

Management Provisions:

Pros and Cons of Manager Managed v. Member Managed Limited Liability Companies

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Date: July 12, 2018

Manager Managed v. Member Managed

- Certificate of formation must state whether the LLC will or will not have **managers**
- Must provide the name and address of each initial manager, or if no managers, each initial member
 - Texas law does not permit anonymity
 - Even foreign LLCs that register in Texas must disclose governing persons on Public Information Reports

Manager Managed v. Member Managed

Potential Management Issues

- Each governing person of an LLC is an agent of the LLC for purposes of carrying out its business
 - For member-managed LLCs, this agency authority extends to each member
 - Restrictions in Company Agreement not binding on third parties without notice
- Corporate-style management by a Board
 - Possible to achieve in both manager-managed and member-managed LLCs with the inclusion of certain language in the Company Agreement
 - Again, any limitations on the authority of an individual manager or member is not binding on third parties without notice

Agency Relationship

- Members may truly want to operate the LLC as a **traditional general partnership** with limited liability, with each member having the authority to act on behalf of the member-managed LLC
- In a member-managed LLC, each member, no matter how small the member's interest, is an agent of the LLC for the purposes of its business
- While this agency relationship can be contractually restricted in the company agreement, those restrictions are not effective against any third party without actual notice

Possible Securities Law Differences

Manager Managed LLCs

- Except in rare cases, LLC membership interests in manager-managed LLCs are securities under federal and state securities laws
- If each of the members is also a manager, and each of the managers actually participates in management decisions, there may be a credible argument that the membership interests in the manager-managed LLC are not securities because no member was dependent “solely” or “primarily” on the efforts of others

Possible Securities Law Differences

- Generally, a membership interest is a security if it is an “**investment contract**”
- One test, frequently applied by the SEC in this context, is the *Howey* test for investment contracts
- Investment contracts involve:
 - An investment of money
 - Into a common enterprise
 - With the expectation of profits
 - Solely from the efforts of the promoter or a **third party**

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First appeared as part of the conference materials for the
27th Annual LLCs, LPs and Partnerships session

"Management Provisions: Pros and Cons of Manager-Managed vs. Member-Managed"