

D R A F T  
FOR DISCUSSION ONLY

**SERIES OF UNINCORPORATED BUSINESS  
ENTITIES ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-TWENTY-THIRD YEAR  
SEATTLE, WASHINGTON  
JULY 11 – JULY 17, 2014

**SERIES OF UNINCORPORATED BUSINESS  
ENTITIES ACT**

*WITH REPORTER'S INTRODUCTORY NOTE*

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By  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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June 6, 2014

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ENTITIES ACT**

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**SERIES OF UNINCORPORATED BUSINESS ENTITIES ACT**

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1                                   **SERIES OF UNINCORPORATED BUSINESS ENTITIES ACT**

2  
3                                   **Prefatory Note – Preliminary**

4  
5                                   **Part I**  
6                                   **The Series Concept**

7  
8 As provided by statutes in more than 10 states, the concept of a series involves:

- 9
- 10     • an identifiable set of assets segregated within an unincorporated entity;<sup>1</sup>
- 11     • with those assets:
  - 12         ○ comprising a protected series;
  - 13         ○ being associated with specified activities;<sup>2</sup>
  - 14         ○ being solely responsible to persons asserting claims pertaining to those assets or
  - 15             arising from those activities; and
  - 16         ○ not being responsible to persons asserting claims arising from the assets or
  - 17             activities of the unincorporated entity or any other set of assets segregated within
  - 18             that entity; and
- 19     • with the profits of the protected series inuring to the benefit of:
  - 20         ○ the unincorporated entity (and thereby indirectly to all the owners of that entity);
  - 21             or
  - 22         ○ only specified owners of the unincorporated entity.

23  
24 Or, as explained in the context of a statutory trust:

25  
26             A series is a segregation or partitioning of property within a statutory trust. Under  
27             Section 402, if a statutory trust has organized as a series trust under this section, a  
28             debt, obligation, or liability associated with the property of a particular series is  
29             enforceable only against property of that series, and not against the property of the  
30             trust generally or any other series thereof.

31  
32 Uniform Statutory Trust Entity Act (2009) (Last Amended 2013) (“USTEA”) § 401, cmt.

33  
34 Thus, an organization that contains series contains “internal shields” – i.e., the partitions  
35 confining the assets and liabilities of each series to that series alone. These shields are  
36 conceptually and practically quite different from the shield that protects the owners of an entity  
37 from automatic liability for the entity’s obligations.

---

<sup>1</sup> The segregation is not necessarily physical and in some cases could not be.

<sup>2</sup> The word “activities” is not meant to require any particular level of activity. In this context, activity includes quiescently holding assets.

1 Number of Series; Relation of Each Series to  
2 the Organization that Established the Series and to Each Other Series  
3

4 Under statutes that provide for series, there is no limit on the number of series an organization  
5 can establish.<sup>3</sup> A series exists “within” an unincorporated entity,<sup>4</sup> or at least under the auspices of  
6 that entity.<sup>5</sup>  
7

8 *Separation of Purposes*  
9

10 Each series may have its own purpose, presumably even if at odds with the purpose of another  
11 series or the organization that established the series.  
12 .

13 *Governance Structure*  
14

15 Each series is a separate center of activity,<sup>6</sup> and as such requires management. The form of  
16 management is largely a matter of agreement. For example, ILCS 180/37-40 (h) states: “A  
17 series may be managed by either the member or members associated with the series or by a  
18 manager or managers chosen by the members of such series, as provided in the operating  
19 agreement.” Delaware law provides: “A limited liability company agreement may establish or  
20 provide for the establishment of one or more designated series of members, managers, limited  
21 liability company interests or assets.” Del. Code tit. 6 § 18-215(a).  
22

23 The Uniform Statutory Trust Entity Act (“USTEA”) (2009) (Last Amended 2013) seems to  
24 presuppose that each series trust will be managed by at least one trustee:  
25

26 If there is at least one trustee of a series trust that, in discharging its duties, is  
27 obligated to consider the interests of the trust and all series thereof, the governing

---

<sup>3</sup> In theory, an organization might establish only one series. However, if that series involved less than all of the assets and activities within the organization, the organization itself would closely resemble a second series.

<sup>4</sup> The proposed Treasury regulations on the taxation of series and USTEA each have a term for the organization that establishes a series. *See* Prop.Reg. §301.7701-1(a)(5)(viii)(A) (defining “series organization” as “a juridical entity that establishes and maintains, or under which is established and maintained, a series”); USTEA § 102 (17) (defining “series trust” as “a statutory trust that has one or more series created under Section 401”).

The Drafting Committee has tentatively decided that these are terms could be confusing, especially to the uninitiated. The current draft refers to “the limited liability company that established the protected series.”

<sup>5</sup> One of the major issues pending for the Drafting Committee is whether the act should:

- characterize a series as:
  - a separate legal entity; or
  - a legal person; or
- leave the characterization issue alone.

<sup>6</sup> See note 2 (explaining that “activity” need not be active).

1 instrument may provide that one or more other trustees, in discharging their  
2 duties, may consider only the interests of the trust or one or more series thereof.<sup>7</sup>

### 3 4 Uses

5  
6 Series have a major, traditional role as a type of investment vehicle:

7  
8 The organization of a master trust with multiple series is common among  
9 statutory trusts that are registered as investment companies under the Investment  
10 Company Act of 1940. Mutual fund complexes commonly organize their various  
11 funds, which may have different investment goals and objectives, as separate  
12 series of a single statutory trust.

13  
14 USTEA § 401, comment.<sup>8</sup>

15  
16 The Study Committee on Series and the Drafting Committee have each sought hard to  
17 understand why series are attractive in non-traditional uses.

18  
19 For example, it is conceivable to use a series structure as a holding company or to  
20 compartmentalize various divisions of an operating company. It is not yet clear why traditional  
21 arrangements of affiliated organizations are not equally satisfactory.

### 22 23 **Reporter’s Introductory Note**

#### 24 25 **The Drafting Committee’s Decision on What to Draft When**

26  
27 Because the series concept is both novel and complicated, the Drafting Committee decided to  
28 approach its task in several steps:

- 29  
30 1. Draft an “add on” series article for one act – the Uniform Limited Liability Company Act  
31 (“ULLCA”) (2006) (Last Amended 2013) – in order to make policy decisions and  
32 explore conceptual and drafting complexities.  
33  
34 2. If possible, draft an “omni-act” statute (like META)<sup>9</sup> providing series provisions for  
35 limited liability companies, limited partnerships, limited liability partnerships, and coops,  
36 regardless of the type of act which governs the company, partnership, or coop.<sup>10</sup>

---

<sup>7</sup> USTEA § 403 (2009) (Last Amended 2013). Section 403 is a mandatory rule. *See* USTEA § 104(6).

<sup>8</sup> *See also Hartsel v. Vanguard Group, Inc.*, C.A. No. 5394–VCP., 2011 WL 2421003, 1 (Del.Ch. June 15, 2011) (Del.Ch. 2011) (“[T]he purpose of the trust structure of Nominal Defendants is to serve as an umbrella entity that registers as an investment company with the SEC so that each mutual fund within the trust can enjoy its trust’s registration and avoid the costs and burdens of separately registering.”)

<sup>9</sup> META – the Model Entity Transactions Act (2007) (Last Amended 2013) – provides for mergers and other organic transactions regardless of: (i) the type(s) of entity involved; and (ii) the specific act under which an involved entity is organized.

<sup>10</sup> *I.e.*, regardless of whether the act is uniform; regardless of whether a uniform enactment is based on the

- 1 3. If an omni-act is possible, determine whether enactment advantages nonetheless warrant  
2 adopting single-act articles for ULLCA, the Uniform Limited Partnership Act (2001)  
3 (Last Amended 2013), and the Uniform Partnership Act (1997) (Last Amended 2013).<sup>11</sup>  
4  
5 4. Determine how to provide uniform series provisions for entities:  
6 a. formed under a uniform act but not the most current version; or  
7 b. not formed under a uniform act.  
8

## 9 **Drafting Premises**

### 10 *What's in a name?*

- 11  
12  
13 • The draft refers to “protected series” because: (i) usage in the series/asset-partitioning  
14 realm requires that the act refer to “series,” while (ii) usage elsewhere makes the term  
15 confusing when standing alone.  
16  
17 • For the latter reason, the draft always refers to “protected series” and never merely to  
18 “series.”  
19

### 20 *Location of Series Provisions – Separate Article Only*

21 *or*

### 22 *Separate Article for Series-Specific Provisions with Tag-Along Provisions Throughout the Act*

- 23  
24 • At least for the annual meeting draft, all series provisions are located in a separate  
25 article – Article 11.  
26 ○ Part 1 of Article 11 contains provisions that are series-specific.  
27 ○ Part 2 is captioned “OTHER PROVISIONS OF [ACT] MADE APPLICABLE  
28 TO PROTECTED SERIES.”  
29 ■ This approach necessarily involves “incorporation with substitution.”  
30 ■ *See e.g.* Section 1119.  
31

### 32 SECTION 1114. SUBSTITUTED MEANINGS; 33 RELATIONSHIP BETWEEN THIS ARTICLE AND OTHERS.

34 (a) For the purposes of Sections 1115 to 1131, the  
35 following words and phrases are applied as follows.

36 (1) “certificate of formation” as if the phrase  
37 referred to “protected series designation”;  
38

---

most current version of the pertinent act.

<sup>11</sup> The series concept is inappropriate for the Uniform Unincorporated Nonprofit Association Act (“UUNA”) (2007) (Last Amended 2013). USTEAs already contains series provisions, which are tailored to fit special needs in the investment trust area and therefore differ substantially in approach from the approach taken by the Drafting Committee. At some point, the Committee might propose USTEAs amendments, consistent with that act’s specialized approach, to improve the “plumbing” aspect of the act’s series provisions.

1 SECTION 1120. CONTRIBUTIONS AND DISTRIBUTIONS.

2 (a) Except as stated in subsections (b) and (c), Sections 402  
3 through 406 apply to a protected series.

4 (b) Section 406(b) does not apply to a protected series.

5 (c) If a protected series has no associated transferable  
6 interests, a distribution from the protected series is made to the  
7 limited liability company that established the protected series.  
8

- 9
- 10 • Incorporation with substitution has the virtue of brevity (relatively speaking) but  
11 produces a dehydrated act, not useable “off the rack.”
    - 12 ○ To draft Part 2, the Reporter:
      - 13 ▪ conceptualized how other provisions of ULLCA would apply to a  
14 protected series;
      - 15 ▪ imagined how references to protected series might fit into those other  
16 provisions; and
      - 17 ▪ created the instructions that comprise Part 2.
    - 18 ○ A reader of the statute must apply the instructions in Part II to create a useable set  
19 of statutory provisions.
  - 20 • Therefore, Appendix provides a few examples of the alternative approach, which would
    - 21 ○ delete Part 2; and
    - 22 ○ insert references to protected series throughout ULLCA, thereby achieving  
23 directly what Part 2 sought to achieve indirectly.

1                   **SERIES OF UNINCORPORATED BUSINESS ENTITIES ACT**

2                   *In this draft – as an article to be added to ULLCA (2006) (Last Amended 2013)*

3                                   **[ARTICLE] 11**

4                                   **PROTECTED SERIES**

5                                   **[PART 1]**

6                                   **[GENERAL PROVISIONS]**

7                   **SECTION 1101. DEFINITIONS.** In this [article]:

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

9                                   (A) property, property that under Section 1109 has become associated with a  
10 particular protected series; and

11                                  (B) a member, a member that under Section 1110 has become associated with a  
12 particular protected series.<sup>12</sup>

13                   (2) “Associated transferable interest” means, with respect to a protected series, the right,  
14 as initially owned by the limited liability company that established the protected series<sup>13</sup> or by a  
15 person in the person’s capacity as an associated member, to receive distributions from the  
16 protected series, regardless of whether the company or associated member continues to own any  
17 part of the right and regardless of whether the associated member remains associated with the  
18 protected series or remains a member. The term applies to any fraction of the interest, by  
19 whomever owned.<sup>14</sup>

---

<sup>12</sup> This article contemplates members and property both as associated and not associated, which this definition takes into account.

<sup>13</sup> Section 1110(c) authorizes a limited liability company to own associated transferable interests upon the establishment of a protected series (if authorized by the operating agreement), as well as by acquiring such interests from a prior owner.

<sup>14</sup> This article contemplates only transferable interests that are associated, which makes necessary this separate definition (rather than defining the concept as a subparagraph of Paragraph 1).

1           (3) “Associated transferee” means a person to which all or part of an associated  
2 transferable interest has been transferred, whether or not the transferor is an associated  
3 member.<sup>15</sup>

4           <sup>16</sup>(4) “Distribution” means a transfer of money or other property from a protected series  
5 to a person on account of an associated transferable interest or in the person’s capacity as an  
6 associated member. The term:

7                   (A) includes:

8                               (i) a redemption or other purchase by a protected series of an associated  
9 transferable interest; and

10                              (ii) a transfer to an associated member in return for the member’s  
11 relinquishment of any right to participate as an associated member in the management or conduct  
12 of the protected series’ activities and affairs or to have access to records or other information  
13 concerning the protected series’ activities and affairs; and

14                   (B) does not include amounts constituting reasonable compensation for present or  
15 past service or payments made in the ordinary course of business under a bona fide retirement  
16 plan or other bona fide benefits program.

17           (5) “Foreign protected series” means a [person] [structure, arrangement, or relationship]<sup>17</sup>

---

<sup>15</sup> This definition could refer to “member” rather than “associated member,” but doing so would obscure the intended point – i.e., that a transferee can take from a person who is not an *associated* member.

<sup>16</sup> The decision to confine all series provisions to one article necessitates redefining this term for the purposes of this article.

<sup>17</sup> The Drafting Committee has tentatively decided to characterize a domestic protected series as a person. *See* Sections 1101(6), 1102(a); note 18, *infra*. However, it would be unwise to limit the scope of “foreign protected series” based on that characterization. Most current series statutes duck this characterization issue. Therefore, to use “person” in this definition would make the definition unduly narrow. Compare Section 1104(6) (stating that the law of this jurisdiction governs the characterization of a protected series as a person) with Section 1132(a) (omitting a comparable provision for foreign protected series).

1 established by a foreign limited liability company which would be a protected series if the  
2 company were formed and the protected series established under this [act].

3 (6) “Protected series”, except in the phrase “foreign protected series”, means a person  
4 established under Section 1107.<sup>18 19</sup>

5 (7) “Series manager” means a person<sup>20</sup> that manages a protected series under Section  
6 1113 or the operating agreement.

---

<sup>18</sup> At its 2014 Winter meeting, the Drafting Committee tentatively decided to characterize a protected series as a person. The Committee made that decision in the hopes of producing useful consequences (e.g., standing to file for bankruptcy) and not to create a requirement that must be satisfied for an arrangement to be considered a protected series. Put another way, given the if/then structure of legal rules, the Committee intends “person” to be part of “then” and not part of “if.”

This defined term raises coordination issues with other parts of ULLCA. Identified so far:

- ULLCA § 901, which refers to the law governing a foreign “series” rather than “protected series;”
- ULLCA, Article 10, (META provisions) which refers to “series” in the traditional sense of the word.
  - See ULLCA § 1031, comment (“The “series” referenced in [the definition of “acquired entity”] are not the series contemplated by the Uniform Statutory Entity Trust Act §§ 401-405 and some LLC statutes. *See, e.g.*, 805 ILCS 180/37-40 (2012); Del. Code Ann. tit. 6, § 18-215 (2012). Instead, in this context “series” refers to a subset of a class, which is a meaning commonly found in corporation law. *See, e.g.*, MBCA § 6.02. Specific provisions expressly authorizing classes and series are less common in unincorporated entity law but do exist. *See, e.g.*, Minn.Stat. § 322B.155 (2012).) Many partnerships and limited liability companies have classes of interests.
  - Note, however, that Article 10 would accept a protected series as a party to an Article 10 transaction. ULLCA § 1001(a)(x)(II) (defining an entity as including “any ... person that has ...the power to acquire an interest in real property in its own name”). *But see* Section 1103(d) (limiting the circumstances in which a protected series may be a party to a merger, interest exchange, conversion, or domestication).

Additional possibility: “legal person”. At least some case law exists on this term, albeit from a very different context, 42 U.S.C. § 1983. *E.g. Thomas v. City of New Orleans*, 883 F. Supp. 2d 669, 678-79 (E.D. La. 2012), appeal dismissed (Oct. 16, 2012).

<sup>19</sup> Coordination issue – This definition does not apply outside this article.

<sup>20</sup> ULLCA § 102(9) defines a manager as “a person.” Query: May an operating agreement provide that one protected series manages another? (This draft does not exclude that arrangement.)

1           **SECTION 1102. NATURE OF PROTECTED SERIES.** Except as otherwise

2 provided in Section 1103(c) and (d),<sup>21</sup> a protected series is a person distinct from:<sup>22 23</sup>

3           (1) the limited liability company that established the protected series;

4           (2) any other protected series of the company; and

5           (3) any member of the company, whether or not the member is associated with the  
6 protected series.

7           **SECTION 1103. POWERS, PURPOSE, AND DURATION OF PROTECTED**  
8 **SERIES.**

9           (a) A protected series has the capacity to sue and be sued in its own name.<sup>24</sup>

10          (b) Except as otherwise provided in subsections (c) and (d), a protected series:

11           (1) has the same powers as the limited liability company that established the  
12 protected series;<sup>25</sup> and

---

<sup>21</sup> The cited subsections provide that a protected series cannot exist on its own. In that sense, therefore, a protected series is not distinct from the company whose existence is a precondition to the existence of the protected series.

<sup>22</sup> The word “distinct” derives from Section 108(a): “A limited liability company is an entity distinct from its member or members.” Merriam Webster (on line), provides as the word’s first definition “distinguishable to the eye or mind as discrete: separate <a distinct cultural group> <teaching as distinct from research>”. <http://www.merriam-webster.com/dictionary/distinct>; last visited 8-23-13.

<sup>23</sup> In addition to the much discussed questions of bankruptcy law, Article 9, and title insurance, this characterization issue has less obvious implications. For example, may one series conspire with another civilly? Criminally? Is a series subject to criminal prosecution? *E.g.*, *U.S. v. ITT Blackburn Co., a Div. of ITT*, 824 F.2d 628, 631 (8th Cir. 1987) (“[A]n unincorporated division cannot be sued or indicted, as it is not a legal entity.... See *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir.1982), cert. denied, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983) (“The RICO ‘enterprise’ was identified in the indictment as the Infonet Division of CSC, an organization which had no corporate existence separate and apart from that of CSC itself”); *Spearing v. National Iron Co.*, 770 F.2d 87, 88-89 (7th Cir.1985) (“The complaint also names as defendants ... National Iron Company, which being an unincorporated division of Pettibone Corporation is not suable in its own right.”).

<sup>24</sup> Formulation parallels Section 109. See also Sections 105(c)(1) and 1105(b)(1) (precluding variance of this capacity).

<sup>25</sup> In the default mode, “[a] limited liability company has ... the power to do all things necessary or convenient to carry on its activities and affairs.”

1 (2) may have any lawful purpose, regardless of whether for profit.<sup>26</sup>

2 **Alternative A**

3 (c) A protected series may continue to exist only:

4 (1) as a protected series of the limited liability company that established the  
5 protected series; or

6 (2) as the result of a transaction permitted by subsection (d)(2)(B).<sup>27</sup>

7 (d) A protected series may not:

8 (1) continue to exist after the termination of the limited liability company that  
9 established the protected series<sup>28</sup> unless the protected series has been a party to a  
10 transaction that:

11 (A) is permitted by paragraph (2)(B); and

12 (B) has become effective before the termination;<sup>29 30</sup> or

13 (2) be a party to a merger, interest exchange, conversion, domestication, or comparable  
14 transaction,<sup>31</sup> except as a party whose existence after the merger takes effect:

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<sup>26</sup> Paragraphs (1) and (2) are default rules. Thus, the operating agreement can: (i) confine the purposes or a protected series so as to correspond to limitations applicable to the limited liability company itself or in any other way; (ii) accord powers to a protected series which transcend limitations applicable to the limited liability company itself; or (iii) cause a protected series to have fewer powers than the limited liability company.

<sup>27</sup> Subsection (c)(2) contemplates a spin-off transaction not necessarily connected to the termination of the LLC that established the series.

<sup>28</sup> Subsection (d)(1) addresses a spin-off of a protect series accomplished in contemplation of the termination of the LLC that established the protected series.

<sup>29</sup> Subsection (c) and (d)(1) overlap somewhat, but each provision refers to a different aspect of the dependent nature of a protected series otherwise distinct from the limited liability company. Alternative B simplifies the drafting by removing “termination” from the statutory text and relying on the comments to explain that termination of an LLC necessarily terminates a protected series established by the LLC unless the protected series is spun off before the LLC terminates.

<sup>30</sup> Arguably, this restriction is redundant of the more far-reaching restriction in Paragraph (1).

<sup>31</sup> These restrictions apply only when a protected series is itself party to the transaction. An LLC might be party to a transaction, with a protected series involved as a non-party. For example, an LLC acquiring

- 1 (A) does not continue; or
- 2 (B) continues:
- 3 (i) as a protected series of the limited liability company
- 4 that established the protected series or of another limited liability company;
- 5 (ii) as a foreign protected series;<sup>32</sup> or
- 6 (iii) [in relation to] [as part of] [within] an entity whose
- 7 governing law provides for the establishment of a structure, arrangement, or relationship
- 8 comparable to a protected series or foreign protected series; or
- 9 (3) establish a protected series, whether of itself or the company.

10 **Alternative B**<sup>33</sup>

- 11 (c) A protected series may continue to exist only:
- 12 (1) as a protected series of the limited liability company that established the
- 13 protected series; or
- 14 (2) as the result of a transaction permitted by subsection (d)(1)(B).
- 15 (d) A protected series may not:
- 16 (1) be a party to a merger, interest exchange, conversion, domestication, or
- 17 comparable transaction, except as a party whose existence after the merger takes effect:

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a target through a merger might provide consideration to the owners of the target by admitting the owners as members and associating them with a protected series. Or the LLC might use the assets of a protected series as consideration to the owners of the target.

Query – What results if a LLC with a protected series domesticates into a state whose LLC law does not provide for protected series, or converts to an entity whose governing law is likewise inhospitable?

<sup>32</sup> This provision authorizes but does not require the continuation of a protected series. The plan of merger, etc. might well provide for termination.

<sup>33</sup> This alternative does not specifically contemplate the termination of an LLC but does produce the same result in that context as does Alternative A.

- 1 (A) does not continue; or
- 2 (B) continues:
- 3 (i) as a protected series of the limited liability company that established
- 4 the protected series or of another limited liability company;
- 5 (ii) as a foreign protected series; or
- 6 (iii) [in relation to] [as part of] [within] an entity whose governing law
- 7 provides for the establishment of a structure, arrangement, or relationship comparable to a
- 8 protected series or foreign protected series.

9 **End of Alternatives**

10 (e) If the law of this state prohibits a limited liability company from engaging in an

11 activity or affair, conducting a business, entering into a transaction, or functioning in any other

12 way, the prohibition applies to a protected series.

13 [(f) A protected series may not:

14 (1) ...

15 (2) ...] <sup>34</sup>

16 **SECTION 1104. GOVERNING LAW.** The law of this state governs:

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

18 (2) the relations between a protected series and each of the following: <sup>35</sup>

19 (A) the limited liability company that established the protected series;

20 (B) any other protected series of the company; and

21 (C) any member, whether or not associated with the protected series;

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<sup>34</sup> Conduct that a state considers acceptable for an LLC might be unacceptable for a “mere” protected series.

<sup>35</sup> These provisions cover each relationship in both directions.

1 (3) the liability of the company for a debt, obligation, or other liability of a protected  
2 series established by the company;

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

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

6 (A) a member in that capacity;<sup>36</sup>

7 (B) a member associated with a protected series in that capacity;<sup>37</sup>

8 (C) a manager in that capacity;<sup>38</sup> and

9 (D) a protected series manager in that capacity; and

10 (6) the characterization of a protected series as a person.<sup>39</sup>

11 **SECTION 1105. RELATIONSHIP OF OPERATING AGREEMENT TO**

12 **PROTECTED SERIES.**<sup>40</sup>

13 (a) Except as otherwise provided in subsection (b),<sup>41</sup> the operating agreement governs:

14 (1) the activities and affairs of the protected series and the conduct of those  
15 activities and affairs;

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<sup>36</sup> Redundant of Section 104(2) (“The law of this state governs ... the liability of a member as member ... for the debts, obligations, or other liabilities of a limited liability company.”)

<sup>37</sup> Here the phrase “whether or not associated with the protected series” does not work. The capacities are separate and should be separately mentioned.

<sup>38</sup> See note 37.

<sup>39</sup> Note reference to law of this state rather than “this act.” It is unclear, for example, whether a state’s version of U.C.C, Article 9 would defer to this act’s characterization of a protected series as a person.

<sup>40</sup> At its Fall 2013 meeting, the Drafting Committee rejected defined terms for series-specific provisions of the operating agreement and supplemental agreements pertaining to a single series. A comment will discuss the variety of ways an operating agreement might provide for series, including appendices, exhibits, etc.

<sup>41</sup> A comment will note that Sections 105 and 107(b)(2) also restrict the power of the operating agreement.

1 (2) relations among:  
2 (A) the members associated with a protected series in their capacity as  
3 associated members and between the associated members and the protected series;  
4 (B) a member associated with a protected series in that capacity with:  
5 (i) the limited liability company that established the protected  
6 series;  
7 (ii) any other protected series established by the company;  
8 (iii) any member not associated with the protected series; and  
9 (C) the protected series, the company, and any other protected series of  
10 the company; and  
11 (3) the rights and duties under this [act] of a person in the capacity of series  
12 manager.  
13 (b) An operating agreement may not:  
14 (1) vary Section 1103(a), (c) or (d);  
15 (2) restrict the rights under this [article]<sup>42</sup> with regard to a protected series of a  
16 person that is neither a series manager of the protected series nor a member or manager of the  
17 company, except to the same extent that Sections 105(c)(15), 106,<sup>43</sup> and 107(b) permit the  
18 operating agreement to restrict the rights under this [act] of a person other than a member or  
19 manager;  
20 (3) vary the provisions of Section 805, as made applicable to a protected series by  
21 Section 1131, but the operating agreement may provide that a protected series may not have a

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<sup>42</sup> Query – For safety’s sake, use “act”?

<sup>43</sup> Arguably, Section 106 need not be included, but there is less risk in needlessly including the section than in erroneously excluding it.

1 special litigation committee; or

2 (4) vary [insert other provisions that may not be varied].<sup>44</sup>

3 **SECTION 1106. NAME.**

4 **Alternative A**<sup>45</sup>

5 The name of a protected series must comply with Section 112 and contain the phrase “protected  
6 series”.<sup>46 47</sup>

7 **Alternative B**

8 The name of a protected series must:

9 (1) comply with Section 112;

10 (2) contain the name of the of the limited liability company that establishes the protected  
11 series; and

12 (3) contain the phrase “protected series”.

13 **End of Alternatives**

14 **SECTION 1107. ESTABLISHING PROTECTED SERIES; PROTECTED SERIES**  
15 **DESIGNATION; AMENDMENT AND CANCELLATION OF DESIGNATION.**

16 (a) With the affirmative vote or consent of all the members, a limited liability company  
17 may establish one or more protected series pursuant to subsections (b) through (d).

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<sup>44</sup> Placeholder for further items.

<sup>45</sup> This draft presents these alternatives, because: (i) at its 2014 Winter meeting the Drafting Committee was approximately evenly divided on whether to require the name of a protected series to include the name of the limited liability company; and (ii) all participants agreed that the Committee should solicit the views of IACA on this issues (as well as others). “IACA” means “International Association of Corporate Administrators” – a/k/a the filing officers.

<sup>46</sup> At its Fall 2013 meeting, the Drafting Committee (provisionally) accepted the Reporter’s recommendation against allowing an abbreviation to function as a designator. (Rationale – the protected series concept is so new, an abbreviation is unlikely to function effectively as a signifier.)

<sup>47</sup> Query: Necessary to state that the designator suffices to distinguish the name of a protected series from the otherwise identical name of the LLC?

1 (b) To establish a protected series, a limited liability company must deliver to the  
2 [Secretary of State] for filing a protected series designation, signed by the company, stating:

3 (1) the name of the company;

4 (2) the name of the protected series; and

5 (3) the name and street and mailing address of the registered agent for the  
6 protected series.

7 (c) A protected series designation may contain statements as to matters other than those  
8 required by subsection (b), but may not vary or otherwise affect the provisions specified in  
9 Sections 105(c) and (d) and 1105(b) in a manner inconsistent with those sections. A statement in  
10 a designation is not effective as a statement of authority.

11 (d) A protected series is established when the protected series designation becomes  
12 effective under Section 207.<sup>48</sup>

13 (e) A limited liability company may amend or cancel a protected series designation by  
14 delivering to the [Secretary of State] for filing a statement of change<sup>49</sup> that states the name of the  
15 company, the name of the protected series to which the designation applies,<sup>50</sup> and:

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

18 (2) for cancellation, that winding up the protected series is complete and the

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<sup>48</sup> ULLCA § 207 governs when a record delivered for filing becomes effective.

<sup>49</sup> Note that Section 116 also uses the term “statement of change” for a different effect in a different context: Change of Registered Agent or Address for Registered Agent by Limited Liability Company. Query – could we avoid confusion by referring to a “statement of designation change”?

<sup>50</sup> It would be possible, though more complicated, to empower the protected series to deliver for filing statements of change. However, there is some rationale for keeping the LLC in charge of all filed records which pertain to it.

1 designation is canceled.<sup>51</sup>

2           **SECTION 1108. [ANNUAL] [BIENNIAL] REPORTS.**<sup>52</sup> For each protected series of  
3 a limited liability company and each registered foreign protected series<sup>53</sup> of a foreign limited  
4 liability company, the company shall include in its [annual] [biennial] report under Section  
5 212.<sup>54</sup>

6           (1) the name of the protected series or foreign protected series; and

7           (2) the name and street and mailing address of the registered agent of the protected series  
8 or foreign protected series.<sup>55 56</sup>

9           **SECTION 1109. PROPERTY ASSOCIATED WITH PROTECTED SERIES.**

10           (a) Property becomes associated with a protected series when a record<sup>57 58</sup> states the name

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<sup>51</sup> Query: What is the effect of cancellation?

<sup>52</sup> The Drafting Committee has not yet decided whether to: (i) require annual/biennial reports; or (ii) provide for a certificates of good standing for a protected series.

<sup>53</sup> Coordination issue – the concept of a “registered foreign protected series” appears in Part 2 and does not expressly apply in Part 1. The Reporter will resolve this problem if the Drafting Committee decides to require annual/biennial reports.

<sup>54</sup> This section is properly located in Part 1, even though the section refers to a section in another article. Part 2 is for sections that at least in part involve *incorporation by reference* and not for sections that merely *add on* to provisions in other articles.

<sup>55</sup> Because this section requires information to be included in an LLC’s or foreign LLC’s annual/biennial report, ULLCA § 212(d) and (e) will by their terms apply to the information required by this section.

<sup>56</sup> This section does not have disclosure requirement comparable to ULLCA § 212(a)(4) and (5) (requiring the annual/biennial report to identify a member of a member-managed LLC or a manager of a manager-managed LLC).

<sup>57</sup> Non-record designation (“the memory of man runneth not to the contrary”) could not possibly satisfy the specificity requirement stated in Section 109(a). *But see Anderson v. City of Huntington*, 40 Ind. App. 130, 81 N.E. 223, 224 (1907) (“If the fence lines at this point have been maintained as they now are, so long that ‘the mind of man runneth not to the contrary,’ we take it no one would contend that the county commissioners could declare that said road was 60 feet wide at such place and appropriate sufficient land from the adjoining property owners to make said road 60 feet wide without any legal proceedings or process.”)

<sup>58</sup> At its 2014 Winter meeting, the Drafting Committee decided to leave open the question of who creates and maintains the record. At least three problems result from that decision. (1) What happens if the operating agreement fails to address this issue? (Shouldn’t the protected series provisions have at least a default rule?) (2) What happens if two different protected series purport to have the same property as

1 of the protected series and describes the property with sufficient specificity to permit a  
2 reasonable person that is not a member,<sup>59</sup> manager, or series manager to identify the property and  
3 distinguish it from:

4 (1) property of the limited liability company that established the protected series;

5 and

6 (2) property associated with any other protected series of the company.<sup>60 61 62</sup>

7 (b) Property associated with a protected series is owned by the protected series.

8 However, subject to subsection (a), associated property of a protected series may be held directly  
9 or indirectly, including in the name of the protected series, in the name of the limited liability  
10 company, through a nominee, or otherwise.<sup>63</sup>

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“associated property”? (Shouldn’t the default rule place the responsibility and authority with the LLC?)  
(3) What happens if a description made by one protected series renders ambiguous a description made by  
another protected series? (Same question as with issue 2.)

<sup>59</sup> In this context, “member” encompasses both general status as a member and status as a member  
associated with the series. That is, the standard excludes members, regardless of whether associated with  
the series.

<sup>60</sup> A comment will note that: (i) different methods may be appropriate for describing different types of  
property (e.g., fungible versus non-fungible goods; and (ii) for property subject to a public recording  
system, the method should take the system into account.

<sup>61</sup> Under this subsection, property might be owned by a protected series without being associated with the  
protected series. That result is intentional. The category of “associated property” provides support for the  
internal shields, *see* Section 1112(e), and having proper identification is the only entryway into that  
protected situation.

<sup>62</sup> Earlier drafts included safe harbor language drawn from UCC § 9-108(b):

[Examples of reasonable identification.] Except as otherwise provided in subsection (d), a  
description of collateral reasonably identifies the collateral if it identifies the collateral by: (1)  
specific listing; (2) category; (3) except as otherwise provided in subsection (e), a type of  
collateral defined in [the Uniform Commercial Code]; (4) quantity; (5) computational or  
allocational formula or procedure; or (6) except as otherwise provided in subsection (c), any other  
method, if the identity of the collateral is objectively determinable.

The language was deleted because it does not extrapolate well to the context of protected series. In  
U.C.C, Article 9, the language functions to characterize different categories of property owned by the  
same person. In the context of series, the task is to distinguish each and every type of property owned by  
one person from each and every type of property owned by other persons.

<sup>63</sup> Like ULLCA itself, this draft does not delineate the mechanics for transferring ownership of associated

1 (c) Property a protected series acquires directly from the limited liability company that  
2 established the protected series or another protected series of the company and causes  
3 simultaneously to be associated with the protected series, vests in the protected series without  
4 transfer, reversion, or impairment.<sup>64 65</sup>

5 **SECTION 1110. ASSOCIATED MEMBER; ASSOCIATED TRANSFERABLE**  
6 **INTEREST.**

7 (a) Only a member of a limited liability company may become associated with a  
8 protected series of the company.<sup>66</sup>

9 (b) A member becomes associated with a protected series when the operating agreement,

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property. Contrast UPA § 302 (1997) (Last Amended 2013) (providing detailed rules for the transfer of property owned by a general partnership). Query – the omission of “another protected series of the company” could imply a prohibition.

<sup>64</sup> This subsection seeks to provide some of the benefits of “entity transactions” (e.g. mergers, conversions) for transfers within the overarching entity. The language derives from the META provisions of ULLCA. *See e.g.* ULLCA § 1026(a)(3) (stating that, when a merger becomes effective, “all property of each merging entity vests in the surviving entity without transfer, reversion, or impairment”). Query – if this provision remains in the act, should the provision also cover transfers from a protected series to the limited liability company? In any event, this subsection must be subject to fraudulent transfer (now “voidable transactions”) acts. See Legislative Note following Section 1132.

<sup>65</sup> Alternative formulation: “Property vests in a protected series without transfer, reversion, or impairment, if the protected series: (1) acquires the property directly from the limited liability company that established the protected series or another protected series of the company; and (2) causes the property to be associated with the protected series at the moment the protected series acquires the property.”

<sup>66</sup> This restriction: (i) is ubiquitous in series provisions; and (ii) fits with the controlling power that the operating agreement has over each protected series. The Drafting Committee has flirted with the notion of allowing the limited liability company itself to be associated with one or more of its own protected series. For several reasons, this Draft does not take that approach:

1. The approach substantially increases drafting complexity.
2. The approach makes an already novel, counterintuitive concept (the series) even more difficult to understand.
3. Virtually the same results are achieved by: (i) allocating to the LLC management authority over and all economic benefits from any protected series that has no associated members; (ii) allowing the operating agreement to allocate associated transferable interests to the LLC *ab initio*; and (iii) permitting the LLC to obtain associated transferable interests from associated members and associated transferees.

1 or a procedure established under the operating agreement, identifies:

2 (1) the member as associated with the protected series; and

3 (2) any associated transferable interest owned or to be owned by the member in  
4 connection with the member becoming associated.

5 (c) A limited liability company may acquire an associated transferrable interest:

6 (1) from an associated member or associated transferee;<sup>67</sup> or

7 (2) as provided in the operating agreement.<sup>68</sup>

8 **SECTION 1111. NO AGENCY POWER OF MEMBER ASSOCIATED WITH**  
9 **PROTECTED SERIES.**<sup>69</sup>

10 (a) A member is not an agent of a protected series solely by reason of being associated  
11 with the protected series.

12 (b) A person's status as a member associated with a protected series does not prevent or  
13 restrict law other than this [act] from imposing liability on the protected series because of the  
14 person's conduct.

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<sup>67</sup> Assume that a limited liability company redeems a member's associated interest in a protected series. If the redeemed interest disappears, the LLC will have paid for an increase in the distribution shares of remaining members associated with the protected series. This provision allows the alternative – the person (i.e., the LLC) that paid for the redemption succeeds to the benefits of the redeemed interest. The trade-off is between the remaining associated members increasing their respective percentages and all the member benefitting (through the LLC) from the redemption.

<sup>68</sup> This provision makes possible the LLC owning a transferable interest upon the establishment of a protect series.

<sup>69</sup> Derived essentially verbatim from Section 301.

1           **SECTION 1112. LIMITED LIABILITY.**<sup>70 71</sup>

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

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

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

12           (d) A member associated with a protected series, a series manager of the protected series,  
13 a member, or manager is not personally liable, directly or indirectly, by way of contribution or  
14 otherwise, for a debt, obligation, or other liability of the protected series solely by reason of  
15 being or acting as an associated member, a protected series manager, a member or manager.

16           (e) Property associated with a protected series is not subject to the enforcement of a  
17 judgment against the limited liability company that established the protected series or another  
18 protected series of the company solely by reason of being associated with the protected series.

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<sup>70</sup> This section is derived from ULLCA § 304. Given the Drafting Committee’s decision to locate all series provisions in one article, the Committee needs to closely consider whether stating the main shield separately from the series shield leaves any gaps.

<sup>71</sup> Like ULLCA § 304, this section *limits* liability. However, ULLCA § 304 is captioned “Liability of Members and Managers.” ULLCA (2006) adopted this language to parallel the comparable captions in UPA (1997) and ULPA (2001). The caption suits the partnership acts, because they both contemplate general partner liability. In contrast, the LLC act and this section contemplate only the limitation of liability.

1 Property of a limited liability company is not subject to the enforcement of a judgment against a  
2 protected series of the company solely by reason of being property of the company that  
3 established the protected series. This subsection applies regardless of whether enforcement is  
4 sought by levy, attachment, execution, judicial sale, or comparable means.<sup>72</sup>

5 (f) The failure of a protected series or a limited liability company that established the  
6 protected series<sup>73</sup> to observe formalities relating to the exercise of their respective powers or  
7 management of their respective activities and affairs is not a ground for imposing liability on:

8 (1) a member whether or not associated with series, a manager, or series manager,  
9 for a debt, obligation, or other liability of the protected series or the company;

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

11 (3) the protected series for a debt, obligation, or other liability of the company.

12 (g) This section applies regardless of the dissolution of a limited liability company or  
13 protected series.

14 **SECTION 1113. MANAGEMENT OF PROTECTED SERIES.**<sup>74</sup>

15 (a) A protected series is managed by:

16 (1) its associated members, if any; or

17 (2) if there are not associated members, the limited liability company that

18 established the protected series.<sup>75</sup>

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<sup>72</sup> Query – does the inclusion of this provision with regard to series necessitate amending the shield provision in the main part of the act?

<sup>73</sup> It is necessary to include the limited liability company itself in this shield; otherwise a gap might exist.

<sup>74</sup> A comment will note that the rules stated in this section apply during winding up as well as during operations.

<sup>75</sup> Note that this subsection provides for management by the limited liability company, which means that those who manage the company will have responsibility for managing the series. As to whether those who manage the LLC owe a duty to the series, this draft takes no position. *Compare In re USACafes, L.P. Litigation*, 600 A.2d 43, 49–50 (Del.Ch. 1991) (recognizing such a duty in an analogous context with

1 (b) For purposes of Section 105(d)(3), it is not manifestly unreasonable if the operating  
2 agreement of a manager-managed limited liability company with more than one manager:<sup>76</sup>

3 (1) makes a manager responsible only for the activities and affairs of a specified  
4 protected series;

5 (2) restricts the manager’s fiduciary and other duties to matters concerning the  
6 specified protected series; and

7 (3) limits or eliminates any fiduciary or other duty the manager might otherwise  
8 have had with respect to matters pertaining to other protected series or the limited liability  
9 company.<sup>77</sup>

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*1515 N. Wells, L.P. v. 1513 N. Wells, L.L.C.*, 392 Ill. App. 3d 863, 872-73, 913 N.E.2d 1, 10 (Ill. App. Ct. 2009) (rejecting *USACafes*). *See also* Section 1113(b) (contemplating a multimanager LLC whose operating agreement makes one of the LLC’s managers responsible solely for one protected series and eliminating the manager’s fiduciary duties with regard to other protected series; stating that such an arrangement is not manifestly unreasonable).

<sup>76</sup>Section 105(d)(2) expressly authorizes this type of provision for the operating agreement of a member-managed LLC.

<sup>77</sup>Query: Locate here, in Section 1105 (addressing the operating agreement), or in Section 1123 (addressing standards of conduct)? Query – Should the same rule apply to series managers? (Reporter suggests yes.)

1 [PART 2]

2 [OTHER PROVISIONS OF [ACT] MADE APPLICABLE TO PROTECTED SERIES]<sup>78</sup>

3 SECTION 1114. SUBSTITUTED MEANINGS; RELATIONSHIP BETWEEN  
4 THIS ARTICLE AND OTHERS.<sup>79</sup>

5 (a) For the purposes of Sections 1115 through 1132,<sup>80</sup> the following words and phrases  
6 are applied as follows.

7 (1) “certificate of formation” as if the phrase referred to “protected series  
8 designation”;

9 (2) “contribution” as if the word referred to “contributions made, promised, or  
10 otherwise pertaining to a protected series”;

11 (3) “dissociates” and “dissociation” as if each word referred to “ceasing to be  
12 associated with a protected series”;

13 (4) “distribution” as if the term were defined as in Section 1101(4);

14 (4) “foreign limited liability company” as if the phrase referred to “foreign  
15 protected series”;

16 (5) “limited liability company” as if the phrase referred to “protected series”;

17 (6) “manager” as if the word referred to “series manager”;

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<sup>78</sup> In most respects, a protected series is like a Mini-Me of the Mother Ship, and Part 2 incorporates most of ULLCA by reference while substituting various terms – e.g., treat “certificate of formation” as if it were “protected series designation.” Given the Drafting Committee’s decision to confine all protected series provisions to one article, this “incorporation with substitution” is the most efficient method at least in terms of word count. For the sake of clarity, this article does not apply incorporation with substitution to definitions. See e.g. Section 1101(4) (defining “distribution” directly for the purposes of this article).

<sup>79</sup> Many provisions of the Act do not need to be “made applicable;” they apply by their terms as stated. E.g., Section 205(c) (“An individual who signs a record authorized or required to be filed under this [act] affirms under penalty of perjury that the information stated in the record is accurate.”).

<sup>80</sup> Section 1132 pertains to foreign protected series and therefore requires slightly different “as if” definitions.

1 (7) “manager-managed limited liability company” as if the phrase referred to  
2 “protected series managed by a series manager”;

3 (8) “member” as if the word referred to “associated member ”;

4 (9) “member-managed limited liability company” as if the phrase referred to  
5 “protected series managed by its members”;

6 (10) “transferable interest” as if the phrase referred to “associated transferable  
7 interest”; and

8 (11) “transferee” as if the word referred to “associated transferee”.

9 (b) This [article] and the other [articles] of this [act] must be construed wherever  
10 reasonable as consistent with each other. If that construction is not possible, this [article]  
11 governs.<sup>81</sup>

12 **SECTION 1115. OPERATING AGREEMENT.** Sections 105(c) and (d) and 107(b)  
13 apply to any provision of an operating agreement which applies to a protected series or any  
14 matter covered by this article.<sup>82</sup>

15 **SECTION 1116. REGISTERED AGENT; SERVICE OF PROCESS, NOTICE, OR**  
16 **DEMAND.**

17 (a) Sections 115 through 119 apply to a protected series or foreign protected series.

18 (b) In addition to the means of service authorized in Section 119(b) and (c), if a protected  
19 series or registered foreign protected series ceases to have a registered agent, or if its registered  
20 agent cannot with reasonable diligence be served, the protected series may be served by:

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<sup>81</sup> Safety net provision. Query: retain?

<sup>82</sup> Query: Necessary? Would a comment suffice?

1 (1) noting<sup>83</sup> on the process, notice, or demand that the protected series is the  
2 addressee; and

3 (2) serving the limited liability company or foreign limited liability company that  
4 established the protected series.

5 (c) Subject to law of this state other than this [act]:

6 (1) except as otherwise provided in subsection (b), service on a limited liability  
7 company or foreign limited liability company is not service on a protected series or foreign  
8 protected series of the company; and

9 (2) service on a protected series or foreign protected series is not service on:

10 (A) the limited liability company or foreign limited liability company that  
11 established the protected series; or

12 (B) another protected series established by the company.

13 **SECTION 1117. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER.**

14 Section 204(b) applies to a protected series and foreign protected series.<sup>84</sup>

15 **SECTION 1118. LIABILITY FOR INACCURATE INFORMATION IN FILED**

16 **RECORD.** Section 205(a) applies to a protected series.<sup>85</sup>

17 **SECTION 1119. STATEMENT OF AUTHORITY; STATEMENT OF DENIAL.**

18 (a) Sections 302 and 303 apply to a protected series

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<sup>83</sup> At its Fall 2013 meeting, the Drafting Committee decided to delete “conspicuously.”

<sup>84</sup> Section 204(a) applies by its terms, and a comment will so note.

<sup>85</sup> Section 205(c) applies by its terms. Subsection (b) is inapposite: “To the extent that the operating agreement of a member-managed limited liability company expressly relieves a member of responsibility for maintaining the accuracy of information contained in records delivered on behalf of the company to the [Secretary of State] for filing under this [act] and imposes that responsibility on one or more other members, the liability stated in subsection (a)(2) applies to those other members and not to the member that the operating agreement relieves of the responsibility.”

1 (b) Except as otherwise provided in subsection (c), a statement of authority or an  
2 amendment or cancellation of a statement of authority affects only the protected series on whose  
3 behalf the statement, amendment, or cancellation was delivered to the [Secretary of State] for  
4 filing.

5 (c) A limited liability company may deliver to the [Secretary of State] for filing a  
6 statement of authority, an amendment, or a cancellation that pertains both to the company and a  
7 protected series of the company.<sup>86</sup>

8 **SECTION 1120. CONTRIBUTIONS AND DISTRIBUTIONS.**

9 (a) Except as otherwise provided in subsections (b) and (c), Sections 402 through 406  
10 apply to a protected series.<sup>87</sup>

11 (b) Section 406(b) does not apply to a protected series.<sup>88</sup>

12 (c) If a protected series has no associated transferable interest,<sup>89</sup> a distribution from the  
13 protected series is made to the limited liability company that established the protected series.<sup>90</sup>

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<sup>86</sup> Query: Should we empower the LLC to deliver a statement, etc. that pertains solely to one or more protected series? Query for IACA – will the filing office want conformed copies for each protected series involved?

<sup>87</sup> Query – Is “applies to a protected series” sufficient? Need we add “and to the rights and obligations of a member associated with the protected series, a series manager, and the limited liability company if the company is a series manager or owns an associated transferable interest of the protected series”?

<sup>88</sup> The excluded subsection is inapposite, because at least to date, the Drafting Committee has decided not to extrapolate the subsection’s provisions to protected series: “To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of the authority and responsibility to consent to distributions and imposes that authority and responsibility on one or more other members, the liability stated in subsection (a) applies to the other members and not the member that the operating agreement relieves of the authority and responsibility.”

<sup>89</sup> This provision reflects a decision made at the Fall 2013 meeting. A protected series might have no associated members but still be obligated to transferees of members that were formerly associated with the series. For a protected series with one or more associated members, subsection (a) makes the act’s default rule applicable (Section 404).

<sup>90</sup> At the Fall 2013 meeting, the members of the Drafting Committee tentatively chose this approach by a vote of 5 to 3. At the Winter 2014 meeting, the Committee reaffirmed its decision by a substantially larger margin.

1           **SECTION 1121. MANAGEMENT.** Section 407(b) through (h) applies to a protected  
2 series.

3           **SECTION 1122. REIMBURSEMENT; INDEMNIFICATION; ADVANCEMENT;**  
4 **AND INSURANCE.** Section 408 applies to a protected series.

5           **SECTION 1123. STANDARDS OF CONDUCT.** Section 409 applies to a protected  
6 series.

7           **SECTION 1124. RIGHTS TO INFORMATION OF ASSOCIATED MEMBER**  
8 **AND PERSON FORMERLY ASSOCIATED WITH PROTECTED SERIES.**

9           (a) Section 410 applies to a protected series.<sup>91</sup>

10           (b) A limited liability company that is not a series manager has only the following rights  
11 to information concerning the protected series: [TBD]

12           (c) A member that is not associated with a protected series has only the following rights  
13 to information concerning the protected series: [TBD]

14           <sup>92</sup>**SECTION 1125. NATURE OF TRANSFERABLE INTEREST.** Section 501  
15 applies to a protected series.

16           **SECTION 1126. TRANSFER OF TRANSFERABLE INTEREST.** Section 502  
17 applies to a protected series.<sup>93</sup>

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<sup>91</sup> A comment will indicate that the information rights of a person no longer associated with a series are the same regardless of whether the person has remained a member. Query – will a comment suffice?

<sup>92</sup> In the alternative, we could combine this and the following three sections into one, captioned “TRANSFERABLE INTERESTS AND RIGHTS OF TRANSFEREES AND CREDITORS”.

<sup>93</sup> ULLCA § 502(g) states: “Except as otherwise provided in Section 602(5)(B), if a member transfers a transferable interest, the transferor retains the rights of a member other than the transferable interest transferred and retains all the duties and obligations of a member.” The application of subsection (g) to protected series works as is, despite the reference to Section 602(5)(B), which does not apply to protected series. Section 602(5)(B) provides for expulsion by unanimous consent if “there has been a transfer of all the person’s transferable interest in the company, other than: (i) a transfer for security purposes; or (ii) a charging order in effect under Section 503 which has not been foreclosed.” This type of expulsion is automatically relevant to a protected series because dissociation from the LLC automatically ends the

1           **SECTION 1127. CHARGING ORDER.** Section 503 applies to a protected series, except  
2 that Section 503(f) applies only if the limited liability company that established the protected series  
3 has only one member.<sup>94</sup>

4           **SECTION 1128. POWER OF LEGAL REPRESENTATIVE OF DECEASED**  
5 **MEMBER.** Section 504 applies to a protected series.<sup>95</sup>

6           **SECTION 1129. CEASING TO BE ASSOCIATED; CONSEQUENCES.**

7           (a) A member associated with a protected series ceases to be associated if the person is  
8 dissociated as a member of the limited liability company that established the protected series.<sup>96</sup>

9           (b) A member has the power to cease to be associated with a protected series at any time,  
10 rightfully or wrongfully<sup>97</sup> and ceases to be associated when the protected series knows or has  
11 notice of the member’s express will to cease being associated.<sup>98</sup>

12           (c) A person’s ceasing to be associated with a protected series does not dissociate the  
13 person from the limited liability company that established the protected series.

14           (d) Section 603 applies to a protected series.<sup>99</sup>

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member’s association with the series.

<sup>94</sup> This exception is necessary because a person must be a member in order to be associated with a protected series. If Section 503(f) were to apply without the exception, then the purchaser at foreclosure (unless already a member) would as a result of the foreclosure: (i) become a member of the LLC, or (ii) be able to be associated with the series without being a member of the LLC.

<sup>95</sup> Section 504 cross references two other sections, each of them applicable to protected series. A comment will so note here and wherever else the same situation exists.

<sup>96</sup> This subsection is not a default rule.

<sup>97</sup> ULLCA permits the operating agreement to eliminate the power as well as the right of a member to dissociate. This Article takes the same approach with regard to ceasing to be associated with a protected series.

<sup>98</sup> Subsection (b) is derived from ULLCA §§ 601(a) and 602(1).

<sup>99</sup> Section 603 is captioned “Effect of Dissociation.”

1           **SECTION 1130. DISSOLUTION.**

2           (a) As part of its winding up, a dissolved limited liability company shall wind up the  
3 activities and affairs of any protected series.<sup>100</sup>

4           (b) [Article] 7 applies to a protected series,<sup>101</sup> but Sections 701(a)(3)<sup>102</sup> and (5),<sup>103 104</sup> 702

5 (c), (d), and (e)(2),<sup>105</sup> and 708 through 710 do not apply.<sup>106</sup>

6           **SECTION 1131. ACTIONS BY MEMBERS.** [Article] 8 applies to a protected series.

7           **SECTION 1132. FOREIGN PROTECTED SERIES.**

8           (a) The law of the jurisdiction of formation of a foreign limited liability company  
9 governs:

10                   (1) the internal affairs of a foreign protected series of the company;<sup>107</sup>

11                   (2) the relationship between a foreign protected series of the company and:

12                           (A) the company;

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<sup>100</sup> Some participants in the drafting process have expressed concern about applying the concept of dissolution to a “thing” that is not an entity. If the Drafting Committee decides finally to characterize a protected series as an entity (or perhaps even as a person), the concern is moot. If not, the Committee will need to consider: (i) how much more complicated Subsection (b) will be if “dissolution” may not be used; and whether the dissolution concept may be at least marginally helpful to protect the shields.

<sup>101</sup> Article 7 pertains to dissolution

<sup>102</sup> The cited provision pertains to dissolution when an LLC has no members. A protected series need not have associated members.

<sup>103</sup> Paragraph 5 pertains to administrative dissolution, and the Committee has not yet decided whether administration dissolution applies to a protected series.

<sup>104</sup> Query: should judicial dissolution of a series due to oppression be non-waivable? Should the limited liability company have standing to seek dissolution of series and, if so, on what grounds?

<sup>105</sup> The cited provisions pertain to a dissolved LLC that has no members. A dissolved protected series without members will be wound up by the LLC.

<sup>106</sup> Administrative dissolution – undetermined whether such applies to a series. Query whether failure to have a registered agent should cause the administrative dissolution of a protected series if the limited liability company can still be served. See Section 1116(b) (substituted service on LLC).

<sup>107</sup> Characterization of a foreign protected series as a person *vel non* is omitted. For example, an enacting state might want its own U.C.C, Article 9 to determine the person/entity/“thing” characterization issue.

- 1 (B) any other protected series of the company; and
- 2 (C) any member<sup>108</sup> whether or not associated with the protected series;
- 3 (3) the liability of the company for a debt, obligation, or other liability of a
- 4 foreign protected series of the company;
- 5 (4) the liability of a foreign protected series of the company for a debt, obligation,
- 6 or other liability of the company or any other protected series of the company; and
- 7 (5) the liability for a debt, obligation, or other liability of the company or a
- 8 foreign protected series of the company of:
- 9 (A) a member in that capacity;<sup>109</sup>
- 10 (B) a member associated with a protected series in that capacity;
- 11 (C) a manager in that capacity; and
- 12 (D) a series manager in that capacity.
- 13 (b) Subsections (c) and (d) apply for purposes of determining whether:
- 14 (1) a foreign limited liability company or foreign protected series has transacted
- 15 business in this state; and
- 16 (2) this state has personal jurisdiction over a foreign limited liability company or
- 17 foreign protected series of a foreign company.
- 18 (c) The conduct of a foreign protected series of a foreign limited liability company is not
- 19 attributable to:

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<sup>108</sup> ULLCA § 102(11) defines “member” as pertaining only to a domestic limited liability company. However, the usage here parallels the usage in ULLCA § 901(a). The same issue exists with regard to “manager” and “series manager.”

<sup>109</sup> With regard to the foreign limited liability company, Paragraph 5(A) is redundant of Section 901(a)(2). The redundancy seems preferable to the more complicated structure needed to eliminate the redundancy.

1 (1) the company solely by reason of the company having established<sup>110</sup> the  
2 protected series; or

3 (2) any other protected series of the company solely by reason of the company  
4 having established other protected series.

5 (d) The conduct of a foreign limited liability company is not attributable to a foreign  
6 protected series of the company solely by reason of the foreign company having established the  
7 protected series.

8 (e) Sections 901(b),<sup>111</sup> 902 through 906, and 910 through 912, apply to a foreign  
9 protected series and for that purpose the following words and phrases are applied as follows.

10 (1) “foreign limited liability company” as if the phrase referred to “foreign  
11 series”;

12 (2) “jurisdiction of formation” as if the phrase referred to the jurisdiction of  
13 formation of the foreign company that established the foreign protected series;

14 (3) “manager” as if the word referred to a person managing either the foreign  
15 company or the foreign protected series;

16 (4) “member” as if the word referred a member of the foreign company regardless  
17 of whether associated with a foreign protected series established by the company; and

18 (5) “the company’s principal office” as if the phrase referred to the principal  
19 office of the company that established the foreign protected series.

20 ***Legislative Note Re: Voidable Transactions:*** *A legislative note will advise enacting states that*  
21 *have not enacted the UVTA revisions to enact the revisions pertaining to protected series.*  
22

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<sup>110</sup> Note the omission of “managed”. Compare Section 304(b).

<sup>111</sup> Subsection (a) addresses the issues addressed by Section 901(a).

1 **Appendix A**  
2 **to Series Provisions**

3 *illustrating necessary amendments to ULLCA (2006) (Last Amended 2013)*  
4 *if the Series provisions do not use “incorporation with substitution”*  
5

6 **SECTION 105. OPERATING AGREEMENT; SCOPE, FUNCTION, AND**  
7 **LIMITATIONS.**

8 (a) Except as otherwise provided in subsections (c) and (d), the operating agreement  
9 governs:

10 (1) relations:

11 (A) among the members as members and between the members and the  
12 limited liability company;

13 (B) among the members associated with a protected series established by  
14 the company in their capacity as associated members and between the associated members and  
15 the protected series;

16 (C) between a member associated with a protected series established by  
17 the company in that capacity and:

18 (i) the company;

19 (ii) another protected series established by the company;

20 (iii) a member not associated with the protected series; and

21 (D) among the protected series, the company, and other protected series  
22 established by the company;

23 (2) the rights and duties under this [act] of a person in the capacity of manager or  
24 series manager;

25 (3) the activities and affairs of the company and a protected series established by  
26 the company and the conduct of those respective activities and affairs; and

1 (4) the means and conditions for amending the operating agreement.

2 (b) To the extent the operating agreement does not provide for a matter described in  
3 subsection (a), this [act] governs the matter.

4 (c) An operating agreement may not:

5 (1) vary the law applicable under Sections 104 or 1104;

6 (2) vary a ~~limited liability company's~~ the capacity under Section 109 to sue and  
7 be sued in its own name of a limited liability company under Section 109 or a protected series  
8 under Section 1103(a);

9 (3) vary any requirement, procedure, or other provision of this [act] pertaining to:

10 (A) registered agents; or

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

13 (4) vary the provisions of Section 204;

14 (5) alter or eliminate the duty of loyalty or the duty of care, whether pertaining to  
15 a limited liability company or a protected series, except as otherwise provided in subsection (d);

16 (6) eliminate the contractual obligation of good faith and fair dealing under  
17 Section 409(d), but the operating agreement may prescribe the standards, if not manifestly  
18 unreasonable, by which the performance of the obligation is to be measured;

19 (7) relieve or exonerate a person from liability for conduct involving bad faith,  
20 willful or intentional misconduct, or knowing violation of law;

21 (8) unreasonably restrict the duties and rights under Section 410, but the operating  
22 agreement may impose reasonable restrictions on the availability and use of information obtained  
23 under that section and may define appropriate remedies, including liquidated damages, for a

1 breach of any reasonable restriction on use;

2 (9) vary the causes of dissolution specified in Section 701(a)(4);

3 (10) vary the requirement to wind up the ~~company's~~ activities and affairs of the  
4 company or a protected series as specified in Section 702(a), (b)(1), and (e);

5 (11) unreasonably restrict the right of a member or a member associated with a  
6 protected series to maintain an action under [Article] 8;

7 (12) vary the provisions of Section 805, but the operating agreement may provide  
8 that the company or a protected series may not have a special litigation committee;

9 (13) vary the right of a member to approve a merger, interest exchange,  
10 conversion, or domestication under Section 1023(a)(2), 1033(a)(2), 1043(a)(2), or 1053(a)(2);

11 (14) vary the required contents of a plan of merger under Section 1022(a), plan of  
12 interest exchange under Section 1032(a), plan of conversion under Section 1042(a), or plan of  
13 domestication under Section 1052(a); ~~or~~

14 (15) vary Section 1103(c) or (d); or

15 (16) except as otherwise provided in Sections 106 and 107(b), restrict the rights  
16 under this [act]:

17 (A) pertaining to a limited liability company of a person other than a  
18 member or manager; or

19 (B) pertaining to a protected series of a person that is neither a series  
20 manager of the protected series nor a member or manager of the company.

21 (d) Subject to subsection (c)(7), without limiting other terms that may be included in an  
22 operating agreement, the following rules apply:

23 (1) The operating agreement may:

1 (A) specify the method by which a specific act or transaction that would  
2 otherwise violate the duty of loyalty may be authorized or ratified by one or more disinterested  
3 and independent persons after full disclosure of all material facts; and

4 (B) alter the prohibition in Section 405(a)(2) so that the prohibition  
5 requires only that the ~~company's~~ total assets of the company or protected series not be less than  
6 the sum of its total liabilities.

7 (2) To the extent the operating agreement ~~of a member-managed limited liability~~  
8 ~~company~~ expressly relieves a member of a member-managed limited liability company or an  
9 associated member of member-managed<sup>112</sup> protected series of a responsibility that the member or  
10 associated member otherwise would have under this [act] and imposes the responsibility on one  
11 or more other members or associated members, the agreement also may eliminate or limit any  
12 fiduciary duty of the member or associated member relieved of the responsibility which would  
13 have pertained to the responsibility.

14 (3) If not manifestly unreasonable, the operating agreement may:

15 (A) alter or eliminate the aspects of the duty of loyalty stated in Section  
16 409(b) and (i);

17 (B) identify specific types or categories of activities that do not violate the  
18 duty of loyalty;

19 (C) alter the duty of care, but may not authorize conduct involving bad

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<sup>112</sup> ULLCA § 102(12) would be revised as follows:

(12) “Member-managed” ~~limited liability company~~ means with respect to:

(A) a limited liability company, a company that is not a manager-managed ~~limited~~  
~~liability~~ company; and

(B) a protected series, a protected series that is managed by its associated members under  
Section 1113(a)(1) or the operating agreement.

1 faith, willful or intentional misconduct, or knowing violation of law; and

2 (D) alter or eliminate any other fiduciary duty.

3 (e) The court shall decide as a matter of law whether a term of an operating agreement is  
4 manifestly unreasonable under subsection (c)(6) or (d)(3). The court:

5 (1) shall make its determination as of the time the challenged term became part of  
6 the operating agreement and by considering only circumstances existing at that time; and

7 (2) may invalidate the term only if, in light of the purposes, activities, and affairs  
8 of the limited liability company or a protected series, as the case may be, it is readily apparent  
9 that:

10 (A) the objective of the term is unreasonable; or

11 (B) the term is an unreasonable means to achieve the term's objective.

12 \* \* \*

13 **SECTION 403. LIABILITY FOR CONTRIBUTIONS.**

14 (a) A person's obligation to make a contribution to a limited liability company or a  
15 protected series established by the company is not excused by the person's death, disability,  
16 termination, or other inability to perform personally.

17 (b) If a person does not fulfill an obligation to make a contribution other than money to a  
18 limited liability company or a protected series established by the company, the person is  
19 obligated at the option of the obligee ~~limited liability company~~ to contribute money equal to the  
20 value of the part of the contribution which has not been made.

21 (c) The obligation of a person to make a contribution may be compromised only by the  
22 affirmative vote or consent of all:

23 (1) the members, if the obligation is owed to the limited liability company; or

1           (2) the members associated with a protected series, if the obligation is owed to a  
2 protected series established by the limited liability company.

3           (d) If a creditor of a limited liability company or a protected series established by the  
4 company extends credit or otherwise acts in reliance on an obligation described in subsection (a)  
5 without knowledge or notice of a compromise under this subsection, the creditor may enforce the  
6 obligation.

7           \* \* \*

8           **SECTION 404. SHARING OF AND RIGHT TO DISTRIBUTIONS BEFORE**  
9 **DISSOLUTION.**

10           (a) Any distribution made by a limited liability company or a protected series established  
11 by the company before ~~its~~ the dissolution and winding up of respectively the company or  
12 protected series must be in equal shares among ~~members and persons dissociated as members~~  
13 owners of transferable interests or associated transferable interests, except to the extent necessary  
14 to comply with a ~~transfer effective under Section 502 or~~ charging order in effect under Section  
15 503.

16           (b) A person has a right to a distribution before the dissolution and winding up of a  
17 limited liability company or protected series established by the company only if the company or  
18 the protected series decides to make an interim distribution. ~~A~~ Neither a person's dissociation as  
19 a member of the company nor a person's ceasing to be associated with a protected series entitles  
20 ~~does not entitle~~ the person to a distribution.

21           (c) A person does not have a right to demand or receive a distribution from a limited  
22 liability company or a protected series in any form other than money. Except as otherwise  
23 provided in Section 707(d), a company or protected series may distribute an asset in kind only if

1 each part of the asset is fungible with each other part and each person receives a percentage of  
2 the asset equal in value to the person's share of distributions.

3 (d) If a member, a member associated with a protected series, transferee, or associated  
4 transferee becomes entitled to receive a distribution, the member, associated member, ~~or~~  
5 transferee, or associated transferee has the status of, and is entitled to all remedies available to, a  
6 creditor of the limited liability company or protected series with respect to the distribution.  
7 However, the obligation of the company's or protected series ~~obligation~~ to make a distribution is  
8 subject to offset for any amount owed to the company or protected series by the member,  
9 associated member, a person dissociated as a member, a person that has ceased to be associated  
10 with the protected series, or associated transferee on whose account the distribution is made.

11 \* \* \*

12 **SECTION 704. KNOWN CLAIMS AGAINST DISSOLVED LIMITED**  
13 **LIABILITY COMPANY OR PROTECTED SERIES.**

14 (a) Except as otherwise provided in subsection (d), a dissolved limited liability company  
15 or protected series established by the company may give notice of a known claim under  
16 subsection (b), which has the effect provided in subsection (c).

17 (b) A dissolved limited liability company or protected series established by the company  
18 may in a record notify its known claimants of the dissolution. The notice must:

19 (1) specify the information required to be included in a claim;

20 (2) state that a claim must be in writing and provide a mailing address to which  
21 the claim is to be sent;

22 (3) state the deadline for receipt of a claim, which may not be less than 120 days  
23 after the date the notice is received by the claimant; and

1 (4) state that the claim will be barred if not received by the deadline.

2 (c) A claim against a dissolved limited liability company or a protected series established  
3 by the company is barred if the requirements of subsection (b) are met and:

4 (1) the claim is not received by the specified deadline; or

5 (2) if the claim is timely received but rejected by the company or the protected  
6 series:

7 (A) the company or protected series causes the claimant to receive a notice  
8 in a record stating that the claim is rejected and will be barred unless the claimant commences an  
9 action against the company or protected series to enforce the claim not later than 90 days after  
10 the claimant receives the notice; and

11 (B) the claimant does not commence the required action not later than 90  
12 days after the claimant receives the notice.

13 (d) This section does not apply to a claim based on an event occurring after the date of  
14 dissolution or a liability that on that date is contingent.