

# Contents

## PART I ORGANIZATION

<b>CHAPTER 1: INTRODUCTION</b> .....	<b>1-1</b>
1.1. Nature and Use of This Practice Manual .....	1-2
1.2. Comparison of the LLC with Other Entities .....	1-3
1.2.1. Generally .....	1-3
1.2.2. Comparison with S Corporations .....	1-5
1.3. History of the LLC .....	1-6
1.4. The New Jersey Limited Liability Company Act — An Overview .....	1-7
1.5. Key Features of the New Jersey Act .....	1-10.3
1.5.1. Flexible vs. Bulletproof Statutes .....	1-10.4
1.5.2. Term of the LLC .....	1-10.5
1.5.3. Written Operating Agreement .....	1-10.5
1.5.4. Management .....	1-10.5
1.5.5. Members .....	1-10.6
1.6. Classification of the LLC as a Partnership for Federal Income Tax Purposes .....	1-10.6
1.6.1. Introduction .....	1-10.6
1.6.2. Consequences of Classification as a Corporation .....	1-10.7
1.6.3. Tax History of the LLC .....	1-11
1.6.4. Understanding the Classification Rules .....	1-12
1.6.4.1. LLCs Organized on or after January 1, 1997 .....	1-14
1.6.4.2. LLCs Organized before January 1, 1997, for Periods before January 1, 1997 .....	1-14.1
1.6.4.3. LLCs Organized before January 1, 1997, for Periods on or after January 1, 1997 .....	1-14.2
1.6.4.4. Elections .....	1-14.3
1.6.5. Understanding the Classification Rules in Effect Prior to the Check-the-Box Regulations ....	1-14.4
1.6.5.1. Limited Liability .....	1-14.5
1.6.5.2. Centralized Management .....	1-14.6
1.6.5.3. Continuity of Life .....	1-16
1.6.5.4. Free Transferability of Interests .....	1-21

CONTENTS

**CHAPTER 2: FORMATION AND ORGANIZATION . . . . . 2-1**

2.1. Introduction . . . . . 2-3

2.2. Preformation Matters . . . . . 2-3

    Form 2-1. Memorandum Attendant to the Execution  
            and Filing of Certificate of Formation . . . . . 2-4

    Form 2-2. Letter Directing Execution and Filing of  
            Certificate of Formation . . . . . 2-4

2.3. Certificate of Formation . . . . . 2-5

    2.3.1. Basic Requirements . . . . . 2-5

        Form 2-3. Certificate of Formation without  
                Special Provisions — Signed by  
                Authorized Person . . . . . 2-7

    2.3.2. Optional Provisions . . . . . 2-8

        Form 2-4. Certificate of Formation —  
                Optional Provision . . . . . 2-8

2.4. Certificate of Correction . . . . . 2-9

    Form 2-5. Certificate of Correction of  
            Certificate of Formation . . . . . 2-9

2.5. Certificate of Amendment . . . . . 2-10

    Form 2-6. Consent of Members to Amend  
            Certificate of Formation . . . . . 2-10

    Form 2-7. Certificate of Amendment . . . . . 2-11

2.6. Reservation of Name . . . . . 2-12

    Form 2-8. Application to Reserve Name . . . . . 2-12

2.7. Change of Name of Registered Agent, Change of  
    Address of Registered Agent . . . . . 2-13

    Form 2-9. Change of Name of Registered Agent . . . . . 2-13

    Form 2-10. Change of Address of Registered Agent . . . . . 2-14

    Form 2-11. Resignation of Registered Agent and  
            Appointment of a Successor . . . . . 2-14

2.8. Alternate Name . . . . . 2-16

    Form 2-12. Certificate of Registration of Alternate Name . . . . . 2-17

2.9. Annual Report . . . . . 2-17

**PART II  
OPERATIONS**

**CHAPTER 3: THE OPERATING AGREEMENT . . . . . 3-1**

3.1. In General . . . . . 3-2

3.2. “Operating Agreement” Defined . . . . . 3-3

3.3. Flexibility of the LLC Form . . . . . 3-4

    Form 3-1. Checklist for the Formation of a New LLC . . . . . 3-5

3.4. Form of the Operating Agreement . . . . . 3-10

3.5. Formality of Adoption . . . . . 3-10

3.6. Amendment . . . . . 3-10

3.7. Form Operating Agreements . . . . . 3-10

3.8. Use of LLCs to hold Vacation Homes . . . . . 3-11

**CHAPTER 4: ORGANIZATION . . . . . 4-1**

4.1. Drafting LLC Organization Provisions . . . . . 4-3

4.2. Introductory Paragraph . . . . . 4-3

    Form 4-1. Introductory Paragraph — Names Parties . . . . . 4-3

    Form 4-2. Introductory Paragraph — Does Not  
        Name Parties . . . . . 4-4

4.3. Background to Agreement . . . . . 4-4

    Form 4-3. Explanatory Statement . . . . . 4-4

4.4. Confirmation of Agreement . . . . . 4-4

    Form 4-4. Confirmation of Agreement . . . . . 4-4

4.5. Definitions . . . . . 4-5

    4.5.1. “Interest” Compared to “Membership Rights” . . . . . 4-5

    4.5.2. “Interest Holder” Compared to “Member” . . . . . 4-6

        Form 4-5. General Definitions . . . . . 4-6

4.6. Agreement to Organize LLC . . . . . 4-8

    Form 4-6. General Agreement to Organize LLC . . . . . 4-8

    Form 4-7. Organizational Provision Confirming That  
        a Certificate of Formation Has Been Filed . . . . . 4-8

4.7. Name . . . . . 4-9

    Form 4-8. Name Provision for Member-Managed LLC . . . . . 4-9

    Form 4-9. Name Provision for Manager-Managed LLC . . . . . 4-9

4.8. Purpose . . . . . 4-9

    Form 4-10. Any Lawful Purpose . . . . . 4-10

    Form 4-11. Specific Purpose . . . . . 4-10

    Form 4-12. Purpose Limited to Real Estate . . . . . 4-10.1

    Form 4-12a. Purpose Limited to Specific Real Estate . . . . . 4-10.1

4.9. Term . . . . . 4-10.2

    Form 4-13. Term Commences on Date of Filing of  
        Certificate of Formation . . . . . 4-11

    Form 4-14. Term Commences upon Execution of  
        Operating Agreement . . . . . 4-12

4.10. Registered Office . . . . . 4-12

    Form 4-15. Registered Office of LLC . . . . . 4-12

4.11. Registered Agent . . . . . 4-12

    Form 4-16. Registered Agent . . . . . 4-13

4.12. Members . . . . . 4-13

    Form 4-17. Schedule of Members Set Forth in Exhibit . . . . . 4-13

    Form 4-18. Schedule of Members Set Forth in Text  
        of Agreement . . . . . 4-14

    Form 4-19. Schedule of Members (without Percentages) . . . . . 4-15

CONTENTS

- Form 4-19A. No Preemptive Rights . . . . . 4-15
- Form 4-19B. Short-Form of Grant of Preemptive Rights . . . . . 4-16
- Form 4-19C. Long-Form of Grant of Preemptive Rights. . . . . 4-16.1
- 4.13. Miscellaneous Provisions . . . . . 4-16.3
  - Form 4-20. Miscellaneous Provisions . . . . . 4-16.3
- 4.14. Post-Organization Communication with Clients. . . . . 4-18
  - Form 4-21. Form of Post-Organization Reporting Letter to Client. . . . . 4-18
  - Form 4-22. Alternate Form of Letter to New LLC Regarding Operational and Other Post-Formation Matters . . . . . 4-20
- 4.15. Series LLC. . . . . 4-33
  
- CHAPTER 5: LIMITED LIABILITY COMPANY CAPITAL . . . . . 5-1**
- 5.1. Drafting Capital Provisions . . . . . 5-3
- 5.2. Initial Capital Contributions . . . . . 5-3
  - Form 5-1. Initial Capital Contributions in Cash . . . . . 5-4
  - Form 5-2. Initial Capital Contributions — Partly in Cash and Partly in Services. . . . . 5-4
  - Form 5-3. Initial Capital Contributions — Partly in Cash and Partly in Property . . . . . 5-5
  - Form 5-4. Representation in Connection with Contribution of Property. . . . . 5-5
- 5.3. Additional Capital Contributions . . . . . 5-5
  - Form 5-5. Additional Capital Contributions at Discretion of Manager — Limit on Amount . . . . . 5-6
  - Form 5-6. Additional Capital Contributions at Discretion of Members — Limit on Amount. . . . . 5-7
  - Form 5-7. No Liability Beyond Initial Capital Contribution . . . . . 5-7
  - Form 5-8. No Liability Beyond Additional Capital Contributions. . . . . 5-8
- 5.4. Default in Payment of Contributions. . . . . 5-8
  - Form 5-9. Remedy of Reduction of Member’s Interest in Event of Failure to Make Contribution to Manager-Managed LLC . . . . . 5-8
  - Form 5-9A. Remedy of Reduction of Member’s Share of Profits in Event of Failure to Make Contribution to Manager-Managed LLC. . . . . 5-9
- 5.5. Interest on Capital Contributions. . . . . 5-9
  - Form 5-10. No Interest on Capital Contributions . . . . . 5-10
  - Form 5-11. Interest on Capital Contributions . . . . . 5-10
- 5.6. Return of Capital Contributions . . . . . 5-10
  - Form 5-12. Return of Capital Contributions . . . . . 5-10.1
- 5.7. Form of Distribution . . . . . 5-10.1

Form 5-13. Form of Distribution — No Right to Receive Anything but Cash . . . . . 5-11

Form 5-14. Form of Distribution — Form of Distribution Is at Discretion of Manager in Manager-Managed LLC . . . . . 5-11

5.8. Capital Accounts . . . . . 5-11

Form 5-15. Capital Accounts Maintained in Accordance with Code Section 704. . . . . 5-12

5.9. Loans . . . . . 5-12

Form 5-16. Loans — General Authority of LLC to Borrow Money from Members on Terms to Be Agreed upon in Future . . . . . 5-12

Form 5-17. Loans — Authority to Make Specific Loan with General Authority to Borrow Money from Members on Terms to Be Agreed upon in Future . . . . . 5-13

Form 5-18. Any Member May Call for Member Loans. . . . . 5-13

Form 5-19. Member Loans — Terms . . . . . 5-14

**CHAPTER 6: ALLOCATION AND DISTRIBUTION PROVISIONS 6-1**

6.1. Taxation of the LLC . . . . . 6-3

6.2. General Allocation and Distribution Concepts . . . . . 6-3

6.3. Distribution Restrictions under the Act . . . . . 6-4

6.4. Allocation Restrictions — Code Section 704(b) . . . . . 6-4

6.4.1. Overview . . . . . 6-4

6.4.2. The Three Alternative Allocation Tests . . . . . 6-5

6.4.2.1. The First Test: Partners’ Interests . . . . . 6-5

6.4.2.2. The Second Test: Substantial Economic Effect and Capital Accounts . . . . . 6-6

6.4.2.3. The Third Test: Nonrecourse Debt. . . . . 6-7

6.4.3. Allocations to Interest Holders . . . . . 6-8

6.5. Definitions . . . . . 6-8

6.5.1. Distribution-Related Definitions . . . . . 6-9

Form 6-1. Distribution Definitions. . . . . 6-9

6.5.2. Allocation-Related Definitions . . . . . 6-10

Form 6-2. Tax Definitions . . . . . 6-10

6.6. Basic Distribution Provisions . . . . . 6-13

6.6.1. In General . . . . . 6-13

6.6.2. Cash Flow from Operations . . . . . 6-13

Form 6-3. Distribution of Cash Flow . . . . . 6-14

6.6.3. Distribution of Net Capital Proceeds . . . . . 6-14

Form 6-4. Distribution of Capital Proceeds . . . . . 6-14

6.6.4. Liquidation Proceeds . . . . . 6-14

Form 6-5. Liquidation and Dissolution . . . . . 6-15

CONTENTS

	Form 6-6. Liquidation and Dissolution — Deficit Restoration Obligation . . . . .	6-15
6.7.	Basic Allocation Provisions. . . . .	6-16
6.7.1.	Basic Allocations of Profits and Losses. . . . .	6-16
	Form 6-7. Profits and Losses . . . . .	6-16
6.7.2.	Minimum Gain Chargeback and Qualified Income Offset. . . . .	6-17
	Form 6-8. Minimum Gain Chargeback and Qualified Income Offset. . . . .	6-17
6.7.3.	Other Regulatory Allocations . . . . .	6-18
	Form 6-9. Regulatory Allocations. . . . .	6-19
6.7.4.	General Provisions. . . . .	6-20
	Form 6-10. General Provisions . . . . .	6-20
6.8.	Complex and Disproportionate Distribution and Allocation Provisions . . . . .	6-22
6.8.1.	Distribution Preferences. . . . .	6-22
	Form 6-11. Distribution Preference. . . . .	6-22.1
6.8.2.	Disproportionate Allocation of Losses . . . . .	6-25
	Form 6-12. Disproportionate Allocation of Losses. . . . .	6-25
<b>CHAPTER 7: MANAGEMENT PROVISIONS. . . . .</b>		<b>7-1</b>
7.1.	Drafting LLC Management Provisions . . . . .	7-3
7.1.1.	General Flexibility under the Act. . . . .	7-3
7.1.2.	Typical Approaches . . . . .	7-4
7.1.3.	Officers and Managers . . . . .	7-5
7.1.4.	Tax Aspects . . . . .	7-5
7.2.	Member-Managed LLC Provisions . . . . .	7-6
	Form 7-1. Simple Member-Management Provision . . . . .	7-6
	Form 7-2. Member-Management with Appointment of Ministerial Manager . . . . .	7-6
7.3.	Representative Management . . . . .	7-6.1
7.3.1.	Management by a Manager Similar to a General Partner of a Limited Partnership . . . . .	7-6.1
	Form 7-3. Manager with Authority Similar to a General Partner of a Limited Partnership . . . . .	7-7
	Form 7-4. Manager with Authority Similar to a General Partner of a Limited Partnership — Alternative Form . . . . .	7-9
7.3.2.	Management by Management Committee. . . . .	7-9
	Form 7-5. Management Committee . . . . .	7-9
	Form 7-5a. Management Committee (Alternative Form) . . . . .	7-11
7.3.3.	Management by One Class of Members . . . . .	7-12.1

	Form 7-6.	Definition of Class A and Class B Members . . . . .	7-12.2
	Form 7-7.	Management by Class A Members . . .	7-12.2
7.3.4.	Management in Bankruptcy Remote Entity . . . . .		7-12.2
	Form 7-7a.	Special Purpose Management Provisions . . . . .	7-12.2
7.4.	Replacement of Managers . . . . .		7-12.5
	Form 7-8.	Removal of Manager for Any Reason . . . . .	7-12.5
	Form 7-9.	Removal of Manager for Only Specified Reasons . .	7-13
7.5.	Meetings of Members . . . . .		7-13
	Form 7-10.	Procedure for Calling and Holding Meetings . . . . .	7-13
	Form 7-11.	Procedure for Calling and Holding Meetings — Only Class A Members Vote . . . . .	7-14
7.6.	Informal Action of Members; Form of Member Consents . . . . .		7-15
	Form 7-12.	Informal Actions . . . . .	7-15
	Form 7-13.	Form of Consent of Members . . . . .	7-15
7.7.	Unanimous Consent . . . . .		7-17
	Form 7-14.	Unanimous Consent (Vote of All Members) . . . . .	7-18
	Form 7-15.	Consent of Members (Vote of Less Than All Members) . . . . .	7-18
7.8.	Deadlock and Resolution . . . . .		7-18
	Form 7-16.	Arbitration of Deadlock . . . . .	7-19
	Form 7-16a.	Arbitration of Dispute (Alternate Form) . . . . .	7-19
	Form 7-16b.	Meeting between Senior Executives; Mediation . . . .	7-21
	Form 7-17.	Reciprocal Purchase Rights in the Event of Deadlock . . . . .	7-21
	Form 7-17a.	Deadlock; Buy-Sell . . . . .	7-24
7.9.	Compensation and Reimbursement . . . . .		7-26
	Form 7-18.	No Arrangement for Compensation (Member-Managed) . . . . .	7-26
	Form 7-19.	Compensation (Manager-Managed) . . . . .	7-27
	Form 7-20.	Extraordinary Compensation . . . . .	7-27
7.10.	Standard of Care and Degree of Loyalty . . . . .		7-27
	Form 7-21.	Standard of Care and Degree of Loyalty . . . . .	7-31
	Form 7-21a.	Standard of Care and Duty of Loyalty (Alternative Form) . . . . .	7-31
7.11.	Indemnification . . . . .		7-33
	Form 7-22.	Liability and Indemnification of Members (Manager-Managed) . . . . .	7-33
	Form 7-22a.	Indemnification . . . . .	7-34
	Form 7-23.	Liability and Indemnification of Members (Member-Managed) . . . . .	7-34
	Form 7-23a.	Right to Indemnification; Advancement . . . . .	7-37
7.12.	Power of Attorney . . . . .		7-38
	Form 7-24.	Power of Attorney . . . . .	7-39

**CHAPTER 8: TRANSFER AND BUY-SELL PROVISIONS . . . . . 8-1**

- 8.1. The Act’s Default Rules for Transfers . . . . . 8-3
- 8.2. Tax Aspects of Transfer Restrictions . . . . . 8-3
  - 8.2.1. Partnership Classification . . . . . 8-3
  - 8.2.2. Termination of the LLC . . . . . 8-4
  - 8.2.3. Basis Issues . . . . . 8-5
- 8.3. Preliminary Drafting Considerations . . . . . 8-5
  - Form 8-1. Definitional Provision — Transfer . . . . . 8-6
  - Form 8-2. Definitional Provisions — Interest and Membership Rights . . . . . 8-6
- 8.4. Drafting Transfer Provisions That Follow the Act’s Default Rules . . . . . 8-6.1
  - Form 8-3. Transfer Provision Following the Act’s Default Rules . . . . . 8-6.1
- 8.5. Drafting Transfer Provisions That Permit Free Transferability of Interests . . . . . 8-6.1
  - Form 8-4. Free Transferability of Interests and Rights . . . . . 8-7
- 8.6. Drafting Transfer Provisions That Absolutely Prohibit Transfers of Any Kind . . . . . 8-7
  - Form 8-5. Absolute Prohibition of Transfers . . . . . 8-7
- 8.7. Miscellaneous Transfer Provisions . . . . . 8-8
  - 8.7.1. In General . . . . . 8-8
    - Form 8-6. Transfer Permitted on Satisfaction of Certain Conditions . . . . . 8-8
  - 8.7.2. First Refusal Rights . . . . . 8-9
    - Form 8-7. Right of First Refusal; LLC Purchases; Installments Allowed . . . . . 8-10
    - Form 8-8. Right of First Refusal; Member’s Purchase; Payment Terms Matched . . . . . 8-11
    - Form 8-9. Right of First Offer; LLC Purchases; Cash Purchase . . . . . 8-13
  - 8.7.3. Admission of Transferee as a Member . . . . . 8-14
    - Form 8-10. Transferee Not Admitted as Member without Consent of Members . . . . . 8-14
    - Form 8-11. Transferee Automatically Admitted as Member . . . . . 8-15
  - 8.7.4. Transfers to Members’ Affiliates and Family . . . . . 8-15
    - Form 8-12. Definitional Provision — Family . . . . . 8-16
    - Form 8-13. Transfers to Affiliates and Family . . . . . 8-16
  - 8.7.5. Right of First Refusal to Member of Family Group . . . . . 8-16
    - Form 8-13a. Right of First Refusal — Members of Designated Family Group Have Right of First Refusal to Purchase Units of That Family Group before Company or Other Members . . . . . 8-16.1

8.7.6.	Transfers Incidental to Disputes between Members . . . . .	8-16.3
8.7.7	Transfers Incidental to Put-Call, Tag-Along and Drag-Along Rights . . . . .	8-16.3
	Form 8-13b. “Put-Call” Buyout Provision . . . . .	8-16.3
	Form 8-13c. Tag-Along Right . . . . .	8-16.4
	Form 8-13d. Drag-Along Right . . . . .	8-16.5
8.7.8	Transfers Incidental to Change-in-Control Provision . . . . .	8-16.6
	Form 8-13e. Change-in-Control . . . . .	8-16.6
8.8.	Resignation and Dissociation under the Act . . . . .	8-16.7
8.8.1.	Resignation . . . . .	8-16.7
	Form 8-14. Resignation Defined . . . . .	8-17
	Form 8-15. Resignation Restricted . . . . .	8-17
	Form 8-15a. Resignation Restricted — Alternative . . . . .	8-17
8.8.2.	Dissociation . . . . .	8-17
	Form 8-16. Dissociation Defined (Long Form) . . . . .	8-19
	Form 8-17. Dissociation Defined (Short Form) . . . . .	8-21
8.9.	Consequences of Dissociation in General . . . . .	8-21
	Form 8-18. Status of Successor of a Dissociated Member; Fair Value Purchase of Resigning Member’s Interest Not Required . . . . .	8-23
8.10.	Fair Value Rights . . . . .	8-24
	Form 8-19. Payment of Fair Value . . . . .	8-24
8.11.	Valuation Provisions . . . . .	8-24.1
	Form 8-20. Agreed Value . . . . .	8-24.1
	Form 8-21. Book Value . . . . .	8-25
	Form 8-22. Appraised Value . . . . .	8-26
	Form 8-23. Net Present Value . . . . .	8-26
8.12.	Other Transfer Considerations . . . . .	8-27
	Form 8-24. Installment Buy-outs . . . . .	8-27
8.13.	Redemption Agreements . . . . .	8-28
	Form 8-25. Membership Interest Redemption Agreement . . . . .	8-28
	Form 8-26. Membership Interest Redemption Agreement (Alternative Form) . . . . .	8-31
<b>CHAPTER 9: DISSOLUTION . . . . .</b>		<b>9-1</b>
9.1.	Tax Aspects of LLC Dissolution . . . . .	9-2
9.2.	Overview of the Act’s Dissolution Provisions . . . . .	9-2
	Form 9-1. Dissolution — Comprehensively Describes All Events of Dissolution . . . . .	9-4
	Form 9-2. Specific Dissolution Event . . . . .	9-5
	Form 9-3. Sample Resolutions Approving Continuation of Business after Dissolution . . . . .	9-5

CONTENTS

Form 9-3a. Sample Appointment of Substitute Member Following Death of Sole Member. . . . . 9-6

Form 9-3b. Consent of Members to Dissolution, Liquidation and Winding Up of Affairs of LLC and Subsidiary . . . . . 9-6.1

9.3. Procedure for Winding Up and Distribution of Assets . . . . . 9-6.3

Form 9-4. Procedure for Winding Up . . . . . 9-7

Form 9-5. Procedure for Winding Up LLC and for Distribution of Assets in Manager-Managed LLC — Manager Acts as Liquidating Trustee . . . . . 9-8

9.4. Certificate of Cancellation. . . . . 9-8

Form 9-6. Filing of Certificate of Cancellation — Member-Managed LLC . . . . . 9-9

Form 9-7. Filing of Certificate of Cancellation — Manager-Managed LLC . . . . . 9-9

Form 9-8. Certificate of Cancellation Signed by Authorized Person. . . . . 9-10

9.5. Notice to Creditors of a Dissolved Limited Liability Company . . . . . 9-11

Form 9-9. Notice to Creditors of a Dissolved Limited Liability Company . . . . . 9-12

Form 9-10. Letter of Transmittal of Notice to Creditors . . . . . 9-13

Form 9-11. Affidavit of Publication and Mailing of Notice to Creditors . . . . . 9-13

**CHAPTER 10: BOOKS, RECORDS, AND ACCOUNTING . . . . . 10-1**

10.1. Introduction . . . . . 10-2

10.2. Banking . . . . . 10-2

Form 10-1. Bank Accounts . . . . . 10-2

10.3. Records . . . . . 10-2

Form 10-2. Maintenance of Records (Short Form) . . . . . 10-3

Form 10-3. Maintenance of Records — Manager-Managed LLC (Long Form). . . . . 10-3

10.4. Accounting Period; Method of Accounting. . . . . 10-4.1

Form 10-4. Calendar Year Accounting Period Specified . . . . . 10-4.1

Form 10-5. Fiscal Year Accounting Period Specified . . . . . 10-5

Form 10-6. Year to Be Determined by Members. . . . . 10-5

Form 10-7. Annual Accounting Period Established by Managers . . . . . 10-5

Form 10-8. Method of Account — Manager-Managed. . . . . 10-6

10.5. Reports. . . . . 10-6

Form 10-9. Preparation of Reports (Short Form) for Member-Managed or Manager-Managed LLC. . . . . 10-6

Form 10-10. Preparation of Reports (Long Form) for Manager-Managed LLC . . . . . 10-7

10.6. Unified Audit Rules and Tax Matters Partner . . . . . 10-7

Form 10-11. Tax Matters Member (Member-Managed) . . . . . 10-9  
 Form 10-12. Tax Matters Partner (Manager-Managed) . . . . . 10-9  
 10.7. Tax Elections . . . . . 10-10  
 Form 10-13. Tax Elections . . . . . 10-10  
 Form 10-14. Tax Elections — Applies to Code  
 Section 754 Only — for Use in Either  
 Member-Managed or Manager-Managed LLC . . . . . 10-10

**PART III  
 MISCELLANEOUS**

**CHAPTER 11: BUSINESS REORGANIZATIONS INVOLVING**

**LLCS . . . . . 11-1**  
 11.1. In General . . . . . 11-2  
 11.2. Admission of New Members . . . . . 11-2  
     11.2.1. Acquisition of Interest from Company . . . . . 11-2  
         Form 11-1. Simple Subscription Agreement  
             for LLC Membership Interest . . . . . 11-4  
         Form 11-2. Long Form Subscription Agreement  
             for LLC Membership Interest with  
             Securities Language . . . . . 11-5  
         Form 11-2a. Short Form Subscription Letter  
             with Securities Language . . . . . 11-9  
         Form 11-3. First Amendment to Operating  
             Agreement Admitting a  
             New Member . . . . . 11-10  
     11.2.2. Acquisition of Interest from Another Member . . . . . 11-12  
         Form 11-4. Assignment of LLC Membership  
             Right . . . . . 11-12.1  
         Form 11-5. Joinder Agreement . . . . . 11-17  
 11.3. Conversion of an Existing Entity into an LLC . . . . . 11-17  
     11.3.1. In General . . . . . 11-17  
     11.3.2. Conversion of General Partnership to LLC . . . . . 11-18  
         Form 11-6. Agreement to Convert General  
             Partnership to Limited Liability  
             Company . . . . . 11-19  
         Form 11-7. Explanatory Statement — Conversion  
             of General Partnership into LLC . . . . . 11-21  
         Form 11-8. Term Is Continuation of Term of  
             Partnership . . . . . 11-22  
         Form 11-9. Initial Capital Contributions — In  
             Property Consisting of Partnership  
             Interests in LLC’s Predecessor . . . . . 11-22

CONTENTS

	Form 11-10. Assignment of General Partnership Interests to LLC . . . . .	11-22
	Form 11-11. Resolutions of Members Approving Liquidation of Partnership into LLC . . . . .	11-23
11.3.3.	Conversion of Limited Partnership into LLC . . . . .	11-24
11.3.4.	Conversion of Corporation into LLC . . . . .	11-24
11.4.	Conversion of LLC into Corporation . . . . .	11-26
11.5.	Recapitalizing the LLC . . . . .	11-27
	Form 11-12. Form of Amendment of Operating Agreement . . . . .	11-28
11.6.	Mergers Involving a New Jersey LLC . . . . .	11-28
	Form 11-13. Merger of Two New Jersey LLCs . . . . .	11-31
	Form 11-14. Merger of Non-New Jersey LLC with and into a New Jersey Corporation . . . . .	11-32
	Form 11-15. Certificate of Merger of New Jersey LLC with and into Delaware LLC . . . . .	11-34
11.7.	Conversions of Business Entities in Delaware . . . . .	11-35
	Form 11-16. Certificate of Conversion to Limited Liability Company . . . . .	11-36

**CHAPTER 12: DOING INTERSTATE BUSINESS . . . . . 12-1**

12.1.	Foreign LLCs Doing Business in New Jersey . . . . .	12-2
	12.1.1. Governing Law . . . . .	12-2
	12.1.2. Doing Business . . . . .	12-2
	12.1.3. Procedure for Registration . . . . .	12-3
	Form 12-1. Application for Registration of a Foreign Limited Liability Company . . . . .	12-3
	12.1.4. Filing Fee . . . . .	12-4
	12.1.5. Issuance and Cancellation of Registration . . . . .	12-4
	12.1.6. Doing Business without Registration . . . . .	12-4
12.2.	New Jersey LLCs Doing Business Outside of New Jersey . . . . .	12-5
	12.2.1. Delaware . . . . .	12-5
	12.2.2. New York . . . . .	12-6
	Form 12-2. Application for Authority of a Foreign Limited Liability Company to Transact Business in New York . . . . .	12-8.1
	12.2.3. Pennsylvania . . . . .	12-10

**CHAPTER 13: PROFESSIONAL LIMITED LIABILITY COMPANIES . . . . . 13-1**

13.1.	Use of Limited Liability Companies by Professionals . . . . .	13-2
13.2.	Limited Liability Partnerships . . . . .	13-5
	13.2.1. Generally . . . . .	13-5
	13.2.2. Becoming a Limited Liability Partnership . . . . .	13-7
	Form 13-1. Statement of Qualifications to Become a Limited Liability Partnership . . . . .	13-7

13.2.3. Foreign Limited Liability Partnerships . . . . . 13-8  
 Form 13-2. Statement of Qualifications of a  
 Foreign Limited Liability  
 Partnership. . . . . 13-9  
 13.2.4. Use of Limited Liability Partnerships by Attorneys. 13-10  
 13.3. Member Service Agreement. . . . . 13-11  
 Form 13-3. Member Service Agreement . . . . . 13-11

**CHAPTER 14: MISCELLANEOUS MATTERS. . . . . 14-1**

14.1. Credit Agreement Considerations for LLC Borrowings . . . . . 14-3  
 14.1.1. Due Diligence . . . . . 14-3  
 Form 14-1. Manager’s Certificate . . . . . 14-5  
 Form 14-2. Member’s Certificate. . . . . 14-7  
 Form 14-3. Majority Member’s Certificate . . . . . 14-8  
 14.1.2. Documentation . . . . . 14-10  
 14.1.2.1. Recourse . . . . . 14-11  
 14.1.2.2. Representations and Warranties . . . . . 14-11  
 14.1.2.3. Covenants . . . . . 14-11  
 14.1.3. Remedies . . . . . 14-12  
 14.1.4. Conversions of Existing Entities. . . . . 14-12  
 14.1.5. Banking Resolutions . . . . . 14-13  
 Form 14-4. Limited Liability Company  
 Depository and Signing  
 Resolutions . . . . . 14-13  
 14.1.6. Amendment of Operating Agreement in  
 Connection with a Loan Transaction . . . . . 14-15  
 Form 14-5. Amendment of Operating Agreement  
 in Connection with Financing  
 Agreement . . . . . 14-16  
 14.2. Opinion Letters . . . . . 14-18  
 14.2.1. Introduction . . . . . 14-18  
 Form 14-6. Form of Opinion Letter in Connection  
 with a Bank Loan to an LLC . . . . . 14-19  
 14.2.2. Status Opinion . . . . . 14-24  
 14.2.2.1. Background and Meaning . . . . . 14-24  
 14.2.2.2. Due Diligence Procedures . . . . . 14-24  
 14.2.3. Power Opinion . . . . . 14-24.1  
 14.2.3.1. Background and Meaning . . . . . 14-24.1  
 14.2.3.2. Due Diligence Procedures . . . . . 14-24.2  
 14.2.4. Acts Opinion . . . . . 14-24.3  
 14.2.4.1. Background and Meaning . . . . . 14-24.3  
 14.2.4.2. Due Diligence Procedures . . . . . 14-24.4  
 14.2.5. No Violation Opinion . . . . . 14-24.6  
 14.2.5.1. Background and Meaning . . . . . 14-24.6  
 14.2.5.2. Due Diligence Procedures . . . . . 14-24.11

CONTENTS

- 14.2.6. No Consent Opinion . . . . . 14-24.12
  - 14.2.6.1. Background and Meaning. . . . . 14-24.13
  - 14.2.6.2. Due Diligence Procedures . . . . . 14-24.14
- 14.2.7. Remedies Opinion . . . . . 14-24.15
  - 15.2.7.1. Background and Meaning. . . . . 14-24.15
  - 14.2.7.2. Due Diligence Procedures . . . . . 14-24.20
- 14.2A. Due Diligence Checklists . . . . . 14-24.22
  - 14.2A.1. Status Opinion . . . . . 14-24.22
    - Form 14-6A. Status Opinion Checklist . . . . . 14-24.22
  - 14.2A.2. Power Opinion . . . . . 14-24.23
    - Form 14-6B. Power Opinion Checklist . . . . . 14-24.23
  - 14.2A.3. Acts Opinion . . . . . 14-24.24
    - Form 14-6C. Acts Opinion Checklist . . . . . 14-24.24
  - 14.2A.4. No Violation Opinion . . . . . 14-24.26
    - Form 14-6D. No Violation Opinion Checklist. . . 14-24.26
  - 14.2A.5. No Consent Opinion. . . . . 14-24.28
    - Form 14-6E. No Consent Opinion Checklist. . . . 14-24.28
  - 14.2A.6. Remedies Opinion . . . . . 14-24.29
    - Form 14-6F. Remedies Opinion Checklist . . . . . 14-24.29
- 14.3. Guarantees and Responsibility for Losses Derived from  
 Guarantees of LLC Obligations. . . . . 14-24.29
  - Form 14-7. Guaranty Agreement. . . . . 14-24.30
  - Form 14-8. Indemnity and Contribution Agreement —  
 Obligation Guaranteed Only by Members . . . . . 14-36
- 14.4. Pledges of LLC Interests . . . . . 14-38
  - Form 14-9. Membership Interest Pledge Agreement. . . . . 14-40
- 14.5. Bankruptcy Implications . . . . . 14-50
  - 14.5.1. The Bankruptcy Code and LLCs . . . . . 14-50
    - Form 14-10. Operating Agreement Provision —  
 Unanimous Consent of Members to  
 Filing a Voluntary Case . . . . . 14-52
    - Form 14-11. Operating Agreement Provision —  
 Manager Vote Required for Filing  
 of Voluntary Case . . . . . 14-52
    - Form 14-12. Operating Agreement Provision —  
 Member and Manager Vote  
 Required for Filing of Voluntary  
 Case . . . . . 14-52
    - Form 14-13. Resolutions of Board of Managers  
 in Manager-Managed LLC  
 Consenting to Filing a Voluntary  
 Case under Chapter 11 . . . . . 14-53
  - 14.5.2. Involuntary Cases. . . . . 14-54
  - 14.5.3. Bankruptcy of a Member . . . . . 14-54
  - 14.5.4. *Ipsa Facto Clauses*. . . . . 14-56.1

14.5.5. Bankruptcy-Remote LLCs . . . . . 14-60

14.6. Securities Law Aspects . . . . . 14-61

14.6.1. LLC Interests as Securities . . . . . 14-62

14.6.2. Status of the LLC as an Issuer . . . . . 14-62

14.7. Applicability of the Pre-Merger Notification Requirements  
of the Hart-Scott-Rodino Act to LLCs . . . . . 14-63

14.7.1. Background . . . . . 14-63

14.7.2. New Hart-Scott Rodino Act Pre-merger  
Reporting Requirements Affecting Partnerships,  
LLCs and Unincorporated Entities . . . . . 14-65

14.7.3. Treatment of LLCs and Unincorporated Entities  
under New Rules . . . . . 14-66

14.7.4. Treatment of LLCs under the Interpretation . . . . . 14-66

14.8. Diversity Jurisdiction for LLCs . . . . . 14-67

14.9. Charging Orders . . . . . 14-67

14.9.1. Generally . . . . . 14-67

14.9.2. The Olmstead Case . . . . . 14-69

14.9.3. The Bankruptcy Cases . . . . . 14-71

14.9.4. Does Olmstead Have Precedential Value in  
New Jersey? . . . . . 14-72

**CHAPTER 15: COMPENSATION STRATEGIES FOR THE LLC . 15-1**

15.1. Introduction . . . . . 15-3

15.2. IRC Section 83 . . . . . 15-4

15.3. Hypo, LLC . . . . . 15-6

15.4. LLC (Partnership) vs. Corporation Compensation Methods . . . . . 15-10

15.4.1. Corporation Context . . . . . 15-11

15.4.1.1. Stock Grants . . . . . 15-11

15.4.1.2. Stock Options . . . . . 15-12

15.4.1.3. Phantom Stock Plans . . . . . 15-13

15.4.2. The LLC Context . . . . . 15-13

15.4.2.1. Equity Interests . . . . . 15-14

15.4.2.1.1. “Full Equity Interest” . . . . . 15-14

15.4.2.2. Point System Compensation . . . . . 15-14.1

15.4.2.3. The Importance of Member  
Involvement . . . . . 15-16

15.4.2.4. Loss Allocation and Debt  
Guarantees . . . . . 15-16

15.4.2.5. Equity Interest vs. Non-equity  
Incentive Compensation . . . . . 15-17

15.4.3. Compensation Comparison Chart . . . . . 15-18

15.4.3.1. Definition of Terms . . . . . 15-20

15.4.4. Guidance from the Internal Revenue Service . . . . . 15-21

15.5. Phantom Income and Distributions . . . . . 15-22

15.5.1. Tax Effected Distributions . . . . . 15-22

CONTENTS

- 15.5.1.1. Separate Calculations for Each Member . . . . . 15-23
- 15.5.1.2. Standard Distribution Rate . . . . . 15-24
- 15.5.1.3. Highest Incremental Tax Rate . . . . . 15-25
- 15.5.2. Self-Employment Tax . . . . . 15-26.1
  - 15.5.2.1. Calculating Self-Employment Income . . . . . 15-26.2
  - 15.5.2.2. Application of Self-Employment Tax to LLC Members . . . . . 15-27
- 15.6. Forms: Equity and Non-equity Based LLC Compensation Plans. 15-27
  - 15.6.1. Grant of Equity Interest to Employees Subject to Forfeiture . . . . . 15-27
    - Form 15-1. Unit Grant Agreement . . . . . 15-28
  - 15.6.2. Phantom Ownership Plan. . . . . 15-32
    - Form 15-2. Communications, LLC : Employee Incentive Compensation Plan . . . . . 15-32
    - Form 15.3. Sample Memorandum to Employee Regarding Unit Grant and Section 83 Rules . . . . . 15-42
    - Form 15.4. Sample Section 83(b) Election Statement . . . . . 15-44
- 15.7. Internal Revenue Code Section 409A . . . . . 15-45

**CHAPTER 16: OPTIONS AND CONVERTIBLE INTERESTS FOR LLCs TAXED AS PARTNERSHIPS. . . . . 16-1**

- 16.1. Introduction: Noncompensatory Call Options and Convertible Preferred Interests . . . . . 16-3
- 16.2. Noncompensatory Call Options: Defined and Example . . . . . 16-3
  - 16.2.1. Tax Consequences of Issuance and Exercise of Call Option. . . . . 16-4
    - 16.2.1.1. Partnership. . . . . 16-8
    - 16.2.1.2. Option Holder . . . . . 16-10
  - 16.2.2. Tax Consequences of Lapse of Call Option. . . . . 16-10
    - 16.2.2.1. Partnership. . . . . 16-10
    - 16.2.2.2. Option Holder . . . . . 16-12
  - 16.2.3. Tax Consequences of Exercise of Option . . . . . 16-12
    - 16.2.3.1. Option Holder . . . . . 16-13
    - 16.2.3.2. Partnership. . . . . 16-13
  - 16.2.4. Drafting Considerations in the Partnership Agreement . . . . . 16-23
    - 16.2.4.1. Capital Account Maintenance under Code Section 704(b) . . . . . 16-23
      - 16.2.4.1.1. Book-Up . . . . . 16-28
      - 16.2.4.1.2. No Book-Up . . . . . 6-30

	16.2.4.2.	Code Section 704(c) . . . . .	16-32
	16.2.4.3.	Tax Distributions . . . . .	16-32
16.2.5.		Ancillary Tax Considerations . . . . .	16-33
	16.2.5.1.	Code Section 704(c) . . . . .	16-33
	16.2.5.2.	Code Section 752 . . . . .	16-35
	16.2.5.3.	Code Section 751 . . . . .	16-35
	16.2.5.4.	Holding Period . . . . .	16-35
	16.2.5.5.	Original Issue Discount . . . . .	16-36
	16.2.5.6.	Code Section 708 . . . . .	16-36
	16.2.5.7.	Disregarded Entities . . . . .	16-37
16.3.		Convertible Preferred Membership Interests . . . . .	16-37
	16.3.1.	Description of Convertible Preferred Interests . . . . .	16-37
	16.3.2.	Example: Convertible Preferred Interests . . . . .	16-38
	16.3.3.	Real Deals . . . . .	16-39
	16.3.4.	Tax Consequences of Issuance and Exercise of Convertible Preferred Interests . . . . .	16-39
	16.3.4.1.	Tax Consequences of Issuance of Convertible Preferred Interests . . . . .	16-39
		16.3.4.1.1 Preferred Holder as a Partner . . . . .	16-39
		16.3.4.1.2 Partnership, A and B . . . . .	16-41
		16.3.4.1.3 Tax Consequences of Partnership Operations Prior to Conversion . . . . .	16-41
	16.3.4.2.	Tax Consequences at Exercise of the Conversion Right of the Preferred Convertible Interest . . . . .	16-42
		16.3.4.2.1 Capital Accounts . . . . .	16-42
		16.3.4.2.2 Tax Consequences of Capital Account Adjustments . . . . .	16-46
		16.3.4.2.3 Code Section 752 . . . . .	16-48
		16.3.4.2.4 Code Section 704(c) . . . . .	16-49
		16.3.4.2.5 Code Section 708 . . . . .	16-51
		16.3.4.2.6 Code Section 705 . . . . .	16-52
		16.3.4.2.7 Nonrecourse Deductions . . . . .	16-52
		16.3.4.2.8 Excess Nonrecourse Liabilities . . . . .	16-53
16.3.5.		Drafting Issues for Convertible Interests . . . . .	16-54
	16.3.5.1.	Form 16-1 Revaluation . . . . .	16-60
	16.3.5.2.	Tax Distributions . . . . .	16-61
		Form 16-1. Selected Provisions Applicable to	

Allocations and Distributions..... 16-61

CHAPTER 17: SINGLE MEMBER LLCS..... 17-1

17.1. In General ..... 17-2
17.2. Tax Issues ..... 17-2
17.3. Uses of Single Member LLCs in Statutory Mergers and Consolidations ..... 17-4
17.4. Uses of Single Member Limited Liability Companies ..... 17-5
17.5. Operating Agreements for Single Member Limited Liability Companies ..... 17-7
17.5.1 Generally ..... 17-7
17.5.2 Operating Agreement as a Means of Withstanding Veil-Piercing ..... 17-7
17.5.3 Single Member Operating Agreement can Eliminate Ambiguity Resulting from Transfer of Member's Interest ..... 17-8
Form 17-1 Transferability of Single Member's Interest ..... 17-9
17.6. Tax Consequences of a Single Member LLC Becoming an Entity with More than One Owner ..... 17-9

PART IV APPENDICES

APPENDIX A: [MEMBER-MANAGED] OPERATING AGREEMENT OF \_\_\_\_\_ LIMITED LIABILITY COMPANY ..... APP A-1
APPENDIX B: [MANAGER-MANAGED] OPERATING AGREEMENT OF \_\_\_\_\_ LIMITED LIABILITY COMPANY ..... APP B-1
APPENDIX C: PROFESSIONAL SERVICES OPERATING AGREEMENT OF \_\_\_\_\_ LIMITED LIABILITY COMPANY ..... APP C-1
APPENDIX D: LIMITED LIABILITY COMPANY AGREEMENT FOR A SINGLE MEMBER NEW JERSEY LIMITED LIABILITY COMPANY OWNED BY A CORPORATION ..... APP D-1

APPENDIX D1: ALTERNATIVE FORM OF SINGLE MEMBER OPERATING AGREEMENT . . . . . APP D1-1

APPENDIX D2: OPERATING AGREEMENT OF LIMITED LIABILITY COMPANY WHICH IS A SUBSIDIARY OF A TAX-EXEMPT ENTITY AND IS USED FOR TAX-EXEMPT PURPOSES. . . . . APP D2-1

APPENDIX D3: OPERATING AGREEMENT FOR A BANKRUPTCY-REMOTE ENTITY . . . . . APP D3-1

APPENDIX E: FORM OF OPERATING AGREEMENT FOR A TWO PERSON LIMITED LIABILITY COMPANY FORMED FOR A SPECIFIC PROJECT . . . . . APP E-1

APPENDIX F: NEW JERSEY LIMITED LIABILITY COMPANY ACT . . . . . APP F-1

APPENDIX G: CHECK-THE-BOX REGULATIONS . . . . . APP G-1

APPENDIX H: REVENUE PROCEDURE 95-10. . . . . APP H-1

APPENDIX I: IRS FORM 8832. . . . . APP I-1

APPENDIX J: N.Y.L.L.C.L. § 204. LIMITED LIABILITY COMPANY NAME . . . . . APP J-1

APPENDIX K: DIVISION OF REVENUE, BUSINESS REGISTRATION FORM, NJ-REG . . . . . APP K-1

APPENDIX L: COMMON UNIT INCENTIVE PLAN; CORRESPONDING PROVISIONS OF OPERATING AGREEMENT; FORM OF INCENTIVE UNIT GRANT AGREEMENT . . . . . APP L-1

APPENDIX M: OPERATING AGREEMENT OF LIMITED LIABILITY COMPANY THAT OWNS A VACATION HOME . . . . . APP M-1

APPENDIX N: COMPARISON OF STATE LLC FEES AND FILING INFORMATION . . . . . APP N-1

**PART V  
LLP AND LLC CASES**

LLP and LLC Cases . . . . . LLC Cases-1

**PART VI  
INDICES**

Cumulative Table of Internal Revenue Code Sections . . . . . INDEX-1  
Cumulative Table of Treasury Regulations . . . . . INDEX-4  
Cumulative Table of Revenue Rulings and Revenue Procedures . . . . . INDEX-8  
Cumulative Table of New Jersey Limited Liability Company  
Act Sections . . . . . INDEX-10  
  
Miscellaneous New Jersey Act Sections . . . . . INDEX-13  
Subject Index . . . . . INDEX-15  
Forms Index . . . . . INDEX-31