

LLC Agreement (Single Class, Multi-Member)

PRACTICAL LAW CORPORATE & SECURITIES

Search the [Resource ID numbers in blue](#) on Westlaw for more.

This document features a few sections of the full resource found on Practical Law. This is one example of the thousands of other up to date, available resources like Practice Notes, Standard Documents, Checklists, Toolkits, and more, that can be accessed as part of a subscription to Practical Law.

A long-form US LLC agreement to be used for a Delaware limited liability company (LLC) with two or more members and one class of membership interests. This Standard Document assumes the LLC is managed by managers who may or may not be members. This Standard Document includes integrated notes with important explanations and drafting and negotiating tips.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

A limited liability company operating agreement (LLC agreement) is an agreement among the members of a limited liability company (LLC) that governs the operation of the LLC, including the members' contractual rights, obligations, and restrictions relating to their membership interests in the LLC. An LLC agreement, together with the certificate of formation, are the basic documents entered into when forming an LLC in Delaware (see Practice Note, Forming and Organizing an LLC (DE) ([W-003-1342](#)) and Forming an LLC Checklist ([2-381-1369](#))).

The principal advantages of forming an LLC, as opposed to a different form of business entity, and entering into an LLC agreement include:

- The flexibility to describe the entire relationship of the parties, including the economics of the venture and any fiduciary duties, by contract, without being governed by a mandatory statutory scheme. Unlike state corporation statutes, most state LLC statutes (including Delaware's) primarily contain default provisions that can be altered by agreement among the members (with some mandatory provisions that cannot be altered).
- The benefit of the same limited liability as is available to a corporation's stockholders. The members of an LLC are generally not personally liable for the liabilities of the LLC.
- For US tax purposes, the opportunity to be treated as a partnership or as a

“pass-through” entity, which avoids taxation at the entity level and passes the LLC’s profits and losses to the members. Noncorporate members may also be eligible for a 20% deduction for US qualified business income earned through the LLC (IRC § 199A). However, the relative inefficiency of operating in corporate form is somewhat reduced by the 21% US federal corporate income tax rate that applies beginning in 2018. For a discussion of the US federal income tax rules that apply to US entities taxed as partnerships, see Practice Note, Taxation of Partnerships ([W-000-6885](#)).

For a more detailed discussion of the advantages of LLCs and LLC agreements, see:

- Practice Note, LLC Agreement Commentary ([1-381-0515](#)).
- Practice Note, Choice of Entity: Tax Issues ([1-382-9949](#)).
- Choosing an Entity Comparison Chart ([7-381-0701](#)).

ASSUMPTIONS USED IN THIS DOCUMENT

LLC agreements can vary widely depending on the transaction’s legal, business, and tax considerations. While this Standard Document includes many of the provisions typically found in an LLC agreement, it is based on several assumptions. Parties should tailor the LLC agreement to the specific facts of the transaction.

This Standard Document assumes that:

- **The LLC has been formed in Delaware.** This Standard Document is based on Delaware law, including the Delaware Limited Liability Company Act (the Delaware Act) (6 Del. C. §§ 18-101 to 18-1109). This is an important assumption, not only for use of correct terminology, but for substantive issues like the permissibility of limiting the fiduciary duties of members or managers of an LLC. It is therefore important to become familiar with relevant statutory and case law before drafting the LLC agreement and, if necessary, to engage local counsel. This Standard Document is based on

Delaware law for the following principal reasons:

- The Delaware Act has a strong influence on the LLC statutes in other jurisdictions;
 - Delaware has the most developed and most rapidly developing common law regime governing LLCs;
 - Delaware statutory and common law provides for the greatest freedom of contract; and
 - LLCs for large, complex transactions are often formed in Delaware.
- **The members are individuals or domestic, privately held companies.** If any of the members are incorporated outside the US, local counsel should be consulted regarding applicable foreign laws, including to determine whether foreign legal requirements should be reflected in the LLC agreement. If any of the members are public companies and the agreement is material to the public company member, the members should consider how the publicly traded company’s reporting obligations under the Securities Exchange Act of 1934, as amended (Exchange Act) might be relevant, including regarding any of the LLC’s confidential information disclosed to the public company member. For an explanation of the types of material agreements that a public company member must file with the Securities and Exchange Commission (SEC), see Practice Note, Form 8-K: Entry into a Material Definitive Agreement ([9-381-0960](#)). Other provisions not included in this Standard Document may also be appropriate if the members are public companies or affiliates of public companies. For example, the members may want to consider adding a standstill agreement in which the members agree to certain limitations on purchasing the public company’s stock. For additional information about standstill agreements, see Practice Note, Standstill Agreements in Public M&A Deals ([2-532-4753](#)).
 - **The LLC is managed by managers.** This Standard Document assumes that the LLC is managed by managers that may or may not be members of the LLC. This is a common management structure for LLCs,

especially those with a larger number of members (or those that anticipate having a larger number of members). Other common management structures include management by one managing member or by all the members. If the members want the LLC to be managed by all of its members, the LLC agreement does not need to address management in any detail because the default rule in Delaware is for an LLC to be managed by its members (6 Del. C. § 18-402). For an example of provisions providing for management by one managing member, see Standard Document, LLC Agreement (Operating Company) ([6-520-9727](#)).

- **There is only one class of membership interests.** Some LLCs do not designate different classes of membership interests. Instead they define the rights of the parties on the basis of their respective percentage ownership interests in the LLC (and explicitly describe any special voting or other rights in the agreement). By contrast, other LLCs, especially those with passive investors that have different economic and other rights, may designate various classes of membership interests. Different classes (with differing rights) may be given depending on when the investors came into the LLC (for example, if they were early investors versus late-stage investors) and the amount of the investment (significant investors may be given more voting rights than smaller investors). An LLC may also have different classes of membership interests for employee compensation. For an example of an LLC agreement that provides for multiple classes of membership interests, see Standard Document, LLC Agreement (Multi-member, Manager-managed) ([3-500-9206](#)).
- In this LLC Agreement, the term “units” is not used to describe a member’s interest in the LLC because there is only one class of membership interests. While most state LLC statutes do not contain a concept of units, parties often use this concept in LLC agreements because it is analogous to the stock of a corporation. It can be helpful to use this concept when there are (or may in the future be) multiple classes of membership interests.

However, when there is only one class of membership interests, it is common to just use the term “membership interest,” which is usually expressed as a percentage interest, to describe a member’s interest in the LLC.

- **The LLC has no subsidiaries.** If the LLC has subsidiaries, the LLC agreement should be revised to make the subsidiaries subject to the same rights and obligations as the LLC and to give the members the same rights and obligations regarding the subsidiaries as they have with the LLC.
- **Members are not required to make additional capital contributions following their initial investment.** This Standard Document assumes that members are not required to make additional capital contributions following their initial investment. If the LLC requires additional capital, the members expect the LLC to raise it either with debt financing or new equity issuances that must run under the pre-emptive rights provisions (see Article VIII).

Other assumptions related to specific sections of the LLC agreement are discussed in the relevant drafting notes.

TAX CONSIDERATIONS

LLC agreements require significant input from tax counsel. The allocations section in particular is mostly driven by tax issues and compliance with various US Department of Treasury (Treasury) regulations. The capital accounts and distributions sections also require thorough review by tax counsel.

When discussing certain tax-related provisions, the drafting notes in this Standard Document sometimes refer to the LLC as a “partnership” when describing the relevant tax issues. This is done for the sake of accuracy when explaining how the Internal Revenue Code (Code) and the Internal Revenue Service (IRS) may view certain provisions in the agreement, because LLCs are generally treated as partnerships for tax purposes. As an organizational matter, the company is an LLC, not a partnership.

SCOPE OF STANDARD DOCUMENT

This Standard Document records most of the terms governing the members' ownership interests in the LLC. In some situations, there may be reason to document certain provisions, such as transfer restrictions, in a separate agreement among the members. Parties sometimes prefer this approach if certain members are subject to certain benefits or obligations that others are not.

This Standard Document also does not include:

- Detailed provisions for registration rights, which members sometimes receive. This Standard Document assumes that the registration rights are described in a separate registration rights agreement. For a form registration rights agreement, see Standard Document, Registration Rights Agreement (Section 4(a)(2) Private Placement Form) ([8-500-6936](#)).

- Deadlock procedures. A deadlock is the failure of an LLC's members or managers to reach agreement by the required voting percentage on a matter set out in the LLC agreement. This is often a concern in joint ventures where neither party has a majority interest or minority approval rights are provided for major decisions. For an example of an LLC agreement with buy-sell deadlock procedures, see Standard Document, LLC Agreement (Operating Company) ([6-520-9727](#)).

BRACKETED ITEMS

Bracketed text in ALL CAPS should be completed with information about the parties and the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices to be selected, added, or deleted at the drafter's discretion.

Section 7.02 Number, Election and Term of Managers.

(a) The number of Managers shall be fixed from time to time by the affirmative vote of Members holding [a majority/[OTHER PERCENTAGE]] of the outstanding Membership Interests, but the number of Managers shall not be less than [NUMBER] [nor more than [NUMBER]]. The Company shall initially have [NUMBER] Managers, who shall be [NAMES OF MANAGERS].

(b) Managers shall be appointed, from time-to-time by the affirmative vote of Members holding [a majority/[OTHER PERCENTAGE]] of the outstanding Membership Interests. Each Manager, including each of the initial Managers named in this Agreement, shall serve for a term ending at the next meeting of Members called for the purpose of electing Managers, or until the Manager's earlier, death, resignation or removal.

(c) The Managers shall maintain a schedule of all Managers with their respective mailing addresses (the "**Managers Schedule**"), and shall update the Managers Schedule upon the removal or replacement of any Manager in accordance with this Section 7.02 or Section 7.03. A copy of the Managers schedule as of the execution of this Agreement is attached hereto as Schedule B.

DRAFTING NOTE: NUMBER, ELECTION AND TERM OF MANAGERS

This Standard Document provides for members holding a majority (or other percentage) of the outstanding membership interests to set the number of managers and to appoint the managers. This may be an issue if one member (or group of related members) holds a majority (or other

percentage) of the outstanding membership interests. In that case, minority members may want to ensure they have some ability to be involved in the management of the LLC. They can do this by providing for a certain number of managers to be selected by a vote of the minority members.

If minority members are able to negotiate this ability, they should also ensure they have the ability to remove and replace their appointed managers without the consent of the majority members. Another common formulation is to allow each member to select one or more managers to ensure that all members have some representation among the managers. As with managers selected by the minority members, if this method is used to appoint managers, each member should have the ability to remove and replace their managers without the consent of the other members.

If minority members are not able to negotiate the ability to elect at least one of the managers, they should ensure they have the ability approve certain fundamental matters (see Section 7.05 and its related drafting note).

MANAGER SCHEDULE

The Delaware Act requires the LLC to maintain a current record of the name and last known business, residence or mailing address of each member and manager (6 Del. C. § 18-305(h)). Any member of the LLC can request this record.

Section 9.03 Right of First Refusal.

DRAFTING NOTE: RIGHT OF FIRST REFUSAL

The ROFR is a standard provision in multi-member LLC agreements. It requires a member receiving an offer from a third party to purchase any or all of its membership interests in an LLC to offer those membership interests to the other members before consummating the sale to the third party. If the other members choose not to buy all of the offered membership interests (or, in some agreements, if they choose to buy less than all the offered membership interests), the offering member can sell those interests (or the remainder of those interests) to the third party.

With this right, a member can prevent a third party from becoming an investor in the LLC and simultaneously increase its ownership interest.

RIGHT OF FIRST OFFER ALTERNATIVE

An alternative to the ROFR is the right of first offer (ROFO), which requires a member to offer its interests to the other members before offering to sell to third

parties. Because the offering member does not first have to negotiate a deal with a third party before offering the shares to the other members, a ROFO is much less restricting on a member's liquidity than a ROFR. ROFO provisions are more common in the context of venture capital or minority investments, which typically feature multiple rounds of financing and many investors. In those contexts, investors may have more of an interest in allowing member liquidity ahead of a wholesale exit transaction.

If the agreement includes a ROFO, the LLC agreement should not also include a ROFR. Although there are no legal constraints against including both provisions, the procedures that must be followed in both cases can be lengthy and ultimately achieve the same goal, making the inclusion of both provisions impractical.

For an example of a ROFO provision, see Standard Clause, LLC Agreement: Right of First Offer ([1-383-8859](#)).

(a) **Right of First Refusal.** Subject to the terms and conditions specified in this Section 9.03, each Member shall have a right of first refusal if any other Member (the "**Offering Member**"), receives an offer from an Independent Third Party that the Offering Member desires to accept to Transfer all or any portion of the Membership Interest owned by the Offering Member (the "**Offered Interests**"). Each time the Offering Member receives an offer for all or any portion

of its Membership Interest in the Company, the Offering Member shall first make an offering of the Offered Interests to the other Members (the “**ROFR Rightholders**”) in accordance with the following provisions of this Section 9.03 prior to Transferring such Offered Interests to the Independent Third Party (other than Transfers that (i) are permitted by Section 9.02, (ii) are proposed to be made by a Dragging Member or required to be made by a Drag-along Member pursuant to Section 9.04, or (iii) are made by a Tag-along Member upon the exercise of its tag-along right pursuant to Section 9.05 after the ROFR Rightholders have declined to exercise their rights in full under this Section 9.03).

SAMPLE

ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

To see the entire resource, **request a free trial of Practical Law at [TryPracticalLaw.com](https://www.practicallaw.com)**.

03-20

© 2020 Thomson Reuters. All rights reserved. Use of Practical Law websites and services is subject to the Terms of Use (<http://static.legalsolutions.thomsonreuters.com/static/agreement/westlaw-additional-terms.pdf>) and Privacy Policy (<https://a.next.westlaw.com/Privacy>).