

MEMORANDUM

TO: Committee on the Uniform Commercial Code and Emerging Technologies

FROM: Steven Harris, Reporter

RE: Miscellaneous Amendments to Definitions (to be discussed on May 3, 11 am CT)

DATE: April 23, 2021

This Memorandum contains miscellaneous amendments to UCC definitions for the Drafting Committee's consideration.

1. General definitions.

Section 1-201. General Definitions.

* * *

(b) Subject to definitions contained in other articles of [the Uniform Commercial Code] that apply to particular articles or parts thereof:

* * *

(2) "Account", except as used in "account for" and "on account of", means a right to payment of a monetary obligation, whether or not earned by performance * * *.

* * *

(27) "Person" means ~~an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity~~ an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity. The term includes a protected series, however denominated, of an entity if the protected series is established under law that limits, or limits if conditions specified under law are satisfied, the ability of a creditor of

the entity or of any other protected series of the entity to satisfy a claim from assets of the protected series.

Reporter's Note

1. *"Account."* The amendment to the definition of "account" would correct an error.

2. *"Person."* The amendment to the first sentence would adopt the current ULC standard definition of "person." The second sentence would treat a protected series as "person" for all purposes under the UCC. A PEB Commentary amends the comments to state, "A protected series formed under the Uniform Protected Series Act (2017) is a "person. *PEB Commentary No. 23, Protected Series Under the Uniform Protected Series Act (2017)* Feb. 24, 2021). This Commentary is attached.

Question: Should the definition in Article 1 be amended to include all protected series?

2. *Definition of "negotiable instrument".*

Section 3–104. Negotiable Instrument.

(a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) is payable on demand or at a definite time; and

(3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, ~~or~~ (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor; or (iv) an undertaking to litigate any dispute concerning the promise or order in a specified forum.

Reporter's Note

The amendment does not address choice-of-law provisions, as an agreement concerning the governing law is not an undertaking.

3. Definition of "signed" in Article 5.

Section 5-102. Definitions.

(a) In this article:

* * *

(14A) "Signed", with respect to a record that is not a writing, means to attach to or logically associate with the record an electronic sound, symbol, or process with present intent to adopt or accept the record.

* * *

Reporter's Note

The definition of "signed" contained in Section 5-102(a)(14A) would accommodate the use of electronic signatures under Sections 5-104(i), 5-108(i)(5), 5-113(a), (b), (c) and (d), and 5-116(a) without invalidating the use of traditional, non-electronic signatures on paper documents in letter-of-credit transactions.

4. Definition of "assignee" in Article 9.

Section 9-102. Definitions and Index of Definitions.

(a) [Article 9 definitions.] In this article:

* * *

(6A) "Assignee" means a person:

(A) in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding; and

(B) a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold.

* * *

Reporter's Note

Many of the provisions of Part 4, instead of referring to a “debtor,” “secured party,” and “security interest,” all of which terms are defined in the UCC, refer to an “assignor,” an “assignee,” and an “assignment,” or sometimes to an “assigned contract,” none of which terms are defined in the UCC. Some courts read the undefined terms in an unduly narrow way. In 2020, the Permanent Editorial Board for the UCC issued a Commentary clarifying the meanings of these terms and amended the official comments accordingly. *PEB Commentary No. 21, Use of the Term “Assignment” in Article 9 of the Uniform Commercial Code* (Mar. 11, 2020). New subsection (6A) would incorporate the essence of the Commentary into the statutory text.

PEB COMMENTARY NO. 23
PROTECTED SERIES UNDER THE UNIFORM PROTECTED SERIES ACT (2017)
(February 24, 2021)

By the Permanent Editorial Board for the Uniform Commercial Code*

PREFACE

The Permanent Editorial Board for the Uniform Commercial Code acts under the authority of the American Law Institute and the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws). The Permanent Editorial Board has resolved to issue from time to time supplementary commentary on the Uniform Commercial Code to be known as *PEB Commentary*. These *PEB Commentaries* seek to further the underlying policies of the Uniform Commercial Code by affording guidance in interpreting and resolving issues raised by the Uniform Commercial Code and/or the Official Comments. The Resolution states that:

The underlying purposes and policies of the *PEB Commentary* are those specified in UCC Section 1-103(a). A *PEB Commentary* should come within one or more of the following specific purposes, which should be made apparent at the beginning of the Commentary: (1) to resolve an ambiguity in the UCC by restating more clearly what the PEB considers to be the legal rule; (2) to state a preferred resolution of an issue on which judicial opinion or scholarly writing diverges; (3) to elaborate on the application of the UCC where the statute and/or the Official Comment leaves doubt as to the inclusion or exclusion of, or application to, particular circumstances or transactions; (4) consistent with UCC Section 1-103(a)(2), to apply the principles of the UCC to new or changed circumstances; (5) to clarify or elaborate upon the operation of the UCC as it relates to other statutes (such as the Bankruptcy Code and federal and state consumer protection statutes) and general principles of law and equity pursuant to UCC Section 1-103(b); or (6) to otherwise improve the operation of the UCC.

For more information about the Permanent Editorial Board for the Uniform Commercial Code, visit www.ali.org or www.uniformlaws.org.

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INTRODUCTION

In 2017, the Uniform Law Commission promulgated the Uniform Protected Series Act (“UPSA”). This Commentary clarifies aspects of the relationship between UPSA and the Uniform Commercial Code (the “UCC”).

A number of states have enacted statutes that provide for protected series¹ within a limited liability company.² A protected series is generally empowered by such a statute to conduct its own activities under its own name, and it has the rights and duties provided in the statute. It is contemplated that the protected series will keep the assets associated with it separate from those of the limited liability company and other protected series of the limited liability company.³ Moreover, under such a statute, the protected series generally is obligated solely to creditors whose obligations arose from interaction with the protected series; the creditors of a protected series have no claim against the assets associated with the limited liability company or of another protected series of the limited liability company. A public filing indicating the creation or existence of any particular protected series may or may not be required under the relevant statute. UPSA will, where enacted, provide for protected series of limited liability companies organized under the laws of those states.

A protected series under the existing state statutes and under UPSA is not a subsidiary of the limited liability company. Rather, a protected series exists within a limited liability company, typically the company that established the protected series. However, UPSA and several other statutes expressly refer to a protected series as a “person,”⁴ and, under UPSA and most, if not all,

¹ A protected series is sometimes referred to as a “series.” See UNIF. PROTECTED SERIES ACT (2017), prefatory note, pt. 2. This Commentary refers to a series as a “protected series” to be consistent with the use of that term in the Uniform Protected Series Act (2017) and to avoid confusion with other so-called “series” in the marketplace, such as series of bonds or equity securities. Effective August 1, 2019, the Delaware Limited Liability Company Act refers to both a “protected series,” and a “registered series.” See DEL. CODE ANN. tit 6, §§ 18-215, -218 (West 2019). The former term is a new name for what the statute previously labeled as a “series.” The latter term refers to a series established through the filing of a “certificate of registered series” in the office of the Delaware Secretary of State. Thus, a “registered series” under the Delaware act resembles a “protected series” under the UPSA.

² As of Aug. 6, 2019, the following statutes provide for protected series within a limited liability company. ALA. CODE §§ 10A-5A-11.01 to -16 (2018); DEL. CODE ANN. tit. 6, § 18-215 (West 2019); D.C. CODE § 29-802.06 (2013); 805 ILL. COMP. STAT. ANN. 180/37-40 (West 2010 & Supp. | 2019); IND. CODE ANN. §§ 23-18.1-1-1 to -7-4 (West 2011); IOWA CODE §§ 489.1201-1206 (2019); KAN. STAT. ANN. § 17-76, 143 (West 2008 & Supp. | 2015); MO. REV. STAT. § 347.186. (2016); MONT. CODE ANN. § 35-8-304 (2017); NEV. REV. STAT. § 86.296 (2018); OKLA. STAT. ANN. tit. 18, §§ 2005(B), 2054.4 (West 2012); TENN. CODE ANN. § 48-249-309 (West 2010); TEX. BUS. ORGS. CODE ANN. §§ 101.601-622 (West 2012); UTAH CODE ANN. §§ 48-3a-1201 to 1209 (West 2014); P.R. LAWS ANN. tit. 14, § 3967 (2011).

³ Even with regard to tangible, fungible assets, the separation need not be physical. UPSA § 301(d) (stating that “[t]he records and recordkeeping” “separating the assets may be organized by specific listing, category, type, quantity, or computational or allocational formula or procedure, *including a percentage or share of any asset*, or in any other reasonable manner) (emphasis added).

⁴ In Delaware, the reference appears in the limited liability company statute’s definition of a person. DEL. CODE ANN. tit. 6, § 18-101(14) (West 2019) (defining “person” to include a “limited liability company” and a range of other entities “or series thereof”). UPSA makes the reference in two places. UPSA § 102(7) (relying generally on the definition of “person” in the underlying LLC act while adding that “[p]erson” includes a protected series”); § 104 (stating that “[a] limited liability company is a person”). The lead-in language to UPSA § 102 (“In this [act] ...”) indicates that the UPSA definition of “person” applies only to UPSA itself and not necessarily to other law of the enacting state, let alone to the law of another jurisdiction which may not have enacted UPSA.

other statutes, a protected series has the essential characteristics which, since at least the early 19th century, are typically associated with the construct of a person for purposes of legal recognition of personhood.⁵ Nonetheless, as noted below, a protected series has a few atypical attributes. Moreover, as explained in the Prefatory Note to UPSA, “in some regulatory environments, [w]ith the approval of the relevant regulator, a series limited liability company makes one regulatory filing or holds a single license, and the various protected series of the company function under the aegis of that filing or license.”⁶

Because a protected series is expected to enter into transactions for itself and in its own name, a party might enter into a transaction within the scope of the UCC with a protected series. For example, a lender might extend credit to a protected series secured by a security interest governed by Article 9 of the UCC in existing and after-acquired personal property assets associated with the protected series. Lawyers in such transactions are often uncertain as to whether the Article 9 “debtor” in such a transaction is the protected series or the limited liability company itself and, if the protected series is the debtor, whether that debtor is a registered organization. Uncertainty with respect to these legal issues creates uncertainty as to how Article 9 rules apply to such extensions of credit, affecting the availability and cost of credit.

Similar determinations are necessary if the protected series is a seller of certain payment rights—accounts, chattel paper, payment intangibles or promissory notes—or is a consignee of goods under a consignment within the scope of Article 9.

DISCUSSION

This Commentary focuses on five issues in transactions with a protected series: (1) Is a protected series a “person” as defined in Article 1 of the UCC? (2) Who is the “debtor” if a security interest within the scope of Article 9 is granted by a protected series to secure an obligation? (3) Who is the debtor if the security interest within the scope of Article 9 is the interest of a buyer of accounts, chattel paper, payment intangibles, or promissory notes from a protected series? (4) Who is the Article 9 debtor if the security interest is the interest of a consignor in a transaction that is a consignment within the scope of Article 9 to a protected series as consignee? (5) If the debtor is a protected series, is the debtor a “registered organization” for purposes of Article 9?

⁵ A “person” is “a subject of legal rights and duties” conferred by the sovereign. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 27 (Roland Gray rev., 2d ed., The MacMillan Co. 1931) (“a ‘person’ is a subject of legal rights and duties”); JOHN SALMOND, *JURISPRUDENCE* 318 (Glanville L. Williams ed., 10th ed. 1947) (a person is “capable of rights [and] duties”); Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 283 (1928) (a person is “the subject of rights and duties”); *Corporations — Right to Prefer Creditors*, 11 HARV. L. REV. 550 (1898) (referring to the by-then well-recognized “idea of a corporation as a legal person having powers similar to those of an individual”); see generally *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819). For a more recent discussion of the meaning of “person,” see Elvia Arcelia Quintana Adriano, *The Natural Person, Legal Entity or Juridical Person and Juridical Personality*, 4 PENN STATE J.L. & INT’L AFFS. 363 (2015) (“A subject of law is any being capable to act as holder of powers, or liable with obligations in a juridical relationship”). For a more recent case supporting the same proposition, see *People ex rel. Nonhuman Rts. Project, Inc. v. Lavery*, 998 N.Y.S.2d 248, 124 A.D.3d 148 (2014) (“... legal personhood has consistently been defined in terms of both rights *and* duties ...” (emphasis in original)).

⁶ UPSA prefatory note, pt. 4.

This Commentary addresses these issues for protected series established under UPSA, which was drafted with the status of a protected series under the UCC in mind. This Commentary does not address protected series statutes containing provisions that vary from the relevant provisions of UPSA.⁷ Nevertheless, as a general matter, this Commentary does not preclude application of its analysis to an issue concerning a protected series of a limited liability company established under law other than UPSA, or a protected series of any other alternative business entity or organization statute, if the statute contains the substance of the provisions of UPSA relevant to the issue discussed. Accordingly, the analysis contained in this Commentary may be useful in resolving these issues under another protected series statute to the extent that the statute's relevant provisions are the same as or substantially similar to those of UPSA.

(1) Is a protected series a “person” under the UCC?

This Commentary concludes that, under Article 1 of the UCC, a protected series established under UPSA is a “person.”

Section 1-201(b)(27) defines the term “person” as follows:

“Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

Reasonable minds might differ as to which of the organizations specified in the definition best describes a protected series. A protected series might be considered to be an “association.”⁸ Or a protected series might be considered to be some other, unspecified, type of “legal or commercial entity.” Article 1 does not define the term “association.” Nor does it further explain the phrase “other legal or commercial entity.” However, that phrase is a residual category, what might be described as a “catch-all” term for other legal or commercial entities that have the attributes of a “person,” as further discussed below.

This analysis proceeds by focusing on the “catch-all” term. If a protected series is an “association,” then it is clearly a “person” under Section 1-201(b)(27). If a protected series is not an association, however, the question becomes whether a protected series fits within the “catch-all” phrase “other legal or commercial entity.”

That a protected series may be either another “legal” entity or another “commercial” entity is consistent with both the historical formulation of the term “person” in the context of

⁷ For example, the discussion below on whether a protected series is a “registered organization” under Section 9-102(a)(71) will not be applicable if the relevant limited liability company statute does not provide for a protected series of the company to be established by a public filing.

⁸ Indeed, Delaware has declared that a “protected series” under its Limited Liability Company Act is an “association” not only under the act itself but also “[f]or all purposes of the laws of the State of Delaware.” See DEL. CODE ANN. tit. 6, § 18-215(b)(12) (West 2019).

Section 1-201(b)(27) and the interpretative canon of *ejusdem generis*.⁹ Together, the history and the canon identify a set of characteristics associated with personhood, notwithstanding that every person might not necessarily possess each characteristic.

The definition of the term “person,” through its definition of the term “organization,” had been part of the Official Text of the UCC issued in 1952. Although predecessor uniform acts had used similar terms, the definition of the terms in the predecessor uniform acts did not include the phrase “any other legal or commercial entity,” and it is unclear why that phrase was added to the UCC definition.

Nevertheless, the later deliberations of the Uniform Law Commission’s Committee on Style are instructive. As early as 1989, the Committee on Style proposed a standardized definition of “person” for other acts promulgated by the Uniform Law Commission.¹⁰ As initially proposed, the definition read:

“Person” means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision [sic] or agency, or any other legal or commercial entity.”¹¹

An accompanying footnote references the emergence of a new construct—the limited liability company—which “of course, would be included in the *catchall* ‘any other legal or commercial entity’” (emphasis added).¹² Shortly thereafter, noting that the forthcoming Uniform Statutory Construction Act explicitly includes the term “limited liability company” within its definition of the term “person,” it was suggested that the standardized definition should explicitly include it, notwithstanding its inclusion by the “catchall phrase ‘any other legal or commercial entity.’”¹³

The deliberations of the Committee on Style strongly suggest that the phrase “or any other legal or commercial entity” was intended as a “catch-all” so that the definition of “person” not only includes individuals and the full range of then-recognized and emerging non-individuals that might enjoy the ability to hold assets or contract but also what its advocates described as a “catch-all” for any not-yet-recognized non-individuals that might enjoy the ability to hold assets or contract.

At the same time, the canon places limits on an overly broad interpretation of the term “person.” According to the canon, “where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those

⁹ *Ejusdem Generis*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.”).

¹⁰ See Eugene A. Burdick, Chairman, Comm. on Style, Proposed Standardized Definitions for Consideration of Executive Committee (Oct. 18, 1989).

¹¹ *Id.*

¹² *Id.* n.3.

¹³ See Memorandum from Eugene A. Burdick, Chairman of the Comm. on Style, and James C. McKay, Jr., Chairman of the Comm. on Liaison with Legis. Drafting Agencies, to the Exec. Comm. of the Unif. L. Comm’n, n.1 (May 16, 1991).

enumerated by the specific words.”¹⁴ *Ejusdem generis* gives effect to both the general and specific terms by “treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words. In light of the specific terms, the general term is restricted to include only things of the same kind, class, character, or nature as those specifically enumerated.”¹⁵

A protected series does have a few attributes not generally associated with personhood. A protected series exists under the aegis of the limited liability company that established the protected series and cannot exist on its own.¹⁶ Furthermore, as a general matter, a protected series necessarily ceases to exist when the limited liability company itself ceases to exist.¹⁷

However, a protected series under UPSA has many other attributes that strongly suggest that a protected series is a “person.”¹⁸ A protected series is distinct from its associated members, the limited liability company, and any other protected series of the limited liability company.¹⁹ A protected series generally possesses the same powers as the limited liability company including the power to own its own assets and to sue and be sued in its own name.²⁰ A protected series is not liable for the debts of the limited liability company or another protected series of the limited liability company merely because it is a protected series,²¹ nor are its assets generally available to creditors of the limited liability company or another protected series of the limited liability company, so long as its assets are “associated” with the protected series.²² A protected series has its own members²³ which are distinct from the protected series²⁴ and which are generally entitled to vertical liability shields for acts of the protected series.²⁵

Despite those few attributes to the contrary, the other attributes indicate, for purposes of the canon, that a protected series is of “the same kind, class, character, or nature” as those specifically enumerated in the definition of the term “person” in Section 1-201(b)(27).

Given the historical formulation of the term “person” with its “catch-all” phrase and even after giving effect to the canon, it would be anomalous for a protected series to have all of these attributes under the common law definition of “person” and yet fall outside of the definition of

¹⁴ Washington State Dep’t of Soc. & Health Servs. v. Guardianship Est. of Keffeler, 537 U.S. 371, 372, 123 S. Ct. 1017, 1019, 154 L. Ed. 2d 972 (2003).

¹⁵ Huggett v. Dep’t of Nat. Res., 464 Mich. 711, 718–19, 629 N.W.2d 915, 920 (2001) (citations and internal quotations omitted).

¹⁶ UPSA § 103 cmt.; UPSA § 104 cmt. to subsec. (c).

¹⁷ The one exception is in the case of the very limited form of merger permitted under the UPSA, UPSA § 104(c). See also UPSA § 607(1)(A) (permitting a protected series of a series limited liability company that does not survive a merger to be relocated to the series limited liability company that does survive).

¹⁸ See *supra* note 5, referring generally to the power, rights and duties of a “person.”

¹⁹ UPSA § 103.

²⁰ UPSA § 104(a), (b).

²¹ UPSA § 401(b).

²² UPSA § 404; see UPSA § 301 for determining when an asset of a protected series is “associated” with the protected series.

²³ The members of a protected series are referred to as “associated members” under UPSA. UPSA § 102(3). An associated member must be a member of the limited liability company itself. UPSA § 302(a).

²⁴ UPSA § 103(3).

²⁵ UPSA § 401(a).

“person” under the UCC. This conclusion is further supported by the clear intent of UPSA’s drafters to establish the “personhood” of a protected series under UPSA by expressly including a protected series under UPSA’s own definition of “person”²⁶ and stating categorically that:

A protected series of a series limited liability company is a person distinct from: (1) the company, subject to Sections 104(c), 501(1), and 502(d); (2) another protected series of the company; (3) a member of the company, whether or not the member is an associated member of the protected series; (4) a protected-series transferee of a protected series of the company; and (5) a transferee of a transferable interest of the company.²⁷

Of course, ultimately whether a non-individual is a “person” as that term is used in the UCC is determined by the definition of the term “person” in the UCC itself, *i.e.*, by Section 1-201(b)(27). However, UPSA’s denomination of a protected series as a “person” for purposes of UPSA is suggestive of the result under the UCC for consistency, where appropriate, among uniform state laws. More fundamentally, a protected series under UPSA has most of the attributes reflected in the specific organizations listed in Section 1-201(b)(27) and is consistent with the meaning of “person” as reflected in the historical formulation of the term in Section 1-201(b)(27).

In sum, this Commentary concludes that a protected series falls within the contours of the “catch-all” phrase “any other legal or commercial entity” in the definition of person in Section 1-201(b)(27).

(2) Who is the “debtor” if a security interest is granted by a protected series to secure an obligation?

This Commentary concludes that, if a protected series grants a security interest in collateral to secure an obligation, the protected series is the “debtor” as that term is used in Article 9. Section 9-102(a)(28) defines the term “debtor” to include “a *person* having an interest, other than a security interest or lien, in the collateral...” (emphasis added).²⁸ If a protected series is a “person” as defined in Section 1-201(b)(27), as this Commentary concludes, it follows that, if a protected series grants a security interest in collateral to secure an obligation, the protected series is the debtor.

²⁶ UPSA § 102(7).

²⁷ UPSA § 103. The cited sections pertain to the characteristics noted *supra* at note 17. UPSA itself leaves open the possibility that a protected series is a “commercial entity” if not a “legal” entity. UPSA § 102(7) cmt. UPSA is designed to work in conjunction with the enacting state’s limited liability company statute under a construct referred to as “extrapolation.” *See* UPSA, prefatory note, pt. 6. Under that construct, UPSA uses terms defined by reference in the limited liability company statute. *See* UPSA § 102 legis. note. That statute may be the Uniform Limited Liability Company Act (2006) (Last Amended 2013). *Id.* Section 102(15) of that Act, like U.C.C. § 1-201(b)(27), does define the term “person” to include an “other ... commercial entity.”

²⁸ U.C.C. § 9-102(a)(28)(A).

(3) Who is the “debtor” if the security interest within the scope of Article 9 is the interest of a buyer of accounts, chattel paper, payment intangibles, or promissory notes from a protected series?

Likewise, this Commentary concludes that if a security interest within the scope of Article 9²⁹ is the interest of a buyer of accounts, chattel paper, payment intangibles, or promissory notes from a protected series,³⁰ the protected series is the “debtor” as that term is used in Article 9. Section 9-102(a)(28) defines the term “debtor” to include “a seller of accounts, chattel paper, payment intangibles or promissory notes....”³¹ Even though the definition of “debtor” does not use the term “person” when referring to a “seller,” Article 9 incorporates Article 2’s definition of “sale”³² (and the corresponding meaning of “seller”) from Article 2, which refers to a “person.”³³ If a protected series is a “person,” as this Commentary concludes, it follows that the protected series can qualify as a “seller” and, accordingly, as a “debtor.”

(4) Who is the “debtor” if the security interest is the interest of a consignor in a transaction that is a “consignment” (as defined in Article 9) as to which a protected series is the consignee?

For similar reasons, this Commentary concludes that if a security interest is the interest of a consignor in a transaction that is a “consignment” within the scope of Article 9 to a protected series as consignee,³⁴ the protected series is the “debtor.”³⁵ Section 9-102(a)(28) defines the term “debtor” to include “a consignee.” Even though the definition of “consignee” does not use the term “person,” nevertheless the definition does use the term “merchant.”³⁶ And the term “merchant” has the same meaning in Article 9 as it does in Article 2.³⁷ Under Article 2, a “merchant” is a “person.”³⁸ Accordingly, a consignee must be a “person” in order to be a consignee just as a seller must be a “person” in order to be a seller. If a protected series is a “person,” as this Commentary concludes, it follows that the protected series can qualify as a “consignee” and, accordingly, as a “debtor.”

²⁹ Pursuant to U.C.C. § 9-109(a)(3), sales of accounts, chattel paper, payment intangibles and promissory notes are generally within the scope of Article 9, subject to some exclusions found in subsections (c) and (d) of that section.

³⁰ See U.C.C. § 1-201(b)(35) defining the term “security interest” to include any interest of a buyer of accounts, chattel paper, payment intangibles or promissory notes in a transaction subject to Article 9.

³¹ U.C.C. § 9-102(a)(28)(B).

³² U.C.C. § 9-102(b), providing a cross-reference” to the term “sale” as defined in U.C.C. § 2-106.

³³ Cf. U.C.C. § 2-103(1)(d) defining a “seller” as “a *person* who sells goods or contracts to sell goods.” (emphasis added). It would be anomalous if a debtor that granted a security interest in collateral to secure an obligation must be a “person” but a seller of accounts, chattel paper, payment intangibles or promissory notes need not be a “person.”

³⁴ See U.C.C. § 9-102(a)(20) defining the term “consignment.”

³⁵ See U.C.C. § 9-102(a)(35) defining the term “security interest” to include any interest of a consignor in a transaction subject to Article 9.

³⁶ See U.C.C. § 9-102(a)(20) referring to a person delivering goods to a “merchant.”

³⁷ See U.C.C. § 9-102(b) providing a cross-reference” to the term “merchant” as defined in U.C.C. § 2-104.

³⁸ See U.C.C. § 2-104(1) defining “a merchant” as “a *person* who deals in goods....” (emphasis added).

(5) If the debtor with respect to a security interest is a protected series, is that debtor a registered organization for purposes of Article 9?

Regardless of whether a security interest secures an obligation, or arises from a sale of accounts, chattel paper, payment intangibles, or promissory notes, or from a consignment within the scope of Article 9, important Article 9 rules depend on whether the debtor with respect to that security interest is a “registered organization.” For one thing, the rules in Section 9-307 that determine the jurisdiction in which a debtor is located are different for registered organizations than for other debtors; this has a major effect on the application of the conflict of laws rules in Sections 9-301 *et seq.* Second, the rules in Section 9-503 that determine whether a financing statement sufficiently provides the name of a debtor are different for debtors that are registered organizations than for other debtors.

This Commentary concludes that a debtor that is a protected series is a “registered organization.” This conclusion follows from the definitions of “organization” in Section 1-201(b)(25) and “registered organization” in Section 9-102(a)(71). Section 1-201(b)(25) defines the term “organization” to mean “a person other than an individual.” Because a protected series is a “person” as defined in § 1-201(b)(27) and is not an individual, a protected series must be an “organization.”

Section 9-102(a)(71) defines the term “registered organization” to include an organization organized solely under the law of a single State ... by the filing of a public organic record with ... the State” The term “public organic record” is defined in Section 9-102(a)(68) to include:

a record that is available to the public for inspection and is:

(A) a record consisting of the record initially filed with or issued by a State ... to form or organize an organization ...;

....

Under UPSA, a protected series of a limited liability company is established when the limited liability company delivers to the Secretary of State of the state in which the limited liability company is organized a “protected series designation” signed by the company and providing the name of the protected series and the protected series designation takes effect.³⁹ The protected series designation, when filed, is available for public inspection so as to provide transparency to the public of the existence of the protected series.⁴⁰

It follows that, because under UPSA the protected series designation is filed with the Secretary of State to establish the protected series and is available to the public for inspection, the protected series designation is a “public organic record” as defined in Section 9-102(a)(68). It also follows that, because the protected series is an organization formed under the law of a single state—the state of organization of the limited liability company—by the filing of the protected

³⁹ UPSA § 201(b)-(c).

⁴⁰ UPSA § 202 cmt. to subsec. (b)(1).

series designation, the protected series is a “registered organization” as defined in Section 9-102(a)(71).

AMENDMENTS TO OFFICIAL COMMENTS

With the discussion in this Commentary in mind, the Official Comments are amended as follows:

The Official Comments to § 1-201 are amended by adding the following sentences at the end of the comment on the term “person” in clause 27:

A protected series formed under the Uniform Protected Series Act (2017) is a “person.” See PEB Commentary No. 23, dated February 24, 2021. The Commentary is available at <https://www.ali.org/peb-ucc>.

Official Comment 2.a to § 9-102 is amended to add the following new paragraph at the end of the comment:

If a security interest is granted by a protected series of a limited liability company formed under the Uniform Protected Series Act (2017), the debtor is the protected series. See PEB Commentary No. 23, dated February 24, 2021. The Commentary is available at <https://www.ali.org/peb-ucc>.

Official Comment 4 to § 9-307 is amended to add the following sentences at the end of the first paragraph of the comment:

A protected series formed under the Uniform Protected Series Act (2017) is a registered organization. See PEB Commentary No. 23, dated February 24, 2021. The Commentary is available at <https://www.ali.org/peb-ucc>.