

UNIFORM PROTECTED SERIES ACT

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ON UNIFORM STATE LAWS

and by it

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IN ALL THE STATES

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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PREFATORY NOTE

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Part 1. The Protected Series Construct

As provided by statutes in 13 states, the District of Columbia, and Puerto Rico,¹ the protected

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

series construct has the following aspects:²

- an identifiable set of assets segregated within a limited liability company (“a series limited liability company”);³
- the assets:
 - comprise a protected series, which is empowered to conduct activities in its own name;
 - must be identified by thorough recordkeeping that distinguishes them from assets of the series limited liability company and assets of any other protected series of the company;⁴
 - are obligated solely to persons asserting claims pertaining to activities related to the segregated assets; and
 - are not available to persons asserting claims arising from the activities of the series limited liability company or any other protected series of the company;
- one or more members of the series limited liability company may be associated with the protected series,⁵ but not necessarily; and
- distributions arising from the assets and activities go to:
 - the members associated with the protected series, if any; or
 - if the series has no associated members, the series limited liability company.

Thus, a series limited liability company contains “internal shields” – *i.e.*, asset partitions reserving the assets of each protected series solely to creditors of that protected series. These “horizontal” shields are conceptually and practically quite different from the traditional, “vertical” shield that protects the owners of an organization from automatic, status-based liability for the organization’s obligations.

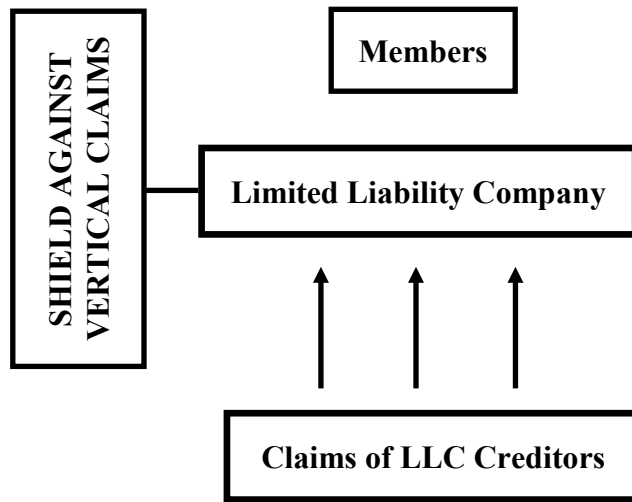
² Existing statutes refer to “series” rather than “protected series.” Part 2 of this Note explains why this act and its commentary use the latter label.

³ Delaware law authorizes protected series within a limited partnership, Del. Code Ann. tit. 6, §17-218 (2015), but few Delaware limited partnerships provide for protected series. Statutory trusts also have series, see, e.g., Del. Code Ann., tit. 16, §§ 3802-3826, but those series differ substantially from the protected series authorized by this act. The Uniform Statutory Trust Entity Act (2009) (Last Amended 2013) provides the greatest contrast with this act. Under the Statutory Trust Entity Act, “[a] series of a statutory trust is not an entity separate from the statutory trust,” Section 401(b), and “may not sue or be sued in its own name.” *Id.* Section 403(a). In contrast, under this act “[a] protected series has the capacity to sue and be sued in its own name,” Section 104(a), and “is a person distinct from ... the [limited liability] company [and any other] ... protected series of the company.” Section 103(1)-(2).

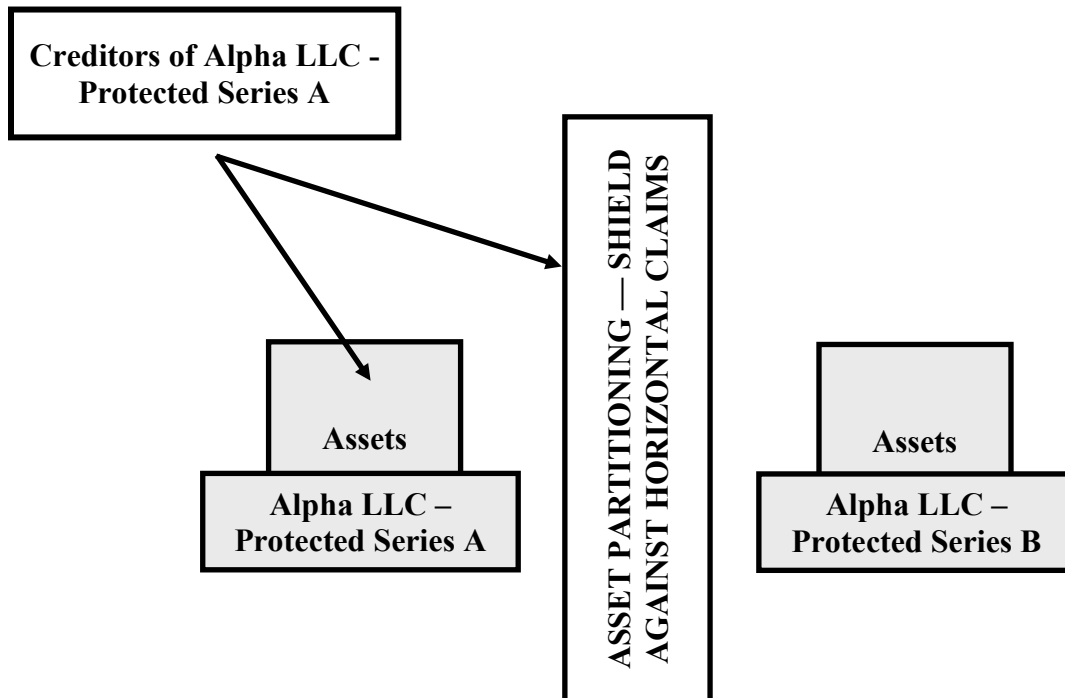
⁴ The recordkeeping is not part of the public record, although some assets might be titled in the name of a protected series. *See* Section 301(e). The act contains an important and novel inducement to accurate recordkeeping. *See* Part 7-C of this Note.

⁵ Allowing a non-member of a series limited liability company to be associated with a protected series of the company would cause daunting complexity while producing very little (if any) benefit. *See* Section 302(a), cmt.

TRADITIONAL — “VERTICAL” — SHIELD



INTERNAL — “HORIZONTAL” — SHIELDS



Part 2. “Protected Series” as the Term of Art

Following long-standing practice with statutory trusts and investment companies, existing protected series statutes use “series” as the term of art for the construct just described. However, outside that context, “series” has an established and very different meaning with regard to bonds, corporate stock, etc. As a result, using “series” to label the new construct is quite confusing.⁶ To avoid confusion, this act uses the term “protected series” – both to signal a different meaning and to call attention to the internal, horizontal shields which are the construct’s defining characteristic.

Part 3. The Import of the Protected Series Construct

The protected series:

- pushes the conceptual envelope of entity law by providing for a quasi-distinct legal person existing *within* an overarching entity;
- establishes a new type of liability shield, the “internal” or “horizontal” shield. Rather than protecting the owners of an organization from status-based liability for the organization’s debts, obligations, and other liabilities (the “vertical shield”), the internal/horizontal shields:
 - protect the assets of one protected series from the creditors of the series limited liability company and the creditors of any other protected series of the company; and
 - provide comparable protection for the assets of the series limited liability company itself.

Part 4. Growing Popularity of Series Limited Liability Companies

It is not possible to determine the number of series limited liability companies and protected series in existence in the United States, because under most protected series statutes a limited liability company can establish a protected series without making a corresponding public filing. The only item on the public record will be a statement that the company has the capacity to establish protected series. However, anecdotal evidence suggests heavy usage, especially under the Delaware statute.⁷

Better data is available from Illinois, where the law requires a public filing to establish a

⁶ For example, lists of limited liability company acts with “series” provisions have often included the statutes of Minnesota, North Dakota, and Wisconsin. Although these acts did (in the case of Minnesota and North Dakota) and do (in the case of Wisconsin) refer to “series,” the word has nothing to do with asset partitioning and internal shields. The three acts have used “series” to describe a category of ownership interest analogous to a series of stock. See Minn. Stat. § 322B.03, subd. 44, repealed 2014 Minn. Laws ch. 157, art. 1; ND Stat. § 10-32.1-02(48), repealed 2015 North Dakota Laws Ch. 87; Wis. Stat. § 183.0504 (2017).

⁷ An ABA Advisor to the Drafting Committee reports having established approximately 1500 series limited liability companies under Delaware law.

protected series. As of January 1, 2017, more than 27,000 protected series were active under Illinois law.

The growing popularity is also reflected in the following chart,⁸ which shows the increasing number of U.S. jurisdictions that provide for the creation of protected series:

year of enactment	name of enacting jurisdictions	total number of enactments in the year	cumulative total of jurisdictions with protected series provisions
1996	Delaware	1	1
2004	Oklahoma	1	2
2005	Illinois, Nevada, Tennessee	3	5
2008	Iowa	1	6
2009	Puerto Rico, Texas	2	8
2011	District of Columbia	1	9
2012	Kansas	1	10
2013	Missouri, Montana, Utah	3	13
2014	Alabama	1	14
2016	Indiana	1	15

Several other jurisdictions are reported as very interested in providing for protected series and as awaiting the conclusion of this project. In 2017, protected series proponents in two states contemplated enacting a non-final version of the uniform act – i.e., before the Drafting Committee had finished its work and the Uniform Law Commission had given final approval to the act. Eventually, in both states, the proponents decided to wait for the 2018 legislative session.

Although the widespread use and growing popularity of the protected series construct are undeniable, the causes are not well understood. For the most part, the legal and business relationships established through protected series can also be established with various structures involving several limited liability companies.

Some situations have been identified in which protected series provide a unique benefit, but these situations involve very specialized types of arrangements and cannot account for widespread use and popularity. Some proponents note a potential convenience in some regulatory environments: With the approval of the relevant regulator, a series limited liability company makes one regulatory filing or holds a single license, and various protected series of the company function under the aegis of that filing or license.

Another explanation is that the series limited liability company provides the first ever off-the-

⁸ Compiled by legislative counsel to the Uniform Law Commission.

shelf template for establishing a structure of affiliated businesses. It is debatable whether such a template increases economic efficiency, provides traps for the unwary, or both. What is not in doubt is that the protected series construct is now an established part of U.S. business law. Also not in doubt is that current statutes leave many very practical questions unanswered and lack important safeguards to protect the public in general and creditors in particular.

Part 5. Structure of the Act – A Module to be Enacted
as Part of an Enacting State’s Current Limited Liability Company Act

A protected series is inevitably connected with a limited liability company.⁹ Accordingly, existing provisions for protected series are inserts into a jurisdiction’s existing limited liability company act. This act takes the same approach and is designed to work with any existing limited liability company act.

Part 6. Extrapolation – Leveraging by Analogy
the Rules of an Enacting State’s Limited Liability Company Act

A. The Need for and Meaning of “Extrapolation”

A protected series is a business organization,¹⁰ analogous in almost all respects to a limited liability company. All limited liability company acts provide rules governing a limited liability company’s existence, including:

- non-variable provisions delineating the relationship of a company and its members with third parties;
- non-variable provisions pertaining to internal affairs (i.e., matters *inter se* the company, its members, agents, and transferees of its members); and
- variable provisions (“default rules”) that govern issues of internal affairs unless the operating agreement provides otherwise.¹¹

A statute providing for protected series needs the same three sets of rules at the “protected series level.” This act meets that need in four ways, by:

⁹ See Section 104(c) (stating that “[a] protected series of a series limited liability company ceases to exist not later than when the company completes its winding up”).

¹⁰ This act provides that “a protected series of a series limited liability company has the same powers and purposes as the company,” Section 104(b), and many limited liability company acts permit a limited liability company to have, in the words of the uniform act, “any lawful purpose, regardless of whether for profit.” Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 108(b). To date, however, using a series limited liability company for non-business purposes is rare, if extant at all.

¹¹ See, e.g., Uniform Limited Liability Company Act (2006) (Last Amended 2013), Sections 105(b) (pertaining to default rules for inter se matters) and 503 (delineating the rights of a creditor of a member or transferee). A protected series does not have its own operating agreement. Rather, the operating agreement of a series limited liability company governs the internal affairs of a protected series of the company. See Section 106, cmt.

- stating the rule directly and in a self-contained way,
 - e.g., Section 301 (stating requirements for associating an asset with a protected series or series limited liability company);
- expressly applying a rule from the limited liability company act of an enacting state,
 - e.g., Section 403 (applying the charging order provision of the enacting state’s limited liability company act to judgment creditors of associated members and protected-series transferees);
- stating the rule in part directly and in part by analogizing to the rule applicable at the “limited liability company level” – i.e., to a limited liability company under an enacting state’s limited liability company act;
 - e.g., Section 106(d) (providing that, if the operating agreement of a series limited liability company does not address a matter involving internal affairs, then the act governs to the extent applicable, and otherwise the default rules of the limited liability company act apply by analogy); and
- stating the rule solely by analogy to the rule applicable at the series limited liability company level,
 - e.g., Sections 106(b) (providing that if the limited liability company act “restricts the power of an operating agreement, the restriction applies” by analogy “to a matter” at the protected series level); 501(4)(B) (providing for dissolution of a protected series by judicial order “on application by an associated member or protected-series manager of the protected seriesto the same extent, in the same manner, and on the same grounds the court would enter an order dissolving a limited liability company on application by a member of or a person managing the company”).

This Note and the act’s official comments label the analogy approach as “extrapolation,”¹² and the mechanics of extrapolation are straightforward. Extrapolation occurs only when expressly invoked by some provision of this act and, when invoked, proceeds according to the following paradigm:

- a protected series is treated *as if it were* a separate limited liability company;
- any associated member of the protected series is treated *as if it were* a member of the separate, hypothetical company;
- any protected-series transferee of the protected series is treated *as if it were* a transferee of the separate, hypothetical company;
- any protected-series transferable interest of the protected series is treated *as if it were* a transferable interest of the separate, hypothetical company;
- a protected-series manager of the protected series is treated *as if it were* a manager

¹² Merriam Webster defines “extrapolate” in relevant part to mean “to infer (values of a variable in an unobserved interval) [i.e., issues at the protected series level] from values within an already observed interval [i.e., default rules at the limited liability company level”], <http://www.merriam-webster.com/dictionary/extrapolate>, last visited 5/17/16.

- of the separate, hypothetical company;
- any asset of the protected series is treated *as if it were* an asset of the separate, hypothetical company, whether or not the asset is an associated asset of the protected series; and
- any creditor or other obligee of the protected series is treated *as if it were* a creditor or obligee of the separate, hypothetical company.

Extrapolation provides two significant advantages. First, the approach avoids burdening this act with lengthy provisions largely duplicative of provisions in the relevant limited liability company act. Second, where appropriate the approach imports to the protected series level the same policy choices reflected at the limited liability company level.

B. An Additional Benefit – Parallelism in Concept and Terminology

Extrapolation has an additional benefit. The approach makes possible parallelism in concept and terminology.

concept	defined term pertaining to series limited liability company	defined term pertaining to a protected series
person with both governance and economic rights	member	associated member
economic rights	transferable interest (rights to distributions from the series limited liability company)	protected-series transferable interest (rights to distributions from a protected series)
owner of solely economic rights	transferee	protected-series transferee ¹³
owned assets	property of the series limited liability company	assets of a protected series
		associated asset/ non-associated asset of a protected series ¹⁴

Part 7. Non-Liability and Non-Recourse Rules and the Act’s Novel Approach to Horizontal Shields

A. The Two-Fold Nature of a Liability Shield

An entity’s traditional liability shield – i.e., the vertical shield – protects an entity’s owners from

¹³ Although a series limited liability company may own a protected-series transferable interest of a protected series of the company, the defined term, “protected-series transferee,” does not include the company. *See* Section 303(d), cmt.

¹⁴ A protected series can own an asset without the asset being associated with the protected series. This act labels this category of property as a “non-associated asset.” Only an associated asset is protected by the internal shields of a protected series. *See* Sections 301 and 404.

automatic, status-based liability for the entity’s debts and thereby protects each owner’s personal assets from creditors of the entity. Thus, the shield has two parts: a non-liability rule (no status-based liability) and a non-recourse rule (no creditor recourse against assets). This distinction is immaterial in the context of a vertical shield but is essential to understanding this act’s novel approach to horizontal shields.

B. Horizontal Shields – Non-Liability and Non-Recourse Rules Distinguished to Create an Important Inducement to Good Recordkeeping

Like the traditional “vertical shield,” a protected series’ horizontal shield contains both a non-liability rule and a non-recourse rule. This act treats these rules separately to create an important inducement to good recordkeeping.

- under the non-liability rule (Section 401(b)):
 - a protected series is not liable for the debts of the series limited liability company or any other protected series of the company and *vice versa*.

- under the non-recourse rule (Sections 301 and 404):
 - only an *associated* asset of a protected series is shielded against collection efforts of judgment creditors of the series limited liability company or of any other protected series of the company, and the same is true for assets of the company; and
 - *association* is accomplished by creating and maintaining required records.¹⁵

C. The Novel and Important Inducement – “Asset by Asset Exposure” under Sections 404 and 301

Thus, even when the non-liability rule is firmly in place for a protected series,¹⁶ the non-recourse rule for each asset of the protected series is subject to challenge on the grounds that: (i) the relevant records are deficient; (ii) the asset is therefore non-associated; and (iii) as a result the asset is “up for grabs” not only by a creditor of the protected series but also by any judgment creditor of the series limited liability company and any judgment creditor of any other protected series of the company.¹⁷

EXAMPLE: Conference, LLC, a series limited liability company, has two protected series, Conference, LLC – Protected Series Alpha (“Alpha”) and Conference, LLC – Protected Series Beta (“Beta”). Beta has several valuable assets, each of which has been properly documented and thereby associated with Beta (Section 301) since first acquired by Beta. A judgment creditor of Alpha attempts to levy on an associated asset of Beta. The attempt will fail for two reasons: (i) the attempt is an effort to hold Beta liable for Alpha’s debts, which

¹⁵ See Section 301(b)-(c).

¹⁶ Like the non-liability rule of a vertical shield, the non-liability rule of a horizontal shield is subject to “piercing” claims. See Section 402.

¹⁷ The situation is the same for assets of the series limited liability company itself.

contravenes the non-liability rule; and (ii) the non-recourse rule protects Beta's associated assets from claims except for claims asserted by Beta's creditors.

EXAMPLE: Same facts, except that, when Alpha's judgment creditor attempts to levy on Beta's property, one of Beta's assets is a "non-associated asset." Although Beta is not liable on the judgment against Alpha and the asset remains Beta's property, under Section 404 the asset is nonetheless subject to levy by the judgment creditor of Alpha.¹⁸

This asset-by-asset exposure does not exist under any current protected series statutes, because no current statute treats the non-liability and non-recourse rules separately with regard to horizontal shields. Moreover, no current statute contemplates situations in which recordkeeping is inadequate as to some assets and not others. Thus, this act's inducement to good recordkeeping is unique.

Part 8. Overcoming the Shields

"Piercing the veil" is the foremost doctrine for overcoming the traditional, vertical shield separating an entity from its owners. When a creditor succeeds with a piercing claim, the shield falls *in toto*. That is, all the owner's non-exempt assets are available to the judgment creditor of the entity.

The piercing doctrine (and any related theories that conflate an organization and its owners) apply to the vertical shield between a series limited liability company and its members and to the vertical shield between a protected series and its associated members. Likewise, the piercing doctrine (and related theories of affiliate liability) will apply to the internal, horizontal shields – *i.e.*, in the proper circumstances, a court will disregard the internal shields, negate the non-liability rule, and thus render the non-recourse rule moot. For a detailed discussion of this issue, see Section 402, cmt.

¹⁸ If a judgment creditor of Alpha or the series limited liability company successfully levies on the asset, Beta may have an unjust enrichment claim against the judgment debtor and a damage action against the person responsible for the recordkeeping that, being deficient, caused the item to be non-associated.

Part 9. Traditional and Internal Shields Compared in Tabular Form

type of shield	what the shield separates	non-liability rule	non-recourse rule	rules for overcoming the shield
traditional, vertical corporate/LLC liability shield	an entity from its owners	stated expressly	unstated, but ineluctably implied	piercing – shield overcome <i>in toto</i>
internal, horizontal shields in a series limited liability company	one set of assets/ operations from other sets of assets/operations	stated expressly	stated expressly but applicable only as to associated assets	piercing – shield overcome <i>in toto</i> “asset by asset” exposure under Section 404

Part 10. Clarity and Safeguards of this Act Compared
to Current Protected Series Statutes

In comparison with existing statutes, this act provides far greater transparency to the public and far greater clarity as to the myriad legal questions raised by the protected series concept. The following chart identifies 21 key issues and compares this act with the seminal Delaware provision on protected series and with the protected series provisions of Illinois and Texas, the two most clearly developed statutes from across the non-uniform spectrum of current law.¹⁹

Provisions Protecting Creditors or Providing Certainty	UPSA	Delaware	Illinois	Texas
Is a separate public filing necessary to establish each protected series?	Yes; § 201(b)	No	Yes; 805 ILL. COMP. STAT. 180/37-40(d)	No
Is protected series defined as a legal person?	Yes; §§ 102(7), 103	Yes; DEL. CODE ANN. tit. 6, § 18-101(12)	No	No
Is the duration of protected series expressly limited to the duration of series limited liability company?	Yes; § 104(b)(1)	No	Yes; 805 ILL. COMP. STAT. 180/37-40(m)	Yes; TEX. BUS. ORGS. CODE § 101.616(1)
Must name of protected series include name of series limited liability company?	Yes; § 202(b)	No	Yes; 805 ILL. COMP. STAT. 180/37-40(c)	No

¹⁹ Analysis current as of November 6, 2017, provided by legislative counsel to the Uniform Law Commission.

Provisions Protecting Creditors or Providing Certainty	UPSA	Delaware	Illinois	Texas
Does the statute specify rules for disregarding the internal shields that protect the assets of one protected series from the creditors of another, other than a general recordkeeping requirement?	Yes; § 402	No	No	No
Are there “asset by asset” consequences for assets not properly associated with a protected series, even if the internal shields remain in place?	Yes; § 404	No	No	No
Does the statute make it ineffective to associate property after a claim against the property has been made?	Yes; § 404	No	No	No

Provisions Protecting Creditors or Providing Certainty	UPSA	Delaware	Illinois	Texas
Do special recordkeeping requirements apply to transfers between a series limited liability company and a protected series of the company and between protected series of the company?	Yes; § 301(b)(3) and (c)(3)	No	No	No
If the statute expressly permits associated assets to be held by a nominee, etc., does the statute limit permission in any way?	Yes; § 301(e)	No; DEL. CODE ANN. tit. 6, § 18-215(b)	No; 805 ILL. COMP. STAT. 180/37-40(b)	No; TEX. BUS. ORGS. CODE § 101.603(a)
Does the statute address specifically the rights of judgment creditors of associated members?	Yes; 403	No	No	No

Provisions Protecting Creditors or Providing Certainty	UPSA	Delaware	Illinois	Texas
Does the statute expressly and directly require membership in the limited liability company as prerequisite to being associated member of protected series?	Yes; § 302(a)	No	No	No
Does the statute address how provisions in the limited liability company act apply at the protected series level?	Yes; §§ 106(d), 108, 304(c) and (f), 501(4)(A), 502(a), and 503(2)	No	Yes; 805 ILL. COMP. STAT. 180/37-40(j)	Yes; TEX. BUS. ORGS. CODE §§ 101.609, 101.617
Does the statute address whether associated members of a protected series have veto rights to operating agreement amendments affecting the protected series?	Yes; § 304(e)	No	No	No

Provisions Protecting Creditors or Providing Certainty	UPSA	Delaware	Illinois	Texas
Does the statute contain rules for protected series that the operating agreement cannot vary?	Yes; § 107	No	No	Yes, but limitation applies only to requirements for maintaining internal shields; TEX. BUS. ORGS. CODE § 101.054(a)(2) (referring to TEX. BUS. ORGS. CODE § 101.602(b))
Does the statute provide for registering foreign protected series to do business in the state?	Yes; § 604	No	Yes; 805 ILL. COMP. STAT. 180/37-40(o)	No
Does the statute require foreign protected series doing business in the state to comply with same name requirements as domestic protected series?	Yes; § 604(c)	No	Yes; 805 ILL. COMP. STAT. 180/37-40(c)	No

Provisions Protecting Creditors or Providing Certainty	UPSA	Delaware	Illinois	Texas
Does the statute require a foreign protected series to disclose either (i) information regarding the foreign series limited liability company and other foreign protected series of the company comparable to the information available from the public record regarding a domestic protected series or (ii) the identity of an individual who has this information?	Yes; §§ 704, 703(b)(2)	No	No	No
Does the statute permit a court to apply to a foreign protected series an enacting state's law regarding liability shields? in	Yes; §§ 404(c), 404(e)	No	No	No

Provisions Protecting Creditors or Providing Certainty	UPSA	Delaware	Illinois	Texas
Does the statute expressly address whether the series limited liability company may own an interest in a protected series of the company?	Yes; § 303(a)	No	No	No

UNIFORM PROTECTED SERIES ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Protected Series Act.

***Legislative Note:** Because this act is intended to be inserted into a state’s current limited liability company act, an enacting state should consider the following, as well as the Legislative Note to Section 102 (which explains how this act relies on specified definitions in an enacting state’s limited liability company act).*

*1. An enacting state should replace all bracketed references to “this [act]” with the state’s term for a part of an existing statute. For example, an enacting state that uses “article” will change “[act]” to “article”. Thus, for the Uniform Limited Liability Company Act this section would be revised to read: “**SECTION 101. SHORT TITLE.** This article may be cited as the Uniform Protected Series Act.”*

2. An enacting state should replace this act’s many bracketed references to “article” with whatever term the state uses to refer to a subpart of a statute. In the Uniform Limited Liability Company Act, the word would be “part”.

3. This act includes bracketed instructions to cite specified provisions of an enacting state’s limited liability company act. If an enacting state has adopted a “hub and spoke” approach to business organization statutes, the instructions should be read where appropriate to include reference to the hub and any other centralized provisions. Using the Uniform Business Organizations Code as an example, the hub encompasses filing requirements, name requirements, registered agents, foreign entities, and administrative dissolution, and another centralized provision addresses entity transactions (e.g., mergers, conversions).

SECTION 102. DEFINITIONS. In this [act]:

- (1) “Asset” means property:
 - (A) in which a series limited liability company or protected series has rights; or
 - (B) as to which the company or protected series has the power to transfer rights.
- (2) “Associated asset” means an asset that meets the requirements of Section 301.
- (3) “Associated member” means a member that meets the requirements of Section 302.
- (4) “Foreign protected series” means an arrangement, configuration, or other structure

established by a foreign limited liability company which has attributes comparable to a protected series established under this [act]. The term applies whether or not the law under which the foreign company is organized refers to “protected series”.

(5) “Foreign series limited liability company” means a foreign limited liability company that has at least one foreign protected series.

(6) “Non-associated asset” means:

(A) an asset of a series limited liability company which is not an associated asset of the company; or

(B) an asset of a protected series of the company which is not an associated asset of the protected series.

(7) “Person” includes a protected series.

(8) “Protected series”, except in the phrase “foreign protected series”, means a protected series established under Section 201.

(9) “Protected-series manager” means a person under whose authority the powers of a protected series are exercised and under whose direction the activities and affairs of the protected series are managed under the operating agreement, this [act], and [cite this state’s limited liability company act].

(10) “Protected-series transferable interest” means a right to receive a distribution from a protected series.

(11) “Protected-series transferee” means a person to which all or part of a protected-series transferable interest of a protected series of a series limited liability company has been transferred, other than the company. The term includes a person that owns a protected-series transferable interest as a result of ceasing to be an associated member of a protected series.

(12) “Series limited liability company”, except in the phrase “foreign series limited liability company”, means a limited liability company that has at least one protected series.

Legislative Note: *Because this act is intended to be inserted into a state’s current limited liability company act, this section does not define terms already defined in the Uniform Limited Liability Company Act (2006) (Last Amended 2013). This act presupposes the following definitions from that act:*

defined term	Uniform Limited Liability Company Act (2006) (Last Amended 2013) Section
Acquired entity	1001(1)
Acquiring entity	1001(2)
Converted entity	1001(4)
Converting entity	1001(5)
Foreign limited liability company	102(5)
Jurisdiction of formation	102(7)
Limited liability company	102(8)
Operating agreement	102(13)
Manager	102(9)
Member	102(11)
Person	102(15)
Property	102(17)
Record	102(18)
Sign	102(21)
State	102(22)
Transfer	102(23)
Transferable interest	102(24)
Transferee	102(25)

Each enacting state should determine whether its limited liability company act defines the terms listed above. If a state’s limited liability company act lacks a particular term entirely, the state should add the term as defined in the Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 102. If a state defines a particular concept but uses a different term – e.g., “limited liability company interest” instead of “transferable interest” – the state should modify this act accordingly.

In both the 2006 and 2013 versions of the Uniform Limited Liability Company Act, some of the above listed definitions appear in Section 1001, which states that it defines terms for use “[i]n this [article]” (pertaining to entity transactions). When adopting this act, a state that has adopted either the 2006 or 2013 version should revise Section 1001 to begin: “In this [article] and [cite the [article] containing this act]”. See also Section 101, Legislative Note 3.

Comment

“Asset” [1] – This definition derives from Uniform Commercial Code (“UCC”) § 9-203(b)(2) and is intended to have the same meaning. The UCC provision states as a precondition to the enforceability of a security interest in collateral that “the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party.”

Property that is subject to a security interest, mortgage, or other lien is nonetheless an asset under this definition. Moreover, an asset remains an asset even if “under water” (i.e., the amount owed and secured by the asset exceeds the value of the asset).

“Associated asset” [2] – This definition is key to establishing and delineating the “internal shields” provided by Section 401(b). Even though a protected series is not liable for the debts of its series limited liability company or any other protected series of the company, under Section 404 an asset owned by a protected series is available for creditors of the company or another protected series of the company unless the asset is an associated asset of the protected series. Section 301 delineates the recordkeeping required for an asset to obtain and maintain “associated asset” status. The same rules apply to assets owned by a series limited liability company.

“Associated member” [3] – Except for requiring that a person be a member of a series limited liability company in order to be an associated member of a protected series of the company, this act does not determine how a member becomes an associated member of a protected series. The operating agreement must address this important question. *See* Section 302(b).

“Foreign protected series” [4] – This definition is derived from Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 102(5), which defines “foreign limited liability company” as “an unincorporated entity formed under the law of a jurisdiction other than this state which would be a limited liability company if formed under the law of this state.” This act characterizes a domestic protected series as a person, Section 103, but this definition omits that characterization. Most current statutes do not address the characterization issue.

“Person” [7] – The definition of “person” in Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 102(15) does not expressly include a protected series, although that definition’s catchall term – “other ... commercial entity” – might apply.

“Protected-series manager” [9] – This definition derives from Uniform Business Organization Code (2013), Section 1-102(18)(K) (catchall provision in definition of “governor”). Note that, if a protected series is managed by its associated members, each associated member fits the definition of “protected-series manager”.

“Protected-series transferee” [11] – A protected-series transferee is analogous to a transferee of a membership interest, see Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 102(25), and the definition includes an associated member of a

protected series to whom is transferred a protected-series transferable interest owned by another person. For how the act treats a protected-series transferable interest owned by the series limited liability company, see Section 303(d).

“Series limited liability company” [12] – This term is shorthand for “a limited liability company that at the relevant moment has at least one protected series.” Thus, a limited liability company might:

- on Day 1, become a series limited liability company by establishing one or more protected series;
- on Day 2, cease to be a series limited liability company, having dissolved, wound up, and terminated all its protected series; and
- on Day 3, become anew a series limited liability company by establishing one or more protected series.

SECTION 103. NATURE OF PROTECTED SERIES. 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.

Comment

Section 104(c) provides that a protected series cannot exist on its own; therefore, a protected series is not entirely distinct from the series limited liability company on whose existence the protected series depends. Section 501(1) reflects this reality by stating that the dissolution of a series limited liability company causes the dissolution of each of the company’s protected series. Section 502(d) reflects this reality by providing that a series limited liability company has not completed its own winding up until the company has completed the winding up of each of the protected series of the company.

SECTION 104. POWERS AND DURATION OF PROTECTED SERIES.

- (a) A protected series of a series limited liability company has the capacity to sue and be sued in its own name.

(b) Except as otherwise provided in subsections (c) and (d), a protected series of a series limited liability company has the same powers and purposes as the company.

(c) A protected series of a series limited liability company ceases to exist not later than when the company completes its winding up.

(d) A protected series of a series limited liability company may not:

(1) be a member of the company;

(2) establish a protected series; [or]

(3) except as permitted by law of this state other than this [act], have a purpose or power that the law of this state other than this [act] prohibits a limited liability company from doing or having; or

(4) [insert other provisions].

Comment

Subsections (a), (c) & (d) – These provisions are non-variable. *See* Section 107(a)(3)-(5).

Subsection (a) – The capacity stated here distinguishes a series limited liability company and its protected series from the protected cell captive insurance companies [PCC] discussed in *Pac Re 5-AT v. Amtrust N. Am., Inc.*, No. CV-14-131-BLG-CSO, 2015 WL 2383406, at *4 (D. Mont. May 13, 2015) (stating that “absent a statutory grant to the contrary, a protected cell does not have the capacity to sue and be sued independent of the larger PCC”).

Subsection (b) – Under this provision, if the operating agreement of a series limited liability company restricts the company’s power, purpose, or both, the restriction applies to each protected series of the company. The provision is a default rule.

Subsection (c) – A protected series may not exist outside the context of the series limited liability company that established the protected series, except as a result of a merger under Section 604 (in which a protected series may be “relocated” from a series limited liability company that does not survive the merger to the series limited liability company that does). Generally, an organization’s disappearance as a result of a merger is not treated as a dissolution, and the merger does not effect the winding up of the organization. *See, e.g.*, Uniform Business Organization Code (2015), Section 2-206(b) (“Except as otherwise provided in the organic law or organic rules of a merging entity, a merger under this [part] does not give rise to any rights that an interest holder, governor, or third party would have upon a dissolution, liquidation, or

winding up of the merging entity.”)

Subsection (d) – The prohibitions stated in this subsection leave available a wide range of activities and affairs. For example, subject to a contrary provision in the operating agreement, every protected series, like every limited liability company, has the power to make contracts and own real and other property. These powers are key attributes to the concept of a legal person, are possessed by every limited liability company regardless of its state of organization, and therefore, under this provision, are possessed by every protected series established under this act.

Subsections (d)(1)-(2) – These provisions preclude structures that would be painfully Byzantine or would push the extrapolation construct beyond any understandable application. For a discussion of the extrapolation construct, see Prefatory Note, Part 6. However, these provisions do not prevent a protected series of a series limited liability company from being a manager of the company or a protected-series manager of another protected series of the company or acting otherwise as an agent for the company or other protected series.

Subsection (d)(3) – A limited liability company may not use a protected series to evade a requirement of other law. This provision’s introductory language – “[e]xcept as permitted by law of this state ...” – refers to situations in which state law authorizes a protected series of a series limited liability company to operate under the auspices of a license obtained or regulatory filing made by the company in the company’s name.

SECTION 105. GOVERNING LAW. The law of this state governs:

(1) the internal affairs of a protected series of a series limited liability company,
including:

(A) relations among any associated members of the protected series;

(B) relations among the protected series and:

(i) any associated member;

(ii) the protected-series manager; or

(iii) any protected-series transferee;

(C) relations between any associated member and:

(i) the protected-series manager; or

(ii) any protected-series transferee;

(D) the rights and duties of a protected-series manager;

(E) governance decisions affecting the activities and affairs of the protected series and the conduct of those activities and affairs; and

(F) procedures and conditions for becoming an associated member or protected-series transferee;

(2) the relations between a protected series of a series limited liability company and each of the following:

(A) the company;

(B) another protected series of the company;

(C) a member of the company which is not an associated member of the protected series;

(D) a protected-series manager that is not a protected-series manager of the protected series; and

(E) a protected-series transferee that is not a protected-series transferee of the protected series;

(3) the liability of a person for a debt, obligation, or other liability of a protected series of a series limited liability company if the debt, obligation, or liability is asserted solely by reason of the person being or acting as:

(A) an associated member, protected-series transferee, or protected-series manager of the protected series;

(B) a member of the company which is not an associated member of the protected series;

(C) a protected-series manager that is not a protected-series manager of the protected series;

(D) a protected-series transferee that is not a protected-series transferee of the protected series;

(E) a manager of the company; or

(F) a transferee of a transferable interest of the company;

(4) the liability of a series limited liability company for a debt, obligation, or other liability of a protected series of the company if the debt, obligation, or liability is asserted solely by reason of the company:

(A) having delivered to the [Secretary of State] for filing under Section 201(b) a protected series designation pertaining to the protected series or under Section 201(d) or 202(c) a statement of designation change pertaining to the protected series;

(B) being or acting as a protected-series manager of the protected series;

(C) having the protected series be or act as a manager of the company; or

(D) owning a protected-series transferable interest of the protected series; and

(5) the liability of a protected series of a series limited liability company for a debt, obligation, or other liability of the company or of another protected series of the company if the debt, obligation, or liability is asserted solely by reason of:

(A) the protected series:

(i) being a protected series of the company or having as a protected-series manager the company or another protected series of the company; or

(ii) being or acting as a protected-series manager of another protected series of the company or a manager of the company; or

(B) the company owning a protected-series transferable interest of the protected series.

Comment

Paragraph (1) – The concept of “internal affairs” presupposes an organization that is a legal person and thus applies to a protected series under this act. *See* Section 103 (stating that “[a] protected series ... is a person”). Because the protected series is a novel construct, this paragraph details some aspects of a protected series’ internal affairs. For a detailed discussion of “internal affairs,” see Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 104, Paragraph (1), cmt.

Paragraph (2) – Although the relationships listed in this provision are not within the internal affairs of a protected series, they are part of the internal affairs of a series limited liability company and therefore subject to the operating agreement. *See* Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 105(a), cmt. The concept of a protected series being so novel, Paragraph (2) is included for the avoidance of doubt.

Paragraph (3) – This provision chooses the law of the enacting state to govern matters pertaining to the vertical shields provided by this act. For an explanation of vertical shields, see Prefatory Note, Part 7-A and Section 401, comment.

Paragraphs (4)-(5) – These provisions choose the law of the enacting state to govern matters pertaining to the horizontal shields provided by this act. For an explanation of horizontal shields, see Prefatory Note, Part 7 and Section 401, comment.

SECTION 106. RELATION OF OPERATING AGREEMENT, THIS [ACT], AND LIMITED LIABILITY COMPANY ACT.

(a) Except as otherwise provided in this section and subject to Sections 107 and 108, the operating agreement of a series limited liability company governs:

(1) the internal affairs of a protected series, including:

(A) relations among any associated members of the protected series;

(B) relations among the protected series and:

(i) any associated member;

(ii) the protected-series manager; or

(iii) any protected-series transferee;

(C) relations between any associated member and:

(i) the protected-series manager: or

(ii) any protected-series transferee;

(D) the rights and duties of a protected-series manager;

(E) governance decisions affecting the activities and affairs of the protected series and the conduct of those activities and affairs; and

(F) procedures and conditions for becoming an associated member or protected-series transferee;

(2) relations among the protected series, the company, and any other protected series of the company;

(3) relations between:

(A) the protected series, its protected-series manager, any associated member of the protected series, or any protected-series transferee of the protected series; and

(B) a person in the person's capacity as:

(i) a member of the company which is not an associated member of the protected series;

(ii) a protected-series transferee or protected-series manager of another protected series; or

(iii) a transferee of the company.

(b) If [cite this state's limited liability company act] restricts the power of an operating agreement to affect a matter, the restriction applies to a matter under this [act] in accordance with Section 108.

(c) If law of this state other than this [act] imposes a prohibition, limitation, requirement, condition, obligation, liability, or other restriction on a limited liability company, a member, manager, or other agent of the company, or a transferee of the company, except as otherwise

provided in law of this state other than this [act], the restriction applies in accordance with Section 108.

(d) Except as otherwise provided in Section 107, if the operating agreement of a series limited liability company does not provide for a matter described in subsection (a) in a manner permitted by this [act], the matter is determined in accordance with the following rules:

(1) To the extent this [act] addresses the matter, this [act] governs.

(2) To the extent this [act] does not address the matter, [cite this state’s limited liability company act] governs the matter in accordance with Section 108.

Comment

A protected series does not have an operating agreement of its own, so the operating agreement of a series limited liability company must address issues pertaining to the company’s protected series. An operating agreement may do so in its main body, through a different exhibit or appendix for each protected series, through an exhibit or appendix applicable all protected series, or through some combination.

Most limited liability company acts permit oral and implied-in-fact operating agreements. *See, e.g.*, Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 102(13) (defining operating agreement as an agreement among all the members, “whether oral, implied, in a record, or in any combination thereof”). However, given the complexity inherent in the protected series construct, prudence demands a written operating agreement – and, moreover, one not subject to amendment except through a signed writing. *See* Uniform Limited Liability Company Act (2006) (Last Amended 2013), Sections 105(4) and 107(a) and comments to each.

Unless prohibited by the operating agreement, associated members of a protected series may make contracts among themselves pertaining to the protected series. To the extent permitted by other law (principally the law of contracts), such contracts bind the parties but have no effect on the operating agreement or the rights and duties of members of the series limited liability company who are not party to the agreement (whether or not the non-party member is an associated member of the protected series).

Subsection (a) – This provision derives from Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 105(a).

Subsection (a)(1) – For a discussion of how the concept of internal affairs applies to a protected series, see Section 105(1), cmt.

Subsection (a)(2) – *See* the comment to Subsection (a)(3).

Subsection (a)(3) – These provisions focus on relationships involving, on the one hand, a protected series, its protected-series manager, associated members, and protected-series transferees and, on the other hand, other persons “internal” to a series limited liability company. Because a protected series exists within (i.e., under the aegis of) a series limited liability company and such company’s operating agreement governs the company’s internal affairs, this provision is arguably unnecessary. It is included for the avoidance of doubt.

Subsection (b) – This subsection is an extrapolation provision. *See* Prefatory Note, Part 6.

Subsection (c) – This subsection is also an extrapolation provision. The phrase “except as otherwise provided by law of this state other than this [act]” refers to situations in which state law authorizes a protected series of a series limited liability company to operate under the auspices of a license obtained or regulatory filing made by the company in the company’s name. *Cf.* Section 104(d)(3), cmt.

Subsection (d)(2) – This provision is an extrapolation provision pertaining only to those internal affairs of a protected series not otherwise addressed by the operating agreement or this act. For a general explanation of extrapolation, see Prefatory Note, Part 6.

All limited liability company acts provide default rules to govern issues of internal affairs that a limited liability company’s operating agreement omits to address. *See, e.g.,* Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 105(b). Comparable gaps can exist at the protected series level, but this act does not provide a comprehensive set of “gap fillers.” Instead, if a question arises within the domain of subsection (a) and neither the operating agreement nor this act provides an answer, the answer is determined by extrapolating to the protected series level the rule for the analogous situation at the limited liability company level. Section 108 provides the extrapolation mechanics – i.e., treating a protected series as if it were a limited liability company, an associated member of the protected series as if it were a member of that “as if” limited liability company, etc. *See* Prefatory Note, Part 6.

Thus, together with Section 108 this provision creates a paradigm for determining the rules applicable to a matter within subsection (a). The following list states the paradigm; “non-variable provision” means a provision of an enacting state’s limited liability company act (including this act as inserted in the statute) which an operating agreement may not vary or waive.

- If a non-variable provision of the limited liability company act (including this act as inserted into that statute) addresses the matter, the provision governs to the extent applicable.
- If the matter is not exhaustively addressed by one or more non-variable provisions, the operating agreement governs to the extent applicable and effective. (If a term of an operating agreement seeks to vary a non-variable provision, the term is ineffective.)

- If the matter is not exhaustively addressed by one or more non-variable provisions, the operating agreement, or a combination thereof, this act's variable provisions govern to the extent applicable.²⁰
- If the matter is not exhaustively addressed by one or more non-variable provisions, the operating agreement, this act's variable provisions, or a combination thereof, the provisions of the limited liability company act govern the matter using the extrapolation rule stated in Section 108.

To this paradigm must be added one other situation. Suppose the terms of the operating agreement purport to comprehensively address a subsection (a) matter (i.e., an internal affair) in a way permitted by this act, but the terms (i) are ambiguous; (ii) incomplete (i.e., a gap exists); or (iii) are called into question due to some generally applicable principle of contract or other law (e.g., waiver). How should the court handle the situation?

- Resolve the matter solely according to contract and other law applicable law, i.e., as if extrapolation did not exist?
- or
- Declare the operating agreement ineffective on the point and rely on extrapolation under this section?

This act does not directly answer the question, but for reasons of logic and policy the answer should be the same as if the problem existed at the company level of a series limited liability company or with the operating agreement of an ordinary limited liability company.

This provision applies only to matters within subsection (a). For provisions providing for extrapolation as to other matters, see Sections 304(c), 304(f), 501(4)(A), 502(a), and 503(2).

SECTION 107. ADDITIONAL LIMITATIONS ON OPERATING AGREEMENT.

(a) An operating agreement may not vary the effect of:

(1) this section;

(2) Section 103;

(3) Section 104(a);

(4) Section 104(b) to provide a protected series a power beyond the powers [cite

this state's limited liability company act] provides a limited liability company;

(5) Section 104(c) or (d);

²⁰ A few variable provisions of this act invoke Section 108. *See, e.g.,* Section 304(c) and (f).

(6) Section 105;

(7) Section 106;

(8) Section 108;

(9) Section 201, except to vary the manner in which a limited liability company approves establishing a protected series;

(10) Section 202;

(11) Section 301;

(12) Section 302;

(13) Section 303(a) or (b);

(14) Section 304(c) or (f);

(15) Section 401, except to decrease or eliminate a limitation of liability stated in Section 401;

(16) Section 402;

(17) Section 403;

(18) Section 404;

(19) Section 501(1), (4), and (5);

(20) Section 502, except to designate a different person to manage winding up;

(21) Section 503;

(22) [Article] 6;

(23) [Article] 7;

(24) [Article] 8, except to vary:

(A) the manner in which a series limited liability company may elect under Section 803(a)(2) to be subject to this [act]; or

(B) the person that has the right to sign and deliver to the [Secretary of State] for filing a record under Section 803(b)(2); or

(25) a provision of this [act] pertaining to:

(A) registered agents; or

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

(b) An operating agreement may not unreasonably restrict the duties and rights under Section 305 but may impose reasonable restrictions on the availability and use of information obtained under Section 305 and may provide appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use.

Legislative Note: Subsection (b) is derived essentially verbatim from Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 105(c)(8). If an enacting state’s limited liability company act includes the uniform provision or comparable language, subsection (b) is redundant and should be deleted.

Comment

This section states restrictions beyond those covered by Section 107(b). (Section 107(b) extrapolates to the protected-series level limitations imposed by an enacting state’s limited liability company act on the power of an operating agreement.)

Occasionally the comments to this act refer to a variable provision as a “default rule” and a mandatory provision as “non-variable.” These references are merely to draw attention to the default/non-variable distinction in particular contexts and have neither the intent nor the power to affect the default/non-variable status of the many provisions of this act whose comments lack a comparable reference.

Subsection (a) – To understand a prohibition listed in this subsection, it is of course necessary to read the provision stating the prohibition. Solely to provide a general sense of the prohibitions listed in this subsection, the following chart:

- states in “initial caps” the captions of each full section listed; and
- describes in lowercase letters the subject matters of listed subsections.

subsection (a) paragraph number	Section Number of Non-Variable Provision	Caption (or description if not full section)
2	Section 103	Nature of Protected Series
3	Section 104(a)	capacity to sue and be sued
4	Section 104(b)	powers
5	Section 104(c)-(d)	no longer duration than series limited liability company; powers and purposes restricted
6	Section 105	Governing Law
7	Section 106	Relation of Operating Agreement, This [Act], And [Limited Liability Company Act]
8	Section 108	Rules for Applying [Limited Liability Company Act] to Specified Provisions of [Act]
9	Section 201	Protected Series Designation; Amendment
10	Section 202	Name
11	Section 301	Associated Asset
12	Section 302	Associated Member
13	Section 303(a) or (b)	initial ownership of protected-series transferable interest
14	Section 304 (c) or (f)	duties of protected-series manager derivative claim provisions

15	Section 401	Limitations on Liability
16	Section 402	Claim Seeking to Disregard Limitation of Liability
17	Section 403	Remedies of Judgment Creditor of Associated Member or Protected-Series Transferee
18	Section 404	Enforcement of Judgment Against Non- Associated Asset
19	Section 501(1) (4) (5)	dissolution of the company dissolves each protected series of the company judicial dissolution
21	Section 503	Effect of Reinstatement of Series Limited Liability Company or Revocation of Voluntary Dissolution
22	Article 6	Entity Transactions Restricted
23	Article 7	Foreign Protected Series
24	Article 8 Section 803	Miscellaneous Provisions Transitional Provisions
25	applicable generally to	provisions related to registered agents or the filing office

Subsection (a)(4) [Section 104(b)] – A protected series may have no greater power than the limited liability company act accords a limited liability company. However, nothing in this act precludes the operating agreement from reducing, restricting, or eliminating particular powers.

Subsection (a)(7) [Section 106] – This provision is less restrictive than might appear at first glance, especially with regard to Section 106(d) (extrapolation for subsection (a) matters

which the operating agreement does not address). By its terms, subsection (d) invites the operating agreement to provide the applicable rules for filling gaps.

EXAMPLE: The members of a manager-managed series limited liability company learn of this act’s extrapolation approach to subsection (a) matters, do not like the approach, and amend the agreement to include a definition of “disinterested” and further to provide:

If this agreement does not provide for a matter described in Section [citing the applicable provision of the state’s LLC statute, as augmented by the act], the agreement is amended so far as necessary to provide for the matter. The amendment is stated and adopted by:

- (i) the manager, if disinterested; or
- (ii) if the manager is not disinterested, the affirmative vote or consent of all members owning a majority of the rights to receive distributions as members at the time the vote or consent is to be effective.

Subsection (a)(8) [Section 108] – Section 108 contains the mechanics for extrapolation, which are non-variable. Section 108 is not self-executing; it applies only when invoked by some other provision of this act, each of which is also invariable. *See* paragraphs 7,14, and 19-21 of this subsection. But see also the comment to Subsection (a)(7).

Subsection (a)(9) [Section 201] – Under the exception, the operating agreement might, for example, decrease the quantum of member consent required to authorize establishing a protected series or grant the authority exclusively to the persons managing the limited liability company.

Subsection (a)(15) [Section 401] – The operating agreement may reduce the protections provided by Section 401 but may not increase (i.e., strengthen) them. However, an agreement between a series limited liability company and a creditor may certainly do so viz a viz that creditor.

EXAMPLE: A bank (“Bank”) makes a loan (“Loan”) to a limited liability company with the money to be used by the company. The loan agreement states that the three protected series of the company “are not party to nor guarantor of the Loan and have no obligation to repay any or all of the Loan” and that the Bank will have “no recourse to or claim against” the protected series “with regard to the Loan regardless of any legal or equitable claim Bank might otherwise have, except for an act by a protected series that is independently tortious toward Bank.” Although this agreement can be seen as reinforcing or strengthening the horizontal shield, Section 401(b), between the company and the protected series, Subsection (a)(15) does not apply. The company’s agreement with the Bank is not part of the operating agreement.

Subsection (a)(16)-(18) [Sections 402 - 404] – If an enacting state’s limited liability company act states a restriction similar to Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 105(c)(15) (prohibiting an operating agreement from “restrict[ing] the

rights under this [act] of a person other than a member or manager”), these provisions may well be redundant. *See* Section 106(b) of this act (providing that, if an enacting state’s limited liability company act “restricts the power of an operating agreement, the restriction applies to a matter under this [act] according to the rules in Section 108”). However, not all limited liability company acts follow the uniform act on this point. And, for those that do, these provisions are useful for the avoidance of doubt.

Subsection (a)(19) (Section 501(1), (4), (5)) – The operating agreement may not change the stated grounds for judicial dissolution but may determine the forum in which a claim for dissolution under Section 501(4) or (5) is determined. For example, arbitration and forum selection clauses are commonplace in business relationships in general and operating agreements in particular.

Subsection (a)(22) – Although the operating agreement may not vary Article 6, Section 604 incorporates by reference the merger-related provisions of an enacting state’s limited liability company act. Some of those provisions are variable, especially, for example, the quantum of consent necessary to approve a limited liability company’s participation in a merger.

Subsection (a)(25) – This provision derives from Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 105(c)(3) (prohibiting the operating agreement from varying “any requirement, procedure, or other provision of this [act] pertaining to: (A) registered agents; or (B) the [Secretary of State], including provisions pertaining to records authorized or required to be delivered to the [Secretary of State] for filing under this [act]”). However, not all limited liability company acts follow the uniform act on this point. For those that do, this provision is included for the avoidance of doubt.

SECTION 108. RULES FOR APPLYING LIMITED LIABILITY COMPANY

ACT TO SPECIFIED PROVISIONS OF [ACT].

(a) Except as otherwise provided in subsection (b) and Section 107, the following rules apply in applying Sections 106, 304(c) and (f), 501(4)(A), 502(a), and 503(2):

(1) A protected series of a series limited liability company is deemed to be a limited liability company that is formed separately from the series limited liability company and is distinct from the series limited liability company and any other protected series of the series limited liability company.

(2) An associated member of the protected series is deemed to be a member of the company deemed to exist under paragraph (1).

(3) A protected-series transferee of the protected series is deemed to be a transferee of the company deemed to exist under paragraph (1).

(4) A protected-series transferable interest of the protected series is deemed to be a transferable interest of the company deemed to exist under paragraph (1).

(5) A protected-series manager is deemed to be a manager of the company deemed to exist under paragraph (1).

(6) An asset of the protected series is deemed to be an asset of the company deemed to exist under paragraph (1), whether or not the asset is an associated asset of the protected series.

(7) Any creditor or other obligee of the protected series is deemed to be a creditor or obligee of the company deemed to exist under paragraph (1).

(b) Subsection (a) does not apply if its application would:

(1) contravene [cite provision of this state’s limited liability company act limiting the power of an operating agreement]; or

(2) authorize or require the [Secretary of State] to:

(A) accept for filing a type of record that neither this [act] nor [the cite this state’s limited liability company act] authorizes or requires a person to deliver to the [Secretary of State] for filing; or

(B) make or deliver a record that neither this [act] nor [cite this state’s limited liability company act] authorizes or requires the [Secretary of State] to make or deliver.

Comment

Subsection (a) – This provision provides the mechanics for the extrapolation approach which is at the core of this act. *See* Prefatory Note, Part 6. In effect, this provision treats each listed item at the protected series level as if the item were the analogous construct at the limited liability company level. However, the intrinsic the nature of the item being “deemed up” does

not change. As Black’s explains, “deem” means “[t]o treat (something) as if ... it has qualities *that it does not have*”) Black’s Law Dictionary (10th ed. 2014) (emphasis added).

Extrapolation does not “deem up” a protected series designation and does not encompass the operating agreement. A protected series designation has no analog at the limited liability company level. A certificate of formation would be the closest, but that certificate does far more than is done by a protected series designation. As for the operating agreement, again no analog exists. A protected series does not have its own operating agreement.

This provision is not self-executing. It applies only when another provision of this act expressly invokes Section 108. Extrapolation, like “proof of negligence” does not float “in the air.” *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 341, 162 N.E. 99 (1928) (Cardozo, J.) (quoting Pollock, Torts [11th ed.], p. 455).

Provision Invoking Section 108	Function of Invoking Provision
106	delineates the multifaceted relationship among the operating agreement of a series limited liability company, this act, and an enacting state’s limited liability company act
304(c)	determines the duties of a protected-series manager to the protected series and any associated members and protected-series transferees of the protected series
304(f)	invokes the derivative claim provisions of an enacting state’s limited liability company act
501(4)(A)	addresses judicial dissolution of a protected series
502(a)	addresses the winding up of a protected series

503(2)	delineates what happens to a protected series of a series limited liability company when the company revokes its voluntary dissolution or is reinstated after being administratively dissolved
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Subsection (b)(1) – A state that has enacted Uniform Limited Liability Company Act (2006) (Last Amended 2013) would cite Section 105.

Subsection (b)(2) – This provision does not address the question of whether the filing office may, may not, or shall accept for filing a record that includes information beyond the information specified by the statute providing for the filing of the record.

[ARTICLE] 2

ESTABLISHING PROTECTED SERIES

SECTION 201. PROTECTED SERIES DESIGNATION; AMENDMENT.

(a) With the affirmative vote or consent of all members of a limited liability company, the company may establish a protected series.

(b) To establish a protected series, a limited liability company shall deliver to the [Secretary of State] for filing a protected series designation, signed by the company, stating the name of the company and the name of the protected series to be established.

(c) A protected series is established when the protected series designation takes effect under [cite to provision of this state’s limited liability company act determining when a record delivered for filing takes effect].

(d) To amend a protected series designation, a series limited liability company shall deliver to the [Secretary of State] for filing a statement of designation change, signed by the company, that changes the name of the company, the name of the protected series to which the designation applies, or both. The change takes effect when the statement of designation change takes effect under [cite to provision of this state’s limited liability company act determining

when a record delivered for filing takes effect].

Legislative Note: *Subsections (b) and (d) presuppose that an enacting state’s limited liability company act will determine who may sign this record. See, e.g., Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 203(a)(1) (stating that in general “a record signed by a limited liability company must be signed by a person authorized by the company”). If no such “catch-all” provision exists, either this act or the limited liability company act should be revised accordingly.*

If an enacting state’s limited liability company act requires a limited liability company’s certificate of formation, however denominated, to identify a person or all persons with governance authority, the same requirement should appear in subsection (b).

Comment

This section contemplates the two types of records pertaining to a protected series which are delivered to the filing office. In each instance, it is the series limited liability company that prepares, signs, and delivers the record – not the protected series itself. With regard to a protected series designation, the rationale is obvious. With regard to a statement of designation change, the rationale has to do with how filing offices maintain and index filed records.

The operating agreement of a series limited liability company cannot vary the effects of this section, except to change the approval method stated in subsection (a). Section 107(a)(9).

Subsection (b) – Because a protected series designation is a record created by a limited liability company, an enacting state’s limited liability company act determines who has authority to sign for the company and when the designation becomes effective, etc. *See, e.g., Uniform Limited Liability Company Act (2006) (Last Amended 2013), Sections 203(a)(1) (stating that in general “a record signed by a limited liability company must be signed by a person authorized by the company”); 207 (pertaining to effective date and time).*

Subsection (c) – A protected series may be established without associated members. *Contrast* Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 201(d) (“A limited liability company is formed when the certificate of organization becomes effective and at least one person has become a member.”) Likewise, a protected series may be established without any assets (whether or not associated).

If a protected series is established without associated members, the series limited liability company:

- owns all the protected-series transferable interests
 - Section 303(b) – applicable only at the moment the protected series is established and subject to subsequent transfers by the company
 - per Section 107(a)(13) – non-variable; and
- is the protected-series manager of the protected series

- Section 304(b) – applicable throughout the existence of the protected series – i.e., whenever a protected series has no associated members
- per Section 107(a) – variable (not listed in the subsection)

Subsection (d) – This provision uses “statement of designation change” to avoid confusion with statutes that use “statement of change” for a different purpose. *See, e.g.*, Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 116 (Change of Registered Agent or Address for Registered Agent by Limited Liability Company).

The decision to file a statement of designation change will typically be ministerial and well within the ordinary course of the activities and affairs of a series limited liability company. For example, if a company changes its name, the company must change accordingly the name of each protected series of the company. *See* Section 202(b)(1), 202(c) cmt. In contrast, the decision to change the company’s name might be neither ministerial nor in the ordinary course.

For the reasons stated in the comment to subsection (b), an enacting state’s limited liability company act governs who has authority to sign a statement of designation change on behalf of a series limited liability company.

Subsection (c) and (d) – A state that has enacted Uniform Limited Liability Company Act (2006) (Last Amended 2013) would cite Section 207.

SECTION 202. NAME.

(a) Except as otherwise provided in subsection (b), the name of a protected series must comply with [cite the provision of this state’s limited liability company act imposing name requirements on a limited liability company].

(b) The name of a protected series of a series limited liability company must:

(1) begin with the name of the company, including any word or abbreviation required by [cite the provision of this state’s limited liability company act requiring that the name of a limited liability company include a designator to designate that the company is a limited liability company]; and

(2) contain the phrase “Protected Series” or “protected series” or the abbreviation “P.S.” or “PS”.

(c) If a series limited liability company changes its name, the company shall deliver to the

[Secretary of State] for filing a statement of designation change for each of the company's protected series, changing the name of each protected series to comply with this section.

Comment

Subsection (b)(1) – This provision and the filing provisions in Sections 201(b) and (d) (protected series designation, statement of designation change), 502(b) and (c) (optional statements of dissolution, optional statement of termination) and 606(2) (required attachments to statement of merger) combine to provide substantial transparency, allowing a person to search the public record to determine

- whether a limited liability company is a series limited liability company;
 - if so, the identity of all protected series of the company; and
- whether an organization is or has been a protected series and, if so
 - identity of the series limited liability company under whose aegis the protected series exists and any other protected series of that company;
 - whether the protected series was previously a protected series of a series limited liability company that merged out of existence under Section 604 – i.e., whether the protected series relocated during the merger;
 - whether the protected series was established as part of a merger under Section 604 in which the series limited liability company was the surviving company; and
 - whether a statement of dissolution or of termination pertaining to the protected is on file.

A filing office's current computer programs and other information-technology issues will affect how efficiently a person will be able to access filed information concerning a protected series.

For transparency provisions pertaining to foreign protected series, see Sections 703 and 704.

For statute to be cited: A state that has enacted Uniform Limited Liability Company Act (2006) (Last Amended 2013) would cite Section 112.

Subsections (b)(1) and (c) – Due to these provisions, a series limited liability company that changes its name must change accordingly the name of each of the company's protected series.

SECTION 203. REGISTERED AGENT.

(a) The registered agent in this state for a series limited liability company is the registered agent in this state for each protected series of the company.

(b) Before delivering a protected series designation to the [Secretary of State] for filing, a limited liability company shall agree with a registered agent that the agent will serve as the

registered agent in this state for both the company and the protected series.

(c) A person that signs a protected series designation delivered to the [Secretary of State] for filing affirms as a fact that the limited liability company on whose behalf the designation is delivered has complied with subsection (b).

(d) A person that ceases to be the registered agent for a series limited liability company ceases to be the registered agent for each protected series of the company.

(e) A person that ceases to be the registered agent for a protected series of a series limited liability company, other than as a result of the termination of the protected series, ceases to be the registered agent of the company and any other protected series of the company.

(f) Except as otherwise agreed by a series limited liability company and its registered agent, the agent is not obligated to distinguish between a process, notice, demand, or other record concerning the company and a process, notice, demand, or other record concerning a protected series of the company.

Comment

Subsection (a) – When a protected series lacks an agent for service of process: (i) perform under this subsection the company also lacks an agent; (ii) under most limited liability company acts that lack, if uncorrected, will lead to administrative dissolution; and (iii) under section 501(1), that dissolution causes the protected series to dissolve. For how to serve a protected series in that situation, see Section 204(b).

Subsection (b) – This provision refers to a limited liability company rather than a series limited liability company so as to encompass a limited liability company that is preparing to establish its first protected series.

Subsection (c) – This provision is derived from Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 203(c): “A person that signs a record as an agent or legal representative affirms as a fact that the person is authorized to sign the record.”

Subsections (d) and (e) – These provisions follow inevitably from subsection (a) but are included for the avoidance of doubt.

Subsection (f) – The series limited liability company rather than the registered agent

must do the sorting unless the company and the agent agree otherwise.

SECTION 204. SERVICE OF PROCESS, NOTICE, DEMAND, OR OTHER RECORD.

(a) A protected series of a series limited liability company may be served with a process, notice, demand, or other record required or permitted by law by:

(1) serving the company;

(2) serving the registered agent of the protected series; or

(3) other means authorized by law of this state other than [cite this state's limited liability company act].

(b) Service of a summons and complaint on a series limited liability company is notice to each protected series of the company of service of the summons and complaint and the contents of the complaint.

(c) Service of a summons and complaint on a protected series of a series limited liability company is notice to the company and any other protected series of the company of service of the summons and complaint and the contents of the complaint.

(d) Service of a summons and complaint on a foreign series limited liability company is notice to each foreign protected series of the foreign company of service of the summons and complaint and the contents of the complaint.

(e) Service of a summons and complaint on a foreign protected series of a foreign series limited liability company is notice to the foreign company and any other foreign protected series of the company of service of the summons and complaint and the contents of the complaint.

(f) Notice to a person under subsection (b), (c), (d), or (e) is effective whether or not the summons and complaint identify the person if the summons and complaint name as a party and

identify:

- (1) the series limited liability company or a protected series of the company; or
- (2) the foreign series limited liability company or a foreign protected series of the

foreign company.

Comment

Subsection (a) – Under this provision, serving a protected series of a series limited liability company by serving the company has the same effect as serving the protected series’ registered agent. Except as otherwise provided in subsections (c) through (g), effective service requires that the protected series being served be adequately identified.

However effected, service of a record on a protected series does not affect the protected series if the record is inapposite. For example, serving a summons to a deposition on a series limited liability company has no effect on a protected series of the company unless the summons names the protected series as the deponent. Likewise, serving a protected series with a charging order pertaining to a judgment debtor has no effect if the debtor is neither an associated member of the protected series nor a protected-series transferee.

This provision does not directly provide how to serve a protected series of a series limited liability company if the protected series ceases to have a registered agent, or its registered agent cannot with reasonable diligence be served, because such a provision is unnecessary. A protected series of a series limited liability company may be served by serving the company. Subsection (a)(1). If the company ceases to have a registered agent, or its registered agent cannot with reasonable diligence be served, a protected series of the company may be served by serving the company under the relevant law for making substituted service.

Subsections (b)-(f) – In a world of complex, multi-tiered, multipart organizations, it is not always easy to identify which part of such an organization is legally responsible for a particular claimed harm. This difficulty enhances statute of limitations risk.

These five subsections encompass series limited liability companies, protected series, foreign series limited liability companies, and foreign protected series. The intent is to mitigate the statute of limitations risk by addressing the “relating back” issue in the context of amending a compliant.

Both federal and state courts provide criteria for amending a complaint to name a new party and having the amendment relate back to the original complaint. *See, e.g.*, F.R.C.P. 15(c), Minn.R.Civ.P. 15(h). While “relating back” solves the statute of limitations problem, the relating back rules require *inter alia* that “the party to be brought in by amendment ... received such notice of the action that it will not be prejudiced in defending on the merits.” F.R.C.P. 15(c)(1)(C)(i).

In some jurisdictions, a plaintiff can also use “Doe” defendants to address the statute of limitations risk. *See, e.g.*, Miss.R.C.P. 9(h) (“Fictitious Parties. When a party is ignorant of the name of an opposing party and so alleges in his [sic] pleading, the opposing party may be designated by any name, and when his [sic] true name is discovered the process and all pleadings and proceedings in the action may be amended by substituting the true name and giving proper notice to the opposing party.”).

However, using “Doe” defendants raises complex issues. *See* N.Y. C.P.L.R. 1024 (McKinney), Vincent C. Alexander, Practice Commentaries (explaining the complexities, noting that: (i) “the defendant whose name is unknown must be described in such a way as to fairly apprise the party that he or she is an intended defendant”; (ii) [a]n inadequate description renders the action jurisdictionally defective”; and (iii) [e]ach case, of course, is fact-specific as to the sufficiency of the description of the intended defendant”).

Moreover, federal and some state courts disfavor the “Doe” tactic. *See, e.g., Barrow v. Wethersfield Police Dep’t*, 66 F.3d 466, 468 (2d Cir. 1995), modified, 74 F.3d 1366 (2d Cir. 1996) (“We have stated that it is familiar law that ‘John Doe’ pleadings cannot be used to circumvent statutes of limitations because replacing a ‘John Doe’ with a named party in effect constitutes a change in the party sued. Thus, such an amendment may only be accomplished when all of the specifications of Fed.R.Civ.P. 15(c) [relating back rule] are met.”) (quoting *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1075 (2d Cir.1993); internal quotation marks and brackets in original omitted); *State ex rel. Holzum*, 342 S.W.3d 313, 316 (Mo. 2011) (holding that naming Doe defendants is immaterial to a motion to relate back an amendment to the complaint and stating that the applicable rule “allows a change in parties but requires that the correct party defendant receive ‘notice’ of the original action”).

SECTION 205. CERTIFICATE OF GOOD STANDING FOR PROTECTED SERIES.

(a) On request of any person, the [Secretary of State] shall issue a certificate of good standing for a protected series of a series limited liability company or a certificate of registration for a foreign protected series if:

(1) in the case of a protected series:

(A) no statement of dissolution, termination, or relocation pertaining to the protected series has been filed; and

(B) the company has delivered to the [Secretary of State] for filing the most recent [annual] [biennial] report required by [cite the provision of this state’s limited

liability company act requiring an annual or biennial report] and the report includes the name of the protected series, unless:

(i) when the company delivered the report for filing, the protected series designation pertaining to the protected series had not yet taken effect; or

(ii) after the company delivered the report for filing, the company delivered to the [Secretary of State] for filing a statement of designation change changing the name of the protected series; or

(2) in the case of a foreign protected series, it is registered to do business in this state.

(b) A certificate issued under subsection (a) must state:

(1) in the case of a protected series:

(A) the name of the protected series of the series limited liability company and the name of the company;

(B) that the requirements of subsection (a) are met;

(C) the date the protected series designation pertaining to the protected series took effect; and

(D) if a statement of designation change pertaining to the protected series has been filed, the effective date and contents of the statement;

(2) in the case of a foreign protected series, that it is registered to do business in this state;

(3) that the fees, taxes, interest, and penalties owed to this state by the protected series or foreign protected series and collected through the [Secretary of State] have been paid, if:

(A) payment is reflected in the records of the [Secretary of State]; and

(B) nonpayment affects the good standing of the protected series; and

(4) other facts reflected in the records of the [Secretary of State] pertaining to the protected series or foreign protected series which the person requesting the certificate reasonably requests.

(c) Subject to any qualification stated by the [Secretary of State] in a certificate issued under subsection (a), the certificate may be relied on as conclusive evidence of the facts stated in the certificate.

***Legislative Note:** This section parallels Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 211, which pertains to certificates of good standing or registration. An enacting state should change this section as necessary to parallel the comparable provision in the state's limited liability company act. In some states, changes to this section need to take into account the filing office's current computer programs and other information-technology resources issues.*

Comment

Subsection (a) – This subsection parallels the provisions of Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 211, pertaining to domestic limited liability companies, with one exception. This provision has no parallel to Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 211(b)(2)(D)(ii) – that “the records of the [Secretary to State] do not otherwise reflect that the [limited liability] company has been dissolved or terminated.”

To make that determination about a protected series, the filing office would have to determine whether its records disclose the dissolution or termination of the series limited liability company. Requiring that determination for each certificate of good standing for a protected series would impose unnecessary costs. For example, suppose that a person seeks a certificate of good standing for 15 protected series of the same series limited liability company. The requestor needs only one certification that the company is in good standing, not 15. *See* comment to Subsection (a)(8).

Subsection (a)(1)(A) – For the role of a statement of dissolution, see Section 502(b). For the role of a statement of termination, see Sections 502(c) and 606(2)(A). For the role of a statement of relocation, see Section 606(2)(B).

Subsection (a)(1)(B) – A state that has enacted Uniform Limited Liability Company Act (2006) (Last Amended 2013) would cite Section 212.

Subsection (a)(8) – As a matter of prudence, a person seeking to determine the good standing of a protected series of a series limited liability company should also determine whether the company is in good standing. Depending on the rules, procedures, or practices of the filing office, a requestor might use this provision to do so, or instead file a contemporaneous, separate request for a certificate of good standing for the company.

**SECTION 206. INFORMATION REQUIRED IN [ANNUAL] [BIENNIAL]
REPORT; EFFECT OF FAILURE TO PROVIDE.**

(a) In the [annual][biennial] report required by [cite the provision of this state’s limited liability company act pertaining to annual or biennial reports], a series limited liability company shall include the name of each protected series of the company:

(1) for which the company has previously delivered to the [Secretary of State] for filing a protected series designation; and

(2) which has not dissolved and completed winding up.

(b) A failure by a series limited liability company to comply with subsection (a) with regard to a protected series prevents issuance of a certificate of good standing pertaining to the protected series but does not otherwise affect the protected series.

Comment

A series limited liability company’s failure to include the name of a protected series does not dissolve or terminate the protected series or alter the capacity or powers of the protected series in any way. However, a court might consider a sustained or deliberate omission as a ground for “piercing” the horizontal shield, the vertical shield, or both. *See* Section 402, cmt.

For statute to be cited: A state that has enacted Uniform Limited Liability Company Act (2006) (Last Amended 2013) would cite Section 212.

[ARTICLE] 3

**ASSOCIATED ASSET; ASSOCIATED MEMBER; PROTECTED-SERIES
TRANSFERABLE INTEREST; MANAGEMENT; RIGHT OF INFORMATION**

SECTION 301. ASSOCIATED ASSET.

(a) Only an asset of a protected series may be an associated asset of the protected series.

Only an asset of a series limited liability company may be an associated asset of the company.

(b) An asset of a protected series of a series limited liability company is an associated asset of the protected series only if the protected series creates and maintains records that state the name of the protected series and describe the asset with sufficient specificity to permit a disinterested, reasonable individual to:

(1) identify the asset and distinguish it from any other asset of the protected series, any asset of the company, and any asset of any other protected series of the company;

(2) determine when and from what person the protected series acquired the asset or how the asset otherwise became an asset of the protected series; and

(3) if the protected series acquired the asset from the company or another protected series of the company, determine any consideration paid, the payor, and the payee.

(c) An asset of a series limited liability company is an associated asset of the company only if the company creates and maintains records that state the name of the company and describe the asset with sufficient specificity to permit a disinterested, reasonable individual to:

(1) identify the asset and distinguish it from any other asset of the company and any asset of any protected series of the company;

(2) determine when and from what person the company acquired the asset or how the asset otherwise became an asset of the company; and

(3) if the company acquired the asset from a protected series of the company, determine any consideration paid, the payor, and the payee.

(d) The records and recordkeeping required by subsections (b) and (c) 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.

(e) To the extent permitted by this section and law of this state other than this [act], a series limited liability company or protected series of the company may hold an associated asset directly or indirectly, through a representative, nominee, or similar arrangement, except that:

(1) a protected series may not hold an associated asset in the name of the company or another protected series of the company; and

(2) the company may not hold an associated asset in the name of a protected series of the company.

Comment

As explained in Prefatory Note, Part 7, with regard to horizontal shields this act distinguishes the non-liability rule, Section 401(b), from the non-recourse rule. The non-recourse rule protects only associated assets, and this section states the recordkeeping mechanics required to qualify an asset as an associated asset. Section 404 states the consequences of non-compliance.

The rules stated in this section and the consequences provided in Section 404 sharply distinguish the protected series construct from more traditional affiliate relationships – e.g., a holding company with subsidiaries. Although concepts of affiliate liability apply in both contexts, see Section 402(a), traditional affiliate relationships face neither the recordkeeping requirements of this section nor the asset-by-asset exposure consequences of Section 404.

Subsection (a) – Only property that is an asset of a protected series may be an associated asset of the protected series. The same rule applies to the series limited liability company itself. Thus, associated assets are a subset of assets (although, if the recordkeeping is satisfactory, the subset will be co-extensive with the set).

Subsections (b) and (c) – These provisions state the recordkeeping required for an asset to be an associated asset of respectively a protected series or series limited liability company.

Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 102(18) defines “record” as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” The reference here and in subsection (c) to “a record or set of records” indicates that the necessary information may be found in one record (e.g., one spreadsheet) or a combination of records comprised so as to enable “a disinterested, reasonable individual” to make sense of the combination. *Cf.* Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 102(13), cmt. (stating that “an operating agreement may comprise several of separate documents (or records), however denominated”).

In this context, a “reasonable individual” has at least a general familiarity with business records. However, the standard does not require familiarity with generally accepted accounting principles (GAAP) or any other particular set of accounting rules. It follows that records decipherable only by a forensic accountant do not meet the standard. By the same token, these provisions do not require that the recordkeeping comply with GAAP or any other particular set of accounting rules.

Unless the operating agreement provides otherwise, the owner of an asset (a protected series or the company, as the case may be) is responsible for meeting the recordkeeping requirements with regard to the asset. However, this decentralized approach can be a trap for the unwary. Records of a protected series might be clear beyond peradventure if considered alone but ambiguous when considered along with the records of another protected series or the series limited liability company. The operating agreement can address this problem by delegating recordkeeping responsibility for a series limited liability company and all its protected series to one person – i.e., the company, one of the protected series, or a third party (e.g., a management company).

Access to the records maintained under this section is governed by the same rules that apply to other information maintained by a series limited liability company or protected series. *See, e.g.*, Section 305 (right of person not associated member of protected series to information concerning protected series) and 107(b) (prohibition against unreasonably restricting the rights stated in Section 305).

This act requires recordkeeping and states consequences for failing to do so but does not itself provide outsiders access to the records – e.g., to a third-party creditor searching for non-associated (“up for grabs”) assets. The question is governed by other law, e.g., rules of discovery in civil matters, including rules pertaining to post-judgment disclosures and protective orders for confidential information.

Subsections (b)(1)-(3); (c)(1)-(3) – An interesting interplay between this act and the Uniform Voidable Transactions Act (“UVTA”) could result if a protected series or series limited liability company fails to meet the transparency requirements stated in these provisions.

EXAMPLE: Karsai LLC is a series limited liability company with three protected series: Karsai LLC Protected Series A (“PS-A”), Karsai LLC Protected Series B (“PS-B”), Karsai LLC Protected Series C (“PS-C”). The following sequence of events occurs:

1. PS-A transfers an asset to PS-B in a transaction voidable under the UVTA.
2. PS-B fails to comply with subsection (b)(3); the asset is therefore a non-associated asset of PS-B.
3. A judgment creditor of PS-C invokes Section 404, seeking to levy on the non-associated asset of PS-B. A judgment creditor of PS-A invokes the voidable transactions act, seeking to recover the asset from PS-B.

Which creditor prevails is determined by other law.

Subsections (b)(1)-(2); (c)(1)-(2) – These provisions impose substantial transparency requirements.

The reference in subsections (b)(2) and (c)(2) to “how the asset otherwise became an asset of the protected series/company” encompasses assets that are manufactured or otherwise created or developed “in house.” Cf. Uniform Commercial Code, Section UCC § 2-501(1)(b) (pertaining to the identification of future goods).

Subsections (b)(3); (c)(3) – These provisions impose additional transparency requirements in transactions between a series limited liability company and one of the protected series of the company or between two protected series of the company. In almost all instances, the person acquiring the asset will itself pay the consideration. However, a protected series or series limited liability company might acquire an asset through a third party beneficiary contract, including one in which the protected series or company is a donee beneficiary. Similarly, payment might be made to an assignee of the person transferring the asset.

Subsection (d) – The language in this provision derives from Uniform Commercial Code (“UCC”) Section 9-108(b). However, both that provision and this one are examples of methodology in service of a goal. In the case of UCC Section 9-108, the goal is to “reasonably identif[y] what is described.” *Id.*, subsection (a). In this case of Section 301 of this act, the goal is substantially different:

to permit a disinterested, reasonable individual to: (1) identify the asset and distinguish it from any other assets of the protected series, any assets of the company, and any assets of any other protected series of the company; (2) determine when and from what person the protected series acquired the asset or how the asset otherwise became an asset of the protected series; and (3) if the protected series acquired the asset from the company or another protected series of the company, determine any consideration paid, the payor, and the payee.

Section 301(b). *See also* Section 301(c) (essentially identical language pertaining to associated assets of a series limited liability company).

Put another way, the goal of UCC Section 9-108 is to distinguish *among* types of property in which a debtor presumably has rights or the power to transfer rights, UCC Section UCC 9-203(b)(2), while the goal of Section 301 is to distinguish assets of a protected series from assets of the series limited liability company or another protected series of the company.

Subsection (e) – Under this provision, for example, stock could constitute an associated asset of a protected series, even though the stock is held in “street name” by a brokerage firm.

Subsection (e)(1)-(2) – These exceptions promote transparency.

SECTION 302. ASSOCIATED MEMBER.

(a) Only a member of a series limited liability company may be an associated member of a protected series of the company.

(b) A member of a series limited liability company becomes an associated member of a protected series of the company if the operating agreement or a procedure established by the agreement states:

(1) that the member is an associated member of the protected series;

(2) the date on which the member became an associated member; and

(3) any protected-series transferable interest the associated member has in connection with becoming or being an associated member.

(c) If a person that is an associated member of a protected series of a series limited liability company is dissociated from the company, the person ceases to be an associated member of the protected series.

Legislative Note: *If an enacting state’s limited liability company act does not permit a “non-economic member,” the state should determine whether to apply a parallel requirement at the protected series level, and, if so, change subsection (b)(2) by stating the requirement directly and substituting “the” for “any”.*

Comment

Subsection (a) – The requirement stated here is integral to this act; allowing a non-member to be associated with a protected series would oust the operating agreement from its fundamental role, or at the very least make that role extraordinarily complex. *See also* Section 102(3) (defining “associated member” as “a *member* that meets the requirements under Section 302.”) (emphasis added).

Under this subsection, any event causing a member’s dissociation from a series limited liability company *ipso facto* ends the person’s status as an associated member of any protected

series company. The operating agreement can specify other events causing a member to cease being an associated member of a protected series.

This act does not prescribe the fate of the protected-series transferable interest of person who ceases to be an associated member of a protected series. That fate depends, first, on the operating agreement and, if the operating agreement is silent, then per Sections 106(d)(2) and 108 on the default rule provided by an enacting state's limited liability company act. The typical result is to freeze in the person as a transferee of its own transferable interest. For a discussion of the lot of a "bare naked assignee" at the limited liability company level, see Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 107(b), cmt.

Subsection (b) – Because this provision addresses how a member becomes an associated member, extrapolation for internal affairs (Sections 106(d) and 108) does not apply. In contrast, extrapolation will determine the consequences of a member ceasing to be an associated member of a protected series, unless the operating agreement addresses the matter.

Subsection (b)(2) – Following Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 401(d), this provision permits a member to be an associated member of a protected series without having an economic interest in the protected series.

SECTION 303. PROTECTED-SERIES TRANSFERABLE INTEREST.

(a) A protected-series transferable interest of a protected series of a series limited liability company must be owned initially by an associated member of the protected series or the company.

(b) If a protected series of a series limited liability company has no associated members when established, the company owns the protected-series transferable interests in the protected series.

(c) In addition to acquiring a protected series transferable series interest under subsection (b), a series limited liability company may acquire a protected-series transferable interest through a transfer from another person or as provided in the operating agreement.

(d) Except for Section 108(a)(3), a provision of this [act] which applies to a protected-series transferee of a protected series of a series limited liability company applies to the company in its capacity as an owner of a protected-series transferable interest of the protected series. A

provision of the operating agreement of a series limited liability company which applies to a protected-series transferee of a protected series of the company applies to the company in its capacity as an owner of a protected-series transferable interest of the protected series.

Comment

Subsection (a) – A protected-series transferable interest can be owned initially only by an associated member or the series limited liability company. *Cf.* Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 102(24) (defining “[t]ransferable interest” as “the right, *as initially owned by a person in the person’s capacity as a member*, to receive distributions from a limited liability company”) (emphasis added). Subsection (a) is not variable, Section 107(a)(13), but does not restrict an initial owner’s rights to transfer. The operating agreement should delineate those rights. If it does not, Sections 106(c) and 108 delineate the rights by extrapolation. *See* Section 106(d), cmt.

Subsection (b) – This provision is non-variable, Section 107(a)(13).

Subsection (d) – By definition, this act does not permit a series limited liability company to be an associated member of any of the protected series of the company. *See* Section 302(a) (“Only a member of a series limited liability company may be an associated member of a protected series of the company.”). In consequence, when a company acquires a protected-series transferable interest it obtains no governance rights in the protected series except as provided in the operating agreement or under Subsection 304(b) (providing as a default rule that whenever a protected series has no associated members, the company is the protected-series manager).

When a series limited liability company owns a protected-series transferable interest of a protected series of the company, the company’s rights are identical to the rights of a protected-series transferee of the protected series with only one exception. The exception is Section 304(b), which makes the company the protected-series manager of any protected series that has no associated members.

The Drafting Committee discussed omitting this subsection in favor of expanding the definition of “protected-series transferee” to include the company. That approach is consistent with “[a] protected series of a series limited liability company [being] a person distinct from ... the company,” Section 103(1), but nonetheless seems counterintuitive (somewhat like a snake swallowing its own tail). To avoid potential confusion, the Committee chose the approach stated in this subsection.

SECTION 304. MANAGEMENT.

(a) A protected series may have more than one protected-series manager.

(b) If a protected series has no associated members, the series limited liability company is

the protected-series manager.

(c) Section 108 applies to determine any duties of a protected-series manager of a protected series of a series limited liability company to:

- (1) the protected series;
- (2) any associated member of the protected series; and
- (3) any protected-series transferee of the protected series.

(d) Solely by reason of being or acting as a protected-series manager of a protected series of a series limited liability company, a person owes no duty to:

- (1) the company;
- (2) another protected series of the company; or
- (3) another person in that person's capacity as:

(A) a member of the company which is not an associated member of the protected series;

(B) a protected-series transferee or protected-series manager of another protected series; or

(C) a transferee of the company.

(e) An associated member of a protected series of a series limited liability company has the same rights as any other member of the company to vote on or consent to an amendment to the company's operating agreement or any other matter being decided by the members, whether or not the amendment or matter affects the interests of the protected series or the associated member.

(f) [Cite the derivative claim provisions of this state's limited liability company act] apply to a protected series in accordance with Section 108.

[(g) An associated member of a protected series is an agent for the protected series with power to bind the protected series to the same extent that a member of a limited liability company is an agent for the company with power to bind the company under [cite the statutory apparent authority provision of this state’s limited liability company act].]

***Legislative Note:** Uniform Limited Liability Company Act (2006), Section 301 eliminated the concept of “statutory apparent authority”, and the 2013 amendments took the same approach. For an enacting state whose limited liability company act retains statutory apparent authority, subsection (g) provides an associated member the same statutory apparent authority to bind a protected series that the limited liability company act provides for a member to bind a limited liability company. A state that enacts subsection (g) also should include the subsection (g) in Section 107(a), which lists provisions of this act whose effects the operating agreement may not vary.*

Comment

This act approaches management rights and duties in a protected series in three ways:

- directly, in Subsections (a), (b), (d), and (e);
- through particularized extrapolation, in Subsections (c) and (f); and
- through the “internal affairs” extrapolation in Section 106(d)(2).

Subsection (a) – If a protected series is managed by its associated members, each associated member fits the definition of “protected-series manager”. *See* Section 102(9) (defining the term).

Subsection (b) – Subject to the operating agreement, this provision applies not only when a protected series is established but also at any other time.

EXAMPLE: When established, Protected Series 1 of XYZ, LLC (“PS-1”) has four associated members. The operating agreement is silent on how PS-1 is to be managed, and the relevant limited liability company act provides for member management as the default rule. Accordingly, PS-1 is member-managed and remains so as long as PS-1 has any associated members. For various reasons, all four associated members eventually cease to be associated. Under this subsection, XYZ, LLC becomes the protected-series manager. If later a member becomes an associated member, Subsection (b) no longer applies.

Subsection (c) – “Duties” includes all duties, including fiduciary duties. The reference to “any duties to ... any associated member of the protected series, or any protected-series transferee of the protected series” does not imply that such duties necessarily exist. The use of “[a]ny” is significant. Moreover, the reference does not override the distinction between direct and derivative claims. *See* subsection (f).

Subsection (d) – The phrase “in that capacity” is crucially important. A person who is protected-series manager of two protected series of a series limited liability company, or a manager of the company and a protected-series manager of one of the protected series of the company is acting as an agent for two different principals. Absent an agreement with both principals after full disclosure, the agent is in a double bind:

The mere existence of a dual agency violates the duty of undivided loyalty. Moreover, the dual agent risks specific conflicts of duty as to a myriad of individual issues. The fact that these individual conflicts may be irreconcilable does not justify the agent ignoring one duty or the other. Rather, if any such specific conflict materializes, the agent is destined to be liable to one principal, the other, or both.

Daniel S. Kleinberger, *AGENCY, PARTNERSHIP AND LLCs: EXAMPLES AND EXPLANATIONS* (5th ed.; Wolters Kluwer; 2017) § 4.1.1-C-4 (No Acting for Others with Conflicting Interests).

The following example shows one method of addressing the inevitable conflict when one person is protected-series manager for more than one protected series of a series limited liability company.

EXAMPLE: A-Z LLC (“A-Z”) has five protected series – A-Z LLC – Protected Series 1, A-Z LLC Protected Series 2, etc. Per the operating agreement, A-Z is the protected-series manager of each of the protected series. To alleviate the “dual agent” problem, the operating agreement provides:

If this agreement, or [the applicable limited liability company act] requires or authorizes A-Z to make a decision that has the potential to benefit one protected series of A-Z to the prejudice of another protected series of A-Z, or to benefit A-Z to the detriment of a protected series of A-Z, A-Z is not liable for damages under this agreement or [the limited liability company act], whether the claim is in law or equity, if A-Z acts in the matter with due care and makes the decision with:

- (1) the honest belief that the decision serves the best interests of A-Z or one or more protected series of A-Z; and
- (2) the reasonable belief that the decision breaches no right under this agreement or [the limited liability company act] (as permissibly varied by this agreement) of:
 - (i) A-Z;
 - (ii) a protected series of A-Z; or
 - (iii) a member of A-Z, whether in the capacity of a member of A-Z or an associated member of a protected series of A-Z.

Subsection (e) – A default rule, this provision precludes any claim to the protected-series equivalent of “class voting.”

Subsection (f) – A state that has enacted Uniform Limited Liability Company Act (2006)

(Last Amended 2013) would cite Sections 801 to 806.

Subsection (g) – *See* the Legislative Note to this section. For a discussion of statutory apparent authority versus common law actual and apparent authority, see Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 301(a), cmt.

SECTION 305. RIGHT OF PERSON NOT ASSOCIATED MEMBER OF PROTECTED SERIES TO INFORMATION CONCERNING PROTECTED SERIES.

(a) A member of a series limited liability company which is not an associated member of a protected series of the company has a right to information concerning the protected series to the same extent, in the same manner, and under the same conditions that a member that is not a manager of a manager-managed limited liability company has a right to information concerning the company under [cite provisions of this state’s limited liability company act which provide information rights for non-manager members of a manager-managed limited liability company].

(b) A person formerly an associated member of a protected series has a right to information concerning the protected series to the same extent, in the same manner, and under the same conditions that a person dissociated as a member of a manager-managed limited liability company has a right to information concerning the company under [cite provisions of this state’s limited liability company act which provide information rights for dissociated members of a manager-managed limited liability company].

(c) If an associated member of a protected series dies, the legal representative of the deceased associated member has a right to information concerning the protected series to the same extent, in the same manner, and under the same conditions that the legal representative of a deceased member of a limited liability company has a right to information concerning the company under [cite provisions of this state’s limited liability company act providing information rights in these circumstances].

(d) A protected-series manager of a protected series has a right to information concerning the protected series to the same extent, in the same manner, and under the same conditions that a manager of a manager-managed limited liability company has a right to information concerning the company under [cite provisions of the limited liability company act which provide information rights for managers of a manager-managed limited liability company].

Comment

The right of an associated member of a protected series to information from or pertaining to the protected series depends in the first instance on the operating agreement. To the extent the agreement does not address the matter, Sections 106(d) and 108 (extrapolation for internal affairs) apply.

Whether a series limited liability company has any right to information concerning a protected series of the company depends entirely on the operating agreement. If the operating agreement is silent, under Sections 106(d) and 108, the company and the protected series are treated as if they were both limited liability companies, distinct from each other. No limited liability company act provides any rule giving one such company access to the information of the other.

Subsections (a)-(d) – A state that has enacted Uniform Limited Liability Company Act (2006) (Last Amended 2013) would cite Section 410.

[ARTICLE] 4

LIMITATION ON LIABILITY AND ENFORCEMENT OF CLAIMS

SECTION 401. LIMITATIONS ON LIABILITY.

(a) A person is not liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of:

(1) a protected series of a series limited liability company solely by reason of being or acting as:

(A) an associated member, protected-series manager, or protected-series transferee of the protected series; or

(B) a member, manager, or a transferee of the company; or

(2) a series limited liability company solely by reason of being or acting as an associated member, protected-series manager, or protected-series transferee of a protected series of the company.

(b) Subject to Section 404, the following rules apply:

(1) A debt, obligation, or other liability of a series limited liability company is solely the debt, obligation, or liability of the company.

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

(3) A series limited liability company is not liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of a protected series of the company solely by reason of the protected series being a protected series of the company or the company:

(A) being or acting as a protected-series manager of the protected series;

(B) having the protected series manage the company; or

(C) owning a protected-series transferable interest of the protected series.

(4) A protected series of a series limited liability company is not liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the company or another protected series of the company solely by reason of:

(A) being a protected series of the company;

(B) being or acting as a manager of the company or a protected-series manager of another protected series of the company; or

(C) having the company or another protected series of the company be or act as a protected-series manager of the protected series.

Comment

This section provides two different types of liability shields:

- the traditional, vertical shields that protect equity holders and managers from status-based liability for an organization’s obligations – i.e., where liability is asserted solely by reason of the status of owner or manager, Subsection (a); and
- the novel, horizontal shields that protect a protected series of a series limited liability company from liability for the debts, obligations, or other liabilities of the company or another protected series of the company (and provide comparable protection for the company itself), Subsection (b).

For further explanation, see Prefatory Note, Part 7.

For claims to disregard the shields created by this section, see Section 402.

Subsection (a)(1) – This provision establishes the traditional, vertical liability shield to protect associated members, protected-series managers, and protected-series transferees of a protected series of a series limited liability company against status-based liability for a debt, obligation, or other liability of the protected series or of the company and is based on Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 304(a). The shield is effective only against status-based liability – i.e., where the liability is asserted *solely by reason* of a person’s status (e.g., associated member, protected-series manager). The shield does not protect against direct liability for tortious conduct. For a detailed discussion of this issue, see Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 304(a), cmt., *Shield Inapposite for Claims Arising from a Member’s or Manager’s Own Conduct*.

The protection accorded a protected-series transferee also extends to the series limited liability company. See Section 303(d) (providing that, (“[i]f a series limited liability company owns a protected-series transferable interest of a protected series of the company, a provision of this [act]... which applies to a protected-series transferee of the protected series applies to the company in its capacity as an owner of the protected-series transferable interest”).

Subsection (a)(2) – This provision is shorter than subsection (a)(1), because an enacting state’s limited liability company act addresses most of the roles protected by a company’s vertical shield – e.g., a member not in the capacity of an associated member of a protected series.

Subsection (b) – This provision establishes the novel, horizontal shields, which are explained in detail in Prefatory Note, Part 7. The provision is subject to Section 404, because the “asset by asset” exposure under that section interferes with the non-recourse aspect of the horizontal shields.

SECTION 402. CLAIM SEEKING TO DISREGARD LIMITATION OF LIABILITY.

(a) Except as otherwise provided in subsection (b), a claim seeking to disregard a limitation in Section 401 is governed by the principles of law and equity, including a principle providing a right to a creditor or holding a person liable for a debt, obligation, or other liability of another person, which would apply if each protected series of a series limited liability company were a limited liability company formed separately from the series limited liability company and distinct from the series limited liability company and any other protected series of the series limited liability company.

(b) The failure of a limited liability company or a protected series to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground to disregard a limitation in Section 401(a) but may be a ground to disregard a limitation in Section 401(b).

(c) This section applies to a claim seeking to disregard a limitation of liability applicable to a foreign series limited liability company or foreign protected series and comparable to a limitation stated in Section 401, if:

(1) the claimant is a resident of this state or doing business or registered to do business in this state; or

(2) the claim is to establish or enforce a liability arising under law of this state other than this [act] or from an act or omission in this state.

Legislative Note: Subsection (b) parallels Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 304(b), but solely with regard to vertical shields. If an enacting state's limited liability company act contains a comparable concept but uses different language, the state should revise subsection (b) accordingly. If an enacting state's limited liability company act does not contain a comparable concept, the state should omit subsection (b).

Comment

Subsection (a) – This provision avoids a court having to reinvent the wheel when considering piercing, affiliate liability, and related theories in the context of a series limited liability company and its protected series. The provision encompasses outside reverse piercing claims (to the extent a state allows such claims) but by its terms does not address inside reverse piercing claims. A successful inside reverse pierce does not disregard a liability shield but rather permits an entity’s owner to enjoy and exercise a right belonging to the entity or vice versa.

The provision’s references to particular categories of “principles of law and equity” should not be interpreted as limiting the effect of Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 111 (stating that “[u]nless displaced by particular provisions of this [act], the principles of law and equity supplement this [act]”) (brackets in original) or of comparable provisions in other limited liability company acts. This provision refers to a subset of those principals but only to determine how to apply the subset’s principles in a novel context.

Subsection (b) – Piercing is based on a factor test. In the corporate context, two of the most prominent factors are the disregard of governance formalities and disregard of economic separateness between the entity and owners. However, “[i]n the realm of LLCs, [the governance] factor is inappropriate, because informality of organization and operation is both common and desired.” Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 304(b), cmt. Some limited liability company acts expressly negate governance informality as a piercing factor entirely, and some courts have discarded or downgraded the factor for LLC piercing claims. *See, e.g.*, Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section § 304(b) (“The failure of a limited liability company to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a member or manager for a debt, obligation, or other liability of the company.”).

Consistent with both the 2006 and 2013 versions of the uniform act, this provision applies the same approach to the vertical shields provided by this act. The provision does not, however, apply to the horizontal shields. To do so would undercut the inducement to good recordkeeping provided by Sections 301 and 404.

Subsection (c) – Section 401(a) and (b) state limitations of liability comprising respectively the vertical and horizontal shields. Claims “seeking to disregard” such limitations of liability are traditionally referred to as “piercing” claims or, in some circumstances, “affiliate liability” claims. Section 402(a) applies an enacting state’s existing jurisprudence on piercing and affiliate liability to domestic series limited liability companies and domestic protected series as “if each protected series of the series limited liability company were a limited liability company: (1) organized separately from the company that established the protected series; and (2) distinct from the company and any other protected series of the company.”

In contrast, this provision—i.e., Subsection (c)—applies an enacting state’s jurisprudence on piercing and affiliate liability to *foreign* series limited liability companies and *foreign*

protected series in carefully and narrowly delineated circumstances. This stance is unusual but is neither novel nor, in the circumstances, unwarranted.

Virtually all, if not all, limited liability company acts provide that the law of the foreign limited liability company's jurisdiction of formation governs piercing claims. *See, e.g.*, Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 901(a)(2). But the situation seems to be the result of "path dependence" on an initially unexplained choice. The approach of limited liability company acts reflects the approach of the Uniform Limited Partnership Act in effect in most states when limited liability company acts were first being enacted. *See* Uniform Limited Partnership Act (1976 with 1985 amendments) § 901(i) (stating that "the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners").

It is unclear why the Uniform Limited Partnership Act codified what had previously been a rule of common law. According to an official comment to the 1985 version, the Uniform Limited Partnership Act, Section 901 "first appeared in the 1976 Act." However, the comment provides no explanation for this variation from the original Uniform Limited Partnership Act of 1916, which relied on common law choice of law principles for both the "internal affairs doctrine" and piercing claims. *See Se. Texas Inns, Inc. v. Prime 36 Hosp. Corp.*, 462 F.3d 666, 672-76 (6th Cir. 2006) (discussing at length which state law to apply to a claim to pierce the veil of a limited partnership, making no reference to the limited partnership statute of the forum state [Tennessee], determining that "the choice-of-law question is not outcome-determinative in this case," and therefore not deciding the issue).

In the corporate context, the choice of law has long been a matter of case law. *See Dassault Falcon Jet Corp. v. Oberflex, Inc.*, 909 F. Supp. 345, 348-49 (M.D.N.C. 1995); Restatement (Second) of Conflict of Laws (1971) § 307 ("The local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation for assessments or contributions and to its creditors for corporate debts.").

Although the Restatement might suggest the rule is invariable, venerable Supreme Court precedent allows for exceptions. *Pinney v. Nelson*, 183 U.S. 144, 150, 22 S. Ct. 52, 55, 46 L. Ed. 125 (1901) ("Contracting with reference to the laws of that state [not the state of incorporation] [the shareholders] ... must be assumed to know the provisions of those laws; that by them a personal liability was cast upon the stockholders in corporations formed under the laws of the state, and that that same liability was also imposed upon the stockholders of corporations formed under the laws of other states and doing business within California.").

Given the novel concept of one legal person existing under the aegis of another legal person and the novel construct of a horizontal shield, the Uniform Law Commission chose to revert to common law flexibility rather than merely to reiterate a codification that entered the law of unincorporated organizations without explanation and whose rationale has never been fully explored.

Subsection (c)(1)-(2) – These provisions limit subsection (c) to matters in which an enacting state has a substantial and direct interest – whether due to the nature of the claimant, the

facts giving rise to the claim, the law providing the legal basis for the claim, or some combination.

SECTION 403. REMEDIES OF JUDGMENT CREDITOR OF ASSOCIATED MEMBER OR PROTECTED-SERIES TRANSFEREE. [Cite provisions of this state’s limited liability company act providing or restricting remedies available to a judgment creditor of a member of a limited liability company or transferee] apply to a judgment creditor of:

- (1) an associated member or protected-series transferee of a protected series; or
- (2) a series limited liability company, to the extent the company owns a protected-series transferable interest of a protected series.

Comment

This section applies to the protected series level charging order provisions found in every limited liability company act.

Statute to be cited: A state that has enacted Uniform Limited Liability Company Act (2006) (Last Amended 2013) would cite Section 503.

SECTION 404. ENFORCEMENT AGAINST NON-ASSOCIATED ASSET.

(a) In this section:

(1) “Enforcement date” means 12:01 a.m. on the date on which a claimant first serves process on a series limited liability company or protected series in an action seeking to enforce under this section a claim against an asset of the company or protected series by attachment, levy, or the like.

(2) Subject to Section 608(b), “incurrence date” means the date on which a series limited liability company or protected series incurred the liability giving rise to a claim that a claimant seeks to enforce under this section.

(b) If a claim against a series limited liability company or a protected series of the company has been reduced to judgment, in addition to any other remedy provided by law or

equity, the judgment may be enforced in accordance with the following rules:

(1) A judgment against the company may be enforced against an asset of a protected series of the company if the asset:

(A) was a non-associated asset of the protected series on the incurrence date; or

(B) is a non-associated asset of the protected series on the enforcement date.

(2) A judgment against a protected series may be enforced against an asset of the company if the asset:

(A) was a non-associated asset of the company on the incurrence date; or

(B) is a non-associated asset of the company on the enforcement date.

(3) A judgment against a protected series may be enforced against an asset of another protected series of the company if the asset:

(A) was a non-associated asset of the other protected series on the incurrence date; or

(B) is a non-associated asset of the other protected series on the enforcement date.

(c) In addition to any other remedy provided by law or equity, if a claim against a series limited liability company or a protected series has not been reduced to a judgment and law other than this [act] permits a prejudgment remedy by attachment, levy, or the like, the court may apply subsection (b) as a prejudgment remedy.

(d) In a proceeding under this section, the party asserting that an asset is or was an associated asset of a series limited liability company or a protected series of the company has the

burden of proof on the issue.

(e) This section applies to an asset of a foreign series limited liability company or foreign protected series if:

(1) the asset is real or tangible property located in this state;

(2) the claimant is a resident of this state or doing business or registered to do business in this state, or the claim under Section 404 is to enforce a judgment, or to seek a pre-judgment remedy, pertaining to a liability arising from law of this state other than this [act] or an act or omission in this state; and

(3) the asset is not identified in the records of the foreign series limited liability company or foreign protected series in a manner comparable to the manner required by Section 301.

Comment

This section pertains to the non-recourse rule explained in Prefatory Note, Part 7-B, and creates an important, novel inducement in support of the recordkeeping requirements of Section 301. Under this section, a creditor may enforce a judgment against one protected series of a series limited liability company by pursuing non-associated assets owned by the company or another protected series of the company. Comparable recourse exists for creditors of the company.

Put another way: an asset of a protected series of a series limited liability company is “up for grabs” not only to creditors of the protected series but also to creditors of the company and creditors of any other protected series of the company if the asset is non-associated at either of two testing moments. Chronologically, the first testing moment is the “incurrence date” – when the underlying liability was incurred; second testing moment is the “enforcement date” – when a creditor first seeks enforcement under this section. “Up for grabs” exposure exists likewise for an asset of a series limited liability company that is non-associated at either of the testing moments.

Except when a claimant invokes subsection (c) (pre-judgment remedy), a proceeding under this section is to enforce a judgment and is not a separate action to establish or re-litigate the underlying liability which resulted in that judgment. *See, e.g., David C. Olson, Inc. v. Denver & Rio Grande W. R. Co.*, 789 P.2d 492, 494-95 (Colo. App. 1990) (“The liability arising from a judgment is a new one, distinct from the liability upon which the judgment is based, and any prior liability merges into that judgment.”). Therefore, a claim under this section is timely

so long as the judgment is viable.

Section 404 exposure is “asset by asset” and does not otherwise implicate the internal, horizontal shields created by Section 401(b). However, this section will be largely moot if a piercing claim succeeds against an internal shield. For example, suppose that, as a result of a piercing claim, a series limited liability company is held liable for a judgment against a protected series of the company. Whether an asset of the company is an associated asset of the company is, at least in the first instance, immaterial to the judgment creditor. The judgment creditor will be enforcing a judgment against the company itself; all the company’s assets are subject to enforcement regardless of whether associated with the company.

In fact, the judgment creditor would *prefer* for each asset of the company to be an associated asset. If so, the asset is not “up for grabs” – i.e., the asset is available only to creditors of the company, including (given the successful piercing claim) the judgment creditor.

Other law determines what, if any, claims a protected series or the company has, and against whom, if the protected series or the company loses an asset under this section due to inadequate recordkeeping. *See* Prefatory Note, Part 7-C (Non-Liability and Non-Recourse Rules), note 19.

The rules stated in this section and the recordkeeping requirements stated in Section 301 sharply distinguish the protected series construct from more traditional affiliate relationships – e.g., a holding company with subsidiaries. Although concepts of affiliate liability apply in both contexts, see Section 402(a), traditional affiliate relationships face neither the recordkeeping requirements of Section 301 nor the asset-by-asset exposures consequences of this section.

Section 404 exposure does not “run with” the asset. Subject to any applicable statute on voidable transfer, if a protected series or series limited liability company transfers an asset to another person, the transfer ends any existing Section 404 exposure. Of course, if the transferee is the series limited liability company or a protected series of the company, Section 404 applies to the asset anew.

Subsection (a)(1) – An “enforcement date” begins at 12:01 a.m. to preclude a protected series or series limited liability company hurriedly rehabilitating its records after being served. The phrase “attachment, levy or the like” comes from the definition of “lien creditor” in UCC § 9-102(a)(52).

Subsection (b) – This subsection applies “asset by asset” and involves analysis at two points in time: when enforcement against the asset is first sought under this section (“enforcement date”) and when the liability giving rise to the claim was incurred (“incurrence date”).

When liability incurred (incurrence date):

- if asset owned but not associated asset available to Section 404 claimant

- if asset not owned or owned and associated availability depends on situation “when enforcement first sought” (i.e., enforcement date)

When enforcement under this section first sought (enforcement date):

- if non-associated asset asset available to Section 404 claimant
- if associated asset availability to claimant depends on situation when liability incurred (incurrence date)

The concept of “liability incurred” has been part of uniform law since 1914. *See* Uniform Partnership Act (1997) (Last Amended 2013) § 306(b), cmt. This act does not determine when a liability is incurred.

This provision’s lead-in reference to particular categories of “principles of law or equity” should not be interpreted as limiting the effect of Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 111 (stating that “[u]nless displaced by particular provisions of this [act], the principles of law and equity supplement this [act]”) (brackets in original) or of comparable provisions in other limited liability company acts.

Subsection (c) – This section does not affect the extent to which pre-judgment attachment is available. Other law governs that determination.

Subsection (d) – Various persons might assert that an asset is an associated asset, including the owner of the asset, a creditor of the owner of the asset, or the trustee in bankruptcy of the owner of the asset.

Subsection (e) – As does entity law generally, this act permits a business to exist under the law of foreign jurisdiction even while conducting some or all its activities in another state. This provision is thus necessary to prevent easy evasion of the act’s asset-by-asset exposure rule.

Subsection (e)(1)-(2) – These provisions are similar in effect and rationale to Section 402(c)(1) and (2).

Subsection (e)(3) – “[A] manner comparable” is emphatically not “a manner exactly like.” What matters is whether information exists and is sufficiently accessible to enable “to permit a disinterested, reasonable individual” to do the identification and make the determinations described in Section 404(a) and (b).

[ARTICLE] 5

DISSOLUTION AND WINDING UP OF PROTECTED SERIES

SECTION 501. EVENTS CAUSING DISSOLUTION OF PROTECTED SERIES.

A protected series of a series limited liability company is dissolved, and its activities and affairs must be wound up, only on the:

(1) dissolution of the company;

(2) occurrence of an event or circumstance the operating agreement states causes dissolution of the protected series;

(3) affirmative vote or consent of all members; or

(4) entry by the court of an order dissolving the protected series on application by an associated member or protected-series manager of the protected series:

(A) in accordance with Section 108; and

(B) to the same extent, in the same manner, and on the same grounds the court would enter an order dissolving a limited liability company on application by a member or manager of the company; or

(5) entry by the court of an order dissolving the protected series on application by the company or a member of the company on the ground that the conduct of all or substantially all the activities and affairs of the protected series is illegal.

Comment

This section states five grounds for dissolving a protected series, which group into three categories:

- a non-variable provision consistent with the nature of a protected series [Paragraph (1)];
- two facilitative provisions, consistent with the contractual nature of a limited liability company [(Paragraphs (2) and (3))]; and
- two non-variable provisions providing for dissolution by order of court [Paragraphs

(4) and (5).

Because this act permits a protected series to be established and function without associated members, this section does not provide for dissolution when a protected series has no associated members. The operating agreement can add such a provision, if desired, as well as sundry other grounds for dissolution.

Paragraph (1) – This non-variable provision has no analogy at the series limited liability company level, comports with Section 104(c) (stating that a protected series of a series limited liability company may not continue when the company has completed winding up). The provision applies regardless of the cause of the company’s dissolution, including administrative dissolution.

Paragraphs (2) and (3) – Section 107(a) does not list these provisions as non-variable, but any variation would be nonsensical – e.g., an operating agreement provision: (i) stating a cause of dissolution while providing that the stated cause does not cause dissolution; or (ii) providing that unanimous consent of the members does not cause dissolution, although unanimous consent suffices to delete the provision.

Paragraph (3) – This provision refers to “the affirmative vote or consent of all the members” (emphasis added) – i.e., not solely the associated members (if any) of the protected series. Except as provided in the operating agreement, associated members of a protected series have no special right to cause (or prevent) dissolution of the protected series. *See* Section 304(e).

Paragraph (4) – This provision analogizes the grounds for court-ordered dissolution of a protected series to the grounds for court-ordered dissolution of a limited liability company. If an enacting state’s limited liability company act makes those grounds non-waivable, Section 107(b) extrapolates that limitation to the protected series level.

Paragraph (5) – When a protected series acts illegally, any member of a series limited liability company has reason to worry. Accordingly, a member has standing under this provision regardless of whether an associated member of the protected series.

SECTION 502. WINDING UP DISSOLVED PROTECTED SERIES.

(a) Subject to subsections (b) and (c) and in accordance with Section 108:

(1) a dissolved protected series shall wind up its activities and affairs in the same manner that a limited liability company winds up its activities and affairs under [cite the winding up provisions of this state’s limited liability company act], subject to the same requirements and conditions and with the same effects; and

(2) judicial supervision or another judicial remedy is available in the winding up

of the protected series to the same extent, in the same manner, under the same conditions, and with the same effects that apply under [cite the judicial supervision provision of this state's limited liability company act].

(b) When a protected series of a series limited liability company dissolves, the company may deliver to the [Secretary of State] for filing a statement of protected series dissolution stating the name of the company and the protected series and that the protected series is dissolved. The filing of the statement by the [Secretary of State] has the same effect with regard to the protected series as the filing by the [Secretary of State] of a statement of dissolution under [cite the provisions of this state's limited liability company act stating the constructive notice effect of the filing of a statement of dissolution pertaining to a limited liability company].

(c) When a protected series of a series limited liability company has completed winding up, the company may deliver to the [Secretary of State] for filing a statement of designation cancellation stating the name of the company and the protected series and that the protected series is terminated. The filing of the statement by the [Secretary of State] has the same effect as the filing by the [secretary of state] of a statement of termination under [cite the provisions of this state's limited liability company act stating the constructive notice effect of the filing of a statement of termination pertaining to a limited liability company].

(d) A series limited liability company has not completed its winding up until each of the protected series of the company has completed its winding up.

Legislative Note: *If the limited liability company act of this state does not provide for constructive notice for a statement of dissolution or termination filed regarding a limited liability company, the state should change subsections (b) and (c) accordingly. A change is also necessary if the limited liability company act provides for only one of the statements or for neither.*

Comment

Subsection (a)(1) – A state that has enacted Uniform Limited Liability Company Act (2006) (Last Amended 2013) would cite Sections 702 to 707.

Subsection (a)(1) – A state that has enacted Uniform Limited Liability Company Act (2006) (Last Amended 2013) would cite Section 702(e).

Subsection (b) – A state that has enacted Uniform Limited Liability Company Act (2006) (Last Amended 2013) would cite Section 103(d)(2)(A).

Subsection (c) – A state that has enacted Uniform Limited Liability Company Act (2006) (Last Amended 2013) would cite Section 103(d)(2)(B).

Subsection (d) – This subsection overlaps the winding up provisions of an enacting state’s limited liability company act pertaining to the winding up of a limited liability company, but only to the extent of treating the winding up of protected series as part of the winding up of a series limited liability company.

SECTION 503. EFFECT OF REINSTATEMENT OF SERIES LIMITED

LIABILITY COMPANY OR REVOCATION OF VOLUNTARY DISSOLUTION. If a series limited liability company that has been administratively dissolved is reinstated, or a series limited liability company that voluntarily dissolved rescinds its dissolution:

(1) each protected series of the company ceases winding up; and

(2) [cite the provisions of this state’s limited liability company act stating the results of the reinstatement or rescission] apply to each protected series of the company in accordance with Section 108.

Legislative Note: Versions of the Uniform Limited Liability Company Act before the amendments adopted in 2013 do not include a right to rescind a voluntary dissolution. Thus, states enacting UPSA that do not allow an LLC that has been voluntarily dissolved to rescind the dissolution should either revise Section 503 to exclude this right or consider adding this right to their LLC statute.

Comment

Dissolution of a series limited liability company immediately dissolves every protected series of the company. Under the Uniform Limited Liability Company Act (2006) (Last Amended 2013), two types of LLC dissolution can be undone – rescission of a voluntary

dissolution, Section 703, and reinstatement after an administrative dissolution. Section 709. In both instances, the uniform act provides certain retroactive effects.

This section provides comparable retroactive effect at the protected series level and is derived from Uniform Limited Liability Company Act (2006) (Last Amended 2013), Sections 703(c) (retroactive effects of rescinding voluntary dissolution) and 709(d) (retroactive effects of reinstatement after administrative dissolution).

[ARTICLE] 6

ENTITY TRANSACTIONS RESTRICTED

SECTION 601. DEFINITIONS. In this [article]:

(1) “After a merger” or “after the merger” means when a merger under Section 604 becomes effective and afterwards.

(2) “Before a merger” or “before the merger” means before a merger under Section 604 becomes effective.

(3) “Continuing protected series” means a protected series of a surviving company which continues in uninterrupted existence after a merger under Section 604.

(4) “Merging company” means a limited liability company that is party to a merger under Section 604.

(5) “Non-surviving company” means a merging company that does not continue in existence after a merger under Section 604.

(6) “Relocated protected series” means a protected series of a non-surviving company which, after a merger under Section 604, continues in uninterrupted existence as a protected series of the surviving company.

(7) “Surviving company” means a merging company that continues in existence after a merger under Section 604.

Legislative Note: In addition to the definitions in this section, Article 6 also depends on several definitions in Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section

1001. See the Legislative Note to Section 102.

Comment

Paragraphs (3) and (6) – These provisions provide two new and related terms to describe novel concepts.

Paragraph (7) – This provision is derived from Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 1001(37).

SECTION 602. PROTECTED SERIES MAY NOT BE PARTY TO ENTITY

TRANSACTION. A protected series may not:

- (1) be an acquiring, acquired, converting, converted, merging, or surviving entity;
- (2) participate in a domestication; or
- (3) be a party to or be formed, organized, established, or created in a transaction

substantially like a merger, interest exchange, conversion, or domestication.

Comment

The protected series is still novel, and this act is the first to comprehensively address the multitude of issues raised by the construct. Juxtaposing protected series with entity transactions raises a plethora of additional issues. For example, during the Drafting Committee's discussions of this subject, a commissioner created a set of Power Point slides diagramming 11 possible merger transactions involving protected series. Adding conversions, domestications, and interest exchanges would have added countless more permutations.

The Drafting Committee decided to move slowly in this area and to provide a very narrow channel for entity transactions involving protected series. As its first step in creating the narrow channel, the Committee rejected allowing a protected series itself to be a party to any entity transaction.

Paragraphs (1) and (2) – Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 1001 defines the terms listed in Paragraph (1) but with regard to domestications refers to a domesticating or domesticated limited liability company. Hence the need for Paragraph (2).

SECTION 603. RESTRICTION ON ENTITY TRANSACTION INVOLVING

PROTECTED SERIES. A series limited liability company may not be:

- (1) an acquiring, acquired, converting, converted, domesticating, or domesticated entity;

or

(2) except as otherwise provided in Section 604, a party to or the surviving company of a merger.

Comment

In service of the “narrow channel” discussed in the comment to Section 602, this section precludes a participation of a series limited liability company in an entity transaction except as is strictly delineated in Section 604. However, this provision does not preclude a series limited liability company: (i) being involved in a triangular merger as the non-party; or (ii) as the non-party to such a merger, providing consideration in the form of interests in one of the protected series of the company. (If the consideration involves making a person an associated member of the protected series, the person must be a member of the series limited liability company or become one as a result of the merger. Section 302(a).)

SECTION 604. MERGER AUTHORIZED; PARTIES RESTRICTED. A series limited liability company may be party to a merger in accordance with [cite the provisions of this state’s limited liability company act pertaining to merger], this section, and Sections 605 through 608 only if:

- (1) each other party to the merger is a limited liability company; and
- (2) the surviving company is not created in the merger.

***Legislative Note:** Paragraph (1) refers to a “limited liability company,” which the Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 102(8), defines to be a domestic company. If an enacting state’s limited liability company act defines the term to include both domestic and foreign companies, this section should be changed to refer to domestic limited liability companies.*

Comment

The mechanics for implementing a permitted merger come mostly from the merger provisions of an enacting state’s limited liability company act. *See*, for example, Uniform Limited Liability Company Act (2006) (Last Amended 2013), Sections 1021-1026 (providing merger provisions for a merger in which at least one party is a limited liability company).

For Section 604 to apply, at least one party must be a series limited liability company. Unless a merger under this section is intended to terminate all protected series of each merging company, the surviving limited liability company will necessarily be a series limited liability company.

The following chart shows what may happen to a protected series of a series limited liability company that is party to a merger under this provision.

post-merger status of merging company	fate of existing protected series	possible to create protected series as part of the merger?
non-surviving	relocated protected series or dissolved, wound up, and terminated Section 605 (2)(A)	no
surviving	continuing protected series or dissolved, wound up, and terminated Section 605(2)(B)	yes Section 605(2)(D)

Paragraph (1) – Coupled with Section 603(1), this provision prevents a foreign series limited liability company from becoming a domestic series limited liability company. Allowing such a change would create significant problems relating to Sections 608 and 404.

Paragraph (2) – A limited liability company created in a merger could not deliver to the filing office the records required by Section 606(2)(B)(ii) and (C). If the surviving company were to be created in the merger, it would be impossible to comply with these requirements. A merger does not take effect until the articles of merger take effect, and each of these provisions requires that a specified record signed by the surviving company accompany the articles of merger when the articles are delivered to the filing office for filing. A surviving company that does not yet exist could not sign any such record.

SECTION 605. PLAN OF MERGER. In a merger under Section 604, the plan of merger must:

(1) comply with [cite the provisions of this state’s limited liability company act pertaining to the contents of a plan of merger]; and

(2) state in a record:

(A) for any protected series of a non-surviving company, whether after the merger

the protected series will be a relocated protected series or be dissolved, wound up, and terminated;

(B) for any protected series of the surviving company which exists before the merger, whether after the merger the protected series will be a continuing protected series or be dissolved, wound up, and terminated;

(C) for each relocated protected series or continuing protected series:

(i) the name of any person that becomes an associated member or protected-series transferee of the protected series after the merger, any consideration to be paid by, on behalf of, or in respect of the person, the name of the payor, and the name of the payee;

(ii) the name of any person whose rights or obligations in the person's capacity as an associated member or protected-series transferee will change after the merger;

(iii) any consideration to be paid to a person who before the merger was an associated member or protected-series transferee of the protected series and the name of the payor; and

(iv) if after the merger the protected series will be a relocated protected series, its new name;

(D) for any protected series to be established by the surviving company as a result of the merger:

(i) the name of the protected series;

(ii) any protected-series transferable interest to be owned by the surviving company when the protected series is established; and

(iii) the name of and any protected-series transferable interest owned by any person that will be an associated member of the protected series when the protected series is

established; and

(E) for any person that is an associated member of a relocated protected series and will remain a member after the merger, any amendment to the operating agreement of the surviving company which:

(1) is or is proposed to be in a record; and

(2) is necessary or appropriate to state the rights and obligations of the person as a member of the surviving company.

Comment

Paragraph (1) – This article rests and is linked to the merger provisions in an enacting state’s limited liability company act. A state that has enacted Uniform Limited Liability Company Act (2006) (Last Amended 2013) would cite Section 1022.

Paragraph (2) – These requirements supplement the requirements stated in the merger provisions of an enacting state’s limited liability company act. *See, e.g.*, Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 1022 (stating what the plan of merger must include).

Paragraph (2)(C)(i)-(iii) – These provisions are the analog to Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 1002(a)(3) (requiring a plan of merger to state “the manner of converting the interests in each party to the merger into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing”).

Paragraph (2)(C)(ii) – This provision encompasses any type of equity shuffle, including “taking out” a person as an associated member or protected-series transferee.

Paragraph (2)(D)(iii) – With regard to “any”, see Section 302(b)(3) and the Legislative Note to Section 302.

Paragraph 2(E) – This language derived from the Model Entity Transactions Act (2007) (Last Amended 2013), Section 202(a)(4).

SECTION 606. STATEMENT OF MERGER. In a merger under Section 604, the statement of merger must:

(1) comply with [cite the provisions of this state’s limited liability company act

pertaining to the contents of a statement of merger]; and

(2) include as an attachment the following records, each to become effective when the merger becomes effective:

(A) for a protected series of a merging company being terminated as a result of the merger, a statement of termination signed by the company;

(B) for a protected series of a non-surviving company which after the merger will be a relocated protected series:

(i) a statement of relocation signed by the non-surviving company which contains the name of the company and the name of the protected series before and after the merger; and

(ii) a statement of protected series designation signed by the surviving company; and

(C) for a protected series being established by the surviving company as a result of the merger, a protected series designation signed by the company.

Comment

Paragraph (1) – This article rests on and is linked to the merger provisions in an enacting state’s limited liability company act. *See* Section 604, comment. A state that has enacted Uniform Limited Liability Company Act (2006) (Last Amended 2013) would cite Section 1025.

Paragraph (2) – These requirements supplement the requirements stated in the merger provisions of an enacting state’s limited liability company act. *See, e.g.*, Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 1025 (stating what the plan of merger must include).

Paragraph (2)(B)(i) – This statement is to provide information for the public record of a non-surviving company.

Paragraph (2)(B)(ii) – This statement is to provide information for the public record of the surviving company.

SECTION 607. EFFECT OF MERGER. When a merger under Section 604 becomes effective, in addition to the effects stated in [cite the provisions of this state’s limited liability company act stating the effect of a merger]:

(1) as provided in the plan of merger, each protected series of each merging company which was established before the merger:

(A) is a relocated protected series or continuing protected series; or

(B) is dissolved, wound up, and terminated;

(2) any protected series to be established as a result of the merger is established;

(3) any relocated protected series or continuing protected series is the same person without interruption as it was before the merger;

(4) all property of a relocated protected series or continuing protected series continues to be vested in the protected series without transfer, reversion, or impairment;

(5) all debts, obligations, and other liabilities of a relocated protected series or continuing protected series continue as debts, obligations, and other liabilities of the protected series;

(6) except as otherwise provided by law or the plan of merger, all the rights, privileges, immunities, powers, and purposes of a relocated protected series or continuing protected series remain in the protected series;

(7) the new name of a relocated protected series may be substituted for the former name of the protected series in any pending action or proceeding;

(8) if provided in the plan of merger:

(A) a person becomes an associated member or protected-series transferee of a relocated protected series or continuing protected series;

(B) a person becomes an associated member of a protected series established by

the surviving company as a result of the merger;

(C) any change in the rights or obligations of a person in the person's capacity as an associated member or protected-series transferee of a relocated protected series or continuing protected series take effect; and

(D) any consideration to be paid to a person that before the merger was an associated member or protected-series transferee of a relocated protected series or continuing protected series is due; and

(9) any person that is a member of a relocated protected series becomes a member of the surviving company, if not already a member.

Comment

For section to be cited just before Paragraph (1): A state that has enacted Uniform Limited Liability Company Act (2006) (Last Amended 2013) would cite Section 1026.

Paragraph (1)(B) – This provision triggers Section 502 and thereby (through extrapolation) the winding up requirements of an enacting state's limited liability company act. These requirements include settling debts with creditors. The rule here is the same as for any other dissolution and winding up of a protected series.

Paragraphs (4)-(8) – These provisions are derived from Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 1046(a) (effects of conversion). The list of effects does not include the taking effect of amendments to the operating agreement, because the merger provisions of an enacting state's limited liability company act should address the point. *See, e.g.*, Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 1026(a)(8)(B) (stating that, "if the surviving entity exists before the merger its private organic rules that are to be in a record, if any, are amended to the extent provided in the plan of merger").

Paragraph (8)(A) – This provision is subject to Section 303(a): "A protected-series transferable interest of a protected series must be owned initially by an associated member of the protected series or the series limited liability company that establishes the protected series." Thus, for a person to become a protected-series transferee as a result of a merger, the plan of merger would have to provide for an existing associated member or protected series transferee to transfer a protected-series transferable interest to the person.

Paragraph (8)(B) – Under Section 303(a), discussed in the comment to Paragraph (8)(A), a protected-series transferable interest must first be owned by an associated member of the protected series or the series limited liability company that established the protected series.

As a result, a merger under Section 604 cannot cause a person to become a protected-series transferee *ab initio* of a protected series established as a result of the merger.

SECTION 608. APPLICATION OF SECTION 404 AFTER MERGER.

(a) A creditor's right that existed under Section 404 immediately before a merger under Section 604 may be enforced after the merger in accordance with the following rules:

(1) A creditor's right that existed immediately before the merger against the surviving company, a continuing protected series, or a relocated protected series continues without change after the merger.

(2) A creditor's right that existed immediately before the merger against a non-surviving company:

(A) may be asserted against an asset of the non-surviving company which vested in the surviving company as a result of the merger; and

(B) does not otherwise change.

(3) Subject to subsection (b), the following rules apply:

(A) In addition to the remedy stated in paragraph (1), a creditor with a right under Section 404 which existed immediately before the merger against a non-surviving company or a relocated protected series may assert the right against:

(i) an asset of the surviving company, other than an asset of the non-surviving company which vested in the surviving company as a result of the merger;

(ii) an asset of a continuing protected series; or

(iii) an asset of a protected series established by the surviving company as a result of the merger;

(iv) if the creditor's right was against an asset of the non-surviving company, an asset of a relocated series; or

(v) if the creditor's right was against an asset of a relocated protected series, an asset of another relocated protected series.

(B) In addition to the remedy stated in paragraph (2), a creditor with a right that existed immediately before the merger against the surviving company or a continuing protected series may assert the right against:

(i) an asset of a relocated protected series; or

(ii) an asset of a non-surviving company which vested in the surviving company as a result of the merger.

(b) For the purposes of subsection (a)(3) and Section 404(b)(1)(A), (2)(A), and (3)(A), the incurrence date is deemed to be the date on which the merger becomes effective.

(c) A merger under Section 604 does not affect the manner in which Section 404 applies to a liability incurred after the merger.

Comment

As explained in the comment to Section 404, ordinarily the transfer of an asset ends any preexisting Section 404 exposure applicable to the asset. As a result, it is necessary to protect against a merger under Section 604 being used solely or essentially to extinguish preexisting Section 404 exposure. Section 608 inhibits such misuse in three ways.

First, the section preserves preexisting exposure to the extent practicable: As to:

- any asset owned by the surviving limited liability company or a continuing or relocated protected series, Section 604(a)(1) expressly preserves preexisting Section 404 exposure; and
- any asset owned by a non-surviving series limited liability company and vested in the surviving company as a result of the merger, Section 608(a)(2) causes any preexisting exposure to “run with” the asset and apply to the asset as if the vesting had not occurred – i.e., if the non-surviving company owned the asset at the incurrence date, for the purposes of Section 404(b)(2) the surviving company is treated as if it owned the asset on that date.

Second, with one major caveat, under Section 608(a)(3)(A) a creditor with a preexisting Section 404 claim against a non-surviving limited liability company or a relocated protected series may assert the claim against any asset owned by the surviving limited liability company or any protected series of the surviving company.

Third, with the same major caveat, under Section 608(a)(3)(B), a creditor with a preexisting Section 404 claim against an asset of the surviving limited liability company or a continuing protected series of the company may assert the claim against an asset of a relocated protected series or an asset of the non-surviving company that vested as a result of the merger in the surviving limited liability company.

The major caveat: For purposes of Section 608(a)(3)(A) and (B), the incurrence date is deemed to be the effective date of the merger. In consequence, due diligence for a surviving limited liability company in a merger under Section 604 includes checking the adequacy of Section 301 recordkeeping for any asset that after the merger will be owned by the surviving company or any relocated or continuing protected series of the company as well as by any protected series created in the merger.

For the definition of “incurrence date”, see Section 404(a)(2).

[ARTICLE] 7

FOREIGN PROTECTED SERIES

SECTION 701. GOVERNING LAW. The law of the jurisdiction of formation of a foreign series limited liability company governs:

- (1) the internal affairs of a foreign protected series of the company, including:
 - (A) relations among any associated members of the foreign protected series;
 - (B) relations between the foreign protected series and:
 - (i) any associated member;
 - (ii) the protected-series manager; or
 - (iii) any protected-series transferee;
 - (C) relations between any associated member and:
 - (i) the protected-series manager;
 - (ii) any protected-series transferee;
 - (D) the rights and duties of a protected-series manager;
 - (E) governance decisions affecting the activities and affairs of the foreign

protected series and the conduct of those activities and affairs; and

(F) procedures and conditions for becoming an associated member or protected-series transferee;

(2) relations between the foreign protected series and:

(A) the company;

(B) another foreign protected series of the company;

(C) a member of the company which is not an associated member of the foreign protected series;

(D) a foreign protected-series manager that is not a protected-series manager of the protected series;

(E) a foreign protected-series transferee that is not a foreign protected-series transferee of the protected series; and

(F) a transferee of a transferable interest of the company;

(3) except as otherwise provided in Sections 402 and 404, the liability of a person for a debt, obligation, or other liability of a foreign protected series of a foreign series limited liability company if the debt, obligation, or liability is asserted solely by reason of the person being or acting as:

(A) an associated member, protected-series transferee, or protected-series manager of the foreign protected series;

(B) a member of the company which is not an associated member of the foreign protected series;

(C) a protected-series manager of another foreign protected series of the

company;

(D) a protected-series transferee of another foreign protected series of the

company;

(E) a manager of the company; or

(F) a transferee of a transferable interest of the company; and

(4) except as otherwise provided in Sections 402 and 404:

(A) the liability of the foreign series limited liability company for a debt, obligation, or other liability of a foreign protected series of the company if the debt, obligation, or liability is asserted solely by reason of the foreign protected series being a foreign protected series of the company or the company:

(i) being or acting as a foreign protected-series manager of the foreign protected series;

(ii) having the foreign protected series manage the company; or

(iii) owning a protected-series transferable interest of the foreign protected series; and

(B) the liability of a foreign protected series for a debt, obligation, or other liability of the company or another foreign protected series of the company if the debt, obligation, or liability is asserted solely by reason of the foreign protected series:

(i) being a foreign protected series of the company or having the company or another foreign protected series of the company be or act as foreign protected-series manager of the foreign protected series; or

(ii) managing the company or being or acting as a foreign protected-series manager of another foreign protected series of the company.

Legislative Note: Sections 402 and 404 apply the law of an enacting state to shield issues and asset-by-asset exposure issues in some circumstances and may conflict in part with Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 901(a)(2) (providing that “[t]he law of the jurisdiction of formation of a foreign limited liability company governs the liability of a member as member and a manager as manager for a debt, obligation, or other liability of the company”) and partially contradict Section 901(a)(3) (providing that “[t]he law of the jurisdiction of formation of a foreign limited liability company governs... the liability of a series of the company”). An enacting state should amend Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 901(a)(2) and (3) (or any comparable provisions in the state’s limited liability company act) to be subject to Sections 402 and 404. For an explanation of “asset-by-asset exposure”, see Prefatory Note to this act, Part 7C, and Section 404, comment.

Comment

Paragraphs (1) and (2) – These provisions parallel the choice of law provisions in Section 105(1) and (2). The comments to those provisions apply here as well.

Paragraph (3) – Except as stated in Sections 402 and 404, this provision states the choice of law for matters pertaining to the traditional, vertical shield. Subject to the exceptions, this section parallels the choice of law provision in Section 105(3), and, likewise subject to the exception, the comment to that provision applies here as well. For an explanation of vertical shields, see Prefatory Note, Part 7-A.

Paragraph 4 – Except as stated in Sections 402 and 404, this provision states the choice of law rules pertaining to the horizontal shields of a foreign series limited liability company or foreign protected series. Subject to the exceptions, this provision parallels Section 105(4) and (5), and, likewise subject to the exception, the comments to those provisions apply here as well. For an explanation of horizontal shields, see Prefatory Note, Part 7-B.

SECTION 702. NO ATTRIBUTION OF ACTIVITIES CONSTITUTING DOING BUSINESS OR FOR ESTABLISHING JURISDICTION. In determining whether a foreign series limited liability company or foreign protected series of the company does business in this state or is subject to the personal jurisdiction of the courts of this state:

(1) the activities and affairs of the company are not attributable to a foreign protected series of the company solely by reason of the foreign protected series being a foreign protected series of the company; and

(2) the activities and affairs of a foreign protected series are not attributable to the company or another foreign protected series of the company solely by reason of the foreign

protected series being a foreign protected series of the company.

Comment

Section 103 provides that “[a] protected series of a [domestic] series limited liability company is a person distinct from the company ... [and from] another protected series of the company.” The non-attribution rules stated here reflect the same construct for a foreign series limited liability company and the foreign protected series of the foreign company, without however purporting to determine whether a foreign protected series is a person.

SECTION 703. REGISTRATION OF FOREIGN PROTECTED SERIES.

(a) Except as otherwise provided in this section and subject to Sections 402 and 404, the law of this state governing the registration of a foreign limited liability company to do business in this state, including the consequences of not complying with that law, applies to a foreign protected series of a foreign series limited liability company as if the foreign protected series were a foreign limited liability company formed separately from the foreign series limited liability company and distinct from the foreign series limited liability company and any other foreign protected series of the foreign series limited liability company.

(b) An application by a foreign protected series of a foreign series limited liability company for registration to do business in this state must include:

(1) the name and jurisdiction of formation of the foreign series limited liability company; and

(2) if the company has other foreign protected series, the name and street and mailing address of an individual who knows the name and street and mailing address of:

(A) each other foreign protected series of the foreign series limited liability company; and

(B) the foreign protected-series manager of and agent for service of process for each other foreign protected series of the foreign series limited liability company.

(c) The name of a foreign protected series applying for registration or registered to do business in this state must comply with Section 202 and may do so using [cite this state's fictitious name statute], if the [fictitious] name complies with Section 202.

(d) The requirement in [cite to the provision of this state's limited liability company act pertaining to updating registration information] to amend a statement of registration to update information applies to the information required by subsection (b).

***Legislative Note:** Under the Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 903, a foreign registration statement does not include a certificate of good standing from the filing office of the foreign limited liability company's jurisdiction of formation. Accordingly, this act does not refer to any analogous certificate pertaining to a foreign protected series. If an enacting state's limited liability company act does require a certificate of good standing at the limited liability company level, the state should consider an analogous requirement at the foreign protected series level. An enacting state that imposes an analogous requirement will have to decide how to deal with a would-be registrant established under the law of a jurisdiction in which a protected series is established without the filing of any public record pertaining to the protected series.*

Comment

Subsection (b)(2) – The information the individual is required to know parallels the information required to be disclosed under Section 704(a) (requiring disclosure in the early course of litigation).

Subsection (d) – A state that has enacted Uniform Limited Liability Company Act (2006) (Last Amended 2013) would cite Section 904.

SECTION 704. DISCLOSURE REQUIRED WHEN FOREIGN SERIES LIMITED LIABILITY COMPANY OR FOREIGN PROTECTED SERIES PARTY TO PROCEEDING.

(a) Not later than [30] days after becoming a party to a proceeding before a civil, administrative, or other adjudicative tribunal of or located in this state or a tribunal of the United States located in this state:

(1) a foreign series limited liability company shall disclose to each other party the

name and street and mailing address of:

(A) each foreign protected series of the company; and

(B) each foreign protected-series manager of and a registered agent for service of process for each foreign protected series of the company; and

(2) a foreign protected series of a foreign series limited liability company shall disclose to each other party the name and street and mailing address of:

(A) the company and each manager of the company and an agent for service of process for the company; and

(B) any other foreign protected series of the company and each foreign protected-series manager of and an agent for service of process for the other foreign protected series.

(b) If a foreign series limited liability company or foreign protected series challenges the personal jurisdiction of the tribunal, the requirement that the foreign company or foreign protected series make disclosure under subsection (a) is tolled until the tribunal determines whether it has personal jurisdiction.

(c) If a foreign series limited liability company or foreign protected series does not comply with subsection (a), a party to the proceeding may:

(1) request the tribunal to treat the noncompliance as a failure to comply with the tribunal's discovery rules; or

(2) bring a separate proceeding in the court to enforce subsection (a).

Comment

This section pertains to the same information encompassed in Section 703(b)(2) (requiring the application for registration by a foreign protected series to include “the name and street and mailing address of an individual who knows the name and street and mailing address of each other foreign protected series of the company and the protected-series manager of and agent for service of process for each other foreign protected series of the company.”).

Subsection (a)(2) – Depending on the applicable foreign limited liability company act and the operating agreement of relevant foreign series limited liability company, a foreign protected series might lack access to the information this provision requires. In that event, this provision should cause a tribunal hearing the matter to allow a party to subpoena the required information from the foreign series limited liability company.

[ARTICLE] 8

MISCELLANEOUS PROVISIONS

SECTION 801. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 802. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

[SECTION 803. TRANSITIONAL PROVISIONS.

(a) Before [all-inclusive date], this [act] governs only:

(1) a series limited liability company formed, or a protected series established, on or after [the effective date of this [act]]; and

(2) a limited liability company that is a series limited liability company before

[the effective date of this [act]] and elects, in the manner provided in its operating agreement or by law for amending the operating agreement, to be subject to this [act].

(b) If a series limited liability company elects under subsection (a)(2) to be subject to this [act]:

(1) the election applies to each protected series of the company, whenever established; and

(2) a manager of the company has the right to sign and deliver to the [Secretary of State] for filing any record necessary to comply with this [act], whether the record pertains to the company, a protected series of the company, or both.

(c) On and after [all-inclusive date], this [act] governs all series limited liability companies and protected series.

[(d) Until [one year after the effective date of this [act]], Sections 402 and 404 do not apply to a foreign protected series that was established before [the effective date of this [act]] or a foreign limited liability company that became a foreign series limited liability company before [the effective date of this [act]]]

Legislative Note: “All-inclusive date” means the date on which the act begins to govern all series limited liability companies and protected series, including those in existence before the act’s effective date.

Comment

Subsection (d) – At first glance, subsection (d) may seem anomalous. As a general proposition, statutory changes applicable to foreign business organizations take effect when the relevant enactment takes effect – i.e., no delayed effective date. Typically, however, such changes establish or modify rules to which an organization cannot respond proactively; most often the changes involve formalities. In contrast, as applied to foreign series limited liability companies and foreign protected series, Sections 402 and 404 are decidedly atypical; they impose important substantive requirements that necessitate a proactive response. Making Sections 402 and 404 immediately applicable to foreign series limited liability companies and foreign protected series might be seen as unfair if this act takes effect immediately in an enacting state that has previously countenanced foreign series limited liability companies and foreign

protected series under far less demanding rules.

SECTION 804. SAVINGS CLAUSE. This [act] does not affect an action commenced, proceeding brought, or right accrued before [the effective date of this [act]].

[SECTION 805. SEVERABILITY CLAUSE. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: Include this section only if this state lacks a general severability statute or decision by the highest court of this state stating a general rule of severability.

SECTION 806. REPEALS; CONFORMING AMENDMENTS.

(a) ...

(b) ...

(c) ...

SECTION 807. EFFECTIVE DATE. This [act] takes effect