Committee on Scope and Program

PROJECT PROPOSAL FORM

SUBMITTED BY:

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DESCRIPTION OF PROJECT:

The Joint Editorial Board on Uniform Unincorporated Organization Acts ("JEB") recommends that the Committee on Scope and Program form a Study Committee to consider whether to add series provisions to some or all of the uniform unincorporated organization acts other than the Uniform Statutory Trust Entity Act, which already includes series provisions. We recommend that if a drafting committee is organized, the drafting committee have the authority to make changes to the series provisions in the Uniform Statutory Trust Entity Act to the extent the drafting committee considers such changes necessary to make the trust series provisions consistent with any provisions recommended for other unincorporated organization acts.

The JEB believes that at this time a Study Committee is appropriate instead of a Drafting Committee because several initial questions must be addressed. Specifically, i) whether series provisions should be included in the other unincorporated organization acts, ii) if so, in which acts and iii) what issues should be addressed as part of the drafting project. We should note that consideration of series provisions was outside of the scope of the Harmonization of Business Entity Acts Committee.

1. Need for and benefits of uniformity in this subject matter area:

There are two principal reasons to promote uniformity in series legislation. The first is more obvious. As described in the summary of existing state law and trends below, eight states have adopted series LLC legislation, and these states have adopted several

approaches to many of the key aspects of series. For example, the states vary in 1) whether the series may be a separate legal entity, 2) the nature of the public filing necessary to establish a series and 3) the power of series to hold title to assets.

The second reason to promote uniformity is that series raise many unresolved issues. While several of these issues are listed in the analysis of current state laws below, the JEB believes that series require more consideration and that many of the significant unresolved issues have not even been identified.

2. Summary/analysis of existing state law and trends concerning this subject:

a) Existing State Law

The Preamble to proposed Federal income tax regulations summarizes the nature of series legislation as follows:

> "A number of States have enacted statutes providing for the creation of entities that may establish series, including limited liability companies (series LLCs). In general, series LLC statutes provide that a limited liability company may establish separate series. 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 purposes. 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. If the conditions enumerated in the relevant statute are satisfied, the debts, liabilities, and obligations of one series generally are enforceable only against the assets of that series and not against assets of other series or of the series LLC."

Eight states have enacted series provisions as part of their LLC statutes (Delaware, Illinois, Iowa, Nevada, Oklahoma, Tennessee, Texas, and Utah). Delaware has enacted series provisions in its LLC, limited partnership and statutory trust statutes. Several states have series provisions in their statutory trust statutes. Also, SB 323, which is pending in California and would enact the California Revised Uniform Limited Liability Company Act, includes series provisions. Although not a part of this proposal, a larger number of states have enacted "cell" legislation, which is similar to series legislation, but which is limited to activities that constitute insurance business for insurance regulatory purposes.

The states have adopted several approaches to different aspects of series provisions. For example, the manner for creating series differs from state to state. In Delaware, the certificate of formation of the Series LLC must include notice of the limitation on liabilities of a series, and a series is then established by agreement among the members with no additional public filing. The notice may be included in the certificate of formation before any series are established. In Illinois, the LLC must file a separate certificate with the Secretary of State to establish a series, and the series is not effective until the filing is made.

The "powers" of series varies dramatically from state to state. In Delaware, a series has 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. Delaware Code Section 18-215. In Illinois, a 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 the Illinois LLC Act. 805 ILCS 180/37-40. The Utah LLC statute provides that a series may contract on its own behalf and in its own name, including through a manager, but it is not clear that the series may hold title in its own name. Utah Code Section 48-2c-606.

There are also differences in the nature of the series. Illinois and Iowa provide that to the extent provided in the certificate of organization, the series may be a separate entity. In other states, the series may not be a separate entity.

There are numerous other differences.

b) Unresolved State Law and Other Issues

There are many unresolved state law issues, including:

(i) What is the significance of the series being (Illinois or Iowa) or not being (Delaware) a separate state law entity if it can own property in its own name, grant liens and security interests and sue and be sued?

(ii) What are the duties of managers and members of the series organization to members associated with a series of the series organization particularly because uniform unincorporated organization acts do not permit elimination of fiduciary duties and how should these duties be defined? This may entail questions of direct and derivative litigation and appropriate default provisions for amending the governing agreement.

(iii) What limits should apply in determining how assets and what portion of an asset may be associated with a series? For example, what are the consequences when a percentage interest in one asset is associated with multiple series of the series organization? This may entail reconsideration of the maintenance and availability of required records.

(iv) What, if any, limitations are necessary on the ability to associate assets and liabilities of a series to protect the interests of creditors?

(v) Should series established for investment purposes have different rules than series established for operating businesses?

(vi) Will states recognize the internal shield of foreign series? The "internal affairs" doctrine may not apply in these circumstances.

(vii) How do limitations on distributions and charging orders apply at the series level?

(viii) Must a member or partner associated with a series be a member or partner in the series organization?

3. Impact of federal laws and regulations on this proposed subject:

One aspect of federal law that is relevant is bankruptcy law. At this time, it is not clear how series will be treated for bankruptcy law purposes. It is believed that the LLC would file in bankruptcy because the series is not an entity that may file in bankruptcy. However, the bankruptcy consequences are not known. The utility of series may be adversely affected if a bankruptcy court concludes that it will not respect the liability limitations available under current state law.

4. Identity of organizations or persons interested in this subject area, and assessment of support/opposition:

We are not aware of any particular organizations or persons that are interested in series or that would be opposed to series legislation.

5. Availability of existing research and/or financial support:

We are not aware of any significant existing research and/or financial support for this project.

Exhibits

Exhibit 1 – Donn, Ely, Keatinge, and Shippel; ALI ABA Program Materials on Series

Exhibit 2 – Treasury Regulations on Tax Classification of Series Organizations and Series

Exhibit 3 – Delaware LLC Series Legislation

Exhibit 4 – Illinois LLC Series Legislation

Exhibit 5 – Texas LLC Series Legislation

Exhibit 1

ALI-ABA Video Law Review

CHOICE OF ENTITY 2011:
Selecting Legal Form and Structure for Closely-Held Businesses and Ventures in a Changing Economy

February 17, 2011
Live Nationwide via Satellite on the American Law Network
Washington, D.C.

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SERIES LLCs

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

I. Delaware Series.

A. Definitions.

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

B. Alternative and Analogous Structures.

1. Parent entity with subsidiaries.

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

3. Protected Cell Companies ("statutory") ("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 chargeable with liabilities of any other protected cell or of the sponsored captive insurance company generally. E.g., 18 Del. Code § 6934(3); Mont. Code Ann. § 33-28-301(2)(c); D.C. Code § 31-3931.04(b) (D.C. also provides an "incorporated protected cell.") § 31-3931.04(a). See Feetham and Jones, Protected Cell Companies (2d ed. 2010) ("Feetham and Jones").

4. Series Captive Insurance Company.

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

See Delaware Insurance Commissioner News Release, January 28, 2011, declaring that only in Delaware can an entity form a series entity captive, reported that the number of captive insurers in Delaware in 2010 increased from 48 to 96.

For discussion of Delaware series captive entities see O'Toole & Symonds, A Winning Combination, Captive Review-Delaware Report 2011.

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

II. Mutual Fund Origin of Concept.

"A series company or fund is an investment company composed of separate portfolios of investments organized under the umbrella of a single corporate or trust entity...

Each portfolio of a series company has distinct objectives and policies, and interests in each portfolio are represented by a separate class or series of shares. Shareholders of each series participate solely in the investment results of that series. In effect, each series operates as a separate investment company." Gordon Altman et al., A Practical Guide to the Investment Company Act, 2-3 (1996).

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

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

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

III. Series LLC.

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

Similar LLC legislation has been adopted by the following states:

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

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

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

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

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

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

Compare Uniform Statutory Trust Entity Act (approved 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); Section 401(b) (series not an entity separate from the statutory trust).

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." 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.[2]

See Symonds & O'Toole, Delaware Limited Liability Companies, Section 5.22 ("Symonds & O'Toole").

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

1. The LLC agreement may establish designated series of members, managers or LLC interests, or 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 the members of designated series. But compare the statement in the Preamble to the federal tax Proposed Regulation that 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 and members' association with one or more particular series is comparable to direct ownership by the members in the series, and that their rights, duties, and powers with respect to the series are direct and specifically identified.

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" or ring-fencing.

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

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

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).

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

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

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

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.

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 manner pertains exclusively to property associated with a series of the trust." The comment in the June 3, 2009 annual meeting draft of the Act stated, "Paragraph (b) ... makes explicit what is implicit in the Delaware act,...." The Delaware Statutory Trust Act does not confer the range of entity characteristics on a series as the Delaware Code does for an LLC or limited partnership.

B. Illinois.

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

See Banoff and Jacobson, "Series LLCs," Limited Liability Companies and S Corporations, Chap. 19 (IICLE, 2005 ed. with 2010 Supp.); Borkus and Myers, Series LLCs: Practical Pointers and Tax Implications, 95 Ill. St. Bar J. 22 (2007); Marsico, Current Issues of the Series LLC: Illinois Series LLC Improves Upon Delaware Series LLC But Many Open Issues Remain, J. Passthrough Entities, Nov.-Dec. 2006, p. 35.

C. Iowa.

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

D. Tennessee.

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

E. Texas.

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

See Clifton, Series LLCs, Chapter 15, State Bar of Texas, 28th Annual Advanced Tax Law Course 2010.

F. Comparison.

For a comparison of the series LLC statutes in various states that have enacted those statutes, see Exhibit 12.

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

creditors of one series of the trust may not reach the assets of any other series of the trust, each is a separate entity for tax purposes.)

c. 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.

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

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

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

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

Consistent with the insurance company treatment at the cell level:

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.

3. Proposed Regulations-Questions Answered.

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, segregated cell company, segregated portfolio, or segregated account company. Prop. Reg. § 301.7701-1(5)(viii)(A).

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 in 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 recordkeeping 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 states 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).

4. Proposed Regulations-Unanswered Questions.

The Section of Taxation of the American Bar Association is preparing comments on the Proposed Regulations to submit to the Treasury.

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. A 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.

For discussion of the Proposed Regulations, see Bishop, The Series LLC: Tax Classification Appears in Rear View, Tax Notes Jan. 17, 2011, 315-2021; Carman, Frost and Bender, First Steps-Proposed Regulations of Series LLCs Provide Clarity, J. Tax'n, 325-338 (Dec. 2010); and Cummings, Ownership, Series, and Cells, Tax Notes, Dec. 6, 2010.

B. State Income Tax Treatment.

1. The California Franchise Tax Board has stated its position that each component series of a series LLC, "for example a Delaware Series LLC," is a separate LLC and must file its own Form 568, Limited Liability Company Return of Income, and pay its own separate LLC annual tax and fee if it is registered or doing business in California, and if (1) the holders of interests in each series are limited to the assets of that series upon redemption, liquidation, or termination, and may share in the income only of that series, and (2) under state law, the payment of the expenses, charges, and liabilities of each series is limited to the assets of that series. California 2010 Limited Liability Company Tax Booklet, Section F, p. 7; FTB Pub. 3556 p. 4 (Rev. 9-2009).

The FTB stated that it was applying the principle of National Securities Series, supra. Franchise Tax Board Tax News, March/April 2006, p.3. See Banoff and Lipton,

Shop Talk, California Refines Its Tax Treatment of Series LLCs, 106 J. Tax'n 316 (May, 2007) for an excellent discussion of the issues raised by the California Franchise Tax Board's conditions for classifying a series LLC as a separate entity. See also Stein, California's Treatment of a Foreign Jurisdiction's Series LLCs, Business Entities 16, 19-21, 64 (May/June 2008).

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

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

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

4. For discussion of state tax issues in light of Proposed Regulations, see McLoughlin and Ely, Guidance on Series LLCs: Will the States Soon Follow, J. Multistate Tax'n, pp. 10, 13-17 (Jan. 2011).

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. Non-Tax Open Issues.

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

"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.

Significant non-tax open issues relating to the series LLC include the following:

A. 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.

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], pp. S14-33 (2006 Cum. Supp. No. 2). See RE-ULLCA § 801 COMMENT: "This provision does not pertain to the 'internal shield of a foreign 'series' LLC, because those shields do not concern the liability of members or managers for the obligation of the LLC. Instead those shields seek to protect specified assets of the LLC (associated with one series) from being available to satisfy specified obligations of the LLC (associated with another series)." The legal analysis required before LLCs were authorized in every state will be required for the series. See Bishop and Kleinberger at ¶ 6.08. Ribstein and Keatinge, Ribstein and Keatinge on Limited Liability Companies § 4:17 (Sept. 2007); Keatinge and Conaway, Keatinge and Conaway on Choice of Business Entity § 8:55 (2010).

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

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

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

enabling legislation, it would clearly be preferable to use multiple legal entities notwithstanding the additional cost.

The acts of some states seem to recognize the internal shield of a foreign series by implication from a provision requiring a statement in the application for a certificate of authority as a foreign LLC that the debts with respect to a particular series are enforceable against the series only and not against the assets of the foreign LLC. E.g., Iowa Code § 489.1206; Texas V.T.C.A., Bus. Org. Code § 9.005(b), but provisions on law applicable to liability do not specifically mention series. Texas V.T.C.A., Bus. Org. Code §§ 1.102 and 1.104.

B. Bankruptcy.

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

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

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

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

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.

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

> The definition of "corporation" in paragraph (8) is similar to the definition in current law, section 1(8) [section 1(8) of former title 11]. The term encompasses any association having the power or privilege that a private corporation, but not an individual or partnership, has; partnership associations organized under a law that makes only the capital subscribed responsible for the debts of the partnership; joint-stock company; unincorporated company or association; and business trust. "Unincorporated association" is intended specifically to include a labor union, as well as other bodies that come under that phrase as used under current law. The exclusion of limited partnerships is explicit, and not left to the case law. Senate Report No. 95-989.

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

e. Based on the definition, an LLC should be treated as a "corporation" under the Bankruptcy Code. Kennedy, Countryman & Williams, 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).

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

See Dawson, Series LLC and Bankruptcy: When the Series Finds Itself in Trouble, Will it Need Its Parent to Bail it Out?, 35 Del. J. Corp. L. 15 (2010); Bahena, Series LLCs: The Asset Protection Dream Machine?, 35 J. Corp. L. 799 (2010); Powell, Delaware Alternative Entities, Probate & Property, January/February 2009 pp. 11, 15-17; Powell, Series LLCs, the UCC, and the Bankruptcy Code – A Series of Unfortunate Events, 41 U.C.C. L. J. #2, 101, 110 (2008).

2. Substantive Consolidation.

a. If the LLC files 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 lender's 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.

C. Secured Transactions - UCC Revised Article 9.

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

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

D. Securities Law.

1. When is an interest in a Series a "security"?

2. SEC broker-dealer financial reporting requirements.

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

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

3. Investment Company Act.

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

b. *Siemers v. Wells Fargo & Co.*, 2006 WL 3041090 (N.D. Cal. 2006). Wells Fargo Funds Trust was the registrant of all Wells Fargo Funds, which were organized as several series. Accepting the 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*.

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

E. Charging Order.

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

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

VII. Use for Real Estate Projects.

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

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

B. Good Standing Certificates.

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

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

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

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.

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

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

Texas. The Secretary of State has not provided a specific form to be used to form a series LLC. The notice of the internal limitation of liability of a series is to be included as supplemental information in the general LLC certificate of formation, Form 205 (Rev'd 7/10). See Formation of Texas Entities FAQs http://www.sos.state.tx.us/corp/formationfaqs.shtml.

B. Provision in Operating Agreement.

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

C. Records.

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

D. Registration of Foreign Series LLC.

1. Illinois.

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

2. Delaware.

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

3. Texas.

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

4. California.

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

E. Form Agreements.

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.

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

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

F. Multiple Real Estate Projects.

See Exhibit 10.

G. Operating Business.

See Exhibit 11.

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

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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.

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

[3] 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.

Exhibit 2

Background

The correction notice that is the subject of this document is under section 108 of the Internal Revenue Code.

Need for Correction

As published, the notice of proposed rulemaking by cross-reference to temporary regulations (REG–142800–09) contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of the notice of proposed rulemaking by cross-reference to temporary regulations (REG–142800–09), which was the subject of FR Doc. 2010–20059, is corrected as follows:

On page 49429, column 2, in the authority citation for part 1, the language "Section 1.108(i)-0T also issued under 26 U.S.C. 108(i)(7). * * *" is removed and the language "Section 1.108(i)-0T also issued under 26 U.S.C. 108(i)(7) and 1502. * * *" is added in its place.

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, Procedure and Administration.

[FR Doc. 2010–22791 Filed 9–13–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG–119921–09]

RIN 1545–BI69

Series LLCs and Cell Companies

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations regarding the classification for Federal tax purposes of a series of a domestic series limited liability company (LLC), a cell of a domestic cell company, or a foreign series or cell that conducts an insurance business. The proposed regulations provide that, whether or not a series of a domestic series LLC, a cell of a domestic cell company, or a foreign series or cell that conducts an insurance business is a juridical person for local law purposes, for Federal tax purposes it is treated as an entity formed under local law. Classification of a series or cell that is treated as a separate entity for Federal tax purposes generally is determined under the same rules that govern the classification of other types of separate entities. The proposed regulations provide examples illustrating the application of the rule. The proposed regulations will affect domestic series LLCs; domestic cell companies; foreign series, or cells that conduct insurance businesses; and their owners.

DATES: Written or electronic comments and requests for a public hearing must be received by December 13, 2010.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–119921–09), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–119921–09), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically, via the Federal eRulemaking portal at *http://www.regulations.gov* (IRS REG–119921–09).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Joy Spies, (202) 622–3050; concerning submissions of comments, Oluwafunmilayo (Funmi) Taylor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

1. Introduction

A number of States have enacted statutes providing for the creation of entities that may establish series, including limited liability companies (series LLCs). In general, series LLC statutes provide that a limited liability company may establish separate series. 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 purposes. 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. If the conditions enumerated in the relevant statute are satisfied, the debts, liabilities, and obligations of one series generally are enforceable only against the assets of that series and not against assets of other series or of the series LLC.

Certain jurisdictions have enacted statutes providing for entities similar to the series LLC. For example, certain statutes provide for the chartering of a legal entity (or the establishment of cells) under a structure commonly known as a protected cell company, segregated account company or segregated portfolio company (cell company). A cell company may establish multiple accounts, or cells, each of which has its own name and is identified with a specific participant, but generally is not treated under local law as a legal entity distinct from the cell company. The assets of each cell are statutorily protected from the creditors of any other cell and from the creditors of the cell company.

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.

Notice 2008–19 (2008–5 IRB 366) requested comments on proposed guidance concerning issues that arise if arrangements entered into by a cell constitute insurance for Federal income tax purposes. The notice also requested comments on the need for guidance concerning similar segregated arrangements that do not involve insurance. The IRS received a number of comments requesting guidance for similar arrangements not involving insurance, including series LLCs and cell companies. These comments generally recommended that series and cells should be treated as separate entities for Federal tax purposes if they are established under a statute with provisions similar to the series LLC statutes currently in effect in several States. The IRS and Treasury Department generally agree with these comments. *See* § 601.601(d)(2)(ii)(*b*).

2. Entity Classification for Federal Tax Purposes

A. Regulatory Framework

Sections 301.7701–1 through 301.7701–4 of the Procedure and Administration Regulations provide the framework for determining an organization's entity classification for Federal tax purposes. Classification of an organization depends on whether the organization is treated as: (i) A separate entity under § 301.7701–1, (ii) a "business entity" within the meaning of § 301.7701–2(a) or a trust under § 301.7701–4, and (iii) an "eligible entity" under § 301.7701–3.

Section 301.7701–1(a)(1) provides that the determination of whether an

entity is separate from its owners for Federal tax purposes is a matter of Federal tax law and does not depend on whether the organization is recognized as an entity under local law. Section 301.7701–1(a)(2) provides that a joint venture or other contractual arrangement may create a separate entity for Federal tax purposes if the participants carry on a trade, business, financial operation, or venture and divide the profits therefrom. However, a joint undertaking merely to share expenses does not create a separate entity for Federal tax purposes, nor does mere co-ownership of property where activities are limited to keeping property maintained, in repair, and rented or leased. *Id.*

Section 301.7701–1(b) provides that the tax classification of an organization recognized as a separate entity for tax purposes generally is determined under §§ 301.7701–2, 301.7701–3, and 301.7701–4. Thus, for example, an organization recognized as an entity that does not have associates or an objective to carry on a business may be classified as a trust under § 301.7701–4.

Section 301.7701–2(a) provides that a business entity is any entity recognized for Federal tax purposes (including an entity with a single owner that may be disregarded as an entity separate from its owner under § 301.7701–3) that is not properly classified as a trust or otherwise subject to special treatment under the Internal Revenue Code (Code). A business entity with two or more members is classified for Federal tax purposes as a corporation or a partnership. *See* § 301.7701–2(a). A business entity with one owner is classified as a corporation or is disregarded. *See* § 301.7701–2(a). If the entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner. However, § 301.7701–2(c)(2)(iv) and (v) provides for an otherwise disregarded entity to be treated as a corporation for certain Federal employment tax and excise tax purposes.

Section 301.7701–3(a) generally provides that an eligible entity, which is a business entity that is not a corporation under § 301.7701–2(b), may elect its classification for Federal tax purposes.

B. Separate Entity Classification

The threshold question for determining the tax classification of a series of a series LLC or a cell of a cell company is whether an individual series or cell should be considered an entity for Federal tax purposes. The determination of whether an organization is an entity separate from its owners for Federal tax purposes is a matter of Federal tax law and does not depend on whether the organization is recognized as an entity under local law. Section 301.7701–1(a)(1). In *Moline Properties, Inc.* v. *Commissioner*, 319 U.S. 436 (1943), the Supreme Court noted that, so long as a corporation was formed for a purpose that is the equivalent of business activity or the corporation actually carries on a business, the corporation remains a taxable entity separate from its shareholders. Although entities that are recognized under local law generally are also recognized for Federal tax purposes, a State law entity may be disregarded if it lacks business purpose or any business activity other than tax avoidance. *See Bertoli* v. *Commissioner*, 103 T.C. 501 (1994); *Aldon Homes, Inc.* v. *Commissioner*, 33 T.C. 582 (1959).

The Supreme Court in *Commissioner* v. *Culbertson*, 337 U.S. 733 (1949), and *Commissioner* v. *Tower*, 327 U.S. 280 (1946), set forth the basic standard for determining whether a partnership will be respected for Federal tax purposes. In general, a partnership will be respected if, considering all the facts, the parties in good faith and acting with a business purpose intended to join together to conduct an enterprise and share in its profits and losses. This determination is made considering not only the stated intent of the parties, but also the terms of their agreement and their conduct. *Madison Gas & Elec. Co.* v. *Commissioner*, 633 F. 2d 512, 514 (7th Cir. 1980); *Luna* v. *Commissioner*, 42 T.C. 1067, 1077–78 (1964).

Conversely, under certain circumstances, arrangements that are not recognized as entities under State law may be treated as separate entities for Federal tax purposes. Section 301.7701–1(a)(2). For example, courts have found entities for tax purposes in some co-ownership situations where the co-owners agree to restrict their ability to sell, lease or encumber their interests, waive their rights to partition property, or allow certain management decisions to be made other than by unanimous agreement among co-owners. *Bergford* v. *Commissioner*, 12 F. 3d 166 (9th Cir. 1993); *Bussing* v. *Commissioner*, 89 T.C. 1050 (1987); *Alhouse* v. *Commissioner,* T.C. Memo. 1991–652. However, the Internal Revenue Service (IRS) has ruled that a co-ownership does not rise to the level of an entity for Federal tax purposes if the owner employs an agent whose activities are limited to collecting rents, paying property taxes, insurance premiums, repair and maintenance expenses, and providing tenants with customary services. Rev. Rul. 75–374 (1975–2 CB 261). *See also* Rev. Rul. 79–77 (1979–1 CB 448), (*see* § 601.601(d)(2)(ii)(*b*)).

Rev. Proc. 2002–22 (2002–1 CB 733), (*see* § 601.601(d)(2)(ii)(*b*)), specifies the conditions under which the IRS will consider a request for a private letter ruling that an undivided fractional interest in rental real property is not an interest in a business entity under § 301.7701–2(a). A number of factors must be present to obtain a ruling under the revenue procedure, including a limit on the number of co-owners, a requirement that the co-owners not treat the co-ownership as an entity (that is, that the co-ownership may not file a partnership or corporate tax return, conduct business under a common name, execute an agreement identifying any or all of the co-owners as partners, shareholders, or members of a business entity, or otherwise hold itself out as a partnership or other form of business entity), and a requirement that certain rights with respect to the property (including the power to make certain management decisions) must be retained by co-owners. The revenue procedure provides that an organization that is an entity for State law purposes may not be characterized as a co-ownership under the guidance in the revenue procedure.

The courts and the IRS have addressed the Federal tax classification of investment trusts with assets divided among a number of series. In *National Securities Series-Industrial Stocks Series* v. *Commissioner*, 13 T.C. 884 (1949), *acq.*, 1950–1 CB 4, several series that differed only in the nature of their assets were created within a statutory open-end investment trust. Each series regularly issued certificates representing shares in the property held in trust and regularly redeemed the certificates solely from the assets and earnings of the individual series. The Tax Court stated that each series of the trust was taxable as a separate regulated investment company. *See also* Rev. Rul. 55–416 (1955–1 CB 416), (*see* § 601.601(d)(2)(ii)(*b*)). But, *see Union Trusteed Funds* v. *Commissioner*, 8 T.C. 1133 (1947), (series funds organized by a State law corporation could not be treated as if each fund were a separate corporation).

In 1986, Congress added section 851(g) to the Code. Section 851(g) contains a special rule for series funds and provides that, in the case of a regulated investment company (within the meaning of section 851(a)) with more than one fund, each fund generally is treated as a separate corporation. For these purposes, a fund is a segregated portfolio of assets the beneficial

interests in which are owned by holders of interests in the regulated investment company that are preferred over other classes or series with respect to these assets.

C. Insurance Company Classification

Section 7701(a)(3) and § 301.7701–2(b)(4) provide that an arrangement that qualifies as an insurance company is a corporation for Federal income tax purposes. Sections 816(a) and 831(c) define an insurance company as any company more than half the business of which during the taxable year is the issuing of insurance or annuity contracts or the reinsuring of risks underwritten by insurance companies. *See also* § 1.801–3(a)(1), ("[T]hough its name, charter powers, and subjection to State insurance laws are significant in determining the business which a company is authorized and intends to carry on, it is the character of the business actually done in the taxable year which determines whether a company is taxable as an insurance company under the Internal Revenue Code."). Thus, an insurance company includes an arrangement that conducts insurance business, whether or not the arrangement is a State law entity.

3. Overview of Series LLC Statutes and Cell Company Statutes

A. Domestic Statutes

Although § 301.7701–1(a)(1) provides that State classification of an entity is not controlling for Federal tax purposes, the characteristics of series LLCs and cell companies under their governing statutes are an important factor in analyzing whether series and cells generally should be treated as separate entities for Federal tax purposes.

Series LLC statutes have been enacted in Delaware, Illinois, Iowa, Nevada, Oklahoma, Tennessee, Texas, Utah and Puerto Rico. Delaware enacted the first series LLC statute in 1996. Del. Code Ann. Tit. 6, section 18–215 (the Delaware statute). Statutes enacted subsequently by other States are similar, but not identical, to the Delaware statute. All of the statutes provide a significant degree of separateness for individual series within a series LLC, but none provides series with all of the attributes of a typical State law entity, such as an ordinary limited liability company. Individual series generally are not treated as separate entities for State law purposes. However, in certain States (currently Illinois and Iowa), a series is treated as a separate entity to the extent provided in the series LLC's articles of organization.

The Delaware statute provides that a limited liability company may establish, or provide for the establishment of, one or more designated series of members, managers, LLC interests or assets. Under the Delaware statute, any such 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 such series may have a separate business purpose or investment objective. Additionally, the Delaware statute provides that the debts, liabilities, obligations, and expenses of a particular series are enforceable against the assets of that series only, and not against the assets of the series LLC generally or any other series of the LLC, and, unless the LLC agreement provides otherwise, none of the debts, liabilities, obligations, and expenses of the series LLC generally or of any other series of the series LLC are enforceable against the assets of the series, provided that the following requirements are met: (1) The LLC agreement establishes or provides for the establishment of one or more series; (2) records maintained for any such series account for the assets of the series separately from the other assets of the series LLC, or of any other series of the series LLC; (3) the LLC agreement so provides; and (4) notice of the limitation on liabilities of a series is set forth in the series LLC's certificate of formation.

Unless otherwise provided in the LLC agreement, a series established under Delaware law 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. A series may be managed by the members of the series or by a manager. Any event that causes a manager to cease to be a manager with respect to a series will not, in itself, cause the manager to cease to be a manager of the LLC or of any other series of the LLC.

Under the Delaware statute, unless the LLC agreement provides otherwise, any event that causes a member to cease to be associated with a series will not, in itself, cause the member to cease to be associated with any other series or with the LLC, or cause termination of the series, even if there are no remaining members of the series. Additionally, the Delaware statute allows a series to be terminated and its affairs wound up without causing the dissolution of the LLC. However, all series of the LLC terminate when the LLC dissolves. Finally, under the Delaware statute, a series generally may not make a distribution to the extent that the distribution will cause the liabilities of the series to exceed the fair market value of the series' assets.

The series LLC statutes of Illinois, 805 ILCS 180/37–40 (the Illinois statute), and Iowa, I.C.A. § 489.1201 (the Iowa statute) provide that a series with limited liability will be treated as a separate entity to the extent set forth in the articles of organization. The Illinois statute provides that the LLC 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 Illinois or any other State.

In addition, under the Illinois statute, a series' existence begins upon filing of a certificate of designation with the Illinois secretary of state. A certificate of designation must be filed for each series that is to have limited liability. The name of a series with limited liability must contain the entire name of the LLC and be distinguishable from the names of the other series of the LLC. If different from the LLC, the certificate of designation for each series must list the names of the members if the series is member-managed or the names of the managers if the series is manager-managed. The Iowa and Illinois statutes both provide that, unless modified by the series LLC provisions, the provisions generally applicable to LLCs and their managers, members, and transferees are applicable to each series.

Some States have enacted series provisions outside of LLC statutes. For example, Delaware has enacted series limited partnership provisions (6 Del. C. § 17–218). In addition, Delaware's statutory trust statute permits a statutory trust to establish series (12 Del. C. § 3804). Both of these statutes contain provisions that are nearly identical to the corresponding provisions of the Delaware series LLC statute with respect to the ability of the limited partnership or trust to create or establish separate series with the same liability protection enjoyed by series of a Delaware series LLC.

All of the series LLC statutes contain provisions that grant series certain attributes of separate entities. For example, individual series may have separate business purposes, investment objectives, members, and managers. Assets of a particular series are not subject to the claims of creditors of other series of the series LLC or of the series LLC itself, provided that certain recordkeeping and notice requirements are observed. Finally, most series LLC statutes provide that an event that causes a member to cease to be

associated with a series does not cause the member to cease to be associated with the series LLC or any other series of the series LLC.

However, all of the State statutes limit the powers of series of series LLCs. For example, a series of a series LLC may not convert into another type of entity, merge with another entity, or domesticate in another State independent from the series LLC. Several of the series LLC statutes do not expressly address a series' ability to sue or be sued, hold title to property, or contract in its own name. Ordinary LLCs and series LLCs generally may exercise these rights. Additionally, most of the series LLC statutes provide that the dissolution of a series LLC will cause the termination of each of its series.

B. Statutes with Respect to Insurance

The insurance codes of a number of States include statutes that provide for the chartering of a legal entity commonly known as a protected cell company, segregated account company, or segregated portfolio company. *See,* for example, Vt. Stat. Ann. tit. 8, chap.141, §§ 6031–6038 (sponsored captive insurance companies and protected cells of such companies); S.C. Code Ann. tit. 38, chap. 10, §§ 38–10–10 through 39–10–80 (protected cell insurance companies). Under those statutes, as under the series LLC statutes described above, the assets of each cell are segregated from the assets of any other cell. The cell may issue insurance or annuity contracts, reinsure such contracts, or facilitate the securitization of obligations of a sponsoring insurance company. Rev. Rul. 2008–8 (2008–1 CB 340), (*see* § 601.601(d)(2)(ii)(*b*)), analyzes whether an arrangement entered into between a protected cell and its owner possesses the requisite risk shifting and risk distribution to qualify as insurance for Federal income tax purposes. Under certain domestic insurance codes, the sponsor may be organized under a corporate or unincorporated entity statute.

Series or cell company statutes in a number of foreign jurisdictions allow series or cells to engage in insurance businesses. *See,* for example, The Companies (Guernsey) Law, 2008 Part XXVII (Protected Cell Companies), Part XXVIII (Incorporated Cell Companies); The Companies (Jersey) law, 1991, Part 18D; Companies Law, Part XIV (2009 Revision) (Cayman Isl.) (Segregated Portfolio Companies); and Segregated Accounts Companies Act (2000) (Bermuda).

Explanation of Provisions

1. In General

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.

With one exception, the proposed regulations do not apply to series or cells organized or established under the laws of a foreign jurisdiction. The one exception is that the proposed regulations apply to a foreign series that engages in an insurance business.

Whether a series that is treated as a local law entity under the proposed regulations is recognized as a separate entity for Federal tax purposes is determined under § 301.7701–1 and general tax principles. The proposed regulations further provide that the classification of a series that is recognized as a separate entity for Federal tax purposes is determined under § 301.7701–1(b), which provides the rules for classifying organizations that are recognized as entities for Federal tax purposes.

The proposed regulations define a *series organization* as a juridical entity that establishes and maintains, or under which is established and maintained, a series. A series organization includes a series limited liability company, series partnership, series trust, protected cell company, segregated cell company, segregated portfolio company, or segregated account company.

The proposed regulations define a *series statute* as 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 (1) members or participants of a series organization to have rights, powers, or duties with respect to the series; (2) a series to have separate rights, powers, or duties with respect to specified property or obligations; and (3) the 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. For purposes of this definition, a "participant" of a series organization includes an officer or director of the series organization who has no ownership interest in the series or series organization, but has rights, powers, or duties with respect to the series.

The proposed regulations define a series as a segregated group of assets and liabilities that is established pursuant to a series statute by agreement of a series organization. A series includes a 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. However, the term "series" does not include a segregated asset account of a life insurance company, which consists of all assets the investment return and market value of which must be allocated in an identical manner to any variable life insurance or annuity contract invested in any of the assets. *See* § 1.817–5(e). Such an account is accorded special treatment under subchapter L. *See* generally section 817(a) through (c).

Certain series statutes provide that the series liability limitation provisions do not apply if the series organization or series does not maintain records adequately accounting for the assets associated with each series separately from the assets of the series organization or any other series of the series organization. The IRS and the Treasury Department considered whether a failure to elect or qualify for the liability limitations under the series statute should affect whether a series is a separate entity for Federal tax purposes. However, 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 generally do not alter the characterization of the entity for Federal tax purposes. Therefore, the proposed regulations provide that an election, agreement, or other arrangement that permits debts and liabilities of other series or the series organization to be enforceable against the assets of a particular series, or a failure to comply with the recordkeeping requirements for the limitation on liability available under the relevant series statute, will not prevent a series from meeting the definition of "series" in the proposed regulations. For example, a series generally will not cease to be an entity under the proposed regulations simply because it guarantees the debt of another series within the series organization.

The proposed regulations treat a series as created or organized under the laws of the same jurisdiction in which the series is established. Because a series may not be a separate juridical entity for local law purposes, this rule

provides the means for establishing the jurisdiction of the series for Federal tax purposes.

Under § 301.7701–1(b), § 301.7701–2(b) applies to a series that is recognized as a separate entity for Federal tax purposes. Therefore, a series that is itself described in § 301.7701–2(b)(1) through (8) would be classified as a corporation regardless of the classification of the series organization.

The proposed regulations also provide that, for Federal tax purposes, ownership of interests in a series and of the assets associated with a series is determined under general tax principles. A series organization is not treated as the owner of a series or of the assets associated with a series merely because the series organization holds legal title to the assets associated with the series. For example, if a series organization holds legal title to assets associated with a series because the statute under which the series organization was organized does not expressly permit a series to hold assets in its own name, the series will be treated as the owner of the assets for Federal tax purposes if it bears the economic benefits and burdens of the assets under general Federal tax principles. Similarly, for Federal tax purposes, the obligor for the liability of a series is determined under general tax principles.

In general, 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. *See,* for example, Rev. Rul. 55–39 (1955–1 CB 403), (*see* § 601.601(d)(2)(ii)(*b*)). 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 under § 301.7701–3. *See,* for example, *Commissioner* v. *Culbertson,* 337 U.S. 733 (1949); *Commissioner* v. *Tower,* 327 U.S. 280 (1946).

The IRS and the Treasury Department considered other approaches to the classification of series for Federal tax purposes. In particular, the IRS and the Treasury Department considered whether series should be disregarded as entities separate from the series organization for Federal tax purposes. This approach would be supported by the fact that series are not generally considered entities for local law purposes (except, for example, potentially under the statutes of Illinois and Iowa, where a series may be treated as a separate entity to the extent set forth in the articles of organization). Additionally, while the statutes enabling series organizations grant series significant autonomy, under no current statute do series possess all of the attributes of independence that entities recognized under local law generally possess. For example, series generally cannot convert into another type of entity, merge with another entity, or domesticate in another jurisdiction independent of the series organization. In addition, the dissolution of a series organization generally will terminate all of its series.

The IRS and the Treasury Department believe that, notwithstanding that series differ in some respects from more traditional local law entities, domestic series generally should be treated for Federal tax purposes as entities formed under local law. Because Federal tax law, and not local law, governs the question of whether an organization is an entity for Federal tax purposes, it is not dispositive that domestic series generally are not considered entities for local law purposes. Additionally, the IRS and the Treasury Department believe that, overall, the factors supporting separate entity status for series outweigh the factors in favor of disregarding series as entities separate from the series organization and other series of the series organization. Specifically, managers and equity holders are "associated with" a series, and their rights, duties, and powers with respect to the series are direct and specifically identified. Also, individual series may (but generally are not required to) have separate business purposes and investment objectives. The IRS and the Treasury Department believe these factors are sufficient to treat domestic series as entities formed under local law.

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 IRS and the Treasury Department do not believe that the failure of a statute to explicitly provide these rights should alter the treatment of a domestic series as an entity formed under local law. These 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 these attributes, the statutory liability shields would still apply to the assets of a particular series, provided the statutory requirements are satisfied.

Furthermore, the rule provided in the proposed regulations would provide greater certainty to both taxpayers and the IRS regarding the tax status of domestic series and foreign series that conduct insurance businesses. In effect, taxpayers that establish domestic series are placed in the same position as persons that file a certificate of organization for a State law entity. The IRS and the Treasury Department believe that the approach of the proposed regulations is straightforward and administrable, and is preferable to engaging in a case-by-case determination of the status of each series that would require a detailed examination of the terms of the relevant statute. Finally, the IRS and the Treasury Department believe that a rule generally treating domestic series as local law entities would be consistent with taxpayers' current ability to create similar structures using multiple local law entities that can elect their Federal tax classification pursuant to § 301.7701–3.

The IRS and the Treasury Department believe that domestic series should be classified as separate local law entities based on the characteristics granted to them under the various series statutes. However, except as specifically stated in the proposed regulations, a particular series need not actually possess all of the attributes that its enabling statute permits it to possess. The IRS and the Treasury Department believe that a domestic 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. Separate State law entities may have common or overlapping business purposes, investment objectives and ownership, but generally are still treated as separate local law entities for Federal tax purposes.

The proposed regulations do not address the entity status for Federal tax purposes of a series organization. Specifically, the proposed regulations do not address whether 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.

Until further guidance is issued, the entity status of a foreign series that does not conduct an insurance business will be determined under applicable law. Foreign series raise novel Federal income tax issues that continue to be considered and addressed by the IRS and the Treasury Department.

2. Classification of a Series That Is Treated as a Separate Entity for Federal Tax Purposes

If a domestic series or a foreign series engaged in an insurance business is treated as a separate entity for Federal tax purposes, then § 301.7701–1(b) applies to determine the proper tax classification of the series. However, the proposed regulations do not provide how a series should be treated for Federal employment tax purposes. If a domestic series is treated as a separate entity for Federal tax purposes, then the series generally is subject to the same treatment as any other entity for Federal tax purposes. For example, a series that is treated as a separate entity for Federal tax purposes may make any Federal tax elections it is otherwise eligible to make independently of other series or the series organization itself, and regardless of whether other series (or the series organization) do not make certain elections or make different elections.

3. Entity Status of Series Organizations

The proposed regulations do not address the entity status or filing requirements of series organizations for Federal tax purposes. A series organization generally is an entity for local law purposes. An organization that is an entity for local law purposes generally is treated as an entity for Federal tax purposes. However, an organization characterized as an entity for Federal income tax purposes may not have an income or information tax filing obligation. For example, § 301.6031(a)–(1)(a)(3)(i) provides that a partnership with no income, deductions, or credits for Federal income tax purposes for a taxable year is not required to file a partnership return for that year. Generally, filing fees of a series organization paid by series of the series organization would be treated as expenses of the series and not as expenses of the series organization. Thus, 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.

4. Continuing Applicability of Tax Law Authority to Series

Notwithstanding that a domestic series or a foreign series engaged in an insurance business is treated as an entity formed under local law under the proposed regulations, the Commissioner may under applicable law, including common law tax principles, characterize a series or a portion of a series other than as a separate entity for Federal tax purposes. Series covered by the proposed regulations are subject to applicable law to the same extent as other entities. Thus, a series may be disregarded under applicable law even if it satisfies the requirements of the proposed regulations to be treated as an entity formed under local law. For example, if a series has no business purpose or business activity other than tax avoidance, it may be disregarded under appropriate circumstances. *See Bertoli* v. *Commissioner,* 103 T.C. 501 (1994); *Aldon Homes, Inc.* v. *Commissioner,* 33 T.C. 582 (1959). Furthermore, the anti-abuse rule of § 1.701–2 is applicable to a series or series organization that is classified as a partnership for Federal tax purposes.

5. Applicability to Organizations That Qualify as Insurance Companies

Notice 2008–19 requested comments on proposed guidance setting forth conditions under which a cell of a protected cell company would be treated as an insurance company separate from any other entity for Federal income tax purposes. Those who commented on the notice generally supported the proposed guidance, and further commented that it should extend to non-insurance arrangements as well, including series LLCs. Rather than provide independent guidance for insurance company status setting forth what is essentially the same standard, the proposed regulations define the term *series* to include a cell, segregated account, or segregated portfolio that is formed under the insurance code of a jurisdiction or is engaged in an insurance business (other than a segregated asset account of a life insurance company).

Although the proposed regulations do not apply to a series organized or established under the laws of a foreign jurisdiction, an exception is provided for certain series conducting an insurance business. Under this exception, a series that is organized or established under the laws of a foreign jurisdiction is treated as an entity if the arrangements and other activities of the series, if conducted by a domestic company, would result in its being classified as an insurance company. Thus, a foreign series would be treated as an entity if more than half of the series' business is the issuing or reinsuring of insurance or annuity contracts. The IRS and the Treasury Department believe it is appropriate to provide this rule even though the proposed regulations otherwise do not apply to a foreign series because an insurance company is classified as a per se corporation under section 7701(a)(3) regardless of how it otherwise would be treated under §§ 301.7701–1, 301.7701–2, or 301.7701–3.

The IRS and the Treasury Department are aware that insurance-specific guidance may still be needed to address the issues identified in § 3.02 of Notice 2008–19 and insurance-specific transition issues that may arise for protected cell companies that previously reported in a manner inconsistent with the regulations. *See* § 601.601(d)(2)(ii)(*b*).

6. Effect of Local Law Classification on Tax Collection

The IRS and Treasury Department understand that there are differences in local law governing series (for example, rights to hold title to property and to sue and be sued are expressly addressed in some statutes but not in others) that may affect how creditors of series, including State taxing authorities, may enforce obligations of a series. Thus, the proposed regulations provide that, to the extent Federal or local law permits a creditor to collect a liability attributable to a series from the series organization or other series of the series organization, the series organization and other series of the series organization may also be considered the taxpayer from whom the tax assessed against the series may be collected pursuant to administrative or judicial means. 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.

7. Employment Tax and Employee Benefits Issues

A. In General

The domestic statutes authorizing the creation of series contemplate that a series may operate a business. If the operating business has workers, it will be necessary to determine how the business satisfies any employment tax obligations, whether it has the ability to maintain any employee benefit plans and, if so, whether it complies with the rules applicable to those plans. Application of the employment tax requirements will depend principally on whether the workers are employees, and, if so, who is considered the employer for Federal income and employment tax purposes. In general, an employment relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the

services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. *See* §§ 31.3121(d)–1(c)(2), 31.3306(i)–1(b), and 31.3401(c)– 1(b).

B. Employment Tax

An entity must be a person in order to be an employer for Federal employment tax purposes. *See* sections 3121(b), 3306(a)(1), 3306(c), and 3401(d) and § 31.3121(d)–2(a). However, status as a person, by itself, is not enough to make an entity an employer for Federal employment tax purposes. The entity must also satisfy the criteria to be an employer under Federal employment tax statutes and regulations for purposes of the determination of the proper amount of employment taxes and the party liable for reporting and paying the taxes. Treatment of a series as a separate person for Federal employment tax purposes would create the possibility that the series could be an "employer" for Federal employment tax purposes, which would raise both substantive and administrative issues.

The series structure would make it difficult to determine whether the series or the series organization is the employer under the relevant criteria with respect to the services provided. For example, if workers perform all of their services under the direction and control of individuals who own the interests in a series, but the series has no legal authority to enter into contracts or to sue or be sued, could the series nonetheless be the employer of the workers? If workers perform services under the direction and control of the series, but they are paid by the series organization, would the series organization, as the nominal owner of all the series assets, have control over the payment of wages such that it would be liable as the employer under section 3401(d)?

The structure of a series organization could also affect the type of employment tax liability. For example, if a series were recognized as a distinct person for Federal employment tax purposes, a worker providing services as an employee of one series and as a member of another series or the series organization would be subject to FICA tax on the wages paid for services as an employee and self-employment tax on the member income. Note further that, if a domestic series were classified as a separate entity that is a business entity, then, under § 301.7701–3, the series would be classified as either a partnership or a corporation. While a business entity with one owner is generally classified as a corporation or is disregarded for Federal tax purposes, such an entity cannot be disregarded for Federal employment tax purposes. *See* § 301.7701–2(c)(2)(iv).

Once the employer is identified, additional issues arise, including but not limited to the following: How would the wage base be determined for employees, particularly if they work for more than one series in a common line of business? How would the common paymaster rules apply? Who would be authorized to designate an agent under section 3504 for reporting and payment of employment taxes, and how would the authorization be accomplished? How would the statutory exceptions from the definitions of employment and wages apply given that they may be based on the identity of the employer? Which entity would be eligible for tax credits that go to the employer such as the Work Opportunity Tax Credit under section 51 or the tip credit under section 45B? If a series organization handles payroll for a series and is also the nominal owner of the series assets, would the owners or the managers of the series organization be responsible persons for the Trust Fund Recovery Penalty under section 6672?

Special administrative issues might arise if the series were to be treated as the employer for Federal employment tax purposes but not for State law purposes. For example, if the series were the employer for Federal employment tax purposes and filed a Form W–2, "Wage and Tax Statement," reporting wages and employment taxes withheld, but the series were not recognized as a juridical person for State law purposes, then administrative problems might ensue unless separate Forms W–2 were prepared for State and local tax purposes. Similarly, the IRS and the States might encounter challenges in awarding the FUTA credit under section 3302 to the appropriate entity and certifying the amount of State unemployment tax paid.

In light of these issues, the proposed regulations do not currently provide how a series should be treated for Federal employment tax purposes.

C. Employee Benefits

Various issues 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. The proposed regulations do not address these issues. However, to the extent that a series can maintain an employee benefit plan, the aggregation rules under section 414(b), (c), (m), (o) and (t), as well as the leased employee rules under section 414(n), would apply. In this connection, the IRS and Treasury Department expect to issue regulations under section 414(o) that would prevent the avoidance of any employee benefit plan requirement through the use of the separate entity status of a series.

8. Statement Containing Identifying Information About Series

As the series organization or a series of the series organization may be treated as a separate entity for Federal tax and related reporting purposes but may not be a separate entity under local law, the IRS and Treasury Department believe that a new statement may need to be created and required to be filed annually by the series organization and each series of the series organization to provide the IRS with certain identifying information to ensure the proper assessment and collection of tax. Accordingly, these regulations propose to amend the Procedure and Administration Regulations under section 6011 to include this requirement and a cross-reference to those regulations is included under § 301.7701–1. The IRS and Treasury Department are considering what information should be required by these statements. Information tentatively being considered includes (1) the name, address, and taxpayer identification number of the series organization and each of its series and status of each as a series of a series organization or as the series organization; (2) the jurisdiction in which the series organization was formed; and (3) an indication of whether the series holds title to its assets or whether title is held by another series or the series organization and, if held by another series or the series organization, the name, address, and taxpayer identification number of the series organization and each series holding title to any of its assets. The IRS and Treasury Department are also considering the best time to require taxpayers to file the statement. For example, the IRS and Treasury Department are considering whether the statement should be filed when returns, such as income tax returns and excise tax returns, are required to be filed or whether it should be a stand-alone statement filed separately by a set date each year, as with information returns such as Forms 1099. A cross-reference to these regulations was added to the Procedure and Administration regulations under section 6071 for the time to file returns and statements. The proposed regulations under section 6071 provide that the statement will be a stand-alone statement due March 15th of each year. In addition, the IRS and

Treasury Department are considering revising Form SS–4, "Application for Employer Identification Number," to include questions regarding series organizations.

Proposed Effective Date

These 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 than series are treated under the final regulations will be required to change their treatment of 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. General tax principles will apply to determine the consequences of the conversion from one entity to multiple entities for Federal tax purposes. *See,* for example, section 708 for rules relating to 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. While a division of a partnership may be tax-free, gain may be recognized in certain situations under section 704(c)(1)(B) or section 737. Sections 355 and 368(a)(1)(D) provide rules that govern 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; however, if the corporate division does not satisfy one or more of the requirements in section 355, the division may result in taxable events to the corporation, its shareholders, or both.

The regulations include an exception for series established prior to publication of the proposed regulations that treat all series and the series organization as one entity. If the requirements for this exception are satisfied, 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, these requirements are satisfied if (1) The series was established prior to September 14, 2010; (2) 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 prior to September 14, 2010; (3) If the series was established pursuant to a foreign statute, the series' classification was relevant (as defined in § 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; (4) 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 for purposes of filing any Federal income tax returns, information returns, or withholding documents for any taxable year; (5) The series and series organization had a reasonable basis (within the meaning of section 6662) for their claimed classification; and (6) 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).

This 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). For this purpose, the term *interest* means (i) in the case of a partnership, a capital or profits interest and (ii) in the case of a corporation, an equity interest measured by vote or value. This transition rule does not apply to any determination other than the entity status of a series, for example, tax ownership of a series or series organization or qualification of a series or series organization conducting an insurance business as a controlled foreign corporation.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that the regulations will not have a significant economic impact on a substantial number of small entities. The regulations require that series and series organizations file a statement to provide the IRS with certain identifying information to ensure the proper assessment and collection of tax. The regulations affect domestic series LLCs, domestic cell companies, and foreign series and cells that conduct insurance businesses, and their owners. Based on information available at this time, the IRS and the Treasury Department believe that many series and series organizations are large insurance companies or investment firms and, thus, are not small entities. Although a number of small entities may be subject to the information reporting requirement of the new statement, any economic impact will be minimal. The information that the IRS and the Treasury Department are considering requiring on the proposed statement should be known by or readily available to the series or the series organization. Therefore, it should take minimal time and expense to collect and report this information. For example, the IRS and the Treasury Department are considering requiring the following information: (1) The name, address, and taxpayer identification number of the series organization and each of its series and status of each as a series of a series organization or as the series organization; (2) The jurisdiction in which the series organization was formed; and (3) An indication of whether the series holds title to its assets or whether title is held by another series or the series organization and, if held by another series or the series organization, the name, address, and taxpayer identification number of the series organization and each series holding title to any of its assets. The IRS and the Treasury Department request comments on the accuracy of the statement that the regulations in this document will not have a significant economic impact on a substantial number of small entities. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. Alternatively, taxpayers may submit comments electronically directly to the Federal eRulemaking portal at *http://www.regulations.gov.*

The IRS and the Treasury Department request comments on the proposed

regulations. In addition, the IRS and the Treasury Department request comments on the following issues:

(1) Whether a series organization should be recognized as a separate entity for Federal tax purposes if it has no assets and engages in no activities independent of its series;

(2) The appropriate treatment of a series that does not terminate for local law purposes when it has no members associated with it;

(3) The entity status for Federal tax purposes of foreign cells that do not conduct insurance businesses and other tax consequences of establishing, operating, and terminating all foreign cells;

(4) How the Federal employment tax issues discussed and similar technical issues should be resolved;

(5) How series and series organizations will be treated for State employment tax purposes and other state employment-related purposes and how that treatment should affect the Federal employment tax treatment of series and series organizations (comments from the states would be particularly helpful);

(6) What issues could arise with respect to the provision of employee benefits by a series organization or series; and

(7) The requirement for the series organization and each series of the series organization to file a statement and what information should be included on the statement.

All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person who timely submits comments. If a public hearing is scheduled, notice of the date, time and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Joy Spies, IRS Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and Recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 301.6011–6 also issued under 26 U.S.C. 6011(a). * * *

Section 301.6071–2 also issued under 26 U.S.C. 6071(a). * * *

Par. 2. Section 301.6011–6 is added to read as follows:

§ 301.6011–6 Statements of series and series organizations.

(a) *Statement required.* Each series and series organization (as defined in paragraph (b) of this section) shall file a statement for each taxable year containing the identifying information with respect to the series or series organization as prescribed by the Internal Revenue Service for this purpose and shall include the information required by the statement and its instructions.

(b) *Definitions*—(1) *Series.* The term *series* has the same meaning as in § 301.7701–1(a)(5)(viii)(C).

(2) *Series organization.* The term *series organization* has the same meaning as in § 301.7701–1(a)(5)(viii)(A).

(c) *Effective/applicability date.* This section applies to taxable years beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 3. Section 301.6071–2 is added to read as follows:

§ 301.6071–2 Time for filing statements of series and series organizations.

(a) *In general.* Statements required by § 301.6011–6 must be filed on or before March 15 of the year following the period for which the return is made.

(b) *Effective/applicability date.* This section applies to taxable years beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 4. Section 301.7701–1 is amended by:

1. Adding paragraph (a)(5).
2. Revising paragraphs (e) and (f).

The additions and revisions read as follows:

§ 301.7701–1 Classification of organizations for Federal tax purposes.

(a) * * *

(5) *Series and series organizations*—(i) *Entity status of a domestic series.* For Federal tax purposes, except as provided in paragraph (a)(5)(ix) of this section, a series (as defined in paragraph (a)(5)(viii)(C) of this section) organized or established under the laws of the United States or of any State, whether or not a juridical person for local law purposes, is treated as an entity formed under local law.

(ii) *Certain foreign series conducting an insurance business.* For Federal tax purposes, except as provided in paragraph (a)(5)(ix) of this section, 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 the meaning of section 816(a) or section 831(c).

(iii) *Recognition of entity status.* Whether a series that is treated as a local law entity under paragraph (a)(5)(i) or (ii) of this section is recognized as a separate entity for Federal tax purposes is determined under this section and general tax principles.

(iv) *Classification of series.* The classification of a series that is recognized as a separate entity for Federal tax purposes is determined under paragraph (b) of this section.

(v) *Jurisdiction in which series is organized or established.* A series is treated as created or organized under the laws of a State or foreign jurisdiction if the series is established under the laws of such jurisdiction. *See* § 301.7701–5 for rules that determine whether a business entity is domestic or foreign.

(vi) *Ownership of series and the assets of series.* For Federal tax purposes, the ownership of interests in a series and of the assets associated with a series is determined under general tax principles. A series organization is not treated as the owner for Federal tax purposes of a series or of the assets associated with a series merely because the series organization holds legal title to the assets associated with the series.

(vii) *Effect of Federal and local law treatment.* To the extent that, pursuant to the provisions of this paragraph (a)(5), a series is a taxpayer against whom tax may be assessed under Chapter 63 of Title 26, then any tax assessed against the series may be collected by the Internal Revenue Service from the series in the same manner the assessment could be collected by the Internal Revenue Service 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, notwithstanding any

other provision of this paragraph (a)(5), and consistent with the provisions of Federal or local law, the series organization and other series of the series organization may also be considered the taxpayer from whom the tax assessed 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.

(viii) *Definitions*—(A) *Series organization.* A *series organization* is a juridical entity that establishes and maintains, or under which is established and maintained, a series (as defined in paragraph (a)(5)(viii)(C) of this section). A series organization includes a series limited liability company, series partnership, series trust, protected cell company, segregated cell company, segregated portfolio company, or segregated account company.

(B) *Series statute.* A *series statute* is 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—

(*1*) Members or participants of a series organization to have rights, powers, or duties with respect to the series;

(*2*) A series to have separate rights, powers, or duties with respect to specified property or obligations; and

(*3*) The 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.

(C) *Series.* A *series* is a segregated group of assets and liabilities that is established pursuant to a series statute (as defined in paragraph (a)(5)(viii)(B) of this section) by agreement of a series organization (as defined in paragraph (a)(5)(viii)(A) of this section). A 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. However, the term *series* does not include a segregated asset account of a life insurance company. *See* section 817(d)(1); § 1.817–5(e). An election, agreement, or other arrangement that permits debts and liabilities of other 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 for the limitation on liability available under the relevant series statute, will be disregarded for purposes of this paragraph (a)(5)(viii)(C).

(ix) *Treatment of series and series organizations under Subtitle C—Employment Taxes and Collection of Income Tax (Chapters 21, 22, 23, 23A, 24 and 25 of the Internal Revenue Code).* [Reserved.]

(x) *Examples.* The following examples illustrate the principles of this paragraph (a)(5):

Example 1. Domestic Series LLC. (i) *Facts.* Series LLC is a series organization (within the meaning of paragraph (a)(5)(viii)(A) of this section). Series LLC has three members (1, 2, and 3). Series LLC establishes two series (A and B) pursuant to the LLC statute of state Y, a series statute within the meaning of paragraph (a)(5)(viii)(B) of this section. Under general tax principles, Members 1 and 2 are the owners of Series A, and Member 3 is the owner of Series B. Series A and B are not described in § 301.7701–2(b) or paragraph (a)(3) of this section and are not trusts within the meaning of § 301.7701–4.

(ii) *Analysis.* Under paragraph (a)(5)(i) of this section, Series A and Series B are each treated as an entity formed under local law. The classification of Series A and Series B is determined under paragraph (b) of this section. The default classification under § 301.7701–3 of Series A is a partnership and of Series B is a disregarded entity.

Example 2. Foreign Insurance Cell. (i) *Facts.* Insurance CellCo is a series organization (within the meaning of paragraph (a)(5)(viii)(A) of this section) organized under the laws of foreign Country X. Insurance CellCo has established one cell, Cell A, pursuant to a Country X law that is a series statute (within the meaning of paragraph (a)(5)(viii)(B) of this section). More than half the business of Cell A during the taxable year is the issuing of insurance or annuity contracts or the reinsuring of risks underwritten by insurance companies. If the activities of Cell A were conducted by a domestic company, that company would qualify as an insurance company within the meaning of sections 816(a) and 831(c).

(ii) *Analysis.* Under paragraph (a)(5)(ii) of this section, Cell A is treated as an entity formed under local law. Because Cell A is an insurance company, it is classified as a corporation under § 301.7701–2(b)(4).

* * * * *

(e) *State.* For purposes of this section and §§ 301.7701–2 and 301.7701–4, the term *State* includes the District of Columbia.

(f) *Effective/applicability dates*—(1) *In general.* Except as provided in paragraphs (f)(2) and (f)(3) of this section, the rules of this section are applicable as of January 1, 1997.

(2) *Cost sharing arrangements.* The rules of paragraph (c) of this section are applicable on January 5, 2009.

(3) *Series and series organizations*—(i) *In general.* Except as otherwise provided in this paragraph (f)(3), paragraph (a)(5) of this section applies on and after the date final regulations are published in the **Federal Register**.

(ii) *Transition rule*—(A) *In general.* Except as provided in paragraph (f)(3)(ii)(B) of this section, a taxpayer's treatment of a series in a manner inconsistent with the final regulations will be respected on and after the date final regulations are published in the **Federal Register**, provided that—

(*1*) The series was established prior to September 14, 2010;

(*2*) 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 series established pursuant to a foreign statute, 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 prior to September 14, 2010.

(*3*) If the series was established pursuant to a foreign statute, the series' classification was relevant (as defined in § 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;

(*4*) 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 for purposes of filing any Federal income tax returns, information returns, or withholding documents in any taxable year;

(*5*) The series and series organization had a reasonable basis (within the meaning of section 6662) for their claimed classification; and

(*6*) 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).

(B) *Exception to transition rule.* Paragraph (f)(3)(ii)(A) of this section

will not apply on and after 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 fifty percent or greater interest in the series organization (or series). For purposes of the preceding sentence, the term *interest* means—

(*1*) In the case of a partnership, a capital or profits interest; and

(*2*) In the case of a corporation, an equity interest measured by vote or value.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2010–22793 Filed 9–13–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 167

[Docket No. USCG–2009–0765]

Port Access Route Study: In the Approaches to Los Angeles-Long Beach and in the Santa Barbara Channel

AGENCY: Coast Guard, DHS.

ACTION: Notice of public meetings; request for comments.

SUMMARY: The Coast Guard announces two separate public meetings to receive comments on the study entitled "Port Access Route Study: In the Approaches to Los Angeles-Long Beach and in the Santa Barbara Channel" that was published in the **Federal Register** on Wednesday, April 7, 2010. As stated in that document, the Coast Guard is conducting a Port Access Route Study (PARS) to evaluate the continued applicability of and the potential need for modifications to the current vessel routing in the approaches to Los Angeles-Long Beach and in the Santa Barbara Channel.

DATES: Public meetings will be held on Wednesday, October 13, 2010 from 7 p.m. to 9 p.m., and on Thursday, October 14, 2010 from 7 p.m. to 9 p.m. to provide an opportunity for oral comments. Written comments and related material may also be submitted to Coast Guard personnel specified at the meetings.

ADDRESSES: The October 13, 2010 public meeting will be held at Oxnard Harbor District Offices at 333 Ponoma Street in Port Hueneme, CA. Visitor parking is available in the adjacent parking lot. The October 14, 2010 public meeting will be held at the Port of Los Angeles Administration Building at 425 S. Palos Verdes St., San Pedro, CA 90731. Visitor parking is available in the Liberty Hill Plaza parking lot directly across the street from the Port of Los Angeles Administration Building. Government-issued photo identification will be required for entrance into both buildings.

FOR FURTHER INFORMATION CONTACT: If you have questions concerning the meeting or the study, please call or e-mail LTJG Lucas Mancini, Coast Guard; telephone 510–437–3801, e-mail *Lucas.W.Mancini@uscg.mil*. If you have questions on viewing the docket call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Background and Purpose

We published a notice of study in the **Federal Register** on April 7, 2010 (75 FR 17562), entitled "Port Access Route Study: In the Approaches to Los Angeles-Long Beach and In the Santa Barbara Channel" in which we did not state a plan to hold a public meeting. We received several requests for a meeting in comments submitted to the docket and have concluded that a public meeting would aid this study. Therefore, we are publishing this notice.

In the notice of PARS, we discussed increased vessel traffic observed bypassing the Santa Barbara Channel Traffic Separation Scheme (TSS) and opting for routes south of San Miguel, Santa Rosa, and Santa Cruz Islands approaching the San Pedro Channel. This study will assess whether the creation of a vessel routing system is necessary to increase the predictability of vessel movements, which may decrease the potential for collisions, oil spills, and other events that could threaten the marine environment.

You may view the notice of PARS in our online docket, in addition to comments submitted thus far by going to *http://www.regulations.gov*. Once there, insert "USCG–2009–0765" in the "Keyword" box and click "Search." If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

We encourage you to participate in this study by submitting comments at the meeting either orally or in writing. If you bring written comments to the meeting, you may submit them to Coast Guard personnel specified at the meeting to receive written comments. These comments will be posted to our online public docket. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Information on Service for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the public meeting, contact LTJG Lucas Mancini at the telephone number or e-mail address indicated under the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Public Meeting

The Coast Guard will hold public meetings regarding its Port Access Route Study In the Approaches to Los Angeles-Long Beach and In the Santa Barbara Channel proposed rule on Wednesday, October 13, 2010 from 7 p.m. to 9 p.m. at the Oxnard Harbor District Offices and Thursday, October 14, 2010 from 7 p.m. to 9 p.m. in the 2nd floor board room at the Port of Los Angeles Administration Building, telephone (310) SEA–PORT (732–7668). Government-issued photo identification (for example, a driver's license or TWIC) will be required for entrance into both buildings. We will provide a written summary of the meeting and additional comments received at the meeting in the docket.

Dated: September 2, 2010.

S.P. Metruck,

Captain, U.S. Coast Guard, Acting Commander, Eleventh Coast Guard District.

[FR Doc. 2010–22799 Filed 9–13–10; 8:45 am]

BILLING CODE 9110–04–P

Exhibit 3

Delaware LLC Series Provisions

§ 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 4

Illinois LLC Provisions

(805 ILCS 180/37-40)

Sec. 37-40. Series of members, managers or limited liability company interests.

(a) An operating agreement may establish or provide for the establishment of designated series of members, managers or limited liability company interests having 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 to the extent provided in the operating agreement, any such series may have a separate business purpose or investment objective.

(b) Notwithstanding anything to the contrary set forth in this Section or under other applicable law, in 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 (directly or indirectly, including through a nominee or otherwise) and accounted for separately from the other assets of the limited liability company, or any other series thereof, and if the operating agreement so provides, and 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 and obligations incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the limited liability company generally or any other series thereof, and unless otherwise provided in the operating agreement, none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the limited liability company generally or any other series thereof shall be enforceable against the assets of such series. The fact that the articles of organization contain the foregoing notice of the limitation on liabilities of a series and a certificate of designation for a series is on file in the Office of the Secretary of State shall constitute notice of such limitation on liabilities of a series. 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. 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. Such elections shall not affect the limitation of liability set forth in this Section except to the extent that the series have specifically accepted joint liability by contract.

(c) Except in the case of a foreign limited liability company that has adopted an assumed name pursuant to Section 45-15, 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. In the case of a foreign limited liability company that has adopted an assumed name pursuant to Section 45-15, the name of the series with limited liability must contain the entire name under which the foreign limited liability company has been admitted to transact business in this State.

(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 duplicate copies stamped "Filed" and 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. If different from the limited liability company, the certificate of designation for each series shall list the names of the members if the series is member managed or the names of the managers if the series is manager managed. The name of a series with limited liability under subsection (b) of this Section may be changed by filing with the Secretary of State a certificate of designation identifying the series whose name is being changed and the new name of such series. If not the same as the limited liability company, the names of the members of a member managed series or of the managers of a manager managed series may be changed by filing a new certificate of designation with the Secretary of State. A series with limited liability under subsection (b) of this Section 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) of this Section. Certificates of designation may be executed by the limited liability company or any manager, person or entity designated in the operating agreement for the limited liability company.

(e) 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.

(f) The registered agent and registered office for the limited liability company in Illinois shall serve as the agent and office for service of process in Illinois for each series.

(g) An operating agreement may provide for classes or groups of members or managers associated with a series having such relative rights, powers and duties as the operating agreement may provide, and may make provision for the future creation 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.

(h) A series may be managed by either the member or members associated with the series or by a manager or managers chosen by the members of such series, as provided in the operating agreement. Unless otherwise provided in an operating agreement, the management of a series shall be vested in the members associated with such series.

(i) An operating 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. An operating agreement may provide that any member or class or group of members associated with a series shall have no voting rights.

(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.

(k) Except as otherwise provided in an operating agreement, any event under this Act or in an operating 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.

(l) 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.

(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) 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 Article 35 of this Act.

(n) If a limited liability company with the ability to establish 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.

(o) If a foreign limited liability company, as permitted in the jurisdiction of its organization, has established a series having separate rights, powers or duties and has limited the liabilities of such series so that the debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series are enforceable against the assets of such series only, and not against the assets of the limited liability company generally or any other series thereof, or so that 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 are not enforceable against the assets of such series, then the limited liability company, on behalf of itself or any of its series, or any of its series on their own behalf may register to do business in the State in accordance with Section 45-5 of this Act. The limitation of liability shall be so stated on the application for admission as a foreign limited liability company and a certificate of

designation shall be filed for each series being registered to do business in the State by the limited liability company. 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.

(Source: P.A. 94-607, eff. 8-16-05; 95-368, eff. 8-23-07.)

Exhibit 5

Texas LLC Provisions

SUBCHAPTER M. SERIES LIMITED LIABILITY COMPANY

Sec. 101.601. SERIES OF MEMBERS, MANAGERS, MEMBERSHIP INTERESTS, OR ASSETS. (a) A company agreement may establish or provide for the establishment of one or more designated series of members, managers, membership interests, or assets that:

(1) has 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; or

(2) has a separate business purpose or investment objective.

(b) A series established in accordance with Subsection (a) may carry on any business, purpose, or activity, whether or not for profit, that is not prohibited by Section 2.003.

Sec. 101.602. ENFORCEABILITY OF OBLIGATIONS AND EXPENSES OF SERIES AGAINST ASSETS. (a) Notwithstanding any other provision of this chapter or any other law, but subject to Subsection (b) and any other provision of this subchapter:

(1) 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 that series only, and shall not be enforceable against the assets of the limited liability company generally or any other series; and

(2) 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 shall be enforceable against the assets of a particular series.

(b) Subsection (a) applies only if:

(1) the records maintained for that particular series account for the assets associated with that series separately from the other assets of the company or any other series;

(2) the company agreement contains a statement to the effect of the limitations provided in Subsection (a); and

(3) the company's certificate of formation contains a notice of the limitations provided in Subsection (a).

Sec. 101.603. ASSETS OF SERIES. (a) Assets associated with a series may be held directly or indirectly, including being held in the name of the series, in the name of the limited liability company, through a nominee, or otherwise.

(b) If the records of a series are maintained in a manner so that the assets of the series can be reasonably identified by specific listing, category, type, quantity, or computational or allocational formula or procedure, including a percentage or share of any assets, or by any other method in which the identity of the assets can be objectively determined, the records are considered to satisfy the requirements of Section 101.602(b)(1).

Sec. 101.604. NOTICE OF LIMITATION ON LIABILITIES OF SERIES. Notice of the limitation on liabilities of a series required by Section 101.602 that is contained in a certificate of formation filed with the secretary of state satisfies the requirements of Section 101.602(b)(3), regardless of whether:

(1) the limited liability company has established any series under this subchapter when the notice is contained in the certificate of formation; and

(2) the notice makes a reference to a specific series of the limited liability company.

Added by Acts 2009, 81st Leg., R.S., Ch. 84, Sec. 45, eff. September 1, 2009.

Sec. 101.605. GENERAL POWERS OF SERIES. A series established under this subchapter has the power and capacity, in the series' own name, to:

(1) sue and be sued;

(2) contract;

(3) hold title to assets of the series, including real property, personal property, and intangible property; and

(4) grant liens and security interests in assets of the series.

Sec. 101.606. LIABILITY OF MEMBER OR MANAGER FOR OBLIGATIONS; DUTIES. (a) Except as and to the extent the company agreement specifically provides otherwise, a member or manager associated with a series or a member or manager of the company is not liable for a debt, obligation, or liability of a series, including a debt, obligation, or liability under a judgment, decree, or court order.

(b) The company agreement may expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person associated with a series has to:

(1) the series or the company;

(2) a member or manager associated with the series; or

(3) a member or manager of the company.

Sec. 101.607. CLASS OR GROUP OF MEMBERS OR MANAGERS. (a) The company agreement may:

(1) establish classes or groups of one or more members or managers associated with a series each of which has certain express relative rights, powers, and duties, including voting rights; and

(2) provide for the manner of establishing additional classes or groups of one or more members or managers associated with the series each of which has certain express rights, powers, and duties, including providing for voting rights and rights, powers, and duties senior to existing classes and groups of members or managers associated with the series.

(b) The company agreement may provide for the taking of an action, including the amendment of the company agreement, without the vote or approval of any member or manager or class or group of members or managers, to create under the provisions of the company agreement a class or group of the series of membership interests that was not previously outstanding.

(c) The company agreement may provide that:

(1) all or certain identified members or managers or a specified class or group of the members or managers associated with a series have the right to vote on any matter separately or with all or any class or group of the members or managers associated with the series;

(2) any member or class or group of members associated with a series has no voting rights; and

(3) voting by members or managers associated with a series is on a per capita, number, financial interest, class, group, or any other basis.

Sec. 101.608. GOVERNING AUTHORITY. (a) Notwithstanding any conflicting provision of the certificate of formation of a limited liability company, the governing authority of a series consists of the managers or members associated with the series as provided in the company agreement.

(b) If the company agreement does not provide for the governing authority of the series, the governing authority of the series consists of:

(1) the managers associated with the series, if the company's certificate of formation states that the company will have one or more managers; or

(2) the members associated with the series, if the company's certificate of formation states that the company will not have managers.

Sec. 101.609. APPLICABILITY OF OTHER PROVISIONS OF CHAPTER; SYNONYMOUS TERMS. (a) To the extent not inconsistent with this subchapter, this chapter applies to a series and its associated members and managers.

(b) For purposes of the application of any other provision of this chapter to a provision of this subchapter, and as the context requires:

(1) a reference to "limited liability company" or "company" means the "series";

(2) a reference to "member" means "member associated with the series"; and

(3) a reference to "manager" means "manager associated with the series."

Sec. 101.610. EFFECT OF CERTAIN EVENT ON MANAGER OR MEMBER. (a) An event that under this chapter or the company agreement causes a manager to cease to be a manager with respect to a series does not, in and of itself, cause the manager to cease to be a manager of the limited liability company or with respect to any other series of the company.

(b) An event that under this chapter or the company agreement causes a member to cease to be associated with a series does not, in and of itself, cause the member to cease to be associated with any other series or terminate the continued membership of a member

in the limited liability company or require the winding up of the series, regardless of whether the member was the last remaining member associated with the series.

Sec. 101.611. MEMBER STATUS WITH RESPECT TO DISTRIBUTION. (a) Subject to Sections 101.613, 101.617, 101.618, 101.619, and 101.620, when a member associated with a series established under this subchapter is entitled to receive a distribution with respect to the series, the member, with respect to the distribution, has the same status as a creditor of the series and is entitled to any remedy available to a creditor of the series.

(b) Section 101.207 does not apply to a distribution with respect to the series.

Sec. 101.612. RECORD DATE FOR ALLOCATIONS AND DISTRIBUTIONS. A company agreement may establish or provide for the establishment of a record date for allocations and distributions with respect to a series.

Sec. 101.613. DISTRIBUTIONS. (a) A limited liability company may make a distribution with respect to a series.

(b) A limited liability company may not make a distribution with respect to a series to a member if, immediately after making the distribution, the total amount of the liabilities of the series, other than liabilities described by Subsection (c), exceeds the fair value of the assets associated with the series.

(c) For purposes of Subsection (b), the liabilities of a series do not include:

(1) a liability related to the member's membership interest; or

(2) except as provided by Subsection (e), a liability of the series for which the recourse of creditors is limited to specified property of the series.

(d) For purposes of Subsection (b), the assets associated with a series include the fair value of property of the series subject to a liability for which recourse of creditors is limited to specified property of the series only if the fair value of that property exceeds the liability.

(e) A member who receives a distribution from a series in violation of this section is not required to return the distribution to the series unless the member had knowledge of the violation.

(f) This section may not be construed to affect the obligation of a member to return a distribution to the series under the company agreement or other state or federal law.

(g) Section 101.206 does not apply to a distribution with respect to a series.

(h) For purposes of this section, "distribution" does not include an amount constituting reasonable compensation for present or past services or a reasonable payment made in the ordinary course of business under a bona fide retirement plan or other benefits program.

Sec. 101.614. AUTHORITY TO WIND UP AND TERMINATE SERIES. Except to the extent otherwise provided in the company agreement and subject to Sections 101.617, 101.618, 101.619, and 101.620, a series and its business and affairs may be wound up and terminated without causing the winding up of the limited liability company.

Sec. 101.615. TERMINATION OF SERIES. (a) Except as otherwise provided by Sections 101.617, 101.618, 101.619, and 101.620, the series terminates on the completion of the winding up of the business and affairs of the series in accordance with Sections 101.617, 101.618, 101.619, and 101.620.

(b) The limited liability company shall provide notice of the termination of a series in the manner provided in the company agreement for notice of termination, if any.

(c) The termination of the series does not affect the limitation on liabilities of the series provided by Section 101.602.

Sec. 101.616. EVENT REQUIRING WINDING UP. Subject to Sections 101.617, 101.618, 101.619, and 101.620, the business and affairs of a series are required to be wound up:

(1) if the winding up of the limited liability company is required under Section 101.552(a) or Chapter 11; or

(2) on the earlier of:

(A) the time specified for winding up the series in the company agreement;

(B) the occurrence of an event specified with respect to the series in the company agreement;

(C) the occurrence of a majority vote of all of the members associated with the series approving the winding up of the series or, if there is more than one class or group of members associated with the series, a majority vote of the members

of each class or group of members associated with the series approving the winding up of the series;

(D) if the series has no members, the occurrence of a majority vote of all of the managers associated with the series approving the winding up of the series or, if there is more than one class or group of managers associated with the series, a majority vote of the managers of each class or group of managers associated with the series approving the winding up of the series; or

(E) a determination by a court in accordance with Section 101.621.

Sec. 101.617. PROCEDURES FOR WINDING UP AND TERMINATION OF SERIES. (a) The following provisions apply to a series and the associated members and managers of the series:

(1) Subchapters A, G, H, and I, Chapter 11; and

(2) Subchapter B, Chapter 11, other than Sections 11.051, 11.056, 11.057, 11.058, and 11.059.

(b) For purposes of the application of Chapter 11 to a series and as the context requires:

(1) a reference to "domestic entity," "filing entity," or "entity" means the "series";

(2) a reference to an "owner" means a "member associated with the series";

(3) a reference to the "governing authority" or a "governing person" means the "governing authority associated with the series" or a "governing person associated with the series"; and

(4) a reference to "business," "property," "obligations," or "liabilities" means the "business associated with the series," "property associated with the series," "obligations associated with the series," or "liabilities associated with the series."

(c) After the occurrence of an event requiring winding up of a series under Section 101.616, unless a revocation as provided by Section 101.618 or a cancellation as provided by Section 101.619 occurs, the winding up of the series must be carried out by:

(1) the governing authority of the series or one or more persons, including a governing person, designated by:

(A) the governing authority of the series;

(B) the members associated with the series; or

(C) the company agreement; or

(2) a person appointed by the court to carry out the winding up of the series under Section 11.054, 11.405, 11.409, or 11.410.

(d) An action taken in accordance with this section does not affect the limitation on liability of members and managers provided by Section 101.606.

Sec. 101.618. REVOCATION OF VOLUNTARY WINDING UP. Before the termination of the series takes effect, a voluntary decision to wind up the series under Section 101.616(2)(C) or (D) may be revoked by:

(1) a majority vote of all of the members associated with the series approving the revocation or, if there is more than one class or group of members associated with the series, a majority vote of the members of each class or group of members associated with the series approving the revocation; or

(2) if the series has no members, a majority vote of all the managers associated with the series approving the revocation or, if there is more than one class or group of managers associated with the series, a majority vote of the managers of each class or group of managers associated with the series approving the revocation.

Sec. 101.619. CANCELLATION OF EVENT REQUIRING WINDING UP. (a) Unless the cancellation is prohibited by the company agreement, an event requiring winding up of the series under Section 101.616(1) or (2) may be canceled by the consent of all of the members of the series before the termination of the series takes effect.

(b) In connection with the cancellation, the members must amend the company agreement to:

(1) eliminate or extend the time specified for the series if the event requiring winding up of the series occurred under Section 101.616(1); or

(2) eliminate or revise the event specified with respect to the series if the event requiring winding up of the series occurred under Section 101.616(2).

Sec. 101.620. CONTINUATION OF BUSINESS. The series may continue its business following the revocation under Section 101.618 or the cancellation under Section 101.619.

Sec. 101.621. WINDING UP BY COURT ORDER. A district court in the county in which the registered office or principal place of business in this state of a domestic limited liability

company is located, on application by or for a member associated with the series, has jurisdiction to order the winding up and termination of a series if the court determines that it is not reasonably practicable to carry on the business of the series in conformity with the company agreement.