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Management Provisions: Pros and Cons of Manager Managed v. Member Managed

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And
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Biography

Allen Sparkman is a founding partner of Sparkman + Foote LLP, which has offices in Denver, Houston and Fort Worth. He has practiced tax and business law since 1973. Mr. Sparkman's practice includes the areas of business transactions, securities, tax, and professional responsibility. Mr. Sparkman's work includes the preparation of securities disclosure documents for start-up companies in a variety of fields, including offshore oil and gas exploration, foreign mining operations, real estate, and comic book certification. Mr. Sparkman also regularly prepares corporate, LLC and partnership documents, and represents buyers and sellers of businesses, including preparing or reviewing all necessary legal documents.

Education

Mr. Sparkman earned his A.B., with honors, from Princeton University in 1968 and his J.D., with high honors, from the University of Texas School of Law in 1973, where he was a Vice Chancellor, Teaching Quizmaster, and Associate Editor of *The Texas Law Review*. In 2015, Mr. Sparkman received a Certificate in Theology and Ministry from the Princeton Theological Seminary.

Memberships

Mr. Sparkman is a member of the State Bar of Texas, the Colorado Bar Association, and the American Bar Association. For the American Bar Association, Mr. Sparkman is a member of the Business Law Section and its Committees on Corporate Governance (co-chair, joint committee on governance of Corporate Governance Committee and Nonprofit Committee); LLCs, Partnerships and Unincorporated Associations (co-chair, task force on model Series LLC operating agreement; chair, governance subcommittee); Mergers and Acquisitions; Middle Market and Small Business (chair, business entities governance subcommittee); The Governance Subcommittees of the LLCs, Partnerships and Unincorporated Committee and the Middle Market and Small Business Committee constitute a joint subcommittee of those Committees and has joined with the Governance of Private and Family-controlled Entities Subcommittee of the Corporate Governance Committee to form a new American Bar Association Business Law Section Task Force on Contractual Governance of Business Entities. The Task Force will be led by the named governance subcommittees of the Corporate Governance Committee, the LLCs, Partnerships, and Unincorporated Associations Committee, and the Middle Market and Small Business Committee. Nonprofit Organizations; Professional Responsibility (chair, state and local liaisons committee); Tax Law Section; Real Property, Probate and Trust Law Section; General Practice, Solo & Small Firm Division and its Agricultural, Business Law, and Estate & Financial Planning Committees; Center for Professional

Responsibility He is a past chair of the Business Law Section of the Colorado Bar Association and an active member of the Business Law Section's Statutory Drafting Committee.

Awards, Publications, & Speaking Engagements

With Herrick K. Lidstone, Jr., Mr. Sparkman is co-author of LIMITED LIABILITY COMPANIES AND PARTNERSHIPS IN COLORADO (CLE in Colorado, Inc., 2015). The first edition of the book received the 2016 Award of Outstanding Achievement from the Association for Continuing Legal Education. The second edition of the book was published in January, 2017. Mr. Sparkman has authored a number of articles relating to limited liability companies and professional entities and has also been a frequent speaker at continuing legal education programs. Mr. Sparkman is listed in THE BEST LAWYERS IN AMERICA® for both Colorado and Texas and speaks regularly at continuing legal education seminars in Colorado, Texas, and nationally on entity selection, fiduciary duties and governance, mergers and conversion, veil piercing, ethics, series LLCs, and tax planning. Mr. Sparkman has presented more than 100 papers at continuing education programs for the American Bar Association, the Colorado Bar Association, Continuing Legal Education in Colorado, the State Bar of Texas, the University of Texas School of Law, the Professional Education Broadcast Network, the Practicing Law Institute, the National Business Institute, and other continuing education providers.

Mr. Sparkman is the author of numerous articles on choice of business entity, series LLCs, and other legal topics. Mr. Sparkman's published articles include "Information Rights" available at http://ssrn.com/abstract=3096698, forthcoming, The University of Missouri School of Law Business, Entrepreneurship & Tax Law Review, "Should Texas Adopt All or Part of the Uniform Protected Series Act? available at http://ssrn.com/abstract=3084274, forthcoming, Houston Business and Tax Law Journal Spring 2018, "Uniform Protected Series Act—A Welcome Advance in Series LLC Legislation available at http://ssrn.com/abstract=3072760, forthcoming American University Business Law Review, "Charging Orders—A Reappraisal," available at http://ssrn.com/abstract=2727973, "Will Your Veil be Pierced? How Strong is Your Entity's Liability Shield?—Piercing the Veil, Alter Ego, and Other Bases for Holding an Owner Liable for Debts of an Entity," 12 *Hastings Bus. L. J.* 349 (2015-2016), available at http://ssrn.com/abstract=267620,With Herrick K. Lidstone, Jr., "Pick Your Partner Versus the United States Bankruptcy Code", 46 *Tex. J. Bus. L.* 23 (2015) available at http://ssrn.com/abstract=2866418, "Through the Looking Glass: Series LLCs in 2016", 3 *Bus. & Bankr. L.J.* 1 (2016) available at http://ssrn.com/abstract=2591548, "Series LLCs", 53 *The REPTL Reporter* No. 2 (Real Estate, Probate and Trust Law Section, State Bar of Texas, February, 2015), "The Rescission Doctrine: Everything Old is New Again,"4 *American University Business Law Review* 183 (2015) "Fifth Circuit Misses Opportunity to Bring Clarity to Series LLC Questions", *Business Law Today* (April 2014), "Series LLCs in Interstate Commerce" and "Tax Aspects of Series LLCs," *Business Law Today* (February 2013), and "The Series LCC: A New Planning Tool" by

Adrienne Randle Bond and Allen Sparkman, 45 *Texas Journal of Business Law* (Fall 2012). Mr. Sparkman is a contributing author to William Schmidt "Preserving Your Wealth: A Guide to Colorado Probate & Estate Planning" (2012), Practitioner's Guide to Colorado Business Organizations (Colorado Bar Association, Allen E. F. Rozansky and E. Lee Reichert, Managing Editors), and Guide for Colorado Nonprofit Organizations (Colorado Bar Association, Karen E. Leaffer, Managing Editor).

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Biography

Shana McGirl is an attorney in the Austin office of McGinnis Lochridge LLP. Ms. McGirl's practice focuses on corporate and securities law in a wide variety of industries. Her experience includes representing public and private clients in the areas corporate governance, business transactions, securities compliance, fiduciary responsibilities and financings. She has guided non-profit organizations on formation, tax and regulatory issues, and has also counseled clients regarding tax restructurings, fundraising and securities law compliance.

Education

Ms. McGirl earned her B.A., with high distinction, from the University of Virginia in 2009 and her J.D., with highest honors, from The University of Texas School of Law in 2015, where she was Clerk of the Chancellors honor society, member of the Order of the Coif, and an Associate Editor of *The Texas Law Review*.

Memberships

Ms. McGirl is a member of the State Bar of Texas, the Austin Bar Association, the Austin Young Lawyers Association and the Junior League of Austin.

I. Manager Managed v. Member Managed—General

A. An LLC's certificate of formation must state whether it will or will not have managers.[1] If the LLC will have managers, the certificate of formation must state the name and address of each initial manager.[2] If the LLC will not have managers, the certificate of formation must state the name and address of each initial member of the LLC.[3]

B. As can be seen, Texas law does not permit the managers of an LLC, or the members, if there are no managers, to hide behind a cloak of anonymity. Other states, for example, Colorado and Delaware, do not require the identification of managers or members in the LLC's formation document. However, if entity is required to register in Texas, it will have to disclose its governing persons, and the Texas Franchise Tax statutes require the filing of Public Information Reports that will also eliminate much of the anonymity of a foreign entity that is subject to the Franchise Tax.

II. Potential Management Issues

A. Each governing person of an LLC is an agent of the LLC for purposes of carrying out its business.[4]

B. In the case of a member-managed LLC, this agency authority extends to each member. Restrictions in the company agreement will not be binding on third parties without notice.

C. Some LLCs may desire that their managers act like a corporate board; the same may be true of member-managed LLCs, which may have a board of managing members that is comprised of all or some of the members. Some sample language to accomplish this

[1] Texas Business Organizations Code (hereafter "TBOC") § 3.010.
[2] *Id*.
[3] *Id*.
[4] TBOC § 101.254.

is:

> Except where any action or approval on the part of the Members is expressly required pursuant to this Agreement or under applicable law, the powers of the Company will be exercised by or under the authority of, and the business and affairs of the Company will be managed under the direction of, a board of management consisting of all the Persons serving as Managers of the Company (the "Board of Management"), and all decisions regarding any matter set forth herein or otherwise relating to or arising out of the business of the Company will be made by the Board of Management. [Without limiting the generality of the foregoing, for purposes of clarity, the Board of Management has sole authority to determine to file a proceeding on behalf of the Company under federal bankruptcy laws.] The Board of Management shall in all cases act as a group through actions in meetings or by written consent. No Manager (acting in his or her capacity as such) shall have any authority to bind the Company to any third party with respect to any action except pursuant to a resolution expressly authorizing such action which resolution is duly adopted by the Board of Management by the affirmative vote required for such matter pursuant to this Agreement.

D. The foregoing language is for a manager-managed LLC; it is easily adaptable for a member-managed LLC.

E. This limitation on the authority of an individual manager or member is not binding on third parties without notice.

III. Possible Securities Law Differences

A. Manager Managed LLCs. The authors believe it is likely that, except in rare cases, courts will determine that membership interests in a manager-managed LLC are a security subject to federal and state regulation. Where each of the members is also a manager of the manager-managed LLC and each of the managers actually participates in management decisions, defense counsel may make a credible argument that the membership interests in the manager-managed LLC were not securities because no member was dependent "solely" or "primarily" on the efforts of others. The SEC has adopted this position

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