

Amending Limited Liability Company Operating Agreements

By Alan S. Gutterman

While a great deal of time effort should be invested in drafting the initial version of the operating agreement for a limited liability company it is inevitable that changed circumstances during the life of the LCC will cause the members to consider the need to amend various provisions of the agreement. Every amendment to an operating agreement should include the basic elements that are part of the form below. For example, it should include recitals that provide the basic background for the amendment such as the date the limited liability company was formed, the history of adopting and amendment the operating agreement and a brief description of the content and purposes of the amendment. It is recommended that the entire text of each section that is being amended be reproduced in the amendment and the amendment should make it clear when it will be deemed to be effective. Finally, the amendment should be executed by at least the minimum number/percentage of members necessary to amend the operating agreement as specified in the agreement (subject to any statutory requirements that must also be satisfied).

Amendment of Operating Agreement for Pledge Procedures

This form is an example of an amendment to the operating agreement of a limited liability company to include authorization for the pledge of membership interests to a third party that has extended credit to the owner of the interests and has bargained for a pledge of the interests as collateral to secure repayment of funds advanced under the credit arrangement. A specific scenario under which such a pledge might occur is when the limited liability company has been formed and organized as a wholly-owned subsidiary of a parent entity and the parent has entered into a secured loan and credit arrangement with a commercial lender. In that case the lender will seek guarantees from all of the operating subsidiaries of the borrower and a pledge of the securities (e.g., membership interests) of the subsidiaries owned by the borrower so that the lender can quickly obtain control over the subsidiaries (and their assets) in the event that the borrower defaults on its obligations. This form of amendment also describes the obligation of the sole member of the limited liability company (i.e., the parent entity) to complete a pledge acknowledgement and send it to the secured party as confirmation that a record of the pledge has been made on the membership books and records of the limited liability company.

FIRST AMENDMENT OF OPERATING AGREEMENT OF [~ NAME OF LIMITED LIABILITY COMPANY ~] (A [~ name of state ~] Limited Liability Company)

FIRST AMENDMENT OF OPERATING AGREEMENT of [~ name of limited liability company ~], LLC, a [~ name of state ~] limited liability company (the “Company”), made as of [~ date ~] by [~ name of sole member ~], a [~ name of state ~] corporation, which is the sole member of the Company and is referred to herein as the “Member.”

RECITALS

1. The Company was duly formed and organized under the laws of the state of [~ name of state ~] upon the filing of Articles of Organization with the Secretary of State of [~ name of state ~] on [~ date ~].
2. The Operating Agreement of the Company were adopted by the Member on [~ date ~] and has not been amended since that date.
3. Pursuant to the terms of that certain Collateral Pledge Agreement dated [~ date ~] made by Member in favor of [~ name of secured party ~] (referred to herein as “Secured Party”), the Member is required to change certain provisions of the Operating Agreement.

For full and valuable consideration the Member hereby adopts the following amendments to the Operating Agreement and otherwise agrees as follows:

1. Article [~ number ~] (Transfer of the Membership Interest) is amended to read as follows:

The Member may sell, assign or otherwise transfer all or any portion of its Membership Interest at any time to any Person as long as such transfer would not result in a violation of applicable law, including U.S. federal or state securities laws, and is made in compliance with the terms and conditions in these Regulations. The Membership Interest shall be treated as “securities” for purposes of and as governed by and defined in Article 8 of [~ name of state ~] Uniform Commercial Code. Notwithstanding anything herein to the contrary, the Membership Interest may be pledged by the Member to Secured Party (as defined in the First Amendment to the Operating Agreement). Upon any exercise by Secured Party of Secured Party’s rights and remedies hereunder as a pledgee and secured creditor resulting in a transfer of title to the Membership Interest to any of (i) Secured Party, (ii) Secured Party’s nominee and/or (iii) any Person(s) to whom Secured Party may transfer any of such equity interests issued in a secured creditor’s sale (any such Person a “Foreclosure Transferee”), such Foreclosure Transferee shall automatically become a member under this Operating Agreement and/or the Articles of Organization of the Company (collectively, the “Organizational Documents”) without the requirement of any consent of the Company or any other member thereof, and that, as such a member, such Foreclosure Transferee shall have all the rights (specifically including without limitation economic rights (including the rights to receive dividends and distributions), voting rights, management rights, rights to designate or appoint managers and/or members of any board of managers or directors and rights to amend the Organizational Documents of such a member of the Company relating to the Membership Interest transferred to such Foreclosure Transferee provided for under the Organizational Documents.

2. Except as expressly amended and modified by this agreement, the Operating Agreement will continue in full force and effect.

3. The Pledge Acknowledgement in substantially the form of Exhibit A attached hereto shall be executed and delivered to the Secured Party and the Company shall comply with the terms and conditions set forth therein.

WITNESS the execution of this Amendment at [~ location ~] the day and year first above written.

[~ name of sole member ~], the Sole Member

By: [~ signature ~]

Name: [~ name of signatory ~]

Title: [~ title of signatory ~]

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