

Series LLCs: Financial and Operational Flexibility Under New Delaware and Other State Laws

Advantages and Disadvantages; Formation and Governance; Drafting Strategies

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THE SERIES LLC—THE NEXT FRONTIER¹

The future of business entities is here with the series limited liability company (“**Series LLC**”). A Series LLC is a limited liability company that is permitted to establish one or more series. Generally, a series is not recognized as a juridical or separate entity under state law even though each such series is recognized as an enterprise separate from each other series and from the Series LLC itself. Further, each series may have associated with it specified members, managers, assets, and obligations that are different from any other series and different from the Series LLC itself.

This paper is intended to introduce the reader to the domestic series statute. The articles referenced in Part VIII of this paper provide the reader with more in-depth analysis.

I. Historical Background

It appears that the series concept can trace its roots to statutory trusts.² Statutory trusts have been used historically by investment companies. One principal advantage offered by statutory trusts is a trustee’s ability to segregate assets within a single trust. By segregating assets, the trustee, through a single entity, could separately manage each tranche of assets and create different investment securities that track the economic performance of particular tranches of assets while excluding others. In other words, by using a statutory trust, a business owner has the ability to create different tranches or series of owners, managers, and assets that are different from any other tranche or series of that particular trust and from the trust itself. Notwithstanding this flexibility, operating businesses have not embraced statutory trusts. It was against this background that the Delaware Legislature in 1996 incorporated the series concept into both its limited partnership statute and its limited liability company statute.³

II. Domestic Series Legislation

The series concept is something that has split the legal community. While some attorneys recognize the potential benefits of the Series LLC, other attorneys are skeptical about the value of the structure.⁴ As of May 2018, the District of Columbia, Puerto Rico, and the following 17 states have adopted a series statute: (1) Alabama, (2) Arkansas, (3) Delaware, (4) Illinois, (5) Indiana, (6) Iowa, (7) Kansas, (8) Missouri, (9) Montana, (10) Nebraska, (11) Nevada, (12) Oklahoma, (13) Tennessee, (14) Texas, (15) Utah, (16) Virginia, (17) and Wyoming.⁵ In addition, the

¹ Special thanks to Gregory Martin at Kemp Smith LLP for preparing this paper and Don Davie at Kemp Smith LLP for updating this paper.

² James Howard, *Where Do We Go From Here? A Survey of Series LLCs in Texas in Light of the Proposed Federal Tax Classification for the Organization*, 63 BAYLOR L. REV. 850, 851-5 (2011).

³ See DEL. CODE ANN. tit. 6, §§ 17-218, 18-215.

⁴ See Vicki R. Harding, *Series LLCs: A Wave of the Future—Or Not*, 27 MICH. BUS. L.J. 19, 21 (Spring 2007); see also *infra* note 425.

⁵ ALA. CODE § 10A-5A-11.01; ARK. CODE ANN §4-41-101; DEL. CODE ANN. tit. 6, § 18-215; 805; D.C. CODE § 29-802.06; ILL. COMP. STAT. 180/37-40; IND. CODE § 23-18.1; IOWA CODE § 489.1201; KAN. STAT. ANN. § 17-76, 143; MO. ANN. STAT. §§ 347.039, 347.153, 347.186; MONT. CODE ANN. §§ 35-8-102, 35-8-107, 35-8-108, 35-8-202, 35-8-208, 35-8-304, 35-8-307, 35-8-503, 35-8-803, 35-8-804, 35-8-901, 35-8-902; 2018 Neb. Laws L.B. 1121 (effective January 1, 2021); NEV. REV. STAT. § 86.296; OKLA. STAT. tit.18 §

American Bar Association’s Revised Prototype Limited Liability Company Act, which was published in 2011, includes series provisions even though series provisions were not included in the Revised Uniform Limited Liability Company Act adopted five years earlier.⁶ The National Conference of Commissioners on Uniform State Laws Drafting Committee began working on the issue of Series LLC legislation in May 2011, and at its July 19, 2017 annual meeting approved the “Uniform Protected Series Act” (“UPSA”) and recommended it for enactment in all the states.⁷ To date, Arkansas, Iowa, Nebraska, and Virginia have adopted the UPSA and Colorado and Tennessee have introduced legislation to adopt the UPSA.⁸

California, Minnesota, North Dakota and Wisconsin appear to have adopted some form of series or class statute that permits the segregation of assets, liabilities, and owners; however, these statutes do not appear to provide the internal liability protection among series that is the defining characteristic of the Series LLC legislation discussed in this paper.⁹ Finally, even though California, Maine and Florida do not have Series LLC legislation, these states allow for the registration of a foreign Series LLC in their respective jurisdictions.¹⁰

III. What is a Series LLC?

A. Segregation of Rights, Powers, and Duties

The limited liability company is a creature of statute. It extends the corporate benefit of limited liability to all of its members while providing the structuring flexibility historically available only through a partnership. The Series LLC retains all of the benefits associated with a traditional limited liability company and adds to those benefits the ability to establish one or more

2054.4; P.R. LAWS ANN. tit. 14 § 3967; TENN. CODE ANN. § 48-249-309; TEX. BUS. ORGS. CODE ANN. §§ 101.601, 101.622; UTAH CODE ANN. § 48-3a-12.01; 2019 Virginia Laws Ch. 636 (H.B. 2272) (effective July 1, 2020); WYO. STAT. ANN. § 17-29-211.

⁶ Compare REVISED PROTOTYPE LIMITED LIABILITY COMPANY ACT § 1101, Comment (Revised Prototype Limited Liability Company Act Editorial Board, LLCs, Partnerships and Unincorporated Entities Committee, Business Law Section, American Bar Association 2011) (“ABA Prototype Act”) with REVISED UNIFORM LIMITED LIABILITY COMPANY ACT (National Conference of Commissioners on Uniform State Laws 2006).

⁷ Uniform Protect Series Act, provided by the National Conference of Commissioners on Uniform State Laws, (February 8, 2017) <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=2ddf fb95-cb77-2bfb-f952-bdc260051563&forceDialog=0>

⁸ Uniform Law Commission, Protected Series Act, <https://www.uniformlaws.org/committees/community-home?CommunityKey=11843f3f-6ba5-4010-be96-8c2125fe7d31> (last visited Feb. 25, 2020)

⁹ See CAL. CORP. CODE §§ 17703.04, 17712.01 (The California statute does not use the word series but provides for classes of members having relative rights, powers and duties senior to other classes of members.) MINN. STAT. § 322B.03, subd. 44; N.D. CENT. CODE § 10-32-02.55; WIS. STAT. § 183.0504.

¹⁰ See CAL. CORP. CODE § 177038.01; 31 ME. REV. STAT. § 1622; FLA. STAT. ANN § 605.0902. Though California recognizes foreign Series LLCs, its Franchise Tax Board takes the position that each series is a separate entity for franchise tax purposes. <https://www.ftb.ca.gov/file/business/types/limited-liability-company/series-limited-liability-company.html>

series of members, managers, membership interests, or assets under which each such series may have:

- separate rights, powers, or duties with respect to specified assets;
- separate rights, powers, or duties with respect to specified obligations;
- separate rights, powers, or duties with respect to profits and losses associated with specified assets or obligations;
- separate business purposes; or
- separate business investment objectives.¹¹

When one considers the ability to segregate rights, powers, and duties through the use of a Series LLC, it becomes evident that a Series LLC literally provides unlimited flexibility for the sharing or division of managerial responsibilities, the sharing or division of profits and losses, and the compartmentalization of assets and liabilities.

B. Segregation of Management

Under a typical series statute, a separate and distinct management structure may be established for each series of a Series LLC and for the Series LLC itself.¹² For example, within one Series LLC, the operating agreement could provide that one or more series will be manager-managed (with each such series having the same or different group of managers) and one or more series will be member-managed (with each such series having the same or different group of members).

C. Segregation of Economic Rights

Under a typical series statute, a separate and distinct arrangement for the sharing of profits, losses, and distributions may be made for each series of the Series LLC and for the Series LLC itself.¹³ The economic rights of the members associated with a series will be established by the operating agreement.¹⁴ Accordingly, a series can be owned by persons who are members of the Series LLC, by persons who are not members of the Series LLC,¹⁵ by persons who are associated with one or more other series of the Series LLC, or by persons who are not associated with any other series of the Series LLC. In addition, there seems to be nothing in the series statutes that

¹¹ See DEL. CODE ANN. tit. 6, §18-215(a); TEX. BUS. ORGS. CODE ANN. §101.601(a); ABA Prototype Act § 1101(a).

¹² See DEL. CODE ANN. tit. 6, §18-215(e)-(g); TEX. BUS. ORGS. CODE ANN. §§101.607-101.610; ABA Prototype Act §§ 301,406.

¹³ See DEL. CODE ANN. tit. 6, §18-215(h)-(i); TEX. BUS. ORGS. CODE ANN. §§101.611-101.613; ABA Prototype Act § 405.

¹⁴ See DEL. CODE ANN. tit. 6, §18-215(h)-(i); TEX. BUS. ORGS. CODE ANN. §101.607; ABA Prototype Act § 1101.

¹⁵ Note that under UPSA Section 302(a), only members of the Series LLC may be associated members of a series. This does not appear to be the case under Delaware law.

would prevent the Series LLC itself or another series from being the member of a series, however, in states that have adopted the UPSA a Series LLC may not be a member of another Series LLC or establish another Series LLC.¹⁶ This requirement in the UPSA does not prevent a Series LLC from being a manager of another company, a manager of another Series LLC, or otherwise acting as an agent for a company or other Series LLC.¹⁷

D. Segregation of Liabilities

Equally appealing to the ability to segregate management and economic rights within a Series LLC is the statutorily sanctioned liability shield afforded by a series statute. Typically, series statutes provide that the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to a particular series are enforceable against the assets of that series only, and are not enforceable against the assets of the Series LLC generally or any other series.¹⁸ Furthermore, series statutes usually provide that none of the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to the Series LLC generally or any other series are enforceable against the assets of a particular series.¹⁹

E. Holding of Assets

Series statutes also may provide wide latitude in the titling of assets within a Series LLC, such as permitting assets associated with a series to be held directly or indirectly, including being held in the name of the series, in the name of the Series LLC, through a nominee, or otherwise.²⁰

F. Powers and Privileges

Series statutes also may grant a series broad power by permitting each series, in its own name, to sue and be sued, contract, hold title to assets, including real property, personal property, and intangible property, and grant liens and security interests.²¹

G. Not a Separate Entity

Even though a series statute often provides limitless flexibility for the sharing or division of managerial responsibilities, the sharing or division of profits and losses, and the compartmentalization of assets and liabilities, it must be remembered that generally a series will

¹⁶ See *Supra* Note 7 at Subsection (d)(1)-(2) of Section 104 available at page 24.

¹⁷ *Id* at Comment Subjection (d)(1)-(2) page 25.

¹⁸ See DEL. CODE ANN. tit. 6, §18-215(b); TEX. BUS. ORGS. CODE ANN. §101.602(a); ABA Prototype Act § 1102(a).

¹⁹ See *id*.

²⁰ See DEL. CODE ANN. tit. 6, §18-215(b); TEX. BUS. ORGS. CODE ANN. §101.603(a); ABA Prototype Act § 1103(a).

²¹ See DEL. CODE ANN. tit. 6, §18-215(c); TEX. BUS. ORGS. CODE ANN. §101.605; ABA Prototype Act § 105(d). Generally, when entering into a contract or taking title to property through a series, this author prefers to disclose the series and the Series LLC. For example, in a contract, the name of the series set forth in the preamble to the contract may be stated as “XYZ COMPANY, a series of ABC, LLC, a Texas series limited liability company, and established pursuant to Subchapter M (section 101.601 *et seq.*) of Chapter 101 of the Texas Business Organizations Code.”

not be recognized as a juridical or separate entity for state law purposes.²² This lack of juridical status may have troublesome consequences:

- Preventing a series itself from being a party to a state law merger or conversion,
- Preventing a series itself from registering to do business in a jurisdiction that does not have a series statute,
- Permitting a series to be recognized in a jurisdiction that does not have a series statute,
- Preventing a series itself from obtaining a certificate of good standing or certificate of existence from an appropriate issuing state authority, or
- Resulting in a series dissolving upon the dissolution or cessation of existence of the Series LLC.

IV. Legislative Models—Romulus, Remus, and the Great Compromise

Since Delaware adopted its series statute in 1996 and up until August of 2019, two principal models for series legislation have evolved: the Delaware model and the Illinois model. The principal differences between the models relate to the formality required to establish a series and the nature of the series once it is established. As a result of the two models, a titanic struggle arose in the world of series legislation, much like the grudge match between the brothers Romulus and Remus. While Romulus prevailed over Remus in his plight to establish Rome, it seems a new model is taking form, which offers a compromise between the two dueling models. To date, Alabama, Indiana, Kansas, Nevada, Oklahoma, Tennessee, Texas, Utah, and Wyoming have adopted a series statute following the Delaware model, confirming that history repeats itself with Romulus prevailing. Siding with Romulus, the ABA Prototype Act follows the Delaware model.²³ Arkansas, Illinois, Iowa, Missouri, Montana, and Virginia follow the Illinois model. Effective August 1, 2019, Delaware, added the Illinois model to its series arsenal.²⁴ Only time will tell if States will follow this new hybrid model and compromise like they did during the constitutional convention or whether they will falter back to the never-ending sibling quarrels.

A. Delaware Model—Romulus

Under the Delaware model, a Series LLC may establish one or more series if the following four requirements are satisfied:

²² *But see infra* note 26.

²³ ABA Prototype Act § 1101, Comment.

²⁴ DEL. CODE ANN. tit. 6, §18-218. Delaware refers to series formed under the traditional Delaware model as “protected” series and series formed under its Illinois model as “registered” series.

- (1) The certificate of formation of the Series LLC contains a notice about the limitation on liabilities afforded under the series statute;²⁵
- (2) The operating agreement of the Series LLC establishes, or provides for the establishment of, one or more series;²⁶
- (3) The operating agreement of the Series LLC provides that records be maintained to account for the assets associated with a series separately from the other assets of the Series LLC or any other series; and
- (4) The Series LLC maintains records for each series and those records account for the assets associated with that series separately from the other assets of the Series LLC or any other series.²⁷

By satisfying the above requirements under the Delaware model, a Series LLC may establish and dissolve series at any time without amending the Series LLC's certificate of formation or making any other type of public filing. Consequently, series can be established and dissolved without additional expenses beyond the state's traditional limited liability company filing and maintenance fees. Because of this no-additional-filing format, it is unclear whether a series under the Delaware model is a separate entity. That uncertainty may complicate ordinary business transactions. For example, a series under the Delaware model is not able to obtain a certificate of good standing or certificate of existence separate and apart from the Series LLC. Likewise, it may not be possible to qualify a particular series to do business in a foreign jurisdiction without qualifying the Series LLC in that jurisdiction.

B. Illinois Model—Remus

Under the Illinois model, a Series LLC may establish one or more series if the following five requirements are satisfied:

- (1) The certificate of formation of the Series LLC contains a notice about the limitation on liabilities afforded under the series statute;

²⁵ See Attachment 1 for an example of a notice provision that could be used in a certificate of formation for a Texas limited liability company. Texas H.B. 3609 has effectively eliminated the ability for any Series LLC to file an assumed name certificate with the Texas Secretary of State or in any county in Texas. Texas Secretary of State, 2019 Legislative Session Update, <https://www.sos.state.tx.us/corp/legislative-updates.shtml> (last viewed Feb. 25, 2020).

²⁶ See Attachment 2 for an example of a provision that could be used in an operating agreement of a member-managed Texas limited liability company providing for the establishment of one or more series. See Attachment 3 for an example of a provision that could be used in an operating agreement of a manager-managed Texas limited liability company providing for the establishment of one or more series. Attachment 4 is an example of a statement of series for a Delaware Series LLC that could be used to establish a protected series under an operating agreement provision.

²⁷ See DEL. CODE ANN. tit. 6, §18-215(b); TEX. BUS. ORGS. CODE ANN. §101.602(b); ABA Prototype Act § 1102(b). Note that both TEX. BUS. ORGS. CODE ANN. §101.602(b)(2) and ABA Prototype Act § 1102(b)(2) require that the notice of limitation on liabilities afforded under the series statute be included in the operating agreement of the Series LLC.

- (2) The operating agreement of the Series LLC establishes, or provides for the establishment of, one or more series;
- (3) The operating agreement of the Series LLC provides that records be maintained to account for the assets associated with a series separately from the other assets of the Series LLC or any other series;
- (4) The Series LLC maintains records for each series and those records account for the assets associated with that series separately from the other assets of the Series LLC or any other series; and
- (5) The Series LLC files a certificate of designation for each series which is to have limited liability.²⁸

As the above requirements show, the Illinois model closely follows the Delaware model except for the fifth requirement. Under the Illinois series statute, the benefits of a series will be extended only after the Series LLC files a certificate of designation.²⁹ In addition, the Illinois statute expressly recognizes that a series can be recognized as an entity separate and apart from the Series LLC if the certificate of formation of the Series LLC so provides.³⁰

V. Federal Taxation

On September 14, 2010, the Department of the Treasury and the Internal Revenue Service issued a notice of proposed rulemaking (REG-119921-09) concerning “Series LLC and Cell Companies” that propose to amend sections 301.6011-6, 301.6071-2, and 301.7701-1 of the regulations.

The proposed regulations establish a practical framework for analyzing the federal tax treatment of a Series LLC and its series. First, they mandate that each series of a Series LLC be treated as an entity for federal income tax purposes regardless of whether it is a juridical person

²⁸ 805 ILL. COMP. STAT. 180/37-40(b). Under the Delaware registered series statute, a protected series (any series that is not a registered series) may convert to a registered series by filing a certificate of conversion of the protected series with the Secretary of State. *See* DEL. CODE ANN. tit. 6, §18-219. Likewise, a registered series may convert to a protected series by filing a certificate of conversion of the registered series with the Secretary of State. *See* DEL. CODE ANN. tit. 6, §18-220. Although the Delaware statute does not expressly provide that a resisted or protected series is a separate legal entity, it does provide that unless otherwise provided in the LLC agreement, a protected series or a registered series has the power and capacity, in its own name, to contract, to hold title to assets, grant liens and security interests, and sue and be sued. *See* DEL. CODE ANN. tit. 6, §18-218(b)(1), (c)(1). While it is likely that a Delaware registered series will be recognized as separate distinct entity, the answer to this question remains unclear. A Series LLC (registered or unregistered) is expressly identified as an “association” for all purposes of Delaware law. *See* DEL. CODE ANN. tit. 6, §18-215(b)(12) and 218(c)(12). This change was intended to clarify that series are “persons” for UCC Article 1 purpose, and therefore “organizations” that can be a debtor under the UCC and because registered series must file a certificate with the Secretary of State, they should meet the definition of a “registered organization” under Article 9 of the UCC. In addition the Delaware Secretary of State will issue a certificate of good standing for registered series. *See* DEL. CODE ANN. tit. 6, §18-1105(a)(10).

²⁹ *See* Form LLC-37.40, Illinois Limited Liability Company Act Certificate of Designation, provided by the Illinois Secretary of State, available at https://www.cyberdriveillinois.com/publications/pdf_publications/llc3740.pdf

³⁰ *See* 805 ILL. COMP. STAT. 180/37-40(b).

under state law.³¹ Second, the proposed regulations require that a series be characterized for tax purposes under section 301.7701-1 of the regulations and general tax principles.³² That is to say, a series with a single owner will be classified for federal tax purposes as a fiscally-transparent entity or a corporation.³³ A series with two or more members, on the other hand, will be classified for federal tax purposes as a partnership or a corporation.³⁴ Third, the proposed regulations require that the ownership of the interests in the series and the assets associated with the series be determined under general tax principles.³⁵ Consequently, it seems that if a series is owned by the Series LLC, the series should be classified for federal tax purposes as a fiscally-transparent entity unless the series elects to be taxed as a corporation. Likewise, if the series is owned directly by three regarded persons, the series should be classified for federal tax purposes as a partnership unless the series elects to be taxed as a corporation. Finally, the proposed regulations require that each series and Series LLC file an annual statement by March 15 of each year containing the identifying information to be prescribed by the Internal Revenue Service.³⁶

Because of the many questions that remained open concerning the federal tax treatment of series at the time the proposed regulations were issued, the Treasury and the Internal Revenue Service is seeking comments on several issues, including:

- 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;
- The appropriate treatment of a series that does not terminate for local law purposes when it has no members associated with it;
- How federal employment tax issues and similar technical issues should be resolved;
- How series and Series LLCs 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 LLCs;
- What issues could arise with respect to the provision of employee benefits by a series organization or series; and
- 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.

No further action has been taken on the proposed regulations.

³¹ Prop. Reg. § 301.7701-1(a)(5)(i).

³² Prop. Reg. § 301.7701-1(a)(5)(iii), (iv).

³³ Treas. Reg. § 301.7701-2(a).

³⁴ *Id.*

³⁵ Prop. Reg. § 301.7701-1(a)(5)(vi).

³⁶ Prop. Reg. §§ 301.6011-6(a), 301.6071-2(a).

VI. Potential Uses

Forming a Series LLC is no more difficult than forming any other limited liability company. Provided that all investments or operations are located in jurisdictions that have a series statute, a Series LLC may prove useful in the following scenarios:

- *Private Equity Investments.* Assume a family wishes to make multiple private equity investments. The family forms PEI, LLC, a Series LLC. In order to compartmentalize the obligations relating to each investment, a new series is established for each such investment.
- *Real Estate Investments.* Assume an entity owns numerous commercial, single-family residential and multi-family residential income producing properties. In lieu of creating a separate LLC to hold each property or each group of similarly situated properties, the entity could be converted into a Series LLC and a separate series could be established to hold each such property or each such group.
- *Multiple Business Operations.* Assume an entity operates through multiple locations, such as multiple restaurants. In lieu of creating a separate LLC to operate each location, the entity could be converted into a Series LLC and a separate series could be established to operate each location.
- *Platting Issues.* Assume A, B, and C own Blackacre through ABC, LLC. A, D, and E wish to acquire Whiteacre, which is adjacent to Blackacre. Access to Whiteacre must be provided across Blackacre. Local authorities have refused to permit Whiteacre to be transferred to anyone except ABC, LLC unless Whiteacre is replatted. In this case ADE, LLC can be converted into a Series LLC and two series can be established: ABC Series and ADE Series. ABC, LLC will acquire Whiteacre. ABC, LLC will hold legal title to Blackacre and Whiteacre as nominee for ABC Series and ADE Series, respectively.
- *Succession Planning.* Assume a family owns several limited partnerships that own a variety of operating businesses and investments. A single limited liability company, GP LLC, serves as general partner of each limited partnership. The patriarch desires to institute a different management and succession structures for each limited partnership. In this case, GP LLC could be converted into a Series LLC, where each series provides for a different management and/or ownership structure.
- *Partition Right.* Assume a family owns three separate classes of investments: ranching, mineral interests, and multi-family housing. The oldest generation (G1) is not willing to split-up the holdings because of uncertainty in current values or future production or use, but the G1s recognize that their descendants, G2 and beyond, will likely not agree on future operations. To address the issue, a Series LLC is formed and three series are established: Farm Series, Mineral Series, and Housing Series. The Series LLC is the member associated with each series. If a dispute arises, one of the options any family may initiate is a partition right detailed in the Series LLC operating agreement. The initiating family designates the appropriate assets that are allocated to the appropriate number of lots. The other families then select lots based on a random process detailed in the Series LLC operating agreement. The initiating family takes the last lot remaining. The

families may either leave their lots in the Series LLC, at which time the ownership of that series becomes associated with that family, or that family may withdraw their lot from the Series LLC altogether.

- *Trust Company Hedge Fund Investment.* A Trust company can create a Series LLC to allow its trust customers to invest in a hedge fund without each trust customer having to go through the qualification paperwork. That is, the Series LLC does the paperwork once and the trusts buy member interests in the Series LLC. In this situation, hedge funds are usually the only reluctant party.
- *Transportation Companies.* A transportation company that has 50 trucks can use 50 separate protected series to hold each individual truck. There will be liability protection for each protected series and only one legal entity will apply for the DOT license for all the protected series.

VII. Unanswered Questions

Even though the ABA Prototype Act, 17 states, and the District of Columbia have adopted series provisions, difficult 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?³⁷
- 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? The author has located four bankruptcy cases involving series, but none of these cases litigated or decided the issue of whether a series of a Series LLC can file for bankruptcy.³⁸
- 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

³⁷ Effective September 1, 2017, the definition of “person” in the Texas Business Organizations Code was extended to include “a series of a domestic limited liability company or foreign entity.” TEX. BUS. ORGS. CODE ANN. § 1.002(69-b).

³⁸ See *In re Crush Real estate Series LLC, sole beneficiary of 427 E. Sixth St. Realty Trust*, 15-bk-10237 (Bankr. D. Mass. 2015), *In re Crush Real Estate Series LLC, sole beneficiary of 917 E. Broadway Realty Trust*, 15-bk-12105 (Bankr. D. Mass 2015), and *In re Crush Real estate Series, LLC, sole beneficiary of 305 K St. Realty Trust*, 15-bk-12106 (Bankr. D. Mass 2015); *Rigby v. Mastro (In re Mastro)*, 465 B.R. 576 (Bankr. W.D. Wash. 2011) (involved a series LLC that included an automobile series, a jewelry series, and a personal residence series, but the series structure was not in issue instead the fraudulent transfer issues were so blatant that the court simply did not need to consider the series structure).

of the creditors of the LLC. *Alphonse v. Arch Bay Holdings, LLC*, 2013 WL 6490229 (5th.Cir. 2013) provides an example of the uncertainties surrounding Series LLC and conflicts of state law.³⁹ In *Alphonse* the Fifth Circuit held that the separate juridical status of a Series LLC with respect to third party plaintiffs was an open question.⁴⁰

- Tax treatment—Will the IRS and the states⁴¹ 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?⁴²

VIII. Additional Resources

This paper is intended to introduce the reader to the domestic series statute. For more in-depth analysis, consider the following articles and the resources cited therein:

- Adrienne Randle Bond & Allen Sparkman, *The Series LLC: A New Planning Tool*, State Bar of Texas Advanced Business Law Course, October 13-14, 2011.
- Allan G. Donn, Bruce P. Ely, Robert R. Keatinge, and Bahar A. Schippel, *Series LLCs*, The American Law Institute Continuing Legal Education, Choice of Business Entity: 2012 Update, July 23, 2012.

³⁹ See *Alphonse v. Arch Bay Holdings, LLC*, 2013 WL 6490229 (5th.Cir., Unpublished, Dec. 11, 2013). (holding that the separate juridical status of a Series LLC with respect to a third party plaintiff is an open question).

⁴⁰ In *Alphonse XYZ, LLC* was a series LLC established under Delaware Law. One of XYZ’s series, Series ABC, owned a note secured by Plaintiff’s home in Louisiana, a state without a Series LLC statute. Plaintiff sued XYZ under Louisiana’s UTPA after Plaintiff’s home was sold at a foreclosure sale. A lower court dismissed Plaintiff’s claim explaining that Delaware law controlled XYZ’s liability, and under Delaware law, ABC was the real party in interest (because it owned the note). The Fifth Circuit reversed the dismissal and explained that while generally the laws of the state of incorporation of a business entity determine issues relating to the internal affairs of an entity, a Series LLC presents a “novel and complex” matter of state law, and therefore Louisiana law should apply to determine whether XYZ or ABC was the real party in interest.

⁴¹ For Texas franchise tax purposes, a Series LLC is treated as a single legal entity. It pays one filing fee and registers as one entity with the Texas Secretary of State. It files one franchise tax report and one Public Information Report as a single entity, not as a combined group, under its Texas taxpayer identification number. If one of the series has nexus in Texas, the entire series LLC has nexus in Texas. See Accounts, Texas Comptroller of Public. “Franchise Tax Frequently Asked Questions.” Franchise Tax Frequently Asked Questions. N.p., n.d. Web. 21 Feb. 2017.
<<https://www.comptroller.texas.gov/taxes/franchise/faq/taxable-entities.php>>

⁴² REVISED UNIFORM LIMITED LIABILITY COMPANY ACT, Prefatory Note pp. 5-6 (National Conference of Commissioners on Uniform State Laws 2006).

- Allen Sparkman, *Through the Looking Glass—Series LLCs in 2016*, 3 BUS. & BANKR. L.J. 1 (2016).
- Bernie R. Kray, *Respecting the Concept and Limited Liability of a Series LLC in Texas*, 42 ST. MARY'S L.J. 501 (2011).
- J. Leigh Griffith & Alberto R. Gonzales, *Series LLCs Part 1—Current Status, Multi-State Issues and Potential Uniform Limited Liability Company Protected Series Act*, Taxes - The Tax Magazine, 57-70 (2016).
- Matthew J. Jakobsze, *Seriously Considering Series LLCs*, 23 DCBA Brief 46 (2011).
- Michael E. Fink, *The Series LLC: Suggestions for Surviving Some Serious Uncertainties*, 72 U. PITT. L. REV. 597 (2011).
- Sandra Mertens, *Series Limited Liability Companies: A Possible Solution to Multiple LLCs*, 84 CHI. KENT L. REV. 271 (2009).
- Steve Brischke, *Drafting Guide for Series Limited Liability Companies*, State Bar of Texas 27th Annual Estate Planning & Probate Drafting, October 6-7, 2016.
- Steven J. Boyajian, *Series LLCs: Can a Series file for Bankruptcy, and What if it Does?* American Bankruptcy Institute Journal, Vol. XXXV, No. 3 (March 2016).
- Larry E. Ribstein and Robert R. Keatinge, *Protected Series*, 2 Ribstein and Keatinge on Ltd. Liab. Cos. (December 2019 Update).

ATTACHMENT 1

CERTIFICATE OF FORMATION

Article VIII

Notice of Series Limited Liability Company

The Company is a series limited liability company as set forth in Sections 101.601 *et seq.* of the Texas Business Organizations Code. To the fullest extent permitted by the Business Organizations Code: (a) 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 Company generally or any other series; and (b) none of the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to the Company generally or any other series shall be enforceable against the assets of a particular series.

ATTACHMENT 2

OPERATING AGREEMENT

(Member-Managed)

Article III

Establishment of Series

3.1 Establishment of Series. At any time and from time to time, to the fullest extent permitted by the [Texas Code], one or more series (“**Series**”) of members, managers, interests or assets may be established that: (a) have separate rights, powers or duties with respect to specified properties or obligations of the Company or profits and losses associated with specified properties or obligations; or (b) have separate business purposes or investment objectives. If one or more separate Series are established in accordance with this Article III, the assets, business and affairs of that Series may be held and conducted directly or indirectly, including being held and conducted in the name of the Series, in the name of the Company, through a nominee, or otherwise. Records for each Series shall be maintained that account for the assets and obligations associated with that Series separately from the other assets and obligations of the Company generally or any other Series.

3.2 Notice of Limitation on Liabilities of Series. Notwithstanding anything in this Agreement to the contrary, debts, liabilities, obligations, and expenses incurred, contracted for or otherwise existing with respect to a particular Series shall be enforceable only against the assets of such Series and not against the assets of the Company generally or any other Series. Furthermore, and notwithstanding anything in this Agreement to the contrary, none of the debts, liabilities, obligations, and expenses incurred, contracted for or otherwise existing with respect to the Company generally shall be enforceable against the assets of any Series.

3.3 Statement of Series. The establishment of any Series shall be adopted in a writing (a “**Statement of Series**”) by the Members and each initial member associated with that Series. For the avoidance of doubt, any Series may have one or more members associated with it and may include the Company, any Member, any other person, or any combination thereof. Each Statement of Series shall include: (a) the name of the Series; (b) name each initial Series member, (c) the rights, powers, and duties (including the rights with respect to voting, allocations and distributions), if any, of each class or group of members or managers associated with the Series; (d) the governing authority of the Series; and (e) any other provision the Members and each initial Series member deem necessary, to the extent not inconsistent with the [Texas Code]. With respect to any Series, unless otherwise modified by a Statement of Series, the provisions of this Agreement and the [Texas Code] shall govern that Series in the same manner as they govern the Company to the fullest extent possible, with the terms of this Agreement to be interpreted in the context of the Series rather than the Company.

[Definition Page Follows]

“Agreement” has the meaning given to it in the preamble of this Operating Agreement, as the same may be amended from time to time. This Agreement is the “company agreement” as defined in [Section 101.001] of the [Texas Code].

“Company” means [•], LLC, a [Texas] limited liability company, formed and operating under this Agreement and the [Texas Code].

“Member” means any person executing this Agreement as a member or any other person later admitted to the Company as a Member as provided in this Agreement, but not including any person who has ceased to be a Member in the Company.

[“Texas Code” means the Texas Business Organizations Code, including the Texas Limited Liability Company Law, and any successor statute, as amended from time to time.]

ATTACHMENT 3

OPERATING AGREEMENT

(Manager-Managed)

Article III

Establishment of Series

3.1 Establishment of Series. At any time and from time to time, to the fullest extent permitted by the [Texas Code], one or more series (“**Series**”) of members, managers, interests or assets may be established that: (a) have separate rights, powers or duties with respect to specified properties or obligations of the Company or profits and losses associated with specified properties or obligations; or (b) have separate business purposes or investment objectives. If one or more separate Series are established in accordance with this Article III, the assets, business and affairs of that Series may be held and conducted directly or indirectly, including being held and conducted in the name of the Series, in the name of the Company, through a nominee, or otherwise. Records for each Series shall be maintained that account for the assets and obligations associated with that Series separately from the other assets and obligations of the Company generally or any other Series.

3.2 Notice of Limitation on Liabilities of Series. Notwithstanding anything in this Agreement to the contrary, debts, liabilities, obligations, and expenses incurred, contracted for or otherwise existing with respect to a particular Series shall be enforceable only against the assets of such Series and not against the assets of the Company generally or any other Series. Furthermore, and notwithstanding anything in this Agreement to the contrary, none of the debts, liabilities, obligations, and expenses incurred, contracted for or otherwise existing with respect to the Company generally shall be enforceable against the assets of any Series.

3.3 Statement of Series. The establishment of any Series shall be adopted in a writing (a “**Statement of Series**”) by the Managers and each initial member associated with that Series. For the avoidance of doubt, any Series may have one or more members associated with it and may include the Company, any Member, any other person, or any combination thereof. Each Statement of Series shall include: (a) the name of the Series; (b) name each initial Series member, (c) the rights, powers, and duties (including the rights with respect to voting, allocations and distributions), if any, of each class or group of members or managers associated with the Series; (d) the governing authority of the Series; and (e) any other provision the Managers and each initial Series member deem necessary, to the extent not inconsistent with the [Texas Code]. With respect to any Series, unless otherwise modified by a Statement of Series, the provisions of this Agreement and the [Texas Code] shall govern that Series in the same manner as they govern the Company to the fullest extent possible, with the terms of this Agreement to be interpreted in the context of the Series rather than the Company.

[Definition Page Follows]

“Agreement” has the meaning given to it in the preamble of this Operating Agreement, as the same may be amended from time to time. This Agreement is the “company agreement” as defined in [Section 101.001] of the [Texas Code].

“Company” means [•], LLC, a [Texas] limited liability company, formed and operating under this Agreement and the [Texas Code].

“Manager” means any person who is designated by the Company’s certificate of formation or this Agreement to manage the day-to-day business and affairs of the Company pursuant to the terms of this Agreement and the [Texas Code], but not including any person who has ceased to be a Manager of the Company.

ATTACHMENT 4

STATEMENT OF SERIES FOR XYZ COMPANY (A Series of ABC, LLC)

This STATEMENT OF SERIES FOR XYZ COMPANY (this “**Statement of Series**”) is entered into as of [•], by the Board of Managers of ABC, LLC, a Delaware series limited liability company (the “**Company**”) and the initial Series Members of XYZ COMPANY, the series established hereunder (the “**Series**”).

WHEREAS, pursuant to that certain Operating Agreement of ABC, LLC dated as of [•] (the “**Operating Agreement**”) and the Limited Liability Company Act, one or more series of members, management powerholders, membership interests or assets may be established that: (a) have separate rights, powers or duties with respect to specified properties or obligations of the Company or profits and losses associated with specified properties or obligations; or (b) have separate business purposes or investment objectives;

WHEREAS, the undersigned desire to establish the Series in accordance with the Operating Agreement, the Limited Liability Company Act, and this Statement of Series; and

WHEREAS, capitalized terms not defined in this Statement of Series shall have the meaning given to them in the Operating Agreement.

NOW, THEREFORE, in consideration of the promises and agreements set forth herein, as well as other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and accepted, and intending to be legally bound hereby, the parties agree as follows:

1. Name. The name of the Series is XYZ Company.
2. Governing Document. The Operating Agreement, as the same may be amended from time to time, is incorporated herein by reference. Unless otherwise modified by this Statement of Series, the provisions of the Operating Agreement and the Limited Liability Company Act shall govern the Series in the same manner as they govern the Company to the fullest extent possible, with the terms of the Operating Agreement to be interpreted in the context of the Series rather than the Company. By way of example, and unless the context requires otherwise, references in the Operating Agreement to the Company or Members shall be deemed to refer to the Series or Series Members. Accordingly, the rights, powers, and duties (including the rights with respect to voting, allocations and distributions), if any, of the Series Members shall be as set forth in the Operating Agreement as modified by this Statement of Series.
3. Series Members. The names, addresses, classes of interests, Series Capital Commitments, Series Distributive Shares, and Series Voting Interests of the Series Members (the Series Distributive Shares and Series Voting Interests hereinafter collectively referred to as the “**Series Interests**”) are set forth on Schedule A hereto, as amended from time to time. The Series Management Powerholder is authorized to substitute as a matter of administrative expediency a new Schedule A (indicating the effective date thereof) to reflect any new or changed information concerning the Series Members.

4. Series Management Powerholder. The business and affairs of the Series shall be managed by or under the direction of a Series Managing Member (the “**Series Managing Member**”). Any power or authority exercisable by the Management Powerholder under the Operating Agreement shall be deemed to refer to the Series Managing Member unless context requires otherwise. 123, LLC, a Delaware limited liability company (“**123**”), is appointed as the initial Series Managing Member of the Series, to serve as such until its successor is duly appointed and qualified or until its earlier resignation or removal. Upon execution by 123 of this Statement of Series, 123 shall be admitted as a Series Class A Member, shall be issued a Class A Interest for serving as Managing Member and shall be entitled to distributions thereon in accordance with the Operating Agreement.

5. Series Type. The Series is established as a Private Equity Series under the Operating Agreement for the purpose of holding one or more Private Equity Investments.

6. Taxation. The Series is classified for federal tax purposes as a [•]. The Employer Identification Number of the Series is _____.

7. Representations and Warranties of Current Series Members. Each undersigned Series Member represents and warrants to the Series that:

(a) The undersigned Series Member is an “Accredited Investor”⁴³ and has such knowledge and experience in financial and business matters that the undersigned Series Member is capable of evaluating the merits and risks of an investment in the Series;

(b) The undersigned Series Member acknowledges that Series Interests are being acquired pursuant to an exemption from the registration requirements of the Securities Act of 1933 (the “**Act**”) and applicable state laws, and have not been registered with the Securities and Exchange Commission or any state securities administrator;

(c) The undersigned Series Member has been furnished certain information about the Series and has had the opportunity to obtain any and all additional information necessary to make an informed investment decision as to this investment;

(d) The undersigned Series Member has sufficient knowledge and experience in matters of investments similar to the acquisition of the Series Interests, and is capable of evaluating the risk involved in making an investment in the Series Interests, and bearing

⁴³ The term “Accredited Investor” means:

(1) Any natural person whose individual net worth, or joint net worth with that person’s spouse at the time of his purchase exceeds \$1,000,000;

(2) Any natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with that person’s spouse in excess of \$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year; or

(3) Any entity in which all equity owners are accredited investors.

all economic risks involved in this investment with full knowledge that this investment could result in a total loss;

(e) The undersigned Series Member understands and acknowledges that the acquisition of the Series Interests involves a high degree of risk, and that there can be no assurance that the undersigned will not lose the entire investment;

(f) The undersigned Series Member has adequate financial means of providing for all current and reasonably foreseeable financial needs and therefore is not relying on an investment in the Series Interests for financial return;

(g) The undersigned Series Member acknowledges that there are substantial restrictions on the transferability of the Series Interests by federal and state securities laws and the Operating Agreement imposes restrictions on transfer of the Series Interests; since the Series Interests will not be, and the undersigned has no right to require that they be, registered under the Act, the Series Interests may not be, and the undersigned agrees that they shall not be, sold unless the sale complies with the Act and applicable state securities laws; the undersigned further acknowledges that the Series is under no obligation to aid the undersigned in transfer of the Series Interests hereby;

(h) The undersigned Series Member has carefully considered and has, to the extent the undersigned believes such discussion is necessary, discussed with the undersigned Series Member's professional legal, tax and financial advisers and other representatives, if any, the suitability of an investment in the Series for the undersigned's particular tax and financial situation; in this regard, the undersigned Series Member understands and acknowledges that the law firm of Kemp Smith LLP ("**Kemp Smith**") has been retained to represent the Series on a variety of matters, and although Kemp Smith represents certain Series Members in other matters, Kemp Smith does not represent any of the undersigned Series Members in this transaction.

(i) The undersigned Series Member acknowledges that the Series has made available to the undersigned, or to the personal advisers of the undersigned Series Member, the opportunity to evaluate the merits and risks of this investment, including, but not limited to, the income tax consequences of the investment. The undersigned Series Member represents that by reason of the undersigned Series Member's business and financial experience and the business and financial experience of those persons retained by the undersigned Series Member to understand fully the risk inherent in the investment. In reaching the conclusion to acquire the Series Interests, the undersigned Series Member has carefully evaluated the undersigned Series Member's financial resources and investment position, and the risks associated with this investment and acknowledges that the undersigned Series Member is able to bear the economic risks of this investment; and

(j) This Statement of Series is a valid and binding obligation of the undersigned, enforceable according to its terms.

The undersigned Series Member acknowledges that the undersigned understands the meaning and legal consequences of the representations and warranties in this Section 6, and further acknowledges that the Series has relied upon the truth and accuracy of such representations as a material condition to issuing the Series Interests to the undersigned Series Member and accepting the undersigned Series Member as a Series Member. The undersigned Series Member hereby agrees to indemnify and hold harmless the Series and its Series Members, Managers, officers,

controlling persons, agents and employees, from an against any and all Claims due to or arising out of a breach of any such representation or warranty.

8. Joinder of Future Series Members. No Person to which a Series Interest is issued or Assigned shall be admitted to the Series as a Member without executing the Joinder to Statement of Series for XYZ Company (a Series of ABC, LLC) attached hereto as Exhibit A.

9. Amendment. Except as provided in Section 2, any amendment to this Statement of Series must be in writing and executed by the then serving Company Management Powerholder and the then existing Series Members of the Series.

10. Counterparts and Retention. This Statement of Series may be executed in multiple counterparts (including by means of facsimile or electronic signature), any one of which need not contain the signatures of more than one party, but all such counterparts taken together shall constitute one and the same instrument. Each party acknowledges and agrees that this Statement of Series may be retained in any form or medium a party desires, including electronic form or paper form (and a party is not required to maintain this Statement of Series in any particular form), and such form shall be treated in all manner and respects as an original of this Statement of Series and shall be considered to have the same binding legal effect as if it were an original signed version of this Statement of Series. No party shall raise the use of any such form or medium, or the fact that an original of this Statement of Series was not produced or retained, as a defense to the formation or enforceability of this Statement of Series, or as an objection to the form evidencing the terms of this Statement of Series, and each party waives any such defense or objection.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties have executed this Statement of Series as of the date first written above.

COMPANY BOARD:

JOHN DOE

STEVE SMITH

SERIES CLASS A MEMBER:

123, LLC

By: _____
Steve Smith, President

SERIES CLASS B MEMBERS:

ANY COMPANY, LLC

By: _____
Steve Smith, President

EVERY COMPANY, L.P.

By: Every Company Management LLC, Managing Partner

By: _____
Steve Smith, President

MISCHIEF PARTNERS, L.P.

By: Mischief Investments, LLC, Managing Partner

By: _____
Steve Smith, Director

Schedule A
(Effective Date: [•])

Names, Addresses and Capital Commitments of the Series Members

Series Class A Members:	Series Commitment	Series Distributive Share	Series Voting Interest
123, LLC 5555 Main El Paso, Texas 79901 Attention: Steve Smith Phone: (555) 867-5309 Facsimile: (555) 867-6309 E-mail: smith@internet.com	N/A	Series Class A Preferred Return	N/A
Series Class A Subtotal	N/A	N/A	N/A
Series Class B Members:	Series Commitment¹	Series Distributive Share	Series Voting Interest
Any Company, LLC 5555 Main El Paso, Texas 79901 Attention: Steve Smith Phone: (555) 867-5309 Facsimile: (555) 867-6309 E-mail: smith@internet.com	\$	33.334%	33.334%
Every Company, L.P. 5555 Main El Paso, Texas 79901 Attention: Steve Smith Phone: (555) 867-5309 Facsimile: (555) 867-6309 E-mail: smith@internet.com	\$	33.333%	33.333%

¹ As of the Effective Date, all Series Commitments have already been paid in full to the Series.

Series Class B Member:	Series Commitment	Series Distributive Share	Series Voting Interest
Mischief Partners, L.P. 5555 Main El Paso, Texas 79901 Attention: Steve Smith Phone: (555) 867-5309 Facsimile: (555) 867-6309 E-mail: smith@internet.com	\$	33.333%	33.333%
Series Class B Subtotal	\$	100.000%	100.000%
TOTAL	\$	100.000%	100.000%

EXHIBIT A

**JOINDER TO STATEMENT OF SERIES FOR
XYZ COMPANY
(A SERIES OF ABC, LLC)**

ANY CAPITALIZED TERM THAT IS NOT OTHERWISE DEFINED IN THIS JOINDER SHALL HAVE THE MEANING GIVEN TO IT IN THE STATEMENT OF SERIES (THE “**STATEMENT OF SERIES**”) FOR XYZ COMPANY (A SERIES OF ABC, LLC) DATED [•], AS AMENDED FROM TIME TO TIME. A COPY OF THE STATEMENT OF SERIES IS ATTACHED TO AND INCORPORATED FOR ALL PURPOSES IN THIS JOINDER.

The undersigned has subscribed to and acquired a Series Class _____ Interest in XYZ Company (a Series of ABC, LLC, a Delaware series limited liability company) (the “**Series**”), and, by signing this Joinder, the undersigned promises, represents, warrants, covenants and agrees as follows:

THE UNDERSIGNED HAS RECEIVED, READ AND UNDERSTANDS THE STATEMENT OF SERIES.

THE UNDERSIGNED ACKNOWLEDGES AND AGREES THAT BY SIGNING THIS JOINDER IT IS BECOMING A PARTY TO THE STATEMENT OF SERIES JUST AS THOUGH IT HAD SIGNED THE STATEMENT OF SERIES ITSELF. ACCORDINGLY, THE UNDERSIGNED AGREES TO BE BOUND BY ALL OF THE TERMS AND PROVISIONS OF THE STATEMENT OF SERIES AND TO BE SUBJECT TO ALL OF THE DUTIES, CONDITIONS, AND OBLIGATIONS IMPOSED ON A MEMBER BY OR UNDER THE STATEMENT OF SERIES AND LAW. THE UNDERSIGNED RATIFIES AND CONFIRMS EACH AND EVERY ARTICLE, SECTION AND PROVISION OF THE STATEMENT OF SERIES.

FOR THE AVOIDANCE OF DOUBT, THE UNDERSIGNED REPRESENTS AND WARRANTS THAT THE STATEMENT OF SERIES CONSTITUTES A LEGAL, VALID AND BINDING OBLIGATION AND THAT THE STATEMENT OF SERIES IS ENFORCEABLE AGAINST THE UNDERSIGNED IN ACCORDANCE WITH ITS TERMS.

THE UNDERSIGNED MAKES THE FOLLOWING ADDITIONAL REPRESENTATIONS AND WARRANTIES:

THE UNDERSIGNED IS AN “ACCREDITED INVESTOR”¹ AND HAS SUCH KNOWLEDGE AND EXPERIENCE IN FINANCIAL AND BUSINESS MATTERS

¹ The term “Accredited Investor” means:

(1) Any natural person whose individual net worth, or joint net worth with that person’s spouse at the time of his purchase exceeds \$1,000,000;

(2) Any natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with that person’s spouse in excess of \$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year; or

THAT THE UNDERSIGNED IS CAPABLE OF EVALUATING THE MERITS AND RISKS OF AN INVESTMENT IN THE SERIES;

THE UNDERSIGNED ACKNOWLEDGES THAT SERIES INTERESTS ARE BEING ACQUIRED PURSUANT TO AN EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT OF 1933 (THE "ACT") AND APPLICABLE STATE LAWS, AND HAVE NOT BEEN REGISTERED WITH THE SECURITIES AND EXCHANGE COMMISSION OR ANY STATE SECURITIES ADMINISTRATOR;

THE UNDERSIGNED HAS BEEN FURNISHED CERTAIN INFORMATION ABOUT THE SERIES AND HAS HAD THE OPPORTUNITY TO OBTAIN ANY AND ALL ADDITIONAL INFORMATION NECESSARY TO MAKE AN INFORMED INVESTMENT DECISION AS TO THIS INVESTMENT;

THE UNDERSIGNED HAS SUFFICIENT KNOWLEDGE AND EXPERIENCE IN MATTERS OF INVESTMENTS SIMILAR TO THE ACQUISITION OF THE SERIES INTERESTS, AND IS CAPABLE OF EVALUATING THE RISK INVOLVED IN MAKING AN INVESTMENT IN THE SERIES INTERESTS, AND BEARING ALL ECONOMIC RISKS INVOLVED IN THIS INVESTMENT WITH FULL KNOWLEDGE THAT THIS INVESTMENT COULD RESULT IN A TOTAL LOSS;

THE UNDERSIGNED UNDERSTANDS AND ACKNOWLEDGES THAT THE ACQUISITION OF THE SERIES INTERESTS INVOLVES A HIGH DEGREE OF RISK, AND THAT THERE CAN BE NO ASSURANCE THAT THE UNDERSIGNED WILL NOT LOSE THE ENTIRE INVESTMENT;

THE UNDERSIGNED HAS ADEQUATE FINANCIAL MEANS OF PROVIDING FOR ALL CURRENT AND REASONABLY FORESEEABLE FINANCIAL NEEDS AND THEREFORE IS NOT RELYING ON AN INVESTMENT IN THE SERIES INTERESTS FOR FINANCIAL RETURN;

THE UNDERSIGNED ACKNOWLEDGES THAT THERE ARE SUBSTANTIAL RESTRICTIONS ON THE TRANSFERABILITY OF THE SERIES INTERESTS BY FEDERAL AND STATE SECURITIES LAWS AND THE OPERATING AGREEMENT IMPOSES RESTRICTIONS ON TRANSFER OF THE SERIES INTERESTS; SINCE THE SERIES INTERESTS WILL NOT BE, AND THE UNDERSIGNED HAS NO RIGHT TO REQUIRE THAT THEY BE, REGISTERED UNDER THE ACT, THE SERIES INTERESTS MAY NOT BE, AND THE UNDERSIGNED AGREES THAT THEY SHALL NOT BE, SOLD UNLESS THE SALE COMPLIES WITH THE ACT AND APPLICABLE STATE SECURITIES LAWS; THE UNDERSIGNED FURTHER ACKNOWLEDGES THAT THE SERIES IS UNDER NO OBLIGATION TO AID THE UNDERSIGNED IN TRANSFER OF THE SERIES INTERESTS HEREBY;

THE UNDERSIGNED HAS CAREFULLY CONSIDERED AND HAS, TO THE EXTENT THE UNDERSIGNED BELIEVES SUCH DISCUSSION IS NECESSARY,

(3) Any entity in which all equity owners are accredited investors.

DISCUSSED WITH THE UNDERSIGNED SERIES MEMBER'S PROFESSIONAL LEGAL, TAX AND FINANCIAL ADVISERS AND OTHER REPRESENTATIVES, IF ANY, THE SUITABILITY OF AN INVESTMENT IN THE SERIES FOR THE UNDERSIGNED'S PARTICULAR TAX AND FINANCIAL SITUATION; IN THIS REGARD, THE UNDERSIGNED UNDERSTANDS AND ACKNOWLEDGES THAT THE LAW FIRM OF KEMP SMITH LLP ("KEMP SMITH") HAS BEEN RETAINED TO REPRESENT THE SERIES ON A VARIETY OF MATTERS, AND ALTHOUGH KEMP SMITH REPRESENTS CERTAIN SERIES MEMBERS IN OTHER MATTERS, KEMP SMITH DOES NOT REPRESENT ANY OF THE UNDERSIGNED IN THIS TRANSACTION; AND

THE UNDERSIGNED ACKNOWLEDGES THAT THE SERIES HAS MADE AVAILABLE TO THE UNDERSIGNED, OR TO THE PERSONAL ADVISERS OF THE UNDERSIGNED, THE OPPORTUNITY TO EVALUATE THE MERITS AND RISKS OF THIS INVESTMENT, INCLUDING, BUT NOT LIMITED TO, THE INCOME TAX CONSEQUENCES OF THE INVESTMENT. THE UNDERSIGNED REPRESENTS THAT BY REASON OF THE UNDERSIGNED'S BUSINESS AND FINANCIAL EXPERIENCE AND THE BUSINESS AND FINANCIAL EXPERIENCE OF THOSE PERSONS RETAINED BY THE UNDERSIGNED TO UNDERSTAND FULLY THE RISK INHERENT IN THE INVESTMENT. IN REACHING THE CONCLUSION TO ACQUIRE THE SERIES INTERESTS, THE UNDERSIGNED HAS CAREFULLY EVALUATED THE UNDERSIGNED'S FINANCIAL RESOURCES AND INVESTMENT POSITION, AND THE RISKS ASSOCIATED WITH THIS INVESTMENT AND ACKNOWLEDGES THAT THE UNDERSIGNED IS ABLE TO BEAR THE ECONOMIC RISKS OF THIS INVESTMENT.

Name:
Address:
Phone:
Facsimile:
Electronic message address:

This Joinder has been accepted by the Series and the above named Person is admitted into the Series as a Series Member effective _____, 20__.

**XYZ COMPANY (A SERIES OF ABC,
LLC)**

By: _____
Authorized Representative