8.2 of this Agreement), transfer of Units to existing Members, and addresses of Members.[[65]](#footnote-66) Such amendments may be made pursuant to Section 13.1(a) of this Agreement without the consent of the Members.

8.2 Additional Capital Contributions. The Company may not require any Member to make any Additional Capital Contribution.[[66]](#footnote-67)

8.3 Issuance of Additional Units and Options to Purchase Units.

(a) The Company may issue additional Units to new or existing Members for such consideration and on such other terms and conditions as may be determined by the Manager, subject to the limitations and provisions of this Agreement, and the issuance of such Units may dilute the Vote and the Economic Interest of existing Units then outstanding.

(b) In issuing such additional Units, the Manager may determine all restrictions and conditions applicable to such Units, including (without limitation) restrictions and conditions such as:

(i) Whether the Units are Class A Units, Class B Units, or Units of a new Class or series;[[67]](#footnote-68)

(ii) Whether the Units are entitled to Vote;

(iii) Whether the Units or any portion of them vest over time or are based on performance or other criteria;[[68]](#footnote-69)

(iv) The consideration to be paid for the additional Units;

(v) The economic terms of such Units (including, without limitation, their right to share in the Net Profits and Net Losses of the Company, whether the Units are entitled to a preferential or subordinated return, and any special allocations attributable to such Units);

(vi) Whether the holders of existing Units have any preemptive rights to acquire the additional Units;

(vii) The effective date of admission of the purchaser as a Member;[[69]](#footnote-70) and

(viii) Other conditions of issuance or attributes of the Units (financial or otherwise) the Manager may determine to be appropriate in the circumstances.

(c) No Person who acquires additional Units may be admitted as a Member unless the Manager specifically approves such admission and unless such Person executes and agrees to be bound by the provisions of this Operating Agreement.

(d) The Company may issue options to purchase Units for such consideration, and on such other terms and conditions, as may be determined by the Manager, subject to the limitations and provisions of this Agreement. In issuing options to purchase such Units, the Manager may determine all restrictions and conditions applicable to such Units as set forth in Section 8.3(b) of this Agreement, the exercise price for such options, the term of such options, whether, upon exercise, the option holder will be admitted as a Member, and other terms and conditions as the Manager may determine to be appropriate. No Person who acquires additional Units pursuant to the exercise of an option may be admitted as a Member unless the Manager specifically approves such admission (either at the time of issuance of the option or upon exercise thereof) and unless such Person executes and agrees to be bound by the provisions of this Agreement. No option holder will be treated as a Member or Assignee.[[70]](#footnote-71)

8.4 Capital Accounts. The Company will maintain a separate Capital Account for each Member and Assignee in accordance with the Code and the applicable Treasury Regulations. All provisions in this Agreement relating to the maintenance of Capital Accounts are intended to comply with Treas. Reg. § 1.704-1(b) and § 1.704-2 and shall be interpreted and applied in a manner consistent with these Regulations. In the event that Members shall determine that it is prudent to modify the manner in which the Capital Accounts, or any additions or subtractions to the Capital Accounts, are computed to comply with these Regulations, the Members may make appropriate modifications, provided that the modifications are not likely to materially affect the amounts distributable to any Member or Assignee upon the dissolution of the Company. The Members and Assignees shall also make (a) any adjustments that are necessary or appropriate to maintain equality between the Capital Accounts of the Members and Assignees and the amount of capital reflected on the Company’s balance sheet, as computed for book purposes, in accordance with the applicable Treasury Regulations, and (b) any appropriate modifications in the event that this Agreement would otherwise not comply with Treas. Reg. § 1.704-1(b) and § 1.704-2. In addition, the Manager, in the Manager’s discretion and in accordance with the Code and Regulations, may direct the Company to increase the Members’ and Assignees Capital Accounts to reflect a revaluation of the Company property on the Company’s books and records. Any such adjustment shall be made in accordance with the applicable Treasury Regulations.

8.5 Withdrawal or Reduction of Economic Interest Owners’ Contributions to Capital. A Member may withdraw or resign as a Member at any time.[[71]](#footnote-72) A Member’s withdrawal or resignation shall cause the Member to be treated as an Assignee for all purposes. For clarity, if a Member is treated as an Assignee, such Member will no longer have any right to vote or to receive any information other than as provided in Section 9.10 of this Agreement. No withdrawal or resignation shall entitle the former Member or the Member’s successor to demand that the Economic Interest be liquidated. Any Member whose resignation or withdrawal from the Company results in damage or injury to the Company will be liable to the Company for such damages, which damages may be offset against the former Member’s Economic Interest.

8.6 Limitation of Distributions. No Person is entitled to receive a Distribution of any part of its Capital Contribution to the extent such Distribution would violate Section 9.2(d) of this Agreement. No Member or Assignee, irrespective of the nature of its Capital Contribution, has the right to demand and receive property other than cash in return for its Capital Contribution.[[72]](#footnote-73)

8.7 No Preemptive Rights. No Person has the preemptive right by reason of being a Member or Assignee to acquire any additional Units that the Company may issue.

8.8 Carry Over Capital Account. If any Person transfers an interest in accordance with this Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent it relates to such Units.

# ARTICLE

# ALLOCATIONS, INCOME TAX, DISTRIBUTIONS, AND REPORTS

9.1 Allocations of Net Profits and Net Losses.

(a) Subject to Section 9.1(b) of this Agreement, the Net Profits and Net Losses of the Company and each other allocable item included in the Company’s tax return for each fiscal year will be allocated between each Member or Assignee in accordance with the Percentage Economic Interest of such holder.[[73]](#footnote-74)

(b) Guaranteed Payments and Regulatory Allocations.

(i) *Guaranteed Payments.* To the extent the Company pays guaranteed payments or compensation (as described in Section 5.11 of this Agreement or otherwise) or interest earned on money the Company borrowed from a Member or Assignee under Section 6.4 of this Agreement, and if such guaranteed payment, compensation, or interest is later held to be a distribution, the Company will specially allocate Net Profits to the Member or Assignee who received such guaranteed payment, compensation, or interest in a positive amount equal to the amount of such guaranteed payment, compensation, or interest that was reclassified as a distribution.

(ii) *Qualified Income Offset.* In the event any Member or Assignee has a Deficit Capital Account at the end of any year or if any Member or Assignee unexpectedly receives any adjustments, allocations, or distributions that result in a Deficit Capital Account, each such Member or Assignee shall be specially allocated items of Company income and gain in the amount of such Deficit Capital Account as quickly as possible, provided that an allocation pursuant to this Section 9.1(b)(ii) shall be made only if and to the extent that such Member or Assignee would have a Deficit Capital Account in excess of such sum after all other allocations provided for in this Section 9.1 have been made as if this Section 9.1(b)(ii) was not in this Agreement. This Section 9.1(b)(ii) is intended to constitute a “qualified income offset” within the meaning of Treas. Reg. § 1.704-1(b)(2)(ii)(d)(3) and shall be interpreted to comply with the requirements of such Regulation.

(iii) *Nonrecourse Deductions*. Deductions attributable to nonrecourse debt incurred by the Company shall be specially allocated among the Members and Assignees in proportion to such Person’s Percentage Economic Interest and in accordance with Treas. Reg. § 1.704-2(c).

(iv) *Code § 754 Adjustment*.[[74]](#footnote-75) The Manager may cause the Company to make a § 754 election when, in their discretion, they deem it appropriate to do so. To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to Code § 734(b) or Code § 743(b) is required (pursuant to Treas. Reg. § 1.704-1(b) or otherwise) to be taken into account in determining Capital Accounts, the amount of such adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) and such gain or loss shall be specially allocated to the Members and Assignees in accordance with their interests in the Company or to the Member or Assignee to whom such distribution was made as may be required by Treas. Reg. § 1.704-1(b) or otherwise.

(v) *Minimum Gain Chargeback.* Notwithstanding any other provision of this Section 9.1, if there is a net decrease in the Partnership Minimum Gain during a taxable year of the Company, then, the Capital Accounts of each Member and Assignee shall be allocated items of Net Profits for such year (and if necessary for subsequent years) equal to that Person’s share of the net decrease in the Partnership Minimum Gain. This Section 9.1(b)(v) is intended to comply with the minimum gain chargeback requirement of Treas. Reg. § 1.704-2 and shall be interpreted consistently with that section. If in any taxable year that the Company has a net decrease in the Partnership Minimum Gain, if the minimum gain chargeback requirement would cause a distortion in the economic arrangement among the holders of Economic Interests and it is not expected that the Company will have sufficient other income to correct that distortion, the Manager may in the Manager’s discretion (and shall, if requested to do so by a Member) seek to have the Internal Revenue Service waive the minimum gain chargeback requirement in accordance with Treas. Reg. § 1.704-2(f)(4).

(vi) *Curative Allocations.* The allocations set forth in Sections 9.1(b)(ii) through (v) of this Agreement (the “Regulatory Allocations”) are intended to comply with certain requirements of the Treasury Regulations. It is the intent of the Members that, to the extent possible, all Regulatory Allocations shall be offset either with other Regulatory Allocations or with special allocations of Net Profits and Net Losses and other items of Company income, gain, loss, or deduction pursuant to this Section 9.1. Therefore, notwithstanding any other provision of this Article 9 (other than the Regulatory Allocations), the Manager shall make such offsetting special allocations of Net Profits and Net Losses and other items of Company income, gain, loss, or deduction in whatever manner they determine appropriate so that, after such offsetting allocations are made, each Member’s and Assignee’s Capital Account balance is, to the extent possible, equal to the Capital Account balance such Member or Assignee would have had if the Regulatory Allocations were not part of this Agreement and all Company items were allocated pursuant to Section 9.1(a) of this Agreement. In exercising their discretion under this Section 9.1(b)(vi), the Manager shall take into account future Regulatory Allocations that, although not yet made, are likely to offset other Regulatory Allocations previously made.

(vii) *Other Allocation Rules.*

(A) *When Allocations Are Made.* Net Profits and Net Losses and any other items of income, gain, loss, or deduction shall be allocated to the Members and Assignees pursuant to this Section 9.1 as of the last day of each year; provided that Net Profits and Net Losses and such other items shall also be allocated at such times as the Fair Market Values of the Company’s property are adjusted.

(B) *Varying Interest.* For purposes of determining the Net Profits and Net Losses or any other items allocable to any period, Net Profits and Net Losses and any such other items shall be determined on a monthly, or other basis, as determined by the Manager using any permissible method under Code § 706 and the Treasury Regulations under that section.

(C) *Consistent Reporting of Allocations.* The Members and Assignees are aware of the income tax consequences of the allocations made by this Section 9.1 and hereby agree to be bound by the provisions of this Section 9.1 in reporting their respective share of Net Profits and Net Losses and other allocable items for income tax purposes, except to the extent otherwise required by law.

(D) *Sharing Excess Nonrecourse Liabilities.* Solely for purposes of determining a Member’s or Assignee’s proportionate share of the “excess nonrecourse liabilities” of the Company within the meaning of Treas. Reg. § 1.752-3(a)(3) (if any), the Members’ and Assignees’ interests in Company profits are in proportion to such Person’s Percentage Economic Interest.

(E) *Treatment of Distributed Loan Proceeds.* To the extent permitted by Treas. Reg. § 1.704-2(h)(3), the Manager shall endeavor not to treat distributions of cash available for distribution as having been made from the proceeds of a nonrecourse liability or a Member nonrecourse debt.

(F) *Part Year Allocations with Respect to Transferred Interests.* No Person shall be entitled to any retroactive allocation of Net Profits or Net Losses incurred by the Company, unless such retroactive allocation complies with Code § 704(b) and § 706(d) and the Treas. Regs. under those sections and is approved by a unanimous Vote of the Members.[[75]](#footnote-76) At the time a Transfer of any Units occurs pursuant to the requirements of this Agreement, the Manager may, at the Manager’s option, close the Company books (as though the Company Fiscal Year had ended) or make a *pro rata* allocation of Net Profits and Net Losses to the transferor for that portion of the Fiscal Year during which the transferor was an owner of a Unit.

(viii) *Tax Allocations: Code § 704(c)*.

(A) *Code § 704(c) Allocations.*

(I) In accordance with Code § 704(c) and the Treasury Regulations thereunder, income, gain, loss, and deduction with respect to any property contributed as a Capital Contribution to the Company shall, solely for federal income tax purposes, be allocated among the Members and Assignees so as to take account of any variation between the adjusted basis of such property to the Company for federal income tax purposes and its Fair Market Value at the time of contribution.

(II) The Capital Accounts of the Members shall be increased or decreased to reflect a revaluation of Company property (including intangible assets such as goodwill) on the Company’s books in connection with a Revaluation Event. Upon such revaluation:[[76]](#footnote-77) (1) the book value of Company property shall be adjusted based on the Fair Market Value of Company property (taking Code § 7701(g) into account) on the date of the Revaluation Event; and (2) the unrealized income, gain, loss, or deduction inherent in such Company property (that has not been reflected in the Capital Accounts previously) shall be allocated among the Members as if there were a taxable disposition of such Company property for such Fair Market Value on the date of the Revaluation Event.

For the purposes of this paragraph, the term *Revaluation Event* means:

(I) The acquisition of an interest in the Company by any new or existing Member or Assignee in exchange for more than a *de minimis* Capital Contribution, or

(II) the liquidation of the Company or a distribution by the Company to a Member or Assignee of more than a *de minimis* amount of Company property as consideration for an interest in the Company, or

(III) the grant of an interest in the Company (other than a *de minimis* interest) as consideration for the provision of services to or for the benefit of the Company by an existing Member acting in a member capacity, or by a new Member acting in a member capacity or in anticipation of being a Member, or

(IV) as may otherwise be permitted by Treas. Reg. § 1.704-1(b)(2)(iv)(*f*).

Subsequent allocations of Profits and Losses with respect to such property shall take account of any variation between the adjusted basis of such property for federal income tax purposes and its Fair Market Value in the same manner as under Code § 704(c), using any method described in Treas. Reg. § 1.704-3 as determined by the Manager. The foregoing adjustments shall be made only if they are necessary or appropriate to reflect the relative economic interests of the Members and Assignees in the Company.

(B) *Elections.* Any elections or other decisions relating to such allocations shall be made by the Manager in any manner that reasonably reflects the purpose and intention of this Agreement, provided that the Company shall elect to apply the traditional allocation method permitted by the Treasury Regulations under Code § 704(c). Allocations pursuant to this Section 9.1(b)(ix) are solely for purposes of federal, state, and local taxes and shall not affect, or in any way be taken into account in computing, any Person’s Capital Account, ownership of Units, or distributions pursuant to any provision of this Operating Agreement.

(C) *Residual Allocations.* Except as otherwise provided in this Agreement, all items of Company income, gain, loss, deduction, and any other allocations not otherwise provided for shall be divided among the Members and Assignees in accordance with such Person’s Percentage Economic Interest.

9.2 Distributions.

(a) Except as provided in Sections 9.2(b) or 10.2 of this Agreement, all distributions of Distributable Cash shall be made to the Members and Assignees in accordance with such Person’s Percentage Economic Interest.[[77]](#footnote-78)

(b) The Company shall make such distributions of Distributable Cash at such time or times as the Manager determines in the Manager’s sole discretion, subject to the following sentence.[[78]](#footnote-79) The Managers will cause the Company to make distributions to Members and Assignees to compensate them for their Maximum Tax Liability.[[79]](#footnote-80) “Maximum Tax Liability” means, for any taxable year, the sum of the hypothetical federal, state, and local taxes payable by a Member of Assignee, which shall be determined by multiplying Member’s or Assignee’s allocated share of the Company’s taxable income (as determined under Section 703 of the Code including items required to be separately stated under Section 703(a)(1) of the Code) for such year by (i) for purposes of determining the hypothetical federal tax, the highest marginal federal income tax rate in effect for such year (including any surtax or surcharge) and (ii) for purposes of determining state and local taxes, the highest effective state and local tax rate, as the case may be, imposed on such taxable income, determined separately with respect to each item so required to be separately stated taking into account state and local rates in effect in any jurisdiction in which any Member is subject to a tax on its allocable share of the Company’s taxable income. In the case of any Member which is an entity treated as a pass‑through tax entity for federal, state, or local purposes, the partners, members, beneficiaries, or shareholders (as the case may be) of such entity shall be considered as Members solely for purposes of applying the immediately preceding sentence. For the purpose of this requirement (and unless otherwise required by this Agreement (including, without limitation, Section 10.2)), each Member and Assignee will be treated identically to the extent of such holder’s Percentage Economic Interest, and the Manager may determine the appropriate amount of distribution to be made.[[80]](#footnote-81)

(c) The Manager may compel the Members and Assignees to accept distributions from the Company in a form other than cash provided the Person’s Percentage Economic Interest in the distribution is equal to the percentage in which the Member or Assignee shares in distributions as provided in this Section 9.2.[[81]](#footnote-82)

(d) The Company will not make any distribution if such distribution would violate the LLC Act.[[82]](#footnote-83)

(e) To the extent that the Company makes distributions in the case of partnerships that have foreign partners (as that term is defined in I.R.C. § 1446(f)), the Company must pay a withholding tax on the portion of such income that is allocable to the foreign partner.[[83]](#footnote-84)

9.3 Accounting Principles. The Net Profits and Net Losses of the Company and other allocable items shall be determined in accordance with accounting principles applied on a consistent basis using the cash or accrual method of accounting as the Manager may determine to be appropriate.

9.4 Interest on and Return of Capital Contributions. No Member or Assignee shall be entitled to interest on the Member’s or Assignee’s Capital Contribution or to return of the Member’s or Assignee’s Capital Contribution.

9.5 Accounting Period. The Company’s accounting period (also referred to in this Agreement as the Company’s fiscal year) shall be the calendar year.

9.6 Withholding.[[84]](#footnote-85) The Company Representative may cause the Company to pay to the applicable Governmental Authority any taxes (and any penalties, interest, and other assessments and charges in respect thereof, together with such taxes being hereinafter collectively referred to as “taxes” for purposes of this Section 9.6) that the Company is required to withhold and remit or otherwise pay with respect to an Equity Owner (including any former Equity Owner, in either case, a “Tax Obligation Equity Owner”), including any taxes the Company may be obligated to pay under any composite or withholding tax regime or under Code § 6225 (as amended from time to time, including by the Bipartisan Budget Act of 2015 (Pub. L. 114-74) as modified by the Protecting Americans from Tax Hikes Act of 2015 (Pub. L. 114-113) and further modified by The Consolidated Appropriations Act, 2018 (Pub. L. 115-141) (collectively the “2015 Act”))[[85]](#footnote-86) in respect of the Tax Obligation Equity Owner or the Tax Obligation Equity Owner’s Interest. For purposes of this Section 9.6 and Section 9.7 of this Agreement, “Governmental Authority” means any federal, state, local, foreign, or other governmental or quasi-governmental authority and any governmental, quasi-governmental, or other department, commission, body, board, bureau, agency, association, subdivision, court, tribunal, or other instrumentality exercising any executive, judicial, legislative, regulatory, or administrative function.

(a) The payment of those taxes by the Company (except to the extent the payment is made with funds received from the Tax Obligation Equity Owner that under this Section 9.6 or Section 9.7 of this Agreement is not treated as a Capital Contribution) will be treated as a Distribution to the Tax Obligation Equity Owner (*i.e.*, as an advance of Distributions otherwise payable under Section 9.2 or 10.2 of this Agreement, as the case may be). The payment will, therefore, reduce, by an equal amount and in the order they otherwise would be made, the Distributions otherwise payable to the Tax Obligation Equity Owner under Section 9.6 or 10.2 of this Agreement.

(b) The Company Representative may, by delivering a written demand to the Tax Obligation Equity Owner, require the Tax Obligation Equity Owner to make a payment of immediately available funds of any amount that the Company Representative determines is needed by the Company to discharge its withholding or other tax liability in respect of the Tax Obligation Equity Owner. The Tax Obligation Equity Owner shall make the cash payment to the Company as instructed in the Company Representative’s written demand (including at the time and in the amount and manner so instructed by the Manager), but the Company Representative must allow the Tax Obligation Equity Owner at least ten (10) days to make that payment.

(c) If the Tax Obligation Equity Owner refuses or fails to timely make the full amount of the required payment to the Company, the Tax Obligation Equity Owner will be in breach of this Agreement and must indemnify and hold the Company, the Company Representative, and the other Equity Owners harmless against any costs, penalties, payments, or other Losses incurred by the Company, the Company Representative, or the other Equity Owners as a result of that refusal or failure.

(d) In addition to the other remedies that the Company may have, the Tax Obligation Equity Owner shall pay the Company interest at the lower of the Prime Rate plus five (5) percentage points, per annum, compounded daily, or the highest rate of interest allowed by applicable Law (the “Default Rate”), on the amount under this Section 9.6 that the Tax Obligation Equity Owner fails to timely pay to the Company.

9.7Indemnification and Reimbursement for Payments on Behalf of a Member*.*

(a) *Equity Owners’ Tax Indemnification Obligations.*

(i) If the Company is obligated to pay any amount to a Governmental Authority or to any other Person (or otherwise makes a payment) because of an Equity Owner’s (including any former Equity Owner’s) status (whether as an Equity Owner, a “partner” for tax purposes, a nonresident, or any other status under applicable Law) or the payment is otherwise attributable to the Equity Owner (including any former Equity Owner) or all or any portion of the Equity Owner’s Interest (including the interest of any former Equity Owner) on account of:

(A) federal, state, local, or foreign withholding taxes with respect to foreign or nonresident partners, state personal property taxes, state or local unincorporated business taxes, and penalties, interest, and other assessments and charges (together with such taxes being hereinafter collectively referred to as “taxes”for purposes of this Section 9.7) payable under Subchapter C of Chapter 63 of the Code, as those provisions are amended from time to time, including by the 2015 Act, and

(B) any such taxes that are attributable to, or made in respect of, any portion of the Interest for which the Equity Owner is a direct or indirect successor-in-interest,

then, except as otherwise provided in this Section 9.7 or Section 9.6 of this Agreement with respect to such payment by the Company, such Equity Owner (including any former Equity Owner, in either case, an “Indemnifying Member”) shall indemnify and otherwise pay the Company in full for the entire amount paid (including, any interest, penalties, and expenses associated with such payment, the combined amount being referred to herein as “Tax Indemnification Amount”).

(ii) At the option and in the sole discretion of the Company Representative,

(A) the Tax Indemnification Amount may be treated as a Distribution to the Indemnifying Member (except to the extent such payment is made with funds received from the Indemnifying Member that under this Section 9.7 or Section 9.6 of this Agreement is not to be treated as a Capital Contribution), and, thereby, charged against the Indemnifying Member’s Capital Account and reducing by an equal amount and in the order they otherwise would be made, the Distributions otherwise payable to the Indemnifying Member under Section 9.2 or Section 10.2 of this Agreement, or

(B) the Indemnifying Member shall promptly, upon notification by the Company Representative of the Indemnifying Member’s obligation to indemnify the Company, make a payment to the Company of immediately available funds, at the time and in the amount and manner directed by the Company Representative, equal to the full amount to be indemnified or otherwise paid by the Indemnifying Member under this Section 9.7. The Company Representative must allow the Indemnifying Member at least ten (10) days to make that payment.

(iii) If the Indemnifying Member refuses or fails to timely make the full amount of any required payment to the Company under this Section 9.7, the Indemnifying Member will be in breach of this Agreement and must indemnify and hold the Company, the Company Representative, and the other Equity Owners harmless against any costs, penalties, payments, or other Losses incurred by the Company, the Company Representative, or the other Equity Owners as a result of that refusal or failure. In addition to the other remedies that the Company may have, the Indemnifying Member shall pay the Company interest at the Default Rate on the amount under this Section 9.7 that the Indemnifying Member fails to timely pay to the Company. Any amount paid by the Indemnifying Member to the Company under this Section will not be treated as a Capital Contribution or otherwise added to the Indemnifying Member’s Capital Account, except to the extent (if at all) the Company Representative determines that characterization and treatment is necessary or appropriate. All decisions and actions to be taken, or that may be taken, by the Company under this Section 9.7 or Section 9.6 of this Agreement will be taken as determined and directed by and in the sole discretion of the Company Representative.

(b) *Survival of Tax Indemnification Obligations.* An Equity Owner’s obligations under Section 9.6 of this Agreement and this Section 9.7 survive the termination, dissolution, liquidation, and winding up of the Company (or all or any portion of the Indemnifying Member’s Interest or other Transfer of all or any portion of the Indemnifying Member’s Interest), and for purposes of Section 9.6 and this Section 9.7, the Company shall be treated as continuing in existence. The Company may pursue and enforce all rights and remedies that it may have against each Indemnifying Member under this Section 9.7 and each Tax Obligation Equity Owner under Section 9.6, including instituting a proceeding governed by the applicable terms of this Agreement to collect such payments with interest at the Default Rate, employing its right of set off under Section 13.6 of this Agreement, exercising its power of attorney and other rights with respect to that obligation and the Tax Indemnification Amount under Section 9.6(b) of this Agreement, or exercising any other rights or remedies that the Company may have.

9.8 Elections. The Company Representative may make or revoke any election or other determination that is made or may be made by the Company for federal, state, local, and foreign tax purposes, including any election under Code §§ 703(b), 709(b), 754, 6221(b), and 6226.

9.9 Inspection of Books and Records.[[86]](#footnote-87)

(a) Upon reasonable Notice to the Company and for a proper purpose reasonably related to the Member’s interest as a Member of the Company, the Members (at their own expense) shall have the right to inspect the Company’s books and records during normal business hours in a manner the Manager reasonably believes will minimize any adverse impact of such inspection on the Business and to minimize the disclosure of Confidential Information.

(b) If requested by any Member in writing and at the Member’s expense, the Manager, acting on behalf of the Company, shall choose and hire a qualified independent auditor to conduct an audit of the Company’s financials (not more than once per 15-month period). Upon completion of such audit, the Company shall make the results and any reports available to all Members. If the audit reveals discrepancies of greater than 10% with respect to any material item (such as annual revenues or net income) from the financial statements prepared by the Company for the period in question, the Company will reimburse the Member for the costs of the audit.

(c) Any sensitive information requested, including customer lists, financial records, tax returns, and other proprietary information or other information that the Managers reasonably believe to be in the nature of trade secrets or that the Company is required by law or agreement with a third party to maintain its confidentiality, may be withheld from disclosure or may be disclosed only to the extent that the Member seeking disclosure enters into a confidentiality or non-disclosure agreement as the Company may require.

(d) Information rights shall be terminated upon the withdrawal or expulsion of a Member from the Company.

9.10 Reports. The Manager shall prepare and provide such reports for the Members as the Manager determines necessary or appropriate in the circumstances. Such reports shall include financial information regarding the Company, but such financial information does not need to be audited. To the extent the Manager determines it appropriate to provide a copy of the budget and operating plan to the Members, the Manager may summarize information contained in them to prevent the disclosure of Confidential Information. The Manager will provide reports to Assignees permitted under this Agreement pertaining to the period, if any, in which such Assignees were Members to the same extent that the Manager provides reports to Members.[[87]](#footnote-88)

# ARTICLE

# DISSOLUTION

10.1 Dissolution. The Company shall be dissolved:

(a) upon the Vote of Members holding a Three-Fourths Interest;

(b) the sale, transfer, or assignment of all or substantially all the assets of the Company;

(c) there being no Members unless, not later than the first anniversary of the date of the termination of the membership of the last Member, the Assignees of the last Member holding at least a Majority Interest in the Company held by the last Member at the time of the Member’s withdrawal, resignation, or death have admitted at least one Person as a Member;[[88]](#footnote-89) and

(d) as otherwise required by law.[[89]](#footnote-90)

10.2 Winding Up, Liquidation, and Distribution of Assets. Upon dissolution, the Company (i) shall file a statement of dissolution pursuant to § 7-80-802 of the Colorado Act, and (ii) shall prepare an accounting of the accounts of the Company and of the Company’s assets, liabilities, and operations, from the date of the last previous accounting until the date of dissolution. The Manager may continue to conduct the Business in a manner to maximize the liquidation proceeds of the Business to the Company and shall immediately proceed to wind up the Company’s affairs. If the Manager continues to conduct the Business, and in any event in winding up the Company’s affairs, the Manager shall continue to be bound by the provisions of Sections 5.5 and 5.8 of this Agreement, but no Manager shall be prohibited from making an offer to purchase one or more of the assets of the Company in liquidation provided that such purchase and sale is approved by the Vote of a majority of the other Managers, or if there are no other Managers, the purchase and sale is approved by the Vote of Three Fourths Interest of the Members.[[90]](#footnote-91)

(a) If the Company is dissolved and its affairs are to be wound up, the Manager shall:

(i) Sell or otherwise liquidate all of the Company’s assets as promptly as practicable (except to the extent the Manager may determine to distribute any assets to the Members and Assignees in kind) and, if any assets of the Company are to be distributed in kind (*pro rata* or in such other manner as the Manager may determine appropriate in the circumstances),[[91]](#footnote-92) the net Fair Market Value of such assets as of the date of dissolution shall be determined by negotiation among the Members (requiring the consent of a Majority Interest of the Members to whom the assets are not being distributed) or by independent appraisal. Such assets shall be deemed to have been sold as of the date of dissolution, and any Net Profits or Net Losses resulting from such sales or deemed sales shall be allocated to the Members’ and Assignees’ Capital Accounts in accordance with Article 9 of this Agreement;

(ii) Discharge all liabilities of the Company, including liabilities to Members and Assignees who are also creditors, to the extent otherwise permitted by law, other than liabilities to Members and Assignees for distributions and the return of capital, and establish such reserves as may be reasonably necessary to provide for the Company’s contingent liabilities (for purposes of determining the Capital Accounts of the Members and Assignees, the amounts of such reserves shall be deemed to be an expense of the Company until such contingent liabilities are resolved); and

(iii) Distribute the remaining assets in the following order:

(A) Distribute to the Members and Assignees the remaining assets in accordance with the positive balance (if any) of each Member’s and Assignee’s Capital Account (as determined after taking into account all Capital Account adjustments for the Company’s taxable year during which the liquidation occurs), either in cash or in kind, as determined by the Manager, with any assets distributed in kind being valued for this purpose at their Fair Market Value. Any such distributions to the Members and Assignees in respect of their Capital Accounts shall be made in accordance with the time requirements set forth in the Treasury Regulations.[[92]](#footnote-93)

(B) Thereafter distribute to the Members and Assignees in accordance with their Percentage Economic Interests.

(b) Notwithstanding anything to the contrary in this Agreement, upon a liquidation within the meaning of Treas. Reg. § 1.704-1(b), if any Member or Assignee has a deficit Capital Account (after giving effect to all contributions, distributions, allocations, and other Capital Account adjustments for all taxable years, including the year during which such liquidation occurs), such Member or Assignee shall have no obligation to make any Capital Contribution, and the negative balance of such Member’s or Assignee’s Deficit Capital Account shall not be considered a debt owed by such Member or Assignee to the Company or to any other Person for any purpose whatsoever.

(c) The Manager shall comply with any applicable requirements of applicable law pertaining to the winding up of the affairs of the Company and the final distribution of its assets.[[93]](#footnote-94)

10.3 Return of Contribution Nonrecourse to Other Members. Upon dissolution, each Member and Assignee shall look solely to the assets of the Company for the return of the Member’s or Assignee’s Capital Contribution. If the Company property remaining after the payment or discharge of the debts and liabilities of the Company is insufficient to return the Capital Contribution or any preferential return of one or more Members and Assignees, such Members or Assignees shall have no recourse against any other Member or Assignee.[[94]](#footnote-95)

# ARTICLE

# BUY-SELL PROVISIONS

11.1 Transfers Void; Effect.

(a) It is important to the Members that ownership of Economic Interests be limited to the Persons who originally contributed Capital to the Company, Members subsequently admitted as Members in accordance with this Agreement, and their assigns permitted under this Agreement. The transfer restrictions included in this Article 11 are intended to implement the “pick your partner” principle and are an important part of the agreement of the Members expressed herein.[[95]](#footnote-96) Therefore, and except as contemplated in Section 11.1(b) and 11.1(c) of this Agreement, should any Member or Assignee attempt to sell, transfer, assign, or in any way alienate all or any portion of the Member’s or Assignee’s Economic Interest by charging order[[96]](#footnote-97) against the Member or Assignee, or otherwise (“Transferred Interest”) to a Person not then a Member, whether now owned or hereafter acquired, without the prior written consent of the Manager (whether such transfer is voluntary or involuntary, by operation of law, by court order, by assignment, charging order, or otherwise), or otherwise in violation of the provisions of Section 11.1 of this Agreement such attempted sale, transfer, assignment, or other form of alienation shall be deemed to be void from its inception, and this shall be considered to be a “Terminating Event” if it occurs within two years of the organization of the Company.[[97]](#footnote-98)

(i) All transfers must be accomplished in accordance with the requirements of federal and applicable state securities laws, compliance with which must be established to the satisfaction of the Manager.

(ii) For the purposes of this Article 11, where a Member or Assignee is an entity, the term “transfer” includes a transfer of ownership of such Member or Assignee resulting in the direct or indirect owners thereof prior to the transfer owning less than 75% ownership interest or having less than 75% voting right and power in such Member or Assignee after the transfer. It is the intent of this provision, where an entity is a Member or Assignee of the Company, to require the direct or (where an entity Member or Assignee is owned by one or more other entities) indirect ownership of the owners of the entity Member or Assignee to remain substantially as at the time such entity became a Member or acquired its interest as an Assignee.[[98]](#footnote-99)

(b) Notwithstanding the restrictions set forth in Section 11.1(a) of this Agreement, a Member may transfer the Member’s Membership Interest, whether by will, by laws of descent and distribution, or otherwise, in each case to the Member’s descendants by law (whether naturally born or adopted). Furthermore, a Member that is an entity may transfer its Membership Interests to Persons who are equity owners of such Member provided that such distribution is upon dissolution of such Member and provided further that such transfer does not result in a dissolution of the Company for federal income tax purposes or a violation of federal or applicable state securities laws.

(i) Any transferee pursuant to this Section 11.1(b) will be deemed to be an “Assignee” unless and until such Person executes and returns to the Company this Agreement or an instrument approved by the Manager acceding to this Agreement (as it may be amended in the future) and the Manager, in its sole discretion, accepts the transferee as a Member or the transferee is accepted as a Member by the Vote of Three Fourths Interest of the Members, upon the occurrence of which such Person will be deemed admitted as a Member pursuant to this Agreement. Whether or not such transferee executes this Agreement or the instrument of accession, any transfer pursuant to this Section 11.1(b) and the rights of the Assignee are subject to this Agreement.[[99]](#footnote-100)

(ii) Notwithstanding the foregoing, no transfer will be permitted pursuant to this Section 11.1(b) if there are agreements with third parties that restrict transferability of Membership Interests or which may be breached as a result of a transfer of a Membership Interest unless the transferring Member obtains the prior written consent from the third party waiving the restriction in the case of the contemplated transfer. Any Member or Assignee making any transfer pursuant to this Agreement will be liable to the Company for damages caused by such transfer to the extent that such transfer breaches a third-party agreement.[[100]](#footnote-101)

(c) If a Member or Assignee (the “Selling Owner”) wishes to dispose of its Membership Interest or Economic Interest or any portion thereof (the “Offered Units”) through a voluntary sale or other disposition,[[101]](#footnote-102) including but not limited to a sale to another Member:[[102]](#footnote-103)

( The Selling Owner shall first notify the Company, and the Company shall in turn notify the other Members (and in the discretion of the Manager, Assignees) of the identities of the Selling Owner and the proposed purchaser or purchasers, the number of Offered Units, and the proposed price and other terms of sale. If the Company fails to notify the other Members within seven (7) days after the Selling Owner has notified the Company, the Selling Owner may notify the other Members (but not Assignees) on behalf of the Company. The Selling Owner shall provide copies of the offer and other related documents to the Company and to the other Members and Assignees (regardless of the use of the term “Assignees” in the remainder of this Section 11.1, Assignees shall have the rights so described only if the Manager has provided Assignees with the notice permitted by this Section 11.1(c) and not otherwise).

( The Company shall have a right of first refusal (but not the obligation) to purchase all, but not less than all, the Offered Units at the price and on the terms offered by the proposed purchaser.

( The Company shall exercise its right to purchase the Offered Units, if at all, by giving notice to all Members and Assignees within 20 days following receipt of the notice from the Selling Owner stating the number of Offered Units it will purchase and shall complete the purchase in accordance with the terms of this Agreement within 50 days after the expiration of the 20-day period.

(d) If the Company does not exercise its right to purchase with respect to all of the Offered Units, the Company together with the other Members (and, in the discretion of the Manager, the other Economic Interest holders who are not Members) shall have the right (but not the obligation) to purchase in the aggregate all, but not less than all, of the Offered Units at the same prices and terms as were available to the Company.

( In order to exercise their purchase rights, the Company and the other Members and Assignees desiring to purchase Offered Units shall, within 20 days after expiration of the Company’s 20-day right of first refusal period, deliver to the Company and to each other Member and Assignee a written election to purchase so many of the Offered Units as each may desire to purchase, specifying that such Person will purchase at the price and terms offered by the proposed purchaser and committing to close on that purchase in accordance with the terms of this Agreement within 30 days after the expiration of the 20 day period provided for in this subparagraph.

( The other Members and Assignees shall have priority to purchase Offered Units ahead of the Company under this Section 11.1(d).

 (x) If the total number of Units that all other Members and Assignees desire to purchase pursuant to this Section 11.1(d) exceeds the number of Offered Units, each such other Member and Assignee shall have priority, up to the number of Units set forth in its written election, to purchase that fraction of the Offered Units in which the numerator is the number of Membership Interest owned by the purchasing Member or Assignee and the denominator is the number of Units owned by all Member and Assignees who elect to purchase.

 (y) That portion of the Offered Units not purchased on such a priority basis shall be allocated in one or more successive allocations to those Members and Assignees who have indicated in their written elections that they desire to purchase more than the number of Membership Interest to which they have a priority right, with the allocation determined by a fraction, the numerator of which is the number of Units owned by such purchasing Member or Assignee and the denominator is the number of Units owned by all Members and Assignees desiring to purchase pursuant to this sentence.

 (z) If the total number of Units that all other Members and Assignees desire to purchase pursuant to this Section 11.1(d) does not exceed the number of Offered Units, the Company may, but shall have no obligation to, purchase the remaining Offered Units.

(e) Purchases under Section 11.1(d)(i) shall close within 30 days after the expiration of the 20-day period provided for in Section 11.1(d)(i) and purchases under Section 11.1(d)(ii) shall close within 45 days after the expiration of the 20-day period provided for in Section 11.1(d)(i). If the Company and the other Members and Assignees do not purchase all of the Offered Units pursuant to Sections 11.1(c) and 11.1(d) of this Agreement, they will not be entitled to purchase any of the Offered Units without the agreement of the Selling Owner.[[103]](#footnote-104) Subject to Section 11.1(f), Section 11.1(g), Section 11.1(h), and Section 11.1(i) of this Agreement, if the Company and the other Members and Assignees are not entitled to purchase any of the Offered Units or the purchases do not close within the time periods provided for closing in Sections 11.1(c) or 11.1(d), as applicable, and if the Selling Owner was ready, willing and able to sell and transfer the Offered Units at a closing within such time periods, then the Selling Owner shall be free, for a period of 45 days after becoming eligible to do so, to sell all (but not less than all) of the Offered Units to the same purchaser or purchasers who offered to purchase the Offered Units, at the same price and on the same terms set forth in the Selling Owner’s notice of intended sale.

(f) If the number of Offered Units offered by a Member or Assignee or more than one Member or Assignee acting together exceeds in the aggregate 50% of the total number of Units outstanding and if the Company or the remaining Members and Assignees or both do not purchase all of the Offered Units pursuant to Sections 11.1(c) and 11.1(d) of this Agreement, any or all of the remaining Members and Assignees may require, by notice (the “Tag Along Notice”) given to the purchaser not later than 20 days after the date the Selling Owner become eligible to complete the sale of the Offered Units, that the purchaser purchase all or any part of the Membership Interest or Economic Interest that each owns[[104]](#footnote-105) at the same price and on the same terms and conditions set forth in the Selling Owner’s (for purposes of this Section 11.1(f) meaning one Selling Owner or more than one Selling Owner acting together) notice of intended sale (except that to the extent the price and terms offered to the Selling Owner contain any non-cash items or a deferred obligation, such non-cash items or deferred obligation must be monetized to present value for the benefit of the Members other than the Selling Owner and the transaction must result in cash being paid to the other Members and Assignees at the closing in lieu of any non-cash item or deferred payment obligation). If this Section 11.1(f) is applicable, the Selling Owner shall not close the sale to the purchaser prior to expiration of the 20-day notice period described in this Section 11.1(f) and if such notice is given, shall not close the sale to the purchaser thereafter until this Section 11.1(f) has been complied with. The purchaser shall give notice to the Members and Assignees giving the Tag Along Notice setting a date for closing of purchase of their respective Membership Interest or Economic Interest, provided that closing shall occur not earlier than 30 days nor later than 60 days after of date of the Tag Along Notice, and the time period for completion of the sale by the Selling Owner in Section 11.1(e) shall be extended to 60 days after the date of the Tag Along Notice.[[105]](#footnote-106) The completion of the sale by the Selling Owner must occur at the same time as or after the completion of the sale by the Members or Assignees giving the Tag Along Notice, but prior to expiration of the time period for completion of the sale by the Selling Owner in Section 11.1(e) as extended by this Section 11.1(f).[[106]](#footnote-107) If the sale by the Selling Owner does not occur as provided in the preceding sentence, any Member or Assignee whose sale of Membership Interest or Economic Interest has been completed shall have the right to void that sale by giving notice of exercise of that right to the purchaser within 30 days after expiration of the time period for completion of the sale by the Selling Owner in Section 11.1(e) as so extended, and upon giving of such notice, that sale shall be null and void ab initio.

(g) If a Selling Owner or more than one Selling Owner acting together receive and offer to purchase all (and not less than all) of the Units it or they own (which Units amount in the aggregate to more than 50% of the total number of Units outstanding) and give the notice of such offer provided in Section 11.1(c), then if the other Company or the other Members and Assignees or both do not purchase all of the Offered Units, the purchaser may by notice to the Company and the other Members and Assignees (the “Drag Along Notice”) require that all, but not less than all, of the other Members and Assignees sell all Units they then own on the same per share price and terms as the purchaser acquires the Offered Units (except that to the extent the price and terms offered to the Selling Owner or Owners contain any non-cash items or a deferred obligation, such non-cash items or deferred obligation must be monetized to present value for the benefit of the Members other than the Selling Owner or Owners and the transaction must result in cash being paid to the other Members and Assignees at the closing in lieu of any non-cash item or deferred payment obligation).[[107]](#footnote-108) Closing of the purchases under this Section 11.1(g) shall occur not earlier than 30 days nor later than 60 days after of date of the Drag Along Notice, and the time period for completion of the sale by the Selling Owner in Section 11.1(e) shall be extended to 60 days after the date of the Drag Along Notice.[[108]](#footnote-109) The completion of the sale by the Selling Owner must occur at the same time as or after the completion of the sale by the Members or Assignees giving the Drag Along Notice, but prior to expiration of the time period for completion of the sale by the Selling Owner in Section 11.1(e) as extended by this Section 11.1(g).[[109]](#footnote-110) If the sale by the Selling Owner does not occur as provided in the preceding sentence, any Member or Assignee whose sale of Membership Interest or Economic Interest has been completed shall have the right to void that sale by giving notice of exercise of that right to the purchaser within 30 days after expiration of the time period for completion of the sale by the Selling Owner in Section 11.1(e) as so extended, and upon giving of such notice, that sale shall be null and void ab initio.

(h) In the case of a transaction under Sections 11.1(f) or 11.1(g) of this Agreement, The Company and the other Members and Assignees shall cooperate with reasonable requests for due diligence investigations by the prospective purchaser, *provided, however*:

(i) The purchaser provides the Company and the other Members and Assignees information reasonably satisfactory to the Company and to the other Members and Assignees that it is financially capable (directly or with borrowings) of completing the purchase of all the outstanding Units; and

(ii) The purchaser enters into confidentiality and non-use agreements as to any confidential or non-public information about the Company that the purchaser may receive in its due diligence investigation, which confidentiality and non-use agreements must be satisfactory to the Company in its reasonable discretion.

(iii) The purchaser makes all appropriate disclosure to the Company and to the other Members and Assignees regarding its ability to complete the purchase, the source of funds for such purchase, the Persons who beneficially own the proposed purchaser, and other information the Company or the other Members and Assignees may reasonably request.

(i) In all cases, all transfers must be accomplished in accordance with the requirements of Section 11.6 of this Agreement. In all cases, if the purchaser does not meet its requirements under Section 11.1(f) or Section 11.1(g), as applicable, of this Agreement, the sale by the Selling Owner to the purchaser, if completed, will be considered void *ab initio*.

11.2 Effect of Termination Event. Should any Terminating Event occur, the Member or Assignee who suffered the Terminating Event shall automatically and without further action be deemed to have:

(a) resigned as a Manager of the Company;

(b) resigned as an officer of the Company;

(c) resigned or withdrawn as a Member of the Company;[[110]](#footnote-111)

(d) ceased having the authority to sign checks or take any other action on behalf of the Company; and

(e) offered the Transferred Interest or (in the discretion of the Manager) his or her entire Economic Interest (including all Units and interest in any Capital Account) to the Company (or, in the discretion of the Manager, to the Members or the Members and Assignees) for a per Unit purchase price as set forth below (the “Buy-Out Price”) which offer must be accepted, if at all, by the Company or some or all of the Members within 60 days after the Company first receives written notification of the Terminating Event.

11.3 Buy-Out Price.

(a) The Buy-Out Price shall be calculated as unanimously agreed among the Managers (not including the withdrawing Member if a Manager) and the withdrawing Member or, if the parties are unable to agree, by an independent third party (the “Appraiser”) selected by the Managers (not including the withdrawing Member), which Appraiser shall have professional accounting valuation experience or other experience as the Managers (not including the withdrawing Member) determine appropriate.

(b) The Appraiser shall calculate the Fair Market Value of the Company as a whole, then apply a 30% discount from the Fair Market Value of the Company as a whole for lack of marketability and a 13% discount for minority interest if the Units in question comprise 50% or less of the total outstanding Units, and then determine the withdrawing Member’s or Assignee’s portion of the resulting Buy-Out Price.[[111]](#footnote-112) Furthermore, the Appraiser will give no value to goodwill,[[112]](#footnote-113) trade names, or other intangible assets.

(c) Upon the request of the withdrawing Member or Assignee, the Company shall (at the expense of the withdrawing Member or Assignee) obtain a second valuation by an independent third party (who must meet the selection criteria and must apply the marketability and minority interest discount established above). Thereafter, the two determinations of the Buy-Out Price shall be averaged and the resulting valuation shall be binding.

11.4 Payment of Buy-Out Price. The Company (or the remaining Members and Assignees in proportion to their Membership Interests) may pay such amount to the withdrawing Member or Assignee within six months of the date the Company first receives written notification of the Terminating Event by any of the following methods, or a combination thereof:

(a) distributing to the former Member or Assignee assets the former Member or Assignee (or his or her predecessor) contributed to the Company (at the then current Fair Market Value thereof as the Manager and the former Member or Assignee may agree or as may be established by third-party appraisal if the Manager and the former Member or Assignee are not able to agree).

(b) cash, or

(c) to the extent the amount payable in cash exceeds $25,000, giving the former Member an unsecured promissory note payable from 15% of the Distributable Cash (or such lesser amount equivalent to the Selling Owner’s Percentage Economic Interest), bearing interest at the prime rate prevailing from time to time as reflected by the prime rate established by Wells Fargo Bank, Denver, Colorado, for loans to large borrowers (compounded annually): (i) payable in full one year after the date the promissory note is issued (if the note is from $25,000 to $60,000), or (ii) two years after the note is issued (if the note is greater than $60,000 to $500,000), or (iii) five years after the note is issued (if the note is greater than $500,000).

(d) to the extent that the Transferor is a foreign Person or does not submit an affidavit as required by I.R.C. § 1446(f)(2), the Transferee (whether the Company or any other Person) shall deduct from the purchase price and withhold a tax equal to 10 percent of the amount realized by the Transferor on the disposition.[[113]](#footnote-114)

11.5 Admission of Assignees; Rights of Non-Admitted Assignees.

(a) Assignees may be admitted as Members of the Company upon the approval of Members holding at least a Three-Fourths Interest or upon approval of the Manager, subject to the additional conditions set forth in Section 11.6 of this Agreement.[[114]](#footnote-115) Members who purchase Membership Interests or Economic Interests in compliance with this Agreement will be deemed admitted as Members to the extent of the Membership Interest purchased.[[115]](#footnote-116)

(b) Rights of Assignees who are not admitted as Members.

(i) Any Assignee to which an Economic Interest has been transferred in accordance with this Agreement will, on the effective date of the transfer,[[116]](#footnote-117) have only those rights of an assignee as specified in the LLC Act and this Agreement unless and until such Assignee is admitted as a Member pursuant to this Agreement. This provision limiting the rights of an Assignee will not apply if such Assignee is already a Member.

(ii) No Assignee has the right:

(A) to participate or interfere in the management or administration of the Company’s Business or affairs,

(B) to Vote or agree on any matter affecting the Company or any Member,

(C) to require any information on account of Company transactions, or

(D) to inspect the Company’s books and records.[[117]](#footnote-118)

(iii) The only rights of an Assignee are to receive the allocations and distributions to which the transferor was entitled (to the extent of the Units transferred) and financial statements of the Company to the same extent provided or available to Members. To the extent of any Units transferred, the transferor Member does not possess any right or power as a Member with respect to those Units and may not exercise any such right or power directly or indirectly on behalf of the Assignee.[[118]](#footnote-119)

(iv) However, each Assignee (including both immediate and remote Assignees) will be subject to all the obligations, restrictions, and other terms contained in this Agreement as if such Assignee were a Member.

11.6 Additional Conditions to Recognition of Transferee.

(a) If a Selling Owner transfers an Economic Interest to a Person who is not already a Member, as a condition to recognizing the effectiveness and binding nature of such Transfer (subject to this Article 11), the Manager may require the Selling Owner and the proposed Assignee to execute, acknowledge, and deliver to the Manager such instruments of transfer, assignment, and assumption, and such other certificates, representations, and documents, and to perform all such other acts which the Manager may deem necessary or desirable to accomplish any one or more of the following:

(i) Constitute such Assignee as a Member as to the interest assigned;[[119]](#footnote-120)

(ii) Confirm that the proposed Assignee as an Economic Interest Owner, or to be admitted as a Member, has accepted, assumed, and agreed to be subject to and bound by all of the terms, obligations, and conditions of this Agreement, as the same may have been further amended (whether such Person is to be admitted as a new Member or will merely be an Assignee);

(iii) Preserve the Company after the completion of such transfer under the laws of each jurisdiction in which the Company is qualified, organized, or does business;

(iv) If, in the reasonable judgment of the Manager the transfer may result in a termination of the Company for federal income tax purposes prevent such termination and declare such transfer is void;[[120]](#footnote-121)

(v) Maintain the status of the Company as a partnership for federal income tax purposes;

(vi) Assure compliance with any applicable state and federal laws, including Securities Laws and regulations; and

(vii) Prevent the Company being treated (or in the reasonable judgment of the Manager may result in the Company being treated) as a publicly traded partnership within the meaning of Code § 7704.

(b) Any transfer of an Economic Interest and admission of a Member in compliance with this Article 11 shall be deemed effective as of the last day of the calendar month[[121]](#footnote-122) in which the required approval thereto was given. The Selling Owner hereby indemnifies the Company and the remaining Members against any and all loss, damage, or expense (including tax liabilities or loss of tax benefits) arising directly or indirectly as a result of any transfer or purported transfer in violation of this Article 11.

(c) No transfer is valid if it would result in more than 100 Persons having an Economic Interest in the Company or otherwise result in the Company being treated as a “publicly traded partnership” taxable as a corporation for federal income tax purposes.

(d) Any Selling Owner shall notify the Company of the transfer in writing within 30 days of the transfer, or, if earlier, by March 31 following the transfer, and must include the names and addresses of the Selling Owner and Assignee, the taxpayer identification numbers of the Selling Owner and the Assignee, and the date of the transfer.

11.7 Gifts of Ownership Interests. Subject to compliance with Sections 11.5 and 11.6 of this Agreement, a Gifting Owner may Gift all or any portion of its Economic Interest provided, however, that the successor-in-interest (“Donee”) is either (i) the Gifting Owner’s spouse, former spouse, lineal descendant (including adopted children and step-children), (ii) a revocable or irrevocable trust the sole beneficiary or beneficiaries of which are the Gifting Owner’s spouse, former spouse, or lineal descendant, or (iii) an entity in which day-to-day voting control is directly or indirectly held by the Gifting Owner. In the event of the Gift of all or any portion of a Gifting Owner’s Economic Interest to one or more Donees who are under 25 years of age, one or more trusts shall be established to hold the Gifted Ownership Interests for the benefit of such Donees until the respective Donees reach the age of at least 25 years. A “transfer” will be deemed to have occurred for the purposes of this Article 11 if the day-to-day voting control over the Economic Interest becomes vested in some Person other than the Gifting Owner without the prior written consent of the Manager.[[122]](#footnote-123) [[123]](#footnote-124)

11.8 Voting Deadlock Buy-Sell Provision. In the event that on three successive occasions, on a particular proposition material to the business of the Company put before them for a Vote, either the Members or the Managers are not willing or able to obtain a majority vote in favor of or against such proposition, including any meeting or other occasion on which there is not a quorum to hold a meeting otherwise duly called in accordance with this Agreement, the provision of Section 11.1, except Section 11.1(a)(i), will not apply, and in lieu thereof the following buy/sell provisions will apply. The Members agree that under this Section 11.8 each of them will sell all their Units for the proportionate portion of the consideration that would be payable for 100% of the outstanding Units, and there will not be assessed a premium or discount for a majority or minority position or lack of marketability. Any Member or Members may begin the buy/sell provisions of the Section 11.8 by sending a Notice, which shall be irrevocable, to each other Member and the Company that contains the price at which the Member(s) sending the Notice have valued the Company per outstanding Unit, which shall constitute of offer by the sending Member(s) to buy or to sell all, but not less than all, of the Units owned by the Member(s) giving the Notice or by the Member(s) to whom the Notice is addressed, as the case may be. The Member(s) receiving the Notice will have the option to either (i) purchase (and the Member(s) sending the Notice shall be obligated to sell) all of the Units owned by the Member(s) giving the Notice at the proposed price, or (ii) sell (and the Member(s) sending the Sale Notice shall be obligated to purchase) all Units owned by the Member(s) to whom the Notice was addressed at the proposed price. The Member(s) receiving the Sale Notice must respond with their election within forty–five (45) days after the effective date of the Notice; failure to respond will be deemed an election by the Members to whom the Notice was addressed to sell to the Member(s) giving the Notice all of the Units owned by the Members to whom the Notice was addressed at the price proposed in the Notice. Any Member who agrees or is obligated under this Section 11.8 to purchase Units may elect to tender (and the selling Member(s) are required to accept) an unsecured promissory note to the extent the amount payable in cash exceeds $25,000, bearing interest at the prime rate prevailing from time to time as reflected by the prime rate established by JPMorgan Chase Bank, N.A., New York, NY, for loans to large borrowers (compounded annually): (i) payable in full one year after the date the promissory note is issued (if the note is from $25,000 to $60,000), or (ii) two years after the note is issued (if the note is greater than $60,000 to $500,000), or (iii) five years after the note is issued (if the note is greater than $500,000).

# ARTICLE

# DISPUTE RESOLUTION

12.1 Disputes. Except for the injunctive or specific performance remedy set forth in Section 13.2(b) and Section 13.5 of this Agreement, in the event a dispute of any kind arises out of, in connection with, or relating to this Agreement or the operations of the Company under this Agreement (including any dispute concerning its construction, performance, or breach), the parties to the dispute (who may be any combination of the Company, any Manager, and any one or more of the Members and Assignees) will attempt to resolve the dispute as set forth in Section 12.2 of this Agreement before proceeding to litigation.[[124]](#footnote-125) [[125]](#footnote-126)

12.2 Negotiation. If a dispute arises, any party to the dispute may give Notice to each other party describing the nature of that party’s claim(s), the provision(s) of this Operating Agreement in question, the material facts surrounding such claim, and the relief sought by that party. If the Company is not a party to the dispute, that party will also give Notice to the Company. After Notice has been given, the parties in good faith will attempt to negotiate a resolution of the dispute.

12.3 Mediation.[[126]](#footnote-127) If, within 45 days after the Notice provided in Section 12.2 of this Agreement has been given, a dispute is not resolved through negotiation, one or more parties may request by Notice to the other parties to the dispute, and to the Company if it is not a party to the dispute, that the dispute be mediated. Upon the giving of that Notice, no party may file any action with respect to all or any part of the dispute in a court of law until the provisions of this Section 12.3 have been satisfied. All parties to the dispute will collectively select a mediator. If they fail to do so within 75 days after the Notice provided in Section 12.2 of this Agreement, one or more parties may request the Judicial Arbiter Group, Inc. (“JAG”), Denver, Colorado, to submit a panel of five arbitrators from which the choice will be made. The party requesting the mediation will strike first, followed by alternative striking until one name remains. If there are more than two parties but not more than four parties, each party will strike in rotation until one name remains and that person shall be the mediator. The parties may by agreement reject one entire list and request a second list. If selection of a mediator is not completed within 105 days after the Notice provided in Section 12.2 or if there are more than four parties, then the mediator will be selected by JAG. The mediator so selected will then mediate the dispute in Denver, Colorado. The party or parties requiring mediation shall bear one-half of the costs and expenses associated with such mediator and the other parties shall bear one-half of such costs and expenses. Within thirty (30) days of the appointment of a mediator, the parties shall hold a mediation hearing before such mediator at such time and place as the parties and the mediator may agree. If such mediation is unsuccessful, or if mediation is not held within 180 days after the Notice provided in Section 12.2 for any reason or reasons other than failure of the party requesting mediation to comply with the requirements above, the party requesting mediation may institute litigation on the claim or claims specified in that party’s Notice, at the requesting party’s sole discretion.

# ARTICLE

# GENERAL PROVISIONS

13.1 Amendment and Power of Attorney.

(a) The Manager may amend this Agreement or the Articles without the consent of the Members provided that such amendments are administrative in nature, are otherwise permitted by this Agreement, or are required to comply with the Code or the LLC Act.

(b) The Members holding at least a Majority Interest of the Units entitled to Vote voting as a single class may amend this Agreement or the Articles as they deem necessary or appropriate in the circumstances (except that a Majority Interest may not amend any provision herein requiring the vote of more than a Majority Interest and may not enact an amendment depriving any Member of a right to vote on any matter which that Member had before such amendment). If there are no Members, Persons who will be admitted as Members[[127]](#footnote-128) holding at least a Majority Interest following such admission may amend this Agreement, and such amendment may be effective immediately before the admission of new Members.[[128]](#footnote-129)

(c) Any amendment will become effective upon the required approval unless otherwise provided. Any duly adopted amendment to this Agreement is binding upon and inures to the benefit of each Person (whether a Member or Assignee) who holds an Economic Interest at the time of such amendment, without the requirement that such Person sign the amendment or any republication or restatement of this Agreement.

(d) Each and every amendment to this Agreement must be in writing, adopted at a meeting of Members duly called at which consideration and Vote on such amendment is permitted or signed by the number of Members required for approval, and the parties hereto exclude, to the maximum extent possible, the possibility that this Agreement may be amended by course of conduct or otherwise not by a writing.

(e) To the extent that any such amendment restricts the rights of or imposes duties on Persons other than Members or Assignees or both, no such amendment can become effective without the consent of such Persons acting by a Vote of a majority of the Economic Interests held by such Persons except to the extent permitted by § 7-80-108(2)(e) of the LLC Act.[[129]](#footnote-130)

(f) *Company Representative*[[130]](#footnote-131) *and* *Power of Attorney*. The Managers shall select the Company Representative pursuant to Code § 6223 and, in addition to the powers and responsibilities provided in Code §§ 6221, *et seq*., shall have all powers and responsibilities provided in Code § 6226, provided that the initial Company Representative shall be \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

(i) Each Equity Owner (including any former Equity Owner), by the execution of this Agreement or otherwise becoming an Equity Owner, hereby constitutes and appoints the Company Representative to be that Equity Owner’s true and lawful representative and attorney-in-fact with full power and authority to act in the Equity Owner’s name, place, and stead in respect of that Equity Owner’s Interest, as the Company Representative determines to be consistent with the Equity Owner’s rights under this Agreement and is necessary, appropriate, or expedient to eliminate or minimize any withholding or other tax-related obligation or responsibility that the Company or the Company Representative might otherwise have in respect of the Equity Owner’s tax liabilities or other responsibilities to any taxing jurisdiction or other Governmental Authority or the Equity Owner’s or the Company’s tax liabilities under, and as provided in, Section 9.7 of this Agreement, including the power and authority to enter into, execute, acknowledge, and file any agreement or statement or other document, return, or form, with any taxing or other Governmental Authority in which the Equity Owner is not a resident or with the Internal Revenue Service: (A) allowing the Company (as, and to the extent that, the Company Representative determines to be appropriate) to include that Equity Owner in any composite or similar return filed by the Company with that taxing jurisdiction or (B) subjecting the Equity Owner to the jurisdiction and authority of, or to any other obligation to pay, the taxing jurisdiction or other Governmental Authority for the purpose of the collection of any taxes the Equity Owner (or in respect of whom, the Company) may owe to the taxing jurisdiction or other Governmental Authority (including in respect of any Tax Indemnification Amount under Section 9.7) in respect of the Equity Owner’s Interest.

(ii) The power of attorney granted under this Section is a special power of attorney, coupled with an interest, and is irrevocable and will (A) survive and not be affected by the death, incapacity, dissolution, termination, or Bankruptcy of the Equity Owner granting this power of attorney or the Transfer of all or any portion of that Equity Owner’s Interest and (B) extend and apply to the Equity Owner’s successors, assigns, and legal representatives.

(iii) In addition to the foregoing, each Equity Owner (including any former Equity Owner) shall take all other actions as the Company Representative may reasonably direct with respect to the Equity Owner’s (or, in respect of the Equity Owner, the Company’s) tax liabilities described in Section 9.6 or Section 9.7 of this Agreement, including filing an amended return for any “reviewed year” to account for all adjustments under Code § 6225(a) (as amended from time to time, including by the 2015 Act) properly allocable to the Equity Owner as provided in, and otherwise contemplated by, Code § 6225(c) and any Treasury Regulations that may be promulgated thereunder.

(iv) The Company Representative shall keep the Manager and all Members informed of all notices from government taxing authorities that may come to the attention of the Company Representative. The Company Representative shall give written notice to an Equity Owner before exercising the power of attorney granted by the Equity Owner under this Section, and the Equity Owner shall cooperate fully with the Company Representative’s exercise thereof.

(v) The Company shall pay and be responsible for all reasonable third‑party costs and expenses incurred by the Company Representative in performing those duties. Each Member and Assignee shall be responsible for any costs incurred by the Member or Assignee with respect to any tax audit or tax‑related administrative or judicial proceeding against any Member or Assignee, even though it relates to the Company.

(vi) The Company Representative may not compromise any dispute with the Internal Revenue Service without the approval of an affirmative vote of a Majority Interest; provided, that this Section 13.1(f)(vi) shall not apply to the Company Representative’s exercise of the powers and responsibilities provided in Code § 6223 or 6226, or by Section 1.14 of this Agreement.

(g) (i) In addition to the power of attorney granted in Section 13.1(e) of this Agreement, each Member and Assignee hereby makes, constitutes, and appoints each Manager, with full power of substitution and re-substitution, its true and lawful attorney-in-fact in its name, place, and stead and for its use and benefit, to sign, execute, certify, acknowledge, swear to, file, and record: (A) all certificates and instruments which the Manager may deem necessary or appropriate to form, qualify, or continue the business of the Company as a limited liability company; (B) any and all amendments or changes to this Agreement and the instruments described in clause (A) above which the Manager may deem necessary or appropriate to effect a change or modification of the Company in accordance with the terms of this Agreement, including, without limitation, amendments or changes to reflect: (I) the exercise by any Manager of any power granted to it under this Agreement, (II) the issuance of Units and admission of any additional or substituted Member, and (III) the disposition by any Member or Assignee of its Units; (C) all certificates of cancellation and other instruments which the Manager deems necessary or appropriate to effect the dissolution of the Company pursuant to the terms of this Agreement; and (D) any other instrument which is now or may hereafter be required by law to be filed on behalf of the Company or is deemed necessary or appropriate by the Manager to carry out fully the provisions of this Agreement in accordance with its terms.[[131]](#footnote-132)

(ii) Each Member and Assignee authorizes each such attorney-in-fact to take any further action which such attorney-in-fact shall consider necessary or advisable in connection with any of the foregoing, hereby giving each such attorney-in-fact full power and authority to do and perform each and every act or thing whatsoever requisite or advisable to be done in connection with the foregoing as fully as such Member or Assignee might or could do personally, and hereby ratifying and confirming all that any such attorney-in-fact shall lawfully do or cause to be done by virtue thereof or hereof.

(iii) The power of attorney granted pursuant to this Article: (A) is a special power of attorney coupled with an interest and is irrevocable; (B) may be exercised by any such attorney-in-fact by listing the Members and Assignees executing any agreement, certificate, instrument, or other document with the single signature of any such attorney-in-fact acting as attorney-in-fact for all such Members and Assignees; and (C) shall survive the bankruptcy, insolvency, dissolution, or cessation of existence of a Member or Assignee, and shall survive the delivery of an assignment by a Member or Assignee of the whole or a portion of its Units, except that where the assignment is of such Member’s or Assignee’s entire Unit and the Assignee is admitted as a substituted Member, the power of attorney shall survive the delivery of such assignment for the sole purpose of enabling any such attorney-in-fact to effect such substitution.

(iv) Whenever any Manager executes a document as attorney-in-fact for a Member or Assignee, the Manager must promptly provide a copy of such document to that Member or Assignee, although a failure to provide such copy does not invalidate the action taken.[[132]](#footnote-133)

13.2 Confidentiality.

(a) All Members and the Manager recognize and acknowledge that the business plan, information, business, business methods or practices, list of the Company’s customers, and any other trade secret or other secret or confidential information relating to the Company’s business as they may exist from time to time are valuable, special, and unique assets of the Company’s business. Therefore, the Members and Manager agree as follows:

(i) That the Members and Manager will hold in strictest confidence and not disclose, reproduce, publish, or use in any manner, without the express authorization of the Manager, the business plan, any information, business, business methods or practices, customer lists, or any other secret or confidential matter relating to any aspect of the Company’s Business, except as such disclosure or use may be required in connection with the Members and Manager’s work for the Company.

(ii) That upon request or at the time of leaving the position of Member or Manager, any Member or Manager so leaving will deliver to the Company, and not keep or deliver to anyone else, or provide a certificate of destruction with respect to, any and all notes, memoranda, documents and, in general, any and all material relating to the Company’s Business whether or not a “trade secret” as defined by law; provided, that this Section 13.2(a)(ii) shall not require the return or destruction of any copy of such material (y) in the possession or control of a Manager leaving the position of Manager if and to the extent that Person also is a Member, remains a Member, and as a Member is entitled to be in possession of such material or (z) maintained electronically in the regularly maintained electronic data backup system of the Member or Manager and provided, further, that any such copy shall remain subject to this Section 13.2 notwithstanding that such Member or Manager has ceased to be a Member or Manager, as the case may be.

(iii) That the Manager may from time to time reasonably designate other subject matters requiring confidentiality and secrecy which shall be deemed to be covered by the terms of this Agreement.

(b) In the event of a breach or threatened breach by any Member or the Manager of the provisions of this Section 13.2, the Company shall be entitled to an injunction: (i) restraining any Member or Manager from disclosing, in whole or in part, any information as described above or from rendering any services to any Person, firm, corporation, association, or other entity to whom such information, in whole or in part, has been disclosed or is threatened to be disclosed; and/or (ii) requiring that the Member or Manager deliver to the Company all information, documents, notes, memoranda, and any and all other material (whether or not trade secrets) as described above upon the Member’s or Manager’s leaving the position of Member or Manager. Nothing in this Section 13.2(c) shall be construed as prohibiting the Company from pursuing other remedies available to the Company for such breach or threatened breach, including the recovery of damages from the Member and Manager.

(c) Notwithstanding anything to the contrary in this Agreement:

(i) A Member or Manager will not be deemed to have violated this Operating Agreement or any federal or state trade secret law for the disclosure of a trade secret that is made in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney and solely for the purpose of reporting or investigating a suspected violation of law, or is made in a complaint or other document filed in a lawsuit or other proceeding if such filing is made under seal;

(ii) An individual who files a lawsuit against the Company based on retaliation against the individual by the Company for reporting a suspected violation of law may disclose the trade secret to an attorney of the individual and use the trade secret information in that court proceeding, if the individual files any document containing the trade secret under seal and does not disclose the trade secret except pursuant to court order; and

(iii) Each Party hereby waives any right to any personal recovery resulting from his or her disclosure of a trade secret for purposes of reporting a violation or suspected violation of law, whether in his or her own lawsuit or one brought by a governmental agency.[[133]](#footnote-134)

13.3 Unregistered Interests. Each Member and Assignee:

(a) Acknowledges that the Units are being offered and sold without registration under the Securities Act of 1933, as amended, or under similar provisions of state law,

(b) Acknowledges that such Person is fully aware of the economic risks of an investment in the Company, and that such risks must be borne for an indefinite period of time,

(c) Represents and warrants that such Person is acquiring an Economic Interest for such Person’s own account, for investment, and with no view to the distribution of the Economic Interest or any interest therein,

(d) Represents that such Member or Assignee is an accredited investor as that term is defined in SEC Rule 501(a), has consulted with such legal, tax, investment, financial, and other advisors regarding such Person’s acquisition of the Units as such Person has deemed necessary or appropriate in the circumstances, and that such Person is financially capable of meeting any federal, state, or local tax obligations arising or that may arise from the acquisition or holding the Units,

(e) Represents that such Member or Assignee has received and reviewed such information about the Business (and proposed Business), assets, financial condition, management, risks relating to the Company and the Business and proposed Business, and such other information regarding the acquisition of the Units as the Member or Assignee has (in consultation with such advisors as the Member or Assignee has deemed appropriate) determined to be necessary or appropriate in the circumstances, and

(f) Agrees not to transfer, or to attempt to transfer, all or any part of such Economic Interest without registration under the Securities Act of 1933, as amended, and any applicable state securities laws, unless the transfer is exempt from such registration requirements.

13.4 Waivers Generally. No course of dealing will be deemed to amend or discharge any provision of this Agreement. No delay in the exercise of any right will operate as a waiver of such right. No single or partial exercise of any right will preclude its further exercise. A waiver of any right on any one occasion will not be construed as a bar to, or waiver of, any such right on any other occasion.[[134]](#footnote-135)

13.5 Equitable Relief. If any Person proposes to transfer all or any part of such Person’s Economic Interest in violation of the terms of this Agreement, the Company or any Member may apply to any court of competent jurisdiction for an injunctive order prohibiting such proposed transfer except upon compliance with the terms of this Agreement, and the Company or any Member may institute and maintain any action or proceeding against the Person proposing to make such transfer to compel the specific performance of this Agreement. Any attempted transfer in violation of this Agreement is null and void, and of no force and effect. The Person against whom such action or proceeding is brought waives the claim or defense that an adequate remedy at law exists, and such Person will not urge in any such action or proceeding the claim or defense that such remedy at law exists.

13.6 Remedies for Breach. The rights and remedies of the Members set forth in this Agreement are neither mutually exclusive nor exclusive of any right or remedy provided by law, in equity, or otherwise. Subject to the dispute resolution provisions of Article 12 of this Agreement, the Members and Assignees agree that all legal remedies (such as monetary damages) as well as all equitable remedies (such as injunctive remedies and specific performance) will be available for any breach or threatened breach of any provision of this Agreement. The Company may set off any damages owed by an Equity Owner against any distributions payable to the Equity Owner under Sections 9.2 or 10.2 of this Agreement. In addition to the foregoing remedies, if a Member materially breaches this Agreement each other Member and the Company shall be entitled to a determination that such Member shall cease to be a Member of the Company and shall attain the status of a mere Assignee.[[135]](#footnote-136)

13.7 Notices. All Notices under this Agreement will be in writing and will be either delivered or sent addressed as follows:

(a) If to the Company, at the Company’s principal place of Business and to its registered office in Colorado; and

(b) If to any Member or Assignee, at such Person’s home or business address as then appearing in the records of the Company.

In computing time periods for the purposes of this Section and the following Section, a day means a business day in Denver, Colorado and shall not include Saturday, Sunday, or days when banks are generally closed for transacting business with the public and a Notice shall be deemed delivered on the last day of the period provided for.

13.8 Deemed Notice. All Notices given to any Person in accordance with this Agreement will be deemed to have been duly given:

(a) On the date of actual receipt if personally delivered or if delivered by electronic mail with confirmation of delivery to the destination server;

(b) Three days after being sent by registered or certified mail, postage prepaid, return receipt requested; or

(c) One day after the day sent by a nationally recognized overnight courier service, next day delivery, prepaid or charged to a valid account with such service.

13.9 Costs. If the Company or any Member or Assignee retains counsel for the purpose of enforcing or preventing the breach or any threatened breach of any provision of this Agreement or for any other remedy relating to it, then the prevailing party will be entitled to be reimbursed by the non-prevailing party for all costs and expenses so incurred (including reasonable attorney’s and other professional fees, costs of bonds, and fees and expenses for expert witnesses) unless the trier of fact determines otherwise to avoid manifest unfairness.

13.10 Indemnification.[[136]](#footnote-137)

(a) Each Member and Assignee hereby indemnifies and agrees to hold harmless the Company, each Manager, and each other Member and Assignee from any liability, cost, or expense arising from or related to any act or failure to act of such Member or Assignee which is in violation of this Agreement.

(b) A Manager shall not be personally liable to the Company or its Members or Assignees for monetary damages for breach of fiduciary duty as a Manager; except that this provision shall not eliminate or limit the liability of a Manager to the Company or its Members for monetary damages otherwise existing for:

* + 1. any breach of the Manager’s duty of loyalty to the Company or to its Members;
		2. any breach of the Manager’s duties and obligation stated in Section 5.5 or Section 5.8 of this Agreement;
		3. acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or
		4. any transaction from which the Manager directly or indirectly derived any improper personal benefit.

(c) The Company shall, to the fullest extent permitted by law,[[137]](#footnote-138) indemnify any and all Persons whom it shall have power to indemnify under this section (the “Indemnitee”) from and against any and all of the expenses, liabilities, or other matters referred to in or covered by said section, and the indemnification provided for in this Section 13.10(c) shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any agreement, vote of Members or disinterested Managers, or otherwise, both as to action in his or her official capacity and as to action in another capacity while holding such office, shall continue as to a Person who has ceased to be a Manager, officer, employee, or agent, and shall inure to the benefit of the heirs, executors, and administrators of such a Person. The Company shall pay timely expenses incurred by the Indemnitee in advance of the final disposition of such matter upon the receipt of an undertaking by or on behalf of such Indemnitee, which need not be secured, to repay such amount if it shall ultimately be determined that the Indemnitee is not entitled to be indemnified by the Company as authorized in this Section 13.10(c).[[138]](#footnote-139) The indemnity obligation under this Section 13.10(c) is an obligation of the Company only and is not enforceable against any Member.

13.11 Partial Invalidity. Wherever possible, each provision of this Agreement will be interpreted in such manner as to be effective and valid under applicable law. However, if for any reason any one or more of the provisions of this Agreement are held to be invalid, illegal, or unenforceable in any respect, such action will not affect any other provision of this Agreement. In such event, this Agreement will be construed as if such invalid, illegal, or unenforceable provision had never been contained in it, and any court or other body determining any provision to be invalid shall interpret the remaining portions of this Agreement to give maximum effect to the intention of the parties as expressed herein, including such invalid provision.

13.12 Entire Agreement. This Agreement contains the entire agreement and understanding of the parties and Persons who may in the future become Members or Assignees with respect to its subject matter, and it supersedes all prior written and oral agreements between or among them. No amendment of this Agreement will be effective for any purpose unless it is made in accordance with Section 13.1 of this Agreement.[[139]](#footnote-140)

13.13 Benefit. The contribution obligations of each Member will inure solely to the benefit of the other Members and the Company, without conferring on any other Person any rights of enforcement or other rights. Without limiting the generality of the foregoing, none of the provisions of this Agreement shall be for the benefit of or enforceable by any creditors of the Company or of any Member.

13.14 Binding Effect. This Agreement is binding upon, and inures to the benefit of, the Members and their permitted successors and assigns; provided that, Assignees will only have the rights set forth in Section 11.5(b) of this Agreement unless admitted as a Member in accordance with this Agreement.

13.15 Further Assurances. Each Member and Assignee agrees, without further consideration, to sign and deliver such other documents of further assurance as may reasonably be necessary to effectuate the provisions of this Agreement.

13.16 Headings. Article and Section titles have been inserted for convenience of reference only. They are not intended to affect the meaning or interpretation of this Agreement.

13.17 Terms. Terms used with initial capital letters will have the meanings specified, applicable to both singular and plural forms, for all purposes of this Agreement. All pronouns (and any variation) will be deemed to refer to the masculine, feminine, or neuter, as the identity of the Person may require. The singular or plural include the other, as the context requires or permits. The word “include” (and any variation) is used in an illustrative sense rather than a limiting sense.

13.18 Legal Representation.[[140]](#footnote-141) The Members agree that the law firm of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Counsel”), represents only the Company in connection with the preparation of this Agreement, and has not offered any Member or other Person any advice regarding the advisability of entering into this Agreement. Each Person executing this Agreement further acknowledges and agrees:

* + - * 1. actual or potential conflicts of interest exist between the Company and the Members, Counsel does not represent any individual Member and neither this Agreement nor the transactions and Company operations contemplated by this Agreement are intended to of do create an attorney/client relationship between Counsel and any of the Member in connection with the preparation of this Agreement or the operations and business of the Company pursuant to this Agreement;
				2. Counsel has not been engaged to protect or represent the individual interests of the Members or any other Person who becomes a Member of the Company (who shall be deemed to be Members from the date of this Operating Agreement solely for the purposes of this Section 13.18), or to represent the interests of the spouses of Members, equity holders of the Members or the spouses of the equity holders of the Members, in the preparation of this Agreement, and the Company has engaged no other legal counsel to act in such capacity;
				3. the interests of such Person (other than the Company) will not be represented by legal counsel in connection with the preparation of this Agreement or the business and operations of the Company unless such Person engages counsel on their own behalf, and Counsel cannot act as such counsel, and such Person has been advised to retain independent legal, tax, and accounting advice and representation of their own choosing for purposes of representing their individual interests with respect to the subject matter of this Agreement;
				4. such Person has been given reasonable time and opportunity to obtain such advice and representation; and
				5. such Person has obtained such independent advice and representation as they have deemed necessary and appropriate in the circumstances at his or her own expense without expecting the Company to reimburse such Person for such fees or other expenses.
				6. such Person (i) has carefully considered the foregoing and hereby approves Counsel’s representation of the Company and understands that Counsel does not represent such Person (other than the Company) in connection with the preparation of this Agreement; (ii) acknowledges the likelihood that, under the laws and ethical rules governing the conduct of attorneys, Counsel would be precluded from representing such Person in connection with any dispute involving the Company or the Members; and (iii) agrees that, in the event of a dispute between the Company and such Person, Counsel may represent the interests of the Company;
				7. the approvals, acknowledgments and waivers made pursuant to this Section 13.18 do not reflect or create a right under this Agreement on the part of such Person (other than the Company) to approve the selection of legal counsel to the Company, and nothing in this Section 13.18 shall preclude the Company from selecting different legal counsel at any time in the future.

13.19 Governing Law. This Agreement will be governed by, and construed in accordance with, the laws of the State of Colorado without considering provisions of Colorado law that would require or permit application of the laws of any other jurisdiction.[[141]](#footnote-142)

13.20 Creditors; No Third-Party Beneficiaries. None of the provisions of this Agreement shall be for the benefit of, or enforceable by, any creditor of the Company or other Person, including without limitation any Member in such Member’s capacity as a creditor. No Person not a party to this Agreement is intended to be a third-party beneficiary of this Agreement.

13.22 Counterparts; Electronic Signature. This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which shall constitute one and the same instrument. At least one original copy of this Operating Agreement will be placed in the Company records. Electronic signatures, including without limitation signatures transmitted by email in a .pdf document, shall be deemed original signatures for all purposes. A copy of this Agreement, as signed, will be delivered to each Member and each such copy will be deemed to be an original document.

**CERTIFICATE**

The undersigned hereby agree, acknowledge, and certify that the foregoing Agreement constitutes the Operating Agreement of the Company adopted by the Manager and by the Members of the Company.

 **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_LLC**

**MANAGERS:**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Manager \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Manager

**MEMBERS:**[[142]](#footnote-143)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Member \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Member

By \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Its \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**SIGNATURE PAGE FOR ASSIGNEES AND NEW MEMBERS**

The undersigned, following consultation with his, her, or its legal, financial, investment, tax, and other advisors to the extent the undersigned deemed appropriate and having read the Operating Agreement for the Company dated \_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_\_ to the extent deemed necessary or appropriate, hereby accepts the terms of said Operating Agreement in accordance with the terms thereof.

**(Where Assignees are to be admitted as Members, or where a Code § 704(c) book-up occurs, consider the following:)** The Members hereby acknowledge that, effective \_\_\_\_\_\_\_\_\_\_\_\_, 200x, the signatories listed below have been admitted as Members of the Company and, immediately prior to his or her admission as a Member, the Company has booked up Capital Accounts pursuant to Treas. Reg. § 1.704-1(b)(2)(iv)(*f*) to the Fair Market Value of the Company as permitted by Section 9.1(b)(ix)(A) of this Agreement.[[143]](#footnote-144) The parties agree that at the time of the Person’s admission as a Member, the Fair Market Value of the Company was $\_\_\_\_\_\_\_\_\_\_.[[144]](#footnote-145)

**(Where Assignees are not to be admitted as Members, and where a Code § 704(c) book-up occurs, consider the following:)** The Assignee hereby acknowledge that, effective \_\_\_\_\_\_\_\_\_\_\_\_, 20xx, the signatories listed below have not been admitted as Members of the Company but will be treated as Assignees, and, immediately prior to his or her acceptance as an Assignee, the Company has booked up Capital Accounts pursuant to Treas. Reg. § 1.704-1(b)(2)(iv)(*f*) to the Fair Market Value of the Company as permitted by Section 9.1(b)(viii)(A) of this Agreement.[[145]](#footnote-146) The parties agree that at the time of the Person’s acceptance as an Assignee, the Fair Market Value of the Company was $\_\_\_\_\_\_\_\_\_\_.[[146]](#footnote-147)

*(Intentionally Left Blank)*

**MEMBER or ASSIGNEE:**

Name: Name:

 Co-owner (if any)

Address:

All co-owners will be treated as joint tenants with rights of survivorship unless not permitted under applicable law or another form of ownership is designated:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Signature Signature

State of )

 ) ss.

County of )

 Subscribed or acknowledged before me, a notary public in and for said county and state, by the Member(s) named above.

 Witness my hand and official seal this \_\_\_\_ day of \_\_\_\_, 20xx.

 My commission expires:

 Notary Public

**Exhibit A**[[147]](#footnote-148)

**Members, Class, Units, Capital Contributions**

**As of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_\_**

This Exhibit shall be amended from time to time to reflect the issuance, transfer, or repurchase of Units.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Member’s****Name & Address** | **Class** | **Capital Contributions** | **Membership** **Interest** **(No. of Units)** | **Percentage****Interest** |
|  | A |  |  | % |
|  | B |  |  | % |
|  |  |  |  |  |
|  | A |  |  | % |
|  | B |  |  | % |
|  |  |  |  |  |
|  | A |  |  | % |
|  | B |  |  | % |
|  |  |  |  |  |
|  | A |  |  | % |
|  | B |  |  | % |
|  |
| **Economic Interest Holders Who Are Not Members** |
| None. |  |  |  |  |

**NOTE ON USE**

**Certain Modifications to the Form of an LLC**

**to Be Treated as an S Corporation for Tax Purposes**

Although this text suggests that a limited liability company adopting S corporation taxation is inadvisable, it is done quite frequently. It is not so simple to adapt the standard operating agreement for an LLC treated as a partnership for tax purposes into one for an LLC treated as an S corporation for tax purposes (or even as a C corporation). Importantly, any reference in the operating agreement to subchapter K of the Internal Revenue Code, I.R.C. sections beginning with “§ 7.” and Treasury Regulations beginning with “§ 1.7. . .,” are irrelevant in the S corporation or the C corporation environment. So are other concepts associated with partnership taxation.

The following sets forth certain provisions to consider when adapting an operating agreement to an S corporation election.

1. Defined Terms should include:

Section 1.xx “*S Corporation*” means a U.S. entity defined as such pursuant to § 1361 of the Code and electing to be taxed as such pursuant to § 1362(a) of the Code.

2. There should be an article or a group of sections entitled “S Corporation” containing the following language:

Section 3.ww ***Election of S Corporation Status.*** By unanimous consent of the initial Members of the Company, the Company has elected to be taxed as a corporation under the “check-the-box” Regulations at §§ 301.7701-1 through 301.7701-4 and has further elected to be taxed as an S Corporation.

Section 3.xx ***Maintenance of S Corporation Status***. The following provisions are adopted for the purpose of defining, limiting and regulating the powers of the Company and of its Managers and Members:

(a) For so long as the Company is an S Corporation, both the Members and the Managers of the Company are prohibited from authorizing or issuing any additional class of Units or issuing any Units of the Company that would cause the Company not to qualify as an S Corporation under § 1361 of the Code without the prior written consent of a Required Interest of the Members.

(b) For so long as the Company is an S Corporation, the Managers of the Company shall not acquire any assets or stock which would cause the Company to become an “ineligible corporation” as defined in § 1361(b)(2) of the Code without the prior written consent of a Required Interest of the Members.

(c) For so long as the Company is an S Corporation, neither the Members nor the Managers of the Company shall take any other action which would cause the Company not to qualify as an S Corporation under § 1361 of the Code without the prior written consent of a Required Interest of the Members.

3.Traditional partnership capital accounts and treatment under I.R.C. § 704 are irrelevant to S corporation taxation. What is important to an S corporation is the accumulated adjustment account. A provision should be included similar to the following:

Section 8.xx ***Accumulated Adjustments Accounts.*** As of and after the Effective Date, the Company shall maintain an accumulated adjustments account as provided in § 1.1368-2 of the Regulations.

4.Because of the S corporation requirement that there be only a single class of stock, all economic interests must be treated identically in proportion to their ownership, but classification into voting and non-voting stock, treated equally in all other ways, is permissible. Special allocations, preferred distributions, and the other flexibility given in partnership taxation are not possible in an S corporation. Thus, the allocations and distributions section of the operating agreement should be something similar to the following:

Section 9.vv ***Allocation of Profit or Loss.*** For any Fiscal Year of the Company, profits or losses of the Company shall be allocated to the Equity Owners in proportion to the holder’s Percentage Economic Interest.

Section 9.ww. ***General Distribution Rules.*** Notwithstanding anything in this Article 9 to the contrary, no distributions shall be made in violation of the Act, including C.R.S. § 7-80-606. Moreover, except with the approval of a Three-Fourths Interest, no distribution shall be made that would jeopardize the Company’s status as an S Corporation.

5.Because of the limitations on the possible owners of an S corporation, the LLC will need additional transferability restrictions, similar to the following:

Section 11.xx ***Prohibited Transfers — S Corporation Eligibility.*** Any purported Transfer of Units that involves a shareholder not eligible to be a holder of an interest in an S corporation is void *ab initio* and further obligates the parties engaging or attempting to engage in such Transfer to indemnify and hold the Company and the other Economic Interest Holders harmless from all costs, liabilities, and damages that any of such indemnified Persons may incur (including, without limitation, incremental tax liability, attorneys’ fees and expenses, and costs, liabilities, and damages associated with the Company’s loss of S Corporation status if such loss of status is a consequence of the prohibited Transfer) as a result of such Transfer or attempted Transfer and efforts to enforce the indemnity granted hereby.

6. Lawyers adapting an operating agreement for an S corporation format should also consider including a restriction on the type of property the LLC may hold. For example, putting assets in an LLC that have a potential to appreciate in value, like real estate, is problematic and can be costly for members when they try to remove a substantially appreciated asset from an LLC treated as an S corporation for tax purposes. Although lawyers may tell their clients when advising them about the negative and positive aspects of the S corporation election, the client may forget over time. Including a restriction on the transfer of appreciating assets, depending on the LLC’s purpose and business strategies, may be advisable.

1. . It is important to note that, when drafting an operating agreement under the Colorado Limited Liability Company Act (C.R.S. §§ 7-80-101, *et seq.*), the Colorado General Assembly expressed its intention “to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements.” C.R.S. § 7-80-108(4). Thus it is important for the draftsperson to consider all relevant issues with the client, and then “scriven with precision.” *See* Lidstone and Sparkman, “*Limited Liabilitly Companies and Partnerships in Colorado* (CLE in Colo. 2019) (“*LLCs and Partnerships”)* § 3.2.5, “Operating Agreements — Agreements Among the Members,” and § 3.2.6, “Important Areas that a Written Operating Agreement Should Address.” The examples of operating agreements being interpreted in courts and found wanting are too numerous to number. [↑](#footnote-ref-2)
2. . This is consistent with the definition of “Affiliate” by the SEC in Rule 405. [↑](#footnote-ref-3)
3. . The more precise the description of the Business is, the less concern that Members and Managers may have about inadvertently usurping opportunities of the entity (for which they would have to account for profits under the LLC Act, C.R.S. § 7-80-404(1)(a), and may be a violation of a duty) or competition (prohibited in C.R.S. § 7-80-404(1)(c)). In addition, and perhaps more importantly, a more precise definition of Business gives more definition to the agency granted to the managers (C.R.S. § 7-80-405(1)), or members in a member-managed LLC (C.R.S. § 7-80-405(2)) to take actions in the ordinary course — actions out of the ordinary course require unanimous Member approval (C.R.S. § 7-80-401(2) — or lesser approval as may be set forth in the operating agreement). *See also* the limitations suggested in Section 3.2 of this Agreement. [↑](#footnote-ref-4)
4. . There are several methods by which Capital Accounts may be maintained in accordance with the Treasury Regulations, including “tax basis,” “tax book rules,” and “generally accepted accounting principles.” *See* § 12.1.5, “Taxation of Operations of Partnerships.” Although the tax rules tend to have an enormous influence on Capital Account maintenance, Capital Accounts can be — and often are — fundamental to the economics of the deal. *Do not assume that everyone except the tax advisors can safely ignore Capital Accounts.* [↑](#footnote-ref-5)
5. . This provision, relying on notice provided by financial statements, is intended to prevent Members and Economic Interest holders from sitting on their rights. If there is a problem, it should be addressed promptly. [↑](#footnote-ref-6)
6. . While the 2015 Act (defined in Section 9.6 of this Agreement) does not require that the Company Representative be a Member, the Members, by contract in the Operating Agreement can do so. The 2015 Act does require that the Company Representative have “a substantial presence in the United States.” [↑](#footnote-ref-7)
7. . This definition and Sections 9.6 and 9.7 of this Agreement should be included if (for any taxable year of the Company beginning after December 31, 2017) the Company has more than 100 Members or, regardless of the number of Members, if any Member is a partnership, a limited liability company, a nonresident alien, a trust other than a grantor trust that is treated as owned by the grantor or another person, or a foreign entity that would not be classified as a corporation if it were a domestic entity. For purposes of this rule, (i) a married couple would be treated as one Member and (ii) if an S corporation is a Member, each of its shareholders must be included in the computation of the number of Members. To take advantage of this exemption, the Company must file an election pursuant to Code § 6221(b)(1), as amended by Public Law 114-74, the Bipartisan Budget Act of 2015 and subsequent amendments. *See also* § 12.1.13, “Partnership Audit Procedures and Tax Assessments Against Partnerships.” [↑](#footnote-ref-8)
8. . See the commentary around Section 11.3(a) of this Agreement for a discussion of lack of liquidity and lack of marketability discounts. [↑](#footnote-ref-9)
9. . This contemplates voting by Percentage Membership Interest. Alternatively, voting can be based on the number of Units, which may not be consistent with Percentage Membership Interest. Alternative language would be “more than 50% of the aggregate number of Units entitled to Vote. . . .” [↑](#footnote-ref-10)
10. . The LLC Act does not require that a manager be a natural individual. C.R.S. § 7-80-102(8) defines “manager” as “a person designated as a manager of a limited liability company to manage the company pursuant to section 7‑80‑402.” C.R.S. § 7-90-102(49) defines “person” as “an individual, an estate, a trust, an entity, or a state or other jurisdiction.” [↑](#footnote-ref-11)
11. . The problem addressed by the last sentence of Section 1.28 of this Agreement is explained in the following note. [↑](#footnote-ref-12)
12. . This addresses a problem that can arise because C.R.S. § 7-80-702(3) provides that, in the case of a member who transfers a portion, but not all, of his or her membership interest, the admission of the transferee as a member “terminates the assignor’s or transferor’s rights and powers as a member with respect to the portion of the membership interest assigned or transferred.” The statute is silent as to any effect on the transferor if the transferee is not admitted, and, in the absence of a contrary provision in the operating agreement, a member who had, say, a 40 percent vote before transferring 90 percent of his or her membership interest would still have a 40 percent vote, not a 4 percent vote, if the transferee was not admitted. The LLC Act now provides as a default rule for the cancellation of the membership interest of a member who transfers all of his or her membership interest, whether or not the transferee is admitted. C.R.S. § 7-80-702(2). Even without this statement, however, the LLC can maintain the position that a transfer by a Member of his or her entire Economic Interest in violation of the terms of the operating agreement should be treated as a resignation of the transferor as a Member under C.R.S. § 7-80-602 or as a withdrawal under C.R.S. § 7-80-603. [↑](#footnote-ref-13)
13. . There are circumstances where the parties may desire that the Membership Interests issued to Class B Members (or other class) be in the nature of a “profits interest” — having no interest in the equity of the business at the time of issuance, but being allocated profits (and perhaps losses) as a result of subsequent operations. If properly structured as a profits interest, a Member may receive the profits interest without recognition of gain on account of receipt of the profits interest if the profits interest is issued to the Member in exchange for past or future services. *See* § 12.1.8, “Receipt of Partnership Interest for Services.” If the Company desires to issue Class B Membership Interests as profits interests, the following provisions may be adapted to that end:

	* + - * 1. Terms of Class B Membership Interests. Each Class B Membership Interest shall: (i) give the Member who is the owner thereof the right to receive distributions (liquidating or otherwise) in accordance with \_\_\_\_\_\_\_ and as otherwise specified herein, (ii) give the Member who is the owner thereof no voting rights but such other rights with respect to such Class B Membership Interest as specified herein and (iii) be issued as provided in \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
					2. Character of Class B Membership Interests. (A) The Class B Membership Interests are intended to constitute “profits interests” as that term (or any term of similar import) is used in Internal Revenue Service Revenue Procedure 93-27, 1993-2 C.B. 343 and Revenue Procedure 2001-43, 2001-2 C.B. 191, and any successor provisions of the Code, Treasury Regulations, IRS Revenue Procedures, Revenue Rulings, or other administrative notices or announcements, with the intended results that: (A) no compensation or other income shall be recognized by an owner of the Class B Membership Interests by reason of the issuance of such Class B Membership Interests; and (B) no compensation expense shall be deducted by the Company by reason of the issuance of such Class B Membership Interests.By executing this Agreement, each Member authorizes and directs the Company to elect to have the “safe harbor” described in the proposed Revenue Procedure set forth in Internal Revenue Service Notice 2005-43 (the “IRS Notice”), including any similar safe harbor in any finalized revenue procedure, revenue ruling, or United States Treasury Regulation, apply to any Interest transferred to a service provider by the Company on or after the effective date of such final pronouncement in connection with services provided to the Company. For purposes of making such safe harbor election, the member designated as the “Company Representative” pursuant to Section 13.1(f) of this Agreement is hereby designated as the “member who has responsibility for federal income tax reporting” by the Company and, accordingly, execution of such safe harbor election by the “Company Representative” constitutes execution of a “safe harbor election” in accordance with the IRS Notice or any similar provision of any final pronouncement. The Company and each Member hereby agree to comply with all requirements of any such safe harbor, including any requirement that a Member prepare and file all federal income tax returns reporting the income tax effects of each interest issued by the Company in connection with services in a manner consistent with the requirements of the IRS Notice or other final pronouncement. A Member’s obligations to comply with the requirements of this Section shall survive such Member’s ceasing to be a member of the Company and the termination, dissolution, liquidation, and winding up of the Company. [↑](#footnote-ref-14)
14. . This section is entitled “Guaranteed Payments and Regulatory Allocations.” [↑](#footnote-ref-15)
15. . This only works if the Units are intended to be a measure of the Member’s Economic Interest in addition to the Member’s Voting Interest. Alternatively, Percentage Economic Interest could be defined based on Capital Contributions or differently on a Class-by-Class basis (defining Percentage Economic Interest for Class A Units being an aggregate of 90 percent and for Class B Units being an aggregate of 10 percent). This definition and other provisions of this form that may affect the economic return to the members must be crafted to reflect the business arrangement desired by the parties. At a minimum, such other provisions include Sections 5.10, 6.3, 6.4, 10.2, 13.1, and 13.6, and Articles 8, 9, and 11 of this Agreement. [↑](#footnote-ref-16)
16. . As set forth in Section 1.35 of this Agreement, this contemplates voting by Percentage Membership Interest. Alternatively, voting can be based on the number of Units which may not be consistent with Percentage Membership Interest. Alternative language would be “more than 75% of the aggregate number of Units entitled to Vote. . . .” [↑](#footnote-ref-17)
17. . This reflects the fact that the Voting rights and the Economic Rights (allocations and Capital Accounts) may differ from a straight “dollar-in, dollar-out” arrangement. The result must be to reflect the business deal among the parties. [↑](#footnote-ref-18)
18. . LLC interests are complex bundles of economic and governance rights — non-standardized interests that have the near-limitless flexibility of contract law. There is a widespread temptation in drafting LLC operating agreements to try to shoehorn these complex LLC interests into corporation-like “units,” which are the drafter’s shorthand for corporate stock. But that shorthand is very dangerous, sometimes truncating the rights of LLC interest holders or implying that more is given than can be given, as in the case of governance rights. In the world of “units,” there is substantial opportunity for LLC interest holders not to get the benefit of their bargain. Furthermore, the language of “units” has no recognition or force in state organizational laws or under federal income tax law. Units are only valuable as a representation of “percentage of the whole,” and this must be kept in mind when structuring an operating agreement around “units.” For a detailed discussion of issues raised by using unit nomenclature in an operating agreement, see L. Andrew Immerman, “Is There Any Such Thing as an LLC Unit?” 11 *Bus. Entities* 20 (July/August 2009). [↑](#footnote-ref-19)
19. . *See* “Who is the Initial Member or Members?” in § 3.2.1. [↑](#footnote-ref-20)
20. . Generally, the more specific the purposes of the LLC are, the less likely there are to be unintended consequences — for example, provisions prohibiting competition (C.R.S. § 7-80-404(1)(c)) or providing for entity opportunities (C.R.S. § 7-80-404(1)(a) requires an accounting when a manager, or member of a member-managed LLC, appropriates an LLC opportunity). In addition, and perhaps more importantly, a more precise definition of Business gives more definition to the agency granted to the managers (C.R.S. § 7-80-405(1)), or members in a member-managed LLC (C.R.S. § 7-80-405(2)) to take actions in the ordinary course — actions out of the ordinary course require unanimous Member approval (C.R.S. § 7-80-401(2) — or lesser approval as may be set forth in the operating agreement). This provision is somewhat duplicative of the definition of “Business” in Section 1.6 of this Agreement, and the drafter should ensure that Section 3.2 of this Agreement is consistent with the definition of “Business.” [↑](#footnote-ref-21)
21. [↑](#footnote-ref-22)
22. . Where the parties have formed the LLC as a Manager-managed LLC but do not intend to name a Manager, consider adding language more precisely defining the management roles:

Although the Company is formed as a Manager-managed limited liability company, the Company does not intend to appoint Managers, and no person has or will have the authority to transact business in the name of the Company except pursuant to this Agreement or resolution of the Members. [↑](#footnote-ref-23)
23. . If the parties want the Managers truly to act like a corporate board of directors, such that the Managers must act as a board and an individual manager has no authority to act unless granted by the board, this language probably is not sufficient. Consider the following alternative:

Except where any action or approval on the part of the Members is expressly required pursuant to this Agreement or under applicable law, the powers of the Company will be exercised by or under the authority of, and the business and affairs of the Company will be managed under the direction of, a board of management consisting of all the Persons serving as Managers of the Company (the “Board of Management”), and all decisions regarding any matter set forth herein or otherwise relating to or arising out of the business of the Company will be made by the Board of Management. [Without limiting the generality of the foregoing, for purposes of clarity, the Board of Management has sole authority to determine to file a proceeding on behalf of the Company under federal bankruptcy laws.] The Board of Management shall in all cases act as a group through actions in meetings or by written consent. No Manager (acting in his or her capacity as such) shall have any authority to bind the Company to any third party with respect to any action except pursuant to a resolution expressly authorizing such action which resolution is duly adopted by the Board of Management by the affirmative vote required for such matter pursuant to this Agreement.

It is important to understand that no such limitation has any effect unless the other party to the contract has actual notice of the limitation. Neither the articles of organization (which are filed with the Secretary of State) nor the operating agreement (which is not) provide constructive notice. As a result, even if language like the suggested language is used, an individual manager will still be able to bind the company unless the person with whom the manager deals has knowledge of the manager’s lack of actual authority. C.R.S. § 7-80-405(1)(b). *See* § 3.2.3, “Who is an Agent of the LLC?” [↑](#footnote-ref-24)
24. . A more detailed provision defining Manager’s discretion is as follows (If used, coordinate language with Section 5.5(a) of this Agreement):

*Discretion of Manager; Limitation of Liability*. The Manager shall be free to exercise his sole and absolute discretion in making any and all decisions relating to the conduct of the Company’s Business or otherwise delegated to the Manager by any provision of this Agreement. The Manager shall not be liable (in respect of any decision) to the Company, the Members, or any of their respective Affiliates or constituent owners for any resulting actual or alleged losses, damages, costs, or expenses suffered by them so long as:

The decision was made by the Manager in good faith for a purpose believed by him to be in, or not opposed to, the best interests of the Company;

The decision did not involve actual fraud or willful misconduct, gross negligence, reckless disregard of duty, or a material breach of this Agreement; and

The decision was not part of any transaction from which the Manager (or any Affiliate) derives any improper personal benefit. [↑](#footnote-ref-25)
25. . The drafter should consider whether to insert a requirement that Managers may conduct a meeting by telephone or other form of communication only if the form of communication used permits each participant to hear every other participant. [↑](#footnote-ref-26)
26. . Even though these provisions give fairly broad powers to the Managers, the Managers are still subject to obligations of good faith and fair dealing. *See* § 4.3.7, “The Contractual Obligation of Good Faith and Fair Dealing.” Arbitrary or capricious actions will probably not be upheld if challenged. *See* *Marshall v. Grauberger*, 796 P.2d 34, 37 (Colo. App. 1990) (a domestic relations case), holding that, although the husband had full discretion over certain of his ex-wife’s assets, he “was required to operate within the bounds of prudent judgment, reasonableness, and equity.” *See also* C.R.S. § 7-80-404(2)-(3). [↑](#footnote-ref-27)
27. . Note that this provision is inconsistent with C.R.S. § 7-80-405(1)(b), which provides, “Each manager is an agent of the limited liability company for the purposes of its business and an act of a manager . . . for apparently carrying on in the ordinary course the business of the limited liability company . . . binds the . . . company, unless the manager had no authority to act for the limited liability company in the particular matter and the person with whom the manager was dealing had notice that the manager lacked authority.” An LLC that wants this kind of limitation to apply to its managers should consider the problem that the limitation is not binding on third parties without notice. *See* § 3.1.5, “Articles of Organization, Statements of Registration, and Certificates of Limited Partnership — Constructive Notice.” [↑](#footnote-ref-28)
28. . This is potentially a useful provision. Managers (in a manager-managed LLC) and members (in a member-managed LLC) are by statute agents of the LLC. C.R.S. § 7-80-405(1)(b) (manager-managed) and -405(2) (member-managed). Where officers are appointed in a manager-managed LLC, the agency relationship can be established by the appointing resolution, and is not absolute. If there is no manager in a manager-managed LLC, there is no person with the full agency granted by the statute. See the discussion at Section 5.1 of this Agreement and “A Third Way — LLCs Without Statutory Agents” in § 3.2.3. [↑](#footnote-ref-29)
29. . This provision allows the Members to act to appoint a Manager or an officer. Since members of a manager-managed LLC do not have agency authority under the LLC Act, the Members would need to appoint someone to act on behalf of the LLC. C.R.S. § 7-80-405(1)(a). However, the Members should not designate any person as a “Manager” if they intend the LLC to be a manger-managed LLC without any manager. Where the parties have formed the LLC as a manager-managed LLC but do not intend to name a manager, consider adding language more precisely defining the management roles:

Although the Company is formed as a Manager-managed limited liability company, the Company does not intend to appoint Managers, and no person has or will have the authority to transact business in the name of the Company except pursuant to this Agreement or resolution of the Members.

*See* “A Third Way — LLCs Without Statutory Agents” in § 3.2.3. [↑](#footnote-ref-30)
30. . This is a governance question, which Members may want to insist upon, or which may be discretionary to the Manager. [↑](#footnote-ref-31)
31. . These limitations on the Manager’s authority to act can be included in the operating agreement as suggested here, or in authorizing resolutions by the Members in organizational or other minutes. Note that no limitation on a Manager’s authority (whether in the operating agreement, minutes, or even the articles of organization) provides third parties notice of those limitations unless they have actual notice. *See* § 3.1.5, “Articles of Organization, Statements of Registration, and Certificates of Limited Partnership — Constructive Notice.” [↑](#footnote-ref-32)
32. . The statute provides that a manager of a manager-managed LLC is an agent of the LLC (C.R.S. § 7-80-405), but (unlike for members in C.R.S. § 7-80-706(2)) does not provide express authority for managers to appoint agents. Under § 3.15 of the *Restatement (Third) of Agency*:

(1) A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent’s principal and for whose conduct the appointing agent is responsible to the principal. The relationships between a subagent and the appointing agent and between the subagent and the appointing agent’s principal are relationships of agency as stated in § 1.01 [of the Restatement].

(2) An agent may appoint a subagent only if the agent has actual or apparent authority to do so.

Thus a Manager may only appoint a proxy or other subagent if given express authority to do so in the operating agreement or by other LLC action, or if circumstances exist that indicate apparent authority. In any event, the Manager would be responsible for the actions of his or her subagent unless exonerated in the operating agreement. [↑](#footnote-ref-33)
33. . Unlike the case with Section 5.3(c) of this Agreement, which provides that a Manager may not act independently, these limitations on the Manager’s authority should not be inconsistent with C.R.S. § 7-80-405(1)(b), which provides, “Each manager is an agent of the limited liability company for the purposes of its business and an act of a manager . . . for apparently carrying on in the ordinary course the business of the limited liability company . . . binds the . . . company, unless the manager had no authority to act for the limited liability company in the particular matter and the person with whom the manager was dealing had notice that the manager lacked authority.” [↑](#footnote-ref-34)
34. . This expressly permits transactions (such as compensation) that are described in the operating agreement. [↑](#footnote-ref-35)
35. . This duty of a Manager to act as an ordinarily prudent person in the best interests of the Company is derived from the duties of directors under the Colorado Business Corporation Act (C.R.S. § 7-108-401(1)) and is inconsistent with the elimination of fiduciary duties set forth in Section 5.8(a) of this Agreement. Read literally, however, C.R.S. § 7-108-401(1) imposes a negligence standard (the “ordinarily prudent person” standard is a concept from tort law), rather than the grossly negligent standard generally associated with the corporate business judgment rule as applied by Colorado courts. *See* *Kim v. Grover C. Coors Trust*, 179 P.3d 86 (Colo. App. 2007); *Polk v. Hergert Land & Cattle Co.*, 5 P.3d 402 (Colo. App. 2000); *Wolf v. Rose Hill Cemetery Ass’n*, 914 P.2d 468 (Colo. App. 1995); *Rifkin v. Steele Platt*, 824 P.2d 32 (Colo. App. 1991). However, unlike the common law gloss on the prudent person language in C.R.S. § 7-108-401, the language in Section 5.5(a) of this Agreement is contractual and these authors, being contractarians, believe that courts should uphold contract language. Section 5.8(a) of this Agreement contemplates that there are no duties between the Members/Manager other than the contractual duties of good faith and fair dealing (as required by statute). Section 5.8(a) basically contemplates that the Members can act in their own self-interest (and can direct managers appointed by them to do so), with the belief that the self-interest of the Members in the business will ultimately prove to be in the best interests of the Company, but the Company is not the measuring stick. Especially where the Members and the Managers are closely interrelated, it would be best not to have this potential conflict between the duties of the Managers and Members, and either the approach in Section 5.5(a) or Section 5.8 of this Agreement should be followed for both Managers and Members. [↑](#footnote-ref-36)
36. . The authorization of related-party transactions needs to be considered carefully, especially in connection with affiliated entities where there may be office sharing, general and administrative expense sharing, and the like. Proper documentation will support the limited liability and separateness of the different entities. [↑](#footnote-ref-37)
37. . An operating agreement is a contract, and as such incorporates an implied obligation of good faith and fair dealing. *See* the discussion in § 4.3.7, “The Contractual Obligation of Good Faith and Fair Dealing.” [↑](#footnote-ref-38)
38. . One can question whether the use of the term “fiduciary” in this context is too narrow a limitation. The phrase “no duties” may provide broader protection to the manager (if that is the goal). Any limitation must be considered in light of the discussion at Section 5.5(a) of this Agreement. The Delaware Supreme Court criticized a lower court that had found statutory default fiduciary duties in the Delaware LLC Act. The Supreme Court explained that the Chancery Court’s holding on this issue was unnecessary to this case (where the operating agreement did impose a contractual fiduciary duty) and that the Chancery Court’s discussion of default statutory duties “must be regarded as dictum without any precedential value.” *Auriga Capital Corp. v. Gatz Props. LLC*, Del. Ch. C.A. 4390-CS, 44 Sec. Reg. & L. Rep. (BNA) 333 (Jan. 27, 2012), *affirmed sub nom. Gatz Props., LLC v. Auriga Capital Corp*., 59 A.3d 1206 (Del. 2012). Effective August 1, 2013, the Delaware General Assembly amended the Delaware LLC Act (6 Del. Code Ann. § 18-1104) to apparently broaden the reach of fiduciary duties as follows (new language italicized):

In any case not provided for in this chapter, the rules of law and equity, including *the rules of law and equity relating to fiduciary duties and* the law merchant shall govern.

Notwithstanding the amendment to 6 Del. Code Ann.§ 18-1104, the Delaware LLC Act still permits an LLC agreement, to the extent a Member or Manager has duties at law or in equity, including fiduciary duties, to restrict or eliminate any and all duties except that it cannot eliminate the implied contractual covenant of good faith and fair dealing. 6 Del. Code Ann. § 18-1101(c) and (e) (2013). [↑](#footnote-ref-39)
39. . The use of the phrase “other than the contractual obligation” leads to the impression that the contractual obligation is, itself, a fiduciary duty (since that is the term that “other than” modifies). A better statement might be: “To the fullest extent permitted by the LLC Act, no Member or Manager has fiduciary duties with respect to the Company or any other Member, Assignee, or Manager. Members, Assignees, and Managers do owe each other the contractual obligation of good faith and fair dealing.” [↑](#footnote-ref-40)
40. . See the conflict between this Section and Section 5.5(a) of this Agreement. C.R.S. § 7-80-108(1.5) provides that the fiduciary duties of a Manager (or member in a member-managed LLC) can be “restricted or eliminated by provisions in the operating agreement, as long as any such provision is not manifestly unreasonable,” but (under C.R.S. § 7-80-108(2)(d)) no provision can eliminate “the obligation of good faith and fair dealing” under C.R.S. § 7-80-404(3). C.R.S. § 7-80-108(2)(d) goes on to say that the operating agreement “may prescribe the standards by which the performance of the obligation is to be measured, if such standards are not unreasonable.” C.R.S. § 7-80-404(3) provides that “each member and each manager shall discharge the member’s or manager’s duties to the limited liability company and exercise any rights consistently with the contractual obligation of good faith and fair dealing.” *See* § 4.3.7, “The Contractual Obligation of Good Faith and Fair Dealing.” Needless to say, including such a limitation or elimination of fiduciary duties may raise concerns in the minds of investors; on the other hand, this may be appropriate in a joint venture organized as an LLC where the members are also managers and can protect their own affairs, but do not want to risk violation of stricter duties in the LLC context. [↑](#footnote-ref-41)
41. . Note that a reference only to the LLC Act may be inadequate. The LLC Act specifically incorporates the law of agency by stating that a manager (or a member of a member-managed LLC) is an agent of the Company. C.R.S. § 7-80-405. [↑](#footnote-ref-42)
42. . Similar waivers have been upheld in Delaware courts. For example, the court in *Wiggs v. Summit Midstream Partners, LLC*, 2013 Del. Ch. LEXIS 84, 2013 WL 1286180 (Del. Ch. March 28, 2013) upheld the following: “No Manager . . . shall have any duties (including fiduciary duties) or liabilities relating thereto to the Company, the Members or the other Managers. . . . [E]ach Manager shall be entitled to act solely on behalf, and in the interests, of the Member that has designated such Manager.” *See also Allen v. Encore Energy Partners, L.P.*,72 A.3d 93 (Del. 2013) (relating to a limited partnership), and *Lonergan v. EPE Holdings, LLC*, 5 A.3d 1008, 1017 (Del. Ch. 2010). [↑](#footnote-ref-43)
43. . This provision may not be appropriate in all contexts. The statute provides that, unless the operating agreement provides otherwise, managers (in a manager-managed LLC) and members (in a member-managed LLC) must “[r]efrain from competing with the limited liability company in the conduct of the limited liability company business before the dissolution of the limited liability company.” C.R.S. § 7-80-404(1)(c). Under agency law, the agent’s duty not to compete with the principal continues “throughout the duration of [the] agency relationship” and thus continues after dissolution through winding up. *Restatement (Third) of Agency* § 8.04. As discussed in § 4.3.3, “Waivers and Explanation in the Operating Agreement,” the language of Section 5.8 of this Agreement should be sufficient to waive duties under agency law as well as the LLC Act. [↑](#footnote-ref-44)
44. . *See* C.R.S. § 7-80-404(1)(b). This is probably not appropriate in most situations. [↑](#footnote-ref-45)
45. . *See* C.R.S. § 7-80-404(1)(a). This also is probably not appropriate in most situations. [↑](#footnote-ref-46)
46. . This provision may not be adequate where the Manager has a significant interest himself or herself. Consider requiring the vote to be “Three-Fourths [or a Majority] of the Remaining Members” where the “Remaining Members” is defined as “Persons holding Membership Interests other than the Manager and his Affiliates.” In addition, note that a Manager is, to the extent the Manager holds Units, a Member. *See* Section 1.28 of this Agreement. This is in part addressed in Section 5.9(c) of this Agreement. [↑](#footnote-ref-47)
47. . Alternatively, where there is a very closely held organization with unity between the Managers and the Members, the parties may want to continue to tie Membership with the person’s role as a Manager. It may be difficult to find a replacement Manager, especially where the former Manager’s ownership is significant. The following language, which could be included here, may be appropriate: “If a Manager is also a Member, the Manager’s resignation shall also constitute such Person’s withdrawal as a Member.” This, however, leaves the Manager as an Economic Interest holder, even if not a Member. It may be advisable to provide a method of redeeming the former Manager’s Units here or in the buy-sell provisions of Article 11 of this Agreement. [↑](#footnote-ref-48)
48. [↑](#footnote-ref-49)
49. . C.R.S. § 7-80-606(1) provides that the term “‘distribution’ shall not include payments to the extent that the payments do not exceed amounts equal to or constituting reasonable compensation for present or past services.” Compensation paid to a person who is also a Member would likely be considered a distribution for tax purposes unless it meets the guaranteed payment requirements of Code § 707 or unless the recipient is considered to be not acting in his or her capacity as a member. *See* § 12.1.7, “Partner Not Acting in Capacity of Partner; Guaranteed Payments.” [↑](#footnote-ref-50)
50. . See special allocations for guaranteed payments set forth in Section 9.1(b), “Guaranteed Payments and Regulatory Allocations.” This provides for a special allocation of profits to the extent of guaranteed payments made to Members or Assignees who hold an economic interest in the Company (and therefore are treated as partners for tax purposes). [↑](#footnote-ref-51)
51. . This provision should be considered carefully, as it may actually expand the liability of Members. The goal would be to contract liability, as in the following sentence. The operating agreement and law will speak for themselves. Why risk incorporating them to possibly dilute the effect of the following sentence? In any case, Section 6.1 of this Agreement should be harmonized with Sections 5.5 through 5.8 of this Agreement. [↑](#footnote-ref-52)
52. . Why would an operating agreement intentionally include a provision like this clause, which would give an argument to plaintiffs to pierce the veil of an LLC? “Piercing the veil” is specifically contemplated by the Colorado LLC Act; C.R.S. § 7-80-107(1) says: “In any case in which a party seeks to hold the members of a limited liability company personally responsible for the alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under Colorado law.” *See* § 7.2.4, “Piercing the Veil of Multi-Member Limited Liability Companies — Factors that Courts Should and Should Not Consider.” *See also* Herrick K Lidstone, Jr., “Piercing the Veil of an LLC or a Corporation,” 39 *Colo. Law.* 71 (Aug. 2010), *updated and available at* http://ssrn.com/abstract=2207735, and Allen Sparkman, “Will Your Veil Be Pierced? How Strong Is Your Entity’s Liability Shield? — Piercing the Veil, Alter Ego, and Other Bases for Holding an Owner Liable for Debts of an Entity,” 12 *Hastings Bus. L.J*. 349 (2016), *available at* http://ssrn.com/abstract=2676250. For a 2014 article reporting on the authors’ use of modern quantitative machine learning methods to analyze the full text of 9,380 judicial veil-piercing opinions, see Jonathan Macey & Joshua Mitts, “Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil,” 100 *Cornell L. Rev.* 99 (2014). [↑](#footnote-ref-53)
53. . This is authorized in C.R.S. § 7-80-404(5). The immediately following sentence is important because the authorization for Members and Managers to make loans to the LLC and exercise rights with respect thereto in § 7-80-404(5) is made subject to “other applicable law.” One other applicable law is C.R.S. § 7-80-404(1)(b), which states that one of the duties of a Manager or of a Member of a Member-managed LLC is to “[r]efrain from dealing with the [LLC] in the conduct or winding up of [its] business as or on behalf of a party having an interest adverse to the [LLC].” Although this provision is not applicable to a member of a manager-managed LLC, these authors consider it best practice to treat Members as though the provision were applicable. [↑](#footnote-ref-54)
54. . *See* C.R.S. § 4-8-103(c), which states that “[a]n interest in a partnership or limited liability company is not a security [for the purposes of Article 8] unless . . . its terms expressly provide that it is a security governed by this article . . . .” If not governed by Article 8, security interests over Membership Interests and Economic Interests in Colorado limited liability companies would usually be taken as general intangibles under Article 9. On the other hand, adopting Article 8 imposes a number of obligations on the entity that should be considered. *See* § 6.3.1, “Grant of a Security Interest in a Membership Interest or Partnership Interest.” [↑](#footnote-ref-55)
55. . Without this language, the Units will be “uncertificated securities” for the purposes of Articles 8 and 9 of the UCC. With this language in the operating agreement, the Units will be treated as “certificated securities” as defined in C.R.S. § 4-8-102(a)(4). Any Unit that is represented by a certificate should bear conspicuous legends restricted transferability and referring to the operating agreement. *See* C.R.S. § 4-8-204 (requiring that a legend restricting transferability be conspicuous) and C.R.S. § 4-8-202(a) (which makes any certificated security subject to the terms and conditions noted thereon or incorporated therein “by reference,” even “against a purchaser for value and without notice”). *See* § 6.3.1, “Grant of a Security Interest in a Membership Interest or Partnership Interest.” [↑](#footnote-ref-56)
56. . This self-serving statement likely will not be effective if the interests otherwise are “securities” within the applicability of such laws. See Chapter 14, “Securities Law Considerations,” for the discussion of federal and state securities laws as applicable to limited liability companies and partnerships. [↑](#footnote-ref-57)
57. . *See* C.R.S. § 4-8-103(c), which states that “[a]n interest in a partnership or limited liability company is not a security [for the purposes of Article 8] unless . . . its terms expressly provide that it is a security governed by this article . . . .” If not governed by Article 8, security interests over Membership Interests and Economic Interests in Colorado limited liability companies would usually be taken as general intangibles under Article 9. On the other hand, adopting Article 8 imposes a number of obligations on the entity that should be considered. *See* § 6.3.1, “Grant of a Security Interest in a Membership Interest or Partnership Interest.” [↑](#footnote-ref-58)
58. . This is unnecessary to state but may add clarity. Under Article 8 of the UCC, a Membership Interest is not a security unless expressly stated to be one. *See* C.R.S. § 4-8-103(c), which states that “[a]n interest in a partnership or limited liability company is not a security [for the purposes of Article 8] unless . . . its terms expressly provide that it is a security governed by this article . . . .” [↑](#footnote-ref-59)
59. . The statute has no provision for expulsion of a Member. By treating the expelled Member as an Assignee, the expelled Member is being treated as though the expelled Member resigned under C.R.S. § 7-80-602. [↑](#footnote-ref-60)
60. . This is one possible provision to require Members, Assignees, Managers, and Affiliates to provide the information necessary for the Company, if a “Reporting Company” under the CTA, to prepare and file its Beneficial Ownership Reports. [↑](#footnote-ref-61)
61. . Note that the more formalized the meeting process and member participation process is (through meetings, reports, etc.), the more formalities will govern the LLC. In *Sheffield Services Co. v. Trowbridge*, 211 P.3d 714 (Colo. App. 2009), *rev’d on other grounds*, *Weinstein v. Colborne Foodbiotics, LLC*,302 P.3d 263 (Colo. 2013) (overruling *Sheffield*’sholding that LLC creditors may assert claims against LLC members for wrongful distribution), the operating agreement required a number of formalities; when the LLC failed to comply with the formalities set forth in the operating agreement, the LLC gave the court of appeals another reason to permit piercing the veil of the LLC to hold Trowbridge (who managed the LLC, although he was not a manager) liable for the debts of the LLC to Sheffield. Had the operating agreement not included the formalities (which the members went on to ignore), the court would not have been able to rely on a lack of formalities that are not a requirement of the LLC Act. *Sheffield* is discussed in § 7.2.5, “Alter Ego Liability Imposed on Non-Owners.” However, even if the operating agreement does not require formal meetings, etc., government agencies that are not bound by the LLC Act, such as the IRS, may assert that the LLC should be disregarded if no formalities are observed. This may be particularly true in the case of an LLC used for family planning purposes. *See* Chapter 16, “Use of LLCs and LPs for Estate Planning.” [↑](#footnote-ref-62)
62. . Note this requirement that, if the requisite number of Members seek a meeting, the Managers must call the meeting. [↑](#footnote-ref-63)
63. . The drafter should consider whether meetings by telephone or other forms of communication will be permitted only if the form of communication employed allows each participant to hear every other participant. [↑](#footnote-ref-64)
64. . Note that the statute specifically provides that Members may vote by proxy. C.R.S. § 7-80-706(2). See the discussion of a Manager granting a proxy at Section 5.3(h) of this Agreement. [↑](#footnote-ref-65)
65. . The last clause of the first sentence of Section 8.1(c) of this Agreement is very broad and most drafters will want to narrow it to be consistent with the client’s wishes. [↑](#footnote-ref-66)
66. . Where the operating agreement does not give the Managers the right to require additional capital contributions or require Members to guarantee debt obligations (or where it does do so, but the Managers have not done so), the operating agreement will likely not be treated as an executory contract should a Member file bankruptcy. See the discussion in “Effect of Bankruptcy” in § 3.3.3.

If the operating agreement gives the Managers the right to require additional Capital Contributions, the Managers will have to recognize the impact of federal and applicable state securities laws at that time. *See* Chapter 14, “Securities Law Considerations.” At the very least, this will require disclosure of the use of proceeds and the consequences of not making the additional Capital Contribution. The operating agreement should also recognize the risk that a Member may elect not to make an additional Capital Contribution or may default in his or her obligation to make an additional Capital Contribution. There are several possible remedies:

• Simple dilution of the Member’s interest — where interests are based on Capital Accounts and not Units, a Capital Contribution by one Member not matched by another Member will change the ratio between the Members.

• Penalty dilution — where a Member is obligated to make a Capital Contribution but fails to do so, the defaulting Member suffers accelerated dilution in his or her Capital Account and membership Interest.

• Treatment as a loan — where the Members who contribute the defaulting Member’s additional Capital Contribution treat the amount contributed as a loan secured by the Member’s Capital Account and Membership Interest. For further discussion of loans by Members, see § 4.3.2, “Rights of Members and Managers.” [↑](#footnote-ref-67)
67. . These authors suggest caution when designating series of membership interest. Such a designation might create confusion with series of series LLCs, which are now authorized in a large number of domestic jurisdictions, not including Colorado. *See* Chapter 15, “Series LLCs.” [↑](#footnote-ref-68)
68. . Where Units are issued for services and are subject to vesting, the recipient and the LLC should consider the potential applicability of Code § 83(b). *See* § 12.1.8, “Receipt of Partnership Interest for Services.” [↑](#footnote-ref-69)
69. . Note Section 11.6(b) of this Agreement which provides in part that transfers or admissions of Members are “deemed effective as of the last day of the calendar month in which the required approval thereto was given.” The Managers may choose a different effective date for the Transfer. [↑](#footnote-ref-70)
70. . If the Company issues options to persons for services, see § 12.1.8, “Receipt of Partnership Interest for Services.” If the Company issues options that are not for services, the Company will be required to comply with the complex Treasury Regulation dealing with non-compensatory options. *See* § 12.1.12, “Non-compensatory Options Issued by Partnerships.” [↑](#footnote-ref-71)
71. . C.R.S. § 7-80-603 provides that a “member who has resigned shall have no right to participate in the management of the business and affairs of the” company “and is entitled only to receive the share of the profits or other compensation by way of income and the return of contributions, to which such member would have been entitled if the member had not resigned.” [↑](#footnote-ref-72)
72. . This is consistent with the first sentence of C.R.S. § 7-80-604. Note the contrary provision in Section 10.2(a)(i) of this Agreement. [↑](#footnote-ref-73)
73. . This is a very simple allocation provision. It is likely not adequate in any but the simplest 50-50 (or 33.3-33.3-33.3) deals. Note that where certain “money partners” desire a return of capital before distributions are made to “service partners,” other allocation provisions should be considered, including an allocation of profits to reduce prior allocation of losses to the money partners. Otherwise the money partners’ capital accounts may not reflect the economic deal for a return of their capital. The following is an example of such an allocation provision where the Class A Member is the “money partner” and the Class B Member is the management partner, but has also provided a significant capital investment. In the following example, the parties agreed that each would receive a return of their Capital Contribution, then the money partner (Class A Member) would receive a 20 percent annualized “preferred return”), and then the return will be 40 percent to the Class A Member and 60 percent to the Class B Member.

Although the allocation provision is important, it is equally important that the distribution provisions in Section 9.2 of this Agreement mirror the allocation provisions. Distributions, after all, equal “cash in the pocket” to the Members and other Economic Interest holders; allocations do not result in cash in the pocket and frequently lead to a cash expenditure when the Member (or other Economic Interest holder) has to pay taxes due on the allocated income.

**9.1 Allocation of Profits and Losses.** (a) Except as otherwise provided in this Article 9, the Company’s Net Profits and Net Losses for any fiscal year of the Company shall be allocated to the Members as follows:

(i) **Net Profits.** Net Profits for any fiscal year shall be allocated in the following order and priority:

	* + - * 1. First, to all Members until the cumulative Net Profits allocated pursuant to this Section 9.1(a)(i)(A) are equal to the cumulative Net Losses allocated pursuant to Section 9.1(a)(ii) for all periods;
					2. Second, to the Class A Members and Class B Member until the cumulative Net Profits allocated pursuant to this Section 9.1(a)(i)(B) are equal to their Capital Contributions (such amounts to be allocated among the Members in the ratios in which their respective Capital Contributions for each Member bear to one another);
					3. Third, ninety‑nine percent (99%) to the Class A Members (in the ratios in which their Capital Contributions bear to one another), 1% to the Class B Member, until the cumulative Net Profits allocated to the Class A Members pursuant to this Section 9.1(a)(i)(C) are in excess of their Capital Contributions and up to an amount equal to a Preferred Return of 20% from the inception of the Company to the end of such fiscal year;
					4. The balance, if any, 40% to the Class A Members and 60% to the Class B Member.(ii) **Net Losses**. Net Losses for any fiscal year shall be allocated in accordance with their Percentage Economic Interests.

*See* “Capital Accounting” and “Target Capital Accounts as Alternative” in § 12.1.5. [↑](#footnote-ref-74)
74. . The Code § 754 basis adjustment applies when a Membership Interest or a partnership interest changes hands, either by sale or exchange or upon death of a Member or partner or when an LLC or a partnership makes a distribution. If a partnership (or LLC treated as a partnership for tax purposes) has a Code § 754 election in effect, in the case of a transfer of a partnership interest or Membership Interest by sale or exchange or upon death of a partner, the partnership or LLC will increase or decrease its inside basis for all of its assets in an amount equal to the difference between the transferee’s basis in the transferred interest and the transferee’s share of the adjusted basis to the partnership (or LLC) of the partnership’s (or LLC’s) property. Treas. Reg. § 1.743-1(b).

Whether to make a Code § 754 election when available is a question for qualified tax practitioners. Arthur B. Willis and Philip F. Postlewaite, *Partnership Taxation* (Warren, Gorham & Lamont, 5th ed. 1997), at ¶ 12.03[1], describe the Code § 754 election as follows: “Section 743(b) provides for adjustments to the basis of partnership property as the result of a sale or exchange of a partnership interest or the transfer of a partnership interest on the death of a partner if a § 754 election is in effect. Without such an election, the purchaser of the partnership interest typically has a basis (outside basis) for that interest which differs from the purchasing partner’s share of the bases of the assets in the partnership (inside basis). Such disparities can also lead to income tax consequences for the acquiring partner with respect to pre-acquisition appreciation or depreciation of the partnership’s assets. With a § 754 election in effect, the § 743(b) adjustment will eliminate many of these adverse consequences to the purchaser.” However, once a Code § 754 election is made, it can only be revoked with the consent of the IRS. It also requires the partnership entity to separately track each partner’s inside basis as compared to tax basis, and future transfers of partnership interests will result in a Code § 754 adjustment. For a good discussion of the pros and cons of the § 754 adjustment, see Sanford Zisman and Darla L Daniel, “IRC § 754 and the Probate Practitioner,” 36 *Colo. Law.* 45 (June 2007). [↑](#footnote-ref-75)
75. . This sentence states the general rule of Code § 706(d). Notwithstanding the general rule, see William S McKee, William S Nelson & William F. Whitmire, *Federal Taxation of Partnerships & Partners* ¶ 12.04(1) (Warren, Gorham and LaMont):

Although the language of § 706(d) admits of no exceptions, its legislative history makes it clear that at least one pre-1984 exception survived its enactment. The exception described in the legislative history is the right of persons who are partners for the entire year to retroactively adjust their distributive shares according to the rules of §§ 704(a) and 761(c) as long as the adjustments are not attributable to additional capital contributions. A third-party purchaser of a partnership interest cannot be allocated a share of partnership income or loss realized prior to the purchase of the interest, however, nor can a partner acquiring his interest by contribution be allocated precontribution partnership income or loss. (Footnotes omitted.)

*See also* Staff of Joint Comm. on Tax’n, 98th Cong., 2d Sess., General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, at 219 (Comm. Print 1984) (“the varying interests rule does not override the longstanding rule of section 761(c) . . . with respect to interest shifts among partners who are members of the partnership for the entire taxable year, provided such shifts are not, in substance, attributable to the influx of new capital from such partners.”).

The IRS has issued proposed regulations that would implement the guidance in the legislative history of Code § 706(d):

First, in the case of persons who have been members or partners for the entire taxable year, changes in the allocations of items of income and deduction among such members or partners may be made if —

Any variation in a member’s or partner’s interest is not attributable to a capital contribution or a distribution that is a return of capital; and

	* + - * 1. The allocations resulting from the modification satisfy the requirements of Code § 704(b) and the regulations thereunder. Proposed Treas. Reg. § 1.706-4(b)(1).Second, in the case of partnerships in which substantially all of the activities involve the providing of services in the fields of health, law, engineering, architecture, accounting, actuarial science, or consulting, for any taxable year in which there is a change in any partner’s interest, the partnership and the partner “may choose to determine the partner’s distributive share of partnership income, gain, loss, deduction, and credit using any reasonable method to account for the varying interests of the partners” if the allocations made satisfy Code § 704(b) and the regulations thereunder. Proposed Treas. Reg. § 1.706-4(b)(2).

Although the cited regulations have not been adopted, Treas. Reg. § 1.6662-4(d)(3)(iii) provides that proposed regulations are “substantial authority” for purposes of avoiding the accuracy-related penalty with respect to understatement of income tax. Moreover, changes in the allocations among persons who have been partners for the entire year where the changes do not result from additional capital contributions is supported by the opinion of the United States Tax Court in *Lipke v. Commissioner*, 81 T.C 689, 696 (1983).

For a discussion of Code § 706 and the regulations thereunder, see “Allocations When Partnership Interests Vary During the Year — Rescission of Formation or Admission of a Member or Partner” in § 12.1.5. [↑](#footnote-ref-76)
76. . This is also referred to as “booking-up,” an optional, but frequently appropriate revaluation of capital accounts to protect the economic rights of existing members when new members are admitted, and to prevent unintended allocation of ordinary income to a services member joining an LLC or partnership. *See* § 12.1.8, “Receipt of Partnership Interest for Services.” The ability to “book-up” may be important if an LLC issues an Economic Interest to a person at the time when there is appreciated property in the LLC. If there are two Members with a $1 million basis in property worth $2 million at the time they want to issue an Economic Interest to a Member (service or cash), this allows them to avoid allocating a portion of the unrealized appreciation to the new Member. This also benefits the new Member, who would possibly be receiving taxable income to the extent of his or her share of the unrealized appreciation. Since most cash investors in an LLC or partnership will be paying for a percentage of the unrealized appreciation, this is less significant than to a new service Member who will have no basis in the newly issued Economic Interest. For an alternative to booking up (that is, granting a profits interest), see the discussion at Section 1.30(b) of this Agreement. For a more detailed discussion of “booking-up,” see Herrick K Lidstone, Jr., “Admitting New Members to an LLC and ‘Booking-Up’ Capital Accounts,” 37 *Colo. Law.* 19 (April 2008). [↑](#footnote-ref-77)
77. . The method of making distributions is an economic decision — whether first to return Capital Accounts (*i.e.*, investments, and perhaps a return on investment) or to make distributions in accordance with ownership percentage (which may be significantly different). In the first note associated with Section 9.1 of this Agreement, there is a possible allocation provision favoring an early return of Capital Contributions. If this is intended, the distribution provisions should mirror the allocations so that Distributable Cash is similarly paid to those who contributed Capital to the LLC ahead of those who contributed services. [↑](#footnote-ref-78)
78. . Vesting the Manager with the ability to act in distributions or any other manner is generally not sufficient to waive fiduciary duties (*see* Section 5.8(a) of this Agreement; but contrast with the duties described in Section 5.5(a) of this Agreement). A Manager, acting in his or her discretion, would still owe duties to the Company and the Members unless the agreement “expressly state[s] that default principles of fiduciary duty would be supplanted if they conflicted with the operation of the sole and complete discretion standard.” *Miller v. Am. Real Estate Partners, L.P.*, 2001 Del. Ch. LEXIS 116, at \*24, 2001 WL 1045643, at \*7 (Del. Ch. Sept. 6, 2001). [↑](#footnote-ref-79)
79. . Alternatively, an operating agreement can state that distributions equal to a specified percentage of net income will be made — mandatory instead of advisable. [↑](#footnote-ref-80)
80. . This provision provides an asset-protection planning consideration where the LLC commits to make tax payments on behalf of its Members. *In re Kenrob Info. Tech. Solutions, Inc*., 474 B.R. 799 (Bankr. E.D. Va. 2012). In the *Kenrob* case, the bankruptcy trustee attempted to recover from the U.S. Treasury as a fraudulent transfer payments made by the S corporation directly to the IRS on behalf of its shareholders (which payments were mandated by what the court described as “an undocumented shareholders’ agreement” but “pursuant to an established course of dealing”). According to the court, the shareholders’ agreement “required Kenrob to reimburse each shareholder with sufficient cash to fund the payment of federal and state income tax liabilities.” The Treasury defended the fraudulent transfer case by claiming that it (the United States) had provided valuable consideration by reduction of tax liabilities and penalties. Arguably, as written, the “distributable cash” undertaking may not be sufficient to achieve this asset protection benefit since it is not a requirement of the agreement and if (as in *Kenrob*) the LLC were considering bankruptcy, there probably is no distributable cash. In the S corporation context, extra care has to be taken that any payment directly of income taxes is always proportionate to share ownership to avoid losing the S election; in the LLC context, the payments should also be in accordance with ownership interests to avoid an argument that the parties disregarded the agreement. [↑](#footnote-ref-81)
81. . C.R.S. § 7-80-604 provides that 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 a percentage of that asset that is equal to the percentage in which the Member shares in distributions from the LLC. *Compare with* C.R.S. § 7-64-402 (CUPA), which provides that a partner “may not be required to accept, a distribution in kind.” [↑](#footnote-ref-82)
82. . Note C.R.S. § 7-80-606(1), which prohibits a distribution “to the extent that at the time of distribution, after giving effect to the distribution, all liabilities of the . . . company, other than liabilities to members on account of their membership interests and liabilities for which the recourse of creditors is limited to a specific property of the limited liability company, exceed the fair value of the assets of the limited liability company.” The section goes on to provide that property value that exceeds the liability against the property can be included in the calculation of the fair value of the assets. Distributions under C.R.S. § 7-80-606(1) do not include amounts equal to or constituting reasonable compensation for present or past services.

Importantly, under C.R.S. § 7-80-606(2), a Member who receives a distribution in violation of the statute and *who knew* of the violation is liable to the company for the full amount of the distribution. On the other hand, a Member who receives a distribution in violation of the statute and *who did not know* of the violation is (under the statute) *not liable*. Where liability exists, it extends for three years from the date of the distribution. C.R.S. § 7-80-606(3). In *Weinstein v. Colborne Foodbotics, LLC*, 302 P.3d 263 (Colo. 2013), the court held that a creditor could not enforce an LLC’s claim against a Member under C.R.S. § 7-80-606(2). Accordingly, the Members of an LLC may wish to consider shortening or eliminating the period of liability. If that is considered, the advisor should also consider C.R.S. § 7-80-502(2), which states:

The obligation of a member to make a contribution or return money or other property paid or distributed in violation of this article may be compromised only by consent in writing of all the members. Notwithstanding the compromise, a creditor of a limited liability company who extends credit or otherwise acts in reliance on the original obligation may enforce the original obligation.

The operating agreement could waive or modify the requirement that all Members consent to a compromise of a member’s liability and require a lesser percentage. See the discussion in § 7.3, “Liability to Return Unlawful Distributions.”

Note that *Weinstein*, as a state court decision, would not prevent the LLC or its members from an action brought by the IRS to collect an obligation arising under the partnership audit rules. *See* *infra* n. 81. [↑](#footnote-ref-83)
83. . I.R.C. § 1446(a). [↑](#footnote-ref-84)
84. . Sections 9.6 and 9.7 of this Agreement should be included if, for any taxable year of the Company beginning after December 31, 2017, the Company has more than 100 Members or, regardless of the number of Members, if any Member is a partnership, a limited liability company, a nonresident alien, a trust other than a grantor trust that is treated as owned by the grantor or another person, or a foreign entity that would not be classified as a corporation if it were a domestic entity. To take advantage of this exemption, the Company must file an election pursuant to Code § 6221(b)(1), as amended by the 2015 Act. Under Code § 6225, as amended by the 2015 Act and subsequent amendments, unless the Company is exempt, any underpayment of tax will be assessed against the Company unless one of the following applies:

• The Company’s imputed underpayment (as defined in Code § 6225) may be reduced by the portion of adjustments that individual members take into account and for which they pay associated taxes. This exception requires that, within 270 days of receiving a notice of a proposed partnership adjustment, members must file amended tax returns reporting their distributive shares of the Company’s adjustments and pay all related taxes. Items of different character (that is, capital or ordinary) are not netted together in determining the amount of imputed underpayment. Rather, the imputed underpayment is determined by netting partnership adjustment items for the reviewed year and applying the highest rate of tax in effect for the reviewed year. When determining partners’ distributive shares, like items are separately netted.

• Within 45 days of receiving a final notice of partnership adjustment, the Company may elect to issue to each prior year member and to the IRS a statement of the member’s share of any adjustment to income, gain, loss, deduction, or credit as determined in the final notice of partnership adjustment. Thereafter, each member is responsible for the adjusted amounts so reported, not the Company.

Sections 9.6 and 9.7 of this Agreement are intended to permit the Company to take advantage of one of these exceptions to its liability under Code § 6225. [↑](#footnote-ref-85)
85. . Section 1101 of the Bipartisan Budget Act, as amended by the PATH Act and the Consolidated Appropriations Act, 2018, modified the partnership audit rules for large and small partnerships. By assessing increased taxes resulting from audit adjustments at the partnership level and requiring joint and several liability of the partners (members in the context of an LLC taxed as a partnership under subchapter K) for the tax adjustment, the provision creates a potentially large contingent liability with respect to every partnership interest. This provision of the 2015 Act also does not expressly take into account changes in the partnership percentage interests that may occur from year to year, leading to potential injustice for partners whose percentage interest increases since they may pay tax with respect to income they did not receive. As indicated in the immediately preceding footnote, these provisions (Sections 9.6 and 9.7 of this Agreement) are intended to permit the Company to take advantage of one of these exceptions to its liability under Code § 6225. *See generally* § 12.1.13, “Partnership Audit Procedures and Tax Assessments Against Partnerships.” [↑](#footnote-ref-86)
86. . C.R.S. § 7-80-408 provides inspection rights for Members, but not Assignees. These rights can be reasonably restricted, but not waived. Moreover, C.R.S. § 7-80-408(3) permits reasonable confidentiality restrictions. An operating agreement may provide some or all information rights, as the parties think appropriate, to assignees as in Section 9.10 of this Agreement. [↑](#footnote-ref-87)
87. . This is not required but may be desirable in some situations. In the case of assignees who are former members, the company may want to limit the reports given to such assignees to reports applicable to the period such assignee was a member. [↑](#footnote-ref-88)
88. . C.R.S. § 7-80-701(2) requires unanimity of the assignees or transferees of the last remaining Member of the LLC, but this can be reduced by the operating agreement. If the interest holders do not admit a Member, the statute provides that the Company will dissolve on “[t]he ninety-first day after the limited liability company ceases to have members unless, prior to that date, a person has been admitted as a member.” C.R.S. § 7-80-801(1)(c)(I). C.R.S. § 7-80-108(2)(d.5) provides that the operating agreement may extend this 91-day period to “not later than the first anniversary of the date of the termination of the membership of the last remaining member.” [↑](#footnote-ref-89)
89. . Consider adding a provision by which a court, in an action for judicial dissolution, may fashion a less drastic remedy. This may be useful where a minority believes the minority is being oppressed, but the business is operating well and dissolution would not be in any party’s best interest. [↑](#footnote-ref-90)
90. . The drafter should consider the effect of dissolution on the duties of the Managers. For example, unless the operating agreement provides otherwise, the duty not to compete does not apply after dissolution. C.R.S. § 7-80-404(1)(c). The duty not to compete does continue under agency law. See the discussion at Section 5.8(a) of this Agreement and § 4.2, “Agency Law — A Common Source of Duties in LLCs and Partnerships.” [↑](#footnote-ref-91)
91. . C.R.S. § 7-80-604, second sentence, provides that Members may not be compelled to accept a distribution of any asset in kind “to the extent that the percentage of the asset distributed to the member exceeds” that Member’s proportionate interest in the Company. This can be modified by the operating agreement. [↑](#footnote-ref-92)
92. . This is probably the most important provision in the operating agreement from a tax perspective — this is the provision that gives any special allocations contained above “substantial economic effect” — at the end of the day, upon liquidation, there will first be a return of Capital Accounts before other distributions are made. Since allocations and distributions have affected Capital Accounts during the operation of the LLC, this may or may not result in a return of cash contributions. [↑](#footnote-ref-93)
93. . These authors have seen operating agreements that include the following incorrect language: “Upon completion of the winding up, liquidation, and distribution of the assets, the Company shall be deemed terminated.” In C.R.S. § 7-80-803 (effect of dissolution), the LLC Act specifically states that a “dissolved [LLC] continues its existence as a limited liability company but shall not carry on any business except as is appropriate to wind up and liquidate its business and affairs.” Moreover, Part 10 of the CCAA (C.R.S. §§ 7-90-1001 through -1005) provides that any dissolved domestic entity (other than a general partnership or a limited partnership formed under CULPL that has not elected to be governed by CULPA) may be reinstated no matter how long ago the entity dissolved and whether voluntarily dissolved, dissolved at the expiration of their term, or dissolved as a result of delinquency. [↑](#footnote-ref-94)
94. . While the Members can contractually agree that return of capital is nonrecourse to the other Members, C.R.S. § 7-80-606(3) provides for potential liability of Members receiving a return of their contributions to the Company for three years when the return of capital is made in violation of the Operating Agreement or the LLC Act. See the discussion at Section 9.2(d) of this Agreement and § 7.3, “Liability to Return Unlawful Distributions.” [↑](#footnote-ref-95)
95. . “Pick your partner” is a fundamental principle underlying many closely held entities, but is not necessarily a principle understood by courts. When transferability restrictions are imposed, it may be helpful to set forth a brief summary of their purpose (the “pick your partner” principle) to explain to the court (and the signatories) within the four corners of the agreement, a purpose of the transferability restrictions. If there are other reasons (such as to maintain S corporation status or a professional status where interests in a law firm can only be owned by licensed lawyers, for example), that also should be set forth. For a discussion of the “pick your partner” principle, see Herrick K. Lidstone, Jr. and Allen Sparkman, “Pick Your Partner Versus the United States Bankruptcy Code,” 46 *Tex. J. Bus. L.* 23 (Fall 2015), *available at* http://ssrn.com/abstract=2686418. [↑](#footnote-ref-96)
96. . There are a number of issues when a charging order may be granted against a member’s interest in a multi-member LLC. *See* § 6.4.1, “Charging Orders.” [↑](#footnote-ref-97)
97. . Transferability restrictions are usually important in small businesses where the proprietors want to choose their partners. Since an interest in an LLC or an LLP is considered to be “personal property” (C.R.S. § 7-80-702(1) (LLC), C.R.S. § 7-64-502 (CUPA), and C.R.S. § 7-60-126 (CUPL)), it is transferable as is personal property, subject to contractual and legal restrictions. Contractual restrictions may include a buy-sell agreement contained in the operating agreement, partnership agreement, or other agreement. In some cases, parties may be less concerned about transferability restrictions after a period of time; in other the owners may want them to be perpetual. *See* § 3.2.8, “Buy-Sell Arrangements,” and § 5.2, “Transfer Restrictions.” [↑](#footnote-ref-98)
98. . This “change of control” provision is appropriate where entities are admitted as Members or permitted to be Assignees. Otherwise, ownership of an LLC interest by an entity can avoid the transferability restrictions of the operating agreement by transferring an interest in the ownership entity in lieu of transferring an interest in the Company. [↑](#footnote-ref-99)
99. . This is a provision allowing transfers for estate planning purposes. This needs to be carefully considered by the Members, and each Member needs to consider whether the Member wants the risk of being in business with the heirs of the other Members. By ensuring that the transferee will be considered an “Assignee,” the interests of the other Members are protected. The person accomplishing the estate planning transfer may not like that limitation. If a provision such as this is to be included, the parties should also consider whether a Member will be allowed to transfer Membership Interests to trusts for the benefit of the Member or members of the Member’s family (which should be defined). These provisions are usually heavily negotiated. [↑](#footnote-ref-100)
100. . See *Kenny v. Fulton Associates, LLC*, 2016 IL App (1st) 152356-U (Dec. 27, 2016), where the Illinois Court of Appeals required that an LLC recognize an estate-planning transfer expressly permitted by the operating agreement even though the transfer would breach a third-party mortgage that prohibited any transfers without the consent of the mortgage holder. A more-detailed discussion is provided in § 5.2.3, “Judicial Support of Transfer Restrictions.” [↑](#footnote-ref-101)
101. . Note that if a Member sells all of its Economic Interest in an LLC, the Person ceases to be a Member. C.R.S. § 7-80-702(2). There are any number of different approaches to buy-sell agreements. This agreement sets forth a right of first refusal — requiring the Selling Owner to obtain an agreement from a third party and then offer it to the Company and to the other Members. Section 3.2.8, “Buy-Sell Arrangements,” discusses this and several other provisions, including a first offer option, Texas Shoot-out, Russian Roulette, Dutch Auction, tag-along, and drag-along rights. These can (and should) be designed to meet the goals of the initial Members, but should be reevaluated from time to time to determine whether the goals of the Members have changed since formation and the execution of the original operating agreement. A form of Texas Shoot-out provision is contained in Brooks, Landeo, and Spier, *Trigger Happy or Gun Shy? Dissolving Common-Value Partnerships with Texas Shootouts* (March 2, 2009), available at www.law.harvard.edu/programs/olin\_center/papers/pdf/Spier\_632.pdf:

“If for any reason any Member (the ‘Electing Member’) is unwilling to continue to be a member of [the Company] if another Member (the ‘Notified Member’) is also a member of [the Company], then the Electing Member may give the Notified Member written notice stating in such notice the value of a 1% Membership Interest (‘Interest Value’) whereupon the Notified Member shall, by written notice given to the Electing Member within 30 days from the date of receipt of the Electing Member’s notice, elect either to purchase the Electing Member’s interest in [the Company] or to sell to the Electing Member the Notified Member’s interest in the Company.”

*Id.* at 2 (quoting *Valinote v. Ballis*, 2001 U.S. Dist. LEXIS 15339 (D. N.D. Ill. Sept. 25, 2001)). [↑](#footnote-ref-102)
102. . See *Achaian, Inc. v. Leemon Family LLC*, 25 A.3d 800 (Del. Ch. 2011), where a 30 percent member transferred his entire interest to a 20 percent member, thus creating a deadlock with the 50 percent member. The 50 percent member attempted to treat the assignee as merely an economic interest holder with respect to the 30 percent received in the assignment — a position not upheld by the Delaware Chancery Court. In opposition to *Achaian*, William Callison (Faegre Baker Daniels LLP) made the following comments by e-mail on April 23, 2013:

In the deep for what it is worth category, when I read *Achaian* I thought it was wrong and that member consent should be needed for transfers of non-economic interests even if the transfer is to someone who is already a member. I think members bargain for a particular deal (not just particular people), and transfers that create deadlock can be antithetical to that deal. Of course operating agreement provisions can permit nonconsensual inter-member transfers, but that was not *Achaian* facts. I have not re-read *Achaian*, but I would be surprised if I changed my mind on a re-read. Delaware can say whatever Delaware says, but in other states I would not rely on *Achaian* and would be careful to delineate power in an operating agreement if consent is not required. If there were no operating agreement provision, I would argue against *Achaian* application.

If this is an issue in the operating agreement or among the members, whether an existing member is a permitted transferee should be addressed. [↑](#footnote-ref-103)
103. . This is a questionable provision — Members and Assignees can more easily make a sale unattractive to the purchaser (and therefore to the Selling Owner) where they purchase only a portion of the Offered Units. The question then is whether that is fair to the Selling Owner or consistent with the business understanding of the parties. As written, this requires that the Company and purchasing Members give the Selling Owner the full benefit of his or her anticipated bargain with the purchaser, rather than only a portion of the benefit, which may result in the purchaser being unwilling to proceed. [↑](#footnote-ref-104)
104. . As noted in Section 11.1(a) of this Agreement, these provisions only apply in sales to persons other than Members. [↑](#footnote-ref-105)
105. . This is a “come-along” right — an option for the other Members and Assignees to sell their Units to the purchaser acquiring Units from the Selling Owner. As discussed, an LLC, like a partnership, is an association of people wanting to do business together. Bringing in a third party may make the business less attractive to the remaining owners. This “come-along” provision gives them the right to exit the business. Clearly this is something that a purchaser (who is not already a Member of the LLC) should know about and negotiate in advance. [↑](#footnote-ref-106)
106. . It is important that the purchaser purchase the “come-along” members for cash value, since the Selling Owner may have negotiated other arrangements, which should be monetized. It is also important that the purchaser acquire the “come-along” interests first or at the same time as the Offered Units. Otherwise the purchaser may be able to take advantage of the situation. [↑](#footnote-ref-107)
107. . This is a “drag-along” right, which forces other Members to sell to the purchaser where the purchaser is making a large-enough commitment to warrant it. Whether 30 percent is the appropriate number is debatable. [↑](#footnote-ref-108)
108. . This is a “come-along” right — an option for the other Members and Assignees to sell their Units to the purchaser acquiring Units from the Selling Owner. As discussed, an LLC, like a partnership, is an association of people wanting to do business together. Bringing in a third party may make the business less attractive to the remaining owners. This “come-along” provision gives them the right to exit the business. Clearly this is something that a purchaser (who is not already a Member of the LLC) should know about and negotiate in advance. [↑](#footnote-ref-109)
109. . It is important that the purchaser purchase the “come-along” members for cash value, since the Selling Owner may have negotiated other arrangements, which should be monetized. It is also important that the purchaser acquire the “come-along” interests first or at the same time as the Offered Units. Otherwise the purchaser may be able to take advantage of the situation. [↑](#footnote-ref-110)
110. . The LLC Act now provides as a default rule for the cancellation of the Membership Interest of a Member who transfers all of his or her Membership Interest, whether or not the transferee is admitted. C.R.S. § 7-80-702(2). It is important to note that resignation as a Member does not forfeit the individual’s Economic Interest. C.R.S. § 7-80-603. If the resignation violates other provisions of the operating agreement, the resigning Member may be liable to the LLC for damages. C.R.S. § 7-80-602. This is similar to a wrongful dissociation in a general partnership under CUPA (C.R.S. § 7-64-602). [↑](#footnote-ref-111)
111. . Discounts have generally been applicable for estate and gift tax planning purposes (*see* Chapter 16, “Use of LLCs and LPs for Estate Planning”). However, as discussed in § 16.2, “Valuation Discounts,” the IRS proposed regulations that, if finalized, would have dramatically reduced the valuation discounts available for family entities. The proposed regulations were withdrawn April 21, 2017. In the absence of an agreement, valuation discounts frequently are not applicable in the context of a shareholder buy-out, corporate dissolution, dissenters’ rights, and similar transactions. *See Pueblo Bancorporation v. Lindoe, Inc.*, 63 P.3d 353 (Colo. 2003). In that case, the issue revolved around whether to apply a discount to reflect “lack of marketability” in determining “fair value” under the Colorado dissenters’ rights statute (C.R.S. §§ 7-113-101, *et seq.*). The Colorado Supreme Court held that, for the purposes of the dissenters’ rights statute, “‘fair value’ . . . means the shareholder’s proportionate ownership interest in the value of the corporation. Therefore, no marketability discount may be applied.” *Id.* at 356. Were there a buy-sell agreement in place specifying the applicability of discounts, that decision might have been different.

In a partnership buy-out following dissociation, the Jefferson County District Court in its opinion stated that in determining fair market value of the partnership interest, “a 20% discount for a minority interest and a 30% discount for lack of marketability are appropriate.” *See Wilson v. Pinon Family Practice Prof’l LLP*, 2004 WL 3605606 (Jefferson Cty, Colo. D. Ct. Feb. 20, 2004) (Not reported). Notably the Jefferson County case did not discuss or distinguish the *Pueblo Bancorporation* case decided the year earlier.

Where there is an agreement as to discounts as proposed in this form, it should be enforceable. [↑](#footnote-ref-112)
112. . The tax rules applicable to distributions made to a withdrawing member are complex and require allocation of the distributions among various categories of assets. A portion of such a distribution may be treated as a distributive share of Company income and reduce the distributive shares of other Members for tax purposes. A portion of such a distribution may be treated as a distribution under Code § 731 that would not affect the distributive shares of taxable income of the other Members. Code § 736; Treas. Reg. § 1.736-1. [↑](#footnote-ref-113)
113. . Under I.R.C. § 1446(f)(2)(A), “[n]o person shall be required to deduct and withhold any amount under paragraph (1) with respect to any disposition if the transferor furnishes to the transferee an affidavit by the transferor stating, under penalty of perjury, the transferor’s United States taxpayer identification number and that the transferor is not a foreign person.” The transferee is not entitled to rely on any such affidavit if, among other reasons, “the transferee has actual knowledge that the affidavit is false.” I.R.C. § 1446(f)(2)(B). This requirement applies if the gain or loss from the sale or exchange of a partnership interest is effectively connected with a U.S. trade or business. Under § 864(c)(8), this applies to the extent that the transferor would have had effectively connected gain or loss had the partnership sold all of its assets at fair market value as of the date of the sale or exchange. [↑](#footnote-ref-114)
114. . The question here is, how difficult do the initial Members want to make it for the admission of Members in the future. [↑](#footnote-ref-115)
115. . In light of *Achaian, Inc. v. Leemon Family LLC*, 25 A.3d 800 (Del. Ch. 2011), discussed at Section 11.1(c) of this Agreement, this seems to be a fair provision, which can be modified by the parties. [↑](#footnote-ref-116)
116. . Note Section 11.6(b) of this Agreement, which provides in part that transfers or admissions of Members are “deemed effective as of the last day of the calendar month in which the required approval thereto was given.” Under Section 8.3(b)(vii) of this Agreement, the Managers may choose a different effective date for the Transfer. [↑](#footnote-ref-117)
117. . As discussed in “Owners of LLCs” in § 3.2.1, these authors believe that most LLCs should allow information rights to the legal representative of a deceased or disabled member. One of the authors has expressed the view that all unincorporated entity statutes should be amended to provide information rights to assignees (particularly in the case of deceased owners) and the legal representatives of deceased or disabled owners. Allen Sparkman, “Information Rights—A Survey,” 2 *Bus. Entrp. & Tax L. Rev.* 41, 154 (2018). [↑](#footnote-ref-118)
118. . To some extent, this is a spendthrift provision that is intended to limit the rights of a creditor. *See* § 6.4.1, “Charging Orders.” [↑](#footnote-ref-119)
119. . *See Achaian, Inc. v. Leemon Family LLC*, 25 A.3d 800 (Del. Ch. 2011), discussed at Section 11.1(c) of this Agreement. If this is an issue in the operating agreement or among the members, whether an existing member is a permitted transferee should be addressed. [↑](#footnote-ref-120)
120. . This transfer limitation is no longer necessary since the Tax Cuts and Jobs Act of 2017 repealed § 708(b)(1)(B). In some cases, Members may desire this limitation, and it can be retained, although clearly the language should be modified and the reference to I.R.C. § 708 should be deleted. [↑](#footnote-ref-121)
121. . The issue here is ease for accounting treatment. See the provision for allocation of varying interests in Section 9.1(b)(viii)(B) of this Agreement. Under Section 8.3(b)(vii) of this Agreement, the Managers may choose a different effective date for the Transfer. [↑](#footnote-ref-122)
122. . Consider whether these estate planning provisions are appropriate. If a provision such as this is to be included, the parties should also consider whether a Member will be allowed to transfer Membership Interests to a trust for the benefit of the Member or members of the Member’s family (which should be defined). [↑](#footnote-ref-123)
123. . This is a method by which the Member’s interest may avoid probate. Whereas it probably is suitable for a single-member LLC, it may not be suitable in all cases for a multi-member LLC. [↑](#footnote-ref-124)
124. . If the parties desire to ensure that Members and Assignees are included in the arbitration provisions, it must be clearly stated. In *Andrews v. Ford*, 990 So.2d 820 (Miss. App. 2008), arbitration under the operating agreement was denied because the operating agreement arbitration provision only referred to Members. [↑](#footnote-ref-125)
125. . Special care must be given when considering dispute resolution provisions for operating agreements involving two-member LLCs. Note that unless the parties can agree on the operation of the LLC, C.R.S. § 7-80-810(2) provides for the only statutory remedy — judicial dissolution — in the event of a deadlock. Note that the deadlock provision does not require wrongdoing by any party — simply a lack of agreement. [↑](#footnote-ref-126)
126. . Some lawyers prefer arbitration to settling disputes in a litigation forum on the belief that arbitration may lead to a speedier result less expensively, and out of the public eye. In Christopher R. Leslie, “The Arbitration Bootstrap,” 94 *Tex. L. Rev.* 265 (2015), Professor Leslie (University of California Irvine School of Law) suggests that arbitration clauses are used to limit remedies and to impose contract terms that might otherwise be unenforceable. As an example, Professor Leslie points out *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), and *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), where the Supreme Court upheld arbitration provisions that waived the party’s right to bring a class action. Professor Leslie also pointed out that firms can (if they choose) use arbitration provisions to reduce statutes of limitations, limit damages, and impose fee-shifting provisions and forum-selection clauses. Professor Leslie concludes that these provisions, with the support of federal courts, have thwarted state consumer protection laws. [↑](#footnote-ref-127)
127. . C.R.S. § 7-80-701(2) provides that, when an LLC has no members, the unanimous consent of all Assignees “of the last remaining member” may admit one or more persons as Members. *See* Section 10.1(c) of this Agreement which reduces the requirement to a majority. Even then, however, where amendments are unreasonable, arbitrary, capricious, or clearly intended to disadvantage one Member with respect to others, courts may find the amendment to be unenforceable. [↑](#footnote-ref-128)
128. . C.R.S. § 7-80-401(3) provides that, when an LLC has no members, persons who will be admitted as members of an LLC may, by unanimous consent, amend the operating agreement to be effective immediately prior to their admission. [↑](#footnote-ref-129)
129. . C.R.S. § 7-80-108(2)(e) states that an operating agreement may not “[r]estrict rights of, or impose duties on, persons other than the members, their assignees and transferees, and the limited liability company without the consent of such persons.” [↑](#footnote-ref-130)
130. . This provision deletes the TEFRA provisions for a “tax matters partner,” which were repealed effective January 1, 2018. The “Company Representative” is the “partnership representative” as contemplated by the Bipartisan Budget Act. [↑](#footnote-ref-131)
131. . Note that any power of attorney executed while the person is in Colorado must comply with Uniform Power of Attorney Act (C.R.S. §§ 15-14-701, *et seq.*) adopted by the Colorado legislature in 2009 (HB 09-1198) or its predecessor found at C.R.S. §§ 15-14-601, *et seq.* This act provides that where the signature of the principal (in this case, the member) is notarized, it is “presumed to be genuine.” C.R.S. § 15-14-705. C.R.S. § 15-14-703(1)(c) provides that powers of attorney for a “proxy or other delegation to exercise voting rights or management rights with respect to an entity” are excluded from Colorado’s Uniform Power of Attorney Act. How broadly those terms will be interpreted is not yet certain, but arguably an LLC operating agreement or a partnership agreement does not need to comply with that Act. There is no harm in doing so, however, and it provides a higher degree of certainty that the power of attorney will be enforceable as written.

Where the operating agreement is to be executed in other states, the power of attorney must comply with the laws of those other states to be effective in Colorado. C.R.S. § 15-14-706(3). Other states have other laws with varying degrees of specificity for the effectiveness of a power of attorney. For example, Title 15 of Article 5 of the General Obligation Law of New York (GOL §§ 5-1501, *et seq.*) requires that (among other things) to be valid a power of attorney must be “typed or printed using letters which are legible or of clear type no less than twelve point in size,” and contain certain specified wording as set forth in § 5-1501B. Section 5-1512 recognizes the effectiveness of powers executed by individuals (wherever domiciled) outside of New York if effective under local law. Thus it is important to know where the power of attorney is executed to judge its effectiveness. While a notary acknowledgement for a power of attorney executed in Colorado is not required, it makes proof of its execution easier if challenged. [↑](#footnote-ref-132)
132. . Powers of attorney can make the maintenance of an LLC easier, but frequently Members do not know what has been signed on their behalf. The power of attorney should only be used for administrative corrections and changes, and not for substantive changes. [↑](#footnote-ref-133)
133. . Included to ensure compliance with § 7(a)(3) of the Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376. [↑](#footnote-ref-134)
134. . This provision, prohibiting waivers by course of conduct, is of questionable enforceability, especially in light of C.R.S. § 7-80-108(5), which provides that an “operating agreement is not subject to any statute of frauds . . . .” *See generally* “Respect Contracts — Act Appropriately” in § 3.2.5. Of course, in light of the language in Section 13.1(d), the parties can argue that course of conduct cannot constitute an amendment to the Operating Agreement. Whether a court would enforce such a provision where course of conduct is provable and clear is a question that these authors have not seen addressed by courts. [↑](#footnote-ref-135)
135. . This provision may assist the non-breaching members in retaining control of the LLC even where a significant Member be involved in the breach. Of course, this begs the question on how to determine the existence of a “material breach” — should it be by the Members or Managers (with or without the participation of the allegedly breaching Member), or only by a court or through the dispute resolution provisions of Article 12. [↑](#footnote-ref-136)
136. . The indemnification provision in in three parts. Subsection (a) requires Members and Assignees to indemnify the Company, each Manager, and each other Member or Assignee in certain circumstances. Subsection (b) provides the limitation of the Manager’s liability to the Company or to its Members or Assignees. This needs to be coordinated with Section 5.5 of this Agreement (establishing the Manager’s standard of care and liability for certain acts), Section 5.6 of this Agreement (establishing the Managers’ duties to the Company), and Section 5.8 of this Agreement (providing for the elimination of “fiduciary duties”). As noted in the notes to those sections, those sections need to be coordinated among themselves and, in this Agreement, may not be. Each attorney has indemnification provisions preferred by such attorney, and those can be adapted to this (or any) operating agreement. [↑](#footnote-ref-137)
137. . LLC Act § 7-80-407 provides for indemnification (“shall”) of “a person who is or was a member or manager for liabilities incurred by the person, in the ordinary course of the business of the limited liability company or for the preservation of its business or property, if such payments were made or liabilities incurred without violation of the person’s duties to the limited liability company.” Unlike the Colorado Business Corporation Act, the LLC Act does not provide for advancement of expenses and, therefore, without advancement being provided for in the operating agreement, a manager or member can only expect to be reimbursed or indemnified after first incurring the expense, and then only if the manager or member has met the standard of care.

This provision of the agreement provides for a mandatory indemnification and advancement of expenses for managers, officers, employees, and agents. The right of an LLC to advance expenses to an officer was addressed in *Hyatt v. Al Jazeera American Holdings II, LLC*, 2016 Del. Ch. LEXIS 57, 2016 WL 1301743 (Del.Ch. March 31, 2016). Joel Hyatt and Al Gore sued Al Jazeera for funds that were placed in escrow following Al Jazeera’s acquisition of Current Media, LLC. Al Jazeera counterclaimed for breach by Hyatt and Gore of representations they had made while officers and directors. Hyatt and Gore then claimed advancement of fees and expenses for defense of the counterclaim (but not the initial claim brought by Hyatt and Gore, which was not “in their capacity as officers or directors” and therefore not subject to the contractual LLC advancement provision). That said, the court looked to advancement provisions under the Delaware General Corporate Law (DGCL) since the operating agreement used similar language. (*See* footnote 38 in the *Hyatt* opinion). In analyzing the claims individually, the court found that most of the claims made against Hyatt and Gore were necessarily based on their actions as former officers and directors of Circuit Media, LLC, and therefore they were entitled to advancement of those expenses by Al Jazeera (which had assumed those operating agreement obligations in the merger agreement). The court also found that Hyatt and Gore were entitled to reimbursement of the legal fees and expenses incurred in prosecution of the advancement action. The case described Hyatt as a “former member and director of Current Media, LLC and its former CEO”; Gore was described as its “former executive chairman.” The initial action was brought by them in their role as “member representatives” to deal with issues under the merger agreement. [↑](#footnote-ref-138)
138. . Note *Bernstein v. TractManager, Inc.*, 953 A.2d 1003 (Del. Ch. 2007), where the court held that if the operating agreement did not provide for advancement of expenses, the LLC had no obligation to advance expenses. [↑](#footnote-ref-139)
139. . Of course, a provision like this that requires specific compliance with the terms of the agreement to amend an agreement may be superseded by the conduct of the parties if it can be adequately proven, especially in light of C.R.S. § 7-80-108(5), which provides that an “operating agreement is not subject to any statute of frauds.” See the discussion in “Respect Contracts — Act Appropriately” in § 3.2.5. *See also Beatty v. Guggenheim Expl. Co.*, 122 N.E. 378, 381 (N.Y. 1919), where Justice Cardozo said: “Those who make a contract may unmake it. The clause which forbids a change, may be changed like any other. . . . What is executed by one act, is restored by another. . . . Whenever two men contract, no limitation self-imposed can destroy their power to contract again.” [↑](#footnote-ref-140)
140. . A provision such as this may be more helpful under Colorado law as a result of the 2016 case, *Baker v. Wood, Ris & Hames, P.C.*, 364 P.3d 872 (Colo. 2016). *Baker* was an estate planning case where beneficiaries of a will attempted to sue the estate planning lawyer for malpractice claiming that their inheritance shrank because of negligence by their parents’ lawyers. The Colorado Supreme Court reaffirmed the “strict privity” rule that prevents non-clients from suing for malpractice except where the lawyer acts fraudulently or tortiously. While a large number of U.S. jurisdictions have abandoned strict privity (allowing non-clients to sue for malpractice under liberalized exceptions such as “third party beneficiary”), Colorado chose not to follow the trend. These authors suggest that this language, intending to limit the law firm’s representation to a single client (in this case, the Company), is appropriate to avoid the risk that others (such as the unrepresented members of the LLC) may develop an expectation that they are beneficiaries of the legal advice to the Company. The drafter should consider whether this provision is sufficient under the *Baker* case and under the Colorado Rules of Professional Conduct. *See* § 17.1, “Ethical Considerations in General.” [↑](#footnote-ref-141)
141. . While this generally refers to the law interpreting the LLC Act, to the extent that it attempts to limit governing law, jurisdiction, and venue for a securities issue, *see* *Mathers Family Trust v. Cagle*, 297 P.3d 943 (Colo. App. 2011), *rev’d*, 295 P.3d 460 (Colo. 2013). The plaintiffs alleged that the defendants had participated in the sale of securities in violation of the Colorado Securities Act. The plaintiffs had signed participation agreements that provided for Texas law and venue. The plaintiffs were not Colorado residents, although the primary defendants (Cagle and HEI Resources, Inc.) were. The Colorado district court had dismissed the plaintiffs’ complaint because of the forum selection clauses; the court of appeals said that the forum selection provisions violated the anti-waiver provisions of the Colorado Securities Act (C.R.S. § 11-51-604(11)) and were, therefore, void. The Colorado Supreme Court reversed and remanded the case to the court of appeals with instructions to reinstate the trial court’s grant of the defendants’ motion to dismiss, stating:

[W]e construe the [Colorado Securities Act] and conclude that it does not express a strong public policy voiding forum selection clauses. Because the [Colorado Securities Act] requires coordination with the federal securities statutes, we find persuasive federal caselaw that analyzes the federal securities laws and that concludes that their anti-waiver provisions do not void a forum selection clause. We reason that the [Colorado Securities Act] anti-waiver provision differs from other anti-waiver provisions in Colorado statutes where we have determined the anti-waiver provision to bar suit in other jurisdictions. We hold that neither Colorado public policy nor the anti-waiver provision in the [Colorado Securities Act] voids a forum selection clause in this contract.

295 P.3d at 462. [↑](#footnote-ref-142)
142. . To the extent the Operating Agreement includes powers of attorney granting the Manager the authority to execute documents (including an amendment to the Operating Agreement) on behalf of Members, the drafter may want to consider including a notary acknowledgement of the Member signing. See Section 13.1(g)(i) of this Agreement and the note at the end of that subsection. [↑](#footnote-ref-143)
143. . Where the Company will be booking up the Members’ Capital Accounts, that changes the economics from the case where the Company does not make a book-up at the time a new Member is admitted. Consequently, it is advisable to make that disclosure here or in the subscription agreement (if a separate document is used). See the discussion at Section 1.30(b) of this Agreement and § 12.1.8, “Receipt of Partnership Interest for Services.” For a more detailed discussion of “booking-up,” see Herrick K. Lidstone Jr., “Admitting New Members to an LLC and ‘Booking-Up’ Capital Accounts,” 37 *Colo. Law.* 19 (April 2008). [↑](#footnote-ref-144)
144. . This identification of Fair Market Value is not necessary, but may avoid later disputes. [↑](#footnote-ref-145)
145. . Where the Company will be making a book-up under Code § 704(c), that changes the economics from the case where the Company does not make a book-up at the time a new Member is admitted. Consequently, it is advisable to make that disclosure here or in the subscription agreement (if a separate document is used). [↑](#footnote-ref-146)
146. . This identification of Fair Market Value is not necessary, but may avoid later disputes. [↑](#footnote-ref-147)
147. . This should be updated as new Assignees or Members are accepted. Note Section 11.6(b) of this Agreement, which provides in part that transfers or admissions of Members are “deemed effective as of the last day of the calendar month in which the required approval thereto was given.” Under Section 8.3(b)(vii) of this Agreement, the Manager may choose a different effective date for the Transfer. [↑](#footnote-ref-148)