

# **SERIES LLCs**

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“The series LLC has the potential of a tax planning H bomb... It may also turn out to provide the whimper of cold fusion rather than the big bang of real fusion.” Cuff, Series LLCs and the Abolition of the Tax System, Business Entities, Jan.-Feb. 2000, p. 28, reproduced in PLI, Tax Planning for Domestic & Foreign Partnerships, LLCs, Joint Ventures & Other Strategic Alliances (June 2006).

I. Delaware Series.

A. Definition.

“Delaware Series LLC” is the term used to describe a form of entity with internal funds, portfolios, cells, or divisions, each of which may have separate members, managers, assets and liabilities, and business purpose or investment objectives. “Series” is the term used to describe each of the separate components.

\*Prepared February 10, 2010

B. Alternative and Analogous Structures.

1. Parent entity with subsidiaries.

2. Single unincorporated entity with “schedular allocations,” defined by Terry Cuff as “allocations that track particular assets and specifically allocate the results of particular partnership assets or bundles of assets in a particular way.” (For description of that concept, see Cuff, Some Basic Issues in Drafting Real Estate Partnership and LLC Agreements, 65 NYU Inst. on Fed Tax’n 18.07(19) (2007)).

3. Protected Cell Companies (“statutory”) (“PCP”).

a. A “protected cell company” and “protected cell” are terms used in the context of segregated or separate accounts of insurance companies or captive insurers.

b. Under the statutes, the assets of a protected cell may not be chargeable with liabilities of any other protected cell or of the sponsored captive insurance company generally. E.g., 18 Del. Code § 6934(3); Mont. Code Ann. § 33-28-301(2)(c); D.C. Code §. 31-3931.04(b) (D.C. also provides an “incorporated protected cell.”) § 31-3931.04(a). See Feetham and Jones, Protected Cell Companies (2008).

4. Serial Captive Insurance Company.

See Delaware Insurance Commissioner’s Statement, News Release, January 25, 2010. Licensed first serial entity captive, which permits use of Series LLC to form the equivalent of a PCC, but without the minimum premium tax per cell applicable under the PCC statute.

5. Master Issuer Trust. “...SPE functions as a ‘master issuer,’ that is, to issue several series of rated securities backed by the same assets that are allocated among the series according to a predetermined formula.” Based upon the allocation provision of a pooling and servicing agreement that constitutes an intercreditor agreement among the holders of the rated securities of the various series, the holders of the defaulted series would be unable to reach the funds allocated to the other series. Standard & Poor’s Structured Finance 53 (5th ed. Oct. 2006).

II. Mutual Fund Origin of Concept.

“A series company or fund is an investment company composed of separate portfolios of investments organized under the umbrella of a single corporate or trust entity... Each portfolio of a series company has distinct objectives and policies, and interests in each portfolio are represented by a separate class or series of shares. Shareholders of each series participate solely in the investment results of that series. In effect, each series operates as a separate investment company.” Gordon Altman et al., A Practical Guide to the Investment Company Act, 2-3 (1996).

“The series fund concept is useful because it permits the formation of only one legal entity. For example, a series mutual fund formed as a corporation under state law has only one board of directors, one set of officers, etc. It files a single registration under the Investment Company Act of 1940. The use of the series is thus designed to save expenses for the fund’s shareholders.” Humphreys, Limited Liability Companies § 1.04 (Revised 2006).

See Section 18(f)(2) of the Investment Company Act and SEC Rule 18f-2 (17 CFR § 270.18 f-2).

Series funds have typically been formed as corporations or business trusts. E.g., iShares® Trust, a Delaware statutory trust, authorized to have multiple series portfolios, with over 100 separate investment portfolios called “Funds.” The Trust is registered under the Investment Company Act of 1940, as an open-ended management investment company. The shares of each Fund are listed and traded on national securities exchanges. Each Fund has its own CUSIP number and exchange trading symbol. Prospectus for iShares® S&P Series, August 1, 2007.

### III. Series LLC.

The first LLC series legislation was enacted in Delaware in 1996. 6 Del. Code § 18-215. Delaware also provides for series limited partnerships, 6 Del. Code § 17-218(b), and series statutory trusts. See 12 Del. Code § 3804(a).

Similar LLC legislation has been adopted by the following states:

Illinois	805 ILCS 180/37-40
Iowa	Iowa Code Ann. § 489.1201 (effective Jan. 1, 2009) (superseding § 490 A.305)
Nevada	NRS § 86.296.3
Oklahoma	18 Okla. Stat. § 18-2054.4B
Tennessee	Tenn. Code Ann. § 48-249-309
Texas	V.T.C.A., Bus. Org. Code § 101.601 (effective Sept. 1, 2009)
Utah	Utah Code Ann. § 48-2c-606

Certain foreign jurisdictions have analogous concepts. E.g., Cayman Islands Companies Law (2007 Revision). Part XIV Segregated Portfolio Company (segregated portfolio company may create one or more segregated portfolios).

For general discussion, see Rutledge, Again, For the Want of a Theory: The Challenge of the “Series” to Business Organization Law, 46 Amer. Bus. L. J. 311 (2009). Goforth, The Series LLC and a Series of Difficult Questions, 60 Ark. L. Rev. 385 (2007).

At least three other states, Minnesota, North Dakota and Wisconsin, provide for a “series” of ownership interests but do not provide the internal limited liability shield described in Section IV.A. 2-6 below. See Minn. Stat. Ann. § 322 B.03, subd. 44; N.D.C.C. § 10-32-02.55; and Wis. Stat. Ann. § 183.0504.

Without using the term “series,” some other states permit classes or groups of one or more members having certain expressed relative rights, powers and duties, including voting rights, but without providing for the internal liability shield.

The Revised Uniform Limited Liability Company Act (2006) does not authorize series LLCs. For the reasons, see Prefatory Note in which the Reporters describe the series.<sup>1</sup> See also Kleinberger and Bishop, The Next Generation: The Revised Uniform Limited Liability Company Act, 62 Bus. Law. 515, 541-543 (2007).

Compare, Uniform Statutory Trust Entity Act (approved at 2009 Annual Meeting) (“USTEA”), which includes series provisions: Section 401(a) (governing instrument may provide for creation by the statutory trust of one or more series); Section 402(a) (if series created, debts, obligations and liabilities with respect to the property of a particular series are enforceable against the property of that series only); Section 401(b) (series not an entity separate from the statutory trust).

#### IV. Separate Characteristics of Series LLC.

##### A. Delaware.

According to the synopsis that accompanied the Delaware legislation authorizing the LLC series, “...a limited liability company may provide that such series shall be treated in many important respects as if the series were a separate limited liability company....” H.R. 528, § 9, 70 Del. Law Ch. 360 (1996). The Delaware series provisions were amended in 2007 (effective August 1, 2007). SB 96, 144th Gen. Assembly (“SB 96”). That bill added a new subsection (c) and redesignated the following subsections. See Exhibit 1 for the language of DEL. CODE ANN. tit. 6, § 18-215 as amended by SB 96.<sup>2</sup>

Among the respects in which a series is treated as if it were a separate entity are the following:

1. The LLC agreement may establish designated series of members, managers or LLC interests or, of assets having separate rights, powers or duties with respect to specified property or obligations of the LLC or profits and losses associated with specified property or obligations, and any series may have a separate business purpose or investment objective. DEL. CODE ANN. tit. 6, § 18-215(a).

NOTE: The statutes do not describe an LLC series structure as a holding company with wholly-owned subsidiaries. The LLC is not necessarily the member or a member of each series; rather, specific LLC members may be the members of designated series. According to the Delaware Act, the series is created by the limited liability company agreement (DEL. CODE ANN. tit. 6, § 18-215(b)). Assets and liabilities must be associated with a series separate from “other assets” of the LLC.

NOTE: The Act refers to a “member associated with” a series as distinguished from a member of a series, so that it seems to follow that any member associated with a series is a member of the LLC.

2. The debts with respect to a particular series are enforceable against the assets of that series only and not those of any other series or the LLC, nor are the assets of a particular series subject to the debts of other series or the LLC. DEL. CODE ANN. tit. 6, § 18-215(b). The liability segregation is referred to as an “internal shield.”

NOTE: The Delaware Act does not expressly provide for the application to a member associated with a series with respect to a series liability of the protection conferred on members as to the liabilities of the LLC by 6 Del. Code § 18-303. By comparison the Texas Act expressly provides that a member or manager associated with a series is not liable for the obligations of a series. V.T.C.A., Bus. Org. Code § 101.606(a).

3. Parallel to the Illinois statute discussed below, the 2007 amendment added that a series has the power and capacity to, in its own name, contract, hold title to assets, grant liens and security interests, and sue and be sued. DEL. CODE ANN. tit. 6, § 18-215(c). Compare Delaware statutory trust. May sue and be sued, 12 Del. Code § 3804(a); legal title to the property of the trust may be held in the name of any trustee with the same effect as if the property were held in the name of the trust. 12 Del. Code § 3805(f).

NOTE: Assets associated with a series may also “be held directly or indirectly... in the name of the limited liability company,....” § 18-215(b).

4. The statutory limitations on distributions are applied separately to a series. DEL. CODE ANN. tit. 6, § 18-215(i).

5. A member’s dissociation from a series does not cause him to be dissociated from any other series or the LLC itself. DEL. CODE ANN. tit. 6, § 18-215(j).

6. A series may be terminated and its affairs wound up without causing dissolution of the LLC. DEL. CODE ANN. tit. 6, § 18-215(k).

7. Judicial termination is available with respect to a series. DEL. CODE ANN. tit. 6, § 18-215(m).

8. Although the Delaware LLC Act includes a series within the definition of “person,”<sup>3</sup> even under SB 96 the Delaware LLC Act does not use the word “entity” in describing a series. For a discussion of the omission of the term “entity,” see, Conaway, A Business Review of the Delaware Series: Good Practice for the Informed. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1097645](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1097645).

In the first reported decision involving a Delaware series LLC, the court said that the statute does not indicate what capacity an LLC has to pursue litigation on behalf of its series; nor indicate what capacity a series of an LLC has, if any, to pursue litigation on its own behalf or whether it should be regarded as an entity distinct from the LLC from which it is carved. *GxG Management LLC v. Young Brothers and Co., Inc.*, 2007 WL 551761 (D. Me. 2007). The court



held that the LLC that had transferred to a series the boat that was the subject of the suit had a sufficient interest in the boat so that it could maintain the action as the real party in interest even though it transferred “nominal ownership” to Series B.

In a subsequent ruling in the same case, the court clarified that it had not meant to resolve the question of whether a series was a separate entity, but merely to rule that “even if Series B could maintain suit in its own name, the judgment in this case will preclude any subsequent litigation in Maine by Series B arising out of the same facts.” *GxG Management LLC v. Young Brothers and Co., Inc.*, 2007 WL 1702872 (D. Me. 2007). The 2007 amendment to §18-215 did not resolve the question of whether a series is a separate entity.

Compare, USTEA § 401(b): “A series of a statutory trust is not an entity separate from the statutory trust.” COMMENT: “Paragraph (b) ... makes explicit what is implicit in the Delaware act,....” The Delaware Statutory Trust Act does not confer the range of entity characteristics on a series as the Delaware Code does for an LLC or limited partnership.

B. Illinois.

The Illinois statute adds even more detail: A series is treated as a separate entity to the extent set forth in the articles of organization; each series with limited liability, may, in its own name, contract, hold title to assets, grant security interests, sue and be sued and otherwise conduct business and exercise the powers of an LLC. 805 ILCS 180/37-40(b).

See Banoff and Jacobson, “Series LLCs,” Limited Liability Companies and S Corporations, Chap. 19 (IICLE, 2005 ed. with 2008 Supp.); Borkus and Myers, Series LLCs: Practical Pointers and Tax Implications, 95 Ill. St. Bar J. 22 (2007); Marsico, Current Issues of the Series LLC: Illinois Series LLC Improves Upon Delaware Series LLC But Many Open Issues Remain, J. Passthrough Entities, Nov.-Dec. 2006, p. 35.

C. Iowa.

The new Iowa LLC Act provides that a series “shall be treated as a separate entity to the extent set forth in the certificate of organization.” Iowa Code Ann. § 489.1201.3.

D. Tennessee.

The Tennessee LLC Act provision on the series states that a number of the provisions of that act apply “to a series of an LLC, as if the series were a separate LLC.” Tenn. Code Ann. § 48-249-309(d), (e), (f) and (g).

E. Texas.

The new Texas series legislation provides that a series in its own name has the power and capacity to sue and be sued; contract; hold title to assets; and grant liens and security interests. V.T.C.A., Bus. Org. Code § 101.605, but it does not expressly provide for treating a series as a separate entity.

F. Comparison.

For a comparison of the series LLC statutes in various states that have enacted those statutes, see Exhibit 2.

V. Open Issues.

“... the series LLC illustrates the costs and benefits of new business forms: the opportunity to experiment along with the risks of uncertainty.” Ribstein, *The Rise of the Uncorporation* 147 (2010).

Significant open issues relating to the series LLC include the following:

A. Federal Tax Treatment.

1. The tax treatment of series LLCs is largely unresolved. In determining the federal tax classification of a series LLC, the threshold inquiry is whether each series within an LLC constitutes a separate business entity for federal tax purposes. In this regard, entity status under state law may be highly relevant, though not determinative. In other words, a partnership may exist for federal tax purposes even without the existence of a distinct state law entity. On the other hand, where a state law entity exists, the existence of an entity for federal tax purposes is often, but not always, inferred.

a. Rev. Rul. 55-39, 1955-1 C.B. 403. The Service ruled that the investment by a partnership of a member’s contributed capital in investments of his own choice and for his own account resulted in the deemed withdrawal of those securities from the partnership.

b. The Tax Court has recognized that the several series of an investment fund may be considered distinct taxable entities. See *National Securities Series-Industrial Stock Series v. Commissioner*, 13 T.C. 884 (1949), acq., 1950-1 C.B. 4. So has the IRS, repeatedly. See, e.g., PLR 200803004 (the separate portfolios of a series LLC will be individually classified as a partnership, disregarded entity, or association); PLR 200544018. (Separate portfolios of a series business trust are classified as business entities and not trusts; and each one with two or more members that does not elect association classification is a partnership); PLR 200303019; PLR 9847013 (if each series is treated as a separate trust and the creditors of one series of the trust may not reach the assets of any other series of the trust, each is a separate entity for tax purposes.)

c. A leading commentator has concluded that the position taken in the investment fund private letter rulings and the principle of Rev. Rul. 55-39, 1955-1 C.B. 403, make it likely that the Service will take the same view in the case of an LLC series. Bishop and Kleinberger, Limited Liability Companies ¶ 2.11 (May 2006).

See also Zeswitz and Pauls, Classification of Series Entities, 49 BNA Tax Mgmt. Memo 531 (2008). Grob and Hannawa, Federal Tax Status of a Series Limited Liability Company, Business Entities, March/April 2008, p. 24; Peaslee and Tenreiro, Tax Classification of Segregated Portfolio Companies, Tax Notes, October 1, 2007. p.

43; Mooney, Series LLCs: The Loaves and Fishes of Subchapter K, Tax Notes, August 20, 2007 663, 668-71; Frost, Musings on Series LLCs, Passthrough Finance Techniques Corner, Journal of Passthrough Entities, 13 (May – June, 2007); Terry and Samz, An Initial Inquiry into the Federal Tax Classification of Series Limited Liability Companies, Tax Notes, March 6, 2006, p. 1093; Cuff, Series LLCs and the Abolition of the Tax System, Business Entities, Jan.-Feb. 2000, p. 28 reproduced in PLI, Tax Planning for Domestic & Foreign Partnerships, LLCs, Joint Ventures & Other Strategic Alliances (June 2006); Stephens and Schultz, Segregating Assets Within a Single Partnership: Delaware Series Partnerships and LLCs, Taxes, March 2000, p. 231; and Ribstein and Keatinge, Ribstein and Keatinge on Limited Liability Companies, § 17:24 (June 2007).

d. Compare IRC § 851(g)(1): “In the case of a regulated investment company... having more than one fund, each fund... shall be treated as a separate corporation for purposes of this title....”

e. Because of the variances in the series LLC statutes of the states that have enacted those statutes, is the determination of whether each series is a separate entity a state-by-state determination?

f. Compare the tax treatment of "tracking stock," that is, whether it is to be treated as stock of the parent corporation or as stock of the tracked business. Bennett, Tracking Stock: Time for Round Three?, Feb. 2007, Taxes, 15, 16 and note 9.

g. IRS Notice 2008-19, 2008-1 C.B. 366.

Rev. Rul. 2008-8, 2008-1 C.B. 340, addressed the standard for determining whether an arrangement between a participant and a cell of a protected cell company constituted insurance for federal income tax purposes, and whether the amounts paid to the cell are deductible as insurance premiums under IRC § 162.

Section 3 of the Notice set forth proposed guidance that would address when a cell of a PCC is treated as an insurance company.

A cell would be treated as an insurance company separate from any other entity if, among other things, the assets and liabilities of the cell are segregated from those of any other cell and those of the PCC, so that no creditor of any other cell or the PCC may reach the assets of the cell.

Consistent with the insurance company treatment at the cell level:

(i) Any tax selections available by reason of a cell's status as an insurance company would be made by the cell, not by the PCC of which it is a part;

(ii) The cell would be required to obtain an EIN if subject to U.S. tax;

(iii) Activities of the cell would be disregarded for purposes of determining the status of the PCC as an insurance company;

(iv) A cell would be required to file all applicable federal income tax returns and pay taxes with respect to its income; and

(v) A PCC would not take into account any items and income, deduction, reserve or credit with respect to any cell that is treated as an insurance company.

In Section 4 of the Notice, the Service requested comments on specific issues, and also “on what guidance, if any, would be appropriate concerning similar segregated arrangements that do not involve insurance.” IRS had previously requested comments on the taxation of cell companies in Notice 2005-49.

The New York State Bar Association submitted comments in response to Notice 2008 – 19 regarding PCCs outside of the insurance area, by letter dated May 2, 2008. 89 Highlights and Documents, 909-914, May 6, 2008.

The ABA Section of Taxation has recommended that each series of an LLC be treated as a separate “business entity” for purposes of Reg. Section 301.7701-2(a) if the series (i) is formed under a statute with the characteristics of a Delaware series, and (ii) satisfies the recordkeeping and notice requirements so that liabilities of a series are enforceable only against that series’ assets. 92 Highlights and Documents, 143, January 6, 2009.

A project on the federal tax classification of a series was included in the Treasury’s 2008-2009 Priority Guidance Plan, and reappears in the 2009-2010 Priority Guidance Plan. General Tax Issues, Item 20 (classification of series LLCs and protected cell companies under §7701) (Nov. 24, 2009).

2. If each series is treated as a separate business entity for federal tax purposes, then it appears that each series is an “eligible entity” that may elect its own tax classification under the check-the-box regulations. See Treas. Reg. Section 301.7701-2. The check-the-box regulations classify organizations, other than non-business trusts, as corporations, partnerships, or disregarded entities.

3. Assuming each series is treated as a separate business entity for federal tax purposes, the next inquiry is whether to treat the LLC itself as a holding company and each series as an entity owned by the holding company or whether to treat each series as owned directly by those members that share in the profits and losses of the series. See Exhibit 3. If the series is a U.S. entity and is deemed owned by the holding company, it is disregarded for federal tax purposes as an entity separate from the LLC, unless the series elects to be treated as a corporation.<sup>4</sup> By contrast, if the series is deemed owned directly by the members of the LLC, then it is treated as a partnership or disregarded entity depending on the number of members that share in the profits and losses of the particular series. Also, to the extent that each series may be deemed owned directly by the members of the LLC, then one must also determine whether the

series LLC itself is a separate partnership, for instance in a situation when it holds assets or has members that are not designated to any series. See Exhibit 3.

a. In the investment fund private letter rulings, the IRS appears to treat the investors in each portfolio of a series business trust as owning a direct ownership interest for federal tax purposes in the particular portfolio. See, e.g., PLR 200303018 (relying on representations by the portfolio “that it has had at least two members from the date of its receipt of the initial investment made by any investor” or “that it has not and will not have more than 100 partners”).

b. Query whether the same result applies if the members share all the profits and losses of each portfolio in the same proportion.

c. The series LLC acts for Delaware, Illinois, Nevada, Oklahoma and Texas provide that a series can freely continue to exist and operate regardless of whether there are any members remaining associated with the series. Further, the series LLC acts for Delaware, Illinois, Iowa and Oklahoma specifically provide that a series terminates when the master LLC terminates. If each series is treated as a separate business entity for tax purposes, query how provisions that allow the business to continue to operate without any members or that require the series to terminate upon the termination of the master LLC, affect its federal tax classification? In this regard, would it be more appropriate to treat each series as a separate business entity owned by a holding company rather than treating each series as owned directly by the members that benefit from its operations?

4. Without a “check-the-box” regime, the determination of whether a series is a separate business entity depends on all the facts and circumstances. See, e.g., *Commissioner v. Culbertson*, 337 U.S. 733 (1949). The determination may depend on some of the following factors:

a. *Commonality of Ownership*. Compare a situation where all the members share in all profits and losses of the assets equally and the series structure is used merely to provide liability protection to a situation where the profits and losses of each series are shared by distinct-member groups with little or no overlap of ownership from series to series.

b. *Separate Business Purpose*. Under tax principles, a partnership may exist if the parties intend to join together for a common purpose of carrying on a business together and to share in the profits from that business. If the various series of a series LLC have similar business purposes, a single partnership may be inferred. By contrast, if the purpose of each series is separate and distinct from the other, then each series may be treated as a separate partnership.

c. *Liability Shield*. The liability protection afforded to the assets of a series against the liabilities of other series is a factor that weighs in favor of treating each series as a separate business entity. For example, even though the existence of schedular allocations may not, by itself, result in separate entity treatment, the addition of the liability shield that the series provides makes it more likely that each series may be treated as a separate entity. However, depending on the other factors, a series may be treated as a disregarded entity.

owned by the LLC for federal tax purposes rather than owned directly by the members of the series LLC. For example, assume that A, B, and C form a series LLC to operate a car wash business. Three series are formed to operate three car wash locations, but A, B and C share equally in all of the profits of the business. Further, A manages all three series. Under these circumstances, if the series LLC is not treated as a single business entity for tax purposes, then each series may be treated as a disregarded entity owned directly by the series LLC and not as three separate partnerships. IRS Private Letter Ruling 200803004 deals with an open-end management investment company, registered under the Investment Company Act of 1940 the beneficial interests in which are divided into transferable shares. The trust's shares are divided into several portfolios or series of portfolios, each of which has elected to be treated as a RIC for federal tax purposes. The ruling addresses the consequences of the reorganization of the trust into a series LLC in which each portfolio will be converted to a separate series. After the reorganization, the series having only one member will not elect to be treated as other than a disregarded entity. While the ruling is directed to whether certain of the series classified as a partnership would be treated as a publicly traded partnership, it appears to assume that the treatment of each series is as a separate partnership or disregarded entity.

5. The federal tax consequences of investing in a series LLC remain unclear. Some of the unresolved issues are as follows:

a. IRC § 6031(a) requires that “every partnership (as defined in IRC § 761(a))” file an information return. Is the master entity a single taxpayer filing one information return or must each series file a separate information return? The statute of limitations on assessments remains open if there is a failure to file a required information return.

b. May (or must) each series obtain its own federal tax identification number?

c. May one series elect to be treated as a corporation under the check-the-box regulations?

d. What if a member contributes an appreciated asset to a series in which the member has little or no interest and the member receives an interest in a different series to which the member makes no contribution?

(i) See Example 8 of Treas. Reg. Section 1.707-3(f), involving schedular allocations followed by the redemption of the contributing partner for marketable securities two years after the property contribution. The transaction is treated as a sale of property to the partnership.

(ii) See also Example 1 of Treas. Reg. Section 1.704-4(f)(2), involving schedular allocations with respect to a particular property with the principal purpose of avoiding IRC § 704(c)(1)(B). The transaction is treated as if the actual distribution occurred at the time the partnership commenced making schedular allocations.

e. What is the result of the “transfer” of assets from one series to another series? That transfer could be treated as a distribution of the assets to the members of the series from which the asset is transferred followed by a recontribution to the LLC or a

transfer to another member followed by a contribution by the transferee. Query how the rules under IRC §§ 704(c)(1)(B), 707(a)(2)(B), 731(c), 737, 751, *etc.* apply to those inter-series transfers? Further, such transfers could violate state law rules on wrongful distributions.

NOTE: It is not clear that “transfer” is accurate terminology under the Delaware Act, which interchangeably refers to “assets of a series” and “assets associated with a series.” § 18-215(b). Perhaps the applicable verb is “reassociate.”

f. How are shifts in percentage ownership interests among the various series treated? For example, what if a member’s percentage interest in Series X is reduced by 10% in exchange for an economically equivalent percentage interest increase in Series Y?

g. What if one series sells relinquished property and another series acquires replacement property in a transaction intended to qualify as an IRC § 1031 exchange?

h. What if one series issues a profits interest to an employee of another series?

i. How are the non-recourse debt allocation rules under IRC § 752 applied to non-recourse liabilities of different series?

j. Can only some, but not all, series make IRC § 754 elections?

k. How is the partnership year determined under IRC § 706?

l. How do the technical termination rules under IRC § 708 apply?

m. How are the TEFRA audit rules applied?

n. If only certain series invest in stocks and other securities, how are the investment partnership rules of IRC § 721(b) applied?

o. Are the members and the transfers of interests of the various series aggregated for the purpose of the publicly traded partnership rules of IRC § 7704?

These are only some of the uncertainties that exist regarding the federal tax treatment of series LLCs. The answers to these questions can vary, largely depending on whether each series is treated as a separate business entity and, if so, whether the LLC is treated as a holding company with each series as a separate subsidiary of the LLC or not.

## B. State Income Tax Treatment.

1. The California Franchise Tax Board has stated its position that each component series of a series LLC, “for example a Delaware Series LLC,” is a separate LLC

and must file its own Form 568, Limited Liability Company Return of Income, and pay its own separate LLC annual tax and fee if it is registered or doing business in California, and if (1) the holders of interests in each series are limited to the assets of that series upon redemption, liquidation, or termination, and may share in the income only of that series, and (2) under state law, the payment of the expenses, charges, and liabilities of each series is limited to the assets of that series. California 2009 Limited Liability Company Tax Booklet, Section F, p. 7; FTB Pub. 3556 p. 4 (Rev. 9-2009).

The FTB stated that it was applying the principle of National Securities Series, supra. Franchise Tax Board Tax News, March/April 2006, p.3. See Banoff and Lipton, Shop Talk, California Refines Its Tax Treatment of Series LLCs, 106 J. Tax'n 316 (May, 2007) for an excellent discussion of the issues raised by the California Franchise Tax Board's conditions for classifying a series LLC as a separate entity. See also Stein, California's Treatment of a Foreign Jurisdiction's Series LLCs, Business Entities 16, 19-21, 64 (May/June 2008).

One interpretation of the California Franchise Tax Board position is illustrated in Exhibit 3 and referred to as the "CAFTB Test."

2. One of the earliest state rulings on federal-state conformity was Florida Department of Revenue Technical Assistance Advisement (TAA) No. 02(M)-009 (Nov. 27, 2002), in which the DOR indicated that it will follow the federal income tax treatment of each series in an LLC, unless that treatment conflicts with Florida law (whatever that means).

3. Consistent with the Florida ruling, Massachusetts Letter Ruling 08-2 (Feb. 15, 2008) considered a Delaware series LLC in which each series will be the successor to a corresponding portfolio trust. Based on National Securities Series-Industrial Stock Series and Rev. Rul. 55-416, the Department of Revenue ruled that "each LLC Series and any additional series established by LLC in the future will be classified for Massachusetts income and corporate excise tax purposes in accordance with its federal classification. We do not rule on whether each series of an LLC is a separate LLC."

4. See McLoughlin and Ely, The Series LLC Raises Serious State Tax Questions but Few Answers Are Yet Available, 16 J. Multistate Tax'n 6 (Jan. 2007) and Keatinge and Conaway, Keatinge and Conaway on Choice of Business Entity § 16:52 (2009). Among other income tax issues, they discuss the Massachusetts ruling. The authors also discuss potential sales, use, and realty transfer tax issues.

5. For example, and in several instances consistent with the same issues that arose when LLCs first came on the scene, will the states automatically follow the federal tax treatment of the series? And since so far there is no official federal pronouncement, what paradigm will the states follow?

6. Will states imposing various forms of entity-level taxes follow California's lead and attempt to impose their tax on each series?



7. If income tax nexus is established over, say, Series A, will that automatically subject the entire LLC and the rest of its series to that state's taxing jurisdiction? What about nexus over the member(s) of Series B, C and D?

8. Apportionment issues are also present. For example, what about the application of the throwback rule? If Series A is taxable in another state, does that preempt the throwback of sales by Series B into that same state? Do Joyce and Finnegan ride again?

9. On the sales/use tax front, will transfers between series trigger a sales or use tax if those transfers do not qualify for the so-called sale-for-resale or casual sale exemptions? Recall that most states do not conform to the check-the-box regulations for sales and use tax purposes. And what about nexus issues? If Series A has sales or seller's use tax nexus with a state, does the series LLC itself or the other series have nexus, too?

### C. Foreign Recognition of Internal Shield.

Another major open issue is the effectiveness of the internal liability shield in a foreign state that does not itself have series legislation.

Some statutes with series provisions have specific provisions that recognize the internal liability shield of a foreign LLC. E.g., 805 ILCS § 80/37-40(A); OKLA. STAT. § 2054.4.M. The result under the Texas Act is not clear. The Delaware series provision had seemed expressly to recognize the internal shield of a foreign LLC. DEL. CODE ANN. tit. 6, § 18-215(m) (under SB 96, (n)) which was modified by SB 96 as follows:

In addition, the foreign limited liability company shall state on such application whether the debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series, if any, shall be enforceable against the assets of such series only, and not against the assets of the foreign limited liability company generally or any other series thereof, and, ~~unless otherwise provided in the limited liability company agreement,~~ ~~none~~ whether any of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the foreign limited liability company generally or any other series thereof shall be enforceable against the assets of such series.

That change appears to eliminate the affirmative statement that Delaware will recognize the internal shields of other state LLC series. However, knowledgeable Delaware lawyers have said that they had not viewed the pre-amendment version as being a recognition provision.

In comparison, the Illinois statute at § 805 ILL. COMP. STAT.180/37-40(o) expressly provides that Illinois will recognize the internal liability protections of a foreign series LLC:

Unless otherwise provided in the operating agreement, the debts, liabilities and obligations incurred, contracted for or otherwise

existing with respect to a particular series of such a foreign limited liability company shall be enforceable against the assets of such series only, and not against the assets of the foreign limited liability company generally or any other series thereof and none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to such a foreign limited liability company generally or any other series thereof shall be enforceable against the assets of such series.

Recognition of the internal liability protection is to be distinguished from the general governing law provision that the law of the state of organization of a foreign LLC governs its organization and internal affairs and the liability of its members and managers. E.g., DEL. CODE ANN. tit. 6, § 18-901(a)(1).

It is not clear that the general provision of the LLC acts of other states recognizing that the law of the state of foreign organization governs the liability of “its members and managers” has the same result as the specific provisions of the series statutes. Bishop and Kleinberger, Limited Liability Companies ¶ 14.06[1], p. S14-33 (2006 Cum. Supp. No. 2). See RE-ULLCA § 801 COMMENT: “This provision does not pertain to the ‘internal shield of a foreign ‘series’ LLC, because those shields do not concern the liability of members or managers for the obligation of the LLC. Instead those shields seek to protect specified assets of the LLC (associated with one series) from being available to satisfy specified obligations of the LLC (associated with another series).” The legal analysis required before LLCs were authorized in every state will be required for the series. See Bishop and Kleinberger at ¶ 6.08. Ribstein and Keatinge, Ribstein and Keatinge on Limited Liability Companies § 4:17 (Sept. 2007); Keatinge and Conaway, Keatinge and Conaway on Choice of Business Entity § 8:55 (2009).

What is the likely result in a state, such as Virginia, which has provisions for the internal shield of a business trust (see Va. Code § 13.1-1231.D) but not for an LLC?

Note the narrow reading of the foreign law recognition provision of the California LLC Act, even in the case of an LLC, in *Butler v. Adoption Media, LLC*, 2005 WL 2077484 (N. D. Cal. 2005), in which the court read the reference to “internal affairs and the liability and authority of its managers and members” to mean no more than a codification of the internal affairs doctrine, that is, it does not apply to disputes that include people or entities that are not part of the LLC, such as creditors.

There can be no assurance that a state without an express provision on the internal liability shield will recognize the shield created by the state of organization. Therefore, where a series is to be used for operating businesses or real estate projects, liability protection is a greater concern than administrative cost savings or perhaps state tax savings. In states without series enabling legislation, it would clearly be preferable to use multiple legal entities notwithstanding the additional cost.

The acts of some states seem to recognize the internal shield of a foreign series by implication from a provision requiring a statement in the application for a certificate of authority as a foreign LLC that the debts with respect to a particular series are enforceable against the

series only and not against the assets of the foreign LLC. E.g., Iowa Code § 489.1206; Texas V.T.C.A., Bus. Org. Code §9.005(b), but provisions on law applicable to liability do not specifically mention series. Texas V.T.C.A., Bus. Org. Code §§1.102 and 1.104.

D. Bankruptcy.

1. May a separate series that is insolvent file a bankruptcy petition separate and apart from the LLC?

a. Petition may be filed by any “person.” 11 U.S.C. § 109 (a).

b. “Person” includes an individual, partnership, or corporation. 11 U.S.C. § 101(41), but does not include an estate or trust (other than a business trust). 11 U.S.C. § 101(15) (“‘entity’ includes person, estate, trust, governmental unit, and United States trustee.”)

In addition to those enumerated as eligible, “other similar entities are as well.” See *In re ICLNDS Notes Acquisition, LLC*, 259 B.R. 289, 292 (Bankr. N.D. Ohio 2001) holding an LLC eligible because it draws its characteristics from both corporations and partnerships and, therefore, “is similar enough to those entities to be eligible.”

c. “Corporation” includes, among others, a partnership association organized under a law that makes only the capital subscribed responsible for the debts of the association (11 U.S.C. § 101(9)(A)(ii)), includes an unincorporated company or association (11 U.S.C. § 101(9)(A)(iv)) and a (v) business trust (11 U.S.C. § 101(9)(A)(v)), but excludes a limited partnership (11 U.S.C. § 101(9)(B)). According to the legislative note:

The definition of “corporation” in paragraph (8) is similar to the definition in current law, section 1(8) [section 1(8) of former title 11]. The term encompasses any association having the power or privilege that a private corporation, but not an individual or partnership, has; partnership associations organized under a law that makes only the capital subscribed responsible for the debts of the partnership; joint-stock company; unincorporated company or association; and business trust. “Unincorporated association” is intended specifically to include a labor union, as well as other bodies that come under that phrase as used under current law. The exclusion of limited partnerships is explicit, and not left to the case law.

Senate Report No. 95-989.

d. “Partnership” is not defined, but 11 U.S.C. § 723 sets forth the rules with respect to partnerships – for example how the partners’ contribution obligations are to be handled. Thus, it seems clear that the defining characteristic of a “partnership” is the vicarious liability and obligation to contribute that does not exist in limited liability entities.

e. Based on the definition, an LLC should be treated as a “corporation” under the Bankruptcy Code. Kennedy, Countryman & Williams, Kennedy, Partnerships, Limited Liability Entities and S Corporations in Bankruptcy § 2.12 (2002); Ribstein and Keatinge, Ribstein and Keatinge on Limited Liability Companies § 14:4 (December, 2006). See also *In re 4 Whip, LLC*, 332 B.R. 670 (Bkrcty. D. Conn. 2005) holding even a *de facto* (imperfectly formed) LLC may be a debtor in bankruptcy.

f. Nonetheless, it is unclear whether a series that is not defined as an “entity” may be a “person” under the Bankruptcy Code.

See Powell, Delaware Alternative Entities, Probate & Property, January/February 2009 p. 11, 15-17; Powell, Series LLCs, the UCC, and the Bankruptcy Code – A Series of Unfortunate Events, 41 U.C.C. L. J. #2, 101, 110 (2008).

## 2. Substantive Consolidation.

a. If the LLC files, will an approach of “substantive deconsolidation” apply to limit the claims of creditors with respect to one series to the assets of that series?

b. Assuming the series can file, how will the principles of “substantive consolidation” be applied?

c. Who would give a “substantive non-consolidation” opinion with respect to a separate series?

## E. Secured Transactions - UCC Revised Article 9.

Is a separate Delaware series a “registered organization” within UCC Revised Sections 9-102(70) and 9-503(a)(1) or does it fall into “other cases” under 9-503(a)(4), in which case is it under (4)(A) or (4)(B)?

For discussion of the “uncertainty as to the identify of its debtor, its debtor’s name, and how to complete and where to file a financing statement,.” See Powell, 41 U.C.C. L.J., supra at 110. Delaware Alternative Entities, Probate & Property January/February 2009 p. 11, 14-15.

## F. Securities Law.

1. When is an interest in a Series a “security”?

2. SEC broker-dealer financial reporting requirements.

Application of SEC broker-dealer financial responsibility rules for a structure in which a master LLC has no business operations, and Series A operates a retail broker-dealer and Series B operates an institutional broker-dealer. Interpretive letter to FINRA dated September 1, 2009. 2009 WL 2768418, Fed. Sec. L. Rep. (CCH) ¶ 76,278. See Exhibit 4.

According to the letter, under the net capital rule, assets that are not available to meet any and all of the firm's obligations are not allowable; and all liabilities of the company must be recognized when computing the net capital of a broker dealer. "Under a Series LLC structure, assets that are not available to all creditors would not be subject to the risk of the broker-dealer's business and would be treated as non-allowable when computing net capital. Similarly, the net capital rule also requires that liabilities be deducted when computing net capital; therefore, all liabilities whether the liability of a Master LLC or a series, would be deductible from allowable assets when computing net capital."

### 3. Investment Company Act.

a. *Batra v. Investors Research Corp.*, 1992 WL 278688 (W.D. Mo. 1991). Case involved a series investment company that offered 12 series funds to investors with various investment objectives. Plaintiff sued under § 36(b) of the Investment Company Act, which imposes a duty upon the investment advisor of a registered investment company with respect to compensation for services paid by the company and permits an action to recover excessive management fees to be brought by a security holder of the registered investment company on behalf of the company. The plaintiff owned shares in one series only and the defendants argued that he could not recover for any series in which he did not own an interest. The court held that each series was not an investment company and that by holding stock in the series investment company, he could bring suit on behalf of all the series.

b. *Siemers v. Wells Fargo & Co.*, 2006 WL 3041090 (N.D. Cal. 2006). Wells Fargo Funds Trust was the registrant of all Wells Fargo Funds, which were organized as several series. Accepting the SCC position that each series of a series investment company should be treated as a separate issuer under the Investment Company Act, the court held that the plaintiff could not sue on behalf of funds that he did not own, distinguishing and disagreeing with *Batra*.

c. *In re Mutual Funds Investment Litigation*, 519 F.Supp. 2d 508 (D. Md. 2007). The plaintiff, who owned some mutual funds, sued on behalf of those and other funds, many of which were separately registered as an investment company. The court held that whether or not the series was separately registered, those funds, functionally stand on the same footing as those separately registered. The court distinguished *Batra* at note 12.

### G. Charging Order.

Is the entry of a charging order, which is the exclusive remedy by which a judgment creditor of a member or assignee may satisfy a judgment out of the judgment debtor's LLC interest under the Delaware Act, applicable to the interest of a member associated with a series?

Compare Texas, which provides that to the extent not inconsistent with the series subchapter, the LLC chapter applies to a series and its associated members and managers. V.T.C.A. Bus. Org. Code § 101.609(a).

### VI. Use for Real Estate Projects.

See Murray, A Real Estate Practitioners' Guide to Delaware Series LLCs (With Form), (2007) <http://www.firstam.com/listReference.cfm?id=5574>. He concludes, "In light of the foregoing unresolved issues, unless there is some overriding business purpose or cost justification, it may be prudent to just create separate LLCs instead of separate series within the master LLC for real-estate ownership purposes."

For title insurance and lender acceptance issues, see Horton, Series LLCs – Current Questions, Future Promise, Real Estate Taxation, 4th Qtr. 2008 p. 4, 12-13.

A. How are assets of a series to be titled?

Delaware. The original statute did not address title to the assets of a series, but the 2007 amendment added provisions allowing assets to be titled in the name of the series. DEL. CODE ANN. tit. 6, § 18-215(c).

Illinois. Each series may in its own name hold title to assets, but the name of the series must contain the entire name of the LLC. 805 ILCS 180/37-40(b).

Texas. Assets associated with a series may be held in the name of the series or in the name of the LLC. V.T.C.A., Bus. Org. Code §101.603(a).

"From the perspectives of both Article 9 and the Bankruptcy Code, it may be best to title assets of a Series in the name of the Series LLC." Powell, *supra* at 110.

B. Good Standing Certificates.

Delaware. The Delaware Secretary of State will not issue a good standing certificate for a separate series.

Illinois. According to the Office of the Illinois Secretary of State, it will issue a good standing certificate for an entity named in a certificate of designation. For the procedure to apply electronically, see Exhibit 5.

C. How will the rating agencies consider a separate series? How will the SPE requirements be applied?

VII. If You Still Want to Form a Series LLC.

The advice given in connection with maintaining a PCC is applicable as well to a Series LLC: "... the benefits of statutory segregation of liabilities in a PCC will not occur automatically simply because a company is incorporated as a PCC. It must also be managed and conduct its affairs in accordance with the terms of the operating legislation." Feetham and Jones at 57.

A. Filing.

Delaware. Set forth in the certificate of formation notice of the limitation on liabilities of a series as referenced in DEL. CODE ANN. tit. 6, § 18-215(b). No form is prescribed by the Secretary of State. For a suggested (unofficial) form, see Exhibit 6.

Illinois. Set forth in the articles of organization a notice of the limitation on liabilities of a series and file with the Secretary of State a certificate of designation for each series that is to have limited liability (805 ILCS 180/37-40(b)). Forms issued by the Secretary of State: Illinois Form LLC 5.5(S) (Articles of Organization), see Exhibit 7; and Form LLC-37.40 (Certificate of Designation), see Exhibit 8.

Texas. The Secretary of State has not provided a specific form to be used to form a series LLC. The notice of the internal limitation of liability of a series is to be included as supplemental information in the general LLC certificate of formation, Form 205 (Rev'd 12/09). See Formation of Texas Entities FAQs <http://www.sos.state.tx.us/corp/formationfaqs.shtml>.

B. Provision in Operating Agreement.

Agreement may establish or provide for the establishment of series. DEL. CODE ANN. tit. 6, § 18-215(a); 805 ILCS 180/37-40(a).

C. Records.

Maintain separate and distinct records for any series and hold the assets associated with that series and account for those assets separately from the other assets of the series or any other series. DEL. CODE ANN. tit. 6, § 18-215(b); 805 ILCS 180/37-40(b); V.T.C.A. Bus. Org. Code § 101.602(b)(1).

D. Registration of Foreign LLC.

1. Illinois.

Form LLC-45.5(S) (Application for Admission to Transact Business for a Foreign Series LLC). See Exhibit 9.

2. Delaware.

If a foreign LLC that is registering to do business in Delaware is governed by an agreement that provides for a series, the application shall state that the debts with respect to a particular series are enforceable only against the assets of that series.

3. Texas.

The Texas Act specifies supplemental information that must be included in the application for registration of a foreign LLC, the agreement for which provides for a Series. V.T.C.A., Bus. Org. Code §9.005(b). The instructions for Form 304 (Rev'd 12/09), the application form for registration of a foreign LLC, state that Form 313 rather than Form 304 is to be used for a Series LLC. Form 313 (Revised 6/10) Application for Registration of a Foreign Series Limited Liability Company, is now available.

4. California.

The pronouncements of the FTB contemplate that a foreign series LLC may register to do business with the Secretary of State.

E. Form Agreements.

1. Murray, *supra*.

2. H. Edward Hales, Jr., 1 ALI-ABA Partnerships, LLCs and LLPs: Uniform Acts, Taxation, Drafting, Securities, and Bankruptcy, Doc. SD5 (2007).

3. Whitmire, et al, Structuring and Drafting Partnership Agreements, (3d ed.) Appdx. A.28 (2009 Cum. Supp. No. 2).

F. Multiple Real Estate Projects.

See Exhibit 10.

G. Operating Business.

See Exhibit 11.

See also Harding, Series LLCs: A Wave of the Future or Not, Mich. Bus. L. J., Spring 2007, at p. 19, 22.

Thanks to Sheldon Banoff, Beth Miller, Christopher Riser, Lou Hering, Tom Rutledge, and Ann Conaway for their comments on this and prior drafts of this outline.



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<sup>1</sup> The Prefatory Note provides:

The new Act also has a very noteworthy omission; it does not authorize “series LLCs.” Under a series approach, a single limited liability company may establish and contain within itself separate series. Each series is treated as an enterprise separate from each other and from the LLC itself. Each series has associated with it specified members, assets, and obligations, and – due to what have been called “internal shields” – the obligations of one series are not the obligation of any other series or of the LLC.

Delaware pioneered the series concept, and the concept has apparently been quite useful in structuring certain types of investment funds and in arranging complex financing. Other states have followed Delaware’s lead, but a number of difficult and substantial questions remain unanswered, including:

conceptual – How can a series be – and expect to be treated as – a separate legal person for liability and other purposes if the series is defined as part of another legal person?

bankruptcy – Bankruptcy law has not recognized the series as a separate legal person. If a series becomes insolvent, will the entire LLC and the other series become part of the bankruptcy proceedings? Will a bankruptcy court consolidate the assets and liabilities of the separate series?

efficacy of the internal shields in the courts of other states – Will the internal shields be respected in the courts of states whose LLC statutes do not recognize series? Most LLC statutes provide that “foreign law governs” the liability of members of a foreign LLC. However, those provisions do not apply to the series question, because those provisions pertain to the liability of a member for the obligations of the LLC. For a series LLC, the pivotal question is entirely different – namely, whether some assets of an LLC should be immune from some of the creditors of the LLC.

tax treatment – Will the IRS and the states treat each series separately? Will separate returns be filed? May one series “check the box” for corporate tax classification and the others not?

securities law – Given the panoply of unanswered questions, what types of disclosures must be made when a membership interest is subject to securities law?

The Drafting Committee considered a series proposal at its February 2006 meeting, but, after serious discussion, no one was willing to urge adoption of the proposal, even for the limited purposes of further discussion. Given the availability of well-established alternate structures (e.g., multiple single member LLCs, an LLC “holding company” with LLC subsidiaries), it made no sense for the Act to endorse the complexities and risks of a series approach.

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<sup>2</sup> According to the Committee Findings of the House Judiciary Committee after its June 13, 2007, Robert Symonds, chair of the Alternative Entities Subcommittee of the Delaware Bar Association, describes the changes as fitting into three categories: technical changes, conforming changes, and confirmations of existing law.

<sup>3</sup> 6 Del. Code §101(12) (“‘Person’ means . . . any other individual or entity (or series thereof) in its own or any representative capacity . . .”).

<sup>4</sup> This assumes the entity is a U.S. entity.

## **EXHIBIT 1**

### **DEL. CODE ANN. tit. 6, § 18-215 as amended by SB 96**

§ 18-215. Series of members, managers, limited liability company interests or assets.

(a) A limited liability company agreement may establish or provide for the establishment of 1 or more designated series of members, managers, limited liability company interests or assets. Any such series may have separate rights, powers or duties with respect to specified property or obligations of the limited liability company or profits and losses associated with specified property or obligations, and any such series may have a separate business purpose or investment objective.

(b) Notwithstanding anything to the contrary set forth in this chapter or under other applicable law, in the event that a limited liability company agreement establishes or provides for the establishment of 1 or more series, and if the records maintained for any such series account for the assets associated with such series separately from the other assets of the limited liability company, or any other series thereof, and if the limited liability company agreement so provides, and if notice of the limitation on liabilities of a series as referenced in this subsection is set forth in the certificate of formation of the limited liability company, then the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the limited liability company generally or any other series thereof, and, unless otherwise provided in the limited liability company agreement, none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the limited liability company generally or any other series thereof shall be enforceable against the assets of such series. Assets associated with a series may be held directly or indirectly, including in the name of such series, in the name of the limited liability company, through a nominee or otherwise. Records maintained for a series that reasonably identify its assets, including by specific listing, category, type, quantity, computational or allocational formula or procedure (including a percentage or share of any asset or assets) or by any other method where the identity of such assets is objectively determinable, will be deemed to account for the assets associated with such series separately from the other assets of the limited liability company, or any other series thereof. Notice in a certificate of formation of the limitation on liabilities of a series as referenced in this subsection shall be sufficient for all purposes of this subsection whether or not the limited liability company has established any series when such notice is included in the certificate of formation, and there shall be no requirement that any specific series of the limited liability company be referenced in such notice. The fact that a certificate of formation that contains the foregoing notice of the limitation on liabilities of a series is on file in the office of the Secretary of State shall constitute notice of such limitation on liabilities of a series.

(c) A series established in accordance with subsection (b) of this section may carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of banking as defined in § 126 of Title 8. Unless otherwise provided in a limited liability company agreement, a series established in accordance with subsection (b) of this section shall have the power and capacity to, in its own name, contract, hold title to assets

(including real, personal and intangible property), grant liens and security interests, and sue and be sued.

(d) Notwithstanding § 18-303(a) of this title, under a limited liability company agreement or under another agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of one or more series.

(e) A limited liability company agreement may provide for classes or groups of members or managers associated with a series having such relative rights, powers and duties as the limited liability company agreement may provide, and may make provision for the future creation in the manner provided in the limited liability company agreement of additional classes or groups of members or managers associated with the series having such relative rights, powers and duties as may from time to time be established, including rights, powers and duties senior to existing classes and groups of members or managers associated with the series. A limited liability company agreement may provide for the taking of an action, including the amendment of the limited liability company agreement, without the vote or approval of any member or manager or class or group of members or managers, including an action to create under the provisions of the limited liability company agreement a class or group of the series of limited liability company interests that was not previously outstanding. A limited liability company agreement may provide that any member or class or group of members associated with a series shall have no voting rights.

(f) A limited liability company agreement may grant to all or certain identified members or managers or a specified class or group of the members or managers associated with a series the right to vote separately or with all or any class or group of the members or managers associated with the series, on any matter. Voting by members or managers associated with a series may be on a per capita, number, financial interest, class, group or any other basis.

(g) Unless otherwise provided in a limited liability company agreement, the management of a series shall be vested in the members associated with such series in proportion to the then current percentage or other interest of members in the profits of the series owned by all of the members associated with such series, the decision of members owning more than 50 percent of the said percentage or other interest in the profits controlling; provided, however, that if a limited liability company agreement provides for the management of the series, in whole or in part, by a manager, the management of the series, to the extent so provided, shall be vested in the manager who shall be chosen in the manner provided in the limited liability company agreement. The manager of the series shall also hold the offices and have the responsibilities accorded to the manager as set forth in a limited liability company agreement. A series may have more than 1 manager. Subject to § 18-602 of this title, a manager shall cease to be a manager with respect to a series as provided in a limited liability company agreement. Except as otherwise provided in a limited liability company agreement, any event under this chapter or in a limited liability company agreement that causes a manager to cease to be a manager with respect to a series shall not, in itself, cause such manager to cease to be a manager of the limited liability company or with respect to any other series thereof.

(h) Notwithstanding § 18-606 of this title, but subject to subsections (i) and (l) of this section, and unless otherwise provided in a limited liability company agreement, at the time a

member associated with a series that has been established in accordance with subsection (b) of this section becomes entitled to receive a distribution with respect to such series, the member has the status of, and is entitled to all remedies available to, a creditor of the series, with respect to the distribution. A limited liability company agreement may provide for the establishment of a record date with respect to allocations and distributions with respect to a series.

(i) Notwithstanding § 18-607(a) of this title, a limited liability company may make a distribution with respect to a series that has been established in accordance with subsection (b) of this section. A limited liability company shall not make a distribution with respect to a series that has been established in accordance with subsection (b) of this section to a member to the extent that at the time of the distribution, after giving effect to the distribution, all liabilities of such series, other than liabilities to members on account of their limited liability company interests with respect to such series and liabilities for which the recourse of creditors is limited to specified property of such series, exceed the fair value of the assets associated with such series, except that the fair value of property of the series that is subject to a liability for which the recourse of creditors is limited shall be included in the assets associated with such series only to the extent that the fair value of that property exceeds that liability. For purposes of the immediately preceding sentence, the term "distribution" shall not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program. A member who receives a distribution in violation of this subsection, and who knew at the time of the distribution that the distribution violated this subsection, shall be liable to a series for the amount of the distribution. A member who receives a distribution in violation of this subsection, and who did not know at the time of the distribution that the distribution violated this subsection, shall not be liable for the amount of the distribution. Subject to § 18-607(c) of this title, which shall apply to any distribution made with respect to a series under this subsection, this subsection shall not affect any obligation or liability of a member under an agreement or other applicable law for the amount of a distribution.

(j) Unless otherwise provided in the limited liability company agreement, a member shall cease to be associated with a series and to have the power to exercise any rights or powers of a member with respect to such series upon the assignment of all of the member's limited liability company interest with respect to such series. Except as otherwise provided in a limited liability company agreement, any event under this chapter or a limited liability company agreement that causes a member to cease to be associated with a series shall not, in itself, cause such member to cease to be associated with any other series or terminate the continued membership of a member in the limited liability company or cause the termination of the series, regardless of whether such member was the last remaining member associated with such series.

(k) Subject to § 18-801 of this title, except to the extent otherwise provided in the limited liability company agreement, a series may be terminated and its affairs wound up without causing the dissolution of the limited liability company. The termination of a series established in accordance with subsection (b) of this section shall not affect the limitation on liabilities of such series provided by subsection (b) of this section. A series is terminated and its affairs shall be wound up upon the dissolution of the limited liability company under § 18-801 of this title or otherwise upon the first to occur of the following:

- (1) At the time specified in the limited liability company agreement;
- (2) Upon the happening of events specified in the limited liability company agreement;
- (3) Unless otherwise provided in the limited liability company agreement, upon the affirmative vote or written consent of the members of the limited liability company associated with such series or, if there is more than 1 class or group of members associated with such series, then by each class or group of members associated with such series, in either case, by members associated with such series who own more than two-thirds of the then-current percentage or other interest in the profits of the series of the limited liability company owned by all of the members associated with such series or by the members in each class or group of such series, as appropriate; or
- (4) The termination of such series under subsection (m) of this section.

(l) Notwithstanding § 18-803(a) of this title, unless otherwise provided in the limited liability company agreement, a manager associated with a series who has not wrongfully terminated the series or, if none, the members associated with the series or a person approved by the members associated with the series or, if there is more than 1 class or group of members associated with the series, then by each class or group of members associated with the series, in either case, by members who own more than 50 percent of the then current percentage or other interest in the profits of the series owned by all of the members associated with the series or by the members in each class or group associated with the series, as appropriate, may wind up the affairs of the series; but, if the series has been established in accordance with subsection (b) of this section, the Court of Chancery, upon cause shown, may wind up the affairs of the series upon application of any member associated with the series, the member's personal representative or assignee, and in connection therewith, may appoint a liquidating trustee. The persons winding up the affairs of a series may, in the name of the limited liability company and for and on behalf of the limited liability company and such series, take all actions with respect to the series as are permitted under § 18-803(b) of this title. The persons winding up the affairs of a series shall provide for the claims and obligations of the series and distribute the assets of the series as provided in § 18-804 of this title, which section shall apply to the winding up and distribution of assets of a series. Actions taken in accordance with this subsection shall not affect the liability of members and shall not impose liability on a liquidating trustee.

(m) On application by or for a member or manager associated with a series established in accordance with subsection (b) of this section, the Court of Chancery may decree termination of such series whenever it is not reasonably practicable to carry on the business of the series in conformity with a limited liability company agreement.

(n) If a foreign limited liability company that is registering to do business in the State of Delaware in accordance with § 18-902 of this title is governed by a limited liability company agreement that establishes or provides for the establishment of designated series of members, managers, limited liability company interests or assets having separate rights, powers or duties with respect to specified property or obligations of the foreign limited liability company or profits and losses associated with specified property or obligations, that fact shall be so stated on

the application for registration as a foreign limited liability company. In addition, the foreign limited liability company shall state on such application whether the debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series, if any, shall be enforceable against the assets of such series only, and not against the assets of the foreign limited liability company generally or any other series thereof, and whether any of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the foreign limited liability company generally or any other series thereof shall be enforceable against the assets of such series. (70 Del. Laws, c. 360, § 9; 70 Del. Laws, c. 186, § 1; 71 Del. Laws, c. 77, §§ 19-23; 71 Del. Laws, c. 341, §§ 9, 10; 72 Del. Laws, c. 389, §§ 14-18; 74 Del. Laws, c. 85, §§ 12, 13; 74 Del. Laws, c. 275, § 9; 76 Del. Laws, c. 105, §§ 22-28.)

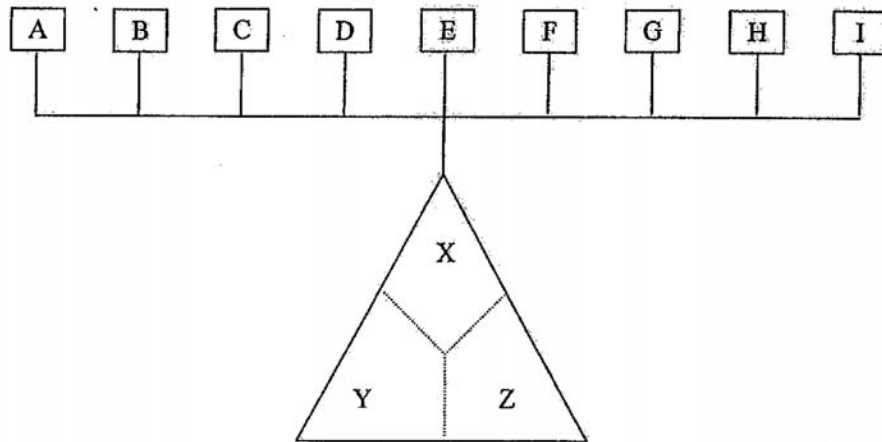
## **EXHIBIT 2**



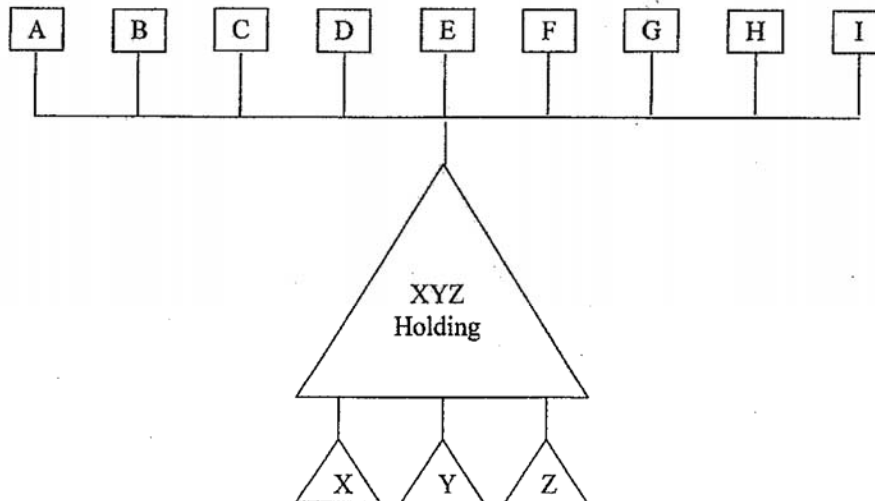
**EXHIBIT 3**

**I. No Series Treated as a Partnership**

**a. Series LLC and all series treated as a single business entity and partnership**



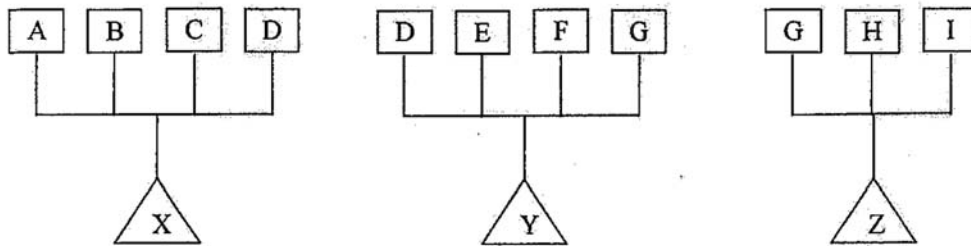
**b. Series LLC treated as a holding company and each series treated as a disregarded entity**



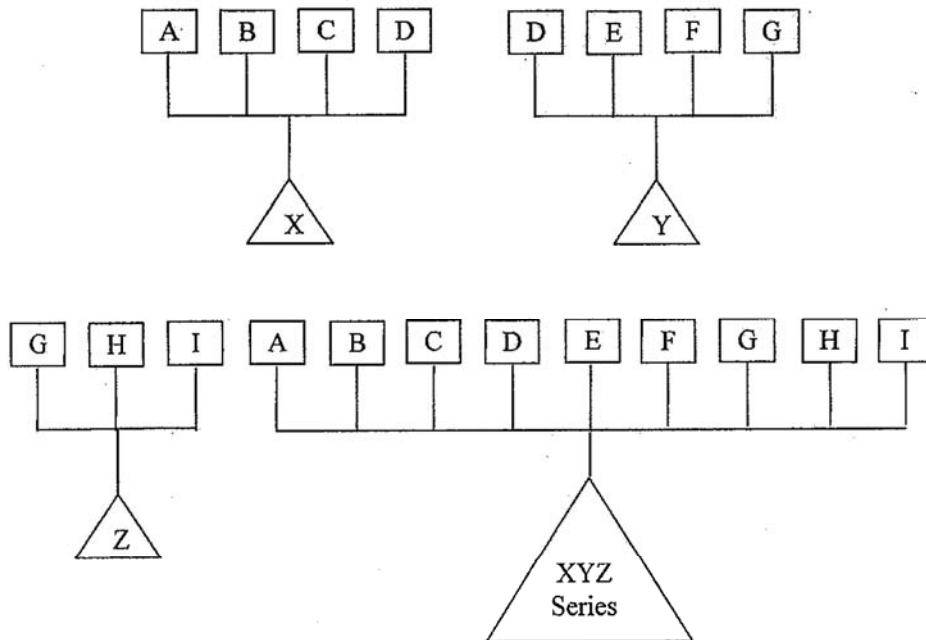
Many thanks to Sheldon Banoff for his invaluable contribution to this Exhibit

**II. Each Series Treated as a Partnership; Overlapping ownership**

**a. Each series treated as a partnership**

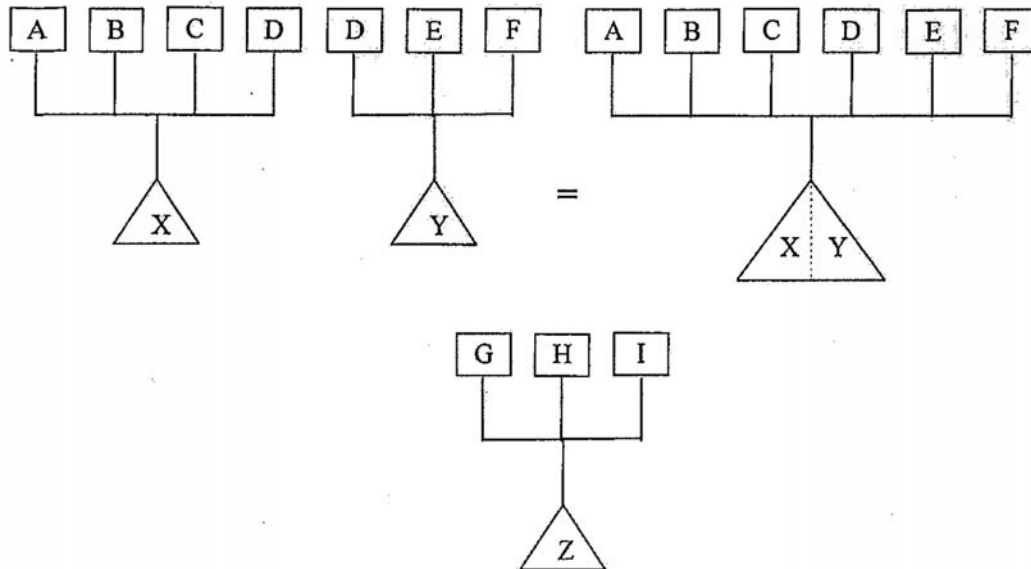


**b. Each series treated as a partnership and series LLC also treated as a partnership**

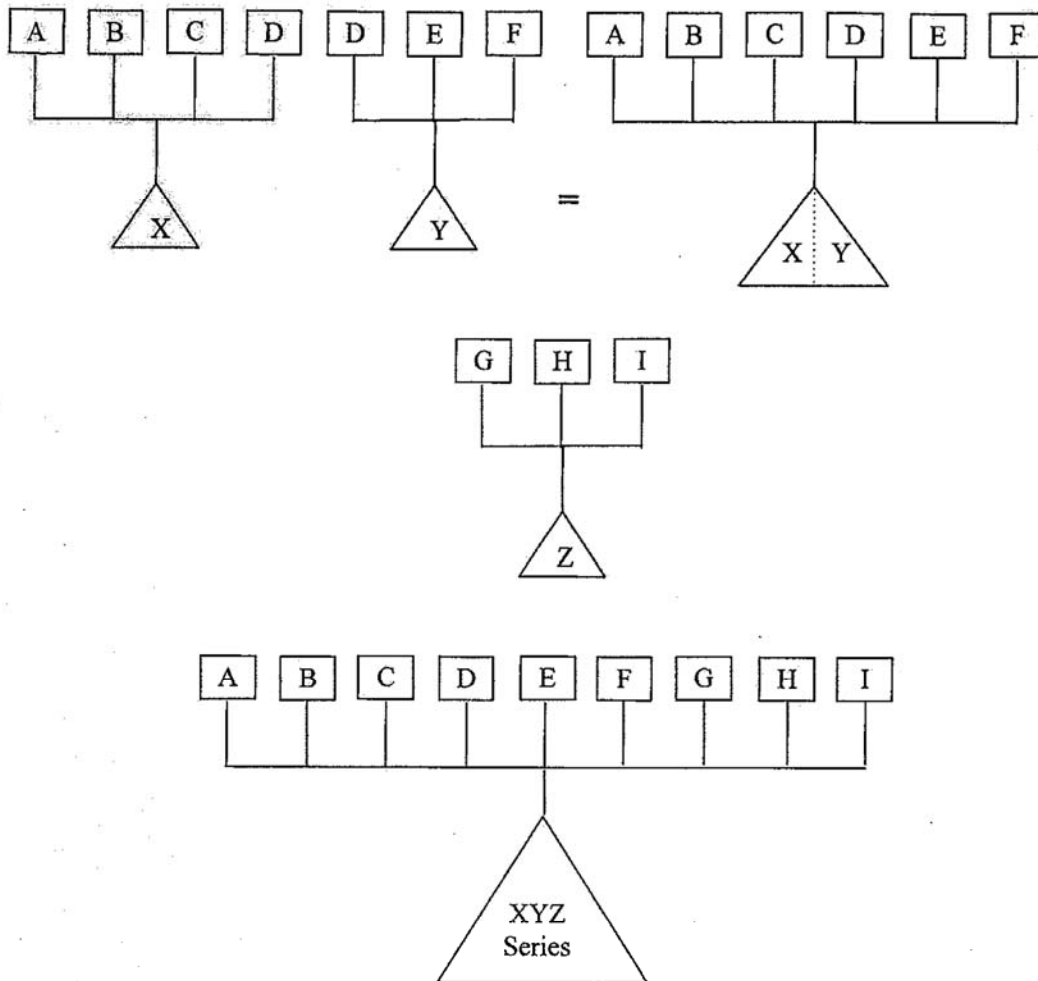


III. Some, But Not All Series, Treated As Separate Partnerships –Overlapping Ownership

- a. Each series treated as a separate partnership as long as the CA FTB Test is met



b. Each series treated as a separate partnership as long as the CA FTB Test is met; the series LLC itself also treated as a partnership





**EXHIBIT 4**  
**UNITED STATES**  
**SECURITIES AND EXCHANGE COMMISSION**  
**WASHINGTON, D.C. 20549**

September 1, 2009

Ms. Susan M. DeMando  
Associate Vice President  
Financial Industry Regulatory Authority  
1735 K Street, N.W.  
Washington, DC 20006

RE: Broker-dealers Operating Under a Series LLC Structure

Dear Ms. DeMando:

On behalf of the Financial Industry Regulatory Authority ("FINRA"), you have asked for interpretive guidance as to how the Securities and Exchange Commission's ("Commission") financial responsibility rules would apply to an entity formed and operated as a Series Limited Liability Company ("Series LLC") under state law.

A Series LLC consists of a Master LLC and "series" of ownership classes within the Master LLC itself. The Master LLC is the only formal legal entity and is the only entity created under applicable state statutes. Generally, under state law a Series LLC may create any number of series that may operate in many respects as independent entities. For example, each series may have separate assets and separate liabilities. Under state law each series is not required to absorb the financial obligations of any other series or the Master LLC, and liabilities of the Master LLC and each series are not enforceable against any other series or the Master LLC.

Series LLCs were first introduced in Delaware in 1996 but the concept has since spread to other states – for example, Illinois, Iowa, Nevada, Oklahoma, Tennessee, and Utah now have laws similar to the Delaware Series LLC law. You have informed us that in recent years, broker-dealers have approached the Financial Industry Regulatory Authority asking to use this structure. As one example of how a broker-dealer may wish to use the Series LLC structure you have described to us the following construct: the broker-dealer would structure the Series LLC such that the Master LLC would have no business operations, Series A would operate a retail broker-dealer and Series B would handle institutional activities. Series A and B would each have separate assets and liabilities and liabilities of one series would not be enforceable against the other series. The Master LLC would be the only Commission registrant. Prospective FINRA members seeking to use this structure have informed FINRA that they would report the assets and liabilities of the two series in one consolidated financial statement when filing financial reports with the Commission.

The Commission's financial responsibility rules include the net capital rule,<sup>1</sup> the customer protection rule,<sup>2</sup> and the financial reporting rule.<sup>3</sup> The net capital rule requires, among other things, different minimum levels of capital based upon the nature of the firm's business and whether the broker-dealer handles customer funds or securities.<sup>4</sup> The main purpose of the net capital rule is "to protect customers and other market participants from broker-dealer failures and to enable those firms that fall below the minimum net capital requirements to liquidate in an orderly fashion without the need for a formal proceeding for financial assistance from the Securities Investor Protection Corporation."<sup>5</sup>

Generally, under the net capital rule, assets that are not available to meet any and all of the firm's obligations are not allowable. The Commission staff has previously taken a no-action position that if a capital contribution to a broker-dealer is to be included in the net capital of the firm, it must be available, without limitation, for the company to use for any purpose.<sup>6</sup> Specifically, the capital needs to be "subject to the risks of the business" in order to be included in the firm's net capital.<sup>7</sup> Further, the rule requires that all liabilities of a company be recognized when computing the net capital of a broker dealer. Under a Series LLC structure, assets that are not available to all creditors would not be subject to the risks of the broker-dealer's business and would be treated as non-allowable when computing net capital. Similarly, the net capital rule also requires that liabilities be deducted when computing net capital; therefore, all liabilities, whether the liability of a Master LLC or a series, would be deducted from allowable assets when computing net capital.

Rule 17a-5 requires broker-dealers to regularly file certain financial information with the Commission and the self regulatory organizations for which the broker-dealer is a member. You note that if a Series LLC reported its financial position on a consolidated basis, SRO and Commission examiners would not be able to determine the financial position and operating results of the registrant and each series without substantial effort. Indeed, a user of the financial statements would be unable to determine which of the series controlled specific assets or was obligated to satisfy specific liabilities. Therefore, the Commission's and the SRO's ability to effectively supervise the financial position of the firm would be greatly diminished.

In addition, the customer protection rule, Rule 15c3-3, imposes requirements on broker-dealers for the protection of customer property. Generally, Rule 15c3-3 requires a broker-dealer that carries customer accounts to compute on a daily basis its possession or control obligations, and perform a weekly computation regarding the amount required to

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<sup>1</sup> 17 CFR 240.15c3-1.

<sup>2</sup> 17 CFR 240.15c3-3.

<sup>3</sup> 17 CFR 240.17a-5.

<sup>4</sup> See, e.g., Alternative Net Capital Requirements for Broker-Dealers that are Part of Consolidated Supervised Entities, Exchange Act Release 49830, 69 F.R. 34,430 (June 21, 2004).

<sup>5</sup> See 69 FR 34,428, 34,430.

<sup>6</sup> See SEC No-Action Letter, Net Capital Treatment of Temporary Capital Contributions, March 6, 2000.

<sup>7</sup> See, e.g., 17 CFR 240.15c3-1d(b)(4) (as to proceeds of subordinated loan agreements).

Ms. Susan DeMando  
September 1, 2009  
Page 3 of 3

be on deposit in a special reserve bank account for the exclusive benefit of customers. Performing this possession and control requirement or a customer reserve requirement for a Series LLC would be difficult, if not impossible, because the assets and liabilities of each series would be in separate entities. For example, the amount required to be held in the customer reserve account must be calculated across and be available to all customers of the firm. However, under the Series LLC laws, if the amount calculated for the special reserve account for customers included credits from one series and debits from another series the account could be underfunded. Therefore, a Series LLC that receives customer cash or securities would not be able to comply with the requirements of Rule 15c3-3.

We also note that the Series LLC structure could be problematic for purposes of a liquidation proceeding under the Securities Investor Protection Act ("SIPA"). Within specified limits, SIPA contemplates equal treatment of customers, and a trustee liquidating a broker-dealer must comply with these requirements. Thus, if customer assets are missing, all customers share the pool of customer property at the firm on a *pro rata* basis. In contrast, if each series is treated as a separate entity it could give preferred treatment to some customers at the expense of others. To illustrate, if assets of only Series A customers are missing, only Series A customers would be subject to the risk of the loss. Series B customers would be made whole. Moreover, unsecured general creditors of Series B would be paid before customers of Series A, an outcome that is inconsistent with SIPA.

This is a staff position on Series LLCs only and does not purport to state any legal conclusion to this issue. Any material change in circumstances may warrant a different conclusion and should be brought immediately to the Division of Trading and Market's attention. Furthermore, this position may be withdrawn or modified if the staff determines that such action is necessary in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the securities laws.

Sincerely,



Michael Macchiaroli  
Associate Director

## **EXHIBIT 5**

### **E-MAIL FROM ILLINOIS SECRETARY OF STATE'S OFFICE RE PROCEDURE FOR OBTAINING CERTIFICATE OF GOOD STANDING ON-LINE**

**February 8, 2007**

For Allan G. Donn – thought you'd like to know about Cert. of Good Standing for Illinois Series – this is from the man (Chuck Moles) who heads the LLC division of the SOS Office in Illinois:

Yes, an individual series can get a Certificate of Good Standing. We can do these in Springfield or Chicago, or they can be purchased on-line. If you go to purchase one on-line, it's a little tricky because you have to enter the series name, not the company name, when you do the search. If you go with the company name or the file number you will only get the company itself. While the File Detail Report for the company will itemize the series names, there's no "click on" function that would let you get a certificate for just the series. So, you would have to confirm the exact name, go back to search function and re-enter the series name. This time, the File Detail Report for the company will appear as before, except that the name of the chosen series will be high-lighted. If you then proceed to purchase a Good Standing Certificate on-line, the system will automatically use this series name.



EXHIBIT 6

**CERTIFICATE OF FORMATION  
OF  
\_\_\_\_\_ LLC**

This Certificate of Formation is being executed as of \_\_\_\_\_, \_\_\_\_\_, for the purpose of forming a limited liability company pursuant to the Delaware Limited Liability Company Act, 6 Del. C. §§ 18-101 et seq.

The undersigned, being duly authorized to execute and file this Certificate of Formation, does hereby certify as follows:

1. Name. The name of the limited liability company is \_\_\_\_\_ LLC (the "Company").

2. Registered Office and Registered Agent. The Company's registered office in the State of Delaware is located at \_\_\_\_\_. The registered agent of the Company for service of process at such address is \_\_\_\_\_.

3. Notice of Limitation of Liabilities of Series. Notice is hereby given that pursuant to §18-215 of the Delaware Limited Liability Company Act, the debts, liabilities, obligations and expenses incurred, contracted for, or otherwise existing with respect to a particular series of the Company shall be enforceable against the assets of such series only and not against the assets of the Company generally or any other series thereof and, unless otherwise provided in the limited liability company agreement of the Company, none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the Company generally or any other series thereof shall be enforceable against the assets of such series.

IN WITNESS WHEREOF, the undersigned has duly executed this Certificate of Formation as of the day and year first above written.

\_\_\_\_\_  
Authorized Person

Prepared by:  
Louis G. Hering  
Morris, Nichols, Arsht & Tunnell LLP  
Wilmington, Delaware

**EXHIBIT 7**

Form **LLC-5.5(S)**

October 2009

**Secretary of State Jesse White**  
Department of Business Services  
Limited Liability Division  
501 S. Second St., Rm. 351  
Springfield, IL 62756  
217-524-8008  
www.cyberdriveillinois.com

Payment must be made by certified check, cashier's check, Illinois attorney's check, C.P.A.'s check or money order payable to Secretary of State.

**Illinois  
Limited Liability Company Act  
Articles of Organization**

**SUBMIT IN DUPLICATE**

Must be typewritten.

This space for use by Secretary of State.

**Filing Fee: \$750**

**Approved:**

**FILE #**

This space for use by Secretary of State.

1. Limited Liability Company Name: \_\_\_\_\_

The LLC name must contain the words Limited Liability Company, L.L.C. or LLC, and cannot contain the terms Corporation, Corp., Incorporated, Inc. Ltd., Co., Limited Partnership, or L.P.

2. Address of Principal Place of Business: (P.O. Box alone or c/o is unacceptable.)

3. The Articles of Organization are effective on: (check one)

a. ☐ the filing date

b. ☐ another date later than but not more than 60 days subsequent to the filing date: \_\_\_\_\_  
Month, Day, Year

4. Registered Agent's Name and Registered Office Address:

Registered Agent:

First Name

Middle Initial

Last Name

Registered Office:

(P.O. Box alone or c/o is unacceptable.)

Number

Street

Suite #

City

ZIP Code

County

5. Purpose(s) for which the Company is Organized:

**The transaction of any or all lawful business for which Limited Liability Companies may be organized under this Act.**

(LLC's organized to provide professional services must list the address(es) from which those services will be rendered if different from Item 2. If more space is needed, use additional sheets of this size.)

6. Latest day, if any, upon which the company is to dissolve: \_\_\_\_\_  
(Leave blank if duration is perpetual.) Month, Day, Year

7. The operating agreement provides for the establishment of one or more series. These Articles of Organization must be on file in accordance with Section 5-40 prior to the attestation and submittal of form LLC-37.40, Certificate of Designation. When the company has filed a Certificate of Designation for each series, which is to have limited liability pursuant to Section 37-40 of the Illinois Limited Liability Company Act, the debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the Limited Liability Company generally or any other series thereof, and unless otherwise provided in the operating agreement, none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to this company generally or any other series thereof shall be enforceable against the assets of such series.

♻️ Printed on recycled paper.

Printed by authority of the State of Illinois. December 2009 — 1M — LLC 37.4

## LLC-5.5(S)

8. OPTIONAL: Other provisions for the regulation of the internal affairs of the company: (If more space is needed, please attach additional sheets of this size.)

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9. The Limited Liability Company: (Check either a or b below.)

a. ☐ is managed by the manager(s). (List names and business addresses.)

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b. ☐ has management vested in the member(s). (List names and addresses.)

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**10. Name and Address of Organizer(s)**

I affirm, under penalties of perjury, having authority to sign hereto, that these Articles of Organization are to the best of my knowledge and belief, true, correct and complete.

Dated \_\_\_\_\_, \_\_\_\_\_  
Month & Day Year


**Signature(s) and Name(s) of Organizer(s)**

**Address(es)**

1.	_____ Signature _____ Name (type or print) _____ Name if a Corporation or other Entity, and Title of Signer
2.	_____ Signature _____ Name (type or print) _____ Name if a Corporation or other Entity, and Title of Signer

1.	_____ Number Street _____ City _____ State ZIP Code
2.	_____ Number Street _____ City _____ State ZIP Code

**Signatures must be in black ink on an original document.  
Carbon copy, photocopy or rubber stamp signatures  
may only be used on conformed copies.**

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# EXHIBIT 8

Form **LLC-37.40**

July 2008

Secretary of State  
Department of Business Services  
Limited Liability Division  
501 S. Second St., Rm. 351  
Springfield, IL 62756  
217-524-8008  
www.cyberdriveillinois.com

Payment may be made by business  
firm check payable to Secretary of  
State. If check is returned for any  
reason this filing will be void.

## Illinois Limited Liability Company Act Certificate of Designation

FILE #:

This space for use by Secretary of State.

**SUBMIT IN DUPLICATE.**

Must be typewritten.

This space for use by Secretary of State.

Filing Fee: \$50

Approved:

1. Limited Liability Company Name: \_\_\_\_\_

2. State or Country under the laws of which the Company is Organized: (check one)

☐ Illinois (Domestic)

☐ Foreign (Specify): \_\_\_\_\_

3. Name of Series: \_\_\_\_\_

Must contain the entire name of the Limited Liability Company and be distinguishable from the names of the other Series.


With the filing of this document: (check one)

☐ the existence of the Series shall begin.

☐ the name of the Series shall be changed to: \_\_\_\_\_

☐ the Series shall be dissolved.

1. The Registered Agent and Registered Office for the Limited Liability Company in Illinois shall serve as the agent and office for service of process in Illinois for each Series.

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**.C-37.40**


Complete only if different from the Limited Liability Company, or if changed, the Series:  
a. ☐ is managed by the manager(s) (List names and business addresses.)

b. ☐ has management vested in the member(s) (List names and addresses.)

The undersigned affirms, under penalties of perjury, having authority to sign hereto, that this Certificate of Designation is to the best of my knowledge and belief true, correct and complete.

Dated \_\_\_\_\_, \_\_\_\_\_  
Month/Day Year  
\_\_\_\_\_  
Signature (Must comply with Section 5-45 of ILLCA.)  
\_\_\_\_\_  
Name and Title (type or print)  
\_\_\_\_\_  
If applicant is a company or other entity, state Name of Company  
and whether it is a member or manager of the LLC.

**NOTE:** This document may be executed by a manager or member of the LLC, or by any other person or entity designated with such authority in the operating agreement. Unless the manager or member is another business entity using the appropriate titles, the only acceptable titles to appear are manager, member, or designee.

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## EXHIBIT 9

<b>Form LLC-45.5(S)</b> November 2008	Illinois <b>Limited Liability Company Act          Application for Admission          to Transact Business</b>	<b>FILE #</b> This space for use by Secretary of State
Secretary of State Jesse White Department of Business Services Limited Liability Division 101 S. Second St., Rm. 351 Springfield, IL 62756 217-524-8008 www.cyberdriveillinois.com	<b>SUBMIT IN DUPLICATE</b> Must be typewritten. This space for use by Secretary of State.	
Payment must be made by certified check, cashier's check, Illinois attorney's C.P.A.'s check or money order payable to Secretary of State.	<b>Filing Fee:</b> \$750 <b>Penalty:</b> \$ <b>Approved:</b>	

- Limited Liability Company Name: \_\_\_\_\_  
 Must comply with Section 1-10 of ILLCA or item 2 below also applies.
- Assumed Name: \_\_\_\_\_  
 By electing this assumed name, the Limited Liability Company hereby agrees not to use its Company Name transaction or business in Illinois. Form LLC-1.20 is attached.
- Jurisdiction of Organization: \_\_\_\_\_
- Date of Organization: \_\_\_\_\_
- Period of Duration: \_\_\_\_\_
- Address, including County, of the Office required to be maintained in the jurisdiction of its organization or, if not rec of the Principal Place of Business: (P.O. Box alone or c/o is unacceptable.)
- |            |          |         |
|------------|----------|---------|
| Number     | Street   | Suite # |
|            |          |         |
| City/State | ZIP Code | County  |
|            |          |         |
- Registered Agent: \_\_\_\_\_
- |            |             |           |
|------------|-------------|-----------|
| First Name | Middle Name | Last Name |
|            |             |           |
- Registered Office: \_\_\_\_\_  
 (P.O. Box alone or c/o is unacceptable.)
- |          |        |          |
|----------|--------|----------|
| Number   | Street | Suite #  |
|          |        |          |
| Illinois |        |          |
| City     | County | ZIP Code |
|          |        |          |
- If applicable, Date on which the Company first conducted business in Illinois: \_\_\_\_\_

(continued on back)

**LLC-45.5(S)**

9. Purpose(s) for which the Company is Organized and Proposes to Conduct Business in Illinois:

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10. The jurisdiction of organization permits the establishment of a series having separate rights, powers or has limited the liabilities of such series. Unless otherwise provided in the operating agreement, the debts and obligations incurred, contracted for or otherwise existing with respect to a particular series of the Limited Liability Company are enforceable against the assets of such series only, and not against the assets of the Limited Liability Company generally or any other series thereof; and none of the debts, liabilities, obligations and expense contracted for or otherwise existing with respect to the Limited Liability Company generally or any of thereof shall be enforceable against the assets of such series.
11. Pursuant to Section 37-40 of the Limited Liability Company Act, a Certificate of Designation shall be filed for each series being registered to do business in this State.
12. The Limited Liability Company: (Check either a or b below.)
- a. ☐ is managed by the manager(s) (List names and business addresses.)
- b. ☐ has management vested in the member(s) (List names and addresses.)
13. The Illinois Secretary of State is hereby appointed the agent of the company for service of process in the circumstances set forth in subsection (b) of Section 1-60 of the Illinois Limited Liability Company Act.
14. This application is accompanied by a Certificate of Good Standing or Existence, as well as a copy of the Articles of Organization, as amended, duly authenticated within the last 60 days by the officer or the country wherein the LLC is formed.
15. If the period of duration is a date certain and is not stated in the Articles of Organization from the state, a copy of that page from the Operating Agreement stating the date also must be submitted.
16. The undersigned affirms under penalties of perjury, having authority to sign hereto that this application for to transact business is to the best of my knowledge and belief, true, correct and complete.

Dated \_\_\_\_\_, \_\_\_\_\_

Month & Day

\_\_\_\_\_  
Signature (Must comply with Section 5-45 of ILLCA.)

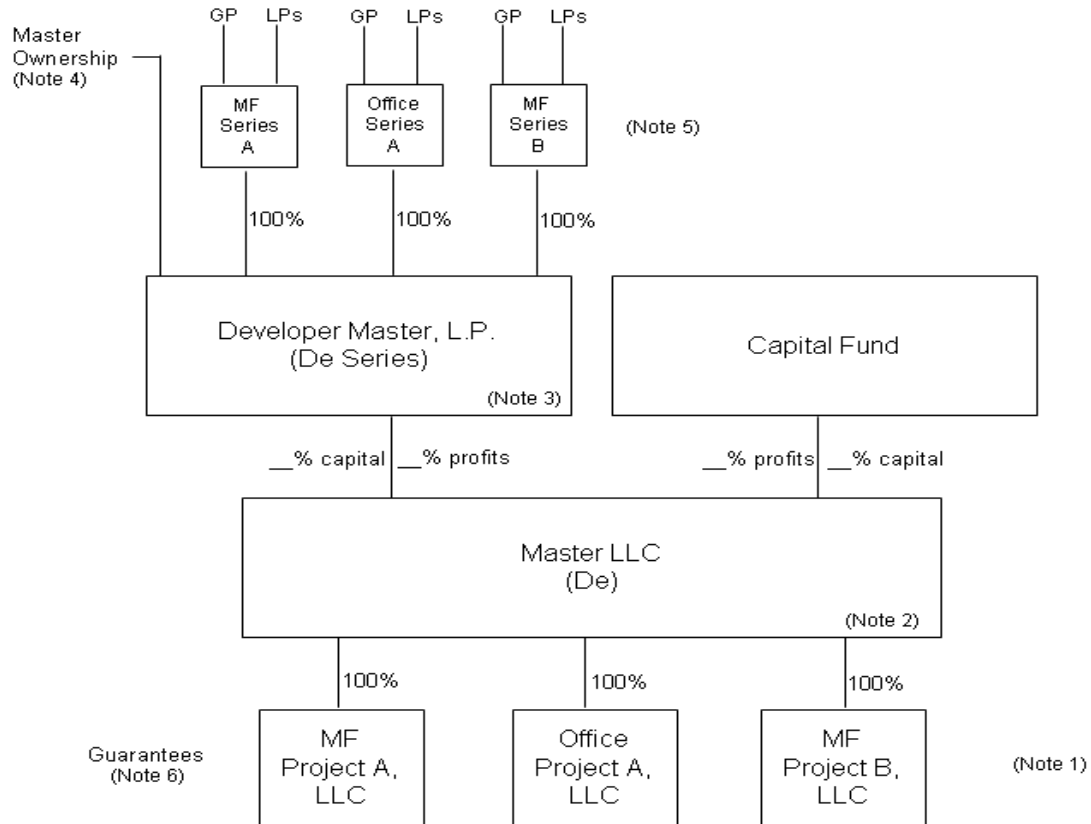
\_\_\_\_\_  
Name and Title (type or print)

If applicant is a Company or other Entity, state Name of Company and indicate if it is a member or manager of the LLC. Please refer to Sections 178.2 and 178.3 of the Illinois Limited Liability Company Act, Illinois Administrative Rules.

Printed by authority of the State of Illinois, November 2008 — 1 — LLC-39.3

## **EXHIBIT 10**

Structure Chart



Dallas:1572281

**Thanks to  
R. Brent Clifton  
Locke Liddell & Sapp LLP  
Dallas, Texas 75201-6776  
[bclifton@lockeliddell.com](mailto:bclifton@lockeliddell.com)  
for providing this chart.**



## **EXHIBIT 10**

### **NOTES**

Note 1. Each real estate project will be owned by a separate entity, generally a single member LLC.

Note 2. Master LLC will be a Delaware LLC. Each Project will be independent, and 100% of the profits or losses of each Project will be passed through directly to the Members of Master LLC without any netting or cross collateralization. Master LLC will sign no guarantees for Project loans nor will Master LLC incur debt or own property other than 100% interests in Projects.

Note 3. Developer Master, L.P. ("Dev Master") will be a Delaware series limited partnership (i.e., employing DRULPA §17-218 for series ownership).

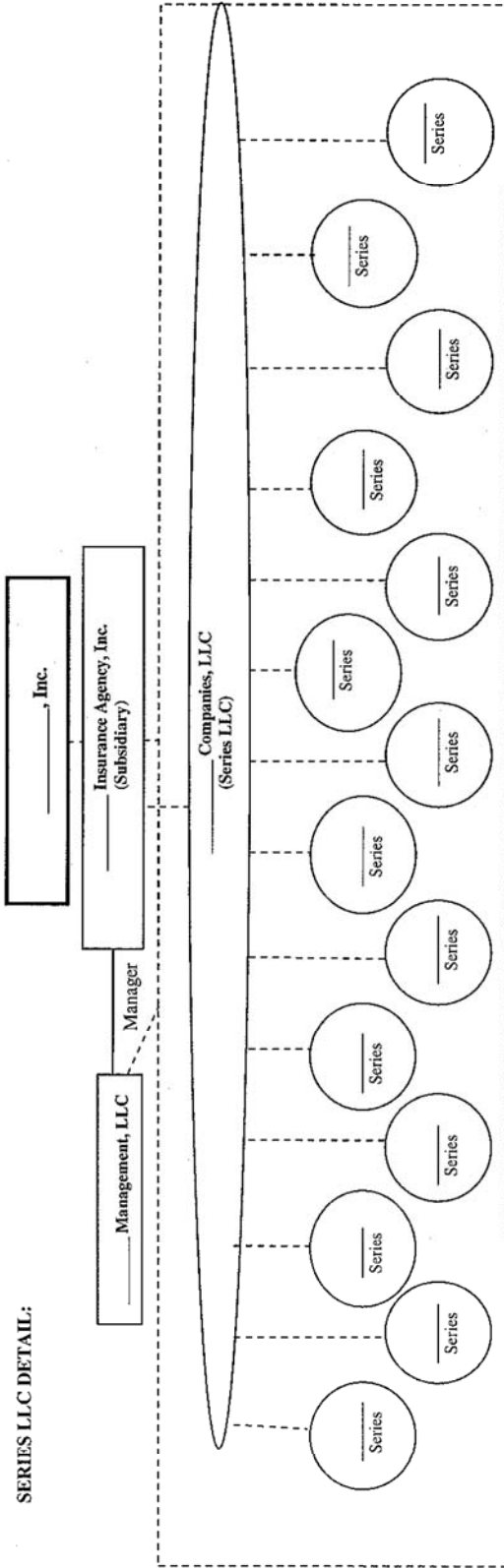
Note 4. The primary or Series 1 overhead ownership of Dev Master will be [GPCo] as 1% general partner and [\_\_\_\_\_] as limited partners. Dev Master and its Series 1 ownership will be purely overhead and have no independent profit or loss.

Note 5. Each Project "Series" of ownership in Dev Master will have its own general partner and limited partners and those partners will share in 100% of the profits or losses of Dev Master as allocated by Master LLC with respect to its corresponding Project entity. For federal tax purposes, each Series will be treated as a separate limited partnership with its own EIN. The series structure will allow different partner ownerships for different Projects including the inclusion of a separate partnership (i.e., with outside partners) as the sole owner of a Series.

Note 6. Guarantees of completion, etc., will be provided for each Project to the lender for the project and Fund. Guarantees will be Project specific without any cross collateralization.

# EXHIBIT 11

SERIES LLC DETAIL:



Notes:

- \_\_\_\_\_ Management, LLC is the Manager of \_\_\_\_\_ Companies, LLC and each Series
- \_\_\_\_\_ Insurance Agency, Inc. is the sole member of \_\_\_\_\_ Companies, LLC
- For each Series \_\_\_\_\_ Insurance Agency, Inc. holds Corporate Units
- \_\_\_\_\_ Individual Producers hold Producer Units

Thanks to  
 Thomas W. Van Dyke  
 Bryan Cave LLP  
 St. Louis, Missouri  
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 for providing this chart.

## **EXHIBIT 11**

### **BENEFITS FROM USE OF SERIES LLC**

1. The LLC, as a single entity, was able to obtain licenses in each state and other jurisdictions where the business operates in lieu of having each separate series become licensed in all states and other jurisdictions.
2. The LLC can contract on behalf of all separate series, so that contracts with insurance carriers can be made on behalf of each of the separate fourteen series.
3. Separate income tax returns will be filed for each series, both at the federal and state levels. Since producer members belong only to a single series, they will report income only in the states where that series generates income. This will save the effort of filing in each and every state if the producer was a member of a single LLC operating in numerous states.
4. As part of the termination of a producer member of a series, the sale of the producer's interest in the series will enhance the enforceability of the restrictive covenants under most states' laws. By virtue of owning a higher percentage of a smaller business unit, this line of cases is more applicable than if there were a very small percentage ownership in the entire LLC entity.