Series LLCs

By

Allan G. Donn
Willcox & Savage, PC
Norfolk, Virginia

Bruce P. Ely
Bradley Arant Boult Cummings LLP
Birmingham, Alabama

Robert R. Keatinge
Holland & Hart LLP
Denver, Colorado

Bahar A. Schippel
Snell & Wilmer LLP
Phoenix, Arizona
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“The series LLC may turn out to be a heaven-sent planning tool, or attractive nuisance that will lure clients and advisors to economic disaster. Anyone involved with series LLCs should proceed with caution.” Cuff, Delaware Series LLCs and Transactional Practice-Part 2, 38 Real Estate Tax’n 170 (2011).

I. Delaware Series.

A. Definitions.

1. “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. The principal distinguishing characteristic is the internal liability shield for each series of the Series LLC.

Other terms for the Series LLC are series organization (see federal tax regulations in Section V.A.3.a.i); master LLC (see SEC Letter in Section VI.D and Cal. Tax News, p. 4 October 2011).

2. “Series” is the term used to describe each of the separate components.
B. **Alternative and Analogous Structures.**

1. **Master LLC-Parent entity with subsidiaries.**

2. **Schedular Allocations:**

   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.” 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 (“PCC”).**
   
   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 charged with liabilities of any other protected cell or of the sponsored captive insurance company generally. E.g., Del. Code Ann. tit. 18, § 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* (2d ed. 2010) (“Feetham and Jones”).

4. **Series Captive Insurance Company.**

   Delaware licensed the first series entity captive, which permits use of Series LLCs to form the equivalent of a PCC, but without the minimum premium tax per cell applicable under the PCC statute. Delaware Insurance Commissioner’s Statement, News Release, January 25, 2010. See also Delaware Insurance Commissioner News Release, January 28, 2011, declaring that only in Delaware can an entity form a series entity captive.

   According to the Commissioner, the series of a licensed captive insurance company formed under the Delaware LLC Act or Delaware Statutory Trust Act, “qualify to assume risk and are named by the Delaware Department of Insurance as Series Business Units (“SBU”). Captive Insurance Bulletin No. 2 (August 16, 2012). The Commissioner also announced that the Department had begun levying a fee upon the captive insurance companies for each SBU formed on or after the effective date.

   For advantages of a Series LLC over a protected cell captive, including “more flexibility to define its governance mechanisms,” and “designed for simpler administration than a protected cell captive,” see *Alternative Risk Transfer Business Opportunities*, Delaware Insurance Commissioner, October 2012.

   The Delaware Insurance Commissioner has recently announced that Delaware has 190 captive companies, 11 protected cells, and 358 SBUs. Further, even though an $1800 series unit application fee was added and more stringent regulatory standards
were imposed in 2012, that year was the best ever for captive growth in Delaware. News Release, Delaware Insurance Commissioner, January 23, 2013.


Montana Captive Insurance Association has announced that it is working for legislation “that would further improve the state’s captive statute, including the addition of Series LLC captives.” Captive Insurance Times, Jan. 18, 2013.

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), republished March 28, 2012.

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 2012).

“Indeed, the purpose of the trust structure of Nominal Defendants [statutory trusts] is to serve as an ‘umbrella’ entity that registers as an investment company with the SEC so that each mutual fund within the trust can enjoy its trust’s registration and avoid the costs and burdens of separately registering.” *Hartsel v. The Vanguard Group Inc.*, C.A. No. 5394-VCP, 2011 WL 2421003 (Del. Ch. 6/15/11).

See Section 18(f)(2) of the Investment Company Act. “... a series company is a registered open-end investment company which, in accordance with the provisions of Section 18(f)(2) of the Act, issues two or more classes or series of preferred or special stock each of
which is preferred over all other classes or series in respect of assets specifically allocated to that class or series.” 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 investment management 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.

A. Initial 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. 12 Del. Code § 3804(a).

B. Additional Series LLC Legislation.

Similar LLC legislation has been adopted by the following jurisdictions:

District of Columbia D.C. Code § 29-802.06 (effective Jan. 1, 2012)

Illinois 805 ILCS 180/37-40


Nevada NRS § 86.296.3

Oklahoma 18 Okla. Stat. § 18-2054.4B

Puerto Rico 14 L.P.R.A. § 3967 (General Corporations Act 2009)

Tennessee Tenn. Code Ann. § 48-249-309

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).


Several other states provide for a “series” of ownership interests but do not provide the internal limited liability shield described in Section IV.A below. See Fla. Stat. Ann. § 608.4351; 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. E.g., Cal. Corp. Code § 17712.01.

C. Legislative Developments.

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 reasons for not authorizing the series. See also Kleinberger and Bishop, The Next Generation: The Revised Uniform Limited Liability Company Act, 62 Bus. Law. 515, 541-543 (2007).

For contrary view, see Feetham and Jones 51 (“This surely was a missed opportunity.”); Kobayashi and Ribstein, The Non-Uniformity of Uniform Laws, p. 14, Ill. Law and Economics Research Paper Series, Research Paper No. LE 07-030 (October 5, 2007). (“Here, action by NCCUSL might have had a significant effect in leading states towards uniformity in a still-developing area in which there are 4 disparate statutes.”). Available at SSRN: http://ssrn.com/abstract=998281.

The new Maine LLC Act that took effect July 1, 2011, did not include the series concept. See Deckelman, McLoon and Pratt, Maine’s New Limited Liability Company Act, Maine Bar J. Fall 2010, 181, 185-86. (“The uncertainties surrounding the series LLC, the fact that the most suitable uses of a series LLC are not common in Maine, and the fact that Delaware has the series LLC available in its LLC Act for those who want a series LLC all lead the Drafting Committee to decide against including the series concept in the New Act.”)

A Florida bar committee considered but decided not to recommend Series LLC legislation.
California Bill, SB 323, introduced in 2011, to adopt RULLCA, included provisions for the creation of a Series LLC (Article 12), but those provisions were dropped from the Bill at the request of the Secretary of State on the grounds that the series provide “additional veils of secrecy to the LLC assets and liabilities,” which “could create an avenue for an LLC to avoid legitimate responsibilities to third parties and/or members.” Senate Judiciary Committee, CA 2012 legislative law case history re: series 01981859, p. 7 (Jan. 4, 2012).

As California RULLCA was adopted, Article 12, captioned Class Provisions, merely authorizes the creation of classes of members having prescribed relative rights, powers, and duties. Cal. Corp. Code § 17712.01.

Iowa and Utah have adopted RULLCA and added in modified form the series provisions from their prior LLC Acts. The District of Columbia has enacted RULLCA and added the series provisions. Kansas has most recently enacted series legislation.

Compare, Uniform Statutory Trust Entity Act (approved by NCCUSL 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).

As recommended by a Study Committee, NCCUSL appointed a Drafting Committee on Series of Unincorporated Business Entities to add series provisions to uniform unincorporated organization acts, rather than a stand-alone act. Steve Frost is the Chairman and Dan Kleinberger is the Reporter.

The Partnership Committee of the ABA Business Law Section has published a draft of the Revised Prototype Limited Liability Company Act that includes series provisions. 67 Bus. Law. 117, 112-23 (2011).

D. Formation Statistics.

Of the jurisdictions with statistics that we have been able to find (Delaware and Illinois) as of December 31, 2012 there were approximately 15,000 Series LLCs currently active. Delaware has 8,068 Series LLCs, of which 1,631 were formed in 2012. Illinois, which has been the only state to track individual series of a Series LLC, has 6,310 Series LLCs and 16,971 individual series currently active.

E. Uses of Series.

1. Investment funds.

2. Captive insurance protected cells.

3. Real estate.

4. Incentive compensation by division.
5. Licensed businesses.
6. Oil and gas ventures.

IV. 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, including limiting the recourse of creditors with respect to liabilities of the series to the assets associated with the series, and not the assets of the limited company generally or the assets of any other series.” (emphasis added) 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.

See Symonds & O’Toole, Delaware Limited Liability Companies, Section 5.22 (“Symonds & O’Toole”), Cunningham, Drafting LLC Operating Agreements, Chapter 5.

1. The LLC agreement may establish or provide for the establishment of designated series of members, managers or LLC interests, or assets. Any series may have 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 “associated with” a series. But compare the statement in the Preamble to the federal tax Proposed Regulations. “Although series of a Series LLC generally are not treated as separate entities for state law purposes, and thus, cannot have members, each series has ‘associated’ with it specified members, assets, rights, obligations, and investment objectives or business purpose.” “Members’ association with one or more particular series is comparable to direct ownership by the members in such series, in that their rights, duties, and powers with respect to the series are direct and specifically identified.” Preamble Section 1.

NOTE: Most provisions of § 18-215 refer 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. “Member” is a person who is admitted to the LLC as a member. § 18-101(11). “Member associated with a series” is not a defined term.

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,” ring-fencing, and internal firewalls. See Ribstein, Foreward to Second Edition of Feetham and Jones, xi.

The liability shield requires the satisfaction of the following conditions:

(a) The LLC agreement establishes or provides for the establishment of one or more series;

(b) The LLC agreement “so provides” for the liability limitation;

(c) Notice of the limitation on liabilities of a series is set forth in the certificate of formation; and

(d) Records are maintained for the series accounting for the assets associated with the series separately from other assets of the LLC or any other series.

NOTE: In the case of a series liability, the Delaware Act does not expressly provide for the application to a member associated with a series the liability protection expressly 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). However, the general protection of § 18-303 should protect the members associated with a series. §18-215(d) seems to contemplate that result by providing that notwithstanding § 18-303, a member may agree to be obligated personally for liabilities of a series. Symonds & O’Toole § 5.22[B] n. 524.

Nevertheless, equitable principles, such as “piercing the veil” may be applied. Symonds & O’Toole § 5.22[B] p. 5-112. See In re Mastro, 2010 WL 2650642 (W.D. Wash. 2010, in which the court included in the bankruptcy estate the assets of LCY, LLC-Series Home, LCY, LLC-Series Jewelry, and LCY, LLC-Series Automobiles.

But see, “... why not just use separate LLCs with common managers?.... A possible answer is that using commonly managed and operated LLCs presents a risk that a court will pierce the veil and attribute the liabilities of one of the commonly managed firms to the ‘sister’ LLCs. A Series LLC statute effectively instructs courts to keep the liability separate as long as the members have followed the formalities and record-keeping rules. In other words, the series provisions use formalities as a shield even as the general LLC statutes provide that noncompliance with formalities cannot be used as a sword to pierce the veil.” Ribstein, Rise of the Uncorporation 146 (2010).

3. Parallel to the Illinois statute discussed below, the 2007 Delaware 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, Del. Code Ann. tit. 12 § 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. Del. Code Ann. tit. 12, § 3805(f).

NOTE: Assets associated with a series may also “be held directly or indirectly... in the name of the limited liability company,...” Del. Code Ann. tit. 6, § 18-215(b).

4. Management is vested in the members associated with a series unless the agreement provides for management by a manager. Del. Code Ann. tit. 6, § 18-215(g). Although the subsection refers to the “manager of the series,” subsection (l) uses the term “manager associated with the series.”

NOTE: Although that section tracks § 18-402, it does not have the counterpart of the last sentence that unless otherwise provided in the agreement, each member and manager has the authority to bind the LLC.

5. The statutory limitations on distributions are applied separately to a series. Del. Code Ann. tit. 6, § 18-215(i). The result appears to be that a series may make distributions even though other series or the Series LLC may be insolvent.

6. 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).

7. A series may be terminated and its affairs wound up without causing dissolution of the LLC. However, a series is terminated and its affairs shall be wound up upon dissolution of the LLC. Del. Code Ann. tit. 6, § 18-215(k).

8. Having no members is a dissolution event for an LLC under Del. Code Ann. tit. 6, § 18-801(4), but there is no comparable provision for a series.

9. On application by a member or manager associated with a series, judicial winding up or termination is available with respect to a series. Del. Code Ann. tit. 6, § 18-215(l) and (m).

B. Entitiness.

1. Delaware.

Although the Delaware LLC Act includes a series within the definition of “person,” 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 “entity,” see Conaway and Tsoflias, The Delaware Series LLC: Sophisticated and Flexible Business Planning, 2 Mich. J. of Private Equity & Venture Capital Law 97 (2012). “..., the ‘LLC’ and the ‘series’ are ‘persons’ within the definitions, but only the ‘LLC’ is considered ‘a separate legal entity’ distinct from its members.” Supra 108-09.
Adding the provision that a “series” is a “person” was intended primarily to make clear that a “series” can be a member of a Delaware LLC or hold an LLC interest in an LLC. Symonds & O’Toole at § 5.22[A] n. 506.

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.

2. 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).


3. Iowa.

The 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.

4. Tennessee.

The Tennessee LLC Act 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).
5. **Texas.**

The 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. However, it does not expressly provide for treating a series as a separate entity.


6. **Utah.** A series may contract on its own behalf and in its own name. Utah Code Ann. § 48-3-1202(5).

7. **District of Columbia.** The articles of organization may provide that a series be treated as a separate entity from the LLC, other series of the LLC, or members of the LLC. D.C. Code § 29-802.06(i). A series of an LLC has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities. D.C. Code § 29-802.06(j).


Compare, USTEA § 401(b): “A series of a statutory trust is not an entity separate from the statutory trust.” COMMENT: “Subsection (b) confirms that for ordinary state law purposes, a series is not an entity separate from the statutory trust. Thus, in litigation involving a series trust, the proper party is the statutory trust itself ..., even if the matter pertains exclusively to property associated with a series of the trust.” The comment in the June 3, 2009 annual meeting draft of the Act noted: “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 that the Delaware Code does for an LLC or limited partnership.

*Hartsel v. The Vanguard Group., Inc.*, C.A. No. 5394-VCP, 2011 WL 2421003 (Del. Ch. 6/15/11) (A series is not a separate legal entity, but a distinct economic entity). “Defendants are not separate legal entities; rather, they are separate mutual funds which form part of a series of mutual funds held by each Nominal Defendant. As such, investors in each of the mutual funds within a specific Nominal Defendant hold different series of shares in the same legal entity.”

*Seidl v. American Century Companies, Inc.*, 713 F.Supp. 2d 249, 253 (S.D.N.Y. 2010). “The ULTRA Fund is one of the eighteen funds managed by ACMF; it is not a separate legal entity from ACMF.”


Unlike the USTEA series but like Delaware, a Kentucky series may hold title to property, contract, grant a security interest, and sue and be sued in its own name. Ky. Rev. Stat. Ann. § 386 A.4-010(4). Kentucky has the following interesting provision: “A series of a statutory trust is to the degree provided in subsection IV of this section an entity separate from the statutory trust.” According to Rutledge, a Kentucky series “while not a distinct legal entity, is sufficiently robust to unilaterally act in the business environment.” At pg. 25.

If a series were treated as a separate legal entity, it would not afford the benefits described by Humphrey, see Section II.

C. Comparison Chart.

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

V. Tax Treatment.

A. Federal Tax Treatment.

1. The tax treatment of Series LLCs was largely unresolved until Proposed Regulations were issued in September, 2010 (REG-119921-09, 75 Fed. Reg. 55699, 9/14/10). “Under current law, there is little specific guidance regarding whether for Federal tax purposes a series (or cell) is treated as an entity separate from other series or the series LLC (or other cells or the cell company, as the case may be), or whether the company and all of its series (or cells) should be treated as a single entity.” Preamble, Section 1.

2. Pre-2010 authority.

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 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. 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....”

d. 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.


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:

a. Any tax elections 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;

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

c. Activities of the cell would be disregarded for purposes of determining the status of the PCC as an insurance company;

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

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


a. Definitions.

i. Series Organization. A juridical entity that establishes and maintains, or under which is established and maintained, a “series.” Series organization includes a Series LLC, series partnership, series trust, protected cell company,

ii. **Series.** A segregated group of assets and liabilities that is established pursuant to a series statute by agreement of a series organization. Series includes a series, cell, segregated account, or segregated portfolio, including a cell, segregated account, or segregated portfolio that is formed under the insurance code of a jurisdiction or is engaged in an insurance business. Prop. Reg. § 301.7701-1(a)(5)(viii)(C).

iii. **Series Statute.** A statute of a state or foreign jurisdiction that explicitly provides for the organization or establishment of a series of a juridical person and explicitly permits:

A. members or participants of a series organization to have rights, powers, or duties with respect to the series;

B. a series to have separate rights, powers, or duties with respect to specific property or obligations; and

C. segregation of assets and liabilities such that none of the debts and liabilities of the series organization (other than liabilities to the state or foreign jurisdiction related to the organization or operation of the series organization, such as franchise fees or administrative costs) or of any other series of the series organization are enforceable against the assets of a particular series of the series organization. Prop. Reg. § 301.7701-1(a)(5)(viii)(B). Thus, the Proposed Regulations do not actually require that the liability of a series be enforceable only against that series for it to qualify as a separate entity for federal tax purposes. The Preamble states that the limitations on liability of owners of an entity for debts and obligations of the entity and the rights of creditors to hold owners liable for debts and obligations of the entity should not alter the characterization of the entity for federal tax purposes. Some series statutes provide that the series liability limitation provisions do not apply if certain records are not maintained. However, failure to qualify for the liability limitations based on the failure to comply with the record keeping requirements under the relevant series statute will not prevent a series from being treated as a “series” under the Proposed Regulations.

An election, agreement or other arrangement that permits debts and liabilities of another series or the series organization to be enforceable against the assets of a particular series, or a failure to comply with the record keeping requirements of the limitation on liability available under the applicable series statute, will be disregarded. Prop. Reg. § 301.7701-1(a)(5)(viii)(B).

b. **Classification Regulations.**

Under the classification regulations (Reg. §§ 301.7701-1 through 301.7701-4), an organization’s entity classification for federal tax purposes depends upon the organization’s being:

i. treated as a separate entity under Reg. § 301.7701-1;
ii. treated as a “business entity” within the meaning of Reg. § 301.7701-2(a) or a trust under Reg. § 301.7701-4; and

iii. treated as an “eligible entity” under Reg. § 301.7701-3.

c. Separate Entity.

Whether an organization is an entity separate from its owners for federal tax purposes is a matter of federal law and does not depend upon whether the organization is recognized as an entity under local law. Reg. § 301.7701-1(a)(5)(i).

A series organized or established under U.S. federal or state law, whether or not a juridical person for local law purposes, is treated as an entity formed under local law. Prop. Reg. § 301.7701-1(a)(5)(i).

For federal tax purposes, a series organized or established under the laws of a foreign jurisdiction is treated as an entity formed under local law if the arrangements and other activities of the series, if conducted by a domestic company, would result in classification as an insurance company within IRC §§ 816(a) or 831(c). Prop. Reg. § 301.7701-1(a)(5)(ii).

In other words, an entity 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. The Proposed Regulations provide that, for federal tax purposes, a domestic series, whether or not a juridical person for local law purposes, is treated as an entity formed under local law. Thus, by clarifying that each series within an LLC presumptively constitutes a separate entity for federal tax purposes, the Proposed Regulations make it easier to determine the federal tax classification of a domestic Series LLC.

The preamble to the Proposed Regulations (“Preamble”) specifically refers to the Series LLC statutes of Delaware, Illinois, Iowa, Nevada, Oklahoma, Tennessee, Texas, Utah and Puerto Rico and points out that all those statutes contain provisions that grant series certain attributes of separate entities while in certain respects limiting the powers of the series. By doing so, the Preamble implicitly blesses all existing Series LLC statutes, and any Series LLC statutes enacted by other states in the future that are similar to currently existing statutes, as qualifying as a “series statute.”

Also, although some statutes creating series organizations permit an individual series to enter into contracts, sue, be sued, and/or hold property in its own name, the failure of a statute to explicitly provide those rights does not, under the Proposed Regulations, alter the treatment of a series as an entity formed under local law. Those attributes primarily involve procedural formalities and do not appear to affect the substantive economic rights of series or their creditors with respect to their property and liabilities. Even in jurisdictions where series may not possess those attributes, the statutory liability shields would still apply to the assets of a particular series, if the statutory requirements are satisfied.
The Preamble also states that a series should be classified as a separate local law entity based on the characteristics granted to it under the governing series statute, not based on the actual possession of all of the attributes that its governing series statute permits it to possess. Thus, a series should be treated as a separate local law entity even if its business purpose, investment objective, or ownership overlaps with that of other series or the series organization itself.

d. **Business Entity.**

A series generally qualifies as a business entity because it is not properly classified as a trust or otherwise subject to special treatment under the Code, such as a corporation.

e. **Eligible Entity.**

A Series LLC generally qualifies as an “eligible entity” that may elect its own tax classification under the check-the-box regulations. Reg. § 301.7701-2. The check-the-box regulations classify organizations, other than non-business trusts, as corporations, partnerships, or disregarded entities. Reg. § 301.7701-3(a) generally provides that an eligible entity, which is a business entity that is not a corporation under Reg. § 301.7701-2(b), may elect its classification for federal tax purposes. A domestic business entity with two or more members is classified for federal tax purposes as a partnership by default, or may elect to be treated as a corporation. A domestic business entity with one owner is disregarded by default, or may elect to be classified as a corporation. If the entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner. However, a disregarded entity is treated as a corporation for certain federal employment tax and excise tax purposes. Thus, each domestic series can elect to be treated as a corporation, including an S corporation, and absent such election, will be treated as a partnership or disregarded entity, depending on the number of its “owners.”

f. **Statements of Series and Series Organization.**

Each series and series organization must file a statement for each taxable year containing the identifying information to be prescribed by the IRS for that purpose and shall include the information required by the statement in its instructions. Prop. Reg. § 301.6011-6(a). The required statement must be filed on or before March 15 of the year following the period for which a return is made. Prop. Reg. § 301.6071-2(a).

g. **Tax Collection.**

The Proposed Regulations also address the ability of the IRS to collect tax liabilities against the series organization or its series. There are differences in the various series statutes that may affect how creditors of series, including state taxing authorities, may enforce obligations of a series. To the extent that under the regulations the series is a taxpayer against whom tax may be assessed, then any tax assessed against the series may be collected by the IRS from the series in the same manner the assessed could be collected from any other taxpayer. In addition, to the extent federal or local law permits a debt attributable to the series to be collected from the series organization or other series of the series organization,
then the series organization and other series of the series organization may also be considered the taxpayer from whom the taxes against the series may be administratively or judicially collected. Further, when a creditor is permitted to collect a liability attributable to a series organization from any series of the series organization, a tax liability assessed against the series organization may be collected directly from a series of the series organization by administrative or judicial means. Prop. Reg. § 301.7701-1(a)(5)(vii).

h. Conversion from One Entity to Multiple Entities.

The Proposed Regulations generally apply on the date final regulations are published in the Federal Register. Generally, when final regulations become effective, taxpayers that are treating series differently for federal tax purposes from the way series are treated under the final regulations will be required to change their treatment of the series. In this situation, a series organization that previously was treated as one entity with all of its series may be required to begin treating each series as a separate entity for federal tax purposes.

According to the Preamble (Proposed Effective Date), general tax principles will apply to determine the consequences of the conversion from one entity to multiple entities for federal tax purposes. For example, the rules of Code Section 708 would apply in determining the tax consequences of partnership divisions in the case of a series organization previously treated as a partnership for federal tax purposes converting into multiple partnerships upon recognition of the series organization’s series as separate entities. Further, the rules of Code Sections 355 and 368(a)(1)(D) will apply in the context of certain divisions of a corporation. The division of a series organization into multiple corporations may be tax-free to the corporation and to its shareholders. If the corporate division does not satisfy one or more of the requirements in Code Section 355, however, the division may result in taxable events to the corporation, its shareholders, or both.

i. Effective Date.

Generally, the new rules apply beginning with publication of the final regulations. Prop. Reg. § 301-7701-1(f)(3). The Proposed Regulations include an exception (called a transition rule) for series established before publication of the Proposed Regulations that treat all series and the series organization as one entity if certain requirements are satisfied. In those cases, after issuance of the final regulations, the series may continue to be treated together with the series organization as one entity for federal tax purposes. Specifically, those requirements are satisfied if:

i. The series was established before September 14, 2010;

ii. The series (independent of the series organization or other series of the series organization) conducted business or investment activity or, in the case of a foreign series, more than half the business of the series was the issuing of insurance or annuity contracts or the reinsuring of risks underwritten by insurance companies, on and before September 14, 2010;
iii. If the series was established pursuant to a foreign statute, the series’ classification was relevant (as defined in Reg. § 301.7701-3(d)), and more than half the business of the series was the issuing of insurance or annuity contracts or the reinsuring of risks underwritten by insurance companies for all taxable years beginning with the taxable year that includes September 14, 2010;

iv. No owner of the series treats the series as an entity separate from any other series of the series organization or from the series organization itself for purposes of filing any federal income tax returns, information returns, or withholding documents for any taxable year;

v. The series and series organization had a reasonable basis (within the meaning of Code Section 6662) for their claimed classification; and

vi. Neither the series nor any owner of the series nor the series organization was notified in writing on or before the date final regulations are published in the Federal Register that classification of the series was under examination (in which case the series’ classification will be determined in the examination).

The exception will cease to apply on the date any person or persons who were not owners of the series organization (or series) prior to September 14, 2010 own, in the aggregate, a 50 percent or greater interest in the series organization (or series).


In addition to requesting comments on the Proposed Regulations, the Preamble requested comment on seven specific issues, including some of the following:

a. Classification of the Series Organization.

Although providing the framework to determine the federal tax classification of a series, the Proposed Regulations do not address the entity status for federal tax purposes of a series organization or the “master LLC.” Specifically, the Proposed Regulations do not address whether a master LLC or a series organization is recognized as a separate entity for federal tax purposes if it has no assets and engages in no activities independent of its series. The Proposed Regulations do, however, shed some light on the filing requirements for a series organization. While recognizing that a series organization is generally an entity for local law purposes, and will therefore generally be treated as an entity for federal tax purposes, the Proposed Regulations also recognize that a series organization may have no income, deductions, or credits for federal income tax purposes. Such an entity is generally not required to file a return. Similarly, a series organization characterized as a partnership for federal tax purposes that does not have income, deductions, or credits for a taxable year need not file a partnership return for the year.

b. Foreign Series.

The Proposed Regulations do not apply to foreign series organizations, except for certain series conducting an insurance business.
c. **Employment Taxes.**

The Proposed Regulations do not provide how a series should be treated for federal employment tax purposes because of numerous complicated issues that arise in that context.

d. **Employee Benefits.**

The Proposed Regulations do not address various issues that arise with respect to the ability of a series to maintain an employee benefit plan, including issues related to those described above with respect to whether a series may be an employer. However, to the extent that a series can maintain an employee benefit plan, certain aggregation rules would apply. The IRS and Treasury Department expect to issue regulations that would prevent the avoidance of any employee benefit plan requirement through the use of the separate entity status of a series.

e. **One Partnership or Many?**

Another issue that comes up under the Proposed Regulations is whether a series organization with multiple series may be treated as a single partnership for federal tax purposes under circumstances where there is great commonality of ownership among the series. For example, if two partners share ownership of ninety-five percent of each of the series and other different partners make up the ownership of the remaining five percent of each series, could the need for filing multiple tax returns be avoided? This structure is similar to a master partnership with numerous single member LLCs with similar tracking ownership structure. There is some uncertainty under current law in the context of a master partnership with several wholly-owned LLCs, although many practitioners feel comfortable that a single partnership return may be filed under those circumstances. The Proposed Regulations do not shed any additional light on whether, under those circumstances, there exist one or numerous partnerships.

The Proposed Regulations provide that the same legal principles that apply to determine who owns interests in other types of entities apply to determine the ownership of interests in series and series organizations. These principles generally look to who bears the economic benefits and burdens of ownership. Furthermore, common law principles apply to the determination of whether a person is a partner in a series that is classified as a partnership for federal tax purposes.

If each series is treated as a separate entity for federal tax purposes, the inquiry becomes whether it is possible to treat the series organization itself as a holding company and each series as an entity owned by the holding company. If the series is deemed owned by the holding company, absent an election, it is disregarded for federal tax purposes as an entity separate from the series organization. Thus, a single partnership return may be filed for the series organization and all of its series. By contrast, if the series is deemed owned directly by the owners, absent an election, each series will be treated as a partnership.

f. For federal tax purposes, the ownership of interests in a series and of assets associated with the series is determined under general tax principles.
series organization is not treated as the owner for federal tax purposes of a series or the assets associated with a series merely because the series organization holds legal title to the assets associated with the series. Prop. Reg. § 301.7701-1(a)(5)(vi). However, the Proposed Regulations do not go as far as to say that a series organization may not be treated as the owner of the series. Thus, while not answering whether the series organization itself may be the deemed owner of the series, the Proposed Regulations do not preclude that treatment. Apparently the same principles that would otherwise apply in the context of a master partnership with wholly-owned LLCs should also apply in the context of a master series with multiple series. See comments of Diana Miosi, special counsel, IRS Office of Chief Counsel (Passthroughs and Special Industries), 2010 TNT 211-2.

Comments on the Proposed Regulations:


B. State Income Tax Treatment.

1. California. 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 formation state law, the payment of the expenses, charges, and liabilities of each series is limited to the assets of that series. California 2012 Limited Liability Company Tax Booklet, Section F, p. 8; FTB Pub. 3556 p. 4-5 (Rev. 4-2011).

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. **Delaware.** In a Private Letter Ruling dated September 16, 2002, the Delaware Department of Finance, the Division of Revenue, ruled that (1) each “series” of the LLC will be disregarded for purposes of Delaware taxation since a series is merely a segregation of assets and liabilities within a Delaware limited liability company, and each series will be wholly-owned by the Taxpayer for purposes of federal income taxes; and (2) any transfer of assets among the series will be treated as assets among or within the same entity, triggering no Delaware taxes so long as the assets remain within the LLC.

3. **Florida.** 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).

4. **Illinois.** “The limited liability company and any of its series may elect to consolidate their operations as a single taxpayer to the extent permitted under applicable law....” 805 ILCS 180/37-40(b).


6. **Massachusetts.** 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.”

7. **Tennessee.** For Tennessee franchise and excise tax purposes, a Series LLC and each individual series must file its own separate return if the Series LLC and each individual series are wholly-owned by a limited partnership. Tenn. DOR Ltr. Rul. 11-42 (9/6/11). Although the Tennessee DOR looks to the proposed federal regulations in addressing the classification issue, Tennessee’s franchise and excise tax law departs from federal law and grants disregarded entity status to a single-member LLC only if it is owned by a corporation. Therefore, in order to be disregarded for Tennessee franchise and excise tax purposes, a series must be (1) a single-member LLC that is (2) disregarded for federal tax purposes, and (3) whose single member is a corporation. See discussion in Carter and Long, Tennessee Issues Guidance on Tax Treatment of Series LLCs, State Tax Today, November 28, 2011, reproduced in 21 J. Multi-State Taxation and Incentives No. 10 (February 2012).

8. **Texas.** In contrast to California, for Texas franchise tax purposes, one series of a Series LLC cannot file a franchise tax report separate from the Series LLC. Texas Comptroller of Public Accounts, Ltr. 201005184L, May 5, 2010 (released Sept. 2011). Only one franchise tax report is permitted but implicitly, the nexus of one series with the state creates nexus for the Series LLC and all series.
9. The ABA Section of Taxation Committee on State and Local Taxation Task Force delivered to state departments of revenue/finance a questionnaire regarding their intent to conform with the IRS proposed tax classification of series regulations. (March 2011). The September 2012 Status Report, including responses from 30 states, was delivered at the Section’s Fall 2012 meeting. According to the Report, 22 states said they would follow the proposed regulations by classifying each series as a separate entity that can make its own income tax elections.


   a. 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?

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

   c. 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?

   d. 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?

   e. On the sales/use tax front, will transfers of tangible personal property 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?

   f. With respect to state employment/unemployment taxes and insurance contributions, in the context of a disregarded series or series organization, who is the employer? The series, the member “associated with” the series, or the series organization? Will the states follow the as yet-to-be-published IRS guidance?
VI. Benefits and Risks of Series Compared to Multiple LLCs.

A. Benefits.

1. Single registration under the Investment Company Act of 1940.

2. Shield against piercing. “... using commonly managed and operated LLCs presents a risk that a court will pierce the veil and attribute the liabilities for one of the commonly managed firms to the ‘sister’ LLCs. A series LLC statute effectively instructs courts to keep the liability separate as long as the members have followed the formalities in record-keeping rules.” Ribstein, The Rise of the Uncorporation, 146 (2010).

3. Fee savings.

B. Risks.

“... 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).

“In electing whether to use a series limited liability company or other alternatives, perhaps the foremost factor to consider is the potential lack of certainty regarding the legal treatment of the series”. Symonds and O’Toole § 5.22[A], p. 5-108.

1. Federal tax issues. See unanswered questions under the proposed IRS regulations. See Section V.A at 4.

2. Open state tax issues. See Section V.B above.

3. Non-tax open issues. See Sections VI.C through H below.


In addition to GxG Management LLC, supra, the only other case involving a Series LLC that we have found is Carr v. Main Car Development, LLC, 337 S.W. 3d 489 (Texas Court of Appeals Fifth District 2011). That case involved a Delaware series limited liability company organized to engage in the development of development, leasing, and financing of automotive sites, but the legal issues did not relate to the series structure.

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 original 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.

The D.C. Act provides, that the law of the jurisdiction of the formation of an entity governs the liability of a series of a Series LLC. D.C. Code § 29-105.01(a)(3). Derived from Uniform Business Organizations Code § 1-501(a)(3).


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][c] (revised June 2010). 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 (2013); Sparkman, Series LLCs in Interstate Commerce, Business Law Today (forthcoming).

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; 31 M.R.S.A. § 1622.J; Utah Code Ann. § 48-3-1210; 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?
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).

c. In addition to those enumerated as eligible, “other similar entities are as well.”

d. “Entity” includes person, estate, trust, governmental unit, and United States trustee.

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.”

See also In re 4 Whip, LLC, 332 B.R. 670 (Bkrtcy. D. Conn. 2005) holding even a de facto (imperfectly formed) LLC may be a debtor in bankruptcy.


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.

f. “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.

g. Based on the definition, an LLC should be treated as a “corporation” under the Bankruptcy Code. Kennedy, Countryman & Williams, Partnerships, Limited Liability Entities and S Corporations in Bankruptcy § 2.12 (2002); Ribstein and Keatinge, Ribstein and Keatinge on Limited Liability Companies § 14:4 (2010).
h. Nonetheless, it is unclear whether a series that is not defined as an “entity” may be a “person” under the Bankruptcy Code. According to one commentator, “…it would appear that an individual Delaware series is not a ‘person’ for purposes of federal bankruptcy law and, therefore, cannot file a petition in bankruptcy without statutory authority.” Conaway and Tsoplias, The Delaware Series LLC: Sophisticated and Flexible Business Planning, 2 Mich. J. of Private Equity & Venture Capital Law 97 (2012) at 124.


2. Substantive Consolidation.

a. If the LLC files a petition in bankruptcy 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?

d. In re General Growth Props., Inc., 409 B.R. 43, 69 (Bankr. S.D.N.Y. 2009). The court said that notwithstanding its order, the fundamental protections that the lenders negotiated and that the SPE structure represents were still in place and would remain so during the chapter 11 cases, including protection against the substantive consolidation of the project-level debtors with any other entity. Acknowledging that a principal goal of the SPE structure is to guard against substantive consolidation, the court said that the question of substantive consolidation is entirely different from the issue whether the board of a debtor that is part of a corporate group can consider the interests of the group along with the interest of the individual debtor in making a decision to file a bankruptcy case. Nothing in the opinion, or under it, implies that the assets and liability of any of the subject debtors could probably be substantively consolidated with those of any other entity.

E. Secured Transactions - UCC Revised Article 9.

Although it seems unlikely that a separate Delaware series is a “registered organization” within the UCC Revised Sections 9-102(70) and 9-503(a)(1), does it fall into “other cases” under 9-503(a)(4), in which case the question is whether it is (4)(A) or (4)(B). However, it would seem that an Illinois, D.C., Iowa, or Kansas series, which requires the filing of a certificate of designation, should be treated as a registered organization.
For discussion of the “uncertainty as to the identity 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 pp. 11, 14-15.

Vice Chancellor Laster suggested that a series “could be used in lieu of or to supplement security interests in a particular asset.” CML V, LLC v. Bax, 6 A.3d 238 (Del. Ch. 2010), aff’d, 28 A.3d 1037 (Del. 2011).

F. Securities Law.

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

2. SEC broker-dealer financial reporting requirements.


   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.”


   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.

   Stegall v. Ladner, 394 F.Supp. 2d 358 (D. Mass. 2005). Plaintiff, who owned one of 33 funds of the John Hancock Family of Funds had no standing to bring action on behalf of all of the funds.

   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 SEC 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.

In re Mutual Funds Investment Litigation, 519 F.Supp. 2d 580 (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, stating that by suing on behalf of the fund family, plaintiff “(who can only feasibly own shares in an individual series),” failed to satisfy the requirement that he sue on behalf of an entity in which he was a “security holder.”

Seidl v. American Century Companies, Inc., 713 F.Supp. 2d 249, 257 n. 9 (S.D.N.Y. 2010). Citing In re Mutual Funds Investment Litigation, the court said, “The individual series of a registered investment company are, for all practical purposes, treated as separate investment companies,.....”

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?


H. HUD Projects.

HUD has not approved Series LLCs.

“HUD claimed Prospect operated as a ‘series limited liability company,’ a business structure unauthorized by FHA, ....” HUD No. 11-146, press release announcing settlement with Prospect Mortgage July 13, 2011. According to a recital in the Settlement Agreement with Prospect, “HUD alleges that a series limited liability company that originates and funds FHA insured mortgages as an FHA-approved mortgagee in the manner that Respondent has, does not comply with HUD/FHA’s guidelines for the operation of branch offices. HUD also alleges that certain of Respondent’s affiliated business arrangements or series limited liability companies did not comply with RESPA requirements governing affiliated business arrangements, including the requirement for sufficient initial capital and separate dedicated employees; ....” See Exhibit 5.
VII. Use for Real Estate Projects.

See Murray, A Real Estate Practitioner’s Guide to Delaware Series LLCs (With Form), Prac. R.E. Law., 23 November 12, 2005. 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 Tax’n, 4th Qtr. 2008, pp. 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.

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

B. Good Standing Certificates.

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

**District of Columbia.** Upon filing by the LLC of the report required by § 29-102.11, the Mayor shall furnish a certificate of good standing for a series of an LLC. D.C. Code § 28-802.06(f).

**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 6.
VIII. 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 58.

A. Filing.

1. Series LLC.

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 7.

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 5/11). See Formation of Texas Entities FAQs, http://www.sos.state.tx.us/corp/formationfaqs.shtml.

2. Series.

Delaware. There is no document filing for the formation of a Delaware series or the states that have followed that model.

District of Columbia. A series is formed upon the filing of the certificate of series designation. D.C. Code § 29-802.06(e).

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), and Form LLC-37.40 (Certificate of Designation).

Kansas. A Kansas series limited liability company is formed by filing Form 51-32 (Rev. 11/2/12) and Form LCD, Certificate of Designation, must be filed for each series.

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

D. Registration of Foreign Series LLC.

1. California.

Phil Jelsma, has explained that because the Secretary of State requires a good standing certificate and most states do not issue those for a series, the registration will have to be for the foreign Series LLC, not merely an individual series.

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. Del. Code Ann. tit. 6, § 18-215(n).

3. Illinois.

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


It appears that the series of a foreign LLC may register to do business in the state. Kan. Stat. Ann. § 17-76,143(o). Form LTB 51-33 (Rev. 11/6/12). Foreign Series limited liability company application for admission to transact business, also requires that a certificate of designation be filed for each series being registered to do business in the state.

5. 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 5/11), 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 5/11) (Application for Registration of a Foreign Series Limited Liability Company). The Commentary for the form states that a series limited liability company that is treated as a single legal entity under the laws of its jurisdiction of organization is treated as a single legal entity for purposes of registration. By comparison, the Texas Foreign or Out-of-State Entity FAQs, item 7 states “A series LLC formed under the laws of another jurisdiction will be treated as a single legal entity for qualification purposes. The LLC itself rather than the individual series should register as the legal entity that is transacting business in Texas.” The instructions to Item 6 of the form direct the applicant to check each statement that describes each of the characteristics specified.
6. **Utah.**

The Utah Division of Corporations and Commercial Code has issued “Frequently Asked Questions for a Foreign Series LLC.” The Division states that a foreign Series LLC may register and file an application, and a certification of good standing/existence from the state of organization must also be filed with the application. As with California, that suggests that the Series LLC, not merely an individual series, must register.

E. **Form Agreements.**

The preferred approach is to have an LLC agreement that provides for the establishment and maintenance of one or more series and contains provisions that will apply to every series and also to have a separate “series agreement” for the operation of each series that is incorporated by reference into the LLC agreement, the statutory definition of which does not address an agreement as to the affairs of a series and the conduct of its business. See Whitmire, below.

1. Murray, supra.


4. Cunningham, Drafting LLC Operating Agreements, Exhibits 5-6.

F. **Multiple Real Estate Projects.**

See Exhibit 8.

G. **Operating Business.**

See Exhibit 9.


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\[1\] 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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ii According to the Committee Findings of the House Judiciary Committee after its June 13, 2007 amendment, 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.

iii 6 Del. Code §101(12) (‘‘Person’ means . . . any other individual or entity (or series thereof) in its own or any representative capacity . . .’’).
Thanks to Sheldon Banoff, Beth Miller, Christopher Riser, Lou Hering, Tom Rutledge, Ann Conaway, and Matt O’Toole for their comments on this and prior drafts of this outline.
§ 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

**State Series LLC Statutes Scheduled to be in Effect as of July 1, 2012**

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<tr>
<td>Whether a series is treated as a separate legal entity</td>
<td>No$^1$</td>
<td>Yes$^2$</td>
<td>Yes$^3$</td>
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<td>Specifies that a series can sue and be sued</td>
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<td>Yes$^7$</td>
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<td>Yes$^9$</td>
<td>No</td>
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<td>States that a series may separately merge with another taxable entity</td>
<td>No$^{11}$</td>
<td>No</td>
<td>No$^{12}$</td>
<td>No</td>
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<td>No</td>
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<td>Specifies that existing business entities may convert to a series LLC</td>
<td>No$^{13}$</td>
<td>No</td>
<td>No</td>
<td>No</td>
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<td>No</td>
<td>No</td>
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<td>States whether a series LLC can domesticate to another state</td>
<td>No$^{14}$</td>
<td>No</td>
<td>Yes$^{15}$</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
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<td>Provides for a liability shield</td>
<td>Yes$^{16}$</td>
<td>Yes$^{17}$</td>
<td>Yes$^{18}$</td>
<td>Yes$^{19}$</td>
<td>Yes$^{20}$</td>
<td>Yes$^{21}$</td>
<td>Yes$^{22}$</td>
<td>Yes$^{23}$</td>
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<td>Allows, but does not require, a series to have a separate business purpose</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<td>States that the dissolution of the parent LLC causes the termination of each of its series</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
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<td>States the time and manner by which a series is created</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
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<td>No</td>
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<td>Provides guidance on how series LLCs interact with other provisions contained in the state’s general LLC Act</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
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<td>States that a series may terminate without causing the dissolution of the entire LLC</td>
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<td>Yes</td>
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<td>Provides for judicial termination</td>
<td>Yes⁶³</td>
<td>No</td>
<td>Indirectly⁶⁴</td>
<td>Yes⁶⁵</td>
<td>Indirectly⁶⁶</td>
<td>No</td>
<td>Yes⁶⁷</td>
<td>No</td>
<td>Yes⁶⁸</td>
<td>No</td>
</tr>
<tr>
<td>Contains a catch-all provision granting a series LLC all of the powers of a LLC</td>
<td>No⁶⁹</td>
<td>Yes⁷⁰</td>
<td>Yes⁷¹</td>
<td>No</td>
<td>Yes⁷²</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes⁷³</td>
<td>No</td>
</tr>
<tr>
<td>Requires the series LLC to file a certificate of designation naming each series with limited liability</td>
<td>No</td>
<td>Yes⁷⁴</td>
<td>Yes⁷⁵</td>
<td>No</td>
<td>Yes⁷⁶</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Mandates that the name of each series LLC must contain the entire name of the LLC and be distinguishable from the names of the other series</td>
<td>No</td>
<td>Yes⁷⁷</td>
<td>Yes⁷⁸</td>
<td>Yes⁷⁹</td>
<td>Yes⁸⁰</td>
<td>Yes⁸¹</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Stipulates a procedure for recognition of a foreign series LLC</td>
<td>Yes⁸²</td>
<td>Probably⁸³</td>
<td>Yes⁸⁴</td>
<td>Yes⁸⁵</td>
<td>Yes⁸⁶</td>
<td>Yes⁸⁷</td>
<td>No</td>
<td>Yes⁸⁸</td>
<td>Yes⁸⁹</td>
<td>Yes⁹⁰</td>
</tr>
<tr>
<td></td>
<td>DE</td>
<td>DC</td>
<td>IL</td>
<td>IA</td>
<td>KS</td>
<td>NV</td>
<td>OK</td>
<td>TE</td>
<td>TX</td>
<td>UT</td>
</tr>
<tr>
<td>---------------------</td>
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</tr>
<tr>
<td>States whether a series can register as an LLC in a state where the LLC itself is not registered.</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Specifies that a member can dissociate from a series without dissociating from any other series or the LLC</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>States that a series can freely continue to exist and operate regardless of whether there are any members remaining associated with the series</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Specifies that the series can contract in its own name</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>
In addition to the nine jurisdiction states listed above, some states mention series LLCs in their LLC statutes. Florida, Minnesota, Mississippi, North Dakota, and Wisconsin authorize classes and series of interests but do not have the “internal shields” that are the essence of a Delaware-type series LLC. Also worth noting, Puerto Rico fully allows for the formation of series LLCs.

The following table surveys where each state stands with regard to series LLCs.

<table>
<thead>
<tr>
<th>STATE</th>
<th>SERIES LLC</th>
<th>STATE</th>
<th>SERIES LLC</th>
<th>STATE</th>
<th>SERIES LLC</th>
<th>STATE</th>
<th>SERIES LLC</th>
</tr>
</thead>
<tbody>
<tr>
<td>AL</td>
<td>No</td>
<td>IN</td>
<td>No</td>
<td>NE</td>
<td>No</td>
<td>SD</td>
<td>No</td>
</tr>
</tbody>
</table>
Although the Delaware LLC statute, Del. Code Ann. tit. 6, § 18-201 (2007), states that a LLC is a separate legal entity, the Delaware series LLC statute does not make any such representations. Compare Del. Code Ann. tit. 6, § 18-201(b) ("A limited liability company formed under this chapter shall be a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the limited liability company’s certificate of formation.") with Del. Code Ann. tit. 6, § 18-215 (neglecting to state whether a series of a series LLC is a separate legal entity); see also Charles Terry and Derek Samz, An Initial Inquiry into the Federal Tax Classification of Series Limited Liability Companies, 2006 Tax Notes 44-40, nn. 16–17 (2006). Professor Terry identified four factors that suggest that a Delaware series LLC is not a separate legal entity: (1) a Delaware series LLC may not sue in its own name, (2) no statutory language indicates a Delaware series LLC may separately merge with another taxable entity, (3) no statutory language indicates whether existing Delaware business entities can convert to a series LLC, and (4) the Delaware statute offers no guidance regarding whether a Delaware series LLC can domesticate to another state. Id.; see infra text accompanying notes 3, 5, 7, and 8. SB 96 does not define a series as an entity, but new Del. Code Ann. tit. 6, § 18-215(c) expressly provides that unless otherwise provided in the LLC agreement, a Delaware series has the power and capacity to hold assets (including real estate) in its own name and sue and be sued in its own name.

D.C. Code § 29-802.06(h) – if articles so provide.

An Illinois series LLC is treated as a separate legal entity, but only to the extent it provides for such treatment in its articles of organization. § 805 Ill. Comp. Stat. 180/37-40(b) (2007) ("A series with limited liability shall be treated as a separate entity to the extent set forth in the articles of organization.").

Iowa Stat § 489.102.1

Kan. Stat. Ann. § 17-76,143(b) ("A series with limited liability shall be treated as a separate entity to the extent set forth in the articles of organization.").

GxG Management LLC v. Young Brothers and Co., 2007 WL 551761 (D. Me. 2007) (internal citations omitted) ("The Delaware statute does not indicate what capacity an LLC has to pursue litigation on behalf of its series. Nor does the statute indicate what capacity a series of an LLC has, if any, to pursue litigation on its own behalf . . . ."). As amended by SB 56, Del. Code Ann. tit. 6, § 215(c) expressly provides that a series may sue and be sued in its own name.

D.C. Code § 29-802.06(j).

§ 17-76,143(b) (“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 a limited liability company under this act.”).

10 V.T.C. Bus. Org. Code § 101.605(2)

11 The Delaware statute states that an LLC may merge with another entity, Del. Code Ann. tit. 6, § 18-209, (“Pursuant to an agreement of merger or consolidation, 1 or more domestic limited liability companies may merge or consolidate with or into 1 or more domestic limited liability companies or 1 or more other business entities . . . .”), however, the Delaware statute provides no guidance on whether a series LLC may separately merge with another taxable entity.

12 Although the Illinois statute, like the Delaware statute, is silent as to whether a series LLC may merge with another entity, it does contain a catch-all provision giving it all the rights of a general LLC, suggesting that an Illinois series LLC may merge with another entity to the same extent that an Illinois LLC may merge with another entity. § 805 Ill. Comp. Stat. 180/37-40(b) (“Each series with limited liability may . . . otherwise conduct business and exercise the powers of a limited liability company under this act.”). Id. at 180/37-40(j) (“[T]he provisions of this Act which are generally applicable to limited liability companies, their managers, members and transferees shall be applicable to each particular series with respect to the operation of such series.”).

13 Although other entities may convert to Delaware LLCs, Del. Code Ann. tit. 6, § 18-214(b) (“Any other entity may convert to a domestic limited liability . . . .”), the Delaware series LLC statute does not state whether they may convert to a series LLC.

14 While Delaware explicitly allows an LLC to domesticate to another state, Del. Code Ann. tit. 6, § 18-213(a) (“Upon compliance with [section 213], any limited liability company may transfer to or domesticate or continue in any jurisdiction, other than any state, and, in connection therewith, may elect to continue its existence as a limited liability company in the State of Delaware.”), Delaware does not provide similar guidance for series LLCs.

15 Illinois allows a series LLC to register to do business in another state if the parent is not going to do business in that state. § 805 Ill. Comp. Stat. 180/37-40(n) (“If a limited liability company with a series does not register to do business in a foreign jurisdiction for itself and certain of its series, a series of a limited liability company may itself register to do business as a limited liability company in the foreign jurisdiction in accordance with the laws of the foreign jurisdiction.”).

16 The Delaware liability shield is conditioned on four factors: (1) creating one or more series in the operating agreement, (2) keeping separate and distinct records and accounts, (3) providing for separate series in the LLC agreement, and (4) setting forth notice of the separate series in the certificate of formation. Del. Code Ann. tit. 6, § 18-215 (2007) (“[I]n the event that an operating agreement creates one or more series, and if separate and distinct records are maintained for any such series and the assets associated with any such series are held in such separate or distinct records . . . and accounted for in such separate and distinct records . . . . and the limited liability agreement so provides, and if notice . . . is set forth . . . . 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 . . . .”).

17 D.C. Code § 29-802.06(b).


20 Kan. Stat. Ann. § 17-76,143(b) (“. . . in the event that an operating agreement establishes or provides for the establishment of one 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 operating agreement so provides, and if notice of the limitation on liabilities of a series as referenced in this subsection is set forth in the articles of organization of the limited liability company and if the limited liability company has filed a certificate of designation for each series which is to have limited liability under this section, 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 operating 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.

21 Although similar to Delaware and Illinois' statutes, the Nevada statute only requires separate record keeping and accounting and compliance with Nevada's laws governing LLCs. NEV. REV. STAT. § 86.296(3) (2007).


25 UTAH CODE ANN. § 48-3-1202(3) and (4) (same as Delaware and Illinois).

26 DEL. CODE ANN. tit. 6, § 18-215(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. . ., and any such series may have a separate business purpose or investment objective.”).

27 D.C. Code § 29-802.06(i).

28 § 805 ILL. COMP. STAT. 180/37-40(a) (“An operating agreement may establish or provide for the establishment of 1 or more designated series of members, managers or limited liability company interests . . ., and to the extent provided in the operating agreement, any such series may have a separate business purpose or investment objective.”).


30 KAN. STAT. ANN. § 17-76,143(a) (“. . . to the extent provided in the operating agreement, any such series may have a separate business purpose or investment objective.”).

31 NEV. REV. STAT. § 86.296(2) (same as Delaware and Illinois).

32 18 OKL. ST. § 2054.4(A) (same as Delaware and Illinois).

33 TENN. CODE ANN. § 48-249-309(a) (same as Delaware and Illinois).


35 UTAH CODE ANN. § 48-3-1202(2) (same as Delaware and Illinois).

36 DEL. CODE ANN. tit. 6, § 18-215(k).

37 § 805 ILL. COMP. STAT. 180/37-40(m).


39 KAN. STAT. ANN. §§ 17-76,143(m) (“A series is terminated and its affairs shall be wound up upon the dissolution of the limited liability company under article 76 of chapter 17 of the Kansas Statutes Annotated, and
amendments thereto.”); (d) (“A series with limited liability under subsection (b) may be dissolved by filing with the secretary of state a certificate of designation identifying the series being dissolved or by the dissolution of the limited liability company as provided in subsection (m).”)

40 IOWA CODE §489.1205.1 (2009)

41 18 OKL. ST. § 2054.4(j) (same as Delaware and Illinois).

42 TENN. CODE ANN. § 48-249-309(h) provides, however, that “A series of an LLC shall be terminated and its affairs shall be wound up upon the occurrence of the same events or reasons as are provided in this chapter for an LLC. It is not clear whether this provision requires the dissolution of a series upon the termination of the parent LLC.


44 UTAH CODE ANN. §48-3-1209(3).

45 D.C. Code § 29-802.06(b)(4) (upon filing a certificate of series designation).

46 § 805 ILL. COMP. STAT. 180/37-40(d) (“Upon filing of the certificate of designation with the Secretary of State setting forth the name of each series with limited liability, the series’ existence shall begin.”).

47 KAN. STAT. ANN. § 17-76,143(d) (“Upon the filing of the certificate of designation with the secretary of state setting forth the name of each series with limited liability, the series’ existence shall begin, and copies of the filed certificate of designation marked with the filing date shall be conclusive evidence, except as against the state, that all conditions precedent required to be performed have been complied with and that the series has been or shall be legally organized and formed under this act.”)

48 D.C. Code § 29-802.06(r).

49 § 805 ILL. COMP. STAT. 180/37-40(j) (“Except to the extent modified in this Section, the provisions of this Act which are generally applicable to limited liability companies, their managers, members and transferees shall be applicable to each particular series with respect to the operation of such series.”).

50 KAN. STAT. ANN. § 17-76,143(j) (“Except to the extent modified in this section, the provisions of this act which are generally applicable to limited liability companies, their managers, members and transferees shall be applicable to each particular series with respect to the operation of such series.”).

51 IOWA CODE §489.1201.7 (2009).


53 UTAH CODE ANN. § 48-3-1205(6).

54 DEL. CODE ANN. tit. 6, § 18-215(k).

55 D.C. Code § 29-802.06(n).

56 § 805 ILL. COMP. STAT. 180/37-40(m) (providing for separate dissolution almost identical to the Delaware statute).


58 KAN. STAT. ANN. § 17-76,143(m) (“Except to the extent otherwise provided in the operating agreement, a series may be dissolved and its affairs wound up without causing the dissolution of the limited liability company. The dissolution of a series established in accordance with subsection (b) shall not affect the limitation on liabilities of such series provided by subsection (b). A series is terminated and its affairs shall be wound up upon the dissolution
of the limited liability company under article 76 of chapter 17 of the Kansas Statutes Annotated, and amendments thereto.”).

59 18 OKL. ST. § 2054.4(j) (same as Delaware and Illinois).

60 TENN. CODE ANN. § 48-249-309(g) (same as Delaware and Illinois).


62 UTAH CODE ANN. § 48-3-1209(1).

63 DEL. CODE ANN. tit. 6, § 18-215(m).

64 Although no specific provision addresses judicial termination, judicial termination may be inferred under 805 ILL. COMP. STAT. 180/37-40(j), which provides that “Except to the extent modified in this Section, the provisions of this Act which are generally applicable to limited liability companies, their managers, members and transferees shall be applicable to each particular series with respect to the operation of such series.”


66 Although no specific provision addresses judicial termination, judicial termination may be inferred under KAN. STAT. ANN. § 17-76,143(j) (“Except to the extent modified in this section, the provisions of this act which are generally applicable to limited liability companies, their managers, members and transferees shall be applicable to each particular series with respect to the operation of such series.”).

67 18 OKL. ST. § 2054.4 (“[T]he district court may decree termination of the series whenever it is not reasonably practicable to carry on the business of the series in conformity with an operating agreement.”).


69 DEL. CODE ANN. tit. 6, §§ 18-215(b) (while not expressly granting powers to a series, providing that the series may have separate rights, powers and duties with respect to specified property or obligations and may have separate business purpose or investment objective); 18-215(c) (providing that the series may carry on any lawful business, purpose or activity other than banking).

70 D.C. Code § 29-802.06(j).

71 § 805 ILL. COMP. STAT. 180/37-40(b) (“Each series with limited liability may . . . otherwise conduct business and exercise the powers of a limited liability company under this act.”). Id. at 180/37-40(j) (“[T]he provisions of this Act which are generally applicable to limited liability companies, their managers, members and transferees shall be applicable to each particular series with respect to the operation of such series.”).

72 KAN. STAT. ANN. §§ 17-76,143(1) (b) (“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 a limited liability company under this act.”). 17-76,143(j) (“Except to the extent modified in this section, the provisions of this act which are generally applicable to limited liability companies, their managers, members and transferees shall be applicable to each particular series with respect to the operation of such series.”).

73 IOWA CODE §489.1201.7 (2009)


75 D.C. Code § 29-802.06(b)(4).
§ 805 ILL. COMP. STAT. 180/37-40(d) (“Upon the filing of the certificate of designation with the Secretary of State setting forth the name of each series with limited liability, the series’ existence shall begin, and each of the duplicative copies . . . shall be conclusive evidence . . . that all conditions precedent required to be performed have been complied with and that the series has been or shall be, . . . legally organized and formed under this Act.”).

KAN. STAT. ANN. § 17-76,143(d) (“Upon the filing of the certificate of designation with the Secretary of State setting forth the name of each series with limited liability, the series’ existence shall begin, and each of the duplicative copies . . . shall be conclusive evidence . . . that all conditions precedent required to be performed have been complied with and that the series has been or shall be, . . . legally organized and formed under this Act.”).

D.C. Code § 29-802.06(d)(1).

§ 805 ILL. COMP. STAT. 180/37-40(c) (“The name of the series with limited liability must contain the entire name of the limited liability company and be distinguishable from the names of the other series set forth in the articles of organization.”).


KAN. STAT. ANN. § 17-76,143(c) (“Except in the case of a foreign limited liability company that has adopted an assumed name pursuant to K.S.A. 17-76,123, and amendments thereto, the name of the series with limited liability must contain the entire name of the limited liability company and be distinguishable from the names of the other series set forth in the articles of organization.”).

Generally, only states that allow for series LLCs explicitly recognize foreign series LLCs (with the exception of Nevada). The California Franchise Tax Board, however, has taken the position that a foreign series LLC will be considered a separate business entity if: “(1) the holders in interest in the series are limited to the assets of the series on 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 that series is limited to assets of that series.” California FTB Informational Publication No. 689, 02/01/2007. For an excellent discussion of the issues raised by the CA FTB’s conditions for classifying a series LLC as a separate entity, see Sheldon I. Banoff and Richard M. Lipton, Shop Talk, California Refines Its Tax Treatment of Series LLCs, 106 Journal of Taxation 316 (May, 2007); see also Jacob Stein, Department: Tax Tips: Advanced Asset Protection and Tax Planning with LLCs, 29 L.A. LAW 17, 21 (2006).

DEL. CODE ANN. tit. 6, § 18-215(n) (requiring foreign LLCs to state on their application for registration that they intend to operate as a foreign series LLC).

D.C. Code §§ 29-101.02 ((B) (“(x) Any other person that has a legal existence separate from any interest holder of that person or that has the power to acquire an interest in real property in its own name.”); 29-105.03. (“To register to do business in the District, a foreign filing entity or foreign limited liability partnership shall deliver a foreign registration statement to the Mayor for filing. The statement shall state . . .”)”).

§ 805 ILL. COMP. STAT. 180/37-40(o) (provision for foreign recognition similar to Delaware).

IOWA CODE §489.1206 (same as Delaware and Illinois).

KAN. STAT. ANN. § 17-76,143(o) (provision for foreign recognition similar to Delaware).

18 OKL. ST. § 2054.4(m) (same as Delaware and Illinois).

TENN. CODE ANN. § 48-249-309(i) (same as Delaware and Illinois).


UTAH CODE ANN. § 48-3-1210.
If a limited liability company with a series does not register to do business in a foreign jurisdiction for itself and certain of its series, a series of a limited liability company may itself register to do business as a limited liability company in the foreign jurisdiction in accordance with the laws of the foreign jurisdiction.

If a limited liability company with a series does not register to do business in a foreign jurisdiction for itself and certain of its series, a series of a limited liability company may itself register to do business as a limited liability company in the foreign jurisdiction in accordance with the laws of the foreign jurisdiction.

If a limited liability company with a series does not register to do business in a foreign jurisdiction for itself and certain of its series, a series of a limited liability company may itself register to do business as a limited liability company in the foreign jurisdiction in accordance with the laws of the foreign jurisdiction.

Any event under this chapter or a limited liability agreement that causes a member 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 or a member in the limited liability company or cause the termination of the series.

Any event under this Act or an operating agreement that causes a member 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.

Except as otherwise provided in an operating agreement, any event under this act or an operating 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.

Except as otherwise provided in an operating agreement, any event under this act or an operating 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.

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Any event under this Act or an operating agreement that causes a member 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.
§ 48-3-1208(2).

Del. Code Ann. tit. 6, § 18-215(c) (expressly permitting a series to contract in its own name.).

§ 805 Ill. Comp. Stat. 180/37-40(b) (“Each series . . . may, in its own name . . . contract . . . .”).

Kan. Stat. Ann. § 17-76,143(b) (“A series with limited liability shall be 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 a limited liability company under this act.”).


Utah Code Ann. § 48-3-1202(5) (“A series may contract on its own behalf and in its own name, including through a manager.”).

Del. Code Ann. tit. 6, § 18-215(c) (expressly permitting a series to grant liens and security interests in its own name.).


Kan. Stat. Ann. § 17-76,143(b) (“A series with limited liability shall be 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 a limited liability company under this act.”).


Del. Code Ann. tit. 6, § 18-215(c) (expressly permitting a series to hold property in its own name.).

§ 805 Ill. Comp. Stat. 180/37-40(b) (“Each series . . . may, in its own name . . . hold title to assets . . . .”).

Kan. Stat. Ann. § 17-76,143(b) (“A series with limited liability shall be 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 a limited liability company under this act.”).


D.C. Code § 29-802.06(f).

§ 805 Ill. Comp. Stat. 180/37-40(e)

While the Kansas statute does not expressly mandate the issuance of a certificate of good standing, Kan. Stat. Ann. § 17-76,143(e) provides, “A series of a limited liability company will be deemed to be in good standing as long as the limited liability company is in good standing.”.

The Illinois statute apparently treats both the series and the parent LLC as separate entities for tax purposes, but allows the series and parent to elect to be treated as one taxpayer. See Terry, supra note 1, nn.62–63 and accompanying text. The Illinois statute states that “[t]he [LLC] and any of its series may elect to consolidate their operations as a single taxpayer to the extent provided under applicable law . . . .” § 805 Ill. Comp. Stat. 180/37-40(b).

Kan. Stat. Ann. § 17-76,143(b) (“The limited liability company and any of its series may elect to consolidate their operations as a single taxpayer to the extent permitted under applicable law, elect to work cooperatively, elect
to contract jointly or elect to be treated as a single business for purposes of qualification to do business in this or any other state.

128 § 805 ILL. COMP. STAT. 180/37-40(b) at 2.


EXHIBIT 3

I. No Series Treated as a Partnership
   a. Series LLC and all series treated as a single business entity and partnership

   ![Diagram A]

   X
   / \
  Y   Z

   ![Diagram B]

   XYZ
   Holding
   / \
  X   Y   Z

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

   ![Diagram C]

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

```
A B C D   D E F   A B C D E F
      \   /       \   /       \   /
     X   Y =     X Y

G H I
  /  \
Z
```
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.

```
A    B    C    D
     /\    /\   /
    X   Y   X   Y

G    H    I
  /\    /\   /
 Z

A    B    C    D    E    F    G    II    I
     /\    /\    /\    /\    /\    /\    /\   /
    X    Y    X    Y    X    Y    X    Y

XYZ Series
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EXHIBIT 4

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

DISTRIBUTION OF
TRADING AND MARKETS

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.
Ms. Susan DeMando  
September 1, 2009  
Page 2 of 3

The Commission’s financial responsibility rules include the net capital rule, the customer protection rule, and the financial reporting rule. 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. 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.”

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. Specifically, the capital needs to be “subject to the risks of the business” in order to be included in the firm’s net capital. 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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1 17 CFR 240.15c3-1.  
2 17 CFR 240.15c3-3.  
3 17 CFR 240.17a-5.  
4 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).  
5 See 69 FR 34,428, 34,430.  
7 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
HUD No. 11-146
Brian Sullivan 202) 708-0980
FOR RELEASE Wednesday July 13, 2011

HUD SETTLES ALLEGATIONS THAT PROSPECT MORTGAGE VIOLATED RESPA AND FHA REPORTING REQUIREMENTS

California lender to pay $3.1 million and dissolve sham joint ventures

WASHINGTON – The U.S. Department of Housing and Urban Development (HUD) today announced an agreement with Prospect Mortgage, LLC (Prospect) to settle allegations the California-based mortgage lender created sham affiliated business arrangements for the purpose of paying improper kickbacks or referral fees in violation of Federal Housing Administration (FHA) guidelines and the Real Estate Settlement Procedures Act (RESPA). Prospect agreed to dissolve these sham joint ventures and pay $3.1 million to resolve the complaint.

HUD claimed Prospect operated as a “series limited liability company,” a business structure unauthorized by FHA, and that Prospect used this business structure to create hundreds of sham joint ventures with real estate brokers, mortgage brokers, mortgage lenders, servicers and other settlement service providers and to share profits for the referral of real estate settlement services. Through these affiliated business arrangements, Prospect allowed non-approved branch offices to originate FHA-insured mortgages in violation of FHA’s guidelines. Read the full text of the agreement announced today.

“The real test for any bona fide affiliate business arrangement is whether the affiliate has sufficient capital and employees to stand on its own two feet,” said Acting FHA Commissioner Carol Galante. “In this case, it was clear that these sham companies had neither and were merely sharing profits for the referral of business.”

HUD alleges that Prospect entered into “series” or “subscription agreements” with real estate brokers, agents, banks, mortgage servicers and others to give the appearance that it was creating legitimate joint ventures to provide real and compensable services. HUD discovered these sham businesses had little or no employees, capital and/or offices; that all core mortgage origination services were performed by Prospect itself; and that Prospect had allowed these affiliated businesses to participate in the origination of FHA-insured loans out of branch offices registered with FHA as exclusive to Prospect. In return for the referral of business, Prospect shared 50 percent of its profits with these entities which HUD determined were not bona fide affiliated businesses, and many of which were not FHA-approved lenders.

RESPA was enacted in 1974 to provide consumers advance disclosures of settlement charges and to prohibit illegal kickbacks and excessive fees in the homebuying process. Section 8(a) of RESPA prohibits a person from giving or accepting anything of value in exchange for the referral of settlement service business and Section 8(b) prohibits unearned fees.

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*HUD's mission is to create strong, sustainable, inclusive communities and quality affordable homes for all. HUD is working to strengthen the housing market to bolster the economy and protect consumers; meet the need for quality affordable rental homes; utilize housing as a platform for improving quality of life; build inclusive and sustainable communities free from discrimination; and transform the way HUD does business. More information about HUD and its programs is available on the Internet at [www.hud.gov](http://www.hud.gov) and [expanel.hud.gov](http://expanel.hud.gov).*

EXHIBIT 5

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C.

In the Matter of:
PROSPECT MORTGAGE, LLC  HUD ID No. 13920
Respondent

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made and entered into between the United States Department of Housing and Urban Development ("Department" or "HUD") and Prospect Mortgage, LLC ("Respondent"), collectively referred to as the "Parties."

WHEREAS, Respondent is a company that participates in HUD's single-family mortgage insurance program;

WHEREAS, HUD alleges that Respondent failed to comply with HUD/FHA requirements and the Real Estate Settlement Procedures Act ("RESPA"). Specifically, HUD alleges that a series limited liability company that originates and funds FHA insured mortgages as an FHA-approved mortgagee in the manner that Respondent has, does not comply with HUD/FHA's guidelines for the operation of branch offices. HUD also alleges that certain of Respondent's affiliated business arrangements or series limited liability companies did not comply with RESPA requirements governing affiliated business arrangements, including the requirement for sufficient initial capital and separate dedicated employees;

WHEREAS, HUD has indicated its intent to issue a Notice of Violation and pursue administrative action against Respondent based on the aforementioned alleged violations of HUD/FHA requirements and Section 8 of RESPA;
EXHIBIT 6

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 7
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 “LLC Act”).

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 Section 18-215 of the LLC Act, the Company has or may hereafter establish one or
more designated series and that 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 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.

__________________________________
Name: _____________________________
Title: An Authorized Person

Prepared by:
Louis G. Hering
Morris, Nichols, Arsh & Tunnell LLP
Wilmington, Delaware
EXHIBIT 8

Thanks to
R. Brent Clifton
Locke Liddell & Sapp LLP
Dallas, Texas 75201-6776
bclifton@lockeliddell.com
for providing this chart.
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 9

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

Notes:
• Management, LLC is the Manager of
  Compares, LLC and each Series
• Insurance Agency, Inc. is the sole member of
  Compares, LLC
• For each Series
  - Insurance Agency, Inc. issues Corporate Units
  - Individual Producer Unit Producer Units
EXHIBIT 9

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.