

**Uniform Protected Series Act**  
*for drafting committee discussion – internet meeting*  
*Wednesday, November 9, 2016 – 2 PM Central*

**FOREIGN PROTECTED SERIES**

**SECTION 601. GOVERNING LAW.**

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

(1) the internal affairs of a foreign protected series of the company;

(2) relations between the protected series and:

(A) the company;

(B) another protected series of the company;

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

(D) a protected series transferee of another protected series of the company;

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

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

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

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

(C) a series transferee of another protected series of the company;

(D) a protected series manager of another protected series of the company;

(E) a person managing the company; or

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

(4) subject to subsection (b) and section 502,

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

(i) having established the protected series;

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

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

(iv) owning a protected series transferable interest in the protected series; and

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

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

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

(b) In determining a claim under subsection (a)(4), a court may apply the law of this state instead of the law of the foreign jurisdiction of the foreign series limited liability company if the court determines that applying the law of the foreign jurisdiction advances a policy or produces a result repugnant to the public policy of this state. In making the determination, the court shall consider:

(1) the specificity, clarity, and forcefulness with which the law of this state reflects a contrary public policy;

(2) whether the claimant is a resident of this state or for another reason reasonably might expect the law of this state to apply; and

(3) any relevant choice-of-law rule of law of this state.

**Subsection (b)** – Virtually all, if not all, limited liability company statutes provide that the law of foreign limited liability company’s jurisdiction of formation governs piercing claims. See, e.g., ULLCA (2013) § 901(a)(2). This approach reflects the approach of the Uniform Limited Partnership Act in effect in most states when limited liability company statutes were first being enacted. See Uniform Limited Partnership Act (1976 with 1985 amendments) § 901(i) (stating that “the law of the state under which a foreign limited partnership is organized govern

its organization and internal affairs and the liability of its limited partners”). According to the official comment, Section 901 “first appeared in the 1976 Act.”

However, the comment provides no explanation for this variation from the original Uniform Limited Partnership Act of 1916, which relied on common law choice of law principles for both the “internal affairs doctrine” and piercing claims. See *Se. Texas Inns, Inc. v. Prime Hosp. Corp.*, 462 F.3d 666, 672-76 (6th Cir. 2006) (discussing at length which state law to apply to a claim to pierce the veil of a limited partnership, making no reference to the limited partnership statute of the forum state (Tennessee), determining that “the choice-of-law question is not outcome-determinative in this case,” and therefore not deciding the issue).

In the corporate context, the choice of law has always been a matter of case law. See *Dassault Falcon Jet Corp. v. Oberflex, Inc.*, 909 F. Supp. 345, 348-49 (M.D.N.C. 1995); Restatement (Second) of Conflict of Laws (1971) § 307 (“The local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation for assessments or contributions and to its creditors for corporate debts.”). Although the Restatement states the rule as invariable, venerable Supreme Court precedent allows for exceptions. *Pinney v. Nelson*, 183 U.S. 144, 150, 22 S. Ct. 52, 55, 46 L. Ed. 125 (1901) (“Contracting with reference to the laws of that state [not the state of incorporation] [the shareholders] ... must be assumed to know the provisions of those laws; that by them a personal liability was cast upon the stockholders in corporations formed under the laws of the state, and that that same liability was also imposed upon the stockholders of corporations formed under the laws of other states and doing business within California.”).

In the context of such a novel concept as internal shields, the Drafting Committee determined to revert to common law flexibility rather than merely reiterating a codification that entered the law of unincorporated organizations without explanation and whose rationale has never been fully explored.

The stated standard – repugnancy – is a high one and consistent with case law from analogous contexts.

**SECTION 602. TRANSACTING OF BUSINESS IN STATE BY FOREIGN LIMITED LIABILITY COMPANY OR FOREIGN PROTECTED SERIES;**  
**JURISDICTION.** In determining whether a foreign limited liability company or foreign protected series of the company has transacted business in this state or is subject to the jurisdiction of the courts of this state:

(1) the activities and affairs of the company are not attributable to a protected series of the company solely because the company established the protected series; and

(2) the activities and affairs of a protected series are not attributable to the company or another protected series of the company solely because the company established the protected series or the other protected series.

*{{NTDC – This section states a non-attribution rule that protects not only foreign protected series but also foreign series limited liability companies. Query – does the latter protection belong in the limited liability company statute, with a Legislative Note to explain?}}*

**SECTION 603. APPLICATION OF SECTIONS 301 AND 402 TO FOREIGN SERIES LIMITED LIABILITY COMPANY AND FOREIGN PROTECTED SERIES.**

Sections 301 and 402 apply to an asset of a foreign series limited liability company or foreign protected series if:

- (1) the asset is located in this state; and
- (2) the foreign company or formal protected series is subject to the personal jurisdiction of the courts of this state.

**Comment**

Other law determines whether an asset is located in this state.

**SECTION 604. REGISTRATION OF FOREIGN PROTECTED SERIES.**

(a) Except as otherwise provided in this section and subject to Section 602, the law of this state governing the registration of a foreign limited liability company to do business in this state applies to a foreign protected series as if the foreign protected series were a foreign limited liability company organized separately from the foreign series limited liability company that established the foreign protected series and distinct from the foreign company and any other foreign protected series of the foreign company.

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

(1) the name and jurisdiction of formation of the foreign series limited liability company that established the foreign protected series applying for registration; and

(2) if the company has other protected series, the name, street, mailing, and electronic mail address of an individual who knows the name, street, mailing and electronic mail address of each other foreign protected series and the protected series manager of and agent for process for each other foreign protected series.

(c) The name of a foreign protected series applying for registration or registered to do business in this state must comply with Section 202. A foreign protected series may comply with Section 202 pursuant to [fictitious name statute].

(d) The requirement in [cite to the relevant provision the limited liability company statute] to amend a statement of registration to update information applies to the information required by subsection (b).

**Legislative Note:** *Although business entity statutes typically do not provide a delayed effective date for foreign entities, an enacting state whose limited liability company statute has previously contemplated foreign protected series should consider delaying the effective date of subsection (a)(2). In such states, subsection (a)(2) imposes a significant new requirement on foreign protected series.*

#### Comment

**Subsection (a)** – Among the provisions made applicable by this subsection are the process used and the information required for registration to do business, the law governing annual or biennial reports, and the law governing statements of good standing. Also made applicable is the “no greater powers” rule contained in many limited liability company statutes – e.g., ULLCA § 901(c) (“Registration of a foreign limited liability company to do business in this state does not authorize the foreign company to engage in any activities and affairs or exercise any power that a limited liability company may not engage in or exercise in this state.”).

Because this subsection treats each foreign protected series as if it were a separate foreign limited liability company, there is no requirement that all registered foreign protected series of a foreign series limited liability company have the same agent for service of process. *Contrast* Section 203(a) (providing that the registered agent of a series limited liability company is the registered agent for each protected series established by company). *{{NTDC – open issue: how to address statutes which require a statement of good standing from the home jurisdiction of a registrant limited liability company when the home jurisdiction does not provide for a statement of good standing pertaining to a protected series.}}*

Section 602 contains non-attribution rules applicable when determining whether a foreign series limited liability company or foreign protected series is doing business in this state.

**Subsection (b)(2)** – This provision is most easily understood with reference to Section 605(a), which requires substantial disclosures when a foreign series limited liability company or foreign protected series becomes party to an adjudicative proceeding. Registration to do business does not require the same disclosure but does require the applicant to identify an individual who knows the information contemplated by Section 605.

**Subsection (c)** – Section 202 requires that the name of a protected series either begin or end with the name of the series limited liability company. Many limited liability company statutes have a provision addressing the problem of a noncomplying name of foreign limited liability company that is applying for registration – e.g., ULLCA § 906. Subsection (a) makes

such provisions applicable to a foreign protected series. A foreign protected series can also use a state's fictitious name statute.

If a foreign series limited liability company changes its name, the foreign company will have to change the name used in this state by any of the foreign company's protected series registered in this state. See Section 202(c).

**SECTION 605. DISCLOSURE REQUIRED WHEN FOREIGN SERIES LIMITED  
LIABILITY COMPANY OR FOREIGN PROTECTED SERIES SUBJECT TO  
PROCEEDING.**

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

(1) a foreign series limited liability company shall disclose to each other party the name, street, mailing, and electronic mail address of:

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

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

(2) a foreign protected series shall disclose to each other party the name, street, mailing, and electronic mail address of:

(A) the foreign series limited liability company that established the foreign protected series, each person managing the company, and an agent for service of process for the company; and



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

(b) The time to make disclosure under subsection (a) is tolled if the foreign series limited liability company or foreign protected series challenges the personal jurisdiction of the tribunal. If the tribunal rules in favor of its jurisdiction, the tolling ends.

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

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

(2) bring a separate proceeding in [appropriate court] to enforce the requirements stated subsection (a).

### Comment

In contrast to Section 604(b)(2), this section requires disclosure of information, not merely the identification of an individual who knows the information.

**Subsection (a)** – Arbitration is an adjudicative tribunal. *{{NTDC – open issues: how to determine whether an arbitration proceeding is located in this state; whether, given that arbitration is consensual process, the protections of this section are unnecessary.}}*