

UNDERWRITING SNAPSHOTS: **The Future Is Near**

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Remote Online Notarizations (RON)





BRINGING REMOTE ONLINE NOTARY INTO FOCUS

eClosing Laws

E-SIGN

- Electronic Signatures in Global and National Commerce Act (2000)
- Federal law

UETA

- Uniform Electronic Transaction Act (1999)
- State law enacted by 47 states and Washington, D.C.

URPERA

- Uniform Real Property Electronic Recording Act (2004)
- State law enacted by 33 states plus Washington, D.C.

RULONA

- Revised Uniform Law on Notarial Acts (2010, 2016, 2018)

Current Status of Alabama Electronic Signatures

- **Alabama Code Section 8-1A-1 Uniform Electronic Transactions Act**
- **Alabama Code Section 8-1A-7 Legal Recognition of Electronic Records, Signatures and Contracts**
- **Alabama Code Section 8-1A-11 Notarization and Acknowledgment**

Current Status of Alabama Electronic Recording

- **Alabama Code Section 35-4-120 Alabama Uniform Real Property Electronic Recording Act**
- **Alabama Code Section 35-4-122 Validity of Electronic Documents**
- **Alabama Code Section 35-4-123 Recording of Documents**

Types of Closings

Traditional Wet Signing	eClosing: “Hybrid Closing”
<ul style="list-style-type: none">• In-person• 100% paper documents with wet signatures• In-office, “mobile notary”, or “mail away”	<ul style="list-style-type: none">• In-person• Some paper documents• Some digital documents with eSignatures• In-office or “mobile notary”
eClosing: “In Person Digital” <i>(a.k.a. “In Person eClosing”)</i>	eClosing: “Online Notary” <i>(a.k.a. “Webcam”, “Remote”)</i>
<ul style="list-style-type: none">• In-person, face-to-face• 100% digital documents with eSignatures• In-office or “mobile notary”	<ul style="list-style-type: none">• <u>NOT</u> in person• Notary public appears before signer via webcam• 100% digital documents with eSignatures

Types of Notary

- ✓ **Traditional** - Wet sign on paper conducted in person
- E-Notary** – Electronic signature on an electronic document conducted in person
- Remote Online Notary (RON)** – Electronic signature on an electronic document conducted via two-way audio visual communication.

Remote v. E-Notary

- Electronic Notary Statutes are more prevalent than Remote Notary Statutes.
- Electronic Notary (E-Notary) is the notarization of documents in person, but on a screen rather than paper.
- The only difference from a traditional notary is that the notarization is on a screen. Parties must still be in the physical presence of each other.
- Makes for quicker recording in jurisdictions with e-recording.
- Remote Online Notary (RON) is where the notary and the signatory are in different physical locations.
- RON allows a party to get a document notarized at any time.

Remote Notary

- The Notary and the party are in different places
 - An electronic connection is used for the notary to view the parties and the signatures.
 - Various technologies are used to prove the identity
 1. Using data in the public domain.
 2. Birthdates.
 3. Prior addresses.
 4. Answers to questions given earlier in the process.

Benefits of eNotarization & RON

Benefits of eNotarization

- Offers a convenient way to sign documents.
- Provides a higher level of security than paper-based notarizations
- Creates new efficiencies in processes and systems
- Helps businesses “go green” by eliminating the need to print and store paper documents
- Decreases the time needed to complete notarization tasks
- Reduces errors such as omitted or illegible Notary Seals
- Achieves measurable cost savings

Benefits of RON- In addition to the benefits noted for eNotarization

- Allows documents to be notarized on demand anytime and anywhere
- Enables businesses to offer notarization services to clients from a central location (???)
- Provides a more reliable way to verify the identity of signers using knowledge-based authentication
- Prevents forgeries by requiring the Notary to archive the audio-video recording of the entire notarization

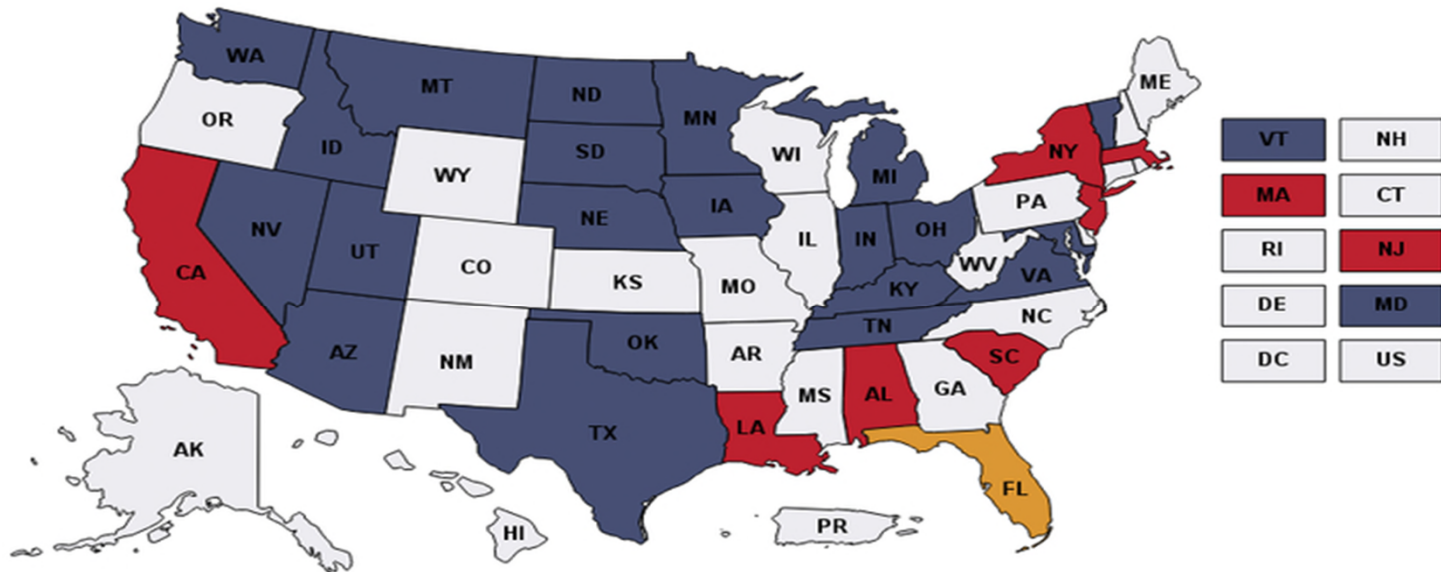
Current Status of Remote Notary Statutes




- 22 states have passed Remote Online Notary Legislation.
- This number is changing daily.
- Currently, only Notaries in 5 of these states are able to perform remote notarizations: Virginia, Montana, Texas, Nevada and Minnesota. The remote notarization laws enacted by the rest of the states have not taken effect yet - waiting for the signature of the Governor or on implementation of regulations.
- Alabama SB359 was introduced on April 30, 2019 but was not passed in this legislative session.

REMOTE ONLINE NOTARIZATION – LATEST NEWS

Read the latest news related to Remote Online Notarization

- May 24, 2019: **Nebraska Legislature approves RON bill (LB-186). UPDATE 6/3: Governor signs bill into law.**
- May 20, 2019: **Proposed RON legislation (AB-4076A) in New York is amended to align more closely with industry approach and the laws of other RON states.**
- May 13, 2019: **Maryland enacts RON legislation (SB-678).**
- May 9, 2019: **Oklahoma enacts RON legislation (SB915).**
- May 2, 2019: **Florida Legislature passes RON legislation (HB-409).**



Key	
	States with enacted RON laws
	States where RON bills have passed but have not been signed
	Other states in session with active RON bills

Available Technology

- Notary Specific
 - Notarize.com – began operations in Virginia
 - Pavaso- specific to the lending industry; already doing electronic notaries in states where it is allowed.
 - Enotarynow.com; Notarycam.com-New companies evolving quickly; mortgage companies, like Rocket Mortgage, developing private systems.

Model Statutes / Drafting Issues

- ALTA and MBA have created a model statute (TX and NV laws used to help draft the model)
- Private corporations are leading the charge in some states
 - MN Statute was in process initiated by private notarization companies before industry partners got involved.
 - MN created a study committee and lender and the title industry expressed concern.
 - Private industry most interested in a consistent set of standards across states to make technology more universal.
 - Private companies have the technology ready to go and therefore don't want to make significant changes in order to work in multiple states.

ALTA/MBA Model RON Legislation

MBA-ALTA model legislation was released 12/19/17 and is largely based on the Texas model.

A checklist for conforming laws has also been published to assist state land title associations, state mortgage bankers' associations, and other interested organizations and persons in reviewing any proposed legislation for remote online notarization. Although RON legislation can take many forms, there are certain essential concepts and features that should be present in order to be consistent with the MBA-ALTA Model Legislation for Remote Online Notarization.

THREE PRIMARY QUESTIONS

- 1. *Mandatory Disclosure:*** Does the proposed legislation require disclosure of the fact of remote online notarization in the notarial certificate? **Sec. 8(4).**
- 2. *Multifactor Authentication:*** Does the proposed legislation require identity to be verified through the following processes using public and private/proprietary data sources? **Sec. 8(2)(b).**
 1. Remote presentation of a government-issued credential
 2. Credential analysis
 3. Identity proofing
- 3. *Audio-Video Recording:*** Does the proposed legislation require the creation and retention of an audio-video recording of the notarial act? **Sec. 6(2) through (4).**

Personal appearance and physical location.

- The law needs to be clear that, for notarial acts performed under the state's authorizing RON statute, personal appearance includes both physical appearance and remote online appearance. Sec. 1(1) and Sec. 8(5).
- The law must require the notary to be physically located within the state while performing RON. Sec. 1(2) and Sec. 5.
- The law should allow the principal whose signature is being notarized to be located outside the state at the time of the RON. Special considerations may apply if the principal is physically outside the United States because the act may be forbidden under the laws of the foreign state where the principal is located. Sec. 5(2) and (3) and Sec. 8(1).

Tamper-evident technology.

- The law should require use of tamper-evident technology to assure the integrity of an electronic document notarized remotely online. Sec. 7(2).

Adequate safeguards to protect the public and the parties relying on notarization from identity theft, forgery, undue influence, and fraud.

- **Multifactor authentication should identify the signer through at least two of the following three forms of authentication: (1) what the signer possesses (credentials, e.g., driver's license, passport, military ID card, etc.); (2) what the signer knows (knowledge-based authentication, e.g., questions based on the signer's personal knowledge); and (3) who the signer is (recognition of behavioral and biological characteristics, e.g., facial or fingerprint recognition, retinal scan).**

Multi-Factor Authentication = Passing 2 of 3 Identity Proofing Measures

✓ **Third Party Credential Analysis**

✓ **Knowledge-Based Authentication**

✓ **Biometrics**



3-Ways to Prove Your Identity

✓ **What you have:** a government issued identification card such as a passport or drivers license

✓ **What you know:** answers to questions about you

✓ **Who you are:** biometric data



- **Each RON transaction must be recorded (audio and video).**
- The Model Legislation only requires a recording of the “notarial act” but does not prohibit other portions of the notarial process from being recorded. Rules and regulations may require additional parts of the process to be recorded, such as the signer’s consent to RON and use of electronic signatures, and the credential analysis of the signer’s government-issued identification. While not a complete protection against fraud, recording the RON transaction serves as evidence of attribution (e.g. as a “security procedure” under § 9 of UETA) and as a deterrence of those who may see RON as an opportunity for criminal activity.
- The audio-video recording and electronic journal must be retained for a defined period. The Model Legislation recommends a 10-year retention requirement. **Sec. 6(4)**. Some states have adopted shorter timeframes (e.g. 5 years in Texas and Virginia; 7 years in Nevada).

Mandatory disclosure in notarial certificate.

- **The certificate of acknowledgment must indicate that the document was notarized remotely online and/or through the use of audio-video communication technology. Sec. 8(4). The Secretary of State (or commissioning official) may be given rulemaking authority to provide for modified forms of notarial certificates.**

Recordability of electronically notarized documents.

- The law should provide confidence that an electronic document notarized using RON is recordable in the official land records and that, once recorded, the document will serve as effective constructive notice upon which the public can rely this includes the ability to record an electronically notarized (including RON) document in the official land records regardless of the capability to receive electronic recordings.
- It is desirable to include a “papering-out” provision that allows an electronically notarized document to be recordable if printed-out and certified by a notary to be a true and complete copy of an electronic original. Such a provision would allow recordation of electronic documents in jurisdictions that do not currently accept electronic recordings.

Rulemaking and Standards for RON.

- The law should provide rulemaking authority for the appropriate commissioning official to implement RON. Some states will require a detailed and express delegation of authority listing each area of rulemaking authority; other states may prefer broader grants of authority to the implementing official. Sec. 2
- The law should also allow the appropriate commissioning official to adopt and maintain technical standards for RON. Sec. 3(1)

- **Optional:** The law may confer various specific areas of rulemaking authority on the commissioning official. Such rules may address:
 - Application, qualifications and authority of remote online notaries.
 - Electronic journal. This requirement protects against fraud and other legal challenges; the law should require the notary to use only electronic records (instead of a traditional paper journal) for RON.
 - Any required notice regarding performance of notarial act.
 - Standards for the performance of the notarial act by means of audio-visual communication technology.
 - Approval of audio-visual communication technology, credential analysis technology, and third-person identity proofing technology.

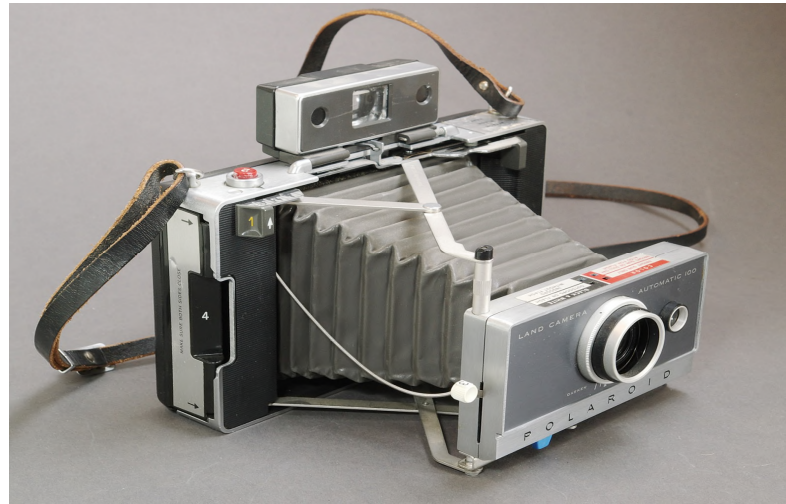
- Procedures for RON including remote presentation, credential analysis, third-person identity verification and identity proofing.
- Requirements or procedures to approve providers of communication technology, credential analysis technology, or third-person identity proofing technology.
- Fees for the remote online notary public application; permissible fees to be charged by the notary for RON.
- Acceptable forms of notarial certificates for any notarial act that is a RON.
- Procedures and requirements for the termination of remote online notary commission.
- Record retention procedures and requirements.
- Standards for the third-party repositories for the retention of the audio-video recording of the notarial act.

Other Considerations

- **Unauthorized access.** Access to electronic notarial records, electronic signatures and seal should be kept secure from unauthorized access or use. Sec. 6(3), Sec. 7(1) and (3). Notaries public and RON technology vendors should be required to take reasonable precautions in the preparation and transmission of electronic records. Sec. 8(3). The law may consider granting access to the records to a title agent, settlement agent, or title insurer that has engaged the notary for purposes of a real estate transaction.
- **Repository and custodian provisions.** Notaries should be allowed to designate a third-party repository or custodian to hold the recording and electronic journal on their behalf. Sec. 6(4)(a).

ALABAMA DATA BREACH NOTIFICATION ACT OF 2018

Does the Alabama Data Breach Notification Act of 2018
apply to you?



SECTION 2: SELECTED DEFINITIONS

Breach of Security or Breach – Unauthorized acquisition of data in electronic form containing sensitive personally identifying information.

Data in Electronic Form – Any data stored electronically or digitally on any computer system or other database, including, but not limited to, recordable tapes and other mass storage devices.

Covered Entity – A person or entity that acquires or uses sensitive personally identifying information.

Individual – Any Alabama resident whose sensitive personally identifying information was, or the covered entity reasonably believes to have been, accessed as a result of the breach.

Third-Party Agent – An entity that has been contracted to maintain, store, process, or is otherwise permitted to access sensitive personally identifying information in connection with providing services to a covered entity

SECTION 3: REASONABLE SECURITY MEASURES

- **Requires covered entities to establish reasonable security measures to protect against a breach and provides guidance for doing so.**
- **Reasonable measures means security measures practicable for the covered entity**
- **Section 3 does not trigger an enforcement mechanism. Penalties are imposed by the Act only for violations of the required Notice Provisions.**

SECTION 4: GOOD FAITH INVESTIGATION OF A BREACH

- Requires a covered entity that has or may have suffered a breach to conduct a “good faith and prompt investigation” to include whether the breached information is reasonably likely to cause substantial harm to the individuals whose information was lost.
- Provides factors to consider in determining whether the breach is “reasonably likely to cause substantial harm”.

SECTION 5: NOTICE TO INDIVIDUALS

Requires a Covered Entity that has determined it has suffered a breach of information that is “reasonably likely to cause substantial harm” to give notice of the breach to the affected individuals “as expeditiously as possible and without unreasonable delay”. Except as provided in subsection (c), a covered entity must provide written notice including the factors set forth in Section 5 within 45 days of its receipt of Notice from a third party agent that a breach has occurred, or upon the covered entity’s determination that a breach has occurred and is “reasonably likely to cause substantial harm”.

SECTION 5: NOTICE TO INDIVIDUALS (con't.)

Direct Notice is required to be sent to the mailing addresses of the affected individuals in the records of the covered entity, or by email notice sent to the email addresses of the individuals in the records of the covered entity.

SECTION 5: NOTICE TO INDIVIDUALS (con't.)

- **Substitute Notice** may be provided if direct notice to affected individuals is not feasible because of excessive cost, lack of sufficient contact information for affected individuals, or where the affected individuals exceed 100,000 persons. Substitute Notice must include both a conspicuous notice on the Internet website of the covered entity for a period of thirty (30) days, and notice in print and in broadcast media where the affected individuals reside. An alternative form of Substitute Notice may be used with the approval of the Attorney General.

SECTION 5(f): RETENTION OF RECORDS OF INVESTIGATION AND DECISION

Requires an entity that determines that Notice is not required because the information breached is not “reasonably likely to cause substantial harm” to document its determination in writing and to retain those records for at least five(5) years.

SECTION 6: NOTICE TO THE ATTORNEY GENERAL

- Requires written notice to the Attorney General as expeditiously as possible and without unreasonable delay if the breach of information affects more than 1,000 persons.
- Notice is required within forty-five(45) days of the covered entity's receipt of Notice from a third party agent that a breach has occurred, or upon entity's determination that a breach has occurred and is "reasonably likely to cause substantial harm".

SECTION 7: NOTICE TO CONSUMER REPORTING AGENCIES

Requires a covered entity that suffers a breach affecting more than 1,000 persons to also notify "all consumer reporting agencies".

SECTION 8: BREACH OF A THIRD PARTY AGENT

- **Requires a third-party agent that suffers a breach to notify the covered entity of the breach within ten(10) days of the determination of the breach or reason to believe the breach occurred.**
- **After receiving notice from a third-party agent, the covered entity must provide notices to affected individuals, the Attorney General and consumer credit reporting agencies as set forth in Sections 5, 6 and 7 of the Act.**
- **A covered entity may enter into a contractual agreement with a third-party agent whereby the third-party agent agrees to handle the notifications required by the Act.**

SECTION 9: PENALTIES AND ENFORCEMENT

- **Section 9(a) provides that a violation of this Act is a violation of the Alabama Deceptive Trade Practices Act (DTPA), but is not a criminal offense under the DTPA. Only violations of Section 5, 6, and 7 of the Act (the notice provisions only) are considered violations of the DTPA.**
- **Provides that a violation of this Act does not create a private cause of action under the DTPA. However, this section also states that “nothing in this Act may otherwise be construed to affect any right a person may have at common law, by statute or otherwise.” (See also Section 9 (b) (2) below.)**

SECTION 9: PENALTIES AND ENFORCEMENT (cont.)

- Under Section 9 (a), if a failure to notify under this Act is done “willfully or with reckless disregard”, the penalty provisions under the DTPA will apply. However, civil penalties assessed under Section 8-9-11 Code of Alabama 1975, shall not exceed \$500,000 per breach.

SECTION 9: PENALTIES AND ENFORCEMENT (cont.)

- Under Section 9 (b) an entity that continues to fail to take reasonable action to comply with the notice provisions of this Act can be fined up to \$5,000 per day.
- Section 9 (b)(2) allows the Attorney General to bring an action on behalf of affected individuals but only for actual damages. This provision may allow the Attorney General to pursue an action against an entity for the breach itself – rather than for a failure to notify. However, damages again are limited in such an action to “actual damages”.

SECTION 10: DISPOSAL OF SENSITIVE RECORDS

- **Requires an entity to take “all reasonable measures” to properly dispose of sensitive records containing personally identifying information.**
- **Section 10 does not trigger an enforcement mechanism. Penalties are imposed by the Act only for violations of the required Notice Provisions.**

SECTION 11: EXEMPTION OF ENTITIES COVERED BY FEDERAL STANDARDS

An entity covered by federal data breach laws, rules, regulations, procedures and guidelines is exempt from this Act provided it maintains procedures pursuant to these federal standards, provides Notice to affected individuals pursuant to said standards, and timely provides a copy of the Notice to the Attorney General when the number of individuals the entity notified exceeds 1,000.

SECTION 12: EXEMPTION OF ENTITIES COVERED BY STATE STANDARDS

Entities covered by state laws, rules, regulations, procedures or guidelines that are at least as thorough as the notice requirements of this Act are exempt from this Act on the same basis as entities covered by federal standards are exempted under Section 11 above.

EFFECTIVE DATE

June 1, 2018



Series LLC's



You have been asked to insure a deed from an Alabama Series LLC to a Purchaser.

What should you do first?

IN GENERAL

Set forth below is a portion of ORT's internal bulletin on Series LLC's:

A Series LLC is a unique form of LLC which, when legally formed, allows a master limited liability company to provide for segregation of its assets and liabilities into one or more “series”, all operating under the umbrella of a master limited liability company. Series LLC's are created by statute and, without sufficient enabling legislation, cannot hold an interest in real property. Only natural persons and those business entities with explicit statutory authority may hold title to real property.

A close review of the statutes governing Series LLCs is therefore required to determine if such an entity is:

- a) legally authorized to hold and convey real property interests in the state of its formation; and**
- b) if the transaction involves a series operating in a foreign state, the statutes of the foreign state specifically provide that a non-domestic Series LLC is legally capable of holding and conveying real property interests.**

To be properly created, unless statutorily authorized by other means, a master series LLC must be filed with the Secretary of State for the state in which the LLC has been formed. Simply registering a Series LLC does not mean the Series LLC is a separate entity or otherwise legally capable of holding a real property interest. A thorough analysis of the pertinent state statutes, for both the state of the LLC's formation and the state where the insured property is located, is required and must be provided to the Corporate Legal Department for review.

For a Series LLC to hold an insurable interest in real property, the following minimum conditions must be met:

- 1) The state where Series LLC is purported to be organized (Domestic State) must authorize the creation and use of a Series LLC;**
- 2) The Domestic State statutes must provide that a Series LLC is capable of holding title to real property;**
- 3) The Series LLC must be registered in the Domestic State's Secretary of State office, unless the Domestic State's statutes specifically provide for its formation by other means;**

- 4) If the state where the property is located is not the state of formation, the foreign state's statutes must clearly authorize a non-domestic Series LLC to do business in that state; and**

- 5) If the state where the property is located is not the state of formation, the foreign state's statutes must specifically allow a non-domestic Series LLC to hold title to real property.**

A Series LLC may be difficult to recognize by its name alone. LLCs are often formed with the same name and distinguished by a sequential numbering system and Series LLCs are typically numbered in the same way. Consequently, an LLC with a number or Roman numeral in its name should prompt further inquiry into the status of the entity as a Series.

IN ALABAMA

The Alabama Uniform LLC statute authorizes domestic Series LLC's if they are provided for in the Certificate of Formation of the master LLC, and otherwise comply with Section 10A-5A-11.02(b) of the Alabama Code. Section 10A-5A-1.04 provides that domestic Series LLC's can hold title to real property in Alabama. However, there are more underwriting issues involved with insuring title to Alabama property held by a domestic Series LLC than just the threshold determination of whether or not the certificate of formation for the master LLC provides for Series LLC's.

A few issues that immediately come to mind are:

1) the need to review the written company agreement of the master LLC for compliance with Section 10A-5A-11.02 (b), any separate written company agreement for the Series LLC, and any other documents pertaining to the Series LLC for all terms, conditions, limitations, prohibitions, etc. regarding the creation and operation of the Series LLC, including maintenance of separate records for the assets of that Series, and its ability to hold title to real property;

(2) title to the real property to be insured must be conveyed into a properly created and identifiable domestic Series LLC by a recorded deed. The master LLC should be referenced somewhere in the body of the deed conveying title to the domestic Series LLC; and

(3) the need to determine if there are any recorded liens against the master LLC as well as the Series LLC, and if any, whether the recorded liens against the master LLC attach to the real property of the Series LLC. Liens against other Series LLCs of the master LLC could also be a problem if the provisions of Section 10A-5A-11.02 (b) have not been met.

CODE OF ALABAMA

Section 10A-5A-1.04

- (a) A limited liability company is a separate legal entity. A limited liability company's status for tax purposes shall not affect its status as a separate legal entity formed under this chapter.**
- (b) A limited liability company shall possess and may exercise all the powers and privileges granted and enumerated by Chapter 1 or by any other law or by its limited liability company agreement, together with any powers incidental thereto, including those powers and privileges necessary or convenient to the conduct, promotion, or attainment of the business purposes, or activities and affairs of the limited liability company.**

Section 10A-5A-1.04 (cont.)

(c) A limited liability company may carry on any lawful activity, whether or not for profit.

(d) A series established under this chapter has the power and capacity, in the series' own name, to:

- (1) sue and be sued;
- (2) contract;
- (3) hold and convey title to assets of the series, including real property, personal property, and intangible property; and
- (4) grant liens and security interests in assets of the series.

Section 10A-5A-11.01

Series of assets.

(a) If a limited liability company complies with Section 10A-5A-11.02, a limited liability company agreement may establish or provide for the establishment of one or more designated series of assets that:

(1) 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

(2) has a separate purpose or investment objective.

(b) A series established in accordance with subsection (a) may carry on any activity, whether or not for profit.

Section 10A-5A-11.01 (cont.)

(c) After a person is admitted as a member of a limited liability company in accordance with Section 10A-5A-4.01, a member is associated with a series of the limited liability company:

- (1) as provided in the limited liability agreement;**
- (2) as the result of a transaction effective under Article 10; or**
- (3) with the consent of all members associated with that series.**

Section 10A-5A-11.02

Enforceability of obligations and expenses of series against assets.

(a) Subject to subsection (b):

- (1) The debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to a 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 thereof; 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 thereof shall be enforceable against the assets of a series.**

Section 10A-5A-11.02 (cont.)

(b) Subsection (a) applies only if:

- (1) The records maintained for that series account for the assets of that series separately from the other assets of the limited liability company or any other series;**
- (2) the limited liability company agreement contains a statement of the effect of the limitations provided in subsection (a); and**
- (3) the limited liability company's certificate of formation contains a statement that the limited liability company may have one or more series of assets subject to the limitations provided in subsection (a).**

Section 10A-5A-11.03

Assets of series.

- (a) Assets of a series may be held directly or indirectly, including being held in the name of the series or in the name of the limited liability company.**
- (b) If the records of a series are maintained in a manner so that the assets of the series can be reasonably identified by specific listing, category, type, quantity, or computational or allocational formula or procedure, including a percentage or share of any assets , or by any other method in which the identity of the assets can be objectively determined, the records are considered to satisfy the requirements of Section 10A-5A-11.02 (b)(1).**