April 29, 2011

Hon. Douglas Shulman  
Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Washington, DC 20224

Re: Comments on Reg-119921-09 Proposed Regulations on Series of a Domestic Series Organization

Dear Commissioner Shulman:

Enclosed are comments on proposed regulations on series of a domestic series organization. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Charles H. Egerton  
Chair, Section of Taxation

Enclosure

cc: Michael Mundaca, Assistant Secretary (Tax Policy), Department of the Treasury  
William Wilkins, Chief Counsel, Internal Revenue Service  
Jeffrey Van Hove, Acting Tax Legislative Counsel, Department of the Treasury  
Robert Crnkovich, Senior Counsel, Office of Tax Legislative Counsel, Department of the Treasury  
Curtis G. Wilson, Acting Associate Chief Counsel, Passthroughs & Special Industries, Internal Revenue Service  
Dianna Miosi, Special Counsel to the Associate Chief Counsel, Passthroughs & Special Industries, Internal Revenue Service  
Joy Spies, Attorney-Advisor, Internal Revenue Service
ABA SECTION OF TAXATION
COMMENTS ON REG-119921-09
PROPOSED REGULATIONS ON SERIES OF A DOMESTIC SERIES ORGANIZATION

These comments ("Comments") are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Paul Carman of the Partnerships and LLCs Committee of the Section of Taxation. Substantive contributions were made by the following individual members of the Section’s Committees on Partnerships and LLCs, Real Estate, Corporate Tax, and State and Local Taxes: Devon Boboh, Ronald L. Buch, Jr., Dave Clark, Brent Clifton, Adam Cohen, Jasper L. Cummings, Jr., Jeffrey Davine, Allan Donn, Bruce P. Ely, Steve Gorin, Leigh Griffith, Sanford Holo, Eliot Kaplan, Carolyn Lee, Tom Lenz, Michael W. McLoughlin, Walter Schwidetzky, Eric Sloan, Davis Smith, Eliza Stubblefield, Stewart M. Weintraub, William Weissman, Andrea Whiteway, and Tom Yearout. The Comments were reviewed by Steve Schneider, Chair of the Partnerships and LLCs Committee. The Comments were further reviewed by R. Brent Clifton of the Section’s Committee on Government Submissions and by William H. Caudill, Council Director for the Partnerships and LLCs Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: April 29, 2011
EXECUTIVE SUMMARY

On September 14, 2010, the Department of the Treasury (the “Treasury”) and the Internal Revenue Service (the “Service”) published Proposed Regulations\(^1\) (the “Proposed Regulations”) that would modify Regulation section 301.7701-1 and provide for the classification of series formed under series statutes. The Proposed Regulations would amend Regulation section 301.7701-1 to add a subsection relating to the classification of series formed under series organizations for Federal income tax purposes. The Proposed Regulations generally treat each series as an entity formed under local law for Federal tax purposes. These Comments respond to the Treasury’s and the Service’s request for comments on the Proposed Regulations and discuss several issues related to the specific topics covered by the Proposed Regulations. These Comments include the recommendations summarized below.

1. Classification of Series Organizations with No Independent Assets or Activities. We respectfully recommend that the final regulations explicitly provide that a series organization that has (i) no more than a \textit{de minimis} amount of assets for administrative costs pending reimbursement or activities other than those undertaken on behalf of its series and (ii) not elected to be taxed as a corporation may, depending upon the particular facts and circumstances, be treated as a mere title holding or nominee arrangement and not recognized as a separate entity for Federal tax purposes. Although we believe existing common law and regulatory authority provide sufficient guidance as to when a juridical entity that has assets or activities should be treated as an entity for Federal tax purposes, we request that the Treasury and the Service provide additional guidance clarifying the classification (independent of the series) of a series organization with separate assets or business. If the Treasury and the Service determine to provide additional guidance on this issue, we recommend that the Treasury and the Service consider including—in final regulations or new proposed regulations—a nonexclusive list of factors to be considered in determining whether the series organization should, as a matter of Federal tax law, be treated as a separate tax entity.

2. Treatment of a Series that Does Not Terminate for State Law Purposes When It Has No Members Associated With It. We respectfully recommend that existing Federal tax common law rules and regulations be applied to determine whether a series has liquidated for Federal tax purposes or if one or more persons should be treated as the owners of the series. We also recommend that state property and contract law be used to determine the existence of economic rights, and then that Federal law be applied to determine whether those rights amount to ownership of the series.

3. Information Returns of Series and Series Organizations. We respectfully recommend that the requirements for filing an annual information statement be created with a view to eliminating duplicative reporting to the extent possible.

4. Authority to Sign Returns and Be Tax Matters Partner. It would be useful if final regulations clarify who has the authority to sign tax returns and claims for refunds and who may be the tax matters partner for a series treated as a partnership for Federal tax purposes. We recommend that in the context of the signing of an original Form 1065, U.S. Return of Partnership Income, of a series:

a. Any member associated with the series who is a manager in respect of the series is an acceptable signer, in accordance with Form 1065 and the instructions thereto.

b. Any member associated with the series presumptively is a valid signer of the Form 1065, in accordance with section 6063 (first sentence) and Regulation section 1.6063-1; and

c. A signing member associated with a series who does not have authority to sign the return may be successfully challenged as an invalid signer, in accordance with section 6063 (second sentence) and Regulation section 1.6063-1.

Although current rules for determining a tax matters partner may be applied by analogy to series treated as partnerships subject to section 6231, clarifying that members for such purposes would include members associated with a series and the role of state law in determining whether a person was a member for such purpose would be useful. Moreover, we respectfully recommend that the final regulations expressly permit any manager within the series organization to be the tax matters partner of any particular series.

5. Requirements to be Associated with a Series. We respectfully recommend that the final regulations provide guidance as to what would be necessary or relevant in determining whether a member is associated with a series for Federal tax purposes.

6. Service Organizations. We respectfully recommend that the final regulations clarify that there is no intent to exclude service organizations from the application of the regulations.

7. Series Formed under Statutory Trust Statutes. Although the Proposed Regulations would sometimes apply to cause series formed under statutory trust statutes to be recognized as separate entities for Federal tax purposes, we respectfully recommend that the final regulations confirm that the analysis of Rev. Rul. 2004-86 would be applied at the series level to determine if the series should be treated as a business entity.

8. State and Federal Unemployment Taxes. Treasury requested comments on how the Proposed Regulations would or should impact state unemployment taxes. Further, we note that the Proposed Regulations are silent regarding the application of the recent amendments

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2 References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated.

to the check-the-box regulations\textsuperscript{4} treating a single member limited liability company—even if it is disregarded for Federal tax purposes—as the employer of record. We respectfully recommend that the final regulations conform in both respects to the check-the-box regulations, as amended.

\section*{9. Transition Rules.} To avoid numerous inadvertent terminations of elections, sometimes resulting in taxable transactions, we respectfully recommend that series organizations that have made a check-the-box election for the series organization, but are viewed as multiple entities under the final regulations, be treated as having made a check-the-box election for each resulting entity unless the series or the series organization (or the members who are treated as owners) elect otherwise.\textsuperscript{5} Also to avoid inadvertent taxable transactions, we respectfully recommend that the exception to the transition rules provided in Proposed Regulation section 301.7701-1(f)(3)(ii)(B) not apply until the earlier of (i) five years from the date of the creation of the series or (ii) the fifth anniversary of the publication of the Proposed Regulations in the Federal Register. Similarly, we respectfully recommend that exceptions be created in the regulations under section 355 to avoid the creation of deemed taxable transactions as a result of triggering the exception to the transition rules provided in Proposed Regulation section 301.7701-1(f)(3)(ii)(B).

\textsuperscript{4} Reg. §§ 301.7701-1, -2, -3, -4.

\textsuperscript{5} Under the current check-the-box regulations, an election of the series organization to be taxed as an association taxable as a corporation would not affect the classification of series viewed as separate entities for Federal tax purposes. Thus, inadvertently triggering a reclassification under the transition rules could cause the series organization to be treated as distributing assets other than stock to its owners.
BACKGROUND

Series limited liability company (“LLC”) statutes have been enacted in Delaware, Illinois, Iowa, Nevada, Oklahoma, Tennessee, Texas, Utah, and Puerto Rico. Delaware enacted the first series LLC statute in 1996. Statutes enacted subsequently by other states are similar, but not identical, to the Delaware statute. All of the statutes provide a significant degree of separateness for individual series within a series LLC, but none provides series with all of the attributes of a typical state law entity, such as an LLC not formed under a series statute. In general, individual series are not treated as separate entities for state law purposes. However, in certain states (currently, Illinois and Iowa), a series is treated as a separate entity to the extent provided in the series LLC’s articles of organization.

For Federal tax purposes, the classification of entities is governed largely by Regulation sections 301.7701-1 through -4, commonly known as the “check-the-box regulations.” Regulation section 301.7701-1 addresses the issue of whether a separate entity should be respected for Federal tax purposes. Regulation sections 301.7701-2 and -3 address the issue of whether a business entity should be treated as a partnership, a corporation (or an association taxed as a corporation), or disregarded for Federal tax purposes. Regulation section 301.7701-4 addresses the issue of whether an entity should be treated as a trust or a business entity for Federal tax purposes. The current check-the-box regulations do not explicitly address the recognition or treatment of series formed under series statutes.

The Proposed Regulations generally treat each series as an entity formed under local law for Federal tax purposes. We commend the Treasury and the Service for taking an approach that establishes certainty and comports with the views of most practitioners who used series prior to issuance of the Proposed Regulations.

COMMENTS

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

The Proposed Regulations do not address the entity status or filing requirements of series organizations for Federal tax purposes. A series organization generally is an entity for local law purposes. If a series organization is treated as a partnership for Federal tax purposes because it is a business entity and has two owners, such organization may not have an income or information tax filing obligation. Under Regulation section 1.6031(a)-(1)(a)(3)(i), a partnership with no income, deductions, or credits for Federal tax purposes for a taxable year is not required to file a partnership return for that year. Generally, if the series organization had no other activity, filing


fees of a series organization paid by a series of the series organization would be treated as expenses of the series and not as expenses of the series organization. Thus, a series organization that is characterized as a partnership for Federal tax purposes and that does not have income, deductions, or credits for a taxable year need not file a partnership return for the year.

Neither the Proposed Regulations\(^8\) nor the preamble\(^9\) explicitly indicate whether a series organization that has no assets or business activities would be required to obtain its own taxpayer identification number. The Service has specifically requested comments on the characterization of a series organization that has no assets or activities separate from its series. Under current Regulation section 301.7701-1, it might well be determined that such a series organization is not a separate entity for Federal tax purposes, although the Proposed Regulations do not explicitly provide guidance one way or the other.

If recognized as a separate entity, the series organization would be an unincorporated entity that, if a business entity, would have a default classification as a partnership or a disregarded entity.\(^10\) Under common law principles, an entity may not be a partnership if it does not have partners. The U.S. Supreme Court in *Commissioner v. Tower* held that the essential test for the existence of a partnership was “whether the partners really and truly intended to join together for the purpose of carrying on the business and sharing in the profits and losses or both.”\(^11\) Thus, if a series organization does not have partners, it cannot be a partnership.

Under current regulations, if a series organization has one equity owner, its default classification would be as a disregarded entity.\(^12\) However, if the series organization has no equity owner under general tax principles (and is not an exempt organization),\(^13\) the sole function of the series organization is likely to be merely as a mechanism for the creation of the series of the series organization.

We respectfully recommend that the final regulations explicitly provide that a series organization that has (i) no more than a de minimis amount of assets for administrative costs pending reimbursement or activities other than those undertaken on behalf of its series and

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\(^8\) Prop. Reg. § 301.7701-1(a)(5).


\(^10\) We are not aware of any corporate statutes that permit the creation of series.

\(^11\) 327 U.S. 280, 287 (1946); see also Reg. § 301.7701-2(c)(i).

\(^12\) Reg. § 301.7701-2(c)(ii).

\(^13\) We recognize that state statutes may require an entity to have at least one nominal member in order to be formed. However, state statutes do not require members to have economic interests. Thus, a series organization may be treated as having no equity owner for Federal tax purposes even if it has a nominal member for state law purposes. Similarly, for Federal tax purposes members associated with a series that have no economic rights independent of the series may not be viewed as equity owners of the series organization for Federal tax purposes even if for state law purposes such members are nominally members of the series organization.
(ii) not elected to be taxed as a corporation may, depending upon the particular facts and circumstances, be treated as a mere title holding or nominee arrangement and not recognized as a separate entity for Federal tax purposes.14

On the other hand, it is possible for a series organization to have assets and business separate and apart from the assets and business of any series formed under the series organization. For example, a series organization could have the benefits and burdens of ownership of interests in a series. The Proposed Regulations do not expressly deal with this situation.15 Once the series organization has separate assets and business, the series organization would generally be required to obtain a separate taxpayer identification number (assuming it is not a disregarded entity) and file its own tax return. Although we believe existing common law and regulatory authority provide sufficient guidance as to when a juridical entity that has assets or activities should be treated as an entity for Federal tax purposes, we request that the Treasury and the Service provide additional guidance clarifying the classification (independent of the series) of a series organization with separate assets and business. If the Treasury and the Service provide additional guidance on this issue, we recommend that the Treasury and the Service consider including in new proposed regulations a nonexclusive list of factors to be considered in determining whether the series organization should, in fact, be treated as a separate entity for Federal tax purposes. For example, we believe that common law ownership of income producing property by the series organization should be one factor considered in whether the series organization is a separate entity for Federal tax purposes.16 We also note that Rev. Rul. 2004-8617 lists factors that are relevant in determining when a state law trust is treated as a trust or a business entity for Federal tax purposes.

2. What is the appropriate treatment of a series that does not terminate for local law purposes when it has no members associated with it?

The preamble indicates that for state law purposes it may be possible for a series to continue after it has no members associated with it. If the series no longer has any assets or business, it would seem that such a series may have undertaken a deemed liquidation for Federal tax purposes.

For example, a corporation is treated as having liquidated for Federal tax purposes when the corporation ceases to be a going concern and its activities are merely for the purpose of winding up its affairs, paying its debts, and distributing any remaining balance to its shareholders. A liquidation for Federal tax purposes may be completed prior to the actual

16 See Jasper L. Cummings, Jr., What Were They Thinking: Ownership, Series and Cells, 129 TAX NOTES (TA) 1129, 1135 (Dec. 6, 2010).
dissolution of the liquidating corporation, and legal dissolution of the corporation is not required.\textsuperscript{18}

In the context of a partnership, Regulation section 1.708-1(b)(1) provides that a partnership terminates when the operations of the partnership are discontinued and no part of any business, financial operation, or venture of the partnership continues to be carried on by any of its partners in a partnership. Thus, similar to the rule for a corporation, if a partnership no longer has any assets or business we believe the partnership should be viewed as having terminated for Federal tax purposes.

The more complex issue is created when the series has no members associated with it for state law purposes, but the series still has assets and business operations. The Delaware statute contemplates that assets and liabilities may be associated with a series and members may be associated with the series.\textsuperscript{19} The statute does not appear to require both members and assets and liabilities to be associated with a series.\textsuperscript{20}

If there were never any members associated with a series, but there were assets and liabilities associated with a series, it would appear that the series organization or the members of the series organization that are not associated with a particular series may effectively be the member or members of such series. However, for Federal tax purposes, one would generally need to determine who has the benefits and burdens of ownership of the series.\textsuperscript{21}

In the partnership context, parties intending to be treated as partners must contemplate sharing the profits of a venture treated as a partnership for Federal tax purposes.\textsuperscript{22} Just as whether an entity is recognized for Federal tax purposes is not determined by state or local law,\textsuperscript{23} whether or not a person is treated as a partner also is not determined by state or local law.

In \textit{Commissioner v. Tower},\textsuperscript{24} the U.S. Supreme Court refused to recognize the taxpayer’s wife as a partner, although the taxpayer argued that the partnership was valid under Michigan law. The court noted that:

\begin{itemize}
  \item \textsuperscript{18} Reg. § 1.332-2(c).
  \item \textsuperscript{19} Del. Code Ann. tit. 6 § 18-215(b), (e).
  \item \textsuperscript{20} Outside the context of series, the Delaware statute provides a person may be admitted as a member of a limited liability company without acquiring a limited liability company interest in the limited liability company. Del. Code Ann. tit. 6 § 18-301(d).
  \item \textsuperscript{21} \textit{See Grodt & McKay Realty, Inc. v. Commissioner}, 77 T.C. 1221, 1237-38 (1981).
  \item \textsuperscript{22} William S. McKee, \textit{et al.}, \textit{Federal Taxation of Partnerships and Partners}, § 3.04[3] (4th ed. 2007). Note that in \textit{Madison Gas & Electric Co. v. Commissioner}, 72 T.C. 521 (1979), the Tax Court questioned whether an intent to share profits was necessary to a partnership finding.
  \item \textsuperscript{23} Reg. § 301.7701-1(a)(1).
  \item \textsuperscript{24} 327 U.S. 280 (1946).
\end{itemize}
Michigan cannot by its decisions and laws governing questions over which it has final say also decide issues of federal tax law and thus hamper the effective enforcement of a valid federal tax levied against earned income.25

In Sommers,26 Rupple,27 Forman,28 and Klein,29 on the other hand, the courts recognized as partners persons who were not partners for state law purposes. Similarly, in Rev. Rul. 58-243,30 Rev. Rul. 77-137,31 and Rev. Rul. 77-332,32 the Service recognized as partners persons who could not be partners under state law.

Thus, as in other areas, state law determines whether a given set of circumstances creates a right or interest; Federal law then determines the Federal tax consequences of the presence or absence of the right or interest.33 Although a series may have no members associated with it for state law purposes, one or more persons may have the benefits and burdens of the ownership of the series for Federal tax purposes.

If the series organization has the benefits and burdens of ownership of 100% of the interests in the series, the series would be a business entity with a single owner with a default classification as a disregarded entity.34 If a group of members of the series organization have the benefits and burdens of ownership of the series, we believe the series should be treated in the same manner as if such members were associated with the series for state law purposes.

Other than in the case of an exempt organization, for Federal tax purposes someone usually has economic ownership of the entity. If the persons who are owners for state law purposes do not have the benefits and burdens of ownership, some other person with an economic relationship to the entity is usually determined to be the economic owner.35

25 Id. at 288.

26 Sommers v. Commissioner, 195 F.2d 680, 681 (2d Cir. 1952).

27 Rupple v. Kuhl, 177 F.2d 823, 826 (7th Cir. 1949).

28 Forman v. Commissioner, 199 F.2d 881, 884 (9th Cir. 1952).


30 1958-1 C.B. 255.

31 1977-1 C.B. 178.


33 See, e.g., Drye Family 1995 Trust v. United States, 152 F.3d 892, 899-900 (8th Cir. 1998); CCA 199930006 (July 30, 1999).

34 Reg. § 301.7701-2(c)(ii).

35 See, e.g., Harry J. Smith, Jr. v. Commissioner, 50 T.C.M. (CCH) 1444, PH T.C.M. P 85567 (seller of property determined to be the true owner when buyer’s limited partners did not have the benefits and burdens of ownership). A similar situation arises when (i) LLC1 forms and owns 100% of LLC2 (neither
3. What is the requirement for the series organization and each series of the series organization to file an information statement, and what information should be included on the statement?

We recognize that from an administrative perspective it will be essential for the Service to associate series with their series organizations. We respectfully recommend, however, that the number of information statements be kept to a minimum to avoid duplicative filings. We therefore respectfully recommend that the requirements for filing the information statements be dependent upon the following factual situations.

A Series Organization that is Not Treated as a Separate Entity for Federal Tax Purposes: A series organization that is not treated as a separate entity for Federal tax purposes should be expected to make an initial filing with the Service stating its legal name and whether the series formed under it are expected not to be recognized as separate tax entities, as disregarded business entities, as regarded business entities, or as a combination thereof. This initial filing could be part of the Form SS-4, Application for Employer Identification Number, if the series organization itself is a regarded business entity, but would need to be made on a separate statement if the series organization would not otherwise be required to obtain an employer identification number (“EIN”). To facilitate coordination of files, the Service may wish to consider assigning a nonrecognized entity number (“NEN”) to series organizations that are not required to obtain an employer identification number.

If a series organization is not otherwise required to obtain an EIN, we recommend that, after the initial filing by the series organization, subsequent filings be the responsibility of the series.

A Series Organization with Assets or Members Not Associated with a Series: If a series organization is required to obtain an EIN, then the annual filing should be in the form of an attachment to the Form 1065 or Form 1120, U.S. Corporation Income Tax Return, of the series organization. Such annual filing should include a list of the series formed under the series organization, the EIN of each series (if any), whether such series are not recognized as separate tax entities, or as disregarded or regarded business entities, and whether the assets of the series are held in the name of the series or in the name of the series organization.

A Series with No Members Associated with It (Other Than the Series Organization): A series with no members associated with it (other than the series organization) would generally not be required to obtain an EIN unless it has employees. If it applies for an EIN, then the series...
could indicate on the Form SS-4 the name and EIN of the series organization with which it is associated, whether the series is not recognized as a separate tax entity, or as a disregarded or regarded business entity, and whether the assets of the series are held in the name of the series or in the name of the series organization. If the series does not apply for an EIN, then a separate information statement containing such information should be filed with the Service shortly after formation. After the initial filing, if the series is not otherwise required to file an annual Federal tax return, the annual reporting requirement should be satisfied when the series is listed on a schedule to the Form 1065 or 1120 of the series organization.

_A Series with Members Associated with It (Other Than the Series Organization):_ If it applies for an EIN, then the series could indicate on the Form SS-4 the name and EIN (or NEN) of the series organization with which it is associated, whether the series is not recognized as a separate tax entity, or as a disregarded or regarded business entity, and whether the assets of the series are held in the name of the series or in the name of the series organization. After the initial filing, the annual reporting requirement should be satisfied by the series organization when the series is identified on the Form 1065 or 1120 of the series.

4. **Who has authority to sign returns and be tax matters partner with respect to a series?**

It would be useful if final regulations clarify who has the authority to sign returns and to be the tax matters partner for a series treated as a partnership for Federal tax purposes.

The Proposed Regulations do not address the question of who can sign the original or amended partnership tax returns pertaining to series that are taxable as partnerships. Uncertainty currently exists in identifying who can validly sign and file Form 1065 and other tax returns on behalf of various types of unincorporated entities taxable as partnerships. A detailed analysis and recommendations as to the appropriate signers of the potpourri of unincorporated entities is beyond the scope of these Comments.

For purposes hereof, we assume that the applicable statute (section 6063), existing regulations (Regulation section 1.6063-1), and Service guidance (including that on Form 1065 and the instructions thereto) remain in effect in their current form, and are applicable to series taxable as partnerships.

We recommend the following in the context of the signing of an original Form 1065 return of a series:

a. Any member associated with the series who is a manager in respect of the series (a “member-manager”) is an acceptable signer, in accordance with Form 1065 and the instructions thereto.

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36 Sheldon I. Banoff and Allan G. Donn, *Who Can Sign a Partnership’s or LLC’s Tax Returns? Simple Question; Complex Answers*, 113 J. TAX’N 144 (Sept. 2010).
b. Any member associated with the series presumptively is a valid signer of the Form 1065, in accordance with section 6063 (first sentence) and Regulation section 1.6063-1;

c. A signing member associated with a series who does not have authority to sign the return may be successfully challenged as an invalid signer, in accordance with section 6063 (second sentence) and Regulation section 1.6063-1.

We further recommend that applicable regulations be modified, in conjunction with the series organizations regulations, to provide that:

d. A manager in respect of a series who is not a member associated with the series and who is a manager of the series organization, or an authorized officer of the series, can be a permitted signer, in light of the unique interrelationships that may exist among the series organization, the series, and those who are authorized to manage the series and file its tax returns.

The consequences of selecting the wrong person to sign the series’ Form 1065 (and other) returns can be extreme, including the tolling of the statute of limitations and costly penalties for failure to file a timely Form 1065 tax return.\(^{37}\) We recommend that the Service provide substantial certainty as to who may properly file original and amended Form 1065 tax returns. In the series context, there are no “members” of the series under state law; rather, the members of the series organization become “associated with” the series, typically having sufficient economic interest in the series to be treated as owners of such interests in the series (partners) for Federal tax purposes. Thus, as a technical matter, under state law there may or may not be “member-managers” of the series to sign the returns. Thus, we recommend that the regulations provide clarification that one who is associated with the series and has appropriate agency authority to carry out the business of the series or authority to sign the return (under state law, the series operating agreement or otherwise) is an acceptable signer.\(^{38}\)

In accordance with section 6063 and Regulation section 1.6063-1, we recommend that a member of the series organization who is associated with a series be recognized as a valid signer unless he is challenged as not having authority to sign the return.\(^{39}\)

Finally, we recommend that a person who is neither a member associated with a series or a manager in respect of the series but who is a manager of the series organization, or an officer of the series itself, be a permitted signer. The manager of the series organization, if authorized to sign on behalf of the series, is likely to have adequate knowledge and information to ascertain the correctness of the tax return and attest to its accuracy. Moreover, there may not be a member associated with the series who has such knowledge. Although every member is treated as a manager for signing purposes in the case of an LLC without managers, in the case of a series, it

\(^{37}\) \textit{Id.} at 145-147.

\(^{38}\) \textit{See} recommendation a, above.

\(^{39}\) \textit{See} recommendations b and c., above.
may not be clear who is, or whether there is, a member associated with the series. The nature of series organizations and their series is such that we believe an exception to the requirement that the signing manager must itself be “associated with” the series (as an owner) is appropriate.

Similarly, we recommend that an authorized officer of the series be permitted to sign, just as a corporation’s authorized officers may sign Form 1120 tax returns. The statute and regulations pertaining to partnerships (section 6063 and Regulation section 1.6063-1) have long restricted permissible signers as being partners only. We respectfully recommend modification of those regulations to include signers who are not partners. Although section 6063 refers to partners as being authorized to sign returns, it does not use language of limitation. We believe the expansion of acceptable signers by regulation (or administrative procedure) is appropriate in this situation.

Similarly, it would be useful if the criteria for the selection of the tax matters partner (a “TMP”) for a series treated as a partnership subject to section 6231 were clarified. Section 6231(a)(7) allows a partnership to designate only a general partner as TMP. Regulation section 301.6231(a)(7)-2 provides that only a member-manager of an LLC will be treated as a general partner for purposes of selecting a TMP. Regulation section 301.6231(a)(7)-2(b) provides that an LLC, for these purposes, means an organization (i) formed under a law that allows the limitation of the liability of all members for the organization’s debts and other obligations within the meaning of Regulation section 301.7701-3(b)(2)(ii), and (ii) classified as a partnership for Federal tax purposes. Regulation section 301.6231(a)(7)-2 further provides that, if no member is a manager, each member is treated as a member-manager. Although these rules may be applied by analogy to series treated as partnerships subject to section 6231, clarifying that members for such purposes would include members associated with a series and the role of state law in determining whether a person was a member for such purpose would be useful.

Moreover, it may be appropriate to expressly permit any manager within the series organization to be the TMP of any particular series. Although this approach may depart from the common perception that a TMP must have an interest in the entity it serves, that common perception is not accurate. For example, the TMP can be anyone who is (or is deemed to be) a general partner at the time the designation is made, even if that person was not a partner during the year at issue.\(^\text{40}\) Similarly, a partner who has entered into a settlement and had its partnership items converted to nonpartnership items may remain a TMP.\(^\text{41}\) Thus, there is no requirement that the TMP have an interest in the entity it serves. In the case of a series LLC, it is not unusual for a person to be responsible for the operations of a series, without holding an interest in that particular series. So that both the Service and the series members can utilize the services of the most knowledgeable person, we suggest that the TMP rules expressly permit any manager of the broader series organization to serve as TMP for any series within that broader organization.

\(^{40}\) Reg. § 301.6231(a)(7)-1(b)(1)(ii).

\(^{41}\) Compare I.R.C. § 6231(b)(1)(C) with Reg. § 301.6231(a)(7)-1(l).
5. What should be the required threshold for being “associated with” a series to make a member a partner of a series and property to be an asset of a series for Federal tax purposes?

Although it may ultimately be a facts and circumstances test, we respectfully request that the final regulations provide guidance and examples as to what constitutes “being associated” with a particular series to cause the member to be a partner of the series and to cause property to be an asset of the series for Federal tax purposes.

In the context of partnerships in which capital is a material income-producing factor, the statute and the regulations clarify who is treated as a partner in a partnership.

Section 704(e)(1) provides that a person shall be recognized as a partner for Federal tax purposes if that person owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person. Regulation section 1.704-1(e)(1)(iii) provides that a donee or purchaser of a capital interest in a partnership is not recognized as a partner under the principles of section 704(e)(1) unless such interest is acquired in a bona fide transaction, not a mere sham for tax avoidance or evasion purposes, and the donee or purchaser is the real owner of such interest. For a transferee to be recognized as a partner, a transferor must vest dominion and control of the partnership interest in the transferee. The existence of such dominion and control in the transferee is to be determined from all the facts and circumstances.

Regulation section 1.704-1(e)(2) lists a series of factors to be considered in determining whether a partner is, in fact, the real owner of a capital interest in a partnership. The factors to be considered, which are illustrative rather than exhaustive, fall into five categories: retained controls (including retention of control of assets essential to the business), indirect controls, participation in management, income distributions, and conduct of partnership business. The first two factors indicate lack of ownership and the last three factors indicate ownership.

Applying the rules of Regulation section 1.704-1(e)(2) in the context of a series, a member should be treated as a partner of the series if a member is identified as being associated with a series, is able to dispose of its interest in the series separately from any interest in the remaining assets of the series organization or other series of the series organization, and receives an allocation and right to distributions of profits from the series without reduction for losses from the series organization or other series. On the other hand, merely receiving a special allocation of profits from the series organization derived from assets held by a series should not make members sufficiently “associated with” the series to make the members partners of the series rather than of the series organization.

42 The subsection heading of section 704(e) is “Family Partnerships,” but the rules of the section and the underlying regulations are applicable to partnerships generally. *TIFD II-E Inc. v. United States*, 660 F. Supp. 2d 367 (D.C. Ct. 2009); *Evans v. Commissioner*, 447 F.2d 547 (7th Cir. 1971), aff’g 54 T.C. 40 (1970). While the language of the section heading may be used as an interpretative aid, it will not be so employed as to limit the meaning and purpose of the text. *Maguire v. Commissioner*, 313 U.S. 1, 9 (1941); *Yoke v. Mazzello*, 202 F.2d 508, 510-511 (4th Cir. 1953); *Prudential Ins. Co. of Am. v. United States*, 319 F.2d 161, 166 (Ct. Cl. 1963); *John Bell Keeble, Jr. v. Commissioner*, 2 T.C. 1249, 1252-1253 (1943).
The language of being “associated with” is reflective of the provisions of series statutes. As in other areas, state law determines whether a given set of circumstances creates a right or interest; Federal law then determines the Federal tax consequences of the presence or absence of the right or interest. As discussed above, the ownership of a partnership interest for Federal tax purposes is generally determined by whether the partner has the benefits and burdens of ownership of the partnership interest. One would expect that the test for determining the partners of a series for Federal tax purposes would be the same as the test for determining the partners of an entity treated as a partnership outside the context of a series.

Similarly, although the test of whether the assets of a series are protected from the liabilities of another series by being associated with the series may be a question under state law, one would expect that the test of whether for Federal tax purposes assets are property of a series would be determined under the traditional benefits and burdens of ownership analysis developed under Federal common law. Clarification of this issue is particularly important because the Proposed Regulations use the expression “associated with” in Proposed Regulation section 301.7701-1(a)(5)(vi), apparently in a limiting fashion. It is unclear whether the Treasury and the Service intended to limit the ownership of assets of a series for Federal tax purposes to assets associated with the series for state law purposes without regard to whether the series had the benefits and burdens of ownership of assets that were not associated with the series for state law purposes.

6. What is the application of the Proposed Regulations to service organizations?

The Proposed Regulations define a series as a segregated group of assets and liabilities established pursuant to a series statute by agreement of a series organization. This raises a question about series that are in the trade or business of providing services. Such series would generally have contractual rights and receivables, which are assets, that may be segregated and associated with a particular series under a series statute but may have only the contribution of future services by its members in the start-up phase.

Informal comments by representatives of the Treasury at the September 2010 American Bar Association Tax Section meeting in Toronto indicated that it was not the intent of the Treasury to exclude service organizations from the application of the series regulations. It would be helpful if the final regulations allowed the application of the regulations to series that were formed to perform a segregated service or group of services even prior to the time the series had any assets or liabilities.

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43 See, e.g., Drye Family 1995 Trust at 899-900; CCA 199930006 (July 30, 1999).

44 It is well settled that beneficial ownership, not legal title, determines ownership for Federal tax purposes. See, e.g., Ragghianti v. Commissioner, 71 T.C. 346, 349 (1978), aff’d, 652 F.2d 65 (9th Cir. 1981).

7. What tests apply to determine whether a series formed under a statutory trust statute is a business entity?

Although the Proposed Regulations would apply to sometimes cause series formed under statutory trust statutes to be recognized as separate entities for Federal tax purposes, it would be helpful if the final regulations confirmed that the analysis of Rev. Rul. 2004-8646 would be applied at the series level to determine if the series should be treated as a business entity. Rev. Rul. 2004-86 confirmed that a statutory trust with a single class of interests may, under certain conditions, be treated as a trust under Regulation section 301.7701-4(c). In addition, Rev. Rul. 2004-86 provides that a trust will be treated as a business entity if the trustee has the power to (i) dispose of property and acquire new property; (ii) renegotiate a lease with the lessee or enter into leases with tenants other than the initial lessee; (iii) renegotiate or refinance the obligation used to purchase property; (iv) invest cash received in order to profit from market fluctuations; or (v) make more than minor non-structural modifications to the initial property not required by law.

For the sake of clarity, we recommend that the final regulations explicitly state that the tests of Regulation section 301.7701-4(c), and, thus, the analysis of Rev. Rul. 2004-86, will be applied at the series level in regard to any series treated as a separate tax entity under the regulations.47

8. What are the issues related to state and local employment tax?

There are many state and local employment tax issues related to the Proposed Regulations. For example, there is a disconnect in some states for LLCs because check-the-box choices are respected for state income tax purposes but not for state employment tax or state unemployment insurance (“SUI”) contribution purposes. This disconnect can result in anomalies, inconsistent treatment, lack of compliance (knowing or unknowing), and may have other consequences. Because this is an issue for LLCs, it will almost certainly be an issue for series LLCs as well.

For example, until recently, California law did not conform to the check-the-box regulations for employment tax purposes. Thus, an LLC that elected to be taxed as a corporation for Federal tax purposes was still treated as an LLC for California payroll tax purposes. The managing members of the LLC were treated as general partners, not employees, for state payroll tax purposes because the managing members had the authority to control the business of the LLC.


47 In a similar manner, it would be helpful if the final regulations included an example confirming that the classification of a series of a series organization for Federal tax purposes is independent of the classification of other series of the same series organization (e.g., one series classified as a partnership, a second series classified as an association taxable as a corporation, a third series classified as a disregarded entity, and a fourth series classified as a trust).
Moreover, non-managing members of an LLC that was taxed as a partnership for Federal tax purposes were treated as partners not subject to Federal employment taxes, but were treated as employees for California employment tax purposes. These disconnects were corrected in California by legislation enacted in 2010. However, similar disconnects persist in many other states.

Another related issue involves determining the employer of record for SUI and employment tax purposes in the context of a single member LLC (“SMLLC”) that by election or by default is disregarded under the check-the-box regime. The Proposed Regulations do not address this issue with respect to a single member/owner series, even though the check-the-box regulations were amended recently to mandate that the SMLLC itself will be treated as the employer for Federal employment tax purposes, rather than the member.\(^{48}\) We see no reason why the answer should not be consistent with respect to series LLCs.

We respectfully recommend that the final regulations (i) encourage the states to follow, to the extent possible, the check-the-box regulations both for income tax and for employment tax/SUI purposes, to avoid confusion, inconsistent treatment, and lack of compliance, and (ii) conform to the check-the-box regulations regarding the disregarded SMLLC issue mentioned above.

9. **What are the issues related to the transition rules?**

The preamble and Proposed Regulations provide that when the final regulations become effective to treat series as separate entities, pre-existing series organizations must follow separate entity treatment unless they choose to continue properly treating the series not as separate entities (subject to certain conditions), but only so long as a 50% change of ownership of the series organization (or series) does not occur. Among other reasons, taxpayers need to be able to continue separate entity treatment for a pre-existing series because the preamble indicates that the series organization will be deemed to distribute the series to the series owners upon the effective date. If the series organization is a corporation on the effective date of the final regulations, any such deemed distribution would be a recognition event to both the corporate series organization and the shareholders, unless sections 355 and 368(a)(1)(D) apply to the deemed incorporation and distribution of the series. The preamble does not indicate that any special consideration will be accorded to insure that section 355 will apply.

Therefore, pre-existing series organizations will have to prepare for the adoption of the regulations by analyzing whether section 355 will apply. If they determine that it will not, then they must plan to continue the prior treatment as not separate entities, if proper. However, at any time that such series organization (or series) experiences a 50% change of ownership relative to its September 14, 2010, ownership, the deemed incorporation and distribution will occur, without any exception. This means that if a series organization wants to maintain the prior non-separate entity treatment, it must effectively freeze its membership.

\(^{48}\) See Reg. § 301.7701-2(c)(2)(iv).
Whether freezing the membership of the series organization would be a hardship or not will depend on the particular circumstances of the series organization. However, deeming a taxable distribution as to existing series organizations upon this regulatory change seems harsh. We respectfully request that the government consider ways to make more certain the application of section 355 when a pre-existing series organization wants to operate under the new rule, including (i) insuring that the series be deemed incorporated for tax purposes if the series is deemed distributed, (ii) ameliorating the five-year-trade-or-business requirement of section 355(b), and (iii) in the case of a deemed distribution upon a 50% change of ownership, providing some presumption that the requirements of section 355 are no less likely to be satisfied than if the distribution had occurred on the effective date.

We are concerned that the uncertainty created by (i) the deemed election without any formal election to continue treating the series as not separate, and (ii) the possibility of a deemed distribution years later upon a change of ownership introduce administrability problems that may be unwarranted. Perhaps the change-of-ownership rule could be limited to a fixed period such as five years and perhaps series organizations should be required to opt out of the regulation well in advance of the date for reporting the tax consequences of the deemed distribution.

**Conclusion**

We applaud the Treasury and the Service for taking a step forward in clarifying the Federal tax treatment of series formed under series statutes. We hope that the Treasury and the Service continue to clarify the area by finalizing the Proposed Regulations and that these Comments are helpful as the Treasury and the Service finalize the Proposed Regulations.