

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*

January 13, 2023

I. 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 2017, and to consider adopting its provisions as new provisions of Fla. Stat. Chapter 605, the Florida Revised Limited Liability Company Act (the “Florida LLC Act”).

The Task Force is comprised of members of the Business Law Section representing all committees of the BLS, as well as representatives from the Tax Section of The Florida Bar, and 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 January 11, 2023. Additional meetings are scheduled in February and March of 2023, as needed to work with legislative sponsors and staff on the proposed legislation.

The leadership of the Department of State Division of Corporations, in the persons of the Division Director and the Commercial Filings 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 (hereafter, “Protected Series”) additions to the Florida LLC Act.

The Task Force compared the UPSA with the series provisions of the Delaware LLC Act (which include “series,” “protected series” and “registered series” LLC provisions), as well as the recently revised Virginia LLC Act (which adopted the UPSA in 2021), and with the Texas Revised LLC Act which incorporated non-uniform series provisions into the Texas Revised LLC Act in 2013. The Task Force also occasionally referred to other state LLC Acts, including Illinois, which contained series or protected series provisions.

The Task Force included representatives of the Corporations, Securities and Financial Services Committee, the Business Litigation Committee, and the Bankruptcy/UCC Committee, as well as representatives of the Real Property Probate and Trust Law Section.

After extensive meetings and analysis, the Task Force proposed 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.

Of particular note are a few non-uniform deviations from the UPSA in the proposed Florida Protected Series provisions which were added based on the recommendations from representatives of The Real Property Probate and Trust Law Section of The Florida Bar to address concerns expressed regarding (i) associating a real property asset or liability with either the series LLC and/or a Protected Series, and (ii) the interplay with recorded title to real property or liens or other instruments affecting real property which are recorded in local real property recording offices around the state addressing the authority of the persons signing those records and their status as records for purposes of dealing with associates assets. These non-uniform provisions are reflected in Sections 605.12301(2)(b) and 605.12301(3)(b).

The other non-uniform change of importance was a deviation from the extrapolation provision of the UPSA (which utilized the concept of extrapolation to apply only to specified sections of the main LLC act, as reflected in Section 605.12108(1)). The Florida Task Force decided that a more general application of the extrapolation concept was advisable, so we adopted a construct whereby it is clear that the provisions of the existing chapter 605 (Florida LLC Act) would be generally applicable to protected series, except where explicitly treated otherwise in the protected series provisions of 605.12101 - 605.12803. This change is reflected in the addition of subparagraph (3) in Section 605.12108(3), which subparagraph is further discussed in the “Extrapolation” concept below in Section C. 2 of this paper.

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 both domestic and foreign series limited liability companies that are doing business in Florida utilizing series LLCs.

II. 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” trusts was initially utilized. Delaware also provides for series limited partnerships. Prior to the application of series” to trusts, LLCs and limited partnerships, the series construct was most often used in the context of investment funds, mutual funds, and captive insurance companies.

Delaware's adoption of series provisions to its LLC Act in 1996, was followed by the adoption of “series” limited liability company provisions 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 in the Florida LLC Act that addresses series LLCs. However, series limited liability companies formed in other states are currently permitted to qualify to do business in Florida by the Florida Division of Corporations, and each such series within a foreign series LLC is currently required to separately qualify to do business in Florida, as if each foreign

series were a separate legal entity. Florida does not keep statistics on how many foreign series LLCs are doing business in Florida, but it is likely that the number of foreign series doing business in Florida will increase, whether or not Florida adopts series LLC legislation.

Generally, for states that do not have their own series LLC provisions, Delaware has become the default jurisdiction for most series limited liability companies, at least for sophisticated parties who want to take advantage of Delaware's business friendly laws, contractual freedom, and its efficient and competent Court of Chancery.

Delaware amended its LLC Act (Sec 18-215 et. seq.) to add a “protected series” (in addition to adding a “registered series”) to the Delaware series provisions, in large part because of the work that went into the creation of UPSA, where Delaware lawyers were on the drafting committee and observers to the UPSA drafting sessions. The UPSA was drafted to use “Protected Series” as the single “series” construct, without need of an additional “registered” series, since the Protected Series construct will satisfy UCC aspects which apply to a legal “person” and since a Protected Series requires the public filing of a separate designation for each protected series created by the limited liability company.

III. Summary of the Proposed Legislation

A. Intent of the Proposed Legislation and Reasons for Adoption

The intent of the proposed legislation 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) transacting business in Florida. The proposed legislation utilizes the relatively new, but well thought out and considered, set of rules in the Uniform Protected Series Act (the “UPSA”) promulgated and adopted by the Uniform Law Commission in 2017, after a five-year period of study and drafting.

The principal reasons for adoption of the proposed Protected Series LLC provisions are:

(1) Series LLC legislation is now found in 21 jurisdictions. All of the series LLCs operating in Florida currently were formed in some other state or territory; however, there are no provisions in the Florida LLC Act (Chapter 605) to provide guidance to Florida citizens or businesses doing business with a foreign series LLC, or to lawyers and judges who are being asked to address them in connection with contracts, claims, or disputes.

(2) Adding Protected Series LLC provisions to the existing Florida LLC Act will prove beneficial to Florida citizens and businesses, as well as to lawyers who are being asked to form and use a series LLC for doing business in Florida, and for judges who may be faced with issues associated with foreign series LLCs operating in Florida and with Florida series LLCs which will be utilized in the future under these new provisions.

(3) The proposed legislation provides comprehensive series provisions with robust rules for greater transparency to the public, and greater clarity as to the myriad issues raised in the “Series LLC” construct; particularly given the diversity of treatment of series LLCs in the jurisdictions which currently address series in their LLC acts, which will make Florida a more attractive jurisdiction for businesses wanting to do business in this state with a series LLC.

(4) The proposed legislation is based on the Uniform Protected Series Act adopted by the Uniform Law Commission in 2017 (the “UPSA”). The UPSA was formulated specifically to be “plugged into” the Revised Uniform Limited Liability Company Act, which Florida adopted in 2013, effective January 1, 2014. The proposed Protected Series provisions would be added as Part II of the existing Chapter 605, with continuous section numbering in new Article 12 of the Florida LLC Act as sections 605.12101 through 605.12803.

B. “Protected Series” as a Term of Art

Following long-standing practice with statutory trusts and investment companies, many series statutes in other jurisdictions use “series” as the term of art for the construct of a “Protected Series” described in the UPSA and the proposed Florida Protected Series provisions. “Protected Series” is being used to distinguish the proposed construct from the simple term “series,” since the term “series” has an established and very different meaning with regard to bonds, corporate stock, mutual funds, partnership interests, *et cetera*, and to avoid the potential for confusion with series LLCs formed in other jurisdictions which are not based on the UPSA.

In an effort to avoid such confusion, the UPSA and in turn the proposed Florida Protected Series legislation, uses the term “Protected Series” – both to signal a different meaning than just “series,” and to call attention to the new internal, horizontal shields which are the protected series construct’s defining characteristic. These new “Horizontal” or “Internal” liability shields are discussed in further detail below.

C. Key Aspects of the Protected Series Limited Liability Company

(1) Protected Series Existence

A Protected Series Limited Liability Company (also called a series limited liability company, a series LLC, and occasionally referred to by the Task Force as the “mothership”) is statutorily defined to be a *legal entity*, which can establish one or more “Protected Series” in its operating agreement and by a series designation filed with the Florida Department of State. Each Protected Series can have its own associated members, managers, assets and liabilities, and each Protected Series can conduct its own business activities, separate and apart from the series LLC and any other Protected Series which was formed by the series LLC.

A Protected Series created by the series LLC is ***not*** a separate and distinct legal entity. Rather, a Protected Series is statutorily described as a “*Person*” in proposed Section 605.12103 (“*[a] protected series... is a person*”) fully empowered to conduct its own business activities in its own name, and, in most respects, is “*deemed*” to be treated “*as if*” it was a limited liability company subject to the overall provisions of the Florida LLC Act. The use of the term “*Person*” in describing a Protected Series is to assure that it is deemed a “*person*” within the meaning of Article 1 of the Uniform Commercial Code (“UCC”), and therefore an “*organization*” that can be a debtor under the UCC.

Section 605.12104(c) provides that a Protected Series of a series LLC cannot exist on its own; therefore, a Protected Series is not entirely separate and distinct from the series LLC on whose existence the Protected Series depends. There is one narrow exception to this rule, where a Protected Series may survive the dissolution of the series LLC as the result of a merger under Section 605.12604 in which a Protected Series may be “relocated” *from* a merging

series LLC that does not survive the merger, *to* the series LLC that does survive the merger.

Section 605.12501(1) further reflects this reality by stating that the dissolution of a series LLC causes the dissolution of each Protected Series of the series LLC. Section 605.12502(d) also reflects this reality by providing that a series LLC has not completed its own “winding up” until the series LLC has completed the winding up of each Protected Series created by the series LLC.

(2) “Extrapolation” (analogizing the provisions of the Florida Limited Liability Company Act to the new Protected Series)

Section 605.12108 provides rules for applying the provisions of the existing Florida LLC Act to the series LLC and the Protected Series via an “extrapolation” by analogy approach, which is fundamental to the Protected Series construct in UPSA. With a few exceptions, this extrapolation by analogy construct provides the mechanics for the “*deemed*” treatment of a Protected Series to be treated “*as if*” it was a limited liability company separate and apart from the series LLC under which it was created, and also distinct from any other Protected Series of the “*mothership*” series LLC. This extrapolation approach is at the core of UPSA and the proposed Florida Protected Series provisions.

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 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*). So, the “*deeming up*” of a Protected Series to be deemed as if it were a separate and distinct limited liability company; when in reality a Protected Series is statutorily described as a “*person*” (rather than a legal entity), does not make the Protected Series an actual legal entity.

Extrapolation occurs under the UPSA when expressly invoked by some provision of the proposed series provisions, and, when invoked, proceeds according to the following example as described in proposed Section 605.12108(1):

Except as otherwise provided in subsection (2) and s. 605.12107 [the additional non-variable limitations on operating agreements of a series LLC]..., the following rules apply:

- a Protected Series of a series limited liability company is deemed to be *treated as if it were* a separate hypothetical limited liability company;
- any associated member of the Protected Series is deemed to be *treated as if it were* a member of the separate hypothetical limited liability company;
- any protected-series transferee of the Protected Series is deemed to be *treated as if it were* a transferee of the separate hypothetical limited liability company;
- any protected-series transferable interest of the Protected Series is deemed to be *treated as if it were* a transferable interest of the separate hypothetical limited liability company;
- a protected-series manager of the Protected Series is deemed to be *treated as if it were* a manager of the separate hypothetical limited liability company;

- an asset of the Protected Series is deemed to be *treated as if it were* an asset of the separate hypothetical limited liability 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 deemed to be *treated as if it were* a creditor or obligee of the separate hypothetical limited liability company.

The Task Force deviated from the UPSA when it came to one aspect of extrapolation. Under the UPSA, extrapolation occurs when it is “expressly invoked” by a specific provision in UPSA. For example, UPSA invokes extrapolation in the specific references to specific provisions in Section 108(1) of UPSA.

The Task Force, by consensus, and as requested by representatives from other sections of The Florida Bar, believe that a more general rule of extrapolation should be included, whereby the default rules of the Florida LLC Act apply both to the series LLC and to the Protected Series created by the series LLC, *unless* there is a specific provision in proposed Sections 605.12101 through 605.12803 which apply different default rules or requirements on a series LLC or its Protected Series.

The more general extrapolation to the Florida LLC Act is codified in new subsection (3) of proposed Section 605.12108(3). There is no subsection (3) in UPSA Section 108. In essence, the proposal to add subsection (3) to 605.12108 deviates from UPSA by statutorily applying the extrapolation construct to the default provisions of the Florida LLC Act, by making it clear that those default rules apply to a series LLC as well as to a Protected Series of a series LLC, except where there are specific provisions in Sections 605.12101 through 605.12803 to the contrary which implement the protected series LLC provisions for Florida limited liability companies.

Extrapolation provides two significant advantages:

First, the approach avoids burdening the Protected Series LLC provisions with lengthy provisions largely duplicative of provisions already in the Florida LLC Act.

Second, where appropriate, the approach imports to the Protected Series level the same policy choices reflected in the existing Florida LLC Act.

The following examples of Extrapolation display the additional benefit of applying “parallelism” in concept and terminology between what we know in the existing Florida LLC Act, and applying parallel terms for application with a Protected Series.

concept	defined term pertaining to a 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	protected-series transferable interest (rights to distributions from a

	company)	protected series)
owner of solely economic rights	transferee	protected-series transferee ¹
owned assets	associated assets of the series limited liability company	assets of a protected series
		associated assets/ non-associated assets of a protected series ²

(3) *Fundamental Aspects of Asset Association & Required Record-Keeping*

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” or “series LLC”);
- (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 series limited liability 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 itself is deemed to be associated with the Protected Series;
- (vii) distributions arising from the assets and activities of a Protected Series 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.

¹Although a series limited liability company may own a protected-series transferable interest of a protected series of the series limited liability company, the defined term, “protected-series transferee” does not include the series limited liability company. See Section 605.12303(4), and the comment to UPSA section 303(d).

²A protected series can own an asset without the asset being associated with the protected series. The proposed Protected Series provisions label this category of property as a “non-associated asset.” However, only an “associated asset” is protected by the internal shields of a Protected Series. See proposed Sections 605.12301 and 605.12404.

Section 605.12301 addresses the association of assets of a Protected Series, and the record-keeping requirements to assure proper “association” of assets among the series LLC and/or any of its Protected Series.

The fundamental record-keeping requirement to properly “associate” an asset with a specific Protected Series, is stated in proposed Section 605.12301(2)(a), “... ***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:***

(i) *identify the asset and distinguish it from any other asset of the protected series, any asset of the series LLC, and any asset of any other protected series;*

(ii) *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*

(iii) *if the protected series acquired the asset from the series LLC or another protected series of the company, determine any consideration paid, the payor, and the payee.*

There are parallel rules for the association of an asset with the series LLC in proposed Section 605.12301(3)(a).

Both proposed Section 605.12301(2)(b) and proposed Section 605.12301(3)(b) include non-uniform language designed to make it clear that deeds and other instruments granting an interest in real property to, respectively, a Protected Series or a series limited liability company or affecting real property owned by, respectively, a Protected Series or a series limited liability company that is properly recorded, and is in favor of a person who gives value without knowledge of the lack of authority of the person signing and delivering the instrument is conclusive as to such authority and also has the effect of being a record for purposes of associating the asset or liability with the respective Protected Series or series limited liability company.

Also notable is the expansive latitude given to the record-keeping requirements, whereby records may be “...*organized by specific listing, category, type, quantity, or computational or allocational formula or procedure, including a percentage or share of any asset, or in any other reasonable manner.*”

(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 *vertical* shield has two parts: a non-liability rule (no status-based liability) and a non-recourse rule (no creditor recourse against an owner's assets). This distinction is immaterial in the context of a vertical shield but is essential to understanding the proposed Protected Series provision's novel approach to the new “*horizontal*” or “*internal*” shields.

A Protected Series limited liability company contains new “internal shields” – i.e., asset and liability 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 shields contain both a non-liability rule and a non-recourse rule. The UPSA and the proposed Florida Protected Series provisions, treat these rules separately to create an important inducement to good recordkeeping.

- under the non-liability rule (proposed Section 605.12401(2)):
 - a Protected Series is not liable for the debts of the series limited liability company or any other Protected Series of the series limited liability company, and vice versa.
- under the non-recourse rule (proposed Sections 605.12301 and 605.12404):
 - 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 series limited liability company, and the same is true for associated assets of the series limited liability company; and such “association of assets” is accomplished by creating and maintaining the required records.

Thus, even when the non-liability rule is firmly in place for a Protected Series,³ 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 series limited liability company.⁴

(5) *Overcoming the Shields - Proposed 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 owners' 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) applies 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/horizontal shields, negate the non-liability rule, and thus render the non-

³Like the non-liability rule of a vertical shield, the non-liability rule of a horizontal shield is subject to “piercing” claims. *See* Section 402 of the UPSA.

⁴The situation is the same for assets of the series limited liability company itself.

recourse rule moot. For a detailed discussion of this issue, see the UPSA Section 402 comment by the UPSA Drafting Committee.

(6) Remedies of a Judgment Creditor- Sections 605.12403 and 605.12404

The current Florida LLC Act in Section 605.0503, (as modified in response to the Florida Supreme Court *Olmstead* opinion), provides that the remedies for a judgment creditor of a multi-member Florida LLC is limited to a charging order; however, if the judgment is against the sole member of a single-member Florida LLC, the judgment creditor may seek a court order compelling distributions to satisfy the judgment, under appropriate circumstances described in the Florida LLC Act.

The proposed Protected Series provisions in Section 605.12403 will apply the same rules to a judgment creditor of: (i) the sole associated member of a single-member Protected Series, or (ii) the sole associated member of a single-member series limited liability company.

(7) Protected Series Governing Law

Proposed Section 605.12105 provides that the law of Florida governs the internal affairs of a Protected Series of a series LLC formed in Florida. The concept of “internal affairs” presupposes an organization that is a legal person and thus applies the internal affairs doctrine to a Protected Series of a series LLC under the proposed provisions. See Section 605.12103 (stating that “[a] protected series ... is a person”).

Since the Protected Series is a novel construct, the following details fundamental aspects of a Protected Series’ internal affairs. Proposed Section 605.12105(1) provides the basic internal affairs rules for a Florida series LLC and its Protected Series. The internal affairs of a Protected Series of a series LLC includes:

- (a) relations among any associated members of the Protected Series;
- (b) relations among the Protected Series and, any associated member, any Protected Series manager, or any Protected Series transferee;
- (c) relations between any associated member and any Protected Series manager or any Protected Series transferee;
- (d) the rights and duties of a Protected Series manager;
- (e) governance decisions of the Protected Series and the conduct of its activities and affairs; and
- (f) procedures and conditions for becoming an associated member or transferee of a Protected Series.

Proposed Section 605.12105(2) provides additional rules (that are not within traditional rules of internal affairs), to govern the relationship between a Protected Series of a series LLC and each of the following:

- (a) the series LLC;
- (b) another Protected Series of the series LLC;
- (c) a member of the series LLC which is not an associated member of the Protected Series;
- (d) a Protected Series manager of a different Protected Series within the same series LLC; and
- (e) a Protected Series transferee of a different Protected Series within the same series LLC.

Proposed Section 605.12105(3) provides a non-liability rule for a status-based person, solely for being or acting as an associated member, manager or transferee of a Protected Series, or solely for being or acting as a member, manager or transferee of the series LLC.

Proposed Section 605.12105(4) provides a non-liability rule for the series LLC solely based on filings made with the Florida Department of State (e.g., filing a protected series designation of a Protected Series, or a statement of designation change), or being or acting as a Protected Series manager, or having the Protected Series being or acting as a manager of the series LLC, or owning any Protected Series transferable interest.

Proposed Section 605.12105(5) provides a non-liability rule for a Protected Series of a series limited liability company, where liability for a debt obligation or other liability of the series LLC or of another Protected Series, is being asserted solely by reason of: (i) the Protected Series being a Protected Series of the series LLC, or (ii) being or acting as a Protected Series manager of another Protected Series of the series LLC or a manager of the series LLC, or (iii) the series LLC owning a Protected Series transferable interest of the Protected Series.

(8) *Operating Agreements for Protected Series*

Pursuant to proposed Section 605.12106, the written operating agreement of the series LLC governs the activities and affairs (including governance and membership) of a Protected Series formed by that series LLC. 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 each of the series LLC's Protected Series.

An operating agreement of the series LLC may do so in its main body, through a different exhibit or appendix for each Protected Series, through an exhibit or appendix applicable to all Protected Series, or through some combination.

The current Florida LLC Act permits 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 *demand a written operating agreement* – and, moreover, demands one that is not subject to amendment except through a signed writing. Consequently, under the proposed Protected Series provisions, there cannot be an oral or implied operating agreement for a Protected Series.

Unless prohibited or limited 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).

If the Florida LLC Act restricts the power of an operating agreement, such restrictions also apply to the Protected Series provisions of the operating agreement. Further, if the law of Florida other than Chapter 605 imposes a restriction, prohibition, limitation, condition, obligation, liability, or other restriction on an LLC, they apply to Protected Series in accordance with Section 605.12108.

Proposed Section 605.12107 provides new “non-variable” rules for the new Protected Series construct, which the operating agreement may not vary. These restrictions are to be read “*in addition to*” the non-variable rules set forth in the Florida LLC Act under current Section 605.0105(3), which are also applied by extrapolation to the Protected Series level.

Occasionally, comments to the Florida 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 Florida LLC Act.

(9) *Management of Protected Series & Duties*

The current Florida LLC Act applies the statutory apparent authority default rule that members of a member-managed Florida LLC have authority to manage the activities and affairs of the LLC, unless otherwise provided in an operating agreement.

Pursuant to proposed Section 605.12304(7), an associated member of a Protected Series is an agent for the Protected Series with power to bind the Protected Series to the same extent that a member of a Florida LLC is an agent for the LLC under Section 605.04074(1)(a).

Section 605.12304(1) of the proposed Protected Series provides that “*A protected series may have more than one protected-series manager.*” That term is defined in the Definitions section 605.12102(9): “*Protected Series Manager*” means 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 this chapter.”

There is also an explicit default rule in Section 605.12304(2) addressing management where there are no associated members of a Protected Series – “*If a protected series has no associated members, the series LLC is the protected series manager.*”

Any duties (including fiduciary duties) of a Protected Series Manager are applied in Section 605.12304(3) by reference to Section 605.12108 by extrapolation to deem a Protected Series Manager to be a *deemed* manager of a *deemed* Florida LLC, and subject to the duties imposed on a manager of a Florida LLC.

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 as a member of the series LLC which is not an associated member or transferee of the Protected Series, or a transferee of the series LLC.

An associated member of a Protected Series has the same rights to vote on, or consent to, any action to which a member of a regular Florida LLC has pursuant to the Florida LLC Act or pursuant to an operating agreement.

An associated member of a series LLC or a Protected Series may bring a derivative action on behalf of the series LLC or a Protected Series, to the same extent as a member may bring a derivative action on behalf of a Florida LLC pursuant to existing Section 605.0802.

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

Section 605.12501 of the Protected Series provisions state five grounds for dissolution of a Protected Series (three of which are non-variable):

- (1) On dissolution of the series LLC;
- (2) an event specified in the operating agreement;
- (3) the affirmative vote or consent of all associated members of the Protected Series;
- (4) by court order upon application by an associated member or protected-series manager of the Protected Series (applying the same grounds for dissolution of an LLC as stated in the Florida LLC Act); and
- (5) by court order upon application by the series LLC, or a member or manager of the series LLC pursuant to Section 605.0702.

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 Florida LLC Act under Section 605.0709(5).

(11) *Entity Transactions Restricted*

The construct of a Protected Series being a “person” rather than a “legal entity” places significant limitations on what a Protected Series may do when it comes to entity transactions; actually, it is more about what a Protected Series may “not do” in connection with entity transactions.

Pursuant to proposed Section 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 a Protected Series in Section 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.* See Section 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.

IV. Conclusion

The foregoing summary addresses some of the most significant aspects of the proposed Protected Series legislation. However, there are a significant number of issues that were discussed by the Task Force with respect to the Protected Series provisions which could not be addressed in summary fashion. This White Paper reflects what we believe are the most significant aspects of the proposed legislation.

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 should statutorily address series LLCs.

Consequently, the Task Force believes it is incumbent on Florida to address Series LLCs, 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 and the Business Law Section of The Florida Bar advocates for enactment of the amendments proposed in the draft provisions of 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 of The Florida Bar by Louis T. M. Conti, Chair of the Task Force, who would like to acknowledge the valuable contributions of Gary I. Teblum in the editing of this White Paper, and the efforts of James Marx in coordinating the discussions and input from the Real Property, Probate & Trust Law Section of The Florida Bar.

[Appendix to contain the draft provisions of proposed Sections 605.12101 through 605.12803 to be added as Part II of the Florida LLC Act]