

Mergers and Other Entity Transactions Involving a
Series Limited Liability Company, Protected Series, or Both
dsk-3-12-17

The first part of this memo is statutory text, taken from a previous draft. The remainder is an outline of material points.

[Statutory Language Begins Here]

SECTION 601. PROTECTED SERIES MAY NOT BE A PARTY TO ENTITY

TRANSACTION. A protected series may not be:

- (1) an acquiring, acquired, converting, converted, domesticating, or domesticated entity;¹
- (2) a party to, or the surviving entity of, a merger, except as provided in Section 602(b);

or

- (3) a party to any transaction substantially similar to a merger, interest exchange, conversion or domestication.

SECTION 602. RESTRICTIONS ON ENTITY TRANSACTION INVOLVING PROTECTED SERIES.

(a) A series limited liability company may not be:

- (1) an acquiring, acquired, converting, converted, domesticating, or domesticated entity;
- (2) first formed as a limited liability company by a merger;² or
- (3) except as provided in subsection (b), a party to a merger.

(b) A series limited liability company may be a party to a merger under [cite the provisions of the limited liability company statute pertaining to mergers] and according to the following rules. *[Statutory Text Ends Here]*

¹ These terms are defined in ULLCA (2013).

² I.e., formed as a limited liability company. Allowing that type of transaction increases complexity and is unnecessary. The same result can be obtained by created a new limited liability company before the merger and merging two or more existing companies into the new one.

[Outline Begins Here]

(Special Rules for Series LLC Involvement in Merger)

Mechanics

1. Parties are limited to domestic LLCs that exist before the merger.
2. The act's provisions rely on the existing merger provisions of the LLC statute.
3. The plan of merger shall state:
 - a. any amendments to the operating agreement of the surviving LLC as are to be in record form and are necessary or appropriate given the merger's treatment of protected series
 - b. for any associated member of a relocating protected series, a provision causing the associated member to be a member of the surviving LLC
 - c. as to a protected series of a non-surviving LLC:
 - i. whether as a protected series is to be terminated or relocated as part of the merger
 - ii. if the protected series is to be relocated:
 - its revised name;
 - any new associated members and any person ceasing to be an associated member;
 - any consideration paid to persons who before the merger were either associated members or protected series transferees
 - c. as to a protected series of the surviving LLC, whether as part of the merger the protected series will be terminated;
 - d. whether as part of the merger, the surviving LLC will establish any additional protected series (i.e., in addition to any protected series being relocated from a non-surviving LLC).
4. The statement of merger must include, as attachments, the appropriate records for each protected series that is being terminated, relocated, or established; i.e.,
 - a. for a protected series being terminated – a statement of termination;
 - b. for a protected series being relocated:
 - i. a statement of "relocation" (to close up the public record of the pre-location protected series), which includes:
 - the name of the limited liability company that established the protected series; and
 - the name of the protected series before the merger and afterwards; and
 - a statement of designation by the surviving LLC

- c. for a protected series being newly established by (not relocated to) the surviving LLC – a statement of designation.
5. Any person remaining an associated member of a relocating protected series must become a member of the surviving LLC.

Section 403 Issues

As used in the following items, “cross border” refer to a claim under Section 403 asserted after a merger by a creditor of party LLC or of one of its protected series, which is asserted against an asset the before the merger belong to another party LLC or one of its protected series.

Rules That Are Not Cross Border

6. Any Section 403 lien, attachment etc. obtained before the merger “travels with” the asset.
7. If before the merger, an asset of a protected series of a non-surviving LLC had Section 403 exposure, the exposure:
 - a. lapses if the protected series is terminated; and
 - b. continues as if the merger had not occurred if the protected series is relocated.
8. If before the merger an asset of a non-surviving LLC had Section 403 exposure, the exposure continues as if the merger had not occurred (with the asset now being owned by the surviving LLC. (Same principle as in item 7, applied to assets that do not stay within a pre-merger cocoon.)

Cross Border Rules³

9. If before the merger a non-surviving LLC or one of its protected series incurred a liability, after the merger the creditor may invoke Section 403 against assets of the surviving series LLC and its non-relocated protected series,⁴ but with a different first testing date:
 - a. the first testing date is the date the merger becomes effective; and
 - b. the second test date remains when the Section 403 claim is first brought.
10. If before the merger the surviving LLC or one of its then-existing protected series incurred a liability, after the merger the creditor may invoke Section 403 against assets of any relocated protected series and the assets formerly owned by the non-surviving LLC (now assets of the surviving LLC), but with a different first testing date:
 - a. the first testing date is the date the merger becomes effective; and
 - b. the second test date remains when the Section 403 claim is first brought.

³ Having been developed by an informal working group after the most recent meeting, these issues were not part of the consensus mentioned in the transmittal email.

⁴ For assets of any relocated protected series, the claim would not be cross border and rule 7-b would apply.

Issue Applicable Beyond the Merger Context

11. Section 403 should include a statute of repose with regard to the first testing date – perhaps six years from the date a liability is incurred.⁵

⁵ Highlighted by the intricacies of merger-related recordkeeping, this issue arose in the above-mentioned discussion of the small working group. To the best of the Reporter's recollection, the issue has been previously discussed but never brought to a vote.