

UPSA
Relocating a Protected Series as Part of a Merger in Which the Series LLC
That Established the Protected Series Does Not Survive¹
dsk – 2-13-17

Premises – Desiderata of the Committee²

- A. This “narrow channel” permits only domestic LLCs as parties.³
- B. When a series LLC (“non-surviving”) merges into another LLC (surviving), a protected series of the non-surviving LLC:
 - 1. should not have to wind up and terminate; but rather
 - 2. should be relocated and continue in existence as a protected series of the surviving LLC.
- C. A protected series may not be party to a merger.

Issues

- 1. The four theoretically possible outcomes for a protected series of a non-surviving LLC are:
 - a. Dissolve and wind up.
 - i. Could be done separately – i.e., as a precursor to the merger.
 - ii. Query – what advantage to making part of the merger – different quantum of consent?
 - b. Disappear into the surviving LLC?
 - i. ***no; tantamount to a merger***
 - c. Disappear into a protected series of the surviving LLC?
 - i. Could establish newco protected series to absorb each relocating protected series.
 - ii. ***no – tantamount to a merger***
 - d. Thus, we arrive at “relocation” – not likely to be the statutory term but used here as convenient shorthand.⁴
 - i. After the merger, each protected series of the non-surviving LLC is a protected series “established” by the surviving LLC.

¹ This memo does not address issues involved when a non-series LLC merges into a series limited liability company, but those issues should be simpler than those discussed here.

² Decided by consensus of the commissioners at the 2/8/17 internet meeting.

³ This decision is reflected in the current language in Section 602(b)(1). The language in braces reflects Commissioner Jacob’s pending proposal to permit some foreign LLCs to be parties: “Each other party to the merger must be a domestic limited liability company {or a foreign limited liability company organized under a statute that authorizes the foreign company to establish foreign protected series}.” Note, however, that the language in braces does not require that the foreign statute have an equivalent to Section 403.

⁴ The act should provide that a protected series itself may not be transferred except as part of a merger under Section 602

- ii. Relocation could be merely the default result – but since a protected series cannot be a party to a merger, the only alternative the Reporter can envision is the dissolution and winding up of a protected series.

2. Approval requirements

- a. Should associated members of a relocating protected series have a vote/consent right?
 - i. Default rule for merger will be unanimous consent in any event.
 - ii. Query – if the overall consent rule is varied, should associated members of a relocating protected series have special consent rights (unless otherwise agreed)?
 -) The act currently rules out “class voting” unless negotiated.
 -) See Section 304(c):

An associated member of a protected series has the same rights as any other member of the series limited liability 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
- b. Should a relocating protected series be a party to the merger?

3. Effect of relocation

- a. Subject to 403 issues, all rights and obligations of the relocating protected series remain vested in the relocated protected series.
 - i. In this sense (*only*), the relocation produces the same results as a merger.
- b. Any pre-existing, inchoate Section 403 exposure⁵ of each relocating protected series must continue as to each relocated protected series.
 - i. Mechanism:
 -) For purposes of Section 403, the relocation is disregarded.
 -) That is, when a Section 403 claim is made against an asset of a relocated protected series, the first testing date (when the liability was incurred) applies to the protected series as it was pre-merger.
 - ii. Example:
 -) Assume that pre-merger:
 - protected series A of the eventual non-surviving LLC incurs a liability (Gamma) (and a creditor of protected series A thereby comes into existence w/r/t Gamma); and
 - at that moment protected series B of that LLC has a non-associated asset.

⁵ Pre-existing, inchoate Section 403 exposure exists if, when protected series A incurs a liability, an asset of protected series B is non-associated. The exposure ceases to be inchoate when a creditor of A (re: the incurred liability) files as required by Section 403.

-) Pre-merger, that non-associated asset is subject to inchoate Section 403 exposure in favor of the creditor Gamma.
 -) Post-merger that exposure continues despite the merger.
 - c. Same result should obtain for Section 403 exposure of the non-surviving LLC's non-associated assets.
 - i. Mechanics are a bit more complicated, because:
 -) unlike a relocated protected series, the non-surviving LLC will not exist post-merger; and therefore
 -) for this purpose, it will be necessary to differentiate the surviving LLC's pre-merger assets and its assets obtained via the merger.
 - ii. However, Section 301(b)(2) already requires association recordkeeping to enable a person to "determine when and from what person the protected series acquired the asset."
 - d. Does Section 403 inchoate exposure broaden after merger?
 - i. May creditors of the surviving LLC or its protected series take advantage of pre-existing Section 403 exposure of relocated protected series and the non-surviving LLC?
 -) Assume that pre-merger:
 - protected series A of the eventual *surviving* LLC incurs a liability (Epsilon) (and a creditor of protected series A thereby comes into existence w/r/t Epsilon); and
 - at that moment, protected series 100 of the eventual *non-surviving* LLC has a non-associated asset
 -) Post-merger, is that non-associated asset of protected series 100 subject to inchoate Section 403 exposure in favor of the creditor Epsilon?
 - ii. Vice versa?
 -) Post-merger, may creditors of the *non-surviving* LLC and its *relocated* protected series apply Section 403 to an asset of the surviving LLC or its preexisting protected series if, when the liability was incurred, the asset was non-associated?
- 4. May an associated member of a relocating protected series cease to be an associated member as part of the merger?
 - a. N.b. – if not "taken out," each associated member of relocating protected series must become a member of the surviving LLC.
- 5. May the assets of a protected series be used as part of the consideration for persons being "taken out" in the merger?
 - a. In general, the assets of a relocating protected series must transfer intact to the relocated protected series.

- b. However, a distribution to associated members or protected series transferees, if otherwise proper, could be built into the plan of merger.

6. Filings

- a. Tracking the destination of relocated protected series
 - i. The statement of merger delivered for filing by the non-surviving LLC should suffice on one end of the transaction.
 -) All filings pertaining to a protected series are filed as part of the file on the series LLC.
 -) Therefore, nothing need be filed specifically pertaining to previously filed statements of designation.
 -) The statement of merger will close out the file and all its constituent filings.
- b. Establishing the status of relocated protected series within the surviving LLC
 - i. For each relocating protected series, a statement of designation must accompany the statement of merger delivered by the surviving LLC.
 - ii. The statement must include a new name which incorporates the name of the surviving LLC.
 - iii. To enable tracking, should the statement also include the name of the protected series before the merger?