

D R A F T
FOR DISCUSSION ONLY

SERIES OF UNINCORPORATED BUSINESS ENTITIES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-TWENTY-FOURTH YEAR
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SERIES OF UNINCORPORATED BUSINESS ENTITIES ACT

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 1, 2015

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Prefatory Note – Preliminary¹

This preliminary prefatory note has 10 parts. Parts 1-8 address conceptual issues. Parts 9-10 explain two drafting decisions.

Conceptual Issues

1. The Series Construct
2. “Protected Series” as the Term of Art
3. Key Defined Terms
4. The Import of the Protected Series Construct
5. The Two-Fold Nature of the Internal Shields: Non-Liability and Non-Recourse Rules
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Conceptual Issues

1. The Series Construct

As provided by statutes in 12 states, the District of Columbia, and Puerto Rico,² the series

¹ The first part of this Prefatory Note is adopted from Daniel S. Kleinberger, “Series of Unincorporated Business Entities: The Construct, the Import, the Recent Activity of the Uniform Law Commission, and the Issues on the Table,” XXXI THE LLC & PARTNERSHIP REPORTER 52; Daniel S. Kleinberger, “Series of Unincorporated Business Entities: The Mobius Strip and Klein Bottle of Business Entity Law,” BUSINESS LAW TODAY (February 2015).

² As of February 25, 2015, the following statutes provide for series within a limited liability company. ALA. CODE §§ 10A-5A-11.01-16 (2015); DEL. CODE ANN. tit. 6, §18-215 (West 2015); D.C. CODE ANN. §29-802.06 (2015); 805 ILL. COMP. STAT. ANN. 180/37-40 (West 2014); IOWA CODE ANN. §§ 489.1201-1206 (West 2014); KAN. STAT. ANN. § 17-76,143 (West 2014); MO. REV. STAT. § 347.186.1 (2014); MONTANA CODE ANN. § 35-8-304 (West 2013); NEV. REV. STAT. ANN. § 86.296 (West 2014); OKLA. ST. ANN. tit. 18, §§ 2005(B), 2054.4 (West 2014); TENN. CODE ANN. § 48-249-309 (West 2014); TEX. BUS. ORGS. CODE ANN. §§101.601-622 (West 2013); UTAH CODE

construct has the following aspects:

- an identifiable set of assets segregated within an unincorporated entity (“a series organization”);³
- the assets:
 - comprise a protected series, empowered to conduct activities in its own name and right;
 - are obligated solely to persons asserting claims pertaining to those assets or activities; and
 - are not responsible to persons asserting claims arising from the assets or activities of the series organization or any other set of assets segregated within the series organization; and
 - perhaps are associated with or more owners of the series organization associated with the protected series,⁴ but not necessarily; and
- distributions arising from the assets and activities go to:
 - the unincorporated entity, if no owners are associated with the series; or
 - otherwise, the owners associated with the series.

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

2. “Protected Series” as the Term of Art

The term “series” derives from the investment trust context. In that context, the term may well be apt; in the broader context, the term is confusing. “Series” has an established and very different meaning with regard to bonds, corporate stock, etc. To avoid confusion, this act uses the term “protected series.”⁵

ANN. §§ 48-3a-1201 to 1209 (West 2014); P.R. LAWS ANN. tit. 14, § 3967 (2011).

³ The segregation is not necessarily physical and in some cases could not be.

⁴ Allowing a non-owner to be associated with a series would cause daunting complexity while producing very little (if any) benefit.

⁵ For this reason, the act never refers merely to “a series.”

3. Key Defined Terms

“protected series”	as described above
“series organization”	a business entity that has established one or more protected series
“associated”	pertaining to a particular protected series, including: associated owners, associated property, associated distributable interests, associated distributees
“organic law”	the statute under which a business entity has been formed, plus any related case law; <i>e.g.</i> , the LLC statute for a limited liability company and related case law
“organic rules”	the rules governing a business organization agreed to which the owners have agreed, including: - those contained in a publicly-filed record (“public organic rules”) – <i>e.g.</i> the certificate of organization of a limited liability company; and - those contained in a private agreement (“private organic rules”) – <i>e.g.</i>, the operating agreement of a limited liability company

4. The Import of the Protected Series Construct

The protected series:

- is one of the most significant developments in the law of business organizations since the advent of the limited liability company;
- pushes the conceptual envelope of entity law by providing for a quasi-distinct legal construct existing *within* an overarching entity;
- establishes a new type of liability shield – rather than protecting the owners of an organization from vicarious liability for the organization’s debts, obligations, and other liabilities, the “internal shields” of a series protect the assets of one protected series from the judgment creditors of the series organization and of any other protected series of the series organization.^{6 7}

⁶ This construct has long existed in the context of investment trusts, but in that context cross-series liability claims do not arise. Therefore, the internal shields are non-controversial.

⁷ In 2009, the Conference adopted the Uniform Statutory Trust Entity Act, which provides a uniform vehicle for investment trusts. See Uniform Statutory Trust Entity Act (2009) (Last Amended 2013) §§ 401 through 405.

1 5. The Two-Fold Nature of the Internal Shields:
2 Non-Liability and Non-Recourse Rules
3

4 A protected series' internal shield⁸ has two separate but related aspects:

- 5
- 6 • the non-liability rule – a protected series is not liable for the debts of the series
7 organization nor any other protected series of the series organization and *vice versa*; and
 - 8
 - 9 • the non-recourse rule – the *associated* property of a protected series is shielded against
10 collection efforts of judgment creditors of the series organization or of any other
11 protected series of the series organization.⁹
 - 12
 - 13

14 6. Non-Liability and Non-Recourse Rules:
15 Contrasting the Traditional Corporate/LLC Liability Shield with
16 the Internal Shield of a Protected Series
17

18 With the traditional corporate/LLC liability shield, the non-liability provision implicitly (but
19 ineluctably) protects the property of owners from being used to satisfy a judgment against the
20 entity. Simply put, if an owner is not liable for the entity debt, the owner's assets are not
21 available to satisfy the debt.

22

23 In the context of protected series, the analysis is more complex. Establishing a protected
24 series invokes the non-liability rule, but to invoke the non-recourse rule it is necessary that
25 property be *associated* with the series. Put another way, an item of property owned by a
26 protected series but not properly associated with the protected series is up for grabs not only
27 to a judgment creditor of the protected series but also to a judgment creditor of the series
28 organization and a judgment creditor of any other protected series of the series organization.

29

30 EXAMPLE: A series organization has two protected series, Alpha and Beta.
31 Each protected series owns property, each item of which is associated with the
32 protected series that owns the item. A judgment creditor of Alpha attempts to
33 levy on property of Beta. The attempt will fail for two reasons: (1) The attempt
34 is an effort to hold Beta liable for Alpha's debts, which contravenes the non-
35 liability rule. (2) The no recourse rule protects Beta's associated property except
36 as to creditors of Beta.

37

38 EXAMPLE: Same facts, except that one item of property owned by Beta is not

⁸ Although the following usage has not yet stabilized, strictly speaking: (i) a protected series has one shield (encircling its assets and operations like a corral); and (ii) a series organization has at least two internal shields. (By definition, a series organization has at least one protected series. Section 102(23). In a series organization with one protected series, one shield encircles the assets and operations of the protected series, and one shield encircles the assets and operations of the series organization.)

⁹ Association of property is a matter of proper recordkeeping. See Section 302.

1 associated with Beta (nor with Alpha or the series organization). Although the
2 item remains Beta's property, the item is equally subject to levy by a judgment
3 creditor of Alpha, Beta, or the series organization. (If a judgment creditor of
4 Alpha or the series organization successfully levies on the item, Beta may have an
5 unjust enrichment claim against the judgment debtor and a damage action against
6 whoever failed to associate the item with Beta.)
7
8

9 7. Overcoming the Shield

10
11 "Piercing the veil" is the foremost doctrine for overcoming the traditional shield separating an
12 entity from its owners. "Conflation" is perhaps a more descriptive term, because the piercing
13 doctrine ignores the formal separateness of entity and owner and treats them as if they were one.
14 When a creditor succeeds with a piercing claim, the shield falls *in toto*. That is, all the owner's
15 non-exempt assets are available to the judgment creditor of the entity.¹⁰
16

17 Doubtlessly, the piercing doctrine applies as between a series organization and its owners.¹¹
18 Presumably, the doctrine will also apply as between a protected series and its associated owners.
19 Likewise, the doctrine (or related theories of affiliate liability) will apply to the internal shields –
20 *i.e.*, in the proper circumstances, a court will disregard the internal shields and negate the non-
21 recourse rule as well as the non-liability rule.
22

23 This act's association requirement creates an additional vulnerability for the internal shields.
24 Even if a judgment debtor has can easily defeat a piercing claim, a particular item of the
25 protected series' property might fail the association requirement and be up for grabs.
26
27

¹⁰ Piercing is based on a factor test. In the corporate context, two of the most prominent factors are the disregard of governance formalities and disregard of economic separateness between the entity and owners. "In the realm of LLCs, [the governance] factor is inappropriate, because informality of organization and operation is both common and desired." ULLCA (2013) § 304(b), cmt. Some LLC statutes negate governance as a piercing factor entirely, and some courts have discarded or downgraded the factor for LLC piercing claims. *See, e.g.*, ULLCA (2013) § 304(b) ("The failure of a limited liability company to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a member or manager for a debt, obligation, or other liability of the company."); *In re Packer*, Bankruptcy No. 13–41304, 2014 WL 5100095 (Bankr. E.D. Tex. Oct. 10, 2014) (noting the informality of LLC governance, recognizing that "the disregard of corporate formalities ... [is] one of the key factors in [corporate] veil-piercing determinations"; but holding that "it makes no sense to imperil the shield simply because the members do not undergo meaningless formalities such as formal meetings") (citation and internal quotation marks omitted).

¹¹ Courts have unanimously held that piercing applies to limited liability companies. *See* ULLCA (2013) 304(b), cmt. (referring to "the equitable doctrine of 'piercing the veil'" and stating that "courts regularly (and sometimes almost reflexively) apply that doctrine to limited liability companies").

8. Traditional and Internal Shields Compared in Tabular Form

type of shield	what the shield separates	non-liability rule	non-recourse rule	rules for overcoming the shield
traditional corporate/LLC liability shield	an entity from its owners	stated expressly	unstated, but ineluctably implied	piercing – shield overcome <i>in toto</i>
internal shield of a protected series	one set of assets/ operations from other sets of assets/operations	stated expressly	stated expressly but only as to associated property	piercing – shield overcome <i>in toto</i>
				association requirement – non-recourse rule overcome item by item

Drafting Decisions

9. A Stand-Alone Act, But Query: Available to Several Entity Types or Solely to LLCs?

This act was initially conceptualized as a stand-alone act, applicable to whatever unincorporated business entities an enacting state were to decide to include. As a result, this draft relies on definitions from Article 1 of the Uniform Business Organizations Code (2011) (Last Amended 2013) (“Code”).

However, almost all protected series legislation pertains to limited liability companies. Only Delaware provides for protected series within a limited partnership, and, as of a few months ago, Delaware had only seven limited partnerships with the authority to establish protected series.¹²

The Drafting Committee is considering limiting the act’s scope to limited liability companies. The act would remain a stand-alone act, so as to fit LLC statutes that are not based on ULLCA (2013).

¹² This information was presented at the May 1, 2015 meeting of the Joint Editorial Board on Unincorporated Business Organizations.

10. “Extrapolation”

Providing Default Rules for the Activities and Affairs of a Protected Series

For the most part, the act provides default rules for the activities and affairs of a protected series by extrapolating rules from the organic law and organic rules of the series organization. Section 103(c) states:

Except as otherwise provided in this [act] or the organic law and organic rules of a series organization, each provision of the organization’s organic law and organic rules applies to each protected series established by the organization, as if:

- (1) the protected series were the organization;
- (2) any associated owner of the protected series were an owner of the organization;
- (3) any associated distributee of the protected series were a transferee of the organization;
- (4) any distributable interest of the protected series were a transferable interest of the organization; and
- (5) each series manager were managing the organization.

Extrapolation Produces Parallelism in Definitions and Concepts

concept	defined term pertaining to series organization	defined term pertaining to a protected series
person with both governance and economic rights	owner	associated owner
economic rights	transferable interest (rights to distributions from the series organization)	distributable interest (rights to distributions from the protected series)
owner of solely economic rights	transferee	associated distributee
owned assets	property of (owned by) the series organization	property of (owned by) a protected series
		associated property of a protected series ¹³

¹³ A protected series can own property without the property being associated with the protected series. Only associated property is protected by the internal shields of a protected series. See Sections 302(a), 303.

1 **SERIES OF UNINCORPORATED BUSINESS ENTITIES ACT**

2 **[ARTICLE] 1**

3 **GENERAL PROVISIONS**

4 **SECTION 101. SHORT TITLE.** This [act] may be cited as the Series of
5 Unincorporated Business Entities Act.¹⁴

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

7 (1) “Associated distributable interest” means a distributable interest pertaining to a
8 particular protected series.¹⁵

9 (2) “Associated distributee” means, with regard to a particular protected series and its
10 associated distributable interests, a person, other than the series organization or an owner
11 associated with the protected series, to which all or part of an associated distributive interest has
12 been transferred, regardless of the identity of the transferor. The term includes a person that
13 owns an associated distributable interest as a result of having ceased to be associated with the
14 protected series.

15 (3) “Associated owner” means an owner that has become associated with a particular
16 protected series under Section 401.

17 (4) “Associated property” means property that has become associated with a particular

¹⁴ As a stand-alone act, this act needs a defined term for an organization that has one or more protected series. Following the usage of the proposed Treasury Regulations on series, this draft refers to “series organization”. If that usage continues into the final version, using “entities” in the act’s title may be confusing (albeit accurate – a domestic series organization must be an entity). In any event, the Reporter prefers a simpler title: the Uniform Protected Series Act.

¹⁵ This draft uses “associated” as the term of art to indicate the connection to a protected series of: (i) economic rights (associated distributable interest); (ii) a holder of economic rights (associated distributee); (iii) owners of the overall organization (associated owners); and (iv) assets (associated property). The term “associated property” has an additional, very important role; the term identifies assets protected by the internal shield of a protected series. See Section 303.

1 protected series or a series organization under Section 302.

2 (5) “Distributable interest” means the right, as initially owned by the series organization
3 or a person in the person’s capacity as an associated owner, to receive distributions from a
4 protected series, regardless of whether¹⁶ the person remains an associated owner or the person or
5 the organization continues to own any part of the rights. The term applies to any fraction of the
6 interest, by whomever owned.

7 (6) “Distributee” means a person to which all or part of a distributable interest has been
8 transferred, regardless of whether the transferor is an associated owner, the series organization,
9 or another person.

10 (7) “Domestic” means a person formed or established under the law of this state.^{17 18}

11 (8) “Eligible organization” means an entity of a type specified in Section 103(a).

12 (9) “Foreign” means a person formed or established under the law of a jurisdiction other
13 than this state.

14 (10) “Foreign protected series” means a structure, arrangement, entity, or person other

¹⁶ Earlier drafts used “regardless of whether” in some provisions and “whether or not” in others. The former phrase fits in all contexts, while the latter does not. Therefore, this draft uses only “regardless of whether”.

¹⁷ The Uniform Business Organizations Code (“UBOC”) has a different definition: “‘Domestic’, with respect to an entity, means governed as to its internal affairs by the law of this state.” UBOC § 1-102(8). However, that definition focuses on the consequences rather than the cause of being a domestic organization.

¹⁸ Section 102(18) defines “person” to include an individual, but “domestic” does not apply to an individual. An individual is not “formed or established under the law of this state.”

1 than an individual,¹⁹ that would be a protected series if established under this [act].²⁰

2 (11) “Foreign series organization” means a foreign organization that has at least one
3 foreign protected series.

4 (12) “Jurisdiction of formation” means the jurisdiction under whose laws a person was
5 formed or became a limited liability partnership.²¹

6 (13) “Organic law” means the law of an organization’s or foreign organization’s
7 jurisdiction of formation governing the internal affairs of the organization or foreign
8 organization.

9 (14) “Organic law and organic rules” means the organic law of a series organization, as
10 supplemented, restricted, varied, or otherwise modified by the organization’s organic rules.²²

11 (15) “Organic rules” means the public organic record and private organic rules of a series
12 organization.²³

¹⁹ The Drafting Committee has decided to characterize a domestic protected series as a person. *See* Section 104. However, it would be unwise to limit the scope of “foreign protected series” based on that characterization, because most current statutes avoid the characterization issue. Therefore, to use “person” alone in this definition would indicate that being a person is a precondition to being a foreign protected series. *Compare* Section 106(8) (stating that the law of this jurisdiction governs the characterization of a protected series as a person) *with* Section 701 (omitting a comparable provision for a foreign protected series).

²⁰ Derived from ULLCA (2013) § 102(5), which defines “foreign limited liability company” as “an unincorporated entity formed under the law of a jurisdiction other than this state which would be a limited liability company if formed under the law of this state.”

²¹ If the Drafting Committee decides to limit this act to limited liability companies, the reference to “limited liability partnership” will become unnecessary and “limited liability company” will replace “organization.”

²² The Drafting Committee’s chair queries whether this term is necessary. The Reporter thinks the term adds some clarity for readers who do not have an understanding in their respective DNA of how statutory rules and private agreements interrelate within the law of unincorporated entities. The committee’s liaison to the Style Committee is currently agnostic on the issue, and the Style Committee itself has yet to consider the matter.

²³ This definition formerly included “or foreign series organization.” However, the act does not use this

1 (16) “Organization” means a domestic or foreign entity.²⁴

2 (17) “Owner” means:

3 (A) a member of a domestic²⁵ limited liability company;

4 (B) a partner in a domestic²⁶ limited liability partnership or limited partnership;

5 ²⁷(C) a person that owns an interest in a foreign series organization and in that
6 capacity has the right to:

7 (i) receive or demand access to information concerning, or the
8 books and records of, the organization;

9 (ii) vote for or consent to the election of the person under whose
10 authority the powers of the organization are exercised and under whose direction the activities
11 and affairs of the organization are managed pursuant to the organic law and organic rules of the
12 organization; or

13 (iii) receive notice of or vote on or consent to an issue involving
14 the internal affairs of the organization[.] [; and]

15 [(D)]

defined term with regard to foreign organizations.

²⁴ Following ULLCA, ULPA, and UPA (2013), this draft does not define entity. The Code definition is not easily imported, because it involves other terms defined in the Code but not used in this act.

²⁵ Limited to “domestic” because the foreign parallel is covered by the catch-all provision in Paragraph (C).

²⁶ Limited to “domestic” because the foreign parallel is covered by the catch-all provision in Paragraph (C).

²⁷ This paragraph comes from the Code’s definition of “governance interest” with part of the Code’s definition of “governor” included. See UBOC §§ 1-102(17) (catchall definition of “governance interest”), 18(K) (catchall definition of “governor”).

1 (18) “Person”²⁸ means:

2 (A) an individual;

3 (B) a protected series;²⁹ or

4 (C) a domestic or foreign business corporation, nonprofit corporation, partnership,
5 limited partnership, limited liability company, [general cooperative association,] limited
6 cooperative association, unincorporated nonprofit association, statutory trust, business trust,
7 common-law business trust, estate, trust, association, joint venture, public corporation,
8 government or governmental subdivision, agency, or instrumentality, or any other legal or
9 commercial entity.³⁰

10 (19) “Private organic rules”³¹ means the rules, whether or not in a record,³² that govern
11 the internal affairs of a series organization, including the internal affairs of its protected series,
12 and which:

13 (A) are not part of the public organic record of the organization; and

14 (B) are binding on:

²⁸ The Committee on Style has the standard definition of “person” under review, due to concerns expressed that the current definition is problematic with regard to some types of unincorporated business organizations.

²⁹ This definition excludes a foreign protected series, because this act neither requires a foreign protected series to be, nor provides that a foreign protected series is, a person. *See* Section 102(10) (referring to a “[f]oreign protected series” as “a structure, arrangement, entity, or person other than an individual”).

³⁰ The reference to “entity” may be problematic, given the Drafting Committee’s decision not to characterize a protected series as an entity. However, removing “entity” would deviate very seriously from the Conference’s standard definition of “person.” To make matters more complicated, under uniform acts “entity” is a subset of “person,” while under the Bankruptcy Code “person” is a subset of “entity.”

³¹ If the act is confined to limited liability companies, this definition will disappear, replaced by a definition that is LLC-specific (i.e., operating agreement).

³² This draft retains “whether or not” here, to conform to the Code.

1 (i) the organization, its owners, and its transferees; and
2 (ii) each protected series of the organization and the associated owners and
3 associated distributees of each protected series.³³

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

6 (21) “Public organic record”³⁴ means the record, the filing of which by the [Secretary of
7 State] is required to form a domestic organization, other than a protected series,³⁵ and any
8 amendment to or restatement of that record. The term includes the certificate of organization of
9 a domestic limited liability company and certificate of limited partnership of a domestic limited
10 partnership.³⁶

11 (22) “Series manager” means a person under whose authority the powers of a protected
12 series are exercised and under whose direction the activities and affairs of the series are managed
13 pursuant to the organic law and organic rules of the series organization.³⁷

14 (23) “Series organization”, except in the phrase “foreign series organization”, means an

³³ A comment will note that the term includes the operating agreement of a domestic limited liability company and the partnership agreement of a domestic limited liability partnership or limited liability limited partnership.

³⁴ If the act is confined to limited liability companies, this definition will disappear, replaced by a definition that is LLC-specific (e.g., “certificate of organization”).

³⁵ Without this exclusion, one could argue that a protected series has a public organic record – *i.e.*, its protected series designation.

³⁶ Following the Code, this definition excludes the statement of qualification of a limited liability partnership. UBOC § 1-102(39).

³⁷ Based on UBOC § 102(18)(K) (catch-all definition of “governor”).

1 entity of the type³⁸ specified in Section 103(a) which has at least one protected series.³⁹

2 (24) “Titled property” means property that is subject to a titling system.

3 (25) “Titling system” means a system for registering or recording title under the law of
4 this state.⁴⁰

5 (26) “Transfer” includes:

6 (A) an assignment;

7 (B) a conveyance;

8 (C) a sale;

9 (D) a lease;

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

11 (F) a gift; and

12 (G) a transfer by operation of law.

13 (27) “Transferable interest” means the right, as initially owned by a person in the
14 person’s capacity as an owner, to receive distributions from an organization, regardless of
15 whether the person remains an owner or continues to own any part of the right. The term applies
16 to any fraction of the interest, by whomever owned.

³⁸ The Code § 1-102(48) defines “type of entity,” but: (i) in the Code, the concept has a much heavier burden to carry (helping to define “conversion”); and (ii) in this act, unlike in the Code, the context – *i.e.*, Section 103(a) – helps delineate the meaning.

³⁹ Under this definition, an organization might go in and out of “series organization” status (and back in again).

⁴⁰ This definition applies to property located in the enacting state regardless of whether the owner is domestic or foreign. For the application of the defined concept, see Sections 302(b) (protected series), 702 (foreign protected series). If the Drafting Committee decides to extend the titling requirement to include property owned by a domestic protected series but located in and subject to the titling laws of a foreign jurisdiction, this definition will need revision.

1 (28) “Transferee” of a series organization means a person to which all or part of a
2 transferable interest has been transferred, regardless of whether the transferor is an owner.

3 **SECTION 103. ELIGIBLE ORGANIZATIONS; RELATIONSHIP OF [ACT] TO**
4 **OTHER LAW AND OWNERS’ AGREEMENTS.**

5 (a) Only a domestic limited liability company, limited liability limited partnership, or
6 limited liability partnership is eligible to establish a protected series under this [act].⁴¹

7 (b) This [act] prevails in any conflict between this [act] and:

8 (1) the organic law of a series organization; or

9 (2) other law of this state pertaining to names permitted to be used by persons
10 other than individuals.⁴²

11 ⁴³(c) Except as otherwise provided in this [act] or the organic law and organic rules of a
12 series organization, each provision of the organization’s organic law and organic rules applies to
13 each protected series established by the organization, as if:

14 (1) the protected series were the organization;

15 (2) any associated owner of the protected series were an owner of the
16 organization;

17 (3) any associated distributee of the protected series were a transferee of the
18 organization;

⁴¹ The Drafting Committee is considering limiting the act’s scope to limited liability companies. The Committee has decided that, in any event, the scope should be limited to unincorporated business organizations with a full, traditional liability shield.

⁴² This provision overrides a junction box name statute restricting the use of designators. See Sections 202(1) and (3).

⁴³ This section contains the “extrapolation” approach. See Prefatory Note, Part 10.

(4) any distributable interest of the protected series were a transferable interest of the organization; and

(5) each series manager were managing the organization.⁴⁴

SECTION 104. NATURE OF PROTECTED SERIES. Except as otherwise provided in Section 105(c)(3) and (d),⁴⁵ a protected series is a person⁴⁶ distinct from:⁴⁷

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

(2) any other protected series of the organization;

(3) any owner of the organization, regardless of whether the owner is associated with the protected series;

⁴⁴ For a comment: Because a distributable interest and transferable interest are separate, non-overlapping concepts, the transfer of one does not cause the transfer of the other.

⁴⁵ The cited subsections provide that a protected series cannot exist on its own. In that sense, therefore, a protected series is not distinct from the organization whose existence is a precondition to the existence of the protected series.

⁴⁶ 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.’)). Given the current draft, it seems more likely than not that a protected series will be subject to criminal prosecution and that a protected series will have the capacity to conspire with another protected series. Diversity jurisdiction presents an additional puzzle.

⁴⁷ The word “distinct” derives from ULLCA (2006) (Last Amended 2013), Section 108(a): “A limited liability company is an entity distinct from its member or members.” See also ULPA (2001) (Last Amended 2013) § 110(a); UPA (1997) (Last Amended 2013) § 201(a). MERRIAM WEBSTER (on line), provides as the word’s first definition “distinguishable to the eye or mind as discrete: separate <a distinct cultural group> <teaching as distinct from research>”. <http://www.merriam-webster.com/dictionary/distinct>; last visited 8-23-13.

(4) any transferee⁴⁸ of the organization; and

(5) any distributee,⁴⁹ regardless of whether associated with the protected series.

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

(a) A protected series has the capacity to sue and be sued in its own name.⁵⁰

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

(1) has the same powers as the series organization that established the protected series;⁵¹ and

(2) may have any lawful purpose, regardless of whether for profit.⁵²

(c) A protected series may not:

⁴⁸ Strictly speaking, a person is not “a transferee of the organization.” The inexactitude is unlikely to cause problems, especially with an explanatory comment. A more exact formulation is “a transferee of a transferable interest pertaining to the organization.” Query: Use the shorter or the more exact formulation?

⁴⁹ The issue discussed in note 48 does not arise here, because – given the notion of an associated distributee, Section 102(2) – it is accurate to refer to an associated distributee of a protected series.

⁵⁰ Stated separately to enable the act to render this provision non-waivable. See Section 107(c)(1).

⁵¹ Beginning with ULPA (2001) § 105, the Conference has eschewed listing in detail the powers of a business organization. For example, ULLCA (2013) § 109 provides: “A limited liability company has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities and affairs.” The Drafting Committee initially decided to follow that approach in this act, with a comment providing examples of the powers provided. However, a recent case will cause the Committee to revisit the issue. See *Pac Re 5-AT v. Amtrust N. Am., Inc.*, No. CV-14-131-BLG-CSO, 2015 WL 2383406, at *4 (D. Mont. May 13, 2015) (interpreting Montana’s statute providing for protected cell captive insurance companies [PCC]); noting that “the statute does not contemplate that the assets of a protected cell will be used to satisfy the liabilities of any other cell,” but holding that “[w]ithout a separate legal identity, and absent a statutory grant to the contrary, a protected cell does not have the capacity to sue and be sued independent of the larger PCC”).

⁵² Subsection (b) states default rules. Thus, the organic rules of a series organization can: (i) cause a protected series to have fewer powers than its series organization; (ii) accord powers to a protected series which transcend limitations imposed by the organic rules on the series organization; or (iii) confine the purposes of a protected series so as to correspond to limitations applicable to the series organization or in any other way.

1 (1) establish a protected series;

2 (2) be a party to a merger, interest exchange, conversion, domestication, or

3 comparable transaction, except a merger permitted by subsection (d);⁵³ [or]

4 (3) continue after its series organization has dissolved and completed winding up,

5 unless:

6 (A) the protected series has been a party to a merger permitted by

7 subsection (d); and

8 (B) the merger becomes effective before the organization has completed

9 winding up[.] [; or]

10 [(4)]⁵⁴

11 (d) A protected series may participate in a merger as a party only if, when the merger has

12 taken effect, the protected series:

13 (1) terminates; or

14 (2) continues as:

15 (A) a protected series of the series organization or another series

16 organization; or

17 (B) a foreign protected series.^{55 56}

⁵³ Allowing interest exchanges, conversions, or domestications would do great mischief to the internal affairs doctrine.

⁵⁴ A legislative note will note that conduct a state considers acceptable for a series organization might be unacceptable for a “mere” protected series.

⁵⁵ This provision authorizes but does not require the continuation of a protected series. The plan of merger might well provide for a protected series to be discontinued. *See* Subsection (d)(1). As for the mechanics of approving and implementing a merger, see Section 103(c) (stating the extrapolation approach).

⁵⁶ At its November 2014 meeting, the Drafting Committee discussed including in Subparagraph 2(B) only

(e) If the law of this state other than this [act] prohibits a series organization from engaging in an activity or affair, conducting a business, entering into a transaction, or functioning or operating in any other way, the prohibition applies to any protected series of the organization.⁵⁷

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

(1) the internal affairs of a protected series;

(2) the relations between a protected series and:⁵⁸

(A) the series organization;

(B) another protected series of the organization;

(C) an owner of the organization, regardless of whether the owner is associated with the protected series;

(D) a transferee⁵⁹ of the organization; and

(E) an associated distributee of any protected series of the organization;

(3) the liability of the organization for a debt, obligation, or other liability of a protected series of the organization;⁶⁰

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

foreign protected series whose formation requires the filing of a public document. The Reporter recalls the rationale being that, otherwise, the merger would not be of record in the jurisdiction of the surviving protected series. The Reporter's notes do not indicate a decision on this issue, and the issue was not discussed at the Committee's March 2015 meeting.

⁵⁷ Non-waivable.

⁵⁸ These provisions cover each relationship in both directions.

⁵⁹ See note 48.

⁶⁰ This paragraph and the next establish the non-liability aspect of the protected series construct.

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

(A) an owner of the organization, regardless of whether associated with the protected series;

(B) a transferee⁶² of the organization;

(D) an associated distributee of any protected series of the organization; and

(E) a series manager of any protected series of the series origination;

(6) whether property owned by a series organization is subject to the enforcement of a judgment against a protected series of the organization;⁶³

(7) whether property owned by a protected series is subject to the enforcement of a judgment against the series organization or another protected series of the organization; and

(8) the characterization of a protected series as a person.

SECTION 107. APPLICATION OF PRIVATE ORGANIC RULES TO PROTECTED SERIES.⁶⁴

(a) Except as otherwise provided in subsections (b) and (c), a series organization's organic rules govern:⁶⁵

⁶¹ This paragraph establishes the traditional type of liability shield – *i.e.*, this paragraph is not asset partitioning but rather establishes the traditional “veil” between an enterprise and its owners, transferees/distributees, and managers.

⁶² See note 48.

⁶³ This paragraph and the next establish the non-recourse aspect of the protected series construct.

⁶⁴ A comment will explain that a protected series: (i) has no organic rules of its own; (ii) is governed by the organic rules of the series organization; and (iii) will have whatever amount of “self-governance” those rules provide. Another comment will discuss the variety of ways the organic rules might provide for protected series, including appendices, exhibits, etc.

⁶⁵ This provision is non-waivable. Section 107(c)(1).

1 (1) the activities and affairs of a protected series of the organization and the
2 conduct of those activities and affairs;
3 (2) relations among the protected series, the organization, and any other protected
4 series of the organization;
5 (3) relations among the associated owners of the protected series;
6 (4) relations between the associated owners of the protected series and:
7 (A) the protected series;
8 (B) the organization;
9 (C) another protected series of the organization;
10 (D) an owner not associated with the protected series;
11 (E) a transferee⁶⁶ of the organization;
12 (F) an associated distributee of any protected series of the organization;
13 and
14 (5) the rights and duties under this [act] of a person in the capacity of series
15 manager.

16 (b) To the extent organic rules of a series organization do not provide for a matter
17 described in subsection (a), this [act] and the organization's organic law govern the matter.

18 (c) A series organization's organic rules⁶⁷ may not:

19 (1) vary:

⁶⁶ See note 48.

⁶⁷ Will a comment suffice to indicate that these limitations add to rather than displace the limitations in the organic law?

1 (A) Section 103, 104, 105(a), (c), (d), (e), 106, 107, 601(a)⁶⁸ or TBA;⁶⁹ or
2 (B) any requirement, procedure, or other provision of this [act]
3 concerning:

4 (i) registered agents; or
5 (ii) the [Secretary of State], including provisions concerning
6 records authorized or required to be delivered to the [Secretary of State] for filing under this
7 [act]; or

8 (2) provide that a protected series has a power greater than or additional to the
9 powers the series organization has under its organic law.⁷⁰

10 (d) Establishing a protected series does not affect a consent, voting, or other requirement
11 for amending a series organization's organic rules.

12 **SECTION 108. SUPPLEMENTAL PRINCIPLES OF LAW.** Unless displaced by
13 particular provisions of this [act], the principles of law and equity supplement this [act].

⁶⁸ The cited provisions refer respectively to eligible organizations (103); nature of protected series (104); power, purpose, and duration of protected series (105), governing law (106), relationship of private organic rules of series organization to protected series (107), dissociation of owner from series organization causes person to cease to be associated with a protected series(601(a)).

⁶⁹ Once the Drafting Committee approves this approach and decides which prohibitions to include, the Reporter will refine this formulation.

⁷⁰ As a default rule, Section 105(b)(1) provides that a protected series “has the same powers as the series organization that established the protected series.” Thus, if the organic rules of a series organization deny the organization a power granted by the organization's organic law, those rules may nonetheless provide the power to a protected series of the organization. However, the rules cannot provide a protected series any power beyond those granted to the organization by its organic law.

1 [ARTICLE] 2

2 ESTABLISHING PROTECTED SERIES; PUBLIC FORMALITIES

3 SECTION 201. ESTABLISHING PROTECTED SERIES; PROTECTED SERIES
4 DESIGNATION; AMENDMENT OF DESIGNATION.

5 (a) With the affirmative vote or consent of all its owners, an eligible organization may
6 establish a protected series under this section.

7 (b) To establish a protected series, an eligible organization must deliver to the [Secretary
8 of State] for filing a protected series designation, signed by the organization, stating the name of
9 the organization and the name of the protected series.⁷¹

10 (c) A protected series is established when the protected series designation becomes
11 effective under the organic law of the series organization.^{72 73}

⁷¹ Omitted – language permitting additional information. Rationale: keeping the designation as simple as possible; dispensing with language explaining how additional information cannot evade restrictions on the organic rules.

⁷² A protected series can be established without any associated owners, associated assets, or associated distributees. *Contrast* ULLCA (2013) § 201(d) (“A limited liability company is formed when the certificate of organization becomes effective and at least one person has become a member.”) Under Section 401(c), associated distributable interests will necessarily exist (owned by the series organization).

⁷³ If one series organization merges with an organization whose organic law provides for protected series, the merger documents will have to specify the fate of the protected series in existence before the merger takes effect.

Query: Should this act so provide?

Query: Upon such a merger, what should be the merger’s effect on the filed statements of series designation pertaining to the non-surviving organization? The Reporter has identified two alternatives: (i) by operation of law the statements are deemed to pertain to the surviving organization; (ii) the surviving organization must re-file the statements on its own behalf. Although the first alternative seems more in keeping with merger law, that alternative could cause confusion with regard to protected series that do not survive the merger. The same problem exists to the extent that the merger terminates the existence of a protected series of the surviving organization.

Upon the merger of a series organization into an organization whose organic law does not provide for protected series, the protected series of the non-surviving organization will necessarily terminate.

Query: Will the merger be deemed to terminate the statement of designation of the terminated protected series?

(d) A series organization may amend a protected series designation by delivering to the [Secretary of State] for filing a statement of designation⁷⁴ change that states the name of the organization, the name of the protected series to which the designation applies, and the information to be in effect as a result of the statement becoming effective.⁷⁵

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

(1) except as otherwise provided in paragraph (3), comply with the organic law of the series organization;

(2) contain the phrase “Protected Series” or “protected series” or the abbreviation “P.S.”, “PS”, “Prot. Ser.”, or “Prot Ser”; and

(3) begin with the name of the series organization, including any word or abbreviation required by the organization’s organic law to designate the organization’s type.⁷⁶

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

(a) A registered agent of a series organization is the registered agent for each protected series of the organization.⁷⁷

⁷⁴ “Designation” is used to avoid confusion with organic laws that use “statement of change” for a different purpose. *See, e.g.*, ULLCA (2006) (Last Amended 2013), § 116 (Change of Registered Agent or Address for Registered Agent by Limited Liability Company).

⁷⁵ Query: If a series organization changes its name, must the organization amend its filed statements of designation?

⁷⁶ This formulation is intended to facilitate searching in the public record, but the Drafting Committee needs further conversation with IACA to determine whether the formulation is correct. Ideally, this provision would accommodate the most common approach to naming series: [name of limited liability company] – [name or number of protected series]. In any event, this provision will override any provision of an enacting jurisdiction’s law which limits the use of such “entity-type” designators to organizations of the series organization’s type.

⁷⁷ This provision does not apply to a foreign protected series. Section 703 applies instead.

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

5 (c) A person that signs a protected series designation delivered to the [Secretary of State]
6 for filing affirms as a fact⁷⁸ that the series organization on whose behalf the certificate is
7 delivered for filing has complied with subsection (b).

8 (d) Except as otherwise provided in an agreement between a series organization and its
9 registered agent, the agent is not obligated to distinguish between a process, notice, demand, or
10 other record concerning a protected series of the organization and a process, notice, demand, or
11 other record concerning the organization or another protected series of the organization.^{79 80}

12 **SECTION 204. [ANNUAL] [BIENNIAL] REPORTS.**⁸¹ If the organic law of a series
13 organization requires the organization periodically to deliver to the [Secretary State] for filing a
14 report concerning the organization, the report must also include the name of each protected series

⁷⁸ Derived from UBOC CODE, 1-209(c): “A person that signs a record as an agent or legal representative affirms as a fact that the person is authorized to sign the record.”

⁷⁹ Thus, the registered agent is not required to perform a sorting function unless so provided in an agreement with the series organization. This draft adds “or other record” to the standard formulation because the latter authorizes, while this provision protects. The addition has the salutary side effect of clarifying that a “process, notice, demand” must be in record form.

⁸⁰ Query: Does Section 203 adequately address what happens when a registered agent resigns? (Probably – because if the series organization does not arrange for a new registered agent, the series organization is subject to administrative dissolution. Dissolution (administrative or otherwise) of a series organization dissolves each protected series. Query: Does Section 203 adequately address the “resurrection” issue?

⁸¹ The Drafting Committee has not yet decided whether to provide for certificates of good standing for a protected series. *Cf.* Section 703(b)(2) (addressing foreign qualification of a foreign protected series established under a statute that does not provide for certificates of good standing pertaining to a foreign protected series).

of the organization as of the date the organization delivers the report to the [Secretary of State].⁸²

SECTION 205. ORGANIC LAW CONCERNING [SECRETARY OF STATE].

(a) Subject to subsection (b), if the law of this state contains provisions that apply to a series organization and concern records required or permitted to be delivered to the [Secretary of State] for filing, the provisions apply to records required or permitted to be delivered to the [Secretary of State] for filing under this [act].

(b) A record delivered to the [Secretary of State] for filing under this [act] on behalf of a protected series must be signed by a person authorized by the protected series.

[ARTICLE] 3

LIABILITY LIMITATIONS; ASSOCIATED PROPERTY AND LEVY LIMITATIONS

SECTION 301. LIMITED LIABILITY.⁸³

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

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

(c) A series organization is not liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of a protected series of the organization solely by reason of having established or being a series manager of the protected series.

(d) A protected series is not liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of its series organization or another protected

⁸² For a Legislative Note: If the organic law of a series organization requires the public organic record of the series organization to identify a person with governance authority, a comparable provision should be included in this act.

⁸³ See Prefatory Note, Parts 5-6.

1 series of the organization solely by reason of being a protected series of the organization or
2 having as a series manager the organization or another protected series.

3 (e) A person is not liable, directly or indirectly, by way of contribution or otherwise, for a
4 debt, obligation, or other liability of a protected series solely by reason of being or acting as:

5 (1) an owner,⁸⁴ regardless of whether associated with the protected series;⁸⁵

6 (2) a distributee, regardless of whether associated with the protected series; or

7 (3) a series manager or other agent of the protected series.

8 (f) Subject to Section 303, a judgment against a series organization or protected series is
9 subject to enforcement against the organization or protected series in the same manner as a
10 judgment against a person not an organization or protected series.

11 (g) Subject to Sections 302 (a) and (b) and 303, the failure of a series organization or a
12 protected series of the organization to observe formalities relating to the exercise of their
13 respective powers or management of their respective activities, affairs, or property is not a
14 ground for imposing liability on a person in contravention of this section.

15 (h) This section applies regardless of the dissolution, winding up, or termination of a
16 protected series or series organization.

⁸⁴ Query: Is it necessary to add “of the series organization”? If so, comparable additions will be made elsewhere.

⁸⁵ Query: Should this list include transferees?

1 **SECTION 302. ASSOCIATING PROPERTY WITH PROTECTED SERIES OR**
2 **SERIES ORGANIZATION.**⁸⁶

3 (a) Subject to subsection (b), an item of property⁸⁷ owned⁸⁸ by a protected series is
4 associated with the series if the series organization⁸⁹ has created and maintains⁹⁰ a record⁹¹ that

⁸⁶ This section states the mechanics of associating property. Section 303 states the consequence of compliance *vel non*.

⁸⁷ This draft refers to “an item of property” to denote that the analysis is item by item. A protected series may own one or all of the “bundle of sticks” pertaining to an item of property. *Cf.* Article 9, § 9-203(b)(2) (“a security interest is enforceable against the debtor and third parties with respect to the collateral only if...the debtor has rights in the collateral”).

⁸⁸ Only property “owned” by a protected series may be associated with the series. Associated property is a subset of owned property (although the subset may be co-extensive with the set). For the meaning of “owns,” see OWNERSHIP, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (characterizing “the right to exclude others” as “one of the most essential sticks in the bundle of rights that are commonly characterized as property”).

⁸⁹ The 2014 Annual Meeting Draft did not specify who is responsible for creating and maintaining this record. The November 2014 draft included language making the series organization responsible, reflecting the sentiments expressed by the Committee of the Whole in 2014. At its March 2015 meeting, the Drafting Committee reverted to vagueness, deciding that the series organization need merely be a contact point for obtaining the records. However, during the discussion no one recalled the relevant statements made at the 2014 annual meeting. Given the strength of those statements, the Reporter has re-reverted the approach of the November 2014 draft. A comment will indicate that: (i) the series organization may delegate the record function, including to a protected series; (ii) delegation does not discharge the series organization’s duties; (iii) if inadequate records cause damage to a protected series, the series organization may be liable, but, to the extent not prohibited by the organic law of a series organization, the private organic rules may alter this *inter se* liability or restrict or eliminate *inter se* claims for damages. Query: Should the act require that the records of associated property for all protected series be kept together or at least be retrievable together? Otherwise, the series organization could delegate the responsibility in a way that might split the records and make life more difficult for creditors. (For example, the series organization might delegate the recordkeeping responsibility for property associated with each protected series to the series with which the property is associated.)

⁹⁰ Under the “maintains” requirement, property once associated with a protected series will cease to be associated if *inter alia*: (i) the series organization or another protected series acquires property that renders insufficient a previously adequate description; or (ii) the series organization otherwise fails to maintain the records adequately. Of course, the series organization can delegate the recordkeeping responsibility to another person.

⁹¹ Non-record designation (“the memory of man runneth not to the contrary”) could not possibly satisfy the specificity requirement stated in Section 302(a). *But see Anderson v. City of Huntington*, 40 Ind. App.

1 identifies the protected series and contains:

2 (1) a description of the item which is sufficiently specific⁹² to permit a reasonable
3 person with no connection to or interest in the organization or protected series to identify the
4 item of property and distinguish it from:

5 (A) property owned by the organization; and

6 (B) property owned by any other protected series of the organization; and

7 (2) a record stating when and from whom the protected series acquired the item of
8 property.⁹³

9 (b) For an item of titled property,⁹⁴ the following rules apply:

10 (1) For the item to be associated with a protected series, the item must be titled in
11 compliance with the applicable titling system.

12 (2) A protected series may register titled property in the name of another person,
13 other than the series organization or another protected series of the organization, if:

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.”)

⁹² A comment will note that different methods may be appropriate for describing different types of property (e.g., fungible versus non-fungible goods; tangible property versus intangible property). For example, funds held in a single bank account in undifferentiated fashion can nevertheless be associated with different protected series, so long as a record maintained by the series organization identifies what amount is associated with which protected series.

⁹³ Under this subsection, property might be owned by a protected series without being associated with the protected series. That result is intentional. Only associated property benefits from the internal shields, *see* Section 303. Being properly identified is the only entryway into that protected situation. Property owned by a protected series but not associated is outside the series’ shield wall— *i.e.*, available to creditors of the series, the series organization, and any other protected series of the organization. *See* Section 303(a) and (b).

⁹⁴ Query: Should the act extend these transparency provisions to property owned by a domestic protected series or series organization but subject to a recording system under the law of a foreign jurisdiction?

1 (A) the title states that the titled holder of record holds the title in a
2 representative capacity on behalf of the protected series or a person not identified on the title; and

3 (B) the applicable titling system so permits.

4 (3) Titling the property in the name of the protected series or as provided in
5 paragraph (2)(A) satisfies subsection (a)(1).

6 (c) Subject to subsections (a) and (b), a protected series may hold associated property
7 directly or indirectly, through a representative, nominee, or otherwise, except in the name of the
8 series organization or another protected series of the organization.

9 (d) A series organization may associate property with itself by complying with
10 subsections (a) through (c).

11 (e) A series organization shall maintain its record of each item of property associated
12 with a protected series or itself until the earlier of:

13 (1) [six] years after the date on which the organization or protected series ceases
14 to have any interest in the item; or

15 (2) the date on which the organization or protected series completes winding up
16 its activities and affairs.

17 (f) In a dispute concerning whether an item of property is associated property, the person
18 asserting association has the burden of proof.⁹⁵ A person's failure to comply with subsection (e)
19 does not revive a claim that has been barred by a statute of limitation or statute of repose.

⁹⁵ This subsection is modeled on ULLCA (2006) (Last Amended 2013) § 410(h) ("In a dispute concerning the reasonableness of a restriction under this subsection [permitting an LLC to impose access and use restrictions on information], the company has the burden of proving reasonableness.").

1 **SECTION 303. ASSOCIATED PROPERTY; RECOURSE LIMITED TO**
2 **JUDGMENT CREDITORS OF PROTECTED SERIES.**⁹⁶

3 (a) Subject to any applicable law pertaining to fraudulent or voidable transfers or
4 transactions, property⁹⁷ owned by a protected series is not subject to the enforcement of a
5 judgment against the series organization or another protected series of the organization, if:

6 (1) the property is associated with the protected series when enforcement is
7 sought; and

8 (2) when the judgment debtor incurred⁹⁸ the liability giving rise to the judgment:

9 (A) the property was associated with the protected series; or

10 (B) the protected series did not own the property.⁹⁹

11 (b) Subject to any applicable law pertaining to fraudulent or voidable transfers or
12 transactions, property owned by a series organization is not subject to the enforcement of a
13 judgment against a protected series of the organization, if:

14 (1) the property is associated with the organization when enforcement is sought;
15 and

16 (2) when the judgment debtor incurred the liability giving rise to the judgment:

17 (A) the property was associated with the organization; or

⁹⁶ See Prefatory Note, Parts 5-6.

⁹⁷ Here the act is referring to property in the collective sense, so “item of” is not necessary. Query:
Correct? In any event, a comment will refer to the “item by item” approach of Section 301.

⁹⁸ The conference has use “incurred” as the applicable term of art since UPA (1914) § 13.

⁹⁹ Without this provision, a business that recognizes that its conduct has created potential claims could
manipulate association to frustrate the enforcement of future judgments arising from the claims.
Although voidable transaction/fraudulent transfer statutes would apply, the more time passes between the
manipulation and the bringing of claims, the more difficult will be the judgment creditor’s problems of
proof. (Of course, unlawful backdating remains possible.)

1 (B) the organization did not own the property.

2 (c) Property owned by a protected series which does not meet the requirements of
3 subsection (a) is subject to the enforcement of a judgment against the protected series, the series
4 organization, and any other protected series of the organization. Property owned by a
5 organization which does not meet the requirements of subsection (b) is subject to the
6 enforcement of a judgment against the organization and any protected series of the
7 organization.¹⁰⁰

8 (d) This section applies regardless of whether enforcement is sought by levy, attachment,
9 execution, judicial sale, or other means.

10 **[ARTICLE] 4**

11 **ASSOCIATED OWNERS AND DISTRIBUTABLE INTERESTS**

12 **SECTION 401. ASSOCIATED OWNER; ASSOCIATED DISTRIBUTABLE**
13 **INTEREST.**

14 (a) Only an owner¹⁰¹ or the series organization¹⁰² may become associated with a
15 protected series of the series organization.

16 (b) Subject to subsection (c), an owner or the series organization becomes associated with
17 a protected series when the organic rules of the organization or a procedure established under
18 those rules identifies:

¹⁰⁰ For a comment: A protected series that loses an item of property under this section may have a claim for unjust enrichment against the judgment debtor and a claim for damages caused by breach of the duty of care against the series organization.

¹⁰¹ The restriction as to owners: (i) is ubiquitous in series provisions; and (ii) fits with the controlling power that the organic rules of the series organization have over each protected series.

¹⁰² At its March 2015 meeting, the Drafting Committee decided to permit the series organization to be itself associated with one or more of its own protected series.

1 (1) the owner or organization as associated with the protected series; and

2 (2) any associated distributable interest owned by the owner or organization in
3 connection with becoming or being associated with the protected series.

4 (c) If upon the establishment of a protected series no owners become associated with the
5 series, the series organization owns all the associated distributable interests.

6 **SECTION 402. RIGHTS OF JUDGMENT CREDITOR OF ASSOCIATED**
7 **OWNER OR ASSOCIATED DISTRIBUTE.**

8 (a) Subject to subsections (b) and (c), if a series organization's organic law contains
9 provisions concerning a judgment creditor of an owner or transferee of the organization, those
10 provisions apply to each protected series of the organization and each associated owner and
11 associated distributee of the protected series as if:

12 (1) the protected series were the organization;

13 (2) each associated owner and each associated distributee of the protected series
14 were respectively an owner or transferee of the organization;

15 (3) the distributable interests of the protected series were transferable interests of
16 the organization; and

17 (4) a judgment creditor of an associated owner or associated distributee of the
18 protected series were a judgment creditor of respectively an owner or transferee of the
19 organization.

20 (b) Service of a process, notice, demand, or other record on a series organization on
21 behalf of a judgment creditor of an owner or transferee of the organization is also service on each
22 protected series of the organization.

23 (c) Service of a process, notice, demand, or other record on a protected series on behalf of

1 a judgment creditor of an associated owner or associated distributee is not service on the series
2 organization or any other protected series of the organization.

3 [ARTICLE] 5

4 MANAGEMENT

5 SECTION 501. MANAGEMENT OF PROTECTED SERIES; RIGHTS AND 6 DUTIES OF SERIES MANAGER.¹⁰³

7 (a) A series organization is the series manager of each of the organization's protected
8 series and has the right and duty to make all decisions concerning each series regardless of
9 whether the decision concerns a matter in or outside the ordinary course of the activities and
10 affairs of the series.¹⁰⁴

11 (b) A series manager of a protected series of a series organization does not in that
12 capacity owe any duties to:

13 (1) the organization or its owners; or

14 (2) another protected series of the organization or the associated owners of the
15 protected series.¹⁰⁵

16 (c) If this [act], or the organic law or organic rules of a series organization require or
17 authorize the organization to make a decision that has the potential to benefit a protected series

¹⁰³ Dissolution does not change this arrangement. See Section 602(b).

¹⁰⁴ Query: Is it necessary to note that this provision does not authorize conduct in breach/violation of the series organization's organic law and organic rules?

¹⁰⁵ A comment will indicate that the reference to no duties to owners associated with another protected series implies nothing about duties, if any, to owners associated with the protected series for which the series manager is a manager. Query: Should the provision also refer to transferees and distributees? Perhaps a legislative note should indicate that – if the relevant organic law provides rights to transferees – the provision should refer to them and also to distributees. (If not, Section 103(b) would cause the transferee rights to be extrapolated to the distributees.)

1 of the organization to the prejudice of another protected series or the organization, or to benefit
2 the organization to the detriment of a protected series of the organization, the organization is not
3 liable for damages under this [act] or the organization’s organic law, whether the claim is in law
4 or equity, if the organization makes the decision with:

5 (1) the honest belief that the decision serves the best interests of the organization
6 or one or more protected series of the organization; and

7 (2) the reasonable belief that the decision breaches no owner’s^{106 107} rights under
8 the organization’s organic law and organic rules.¹⁰⁸

9 (d) If a series organization is not the series manager of a protected series and the
10 management of the protected series is deadlocked so that it is not reasonably practicable to carry
11 on the activities and affairs of the protected series in conformity with the organic law and organic
12 rules of the organization, the organization may take any action it reasonably considers necessary
13 and proper to resolve the deadlock.¹⁰⁹

¹⁰⁶ Query: Is it necessary to specify “no owner regardless of whether etc.”?

¹⁰⁷ Note the omission of “transferee” and “distributee.” To include them would be to suggest that transferees and distributees have standing to sue.

¹⁰⁸ On the instructions of the Drafting Committee at its November, 2014 meeting, the Reporter drafted this provision to address “the *Sinven/Nemec* problem.” See *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971) (shareholders of one corporate subsidiary [Sinven] brought derivative claims against the parent in part because the parent had allocated a business opportunity to another subsidiary); *Nemec v. Shrader*, 991 A.2d 1120 (Del. 2010) (deciding by a 3-2 vote that calling preferred stock did not breach the implied covenant of good faith and fair dealing, even though the call substantially prejudiced the owners of preferred stock to the benefit of the owners of common stock). At its March, 2015 meeting, the Drafting Committee decided to retain this provision while leaving for further discussion whether the operating agreement may reduce the standards stated in Paragraphs 1 and 2.

¹⁰⁹ This idea arose at the March 2015 meeting of the Drafting Committee. To delineate the triggering circumstances, this draft uses language from ULLCA (2013) § 701(a)(4)(B) (authorizing judicial dissolution). There are many other formulations available. See, e.g., Cal. Corp. Code § 308 (2014) (authorizing a court to appoint a provisional director “if a corporation has an even number of directors who are equally divided and cannot agree as to the management of its affairs, so that its business can no longer be conducted to advantage or so that there is danger that its property and business will be impaired

(2) discharge the person from any debt, obligation, or other liability to the protected series or to another associated owner of the protected series which the person incurred while associated with the protected series.

SECTION 602. DISSOLUTION AND WINDING UP OF PROTECTED SERIES.

(a) When a series organization dissolves, each protected series of the organization:¹¹³

(1) dissolves; and

(2) shall immediately begin winding up its activities and affairs.

(b) The series manager of each protected series shall manage the winding up of the activities and affairs of the protected series.¹¹⁴

(c) When a protected series has completed winding up, the series organization may deliver to the [Secretary of State] for filing a statement of designation cancellation stating the name of the series and that the series is terminated.

(d) A series organization has not completed winding up until each of its protected series has completed winding up.

[ARTICLE] 7

FOREIGN PROTECTED SERIES

SECTION 701. GOVERNING LAW. The law of the jurisdiction of formation of a foreign series organization¹¹⁵ governs:

of an owner that ceases to be associated with a protect series. Section 103(c) – the extrapolation provision – addresses the issue.

¹¹³ The organic rules of a series organization may provide additional grounds for winding up a protected series.

¹¹⁴ If the position of series manager is vacant or the series manager declines to direct winding up and the organic rules do not address the situation, Section 103(c) will apply.

¹¹⁵ This provision is limited to a foreign *series* organization. The comparable provision for a foreign

- 1 (1) the internal affairs of a foreign protected series of the organization;¹¹⁶
- 2 (2) the relationship between a foreign protected series and:
- 3 (A) the organization;
- 4 (B) another foreign protected series of the organization;
- 5 (C) an owner of the organization, regardless of whether the owner is associated
- 6 with the foreign protected series;
- 7 (D) a transferee¹¹⁷ of the organization; and
- 8 (E) any distributee of the foreign protected series.
- 9 (3) the liability of the organization for a debt, obligation, or other liability of a foreign
- 10 protected series of the organization;
- 11 (4) the liability of a foreign protected series for a debt, obligation, or other liability of the
- 12 organization or any other protected series of the organization;
- 13 (5) the liability for a debt, obligation, or other liability of a foreign protected series of:
- 14 (A) the organization;
- 15 (B) an owner of the organization, regardless of whether associated with the
- 16 foreign protected series;
- 17 (C) a transferee¹¹⁸ of the organization;
- 18 (D) an associated distributee of the foreign protected series; and
- 19 (F) a manager of the foreign protected series; and

organization appears in the foreign organic law pertaining to the relevant type of organization.

¹¹⁶ 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.

¹¹⁷ See note 48.

¹¹⁸ See note 48.

1 (6) except as otherwise provided in Section 702, whether property owned by:

2 (A) a foreign protected series is subject to the enforcement of a judgment against
3 the organization or another protected series of the organization; and

4 (B) the organization is subject to the enforcement of a judgment against a
5 protected series of the organization.

6 **SECTION 702. TITLED PROPERTY OF FOREIGN PROTECTED SERIES OR**
7 **FOREIGN SERIES ORGANIZATION.**

8 (a) Section 302 applies to titled property¹¹⁹ owned by a foreign series organization or
9 foreign protected series.

10 (b) Titled property owned by a foreign protected series which does not meet the
11 requirements of Section 302 is subject to the enforcement of a judgment against the foreign
12 protected series, the foreign series organization, and any other foreign protected series of the
13 organization. Titled property owned by a foreign series organization which does not meet the
14 requirements of Section 302 is subject to the enforcement of a judgment against the organization
15 or any foreign protected series of the organization.

16 (c) This section applies regardless of whether enforcement is sought by levy, attachment,
17 execution, judicial sale, or other means.

18 **SECTION 703. TRANSACTING BUSINESS IN THIS STATE; FOREIGN**
19 **REGISTRATION; PERSONAL JURISDICTION.**

20 (a) Except as otherwise provided in subsection (b), the law of this state concerning the
21 registration of a foreign organization to do business in this state applies to a foreign protected

¹¹⁹ Note that “titled property” is property subject to a “titling system” and the latter terms refers only to domestic systems (i.e., titling requirements of the enacting state). See Section 102(24), (25).

1 series of a foreign series organization as if the foreign protected series were a separate foreign
2 organization of the same type as the foreign series organization.¹²⁰

3 (b) If the law of this state concerning the registration of a foreign organization to do
4 business in this state requires an application for registration to include a statement of good
5 standing¹²¹ pertaining to the organization:

6 (1) subject to paragraph (2), when a foreign protected series applies for
7 registration, the application must include a statement of good standing pertaining to the
8 organization and a statement of good standing pertaining to the foreign protected series; or

9 (2) if the organic law of the applicant's foreign series organization does not
10 provide for a statement of good standing pertaining to a foreign protected series, the application
11 must include:

12 (A) an affirmation of that fact by an individual on behalf of the applicant;
13 and

14 (B) a statement of good standing pertaining to the organization.

15 (c) For purposes of determining whether a foreign series organization or foreign protected
16 series has transacted business in this state and whether this state has personal jurisdiction over a
17 foreign series organization or foreign protected series:

18 (1) the activities of the organization are not attributable to the foreign protected
19 series of the organization solely by reason of the organization having established the foreign
20 protected series; and

¹²⁰ *Inter alia*, this provision extrapolates registered agent requirements.

¹²¹ Query: Should "statement of good standing" be bracketed given that some states use a different term of art?

(2) the activities of a foreign protected series are not attributable to the organization or another foreign protected series of the organization solely by reason of the organization having established the foreign protected series or the other foreign protected series.¹²²

[ARTICLE] 8

MISCELLANEOUS PROVISIONS

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

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

Comment

This section responds to specific language of the Electronic Signatures in Global and National Commerce Act and is designed to avoid preemption of state law under that federal legislation.

SECTION 803. SAVINGS CLAUSE. This [act] does not affect an action commenced, proceeding brought, or right accrued before [the effective date of this [act]].

[SECTION 804. SEVERABILITY CLAUSE. If any provision of this [act] or its

¹²² A comment will state that each foreign series organization and each of its foreign protected series can and, if applicable, must qualify separately.

1 application to any person or circumstance is held invalid, the invalidity does not affect other
2 provisions or applications of this [act] which can be given effect without the invalid provision or
3 application, and to this end the provisions of this [act] are severable.]

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

6 **SECTION 805. REPEALS.** The following are repealed:

7 (1) [the state statutory provisions on protected series], as [amended, and as] in effect
8 immediately before [the effective date of this [act]];

9 (2)

10 (3)

11 **SECTION 806. EFFECTIVE DATE.** This [act] takes effect