

**Conversion of Business Entities  
into  
Limited Liability Companies**

**American Bar Association  
Section  
of  
Real Property, Trust & Estate Law**

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**RPTE Spring Symposium**  
**Conversion of Business Entities into Limited Liability Companies**  
**April 30, 2009**  
**Fact Pattern**

**Facts**

Clean Products of America, Inc. (“Clean Products”) is a privately held company engaged in the business of manufacturing and distributing commercial, institutional, and residential cleaning products. William Clean founded Clean Products after earning a chemical engineering degree on the GI bill after serving in the military during WW2. The business is not sexy, its products are not flashy, but the company has performed solidly for six decades through economic ups and downs. The business has made the Clean family very wealthy.

William Clean died several years ago, survived by his wife (Mary), a daughter (Susan) and a son (Bill), 5 grandchildren, and 2 great grandchildren. Susan and Bill and one grandchild are active in the business. Most executives and managers of the business, however, are not family members.

The Cleans are pillars of their community. The business provides hundreds of jobs, and the company and the family’s various foundations support virtually every philanthropic endeavor in town. In short, although privately held, Clean Products stakeholders extend well beyond the Clean family.

William and Mary Clean did extensive estate planning over the years with the result that most of the stock of Clean Products is owned by trusts for the benefit of their descendants. Susan and Bill, however, own outright a majority of the voting stock of the company. Clean Products is an S corporation, so the various trusts are either QSSTs or ESBTs depending on when they were established.

A number of the trusts for the benefit of grandchildren, including trusts that own some of the voting stock, terminate when beneficiaries reach the age of 35. Currently, the trustees of the various trusts are different combinations of Mary, Susan, and Bill. In the future, however, their descendants or financial institutions in different combinations will be trustees.

This potential fragmentation of control of Clean Products has Susan and Bill concerned. Susan and Bill are dedicated to the idea that the ownership of Clean Products should remain in the hands of the descendants of their parents and that the business continue to serve all of its stakeholders. Accordingly, they would like to restrict the transferability of ownership to descendants of their parents. They also wish to assure that the creditors of a stockholder do not end up with voting rights associated with Clean Products.

Appreciating that Clean Products has been a consistently outstanding economic performer over the years, and watching how their friends' stock market wealth has evaporated, they also wish to put in place a mechanism that would make it quite difficult for Clean Products to sell its business.

They realize that the corporate form of ownership may limit their ability to achieve these goals, so they have approached you as their estate planning lawyer to discuss why an LLC might be a better form of entity.

CP Real Estate Holdings, Inc. is an affiliated corporation that owns and manages real estate used by Clean Products in its operations throughout the United States. It is an S corporation as well with stock ownership similar to Clean Products. Susan and Bill are equally concerned about the control of CP, so whatever strategy they adopt for Clean Product, they would like to use for CP as well.

### **Questions**

How could converting to an LLC mitigate the fragmented control concern and accomplish the transfer restrictions?

With an LLC, are super majority voting restrictions more durable?

Is an LLC a better choice for asset protection planning purposes?

How would Clean Products accomplish the conversion from an S corporation to an LLC taxed under subchapter S?

What state and local tax issues need to be considered?

## MEMORANDUM

TO: Clean Products of America, Inc.

FROM: James D. Spratt, Jr.

DATE: April 1, 2009

RE: Clean Products of America, Inc./Clean Products of America, LLC Merger Steps

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This memorandum outlines the steps by which Clean Products of America, Inc. ("CPA, Inc."), a Georgia corporation which has elected to be an S corporation under Subchapter S of the Internal Revenue Code of 1986, as amended (the "Code"), will merge into a newly created Delaware limited liability company to be named Clean Products of America, LLC ("CPA, LLC"), which will elect to be classified as an association taxable as a corporation for federal income tax purposes.

### Step 1. Form CPA, LLC

CPA, LLC will be formed as a Delaware limited liability company pursuant to 6 Del. C. § 18-201. It is contemplated that the Operating Agreement of CPA, LLC will be in substantially the same form as the draft Operating Agreement attached hereto.

### Step 2. CPA, LLC Elects to be Classified as an Association Taxable as a Corporation

CPA, LLC will elect to be classified as an association taxable as a corporation, pursuant to Treasury Regulation Section 301.7701-3 by filing Form 8832, attached hereto, with the Internal Revenue Service (the "IRS"). CPA, LLC's Form 8832 will specify that the election is effective as of the date of formation of CPA, LLC. To be effective as of the date of formation, CPA, LLC's election must be filed with the IRS within seventy-five days of formation.

### Step 3. CPA, Inc. Merges into CPA, LLC

CPA, Inc. will merge with and into CPA, LLC, with CPA, LLC as the surviving entity in the merger pursuant to 6 Del. C. § 18-209. As a result of CPA, LLC's election to be classified as an association taxable as a corporation, the merger will constitute a reorganization under Section 368(a)(1)(F). See, e.g., PLR 200839017, PLR 200719005, PLR 200528021.

### Step 4. CPA, LLC Retains CPA, Inc's Tax Attributes

Under Treasury Regulation Section 1.381(b)-1(a)(2), CPA, Inc. will be treated just as CPA, Inc. would have been treated in the absence of the reorganization and the taxable year of CPA, Inc. will not close on the date of the merger. CPA, LLC will retain CPA, Inc.'s previously assigned employer identification number pursuant to Revenue Ruling 73-526, 1973-2 C.B. 404.

CPA, Inc.'s election to be an S corporation under Subchapter S of the Code will not terminate as a result of the reorganization pursuant to Revenue Ruling 64-250, 1964-2 C.B. 333. CPA, LLC therefore will not be required to file a new election to be an S corporation under Subchapter S of the Code.

*(FORM FOR LLC THAT IS TAXED AS AN S CORP)*

**OPERATING AGREEMENT**

**OF**

**CLEAN PRODUCTS OF AMERICA, LLC**

**(A Delaware Limited Liability Company)**

**DATED: \_\_\_\_\_, 2009**

**THE SHARES OF CLEAN PRODUCTS OF AMERICA, LLC ARE SUBJECT TO THE RESTRICTIONS ON TRANSFER SET FORTH IN SECTION 8 OF THIS OPERATING AGREEMENT. THE SHARES OF CLEAN PRODUCTS OF AMERICA, LLC HAVE BEEN ACQUIRED FOR INVESTMENT AND HAVE NOT BEEN REGISTERED UNDER (i) THE UNITED STATES SECURITIES ACT OF 1933, AS AMENDED (THE "FEDERAL ACT") OR (ii) ANY STATE SECURITIES LAWS. NEITHER THE SHARES REPRESENTED BY THIS OPERATING AGREEMENT NOR ANY PART THEREOF MAY BE OFFERED FOR SALE, PLEDGED, HYPOTHECATED, SOLD, ASSIGNED OR TRANSFERRED AT ANY TIME EXCEPT IN COMPLIANCE WITH THE TERMS AND CONDITIONS OF SECTION 8 OF THIS OPERATING AGREEMENT AND (i) PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER ANY APPLICABLE STATE SECURITIES LAWS OR IN A TRANSACTION THAT IS EXEMPT FROM REGISTRATION UNDER SUCH SECURITIES LAWS OR THAT IS OTHERWISE IN COMPLIANCE WITH SUCH SECURITIES LAWS AND (ii) PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER THE FEDERAL ACT OR IN A TRANSACTION THAT IS EXEMPT FROM REGISTRATION UNDER THE FEDERAL ACT OR THAT IS OTHERWISE IN COMPLIANCE WITH THE FEDERAL ACT.**

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Clean Products of America, LLC (the "Company") is organized as a limited liability company under the laws of the State of Delaware. Clean Products of America, Inc., a Georgia corporation, has been merged with and into the Company in the Merger, effective as of the Effective Date, with the Company as the surviving entity in the Merger. Effective as of the Effective Date, the Company has elected on IRS Form 8832 pursuant to Section 301.7701-3 of the Treasury Regulations to be classified as an association taxable as a corporation for federal income tax purposes. As a result, the Merger constitutes a "reorganization" under Section 368(a)(1)(F) of the Code and the election of Clean Products of America, Inc. to be an S corporation under Subchapter S of the Code will continue in effect without interruption, as provided in Revenue Ruling 64-250, 1964-2 C.B. 333. The Members have entered into this Operating Agreement (the "Agreement") to set forth the terms and conditions on which the management, business and financial affairs of the Company shall be conducted.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual promises, covenants and conditions herein contained, the receipt and sufficiency of which are hereby acknowledged, the parties do hereby covenant and agree as follows:

#### **ARTICLE I - Definitions**

"Act" shall mean the Delaware Limited Liability Company Act and its default provisions, 6 Del. C. § 18-101 et. seq. (as amended from time to time).

"Authorized Person" means any person authorized to act on behalf of the Company pursuant to Section 3.4.

"Certificate" shall mean Certificate of Formation of the Company as filed with the Delaware Secretary of State.

"Code" shall mean the Internal Revenue Code of 1986, as amended from time to time, and any successor act thereto.

"Descendant(s)" shall refer at any given time only to individuals who prior to that time were born in wedlock, born out of wedlock to parents who subsequently married each other or legally adopted before reaching the age of majority.

"Dissolution Event" shall have the meaning set forth in Section 10.1.

"Effective Date" shall mean \_\_\_\_\_, 2009.

"Indemnified Person" means any person entitled to indemnification pursuant to the terms set forth in Article VII.

"Majority" or "Majority-In-Interest" shall mean more than fifty percent of all Shares in the Company.

"Manager" refers to \_\_\_\_\_, whose rights, powers and duties are specified in Article III of this Agreement.



“Member” shall mean each Person that is identified as an initial Member in Schedule A hereto or is admitted as a Member as provided in Article VIII hereof. A Person shall cease to be a Member at such time as such Person no longer owns an Interest as a Member.

“Merger” shall mean the merger of Clean Products of America, Inc., a Georgia corporation, with and into the Company, effective as of the Effective Date, with the Company as the surviving entity.

“Permitted Transferee” shall mean any Person entitled to receive a transfer of an Interest without the consent of the Manager pursuant to Section 8.4.

“Person” shall mean any natural person, trust or entity, and the heirs, executors, administrators, legal representatives, successors, and assigns of such person where the context so admits.

“Share” shall mean a share of ownership in the Company. The Shares issued to each Member in the Merger in exchange for shares of common stock of Clean Products of America, Inc. are as set forth on Schedule A hereto. Each Member’s “limited liability company interest” as defined in Section 18-101(8) of the Act shall be based upon the number of Shares held by the Member.

“Substitute Member” refers to any Person admitted to the Company as a Member pursuant to Section 8.2(b).

“Treasury Regulations” shall mean the U.S. federal income tax regulations promulgated under the Code, as they may be amended from time to time.

## **ARTICLE II - Purpose, Principal Office, Etc.**

2.1 Purpose. The Company is formed to engage in any lawful activity for which limited liability companies may be formed under the Act, and to engage in any and all activities necessary or incidental to the foregoing, including, without limitation, acquiring, operating, managing, holding and disposing of real estate (and interests therein), stocks, bonds, notes, debentures, limited liability company interests, limited partner interests and other securities and assets of any kind.

2.2 Principal Office. The principal office of the Company shall be located at \_\_\_\_\_ . The location of the Company’s principal place of business may be changed by the Manager from time to time in accordance with the then applicable provisions of the Act and any other applicable laws.

2.3 Registered Office and Registered Agent. The Manager shall designate a registered office and a registered agent for service of process in accordance with the Act. The Manager may from time to time in accordance with the Act change the Company’s registered office or registered agent or both. The Manager shall select and designate a registered office and registered agent for the Company in each other state in which the Company is required to maintain or appoint one.

2.4 Term. The term of the Company shall begin upon the acceptance of the Certificate by the Office of the Secretary of State of the State of Delaware and shall continue in existence until terminated pursuant to Section 10.1 hereof.

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

2.6 Other Business. The Manager, Members and any Person affiliated with any of the Manager or Members may engage in or possess an interest in other business ventures of every kind and description, independently or with others. Neither the Company nor other Members shall have any rights in or to such independent ventures or the income or profits therefrom by virtue of this Agreement.

2.7 Transaction of Business. With the consent of the Manager, any Member shall have the authority to lend money to, borrow money from, act as surety, guarantor or endorser for, guarantee or assume one or more obligations of, provide collateral for, and transact other business with the Company. Any Member transacting business with the Company shall have the same rights and obligations with respect to such matter as a person who is not a Member or Manager.

2.8 Filings. The Manager and any Authorized Person are hereby designated as authorized persons, within the meaning of the Act, and are and have been authorized to execute and file (or direct the execution and filing of) the Certificate with the Office of the Secretary of State of the State of Delaware. The Manager and any Authorized Person are hereby authorized to execute, file and record all such other certificates and documents, including amendments to the Certificate, and to do such other acts as may be appropriate to comply with all requirements for the formation, continuation and operation of a limited liability company, the ownership of property and the conduct of business under the laws of the State of Delaware and any other jurisdiction in which the Company may own property or conduct business.

### **ARTICLE III - Management Of The Company**

3.1 Management and Control. The Members shall not be entitled to participate in the day-to-day affairs and management of the Company and except as otherwise expressly provided in the Act, the Certificate or this Operating Agreement, the Manager and any Authorized Person are hereby authorized and empowered on behalf of and in the name of the Company to carry out any and all of the purposes of the Company and to perform all acts and enter into and perform all contracts and other undertakings that it may, in the Manager's sole discretion, deem necessary, advisable or incidental thereto. Notwithstanding the foregoing and Section 18-402 of the Act, no Member other than the Manager shall have authority to manage or specifically bind the Company except as specifically provided in this Operating Agreement.

3.2 Manager. \_\_\_\_\_ shall serve as the Manager of the Company.

3.3 Powers. Except as otherwise expressly provided in the Act, the Certificate or this Operating Agreement, the Manager shall have full, exclusive and complete discretion, power and authority to manage, control, administer and operate the business and affairs of the Company for the purposes herein stated, and to make all decisions affecting such business and affairs, including without limitation, the power to:

- (a) acquire by purchase, lease or otherwise, any real or personal property, tangible or intangible;
- (b) construct, operate, maintain, finance and improve and to own, sell, convey, assign, mortgage or lease any property owned or held by the Company;
- (c) enter into agreements and contracts in connection with the Company's business;
- (d) borrow money for and on behalf of the Company and execute any guaranty on behalf of a third party and pledge Company property to secure any such obligation;
- (e) execute or modify agreements or contracts with respect to any part or all of the property owned or held by the Company;
- (f) repay, in whole or in part, refinance, amend, modify or extend any mortgages or deeds of trust that may affect any property owned or held by the Company and, in connection therewith, to execute for and on behalf of the Company any extensions, renewals or modifications of such mortgages or deeds of trust;
- (g) execute any and all other instruments and documents that may be necessary, or in the reasonable opinion of the Manager, desirable to carry out the intent and purpose of this Agreement;
- (h) make any and all expenditures that the Manager, in the Manager's sole discretion, deems necessary or appropriate in connection with the management of the affairs of the Company and the carrying out of its obligations and responsibilities under this Agreement, including, without limitation, all operating, capital, legal, accounting, investment advisory and other related expenses incurred in connection with the organization, financing and operation of the Company or in connection with its property;
- (i) enter into any kind of activity necessary for, in connection with, or incidental to, the accomplishment of the purposes of the Company;
- (j) open bank accounts, and invest and reinvest Company monies in short term instruments or money market funds or any securities or other investments, whether or not publicly traded or readily marketable;
- (k) loan money on behalf of the Company;
- (l) carry out the Company purposes through other limited liability companies, joint ventures, partnerships, corporations, trusts or other entities;

- (m) purchase liability and other insurance to protect the Company's property and business, including policies of life insurance which insure the life of any Member;
- (n) pay all Company debts, obligations and expenses;
- (o) employ accountants, attorneys, appraisers or other professionals to perform services for or on behalf of the Company and to compensate them from Company funds; and
- (p) perform any and all other acts as the Manager may deem necessary or appropriate to the conduct of the Company's business.

3.4 Authorized Persons. The Manager may (a) authorize by written action any person to enter into and perform any agreement on behalf of the Company, and (b) appoint individuals (including one or more Persons who are serving as Managers), with such titles as they may select, as officers, employees or agents of the Company to act on behalf of the Company, for such reasonable compensation as the Manager shall determine, and with such power and authority as the Manager may delegate from time to time to any such person. Any such persons, individuals, officers, employees and agents (each "Authorized Person") may be removed by the Manager at any time and from time to time, with or without cause.

3.5 Authority. The Manager and any Authorized Person shall have the right to act for and bind the Company and may execute documents, instruments and contracts in the name of and on behalf of the Company. Any person or entity dealing with the Company, the Members, the Manager or any Authorized Person may rely upon a certificate signed by the Manager as to the identity of the Members, the Manager or such Authorized Person and as to the authority of the Manager or such Authorized Person to execute and deliver any agreement or other instrument or document on behalf of the Company. No person dealing with the Manager need inquire into the validity or propriety of any agreement, instrument or document executed in the name of the Company by the Manager, or as to the authority of the Manager executing the same.

3.6 Reliance by Authorized Persons. An Authorized 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 or entity as to matters the Authorized Person reasonably believes are within such person's or entity's professional or expert competence.

3.7 Compensation and Reimbursement. The Manager shall be entitled to reasonable compensation for services rendered to the Company in that capacity as well as to be reimbursed for all expenses reasonably incurred by the Manager in connection with the business and purposes of the Company.

#### **ARTICLE IV - Ownership of Shares**

4.1 Initial Capital Contributions. Each of the Members owns the number of Shares set forth opposite such Member's name on Schedule A hereto.

#### **ARTICLE V - Tax Elections**

5.1 Election to be Classified as an Association Taxable as a Corporation. The Company and each Member have elected on IRS Form 8832 pursuant to Section 301.7701-3 of the Treasury Regulations for the Company to be classified as an association taxable as a corporation for federal income tax purposes and all other tax purposes.

5.2 Subchapter S Election. The Company has elected pursuant to Section 1362(a) of the Code to have the provisions of Subchapter S of the Code apply to the Company and its Members.

5.3 Members' Covenants. Each Member hereby covenants and agrees that he, she or it will not commit any act which would cause any tax elections described in Section 5.1 or 5.2 to be terminated and that he, she or it will take such steps as may be necessary or appropriate to assure that each such election made by the Company will continue in effect until voluntarily revoked with the unanimous consent of the Manager and a Majority-In-Interest of the Members.

## **ARTICLE VI - Distributions**

6.1 Non-Liquidating Distributions. Cash and other property of the Company may be distributed to the Members in such amounts and at such times as the Manager shall determine in the Manager's discretion, but always in proportion to the number of Shares owned by each Member on the record date of the distribution.

6.2 Member Tax Liability. The amount of any tax which is required to be paid or withheld by the Company with respect to any Member's allocable share of the income of the Company shall be assessed to such Member, who shall pay the same to the Company or the taxing authority forthwith upon demand of the Manager. The Manager may in the Manager's discretion set off any such tax against any amounts otherwise distributable to a Member under this Agreement. Each Member hereby indemnifies the Company and every other Member and agrees to hold them harmless from any liability or loss they might incur by virtue of any such tax with respect to such Member's allocable share of the income of the Company.

6.3 Restrictions on Distributions. Notwithstanding the distributions contemplated by this Section, if the Company has creditors, no distribution may be made if, after giving effect to such distribution, either (i) the Company would be unable to pay its debts as they become due in the usual course of business or (ii) the net assets of the Company would be less than zero.

6.4 Liquidating Distributions. Distributions of proceeds resulting from a termination and dissolution of the Company shall be distributed by the Manager in the manner set forth in Section 10.2 hereof.

## **ARTICLE VII - Exculpation, Indemnification And Insurance**

7.1 Exculpation. So long as the Manager acts in good faith with respect to the conduct of the business and affairs of the Company, the Manager shall not be liable or accountable to the Company or to the Members, in damages or otherwise, for any error of judgment, for any mistake of fact or of law, for any other act or thing that the Manager may do or refrain from doing in connection with the business and affairs of the Company or for any act

or omission performed or omitted by the Manager or an Authorized Person, except for willful misconduct or gross negligence or breach of fiduciary duty, and further except for breaches of contractual obligations or agreements between the Manager and the Company. Whenever in this Agreement the Manager is permitted or required to make decisions in good faith, the Manager shall act under such standard imposed by this Agreement or any relevant provisions of law or in equity or otherwise.

7.2 Reliance. The Manager 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 of the Members, officers, employees or committees, or by any other person as to matters the Manager 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, without limitation, information, opinions, reports or statements as to the value and the amount of the assets, liabilities, profits or losses of the Company or any other facts pertinent to the existence and amount of assets from which distributions to Members might properly be paid). In addition, the Manager may consult with legal counsel, accountants, appraisers, management consultants, investment bankers and other consultants and advisors selected by him or her, and any opinion of any such person as to matters which the Manager reasonably believes to be within such person's professional or expert competence shall be a full and complete authorization and shall provide full and complete protection in respect of any action taken or suffered or omitted by the Manager hereunder in good faith and in accordance with such opinion.

7.3 Indemnification. In addition to any other powers provided by law:

(a) The Company has the power to indemnify any person (an "Indemnified Person") who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the Company) by reason of the fact that the Indemnified Person is or was a Manager, Member, Authorized Person, employee or agent of the Company, or is or was serving at the request of the Company as a Manager, Member, officer, director, Authorized Person, employee or agent of another company, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if the Indemnified Person acted in good faith and in a manner the Indemnified Person reasonably believed to be not opposed to the best interests of the Company and, with respect to any criminal action or proceeding, had no reasonable cause to believe the Indemnified Person's conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the Indemnified Person did not act in good faith and in a manner which the Indemnified Person reasonably believed to be or not opposed to the best interests of the Company (measured as aforesaid), and, with respect to any criminal action or proceeding, had reasonable cause to believe that the Indemnified Person's conduct was unlawful.

(b) The Company has the power to indemnify any Indemnified Person who was or is a party or is threatened to be made a party to any threatened, pending or contemplated action or

suit by or in the right of the Company to procure a judgment in its favor by reason of the fact that the Indemnified Person was or is a Manager, Member, Authorized Person, employee or agent of the Company, or is or was serving at the request of the Company as a Member, Manager, Authorized Person, director, officer, employee or agent of another company, partnership, joint venture, trust or other enterprise at the request of the Company against expenses (including attorneys fees) actually and reasonably incurred by the Indemnified Person in connection with the defense or settlement of such action or suit if the Indemnified Person acted in good faith and in a manner the Indemnified Person reasonably believed to be in or not opposed to the best interests of the Company (measured as aforesaid) and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of the Indemnified Person's duty to the Company unless and only to the extent that the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which such court shall deem proper.

(c) To the extent that a Manager, Member, Authorized Person, director, employee or agent of a Company has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subparagraphs (a) or (b), or in defense of any claim, issue or matter therein, the Indemnified Person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him, her or it in connection therewith.

(d) Any indemnification under subparagraphs (a) or (b) (unless ordered by a court) shall be made by the Company only as authorized in the specific case upon a determination that indemnification of the Manager, Member, Authorized Person, employee or agent is proper in the circumstances because such Person has met the applicable standard of conduct set forth in subparagraphs (a) or (b). Such determination shall be made by the Manager if the Manager was not a party to such action, suit or proceeding supported by independent legal counsel in a written opinion. If the Manager was a party to such action, suit, or proceeding, then such determination shall be made by a Majority-In-Interest of the Members provided such Members were not parties to such action, suit, or proceeding supported by independent legal counsel in a written opinion.

(e) The indemnification provided by this Section 7.3 shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any law, agreement, or otherwise, both as to action in the Indemnified Person's official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a Manager, Member, Authorized Person, employee or agent and shall inure to the benefit of the heirs, personal representatives, successors and assigns of such Person.

7.4 Insurance. The Company shall have the power to purchase and maintain insurance on behalf of any Person who is or was a Manager, Member, Authorized Person, employee or agent of the Company, or is or was serving at the request of the Company as a Manager, Member, Authorized Person, director, officer, employee or agent of another company, partnership, joint venture, trust or other enterprise against any liability asserted against the Indemnified Person and incurred by the Indemnified Person in any such capacity or arising out of the Indemnified Person's status as such, whether or not the Company would have

the power to indemnify the Indemnified Person against such liability under the provisions of this Section.

7.5 Expenses. To the fullest extent permitted by applicable law, expenses (including, without limitation, attorneys' fees and disbursements) incurred by an Indemnified Person in defending any claim, demand, action (civil or criminal), suit or proceeding shall, from time to time, be advanced by the Company prior to the final disposition of such claim, demand, action, suit or proceeding, subject to recapture by the Company following a later determination that such Indemnified Person was not entitled to be indemnified hereunder.

**ARTICLE VIII - Resignation; Admission Of Members**  
**Voluntary Transfers Of Interests; Involuntary Transfers Of Interests**

8.1 Resignation.

(a) Resignation by Manager. The Manager may resign at any time by giving written notice to the Members of the Company. The resignation of the Manager shall take effect upon delivery of notice thereof or at such later time as shall be specified in such notice; and, unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective. Such resignation may be revoked at any time before its effective date by delivery of a notice of revocation to the Members. The resignation of the Manager shall not affect such Manager's rights and liabilities as a Member, if any.

(b) Resignation by Member. In accordance with the Act, no Member shall have the right to resign from the Company, except as a result of a transfer of his, her or its Shares pursuant to Section 8.4 hereof.

8.2 Admission of Members.

(a) Admission of New Members. No person shall be admitted to the Company as a Member without the written consent of the Manager. Upon the admission of one or more new Members, the Manager is authorized to cause the Company to issue Shares to the new Member based upon the value of the new Member's capital contribution in relation to the value of the Company upon admission. Each new Member shall have all of the rights, duties and obligations of the original Members hereunder and in all respects each new Member's admission shall be subject to all of the terms and provisions of this Agreement.

(b) Admission of Substitute Member. In the event a Member transfers all or any part of his, her or its Shares in accordance with this Agreement, the transferee of such Member shall be admitted to the Company as a Substitute Member provided that:

(i) the transferring Member and his, her or its transferee execute and deliver such instruments as the Manager deems necessary or desirable to effect such substitution;



(ii) such transferring Member furnishes to the Manager such assurances as the Manager may request, including, without limitation, an opinion of counsel, which opinion and counsel are satisfactory to the Manager, that the transfer of such Member's Shares complies with, or does not require the registration under, applicable Federal and state securities laws, and that such transfer shall not require the Company to be registered under the Investment Company Act of 1940, as amended; and

(iii) except as provided in Sections 8.4 and 8.8, the Manager consents in writing to the substitution of such transferee as a Substitute Member.

Substituted Members shall have all of the rights, duties and obligations of the original Members hereunder, and in all respects their admission shall be subject to all of the terms and provisions of this Agreement.

(c) Unadmitted Assignee. A person who acquires all or any portion of a Member's Shares, but who is not admitted as a Substitute Member pursuant to Section 8.2(b) shall be a mere assignee (herein an "Unadmitted Assignee") under the Act and shall have the right to receive such distributions to which the assignor was entitled to the extent assigned and shall be allocated the items of income, gain, loss and deduction for income tax purposes that are attributable to such Shares transferred to such person and shall otherwise be treated as a Member for purposes of the distribution of cash or other assets to such person upon dissolution of the Company pursuant to Section 10.1, but shall have no right to exercise any rights as a Member under this Agreement, to require any information or account of Company transactions, or to inspect the Company books and records.

8.3 Voluntary Transfers of Shares. Except as provided under Sections 8.4 and 8.6, each Member hereby covenants and agrees that he, she or it shall only sell, assign, transfer, mortgage, pledge, encumber, hypothecate or otherwise dispose of all or any part of his, her or its Shares to any Person after first having obtained the written consent of the Manager.

8.4 Permitted Transfers. Notwithstanding any other provision of this Agreement to the contrary, if a Member's Shares are (a) transferred (1) by gift or sale during the lifetime of the Member, (2) as a bequest or devise upon the death of the Member, (3) upon distribution to a beneficiary of a trust that is a Member, or (4) by a custodian for a minor under the laws of any state, to such minor when the minor has attained the age of termination of such custodianship under the applicable law, and (b) the transferee is a member of the class consisting of (i) the Descendants of WILLIAM CLEAN and MARY CLEAN and any trust created and existing for the primary benefit of one or more Descendants of WILLIAM CLEAN and MARY CLEAN; (ii) a trust established for the primary benefit of a spouse of a Descendant of WILLIAM CLEAN and MARY CLEAN, where such spouse does not possess a power of appointment or other power of disposition over the property of such trust, other than a power exercisable only in favor of Descendants of WILLIAM CLEAN and MARY CLEAN, and where the remainder interest in such trust shall in all events be distributed to individuals or trusts described in the immediately preceding clause (i) or to trusts described in this clause (ii) ("Permitted Transferee(s)"), the transfer shall be valid and the Permitted Transferee shall be admitted as a Substitute Member on the terms and conditions of Section 8.2(b), but without the requirement of the consent of the Manager. Notwithstanding the foregoing, a trust shall be a Permitted

Transferee only if it is an eligible holder of an interest in a limited liability company that has elected to be classified as an association taxable as a corporation which has in effect an election under Section 1362(a) of the Code to be treated as an S corporation.

8.5 Members Put Right.

8.6 Involuntary Transfer of Shares. In the event the Shares of a Member or Unadmitted Assignee are taken or encumbered by levy, foreclosure, charging order, execution, assignment for the benefit of creditors or other similar involuntary proceeding (an "Involuntary Transfer") or in the event a Member or Unadmitted Assignee voluntarily files or is involuntarily subject to a bankruptcy proceeding (the "debtor Member"), the statutory or other involuntary assignee (the "Involuntary Assignee") of such Shares or the debtor Member, as the case may be, shall have the rights, duties and obligations of an Unadmitted Assignee in accordance with Section 8.2(c) hereof.

8.7 Death, Incompetency or Termination of a Member. In the event of the incompetency of a Member (who is a natural person), any guardian, conservator, or trustee of such incompetent Member shall have the rights, duties and obligations of a Substitute Member as defined in Section 8.2(b) hereof. In the event of the death of a Member (who is a natural person), the personal representative of the deceased Member's estate or the trustee of any trust serving as a testamentary substitute shall have the rights, duties and obligations of a Substitute Member as defined in Section 8.2(b) hereof only if all persons who are to receive Shares under the deceased Member's Will or testamentary substitute or under the applicable laws of intestacy are Permitted Transferees.

**ARTICLE IX - Books And Records; Bank Accounts**

9.1 Books and Records. The Manager shall keep or cause to be kept complete and accurate books and records of the Company, using the same methods of accounting which are used in preparing the required tax returns of the Company to the extent applicable and otherwise in accordance with the cash method of accounting. Such books and records shall be maintained and be available, in addition to any documents and information required to be kept under the Act, at its principal office, for examination and copying by any Member, or his or her duly authorized representative, at his or her reasonable request and at his or her expense during ordinary business hours. A current list of the full name and last known address of each Member, a copy of this Agreement, any amendments thereto and the Certificate, executed copies of all powers of attorney, if any, pursuant to which this Agreement or the Certificate or any amendment has been executed, copies of the Company's financial statements and required-tax returns and reports, if any, for the three most recent years, shall also be maintained at such office.

9.2 Bank Accounts. Bank accounts and/or other accounts of the Company shall be maintained in such banking and/or other financial institution(s) as shall be selected by the Manager, and withdrawals shall be made and other activity conducted on such signature or signatures as shall be designated by the Manager.

9.3 Filing Returns and Other Writings. The Manager shall cause the preparation and timely filing of all required Company tax returns and shall, on behalf of the Company, timely file all other writings required by any governmental authority having jurisdiction to require such filing. On or before the date which is 15 days before the due date (including extensions) of any required federal income tax return of the Company for each year, each Member shall be furnished with a copy of his, her or its Form K-1 with respect to the Company's federal income tax return for the year.

## **ARTICLE X - Dissolution And Winding Up**

10.1 Dissolution Events. The Company shall be dissolved and its affairs shall be wound up upon the first to occur of the following (each a "Dissolution Event"):

- (a) The consent of the Manager;
- (b) The entry of a decree of judicial dissolution; or
- (c) At any time there are no Members, unless the Company is continued as permitted under the Act.

### 10.2 Winding Up.

- (a) Upon the occurrence of a Dissolution Event, the Manager shall wind up the Company's affairs.
- (b) The Manager shall sell such assets as the Manager deems proper to pay or provide for the Company's debts or liabilities and to generate cash for distribution to the Members.
- (c) Any cash or other assets, based on their fair market values, remaining, after paying or providing for payment of the debts and liabilities of the Company, in any order of priority required by the Act, shall be distributed to the Members in proportion to their Shares.

### 10.3 State Law Compliance.

- (a) The Manager may utilize any provisions of the Act designed to limit liability of the Members after distribution of the Company's assets.
- (b) The Manager shall take all steps which are required by the Act to complete the dissolution of the Company of record.

## **ARTICLE XI - Miscellaneous**

11.1 Binding Effect, Not for Benefit of Creditors. Subject to the restrictions on transfers set forth herein, the terms of this Agreement shall be binding upon and shall inure to the benefit of the Members, their respective successors, successors-in-title, heirs, legal representatives and assigns; and each and every successor-in-interest to any Member, whether such successor acquires his, her or its Shares by way of inheritance, gift, purchase, foreclosure or

any other method, and each Member shall hold his, her or its Shares subject to all of the terms and provisions of this Agreement. None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditor of the Company or of any Member (including any Member acting in his, her or its capacity as a creditor of the Company).

11.2 Amendment. This Agreement may be amended or modified only by written instrument signed by the Manager and a Majority in Interest of the Members; further provided, that no change or modification adversely affecting the rights of any Member to allocations or distributions under this Agreement, or the extent to which any Member can transfer Shares under this Agreement, shall be effective unless the same is in writing and signed by such Member. No term or condition of this Agreement shall be considered waived by a Member, unless the waiver is in writing and is signed by such Member. Notwithstanding the foregoing, an amendment to this Agreement shall be valid and binding on all Members if its purpose is to reflect the admission of a new Member or a Substitute Member or the transfer of a Member's Shares (provided such admission or transfer is in compliance with the other provisions of this Agreement), and it is signed by the Person(s) having the power to approve such admission or transfer and, as the case may be, the newly admitted Member, Substitute Member or the transferor and transferee Members. Any amendment made pursuant to this Section 11.2 may be made effective as of the date of this Agreement.

11.3 Additional Documents and Acts. Each Member agrees to timely execute and deliver such additional documents and instruments and to timely perform such additional acts as may be necessary or appropriate to effectuate, carry out and perform all of the terms, provisions, and conditions of this Agreement and the transactions contemplated hereby.

11.4 Severability of Provisions. Each provision of this Agreement shall be considered severable and, 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.

11.5 Waiver of Partition. Each Member agrees that irreparable damage would be done to the Company if any Member brought an action in court to dissolve the Company. Accordingly, except as may be otherwise expressly authorized in this Agreement, each Member agrees that he, she or it shall not, either directly or indirectly, take any action to require partition or appraisal of the Company or of any of the assets or properties of the Company, and notwithstanding any provisions of this Agreement to the contrary, each Member (and his, her or its successors and assigns) accepts the provisions of this Agreement as his, her or its sole entitlement on termination, dissolution or liquidation of the Company and hereby irrevocably waives any and all right to maintain any action for partition or to compel any sale or other liquidation with respect to his, her or its Interest, in or with respect to, any assets or properties of the Company; and each Member agrees that he, she or it will not petition a court for the dissolution, termination or liquidation of the Company.

11.6 Title to Assets. Title to the assets and to any other property, real or personal, owned by or leased to the Company shall be held in the name of the Company unless, in the opinion of counsel to the Company or if the Manager so determines, it is advisable to hold record

title in a nominee or in a limited liability company or other entity wholly owned, directly or indirectly, by the Company.

#### 11.7 Resolution of Controversies.

(a) Intent. It is the intention of the parties to bring all disputes between or among any of them to an early, efficient and final resolution. Therefore, it is hereby agreed that all disputes, claims and/or controversy, including, without limitation, management, fiduciary, contract, quasi contract, equitable claims, tort claims, statutory claims or any other kind of controversy, claim or dispute shall be resolved by mediation and arbitration as provided herein. Nothing herein shall preclude any party from applying to a court of competent jurisdiction for preliminary injunctive relief or a temporary restraining order or other preliminary relief as may be required.

(b) Mediation. All disputes arising among the Members with respect to Company matters shall be resolved by mediation in the following manner. Mediation shall be initiated by any Member by written request to the Manager for selection of a mediator, which request (the "Mediation Request") shall identify the matters to be mediated. Such mediation shall occur either in Wilmington, Delaware or Atlanta, Georgia. The selection as between Wilmington, Delaware and Atlanta, Georgia shall be in the discretion of the Manager. The mediator shall be an individual selected by the Manager within **[fifteen (15)]** days after the date of the Mediation Request. Costs and expenses of mediator shall be borne by the party that initiates the mediation.

(c) Arbitration. In the event the Members are unable to reach agreement through mediation, then such dispute arising among the Members shall be resolved by arbitration in the following manner. Such arbitration shall occur in either Wilmington, Delaware or Atlanta, Georgia in accordance with the rules of the American Arbitration Association then in effect. The selection as between Wilmington, Delaware or Atlanta, Georgia shall be in the discretion of the Manager. The arbitrator shall be an individual selected by the Manager. The determination of the arbitrator shall be binding upon all parties in accordance with the procedures of the American Arbitration Association. The prevailing party shall be entitled to attorney's fees and costs including the expense of arbitration.

(d) Confidentiality Relating to Mediation or Arbitration. Except to the extent necessary to enforce the determination by any mediator or arbitrator pursuant to the dispute resolution provisions of this Section 11.7, or as required by law, the parties to any dispute subject to the dispute resolution provisions of this Section and their employees, officers, directors, counsel, consultants and expert witnesses, if any, shall maintain as confidential the fact of the mediation or arbitration proceeding, the determination by the mediator or arbitrator, contemporaneous or historical documents exchanged or produced during the mediation or arbitration proceeding, and memorials, briefs and other documents prepared for mediation or arbitration.

11.8 Applicable Law. This Agreement and the rights and obligations of the parties hereunder shall be governed by and interpreted and enforced in accordance with the laws of the State of Delaware, notwithstanding any choice of law rules to the contrary.

11.9 Entire Agreement. This Agreement, including the Certificate, which is hereby incorporated herein, embodies the entire agreement and understanding between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings relating to such subject matter.

11.10 Non-Waiver. The failure of any Member to insist upon strict performance of a covenant hereunder or of any obligation hereunder, irrespective of the length of time for which such failure continues, shall not be a waiver of such Member's right to demand strict compliance in the future. No consent or waiver, expressed or implied, to or of any breach or default in the performance of any obligation hereunder, shall constitute a consent or waiver to or of any other breach or default in the performance of the same or any other obligation hereunder.

11.11 Notices. Any and all notices provided under this Agreement shall be treated as having been received (i) on the fourth business day after being sent by registered or certified mail, return receipt requested, postage prepaid, or (ii) on the first business day after being sent by commercial expedited delivery service providing a receipt for delivery or by telecopy or e-mail by a machine providing automatic, printed confirmation of successful transmission (if the telecopy number or e-mail address, as the case may be, of the person to whom the notice is addressed is set forth as part of such person's address for purposes of this Agreement) or by United States Postal Service express mail. All such notices in order to be effective shall be addressed, if to the Manager or the Company at the principal office of the Company, if to a Member at the last address of record on the Company's books; and copies of such notices shall also be sent to the last address for the recipient which is known to the sender, if different from the address so specified.

11.12 Titles, etc. Article and paragraph titles are for descriptive purposes only and shall not control or alter the meaning of the Agreement as set forth in the text. As used herein, the singular shall include the plural and the masculine gender shall include the feminine and neuter, and vice versa, unless the context otherwise requires.

11.13 Counterparts. This Agreement may be executed in any number of counterparts, all of which together shall for all purposes constitute one Agreement, binding on all parties notwithstanding that all parties have not signed the same counterpart.

11.14 Certificates of Shares. The Manager may elect to evidence the Members respective Shares in the Company by issuing share certificates ("Share Certificates"). In such event, the Manager shall institute such procedures as may be necessary to provide for the registry of such Share Certificates and the transfer thereof consistent with the provisions of this Agreement.

IN WITNESS WHEREOF, the undersigned has executed this Agreement on the date shown above.

**[TO BE EXECUTED BY THE MANAGER AND EVERY OWNER OF ENTITY  
CONVERTING TO THIS LLC FORMAT]**

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Manager

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Member

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Member

SCHEDULE A

Member's Name

Shares

Address



## Entity Classification Election

<b>Type or Print</b>	Name of eligible entity making election	Employer identification number
	Number, street, and room or suite no. If a P.O. box, see instructions.	
	City or town, state, and ZIP code. If a foreign address, enter city, province or state, postal code and country. Follow the country's practice for entering the postal code.	

▶ Check if:  Address change

**1 Type of election** (see instructions):

- a  Initial classification by a newly-formed entity. Skip lines 2a and 2b and go to line 3.
- b  Change in current classification. Go to line 2a.

**2a** Has the eligible entity previously filed an entity election that had an effective date within the last 60 months?

- Yes.** Go to line 2b.
- No.** Skip line 2b and go to line 3.

**2b** Was the eligible entity's prior election for initial classification by a newly formed entity effective on the date of formation?

- Yes.** Go to line 3.
- No.** Stop here. You generally are not currently eligible to make the election (see instructions).

**3** Does the eligible entity have more than one owner?

- Yes.** You can elect to be classified as a partnership or an association taxable as a corporation. Skip line 4 and go to line 5.
- No.** You can elect to be classified as an association taxable as a corporation or disregarded as a separate entity. Go to line 4.

**4** If the eligible entity has only one owner, provide the following information:

- a Name of owner ▶ .....
- b Identifying number of owner ▶ .....

**5** If the eligible entity is owned by one or more affiliated corporations that file a consolidated return, provide the name and employer identification number of the parent corporation:

- a Name of parent corporation ▶ .....
- b Employer identification number ▶ .....



## General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

### What's New

This revision of the Form 8832 instructions reflects an update to the filing locations. Our previous revision (December 2006) stated that all entity classification elections were sent to the service center in Ogden, UT. *This is no longer the case.* Now the form is filed either in Cincinnati or Ogden depending upon your principal business location. See *Where To File* on page 4 for your filing location.

- You are not required to sign the copy of Form 8832 filed with your tax return. See *Consent statement and signature(s)* on page 6.
- New questions on lines 2a and 2b highlight the general rule which limits an eligible entity's ability to change its classification by election again during the 60 months after the effective date of making an earlier entity classification election.
- All single-owner eligible entities electing either corporate or disregarded entity status must provide the name and identifying number of their owner on lines 4a and 4b. Previously this requirement applied only to single-owner eligible entities electing disregarded entity status.
- All eligible entities owned by one or more affiliated corporations that file a consolidated return must provide the name and employer identification number (EIN) of their parent corporation on lines 5a and 5b. Previously this requirement applied only to single-owner eligible entities electing disregarded entity status.
- All foreign eligible entities making an entity classification election, including those also organized under domestic law, must provide the name of the foreign country in which they are organized on line 7. Previously this requirement applied only to single-owner foreign eligible entities electing disregarded entity status.

### Purpose of Form

An eligible entity uses Form 8832 to elect how it will be classified for federal tax purposes, as a corporation, a partnership, or an entity disregarded as separate from its owner. An eligible entity is classified for federal tax purposes under the default rules described below unless it files Form 8832 or Form 2553, Election by a Small Business Corporation, to elect a classification or change its current classification. See *Who Must File* on page 4.



*A new eligible entity should not file Form 8832 if it will be using its default classification (see Default Rules below).*

**Eligible entity.** An eligible entity is a business entity that is not included in items 1, or 3 through 9, under the definition of **corporation** provided under *Definitions*.

Eligible entities include limited liability companies (LLCs), partnerships, and any foreign entity that is not identified as a corporation under Regulations section 301.7701-2(b)(8) (see item 3 below).

Generally, corporations are not eligible entities. However, the following types of corporations are treated as eligible entities:

1. An eligible entity that previously elected to be an association taxable as a corporation by filing Form 8832. An entity that elects to be classified as a corporation by filing Form 8832 can make another election to change its classification (see the *60-month limitation rule* discussed below in the instructions for lines 2a and 2b).
2. A foreign eligible entity that became an association taxable as a corporation under the foreign default rule described below.
3. A foreign corporation that is not identified as a corporation under Regulations section 301.7701-2(b)(8). If a foreign corporation is not identified on the list included in these regulations, it qualifies as an eligible entity. See the list of *Foreign Entities Classified as Corporations for Federal Tax Purposes* under this regulation on page 6. Refer to the regulations for any changes to the list made after these instructions were printed.

The IRS will use the information entered on this form to establish the entity's filing and reporting requirements for federal tax purposes.

### Default Rules

**Existing entity default rule.** Certain domestic and foreign entities that were in existence before January 1, 1997, and have an established federal tax classification generally do not need to make an election to continue that classification. If an existing entity decides to change its classification, it may do so subject to the 60-month limitation rule. See the instructions for lines 2a and 2b. See Regulations sections 301.7701-3(b)(3) and 301.7701-3(h)(2) for more details.

**Domestic default rule.** Unless an election is made on Form 8832, a domestic eligible entity is:

1. A partnership if it has two or more members.
2. Disregarded as an entity separate from its owner if it has a single owner.

A change in the number of members of an eligible entity classified as an **association** (defined below) does not affect the entity's classification. However, an eligible entity classified as a partnership

will become a disregarded entity when the entity's membership is reduced to one member and a disregarded entity will be classified as a partnership when the entity has more than one member.

**Foreign default rule.** Unless an election is made on Form 8832, a foreign eligible entity is:

1. A partnership if it has two or more members and at least one member does not have limited liability.
2. An association taxable as a corporation if all members have limited liability.
3. Disregarded as an entity separate from its owner if it has a single owner that does not have limited liability.

### Definitions

**Association.** For purposes of this form, an association is an eligible entity taxable as a corporation by election or, for foreign eligible entities, under the default rules (see Regulations section 301.7701-3).

**Business entity.** A business entity is any entity recognized for federal tax purposes that is not properly classified as a trust under Regulations section 301.7701-4 or otherwise subject to special treatment under the Code regarding the entity's classification. See Regulations section 301.7701-2(a).

**Corporation.** For federal tax purposes, a corporation is any of the following:

1. A business entity organized under a federal or state statute, or under a statute of a federally recognized Indian tribe, if the statute describes or refers to the entity as incorporated or as a corporation, body corporate, or body politic.
2. An association (as determined under Regulations section 301.7701-3).
3. A business entity organized under a state statute, if the statute describes or refers to the entity as a joint-stock company or joint-stock association.
4. An insurance company.
5. A state-chartered business entity conducting banking activities, if any of its deposits are insured under the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1811 et seq., or a similar federal statute.
6. A business entity wholly owned by a state or any political subdivision thereof, or a business entity wholly owned by a foreign government or any other entity described in Regulations section 1.892-2T.
7. A business entity that is taxable as a corporation under a provision of the Code other than section 7701(a)(3).
8. A foreign business entity listed on page 6. See Regulations section 301.7701-2(b)(8) for any exceptions and inclusions to items on this list and for any revisions made to this list since these instructions were printed.

9. An entity created or organized under the laws of more than one jurisdiction (business entities with multiple charters) if the entity is treated as a corporation with respect to any one of the jurisdictions. See Regulations section 301.7701-2(b)(9) for examples.

**Disregarded entity.** A disregarded entity is an eligible entity that is treated as an entity not separate from its single owner. Its separate existence will be ignored for federal tax purposes unless it elects corporate tax treatment.

**Limited liability.** A member of a foreign eligible entity has limited liability if the member has no personal liability for any debts of or claims against the entity by reason of being a member. This determination is based solely on the statute or law under which the entity is organized (and, if relevant, the entity's organizational documents). A member has personal liability if the creditors of the entity may seek satisfaction of all or any part of the debts or claims against the entity from the member as such. A member has personal liability even if the member makes an agreement under which another person (whether or not a member of the entity) assumes that liability or agrees to indemnify that member for that liability.

**Partnership.** A partnership is a business entity that has at least two members and is not a corporation as defined on page 3 under *Corporation*.

## Who Must File

File this form for an eligible entity that is one of the following:

- A domestic entity electing to be classified as an association taxable as a corporation.
- A domestic entity electing to change its current classification (even if it is currently classified under the default rule).
- A foreign entity that has more than one owner, all owners having limited liability, electing to be classified as a partnership.
- A foreign entity that has at least one owner that does not have limited liability, electing to be classified as an association taxable as a corporation.
- A foreign entity with a single owner having limited liability, electing to be an entity disregarded as an entity separate from its owner.
- A foreign entity electing to change its current classification (even if it is currently classified under the default rule).

Do not file this form for an eligible entity that is:

- Tax-exempt under section 501(a);
- A real estate investment trust (REIT), as defined in section 856; or

- Electing to be classified as an S corporation. An eligible entity that timely files Form 2553 to elect classification as an S corporation and meets all other requirements to qualify as an S corporation is deemed to have made an election under Regulations section 301.7701-3(c)(v) to be classified as an association taxable as a corporation.

All three of these entities are deemed to have made an election to be classified as an association.

## Effect of Election

The federal tax treatment of elective changes in classification as described in Regulations section 301.7701-3(g)(1) is summarized as follows:

- If an eligible entity classified as a partnership elects to be classified as an association, it is deemed that the partnership contributes all of its assets and liabilities to the association in exchange for stock in the association, and immediately thereafter, the partnership liquidates by distributing the stock of the association to its partners.
- If an eligible entity classified as an association elects to be classified as a partnership, it is deemed that the association distributes all of its assets and liabilities to its shareholders in liquidation of the association, and immediately thereafter, the shareholders contribute all of the distributed assets and liabilities to a newly formed partnership.
- If an eligible entity classified as an association elects to be disregarded as an entity separate from its owner, it is deemed that the association distributes all of its assets and liabilities to its single owner in liquidation of the association.
- If an eligible entity that is disregarded as an entity separate from its owner elects to be classified as an association, the owner of the eligible entity is deemed to have contributed all of the assets and liabilities of the entity to the association in exchange for the stock of the association.

**Note.** For information on the federal tax consequences of elective changes in classification, see Regulations section 301.7701-3(g).

## When To File

An election specifying an eligible entity's classification cannot take effect more than 75 days prior to the date the election is filed, nor can it take effect later than 12 months after the date the election is filed.

**Late election relief.** A newly formed entity may be eligible for late election relief under Rev. Proc. 2002-59, 2002-39 I.R.B. 615 if:

- The entity failed to obtain its desired classification solely because Form 8832 was not timely filed,

- The due date for the entity's desired classification tax return (excluding extensions) for the tax year beginning with the entity's formation date has not passed, and
- The entity has reasonable cause for its failure to make a timely election.

To obtain relief, a newly formed entity must file Form 8832 on or before the due date of the first federal tax return (excluding extensions) of the entity's desired classification. The entity must also write "FILED PURSUANT TO REV. PROC. 2002-59" at the top of the form. The entity must attach a statement to the form explaining why it failed to file a timely election. If Rev. Proc. 2002-59 does not apply, an entity may seek relief for a late entity election by requesting a private letter ruling and paying a user fee in accordance with Rev. Proc. 2006-1, 2006-1 I.R.B. 1 (or its successor).

## Where To File

File Form 8832 with the Internal Revenue Service Center for your state listed below.

Attach a copy of Form 8832 to the entity's federal tax return for the tax year of the election. If the entity is not required to file a return for that year, a copy of its Form 8832 must be attached to the federal tax returns of all direct or indirect owners of the entity for the tax year of the owner that includes the date on which the election took effect. Failure to attach a copy of Form 8832 will not invalidate an otherwise valid election, but penalties may be assessed against persons who are required to, but do not, attach Form 8832.

Each member of the entity is required to file their return consistent with the entity election. Penalties apply to returns filed inconsistent with the entity's election.

If the entity's principal business, office, or agency is located in:	Use the following Internal Revenue Service Center address:
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Connecticut, Delaware, District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, West Virginia, Wisconsin	Cincinnati, OH 45999
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**If the entity's principal business, office, or agency is located in:** Use the following Internal Revenue Service Center address:

Alabama, Alaska,  
Arizona, Arkansas,  
California, Colorado,  
Florida, Georgia, Hawaii,  
Idaho, Iowa, Kansas,  
Louisiana, Minnesota,  
Mississippi, Missouri,  
Montana, Nebraska,  
Nevada, New Mexico,  
North Dakota,  
Oklahoma, Oregon,  
South Dakota,  
Tennessee, Texas, Utah,  
Washington, Wyoming

Ogden, UT 84201

A foreign country or U.S. possession Ogden, UT 84201-0023

**Note.** Also attach a copy to the entity's federal income tax return for the tax year of the election.

## Acceptance or Nonacceptance of Election

The service center will notify the eligible entity at the address listed on Form 8832 if its election is accepted or not accepted. The entity should generally receive a determination on its election within 60 days after it has filed Form 8832.

Care should be exercised to ensure that the IRS receives the election. If the entity is not notified of acceptance or nonacceptance of its election within 60 days of the date of filing, take follow-up action by calling 1-800-829-0115, or by sending a letter to the service center to inquire about its status. Send any such letter by certified or registered mail via the U.S. Postal Service, or equivalent type of delivery by a designated private delivery service (see Notice 2004-83, 2004-52 I.R.B. 1030 (or its successor)).

If the IRS questions whether Form 8832 was filed, an acceptable proof of filing is:

- A certified or registered mail receipt (timely postmarked) from the U.S. Postal Service, or its equivalent from a designated private delivery service;
- Form 8832 with an accepted stamp;
- Form 8832 with a stamped IRS received date; or
- An IRS letter stating that Form 8832 has been accepted.

## Specific Instructions

**Name.** Enter the name of the eligible entity electing to be classified.

**Employer identification number (EIN).** Show the EIN of the eligible entity electing to be classified.

**Caution.** Do not put "Applied For" on this line.

**Note.** Any entity that has an EIN will retain that EIN even if its federal tax classification changes under Regulations section 301.7701-3.

If a disregarded entity's classification changes so that it becomes recognized as a partnership or association for federal tax purposes, and that entity had an EIN, then the entity must continue to use that EIN. If the entity did not already have its own EIN, then the entity must apply for an EIN and not use the identifying number of the single owner.

A foreign person that makes an election under Regulations section 301.7701-3(c) and (d) must also use its own taxpayer identifying number. See sections 6721 through 6724 for penalties that may apply for failure to supply taxpayer identifying numbers.

If the entity electing to be classified using Form 8832 does not have an EIN, it must apply for one on Form SS-4, Application for Employer Identification Number. If the filing of Form 8832 is the only reason the entity is applying for an EIN, check the "Other" box on line 9 of Form SS-4 and enter "Form 8832" to the right of that box. The entity must have received an EIN by the time Form 8832 is filed in order for the form to be processed. An election will not be accepted if the eligible entity does not provide an EIN. **Caution.** Do not apply for a new EIN for an existing entity that is changing its classification if the entity already has an EIN.

**Address.** Enter the address of the entity electing a classification. All correspondence regarding the acceptance or nonacceptance of the election will be sent to this address. Include the suite, room, or other unit number after the street address. If the Post Office does not deliver mail to the street address and the entity has a P.O. box, show the box number instead of the street address. If the electing entity receives its mail in care of a third party (such as an accountant or an attorney), enter on the street address line "C/O" followed by the third party's name and street address or P.O. box.

**Address change.** If the eligible entity has changed its address since filing Form SS-4 or the entity's most recently-filed return (including a change to an "in care of" address), check the box for an address change.

**Note.** If a change of address occurs after the later of the filing of Form SS-4 or the most recently-filed return, use Form 8822, Change of Address, to notify the IRS of the new address. A new address shown on Form 8832 will not update the entity's address of record with the IRS.

**Line 1.** Check box 1a if the entity is choosing a classification for the first time (i.e., the entity does not want to be classified under the applicable default classification). Do not file this form if the

entity wants to be classified under the default rules.

Check box 1b if the entity is changing its current classification.

**Lines 2a and 2b. 60-month limitation rule.** Once an eligible entity makes an election to *change* its classification, the entity generally cannot change its classification by election again during the 60 months after the effective date of the election. However, the IRS may (by private letter ruling) permit the entity to change its classification by election within the 60-month period if more than 50% of the ownership interests in the entity, as of the effective date of the election, are owned by persons that did not own any interests in the entity on the effective date or the filing date of the entity's prior election.

**Note.** The 60-month limitation does not apply if the previous election was made by a *newly formed* eligible entity and was effective on the date of formation.

**Line 4.** If an eligible entity has only one owner, provide the name of its owner on line 4a and the owner's identifying number (social security number, or individual taxpayer identification number, or EIN) on line 4b. Enter "DE" if the owner is a disregarded entity that does not have an identifying number. If the owner is a foreign person or entity and does not have a U.S. identifying number, enter "none" on line 4b.

**Line 5.** If the eligible entity is owned by one or more members of an affiliated group of corporations that file a consolidated return, provide the name and EIN of the parent corporation.

**Line 6.** Check the appropriate box if you are changing a current classification (no matter how achieved), or are electing out of a default classification. Do not file this form if you fall within a default classification that is the desired classification for the new entity.

**Line 7.** If the entity making the election is created or organized in a foreign jurisdiction, enter the name of the foreign country in which it is organized. This information must be provided even if the entity is also organized under domestic law.

**Line 8.** Generally, the election will take effect on the date you enter on line 8 of this form, or on the date filed if no date is entered on line 8. An election specifying an entity's classification for federal tax purposes can take effect no more than 75 days prior to the date the election is filed, nor can it take effect later than 12 months after the date on which the election is filed. If line 8 shows a date more than 75 days prior to the date on which the election is filed, the election will default to 75 days before the date it is filed. If line 8 shows an effective date more than 12 months from the filing date, the election will take effect 12 months after the date the election is filed.

**Consent statement and signature(s).**  
Form 8832 must be signed by:

1. Each member of the electing entity who is an owner at the time the election is filed; or

2. Any officer, manager, or member of the electing entity who is authorized (under local law or the organizational documents) to make the election. The elector represents to having such authorization under penalties of perjury.

If an election is to be effective for any period prior to the time it is filed, each person who was an owner between the date the election is to be effective and the date the election is filed, must sign.

If you need a continuation sheet or use a separate consent statement, attach it to Form 8832. The separate consent statement must contain the same information as shown on Form 8832.

**Note.** Do not sign the copy that is attached to your tax return.

**Paperwork Reduction Act Notice**

We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is:

**Recordkeeping** . . . . 1 hr., 49 min.

**Learning about the law or the form** . . . . 2 hr., 7 min.

**Preparing and sending the form to the IRS** . . . . 23 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6406, Washington, DC 20224. Do not send the form to this address. Instead, see *Where To File* on page 4.

**Foreign Entities Classified as Corporations for Federal Tax Purposes:**

**American Samoa**—Corporation  
**Argentina**—Sociedad Anonima  
**Australia**—Public Limited Company  
**Austria**—Aktiengesellschaft  
**Barbados**—Limited Company  
**Belgium**—Societe Anonyme  
**Belize**—Public Limited Company  
**Bolivia**—Sociedad Anonima  
**Brazil**—Sociedade Anonima  
**Canada**—Corporation and Company  
**Chile**—Sociedad Anonima  
**People's Republic of China**—Gufen Youxian Gongsi  
**Republic of China (Taiwan)**—Ku-fen Yu-hsien Kung-szu  
**Colombia**—Sociedad Anonima  
**Costa Rica**—Sociedad Anonima  
**Cyprus**—Public Limited Company  
**Czech Republic**—Akciova Spolecnost  
**Denmark**—Aktieselskab  
**Ecuador**—Sociedad Anonima or Compania Anonima  
**Egypt**—Sharikat Al-Mossahamah  
**El Salvador**—Sociedad Anonima  
**Estonia**—Aktiaselts  
**European Economic Area/European Union**—Societas Europaea  
**Finland**—Julkinen Osakeyhtio/ Publikt Aktiebolag  
**France**—Societe Anonyme  
**Germany**—Aktiengesellschaft  
**Greece**—Anonymos Etaireia  
**Guam**—Corporation  
**Guatemala**—Sociedad Anonima  
**Guyana**—Public Limited Company  
**Honduras**—Sociedad Anonima  
**Hong Kong**—Public Limited Company  
**Hungary**—Reszvenytarsasag  
**Iceland**—Hlutafelag  
**India**—Public Limited Company  
**Indonesia**—Perseroan Terbuka  
**Ireland**—Public Limited Company  
**Israel**—Public Limited Company  
**Italy**—Societa per Azioni  
**Jamaica**—Public Limited Company  
**Japan**—Kabushiki Kaisha  
**Kazakstan**—Ashyk Aktsionerlik Kogham  
**Republic of Korea**—Chusik Hoesa  
**Latvia**—Akciju Sabiedriba  
**Liberia**—Corporation  
**Liechtenstein**—Aktiengesellschaft  
**Lithuania**—Akcine Bendroves  
**Luxembourg**—Societe Anonyme

**Malaysia**—Berhad  
**Malta**—Public Limited Company  
**Mexico**—Sociedad Anonima  
**Morocco**—Societe Anonyme  
**Netherlands**—Naamloze Vennootschap  
**New Zealand**—Limited Company  
**Nicaragua**—Compania Anonima  
**Nigeria**—Public Limited Company  
**Northern Mariana Islands**—Corporation  
**Norway**—Allment Aksjeselskap  
**Pakistan**—Public Limited Company  
**Panama**—Sociedad Anonima  
**Paraguay**—Sociedad Anonima  
**Peru**—Sociedad Anonima  
**Philippines**—Stock Corporation  
**Poland**—Spolka Akcyjna  
**Portugal**—Sociedade Anonima  
**Puerto Rico**—Corporation  
**Romania**—Societe pe Actiuni  
**Russia**—Otkrytoye Aktsionerloy Obshchestvo  
**Saudi Arabia**—Sharikat Al-Mossahamah  
**Singapore**—Public Limited Company  
**Slovak Republic**—Akciova Spolocnost  
**Slovenia**—Delniska Druzba  
**South Africa**—Public Limited Company  
**Spain**—Sociedad Anonima  
**Surinam**—Naamloze Vennootschap  
**Sweden**—Publika Aktiebolag  
**Switzerland**—Aktiengesellschaft  
**Thailand**—Borisat Chamkad (Mahachon)  
**Trinidad and Tobago**—Limited Company  
**Tunisia**—Societe Anonyme  
**Turkey**—Anonim Sirket  
**Ukraine**—Aktsionerne Tovaristvo Vidkritogo Tipu  
**United Kingdom**—Public Limited Company  
**United States Virgin Islands**—Corporation  
**Uruguay**—Sociedad Anonima  
**Venezuela**—Sociedad Anonima or Compania Anonima



See Regulations section 301.7701-2(b)(8) for any exceptions and inclusions to items on this list and for any revisions made to this list since these instructions were printed.