

PAVING THE WAY FOR SECURED LENDERS: WHY TEXAS SHOULD FOLLOW DELAWARE'S SERIES LLC STATUTES

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I. INTRODUCTION

The limited liability company (“LLC”) is the most popular legal entity formed in Texas and throughout the United States.¹ A series limited liability company (“SLLC”) is a form of alternative entity in which one or more series

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¹The Office of the Secretary of State has provided the author the following information about the number of certificates of formation and initial LLP registration certificates filed for domestic entities:

	2018	2017	2016
For Profit Corporations	24,135	21,938	22,407
LLC's	192,284	166,589	150,266
Limited Partnerships	4,599	4,516	5,054
Limited Liability Partnerships	417	525	624

The chart demonstrates the LLC is the most common entity formed in Texas in the last three years. The statistics for Delaware show similar results:

	2017	2016	2015
Corporations	41,553	40,253	38,288
LLC's	143,996	128,852	128,042
Limited Partnerships/ Limited Liability Partnerships	11,517	10,337	10,746

Annual Report Statistics, Delaware Division of Corporations (Jan. 16, 2019, 10:05 AM), <https://www.corp.delaware.gov/stats/>. See also David L. Cohen, *Theories of Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?*, 51 OKLA. L. REV. 427, 447 (1998) (“The LLC has spread like wildfire . . .”); Jacob Stein, *Tax Tips: Advanced Asset Protection and Tax Planning with LLCs*, L.A. LAW., June 2006, at 17, 17, <https://www.lacba.org/docs/default-source/lal-back-issues/2006-issues/june-2006.pdf> (noting the soaring popularity of LLCs in California since 1994 as compared to corporations).

are established within a single LLC.² As SLLCs continue to increase in popularity, certain questions inevitably arise regarding how to engage in business relationships with this type of structure.³

Recently, Delaware enacted new legislation that enables a new type of series of an LLC, called a “registered series.”⁴ The additions made to the Delaware Limited Liability Company Act (“DLLCA”) address historical uncertainty among secured lenders and other issues faced by business professionals in dealing with SLLCs.⁵ This comment reviews the amendments to the Delaware code and considers whether Texas should consider adopting similar legislation.⁶ Leading up to that review, this article discusses the development of SLLC legislation, SLLC formation, the rights and abilities possessed by SLLCs currently, and the current issues surrounding SLLCs. Finally, this comment concludes that the new Delaware amendments contain useful and desirable provisions that should be considered for adoption by the Texas legislature.

²TEX. BUS. ORGS. CODE ANN. § 101.601.

³See generally Michelle M. Masoner et al., *In This Issue: Lien on Me, How Are Security Interests in Series LLC Assets Perfected, and Is It Even Possible?*, 35–9 AM. BANKR. INST. 22, 22 (2016) (discussing the difficulties in lending to SLLCs); Allen Sparkman, *Through the Looking Glass—Series LLCs in 2016*, 3 BUS. & BANKR. L.J. 1, 12–14 (2016) (discussing uncertainties when dealing with SLLCs).

⁴R. Jason Russell & Sean Sullivan, *Del. Series LLC Changes Bring Clarity for Secured Lenders*, Law360 (Aug. 23, 2018), <https://www.law360.com/articles/1075601/del-series-llc-changes-bring-clarity-for-secured-lenders>; see also An Act to Amend Chapter 18, Title 6 of the Delaware Code Relating to the Creation, Regulation, Operation, and Dissolution of Domestic Limited Liability Companies and the Registration and Regulation of Foreign Limited Liability Companies, 81 Del. Laws, c. 357 (2018).

⁵See Russell & Sullivan, *supra* note 4; see also Allison Land & Anne Connolly, *How Delaware Refreshed Its LLC Act and General Corp. Law*, Law360 (Aug. 6, 2018), <https://www.law360.com/articles/1069815/how-delaware-refreshed-its-llc-act-and-general-corp-law> (stating that “[r]egistered series address certain issues and limitations that have arisen in connection with existing series, including (1) the inability of an existing series to obtain a good standing certificate, (2) the inability of an existing series to merge with other series of the same LLC, and (3) the fact that existing series are not considered ‘registered organizations’ for purposes of the Uniform Commercial Code, thereby creating issues in perfecting a security interest against a series’ assets”).

⁶This Article will focus on the DLLCA amendments concerning the creation and perfection of a security interest under the UCC and the newly created “registered series,” as well as the “protected series.” This Article will not address other provisions of the act, such as the creation of public benefit LLCs. For a brief overview of the new provisions not discussed, see Land & Connolly, *supra* note 5 (discussing the new amendments to the Delaware LLC Act).

II. WHAT IS AN SLLC?

Delaware became the first state to adopt statutory provisions for SLLCs in 1996 at the same time that it added series provisions to its limited partnership act.⁷ Although series LLCs did not gain much attention for several years, Texas eventually followed suit and adopted amendments to the Texas Business Organizations Code (“TBOC”) permitting the formation and operation of SLLCs in 2009.⁸

An SLLC is a mechanism that allows a business to partition its assets and liabilities among various series and “have different economic arrangements with respect to the different series contained within a single entity.”⁹ Thus, an SLLC allows a single “master” LLC to “compartmentalize different series of properties or operations, perhaps with diverse business purposes or objectives, without the need for a distinct holding company governing multiple separate subsidiaries.”¹⁰ Under Texas law and the laws of the majority of other states with SLLC legislation,¹¹ an organizer forms a juridical or “master” LLC (the series LLC) and provides in its certificate of formation and company agreement the power to form individual series.¹²

⁷ See Sparkman, *supra* note 3, at 5.

⁸ See *id.* at 9. Texas amended Chapter 101 of the TBOC by adding subchapter M. See Act of May 20, 2009, 81st Leg., R.S., ch. 84, § 45, 2009 Tex. Gen. Laws 140, 153 (codified at TEX. BUS. ORGS. CODE ANN. §§ 101.601–621).

⁹ See Julia Gold, *Series Limited Liability Companies—Too Good to Be True?*, 12 NEV. LAW. 18, 18 (2004); see also Masoner et al., *supra* note 3.

¹⁰ Bernie R. Kray, Comment, *Respecting the Concept and Limited Liability of a Series LLC in Texas*, 42 ST. MARY’S L.J. 501, 503 (2011) (citing Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 185, 193 (2009)).

¹¹ As of September 17, 2017, the following statutes provide for series within an LLC: ALA. CODE §§ 10A-5A-11.01–.16 (2015); DEL. CODE ANN. tit. 6, § 18-215 (West 2015); D.C. Code Ann. § 29-802.06 (West 2015); 805 ILL. COMP. STAT. ANN. 180/37- 40 (West 2014); IND. CODE ANN. § 23-18.1-1-1 to 23-18.1-7-4 (West 2017); IOWA CODE ANN. §§ 489.1201-1206 (West 2014); KAN. STAT. ANN. § 17-76,143 (West 2014); MO. REV. STAT. § 347.186. (2014); MONT. CODE ANN. § 35-8-304 (West 2013); NEV. REV. STAT. ANN. § 86.296 (West 2014); OKLA. STAT. ANN. tit. 18, §§ 2005(B), 2054.4 (West 2014); TENN. CODE ANN. § 48-249-309 (West 2014); TEX. BUS. ORGS. CODE ANN. §§ 101.601- 622 (West 2013); UTAH CODE ANN. §§ 48-3a-1201 to 1209 (West 2014); P.R. LAWS ANN. tit. 14, § 3967 (2011). A minority of the states either permit or require an individual series to publicly file with the state filing office. Compare 805 ILL. COMP. STAT. ANN. 180/37-40 (requiring a public filing to establish a series) with DEL. CODE ANN. tit. 6, §§ 18-215 & 18-218 (effective Aug. 1, 2019) (allowing a series to be treated as a “protected” or a “registered” series, the latter of which requires a public filing).

¹² The “master” LLC has also been referred to as the “Mothership.” See Adrienne Randle Bond & Allen Sparkman, *The Series LLC: A New Planning Tool*, 45 TEX. J. BUS. L. 57, 58–59 (2012).

Only the master SLLC is the filing entity—the creation of individual series does not require an additional public filing.¹³ These series can have rights, powers, and duties separate from other series and hold assets individually.¹⁴ Texas and Delaware law both allow a single SLLC to create an infinite number of individual series.¹⁵ The ability to create series is a significant departure from a traditional LLC, which may have different classes of members that have divergent rights.¹⁶ However, the ability to create different classes of members does not impact the obligations and liabilities of the LLC concerning outside entities or creditors.¹⁷

In most state SLLC acts, including those of Delaware and Texas, the entity for state law purposes is the master LLC and not the individual series within the SLLC.¹⁸ In short, an individual series within the SLLC is not a separate legal entity under the laws of Texas or Delaware.¹⁹ Although an individual series is not a separate legal entity, it does have the power to contract, hold title to assets, grant liens and security interests, and sue and be sued in its own name.²⁰ However, an individual series cannot enter into a merger or conversion; the TBOC only permits a “domestic entity” to enter into such agreements.²¹ Because a “domestic entity” is an “organization formed under or the internal affairs of which are governed by this code,” a series is not a domestic entity.²² Only the parent LLC is formed under the

The authors use of the term “master” or “Mothership” is for simplicity and ease of understanding. Either term, although not technically correct, refer to the totality of the LLC of which an individual series within the LLC is a segregated unit.

¹³ *E.g.*, TEX. BUS. ORGS. CODE ANN. § 101.601.

¹⁴ *Id.*

¹⁵ *See* Sparkman, *supra* note 3, at 6.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Bond & Sparkman, *supra* note 12, at 59. The jurisdictions that do treat individual series as a separate legal entity include: The District of Columbia, Kansas, Illinois, Iowa, Missouri, and Utah. D.C. CODE § 29–802.06; 805 ILL. COMP. STAT. 180/37-40; IOWA CODE ANN. § 489.1201; KAN. STAT. ANN. § 17-76, 143; MO. REV. STAT. § 347.186; and UTAH CODE ANN. § 48-3a-1201(3)(a).

¹⁹ *E.g.*, TEX. BUS. ORGS. CODE ANN. § 101.622 (a “series has the rights, powers, and duties provided by this subchapter to the series but is *not a separate domestic entity or organization*”) (emphasis added). This principle is consistent with the treatment of statutory trusts, as different funds of a statutory trust are not themselves separate organizations. Sparkman, *supra* note 3, at 12 (discussing the similarities between series and statutory trusts).

²⁰ TEX. BUS. ORGS. CODE ANN. § 101.605; 6 DEL. CODE § 18-215(c) (2018).

²¹ TEX. BUS. ORGS. CODE ANN. § 10.001.

²² *Id.* The TBOC also explicitly states a series is not a separate domestic entity in subchapter M, the subchapter covering SLLCs. *Id.* § 101.622 (“For purposes of this chapter and Title 1, a series

TBOC by filing with the Office of the Secretary of State (just as in Delaware), while the individual series are created according to the company agreement of the SLLC itself.²³ As will be discussed in following sections, this principle causes confusion and difficulty for practitioners attempting to fit the SLLC into the confines of the Uniform Commercial Code (“UCC”).²⁴ Therefore, an SLLC is a unique entity structure that, if formed and maintained correctly, provides the opportunity for practitioners to segregate assets and liabilities between individual series.²⁵

A. *Formation of an SLLC.*

Subchapter M of the Texas LLC Act contains the express provisions required for the creation of an SLLC, including the requirements for the contents of the certificate of formation (which creates the SLLC itself), the terms and conditions necessary for the SLLC’s company agreement, and requirements for specific record keeping.²⁶ Specifically, Section 101.601 of the TBOC provides:

(a) A company agreement may establish or provide for the establishment of one or more designated series of members, managers, membership interests, or assets that:

(1) has separate rights, powers, or duties with respect to specified property or obligations of the limited liability company or profits and losses associated with specified property or obligations; or

(2) has a separate business purpose or investment objective.²⁷

has the rights, powers, and duties provided by this subchapter to the series but is not a separate domestic entity or organization.”).

²³Sparkman, *supra* note 3, at 6. On the other hand, Illinois law requires each individual series to file with the state filing office. *See* ILL COMP. STAT. 180/37-40.

²⁴*See infra* Section IV; *see also* Sparkman, *supra* note 3, at 13–14 (stating that the concept of separate series within a single entity confuses many individuals because despite the lack of “separate entity status,” an individual series of an SLLC may contract and hold title to assets in its own name, as well as grant liens and security interests, and sue and be sued).

²⁵TEX. BUS. ORGS. CODE ANN. § 101.602(a); Allen Sparkman, *Should Texas Adopt All or Part of The Uniform Protected Series Act?*, 18 HOUS. BUS. & TAX L.J. 243, 250–51 (2018).

²⁶TEX. BUS. ORGS. CODE ANN. §§ 101.601–604.

²⁷*Id.* § 101.601(a).

If notice and record keeping requirements provided by the TBOC are satisfied, an internal liability shield between and among the individual series and “master” LLC is kept intact.²⁸ In fact, the statute provides:

(1) the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to a particular series shall be enforceable against the assets of that series only, and shall not be enforceable against the assets of the limited liability company generally or any other series; and

(2) none of the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to the limited liability company generally or any other series shall be enforceable against the assets of a particular series.²⁹

However, there are three requirements to establish and maintain liability protection that Section 101.602(a) provides an SLLC.³⁰ First, notice of the limited liability of the SLLC must be contained within the SLLC’s certificate of formation.³¹ Second, the company agreement of the SLLC must contain a statement addressing the effect of its limited liability.³² Most practitioners recommend as a best practice to quote the exact language provided by Section 101.602(a) to remove any possible ambiguity.³³ The notice of limitations is effective whether or not a series has been established at the time it is placed in the certificate of formation and whether or not it refers to a specific series.³⁴ Thus, many practitioners include the notice of limitations provision within an

²⁸*Id.* § 101.603(b) (“[i]f the records of a series are maintained in a manner so that the assets of the series can be reasonably identified by specific listing, category, type quantity, or computational or allocational formula or procedure, including a percentage or share of any assets, or by any other method in which the identity of the assets can be objectively determined, the records are considered to satisfy the requirements of Section 101.602(b)(1).”). In turn, section 101.602(b)(1) provides that the liability shield protecting the individual series created only applies if “the records maintained for that particular series account for the assets associated with that series separately from the other assets of the company or any other series.” *Id.* § 101.602(b). This protection has been referred to as a “horizontal liability shield.” *See* Unif. Protected Series Act (Unif. Law Comm’n 2017).

²⁹TEX. BUS. ORGS. CODE ANN. § 101.602(a).

³⁰*Id.* § 101.602(b).

³¹*Id.*

³²*Id.*

³³Bond & Sparkman, *supra* note 12, at 60.

³⁴TEX. BUS. ORGS. CODE ANN. § 101.604. The same rule applies in Delaware as well. 6 DEL. CODE § 18–215(b).

LLC's certificate of formation and company agreement to allow the members or managers to form individual series in the future without having to amend both documents.³⁵ Finally, the books and records of the SLLC and the individual series must be maintained separately and account for the assets of each series individually.³⁶

According to the requirements in Section 101.602, the records must be maintained in a manner such that the assets of the series can be "reasonably identified by specific listing, category, type, quantity, or computational or allocational formula or procedure"³⁷ The expansive nature of the statute seems to indicate the burden to maintain separate records is low;³⁸ however, neither the BOC nor the courts have directly addressed this issue.³⁹ Because of the complex nature of SLLCs, the failure to maintain adequate records is a likely culprit for an SLLC losing its liability shield.⁴⁰ Thus, it is essential for the SLLC to comply with the recordkeeping requirement to ensure the continued benefit of limited liability protection.

B. Rights and Abilities of SLLCs

Although an individual series is not a separate legal entity under Texas law, the TBOC provides significant powers to SLLCs under Subsection M.⁴¹ Specifically, Section 101.605 provides four main powers for an individual

³⁵ See Bond & Sparkman, *supra* note 12, at 59–60. The Texas Secretary of State does not have a specific form to create an SLLC. The Secretary of State website recommends using the general certificate of formation form for an LLC and add the additional language required by the statute in the "supplemental text" area of the form. See Texas Secretary of State, <https://www.sos.state.tx.us/corp/formationfaqs.shtml#LLC> (last visited Dec. 12, 2018).

³⁶ TEX. BUS. ORGS. CODE ANN. § 101.602(b).

³⁷ *Id.* § 101.603(b).

³⁸ The assets of a series need only be "reasonably identified" and the statute lists seven ways to accomplish this requirement. See *id.* § 101.602(b).

³⁹ See Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 399–400 (2007) (stating that there are no reported decisions concerning an SLLC's failure to observe formalities imposed by a state's law and noting the lack of clear legislative guidance in the "separate record keeping requirement" imposed on individual series within an SLLC).

⁴⁰ Confusion is easy to imagine. For example, an individual series can be managed by members of the series, even though the LLC itself is manager-managed. See TEX. BUS. ORGS. CODE ANN. §§ 101.607, 101.608. Moreover, assets associated with an individual series "may be held directly or indirectly, including being held in the name of the series, in the name of the limited liability company, through a nominee, or otherwise." *Id.* § 101.603(a).

⁴¹ Bond & Sparkman, *supra* note 12, at 62 (discussing the powers of an individual series within an SLLC).

series within an SLLC: (1) sue and be sued; (2) contract; (3) acquire, sell, and hold title to assets of the series, including real property, personal property, and intangible property; and (4) grant liens and security interests in assets of the series.⁴² These powers provide the basic abilities for any business to “acquire, own, operate, convey or dispose of assets.”⁴³ Despite not being a separate legal entity, clearly for all intents and purposes, an individual series operates as an entity in its own right.⁴⁴ Another key provision providing powers to SLLCs is section 101.609.⁴⁵ Section 101.609 states that the general rules on LLCs apply to SLLCs “to the extent not inconsistent with [subchapter M].”⁴⁶ Thus, this section allows an SLLC to avail itself of the rules that apply to LLCs in general.⁴⁷

The grant of express powers to individual series within an SLLC are broad and encompass many, if not most, of the powers necessary to operate a business.⁴⁸ However, there are some limits. A series within an SLLC may not merge, convert, or conduct an interest exchange, according to the TBOC.⁴⁹ These particular transactions are reserved for the SLLC itself

⁴²TEX. BUS. ORGS. CODE ANN. § 101.605. Section 101.605 also provides two additional powers: a series may “be a promoter, organizer, partner, owner, member, associate, or manager of an organization” and a series may “exercise any power or privilege as necessary or appropriate to conduct, promotion, or attainment of the business, purposes, or activities of the series.” *Id.* § 101.605. Importantly, since an individual series within an SLLC has the express power to grant security interests, a series can execute a valid security agreement, and a creditor should be able to perfect its security interest by filing a financing statement. However, as will be discussed *infra* Section IV, this is more difficult under current Texas law.

⁴³Bond & Sparkman, *supra* note 12, at 62.

⁴⁴See Thomas E. Rutledge, *Again, For Want of a Theory: The Challenge of the “Series” to Business Organization Law*, 46 AM. BUS. L.J. 311, 336 (2009).

⁴⁵TEX. BUS. ORGS. CODE ANN. § 101.609.

⁴⁶*Id.* § 101.609(a). For example, the merger provisions provided by the BOC are inconsistent with SLLCs. See Bond & Sparkman, *supra* note 12, at 65.

⁴⁷TEX. BUS. ORGS. CODE ANN. § 101.609. Additionally, section 101.609(b) provides that “a provision specific to Series within the LLCs is affected by the rest of the [subchapter M] on LLCs, the rest of [Subchapter M] may be applied to the Series within the LLC.” Bond & Sparkman, *supra* note 12, at 65.

⁴⁸Bond & Sparkman, *supra* note 12, at 62. Bond and Sparkman also argue that an individual series may not sell substantially all of its assets under the terms and conditions of Chapter 10 of the TBOC. *Id.*

⁴⁹See *id.* However, the new amendments to the Delaware LLC Act do allow “registered series” to merge with other “registered series.” See Russell & Sullivan, *supra* note 4.

because the individual series is not a “domestic entity” as defined by the TBOC.⁵⁰

III. BENEFITS OF OPERATING A SERIES LLC

A traditional LLC offers liability protection for its members (or managers) and offers flexibility regarding management and structure.⁵¹ Moreover, LLC case law is well established and provides answers to questions that have not been addressed about SLLCs. So why then should anyone use an SLLC?

An SLLC’s most obvious advantage is its potential to segregate assets and liabilities within a single entity. As this Article previously noted, Section 101.602(a), which provides for the internal liability protection of an SLLC, is limited by Section 101.602(b).⁵² It is crucial for an SLLC to maintain the statutory requirements so that each series’ assets are shielded from the liabilities of the other series and the SLLC itself.⁵³ Additionally, the liability shield provided by Section 101.602(a) protects the owners against personal liability of the obligations of the parent LLC and each series.⁵⁴ Thus, in theory, if one series is liquidated or attacked by creditors, the liability shield created by Section 101.602(a) prevents the creditor from penetrating the remaining series’ or SLLC’s assets to satisfy a judgment.⁵⁵ Another advantage, albeit not a significant advantage, is that the SLLC can create series without paying a filing fee or filing a certificate of formation.⁵⁶

⁵⁰ See *supra* Section II.

⁵¹ Masoner et al., *supra* note 3.

⁵² TEX. BUS. ORGS. CODE ANN. § 101.602. Additionally, just like an LLC provides liability protection for members, section 101.606 provides that any members or managers associated with an SLLC are not liable for “a debt, obligation or liability of a series, including a debt, obligation or liability under a judgment, decree or court order.” *Id.* § 101.606(a).

⁵³ Bond & Sparkman, *supra* note 12, at 60.

⁵⁴ *Id.*; see also Rutledge, *supra* note 44, at 318–19 (stating three implications of the liability shields created by statute as: (1) “neither the assets of the parent entity . . . nor those of any other series of the entity, are subject to the debts and obligations of any individual series”; (2) “the owners of the series are not personally liable for the debts and obligations of the series which they own”; and (3) “the assets of a particular series are not available to satisfy the debts and obligations of another series, of the parent organization, or of the members of that series”); TEX. BUS. ORGS. CODE ANN. § 101.602.

⁵⁵ Masoner et al., *supra* note 3; TEX. BUS. ORGS. CODE ANN. § 101.602(a).

⁵⁶ TEX. BUS. ORGS. CODE ANN. § 101.601. Moreover, individual series are not required to have a registered agent or file annual reports, further reducing administrative costs. TEX. BUS. ORGS. CODE ANN. §§ 4.154, 3.005.

Another important advantage offered by the SLLC organization is flexibility in management and structure.⁵⁷ While a traditional LLC may have different classes of membership, it is very uncommon to limit managerial authority to only particular aspects of the LLC's business.⁵⁸ On the other hand, the SLLC statutes contemplate there may be a different governing body for individual series.⁵⁹ The TBOC provides the management rules governing SLLCs in four provisions: Sections 101.606, 101.607, 101.608, and 101.610.⁶⁰ Section 101.607 provides that each series within the SLLC may have its own managers, members, assets, and purpose.⁶¹ Section 101.607 also provides that members or managers "associated" with an individual series gives the members or managers the rights to deal with the series within the SLLC under the powers described in Subchapter M, but the members or managers may not have the same full rights as members or managers of the SLLC itself.⁶²

Section 101.608 contains the substantive "just-in-case" provisions concerning the governing authority in the event the company agreement is silent on the issue.⁶³ The first rule contained in Section 101.608 provides that the company agreement of the SLLC trumps the certificate of formation concerning matters of governing authority.⁶⁴ The second rule in Section 101.608 states that if the company agreement does not name governing persons for the individual series, they will be the managers or members associated with the series as provided for in the certificate of formation.⁶⁵

⁵⁷For an extremely detailed look at the management structures of SLLCs, *see* Bond & Sparkman, *supra* note 12, at 68–69. It provides a much more detailed analysis that is beyond the scope of this Article.

⁵⁸*See* Bond & Sparkman, *supra* note 12, at 64.

⁵⁹Bond & Sparkman, *supra* note 12, at 64.

⁶⁰TEX. BUS. ORGS. CODE ANN. §§ 101.606–607, 610. Section 101.601 contains the liability limitation for managers or members of the series. TEX. BUS. ORGS. CODE ANN. § 101.601. Section 101.610 concerns the termination of a manager or member from an SLLC. *Id.* § 101.610.

⁶¹TEX. BUS. ORGS. CODE ANN. § 101.607.

⁶²*Id.*; *see also* Bond & Sparkman, *supra* note 12, at 64.

⁶³TEX. BUS. ORGS. CODE ANN. § 101.608.

⁶⁴*Id.* ("Notwithstanding any conflicting provision of the certificate of formation of a[n] [LLC], the governing authority of a series consists of the managers or members associated with the series as provided in the company agreement").

⁶⁵*Id.* However, there is a potential issue concerning the governing authority for an individual series that can cause problems for those working with SLLCs: there is no backup rule if the certificate of formation does not contain governing persons for a particular series. *See id.*; *see also* Bond & Sparkman, *supra* note 12, at 64.

Basically, these provisions all boil down to this: the information provided in the certificate of formation and company agreement is critical to the determination of which persons make up the governing authority of an individual series.⁶⁶ If the company agreement is not clear or does not provide for members or managers for an individual series, the backup rule in Section 101.608 applies.⁶⁷ Thus, if the SLLC itself is a manager-managed LLC, the governing persons of an individual series will be the managers associated with the series.⁶⁸ If the SLLC is a member-managed LLC, the governing persons of an individual series will be those members associated with the series.⁶⁹ However, it is important to remember that the management structure of an SLLC is a creature of contract, as long as the baseline requirements of Subchapter M are followed.⁷⁰ Thus, Section 101.608 also permits an individual series to have a different management structure from the parent LLC.⁷¹ This means a manager-managed LLC is allowed to establish a series whose governing authority is member-managed.⁷² Likewise, a member-managed LLC may have a manager-managed series.⁷³

The potential application for an SLLC is boundless. However, some areas give the SLLC a distinct advantage over other traditional entities.⁷⁴ Generally, the SLLC structure is well-suited where the assets of each series and their respective costs, expenses, and revenue streams can be tracked separately with ease.⁷⁵ Moreover, the SLLC is an attractive option when a single business entity owns several assets that can be segregated and

⁶⁶Bond & Sparkman, *supra* note 12, at 65. The ability to determine the person authorized to enter into contracts and grant security interests is a difficult problem faced by lenders when dealing with an SLLC because of the flexibility in management structure. Bond & Sparkman, *supra* note 12, at 65. Therefore, it is imperative for a lender to review the company agreement before it provides funding to an SLLC. Bond & Sparkman, *supra* note 12, at 65.

⁶⁷Bond & Sparkman, *supra* note 12, at 64.

⁶⁸Bond & Sparkman, *supra* note 12, at 65.

⁶⁹Bond & Sparkman, *supra* note 12, at 65.

⁷⁰See Bond & Sparkman, *supra* note 12, at 64–66.

⁷¹TEX. BUS. ORGS. CODE ANN. § 101.608; see also Bond & Sparkman, *supra* note 12, at 65.

⁷²Bond & Sparkman, *supra* note 12, at 65.

⁷³Bond & Sparkman, *supra* note 12, at 65.

⁷⁴Sparkman, *supra* note 3, at 18–22 (discussing several actual and potential uses for an SLLC, including: family wealth transfers, equity participation planning, and real estate holdings); Kristin Rylko et al., *The Benefits And Challenges Of Lending To Series LLCs*, Law360, (2016), <https://www.law360.com/articles/1036618/the-benefits-and-challenges-of-lending-to-series-llcs> (discussing the potential of SLLCs in the private equity arena as alternative fund structures).

⁷⁵See Masoner et al., *supra* note 3.

managed separately because of the ease in creating series to own and manage the assets.⁷⁶ Furthermore, as previously mentioned, the SLLC model results in lower costs.⁷⁷

Despite the many advantages of operating an SLLC, detractors point out the fact there are numerous unanswered questions regarding the SLLC structure as a viable business platform.⁷⁸ SLLCs are relatively untested in the courts, and uncertainty abounds regarding whether or not states without SLLC statutes will honor foreign SLLC protection.⁷⁹ Additionally, uncertainties arise concerning the creation and perfection of security interests against an SLLC⁸⁰ and what a practitioner should consider if asked to render a legal opinion with respect to an individual series.⁸¹ This Article will examine these current issues and specifically focus on secured lending to SLLCs.⁸²

⁷⁶*Id.*; see also Rylko et al., *supra* note 74.

⁷⁷A practitioner attempting to use multiple entities to accomplish the same asset segregation and liability protection as an SLLC will increase filing fees, registered agent fees, and other administrative costs. Masoner et al., *supra* note 3.

⁷⁸*See id.*

⁷⁹See Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 185, 190 (2009) (stating that the skepticism of the SLLC may come from a belief that the SLLC is “too good to be true”); Mark A. Sargent & Walter D. Schwidetzky, *Limited Liability Handbook* § 3:85 (West 2009) (noting that practitioners will resist using SLLCs until there is more certainty in how their liability shields will be treated in states without SLLC legislation).

⁸⁰Sparkman, *supra* note 3, at 18–22 (noting that uncertainties exist regarding how one files a valid financing statement against the assets of an individual series).

⁸¹See generally Norman M. Powell, *Opining on Limited Liability Company Series*, PRAC. LAW., Aug. 2014, at 19, 20, http://files.ali-cle.org/thumbs/datastorage/lacidoirep/articles/TPL1408_Powell_thumb.pdf (discussing the difficulties of giving a legal opinion concerning an SLLC).

⁸²Other uncertainties, which this comment does not discuss, include how an SLLC and its individual series will be treated in bankruptcy and federal income tax treatment. Shannon L. Dawson, *Series LLC and Bankruptcy: When the Series Finds Itself in Trouble, Will It Need Its Parent to Bail It Out?*, 35 DEL. J. CORP L. 515 (2010), <http://ssrn.com/abstract=1681743>; see also 75 Fed. Reg. 55699 (Sept. 14, 2010) (providing guidance that an SLLC will be treated as an entity formed under local law).

IV. SECURED LENDING TO SLLCs – A PRACTICAL PROBLEM

One of the biggest problems currently facing SLLCs occurs in the commercial lending arena.⁸³ Specifically, the proper method for obtaining and perfecting a security interest in an individual series' assets as collateral is a burdensome issue for lenders.⁸⁴ First, the current issues facing the creation of a security interest in the assets of an individual series within an SLLC revolve around whether an individual series is a “debtor” under the Uniform Commercial Code (UCC).⁸⁵ Secondly, additional problems arise for commercial lenders in perfecting a created security interest in an individual series because the flexible nature of the series does not fit neatly within the UCC.⁸⁶

A. *Problems with Creating a Security Interest*

In the typical commercial lending scenario, the creation of a security interest is a relatively straightforward process. In order to create an enforceable security interest: (1) the secured party must give value; (2) the debtor must authenticate a security agreement; and (3) the debtor must have rights in the collateral.⁸⁷ The determination of who exactly is the debtor is one of the most important considerations for the commercial lender.⁸⁸

Until recently, it was questioned whether an individual series of an SLLC was covered under the UCC's definition of a debtor. A “debtor” is a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor.⁸⁹ In turn, a “person” is defined by the UCC as “an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture . . . or any other legal or

⁸³Masoner et al., *supra* note 3, at 23, 66; *see also* Rylko et al., *supra* note 74 (stating that it is unclear who is the “debtor” under Article 9 of the UCC when dealing with SLLCs); Bond & Sparkman, *supra* note 12, at 73–74 (noting the difficulty in applying the UCC rules to SLLCs).

⁸⁴Masoner et al., *supra* note 3, at 23.

⁸⁵Bond & Sparkman, *supra* note 12, at 73–74 (noting that an SLLC is not specifically listed in the definition of a person under the UCC). However, Texas amended its definition of “person” under the UCC to include a series in 2015, after the aforementioned article was published. *See infra* this Section.

⁸⁶*See* Bond & Sparkman, *supra* note 12, at 73–74; *see also* Russell & Sullivan, *supra* note 4 (stating that lenders making loans to SLLCs have dealt with uncertainty when seeking to perfect their security interest in the assets of the SLLC).

⁸⁷U.C.C. § 9-203(b) (Am. Law Inst. & Unif. Law Comm'n 2018).

⁸⁸*See* Russell & Sullivan, *supra* note 4; *see also* Bond & Sparkman, *supra* note 12, at 73–75.

⁸⁹U.C.C. § 9-102(a)(28) (Am. Law Inst. & Unif. Law Comm'n 2018).

commercial entity.”⁹⁰ Because an SLLC is not expressly part of these definitions, there was a question as to whether an individual series is covered by the UCC.⁹¹ However, Texas resolved some of the ambiguity by amending its definition of “person” under the UCC to include “series.”⁹² Therefore, it is clear that an individual series is considered a “person” under Texas law.⁹³

Although it is clear under Texas law that a series may be a debtor, other problems arise for the commercial lender. First, the lender must confirm who owns the collateral: the individual series or the master LLC.⁹⁴ As previously mentioned, series assets may be held by the individual series, the SLLC, or through a nominee.⁹⁵ Because an SLLC may create an infinite number of individual series, and each series can be operated by separate managers, the identification of who actually has “rights in the collateral” may not be an easy determination.⁹⁶ The UCC requires the secured party to verify and state the exact name of the debtor in both the security agreement and financing statement.⁹⁷ Thus, whether the assets associated with an individual series are actually held in the name of the series or in the name of the master SLLC is a crucial factor for enforcement and perfection.⁹⁸ Secondly, if the collateral is held in the name of the individual series, then the entity’s organizational documents must be reviewed to ensure it has satisfied the specific statutory requirements of formation and that it has the proper ability to own assets and grant a security interest.⁹⁹

⁹⁰*Id.* § 1-201(b)(27).

⁹¹*See* Powell, *supra* note 81.

⁹² Act of May 23, 2015, 84th Leg., R.S. ch. 120, § 1, 2015 Tex. Gen. Laws, 1122, 1122 (codified at TEX. BUS. & COM. CODE ANN. § 1.201(b)(27)). Texas amended the definition of a person to include an “individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, government subdivision, agency, or instrumentality, public corporation, any other legal or commercial entity, *or a particular series of a for-profit entity.*” *Id.* (emphasis added).

⁹³Senate Research Center, Bill Analysis, Tex. S.B. 1077, 84th Leg., R.S. (2015) (stating the purpose of the amendment was to “ensure the definition of ‘person’ with the [TBOC] captures Series LLCs”).

⁹⁴Rylko et al., *supra* note 74.

⁹⁵*See e.g.*, 6 Del. Code § 18-215(b) (2018); TEX. BUS. ORGS. CODE ANN. § 101.602(a).

⁹⁶*See* Masoner et al., *supra* note 3, at 23.

⁹⁷U.C.C. § 9-503 (Am. Law Inst. & Unif. Law Comm’n 2018); Masoner et al., *supra* note 3, at 66.

⁹⁸Masoner et al., *supra* note 3, at 66.

⁹⁹Masoner et al., *supra* note 3, at 66.

If the assets concerning the secured transaction are held by the SLLC on behalf of the individual series, then the SLLC is the debtor.¹⁰⁰ On the other hand, if the individual series holds the assets, significant problems arise because most states, including Texas, do not require a filing to show that the individual series has been organized.¹⁰¹ Therefore, although it is clear the TBOC gives individual series the power to grant a security interest in its assets, it is not clear how a secured party is able to perfect this interest under the UCC.¹⁰²

B. Problems Perfecting a Security Interest

Under the UCC, there are four general methods of perfecting security interests: (1) by filing a financing statement; (2) by possession of the assets; (3) by control; and (4) by other methods under state and federal law.¹⁰³ The most used and practical method of perfection is to file a UCC-1 financing statement in the appropriate location which accurately names the debtor and the collateral.¹⁰⁴ The UCC choice of law rules state that a financing statement should be filed in the location of the debtor.¹⁰⁵ The location of the debtor rule depends on whether the debtor is an individual, a “registered organization,” or an “organization.”¹⁰⁶ This rule is usually straightforward when a lender is not dealing with an SLLC.¹⁰⁷

The UCC defines a “registered organization” as an organization formed or organized under the laws of a single state or the U.S. by filing or creating a public record of its existence.¹⁰⁸ Thus, to file in the debtor’s location, a financing statement for a registered organization is filed in the state where

¹⁰⁰Masoner et al., *supra* note 3, at 66.

¹⁰¹See TEX. BUS. ORGS. CODE §§ 101.601–.604 (2018).

¹⁰²Masoner et al., *supra* note 3, at 66.

¹⁰³Masoner et al., *supra* note 3, at 66.

¹⁰⁴Masoner et al., *supra* note 3, at 66.

¹⁰⁵See U.C.C. § 9-301 (AM. LAW INST. & UNIF. LAW COMM’N 2018) (stating that while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection).

¹⁰⁶U.C.C. § 9-307 (AM. LAW INST. & UNIF. LAW COMM’N 2018).

¹⁰⁷See Masoner et al., *supra* note 3, at 66–67 (noting that SLLCs do not fit as clearly into UCC Article 9’s rules for identifying the debtor and determining the debtors location compared to other entities); see also Bond & Sparkman, *supra* note 12, at 73–75 (stating the uncertainty regarding the location of the debtor rules will remain a problem until the UCC or TBOC is clarified to account for SLLCs).

¹⁰⁸U.C.C. § 9-102(a)(71) (AM. LAW INST. & UNIF. LAW COMM’N 2018).

the entity is created.¹⁰⁹ Under both Texas and Delaware law, the SLLC itself is a registered organization because it files its certificate of formation or articles of organization with the secretary of state.¹¹⁰ However, the individual series within the parent LLC cannot be a “registered organization” under the UCC because the TBOC does not require a public record to document the formation of a series within an SLLC.¹¹¹

As an example, a secured party would file a financing statement against a Texas LLC in Texas; however, if the borrower is a series of an SLLC, and the borrower series has its principal place of business outside of Texas, the location of the debtor is not so clear.¹¹² However, some of this ambiguity can be resolved by attempting to classify the series as an “organization” under the UCC.¹¹³

The filing rules of the UCC offer another alternative for a secured party attempting to file against a debtor.¹¹⁴ An “organization” is a person other than an individual and is something that does not fall under the definition of a “registered organization.”¹¹⁵ When lending to an “organization,” a secured lender must file its financing statement in the location of the organization’s place of business.¹¹⁶ If there is more than one place of business, a financing statement is filed in the location of the chief executive office.¹¹⁷ As previously mentioned, Texas amended the definition of “person” to include “series of a for-profit entity.”¹¹⁸ Thus, it appears the Texas legislature clarified that a series of an SLLC could be an “organization” defined by the Texas UCC.¹¹⁹ However, even if the filing location is somewhat resolved,

¹⁰⁹*Id.* § 9-307(e).

¹¹⁰TEX. BUS. ORGS. CODE §§ 101.601–.609; 6 DEL. CODE § 18-215 (2018).

¹¹¹TEX. BUS. ORGS. CODE § 101.602(b).

¹¹²*See* U.C.C. § 9-307 (AM. LAW INST. & UNIF. LAW COMM’N 2018) (providing the location of the debtor rules).

¹¹³*Id.*; *see also* *supra* this Section.

¹¹⁴U.C.C. § 9-307 (AM. LAW INST. & UNIF. LAW COMM’N 2018).

¹¹⁵*Id.* § 1-201(b)(25).

¹¹⁶*Id.* § 9-307(b).

¹¹⁷*Id.*

¹¹⁸TEX. BUS. & COM. CODE § 1.201(b)(27).

¹¹⁹*See supra*, note 94. Despite the ability to classify a series as an “organization” under the UCC, the application of the filing rules for an organization are not necessarily easy or efficient. The rules provide that if a business is an organization and it has more than one place of business, the debtor is deemed to be located at its “chief executive office.” U.C.C. § 9-307(b) (AM. LAW INST. & UNIF. LAW COMM’N 2018). However, “chief executive office” is not defined by the UCC. *Id.* § 9-307, cmt. 1. The comment goes on to provide that if there is any doubt as to which place of business

another issue arises concerning perfection: how to name the debtor in the UCC-1 financing statement.¹²⁰

The next major area of concern involves the correct legal name of the individual series on the financing statement.¹²¹ UCC Section 9-503 establishes when a financing statement sufficiently provides the name of the debtor.¹²² Because an individual series is not a “registered organization,” a secured party attempting to file a financing statement cannot use the simple naming rule provided by 9-503(a)(1).¹²³ In the situation described by section 9-503(a), a secured party need only look to the registered organization’s name as stated on the most recently filed public organic records filed with the organization’s jurisdiction of formation (e.g., a certificate of formation for a Texas LLC).¹²⁴ Instead, a secured party lending to an individual series must utilize the alternative naming rules provided by Section 9-503(a)(6).¹²⁵ Section 9-503(a)(6)(A) states that a financing statement sufficiently provides the name of the debtor “if the debtor has a name, only if the financing statement provides the individual or organizational name of the debtor.”¹²⁶ Thus, if the individual series name is “Series 1,” then the name on the financing statement must be “Series 1” in order for the financing statement to be effective. This rule described in Section 9-503(a)(6)(A) is usually straightforward when applied to organizations such as corporations;

is the chief executive office for a business, a secured party may protect itself by filing under the law of each possible jurisdiction. *Id.* While this might be effective, it is certainly not efficient. Why not provide more clarification to remove all doubt as to which rules to apply to an SLLC? Delaware’s amendments to the DLLCA have done just that. *See infra* Section IV–V.

¹²⁰Although a series within a parent LLC is an organization, other potential lending issues remain unresolved. *See* Russell & Sullivan, *supra* note 4 (stating that a lender may have to file in multiple jurisdictions if an individual series is not a “registered organization” under the UCC); Rylko et al., *supra* note 74 (because the assets and liabilities of a series in an SLLC are often intended to be separate and distinct from those of another series and the SLLC itself, the lender will need to confirm whether the operating agreement adequately provides for such segregated liability); Masoner et al., *supra* note 3, at 22 (stating “whether the assets associated with an individual series are actually held in the name of the series or in the name of the master [SLLC] will be a crucial factor for perfection.”).

¹²¹Rylko et al., *supra* note 74.

¹²²U.C.C. § 9-503 (AM. LAW INST. & UNIF. LAW COMM’N 2018).

¹²³*See supra*, note 110; *see also* U.C.C. § 9-503(c) (AM. LAW INST. & UNIF. LAW COMM’N 2018) (a financing statement that provides only the debtor’s trade name does not sufficiently provide the name of the debtor).

¹²⁴U.C.C. § 9-503(a) (AM. LAW INST. & UNIF. LAW COMM’N 2018).

¹²⁵*Id.* § 9-503(a)(6).

¹²⁶*Id.*

however, because of the flexibility in naming series of a Texas LLC, there could be many series that have the same name.¹²⁷ For example, there could be many SLLCs that have a “Series 1” located within the same jurisdiction.¹²⁸ Moreover, the TBOC does not have provisions governing the naming of an individual series within an SLLC.¹²⁹ In a complex SLLC structure, the absence of the correct name of an individual series leads to significant issues when a secured creditor attempts to utilize UCC Section 9-503(a)(6)(A).¹³⁰ For example, if the company agreement of XYZ, LLC provides for Series 2018-1, is the correct legal name of the series “XYZ, LLC, Series 2018-1”, or “Series 2018-1 of XYZ, LLC” or “Series 2018-1”? In some cases, the company agreement or certificate of formation of the SLLC may refer to a series in multiple ways.¹³¹

The UCC requires the creditor to correctly identify the name of the debtor on a financing statement because the financing statement provides notice to subsequent secured lenders that another lender has a security interest in some of the debtor’s collateral.¹³² If the secured party fails to identify the name of the debtor correctly, then the secured party may lose its perfected security interest in the collateral.¹³³ Section 9-506 of the UCC provides guidance on whether a financing statement adequately identifies the debtor in order to maintain a perfected security interest.¹³⁴ If a financing statement is deemed “seriously misleading” because of errors or omissions in the statement, a secured party becomes unperfected and loses its priority over other creditors.¹³⁵ Because there are no defined rules for naming a series of an

¹²⁷Russell & Sullivan, *supra* note 4 (stating because of the flexibility in naming series, there could be many series that have the same name).

¹²⁸*Id.*

¹²⁹TEX. BUS. ORGS. CODE ANN. § 101.602(b). However, Texas does require that if the name of any individual series is different than the name of the SLLC stated in its certificate of formation, the SLLC must file an assumed name certificate for that series. *See* TEX. BUS. & COM. CODE ANN. § 71.002(2)(H). This still does not help the secured creditor, as assumed names are not a means of identifying the debtor for filing a financing statement. *Id.* § 9.503(c) (“[a] financing statement that provides only the debtor’s trade name does not sufficiently provide the name of the debtor.”).

¹³⁰Rylko et al., *supra* note 74.

¹³¹*Id.*

¹³²U.C.C. § 9-503 (AM. LAW INST. & UNIF. LAW COMM’N 2018); *see also* Masoner et al., *supra* note 3, at 66.

¹³³Rylko et al., *supra* note 74.

¹³⁴U.C.C. § 9-506 (AM. LAW INST. & UNIF. LAW COMM’N 2018).

¹³⁵*Id.*

SLLC, secured lenders face an uphill battle when attempting to correctly identify a series as a debtor on a financing statement.

One potential solution for creditors lending to individual series is to utilize UCC Section 9-503(a)(6)(B), which is an alternative to general naming provision.¹³⁶ Section 9-503(a)(6)(B) states that a financing statement sufficiently provides the name of the debtor “if the debtor does not have a name, only if the financing statement provides the names of the partners, members, associates, or other persons comprising the debtor.”¹³⁷ This method potentially avoids the downfalls associated with attempting to name the series under the “organization” rules correctly.¹³⁸ However, this alternative is probably not efficient, as individual series can have many members and managers associated only with that series, and individuals with an interest in the parent LLC may or may not be associated with the borrower series.¹³⁹ Therefore, a potential, but inefficient, solution exists for a creditor to perfect a security interest in an individual series by providing all the names of the members of the series on the financing statement.¹⁴⁰

V. NEW DELAWARE LEGISLATION

In response to the issues and concerns addressed in this comment, Delaware adopted new legislation that was signed into law by Delaware Governor John Carney on July 23, 2018.¹⁴¹ The new amendments to the Delaware Limited Liability Company Act take effect on August 1, 2019.¹⁴² In short, the amendments provide a statutory basis for characterizing a

¹³⁶*Id.* § 9-503(a)(6)(B).

¹³⁷*Id.*

¹³⁸Bond & Sparkman, *supra* note 12, at 60.

¹³⁹Bond & Sparkman, *supra* note 12, at 60–61. Additionally, what does the term “associates” refer to in an SLLC? Does the term include managers, and if so, do all of the managers of a debtor series need to be included?

¹⁴⁰*Id.* As discussed previously in this Article, the difficulty in identifying the governing authority of a particular series may also prove to be very challenging given the flexibility in management structure. *See infra* Section III. Moreover, does a secured lender also need to provide the names of all of the members of the parent SLLC in order to satisfy the requirement in § 9-503(a)(6)(B)? *See* U.C.C. § 9-503(a)(6)(B) (AM. LAW INST. & UNIF. LAW COMM’N 2018). Thus, it seems that more questions are raised under § 9-503(a)(6)(B) rather than efficient solutions.

¹⁴¹Russell & Sullivan, *supra* note 4. *See also* S.B. 183, 149th Leg., R.S. (Del. 2018) (Synopsis) (demonstrating the legislative intent to amend the DLLCA to “keep it current and to maintain its national preeminence.”).

¹⁴²Russell & Sullivan, *supra* note 4.

particular type of series as a “registered organization” under Article 9 of the Uniform Commercial Code.¹⁴³ This Section will discuss the new statutory amendments.

The first major change adopted by Delaware is the creation of a new type of series known as a “registered series.”¹⁴⁴ Under Section 18–101 of the DLLCA, a “registered series” is defined as “a designated series of members, managers, limited liability company interests or assets that is established in accordance with § 18-218 of this title.”¹⁴⁵ Section 18-218 provides for the establishment of a registered series.¹⁴⁶ First, the LLC agreement must contain language that establishes one or more series and the series must file of a certificate of registered series¹⁴⁷ with the Delaware Secretary of State.¹⁴⁸ Additionally, a notice of the limitation on liabilities of a registered series must be outlined in the SLLC’s certificate of formation.¹⁴⁹ Similar to the TBOC, this notice requirement is sufficient for all “purposes of this subsection whether or not the [LLC] has formed any registered series when such notice is included in the certificate of formation.”¹⁵⁰ The remaining language in Section 18-218 remains relatively unchanged when compared to the previous provision.¹⁵¹ The same liability protection and record keeping requirements are in effect for a registered series as they were previously for an unregistered series (now a “protected series” under the new amendments).¹⁵² Therefore, with the exception of filing a certificate of

¹⁴³Russell & Sullivan, *supra* note 4; *see also* S.B. 183, 149th Leg., R. S. (Del. 2018) (Bill Analysis) (registered series are associations and formed by the filing of a certificate of registered series and, therefore, have the attributes required to be “registered organizations” under the Uniform Commercial Code).

¹⁴⁴Russell & Sullivan, *supra* note 4.

¹⁴⁵6 DEL. CODE § 18-101(15) (effective Aug. 1, 2019).

¹⁴⁶*Id.* § 18-218.

¹⁴⁷*Id.* § 18-218(d) (“[i]n order to form a registered series of a [LLC], a certificate of registered series must be filed in accordance with this subsection.”). The statute states that a certificate of registered series must include: (1) the name of the LLC; and (2) the name of the registered series. *Id.* § 18-218(d)(1). Additionally, this provision requires the organizer to follow § 18-204 in executing the certificate of registered series and file the certificate in the office of the Secretary of State in accordance with § 18-206. *Id.* § 18-218(d)(2).

¹⁴⁸*Id.* § 18-218(a).

¹⁴⁹*Id.* § 18-218(b).

¹⁵⁰*Id.* *See also* TEX. BUS. ORGS. CODE § 101.604 (notice of limitation on liabilities of a series is effective whether or not the limited liability company has established any series).

¹⁵¹*Compare* 6 DEL. CODE § 18-218 (effective Aug. 1, 2019) *with id.* § 18-218.

¹⁵²*See id.*; 6 DEL. CODE § 18-215(b) (effective Aug. 1, 2019).

registered series (and a few other minor changes not relevant to this article), the registered series provisions do not significantly alter what most practitioners understand about SLLCs.¹⁵³

One substantial change made to the DLLCA involves the new registered series naming rules. Section 18–218(e) states that the name of each registered series as outlined in the certificate of registered series “shall begin with the name of the [LLC], including any word, abbreviation or designation required by § 18–102.”¹⁵⁴ Moreover, the name of the registered series “must be such as to distinguish it upon the records in the office of the Secretary of State from the name on such records of any corporation . . .” or other entity.¹⁵⁵ This rule significantly aids secured lenders attempting to correctly identify the name of the debtor for the purposes of filing a financing statement under the UCC.¹⁵⁶

Despite the creation of a new type of series, the amendments to the DLLCA still permit a series with limited liability formed under the presently existing Section 18-215(b).¹⁵⁷ This type of series is known as a “protected series” in the legislation that takes effect on August 1, 2019.¹⁵⁸ The same general requirements exist for the creation of a protected series before the new amendments take effect: (1) the company agreement must provide for the establishment of one or more series; (2) separate records must be maintained by the individual series; and (3) notice of the limitation on liabilities of a series must be provided in the certificate of formation of the SLLC.¹⁵⁹ Similarly, the same limitations present on individual series before the new amendments are still present on protected series.¹⁶⁰ Therefore, the

¹⁵³Land & Connolly, *supra* note 5 (registered series “will have the same rights, powers and interseries limitations on liabilities as series previously formed under Section 18-215(b)”).

¹⁵⁴6 DEL. CODE § 18-218(e) (effective Aug. 1, 2019).

¹⁵⁵*Id.* Section 18-218(e)(3) goes on to provide that a registered series may register under any name which is not as to distinguish it upon the records if written consent is given by the other entity and that written consent is filed with the Secretary of State. *Id.*

¹⁵⁶*See* discussion *supra* Section IV.

¹⁵⁷*Compare* 6 DEL. CODE § 18-215 with *id.* § 18-215.

¹⁵⁸*Id.*

¹⁵⁹*See id.*

¹⁶⁰*Id.* Specifically, the statute provides that subject to §§ 18-219 (conversion of a protected series to a registered series), 18-220 (conversion of a registered series to a protected series), and 18-221 (merger and consolidation of registered series), a series may not merge, convert or consolidate pursuant to any section of the DLLCA. 6 DEL. CODE § 18-215 (effective Aug. 1, 2019).

rules that applied to a series before the new amendments remain unchanged after the amendments take effect next year.¹⁶¹

Delaware also amended several provisions within the Delaware UCC to clarify how an individual series is treated under Article 9.¹⁶² First, Delaware amended the definition of a “registered organization” in Section 9-102(71) to expressly include registered series.¹⁶³ This change confirms that a series of an SLLC will constitute a registered organization under the Delaware UCC.¹⁶⁴ Next, Delaware amended the definition of “person” in Section 1-201(27) to include series.¹⁶⁵ This also codified the position that a series of an SLLC can be a debtor under the Delaware UCC and allow a secured lender to create and perfect security interests in the assets of the series.¹⁶⁶

Finally, Delaware created several provisions that further the flexibility of the SLLC structure.¹⁶⁷ First, the Delaware legislature created provisions that allow a registered series to convert to a protected series and a protected series to convert to a registered series.¹⁶⁸ The process for a series to convert is

¹⁶¹ See 6 DEL. CODE § 18-101(15); see also Russell & Sullivan, *supra* note 4.

¹⁶² See 6 DEL. CODE § 18-101(15).

¹⁶³ Compare 6 DEL. CODE § 9-102(71) (effective Aug. 1, 2019) with *id.* § 9-102(71). The revised code provides: “a registered organization means 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. . . . The term 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 series requires that the public organic record of the series be filed with the State.” *Id.* § 9-102(71).

¹⁶⁴ See Russell & Sullivan, *supra* note 4.

¹⁶⁵ 6 DEL. CODE § 1-201(27) (effective Aug. 1, 2019) (“[p]erson” means an individual, corporation, business trust, statutory 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 any series of any of the foregoing.*”) (emphasis added). Compare *id.* § 1-201(27) (effective Aug. 1, 2019) with *id.* § 1-201(27). The definition of “person” has included “series” in the DLLCA since 2005. See H.B. 414, 143d Leg., R.S. (2005) (amending the definition of person to include “series”).

¹⁶⁶ See Russell & Sullivan, *supra* note 4.

¹⁶⁷ These provisions include §§ 18-219, 18-220, 18-221, and 18-1107 (taxation of limited liability companies and registered series). Section 18-1107 also contemplates that the Delaware Secretary of State may provide a certificate of good standing for registered series. 6 DEL. CODE § 18-1107(k) (effective Aug. 1, 2019). As the author will discuss later in this article, this provides another advantage for secured lenders dealing with SLLCs. See *infra* Section VI. However, it should be noted that the Delaware Secretary of State will only provide a certificate of good standing for an individual series if the SLLC is in good standing itself. *Id.* § 18-1107(k).

¹⁶⁸ 6 DEL. CODE §§ 18-219, 18-220 (effective Aug. 1, 2019). This could be an especially handy tool for those already operating an SLLC with several series whom desire to procure secured

relatively straightforward: a protected series changing to a registered series must file a certificate of conversion and file a certificate of registered series.¹⁶⁹ Conversion requires the approval of the members holding fifty percent of the profits of the series (unless otherwise provided in the company agreement).¹⁷⁰ Finally, the Delaware legislature added an additional useful feature to its new registered series provisions in Section 18-221.¹⁷¹ Section 18-221 allows one or more *registered* series of an SLLC to merge or consolidate with or into one or more other *registered* series of the same SLLC.¹⁷² This addition to the DLLCA provides a more practical and efficient way for an LLC to combine the assets and liabilities of two series than what was previously available under applicable law.¹⁷³

The new legislation adopted by Delaware for inclusion in the DLLCA provides a new alternative to the typical SLLC structure in the form of a registered series. Moreover, the Delaware amendments provide clarity for secured lenders and other business professionals in dealing with SLLCs. These new provisions continue to keep Delaware at the forefront of corporate innovation and maintain its “national preeminence” in business organizations law.¹⁷⁴

VI. SHOULD TEXAS ADOPT SIMILAR LEGISLATION?

Delaware’s adoption of the “registered series” and other statutory amendments provides several advantages concerning SLLCs. Significantly,

financing. Oppositely, secured lenders could require potential debtors to change their “protected series” to a “registered series” to ensure no ambiguity exists under the Delaware UCC in regard to the series’ treatment under Article 9 of the UCC.

¹⁶⁹ *See id.* § 18-219.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* § 18-221; Land & Connolly, *supra* note 5.

¹⁷² 6 DEL. CODE § 18-221 (effective Aug. 1, 2019).

¹⁷³ Land & Connolly, *supra* note 5. For example, under the “old law” an LLC would need to transfer all the assets and liabilities from one series to another series. *Id.* Theoretically, Section 18-220 simplifies the process by allowing the members to adopt a plan of merger instead. *See* 6 DEL. CODE § 18-221(b) (effective Aug. 1, 2018).

¹⁷⁴ S.B. 183, 149th Leg., Reg.Sess. (Del. 2018) (Bill Synopsis) (stating the reason for the Delaware Legislature’s decision to amend the DLLCA is to keep it current and to maintain its national preeminence); *see also* Bond & Sparkman, *supra* note 12, at 58 (stating that Delaware was the first state to adopt SLLC legislation); Sparkman, *supra* note 3, at 5 (noting that SLLC legislation was adopted “presumably to maintain the Delaware LLC Act’s stature as a modern, forward-looking statute.”).

the new Delaware amendments deliver much-needed clarity about the treatment of SLLCs under state law and Article 9 of the UCC.¹⁷⁵

A. *Advantages for Secured Lenders*

First, the new Delaware amendments remove any doubt concerning whether an individual series of an SLLC is a person under Article 9 of the UCC.¹⁷⁶ A series is expressly identified as an “association” under Sections 18-215 and 18-218 of the DLLCA.¹⁷⁷ If that was not clear enough, the Delaware UCC amendments also provide that a series is a person under the Code.¹⁷⁸ Similarly, the Texas UCC has almost identical language in its Section 1.201.¹⁷⁹ As previously discussed, Texas mostly resolved the issue of whether an individual series of an SLLC can be a debtor under Article 9 of the Texas UCC when it amended Section 1.201.¹⁸⁰ Therefore, there is no significant advantage for the Texas Legislature to adopt the Delaware language for this provision.

However, the Delaware amendments also clarify that a registered series is a registered organization as defined by the UCC.¹⁸¹ This clarification is permissible because a registered series is created by filing a certificate of registered series with the Delaware Secretary of State Office, similar to a corporation’s required filing of articles of incorporation.¹⁸² This change to the Delaware statute eliminates confusion for secured lenders when dealing with registered series for two primary reasons. First, a secured lender dealing with a registered series now understands what type of debtor they are dealing

¹⁷⁵The amendments to the DLLCA were intended to add clarity under the Delaware UCC, but the analysis discussed by this article should apply equally to the UCC when dealing with Delaware registered series. *See* Russell & Sullivan, *supra* note 4.

¹⁷⁶6 DEL. CODE § 1-201(b)(27) (“a person means an individual, corporation, business trust, statutory trust, estate, trust, partnership, [LLC], *association* . . . or any series of the foregoing.”) (emphasis added).

¹⁷⁷*Id.* § 18-215(b)(12); *id.* § 18-218(c)(12) (“For all purposes of the laws of the State of Delaware, a [series] is an association, regardless of the number of members or managers, if any, of such series.”).

¹⁷⁸*See* Russell & Sullivan, *supra* note 4.

¹⁷⁹*Compare* TEX. BUS. & COM. CODE § 1.201(b)(27) with 6 DEL. CODE § 1-201(b)(27) (effective Aug. 1, 2019).

¹⁸⁰*See supra* Section IV.

¹⁸¹*See* 6 DEL. CODE § 9-102(71) (effective Aug. 1, 2019); *id.* § 18-218.

¹⁸²*See supra* Section V.

with for purposes of Article 9.¹⁸³ Because a registered series is explicitly a registered organization, a secured lender perfects its security interest against a registered series by filing in the state where the series was created.¹⁸⁴ Thus, a secured lender perfecting a security interest against a Delaware registered series files its financing statement in Delaware, regardless of where the registered series might have its chief executive office.¹⁸⁵ The second clarification for secured lenders comes in the form of uniform naming rules for individual series.¹⁸⁶ The DLLCA amendments require that the name of the registered series begin with the name of the SLLC and be included in the certificate of registration.¹⁸⁷ Furthermore, the DLLCA also requires that the name be distinguishable from other Delaware entities “formed or organized under the laws of the State of Delaware or qualified to do business . . . in the State of Delaware.”¹⁸⁸ Collectively, these amendments provide a simple and effective means for a secured lender to correctly identify an individual series on a UCC-1 financing statement.¹⁸⁹

On the other hand, Texas law does not provide the same level of clarity as Delaware.¹⁹⁰ Texas does not have provisions concerning the naming of individual series of an SLLC or provisions allowing for a registered series.¹⁹¹ Therefore, it is the author’s opinion that Texas should favorably consider adopting similar “registered series” provisions and the applicable UCC amendments to eliminate the uncertainty faced by secured lenders.

Finally, the DLLCA amendments provide many other benefits to commercial lenders seeking to lend capital to an individual series within an SLLC.¹⁹² One specific example is the Office of the Delaware Secretary of

¹⁸³ See Russell & Sullivan, *supra* note 4 (stating registered series are expressly created by statute and provide several characteristics designed to facilitate secured lending); see also Land & Connolly, *supra* note 5 (stating the rules for filing UCC statements in Delaware against registered series formed under the Delaware LLC Act should become simplified).

¹⁸⁴ U.C.C. § 9-307 (AM. LAW INST. & UNIF. LAW COMM’N 2018).

¹⁸⁵ *Id.* This is significantly more efficient and easier for secured lenders. Under current Texas and Delaware law, the alternative “location of the debtor rules” must be used to properly perfect a security interest in a series. See *supra* Section IV for a discussion of this process.

¹⁸⁶ 6 DEL. CODE § 18-218(e) (effective Aug. 1, 2019); see discussion of these naming rules *supra* Section IV.

¹⁸⁷ 6 DEL. CODE. § 18-218(e)(1–3) (effective Aug. 1, 2019).

¹⁸⁸ *Id.* § 18-218(e)(3).

¹⁸⁹ See *supra* Section IV(B).

¹⁹⁰ *Id.*

¹⁹¹ TEX. BUS. ORGS. CODE ANN. § 101.602(b); see also *supra* note 125.

¹⁹² See 6 DEL. CODE § 18-101(15); see also Russell & Sullivan, *supra* note 4.

State can provide certificates of good standing and certificates of existence for registered series of a Delaware SLLC.¹⁹³ Under current legislation, a secured lender has no way of knowing the financial stability of a series or whether it has the authorization to enter such a transaction.¹⁹⁴ This is another useful provision currently unavailable in Texas.¹⁹⁵

B. Other Useful Amendments the Texas Legislature Should Adopt

The adoption of the DLLCA amendments will provide clarity and efficiency for secured lenders looking to provide capital to SLLCs. However, there are other useful provisions adopted by Delaware that should be looked at favorably by the Texas Legislature.

Although the registered series provisions provide clarity under Article 9, the DLLCA still permits traditional series that are not registered (the “protected series”).¹⁹⁶ The option for an SLLC to create either protected or registered series is a provision the Texas Legislature should consider for adoption into the TBOC. The choice of creating either a protected series or a registered series provides practitioners the flexibility to adopt innovative business practices, continues Texas’s “economic development efforts to remain competitive and aggressive,” and continues to match or exceed the benefits provided by Delaware to organizing business entities.¹⁹⁷ Additionally, Texas should consider adopting Sections 18-218, 18-219, 18-220, and 18-221 to further improve the flexibility provided by the SLLC structure.¹⁹⁸ These provisions allow individuals series to convert between protected and registered series as long as the statutory formalities are followed.¹⁹⁹ Section 18-221 allows registered series to merge or consolidate with or into one or more other registered series, which provides a “more practical way to combine the assets and liabilities of two series than previously available under the applicable law (i.e., transferring all assets and

¹⁹³Russell & Sullivan, *supra* note 4; *see also supra* note 160.

¹⁹⁴*See supra* Section IV.

¹⁹⁵Although a certificate of good standing is no longer provided by the Texas Comptroller, a practitioner can obtain a “certificate of account status,” which provides information concerning an entity’s franchise tax account status. Texas Secretary of State, *Filing & Other General FAQs*, <https://www.sos.texas.gov/corp/filingandothergeneral FAQs.shtml#CC1> (last visited Jan. 21, 2019).

¹⁹⁶6 DEL. CODE § 18-215 (effective Aug. 1, 2019).

¹⁹⁷House Research Organization, Bill Analysis, Tex. S.B. 1442, 81st Leg., R.S. (2009) (establishing the legislative intent for enacting subchapter M of the BOC).

¹⁹⁸*See supra* Section V.

¹⁹⁹*See* 6 DEL. CODE §§ 18-219, 18-220 (effective Aug. 1, 2019).

liabilities).²⁰⁰ The adoption of this provision does not offend the prohibition Texas places on the ability of series to engage in mergers because a registered series would likely qualify as a “domestic entity” under the code.²⁰¹ Therefore, the adoption of these provisions would provide additional flexibility for businesses using an SLLC model, and the provisions continue the Texas Legislature’s intent to maintain “model legislation” for other states to follow.²⁰²

VII. CONCLUSION

The creation of the “registered series” and the accompanying provisions of the amended DLLCA provide transparency when conducting business with SLLCs. Secured lenders can sleep well at night knowing they can properly and efficiently create and perfect a security interest granted by a “registered series” because of the new amendments. The author believes the revised DLLCA contains several provisions the Texas Legislature should consider for adoption in the TBOC. Specifically, the provisions regarding the creation of a registered series, the public filing requirement needed to create a registered series, and the naming requirements for individual series are especially useful provisions the author believes improve the current Texas SLLC statutes.

²⁰⁰Land & Connolly, *supra* note 5. This is one provision that lenders need to consider when lending to registered series. *See* Russell & Sullivan, *supra* note 4 (stating that lenders should be mindful that a registered series will have the ability to merge or consolidate with other registered series of the same LLC).

²⁰¹*See supra* notes 19–22. Because a registered series is formed by filing a certificate of registered series, it should be considered an “organization formed under or the internal affairs of which are governed by this code.” TEX. BUS. ORGS. CODE § 10.001.

²⁰²House Research Organization, Bill Analysis, Tex. S.B. 1442, 81st Leg., R.S. (2009).