

# **Creating Practical Operating Procedures**

Presented by:

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## **How Internal Management and Regulation Choices Affect the Entity**

### **Important Power and Duties of Members**

Unless otherwise provided in the LLC's articles, a member control agreement or by the board of governors, members have voting power in proportion to their monetary contribution to the LLC. The members voting powers cannot be changed in an operating agreement or another written agreement. The members generally act by the affirmative vote of the members owning the greater of a majority of the voting power of the membership interests present or a majority of the voting power that would constitute a quorum if the articles of organization, a member control agreement, of the Act require a larger proportion.<sup>1</sup>

Except as otherwise provide in the Minnesota LLC Act, members may enter written voting agreements concerning voting their interests, as well as agreements concerning the management of the LLC's business, the declaration and payment of distributions, the sharing of profits and losses, the election of governors or managers, the employment of members and others by the LLC, the relations among members and persons who have signed contribution agreements, the dissolution, termination and liquidation of the LLC, and the arbitration of disputes.<sup>2</sup>

Further, when the Minnesota LLC Act provides that a particular result may or must be obtained through a provision in the articles of organization (other than a provision required to be contained in the articles), in the bylaws, or by an act of the

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<sup>1</sup> Minn. Stat. § 322B.346 subd. 1

<sup>2</sup> Minn. Stat. § 322B.37 subd. 1

board, the same result can be accomplished through a member control agreement or a procedure established by a member control agreement.<sup>3</sup> In addition, a member control agreement may allocate to the members authority ordinarily exercised by the board of governors, allocate to the board of governors authority ordinarily exercised by the members, or structure the governance of the LLC in any agreed fashion; and can waive, in whole or in part, a member's dissenting rights.<sup>4</sup>

A member control agreement may include a *business continuation agreement*, whereby the members give their advance consent to LLC continuation after dissolution, *only* if the articles of organization grant the members the power to enter into a business continuation agreement.<sup>5</sup> A valid member control agreement is specifically enforceable.<sup>6</sup>

A member control agreement is valid if it is in writing and signed by the persons who, on the date the agreement first becomes effective, comprise all the members as the LLC (regardless of voting power), and all persons who are party to contribution agreements that on that date have not yet been fully performed. A member control agreement may also include as parties persons who are neither members nor parties to a contribution agreement, and it may provide for its amendment through non-unanimous means.<sup>7</sup> Such an agreement is enforceable only by parties to the agreement, and is enforceable only against those persons and other persons having knowledge of the agreement.<sup>8</sup>

### **Complete Records, Returns and Reports: Safeguarding the Organization**

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> § 322B.37 subd. 3(b)

<sup>7</sup> § 322B.37 subd. 2

<sup>8</sup> § 322B.37 subd. 3(a)

Minn. Stat. § 322B.373 requires limited liability companies to keep at its principal executive office, or at another place or places within the United States determined by the board of governors:

(1) a current list of the full name and last-known business, residence, or mailing address of each member, governor, and chief manager;

(2) a current list of the full name and last-known business, residence, or mailing address of each assignee of financial rights other than a secured party, and a description of the rights assigned;

(3) a copy of the articles of organization and all amendments to the articles;

(4) copies of any currently effective written bylaws;

(5) copies of the limited liability company's federal, state, and local income tax returns and reports, if any, for the three most recent years;

(6) financial statements required by § 322B.376;

(7) records of all proceedings of members for the last three years;

(8) records of all proceedings of the board of governors for the last three years;

(9) reports made to members generally within the last three years;

(10) member control agreements;

(11) a statement of all contributions accepted under § 322B.40, subd. 3, including for each contribution:

(i) the identity of the member to whom the contribution relates;

(ii) the class or series to which the contribution pertains;

(iii) the amount of cash accepted by the limited liability company or promised to be paid to the limited liability company;

(iv) a description of any services rendered to or for the benefit of the limited liability company or promised to be rendered to or for the benefit of the limited liability company; and

(v) the value accorded under § 322B.40, subd. 4 to: (A) any other property transferred or promised to be transferred to the limited liability company; and (B) any services rendered to or for the benefit of the limited liability company or promised to be rendered to or for the benefit of the limited liability company;

(12) a statement of all contribution agreements made under § 322B.42, including for each contribution agreement:

(i) the identity of the would-be contributor;

(ii) the class or series to which the future contribution pertains; and

(iii) as to each future contribution to be made, the same information as subdivision 1, clause (11) requires for contributions already accepted;

(13) a statement of all contribution allowance agreements made under § 322B.43, including for each contribution allowance agreement:

(i) the identity of the would-be contributor;

(ii) the class or series to which the future contribution would pertain; and

(iii) as to each future contribution allowed to be made, the same information as subd. 1(11) requires for contributions already accepted;

(14) an explanation of any restatement of value made under § 322B.41;

(15) any written consents obtained from members under this chapter;

(16) a copy of agreements, contracts, or other arrangements or portions of them incorporated by reference under § 322B.40, subd. 6.

## **The Comprehensive Operating Agreement – Sample Review**

See Appendix for a sample Operating Agreement

### **Securities Law Issues Related to Issuance or Transfer of Membership Interests in LLCs**

If an LLC membership interest is a “security” under federal law, then all who sell, purchase, or promote membership interests must comply within the Security Exchanges Commission (SEC) regulatory system. Compliance requirements, including aggressive antifraud laws, also extend to all subsequent sales, resales, assignments, and purchases of membership interests. SEC Rule 10b-5 imposes disclosures requirements far beyond the common law of fraud. LLC organizers must consider carefully the question of whether LLC membership interests are securities.

The question of membership interests as securities will also arise in the context of litigation. When an LLC fails or otherwise falls short of expectations, some members will take legal action. If the membership interest is deemed a security and the LLC did not register the interest, nor qualified for exemption, then a timely claim will allow each original member to rescind its “purchase” and recover its contribution plus interest.<sup>9</sup> The claimant need not show fraud by the LLC or its organizers. The statute imposes strict liability.<sup>10</sup>

Fraud claims may also be available. A person who becomes a member through a secondary transaction, after reviewing the LLC’s required records, may be able to sue if the investment goes sour. They can claim the assignor and the required records painted too rosy a picture and have a securities fraud claim against both the assignor and the

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<sup>9</sup> Kleinberg

<sup>10</sup> Securities Act of 1933, § 5(a), 15 U.S.C. § 77(e)

LLC. Rule 10b-5 applies to any material misstatements and nondisclosures occurring “in connection with the purchase or sale of any security.” There is also no requirement that the defendant be directly involved in the challenged transaction.<sup>11</sup>

Claims can also be brought on behalf of a seller. If a member of a LLC agrees to sell its interest to a member-manager, and soon after the sale the LLC itself is sold at a premium, the former member can bring a suit for nondisclosure of material information.<sup>12</sup>

Unfortunately, whether an LLC membership interest is a security at all has no simple, categorized answer. Instead of defining “security,” federal law provides a laundry list of instruments, investment vehicles, and other arrangements that qualify as securities.<sup>13</sup> LLCs and membership in a LLC, while not on the list, are considered securities in some cases. Each membership interest will require individual assessment made under general principles drawn from the case law.

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<sup>11</sup> E.g. *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

<sup>12</sup> Kleinberger 11.01

<sup>13</sup> Securities Act of 1933; Securities Act of 1934

## APPENDIX – SAMPLE OPERATING AGREEMENT

### OPERATING AGREEMENT

#### OF \*\*\*\*\*, LLC

#### Article 1. Offices

1. Principal Executive Office. The principal executive office of \*\*\*, LLC (the "Company") shall be in the City of \*\*\*, County of \*\*\*, Minnesota.
2. Registered Office. The location and address of the registered office of the Company is \*\*\*\*\*. The registered office need not be identical with the principal executive office of the Company and may be changed from time to time by the Board of Directors.
3. Other Offices. The Company may have other offices at such places within and without the State of Minnesota as the Board of Governors may determine from time to time.

#### Article 2. Members

1. Place of Meeting. All meetings of the Members of the Company shall be held at its principal executive office unless some other place for any such meeting within or without the State of Minnesota is designated by the Board of Governors in the notice of meeting. Any regular or special meeting of the Members of the Company called by or held pursuant to a written demand of Members shall be held in the county where the principal executive office of the Company is located.
2. Regular Meetings. Regular meetings of the Members of the Company may be held at the discretion of the Board of Governors on an annual or less frequent periodic basis on such dates and at such times and places as may be designated by the Board of Governors in the notices of meeting. At regular meetings, the Members shall elect a Board of Governors and transact such other business as may be appropriate for action by Members. If a regular meeting of Members has not been held for a period of fifteen (15) months, one (1) or more Members holding not less than three percent (3%) of the Membership Units entitled to vote of the Company outstanding may call a regular meeting of Members by delivering to the Chief Manager or Chief Financial Manager a written demand for a regular meeting. Within thirty (30) days after the receipt of such a written demand by the Chief Manager or Chief Financial Manager, the Board of Governors shall cause a regular meeting of Members to be called and held on notice no later than ninety (90) days after the receipt of such written demand, all at the expense of the Company.



3. Special Meetings. Special meetings of the Members, for any purpose or purposes appropriate for action by Members, may be called by the Chief Manager, by the acting Chief Manager in the absence of the Chief Manager, by the Chief Financial Manager, or by the Board of Governors or any two (2) or more Governors. Such meeting shall be held on such date and at such time and place as shall be fixed by the person or persons calling the meeting and designated in the notice of meeting. A special meeting may also be called by one (1) or more Members holding ten percent (10%) or more of the outstanding Membership Units entitled to vote. The Members calling such meetings shall deliver to the Chief Manager or Chief Financial Manager a written demand for a special meeting, which demand shall contain the purposes of the meeting. Within thirty (30) days after the receipt of such a written demand for special meeting of Members by the Chief Manager or Chief Financial Manager, the Board of Governors shall cause a special meeting of Members to be called and held on notice no later than ninety (90) days after the receipt of such written demand, all at the expense of the Company. Business transacted at any special meeting of Members shall be limited to the purpose or purposes stated in the notice of meeting. Any business transacted at any special meeting of Members that is not included among the stated purposes of such meeting shall be voidable by or on behalf of the Company unless all of the Members entitled to vote have waived notice of the meeting.

4. Notice of Meetings. Except where a meeting of Members is an adjourned meeting and the date, time, and place of such meeting were announced at the time of adjournment, notice of all meetings of Members stating the date, time, and place thereof, and any other information required by law or desired by the Board of Governors or by such other person or persons calling the meeting, and in the case of special meetings, the purpose thereof, shall be given to each Member of record entitled to vote at such meeting not less than three (3) nor more than sixty (60) days prior to the date of such meeting. If a plan of merger or exchange or the sale or other disposition of all or substantially all of the assets of the Company is to be considered at a meeting of Members, notice of such meeting shall be given to every member, whether or not entitled to vote. The notice of meeting at which there is to be considered a proposal to adopt a plan of merger or exchange or the sale or other disposition of all or substantially all of the assets of the Company shall be given not less than fourteen (14) days prior to the date of such meeting, shall state the purpose of such meeting, and, where a plan of merger or exchange is to be considered, shall include a copy or a short description of the plan. Notices of meeting shall be given to each Member entitled thereto by oral communication, by mailing a copy thereof to such Member at an address designated by such Member or to the last known address of such Member, by handing a copy thereof to such Member, or by any other delivery that conforms to law. Notice by mail shall be deemed given when deposited in the United States mail with sufficient postage affixed. Notice shall be deemed received when it is given.

5. Waiver of Notice. Any Member may waive notice of any meeting of Members. Waiver of notice shall be effective whether given before, at, or after the meeting and whether given orally, in writing, or by attendance. Attendance by a Member at a meeting

is a waiver of notice of that meeting, except where the Member objects at the beginning of the meeting to the transaction of business because the meeting is not lawfully called or convened and does not participate thereafter in the meeting, or objects before a vote on an item of business because the item may not lawfully be considered at that meeting and does not participate in the consideration of that item at the meeting.

6. Record Date. For the purpose of determining Members entitled to notice of and to vote at any meeting of Members or any adjournment thereof, or members entitled to receive payment of any dividend, or in order to make a determination of Members for any other proper purpose, the Board of Governors may, but need not, fix a date as the record date for any such determination of Members, which record date, however, shall in no event be more than sixty (60) days prior to any such intended action or meeting.

7. Quorum. The owners of a majority of the Membership Units of the Company entitled to vote at a meeting shall constitute a quorum at a meeting of Members for the purpose of taking any action other than adjourning such meeting. If the owners of a majority of the Membership Units entitled to vote are not represented at a meeting, the Members present in person or by proxy shall constitute a quorum for the sole purpose of adjourning such meeting, and the owners of a majority of the Membership Units entitled to vote so represented may adjourn the meeting to such date, time, and place as they shall announce at the time of adjournment. Any business that might have been transacted at the adjourned meeting had a quorum been present, may be transacted at the meeting held pursuant to such an adjournment and at which a quorum shall be represented. If a quorum is present when a duly called or held meeting is convened, the Members present may continue to transact business until adjournment, even though the withdrawal of a number of Members originally represented leaves less than the number otherwise required for a quorum.

8. Voting and Proxies. At each meeting of the Members, every Member shall be entitled to one (1) vote for each Membership Unit which carries voting rights, except as may be otherwise provided in the Articles of Organization or as may be required to provide for cumulative voting (if not denied by the Articles of Organization), but no appointment of a proxy shall be valid for any purpose more than eleven (11) months after the date of its execution, unless a longer period is expressly provided in the appointment. Every appointment of a proxy shall be in writing (which shall include telegraphing, cabling, or telephotographic transmission, provided that any appointment by telegraph, cable, or other method where the signature of the Member is not available shall be accompanied by the Member's social security number, home telephone number and address to confirm the identity of the Member), and shall be filed with a Manager of the Company before or at the meeting at which the appointment is to be effective. An appointment of a proxy for Membership Units entitled to vote held jointly by two (2) or more Members shall be valid if signed by any one (1) of them, unless a Manager of the Company receives from any one (1) of such Members written notice either denying the authority of another of such Members to appoint a proxy or appointing a different proxy. All questions regarding the qualification of

voters, the validity of appointments of proxies, and the acceptance or rejection of votes shall be decided by the presiding Manager or Governor of the meeting. The Members shall take action by the affirmative vote of the owners of a majority of the Membership Units present, in person or represented by proxy, and entitled to vote, except where a different vote is required by law, the Articles of Organization, this Operating Agreement, or any applicable member control agreement.

9. Action in Writing. Any action required or permitted to be taken at a meeting of Members may be taken without a meeting by written action signed by the Members who own the number of Membership Units entitled to vote that would be required to take the same action at a meeting of Members at which all Members entitled to vote were present. If any written action is taken by less than all Members entitled to vote, all Members entitled to vote shall be notified immediately of its text and effective date. The failure to provide such notice, however, shall not invalidate such written action.

### **Article 3.** **Governors**

1. General Powers. Except as otherwise provided by the Members pursuant to a member control agreement, the business and affairs of the Company shall be managed by or under the direction of its Board of Governors. The Governors may exercise all such powers and do all such things as may be exercised or done by the Company, subject to the provisions of applicable law, the Articles of Organization, this Operating Agreement and any member control agreement.

2. Number, Tenure, and Qualification. The number of Governors which shall constitute the whole Board of Governors shall be fixed from time to time by resolution of the Members, subject to increase by resolution of the Board of Governors. In the event that the Members fail to fix the number of Governors, the number of Governors shall be four (4), subject to increase by resolution of the Board of Governors. No decrease in the number of Governors pursuant to this section shall affect the removal of any Governor then in office except upon compliance with the provisions of section 7 of this Article. Except as provided in sections 6 and 7 of this Article, each Governor shall be elected at a regular meeting of Members and shall hold office until the next regular meeting of Members and thereafter until a successor is duly elected and qualified, unless a prior vacancy shall occur by reason of death, resignation, or removal from office. Governors shall be natural persons, but need not be Members.

3. Meetings. Meetings of the Board of Governors may be held at such times and places as shall from time to time be determined by the Board of Governors. Meetings of the Board of Governors may be called by the Chief Manager (President), by the acting Chief Manager (Vice-President) in the absence of the Chief Manager, or by any Governor, in which case the person or persons calling such meeting may fix the date, time, and place thereof, either within or without the State of Minnesota, and shall cause notice of meeting to be given.

4. Notice of Meetings. In all cases, three (3) days notice of meetings of the Board of Governors, stating the date and time thereof and any other information required by law or desired by the person or persons calling such meeting, shall be given to each Governor. If notice of meeting is required, and such notice does not state the place of the meeting, such meeting shall be held at the principal executive office of the Company. Notice of meetings of the Board of Governors shall be given to Governors in the manner provided in this Operating Agreement for giving notice to Members of meetings of Members.

5. Waiver of Notice. Any Governor may waive notice of any meeting. A waiver of notice by a Governor is effective whether given before, at, or after the meeting, and whether given orally, in writing, or by attendance. The attendance of a Governor at any meeting shall constitute a waiver of notice of such meeting, unless such Governor objects at the beginning of the meeting to the transaction of business on grounds that the meeting is not lawfully called or convened and does not participate thereafter in the meeting.

6. Quorum and Voting. A majority of the Governors currently holding office shall constitute a quorum for the transaction of business at any meeting of the Board of Governors. In the absence of a quorum, a majority of the Governors present may adjourn the meeting from time to time until a quorum is present. If a quorum is present when a duly called or held meeting is convened, the Governors present may continue to transact business until adjournment, even though the withdrawal of a number of Governors originally present leaves less than the number otherwise required for a quorum. The Board of Governors shall take action by the affirmative vote of a majority of the Governors present at any duly held meeting, except as to any question upon which any different vote is required by law, the Articles of Organization, or any member control agreement. A Governor may give advance written consent or objection to a proposal to be acted upon at a meeting of the Board of Governors. If the proposal acted on at the meeting is substantially the same or has substantially the same effect as the proposal to which the Governor has consented or objected, such consent or objection shall be counted as a vote for or against the proposal and shall be recorded in the minutes of the meeting. Such consent or objection shall not be considered in determining the existence of a quorum.

7. Vacancies and Newly Created Governorships. Any vacancy occurring in the Board of Governor may be filled by the affirmative vote of a majority of the Governors remaining in office, even though said remaining Governors be less than a quorum. Any newly created governorship resulting from an increase in the authorized number of Governors by action of the Board of Governors may be filled by a majority vote of the Governors serving at the time of such increase. Any vacancy or newly created governorship may be filled by resolution of the Members.

8. Removal of Governors. The entire Board of Governors or any Governor or Governors may be removed from office, with or without cause, at any special meeting of the Members duly called for that purpose as provided in this Operating Agreement, by a vote of the Members owning a majority of the Membership Units entitled to vote at an

election of Governors. At such meeting, without further notice, the Members may fill any vacancy or vacancies created by such removal as provided in section 6 of this Article. Any such vacancy not so filled may be filled by the Governors as provided in section 6 of this Article. Any Governor named by the Board of Governors to fill a vacancy may be removed at any time, with or without cause, by an affirmative vote of a majority of all remaining Governors (including remaining Governors that were elected by the Members and remaining Governors elected by the Governors without Member action pursuant to section 6 of this Article), even though said remaining Governors be less than a quorum, if the Members have not elected Governors in the interval between the appointment to fill the vacancy and the time of removal.

9. Committees. The Board of Governors, by a resolution approved by the affirmative vote of a majority of the Governors then holding office, may establish one (1) or more committees of one (1) or more natural persons having the authority of the Board of Governors in the management of the business of the Company to the extent provided in such resolutions. Such committees, however, shall at all times be subject to the direction and control of the Board of Governors. Committee members need not be Governors and shall be appointed by the affirmative vote of a majority of the Governors present. A majority of the members of any committee shall constitute a quorum for the transaction of business at a meeting of any such committee. In other matters of procedure, the provisions of this Operating Agreement shall apply to committees and the members thereof to the same extent they apply to the Board of Governors and Governors, including, without limitation, the provisions with respect to meetings and notice thereof, absent members, written actions, and valid acts. Each committee shall keep regular minutes of its proceedings and report the same to the Board of Governors.

10. Action in Writing. Any action required or permitted to be taken at a meeting of the Board of Governors or of a lawfully constituted committee thereof may be taken by written action signed by all of the Governors then in office or by all of the members of such committee, as the case may be. If the action does not require Member approval, such action shall be effective if signed by the number of Governors or members of such committee that would be required to take the same action at a meeting at which all Governors or committee members were present. If any written action is taken by less than all Governors, all Governors shall be notified immediately of its text and effective date. The failure to provide such notice, however, shall not invalidate such written action.

11. Meeting by Means of Electronic Communication. Members of the Board of Governors of the Company, or any committee designated by the Board, may participate in a meeting of the Board or committee by means of conference telephone or similar means of communication by which all persons participating in the meeting can simultaneously hear each other. Participation in a meeting pursuant to this section shall constitute presence in person at such meeting.

**Article 4.**  
**Managers**

1. **Number and Qualification.** The Managers of the Company shall consist of one (1) or more natural persons elected by the Board of Governors exercising the functions of the offices, however designated, of Chief Manager and Chief Financial Manager. The Board of Governors may also appoint such other Managers and Assistant Managers as it may deem necessary or advisable. Except as provided in this Operating Agreement or any applicable member control agreement, the Board of Governors shall fix the powers, duties, and compensation of all Managers. Managers may be, but need not be, Governors of the Company. Any number of Manager positions may be held by the same person.
2. **Term of Office.** A Manager shall hold office until a successor shall have been duly elected, unless prior thereto such Manager shall have resigned or been removed from office as hereinafter provided.
3. **Removal and Vacancies.** Any Manager or agent elected or appointed by the Board of Governors shall hold office at the pleasure of the Board of Governors and may be removed, with or without cause, at any time by the vote of a majority of the Board of Governors present, subject to the terms of any member control agreement. Any vacancy in an office of the Company shall be filled by action of the Board of Governors.
4. **Chief Manager.** Unless provided otherwise by a resolution adopted by the Board of Governors, the Chief Manager shall have general active management of the business of the Company, and in the absence of the chairperson of the Board or if the office of chairperson of the Board is vacant, shall preside at meetings of the Members and Board of Governors, shall see that all orders and resolutions of the Board of Governors are carried into effect, shall have authority to sign and deliver in the name of the Company any deeds, mortgages, bonds, contracts, or other instruments pertaining to the business of the Company, except in cases in which the authority to sign and deliver is required by law to be exercised by another person or is expressly delegated by the Articles of Organization, this Operating Agreement, or the Board of Governors to some other Manager or agent of the Company, may maintain records of and certify proceedings of the Board of Governors and Members, and shall perform such other duties as may from time to time be prescribed by the Board of Governors.
5. **Chief Financial Manager.** Unless provided otherwise by a resolution adopted by the Board of Governors, the Chief Financial Manager shall keep accurate financial records for the Company, shall deposit all monies, drafts, and checks in the name of and to the credit of the Company in such banks and depositories as the Board of Governors shall designate from time to time, shall endorse for deposit all notes, checks, and drafts received by the Company as ordered by the Board of Governors, making proper vouchers therefore, shall disburse Company funds and issue checks and drafts in the name of the Company as ordered by the Board of Governors, shall render to the Chief Manager and the Board of Governors, whenever required, an account of all such Manager's transactions as Chief Financial Manager and of the financial condition of the Company,

and shall perform such other duties as may be prescribed by the Board of Governors or the Chief Manager from time to time.

6. Chairperson of the Board. The Board of Governors may elect a chairperson of the Board who, if elected, shall preside at all meetings of the Members and of the Board of Governors and shall perform such other duties as may be prescribed by the Board of Governors from time to time.

7. President. Unless otherwise determined by the Board of Governors, the President shall be the Chief Manager of the Company. If a Manager other than the President is designated Chief Manager, the President shall have such powers and perform such duties as the Board of Governors or the Chief Manager may prescribe from time to time.

8. Vice Presidents. The Vice President, if any, or Vice Presidents in case there is more than one (1), shall have such powers and perform such duties as the Chief Manager or the Board of Governors may prescribe from time to time. In the absence of the President or in the event of the President's death, inability or refusal to act, the Vice President, or in the event there is more than one (1) Vice President, the Vice Presidents in the order designated by the Board of Governors, or, in the absence of any designation, in the order of their election, shall perform the duties of the President, and, when so acting, shall have all the powers of and be subject to all of the restrictions upon the President.

9. Secretary. The Secretary shall attend all meetings of the Board of Governors and of the Members and shall maintain records of, and whenever necessary, certify all proceedings of the Board of Governors and of the Members. The Secretary shall keep the required records of the Company, when so directed by the Board of Governors or other person or persons authorized to call such meetings, shall give or cause to be given notice of meetings of the Members and of meetings of the Board of Governors, and shall also perform such other duties and have such other powers as the Chief Manager or the Board of Governors may prescribe from time to time.

10. Treasurer. Unless otherwise determined by the Board of Governors, the Treasurer shall be the Chief Financial Manager of the Company. If a Manager other than the Treasurer is designated Chief Financial Manager, the Treasurer shall have such powers and perform such duties as the Chief Manager or the Board of Governors may prescribe from time to time.

11. Delegation. Unless prohibited by a resolution approved by the affirmative vote of a majority of the Governors present, a Manager elected or appointed by the Board of Governors may delegate in writing some or all of the duties and powers of such person's management position to other persons.

**Article 5.**  
**Membership Units**

1. **Membership Units.** Membership interests in the Company shall be represented by Membership Units. Membership Units shall be deemed to be personal property but shall not be evidenced by any writing, except as provided in this section. At the request of any Member, the Company shall state in writing the particular Membership Units, or any rights with respect thereto, owned by that Member at the time of the statement. The statement must describe the Member's voting rights, share in profits and losses, shares in distributions, and any assignment of the Member's rights then in effect, but such statement shall not be (i) a certificated security as defined in Minn. Stat. 336.8-102(l)(a), (ii) an uncertificated security as defined in Minn. Stat. 336.8-102(l)(b), nor (iii) a negotiable instrument, and nor may such statement be used to transfer any Membership Unit, in whole or in part. For the purpose of any law relating to security interests, a Membership Unit and any financial rights appurtenant thereto are each a general intangible as defined in Minn. Stat. 336.9-106. A Membership Unit includes both financial rights and governance rights. Financial rights are the right to share in profits and losses, the right to receive distributions from the Company, and the right to assign financial rights. Governance rights are all rights other than financial rights, including without limitation any rights to vote, receive notices and attend meetings of Members.

2. **Transfer of Financial Rights, Governance Rights and Membership Units.** Unless otherwise provided in the Articles of Organization, this Operating Agreement, any resolution adopted by the Members, or any written agreement or written action among the Members and the Company, any Member may transfer his, her, or its financial rights, in whole or in part, without the consent of any other Member. Unless otherwise provided in the Articles of Organization, this Operating Agreement, any resolution adopted by the Members, or any written agreement or written action among the Members and the Company, any Member may transfer his, her, or its governance rights, in whole or in part, to any other Member without the consent of any other Member. Any other transfer of governance rights, in whole or in part, to any person not a Member is effective only upon the unanimous written consent of all Members with voting rights other than the Member seeking to make the transfer. The foregoing notwithstanding, any transfer of financial rights apart from the appurtenant governance rights terminates the governance rights of the transferor with respect to the Membership Units to which the transferred financial rights are attributable. For the purposes of this Operating Agreement, the word "transfer" includes any disposition, sale or gift, whether voluntary or involuntary, but it does not include the voluntary grant of a security interest or other lien or encumbrance unless such voluntary security interest or other lien or encumbrance is foreclosed, executed, levied, or realized upon in any manner provided by law. In any case, no transfer or assignment of any rights with respect to Membership Units shall be effective until a duly executed and acknowledged written instrument of assignment, in form and substance satisfactory to the Company, is received and accepted by the Company. No proposed transfer or assignment of any rights with respect to Membership Units which (i) fails to comply with all applicable state and federal securities laws, (ii) will have an adverse impact on the ability of the Company to be taxed as a partnership for federal income tax purposes, (iii) will



result in a Member being exposed to liability for the debts and obligations of the Company, or (iv) will result in the termination of the Company for tax purposes pursuant to 708 of the Internal Revenue Code of 1986, as amended, or for state law purposes pursuant to Chapter 322B of the Minnesota Statutes, will be effective for any purpose and shall be void ab initio. The Company may request an opinion of counsel satisfactory to the Company (with the costs and expenses thereof payable by the transferee or assignee), stating that the foregoing conditions have been satisfied. All sales, transfers or assignments of Membership Units, or any financial or governance rights appurtenant thereto, occurring during any calendar month shall be deemed effective on the first day of the calendar month following the calendar month in which the transfer or assignment occurs. Until such time as a written assignment that conforms to all requirements of this section 2 has been received by and recorded on the books of the Company, any distribution by the Company to any Member or his, her, or its executors, administrators, or representatives shall acquit the Company of liability to the extent of such payments to any other person who may have an interest in such payment by reason of a transfer or assignment by the Member, such Member's death, or otherwise.

#### **Article 6.** **Required Records**

The books and records of the Company shall be maintained at the designated or principal office of the Company as listed in the Articles of Organization and shall be available for examination there by any Member or his, her, or its duly authorized representatives by appointment during ordinary business hours upon five (5) days' notice. The Company shall keep the following records:

A current list of the full legal name and last known business address of each Member;

A copy of the Articles of Organization, this Operating Agreement and any applicable member control agreement and all amendments to any of the foregoing, and executed copies of any powers of attorney pursuant to which any of the foregoing have been executed;

Copies of the Company's federal, state, and local income tax returns and reports, if any, for the three (3) most recent years;

Copies of any financial statements of the Company for the three (3) most recent years; and

To the extent not contained in a member control agreement, a writing setting out contributions made and agreed to be made by each member, and, if other than cash, the agreed value of such contributions.

In addition, the Company shall maintain any other books and records required to be maintained by Chapter 322B of the Minnesota Statutes and such additional books and records as the Board of Governors or Chief Manager deems advisable.

**Article 7.**  
**Dissolution**

1. Events Causing Dissolution. The Company shall be dissolved upon the happening of the first to occur of the following:

- i. The expiration of the term set forth in the Articles of Organization of the Company;
- ii. Any order of a court of competent jurisdiction requiring dissolution;
- iii. The action of the Members as provided in 302A.806 of the Minnesota Statutes to dissolve the Company;
- iv. The unanimous written consent of all Members holding Membership Units entitled to vote to dissolve the Company;
- v. Any event that terminates the continued membership of a Member in the Company, including:
  - death of any Member;
  - retirement of any Member;
  - resignation of any Member;
  - redemption of a Member's complete Membership Unit(s);
  - assignment of a Member's financial or governance rights which leaves the member with no governance rights; purchase of a Member's Membership Unit(s) that leaves the Member with no governance rights
- vi. to the extent that Members may be expelled pursuant to the Articles of Organization or any member control agreement, expulsion of any Member;
- vii. bankruptcy and/or dissolution of any Member; or
- viii. a merger or exchange in which the Company is not the surviving or acquiring Company.

2 Effect of Dissolution. Upon the occurrence of any event causing dissolution of the Company, the business of the Company shall be wound up and terminated as provided in Chapter 322B of the Minnesota Statutes, except that the dissolution of the Company due to the occurrence of any event which terminates the continued membership of a Member in the Company can be avoided as provided in Section 322B.80 of the Minnesota Statutes, and except that the business of the Company may be continued after dissolution only as provided in Section 322B.03, subd. 9, and Section 322B.37 of the Minnesota Statutes.

**Article 8.**  
**Contracts, Loans, Checks, and Deposits**

1. Contracts. The Board of Governors may authorize such Managers or agents as they shall designate to enter into contracts or execute and deliver instruments in the name of and on behalf of the Company, and such authority may be general or confined to specific instances.

2. Loans. The Company shall not lend money to guarantee the obligation of, become a surety for, or otherwise financially assist any person unless the transaction, or class of transactions to which the transaction, belongs, has been approved by the affirmative vote of a majority of Governors present, and (a) is in the usual and regular course of business of the Company, (b) is with, or for the benefit of, a related company, an organization in which the Company has a financial interest, an organization with which the Company has a business relationship, or an organization to which the Company has the power to make donations, (c) is with, or for the benefit of, a Manager or other employee of the Company or a subsidiary, including a Manager or employee who is a Governor of the Company or a subsidiary, and may reasonably be expected, in the judgment of the Board of Governors, to benefit the Company, or (d) has been approved by the affirmative vote of the owners of two-thirds (2/3) of the outstanding Membership Units, including both voting and nonvoting Membership Units, if any.

3. Checks, Drafts, etc. All checks, drafts, or other orders for the payment of money, notes, or other evidences of indebtedness issued in the name of the Company shall be signed by the Chief Manger or such Managers or agents of the Company as shall be designated and in such manner as shall be determined from time to time by resolution of the Board of Governors.

4. Deposits. All funds of the Company not otherwise employed shall be deposited from time to time to the credit of the Company in such banks or other financial institutions as the Board of Governors may select.

**Article 9.**  
**Miscellaneous**

1. Distributions. The Board of Governors from time to time may declare, and the Company may make, distributions on its outstanding Membership Units in the manner and upon the terms and conditions provided by law.

2. Reserves. There may be set aside out of any funds of the Company available for distributions such sum or sums as the Board of Governors from time to time, in its absolute discretion, deems proper as a reserve or reserves to meet contingencies, for equalizing distributions, for repairing or maintaining any property of the Company, for the purchase of additional property, or for such other purpose as the Governors shall deem to be consistent with the interests of the Company. The Board of Governors may modify or abolish any such reserve.

3. Fiscal Year. The fiscal year of the Company shall be such twelve (12) month period as is set by a resolution of the Board of Governors, provided, however, that the first fiscal year of the Company may be a shorter period if permitted by law and set by a resolution of the Board of Governors.

4. Amendments. Except as limited by the Articles of Organization or any member control agreement, this Operating Agreement may be altered or amended by the Board of Governors at any meeting of Governors to the full extent permitted by law, subject, however, to the power of the Members of the Company to alter or repeal this Operating Agreement.

5. Member Control Agreements. In the event of any conflict or inconsistency between this Operating Agreement, or any amendment thereto, and the terms of any member control agreement, whenever adopted, the terms of such member control agreement shall control.

6. Seal. The Company shall have no seal.

The undersigned, \*\*\*\*\*, LLC, a Minnesota limited liability company, does hereby certify that the foregoing Operating Agreement is the Operating Agreement adopted for the Company by its Board of Governors by unanimous written consent.

Dated As Of: \*\*\*\*\*, \*\*\*\*\*

\_\_\_\_\_  
\*\*\*\*\*, Secretary