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The Series LLC:
A New Planning Tool

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I. The Series LLC in Texas.

Texas adopted new provisions permitting the creation and operation of series limited liability companies (the "Series LLC") under Texas law in 2009. This paper is to discuss what the state of law is on series under the Texas statute, with some consideration of the other jurisdiction and practice pointers for resolving the issues presented by the statutory formulation for the Series LLC. After discussing what series are and can do, the paper will go through points of ambiguity and development where the results of the use of the series structure may not be perfectly clear. This vehicle for formation is still under development, but presents an elegant solution to ownership and management of closely related, but not identical, groups of assets.

II. What is a Series LLC?

The Series LLC was first created in Delaware in 1996, i.e. the Uniform Statutory Trust Entity Act, but has only recently gained traction in legislation in other states. Like all new formation vehicles, it is an idea that is in process, and the several statutory formulations are not uniform. In fact, august bodies such as the American Bar Association and the NCCUSL that usually draft and distribute uniform laws, have only recently weighed in with draft legislation, in the Uniform Statutory Trust Entity Act. Texas is one of the most recent thoughts on drafting, and tends to follow the Delaware formulations (and reject those state formulations that have strayed from Delaware). The kernel legal concept of the Series LLC is the internal segregation of assets. The TBOC states the following: "A company agreement may establish . . . one or more designated series . . . that (a) has separate rights, powers or duties with respect to specified property or obligations of the limited liability company or profits and losses associated with specified property or obligations, or (b) has a separate business purpose or investment objective."

If you consider the concept of internal asset segregation, that means that two other issues have to necessarily complement that idea: first if assets are segregated, the primary reason for such segregation is to allocate the economic rights to those assets differently among the owners. Second, if the segregation is internal, and the purpose for the segregation is economic, then there must be some commonality within the entity, which can only be something to do with the management of the enterprise. While the Texas statute has significant flexibility around the issues of ownership and operation of the assets in the series, the flexibility should not confuse the basic nature and use of the vehicle: segregation of assets with common management structures. Business lawyers have always split up and recombined management structures and economic allocations of the enterprise, and the Series LLC is a permutation of that concept.

Since the Texas statute is based on the issue of "commonality" among the Series LLC, that definitional concept has been imbedded in the statutory formulation. Commentators have labeled the totality of the LLC (of which the Series within the LLC is a segregated part) the "Mothership." The entity for state law purposes is the LLC itself and not the Series within the LLC. Stated positively, the Series within the LLC is not a separate entity under the laws of the state of Texas. An important technical point in the Texas statute is that the Series within the LLC generally is **NOT** a "Domestic Entity" within the meaning of Section 1.002(18) of the TBOC. This basic concept has effects throughout the formation of the Series LLC, the drafting of the LLC Agreement, the operation of the LLC and the Series within the LLC and the exit strategies for the Series within the LLC. Some states, namely Illinois and Iowa, have considered this issue and have permitted (but not required) that the Series within the LLC be a separate entity. Most of the statutory formulations, however, are like Texas where the Series within the LLC is not a separate entity. This is the most core issue that creates the ambiguity and mystery of forming and using this vehicle, and will be a theme throughout this paper. While many discuss (and complain) about this issue, this paper will suggest treatments when it arises to provide certainty for the use of the Series LLC.

III. How Do You Create a Series LLC?

The TBOC has express requirements for the filing requirements for a Series LLC, including requirements for the contents of the certificate of formation, requirements for the terms and conditions of the LLC Agreement and requirements for specific record keeping. Section 101.602(b) of the TBOC sets forth these three express statutory requirements. Upon formation, or by amendment, the Certificate of Formation must contain a notice of the existence of a Series LLC, by setting forth a notice of the limitations (internal) caused by the segregation of the assets in the Series LLC, as specified in Section 101.602(a). Those Series LLC limitations are as follows:

(1) The debts, liabilities, obligations and expenses incurred, contracted for, or otherwise existing with respect to a particular series shall be enforceable against the assets of that series only and shall not be enforceable against the assets of the limited liability company generally or any other series; and

(2) None of the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to the limited liability company generally or any other series shall be enforceable against the assets of a particular series.

The Secretary of State of the State of Texas has not promulgated a separate form for filing a Texas Series LLC, although there is a form to qualify a foreign series LLC in this state. I would recommend that you expressly state