

Series LLCs - A Trap for the Unaware

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Outline of Topics

1. What is a “Series LLC”
2. Tax Issues
3. Bankruptcy Issues
4. Securities Issues
5. Non-Series Jurisdiction Issues
6. Recent Changes in Utah Statutory Law
7. If You Still Want to Form a Series LLC

Introduction

“The series LLC may turn out to be a heaven-sent planning tool, or attractive nuisance that will lure clients and advisors to economic disaster. Anyone involved with series LLCs should proceed with caution.”

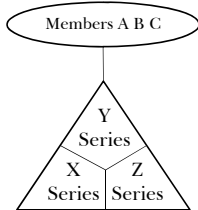
– Terence Cuff, Delaware Series LLCs and Transactional Practice- Part 2, 38 Real Estate Tax’n 170 (2011).

What is a “Series LLC”

- “**Series LLC**” is the term used to describe a form of entity with internal funds, portfolios, cells, or divisions, each of which may have separate members, managers, assets and liabilities, and business purpose or investment objectives. The principal distinguishing characteristic is the internal liability shield for each series of the Series LLC.
- “**Series**” is the term used to describe each of the separate components.
- For purposes of this presentation the term “Master” will refer to the entity organization and the term “Series” will refer to a separate component of assets and liabilities.

Alternative Structures

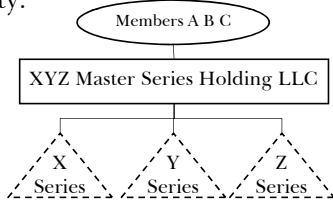
- Master and each Series treated as a single business entity and partnership.



5

Alternative Structures

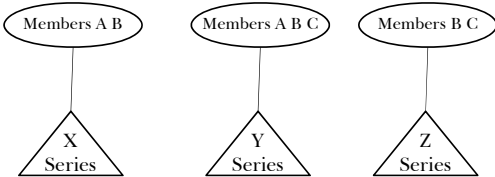
- Master treated as a holding company with each Series treated as a disregarded entity.



6

Alternative Structures

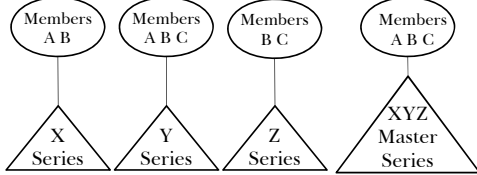
- Each Series treated as a partnership and the Master disregarded.



7

Alternative Structures

- Each Series and Master treated as a separate partnership.



8

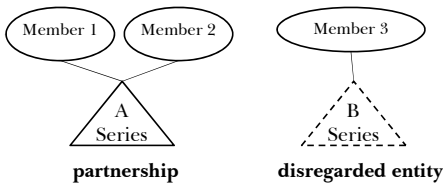
Federal Tax Treatment

- Proposed Regulations were issued in September, 2010 (REG-119921-09, 75 Fed. Reg. 55699, 9/14/10) (the “Proposed Regulations”).
- Generally, the Proposed Regulations treat each series within a series LLC as a separate entity for federal income tax purposes. Each series can be classified as:
 - A partnership,
 - A disregarded entity, or
 - An association taxable as a corporation.
- The Proposed Regulations provide a beneficial rule in that they will allow the same income classification that would apply if separate LLCs were established in place of a series entity.

9

Federal Tax Treatment

- **Example 1 of the Proposed Regulations:** Under “general tax principles”, Members 1 and 2 are the owners of Series A, and Member 3 is the owner of Series B.



10

Open Tax Issues

- **Treatment of the Master - The preamble to the Proposed Regulations states:**

"The proposed regulations do not address the entity status for Federal tax purposes of a series organization [i.e., "Master"]. Specifically, the proposed regulations do not address whether a series organization [i.e., "Master"] is recognized as a separate entity for Federal tax purposes if it has no assets and engages in no activities independent of its series."

- **Employment tax and employee benefit issues**
- **State tax issues**

11

Bankruptcy Issues

- **Eligibility to file bankruptcy**

- May a Series file a bankruptcy petition separate and apart from the Master?
 - Petition may be filed by a "person". 11 U.S.C. § 109(a)
 - "Person" includes an individual, partnership, or corporation, but does not include an estate or trust (other than a business trust).
 - Courts have characterized LLCs as corporations under the Bankruptcy Code.
 - Unclear whether a series that is not defined as an "entity" may be a "person".

12

Bankruptcy Issues

- **Substantive consolidation**

- Equitable doctrine used to combine the assets and liabilities of the debtor's bankruptcy estate with the assets and liabilities of another company or group of companies.
- Factors considered by Courts:
 - Often resemble factors in alter ego/veil piercing.
 - May consider state statute (i.e., separateness requirements) and Master and Series conduct.
 - Focus on creditor reliance and expectations.
- ***In re Dominion Ventures, LLC, No. 11-12282 (Bankr. D. Del.)*** – pending bankruptcy case involving a series LLC structure.

13

Securities Issues

- **Uncertainty as to whether the issuer of securities is only one particular Series or the Master for purposes of registration, exemptions from registration, offering integration, and disclosure requirements.**
- **When is an interest in a Series a "security"?**
- **SEC broker-dealer financial reporting requirements.** See, Interpretive letter to FINRA dated September 1, 2009. 2009 WL 2768418, Fed. Sec. L. Rep. (CCH) ¶ 76,278. 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.

Non-Series Jurisdictions Issues

- **Foreign qualification issues in non-series jurisdictions.**
 - If a Series wishes to carry on activities in a non-series state, should the Master or the Series make the qualification filing?
 - If the filing should be done by the Series, how or is it even permitted to make the filing?
 - In Colorado, a non-series state, for example, the statute provides that "a foreign entity shall not transact business or conduct activities in this state . . . until its statement of foreign entity authority is filed in the records of the secretary of state." C.R.S. §7-90-801 (emphasis added).
 - The Colorado statute defines "foreign entity" as "a foreign corporation, . . . a foreign limited liability company, or any other organization or association that is formed under a statute or common law of a jurisdiction other than this state or as to which the law of a jurisdiction other than this state governs relations among the owners and between the owners and the organization or association and is recognized under the law of such jurisdiction as a separate legal entity." C.R.S. §7-90-102(23) (emphasis added).
 - See attached "States with Series LLC Statutes" chart
 - This is particularly a problem for Series formed in DE, MN, NV, ND, OK, TN, TX, WI or under old Utah law

Non-Series Jurisdictions Issues

- **Internal liability shield in a non-series jurisdiction.**
 - Unclear whether general provision in LLC acts recognizing that the law of the foreign organization governs the liability of "its members and managers" is applicable to internal shield of Series. Most commentator agree that it shouldn't apply.
 - Does the Full Faith and Credit Clause of the United States Constitution apply?
 - No. A state is not required "to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Commission*, 306 U.S. 493, 501 (1939).
 - By contrast, the Full Faith and Credit Clause applies quite differently to judgments of a sister state: "A valid judgment in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim. Restatement (Second) of Conflicts §117 (1971); *Baker v. General Motors Corporation*, 522 U.S. 222, 233 (1998).

Recent Changes to Utah Law

- On April 1, 2013, S.B. 21 (the Unincorporated Business Entity Act) was signed into law. S.B. 21 adds the following provisions that increase the likelihood that the existence of a separate series will be respected:
 - Series is to be treated as a "separate entity". §48-3a-1201(3)(a)
 - Series "have the power and capacity to, in its own name, contract, hold title to property, grant liens and security interests, and sue and be sued." §48-3a-1201(3)(b)
 - The provisions of the new LLC act generally applicable to LLCs and its managers, members and transferees are applicable to Series. §48-3a-1201(6)
 - The name of each Series must contain the name of the Master and be distinguishable from the name of any other Series. §48-3a-1201(I)
- New LLC act effective January 1, 2014.
 - S.B. 131 repealed
 - Existing LLC act will cease to apply to an LLC formed prior to January 1, 2014 upon the earlier of:
 - January 1, 2016; or
 - The date the LLC elects to be governed pursuant to the new LLC act (i.e., Opt In).

17

If You Still Want to Form a Series LLC

1. Follow proper formation procedures and use good documentation (Master LLC Operating Agreement with a Series Addendum for each Series).
2. Opt into the new Utah LLC Act.
3. Adopt proper naming conventions.
4. Limit Series owners to the same group with same percentages.
5. Keep statutorily required books and records.

18

If You Still Want to Form a Series LLC

6. Include pro-series contractual terms with 3rd parties (i.e., require creditors to acknowledge series organization).
7. Contract with and hold assets through and in the name of the appropriate "Series".
8. Don't put assets in the Master.
9. Avoid doing business in non-series jurisdictions.
10. Avoid creditors in non-series states.
11. Sponsors and managers should evaluate their disclosure obligations to investors (i.e., information concerning insolvency risks)

19

Attachment 1

States With Series LLC Statutes

as of April 9, 2013

State and Citation	Is a Series Treated as a Separate Legal Entity under Statute?	Does Statute Specify that a Series Can Sue and Be Sued?	Does Statute Specify that a Series Can Contract in Its Own Name?	Internal Liability Shield for Series in Statute?	Must a Certificate of Designation Be Filed for Each Series?	Must Name of Series Include "Master" LLC Name?	Is Name of Individual Series on Public Record?	Does Cert. of Good Standing for "Master" Indicate Series LLC Status?	Does Statute Have Provision to Qualify Foreign Series LLC?
DELAWARE DEL. CODE ANN., tit 6, § 18-215	NO	YES	YES	YES	NO	NO	NO	YES	YES
DISTRICT OF COLUMBIA D.C. Code §29-802.06	YES	YES	Implied	YES	YES	YES	YES	YES	NO
ILLINOIS § 805 ILL. COMP. STAT. 180/37-40	YES	YES	YES	YES	YES	YES	YES	YES	YES
IOWA IOWA CODE §§ 489.1201-489.1206	YES	NO	NO	YES	NO	YES	NO	NO	YES
KANSAS L.2012 Kan. Sess., Ch. 50 (2012 Kan. Sub HB2207)	YES	YES	YES	YES	YES	YES	YES	YES	YES
MINNESOTA MINN. STAT. § 322B.03(44)	NO	NO	NO	NO	NO	NO	NO	NO	NO
NEVADA NEV. REV. STAT. §§ 86.1255, 86.161, 86.286, 86.291, 86.296, 86.491, 86.544	NO	NO	NO	YES	NO	NO	NO	NO	YES
NORTH DAKOTA N.D. CENT. CODE § 10-32-02(57)	NO	NO	NO	NO	NO	NO	NO	NO	NO
OKLAHOMA OKLA. STAT. tit. 18, §§ 2054.4, 2005	NO	NO	NO	YES	NO	NO	NO	NO	YES
TENNESSEE TENN. CODE ANN. § 48-249-309	NO	NO	NO	YES	NO	NO	NO	NO	YES
TEXAS Tex. Bus. Org. Code §§ 101.601- 101.621; § 9.005	NO	YES	YES	YES	NO	NO	NO	NO	YES
UTAH (Existing) ¹ UTAH CODE ANN. §§ 48-2c-606 to 48- 2c-616	NO	NO	YES ²	YES ³	NO	NO	NO	NO	YES ⁴
UTAH (New) ⁵ UTAH CODE ANN. §§ 48-3a-1201 to 48-3a-1209	YES ⁶	YES ⁷	YES ⁸	YES ⁹	NO	YES ¹⁰	NO	MAYBE ¹¹	YES ¹²
WISCONSIN WIS. STAT. § 183.0504	NO	NO	NO	NO	NO	NO	NO	NO	NO

ENDNOTES

¹ Utah's existing LLC act (known as the "Utah Revised Limited Liability Company Act", Title 48, Chapter 2c of the Utah Code, Section 48-2c-101 *et seq.*) will cease to apply to an LLC formed prior to January 1, 2014 upon the earlier of (a) January 1, 2016, or (b) the date the LLC elects to be governed pursuant to Utah's new LLC act (*see* endnote 5). LLCs formed on or after January 1, 2014 will be governed by the new LLC act. The existing LLC act is repealed effective January 1, 2016.

² UTAH CODE ANN. § 48-2c-606(5).

³ *Id.* §§ 48-2c-606(3) and (4).

⁴ *Id.* § 48-2c-616.

⁵ Utah's new LLC act (known as the "Utah Revised Uniform Limited Liability Company Act", Title 48, Chapter 3a of the Utah Code, Section 48-3a-101 *et seq.*) becomes effective January 1, 2014.

⁶ *Id.* § 48-3a-1201(3)(a).

⁷ *Id.* § 48-3a-1201(3)(b).

⁸ *Id.* § 48-3a-1201(3)(b).

⁹ *Id.* § 48-3a-1201(2).

¹⁰ *Id.* § 48-3a-1201(1).

¹¹ If not specifically requested, a certificate of good standing would not indicate whether the LLC is a Series LLC or not. However, if so requested, a certificate of good standing for an LLC must state whether such LLC's certificate of organization contains a notice of limitation on liabilities of a series. *See id.* §§ 48-3a-211(f) and 48-3a-1202.

¹² *Id.* § 48-3a-1209.

Attachment 2

DELAWARE
6 Del.C. § 18-215

§ 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 $\frac{2}{3}$ 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 or manager associated with the series, or 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.

UTAH – EXISTING
U.C.A. 1953 § 48-2c-606, et. seq.
[Repealed effective January 1, 2016]

§ 48-2c-606. Series of members, managers, or limited liability company interests

(1) (a) An operating agreement may establish or provide for the establishment of one or more designated series of members, managers, or interests in the company 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.

(b) The separate rights, powers, and duties of a series shall be identified in the operating agreement.

(2) A series may have a business purpose or investment objective separate from the company.

(3) A series' debts, liabilities, obligations, and expenses are enforceable against the assets of that series only, and not against the assets of the company generally or any other series if:

(a) the operating agreement provides for separate treatment of the series;

(b) separate and distinct records are maintained concerning the series;

(c) the assets associated with the series are held and accounted for separately from the other assets of the company and any other series; and

(d) notice of the limitation on liability of a series is included in the company's articles of organization in accordance with Section 48-2c-607.

(4) None of the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to the company generally or any other series are enforceable against the assets of a series if:

(a) the operating agreement provides for separate treatment of the series;

(b) separate and distinct records are maintained concerning the series;

(c) the assets associated with the series are held and accounted for separately from the other assets of the company and any other series; and

(d) notice of the limitation on liability of a series is included in the company's articles of

organization in accordance with Section 48-2c-607.

(5) A series may contract on its own behalf and in its own name, including through a manager.

(6) Notwithstanding other provisions of this section:

(a) property and assets of a series may not be transferred to the company generally or another series if the transfer impairs the ability of the series releasing the property or assets to pay its debts existing at the time of the transfer unless fair value is given to the transferring series for the property or assets transferred; and

(b) a tax or other liability of the company generally or of a series may not be assigned by the series against which the tax or other liability is imposed to the company generally or to another series within the company if the assignment impairs a creditor's right and ability to fully collect an amount due when owed.

§ 48-2c-607. Notice of series--Articles of organization

(1) Notice in a company's articles of organization of the limitation on liabilities of a series, as required by Section 48-2c-606, is sufficient whether or not the company has established any series at the time the notice is included in the articles of organization.

(2) The notice required by Section 48-2c-606:

(a) need not reference any specific series; and

(b) for articles of organization or an amendment to articles of organization made to include notice of series that is filed on or after May 11, 2010, notice in a company's articles of organization is sufficient for purposes of Subsection (1) only if the notice of series appears immediately following the provision stating the name of the company.

(3) The filing of the notice required by Section 48-2c-606 with the division constitutes notice of the limitation on liability of a series.

§ 48-2c-608. Agreement to be liable

Notwithstanding Section 48-2c-601, 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.

§ 48-2c-609. Series related provisions in operating agreement

(1) An operating agreement may provide for classes or groups of members or managers associated with a series with separate rights, powers, or duties as provided in Subsection 48-2c-606(1).

(2) An operating agreement may provide for the future creation of additional classes or groups of members or managers associated with a 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.

(3) An operating agreement may provide for the taking of an action without the vote or approval of any member or manager, or class or group of members or managers, including:

- (a) an action to create a class or group of a series of interests in the company that was not previously outstanding; and
- (b) amending the operating agreement.

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

(5)(a) 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.

(b) Voting by members or managers associated with a series may be on a per capita, number, financial interest, class, group, or any other basis.

§ 48-2c-610. Management of a series

(1) Unless otherwise provided in an operating agreement, the management of a series is vested in the members associated with the 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 the series.

(2) Unless otherwise provided in an operating agreement, the decision of members owning more

than 50% of the then-current percentage or other interest in the profits controls.

(3) Notwithstanding Subsection (2), if an operating agreement provides for the management of the series in whole or in part by a manager, the management of the series is vested to that extent in the manager, who is chosen in the manner provided in the operating agreement.

(4) The manager of a series holds the offices and has the responsibilities accorded to the manager under the operating agreement.

(5) A series may have more than one manager.

(6) Subject to a manager's resignation, a manager ceases to be a manager with respect to a series as provided in the operating agreement.

(7) Except as otherwise provided in an operating agreement, any event under this chapter or in an operating agreement that causes a manager to cease to be a manager with respect to a series does not, by itself, cause the manager to cease to be a manager of the limited liability company or with respect to any other series.

§ 48-2c-611. Distributions concerning a series

(1) Subject to an operating agreement, at the time a member associated with a series becomes entitled to receive a distribution with respect to the 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.

(2) An operating agreement may provide for the establishment of a record date for allocations and distributions concerning a series.

(3) Notwithstanding Section 48-2c-1005, a limited liability company may make a limited distribution with respect to a series only.

(4) No distribution may be made by a company under this section with respect to a series if, after giving effect to the distribution:

(a) the series would not be able to pay its debts as they become due in the usual and regular course of its business; or

(b) the value of the series' total assets would be less than the sum of:

(i) its total liabilities; and

(ii) unless the articles of organization or the operating agreement permit otherwise, the amount that would be needed, if the series were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon

dissolution and winding up of members whose preferential rights are superior to the rights of members receiving the distribution.

(5) The company may base a determination that a distribution is not prohibited under Subsection (4) either on:

(a) financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances; or

(b) a fair valuation or other method that is reasonable in the circumstances.

(6) For purposes of this section, 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 do not constitute a distribution.

(7) A member who receives a distribution in violation of this section is liable to the series for the amount of the distribution.

(8) Subject to Section 48-2c-1006, this section does not affect any obligation or liability of a member under an agreement or other applicable law for the amount of a distribution.

**§ 48-2c-612. Member removal from a series—
Effect**

(1) Unless otherwise provided in the operating agreement, a member ceases to be associated with a series and to have the power to exercise any rights or powers of a member with respect to the series upon the assignment of all of the member's interest in the company with respect to the series.

(2) Unless otherwise provided in an operating agreement, any event under this chapter or the operating agreement that causes a member to cease to be associated with a series does not, by itself:

(a) cause the member to cease to be associated with any other series;

(b) terminate the continued membership of a member in the limited liability company; or

(c) cause the termination of the series, regardless of whether the member is the last remaining member associated with the series.

§ 48-2c-613. Termination of series

(1) Subject to Section 48-2c-1201, except to the extent otherwise provided in the operating agreement, a series may be terminated and its affairs wound up without causing the dissolution of the limited liability company.

(2) The termination of a series does not affect the limitation on liabilities of the series provided by Section 48-2c-606.

(3) A series is terminated and its affairs shall be wound up upon the dissolution of the limited liability company under Section 48-2c-1201 or otherwise upon the first to occur of the following:

(a) the time specified in the operating agreement;

(b) the happening of events specified in the operating agreement;

(c) unless otherwise provided in the operating agreement, the affirmative vote or written consent of:

(i) (A) the members of the limited liability company associated with the series; or

(B) if there is more than one class or group of members associated with the series, by each class or group of members associated with the series; and

(ii) (A) members associated with the series who own more than 2/3 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

(B) the members in each class or group of the series, as appropriate; or

(d) the termination of the series under Section 48-2c-614.

§ 48-2c-614. Court-decreed termination of series

On application by or for a member or manager associated with a series, the district court may decree termination of the series whenever it is not reasonably practicable to carry on the business of the series in conformity with an operating agreement.

§ 48-2c-615. Participation in winding up

(1) Notwithstanding Section 48-2c-1303, unless otherwise provided in the operating agreement, the series' affairs may be wound up by the following:

(a) a manager associated with a series who has not wrongfully terminated the series; or

(b) if there is no manager under Subsection (1)(a):

(i) the members associated with the series, or a person approved by the members associated with the series, who own more than 50% 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

(ii) if there is more than one class or group of members associated with the series, then by each class or group of members associated with the series owning more than 50% of the then-current percentage or other interest in the profits of the series owned by all of the members in each class or group associated with the series.

(2) (a) The district court may, upon cause shown, wind up the affairs of the series upon application of any member associated with the series, the member's personal representative, or the member's assignee.

(b) If the district court winds up the affairs of a series under Subsection (2)(a), the district court may appoint a liquidating trustee.

(3) (a) A person winding up the affairs of a series may, in the name of the limited liability company and on behalf of the limited liability company and the series, take any action with respect to the series that is allowed by Part 13, Winding Up.

(b) A person winding up the affairs of a series shall comply with Part 13, Winding Up.

(c) The winding up the affairs of a series in accordance with this section does not:

(i) affect the liability of members;
or

(ii) impose liability on a liquidating trustee.

**48-2c-616. Foreign limited liability company—
Series**

(1) If a foreign limited liability company that is registering to do business in the state is governed by an operating agreement establishing or providing for the establishment of a series, that fact shall be stated on the application for authority to transact business in the state.

(2) (a) A company shall identify on an application for authority to transact business in the state which of the protections for the series and company found in Section 48-2c-606 apply to a series.

(b) If different protections found in Section 48-2c-606 apply to different series of a company, the application for authority to transact business in the state shall identify:

(i) the protections that apply to each existing series; and

(ii) the protections that will apply to any later-created series.

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U.C.A. 1953 § 48-3a-1201, et. seq.
[Effective January 1, 2014]

48-3a-1201. Series of transferable interests.

(1) An operating agreement may establish or provide for the establishment of a designated series of transferable 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. The name of each series must contain the name of the limited liability company and be distinguishable from the name of any other series.

(2) Notwithstanding contrary provisions of this chapter, the debts, liabilities, and obligations incurred, contracted for, or otherwise existing with respect to a particular series shall be enforceable against the assets of that series only, and not against the assets of the limited liability company generally or any other series, if all of the following apply:

(a) the series is established by or in accordance with the operating agreement;

(b) separate and distinct records are maintained for the series;

(c) the assets associated with the series are held and accounted for separately from the other assets of the limited liability company, including another series;

(d) the operating agreement or the agreement establishing the series provides for the limitation on liabilities of the series; and

(e) notice of the limitation on liability of the series is set forth in the limited liability company's certificate of organization in accordance with Section 48-3a-1202.

(3) A series meeting all of the conditions of Subsection (2) shall:

(a) be treated as a separate entity to the extent set forth in the certificate of organization; and

(b) have the power and capacity to, in its own name, contract, hold title to property, grant liens and security interests, and sue and be sued.

(4) Notwithstanding the other provisions of this section:

(a) property and assets of a series may not be transferred to the limited liability company generally or another series if the transfer impairs the ability of the series releasing the property or assets to pay its debts existing at the time of the transfer unless fair value is given to the transferring series for the property or assets transferred; and

(b) a tax or other liability of the limited liability company generally or of a series may not be assigned by the series against which the tax or other liability is imposed to the limited liability company generally or to another series within the limited liability company if the assignment impairs a creditor's right and ability to fully collect an amount due when owed.

(5) Notwithstanding the other provisions of this part:

(a) a professional services company may not designate series of transferable interests; and

(b) a limited liability company may not form a professional services company as series of the limited liability company.

(6) Except to the extent modified by this part, the provisions of this chapter which are generally applicable to a limited liability company, and its managers, members and transferees, shall be applicable to each series with respect to the operations of such series.

48-3a-1202. Notice of limitation on liability of a series.

(1) Notice in a limited liability company's certificate of organization of the limitation on liabilities of a series as referenced in Subsection 48-3a-1201(2)(e) is sufficient for all purposes of this part whether or not the limited liability company has established a series at the time the notice is included in the certificate of organization.

(2) The notice of a limitation on liability of a series as referenced in Subsection 48-3a-1201(2)(e) is not required to reference a specific series.

(3) The filing by the division of the certificate of organization containing a notice of the limitation on liabilities of a series constitutes notice of the limitation on liabilities of the series.

48-3a-1203. Agreement to be liable.

Notwithstanding Section 48-3a-304, or a contrary provision in an operating agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations, or liabilities of one or more series.

48-3a-1204. Series related provisions in operating agreement.

(1) 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.

(2) The operating agreement may provide 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.

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

(4) An operating agreement may provide that any member or class or group of members associated with a series does not have voting rights.

(5) 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 on any matter separately or with all or any class or group of the members or managers associated with the series. Voting by members or managers associated with a series may be on any basis including:

- (a) a per capita basis;
- (b) a number basis;
- (c) on the basis of a financial interest; or
- (d) by class or group.

48-3a-1205. Management of a series.

(1) A series is member-managed unless the operating agreement:

(a) expressly provides that:

(i) the series is or will be "manager-managed";

(ii) the series is or will be "managed by managers"; or

(iii) management of the series is or will be "vested in managers"; or

(b) includes words of similar import.

(2) In a member-managed series, unless modified pursuant to Section 48-3a-1204, the following rules apply:

(a) The management and conduct of the series are vested in the members of the series.

(b) Each series member has equal rights in the management and conduct of the series' activities.

(c) A difference arising among series members as to a matter in the ordinary course of the activities of the series shall be decided by a majority of the series members.

(d) An act outside the ordinary course of the activities of the series may be undertaken only with the consent of all members of the series.

(e) The operating agreement may be amended only with the consent of all members of the series.

(3) In a manager-managed series, the following rules apply:

(a) Except as otherwise expressly provided in this chapter, any matter relating to the activities of the series is decided exclusively by the managers of the series.

(b) Each series manager has equal rights in the management and conduct of the activities of the series.

(c) A difference arising among managers of a series as to a matter in the ordinary course of the activities of the series shall be decided by a majority of the managers of the series.

(d) Unless modified pursuant to Section 48-3a-1204, the consent of all members of the series is required to:

(i) sell, lease, exchange, or otherwise dispose of all, or substantially all, of the series' property, with or without the goodwill, outside the ordinary course of the series' activities;

(ii) approve a transaction under Part 10, Merger, Interest Exchange, Conversion, and Domestication;

(iii) undertake any other act outside the ordinary course of the series' activities; and

(iv) amend the operating agreement as it pertains to the series.

(e) A manager of the series may be chosen at any time by the consent of a majority of the members of the series and remains a manager of the series until a successor has been chosen, unless the series manager at an earlier time resigns, is removed, or dies, or, in the case of a series manager that is not an individual, terminates. A series manager may be removed at any time by the consent of a majority of the members without notice or cause.

(f) A person need not be a series member to be a manager of a series, but the dissociation of a series member that is also a series manager removes the person as a manager of the series. If a person that is both a series manager and a series member ceases to be a manager of the series, that cessation does not by itself dissociate the person as a member of the series.

(g) A person's ceasing to be a series manager does not discharge any debt, obligation, or other liability to the series or members of the series which the person incurred while a manager of the series.

(4) An action requiring the consent of members of a series under this chapter may be taken without a meeting, and a member of a series may appoint a proxy or other agent to consent or otherwise act for the series member by signing an appointing record, personally or by the series member's agent.

(5) The dissolution of a series does not affect the applicability of this section. However, a person that wrongfully causes dissolution of the series loses the right to participate in management as a series member and a series manager.

(6) This chapter does not entitle a series member of a series to remuneration for services performed for a member-managed series, except for reasonable compensation for services rendered in winding up the activities of the series.

48-3a-1206. Series distributions.

(1) Any distribution made by a series before its dissolution and winding up must be in equal shares among the series members and dissociated series members, except to the extent necessary to comply with any transfer effective under Section 48-3a-502 and any charging order in effect under Section 48-3a-503.

(2) A person has a right to a distribution before the dissolution and winding up of a series only if the series decides to make an interim distribution. A person's dissociation with respect to a series does not entitle the person to a distribution.

(3) A person does not have a right to demand or receive a distribution from a series in any form other than money. Except as otherwise provided in Subsection 48-3a-711(3), a series may distribute an asset in kind if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person's share of distributions.

(4) If a series member or transferee becomes entitled to receive a distribution, the series member or transferee has the status of, and is entitled to all remedies available to, a creditor of the series with respect to the distribution. However, the series' obligation to make a distribution is subject to offset for any amounts owed to the series by the member or a person dissociated as a member on whose account the distribution is made.

(5) A series may not make a distribution if after the distribution:

(a) the series would not be able to pay its debts as they become due in the ordinary course of the series' activities; or

(b) the series' total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the series were to be dissolved, wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up, and termination of members whose preferential rights are superior to those of persons receiving the distribution.

(6) A series may base a determination that a distribution is not prohibited under Subsection (5) on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable under the circumstances.

(7) Except as otherwise provided in Subsection (9), the effect of a distribution under Subsection (5) is measured:

(a) in the case of a distribution by purchase, redemption, or other acquisition of a transferable interest in the series, as of the date money or other property is transferred or debt incurred by the series; or

(b) in all other cases, as of the date:

(i) the distribution is authorized, if the payment occurs within 120 days after that date; or

(ii) the payment is made, if the payment occurs more than 120 days after the distribution is authorized.

(8) A series' indebtedness to a series member incurred by reason of a distribution made in accordance with this section is at parity with the series' indebtedness to its general, unsecured creditors.

(9) A series' indebtedness, including indebtedness issued in connection with or as part of a distribution, is not a liability for purposes of Subsection (5) if the terms of the indebtedness provide that payment of principal and interest are made only to the extent that a distribution could be made to members of the series under this section. If such indebtedness is issued as a distribution, each payment of principal or interest on the indebtedness is treated as a distribution, the effect of which is measured on the date the payment is made.

(10) Except as otherwise provided in Subsection (11), if a member of a member-managed series or manager of a manager-managed series consents to a distribution made in violation of this section and in consenting to the distribution fails to comply with Section 48-3a-409, the member or manager is personally liable to the series for the amount of the distribution that exceeds the amount that could have been distributed without the violation of this section.

(11) To the extent the operating agreement of a member-managed series expressly relieves a series member of the authority and responsibility to consent to distributions and imposes that authority and responsibility on one or more other members of the series, the liability stated in Subsection (10) applies to the other members of the series and not the member of the series that the operating agreement relieves of authority and responsibility.

(12) A person that receives a distribution from a series knowing that the distribution to that person was made in violation of this section is personally liable to the limited liability company but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under this section.

(13) A person against which an action is commenced because the person is liable under Subsection (10) may:

(a) implead any other person that is liable under Subsection (10) and seek to compel contribution from the person; and

(b) implead any person that received a distribution in violation of Subsection (12) and seek to compel contribution from the person in the amount the person received in violation of Subsection (12).

(14) An action under this section is barred if not commenced within two years after the distribution.

48-3a-1207. Events causing dissociation from a series.

(1) Unless otherwise provided in the operating agreement, a member ceases to be associated with a series and to have the power to exercise a right or power of a member with respect to the series upon the assignment of all of the member's transferable interest in the limited liability company with respect to the series.

(2) Unless otherwise provided in an operating agreement, an event under this chapter or the operating agreement that causes a member to cease to be associated with a series does not, by itself:

(a) cause the member to cease to be associated with another series;

(b) terminate the continued membership of a member in the limited liability company; or

(c) cause the termination of the series, regardless of whether the member is the last remaining member associated with the series.

48-3a-1208. Dissolution of a series.

(1) 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.

(2) The dissolution of a series does not affect the limitation on liabilities of the series under Section 48-3a-1201.

(3) A series is dissolved and its affairs shall be wound up upon the dissolution of the limited liability company under Section 48-3a-701 or upon the occurrence of any of the events described in Section 48-3a-701, as applied to the series.

(4) Notwithstanding Section 48-3a-703, unless otherwise provided in the operating agreement, any of the following persons may wind up the affairs of a dissolved series:

(a) a manager associated with a series who has not wrongfully caused the dissolution of the series;

(b) if there is no manager that satisfies the requirements of Subsection (4)(a), the members associated with the series who have not wrongfully caused the dissolution of the series or a person approved by the members associated with the series who have not wrongfully caused the dissolution of the series; or

(c) if there is more than one 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 have not wrongfully caused the dissolution of the series, and either:

(i) own more than 50% of the transferable interests of the series owned by members associated with the series who have not wrongfully caused the dissolution of the series; or

(ii) own more than 50% of the transferable interests of each class or group associated with the series owned by members associated with the series who have not wrongfully caused the dissolution of the series.

(5) The persons winding up the affairs of a series, in the name of the series and for and on behalf of the series, may take all actions with respect to the series as are permitted under Section 48-3a-703 for a limited liability company. The persons winding up the affairs of a series shall provide for the claims and obligations of the series as provided in Section 48-3a-711 for a limited liability company and distribute the assets of the series as provided in Section 48-3a-711 for a limited liability company. An action taken pursuant to this subsection may not affect the liability

of a member and may not impose liability on a liquidating trustee.

48-3a-1209. Foreign limited liability company -- Series.

A foreign limited liability company that is registered to do business in this state that is governed by an operating agreement that establishes or provides for the establishment of a series of transferable interests 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 the specified property or obligations, shall indicate that fact on the foreign registration statement filed by the division. In addition, the foreign limited liability company shall state on the foreign registration statement whether the debts, liabilities, and obligations incurred, contracted for, or otherwise existing with respect to a particular series, if any, are enforceable against the assets of such series only, and not against the assets of the foreign limited liability company generally or any other series. Notice in a foreign limited liability company's foreign registration statement of the limitation on liability of a series as referenced in this section shall have the same effect found in Section 48-3a-1202 as a notice of limitation on liability of a series set forth in a limited liability company's certificate of organization.