

UNIFORM PROTECTED SERIES ACT:
A WELCOME ADVANCE IN SERIES LLC LEGISLATION

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I.	INTRODUCTION	235
II.	THE DEVELOPMENT OF SERIES LLC LEGISLATION	235
III.	ISSUES AND QUESTIONS ARISING UNDER EXISTING SERIES LEGISLATION	238
	A. <i>Requirements for Forming a Series and Notice Requirements</i>	238
	B. <i>What Powers Does an Individual Series Possess?</i>	240
	C. <i>Significance of Separate Entity Status</i>	242
	D. <i>Information Rights</i>	248
	E. <i>Duties</i>	249
IV.	THE UPSA	250
	A. <i>Nature, Powers, and Duration of a Protected Series under the UPSA</i>	250
	1. <i>Nature of a Protected Series</i>	250
	2. <i>Powers and Duration of a Protected Series</i>	251
	B. <i>Name of Protected Series</i>	251
	C. <i>Forming an SLLC and Protected Series under the UPSA</i>	252
	D. <i>Associated Members under the UPSA</i>	252
	E. <i>Duties under the UPSA</i>	253
	F. <i>Registered Agent Requirements of the UPSA</i>	253
	G. <i>Certificate of Good Standing for a Protected Series</i>	254
	H. <i>Information Required in Periodic Report and the Effect of Failing to File under the UPSA</i>	254
	I. <i>Associated Assets and UPSA Requirements for Records</i>	255
	J. <i>Limitation on Liability and Enforcement of Claims under the UPSA</i>	256
	K. <i>Enforcement of Judgments Against Non-Associated Assets under the UPSA</i>	257
	L. <i>Information Rights under the UPSA if Not an Associated Member of a Protected Series</i>	259
	M. <i>Entity Transactions under the UPSA</i>	259
V.	AREAS NOT ADDRESSED BY THE UPSA	263

234	<i>HOUSTON BUSINESS AND TAX LAW JOURNAL</i>	[Vol. XIX
	A. <i>UCC</i>	263
	B. <i>Securities Laws</i>	265
	1. Who is the Issuer?	265
	2. Determining Accredited Investor and Purchaser Status	266
VI.	CONCLUSION	267

I. INTRODUCTION

On July 19, 2017, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Protected Series Act (UPSA) and recommended its enactment for all States.¹ The final version of the UPSA, with a prefatory note and comments, is dated September 26, 2018.² This article reviews the UPSA with an emphasis on existing series LLC (SLLC) legislation, including issues arising under those statutes and how the UPSA addresses those issues. This article concludes that the UPSA contains many desirable provisions that should be considered for enactment by the jurisdictions that have SLLC legislation, particularly those jurisdictions that do not provide for separate entity treatment for the independent series within an SLLC.³ Finally, this article questions why the NCCUSL, its commentators, and states with established SLLC statutes have failed to articulate a persuasive rationale for why a state should enact SLLC legislation.

II. THE DEVELOPMENT OF SERIES LLC LEGISLATION

In 1996, a few years after it enacted its Business Trust Act, Delaware passed the first statutory provisions for SLLCs⁴ and added series provisions to its Limited Partnership Act.⁵ Since then, several other jurisdictions have added SLLC provisions of their own.⁶

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1. The UPSA was drafted by the Drafting Committee on Series of Unincorporated Business Entities of the NCCUSL. The author was an ABA Advisor to the Drafting Committee.

2. UNIF. PROTECTED SERIES ACT (U.P.S.A.) tit. p. (UNIF. LAW COMM'N 2017).

3. For a similar discussion on Texas specifically and why the Texas Legislature should adopt favorable provisions of the UPSA to its SLLC statute, see Allen Sparkman, *Should Texas Adopt All or Part of the Uniform Protected Series Act?*, 18 HOUS. BUS. & TAX L.J. 243 (2018).

4. See 1996 Del. Legis. Serv. Ch. 360 (West, Westlaw Delaware Laws 1996, ch. 360); see also DEL. CODE ANN. tit. 6, § 18-215 (West, Westlaw through 82 Laws 2019, ch. 4).

5. See 1996 Del. Legis. Serv. Ch. 362 (Westlaw); see also DEL. CODE ANN. tit. 6, § 17-218 (Westlaw).

6. The author has previously discussed the development of SLLCs. See Allen Sparkman, *Through the Looking Glass: Series LLCs in 2016*, 3 BUS. & BANKR. L.J. 1, 3-9 (2015). As of August 1, 2017, the jurisdictions that have enacted series legislation are Alabama (ALA. CODE § 10A-5A-11.01 (West, Westlaw through Act 2018-579)); Delaware (DEL. CODE ANN. tit. 6, § 18-215 (Westlaw)); District of Columbia (D.C. CODE § 29-802.06 (West, Westlaw through Feb. 22, 2019)); Illinois (805 ILL. COMP. STAT. 180/37-40 (West, Westlaw through P.A. 100-1180 of the 2018 Reg. Legis. Sess., and P.A. 101-1 of the 2019 Reg. Legis. Sess.)); Indiana (IND. CODE ANN. § 23-18.1-1-1-1-7-4 (West, Westlaw through 2018 2nd Reg. Legis. Sess.)); Iowa (IOWA CODE ANN. § 489.1201 (West, Westlaw through 2019 Reg. Legis. Sess.)). Iowa also provides for protected insurance cell companies. *Id.* § 521G.7. See Kansas (KAN. STAT. ANN. § 17-76,143 (West, Westlaw through 2018 Reg. Legis. Sess.)); Missouri (MO. REV. STAT. § 347.186 (West, Westlaw through 2018 2nd Reg. Legis. Sess.)); Montana (MONT. CODE ANN. § 35-8-202 (West, Westlaw through Feb. 28, 2019)) (requiring that the articles

Under Delaware law, and a majority of other states with SLLC legislation, an organizer forms a juridical LLC (the SLLC) and provides the power to form additional independent series in the company agreement.⁷ Once a certificate of formation is on file, an LLC can form one or more independent series pursuant to the procedure set forth in its company agreement.⁸ Each independent series must operate as a distinct entity for administrative and accounting purposes. Provided that each independent series is properly formed and separately maintained, the limited liability protection between and among each independent series and the SLLC remains.⁹

A minority of jurisdictions recognizing SLLCs allow an independent series within an SLLC to be treated as a separate entity,¹⁰ but those statutes still have commonality requirements, such as common reporting between the SLLC and each series and common registered agents.¹¹ Moreover, all of these separate-entity jurisdictions

of organization for a SLLC attach a list naming each series member and including their individual operating agreements and requires a filing fee of \$70 plus \$50 for each series member); Nevada (NEV. REV. STAT. 86.296 (West, Westlaw through 2019 Reg. Legis. Sess.)); Oklahoma (OKLA. STAT. tit. 18, § 2054.4 (West, Westlaw through 2018 2nd Reg. Legis. Sess.)); Puerto Rico (14 P.R. LAWS ANN. tit. 14, § 3967 (West, Westlaw through 2010 Reg. Legis. Sess.)); Tennessee (TENN. CODE ANN. § 48-249-309 (West, Westlaw through 2018 2nd Reg. Legis. Sess.)); Texas (TEX. BUS. ORGS. CODE ANN. § 101.601 (West, Westlaw through 2017 Reg. Legis. Sess.)); and Utah (UTAH CODE ANN. § 48-3a-1201 (West, Westlaw through 2018 3rd Spec. Legis. Sess.)). In addition, North Dakota and Wisconsin have legislation providing for entities known as SLLCs, but the statutes in these states do not provide for internal liability shields. *See* North Dakota (N.D. CENT. CODE § 10-32-02.57 (West, Westlaw through 2017 Reg. Legis. Sess.)); Wisconsin (WIS. STAT. § 183.0504 (West, Westlaw through 2017 Act 370)). Delaware law also provides for series limited partnerships. DEL. CODE ANN. tit. 6, § 17-218 (Westlaw). The District of Columbia, Illinois, Indiana, Iowa, Kansas, Missouri, and Utah SLLC statutes permit the SLLC to elect to treat individual series as separate entities. D.C. CODE § 29-802.06 (Westlaw); 805 ILL. COMP. STAT. 180/37-40 (Westlaw); IND. CODE ANN. § 23-18.1-1-1-.1-7-4 (Westlaw); IOWA CODE ANN. § 489.1201 (Westlaw); KAN. STAT. ANN. § 17-76,143 (Westlaw); MO. REV. STAT. § 347.186 (Westlaw); and UTAH CODE ANN. § 48-3a-1201(3)(a) (Westlaw). The District of Columbia, Illinois, and Kansas require the filing of a certificate for each series. Missouri requires the limited liability company to file “articles of organization that separately identify each series which is to have limited liability.” MO. REV. STAT. § 347.186.2 (1)(f) (Westlaw).

7. DEL. CODE ANN. tit. 6, § 18-215 (Westlaw).

8. *Id.*

9. *See id.*

10. These jurisdictions are the District of Columbia, Kansas, Illinois, Indiana, Iowa, Missouri, and Utah. D.C. CODE § 29-802.06 (Westlaw); 805 ILL. COMP. STAT. 180/37-40 (Westlaw); IND. CODE ANN. § 23-18.1-6-8-.1-6-9 (Westlaw); IOWA CODE ANN. § 489.1201 (Westlaw); KAN. STAT. ANN. § 17-76,143 (Westlaw); MO. REV. STAT. § 347.186 (Westlaw); and UTAH CODE ANN. § 48-3a-1201(3)(a) (Westlaw); *see supra* note 6; *see also infra* note 38 and accompanying text.

11. D.C. CODE § 29-802.06(p) (Westlaw); KAN. STAT. ANN. § 17-76,143(f) (Westlaw); 805 ILL. COMP. STAT. 180/37-40(f) (Westlaw); IOWA CODE ANN. § 23-18.1-6-9 (Westlaw), 23-18.1-6-8; *id.* §§ 489.113, 489.1201.7. The Iowa series provisions do not contain a registered agent provision. *Id.* §§ 489.113, 489.1201.7. Section 489.113 provides for the naming of a registered agent by a “limited liability company.” *Id.* § 489.113. Section 489.1201.7 provides that except as otherwise modified by the series provisions, the provisions generally applicable to a limited liability company apply to a series. *Id.* § 489.1201.7; *see also* MO. REV. STAT. § 347.186.4(e)(4) (Westlaw) (stating that the registered agent for a limited liability company will be the registered agent for each series). The Utah series provisions also do not contain a registered agent provision. *See* UTAH CODE ANN. §§ 48-

provide that an independent series is only in good standing if the SLLC is in good standing.¹² The UPSA does not provide for separate-entity treatment of a protected series formed under the UPSA.¹³

It appears that Delaware is the first state to respond to the UPSA; as of August 1, 2019, the term “protected series” appears in its LLC statute.¹⁴ Delaware also provides for “registered series.”¹⁵ The formation of a “registered series” requires the filing of a certificate of registered series stating:

- (i) The name of the limited liability company; and
- (ii) The name of the registered series.¹⁶

The name of a registered series must begin with the name of the limited liability company; this includes any word, abbreviation or designation required by § 18-102. The name may contain the name of a member or manager.¹⁷ The name may also include the following words: “Company, Association, Club, Foundation, Fund, Institute, Society, Union, Syndicate, Limited, Public Benefit or Trust (or abbreviations of like import)”¹⁸ but generally may not include the word “bank.”¹⁹

A registered series will be treated as a registered organization under Delaware’s UCC.²⁰ The statute provides:

The term [registered organization] also includes a series of a registered organization if the series is an organization formed or organized under the law of a single State and the statute of the State governing the

3a-111, -1201(6) (Westlaw). Section 48-3a-111 provides for the naming of a registered agent by a “limited liability company.” *Id.* § 48-3a-111. Section 48-3a-1201(6) states: “Except to the extent modified by this part, the provisions of this chapter which are generally applicable to a limited liability company, and its managers, members, and transferees, shall be applicable to each series with respect to the operations of such a series.” *Id.* § 48-3a-1201(6).

12. D.C. CODE § 29-802.06(g) (Westlaw) (“A series of a limited liability company shall be in good standing as long as the limited liability company is in good standing.”); 805 ILL. COMP. STAT. 180/37-40(e) (Westlaw) (“A series of a limited liability company will be deemed to be in good standing as long as the limited liability company is in good standing.”); IOWA CODE ANN. § 489.208 (Westlaw) (providing for issuance of a certificate of existence for a limited liability company; there is no separate provision for a series); KAN. STAT. ANN. § 17-76,143(e) (Westlaw) (same as Illinois); MO. REV. STAT. § 347.186.4(e)(3) (Westlaw) (same as Illinois); UTAH CODE ANN. § 48-3a-211 (Westlaw) (same as Iowa).

13. See U.P.S.A. §§ 104, 602 (UNIF. LAW COMM’N 2017).

14. See DEL. CODE ANN. tit. 6, § 18-215 (West, Westlaw through 82 Laws 2019, ch. 4) (effective Aug. 1, 2019).

15. *Id.* § 18-218(d).

16. *Id.* § 18-218(d)(1).

17. *Id.* § 18-218(e)(1)–(3).

18. *Id.* § 18-218(e)(4) (internal quotations omitted).

19. *Id.* § 18-218(e)(5).

20. *Id.* § 9-102(a)(71).

series requires that the public organic record of the series be filed with the State.²¹

This additional language should allow series formed under the UPSA or a statute that provides for separate entity treatment to be a registered organization. This will facilitate the filing of financing statements with respect to such series.

It is unfortunate that Delaware chose to have this statutory dichotomy: a form of series that requires the filing of a public document and one that does not. The lack of a notice requirement for the latter form is common in series jurisdictions other than those that permit a series to be treated as a separate entity.²²

III. ISSUES AND QUESTIONS ARISING UNDER EXISTING SERIES LEGISLATION

A. *Requirements for Forming a Series and Notice Requirements*

The series jurisdictions that do not treat a series as a separate entity generally do not require any notice of the formation of a series. Effective August 1, 2019, Delaware will require notice with respect to registered series via its certificate filing requirement.²³ Similarly, Texas requires that if the name of any series established by an SLLC differs from the name of the SLLC stated in its certificate of formation, the LLC must file an assumed name certificate for that series.²⁴

Prior to the enactment of Delaware's registered series provisions, the only notice required was a statement in the LLC's certificate of formation as to the limitation on liability of a series.²⁵ Notice is sufficient even if no series has been created, and there is no requirement that any specific series be referenced.²⁶ There is also currently no requirement in the Delaware statute that the name of a series include the word "series" or any other indication that it is a series of an SLLC.²⁷ Although these requirements will change for registered series once the new

21. *Id.*

22. *See supra* Part II.

23. *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-215(b) (Westlaw).

24. *See* TEX. BUS. & COM. CODE ANN. § 71.002(2)(H) (West, Westlaw through 2017 Reg. Legis. Sess.). There is a question as to whether the name of a series would not always vary from the name of the SLLC stated in its certificate of formation. This means Texas would always require an assumed name certificate for a named series—which may well be the intent of the statute.

25. DEL. CODE ANN. tit. 6, § 18-215(b) (Westlaw).

26. *Id.* ("The fact that a certificate of formation that contains the foregoing notice of the limitation on liabilities of a series is on file in the office of the Secretary of State shall constitute notice of such limitation on liabilities of a series."); Ann E. Conaway & Peter I. Tsoflias, *The Delaware Series LLC: Sophisticated and Flexible Business Planning*, 2 MICH. J. OF PRIV. EQUITY & VENTURE CAP. L. 97, 131 (2012). (noting it is "[p]robably" sufficient to state in the certificate of formation that the LLC "is a 'series LLC with all the limitations provided by law[.]'" but that it would be safer to track the language of the statute).

27. *See generally* DEL. CODE ANN. tit. 6 §§ 18-201 to -216 (Westlaw).

legislation becomes effective,²⁸ it will not change for protected series.²⁹ For example, a trade creditor (much less a tort creditor) dealing with “Able Company Ltd.” has no way of learning that Able Company Ltd. is a series of Baker LLC, even if he checks the website of the Delaware Secretary of State.³⁰ Although other series jurisdictions may require greater notice,³¹ the lack of any required particularized notice by the

28. See DEL. CODE ANN. tit. 6, § 18-215 (West, Westlaw through 82 Laws 2019, ch. 4) (effective Aug. 1, 2019).

29. *Id.* § 18-215(b).

30. See STATE OF DELAWARE, <https://corp.delaware.gov/> (last visited Feb. 29, 2019) (follow “Search for a Business Entity” hyperlink to search for entities). This assumes that the stationary, invoices, emails, or other documents of Able Company Ltd. do not contain any references to its being a series of Baker LLC. Whether this fact pattern or any variations thereof may create other issues, such as liability for acting for an undisclosed principal or for a deceptive trade practice, is beyond the scope of this article.

31. For example, in Texas, if the name of any series established by an SLLC differs from the name of the SLLC stated in its certificate of formation, the LLC must file an assumed name certificate for that series. TEX. BUS. & COM. CODE ANN. § 71.051 (West, Westlaw through 2019 Reg. Legis. Sess.). Query whether the name of a series would not always vary from the name of the SLLC stated in its certificate of formation—which means Texas would always require an assumed name certificate for a named series—which may well be the intent of the statute. See TEX. BUS. & COM. CODE ANN. § 71.002(2)(H) (West, Westlaw through 2017 Reg. Legis. Sess.). In Missouri, the form Articles of Organization (LLC-1) requires the identification of each series and that each separate series file an Attachment Form L.L.C.IA. *Form: Articles of Organization*, MO. SEC’Y OF STATE, <https://www.sos.mo.gov/CMSImages/Business/llc1.pdf?v=2> (last visited May 14, 2019). The Missouri statute requires that an LLC file articles of organization “that separately identify each series which is to have limited liability” MO. REV. STAT. § 347.186.2(1)(f) (West, Westlaw through 2018 2nd Reg. Legis. Sess.). Further, Missouri requires the name of each series to include the entire name of the limited liability company and be distinguishable from the name of any other series. *Id.* § 347.186.(3). Montana requires that the operating agreement of each series be in writing and filed with the Articles of Organization. MONT. CODE ANN. § 35-8-202(1)(h) (West, Westlaw through Feb. 28, 2019). The District of Columbia, Illinois, and Kansas require the filing of a certificate for each series. D.C. CODE § 29-802.06(d)(1) (West, Westlaw through Feb. 22, 2019) requires that a certificate of series designation state a different name for each series that contains the entire name of the limited liability company. 805 ILL. COMP. STAT. 180/37-40(c) (West, Westlaw through P.A. 100-1181 of the 2018 Reg. Sess., and P.A. 101-1 of the 2019 Reg. Legis. Sess.) requires that a series with limited liability have a name that “commence[s] with the entire name of the limited liability company, as set forth in its articles of incorporation, and be distinguishable from the names of the other series [as] set forth in the articles of organization.” IND. CODE ANN. § 23-18.1-6-7 (West, Westlaw through 2018 2nd Reg. Legis. Sess.) requires that the name of a series with limited liability (1) contain the entire name of the master limited liability company, (2) contain the word “series”, (3) be distinguishable from the names of the other series set forth in the articles of organization of the master limited liability company or the articles of designation filed for any other series of the master limited liability company, and (4) be distinguishable from the names of any LLC or other business entity reserved or organized under the laws of Indiana or authorized to transact business in Indiana; IOWA CODE ANN. § 489.1201.(1) (West, Westlaw through 2019 Reg. Legis. Sess.) provides that “[t]he name of each series must contain the name of the limited liability company and be distinguishable from the name of any other series as set forth in the certificate of organization.” KAN. STAT. ANN. § 17-76,143(c) (West, Westlaw through 2018 Reg. Legis. Sess.) provides that “the name of the series with limited liability must contain the entire name of the limited liability company and be distinguishable from the names of the other series set forth in the articles of organization.” Utah requires that the name of each series include the name of the limited liability company and be distinguishable from the name of any other series. UTAH CODE ANN. § 48-3a-1201(1) (West, Westlaw through 2018 3rd Spec. Legis. Sess.). The Utah notice provision, however, is like Delaware’s in that the notice required in the certificate of organization is sufficient

Delaware statute is serious because most SLLCs are formed in either Delaware or Nevada, which has similar notice requirements.³²

To establish a protected series under the UPSA, § 201(b) requires an SLLC to file a protected series designation that states both the name of the SLLC and the name of the protected series.³³ Moreover, UPSA § 202(b) requires that the name of a protected series begin with the name of the SLLC and contain the phrase “protected series” or the abbreviation “P.S.” or “PS.”³⁴ For example, if an SLLC named Bluebonnet LLC formed two series—Magnolia and Paint Brush—the series’ names would have to be: Bluebonnet LLC Magnolia Protected Series and Bluebonnet LLC Paint Brush Protected Series. As noted, the term “protected series” may be abbreviated.³⁵ The author does not believe that there is a good policy reason for requiring that the name of a series begin with the name of the SLLC. Why shouldn’t the names be: Magnolia, a Protected Series of Bluebonnet LLC and Paint Brush, a Protected Series of Bluebonnet LLC?³⁶ The author submits that this feature of the UPSA should be considered for adoption by all series jurisdictions that do not already have comparable provisions in their SLLC legislation.

B. What Powers Does an Individual Series Possess?

Under the majority of state SLLC acts,³⁷ the entity for state law purposes is the juridical LLC (that is, the LLC actually formed by a filing with the state filing office) and not an individual series within the LLC.³⁸

even if no series has been established—and the notice is not required to reference a specific series. *Id.* § 48-3a-1202.

32. J. Leigh Griffith & James E. Long, Jr., *Series LLCs—December 2013 Update on Recent State Legislative and Taxation Developments*, 55 TAX MGMT. MEMORANDUM 83, 89 (2014) (reporting that of the approximately 37,000 SLLCs that were formed as of 2013, almost 26,000 were formed either in Delaware or in Nevada and that Nevada does not appear to require any more meaningful notice than Delaware). *But see id.* at 90 (stating the large number of SLLCs in Nevada may be misleading because “the Nevada Secretary of State’s form for the formation of LLCs has a box to check if the LLC is a series LLC. It may well be that a significant percentage of the Nevada LLCs are series LLCs due to businessmen forming their own LLCs, using the Secretary of State form, and checking a box for which they have no understanding and in fact have no intention of forming any series.”).

33. U.P.S.A. § 201(b) (UNIF. LAW COMM’N 2017). For the public notice requirement, *see id.* § 204.

34. *Id.* § 202(b).

35. *See id.*

36. *See id.*

37. *See* ALA. CODE § 10A-5A-11.01 (West, Westlaw through Act 2018-579); DEL. CODE ANN. tit. 6, § 18-215 (West, Westlaw through 82 Laws 2019, ch. 4.); MONT. CODE ANN. § 35-8-202 (West, Westlaw through Feb. 28, 2019); NEV. REV. STAT. 86.296 (West, Westlaw through 2019 Reg. Legis. Sess.); OKLA. STAT. tit. 18, § 2054.4 (West, Westlaw through 2018 2nd Reg. Legis. Sess.); 14 P.R. LAWS ANN. tit. 14, § 3967 (West, Westlaw through 2010 Reg. Legis. Sess.); TENN. CODE ANN. § 48-249-309 (West, Westlaw through 2018 2nd Reg. Legis. Sess.); TEX. BUS. ORGS. CODE ANN. § 101.601 (West, Westlaw through 2017 Reg. Legis. Sess.).

38. D.C. CODE § 29-802.06 (West, Westlaw through Feb. 22, 2019); 805 ILL. COMP. STAT. 180/37-40 (West, Westlaw through P.A. 100-1180 of the 2018 Reg. Legis. Sess., and P.A. 101-1 of the 2019 Reg. Legis. Sess.); IND. CODE ANN. § 23-18.1-1-1-7-4 (West, Westlaw through 2018 2nd

Stated differently, an individual series within an SLLC is not a separate entity under the laws of Delaware or any of the other series jurisdictions other than the District of Columbia, Kansas, Illinois, Indiana, Iowa, Missouri, and Utah.³⁹ Even so, an individual series has “the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued[.]”⁴⁰ but an individual series may not enter into a merger or conversion because the individual series is not a separate entity.⁴¹ This approach also appears in the UPSA.⁴²

For example, although the applicable statutes are silent on this, presumably a member could transfer not just the member’s interest in the SLLC, but also the member’s status associated with one or more series. It would seem that a member’s association with a series would be viewed by a court as a property right, and courts favor the free alienability of property.⁴³ It is unclear to what extent such a transfer would be permitted by the UPSA. Section 302(b) of the UPSA provides that a person becomes an associated member of a protected series pursuant to an agreed-on procedure that, *inter alia*, “states . . . any

Reg. Legis. Sess.); IOWA CODE ANN. § 489.1201 (West, Westlaw through 2019 Reg. Legis. Sess.); KAN. STAT. ANN. § 17-76,143 (West, Westlaw through 2018 Reg. Legis. Sess.); MO. REV. STAT. § 347.186 (West, Westlaw through 2018 2nd Reg. Legis. Sess.); and UTAH CODE ANN. § 48-3a-1201(3)(a) (West, Westlaw through 2018 3rd Spec. Legis. Sess.). It is unclear that the term “separate entity” or even the term “juridical entity” has an accepted meaning. *See* Thomas E. Rutledge, *External Entities and Internal Aggregates: A Deconstructionist Conundrum*, 42 SUFFOLK U. L. REV. 655, 680 (2009); David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STANFORD AGORA 39, 58 (2001), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=264141. Humpty Dumpty would feel right at home. LEWIS CARROL, *THROUGH THE LOOKING GLASS* 57 (Cosimo, Inc.) (1865) (“When I use a word . . . it means just what I choose it to mean—neither more nor less.”).

39. *See* U.P.S.A. § 201 (UNIF. LAW COMM’N 2017); DEL. CODE ANN. tit. 6, § 18-215 (Westlaw).

40. *E.g.*, DEL. CODE ANN. tit. 6, § 18-215(c) (Westlaw).

41. *Id.* Delaware permits a “domestic limited liability company” to enter into a merger or conversion. *Id.* § 18-209(a). Further, Delaware defines a “limited liability company” and a “domestic limited liability company” as “a limited liability company formed under the laws of the State of Delaware and having 1 or more members.” *Id.* § 18-101(6). An individual series within an SLLC is not “formed” under Delaware law but rather only exists pursuant to the limited liability company agreement of the SLLC. *See id.* § 18-215(b). Members are not admitted as members of an individual series but are members of the SLLC who are then “associated” with one or more series. *See id.* § 18-215(d); *see also id.* § 18-215(e)–(g). A member may or may not have any economic interest in the SLLC itself; the member’s economic interest may be tied only to one or more series. This is also the case with a series of a District of Columbia SLLC even though the District of Columbia allows separate entity treatment for a series. D.C. CODE § 29-802-06(o) (West, Westlaw through Dec. 13, 2018) (“A series of a limited liability company shall not engage in a transaction under subchapter IX of this chapter or Chapter 2 of this title independently of the limited liability company.”). Taken together, the provisions of the Delaware statute discussed above in the text accompanying notes 25 through 32 clearly provide that an individual series of a Delaware SLLC is not a separate legal entity. *Accord* Conaway & Tsouflas *supra* note 26, at 126–27 (noting that the existence of a series under Delaware law is entirely derivative of the SLLC). This analysis would also apply to individual series of SLLCs formed under the SLLC statutes of the other jurisdictions listed in note 6 other than the District of Columbia, Kansas, Illinois, Iowa, Missouri, and Utah.

42. *See* U.P.S.A. §§ 102(1), 104(a), 602 (UNIF. LAW COMM’N 2017).

43. *United States v. Evans*, 844 F.2d 36, 42 (2d Cir. 1988).

protected series transferable interest the associated member has in connection with becoming or being an associated member.”⁴⁴

Section 302(c) of the UPSA states that “if a person that is an associated member of a protected series of a series limited liability company is dissociated from the company, the person ceases to be an associated member of the protected series.”⁴⁵ It is unclear whether § 302 would permit a provision that allows an associated member of a protected series to transfer the member’s transferable interest if the transfer would cause the member to be dissociated from the company.

Likewise, because the powers of an individual series include the power to contract and hold title to assets,⁴⁶ presumably an individual series might be admitted as a member of another LLC, whether or not the other LLC is an SLLC, and could acquire other equity interests, such as corporate stock. These powers would permit an individual series to become a member of the SLLC that created it and then be associated with other series. Admittedly, this possibility brings to mind the image of a snake swallowing itself, but its existence adds to the potential confusion that may result from statements that individual series are not separate legal entities. The UPSA prohibits a protected series from being a member of the SLLC of which it is a protected series and from establishing another protected series.⁴⁷ The author submits that this provision of the UPSA represents a welcome clarification that should also be considered for adoption by the existing SLLC jurisdictions.

C. *Significance of Separate Entity Status*

It is unclear what it means in practice that the governing law of a series jurisdiction treats a series as a separate entity or allows such treatment. For example, in Illinois, Indiana, Iowa, Kansas, Missouri, and Utah, six of the seven series jurisdictions that permit a series to be treated as a separate entity, the applicable statutory language speaks of “members associated with a series.”⁴⁸ However, Utah also refers to

44. U.P.S.A. § 302(b) (UNIF. LAW COMM’N 2017).

45. *Id.* § 302(c).

46. *E.g.*, DEL. CODE ANN. tit. 6, § 18-215(c) (Westlaw).

47. U.P.S.A. § 201(a) (UNIF. LAW COMM’N 2017).

48. 805 ILL. COMP. STAT. 180/37-40(i) (West, Westlaw through P.A. 100-1180 of the 2018 Reg. Legis. Sess., and P.A. 101-1 of the 2019 Reg. Legis. Sess.); IND. CODE ANN. § 23-18.1-4-3 (West, Westlaw through 2018 2nd Reg. Legis. Sess.); IOWA CODE ANN. § 489.1201.5 (West, Westlaw through 2019 Reg. Legis. Sess.); KAN. STAT. ANN. § 17-76,143(i) (West, Westlaw through 2018 Reg. Legis. Sess.); MO. REV. STAT. § 347.186.5(3) (West, Westlaw through 2018 2nd Legis. Sess.); UTAH CODE ANN. § 48-3a-1204(4) (West, Westlaw through 2018 3rd Spec. Legis. Sess.); *see also* 805 ILL. COMP. STAT. 180/37-40(g)-(h) (Westlaw) (using similar language as 805 ILL. COMP. STAT. 180/37-40(i)); IOWA CODE ANN. § 489.1201.6 (Westlaw) (using similar language as IOWA CODE ANN. § 489.1201.5); KAN. STAT. ANN. § 17-76,143(g), (h), and (l) (Westlaw) (using similar language as KAN. STAT. ANN. § 17-76,143(i)).

“members of the series” and “the series members.”⁴⁹ The District of Columbia SLLC provisions do not contain the “members associated with” language, but do refer to “member[s] . . . of a series.”⁵⁰ Further, the District of Columbia statute defines “member” as “a person that has become a member of a limited liability company under [§] 29-804.01.”⁵¹ None of these series provisions provide a mechanism for a person to be admitted as a member of a series without admission to membership in the SLLC. Arguably, statutory authority for such admission might be found in the language providing, as Illinois does, that each series with limited liability may “otherwise conduct business and exercise the powers of a limited liability company under this Act.”⁵² Indiana, Iowa, Kansas, Missouri, and Utah have similar provisions.⁵³

The District of Columbia provision produces results similar to the aforementioned jurisdictions despite different wording.⁵⁴ There is simply no guidance available; admission as a member of a series appears inconsistent with the “members associated with a series” language of all of the separate entity SLLC statutes other than that of the District of Columbia.⁵⁵ Interestingly, only Tennessee, which does not permit separate entity treatment for a series, clearly allows members to

49. UTAH CODE ANN. § 48-3a-1205 (Westlaw). Section 48-3a-1204, series related provisions in the operating agreement, speaks exclusively of “members associated.” Section 48-3a-401, admission of members, speaks only of members being admitted to a limited liability company. Section 48-3a-1201(1), however, is unusual in that, unlike Delaware and other series jurisdictions, it provides that an LLC may establish one or more “series of transferable interests[.]” Delaware provides that an LLC may establish one or more “designated series of members, managers, limited liability company interests or assets.” DEL. CODE ANN. tit. 6, § 18-215(a) (Westlaw).

50. D.C. CODE ANN. § 29-802.06(k)(2) (West, Westlaw through Feb. 22, 2019); *see id.* § 29-802.06(a), (c), (h), (l) (using similar language as D.C. CODE ANN. § 29-802.06(k)(2)).

51. *Id.* § 29-801.02(8).

52. 805 ILL. COMP. STAT. ANN. 180/37-40(b) (Westlaw).

53. IND. CODE ANN. § 23-18.1-1-4 (Westlaw) (stating that, except as otherwise provided in the series provision, the Indiana LLC statute “is generally applicable to all series limited liability companies”); IOWA CODE ANN. § 489.1201.7 (Westlaw) (“Except to the extent modified by this article, the provisions of this chapter which are generally applicable to a limited liability company, and its managers, members and transferees, shall be applicable to each series with respect to the operations of such series.”); KAN. STAT. ANN. § 17-76,143(j) (Westlaw) (“Except to the extent modified in this section, the provisions of this act which are generally applicable to limited liability companies, their managers, members and transferees shall be applicable to each particular series with respect to the operation of such series.”); MO. REV. STAT. ANN. § 347.186.5.(4) (Westlaw) (“Except as modified in this section, the provisions of this chapter which are generally applicable to limited liability companies and their managers, members, and transferees shall be applicable to each particular series with respect to the operation of such series.”); UTAH CODE ANN. § 48-3a-1201(6) (Westlaw) (“Except to the extent modified by this part, the provisions of this chapter which are generally applicable to a limited liability company, and its managers, members, and transferees, shall be applicable to each series with respect to the operations of such a series.”).

54. *See* D.C. CODE ANN. § 29-802.06(r) (Westlaw) (“In all matters not otherwise specifically addressed in this section, this chapter shall govern a series as if the series of the limited liability company were a separate limited liability company formed under this chapter.”).

55. *See supra* notes 48–53 and accompanying text.

be admitted at the series level.⁵⁶ The UPSA states that only a member of an SLLC may be an associated member of a protected series of the SLLC; accordingly, members must be admitted at the SLLC level under the UPSA.⁵⁷

Similar to the “members associated with a series”⁵⁸ language, the statutes of all of the series jurisdictions that permit a series to be a separate entity refer to “the assets associated with any such series.”⁵⁹ Although most series jurisdictions provide that a series may take title to property in the name of the series,⁶⁰ no SLLC statute speaks of assets being owned by a series but, rather, associated with a series.⁶¹ Some statutory language does suggest actual ownership.⁶² The UPSA distinguishes among assets that are associated assets of a protected series, assets that are associated assets of the SLLC, and assets that are neither associated assets of a protected series or of the SLLC.⁶³ This distinction under the UPSA is significant because the UPSA provides that claims against the SLLC or a protected series may be enforced against non-associated assets.⁶⁴

Even though the District of Columbia SLLC statute allows separate entity treatment for a series, the statute provides that a series may not engage in a merger, conversion, or interest exchange apart from the

56. TENN. CODE ANN. § 48-249-309(f) (West, Westlaw through 2018 2nd Reg. Legis. Sess.) (“Parts 4 and 5 of this chapter shall apply to a series of an LLC, as if the series were a separate LLC.”); *id.* § 48-249-501 (providing for admission of members).

57. U.P.S.A. § 302(a) (UNIF. LAW COMM’N 2017); *see infra* Part III.E.

58. *See supra* Part III.B.

59. 805 ILL. COMP. STAT. ANN. 180/37-40(b) (West, Westlaw through P.A. 100-1180 of the 2018 Reg. Legis. Sess., and P.A. 101-1 of the 2019 Reg. Legis. Sess.); IND. CODE ANN. § 23-18.1-5-2 (West, Westlaw through 2018 2nd Reg. Legis. Sess.); IOWA CODE ANN. § 489.1201.2.b (West, Westlaw through 2019 Reg. Legis. Sess.); KAN. STAT. ANN. § 17-76,143(b) (West, Westlaw through 2018 Reg. Legis. Sess.); MO. REV. STAT. § 347.186.2(1)(c) (West, Westlaw through 2018 2nd Reg. Legis. Sess.); *see* D.C. CODE § 29-802.06(b)(2), (g), (h), (i) (Westlaw); UTAH CODE ANN. § 48-3a-1201(2)(c) (West, Westlaw through 2018 3rd Spec. Legis. Sess.).

60. *See* ALA. CODE § 10A-5A-11.01 (West, Westlaw through Act 2018-579); DEL. CODE ANN. tit. 6, § 18-215 (West, Westlaw through 82 Laws 2019, ch. 4.); D.C. CODE § 29-802.06(r) (Westlaw); 805 ILL. COMP. STAT. 180/37-40 (Westlaw); IOWA CODE ANN. § 489.1201 (Westlaw); KAN. STAT. ANN. § 17-76,143 (Westlaw); MO. REV. STAT. § 347.186 (Westlaw); MONT. CODE ANN. § 35-8-202 (West, Westlaw through Feb. 28, 2019); NEV. REV. STAT. § 86.296 (West, Westlaw through 2019 Reg. Legis. Sess.); OKLA. STAT. tit. 18, § 2054.4 (West, Westlaw through 2018 2nd Reg. Legis. Sess.); 14 P.R. LAWS ANN. tit. 14, § 3967 (West, Westlaw through 2010 Reg. Legis. Sess.); TENN. CODE ANN. § 48-249-309 (Westlaw); TEX. BUS. ORGS. CODE ANN. § 101.601 (West, Westlaw through 2017 Reg. Legis. Sess.); UTAH CODE ANN. § 48-3a-1201 (Westlaw).

61. 805 ILL. COMP. STAT. 180/37-40(b) (Westlaw); IOWA CODE ANN. § 489.1201.2.b (Westlaw); KAN. STAT. ANN. § 17-76,143(b) (Westlaw); MO. REV. STAT. § 347.186.2(1)(c) (Westlaw); *see* D.C. CODE § 29-802.06(b)(2), (g), (h), (i) (Westlaw); UTAH CODE ANN. § 48-3a-1201(2)(c) (Westlaw).

62. ALA. CODE § 10A-5A-1.04(d)(3) (Westlaw) (providing that a series has the power and capacity to hold and convey title to assets of the series); IOWA CODE ANN. § 489.1201.2 (Westlaw) (stating that debts of a series are enforceable “against the assets of that series only”); *id.* § 489.1202.3.d(1) (referring to “the series’ property”).

63. U.P.S.A. §§ 301, 404 (UNIF. LAW COMM’N 2017); *see infra* Part IV.I.

64. U.P.S.A. § 404(b) (UNIF. LAW COMM’N 2017).

SLLC.⁶⁵ On the other hand, Illinois provides that each series with limited liability may “otherwise conduct business and exercise the powers of a limited liability company under this Act.”⁶⁶ Indiana, Iowa, Kansas, Missouri, and Utah have similar provisions.⁶⁷ The scope and effect of these provisions is uncertain. For example, do the provisions mean that an individual series of an Illinois SLLC could merge with another entity? If so, what would that look like in practice? Could a series of Illinois (SLLC A) merge with a series created by another Illinois SLLC (SLLC B)? If so, what relationship would the survivor have with either SLLC? What happens if the merging series of SLLC A is the survivor? Must the company agreement of SLLC A provide for the consequences of such a merger? If the merging series of SLLC A is not the survivor, does it then follow that the series of SLLC B that was a party to the merger has no relationship with SLLC A?⁶⁸ In either case, will the surviving series remain as a series of the SLLC that created it? Will all of this depend on the provisions of the company agreements of the SLLCs and the merger agreement? What additional questions might arise if a series of SLLC A is a party to a merger with a non-series LLC or a corporation?

The UPSA brings welcome clarity to the concept of mergers involving SLLCs or their series.⁶⁹ The UPSA provides that a protected

65. See D.C. CODE ANN. § 29-802.06(o) (Westlaw).

66. 805 ILL. COMP. STAT. ANN. 180/37-40(b) (Westlaw).

67. IND. CODE ANN. § 23-18.1-1-4 (West, Westlaw through 2018 2nd Reg. Legis. Sess.) (stating that, except as otherwise provided in the series provision, the Indiana LLC statute “is generally applicable to all series limited liability companies”); IOWA CODE ANN. § 489.1201.7 (West, Westlaw through 2019 Reg. Legis. Sess.) (“Except to the extent modified by this article, the provisions of this chapter which are generally applicable to a limited liability company, and its managers, members and transferees, shall be applicable to each series with respect to the operations of such series.”); KAN. STAT. ANN. § 17-76,143(j) (West, Westlaw through 2018 Reg. Legis. Sess.) (“Except to the extent modified in this section, the provisions of this act which are generally applicable to limited liability companies, their managers, members and transferees shall be applicable to each particular series with respect to the operation of such series.”); MO. REV. STAT. § 347.186.5.(4) (West, Westlaw through 2018 2nd Reg. Legis. Sess.) (“Except as modified in this section, the provisions of this chapter which are generally applicable to limited liability companies and their managers, members and transferees, shall be applicable to each particular series with respect to the operation of such series.”); UTAH CODE ANN. § 48-3a-1201(6) (West, Westlaw through 2018 3rd Spec. Legis. Sess.) (“Except to the extent modified by this part, the provisions of this chapter which are generally applicable to a limited liability company, and its managers, members, and transferees shall be applicable to each series with respect to the operations of such a series.”).

68. The separate existence of the non-surviving series presumably would cease pursuant to 180/37-30(a)(2), and “all property owned by” the non-surviving series would become the property of the surviving series. See 805 ILL. COMP. STAT. ANN. 180/37-30(a)(1)-(2) (Westlaw). The merger of a series could raise issues about what property was “owned by” the series. See *id.* 180/37-40(b). The Illinois series provisions, like all others, refer to “the assets associated with any such series.” *Id.* The statutes of the other series jurisdictions that permit a series to be a separate entity contain similar language referring to assets being associated with a series, rather than being owned by a series or just being assets of a series. D.C. CODE ANN. §§ 29-802.06(b)(2), (g)-(i) (Westlaw); IOWA CODE ANN. § 480.1201.2 (Westlaw); § 17-76,143(b); MO. REV. STAT. § 347.186.2.(1)(c) (Westlaw); UTAH CODE ANN. § 48-3a-1201(2)(c) (Westlaw). If the plan of merger could provide that the merging SLLC A would be the survivor, would it become a series of SLLC B?

69. See *infra* Part IV.M.

series may not engage in any entity transaction.⁷⁰ The UPSA also provides that an SLLC may not engage in any entity transaction except that an SLLC may be a party to a merger if each other party to the merger is an LLC and the surviving company is not created in the merger.⁷¹ It is not clear that the SLLC itself needs to be this restricted. For example, what would the potential harm be if a corporation merged into an SLLC in a transaction in which the corporation was not the survivor? The plan of merger could provide for what would happen to the assets and shareholders—whether they would become assets of the SLLC or of one or more of its series and, likewise, whether the shareholders would be associated with one or more of the series of the surviving SLLC.

All of the SLLC statutes providing for separate entity treatment also provide, like the Delaware statute and other non-separate entity states, that if the notice and recordkeeping requirements are satisfied, then the debts and obligations of a series are not enforceable against the assets of the SLLC or any other series.⁷² This is confusing because debts of a non-series entity ordinarily would not be considered those of the entity's owners because the entity is a separate legal entity.⁷³ Accordingly, the question arises, if individual series are truly separate entities under the District of Columbia, Illinois, Indiana, Iowa, Kansas, Missouri, and Utah LLC statutes, why is the series rule regarding internal liability shields needed? Is it just cautious drafting? Additionally, if a series of a District of Columbia, Illinois, Indiana, Iowa, Kansas, Missouri or Utah LLC is truly a separate entity, why do all of these jurisdictions require that a series have the same registered agent as the LLC?⁷⁴ Moreover, all of these jurisdictions provide that a series is in good standing only if the LLC is in good standing.⁷⁵ Finally, if a series in one of

70. U.P.S.A. § 602 (UNIF. LAW COMM'N 2017).

71. U.P.S.A. §§ 603, 604 (UNIF. LAW COMM'N 2017).

72. D.C. CODE ANN. § 29-802.06(g) (Westlaw); 805 ILL. COMP. STAT. 180/37-40(e); IND. CODE ANN. § 23-18.1-5-1 (West, Westlaw through 2018 Reg. Legis. Sess.); IOWA CODE ANN. § 489.1201.2 (Westlaw); KAN. STAT. ANN. § 17-76,143(e) (West, Westlaw through 2018 Reg. Legis. Sess.); MO. REV. STAT. § 347.186.2.(1)(c) (Westlaw); UTAH CODE ANN. § 48-3a-1202 (Westlaw).

73. See BAYLESS MANNING, A CONCISE TEXTBOOK ON LEGAL CAPITAL 6 (2d ed. 1981).

74. See *supra* note 11 and accompanying text.

75. D.C. CODE ANN. § 29-802.06(g) (Westlaw) ("A series of a limited liability company shall be in good standing as long as the limited liability company is in good standing."); 805 ILL. COMP. STAT. 180/37-40(e) (Westlaw) ("A series of a limited liability company will be deemed to be in good standing as long as the limited liability company is in good standing."); IND. CODE ANN. § 23-18-12-9 (Westlaw) (repealed effective Jan. 1, 2018) (providing for issuance of a certificate of existence for a limited liability company; there is no separate provision for a series; however, § 23-18.1-6-9(b) provides that the biennial report of the master limited liability company serves as the biennial report for each of its series); IOWA CODE ANN. § 489.208 (Westlaw) (providing for issuance of a certificate of existence for a limited liability company; there is no separate provision for a series); KAN. STAT. ANN. § 17-76,143(e) (Westlaw) (same as Illinois); MO. REV. STAT. § 347.186.4(e)(3) (Westlaw) (same as Illinois); UTAH CODE ANN. § 48-3a-211 (Westlaw) (same as Iowa).

these states can truly do anything any LLC can do,⁷⁶ is there any reason to use an SLLC in these states other than to save on filing fees?⁷⁷

Because of these uncertainties,⁷⁸ the author has always admired the District of Columbia series legislation. One will save no money on filing fees in the District of Columbia. Formation of each series requires the filing of a certificate of designation for a series and the payment of a \$220 filing fee, which is also the filing fee for a certificate of organization for an LLC.⁷⁹ Moreover, even though the District of Columbia SLLC statute allows separate entity treatment for a series (for no apparent

76. However, a series of a District of Columbia SLLC cannot engage in a merger, conversion, or interest exchange apart from the SLLC. D.C. CODE ANN. § 29-802.06(o) (Westlaw). This also appears to be the case in Indiana, as the merger provisions of the Indiana series provisions deal only with mergers of the SLLC. IND. CODE ANN. § 23-18.1-1-3 (Westlaw).

77. The filing fee in Illinois to form an LLC is \$500; to form a SLLC, the Illinois fee is \$750. *Business Services: LLC Articles of Organization*, OFFICE OF THE SECRETARY OF STATE JESSE WHITE, https://www.cyberdriveillinois.com/departments/business_services/organization/llc_instructions.html (last visited Mar. 15, 2019). Filing fees in other series jurisdictions are as follows: Alabama: Certificate of formation of LLC is \$100; Delaware: Certificate of formation for LLC is \$90. Delaware offers expedited service for fees ranging up to \$100 for one hour service; District of Columbia: Certificate of organization for LLC is \$220; certificate of designation for a series is \$220; Indiana: Articles of organization for an LLC is \$75 (online) and \$100 (paper); filing fee for a master LLC is \$225 (online) and \$250 (paper); Kansas: Articles of organization for LLC is \$165; Certificate of designation for a series is \$100; Iowa: Certificate of organization for LLC is \$50; Missouri: Certificate of formation for LLC is \$50 (online) and \$105 (paper); Montana: Certificate of formation for SLLC is \$70 plus \$50 for each series member; Oklahoma: Articles of organization for LLC is \$100; Tennessee: Articles of organization for LLC is \$50 per member with a minimum of \$300, and a maximum of \$3,000; Texas: Certificate of formation for LLC is \$300; Utah: Certificate of organization for LLC is \$70. *Domestic Limited Liability Company Certificate of Formation*, ALABAMA SECRETARY OF STATE, <http://www.sos.alabama.gov/downloads/business/sosdf-8.pdf> (last visited Mar. 15, 2019); *Division of Corporations Fee Schedule*, DEL. DEPT. OF STATE (2009), <https://corp.delaware.gov/Aug09feesch.pdf> (last visited Mar. 15, 2019); *Corporations Division Fees – Limited Liability Company*, DEP'T OF CONSUMER AND REGULATORY AFFAIRS, <http://dcra.dc.gov/book/fees-corporate-registration-services/corporations-division-fees-limited-liability-company> (last visited Mar. 15, 2019); *Filings & Forms-Business Entities*, STATE OF KANSAS OFFICE OF THE SECRETARY OF STATE, https://www.sos.ks.gov/forms/business_services/DLLP.pdf (last visited Mar. 15, 2019); *Business Entity Forms and Fees*, IOWA SECRETARY OF STATE, PAUL D. PATE, <http://sos.iowa.gov/business/formsandfees.html> (last visited Mar. 15, 2019); *Schedule of Fees and Charges*, STATE OF MISSOURI, <http://s1.sos.mo.gov/CMSImages/Business/ScheduleofCorporationfeesandcharges.pdf> (last visited Mar. 15, 2019); *Business Services Filing Fees*, MONT. SECRETARY OF STATE, http://sos.mt.gov/business/forms/LLC/19A-ArticlesofOrganization_for_Domestic_LLC.pdf (last visited Mar. 15, 2019); *Oklahoma Secretary of State Filing Fees*, OKLA. SECRETARY OF STATE, <https://www.sos.ok.gov/business/fees.aspx> (last visited Mar. 15, 2019); *Articles of Organization Limited Liability Company*, TENNESSEE SECRETARY OF STATE, <http://www.tn.gov/sos/forms/ss-4270.pdf> (last visited Mar. 15, 2019); *Form 205—General Information: Certificate of Formation—Limited Liability Company*, STATE OF TEX., http://www.sos.state.tx.us/corp/forms/205_boc.pdf (last visited Mar. 15, 2019); *Certificate of Organization Instructions*, STATE OF UTAH DEP'T OF COMMERCE, <http://corporations.utah.gov/pdf/llc%20domestic%20instructions.pdf> (last visited Mar. 15, 2019).

78. *E.g.*, if a series is allowed to participate in a merger or the variation in filing fees.

79. D.C. CODE ANN. §§ 29-802.06(b)(4), (e) (Westlaw).

reason), the statute provides that a series may not engage in a merger, conversion, or interest exchange apart from the SLLC.⁸⁰ The author submits that all series jurisdictions that currently allow a series to be treated as a separate entity⁸¹ would do well to adopt the approach of the UPSA. It is not apparent that there is any advantage in the separate entity treatment and, as discussed above, if a series were to start acting like a true separate entity by engaging in mergers and the like, there would be serious unanswered questions about what that would look like in practice.⁸²

D. Information Rights

Information rights present another issue that is complicated by a series structure. In Delaware, each “member of a limited liability company” is entitled to inspect certain records of the LLC.⁸³ Unless limited by agreement, each member associated with an SLLC has the right to examine all of the records of the LLC.⁸⁴ The breadth and ambiguity of Delaware’s (and other series jurisdictions’) information rights provisions makes it important for the parties to think about what they want and for the company agreement to be drafted accordingly. Indeed, the company agreement should clearly articulate the information rights of the members no matter the state of formation, or whether the LLC is a series, instead of relying on a court to apply statutory provisions in a way that is acceptable to the parties.⁸⁵ The UPSA somewhat clarifies the rights of a member of the LLC to information about a protected series of the SLLC if the member is not an associated member of the protected series.⁸⁶

80. *Id.*

81. *See* D.C. CODE § 29-802.06 (Westlaw); 805 ILL. COMP. STAT. 180/37-40 (West, Westlaw through P.A. 100-1180 of the 2018 Reg. Legis. Sess., and P.A. 101-1 of the 2019 Reg. Legis. Sess.); IND. CODE ANN. § 23-18.1-1-1-.1-7-4 (Westlaw); IOWA CODE ANN. § 489.1201 (West, Westlaw through 2019 Reg. Legis. Sess.); KAN. STAT. ANN. § 17-76,143 (West, Westlaw through 2018 Reg. Legis. Sess.); MO. REV. STAT. § 347.186 (West, Westlaw through 2018 2nd Reg. Legis. Sess.); and UTAH CODE ANN. § 48-3a-1201(3)(a) (West, Westlaw through 2018 3rd Spec. Legis. Sess.).

82. *Supra* notes 65-71 and accompanying text.

83. DEL. CODE ANN. tit. 6, § 18-305(a) (West, Westlaw through 82 Laws 2019, ch. 4.).

84. *Id.*

85. *See id.* All state LLC statutes permit some restrictions on members’ information rights, such as restrictions necessary to protect trade secrets. For example, Delaware allows reasonable restrictions. *Id.* (allowing restricted access to protect trade secrets and other protected information).

86. U.P.S.A. § 305 (UNIF. LAW COMM’N 2017); *see infra* Part IV.D.

E. Duties

The UPSA also adds clarity with respect to duties.⁸⁷ The Act adopts the position that the no default rule should provide for duties across the internal shields of an SLLC by stating:

- (d) Solely by reason of being or acting as a protected series manager of a protected series of a series limited liability company, a person owes no duty to:
 - (1) the company;
 - (2) another protected series of the company; or
 - (3) another person in that person's capacity as:
 - (A) a member of the company which is not an associated member of the protected series;
 - (B) a protected series transferee or protected series manager of another protected series; or
 - (C) a transferee of the company.⁸⁸

The author believes this is a reasonable policy choice for a default rule. However, the company agreement may vary this rule.⁸⁹ The author submits that variation should be considered in any instance in which the actions of the protected series manager of one protected series could endanger the business of all of the other protected series of the SLLC; for example, in the case of an SLLC holding a liquor license supporting the business of several series operating retail liquor stores.

87. *See infra* Part IV.E.

88. U.P.S.A. § 304(d) (UNIF. LAW COMM'N 2017).

89. *Id.* § 107(a).

IV. THE UPSA

The UPSA introduces a new term—“protected series”⁹⁰—that it uses in lieu of the term that every series jurisdiction has used up to now—“series.”⁹¹

A. *Nature, Powers, and Duration of a Protected Series under the UPSA*

1. Nature of a Protected Series

The UPSA states that a protected series is its own legal entity, entirely distinct from “(1) the company . . . ; (2) another protected series of the company; (3) a member of the series LLC, whether or not the member is an associated member of the protected series; (4) a protected series transferee of a protected series of the company; and (5) a transferee of a transferable interest of the company.”⁹²

90. The Prefatory Note to the UPSA defines the term “protected series construct” by looking to the provisions of the SLLC statutes in thirteen states, the District of Columbia, and Puerto Rico, and by determining that the protected series construct has certain identifiable common to all series jurisdictions:

an identifiable set of assets segregated within a limited liability company (“a series limited liability company”); the assets: comprise a protected series, which is empowered to conduct activities in its own name; must be identified by thorough recordkeeping that distinguished them from assets of the series limited liability company and assets of any other protected series of the company; are obligated solely to persons asserting claims pertaining to activities related to the segregated assets; and are not available to persons asserting claims arising from the activities of the series limited liability company or any other protected series of the company; one or more members of the series limited liability company may be associated with the protected series, but not necessarily, and distributions arising from the assets and activities go to: the members associated with the protected series, if any; or the series limited liability company, if the series has no associated members.

U.P.S.A. tit. p. (2017). Thus, an SLLC contains “internal shields”—*i.e.*, asset partitions confining the assets and liabilities of each protected series solely to creditors of that protected series. *Id.* These “horizontal” shields are conceptually and practically quite different from the traditional, “vertical” shield that protects the owners of an organization from automatic, vicarious liability for the organization’s obligations. *Id.* The NCCUSL Committee explains its decision to use a new term as follows:

Following long-standing practice with statutory trusts and investment companies, existing protected series statutes use “series” as the term of art for the construct just described. However, outside the investment trust context, using “series” can be quite 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”—to signal the different meaning and to call attention to the internal, horizontal shields which are the construct’s defining characteristic.

Id.

91. With the exception of Delaware (effective Aug. 1, 2019); *see supra* Part II.
 92. U.P.S.A. § 103 (UNIF. LAW COMM’N 2017).

2. Powers and Duration of a Protected Series

The UPSA specifies the following powers and restrictions for protected series:

- (a) A protected series of a series LLC may sue and be sued in its own name.
- (b) Except as otherwise provided in subsections (c) and (d), a protected series of a series LLC has the same powers and purposes as the series LLC.
- (c) A protected series of a series LLC ceases to exist not later than when the series LLC completes its winding up.
- (d) A protected series of a series LLC may not:
 - (1) Be a member of the series LLC;
 - (2) Establish a protected series; or
 - (3) Except as permitted by law of the applicable state other than the UPSA, have any purpose or power that such law prohibits to an LLC.⁹³

B. Name of Protected Series

The UPSA also dictates how a protected series may be named. A protected series of a SLLC must have a name that begins with the name of the SLLC, “including any word or abbreviation required by state law as a “designator” to indicate that the series LLC is an LLC; and [it must contain] the phrase “Protected Series” or “protected series” or the abbreviation “P.S.” or “PS.”⁹⁴ For example, a protected series of Lone Star LLC would have to be named Lone Star LLC Protected Series, Lone Star LLC protected series, Lone Star P.S., or Lone Star PS. If Lone Star LLC had more than one protected series, the first one established might be known as Lone Star LLC PS 1.

If an SLLC changes its name, the SLLC must file a statement of designation change for each of its protected series, changing the name of each protected series to comply with UPSA § 202(b).⁹⁵

93. *Id.* § 104(d)(3). Which contemplates that a state may decide that a power, purpose, or conduct permitted to an LLC is not appropriate for a protected series. The Prefatory Note at 25 states with respect to § 104(d)(3):

[a] limited liability company may not use a protected series to evade a requirement of other law. This provision’s introductory language— “[e]xcept as permitted by law of this state”—refers to situations in which state law authorizes a protected series of a series limited liability company to operate under the auspices of a license obtained or regulatory filing made by the company in the company’s name.

Id.

94. *Id.* § 202(b).

95. *Id.* § 202(c).

C. Forming an SLLC and Protected Series under the UPSA

The UPSA is designed to be “dropped in” to a state’s existing LLC statute.⁹⁶ In a state that has adopted the Revised Uniform Limited Liability Company Act, an SLLC will be formed upon filing a certificate of organization.⁹⁷

Once an LLC has been formed, it may establish a protected series with the affirmative vote or consent of all of its members.⁹⁸ UPSA § 107(a)(9) states that the operating agreement may not vary the effect of UPSA § 201 “except to vary the manner in which a limited liability company approves establishing a protected series.”⁹⁹ The exception language is broad; for example, it would appear that the following variations should be permissible:

- (a) Approval by a lesser percentage of the members;
- (b) Approval by the managers; or
- (c) Approval of the establishment of a protected series upon the occurrence of specified dates or events.¹⁰⁰

To establish a protected series, an LLC must file a signed protected series designation that states the name of the company and the name of the protected series to be established with the applicable secretary of state.¹⁰¹ The protected series designation becomes effective as provided in the applicable state filing statute.¹⁰² This is an excellent provision and, in the author’s view, should be adopted by all series jurisdictions that do not already have a comparable provision in their SLLC legislation.

D. Associated Members under the UPSA

Only a member of an SLLC may be an associated member of a protected series of the SLLC.¹⁰³ A member of an SLLC becomes an associated member of a protected series of the SLLC when the company agreement “or a procedure established by the agreement . . . :” (1) Identifies the member as an associated member of the protected series; and (2) states “any protected series transferable interest the associated

96. *Id.* § 101.

97. REV. UNIF. LTD. LIAB. CO. ACT § 101 (UNIF. LAW COMM’N 2017) (RULLCA). Presumably, a non-series state that has adopted RULLCA and that wants to adopt the UPSA will want to amend RULLCA § 201 to provide that the certificate of organization of a SLLC will have to include a statement that it is an SLLC with the power to establish one or more protected series.

98. U.P.S.A. § 201(a) (UNIF. LAW COMM’N 2017).

99. *Id.* § 107(a)(9).

100. *Id.* § 107 CMT.

101. *Id.* § 201(b).

102. *Id.* § 201(c).

103. *Id.* § 201(b). This is consistent with all existing SLLC legislation except for Tennessee. TENN. CODE ANN. § 48-249-309(f) (West, Westlaw through 2018 2nd Reg. Legis. Sess.); *see supra* Part III.C.

member has in connection with becoming or being an associated member.”¹⁰⁴ Further, “[i]f a person that is an associated member of a protected series of a series LLC is dissociated from the series LLC, the person ceases to be an associated member of the protected series.”¹⁰⁵

E. Duties under the UPSA

The UPSA provides that “any duties of a series manager of a protected series of an SLLC to the protected series, any associated member of the protected series, or any protected series transferee of the protected series” will be determined in accordance with UPSA § 108, which provides for the application of the state’s general LLC statute.¹⁰⁶

Notwithstanding the foregoing rule, the UPSA provides that “solely by reason of being or acting as a protected series manager” of an SLLC, a person owes no duty to:

- (1) the [series LLC];
- (2) Another protected series of the [series LLC];
- (3) Another person in that person’s capacity as:
 - (A) A member of the series LLC which is not an associated member of the protected series;
 - (B) A protected series transferee or protected series manager of another protected series; or
 - (C) A transferee of the [series LLC].¹⁰⁷

This paper discusses earlier circumstances in which the members of an SLLC should consider if they want duties to run across the internal shields of the SLLC.¹⁰⁸

F. Registered Agent Requirements of the UPSA

The registered agent for an SLLC is the registered agent for each protected series of the SLLC.¹⁰⁹ Before filing a protected series designation, an SLLC must contract with a registered agent for the agent to serve as the registered agent for both the SLLC and the protected series.¹¹⁰ A person who signs a protected series designation that is delivered for filing “affirms as a fact” that the SLLC has complied with

104. U.P.S.A. § 302(b) (UNIF. LAW COMM’N 2017).

105. *Id.* § 302(c).

106. *Id.* § 304(c). This provision may not be varied by the company agreement. *Id.* § 107(a)(14).

107. *Id.* § 304(d). This provision is not one that UPSA § 107(a) prohibits variation of the effect thereof. *Id.* § 107(a).

108. *Supra* Part III.E.

109. *Id.* § 203(a).

110. *Id.* § 203(b).

this requirement.¹¹¹ “A person that ceases to be the registered agent for a series limited liability company ceases to be the registered agent for each protected series of the company,”¹¹² and “[a] person that ceases to be the registered agent for a protected series of a series limited liability company, other than as a result of the termination of the protected series, ceases to be the registered agent of the company and any other protected series of the company.”¹¹³

G. Certificate of Good Standing for a Protected Series

In a state that adopts the UPSA, the applicable secretary of state will issue a certificate of good standing for a protected series if:

in the case of a protected series, no statement of dissolution, termination, or relocation pertaining to the protected series has been filed, and the company has delivered . . . for filing the most recent [required] . . . report . . . and the report includes the name of the protected series, unless when the company delivered the report for filing, the protected series designation pertaining to the protected series had not yet taken effect, or after the company delivered the report for filing, the company delivered to the [Secretary of State] for filing a statement of designation change changing the name of the protected series . . .¹¹⁴

H. Information Required in Periodic Report and the Effect of Failing to File under the UPSA

In its annual or biennial report, “a series limited liability company shall include the name of each protected series of the company for which the company has previously delivered to the [Secretary of State] for filing a protected series designation, and which has not dissolved and completed winding up.”¹¹⁵ Additionally, “[a] failure by a series limited liability company to comply with [UPSA § 203(a)] with regard to a protected series prevents issuance of a certificate of good standing pertaining to the protected series but does not otherwise affect the protected series.”¹¹⁶

111. *Id.* § 203(c).

112. *Id.* § 203(d).

113. *Id.* § 203(e).

114. *Id.* § 205(a)(1).

115. *Id.* § 206(a).

116. *Id.* § 206(b).

I. Associated Assets and UPSA Requirements for Records

“Only an asset of a protected series may be an associated asset of the protected series[,]” and “[o]nly an asset of the series limited liability company may be an associated asset of the company.”¹¹⁷ This is important under the UPSA because only associated assets are protected by the internal liability shields of the SLLC.¹¹⁸

An asset of a protected series may be an associated asset only if the protected series creates and maintains records that state the name of the protected series and describe the asset with sufficient specificity to permit a disinterested, reasonable individual to:

- (1) Identify the asset and distinguish it from any other assets of the protected series, any assets of the series LLC, and any assets of any other protected series of the series LLC;
- (2) Determine when and from what person the protected series acquired the asset or how the asset otherwise became an asset of the protected series; and
- (3) If the protected series acquired the asset from the series LLC or another protected series of the series LLC, determine any consideration paid, the payor, and the payee.¹¹⁹

An asset of an SLLC is an associated asset of the SLLC only if the SLLC creates and maintains records that state the name of the SLLC and describe the asset with sufficient specificity to permit a disinterested, reasonable individual to:

- (1) Identify the asset and distinguish it from any other assets of the series LLC and any assets of any protected series of the series LLC;
- (2) Determine when and from what person the protected series acquired the asset or how the asset otherwise became an asset of the protected series; and
- (3) If the series LLC acquired the asset from a protected series of the series LLC, determine any consideration paid, the payor, and the payee.¹²⁰

The UPSA permits the records and recordkeeping required to “be organized by specific listing, category, type, quantity, computational or

117. *Id.* § 301(a).

118. *Id.* § 404(b); *see also infra* Part IV.K.

119. *Id.* § 301(b).

120. *Id.* § 301(c).

allocational formula or procedure, including a percentage or share of any asset or assets, or in any other reasonable manner.”¹²¹

An SLLC or a protected series may hold an associated asset directly or indirectly, through a representative, nominee, or similar arrangement, except that:

- (1) A protected series may not hold an associated asset in the name of the series LLC or another protected series of the series LLC; and
- (2) The series LLC may not hold an associated asset in the name of a protected series of the series LLC.¹²²

J. Limitation on Liability and Enforcement of Claims under the UPSA

UPSA § 401(a) provides that “[a] person is not liable . . . for a debt, obligation, or other liability of” a protected series “solely by reason of being or acting as an associated member, series manager, or protected series transferee of the protected series.”¹²³ Furthermore, a person is not liable to an SLLC solely by reason of being or acting as an associated member, protected series manager, or protected series transferee of the SLLC.¹²⁴

UPSA § 401(b) provides that, subject to § 404, the following rules apply:

- (1) A debt, obligation, or other liability of a series limited liability company is solely the debt, obligation, or liability of the company.
- (2) A debt, obligation, or other liability of a protected series is solely the debt, obligation, or liability of the protected series.
- (3) A series limited liability company 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 company solely by reason of the protected series being a protected series of the company or the company:
 - (A) being or acting as a protected-series manager of the protected series;

121. *Id.* § 301(d).

122. *Id.* § 301(e).

123. *Id.* § 401(a) (including “directly or indirectly, by way of contribution or otherwise” after “liable”).

124. *Id.*

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

(C) owning a protected-series transferable interest of
the protected series.¹²⁵

A protected series of an SLLC is not liable¹²⁶ for a debt, obligation, or other liability of the SLLC or another protected series of the SLLC solely by reason of (i) being a protected series of the SLLC; (ii) being or acting as a manager of the SLLC or as a protected series manager of another protected series of the SLLC; or (iii) having the SLLC or another protected series of the SLLC be or act as a protected series manager of the protected series.¹²⁷ UPSA § 402(a) states:

Except as otherwise provided in subsection (b), a claim seeking to disregard a limitation in Section 401 is governed by the principles of law and equity, including a principle providing a right to a creditor or holding a person liable for a debt, obligation, or other liability of another person, which would apply if each protected series of the series limited liability company were an limited liability company formed separately from the series limited liability company and distinct from the series limited liability company and any other protected series of the series limited liability company.

UPSA § 402(b) states:

The failure of a limited liability company or a protected series to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground to disregard a limitation in Section 401(a) but may be a ground to disregard a limitation in Section 401(b).¹²⁸

UPSA § 403 provides that remedies available to a judgment creditor of a member or transferee of an LLC under the state's general LLC statute "apply to a judgment creditor of: (i) an associated member or protected-series transferee of a protected series; or (ii) a series limited liability company, to the extent the company owns a protected-series transferable interest of a protected series."¹²⁹

K. Enforcement of Judgments Against Non-Associated Assets under

125. *Id.* § 401(b).

126. *Id.* (including "directly or indirectly, by way of contribution or otherwise" after "liable").

127. *Id.*

128. *Id.* § 402(a), (b).

129. *Id.* § 403.

the UPSA

UPSA § 404 provides that judgments may be enforced against non-associated assets as follows:

- (1) A judgment against the [series LLC] may be enforced against an asset of a protected series of the series LLC if the asset:
 - (A) was a non-associated asset of the protected series on the incurrence date;¹³⁰ or
 - (B) . . . on the enforcement date;¹³¹
- (2) A judgment against a protected series may be enforced against an asset of the [series LLC] if the asset:
 - (A) was a non-associated asset of the protected series on the incurrence date;¹³² or
 - (B) . . . on the enforcement date;¹³³
- (3) A judgment against a protected series may be enforced against an asset of another protected series of the [series LLC] if the asset: was a non-associated asset of the other protected series on the incurrence date; or . . . on the enforcement date.¹³⁴

130. "Incurrence date' means the date on which a series LLC or a protected series incurred the liability giving rise to a claim that a claimant seeks to enforce under [UPSA § 404]." *Id.* § 404(a)(2).

131. "Enforcement date' means 12:01 a.m. on the date on which a claimant first serves process on a series limited liability company or a protected series seeking to enforce . . . a claim against an asset of the [series LLC] or protected series by attachment, levy, or the like." *Id.* § 404(a)(1).

132. "Incurrence date' means the date on which a series LLC or a protected series incurred the liability giving rise to a claim that a claimant seeks to enforce under [UPSA § 404]." *Id.* § 404(a)(2).

133. "Enforcement date' means 12:01 a.m. on the date on which a claimant first serves process on a series limited liability company or a protected series seeking to enforce . . . a claim against an asset of the [series LLC] or protected series by attachment, levy, or the like." *Id.* § 404(a)(1).

134. *Id.* § 404(b).

L. Information Rights under the UPSA if Not an Associated Member of a Protected Series

A member of an SLLC that is not an associated member of a protected series has the same right to information about the protected series as a member that is not a manager of a manager-managed LLC has about that LLC.¹³⁵ A person who was an associated member of a protected series has the same right to information about the protected series that a person who dissociates as a member of a manager-managed LLC is legally entitled to about that LLC, assuming provisions of the applicable law provide information rights to dissociated members.¹³⁶

The legal representative of a deceased associated member of a protected series has the same right to information about the protected series as a legal representative of a deceased member of an LLC has to information about the LLC under applicable law.¹³⁷ Further, a manager of a protected series¹³⁸ of a protected series has the same right to information about the protected series as a manager of a manager-managed LLC has to information about the LLC under applicable law.¹³⁹

M. Entity Transactions under the UPSA

UPSA § 602 instructs that “[a] protected series may not: (1) be an acquiring, acquired, converting, converted, merging, or surviving entity; (2) participate in a domestication; or (3) be a party to or be formed, organized, established, or created in a transaction substantially like a merger, interest exchange, conversion, or domestication.”¹⁴⁰

Section 603 further dictates that “[a] series limited liability company may not be . . . an acquiring, acquired, converting, converted, domesticating, or domesticated entity” and may not be “a party to or the surviving company of a merger.”¹⁴¹ That is, except as provided in §§ 604–08 and, even then, only if each of the other parties to the merger is an LLC and the surviving company is not created in the merger.¹⁴²

135. *Id.* § 305(a).

136. *Id.* § 305(b).

137. *Id.* § 305(c). The author has argued elsewhere that all LLC statutes should provide information rights to assignees, particularly assignees or legal representatives of deceased or disabled members. Allen Sparkman, *Information Rights – A Survey*, 2 BUS. ENTREP. & TAX L. REV. 41, 116, 154 (2018).

138. A protected series manager is “a person under whose authority the powers of a protected series are exercised and under whose direction the activities and affairs of the protected series are managed under the operating agreement and” the applicable LLC statute. U.P.S.A. § 102(9) (UNIF. LAW COMM’N 2017).

139. *Id.* § 305(d).

140. *Id.* § 602.

141. *Id.* § 603.

142. *Id.* § 604.

Note the requirement that all other parties to the merger be LLCs (but not SLLCs) and that the remainder of the merger provisions accommodate the situation where the survivor in the merger is not an SLLC.¹⁴³ A question to consider is why the UPSA was not drafted to permit an SLLC to merge with a corporation or partnership if the SLLC is the survivor. Perhaps the reason was simply the press to finish drafting the UPSA.

An SLLC could, of course, acquire all of the assets of a corporation or partnership, and the acquisition agreement could provide for how the acquired assets would be treated after the acquisition. The SLLC could treat the acquired assets as associated assets of the company,¹⁴⁴ could cause them to be treated as associated assets of one or more preexisting protected series of the SLLC,¹⁴⁵ or could create one or more new protected series.¹⁴⁶ If the consideration used in the acquisition was membership interests in the SLLC, the former shareholders or partners might become members associated with the new protected series.¹⁴⁷ Unlike the case with a merger under the statutes of many states, however, the transfer of assets by a corporation or partnership to an SLLC in an acquisition for cash or other consideration would be a transfer that would likely trigger any applicable transfer restrictions.¹⁴⁸ UPSA § 605 states that:

- (A) The plan of merger for a merger under UPSA § 605 must comply with applicable state law; and state: for any protected series of a non-surviving company, whether after the merger the protected series will be a relocated protected series or be dissolved, wound up, and terminated;
- (B) for any protected series of the surviving company which exists before the merger, whether after the merger the protected series will be a continuing protected series or be dissolved, wound up, and terminated;
- (C) for each relocated protected series or continuing protected series:

143. *Id.*; *see also id.* §§ 605-08.

144. *Id.* § 301(b).

145. *Id.* § 301(a); *see also id.* § 302(a)-(c).

146. *Id.* § 201(a).

147. *Id.* § 302.

148. *See* TEX. BUS. ORGS. CODE ANN. § 10.003 (West, Westlaw through 2017 Reg. Legis. Sess.) (noting that in a divisive merger, for example, a corporation may distribute some of its assets to one or more shareholders, retain some assets, and distribute the rest to a new entity that it distributes to some or all of its shareholders); *see also id.* § 10.008 (although such a divisive merger is unlikely to qualify as a reorganization under § 368 of the Internal Revenue Code, it would avoid contractual transfer restrictions that had not been drafted with divisive mergers in mind).

- (i) the name of any person that becomes an associated member or protected-series transferee of the protected series after the merger, any consideration to be paid by, on behalf of, or in respect of the person, the name of the payor, and the name of the payee;
 - (ii) the name of any person whose rights or obligations in the person's capacity as an associated member or protected-series transferee will change after the merger;
 - (iii) any consideration to be paid to a person who before the merger was an associated member or protected-series transferee of the protected series and the name of the payor; and
 - (iv) if after the merger the protected series will be a relocated protected series, its new name;
- (D) for any protected series to be established by the surviving company as a result of the merger:
- (i) the name of the protected series;
 - (ii) any protected-series transferable interest to be owned by the surviving company when the protected series is established; and
 - (iii) the name of and any protected-series transferable interest owned by any person that will be an associated member of the protected series when the protected series is established; and
- (E) for any person that is an associated member of a relocated protected series and will remain a member after the merger, any amendment to the operating agreement of the surviving company which:
- (1) is or is proposed to be in a record; and
 - (2) is necessary or appropriate to state the rights and obligations of the person as a member of the surviving company.¹⁴⁹

The statement of merger in a merger under UPSA § 604 must comply with applicable state law and include as an attachment the following records, each to become effective when the merger becomes effective:

149. U.P.S.A. § 605 (2017).

- (A) For a protected series of a merging series LLC being terminated as a result of the merger, a statement of termination signed by the merging series LLC;
- (B) For a protected series of a non-surviving series LLC which after the merger will be a relocated protected series:
 - (i) A statement of relocation signed by the non-surviving series LLC which contains the name of the series LLC and the name of the protected series before the merger and afterwards;
 - (ii) A statement of protected series designation signed by the surviving series LLC;
- (C) For a protected series being established by the surviving series LLC as a result of the merger, a statement of designation signed by the [series LLC].¹⁵⁰

When a merger under UPSA § 604 becomes effective, in addition to the effects stated in applicable state law, the following will happen:

- (1) As provided in the plan of merger, each protected series of each merging series LLC which was established before the merger:
 - (A) Is a relocated protected series or continuing protected series; or
 - (B) Is dissolved, and then wound up and terminated.
- (2) Any protected series to be established as a result of the merger is established;
- (3) Any relocated protected series or continuing protected series is the same person without interruption as it was before the merger;
- (4) All property of a relocated protected series or continuing protected series continues to be vested in the protected series without transfer, reversion, or impairment.
- (5) All debts, obligations, and other liabilities of a relocated protected series or continuing protected series continue as debts, obligations, and other liabilities of the protected series.
- (6) Except as otherwise provided by law or the plan or merger, all the rights, privileges, immunities, powers, and purposes of a relocated protected series or

150. *Id.* § 606.

continuing protected series remain in the protected series;

- (7) The new name of a relocated protected series may be substituted for the former name of the protected series in any pending action or proceeding;
- (8) If provided in the plan of merger:
 - (A) A person becomes an associated member or protected series transferee of a relocated protected series or continuing protected series;
 - (B) A person becomes an associated member of a protected series established by the surviving series LLC as a result of the merger;
 - (C) Any change in the rights and obligations of a person in the person's capacity as an associated member or protected series transferee of a relocated protected series or continuing protected series takes effect; and
 - (D) Any consideration to be paid to a person that before the merger was an associated member or protected series transferee of a relocated protected series or continuing protected series is due; and
- (9) Any person that is a member of a relocated protected series becomes a member of the surviving series LLC, if not already a member.¹⁵¹

V. AREAS NOT ADDRESSED BY THE UPSA

A. UCC

It would appear clear that a protected series of an SLLC can place a lien on the assets associated with the series, but the relationship with the UCC is not as clear in all series jurisdictions. For example, TEX. BUS. & COM. CODE. § 9.102(28) defines “debtor” for purposes of the Texas UCC as a “person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor.”¹⁵²

Section 1.201(b)(27) of the Texas UCC defines “person” as “an individual, corporation, business trust, estate, trust, partnership limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, any other legal or commercial entity, or a particular series of a for-profit entity.”¹⁵³

151. *Id.* § 607.

152. TEX. BUS. & COM. CODE ANN. § 9.102 (Westlaw).

153. *Id.* § 1.201 (emphasis added).

The Delaware UCC does not define “person” to include a series, although the definition in the Delaware LLC Act does.¹⁵⁴

The next definition of relevance is that of a “registered organization.” Section 9.102(71) of the Texas UCC defines a registered organization as “an organization formed or organized solely under the law of a single state or the United States” and as to which the state or the United States must maintain a public record showing the organization to be have been organized.¹⁵⁵ The corresponding current provision of the Delaware UCC, as here relevant, defines a registered organization as “an organization formed or organized solely under the law of a single state or the United States by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the State or the United States.”¹⁵⁶ The Delaware UCC defines “public organic record” as “a record that is available to the public for inspection and is a record consisting of the record initially filed with or issued by a State or the United States to form or organize an organization and any record filed with or issued by the State or the United States which amends, restates, or corrects the initial record.”¹⁵⁷ A series of an SLLC that is established by an SLLC, that itself was formed in a series jurisdiction that requires no public filing beyond the certificate of formation for the SLLC, would not appear to be a registered organization under either the Delaware or the Texas UCC. The author surmises this would also be the case under any other state’s UCC. Effective August 1, 2019, an amendment to Delaware’s UCC will provide for registered series to be treated as registered organizations.¹⁵⁸

Might a protected series that is established by the filing of a protected series designation be a registered organization? It appears unlikely to the author because the protected series does not exist but for action of the SLLC. On the other hand, one could argue that the protected series designation is a record filed with a state that establishes the protected series and establishment should be considered equivalent to form or organize. This issue also arises in the existing series jurisdictions that require the filing of a certificate of designation or the like for each series.¹⁵⁹

154. DEL. CODE ANN. tit. 6, § 18-101(12) (West, Westlaw through 81 Laws 2018, chs. 200-453) (“‘Person’ means . . . or any other individual or entity (or series thereof . . .”).

155. TEX. BUS. & COM. CODE ANN. § 9.102(71) (Westlaw).

156. DEL. CODE ANN. tit. 6, § 9-102(71) (Westlaw).

157. *Id.* § 9-102(68).

158. *See supra* Part II.

159. *See supra* Part III.A.

A financing statement must sufficiently provide the name of the debtor.¹⁶⁰ Under the UCC, rules regarding the name of the debtor are divided into two categories: registered organizations and other cases.¹⁶¹

If the debtor is a registered organization, the debtor's name is the name stated in the most recently filed public organic record.¹⁶² In other cases, a financing statement sufficiently provides the name of the debtor "if the debtor has a name, only if it provides the organizational name of the debtor."¹⁶³ Texas law now requires the filing of an assumed name certificate if the name of a series differs from the name of the SLLC stated in its certificate of formation.¹⁶⁴ The author believes this should be sufficient to establish that the name of a debtor series is the organizational name of the series. The author also believes that the filing of a protected series designation or a certificate of designation or similar document should be sufficient to establish the organizational name for purposes of the UCC of a protected series or series with respect to which a certificate of designation or similar document has been filed.

B. Securities Laws

Securities law issues associated with SLLCs have not yet reached the courts and are at best speculative. Whether an investment opportunity constitutes the offer and sale of a security subject to securities registration or exemption requirements is a facts and circumstances determination. In considering securities regulation as applicable to SLLCs and the individual series, two issues are unique to SLLCs and the individual series: the identity of the issuer, and the determination of accredited investor and purchaser status.

1. Who is the Issuer?

In a state such as Delaware or Texas, where a person becomes a member at the SLLC level and then may be associated with one or more series, the author believes it clear that the SLLC is the issuer. Though, that may not always be the case. Where the economic rights associated with the investment derive from an individual series, the individual series may be considered a "co-issuer" with the juridical LLC and subject to similar obligations and liabilities.

If the SLLC is formed in a state such as Illinois, which permits but does not require an individual series to be treated as a separate legal entity, then the entity of the issuer may depend on whether an

160. DEL. CODE ANN. tit. 6, § 9-503(a) (Westlaw).

161. *Id.*

162. *Id.* § 9-503(a)(1).

163. *Id.* § 9-503(a)(5).

164. TEX. BUS. & COMM. CODE ANN. § 71.002(2)(H) (West, Westlaw through 2017 Reg. Legis. Sess.).

individual series has been elected to be treated as a separate entity.¹⁶⁵ If so, this will also depend on whether applicable state law permits such an individual series to admit members.¹⁶⁶ Until the issue is interpreted by the SEC securities regulators or courts in non-series states, there is no certainty as to how it will be resolved.

2. Determining Accredited Investor and Purchaser Status

The definition of “accredited investor” provides that an entity is an accredited investor if all of the equity owners of the entity are accredited.¹⁶⁷ In addition, such an entity will be treated as one purchaser for purposes of Regulation D.¹⁶⁸ In the case of an SLLC, both of these determinations depend on whether the individual series is considered “the entity” for this purpose or if “the entity” for determination of accredited investor or purchaser status is the entire SLLC.¹⁶⁹ The author is unaware of any guidance on this issue.

In the case of a Delaware or Texas SLLC, where state law does not treat an individual series as a separate legal entity, the SEC or a court may look at all of the members of the SLLC and the underlying individual series to test whether the entity (the SLLC) is an accredited investor.¹⁷⁰ On the other hand, since it will be an individual series that is the potential investor and only its members will stand to gain from the investment, an argument can be made that the individual series should be the measuring point. Because there is no guidance, where individual series plan to make investments as accredited investors, caution would

165. For an individual series of an Illinois SLLC to have limited liability, the SLLC must file a certificate of designation with respect to the individual series with the Illinois Secretary of State. 805. ILL. COMP. STAT. ANN. 180/37-40(b) (West, Westlaw through P.A. 100-1180 of the 2018 Reg. Legis. Sess., and P.A. 101-1 of the 2019 Reg. Legis. Sess.).

166. “A series with limited liability [will] be treated as a separate entity to the extent set forth in the articles of organization.” *Id.* Apparently, whether or not the series is treated as a separate entity, “each series with limited liability may, in its own name, contract, hold title to assets, grant security interests, sue and be sued *and otherwise conduct business and exercise the powers of a limited liability company under this Act.*” *Id.* (emphasis added). Notwithstanding the foregoing, however, an individual series is in good standing only if the SLLC is in good standing. *Id.* 180/37-40(e). *See supra* note 72-77 and accompanying text (noting other states that allow separate entity status for an individual series but either provide that a series is in good standing only if the SLLC is or have no provision for determining if a series is in good standing); *see also supra* note 48 (in six of the seven series jurisdictions that permit separate entity status for a series, the statutory language speaks of “members associated with a series” just as in Delaware and Texas). *Cf.* TENN. CODE ANN. § 48-249-309(f) (West, Westlaw through 2018 2nd Reg. Legis. Sess.) (the Tennessee statute, which is not a separate-entity statute, is the only one that permits admission of members at the series level, stating “Parts 4 and 5 if this chapter shall apply to a series of an LLC, as if the series were a separate LLC”). Title 48, chapter 249, part 5 of the Tennessee Code provides for admission of members. *Id.*

167. Sparkman, *supra* note 6 at 38.

168. *Id.*

169. *Id.* at 38-39.

170. *Id.* at 39.

suggest examining the accredited investor status of all of the members of the SLLC, not only the members associated with the individual series.

If the SLLC is formed in Illinois or another state that permits an individual series to be treated as a separate entity, an advisor may determine that only the members associated with the purchasing series need be considered. Once again, though, there is no specific guidance and caution is warranted.

VI. CONCLUSION

As stated previously in this article, the author believes that the UPSA represents a set of welcome ideological additions to what should be included in an SLLC statute. The author recommends that series jurisdictions that do not desire to adopt the UPSA in total should strongly consider adopting its provisions for the name of a series,¹⁷¹ the filing of a protected series designation¹⁷² or similar public document, the provisions for classifying assets,¹⁷³ and the merger provisions.¹⁷⁴

In the author's view, the NCCUSL, any series jurisdiction, nor any commentator has articulated a persuasive rationale for why SLLC legislation is desirable. In the course of drafting the UPSA, the NCCUSL Drafting Committee received emails from several Delaware practitioners¹⁷⁵ reporting on their experiences and that of their colleagues in using Delaware SLLCs. The comments of the Delaware lawyers may be summarized as follows:

- Several clients who asked about using an SLLC decided not to after being advised on the uncertainties of judicial scrutiny, bankruptcy, tax treatment, UCC perfection, the cost to set up an SLLC, and recommended best practices and alternatives;
- The statistics on the number of SLLCs formed in Delaware may be skewed because some tax practitioners routinely include series language in their certificates of formation to afford their clients the flexibility to set up series later;
- The uses for which SLLCs were formed included:
 - Family wealth transfers;
 - Equity participation planning;
 - Licensing issues;
 - Real estate holdings;

171. U.P.S.A. § 202(b) (UNIF. LAW COMM'N 2017).

172. *Id.*

173. *Id.* § 301.

174. *Id.* §§ 601-08.

175. Emails from Del. practitioners to Nat'l Conference of Comm'rs on Unif. State Laws Drafting Comm. (on file with author).

- Other situations in which the client preferred the SLLC for separate operations instead of separate subsidiaries;
- In another case where the client liked the idea of being able to appoint a number of people as either the CEO or president of a series;
- In many of the situations in which the client decided to use an SLLC, the internal liability shields were not an important factor.¹⁷⁶

In the situations in which the Delaware practitioners reported that SLLCs were used,¹⁷⁷ in the author's view, there were only one or two instances where the client could not have accomplished the stated goals by using several wholly-owned subsidiaries. Granted, using subsidiaries would result in greater filing fees.¹⁷⁸ However, if one considers the record-keeping requirements of the series provisions of the Delaware LLC Act,¹⁷⁹ the series structure may not avoid a meaningful amount of administrative burden.

Without presenting any evidence of market demand, Conaway and Tsoflias assert that "[t]he Delaware series . . . is a prime example of a legislative response to market demands of the business community."¹⁸⁰ Should a legislature automatically respond favorably to *market demands* of the business community? What factors should a legislature consider in determining if a market or other demand of the business or other community is appropriate?

Particularly as more states improve their filing systems to provide instantaneous acceptance (or rejection) of a filed document, the author believes the burden is on proponents of SLLC legislation to show good reasons for the use of an SLLC other than saving on filing fees. The author is agreeable to saving on filing fees when possible, but does not

176. *Id.*

177. *See* Sparkman, *supra* note 6 at 20–23 (comprehensively summarizing the email from the Delaware practitioners).

178. *See supra* note 77 (noting the filing fees associated with forming LLCs in different states).

179. The Delaware series provisions on record-keeping state: "The records maintained for [a] series [must] account for the assets associated with such series separately from the other assets of the limited liability company, or any series thereof Records maintained for a series that reasonably identify its assets, including by specific listing, category, type, quantity, computational or allocational formula or procedure (including a percentage of share of any asset or assets) or by any other method where the identity of the such assets is objectively determinable, will be deemed to account for the assets associated with the series separately from the other assets of the limited liability company or any other series thereof." DEL. CODE ANN. tit. 6, § 18-215(b) (West, Westlaw through 82 Laws 2019, ch. 4). It appears to the author that UPSA § 301 is more stringent than the Delaware requirement. *See supra* Part IV.I. Moreover, the proposed regulations on the federal income tax treatment of SLLCs, if ever finalized, are expected to impose some sort of reporting requirement, which will, of course, impact record-keeping. *See* Allen Sparkman, *Tax Aspects of Series LLCs*, BUS. LAW TODAY, Feb. 2013, at 3.

180. Conaway and Tsoflias, *supra* note 26, at 1.

believe it is good public policy to have choice of entity decisions based on filing fees.

The author also questions whether the time was ripe for the NCCUSL to draft the UPSA and recommend its adoption in all states. At this time, only fifteen jurisdictions have adopted SLLC legislation.¹⁸¹ It is also unclear whether uniform legislation is appropriate for this area of the law. What interest do the managing persons of a Delaware SLLC have in the series or other laws of other states other than, perhaps, their laws relating to foreign entities? Particularly because there has not yet been any rationale for SLLCs articulated, the UPSA would have better served the legal community as a model act.

181. *See supra* note 6 and accompanying text.