**White Paper**

**Analysis of Proposed Revisions to Chapter 605**

**Addition of the Uniform Protected Series LLC Provisions**

**Sections 605.12101-605.12803**

*Prepared by the Protected Series LLC Task Force of*

*The Business Law Section of The Florida Bar*

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1. **Background**

The Business Law Section ("BLS") of The Florida Bar formed the Protected Series LLC Task Force  (the "Task Force") in 2020 to analyze the Uniform Protected Series Act (the "UPSA") promulgated and adopted by the Uniform Law Commission in 2018, and to consider adopting its provisions as new Sections 605.12101 through 605.12803 of the Florida Revised Limited Liability Company Act (the "LLC Act").   UPSA was formulated specifically to be "plugged into" the Revised Uniform Limited Liability Company Act, which Florida adopted in 2014. The proposed Protected Series provisions would be added as Part II of the existing Chapter 605, with continuous section numbering in new subsection 12 of the LLC Act.

The Task Force is comprised of members of the Business Law Section representing all committees of the BLS, as well as 6 representatives from the Tax Section of The Florida Bar, and several representatives of the Real Property Probate and Trust Law Section of The Florida Bar.  The Task Force met every month, via ZOOM videoconference, and met in person and by Zoom at all in-person meetings of the BLS through Labor Day 2022. Additional meetings are scheduled in October, November and December of 2022, and in January of 2023, as needed to work with legislative sponsors and staff on the proposed legislation if it is approved by the BLS and The Florida Bar Board of Governors.

The leadership of the Department of State Division of Corporations, in the persons of the Division Director and  the Bureau Chief, actively participated in the Task Force drafting sessions, and we continue to work with them in connection with all Division of Corporations filings that would be required by the proposed Protected Series additions to Chapter 605.

The Task Force compared UPSA with the Series Provisions of the Delaware LLC Act, as well as the recently revised Virginia LLC Act which adopted UPSA in 2021, and with the Texas Revised LLC Act which incorporated non-uniform series provisions into its LLC Act in 2013. The Task Force also occasionally referred to other state LLC Acts which contained series or protected series provisions.

The Task Force included representatives of the Business Litigation Committee and the Bankruptcy/UCC Committee, as well as representatives of RPPTL, some of whom expressed concerns regarding the underwriting of title insurance where real property was an associated asset of a Protected Series of a Protected Series LLC. We are continuing to address their concerns and work with them on proposed non-uniform language which they would like to see added to the Protected Series legislation.

After extensive meetings and analysis, the Task Force proposes that new sections 605.12101 through 605.12803 be added to the Florida LLC Act to permit the formation of Protected Series LLCs in Florida. The Task Force believes that adding these Protected Series provisions will be beneficial for Florida businesses and citizens, as well as for lawyers and judges being asked to address matters affecting foreign series limited liability companies doing business in Florida.

1. **Series LLCs around the Country**

 There are now 21 jurisdictions which provide for the formation of some type of "series" limited liability companies. Delaware led the way when it passed series LLC legislation in 1996, which it borrowed from its own Business Trust law where series was initially utilized. Delaware also provides for series limited partnerships. The series construct was initially most often used in investment funds, mutual funds, and captive insurance companies.

 Delaware was followed by Wisconsin in 2001, then later by Oklahoma, Illinois, Nevada, Tennessee, Iowa, Texas, Puerto Rico, District of Columbia, Kansas, Missouri, Montana, Utah, Alabama, Indiana, Arkansas, Nebraska, North Dakota, Virginia, and Ohio.

 Florida currently has nothing about series LLCs in its LLC Act. However, series formed in other states are permitted to qualify to do business in Florida, and each series within a foreign series LLC must separately qualify to do business in Florida, as if it were a separate legal entity. Florida does not keep statistics on how many foreign series LLCs are doing business in Florida, but that will change if Florida adopts series LLC legislation.

 Generally, Delaware has become the default jurisdiction for series LLCs, at least for sophisticated parties who want to take advantage of Delaware's business friendly laws, contractual freedom, and its Chancery Court. However, states like Wyoming and Nevada have attracted series nosiness because of the scarcity of formal legal requirements for their series LLCs, and in Wyoming, there is added anonymity when it comes to publicly identifying members or managers.

1. **Summary of the Issues and Proposed Revisions**

A. *Intent of the Statute*

The intent of the new Protected Series LLC provisions is to allow, for the first time in Florida, the creation of Florida Protected Series LLCs, and to add statutory rules addressing foreign series LLCs (formed in other states) which are operating in Florida, utilizing a relatively new, but well thought out and considered set of rules in the Uniform Protected Series Act ("UPSA") promulgated and adopted by the Uniform Law Commission in 2017, after a five year period of study and drafting.

B. *Key Aspects of the Protected Series LLC*

(1) *Protected Series Existence*

A Protected Series LLC is statutorily deemed a legal entity. However, a Protected Series created by the Protected Series LLC is not deemed to be a separate legal entity. Although not a separate legal entity, a protected series is statutorily deemed a "person" in Section 605.12103 ("[a] protected series… is a person").

Section 605.12104(c) provides that a protected series of a series limited liability company cannot exist on its own; therefore, a protected series is not entirely distinct from the series limited liability company on whose existence the protected series depends, except as a result of a merger under Section 605.12604 (in which a protected series may be “relocated” from a series limited liability company that does not survive the merger to the series limited liability company that does survive the merger).

Section 605.12501(1) reflects this reality by stating that the dissolution of a series limited liability company causes the dissolution of each of the company’s protected series. Section 605.12502(d) further reflects this reality by providing that a series limited liability company has not completed its own winding up until the company has completed the winding up of each of the protected series of the series limited liability company.

 (2) *Extrapolation*

Section 605.12108 provides rules for applying the existing Florida LLC Act to the Protected Series provisions via tan extrapolation approach, which is fundamental to the Protected Series provisions. This provision provides the mechanics for the extrapolation approach which is at the core of this act.

In effect, this provision treats each listed item at the protected series level as if the item were the analogous construct at the limited liability company level. However, the intrinsic the nature of the item being “deemed up” does not change. As Black’s explains, “deem” means “[t]o treat (something) as if ... it has qualities *that it does not have*”. Black’s Law Dictionary (10th ed. 2014) (emphasis added).

The Protected Series provisions adopt the UPSA concept of "Extrapolation" - whereby the provisions of the existing Florida LLC Act apply to a Protected Series LLC and any Protected Series created within that Protected Series LLC, when invoked in Part II of the LLC Act.

Extrapolation occurs only when expressly invoked by some provision of this act and, when invoked, proceeds according to the following paradigm:

* a protected series is treated *as if it were* a separate limited liability company;
* any associated member of the protected series is treated *as if it were* a member of the separate, hypothetical company;
* any protected-series transferee of the protected series is treated *as if it were* a transferee of the separate, hypothetical company;
* any protected-series transferable interest of the protected series is treated *as if it were* a transferable interest of the separate, hypothetical company;
* a protected-series manager of the protected series is treated *as if it were* a manager
* of the separate, hypothetical company;
* any asset of the protected series is treated *as if it were* an asset of the separate, hypothetical company, whether or not the asset is an associated asset of the protected series; and
* any creditor or other obligee of the protected series is treated *as if it were* a creditor or obligee of the separate, hypothetical company.

Extrapolation provides two significant advantages. First, the approach avoids burdening this act with lengthy provisions largely duplicative of provisions in the relevant limited liability company act. Second, where appropriate the approach imports to the protected series level the same policy choices reflected at the limited liability company level.

 Examples of Extrapolation has an additional benefit. The approach makes possible parallelism in concept and terminology.

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| **concept** | **defined term pertaining to series limited liability company** | **defined term pertaining to a protected series** |
| person with both governance and economic rights | Member | associated member |
| economic rights | transferable interest (rights to distributions from the series limited liability company) | protected-series transferable interest (rights to distributions from a protected series) |
| owner of solely economic rights | transferee | protected-series transferee[[1]](#footnote-2) |
| owned assets | property of the series limited liability company | assets of a protected series |
| associated asset/ non-associated asset of a protected series[[2]](#footnote-3) |

(3) *Fundamental Aspects of Asset Association*

The Protected Series construct has the following fundamental aspects: (i) an identifiable set of assets segregated within a limited liability company (“a series limited liability company”); (ii) a protected series is empowered to conduct activities in its own name; (iii) its assets must be identified by thorough recordkeeping that distinguishes them from assets of the series limited liability company and assets of any other protected series of the company; (iv) its assets are obligated solely to persons asserting claims pertaining to activities related to the segregated assets; (v) its assets 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; (vi) one or more members of the series limited liability company may be associated with the protected series, but not necessarily; if no members of the series limited liability company are associated with a protected series, the series LLC is deemed to be associated with the protected series; (vii) distributions arising from the assets and activities go to either: (a) the members associated with the protected series, if any; or (b) if the series has no associated members, the series limited liability company.

(4) *New "Horizontal" or "Internal" Shields*.

 An entity’s traditional liability shield – i.e., the vertical shield – protects an entity’s owners from automatic, status-based liability for the entity’s debts and thereby protects each owner’s personal assets from creditors of the entity. Thus, the traditional shield has two parts: a non-liability rule (no status-based liability) and a non-recourse rule (no creditor recourse against assets). This distinction is immaterial in the context of a vertical shield but is essential to understanding this act’s novel approach to horizontal shields.

A protected series limited liability company contains new “internal shields” – i.e., asset partitions reserving the assets of each protected series solely to creditors of that protected series. These new “horizontal” shields are conceptually and practically quite different from the traditional, “vertical” shield that protects the owners of an organization from automatic, status-based liability for the organization’s obligations.

Like the traditional “vertical shield,” a protected series’ horizontal shield contains both a non-liability rule and a non-recourse rule. UPSA treats these rules separately to create an important inducement to good recordkeeping.

* under the non-liability rule (Section 401(b)):
* a protected series is not liable for the debts of the series limited liability company or any other protected series of the company and vice versa.
* under the non-recourse rule (Sections 301 and 404):
* only an associated asset of a protected series is shielded against collection efforts of judgment creditors of the series limited liability company or of any other protected series of the company, and the same is true for assets of the company; and association is accomplished by creating and maintaining required records.

Thus, even when the non-liability rule is firmly in place for a protected series,[[3]](#footnote-4) the non-recourse rule for each asset of the protected series is subject to challenge on the grounds that: (i) the relevant records are deficient; (ii) the asset is therefore non-associated; and (iii) as a result the asset is “up for grabs” not only by a creditor of the protected series but also by any judgment creditor of the series limited liability company and any judgment creditor of any other protected series of the company.[[4]](#footnote-5)

(5) *Overcoming the Shields* *- Section 605.12402*

 “Piercing the veil” is the foremost doctrine for overcoming the traditional, vertical shield separating an entity from its owners. When a creditor succeeds with a piercing claim, the shield falls *in toto*. That is, all the owner’s non-exempt assets are available to the judgment creditor of the entity.

The piercing doctrine (and any related theories that conflate an organization and its owners) apply to the vertical shield between a series limited liability company and its members and to the vertical shield between a protected series and its associated members.

Likewise, the piercing doctrine (and related theories of affiliate liability) will apply to the internal, horizontal shields – *i.e.,* in the proper circumstances, a court will disregard the internal shields, negate the non-liability rule, and thus render the non-recourse rule moot. For a detailed discussion of this issue, see UPSA Section 402, comment by the UPSA Drafting Committee.

(6) *Remedies of a Judgment Creditor- Section 605.12403 and 12404*

 The current LLC Act in Section 605.0503, provides that the remedies for a judgement creditor of a member of a Florida LLC is limited to a charging order, unless it is against the sole member of a single-member LLC, where the judgement creditor may seek a court order compelling distributions to satisfy the judgement under appropriate circumstances. The new Protected Series provisions in s. 605.12403 will apply the same rules to a judgement creditor of an Associated Member of a Protected Series or of a Protected Series LLC.

(7) *Protected Series Governing Law*

Section 605.12105 provides that the law of Florida governs the internal affairs of a protected series of a series LLC. The concept of “internal affairs” presupposes an organization that is a legal person and thus applies to a protected series under this act. *See* Section 605.12103 (stating that *“[a] protected series ... is a person*”). Because the protected series is a novel construct, this paragraph details some aspects of a protected series’ internal affairs. For a more detailed discussion of “internal affairs,” see Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 104, Paragraph (1), comment.

Although the relationships listed in this provision are not within the internal affairs of a protected series, they are part of the internal affairs of a series limited liability company and therefore subject to the operating agreement. The concept of a protected series being so novel, Paragraph (2) of s. 605.12105 is included for the avoidance of doubt.

Section 605.12105(4) -(5) chooses the law of the enacting state to govern matters pertaining to the vertical shields as well as governing matters pertaining to the horizontal shields provided by this act.

(8) *Operating Agreements for Protected Series*

Pursuant to Section 605.12106 of the Act, a protected series does not have an operating agreement of its own, so the operating agreement of the series limited liability company must address issues pertaining to the company’s protected series. An operating agreement may do so in its main body, through a different exhibit or appendix for each protected series, through an exhibit or appendix applicable all protected series, or through some combination.

Florida's limited liability company acts permit oral and implied-in-fact operating agreements, (defining the operating agreement as an agreement among all the members, “whether oral, implied, in a record, or in any combination thereof”). However, given the complexity inherent in the protected series construct, prudence demands a written operating agreement – and, moreover, one not subject to amendment except through a signed writing.

Unless prohibited by the operating agreement, associated members of a protected series may make contracts among themselves pertaining to the protected series. To the extent permitted by other law (principally the law of contracts), such contracts bind the parties but have no effect on the operating agreement or the rights and duties of members of the series limited liability company who are not party to the agreement (whether or not the non-party member is an associated member of the protected series).

Section 605.12107 provides "non-variable" provisions which the operating agreement may not vary. These restrictions are to be read "*in addition to*" the non-variable rules set forth in the LLC Act under current Section 605.0105(3), which are applied by extrapolated to the protected-series level.

Occasionally the comments to the LLC Act refer to a variable provision as a “default rule” and a mandatory provision as “non-variable.” These references are merely to draw attention to the default/non-variable distinction in particular contexts and have neither the intent nor the power to affect the default/non-variable status of the many provisions of the LLC Act whose comments lack a comparable reference.

(9) *Management of Protected Series & Duties*

The Protected Series LLC provisions in Section 605.12304 approaches management rights and duties in a protected series in three ways:

(i) *directly*, in Subsection (1)– "*If a protected series is managed by its associated members, each associated member fits the definition of “protected-series manager*”; and in Subsection (2) – "*If a protected series has no associated members, the series LLC is the protected series manager."*

Subject to the operating agreement, this provision applies not only when a protected series is established but also at any other time., (d), and (e);

(ii) *through particularized extrapolation*, in Subsections (c) and (f); and

(iii) *through the “internal affairs” extrapolation in Section 605.12106(d)(2)*.

Solely by reason of being or acting as a protected-series manager of a protected series, that person owes no duties to the series LLC; another protected series, or another person in that person's capacity a member of the series LLC which is not a member of the protected series or a transferee of the series LLC.

(10) *Dissolution and Winding Up of Protected Series*

The protected series provides five grounds for dissolution (1)dissolution of the series LLC, (2) an event specified in the operating agreement, (3) the affirmative vote or consent of all associated members of that protected series, (4) by court order upon application by an associated member or manager of the protected series (using the same grounds as in the LLC act), and (5) by court order upon application by the series LLC.

A dissolved protected series winds up its activities and affairs in the same manner that a dissolved LLC winds up its activities and affairs. Judicial supervision or another judicial remedy is available in the winding up of a protected series to the same extent and under the same conditions and same effects that apply in the LLC act under s. 605.0709(5).

 (11) *Entity Transactions Restricted*

The construct of a protected series not being a legal entity places significant limitations on what a protected series may do; actually, it is more about what a protected series "may not do" in connection with entity transactions. Pursuant to proposed s. 605.12602, 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.

 There are also restrictions that apply to the series LLC which has created protected series in s. 605.12603: "*A series limited liability company may not be: (1) an acquiring, acquired, converting, converted, domesticating, or domesticated entity; or* (*2) except as otherwise provided in Section 604, a party to or the surviving company of a merger.*

 A protected series may only be a party to a merger, if it is as part of a merger of the series LLC, but *"only if" (1) each party to the merger is a LLC; and (2) the surviving company is not created in the merger.* s. 605.12604. The rationale for the very "narrow channel" through which a protected series may travel in a merger under this section is tied to the fundamental concept that the protected series does not exist independently, and so exists only through its mothership - the protected series LLC.

1. **Conclusion**

The foregoing summary addresses some of the most significant aspects of the proposed legislation. However, there are a significant number of issues and discussions had by the Task Force with respect to the Protected Series provisions which could not be addressed in summary fashion.  It reflects the most significant aspects of the proposed revisions as determined by the Task Force. The consensus of the Task Force is that since foreign series LLCs are already operating in Florida, and more foreign series LLCs are sure to follow, Florida needs to statutorily address series LLCs.

Hence, it is incumbent on Florida to address Series LLCs, and to provide statutory rules to permit the formation of Florida Protected Series LLCs, and to provide basic statutory requirements for foreign series LLCs doing business in Florida.

The Task Force supports and advocates for enactment of the amendments proposed in the draft provisions in Sections 605.12101 through 605.12803 as reflected in the Appendix hereto.

Respectfully submitted on behalf of the Protected Series LLC Task Force of the Business Law Section by Louis T. M. Conti, Chair of the Task Force.

 [Appendix to contain the draft provisions of Sections 605.12101 through 605.12803 ]

1. Although a series limited liability company may own a protected-series transferable interest of a protected series of the company, the defined term, “protected-series transferee,” does not include the company. *See* Section 303(d), cmt. [↑](#footnote-ref-2)
2. A protected series can own an asset without the asset being associated with the protected series. This act labels this category of property as a “non-associated asset.” Only an associated asset is protected by the internal shields of a protected series. See Sections 301 and 404. [↑](#footnote-ref-3)
3. Like the non-liability rule of a vertical shield, the non-liability rule of a horizontal shield is subject to “piercing” claims. *See* Section 402. [↑](#footnote-ref-4)
4. The situation is the same for assets of the series limited liability company itself. [↑](#footnote-ref-5)