

DRAFT
FOR DISCUSSION ONLY

**SERIES OF UNINCORPORATED BUSINESS
ENTITIES ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

November 7 - 8, 2014 Drafting Committee Meeting

With Reporter's Introductory Note and Preliminary Prefatory Note

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October 23, 2014

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ENTITIES ACT**

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SERIES OF UNINCORPORATED BUSINESS ENTITIES ACT

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1 **Reporter’s Introductory Note**

2
3 The first reading of the Series of Unincorporated Business Entities Act (“SUBE”) took place at
4 the 2014 Annual Meeting in July, in Seattle. The first reading provoked extensive and spirited
5 discussion, which was at times quite skeptical.
6

7
8 Nature of the Draft
9

10 From that discussion, several points became apparent. The next draft would have to:

- 11
- 12 • take a fundamentally different approach, including:
 - 13 ○ being a stand-alone act:
 - 14 ▪ in the nature of a junction box (like META¹);
 - 15 ▪ applicable to various types of unincorporated entities as determined by
16 each enacting state;
 - 17 ○ having a defined term to refer generically to an organization that has in place
18 at least one protected series; and
 - 19 ○ eschewing the “definition by substitution” approach proffered in Part 2 of the
20 2104 Annual Meeting Draft; and
 - 21 • provide for improved transparency with regard to:
 - 22 ○ the existence of protected series;
 - 23 ○ the relationship of a protected series to the organization that established the
24 series; and
 - 25 ○ the association of property with each protected series.
- 26
27

28 The New Draft as a First Draft
29

30 Given these fundamental changes the November 2014 Meeting Draft (the “Draft”) has been
31 drafted and should be addressed as a first draft – i.e., a starting point for discussion.² The Draft
32 adopts the term “series organization” (consonant with the proposed Treasury Regulations on
33 series); attempts to address each major issue considered by the Drafting Committee (the
34 “Committee”); and makes choices as to how to resolve each issue. On many issues the Draft
35 does not follow a Committee consensus, because none exists. With one exception, the Draft opts
36 always in the direction of greater transparency and precision.
37
38

¹ Model Entity Transactions Act (2007) (Last Amended 2013).

² Because the Draft is merely a starting point, it has not yet been reviewed by the chair of the Drafting Committee, Steve Frost, or the Committee’s liaison from the Committee on Style, John Stieff. With regard to Style issues: (i) it seemed inefficient to take Commissioner Stieff’s time without knowing what, if any, of the Draft’s provisions will emerge from the November meeting; and (ii) in particular, the use of the following words will require adjustment: a(n), the, each, all.

1 The New Defined Term – “In Place”

2
3 The exception concerns the words used to label the relationship of a protected series to the
4 organization that has established the protected series. Some dissension exists within the
5 Committee on this issue, whether the question concerns a proposed term of art or even a
6 colloquial expression. The aversion to the phrase “mother ship” exemplifies the situation, as
7 does the aversion to referring to a protected series as being “within” a series organization.
8

9 The phrase “protected series of a series organization” seems generally acceptable, but that phrase
10 does not fit felicitously into all syntactic contexts. For those contexts, the Draft defines and uses
11 the term “in place”.³ For example, Section 102(7) provides: “‘Foreign series organization’
12 means a foreign organization that has in place at least one foreign protected series”.
13
14

15 The Default Paradigm for a Protected Series

16
17 A uniform business entity act must be self-executing – i.e., workable without the need for any
18 agreement among the participants. As a result, this act must provide a wide range of default
19 rules for the internal affairs of a protected series. The act must also provide rules pertaining to
20 the relationship of a protected series to various third parties (e.g., the filing office, persons
21 seeking to serve process). Because this is a stand-alone act, these rules may not be entity
22 specific.
23

24 For the most part, this Draft addresses this issue by extrapolation, which is best explained by
25 example:
26

27 **SECTION 303. FINANCIAL RIGHTS AND OBLIGATIONS**
28 **PERTAINING TO A PROTECTED SERIES.**

29 (a) Subject to subsection (b), to the extent the organic law of a series
30 organization contains provisions with regard to financial rights and obligations of
31 the series organization, its owners, or persons owning a distributional interest in
32 the series organization, this subsection establishes comparable provisions
33 applicable to a protected series of the series organization and the associated
34 owners and transferees of the protected series.

35 (b) If a protected series has no associated transferable interests, a
36 distribution from the protected series is made to the series organization that has
37 the protected series in place.⁴
38
39

³ For the definition, see Section 102(9).

⁴ Put colloquially, a protected series is largely a Mini-Me of the series organization. (Mini-Me is “the clone of Austin Power's nemesis, Dr. Evil,” <http://www.urbandictionary.com/define.php?term=Mini%20Me> (last visited 10/21/14), in the comedies *Austin Powers: The Spy Who Shagged Me* (1999) and *Austin Powers in Goldmember* (2002). Mini-Me is “Dr. Evil's smaller and more concentrated pure evil protégé.” <http://www.imdb.com/name/nm0873942/> (last visited 10/21/14).)

1 **Prefatory Note – Preliminary**⁵

2
3 The Series Construct

4
5 As provided by statutes in 12 states, the District of Columbia, and Puerto Rico, the series
6 construct involves:

- 7
- 8 • an identifiable set of assets segregated within an unincorporated entity (“a series
9 organization”);⁶
 - 10 • with those assets:
 - 11 ○ comprising a series, empowered to conduct activities in its own name and right;
 - 12 ○ being solely responsible to persons asserting claims pertaining to those assets or
13 activities; and
 - 14 ○ not being responsible to persons asserting claims arising from the assets or
15 activities of the series organization or any other set of assets segregated within the
16 series organization; and
 - 17 ○ with perhaps one or more owners of the series organization associated with the
18 series,⁷ but not necessarily; and
 - 19 • with distributions from the series going to:
 - 20 ○ the unincorporated entity, if no owners are associated with the series; or
 - 21 ○ otherwise, to the owners associated with the series.
- 22

23 Thus, an organization that contains one or more series contains “internal shields” – i.e., asset
24 partitions confining the assets and liabilities of each series to that series alone. These shields are
25 conceptually and practically quite different from the shield that protects the owners of an entity
26 from automatic liability for the entity’s obligations.

27
28 Most series provisions connect to LLC statutes, although the Delaware limited partnership act
29 and the Virginia Business Trust Act also provide for series.

30
31 In contrast, this act will be a stand-alone act, applicable to whatever unincorporated business
32 entities an enacting state decides to include. As a result, the act will rely heavily on definitions
33 from Article 1 of the Uniform Business Organizations Code (2011) (Last Amended 2013).
34 Moreover, because the word “series” has a very different, established meaning with regard to
35 bonds, corporate stock, etc., the act (and the rest of this Prefatory Note) uses the term “protected
36 series.”

37
38

⁵ This Prefatory Note is adopted from the Daniel S. Kleinberger, “Series of Unincorporated Business Entities: The Construct, the Import, the Recent Activity of the Uniform Law Commission, and the Issues on the Table,” XXXI THE LLC & PARTNERSHIP REPORTER 52

⁶ The segregation is not necessarily physical and in some cases could not be.

⁷ Allowing a non-owner to be associated with a series would cause daunting complexity while producing very little (if any) benefit.

- 1 2. Will jurisdictions that have not adopted protected series statutes respect the internal
2 shields of protected series established in other jurisdictions?
3

4 This question concerns choice of law issues that are unlikely to be seen as
5 pertaining merely to an organization’s internal affairs.
6

- 7 3. How does this act make sure (or as sure as possible) that other areas of law will
8 accommodate the protected series construct?
9

10 Bankruptcy law and U.C.C., Article 9 are the most prominent other areas. If
11 bankruptcy law does not respect the internal shields, the shields are worthless.
12 Moreover, if a protected series cannot enter bankruptcy on its own, the situation
13 will be messy at best.
14

15 As for Article 9, that law – not protected series law – determines where to file
16 financing statement on assets associated with a protected series. Moreover,
17 Article 9 requires at least a certain amount of clarity as to the ownership
18 consequences of “associating” assets.
19

20 Other examples: How do foreign registration acts apply to protected series? How
21 does a person make service on a protected series?
22

- 23 4. Given that a protected series has most of the powers of a legal entity and, for liability
24 purposes, is entirely distinct from the series organization and other protected series of the
25 series organization, should a protected series be characterized as an entity or at least a
26 legal person?
27

28 Most protected series statutes duck this “personhood” issue, or approach it
29 obliquely. The Illinois act permits a protected series to be designated as an entity.
30 However, staff of the office of the Illinois Secretary of State report that, although
31 the office does not track this characteristic, they cannot recall such a designation
32 having been made.
33

34 For investment trusts and captive insurance companies, regulations dictate a “non-
35 person” approach. But outside those contexts, the aversion to “personhood”
36 remains unexplained – even though this characterization issue has significant
37 implications under both bankruptcy law and U.C.C., Article 9.
38

39 The issue may also have implications for questions of piercing and reverse
40 piercing and for other areas of law as well – e.g., are protected series separate
41 persons for purposes of conspiracy, aiding and abetting, tortious interference,
42 RICO, etc.?
43

44 In addition, the issue colors discussion of at least two important transactional
45 issues:
46

- 1 • May a protected series participate as a party in a merger or other organic
2 transaction?
3 • May a series be spun off into a separate entity?
4

5 5. What does the public need to know about a protected series?
6

7 This question has several aspects:
8

- 9 • Is a separate public filing necessary to establish each protected series?¹¹
10 • Should the name of a protected series indicate:
11 ○ the name of the series organization that established the protected
12 series?
13 ○ that the protected is a protected series (a “designator”
14 requirement)?
15 • Assuming that the series organization must file an annual/biennial report,
16 should:
17 ○ the report provide information on each protected series of the
18 series organization (e.g., name, agent for service of process); or
19 ○ the requirement apply to each protected series individually?
20

21 6. What does it mean to associate property with a protected series?
22

23 This question has subparts:
24

- 25 • Procedurally:
26 ○ agreed – association requires adequate documentation in the
27 records of the series organization;¹²
28 ○ under discussion – should compliance with any applicable
29 recording statutes be required
30 • Substantively:
31 ○ association means that the protected series owns the assets;¹³ and
32 ○ only assets properly identified as associated with a protected series
33 are protected by the internal shield encompassing the protected
34 series’ assets.¹⁴
35
36

¹¹ As with limited liability companies and partnerships, the foundational document will be by far more important than any public filing regarding *inter se* matters.

¹² “Adequate” raises several important questions, including: (i) what suffices as adequate; (ii) what are the consequences of inadequate documentation, both as to the internal shields and liability *inter se* the organization for the consequences of any resulting failure of the shields; and (iii) who may have access to the records and in what circumstances.

¹³ This result follows from the twin notions of segregated assets and internal shields.

¹⁴ Once a protected series exists, the organization’s assets must also be properly identified.

1 7. How is a protected series managed in the default mode (i.e., absent a contrary
2 agreement)?

3
4 Because a protected series need not have any associated owners, the default rule
5 (and perhaps the inevitable rule in that situation) is management by the series
6 organization.

7
8 What should be the default rule on management when a protected series has at
9 least one associated owner? In particular, should management be by the
10 associated owners, and, if so, what matters require:

- 11 • unanimous consent of associated owners?
- 12 • consent of the organization?
- 13 • consent of all the owners of the organization?

14
15
16 8. What is the relationship of a series organization's foundational agreement to a protected
17 series established by the series organization?

18
19 When an organization establishes a protected series, the organization will have to
20 revise its foundational agreement to reflect the protected series' existence. The
21 revisions might be integrated in the agreement or stated separately in an exhibit or
22 appendix made part of the agreement.

23
24 So long as a protected series has no associated owners, the protected series and its
25 associated assets are subject to the foundational agreement of the series
26 organization just like any other aspects of the series organization. In contrast,
27 associating an owner with a protected series raises many questions pertaining to
28 the foundational agreement, including: (i) interpretative issues; (ii) the default
29 mode consent rule for amending a part of the foundational agreement specific to
30 the protected series (a "series-specific provision"); (iii) issues arising when an
31 amendment to a provision not series-specific (a "generally-applicable provision")
32 has a prejudicial impact on a protected series or its associated owners not felt
33 comparably by the series organization, the owners in general, some other
34 protected series, or owners associated with some other protected series.

- 35 • Interpretative issues:
 - 36 ○ If series-specific provisions have a gap, does an interpreting court
 - 37 fill the gap with reference to:
 - 38 ■ the foundational agreement;
 - 39 ■ the statute governing the series organization;
 - 40 ■ the stand-alone series act?
 - 41 ○ Do special rules of interpretation apply if a series-specific
 - 42 provision conflicts with:
 - 43 ■ a generally-applicable provision;
 - 44 ■ a series-specific provision pertaining to another protected
 - 45 series?
 - 46

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- Issues pertaining to amendments of series-specific provisions:
 - What are the consent rights (if any) of:
 - the owners associated with the protected series?
 - the series organization?
 - the owners not associated with the protected series?
 - May the foundational agreement entirely deny consent rights to the associated owners?
 - Given the many possible externalities of amending series-specific provisions:
 - How, if at all, do the consent rights change if amending a series-specific provision affects the rights of:
 - ~ the organization itself;
 - ~ owners not associated with the protected series;¹⁵
 - ~ another protected series; or
 - ~ owners associated with another protected series?
 - Who makes the determination whether:
 - ~ a provision of the foundational agreement is series-specific; or
 - ~ an amendment to a series-specific provision has a sufficient likelihood of sufficient impact on the organization, owners not associated with the protected series, another protected series, owners associated with another protected series to trigger different consent rights?
- Issues arising from alleged differential impact on a protected series of amending a generally-applicable provision or a series-specific provision pertaining to another protected series:
 - Who makes the determination?
 - What are the consequences?

9. In the default mode, what is the relationship between: (i) a protected series and the series organization; and (ii) if a series organization has established more than one protected series, among the protected series established by the series organization?

This issue includes questions pertaining to fiduciary duties of managers and fiduciary duties (if any) among protected series.

- In the default mode, normal fiduciary duties apply to a person managing a protected series.
 - Normal duties are defined with reference to the act governing the organization.

¹⁵In many cases, an effect on the organization would affect all the non-associated owners as well. However, in some circumstances, the ripples might reach only some of the non-associated owners.

- 1 ○ If a protected series has no associated owners, the normal duties
2 may run directly to the series organization.
 - 3 ▪ But query the rights, if any, of persons holding only
4 transferable interests in a protected series?¹⁶
 - 5 ▪ Query whether a transferee's rights viz a viz a protected
6 series differ depending on whether the transferee is an
7 owner of the organization (even though not associated with
8 the protected series)?
- 9 • Should a protected series be deemed at arm's length from the series
10 organization and any other protected series of the series organization?
 - 11 ○ If so, a protected series may:
 - 12 ▪ compete with the series organization and other protected
13 series;
 - 14 ▪ pursue and take opportunities attractive to the series
15 organization and other protected series; and
 - 16 ▪ buy from and sell to the series organization and other
17 protected series at whatever price "the market may bear."
- 18 • If a series organization is managing more than one protected series, what
19 is the series organization's obligation re:
 - 20 ○ allocating an opportunity to one protected series rather than
21 another?
 - 22 ○ causing one protected series to provide services or sell assets to
23 another?

24
25 10. What are the rights of a person who becomes a transferee of the rights of a person
26 associated with a protected series?
27

28 What is the proper default rule? Should the rule be different depending on
29 whether the transferee is:

- 30
- 31 • an owner of the series organization and associated with the protected
32 series?
- 33 • an owner not associated with the protected series?
- 34 • neither?
- 35

¹⁶ In many instances, the rights would be derivative rather than direct, if they were to exist at all.

1 **SERIES OF UNINCORPORATED BUSINESS ENTITIES**

2 **[ARTICLE] 1**

3 **GENERAL PROVISIONS**

4 **SECTION 101. SHORT TITLE.** This [act] may be cited as the Series of
5 Unincorporated Business Entities Act.¹⁷

6 **SECTION 102. DEFINITIONS.** In this [act]:

7 (1) “Associated” means, with respect to:

8 (A) a “distributable interest”, a distributable interest pertaining to a particular
9 protected series;

10 (B) an owner, an owner that under Section 302 has become associated with a
11 particular protected series; and

12 (C) property, property that under Section 301 has become associated with a
13 particular protected series.

14 (2) “Associated transferee” means a person, other than an owner associated with a
15 protected series, to which all or part of an associated distributional interest has been transferred,
16 whether or not the transferor is an associated owner. The term includes a person that owns an
17 associated transferable interest under Section 401(c)(1).¹⁸

18 (3) “Discontinued” means a protected series whose series designation has been

¹⁷ As a stand-alone act, this act needs a defined term for an organization that has one or more protected series in place. Following the usage of the proposed Treasury Regulations on series, this draft refers to “series organization”. If that usage continues into the final version, the Drafting Committee should seek permission to substitute “organization” for “entity” in the act’s name. In any event, the Reporter prefers a simpler name: the Uniform Protected Series Act.

¹⁸ Under the cited provision, an owner that ceases to be associated with a protected series is stripped of all rights except the person’s associated distributional interest, which the owner then owns in the nature of an associated transferee.

1 canceled.¹⁹

2 (4) “Distributional interest” means the right under the organic law and organic rules of an
3 organization or foreign organization to receive distributions from the organization or foreign
4 organization.

5 (5) “Foreign organization” means an entity:²⁰

6 (A) governed as to its internal affairs by the law of a jurisdiction other than this
7 state; and

8 (B) of a type corresponding to one of the entity types listed in Section 103(a).²¹

9 (6) “Foreign protected series” means a structure, arrangement, or relationship:²²

10 (A) that has been established by a foreign organization; and

11 (B) whose capacities, powers, liability protections, and all other material
12 characteristics under the law governing the foreign organization are substantially similar to the
13 capacities, powers, liability protections, and all other material characteristics of a protected
14 series.²³

15 (7) “Foreign series organization” means a foreign organization that has in place at least

¹⁹ Strictly speaking, this definition is unnecessary. The reference to cancellation could be used wherever the defined term appears. However, it seems useful to create a term of art analogous to the termination of an entity.

²⁰ This definition confines the category of foreign organizations to entities.

²¹ To be recognized under this act, the foreign series organization of a foreign protected series must be a type comparable to one of the eligible domestic entities listed in Section 103(a).

²² The Drafting Committee has tentatively decided to characterize a domestic protected series as a person. *See* Section 104. However, it would be unwise to limit the scope of “foreign protected series” based on that characterization, because most current series statutes duck this characterization issue. Therefore, to use “person” in this definition suggest that being a person is a precondition to being a foreign protected series. *Compare* Section 106(6) (stating that the law of this jurisdiction governs the characterization of a protected series as a person) *with* Section 501 (omitting a comparable provision for foreign protected series).

²³ Alternate formulation for Paragraph 6(B): “which would be a protected series if formed under this [act]”.

1 one foreign protected series.

2 (8) "Governance authority" means the authority and responsibility, alone or together with
3 other persons, to:

4 (A) determine important policies for an organization or foreign organization; and

5 (B) superintend and maintain ultimate control over the activities, affairs, and
6 property of the organization or foreign organization.

7 (9) "In place", with regard to a protected series and a series organization, means a
8 protected series:

9 (A) established under Section 201 by the series organization; and

10 (B) that has not been discontinued.²⁴

11 (10) "Organic law" means the law of an organization's or foreign organizations'
12 jurisdiction of formation which governs the internal affairs of the organization or foreign
13 organization.

14 (11) "Organic rules" means the public organic record and private organic rules of an
15 organization.²⁵

16 (12) "Organization, except in the phrase "foreign organization", means a domestic entity
17 of a type listed in Section 103(a), regardless of whether the organization has in place any
18 protected series.

²⁴ Some dissension exists within the Committee on how to label the relationship of a protected series to the series organization. The dissension concerns not only any proposed term of art but also colloquial expressions. The aversion to the phrase "mother ship" exemplifies the situation, as does the aversion to referring to a protected series as being "within" a series organization. The phrase "protected series of a series organization" seems generally acceptable, but that phrase does not fit felicitously into all syntactic contexts. For those contexts, the Draft defines and uses the term "in place". *See, e.g.*, Section 102(7) (defining "foreign protected series" as "a foreign organization that has in place at least one foreign protected series").

²⁵ Query: Necessary to add "or foreign organization"?

1 (13) “Owner” means a person having the right under the organic law or organic rules of
2 an organization or foreign organization, other than in the capacity of an agent, assignee, proxy,
3 or person with governance authority, to:

4 (A) receive or demand access to information concerning, or the books and records
5 of, the organization or foreign organization;

6 (B) consent or vote for the election of a person with governance authority; or

7 (C) receive notice of or consent or vote on an issue involving the internal affairs
8 of the organization or foreign organization.

9 (14) “Person” means an:

10 (A) an individual;

11 (B) a protected series or foreign protected series; and

12 (C) a domestic or foreign business corporation, nonprofit corporation, partnership,
13 limited partnership, limited liability company, [general cooperative association,] limited
14 cooperative association, unincorporated nonprofit association, statutory trust, business trust,
15 common-law business trust, estate, trust, association, joint venture, public corporation,
16 government or governmental subdivision, agency, or instrumentality, or any other legal or
17 commercial entity.

18 (15) “Private organic rules” means the rules, whether or not in a record, that govern the
19 internal affairs of an organization or foreign organization, are binding on all its owners and all
20 persons owning a distributable interest in the organization or foreign organization, and are not
21 part of the public organic record, if any, of the organization or foreign organization. The term
22 includes:

23 (A) the partnership agreement of a general partnership;

- 1 (B) the partnership agreement of a limited partnership;
- 2 (C) the operating agreement of a limited liability company; and
- 3 (D)

4 (16) “Protected series”, except in the phrase “foreign protected series”, means a person
5 established under Section 201 by an organization.^{26 27}

6 (17) “Public organic record” means the record the filing of which by the [Secretary of
7 State] is required to form an organization or foreign organization and any amendment to or
8 restatement of that record. The term includes the certificate of limited partnership of a limited
9 partnership and the certificate of organization of a limited liability company;

10 (18) “Series manager” means:

- 11 (A) a person²⁸ that manages a protected series under Section 1113; or
- 12 (i) in the case of a foreign protected series, a person with governance
13 authority pertaining to the foreign protected series.

14 (19) “Series organization”, except in the phrase “foreign series organization”, means an
15 entity listed in Section 103(a) which has in place at least one protected series.

16 (20) “Transfer” includes:

- 17 (A) an assignment;
- 18 (B) a conveyance;
- 19 (C) a sale;
- 20 (D) a lease;

²⁶ The term “protected series” is useful even after the protected series has discontinued.

²⁷ The definition refers to “an organization” rather than a “series organization” because an entity is not a series organization until it has in place at least one protected series.

²⁸ This definition allows the private organic rules of a series organization to designate one series to manage another. Query: An acceptable idea?

1 (E) an encumbrance, including a mortgage or security interest;

2 (F) a gift; and

3 (G) a transfer by operation of law.

4 (21) “Type of organization” means a generic form of entity:

5 (A) recognized at common law; or

6 (B) formed under an organic law, whether or not some entities formed under that
7 law are subject to provisions of that law that create different categories of the form of entity.

8 **SECTION 103. ELIGIBLE ORGANIZATIONS; RELATIONSHIP OF THIS**
9 **[ACT] TO ORGANIC LAW OF ELIGIBLE ORGANIZATIONS.**

10 (a) This [act] applies to the following types of domestic²⁹ unincorporated entities:³⁰

11 (1) general partnerships;

12 (2) limited partnerships;

13 (3) limited liability companies;

14 (4).....³¹

15 (b) If this [act] conflicts with the organic law of a series organization;

16 (1) to the extent possible the conflicting provisions should be reconciled; and

17 (2) otherwise, this [act] governs.

18 (c) When this [act] establishes provisions described as “comparable” to specified
19 provisions of the organic law of a series organization, the comparable provisions do not include
20 any provision that the difference in context renders moot or impracticable.³²

²⁹ Query: Necessary to define “domestic”?

³⁰ The list excludes statutory or other trusts, because this act neither displaces nor overlaps USTEPA.

³¹ Query: Should this provision have an exclusivity provision?

³² This draft uses “comparable provisions” to perform the Mini-Me function. (See the Reporter’s

1 **SECTION 104. NATURE OF PROTECTED SERIES.** Except as otherwise provided

2 in Section 105(c)(2),³³ a protected series is a person distinct from:^{34 35}

3 (1) the series organization that established the protected series;

4 (2) any other protected series of the series organization;

5 (3) any owner of the series organization, whether or not the owner is associated with the
6 protected series; and

7 (4) any person owning a distributional interest in the series organization, whether or not
8 the interest is an associated distributional interest.

9 **SECTION 105. POWERS, PURPOSE, AND CONDITIONAL DURATION OF**
10 **PROTECTED SERIES.**

11 (a) A protected series has the capacity to sue and be sued in its own name.³⁶

12 (b) Except as otherwise provided in subsections (c) – (f), a protected series:

Introductory Note.)

³³ The cited subsections provide that a protected series cannot exist on its own. In that sense, therefore, a protected series is not distinct from the organization whose existence is a precondition to the existence of the protected series.

³⁴ The word “distinct” derives from ULLCA (2006) (Last Amended 2013), Section 108(a): “A limited liability company is an entity distinct from its member or members.” *See also* ULPA (2001) (Last Amended 2013) § 110(a); UPA (1997) (Last Amended 2013) § 201(a). MERRIAM WEBSTER (on line), provides as the word’s first definition “distinguishable to the eye or mind as discrete: separate <a distinct cultural group> <teaching as distinct from research>”. <http://www.merriam-webster.com/dictionary/distinct>; last visited 8-23-13.

³⁵ In addition to the much discussed questions of bankruptcy law, Article 9, and title insurance, this characterization issue has less obvious implications. For example, may one series conspire with another civilly? Criminally? Is a series subject to criminal prosecution? *E.g., U.S. v. ITT Blackburn Co., a Div. of ITT*, 824 F.2d 628, 631 (8th Cir. 1987) (“[A]n unincorporated division cannot be sued or indicted, as it is not a legal entity.... See *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir.1982), cert. denied, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983) (“The RICO ‘enterprise’ was identified in the indictment as the Infonet Division of CSC, an organization which had no corporate existence separate and apart from that of CSC itself”); *Spearing v. National Iron Co.*, 770 F.2d 87, 88-89 (7th Cir.1985) (“The complaint also names as defendants ... National Iron Company, which being an unincorporated division of Pettibone Corporation is not suable in its own right.”).

³⁶ Stated separately to enable the act to render this provision non-waivable. *See* Section 108(b)(1).

1 (1) has the same powers as the series organization that established the protected
2 series; and

3 (2) may have any lawful purpose, regardless of whether for profit.³⁷

4 (c) A protected series may not:

5 (1) establish a protected series, whether of itself or its series organization;

6 (2) continue after the termination of its series organization unless:

7 (A) the protected series has been a party to a merger permitted by
8 subsection (d); and

9 (B) the transaction becomes effective before the termination becomes
10 effective; or

11 (3) be a party to:

12 (A) an interest exchange, conversion, domestication, or comparable
13 transaction;

14 (B) a merger, except as provided in section (d).^{38 39}

15 (d) A protected series may participate in a merger as a party only if, after the merger

³⁷ Subsection (b) states default rules. Thus, the private organic rules of a series organization can: (i) cause a protected series to have fewer powers than its series organization; (ii) accord powers to a protected series which transcend limitations imposed by the private organic rules of its series organization; and (iii) confine the purposes of a protected series so as to correspond to limitations applicable to the series organization or in any other way.

³⁸ These restrictions apply only when a protected series is itself party to the transaction. A series organization might be party to a transaction, with a protected series involved as a non-party. For example, an LLC acquiring a target through a merger might provide consideration to the owners of the target by admitting the owners as members and associating them with a protected series. Or the LLC might use the assets of a protected series as consideration to the owners of the target.

³⁹ Pending the Drafting Committee's decision on whether to permit a protected series to participate as a party in organic transactions, this Draft authorizes only mergers. Query: What results if a series organization domesticates into a state whose organic law does not provide for protected series, or converts to an entity whose governing law is likewise inhospitable?

1 takes effect, the protected series:

2 (1) does not continue; or

3 ⁴⁰(2) continues as:

4 (A) a protected series of the series organization or another series
5 organization; or

6 (B) a foreign protected series;

7 (e) If the law of this state prohibits an organization from engaging in an activity or affair,
8 conducting a business, entering into a transaction, or functioning or operating in any other way,
9 the prohibition applies to a protected series of the organization.

10 [(f) A protected series may not:

11 (1) ...

12 (2) ...]⁴¹

13 **SECTION 106. GOVERNING LAW.** The law of this state governs:

14 (1) the internal affairs of a protected series;

15 (2) the relations between a protected series and each of the following:⁴²

16 (A) the series organization;

17 (B) any other protected series of the series organization;

18 (C) any owner of the series organization, whether or not associated with the
19 protected series;

20 (D) a person owning a distributable interest in the series organization, whether or

⁴⁰ This provision authorizes but does not require the continuation of a protected series. The plan of merger might well provide for a protected series to be discontinued. *See* Subsection (d)(1).

⁴¹ Conduct that a state considers acceptable for an organization might be unacceptable for a “mere” protected series.

⁴² These provisions cover each relationship in both directions.

1 not the interest is an associated distributable interest.

2 (3) the liability of the series organization for a debt, obligation, or other liability of a
3 protected series of the series organization;

4 (4) the liability of a protected series for a debt, obligation, or other liability of its series
5 organization or any other protected series of the series organization;

6 (5) the liability for a debt, obligation, or other liability of a protected series of:

7 (A) an owner of the series organization, in that capacity, including as an
8 associated owner;

9 (B) the owner of a distributional interest in the series organization, in that
10 capacity, including as an associated transferee;

11 (C) a series manager in that capacity; and

12 (D) a manager or agent of the series organization in that capacity

13 (6) the characterization of a protected series as a person.⁴³

14 **SECTION 107. ARM'S LENGTH RELATIONSHIPS.**⁴⁴

15 (a) An arm's length relationship exists:

16 (1) between a series organization in that capacity and a protected series of the
17 organization;⁴⁵ and

18 (2) among the protected series of a series organization.

19 (b) A series manager of one protected series of a series organization does not in that

⁴³ Note reference to law of this state rather than "this act." It is unclear, for example, whether a state's version of U.C.C, Article 9 would defer to this act's characterization of a protected series as a person.

⁴⁴ See BLACK'S LAW DICTIONARY (9th ed. 2009), arm's length (defining the terms as "[o]f or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship").

⁴⁵ "In that capacity" because a series organization that is a series manager is not at arm's length with the series.

1 capacity owe any fiduciary duties to another protected series of the organization or the owners
2 associated with another protected series.⁴⁶

3 **SECTION 108. RELATIONSHIP OF PRIVATE ORGANIC RULES OF SERIES**
4 **ORGANIZATION TO PROTECTED SERIES.**⁴⁷

5 (a) Except as otherwise provided in subsection (b), a series organization’s private organic
6 rules⁴⁸ govern:

7 (1) the activities, affairs, and property⁴⁹ of a protected series, the conduct of those
8 activities and affairs, and the use of that property;

9 (2) relations among the associated owners in that capacity and between the
10 associated owners in that capacity and

11 (A) the protected series;

12 (B) any other protected series of the organization;

13 (C) the series organization;

14 (D) any owner not associated with the protected series;⁵⁰

15 (E) any person owning a distributional interest in the series organization,

16 whether or not the interest is an associated distributional interest.

⁴⁶ A series manager of one protected series can be liable in tort to another protected series.

⁴⁷ At its Fall 2013 meeting, the Drafting Committee rejected defined terms for series-specific provisions of the operating agreement (now “private organic rules”) and supplemental agreements pertaining to a single series. A comment will discuss the variety of ways the private organic rules of a series organization might provide for protected series, including appendices, exhibits, etc.

⁴⁸ In unincorporated organizations, the organic record, if any, typically has little role in the internal affairs of the organization. UPA, ULPA, and ULLCA each contain provisions preferring in *inter se* matters the partnership or LLC agreement over any filed record, in the event of a conflict.

⁴⁹ This provision specifically refers to “property,” because a protected series is, most fundamentally, an asset protection device.

⁵⁰ Section 302 addresses “associated owners”. The two sets (associated and not) could be addresses in one provision, but this approach reflects the different realms of relationships.

1 (3) relations among the protected series, the series organization, and any other
2 protected series of the organization;

3 (4) the rights and duties under this [act] of a person in the capacity of series
4 manager.

5 (b) The private organic rules of a series organization may not vary:

6 (1) Sections 103, 104, 105(a), (c), (d), (e), 106; 108,⁵¹ or TBA.

7 (2) any requirement, procedure, or other provision of this [act] pertaining to:

8 (A) registered agents; or

9 (B) the [Secretary of State], including provisions pertaining to records
10 authorized or required to be delivered to the [Secretary of State] for filing under this [act];.

11 (c) If the organic law⁵² of a series organization authorizes the series organization's
12 private organic rules to include a particular provision with regard to the series organization, its
13 activities, affairs, property, owners, managers, or persons not owners,⁵³ this subsection
14 establishes a comparable authorization with regard to the private organic rules as they pertain to
15 a protected series, its activities, affairs, associated property, associated owners, series managers,
16 and persons not associated owners.

17 (d) If the organic law of a series organization prohibits the series organization's private
18 organic rules from including a particular provision with regard to the series organization, its
19 activities, affairs, property, owners, managers, or persons not owners, this subsection establishes

⁵¹ The cited provisions refer respectively to eligible organizations (103); nature of protected series (104); power, purpose, and duration of protected series (105), governing law (106), and relationship of private organic rules of series organization to protected series (108). Once the Drafting Committee approves this approach and decides which prohibitions to include, the Reporter will refine this formulation.

⁵² This act is part of the organic law of an organization that becomes a series organization. Query: What consequences?

⁵³ "Persons not owners" includes mere associated transferees.

1 a comparable prohibition with regard to the private organic rules as they pertain to a protected
2 series, its activities, affairs, associated property, associated owners, series managers, and persons
3 not associated owners.⁵⁴

4 (d) The consent or voting requirements for amending the organic rules of an organization
5 do not change when the organization becomes a series organization.

6 **SECTION 109. SUPPLEMENTAL PRINCIPLES OF LAW.** Unless displaced by
7 particular provisions of this [act], the principles of law and equity supplement this [act].

8 **[ARTICLE] 2**

9 **FORMATION AND RELATED PUBLIC FORMALITIES**

10 **SECTION 201. ESTABLISHING PROTECTED SERIES; PROTECTED SERIES**
11 **DESIGNATION; AMENDMENT AND CANCELLATION OF DESIGNATION.**

12 (a) With the affirmative vote or consent of all its owners, an organization⁵⁵ may establish
13 a protected series pursuant to subsections (b) through (d).⁵⁶

14 (b) To establish a protected series, an organization must deliver to the [Secretary of State]
15 for filing a protected series designation, signed by the organization, stating the name of the
16 organization and the name of the protected series.⁵⁷

17 (c) A protected series is established when the protected series designation becomes

⁵⁴ An earlier version of this Draft combined subsections (c) and (d). Separation involves repetition but may produce easier reading.

⁵⁵ “Organization” rather than “series organization” because an organization is not a series organization until the organization has at least one protected series in place.

⁵⁶ Earlier drafts referred to “one or more protected series” to make clear that a series organization may have more than one series.

⁵⁷ Omitted – language permitting additional information. Rationale: keeping the designation as simple as possible; dispensing with language explaining how additional information cannot evade restrictions on the private organic rules.

1 effective under the organization’s organic law.⁵⁸

2 (d) A series organization may amend or cancel a protected series designation by
3 delivering to the [Secretary of State] for filing a statement of designation⁵⁹ change that states the
4 name of the organization, the name of the protected series to which the designation applies,⁶⁰
5 and:

6 (1) for an amendment, the information to be in effect as a result of filing the
7 statement;⁶¹ and

8 (2) for cancellation, that the protected series no longer continues and the
9 designation is canceled.⁶²

10 **SECTION 202. NAME.** The name of a protected series must:⁶³

11 (1) comply with the organic law of the series organization as if the protected series were
12 an organization; and

13 (2) contain the name of the series organization and the phrase “protected series”.

14 **SECTION 203. REGISTERED AGENT; SERVICE OF PROCESS, NOTICE, OR**
15 **DEMAND.**

16 (a) A registered agent of a series organization is also the registered agent for each

⁵⁸ Legislative note will warn of possible need to amend the organic law if that law does not have a catch-all provision.

⁵⁹ “Designation” included to avoid confusion with organic laws that use “statement of change” for a different purpose. *See, e.g.*, ULLCA (2006) (Last Amended 2013), § 116 (Change of Registered Agent or Address for Registered Agent by Limited Liability Company).

⁶⁰ It would be possible, though more complicated, to empower each protected series to deliver for filing statements of change. However, there is some rationale for keeping the series organization in charge of all filed records that pertain to it.

⁶¹ Given the narrow scope of a certificate of designation, the only amendments possible would change the name of the series organization, the name of a protected series, or both.

⁶² Query: What is the effect of cancellation?

⁶³ TBA – parallel provision for name of foreign protected series.

1 protected series of the organization.

2 (b) Before delivering a certificate of protected series designation to the [Secretary of
3 State] for filing, an organization must arrange with its registered agent that the registered agent
4 will also serve as the registered agent for the protected series to be established when the
5 certificate becomes effective.⁶⁴

6 (c) Signing a certificate of designation that is delivered to the [Secretary of State]⁶⁵ for
7 filing is an affirmation under the penalties of perjury that the organization on whose behalf the
8 certificate is delivered for filing has complied with subsection (b).

9 (d) Except as otherwise provided in an agreement between a series organization and its
10 registered agent, the agent is not responsible for distinguishing between process, notice, or
11 demand pertaining to the series organization and process, notice, or demand pertaining to a
12 protected series of the series organization.⁶⁶

13 **SECTION 204. [ANNUAL] [BIENNIAL] REPORTS.**⁶⁷ If the organic law of an
14 organization requires the organization periodically to report information to the [Secretary State]
15 and the organization is a series organization when it delivers required information to the
16 [Secretary of State] for filing, the information must include the name of each protected series
17 then in place.

18

19

⁶⁴ If the Drafting Committee decides to permit an organization to acquire a protected series by merger, conversation or domestication, this subsection will be revised accordingly.

⁶⁵ The affirmation does not take effect until the filling office has received the certificate of designation.

⁶⁶ Thus, the registered agent is not required to perform a sorting function unless so provided in an agreement with the series organization.

⁶⁷ The Drafting Committee has not yet decided whether to provide for a certificates of good standing for a protected series or foreign protective series.

1 (A) the name of the protected series;
2 (B) a description of the property which is sufficiently specific⁷³ to permit a
3 reasonable person that is not an owner,⁷⁴ series manager, or manager or agent of the series
4 organization, to identify the property and distinguish it from:

5 (i) property of the series organization; and

6 (ii) property associated with any other protected series of the series
7 organization; and

8 (2) in the case of property that is subject to a public system for registering title,⁷⁵ the
9 property is titled under that system in the name of the protected series.⁷⁶

10 (b) A series organization shall maintain its record of each item of property associated
11 with a protected series until the later of:

12 (1) [six] years after the date on which the protected series transfers to another
13 person⁷⁷ all of the protected series' then remaining interest in the property; or

14 (2) the date on which the protected series is discontinued.

from the adjoining property owners to make said road 60 feet wide without any legal proceedings or process.”)

⁷³ A comment will note that different methods may be appropriate for describing different types of property (e.g., fungible versus non-fungible goods; tangible property versus intangible property).

⁷⁴ In this context, “owner” encompasses both general status as an owner of the series organization and particular status as an owner associated with a protected series. That is, the reasonable person standard excludes reference to any owner, regardless of whether associated with a particular series.

⁷⁵ If an arm’s length transaction, the transferee has strong incentive to update the public record. That incentive is weaker, if even extant, within a series organization.

⁷⁶ Under this subsection, property might be owned by a protected series without being associated with the protected series. That result is intentional. The category of “associated property” provides support for the internal shields, *see* Section 301, and being properly identified is the only entryway into that protected situation.

⁷⁷ Query: Should the phrase “to another person” be deleted as redundant or retained as comforting despite the redundancy?

1 (c) Property associated with a protected series is owned by the protected series.⁷⁸
2 However, subject to subsections (a) and (b), a protected series may hold associated property
3 directly or indirectly, including in the name of the protected series, in the name of the series
4 organization, through a nominee, or otherwise.

5 **SECTION 302. ASSOCIATED OWNER; ASSOCIATED DISTRIBUTABLE**
6 **INTEREST.**

7 (a) Only an owner of a series organization may become associated with a protected series
8 of the organization.⁷⁹

9 (b) An owner becomes associated with a protected series when the private organic rules
10 of the series organization, or a procedure established under those rules:

11 (1) identifies the owner as associated with the protected series; and

12 (2) states any associated distributable interest owned or to be owned by the owner
13 in connection with becoming or being associated with the protected series.

14 (c) A series organization may acquire an associated transferrable interest:

⁷⁸ Like ULLCA and ULPA, this draft does not delineate the mechanics for transferring ownership of associated property. Contrast UPA § 302 (1997) (Last Amended 2013) (providing detailed rules for the transfer of property owned by a general partnership).

⁷⁹ This restriction: (i) is ubiquitous in series provisions; and (ii) fits with the controlling power that the private organic rules of the series organization have over each protected series. The Drafting Committee has flirted with the notion of allowing the series organization itself to be associated with one or more of its own protected series. For several reasons, this Draft does not take that approach:

1. The approach substantially increases drafting complexity.
2. The approach makes an already novel, counterintuitive concept (the protected series) even more difficult to understand.
3. Virtually the same results are achieved by: (i) making the series organization the series manager for and the recipient of all distributions benefits from any protected series that has no associated owners; (ii) allowing the operating agreement to allocate associated transferable interests to the series organization *ab initio*; and (iii) permitting the series organization to obtain associated transferable interests from associated owners and associated transferees.

1 (1) from an associated owner or transferee;⁸⁰ or

2 (2) as provided in the private organic rules of the series organization.⁸¹

3 **SECTION 303. FINANCIAL RIGHTS AND OBLIGATIONS PERTAINING TO A**
4 **PROTECTED SERIES.**

5 (a) Subject to subsection (b), to the extent the organic law⁸² of a series organization
6 contains provisions with regard to financial rights and obligations of the series organization, its
7 owners, or persons owning a distributional interest in the series organization, this subsection
8 establishes comparable provisions applicable to a protected series of the series organization and
9 the associated owners and transferees of the protected series.⁸³

10 (b) If a protected series has no associated transferable interests,⁸⁴ a distribution from the
11 protected series is made to the series organization that has the protected series in place.⁸⁵

12 **SECTION 304. TRANSFERABILITY LIMITED.**

13 (a) Subject to subsection (b), to the extent the organic law of a series organization limits

⁸⁰ Assume that a series organization redeems an owner's associated interest in a protected series. If the redeemed interest disappears, the series organization will have paid for an increase in the distribution shares of the remaining associated owners. This provision takes the alternate approach – the person (i.e., the series organization) that pays for the redemption succeeds to the benefits of the redeemed interest.

⁸¹ This provision enables a series organization to own an associated distributional interest upon the establishment of a protected series.

⁸² This subsection refers to the organic law because applying provisions of the organic rules might: (i) be extremely complicated; and (ii) lead to misfits in the comparable provisions.

⁸³ The substance is parallel although the language is not. The act defines “associated transferee” as a person to whom an associated distributional interest has been transferred but has no defined term for a person owning a distributional interest in a series organization.

⁸⁴ Note: a protected series can have associated distributable interests without having any associated owners; e.g., all associated owners have transferred their economic rights to persons not associated owners; the series organization acquired all the associated distributional interests upon formation and subsequently transferred those interests to a person or persons that are not associated owners.

⁸⁵ At the Fall 2013 meeting, the Drafting Committee tentatively chose this approach by a vote of 5 to 3. At the Winter 2014 meeting, the Committee reaffirmed its decision by a substantially larger margin.

1 the rights of owners to transfer their respective rights of ownership, this subsection establishes
2 comparable limitations applicable to the rights of owners associated with a protected series to
3 transfer their respective rights with regard to the protected series.⁸⁶

4 (b) The owner of a transferable distributional interest⁸⁷ in a protected series does not in
5 that capacity have any right to:

6 (1) participate in the management, activities, and affairs of the protected series;⁸⁸

7 or

8 (2) subject to Section 401(d) have access to any information concerning:

9 (A) the activities and affairs of the protected series; or

10 (B) property, owners, transferees currently or formerly associated with the
11 protected series.

12 **SECTION 305. NO AGENCY POWER OF OWNER ASSOCIATED WITH**
13 **PROTECTED SERIES.**⁸⁹

14 (a) An owner is not an agent of a protected series solely by reason of being associated
15 with the protected series.

16 (b) A person’s status as an owner associated with a protected series does not prevent or
17 restrict law other than this [act] from imposing liability on the protected series because of the
18 person’s conduct.

19

⁸⁶ Note that this subsection extrapolates restrictions in the organic law but in the organic rules.

⁸⁷ Query: Or “associated transferee”?

⁸⁸ Query: Add “or series organization”

⁸⁹ Derived essentially verbatim from ULLCA (2006) (Last Amended 2013), Section 301.

1 **SECTION 306. MANAGEMENT OF PROTECTED SERIES; RIGHTS AND**
2 **DUTIES OF SERIES MANAGER.**⁹⁰

3 (a) A protected series is managed by:

4 (1) its associated owners, if any; or

5 (2) otherwise by the series organization.⁹¹

6 (b) If a protected series is managed by its associated owners, the actual authority and
7 rules for decision making are the same that apply to persons having governing authority with
8 regard to the series organization.

9 (c) To the extent the organic rules of a series organization contain provisions pertaining
10 to the rights of an owner or person with governance authority to participate in management, have
11 access to information, be reimbursed for expenses, be indemnified, or be provided advancements
12 on indemnification, this subsection establishes comparable provisions applicable to an owner
13 associated with a protected series or series manager.⁹²

14 (d) To the extent the organic rules of a series organization contain provisions pertaining
15 to the duties and obligations of an owner or person with governance authority in the series
16 organization, this subsection establishes comparable provisions applicable to an owner
17 associated with a protected series and a series manager.

⁹⁰ A comment will note that the rules stated in this section apply during winding up as well as during operations.

⁹¹ Note that this subsection provides for management by the series organization, which means that those who manage the series organization will have responsibility for managing the protected series. As to whether those who manage the series organization owe a duty to the protected series and its associated owners, this draft takes no position. *Compare In re USACafes, L.P. Litigation*, 600 A.2d 43, 49–50 (Del.Ch. 1991) (recognizing such a duty in an analogous context *with 1515 N. Wells, L.P. v. 1513 N. Wells, L.L.C.*, 392 Ill. App. 3d 863, 872-73, 913 N.E.2d 1, 10 (Ill. App. Ct. 2009) (rejecting *USACafes*).

⁹² This section is the first example of the Mini-Me approach to the internal affairs of a protected series. See Reporter’s Introductory Note, *The Default Paradigm for a Protected Series*.

1 **SECTION 307. LIMITED LIABILITY.**⁹³

2 (a) A debt, obligation, or other liability of a series organization is solely the debt,
3 obligation, or other liability of the series organization. A debt, obligation, or other liability of a
4 protected series is solely the debt, obligation, or other liability of the protected series.⁹⁴

5 (b) A series organization is not liable, directly or indirectly, by way of contribution or
6 otherwise, for a debt, obligation, or other liability of a protected series of the series organization
7 solely by reason of having established or managed the protected series.

8 (c) A protected series is not personally liable, directly or indirectly, by way of
9 contribution or otherwise, for a debt, obligation, or other liability of its series organization or
10 another protected series of the series organization solely by reason of being a protected series of
11 the series organization.

12 (d) No person is liable, directly or indirectly, by way of contribution or otherwise, for a
13 debt, obligation, or other liability of a protected series solely by reason of being or acting as:

14 (1) an owner, whether or not associated with the protected series;

15 (2) a person owning a distributional interest in the series organization, whether or
16 not the interest is associated with the protected series;

17 (3) a series manager of the protected series; or

18 (4) a manager or other agent of the series organization.

19 (e) Property of a series organization⁹⁵ is not subject to the enforcement of a judgment

⁹³ Subsections (a) – (c) establish the “internal shields.” Subsection (d) provides the traditional liability shield. Subsection (e) connects the internal shields with the concept of associated property.

⁹⁴ This subsection merely negates any joint liability by status and does not prevent another person from undertaking its own responsibility for paying a debt, obligation, or other liability of a series organization or protected series; *e.g.* as a guarantor.

⁹⁵ “Property *of* a series organization” is vague and in particular ducks the question of whether, once the series organization has records for property associated with a protected series, the series organization

1 against a protected series of the series organization solely by reason of being property of the
2 series organization. Property associated with a protected series is not subject to the enforcement
3 of a judgment against the series organization or another protected series of the series
4 organization solely by reason of being associated with the protected series.⁹⁶ This subsection
5 applies regardless of whether enforcement is sought by levy, attachment, execution, judicial sale,
6 or comparable means.⁹⁷

7 (f) This section applies regardless of:

8 (1) the discontinuance of a protected series; and

9 (2) the dissolution or termination of the series organization.

10 (g) Subject to Section 301(a) and (b), the failure of a series organization or protected
11 series of the series organization to observe formalities relating to the exercise of their respective
12 powers or management of their respective activities, affairs, or property is not a ground for
13 disregarding a provision of this section.

14 **SECTION 308. ACTIONS BY ASSOCIATED OWNERS**

15 (a) Subject to subsection (b), to the extent the organic law and organic rules⁹⁸ of a series
16 organization contain provisions pertaining to the rights of owners to bring actions concerning the

must also maintain records for the “property of the series organization.” This question reflects a policy issue: whether “unscheduled” property should be available only to the creditors of the series organization or both to those creditors and the creditors of any protected series.

⁹⁶ Query: Is it clear that “the protected series” refers to the first-mentioned protective series and not to “another protective series”?

⁹⁷ Query: Should a Legislative Note advise states to include a comparable provision in the shield provisions of each relevant organic law to avoid a negative inference?

⁹⁸ The phrase “organic law and organic rules” means in effect, “organic law as supplemented, restricted, or both by the organic rules”. The other alternative, used elsewhere in this draft, applies solely the rules from the organic law. *See, e.g.*, Section 303(a). Under that approach, for the organic rules pertaining to the series organization to apply in the context of the protected series, the organic rules must so provide. The act should probably take a consistent approach to this issue.

1 organization, activities, affairs, and property, its owners, managers, and persons owning a
2 distributable interest in the series organization , this section establishes comparable provisions
3 applying to the rights of an owner associated with a series to bring an action pertaining to the
4 protected series, its activities and affairs, its associated property, owners, and transferees, and its
5 series manager.

6 (b) An owner not associated with a protective series has no standing to bring a derivative
7 claim pertaining to the protected series.⁹⁹

8 **[ARTICLE 4]**

9 **CEASING TO BE AN ASSOCIATED OWNER; WINDING UP PROTECTED SERIES**

10 **SECTION 401. CEASING TO BE ASSOCIATED; CONSEQUENCES.**

11 ¹⁰⁰(a) An owner associated with a protected series ceases to be associated when:

12 (1) the protected series knows or has notice of the owner’s express will to cease to
13 be associated, but, if the owner has specified an effective date later than the date the protected
14 series knew or had notice, on that later date;¹⁰¹

15 (2) the person no longer owns any associated transferable interest;

16 (3) the person is no longer an owner of the series organization;

17 (4) the protected series is discontinued;

18 (5) the series organization has participated in a merger in which the series
19 organization is the not the surviving organization, a conversion to a different type of entity, or a

⁹⁹ This statement may be unnecessary. However, mismanagement of one protected series can prejudice another protected series.

¹⁰⁰ This section is slimmer than the comparable provisions in UPA, ULPA, and ULLCA.

¹⁰¹ Query: Non-available? Waivable? Follows the rule for dissociation by express will as stated in the relevant organic law?

1 domestication;¹⁰² or

2 (6) the series organization has completed the winding up of its activities and
3 affairs.

4 (c) An owner's ceasing to be associated with a protected series:

5 (1) terminates all the owner's rights with regard to the protected series except the
6 person's associated transferable interest and as provided in subsection (d);

7 (2) does not discharge the owner from any debt, obligation, or other liability to the
8 protected series or to other associated owners which the owner incurred while associated with the
9 protected series;

10 (3) does not affect the person's status as an owner of the series organization or as
11 an owner associated with another protected series.¹⁰³

12 (d) To the extent the organic law or organic rules of a series organization provide to a
13 person that has ceased to be an owner of the series organization rights to information pertaining
14 to the series organization, this subsection establishes for a person that has ceased to be associated
15 with a protected series comparable information rights pertaining to the protected series.

16 **SECTION 402. WINDING UP.**

17 (a) When a series organization has dissolved:¹⁰⁴

18 (1) each protected series of the series organization shall immediately begin
19 winding up its activities and affairs; and

¹⁰² This provision is a placeholder, pending the Drafting Committee's decision as to whether to allow a protected series to participate as parties in organic transactions.

¹⁰³ Query: Necessary to add "of the series organization"?

¹⁰⁴ The organic rules of a series organization may provide additional grounds for winding up a protected series.

1 (2) complete winding up no later than when the series organization completes its
2 winding up.

3 (b) The series manager is responsible for winding up the activities and affairs of a
4 protected series.

5 (c) When a protected series has completed winding up, the series organization shall
6 deliver to the [Secretary of State] for filing a statement of designation change that cancels the
7 statement of designation of the protected series.

8 (d) A series organization has not completed winding up until each of its protected series
9 has completed winding up, the series organization has complied with subsection (c), and the
10 statements of designation change delivered to the [Secretary of State] for filing have become
11 effective.

12 **[ARTICLE] 5**

13 **FOREIGN PROTECTED SERIES**

14 **SECTION 501. GOVERNING LAW.** The law of the jurisdiction of formation of a
15 foreign series organization governs:

16 (1) the internal affairs of a foreign protected series of the foreign organization;¹⁰⁵

17 (2) the relationship between a foreign protected series and:

18 (A) its foreign series organization;

19 (B) any other protected series of the foreign organization;

20 (C) any owner of the series organization, whether or not the owner is associated
21 with the protected series; and

¹⁰⁵ Characterization of a foreign protected series as a person *vel non* is omitted. For example, an enacting state might want its own U.C.C, Article 9 to determine the person/entity/“thing” characterization issue.

1 (D) a person owning a distributional interest in the series organization, whether or
2 not the interest is an associated distributable interest;

3 (3) the liability of the foreign series organization for a debt, obligation, or other liability
4 of a foreign protected series of the foreign series organization;

5 (4) the liability of a foreign protected series for a debt, obligation, or other liability of its
6 foreign series organization or any other protected series of the foreign series organization; and

7 (5) the liability for a debt, obligation, or other liability of a foreign protected series of:

8 (A) an owner of the foreign series organization, in that capacity, including as an
9 associated owner;

10 (B) the owner of a distributional interest in the foreign series organization, in that
11 capacity, including as an associated transferee;

12 (C) a series manager in that capacity; and

13 (D) a manager or agent of the series organization in that capacity.¹⁰⁶

14 **SECTION 502. TRANSACTING BUSINESS IN THIS STATE; FOREIGN**
15 **REGISTRATION; PERSONAL JURISDICTION.**

16 (a) The law of this state pertaining to the registration of a foreign organization doing
17 business in this state applies to a foreign protected series of a foreign series organization as if the
18 foreign protected series were itself a separate foreign organization of the same type as the foreign
19 series organization.

20 (b) For purposes of determining whether a foreign series organization or foreign

¹⁰⁶ Unlike Section 106, the comparable provision on domestic governing law, this section does not include “the characterization of a protected series as a person”. Even though foreign jurisdictions take varying approaches to the issue, comparable language is available: “the characterization of a foreign protected series as an entity, person, or otherwise”. It would be inappropriate to include such language, however, for the same reasons the domestic provision refers to the law of this state (and not merely this act or even the relevant organic law). *See* Section 106(a), and the footnote to that provision.

1 protected series has transacted business in this state and whether this state has personal
2 jurisdiction over a foreign series organization or foreign protected series:

3 (1) the activities of a foreign series organization are not attributable to a foreign
4 protected series of the foreign organization solely by reason of the foreign organization having
5 foreign protected series in place;¹⁰⁷ and

6 (2) the activities of a foreign protected series are not attributable to the foreign
7 series organization in which the foreign protected series is in place or to another foreign
8 protected series of that foreign series organization solely by reason of the foreign series
9 organization having the foreign protected series in place.¹⁰⁸

10 **[ARTICLE] 6**

11 **MISCELLANEOUS PROVISIONS**

12 **TBA**

¹⁰⁷ This non-attribution rule does not apply, however, to the activities of a series organization as series manager of a protected series. Contrast Section 107(b) (internal liability shield of series organization not negated “solely by reason of [the series organization] having established or managed [a] protected series”).

¹⁰⁸ This provision provides a good example of: (i) a context in which “of” works [“another foreign protected series of that foreign series organization”]; and (ii) a context in which “of” does not work [“solely by reason of the foreign series organization having the foreign protected series in place”]. See Section 102(9).