¶ A.28 SERIES LLC AGREEMENT WITH SEPARATE LLC SERIES AGREEMENT

Sample Agreement A.28 is for a newly formed Delaware limited liability company that establishes an LLC series of interests pursuant to Section 18-215 of the Delaware Limited Liability Company Act.[20] This sample LLC Agreement constitutes a "master agreement" that provides for the issuance of one or more LLC series and contains provisions that apply to each series. The master agreement provides for the issuance of separate series that will be governed by specific provisions set forth in a separate "series agreement." Exhibit A is a sample of what a separate "series agreement" might contain.

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¶ A.29 OIL AND GAS TAX PARTNERSHIP AGREEMENT

Oil and gas companies frequently agree to jointly develop and fund leases held by one or both of the companies. These joint operations are sometimes implemented pursuant to agreements styled as "Participation Agreements." Quite often, one of the parties to the agreement will own and "contribute" one or more oil and gas leases to the joint undertaking, while the other party agrees to fund a disproportionately larger part of the cost of exploration and development with respect to the "contributed" leases (i.e., agrees to "carry" the other party). It is important to note that the arrangements evidenced by these Participation Agreements do not create a separate legal entity. Rather, the parties directly hold undivided interests in the leases and the leases are explored and developed pursuant to standard oil and gas joint operating agreements. The parties to the arrangement, however, often desire to treat their undertaking as a "tax partnership" (i.e., a partnership for federal and state income tax purposes). Such arrangements almost always fit within the federal income tax definition of a "partnership," and thus the parties' desire to operate the arrangement as a partnership for tax purposes can be accommodated.

Sample Agreement A.29 is intended to be attached as an exhibit to a Participation Agreement similar to one described above. Because the "partnership" will only be a partnership for tax purposes, the provisions of the "tax partnership" agreement must reflect the fact that the parties directly hold their interests in the underlying properties that they will explore and that they will directly develop these leases pursuant to joint operating agreements they enter into in their individual capacities (and sometimes with one or more third parties), as well as the "fiction" that a partnership has been formed by the parties to which they have contributed (or will contribute) oil and gas leases and the funds necessary to explore and develop those leases.

This agreement assumes (1) that Partner 1 owns and will contribute certain oil and gas leases, (2) that Partner 1 and Partner 2 will jointly fund the exploration and development of the leases, but that Partner 2 will fund a disproportionately larger share of the exploration and development costs (i.e., Partner 2 will have a "carry obligation"), and (3) that each partner will have a percentage interest in the partnership that reflects the partner's undivided interest in the oil and gas leases that, as a matter of non-tax state law, they will own. The exact percentage interests of the partners will, of course,

be negotiated between them and will reflect their respective obligations to fund the exploration and development costs associated with the leases. It is important that these percentage interests be respected so that the allocation of items of deduction and loss to the partner funding such costs will be recognized for tax purposes.

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¶ A.30 SINGLE-MEMBER DELAWARE LLC AGREEMENT FOR A BANKRUPTCY REMOTE VEHICLE

Sample Agreement A.30 is a Delaware LLC agreement that is intended to be used for a single-member LLC formed for a limited purpose and designed to be bankruptcy remote vehicle, separate from its sole member and its member's affiliates. Bankruptcy remote vehicles are often formed in connection with financing transactions, when third parties holding obligations of the LLC insist on the LLC being a bankruptcy remote, limited purpose company in order to protect their creditor position in the LLC. Specifically, third party creditors will often insist on provisions that are designed to preclude the LLC's assets being substantively consolidated with those of its member in a bankruptcy of either the member or its member's affiliates. Consistent with this framework, this sample agreement anticipates that the business purpose for which the LLC is being formed is a limited one and that the powers granted to the LLC will be limited to those necessary to allow the LLC to operate consistent with this limited business purpose. The agreement also provides for express limitations on the LLC's ability to engage in certain actions, and contains a traditional and robust set of separateness covenants with which the LLC is required to comply in order to ensure that it will in fact be bankruptcy remote from its member and its member's affiliates. In addition, the agreement provides that the LLC will be managed by a board of managers, including an independent, special manager who must consent to any action to be taken by the LLC that would result in its dissolution or liquidation as well as the institution of bankruptcy proceedings with respect to the LLC.

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¶ A.34 DELAWARE LLC AGREEMENT FOR USE WITH TIER-STRUCTURED REAL ESTATE PROJECTS—TARGETED CAPITAL ACCOUNTS

Sample Agreement A.34 is the same agreement as Sample Agreement A.32 except that it employs a "targeted capital account" approach in Section 2(A) of Exhibit 1 for allocating the income, gain, deductions, and loss of the Company to its Members. To illustrate this approach, a more complex distribution scheme is posited. This approach to allocations is described and discussed in ¶ 5.05[2] (The Forced Allocation Technique).

This approach is utilized when partners desire to have the cash distribution provisions of their partnership agreement govern the manner in which the economic benefits and burdens of the entity are shared. Here, the provisions of Section 6.2

govern the manner in which the Members will share the cash distributions made by the Company, including upon liquidation of the Company pursuant to Section 11.2(a)(iv).

As with any targeted capital account allocation scheme, the allocation provisions attempt to cause the partners' capital accounts to equal the amount that would be distributed to the partners if the partnership sold all of its assets for their then Gross Asset Value, paid all the debts of the partnership, and distributed the remaining cash of the partnership to the partners pursuant to the cash waterfall distribution provisions. If, however, there are insufficient items allocable to the partners to "force" the capital accounts to equal the amounts the partners would receive pursuant to the cash waterfall provisions, the cash waterfall provisions--and not the positive capital account balances—determine the rights of the partners in liquidation. Section 11.2(a)(iv) attempts to "force" the final Capital Accounts of the Members to equal the amounts to be distributed to each of them pursuant to Section 6.2 in liquidation of the Company but, as noted, the failure of the Capital Accounts to equal the amounts to which the Members are entitled to receive pursuant to Section 6.2 has no effect on the members' rights to receive the cash distributions mandated by Section 6.2.

The specific allocation provisions set forth in Section 2(A) of Exhibit 1 are generally the same as those used in Exhibit 5-23 in Chapter 5. That is, the beginning of the year Capital Accounts of the Members are adjusted for all contributions and distributions made during the Allocation Year, as well as any special allocations (i.e., required Section 704(b) regulatory allocations) made for the current and all prior Allocation Years, and then allocates the Profits or Losses for the Allocation Year to the Members in a manner that, to the extent possible, causes the Capital Accounts of the Members to equal the amounts they would receive in a liquidation of the Company. As in the Exhibit 5-23 provisions, the allocation provisions of Section 2(A) take into account each Member's share of any Company Minimum Gain and Member Nonrecourse Debt Minimum Gain in order to not overstate the "target" Capital Account of the Member.