

Model Form of Limited Liability Company Agreement

By Committee on Securitization and Structured Finance, ABA Business Law Section

This is the model form of Delaware Limited Liability Company Agreement prepared by the Task Force on Bankruptcy Remoteness of the American Bar Association Business Law Section, Committee on Securitization and Structured Finance (“Task Force”) as a companion piece to the white paper “Bankruptcy Remoteness: A Summary Analysis.”*

LIMITED LIABILITY COMPANY AGREEMENT OF _____ LLC

This Limited Liability Company Agreement (together with the schedules attached hereto, this “Agreement”) of _____ LLC (the “Company”), is entered into by _____, as the sole equity member (the “Member”), and _____, as the Independent Managers (as defined on Schedule A hereto). Capitalized terms used and not otherwise defined herein have the meanings set forth on Schedule A hereto.

The Member, by execution of this Agreement, hereby forms the Company as a limited liability company pursuant to and in accordance with the Delaware Limited Liability Company Act (6 Del. C. § 18-101 et seq.), as amended from time to time (the “Act”), and this Agreement, and the Member and the Independent Managers hereby agree as follows:

SECTION 1. NAME.

The name of the limited liability company is _____ LLC.

SECTION 2. PRINCIPAL BUSINESS OFFICE.

The principal business office of the Company shall be located at _____ or such other location as may hereafter be determined by the Member.

* While this is a Task Force effort, special thanks go to Colleen H. McDonald, Sheppard Mullin Richter & Hampton LLP (Chair); Joshua Novak, Richard Layton & Finger, P.A.; Sandra Rocks, Cleary Gottlieb Steen & Hamilton LLP; Mark Anthony Curtis, Cleary Gottlieb Steen & Hamilton LLP; Sylvia Chin, White & Case LLP; and Caitlin Colesanti, White & Case LLP. Thanks also to Craig Wolson for polishing the draft.

SECTION 3. REGISTERED OFFICE.

The address of the registered office of the Company in the State of Delaware is c/o [_____].

SECTION 4. REGISTERED AGENT.

The name and address of the registered agent of the Company for service of process on the Company in the State of Delaware are [_____].

SECTION 5. MEMBERS.

- (a) The mailing address of the Member is set forth on Schedule B attached hereto. The Member was admitted to the Company as a member of the Company upon its execution of a counterpart signature page to this Agreement.
- (b) Subject to Section 9(j),¹ the Member may act by written consent.
- (c) Upon the occurrence of any event that causes the Member to cease to be a member of the Company (other than upon continuation of the Company without dissolution upon (i) an assignment by the Member of all of its limited liability company interest in the Company and the admission of the transferee pursuant to Sections 21 and 23 or (ii) the resignation of the Member and the admission of an additional member of the Company pursuant to Sections 22 and 23), each person acting as an Independent Manager pursuant to Section 10² shall, without any action of any Person and simultaneously with the Member ceasing to be a member of the Company, automatically be admitted to the Company as a Special Member and shall continue the Company without dissolution. No Special Member may resign from the Company or transfer its rights as Special Member unless (i) a successor Special Member has been admitted to the Company as Special Member by executing a counterpart to this Agreement and (ii) such successor has also accepted its appointment as Independent Manager pursuant to Section 10; provided, however, the Special Members shall automatically cease to be members of the Company upon the admission to the Company of a substitute Member. Each Special Member shall be a member of the Company that has no interest in the profits, losses and capital of the Company and has no right to receive any distributions of Company assets. Pursuant to Section 18-301 of the Act, a Special Member shall not be required to make any capital contributions to the Company and shall not receive a limited liability company interest in the Company. A Special Member,

1. Section 9(j) sets out the limited purposes of the Company. See notes 9 and 10 for relevant comments.

2. Section 10 sets out the requirement that the Company have an Independent Manager. See note 13 for relevant comments.

in its capacity as Special Member, may not bind the Company. Except as required by any mandatory provision of the Act, each Special Member, in its capacity as Special Member, shall have no right to vote on, approve or otherwise consent to any action by, or matter relating to, the Company, including, without limitation, the merger, consolidation, division or conversion of the Company. In order to implement the admission to the Company of each Special Member, each Person acting as an Independent Manager pursuant to Section 10 shall execute a counterpart to this Agreement. Prior to its admission to the Company as Special Member, each Person acting as an Independent Manager pursuant to Section 10 shall not be a member of the Company.³

SECTION 6. CERTIFICATES.

_____, as an “authorized person” within the meaning of the Act, has executed, delivered and filed the Certificate of Formation of the Company with the Secretary of State of the State of Delaware. Upon the filing of the Certificate of Formation with the Secretary of State of the State of Delaware, such Person’s powers as an “authorized person” ceased, and the Member thereupon became the designated “authorized person” and shall continue as the designated “authorized person” within the meaning of the Act. The Member, a Manager or an Officer shall execute, deliver and file any other certificates (and any amendments and/or restatements thereof) necessary for the Company to qualify to do business in any jurisdiction in which the Company may wish to conduct business.

The existence of the Company as a separate legal entity shall continue until cancellation of the Certificate of Formation as provided in the Act.

SECTION 7. PURPOSE.⁴

- (a) The purpose to be conducted or promoted by the Company is to engage in the following activities:

3. As a general matter, under Delaware law, a Limited Liability Company (“LLC”) will dissolve at any time that it has no Members. This section is intended to ensure that, if the sole Member ever ceases to be a member of the Company and there is no Member remaining to continue the Company without dissolution, each person acting as an Independent Manager will, simultaneously with the sole Member ceasing to be a member, be admitted as a non-economic Special Member and continue the Company without dissolution. The Special Member, commonly referred to as a “springing member” to reflect the automatic nature of the appointment, has no economic interest in the Company, has no voting or consent rights or other rights to bind the Company, and is expressly excluded from the term “Member” in this Agreement. Rather, the Special Member simply acts as a placeholder member until a new economic Member is admitted (including pursuant to Section 24(a)), at which time the Special Member will cease to be a member of the Company. This provision helps provide lenders and other interested parties comfort that the Company will not inadvertently dissolve due to having no member.

4. Delaware law generally permits an LLC to carry on any lawful business, other than banking, subject to the powers and privileges set forth in its governing document (“LLC Agreement”). DEL. CODE ANN. tit. 6, § 18-106(a)–(b) (2022). For bankruptcy-remote special purpose entities (“SPEs”), lenders and other interested parties often require that the LLC’s purpose be limited to undertaking the activities related to the particular financing arrangements. These limitations provide assurance that the SPE will not engage in unrelated activities which could adversely affect the SPE’s creditworthiness or otherwise interfere with the expected cashflows. See APPELBY, GUIDE TO SECURITISATION AND

- (i) []; and
 - (ii) to engage in any lawful act or activity and to exercise any powers permitted to limited liability companies organized under the laws of the State of Delaware that are related or incidental to and necessary, convenient or advisable for the accomplishment of the above-mentioned purposes.
- (b) The Company is hereby authorized to execute, deliver and perform, and the Member or any Manager or Officer on behalf of the Company are hereby authorized to execute and deliver, the Basic Documents and all documents, agreements, certificates, or financing statements contemplated thereby or related thereto, all without any further act, vote or approval of any Member, Manager, Officer or other Person notwithstanding any other provision of this Agreement. The foregoing authorization shall not be deemed a restriction on the powers of the Member or any Manager or Officer to enter into other agreements on behalf of the Company.

SECTION 8. POWERS.

Subject to Section 9(j), the Company, and the Board of Managers and the Officers of the Company on behalf of the Company, (i) shall have and exercise all powers necessary, convenient or incidental to accomplish its purposes as set forth in Section 7 and (ii) shall have and exercise all of the powers and rights conferred upon limited liability companies formed pursuant to the Act.

SECTION 9. MANAGEMENT.⁵

(A) BOARD OF MANAGERS.⁶

Subject to Section 9(j), the business and affairs of the Company shall be managed by or under the direction of a Board of one or more Managers designated by

Structured Finance Transactions 5–6 (2004). Limiting the activities of the SPE also reduces the risk that a court will disregard the separateness of the SPE and any relevant affiliate. Courts have considered an LLC's limited purpose as a mitigating factor in determining whether substantive consolidation is justified. See *In re Doctors Hosp. of Hyde Park, Inc.*, 507 B.R. 558, 717–18 (Bankr. N.D. Ill. 2013). Drafters should be mindful, however, not to make the purpose provision so restrictive as to preclude the SPE from pursuing its intended purpose, including in certain circumstances future transactions conducted within the designated parameters.

5. SPEs will have one of the following management structures: (i) a board of directors, (ii) a committee of managers, (iii) a single manager, or (iv) a single-member manager. In any of these cases, for many transactions, there will be at least one duly-appointed independent director or independent manager. In determining which management structure is most suitable for a particular SPE (and a transaction), it is important to consider factors relating to a substantive consolidation analysis in which issues of management and ownership of the SPE will be relevant. However, such concerns tend to be less important than operational issues such as any commingling of assets or the failure to keep or properly maintain books and records, and, to a lesser extent, following entity formalities. In a substantive consolidation analysis, the type of management structure is not likely to be as important as whether the SPE adhered to the corporate formalities.

Another factor to consider is the management structure most commonly used for SPEs financing assets similar to the assets the newly formed SPE will own. For example, single member managed structures are often utilized in loans that will be included in commercial mortgage-backed securitizations. On the other hand, in two-tier transactions, the SPE will often have a board of managers or

the Member. Subject to Section 10, the Member may determine at any time in its sole and absolute discretion the number of Managers to constitute the Board. The authorized number of Managers may be increased or decreased by the Member at any time in its sole and absolute discretion, upon notice to all Managers, and subject in all cases to Section 10. The initial number of Managers shall be five, two of which shall be Independent Managers pursuant to Section 10. Each Manager elected, designated or appointed by the Member shall hold office until a successor is elected and qualified or until such Manager's earlier death, resignation, expulsion or removal. Each Manager shall execute and deliver the Management Agreement. Managers need not be a Member. The initial Managers designated by the Member are listed on Schedule D hereto.

(B) POWERS.

Subject to Section 9(j), the Board of Managers shall have the power to do any and all acts necessary, convenient or incidental to or for the furtherance of the purposes described herein, including all powers, statutory or otherwise. Subject to Sections 7 and 9, the Board of Managers has the authority to bind the Company.

(C) MEETING OF THE BOARD OF MANAGERS.

The Board of Managers of the Company may hold meetings, both regular and special, within or outside the State of Delaware. Regular meetings of the Board may be held without notice at such time and at such place as shall from time to time be determined by the Board. Special meetings of the Board may be called by the President on not less than one day's notice to each Manager by telephone, facsimile, mail, telegram, electronic mail or any other means of communication, and special meetings shall be called by the President or Secretary in like manner and with like notice upon the written request of any one or more of the Managers.

(D) QUORUM: ACTS OF THE BOARD.

At all meetings of the Board, a majority of the Managers shall constitute a quorum for the transaction of business and, except as otherwise provided in any other provision of this Agreement, the act of a majority of the Managers present at any meeting at which there is a quorum shall be the act of the Board. If a quorum shall not be present at any meeting of the Board, the Managers present at such meeting may adjourn the meeting from time to time, without notice other than

directors which, in addition to one or more independent managers or independent directors, may include individuals who are not on the board of the SPE's immediate parent, thereby further reducing the SPE's overlapping ownership and management.

In addition to the foregoing, it is important to check the requirements of the party financing the assets or, to the extent such loan is rated by a Rating Agency, the requirements of such rating Agency. For example, the Federal Home Loan Mortgage Corporation (Freddie Mac), the Federal National Mortgage Association (Fannie Mae), and a number of private lenders have their own management structure requirements for SPEs.

6. Those persons that manage an LLC are commonly referred to as "Managers" in LLC Agreements, but they may also be referred to as "Directors."

announcement at the meeting, until a quorum shall be present. Any action required to be taken at any meeting of the Board or any committee thereof or any action which may be taken at any meeting of the Board or such committee may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by such number of Managers that would be necessary to authorize or take such action at a meeting at which all Managers entitled to vote thereon were present and voted.

(E) ELECTRONIC COMMUNICATIONS.

Members of the Board, or any committee designated by the Board, may participate in meetings of the Board, or any such committee, by means of telephone conference or similar communications equipment that allows all Persons participating in the meeting to hear each other, and such participation in a meeting shall constitute presence in person at the meeting. If all the participants are participating by telephone conference or similar communications equipment, the meeting shall be deemed to be held at the principal place of business of the Company.

(F) COMMITTEES OF MANAGERS.⁷

- (i) The Board may, by resolution passed by a majority of the whole Board, designate one or more committees, each committee to consist of one or more of the Managers of the Company. The Board may designate one or more Managers as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee.
- (ii) In the absence or disqualification of a member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not such members constitute a quorum, may unanimously appoint another member of the Board to act at the meeting in the place of any such absent or disqualified member.
- (iii) Any such committee, to the extent provided in the resolution of the Board, and subject to, in all cases, Sections 9(j) and 10, shall have and may exercise all the powers and authority of the Board in the management of the business and affairs of the Company. Such committee or committees shall have such name or names as may be determined from time to time by resolution adopted by the Board. Each committee shall keep regular minutes of its meetings and report the same to the Board when required.

7. One or more committees for an LLC is not a requirement under Delaware law. The drafter should consider whether it is necessary or desirable to have one or more committees appointed by the managers or directors to assist with management of the SPE. It would be atypical to see a committee used by an SPE in a term asset-backed securitization because of the self-liquidating nature of the assets. Regardless of the likelihood of utilization, the committee provision often remains in the LLC Agreement.

(G) COMPENSATION OF MANAGERS; EXPENSES.⁸

The Board shall have the authority to fix the compensation of Managers. The Managers may be paid their expenses, if any, of attendance at meetings of the Board, which may be a fixed sum for attendance at each meeting of the Board or a stated salary as Manager. No such payment shall preclude any Manager from serving the Company in any other capacity and receiving compensation therefor. Members of special or standing committees may be allowed like compensation for attending committee meetings.

(H) REMOVAL OF MANAGERS.

Unless otherwise restricted by law and subject to Section 10, any Manager or the entire Board of Managers may be removed or expelled, with or without Cause, at any time by the Member, and, subject to Section 10, any vacancy caused by any such removal or expulsion may be filled by action of the Member.

(I) MANAGERS AS AGENTS.

To the extent of their powers set forth in this Agreement and subject to Section 9(j), the Managers are agents of the Company for the purpose of the Company's business, and the actions of the Managers taken in accordance with such powers set forth in this Agreement shall bind the Company. Notwithstanding the last sentence of Section 18-402 of the Act, except as provided in this Agreement or in a resolution of the Managers, a Manager may not bind the Company.

(J) LIMITATIONS ON THE COMPANY'S ACTIVITIES.^{9, 10}

- (i) This Section 9(j) is being adopted in order to comply with certain provisions required in order to qualify the Company as a "special purpose" entity.

8. It would be atypical for compensation to be paid to a director or manager of an SPE that is a non-operating company.

9. Section 9(j)—in particular, subclauses (ii) and (iii)—of this Agreement restricts the Company's ability to file a voluntary bankruptcy petition and take other "Material Actions." The required contents of this Section will often be dictated by the specific terms of the loan or other transaction documents governing the financing transaction, and many lenders and other interested parties have different (albeit usually similar) requirements. Specifically, subsections (ii) and (iii) may be tailored to reflect the specifics of the transaction. In transactions requiring an Independent Manager (or independent director), the consent of such Independent Manager (or independent director) is usually required in order for the Company to take a "Material Action." This helps provide lenders and other interested parties with comfort that the parties in control of the Company will not make a bad-faith bankruptcy filing by requiring the consent of the Independent Manager (or independent director) who is independent of the Company and those who control it, and is bound by the express duties found in Section 10 of this Agreement. See *infra* note 13.

It is worth noting that it is not customary practice to include a clause that prohibits the SPE from voluntarily filing for bankruptcy altogether, and that the reason for eschewing such an approach is grounded in case law. As noted in the white paper prepared by the Bankruptcy Remoteness Task Force for the Committee on Securitization and Structured Finance of the ABA Business Law Section, *Bankruptcy Remoteness: A Summary Analysis*, "[w]hile a variety of contractual provisions supporting bankruptcy remoteness have been upheld in bankruptcy over the years, including the requirement

- (ii) The Member shall not, so long as any Obligation is outstanding, amend, alter, change or repeal the definition of “Independent Manager” or Sections 5(c), 7, 8, 9, 10, 16, 20, 21, 22, 23, 24, 25, 26 or 31 or Schedule A without the unanimous written consent of the Board (including all Independent Managers). Subject to this Section 9(j), the Member reserves the right to amend, alter, change or repeal any provisions contained in this Agreement in accordance with Section 31.
- (iii) Notwithstanding any other provision of this Agreement and any provision of law that otherwise so empowers the Company, the Member, the Board, any Officer or any other Person, so long as any Obligation is outstanding neither the Member nor the Board nor any Officer nor any other Person shall be authorized or empowered on behalf of the Company to, nor shall they permit the Company to, and the Company shall not, without the prior unanimous written consent of the Member and the Board (including all Independent Managers), take any Material Action, provided, however, that, so long as any Obligation is outstanding, the Board may not vote on, or authorize the taking of, any Material Action, unless there are at least two Independent Managers then serving in such capacity and all such Independent Managers consent thereto.¹¹
- (iv) The Board and the Member shall cause the Company to do or cause to be done all things necessary to preserve and keep in full force and effect its existence, rights (charter and statutory) and franchises. So long as any Obligation is outstanding, the Board also shall cause the Company to:
 - (A) maintain its own separate books and records and bank accounts;
 - (B) at all times hold itself out to the public and all other Persons as a legal entity separate from the Member and any other Person;
 - (C) have a Board of Managers separate from that of the Member and any other Person;
 - (D) file its own tax returns, if any, as may be required under applicable law, to the extent (1) not part of a consolidated group filing a consolidated return or returns or (2) not treated as a division for

that the independent directors or managers of an SPE vote affirmatively to file a voluntary bankruptcy petition, contractual provisions that are seen by bankruptcy courts as being overly restrictive of a party's right to access bankruptcy relief are considered to be void as against public policy under federal bankruptcy law or otherwise in conflict with the Bankruptcy Code.”

10. Sections 9(j)(iv) and (v) contain the separateness covenants, which are intended to ensure that the Company acts as, and holds itself out as, a legal entity separate from its Member and other affiliates. The separateness covenants are important in a substantive consolidation analysis, and the specific covenants for a particular deal are usually driven by the requirements contained in the applicable loan or other transaction documents or, to the extent such loan is rated by a Rating Agency, the requirements of such Rating Agency.

11. The definition of “Material Action” can differ from matter to matter but typically includes various bankruptcy or insolvency actions relating to the Company and can include other matters such as mergers, consolidations, conversions, divisions, and dissolution of the Company.

- tax purposes of another taxpayer, and pay any taxes so required to be paid under applicable law;
- (E) except as contemplated by the Basic Documents, not commingle its assets with assets of any other Person;
 - (F) conduct its business in its own name and strictly comply with all organizational formalities to maintain its separate existence;
 - (G) maintain separate financial statements;
 - (H) pay its own liabilities only out of its own funds, provided, however, the foregoing shall not require the Member to make any additional capital contributions to the Company;
 - (I) maintain an arm's length relationship with its Affiliates and the Member;
 - (J) pay the salaries of its own employees, if any, provided, however, the foregoing shall not require the Member to make any additional capital contributions to the Company;
 - (K) not hold out its credit or assets as being available to satisfy the obligations of others;
 - (L) allocate fairly and reasonably any overhead for shared office space;
 - (M) use separate stationery, invoices and checks;
 - (N) except as contemplated by the Basic Documents, not pledge its assets for the benefit of any other Person;
 - (O) correct any known misunderstanding regarding its separate identity;
 - (P) intend to maintain adequate capital in light of its contemplated business purpose, transactions and liabilities, provided, however, that the foregoing shall not require the Member to make any additional capital contributions to the Company;
 - (Q) cause its Board of Managers to keep minutes of any meetings and actions and observe all other Delaware limited liability company formalities;
 - (R) not acquire any securities of the Member; and
 - (S) cause the Managers, Officers, agents and other representatives of the Company to act at all times with respect to the Company consistently and in furtherance of the foregoing.

Failure of the Company, or the Member or Board on behalf of the Company, to comply with any of the foregoing covenants or any other covenants contained in this Agreement shall not affect the status of the Company as a separate legal entity or the limited liability of the Member or the Managers.

- (v) So long as any Obligation is outstanding, the Board shall not cause or permit the Company to:
 - (A) except as contemplated by the Basic Documents, guarantee any obligation of any Person, including any Affiliate;
 - (B) engage, directly or indirectly, in any business other than the actions required or permitted to be performed under Section 7, the Basic Documents or this Section 9(j);
 - (C) incur, create or assume any indebtedness other than as expressly permitted under the Basic Documents;
 - (D) make or permit to remain outstanding any loan or advance to, or own or acquire any stock or securities of, any Person, except that the Company may invest in those investments permitted under the Basic Documents and may make any advance required or expressly permitted to be made pursuant to any provisions of the Basic Documents and permit the same to remain outstanding in accordance with such provisions;
 - (E) to the fullest extent permitted by law, engage in any dissolution, liquidation, consolidation, division,¹² merger, asset sale or transfer of ownership interests other than such activities as are expressly permitted pursuant to any provision of the Basic Documents and subject to obtaining any approvals required under this Agreement; or
 - (F) except as contemplated or permitted by the Basic Documents, form, acquire, hold or own any subsidiary (whether corporate, partnership, limited liability company or other).

SECTION 10. INDEPENDENT MANAGER.¹³

As long as any Obligation is outstanding, the Member shall cause the Company at all times to have at least two Independent Managers who will be

12. The Act was amended August 1, 2018 to permit “Division” of an LLC into two or more separate LLCs through a plan of division. Upon the effectiveness of a Division, the dividing company’s assets and liabilities are “allocated” to, and vested in, the resulting LLCs, as specified in a plan of division, without the need for any further action by any party. It is important that the LLC agreement or another agreement to which the SPE is a party prohibits division because, absent a specific restriction, condition, or prohibition in the agreements, the SPE would have the option of Division. *See* DEL. CODE ANN. tit. 6, § 18-217 (2022).

13. Section 10 reflects the customary practice with respect to the use of an SPE; lenders and other interested parties often require that there be at least one Independent Manager (or independent director). In certain transactions, they may also insist that the LLC Agreement restrict the ability to remove an Independent Manager (or independent director). Such restrictions can include, among other things, only permitting removal for cause and requiring that notice be provided to the lenders, administrative agents, or other interested parties prior to such removal. By limiting the ability to remove an Independent Manager (or independent director) for “Cause,” lenders and other interested parties can help to ensure that the Member cannot terminate an Independent Manager (or independent director) for no reason in order to install a new Independent Manager (or independent director) that will, from the outset, be sympathetic to the Member’s desire to put the relevant company into bankruptcy. *See In re Gen. Growth Props. Inc.*, 409 B.R. 43, 67–70 (Bankr. S.D.N.Y. 2009) (holding a

appointed by, and subject to this Section 10 may be removed by, the Member. To the fullest extent permitted by law, including Section 18-1101(c) of the Act, and notwithstanding any duty otherwise existing at law or in equity, the Independent Managers shall consider only the interests of the Company, including its respective creditors, in acting or otherwise voting on the matters referred to in Section 9(j)(iii). Except for duties to the Company as set forth in the immediately preceding sentence (including duties to the Member and the Company's creditors solely to the extent of their respective economic interests in the Company but excluding (i) all other interests of the Member, (ii) the interests of other Affiliates of the Company, and (iii) the interests of any group of Affiliates of which the Company is a part), the Independent Managers shall not have any fiduciary duties to the Member or any other Person bound by this Agreement; provided, however, that the foregoing shall not eliminate the implied contractual covenant of good faith and fair dealing. The Member may only remove the Independent Manager for Cause and by providing notice to any party entitled to notice of removal under the Basic Documents.¹⁴ No resignation or removal of

surreptitious firing of independent managers did not constitute bad faith when the LLC agreement did not prohibit the action). On the other hand, by strictly defining "Cause" or other specific actions required to remove an Independent Manager (or independent director), lenders may also foreclose opportunities to negotiate a workable solution with the relevant company in the event of bankruptcy or insolvency, inasmuch as many transaction documents limit the ability to amend or modify an LLC Agreement during the life of a transaction.

Regarding removal for cause, some transaction documents may provide a definition for what constitutes "Cause," while others may not. An undefined "for cause" removal requirement should generally be permissible. If a definition of "Cause" is provided, it is important that an independent manager's (or independent director's) mere refusal to consent to the filing of a bankruptcy petition with respect to the LLC *not* be included in such definition. For example, if an independent manager (or independent director) breaches his or her duties in refusing to consent, or otherwise simply does not respond to requests for action, such actions should constitute cause and permit removal. However, if an independent manager (or independent director) fulfills his or her fiduciary duties in evaluating whether to consent to a bankruptcy action, and determines not to consent to such bankruptcy action after such evaluation, then such actions should not constitute cause.

If a definition for "Cause" is provided, the parties should also consider practical events of "Cause" that might warrant replacing the independent manager (or independent director), including a situation in which an independent manager (or independent director) dies or becomes disabled or incapacitated, ceases to satisfy the definition of "Independent Manager" provided in the LLC Agreement, or materially changes the terms of service (including fees charged) for his or her services as independent manager (or independent director).

Section 10 also clearly defines the fiduciary duties of an Independent Manager (or independent director). It is important that the Independent Manager (or independent director) be permitted to consider the interests of the Company when taking Material Actions; the fiduciary duties of an Independent Manager (or independent director) have been an important factor that a bankruptcy court will look to in determining whether to respect the LLC Agreement's requirement that the consent of the Independent Manager (or independent director) be obtained in order for the Company to file for bankruptcy. Consequently, it is critical that an Independent Manager's (or independent director's) fiduciary duties include a consideration of the interests of the Company in determining whether to consent to taking bankruptcy action.

14. If there is a lender under the Basic Documents, consider replacing "by providing notice to any party entitled to notice of removal under the Basic Documents" with "by providing the lender with at least five business days' notice of such removal." It is important that any limitations on removal balance the interests of the parties to the transaction with the need to ensure that the restrictions will be respected as a matter of applicable state law and federal bankruptcy law and, in particular, that any such restrictions would not be deemed to restrict unreasonably the right of the Company to file for

an Independent Manager, and no appointment of a successor Independent Manager, shall be effective until such successor (i) shall have accepted his or her appointment as an Independent Manager by a written instrument, which may be a counterpart signature page to the Management Agreement, and (ii) shall have executed a counterpart to this Agreement as required by Section 5 (c). In the event of a vacancy in the position of Independent Manager, the Member shall, as soon as practicable, appoint a successor Independent Manager. All right, power and authority of the Independent Managers shall be limited to the extent necessary to exercise those rights and perform those duties specifically set forth in this Agreement. No Independent Manager shall at any time serve as trustee in bankruptcy for any Affiliate of the Company.

SECTION 11. OFFICERS.¹⁵

(A) OFFICERS.

The initial Officers of the Company shall be designated by the Member. The additional or successor Officers of the Company shall be chosen by the Board and shall consist of at least a President, a Secretary and a Treasurer. The Board of Managers may also choose one or more Vice Presidents, Assistant Secretaries and Assistant Treasurers. Any number of offices may be held by the same person. The Board may appoint such other Officers and agents as it shall deem necessary or advisable who shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time by the Board. The salaries of all Officers and agents of the Company shall be fixed by or in the manner prescribed by the Board. The Officers of the Company shall hold office until their successors are chosen and qualified. Any Officer may be removed at any time, with or without cause, by the affirmative vote of a majority of the Board. Any vacancy occurring in any office of the Company shall be filled by the Board. The initial Officers of the Company designated by the Member are listed on Schedule E hereto.

(B) PRESIDENT.

The President shall be the chief executive officer of the Company, shall preside at all meetings of the Board, shall be responsible for the general and active management of the business of the Company and shall see that all orders and resolutions of the Board are carried into effect. The President or any other Officer authorized by the President or the Board shall execute all bonds, mortgages and other contracts, except: (i) where required or permitted by law or this Agree-

bankruptcy in appropriate circumstances. In furtherance of the foregoing, as a general matter, no more than five business days' notice should be required in order to remove an independent manager (or independent director).

15. Officers for an LLC are not required under Delaware law; however, having them can add flexibility in determining how the LLC will execute documents. Accordingly, drafters should consider whether to provide for officers in the LLC Agreement. The listed offices and descriptions are suggestions and can be modified to fit a particular deal or client.

ment to be otherwise signed and executed, including Section 7(b), (ii) where signing and execution thereof shall be expressly delegated by the Board to some other Officer or agent of the Company, and (iii) as otherwise permitted in Section 11(c).

(C) VICE PRESIDENT.

In the absence of the President or in the event of the President's inability to act, the Vice President, if any (or, in the event that there is more than one Vice President, the Vice Presidents in the order designated by the Managers, or in the absence of any designation, then 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 the restrictions upon the President. The Vice Presidents, if any, shall perform such other duties and have such other powers as the Board may from time to time prescribe.

(D) SECRETARY AND ASSISTANT SECRETARY.

The Secretary shall be responsible for filing legal documents and maintaining records for the Company. The Secretary shall attend all meetings of the Board and record all the proceedings of the meetings of the Company and of the Board in a book to be kept for that purpose and shall perform like duties for the standing committees when required. The Secretary shall give, or shall cause to be given, notice of all meetings of the Member, if any, and special meetings of the Board, and shall perform such other duties as may be prescribed by the Board or the President, under whose supervision the Secretary shall serve. The Assistant Secretary, or, if there is more than one, the Assistant Secretaries in the order determined by the Board (or, if there is no such determination, then in order of their election), shall, in the absence of the Secretary or in the event of the Secretary's inability to act, perform the duties and exercise the powers of the Secretary and shall perform such other duties and have such other powers as the Board may from time to time prescribe.

(E) TREASURER AND ASSISTANT TREASURER.

The Treasurer shall have the custody of the Company funds and securities and shall keep full and accurate accounts of receipts and disbursements in books belonging to the Company and shall deposit all moneys and other valuable effects in the name and to the credit of the Company in such depositories as may be designated by the Board. The Treasurer shall disburse the funds of the Company as may be ordered by the Board, taking proper vouchers for such disbursements, and shall render to the President and to the Board, at its regular meetings or when the Board so requires, an account of all of the Treasurer's transactions and of the financial condition of the Company. The Assistant Treasurer, or, if there is more than one, the Assistant Treasurers in the order determined by the Board (or, if there is no such determination, then in the order of their

election), shall, in the absence of the Treasurer or in the event of the Treasurer's inability to act, perform the duties and exercise the powers of the Treasurer and shall perform such other duties and have such other powers as the Board may from time to time prescribe.

(F) OFFICERS AS AGENTS.

The Officers, to the extent of their powers set forth in this Agreement or otherwise vested in them by action of the Board not inconsistent with this Agreement, are agents of the Company for the purpose of the Company's business and, subject to Section 9(j), the actions of the Officers taken in accordance with such powers shall bind the Company.

(G) DUTIES OF BOARD AND OFFICERS.

Except to the extent otherwise modified herein (including, without limitation, in Section 10), each Manager and Officer shall have fiduciary duties identical to those of directors and officers of business corporations organized under the General Corporation Law of the State of Delaware.

SECTION 12. LIMITED LIABILITY.

Except as otherwise expressly provided by the Act, the debts, obligations and liabilities of the Company, whether arising in contract, tort or otherwise, shall be the debts, obligations and liabilities solely of the Company, and neither the Member nor the Special Members nor any Manager shall be obligated personally for any such debt, obligation or liability of the Company solely by reason of being a Member, Special Member or Manager of the Company.

SECTION 13. CAPITAL CONTRIBUTIONS.¹⁶

The Member has contributed to the Company property of an agreed value as listed in the books and records of the Company. In accordance with Section 5(c), the Special Members shall not be required to make any capital contributions to the Company.

SECTION 14. ADDITIONAL CONTRIBUTIONS.

The Member is not required to make any additional capital contribution to the Company. However, the Member may make additional capital contributions to the Company at any time upon the written consent of such Member. To the extent that the Member makes an additional capital contribution to the Company, the Member shall revise the books and records of the Company. The provisions of

16. Under the Delaware LLC Act, a member can be admitted without making a capital contribution and without being required to make a capital contribution. Notwithstanding the foregoing, it is common to reflect some sort of initial capital contribution (which can be nominal or substantive). It should be noted that proper financial capitalization can be a factor in determining whether to respect the separate legal entity status of an LLC.

this Agreement, including this Section 14, are intended to benefit the Member and the Special Members and, to the fullest extent permitted by law, shall not be construed as conferring any benefit upon any creditor of the Company, other than a Covered Person (and no such creditor of the Company shall be a third-party beneficiary of this Agreement), and the Member and the Special Members shall not have any duty or obligation to any creditor of the Company to make any contribution to the Company or to issue any call for capital pursuant to this Agreement.

SECTION 15. ALLOCATION OF PROFITS AND LOSSES.

The Company's profits and losses shall be allocated to the Member.

SECTION 16. DISTRIBUTIONS.

Distributions shall be made to the Member at the times and in the aggregate amounts determined by the Board. Notwithstanding any provision to the contrary contained in this Agreement, the Company shall not make a distribution to the Member on account of its interest in the Company if such distribution would violate the Act or any other applicable law or any Basic Document.

SECTION 17. BOOKS AND RECORDS.

The Board shall keep or cause to be kept complete and accurate books of account and records with respect to the Company's business. The books of the Company shall at all times be maintained by the Board. The Member and its duly authorized representatives shall have the right to examine the Company books, records and documents during normal business hours. The Company, and the Board on behalf of the Company, shall not have the right to keep confidential from the Member any information that the Board would otherwise be permitted to keep confidential from the Member pursuant to Section 18-305(c) of the Act. The Company's books of account shall be kept using the method of accounting determined by the Member. The Company's independent auditor, if any, shall be an independent public accounting firm selected by the Member.

SECTION 18. REPORTS.

The Board shall, after the end of each fiscal year, use reasonable efforts to cause the Company's independent accountants, if any, to prepare and transmit to the Member as promptly as possible any such tax information as may be reasonably necessary to enable the Member to prepare its federal, state and local income tax returns relating to such fiscal year.

SECTION 19. OTHER BUSINESS.

Notwithstanding any duty otherwise existing at law or in equity, the Member, the Special Members, any Officer, Manager, employee or agent of the Company, and any Affiliate of the Member or the Special Members may engage in or possess

an interest in other business ventures (unconnected with the Company) of every kind and description, independently or with others, and the Company shall not have any rights in or to such independent ventures or the income or profits therefrom by virtue of this Agreement.

SECTION 20. EXCULPATION AND INDEMNIFICATION.¹⁷

- (a) To the fullest extent permitted by applicable law, neither the Member, nor the Special Members, nor any Officer, Manager, employee or agent of the Company, nor any employee, representative, agent or Affiliate of the Member or the Special Members (collectively, the “Covered Persons”) shall be liable to the Company or any other Person who is bound by this Agreement for any loss, damage or claim incurred by reason of any act or omission performed or omitted by such Covered Person in good faith on behalf of the Company and in a manner reasonably believed to be within the scope of the authority conferred on such Covered Person by this Agreement, except that a Covered Person shall be liable for any such loss, damage or claim incurred by reason of such Covered Person’s gross negligence or willful misconduct.
- (b) To the fullest extent permitted by applicable law, a Covered Person shall be entitled to indemnification from the Company for any loss, damage or claim incurred by such Covered Person by reason of any act or omission performed or omitted by such Covered Person in good faith on behalf of the Company and in a manner reasonably believed to be within the scope of the authority conferred on such Covered Person by this Agreement, except that no Covered Person shall be entitled to be indemnified in respect of any loss, damage or claim incurred by such Covered Person by reason of such Covered Person’s gross negligence or willful misconduct with respect to such acts or omissions; provided, however, that any indemnity under this Section 20 by the Company shall be provided out of and to the extent of Company assets only, and the Member and the Special Members shall not have personal liability on account thereof; and provided, further, that, so long as any Obligation is outstanding, no indemnity payment from funds of the Company (as distinct from funds from other sources, such as insurance) of any indemnity under this Section 20 shall be payable from amounts allocable to any other Person pursuant to the Basic Documents.
- (c) To the fullest extent permitted by applicable law, expenses (including reasonable legal fees) incurred by a Covered Person defending any claim, demand, action, suit or proceeding shall, from time to time,

17. Delaware law permits broad flexibility in creating exculpation and indemnification standards. The standards set forth in this Section 20 are typical of provisions frequently seen in an SPE’s LLC Agreement.

be advanced by the Company prior to the final disposition of such claim, demand, action, suit or proceeding, upon receipt by the Company of an undertaking by or on behalf of the Covered Person to repay such amount if it shall be determined that the Covered Person is not entitled to be indemnified as authorized in this Section 20.

- (d) A Covered Person shall be fully protected in relying in good faith upon the records of the Company and upon such information, opinions, reports or statements presented to the Company by any Person as to matters the Covered Person reasonably believes are within such other Person's professional or expert competence and who has been selected with reasonable care by or on behalf of the Company, including information, opinions, reports or statements as to the value and amount of the assets, liabilities, or any other facts pertinent to the existence and amount of assets from which distributions to the Member might properly be paid.
- (e) The provisions of this Agreement, to the extent that they restrict or eliminate the duties and liabilities of a Covered Person to the Company or its members otherwise existing at law or in equity, are agreed by the parties hereto to replace such other duties and liabilities of such Covered Person.
- (f) The foregoing provisions of this Section 20 shall survive any termination of this Agreement.

SECTION 21. ASSIGNMENTS.¹⁸

The Member may assign in whole or in part its limited liability company interest¹⁹ in the Company. Subject to Section 23, the transferee of a limited liability company interest in the Company shall be admitted to the Company as a member of the Company upon its execution of an instrument signifying its agreement to be bound by the terms and conditions of this Agreement, which instrument may be a counterpart signature page to this Agreement. If the Member transfers all of its limited liability company interest in the Company pursuant to this Section 21, such admission shall be deemed effective immediately prior to the transfer and,

18. Secured parties may wish to consider including in this section provisions enabling a pledgee or collateral assignee to have certain rights, including upon foreclosure, to become a member or to exercise certain rights of a member without consent of the members. One way that would ensure consistency would be to refer to such rights that are provided for in the applicable pledge or security agreement. Note that by becoming a member the secured party may also assume liability for the activities of the LLC. Del. Code Ann. tit. 6, § 18-704(b) (2022).

19. Under Delaware law, a "limited liability company interest" is defined as "a member's share of the profits and losses of a limited liability company and a member's right to receive distributions of the limited liability company's assets." Del. Code Ann. tit. 6, § 18-101(10) (2022). The definition does not include voting rights and other governance rights and an assignee would not have such rights unless provided for in the LLC Agreement or until the assignee is admitted as a member. *Id.* § 18-702.

immediately following such admission, the transferor Member shall cease to be a member of the Company. No admission shall be effected by a partial assignment without the written consent of the Member. Notwithstanding anything in this Agreement to the contrary, (i) any successor to the Member by merger or consolidation in compliance with the Basic Documents shall, without further act, be the Member hereunder, (ii) such merger or consolidation shall not constitute an assignment for purposes of this Agreement, and (iii) upon the occurrence of such an event, the Company shall continue without dissolution.

SECTION 22. RESIGNATION.

So long as any Obligation is outstanding, the Member may not resign, except as permitted under the Basic Documents and if the Rating Agency Condition is satisfied. If the Member is permitted to resign pursuant to this Section 22, an additional member of the Company shall be admitted to the Company upon its execution of an instrument signifying its agreement to be bound by the terms and conditions of this Agreement, which instrument may be a counterpart signature page to this Agreement. Such admission shall be deemed effective immediately prior to the resignation and, immediately following such admission, the resigning Member shall cease to be a member of the Company.

SECTION 23. ADMISSION OF ADDITIONAL MEMBERS.

One or more additional Members of the Company may be admitted to the Company with the written consent of the Member; provided, however, that, notwithstanding the foregoing, so long as any Obligation remains outstanding, no additional Member may be admitted to the Company unless the Rating Agency Condition is satisfied.

SECTION 24. DISSOLUTION.²⁰

- (a) The Company shall be dissolved, and its affairs shall be wound up, upon the first to occur of the following: (i) the termination of the legal existence of the last remaining member of the Company or the occurrence of any other event that terminates the continued membership of the last remaining member of the Company in the Company, unless the Company is continued without dissolution in a manner permitted by this Agreement or the Act, or (ii) the entry of a decree of judicial dissolution of the Company under Section 18-802 of the Act. Upon the occurrence of any event that causes the last remaining member of the Company to cease to be a

20. Lenders and other interested parties will often try to limit the events that will cause the Company to dissolve, and the events listed below are often the only events of dissolution that will be permitted. The second sentence of this Section 24, often referred to as the “personal representative clause,” works in harmony with Section 5(c) and is intended to ensure that a person or entity will become a “Member” and continue the business of the Company in the event that the sole Member ceases to be a member of the Company without leaving another Member to carry on the business.

member of the Company or that causes the Member to cease to be a member of the Company (other than upon continuation of the Company without dissolution upon (i) an assignment by the Member of all of its limited liability company interest in the Company and the admission of the transferee pursuant to Sections 21 and 23, or (ii) the resignation of the Member and the admission of an additional member of the Company pursuant to Sections 22 and 23) to the fullest extent permitted by law, the Personal Representative of such member is hereby authorized to, and shall, within 90 days after the occurrence of the event that terminated the continued membership of such member in the Company, agree in writing (i) to continue the Company and (ii) to the admission of the Personal Representative or its nominee or designee, as the case may be, as a substitute member of the Company, effective as of the occurrence of the event that terminated the continued membership of such member in the Company.

- (b) Notwithstanding any other provision of this Agreement, (i) the Bankruptcy of the Member or a Special Member shall not cause the Member or Special Member, respectively, to cease to be a member of the Company and (ii) upon the occurrence of such an event, the Company shall continue without dissolution.²¹
- (c) Notwithstanding any other provision of this Agreement, each of the Member and the Special Members waives any right it might have to agree in writing to dissolve the Company upon the Bankruptcy of the Member or a Special Member or the occurrence of an event that causes the Member or a Special Member to cease to be a member of the Company.
- (d) In the event of dissolution, the Company shall conduct only such activities as are necessary to wind up its affairs (including the sale of the assets of the Company in an orderly manner), and the assets of the Company shall be applied in the manner, and in the order of priority, set forth in Section 18-804 of the Act.
- (e) The Company shall terminate when (i) all of the assets of the Company, after payment of or due provision for all debts, liabilities and obligations of the Company, shall have been distributed to the Member in the manner provided for in this Agreement and (ii) the Certificate of Formation shall have been canceled in the manner required by the Act.

21. Under Delaware law, absent provisions to the contrary, an event of bankruptcy of a member will cause such member to cease to be a member of the LLC. This provision is intended to override such a statutory default and provides the lender and other interested parties with comfort that, if the sole member goes into bankruptcy, such bankruptcy will not cause the LLC to dissolve. This provision, together with Section 5(c), also permit opinion-givers to give a “non-dissolution” opinion regarding the effect of the bankruptcy or dissolution of the sole member on the LLC.

SECTION 25. WAIVER; NATURE OF INTEREST.

Except as otherwise expressly provided in this Agreement, to the fullest extent permitted by law each of the Member and the Special Members hereby irrevocably waives any right or power that such Person might have to institute any proceeding at law or in equity to cause the dissolution, liquidation, winding up or termination of the Company. The Member shall not have any interest in any specific assets of the Company, and the Member shall not have the status of a creditor with respect to any distribution pursuant to Section 16. The interest of the Member in the Company is personal property.

SECTION 26. BENEFITS OF AGREEMENT; NO THIRD-PARTY RIGHTS.

None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditor of the Company or by any creditor of the Member or a Special Member. Nothing in this Agreement shall be deemed to create any right in any Person (other than Covered Persons) not a party hereto, and this Agreement shall not be construed in any respect to be a contract in whole or in part for the benefit of any third Person (other than Covered Persons).

SECTION 27. SEVERABILITY OF PROVISIONS.

Each provision of this Agreement shall be considered severable; if for any reason any provision or provisions herein are determined to be invalid, unenforceable or illegal under any existing or future law, such invalidity, unenforceability or illegality shall not impair the operation of or affect those portions of this Agreement which are valid, enforceable and legal.

SECTION 28. ENTIRE AGREEMENT.

This Agreement constitutes the entire agreement of the parties with respect to the subject matter hereof.

SECTION 29. BINDING AGREEMENT.

Notwithstanding any other provision of this Agreement, the Member agrees that this Agreement, including, without limitation, Sections 7, 8, 9, 10, 20, 21, 22, 23, 24, 26, 29 and 31, constitutes a legal, valid and binding agreement of the Member, and is enforceable against the Member by the Independent Managers, in accordance with this Agreement's terms.

SECTION 30. GOVERNING LAW.

This Agreement shall be governed by and construed under the laws of the State of Delaware (without regard to conflict of laws principles that would call for the application of the substantive laws of a jurisdiction other than the State of Delaware), all rights and remedies being governed by said laws.

SECTION 31. AMENDMENTS.

Subject to Section 9(j), this Agreement may be modified, altered, supplemented or amended pursuant to a written agreement executed and delivered by the Member. Notwithstanding anything to the contrary in this Agreement, so long as any Obligation is outstanding, this Agreement may not be modified, altered, supplemented or amended unless the Rating Agency Condition is satisfied except: (i) to cure any ambiguity or (ii) to convert or supplement any provision in a manner consistent with the intent of this Agreement and the other Basic Documents.

SECTION 32. COUNTERPARTS.

This Agreement may be executed in any number of counterparts (including .pdf file, .jpeg file, Adobe Sign or DocuSign), each of which shall be deemed an original of this Agreement and all of which together shall constitute one and the same instrument.

SECTION 33. NOTICES.

Any notices required to be delivered hereunder shall be in writing and personally delivered, mailed or sent by telecopy, electronic mail or other similar form of rapid transmission and shall be deemed to have been duly given upon receipt (i) in the case of the Company, to the Company at its address in Section 2, (ii) in the case of a Member, to such Member at its address as listed on Schedule B attached hereto, (iii) in the case of a Manager, to such Manager at its address as listed in the Management Agreement, and (iv) in the case of any of the foregoing, at such other address as may be designated by written notice to the other party.

LIMITED LIABILITY COMPANY INTERESTS.

Each limited liability company interest in the Company shall be uncertificated. The limited liability company interests are securities governed by Article 8 of the Uniform Commercial Code of Delaware.²²

22. Under Delaware law, a security interest in a limited liability company interest may be perfected as a “security” under Article 8 of the Uniform Commercial Code (“UCC”). By electing to have the limited liability company interests treated as a “security”, this section ensures that the limited liability company interests of the Company are entitled to the benefits of Article 8 and also constitute investment property under Article 9 of the UCC. This election is frequently referred to as an “opt in” to Article 8. A security interest in investment property may be perfected by control under Article 8 (Del. UCC §§ 9-314, 9-106 and 8-106) and also by filing a UCC financing statement under Article 9 (Del. UCC § 9-312). Secured parties will generally require both methods of perfection. If the limited liability company interests are not securities under Article 8, they will constitute “general intangibles” under Article 9 and may only be perfected by filing. If the limited liability company interests are certificated, the opt in provision should also be included in the certificate, in addition to the limited liability company agreement.

EFFECTIVENESS.

Pursuant to Section 18-201(d) of the Act, this Agreement shall be effective as of the time of the filing of the Certificate of Formation with the Office of the Delaware Secretary of State on _____, 20__.

IN WITNESS WHEREOF, the undersigned, intending to be legally bound hereby, have duly executed this Limited Liability Company Agreement as of the ____ day of _____, 20__.²³

MEMBER:

[_____]

By: _____

Name:

Title:

INDEPENDENT MANAGERS:

Name:

Name:

23. An LLC is formed at the time of filing of the initial certificate of formation or at any later time and date specified therein so long as there has been substantial compliance with the requirements of Section 18-201 of the Act. Del. Code Ann. tit. 6, § 18-201(b) (2022). An LLC Agreement is required under the Act but may be entered into before, after or at the time of filing of the certificate of formation and may be made effective as of the formation of the LLC or at such other time or date provided in the LLC Agreement. *Id.* § 18-201(d).

SCHEDULE A

Definitions

A. Definitions

When used in this Agreement, the following terms not otherwise defined herein have the following meanings:

“Act” has the meaning set forth in the preamble to this Agreement.

“Affiliate” means, with respect to any Person, any other Person directly or indirectly Controlling or Controlled by or under direct or indirect common Control with such Person.

“Agreement” means this Limited Liability Company Agreement of the Company, together with the schedules attached hereto, as amended, restated or supplemented or otherwise modified from time to time.

“Bankruptcy” means, with respect to any Person, (A) if such Person (i) makes an assignment for the benefit of creditors, (ii) files a voluntary petition in bankruptcy, (iii) is adjudged a bankrupt or insolvent, or has entered against it an order for relief, in any bankruptcy or insolvency proceedings, (iv) files a petition or answer seeking for itself any reorganization, arrangement, composition, readjustment, liquidation or similar relief under any statute, law or regulation, (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against it in any proceeding of this nature, or (vi) seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of the Person or of all or any substantial part of its properties, or (B) if 120 days after the commencement of any proceeding against the Person seeking reorganization, arrangement, composition, readjustment, liquidation or similar relief under any statute, law or regulation, the proceeding has not been dismissed, or if within 90 days after the appointment without such Person’s consent or acquiescence of a trustee, receiver or liquidator of such Person or of all or any substantial part of its properties, the appointment is not vacated or stayed, or within 90 days after the expiration of any such stay, the appointment is not vacated. The foregoing definition of “Bankruptcy” is intended to replace and shall supersede and replace the definition of “Bankruptcy” set forth in Sections 18-101(1) and 18-304 of the Act.

“Basic Documents” means [insert documents being executed by Company at closing (and after closing if the Company will be participating in future transactions)] and all documents and certificates contemplated thereby or delivered in connection therewith.

“Board” or “Board of Managers” means the Board of Managers of the Company.

“Cause” means, with respect to an Independent Manager, (i) acts or omissions by such Independent Manager that constitute willful disregard of, or bad faith or gross negligence with respect to, such Independent Manager’s duties under this Agreement, (ii) that such Independent Manager has engaged in or has been charged with, or has been convicted of, fraud or other acts constituting a

crime under any law applicable to such Independent Manager, (iii) that such Independent Manager is unable to perform his or her duties as Independent Manager due to death, disability or incapacity, (iv) that there is a material increase in the fees charged by such Independent Manager or any other material change adverse to the Company in such Independent Manager's terms of service, or (v) that such Independent Manager no longer meets the definition of Independent Manager.

"Certificate of Formation" means the Certificate of Formation of the Company filed with the Secretary of State of the State of Delaware on _____, 20__, as amended or amended and restated from time to time.

"Company" means _____ LLC, a Delaware limited liability company.

"Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ownership of voting securities or general partnership or managing member interests, by contract or otherwise. "Controlling" and "Controlled" shall have correlative meanings. Without limiting the generality of the foregoing, a Person shall be deemed to Control any other Person in which the former owns, directly or indirectly, a majority of the ownership interests.

"Covered Persons" has the meaning set forth in Section 20(a).

"Independent Manager" means a natural person who, for the five-year period prior to his or her appointment as Independent Manager has not been, and during the continuation of his or her service as Independent Manager is not: (i) an employee, director, stockholder, partner, member or officer of the Company or any of its Affiliates (other than his or her service as an Independent Manager, Special Member or similar capacity of the Company or any of its Affiliates); (ii) a customer or supplier of the Company or any of its Affiliates (other than an Independent Manager provided by a corporate services company that provides independent directors or managers in the ordinary course of its business); or (iii) any member of the immediate family of a person described in (i) or (ii).²⁴

24. The definition of "Independent Manager" can vary from matter to matter, and the specific requirements are often contained in the underlying transaction documents. Many lenders and other interested parties will specify that the definition of "Independent Manager" require that the party be an employee of a nationally recognized service provider (e.g., Corporation Service Company, The Corporation Trust Company, National Registered Agents, Inc., etc.). While such a requirement is generally acceptable, it is important that, beyond dictating the requirements for an "Independent Manager" as set forth in the LLC Agreement, such lenders or other interested parties do not have a right to approve or reject any particular "Independent Manager." It is also important that the requirements for an "Independent Manager" not restrict the ability of an Independent Manager to fulfill his or her role as a manager and potential Special Member under this Agreement. One reason to ensure that the Independent Manager is truly independent is to demonstrate to a court that the SPE and parent maintained separate identities, making it less likely that the court will find that the entities did not maintain a separate existence. Ensuring that such independence did not commence on the date of the financing transaction, there is typically a requirement that the independence criteria are satisfied with respect to a given individual for a significant period of time before the individual becomes a director or manager of the SPE. The independence concept also provides creditors comfort that the Independent Manager will consider the interests of the SPE's creditors and not solely the interests of the SPE's affiliates in exercising such voting or consent rights.

“Management Agreement” means the agreement of the Managers in the form attached hereto as Schedule C. The Management Agreement shall be deemed incorporated into, and a part of, this Agreement.

“Managers” means the Persons elected to the Board of Managers from time to time by the Member, including the Independent Managers, in their capacity as managers of the Company. A Manager is hereby designated as a “manager” of the Company within the meaning of Section 18-101(12) of the Act.

“Material Action” means to consolidate or merge the Company with or into any Person, or sell all or substantially all of the assets of the Company, or to institute proceedings to have the Company be adjudicated bankrupt or insolvent, or consent to the institution of bankruptcy or insolvency proceedings against the Company or file a voluntary bankruptcy petition or any other petition seeking, or consent to, reorganization or relief with respect to the Company under any applicable federal or state law relating to bankruptcy, or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator (or other similar official) of the Company or a substantial part of its property, or make any assignment for the benefit of creditors of the Company, or admit in writing the Company’s inability to pay its debts generally as they become due, or take action in furtherance of any such action, or, to the fullest extent permitted by law, dissolve or liquidate the Company.²⁵

“Member” means _____, as the initial member of the Company, and includes any Person admitted as an additional member of the Company or a substitute member of the Company pursuant to the provisions of this Agreement, each in its capacity as a member of the Company; provided, however, the term “Member” shall not include the Special Members.²⁶

“Obligations” shall mean the indebtedness, liabilities and obligations of the Company under or in connection with the Basic Documents or any related document in effect as of any date of determination.

“Officer” means an officer of the Company described in Section 11.

“Person” means any individual, corporation, partnership, joint venture, limited liability company, limited liability partnership, association, joint stock company, trust, unincorporated organization, or other organization, whether or not a legal entity, and any governmental authority.

“Personal Representative” means, as to a natural person, the executor, administrator, guardian, conservator or other legal representative thereof and, as to a person other than a natural person, the legal representative or successor thereof.

“Rating Agency” has the meaning assigned to that term in [the Basic Documents].²⁷

25. See discussion of the content and function of the term “Material Action” in note 11 above.

26. As noted above, while a Special Member is a member of the Company, it is not intended to be a “Member for purposes of this Agreement” (i.e., the Special Member has no economic interest in the Company and has no right to vote or consent or to otherwise take any actions on behalf of the Company). Consequently, the definition of “Member” should make clear that it does not include the Special Member.

27. If a particular transaction is not going to be a rated transaction, then it is possible that the terms “Rating Agency” and “Rating Agency Condition” can be deleted and that the provisions in

“Rating Agency Condition” means a condition that is satisfied if (i) with respect to any action taken at any time before the loan evidenced and secured by the Basic Documents has been sold or assigned to a securitization trust, the lender thereunder has consented in writing to such action and (ii) with respect to any action taken at any time after such loan has been sold or assigned to a securitization trust, each Rating Agency shall have been given 10 days’ prior notice thereof and each such Rating Agency shall have notified the Company in writing that such action will not result in a reduction or withdrawal of the then-current rating by such Rating Agency of any of the securities issued by such securitization trust.

“Special Member” means, upon such person’s admission to the Company as a member of the Company pursuant to Section 5(c), a person acting as Independent Manager, in such person’s capacity as a member of the Company. A Special Member shall only have the rights and duties expressly set forth in this Agreement.

B. Rules of Construction

Definitions in this Agreement apply equally to both the singular and plural forms of the defined terms. The words “include” and “including” shall be deemed to be followed by the phrase “but not limited to.” The terms “herein,” “hereof” and “hereunder” and other words of similar import refer to this Agreement as a whole and not to any particular Section, paragraph or subdivision. The Section titles appear as a matter of convenience only and shall not affect the interpretation of this Agreement. All Section, paragraph, clause, Exhibit or Schedule references not attributed to a particular document shall be references to such parts of this Agreement.

SCHEDULE B

Member

<u>Name</u>	<u>Address for Notice</u>	<u>Limited Liability Company Interest</u>
		100%

SCHEDULE C

Management Agreement

_____, 20__

[_____

_____]

Re: Management Agreement -- _____ LLC

Ladies and Gentlemen:

For good and valuable consideration, each of the undersigned Persons, who have been designated as Managers of _____ LLC, a Delaware limited liability company (the "Company"), in accordance with the Limited Liability Company Agreement of the Company, dated as of _____, 20__, as it may be amended or restated from time to time (the "LLC Agreement"), hereby agree as follows:

1. Each of the undersigned accepts such Person's rights and authority as a Manager under the LLC Agreement and agrees to perform and discharge such Person's duties and obligations as a Manager under the LLC Agreement and further agrees that such rights, authorities, duties and obligations under the LLC Agreement shall continue until such Person's successor as a Manager is designated or until such Person's resignation or removal as a Manager in accordance with the LLC Agreement. Each of the undersigned agrees and acknowledges that it has been designated as a "manager" of the Company within the meaning of the Delaware Limited Liability Company Act.
2. So long as any Obligation is outstanding, each of the undersigned agrees, solely in its capacity as a creditor of the Company on account of any indemnification or other payment owing to the undersigned by the Company, not to acquiesce, petition or otherwise invoke or cause the Company to invoke the process of any court or governmental authority for the purpose of commencing or sustaining an involuntary case against the Company under any federal or state bankruptcy, insolvency or similar law or appointing a receiver, liquidator, assignee, trustee, custodian, sequestrator or other similar official of the Company or any substantial part of the property of the Company, or ordering the winding up or liquidation of the affairs of the Company.
3. THIS MANAGEMENT AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF DELAWARE, AND ALL RIGHTS AND REMEDIES SHALL BE

GOVERNED BY SUCH LAWS WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAWS.

Initially capitalized terms used and not otherwise defined herein have the meanings set forth in the LLC Agreement.

This Management Agreement may be executed in any number of counterparts, each of which shall be deemed an original of this Management Agreement and all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the undersigned have executed this Management Agreement as of the day and year first above written.

Name:
Address for Notice:

Name:
Address for Notice:

Name:
Address for Notice:

Name:
Address for Notice:

SCHEDULE D

Managers

- 1.
- 2.
- 3.
- 4.
- 5.

SCHEDULE E

<u>Officers</u>	<u>Title</u>
	President
	Vice President
	Treasurer
	Secretary

