



***SELECTED ISSUES IN NEGOTIATING AND DRAFTING
LLC DOCUMENTATION***

HAYNES AND BOONE
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Presented by:

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TOP TEN "GOTCHAS"

In the 1990s states began adopting the Limited Liability Company as an entity structure.....as the better mouse trap.

- **Very flexible for business structure and tax**
- **Full liability shield**

As a result, there has been an increased demand on lawyers to think through and design documents that address the particular needs of these creative business structures.



TOP TEN "GOTCHAS"

Today the LLC is, by far the most highly utilized form of business entity in the State of Texas and on a national basis.

In the State of Texas the Office of the Secretary of State, which is the office responsible for the filing and tracking of these entities in the State of Texas, has indicated that approximately 75 % of the for profit “filing” business entities created in this State are now formed in the LLC structure (approximately 17% as corporations approximately 8% as limited partnerships.)



TOP TEN "GOTCHAS"

WARNING:

The laws relating to the formation and operations of Limited Liability Companies will vary from state to state.

As you encounter issues with the formation of these entities, please consult the application of the local laws in that particular state.



TOP TEN "GOTCHAS"

WARNING:

Some of the materials consist of actual examples of language used in entity documentation.

The flexibility which makes these entities so useful also makes it difficult to devise forms that may be useful for parties or practitioners.

This language is not intended to be used as a form. It is only an example of language used in prior transactions.



TOP TEN "GOTCHAS"

Elements of the Company Agreement:

- Formation and Purpose
- Economics of the Deal
 - ❖ Capital Structure
 - ❖ Sharing of Profits and Losses
 - ❖ Distributions
- Management of the Entity
- Limitations on Transfers
- Default Rights and Remedies
- Back Doors or Exit Plans



TOP TEN "GOTCHAS"

This presentation will explore some of the more common issues clients may overlook as they structure transactions of this nature as well as some practical ways to address these issues in connection with the formation of an LLC.



**TOP TEN
"GOTCHAS"**

Gotcha # 1 – Failure to Cause Capital Accounts to Tract the Economics of the Deal

"The Lunatics Have Taken Charge of the Asylum"



TOP TEN "GOTCHAS"

- Contributions define the direct economic **responsibility** to the LLC while distributions define the direct economic **benefits** to be received from the LLC
- The allocation of profits and losses define the methods by which the Members of the LLC will share the success and failure of the entity.
- Capital accounts – are nothing more than the accounting system to track the economics of these elements of the deal.
- The **key** is to make these systems operate in sync to assure the "economic effect" anticipated by the clients.
- If the Agreement does not address this arrangement this can raise issues!



TOP TEN "GOTCHAS"

Example of flawed language:

- A contributes \$100,000.00 B Contributes \$0. They agree to share profits, losses and distribution on a 50/50 basis. The real property/business is sold 1 year later for \$200,000.00.

Economics:

- A's Capital Account.....\$100,000.00 + \$50,000.00 = \$150,000.00
- B's Capital Account \$0.00 + \$50,000.00 = \$ 50,000.00
- But distributions = A gets \$100,000.00 and B gets \$100,000.00?
- **Results do not match?**



TOP TEN "GOTCHAS"

Example of flawed language:

- A contributes \$100,000.00 B Contributes \$0. They agree to split profits, losses and distributions on a 50/50 basis. Business is created and sold 1 year later for \$50,000.00.
- A's Capital Account.....\$100,000.00 - <\$25,000.00> = \$ 75,000.00
- B's Capital Account \$0.00 - <\$25,000.00> = \$ -25,000.00
- But distributions A gets \$25,000.00 and B gets \$25,000.00?
- Again results do not match?



TOP TEN "GOTCHAS"

Example of correct language:

- A contributes \$100,000.00 B Contributes \$0. They agree to split profits 50/50 and losses are first to be allocated to A to the extent of his capital account and then to A and B, 50/50. Distributions provide that A and B each get their respective unreturned capital back and then the remaining available funds are to be distributed 50/50.
- The Business is created and sold 1 year later for \$200,000.00.
- A's Capital Account.....\$100,000.00 + \$50,000.00 = \$150,000.00
- B's Capital Account \$0.00 + \$50,000.00 = \$ 50,000.00
- Distributions A gets \$150,000 (capital plus ½ profits) and B gets \$50,000.00 (1/2 profits).



TOP TEN "GOTCHAS"

Example of correct language:

- A contributes \$100,000.00 B A tContributes \$0. They agree to split profits 50/50 and losses are first to be allocated to the extent of any positive capital account and then to A and B, 50/50. Business is created and sold 1 year later for \$50,000.00.

The loss is allocated 100% to A and then A gets his remaining capital back.

- A's Capital Account.....\$100,000.00 - \$50,000.00 = \$ 50,000.00
- B's Capital Account \$0.00 - \$0 = \$ 0.00
- Distributions A gets \$50,000 and B gets \$ 0.00.



TOP TEN "GOTCHAS"

There are two prevailing philosophies to achieve the intended results:

- Try to draft the two schemes to match.
- Define the nature in which Distributions and Contributions are to be made and cause the capital account accounting process to “fit” the contribution /distribution scheme.



TOP TEN "GOTCHAS"

- The first philosophy is difficult to achieve.
- The second philosophy seems the most practical; however:

When attorneys sat down to draft the language for this concept (and it seems to work) it is a formula that is so complex it will challenge the patience of even some of the brightest transactional attorneys.

Clients tend to get upset when they are presented language they cannot fully understand.

See the following text for example of language.



TOP TEN "GOTCHAS"

Profits and Losses for each Adjustment Period will be allocated among the Members so as to reduce, proportionately, in the case of Profits, the excess of their respective Target Capital Accounts over their respective Partially Adjusted Capital Accounts for such Adjustment Period and, in the case of Losses, the excess of their respective Partially Adjusted Capital Accounts over their respective Target Capital Accounts for such Adjustment Period. No portion of Profits or Losses for any Adjustment Period will be allocated to a Member, in the case of Profits, whose Partially Adjusted Capital Account is greater than or equal to its Target Capital Account or, in the case of Losses, whose Target Capital Account is greater than or equal to its Partially Adjusted Capital Account for such Adjustment Period.



TOP TEN "GOTCHAS"

Κέρδη και ζημίες για κάθε περίοδο προσαρμογής θα κατανέμονται μεταξύ των εταίρων, έτσι ώστε να μειώσει αναλογικά, στην περίπτωση των κερδών, η υπέρβαση των αντίστοιχων λογαριασμών κεφαλαίου στόχος τους πάνω από τις αντίστοιχες Μερικώς διορθωμένων λογαριασμών κεφαλαίου τους για την εν λόγω περίοδο προσαρμογής και, στην περίπτωση Απώλειες της, η υπέρβαση των αντίστοιχων μερικώς τις αναπροσαρμοσμένες σταθμίσεις τους Λογαριασμοί πάνω από τις αντίστοιχες λογαριασμών Κεφαλαίου στόχος τους για την εν λόγω περίοδο προσαρμογής. Δεν μέρος των κερδών ή ζημιών για κάθε περίοδο προσαρμογής θα διατεθούν για έναν συνεργάτη, στην περίπτωση των κερδών, των οποίων μερικώς Προσαρμοσμένο Ισοζύγιο Κεφαλαιακών Μεταβιβάσεων είναι μεγαλύτερη ή ίση με το σύστημα Target λογαριασμό του κεφαλαίου ή, σε περίπτωση ζημιών, των οποίων στόχος Ισοζύγιο Κεφαλαιακών Μεταβιβάσεων είναι μεγαλύτερη ή ίση με μερική Προσαρμοσμένο Ισοζύγιο Κεφαλαιακών Μεταβιβάσεων του για την εν λόγω περίοδο προσαρμογής.



TOP TEN "GOTCHAS"

Profits and Losses for each Adjustment Period (the time period which the calculation is made for)

will be allocated among the Members so as to reduce, proportionately, in the case of Profits, the excess of their respective Target Capital Accounts (what their capital account would need to be if the Company liquidated and distributed its assets as of that date)

over their respective Partially Adjusted Capital Accounts (what their capital accounts actually are) for such Adjustment Period

That is profits are to be allocated to true up or increase actual capital accounts to desired capital account – closing the gap between what the capital accounts actually are and what they should be.



TOP TEN "GOTCHAS"

Best advice:

Make certain these provisions of a Company Agreement are reviewed by someone with a sound knowledge of the current provisions of the Code and Treasury Regulations relating to Partnership tax law.



TOP TEN "GOTCHAS"

Gotcha # 2 – Requirements for Capital Contributions

You've Got to Be Careful If You Don't Know Where You're Going 'Cause You Might Not Get There“ Yogi Berra



TOP TEN "GOTCHAS"

- 1. Define the nature of the Contribution.**
- 2. Define when and under what conditions the contribution will be required.**
- 3. If it is to be contributed in installments or on conditions, state the conditions clearly.**
- 4. Consider the timing element and need to address entity obligations.**
- 5. What is the security for contributions?**
- 6. Loans vs. contributions – setting the terms of the Loan – rate, repayment term, security for repayment.**



TOP TEN "GOTCHAS"

Phased-in Capital Contribution

*Additional Contributions. In addition to the sums contributed to the capital of the Company by a Member as its Initial Contribution, as described above, each Member does hereby unconditionally agree to contribute to the Company its allocable portion of additional capital as described on Exhibit "A" Schedule "2" attached hereto (the "Additional Contribution"). Such funds shall be required to be contributed to the Company for the purpose of providing funds to the Company to address its cash needs **as may be determined by the Managing Member[Members] [optional language: and as described in the Approved Budget], and the Managing Member[Members] shall call for such funds only to the extent necessary for these purposes or to address an unanticipated need for cash in the Company which, if not provided, would have the effect of causing material adverse effects to the operations of the Company.** Each Member shall contribute such Additional Contribution to the Company, in good funds payable to the Company, within ten (10) days following their receipt of written notice of a call for such Additional Contribution. In connection with the written notice for such Additional Contribution the Managing Member [Members] shall provide a description of how such funds are to be used [optional language: under the terms of the Approved Budget] in connection with the business of the Company.*

No Member shall be required to make additional capital contributions to the Company in excess of their Initial Contribution and their Additional Contribution.



TOP TEN "GOTCHAS"

If contributions are intended to be staged over time, the parties may want to include methods for securing future contributions.

Letters of Credit

Term

Conditions to Draw

Partial Draw Provisions

Documents to Present for Draw

Guaranty

Offset against future distributions

Other Security



TOP TEN "GOTCHAS"

If property is contributed in kind consider:

- 1. A good description of the property**
- 2. The terms and conditions for the contribution**
- 3. Standard Due Diligence for the Property (environmental and gov. compliance)**
- 4. Representations as to the nature (title) of the property**
- 5. Liabilities relating to the property (taxes, mortgages)**
- 6. Assumption of contracts relating to the property contributed and**
- 7. AS IS WHERE IS nature of contribution, if appropriate.**



**TOP TEN
"GOTCHAS"**

Gotcha # 3 – What to do on a default in the obligation to make a contribution or failure to perform on other obligations?

"Make the Punishment Fit the Crime" *Gilbert and Sullivan*



TOP TEN "GOTCHAS"

Defaults for failure to contribute

- **Define when a default exists**
- **Describe cure periods**
- **Describe Remedies**
 - **general remedies at law or equity**
 - **buyout**
 - **forfeiture**
 - **buy out with discount**
 - **dilution**
 - **management shift**
- **Describe any limits on Damages – if no limits, can you be liable for more than you agreed to contribute?**



**TOP TEN
"GOTCHAS"**

Gotcha # 4 – The Post-Tax Nature of a Contribution

"It's Like Beating Your Head Against a Dead Horse." Farley Katz



TOP TEN "GOTCHAS"

Often a member contributing funds to the entity on a disproportionate basis will insist on priority return until he receives "his money back."

- 1. When have they gotten all of their money back?**
- 2. The money contributed is money on which they have paid federal income tax. However, distribution may be pre-tax dollars; that is distributions which carry with them tax liabilities.**
- 3. Was it the intention of the member for the preferred distribution to remain in place until the member received the same amount of money pre-tax or post-tax?**

If it's post tax, and this is not addressed by the company agreement, this can be an issue.



TOP TEN "GOTCHAS"

Include in the company agreement a gross up of the distribution to cover both the original contribution plus the Federal income tax (or other state tax) liabilities relating to the sums distributed, or

If a priority tax distribution has been included in the documentation, an easy way to address this issue may be to exclude the priority tax distribution from the calculation of those distributions that are counted toward the preferential return of capital.



**TOP TEN
"GOTCHAS"**

Gotcha # 5 –Need for Cash to Pay Pass-Through Tax Liabilities

"Nothing Is Certain in Life but Death and Taxes!"



TOP TEN "GOTCHAS"

Limited Liability Companies are pass-through entities for Federal income tax purposes so tax attributes, income and losses, pass through to the principals.

This occurs whether or not distributions are made from the entity.

What if the company agreement fails to address the potential for the allocation of taxable income or gain to the members and creation of tax liability in connection therewith without a corresponding distribution of cash to address this tax liability?



TOP TEN "GOTCHAS"

Include as initial distribution to all members an amount necessary to address the tax liability

- ❖ **Annualized**
- ❖ **Aggregate Historical determination**

In connection with the repayment terms of any indebtedness that requires large or disproportionate reductions in the principal of the indebtedness, the lender should allow a portion of the Company's revenues to be distributed to the members for the purpose of addressing pass-through tax liability.



TOP TEN "GOTCHAS"

Alternative provision for tax distributions. First, from and after such time as a Member has received allocations of Profits from the Company which, in aggregate, exceed that Member's aggregate allocation of Losses from the Company (the "Taxable Profits"), each such Member shall receive a distribution of cash, within 90 days following the end of each calendar year in which Taxable Profits have been allocated to a Member, equal to such Member's allocation of such Taxable Profits for such calendar year, multiplied by a factor that is equal to the highest tax rate for Federal Income Tax purposes applicable for the tax year in which the allocation of Taxable Profits occurred, for the character of income that makes up such Taxable Profits allocation (the "Tax Distribution"). In the event a distribution is to be made under this paragraph that reflects only a portion of the sums to be distributed pursuant to this Article, the sums to be distributed shall be distributed to the Members pro rata to the distributions to otherwise be made under this paragraph. In the event all or any portion of this distribution cannot be made, it shall be carried forward to be made as soon as distributable cash flow is available.



TOP TEN "GOTCHAS"

Gotcha # 6 – Failure to address the proper management structure for the entity

"Management by objective works - if you know the objectives. Ninety percent of the time you don't" Peter Drucker



TOP TEN "GOTCHAS"

Selection of Management Structure in an LLC

Partnership Format

- ❖ **One or more active owners (like GPs) and One or more passive owner (like LPs).**
- ❖ **Managed by a managing member or managers appointed by managing members.**
- ❖ **Degree of authority delegated to managers is broad.**
- ❖ **Major Decisions retained by Members is narrow.**
- ❖ **Voting when applicable is by ownership interest (weighted) to profits or units owned**
- ❖ **Members may set parameters set for performance (budgets, return criteria)**
- ❖ **Members may have a right to removal management for failure to meet parameters**



TOP TEN "GOTCHAS"

Selection of Management Structure in an LLC

Corporate Format

- ❖ **Members delegate management to managers**
- ❖ **Certain major Decisions may be retained by Members**
- ❖ **Voting by ownership interest for managers – but managers (like directors) vote per capita (watch for this trap if not representative of Members.)**
- ❖ **Meeting structure looks more corporate**



TOP TEN "GOTCHAS"

Selection of Management Structure in an LLC

Hybrid Partnership/Corporate Format

- ❖ **All Members manage or appoint managers**
- ❖ **If Managers, Members delegate management to managers**
- ❖ **Members appoint managers based on a representative capacity— and managers retain weighted rights of the owners who appoint them**
- ❖ **Managers can be removed and appointed at any time by the appointing Members**
- ❖ **Meeting structure looks more a partnership**



**TOP TEN
"GOTCHAS"**

Gotcha # 7 – Duty of Care

"If the World Were Perfect, It Wouldn't Be"

Yogi Berra



TOP TEN "GOTCHAS"

As a part of defining the relationship the parties intend to have with each other in connection with the Company, they should also examine the duty of care and loyalty they will owe to each other as a part of this business endeavor.

This may impact the level of care that is owed by those granted management authority, as well as the ability to engage in other businesses that might compete or be deemed by other members to compete with the purpose of the joint venture.



TOP TEN "GOTCHAS"

The BOC provides a great deal of flexibility for the purpose of defining the level of duty the Members and Managers of an LLC may owe to one another.

"the company agreement ...may expand or restrict any duties, including fiduciary duties and related liabilities a member, manager or officerhas to the company..."

There may be some that are implicit in the BOC such as the duty of "care" and "loyalty" or, in the case of governing persons, the duties that an agent owes to its master, since, each governing person is deemed an agent of the LLC

While a fiduciary duty may not be formally stated to exist - an informal duty may be implied under certain circumstances.



TOP TEN "GOTCHAS"

Management Structure – Duty of Care Standard

Fiduciary?

Best Business Efforts?

Reasonable Business Judgment?

Business Judgment Rule? (1) in [good faith](#); (2) with the care that an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the directors reasonably believe to be in the best interests of the corporation.

Carve out to address exercise of your ownership rights?



TOP TEN "GOTCHAS"

Management Structure – Duty of Care Standard

Each Manager shall perform his duties as a Manager in good faith and with that degree of diligence and care that an ordinary prudent person in a like position would use under similar circumstances. Each Member and Manager expressly agree and confirm that they have no duty to one another beyond the duties expressly stated in this Agreement and do here by waive any and all other duties that may be imposed or implied, including but not limited to any fiduciary duty. Each Manager shall be entitled to rely on information, opinions, reports or statements, including financial statements, in each case prepared by one or more agents or employees, counsel, public accountants or other Persons employed by the Company as to matters that such Manager believes to be within such person's professional or expert competence. Any act of or failure to act by the Board of Managers in good faith reliance on such advice shall in no event subject the Board of Managers or any Manager to liability to the Company or any Member. No Manager has any other duty to the Company, any other Manager, any Member or any other Person. Each Manager may have other business interests and may engage in other activities in addition to those relating to the Company. Subject to Section hereof, neither the Company nor any Member shall have any right, by virtue of this Agreement, to share or participate in such other investments or activities of the Managers or in any income or proceeds derived therefrom.



TOP TEN "GOTCHAS"

Management Structure – Indemnities

The BOC sets out a statutory Indemnification provision. However this does not apply to LLC's unless the parties elect to have it apply. The LLC may also set out provisions relating to: (1) indemnification; (2) advancement of expenses; or (3) insurance or another arrangements to indemnify or hold harmless a governing person.



TOP TEN "GOTCHAS"

Gotcha # 8 - Failure to address the business opportunity Obligations and the right of members to compete

***“If you want to be incrementally better: Be competitive.
If you want to be exponentially better: Be cooperative.”***



TOP TEN "GOTCHAS"

Address the Rights of Members to Compete

Due to what may be implicit duties of care and loyalty, in particular as to those in management positions with the Company you should expressly address the rights and limitations on each member to engage in other business which may conflict or compete with the against the business of the company.

- **Address any waiver of any duty to not compete and**
- **Address the duty to present opportunities**



TOP TEN "GOTCHAS"

Address the Rights of Members to Compete

There may be a waiver of all duties or a partial waiver – that is certain restrictions may be expressed.

The parties may also want to limit the use of confidential information that could be used in a competitive manner.

If there are limitations on competition consider the effect of inadvertent violations from mergers or acquisitions of other companies.



TOP TEN "GOTCHAS"

Any Member, or Affiliate thereof may engage in or possess an interest in other business ventures of any nature or description, independently or with others, similar or dissimilar to the business of the Company, and the Company, the Members and the Managers shall have no rights by virtue of this Agreement in and to such independent ventures or the income or profits derived therefrom, and the pursuit of any such venture, even if competitive with the business of the Company, shall not be deemed wrongful or improper. No Member, Manager or Affiliate thereof shall be obligated to present any particular investment opportunity to the Company even if such opportunity is of a character that, if presented to the Company, could be taken by the Company, and any Member, Manager or Affiliate thereof shall have the right to take for its own account (individually or as a partner or fiduciary) or to recommend to others any such particular investment opportunity.



**TOP TEN
"GOTCHAS"**

Gotcha # 9 - Assignee Status of Transferees

"My Mother Always Said - Don't Make an Assignee of Yourself"



TOP TEN "GOTCHAS"

The Code makes a distinction between a person who is an assignee of a Membership interest and a person who is admitted as Member.

Absent an agreement, an assignee receives only the economic benefits of the assigned ownership interest with some limited inspection rights to review the company books and records, but none of the management rights.

The assignor is not released from its continuing liabilities to the Company.



TOP TEN "GOTCHAS"

Often agreements will fail to address this distinction and may fail to address transferability or assignability all together.

The Code provides very specific rights to the assignees and assignors. If you fail to address these issues and the parties desire a result that is different that as set out in the Code.



TOP TEN "GOTCHAS"

The agreement should be drafted to include provisions which address:

- (i) whether transferability should be allowed or not and, if allowed, the effect of a transfer?**
- (ii) what rights may be assigned to an assignee beyond the statutory rights?**
- (iii) what obligations should be transferred and assumed by an assignee?**
- (iv) what steps must be taken for an assignee to become a substitute member? and**
- (iv) Any buy out rights that are to be triggered.**

This would seem to be of particular interest to anyone who might take a security interest in a membership interest.



**TOP TEN
"GOTCHAS"**

Gotcha # 10 - Failure to Build Back Doors or Exit Plans for Members

"What Do General Custer and Davy Crockett Have in Common?"



TOP TEN "GOTCHAS"



Back Doors - Overview:

- Buy out at death: Fairness to both sides.
- Buy out at disability: Definition of “disability” and fairness to both sides.
- Buy out at divorce: Right to the Divorces member, penalty to spouse?
- Buy out upon Member insolvency.
- Buy Out at deadlock: Define deadlock.
- Buy Out at termination of employment: cause and not for cause?
- Push Pull Agreements: potential inequity – who has the money?
- Right of first offer
- Right of first refusal
- Drag along/tag along rights



TOP TEN "GOTCHAS"

Right Of First Refusal

Third Party Offer. If a Member (the "Selling Member") receives a written offer (the "Third Party Offer") to purchase all or any purchase of his, her or its Ownership Interests in this Company from a person, and the Selling Member elects to sell all of such Ownership Interests, the Selling Member shall promptly deliver a copy of the Third Party Offer to all other Members, and shall thereafter promptly disclose all pertinent information with regard to the offer which the other Members may reasonably request.

Other Members' Election. The date that all of the Members receive notice of the Selling Member's intent to sell his Ownership Interests is the "Notification Date." Each Member who receives the copy of the Third Party Offer made to the Selling Member will have forty-five (45) days from the Notification Date in which to notify the Selling Member in writing of his intention to purchase all (but not less than all) of the Selling Member's Ownership Interests for the amount and on the terms and conditions set out in the Third Party Offer. If more than one of the Members (the "Electing Members") elect to purchase the Selling Member's Ownership Interests, each Electing Member shall purchase the part of the Selling Member's Ownership Interests that is proportional to the Electing Member's Ownership Interests divided by the aggregate Ownership Interests of all Electing Members.

Failure To Elect. If none of the Members elect to purchase the Ownership Interests of the Selling Member within forty-five (45) days from the Notification Date, the Selling Member may then sell his Ownership Interests to the Third Party on the terms and conditions of the Third Party Offer.

Payment. If one or more of the Electing Members elect to purchase the Ownership Interests, then the purchase price must be paid on the same terms and conditions as are set out in the Third Party Offer and the sale by the Selling Member to the Electing Member shall be closed on the date set out in Section .



TOP TEN "GOTCHAS"

Right of First Offer

Proposed Offer. If a Member (the "Selling Member") desires to market all or a portion of his Ownership Interest (the "Proposed Sale Terms") to a third party the Selling Member shall deliver to all other Members a statement of intent to do so which shall contain the sales price and sale terms upon which he is willing to sell the Ownership Interest.

Other Members' Election. The date that all of the Members receive notice of the Selling Member's intent to sell his Ownership Interests is the "Notification Date." Each Member who receives the copy of the Proposed Sale Terms will have forty-five (45) days from the Notification Date in which to notify the Selling Member in writing of his intention to purchase all (but not less than all) of such Ownership Interests for the amount and on the terms and conditions set out in the Proposed Sale Terms. If more than one of the Members (the "Electing Members") elect to purchase the Selling Member's Ownership Interests, each Electing Member shall purchase the part of the Selling Member's Ownership Interests that is proportional to the Electing Member's Ownership Interests divided by the aggregate Ownership Interests of all Electing Members.

Failure To Elect. If none of the Members elect to purchase the Ownership Interests of the Selling Member within forty-five (45) days from the Notification Date, the Selling Member may then sell his Ownership Interests to any third party provided (i) the sales price is no less than 90% of the purchase price offered to the Members under the Proposed Sale Terms, and (ii) the sale occurs within no more than 270 days from the date the Proposed Sale Terms were offered to the other Members.

Payment. If one or more of the Electing Members elect to purchase the Ownership Interests, then the purchase price must be paid on the same terms and conditions as are set out in the Proposed Sale Terms and the sale by the Selling Member to the Electing Member shall be closed on the date set out in Section.



TOP TEN "GOTCHAS"

Push/Pull Arrangement

Any Member (the "Offering Member") at any time may offer to purchase all, but not less than all of the ownership interest of any of the other Members (the "Offeree Members") at such price as is stated in a written notice (the "Offer") from the Offering Member to the Offeree Members. Any such Offer shall indicate a price the Offering Member is willing to pay for each percentage point of Ownership Interest owned by the Offeree Members (the "Per Unit Price"). Upon receipt of such Offer from the Offering Member the Offeree Members shall have 30 days (the "Election Period") from the date of receipt of the Offer within which to elect, by written notice to the Offering Member (the "Notice of Election") either to sell their entire Ownership Interest to the Offering Member at the price stated in the Offer or to participate in the purchase of the entire ownership interest of the Offering Member at the per unit price set forth in the Offer. If an Offeree Member (the "Electing Offeree Member") elects to participate in the purchase of the entire Ownership Interest of the Offering Member, said election shall act as an election to purchase that portion of the Offering Members Ownership Interest that the Electing Offeree Member's Ownership Interest bears to the aggregate of the Ownership Interests of each of Electing Offeree Members (that is, if an Offeree Member elects to participate in the purchase of the entire Ownership Interest of the Offering Member, and said Offeree Member must stand ready to purchase all of the Offering Members Ownership Interest where it is the only Offeree Member to elect, or (to some lesser pro rata portion of the Offering Members Ownership Interest where more than one Offeree Member elects to participate.) If an Offeree Member elects to sell its entire Ownership Interest, said election shall constitute an election to (1) not participate in any joint purchase of all of the Offering Members Ownership Interest, and (2) sell its entire Ownership Interest to the Offering Member if, and only if, there are no Electing Offeree Members to purchase the Offering Member's entire Ownership Interest. If any Offeree Member fails to give Notice of Election to the Offering Member by the end of election period, the Offeree Member shall be deemed to have elected to sell its entire Ownership Interest to the Offering Member under the terms set forth in the Offer.

Any purchase and sale of an Ownership Interest purchased pursuant to this Article shall be at the purchase price stated in the Offer such price to be payable as provided therein.



Notes:



Notes:



Notes:



***SELECTED ISSUES IN NEGOTIATING AND DRAFTING
LLC DOCUMENTATION***

HAYNES AND BOONE
Sept 2013

San Antonio Young Lawyers Association
San Antonio, Texas

Presented by:

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