

Permanent Editorial Board for the Uniform Commercial Code

PEB COMMENTARY NO. []

**PROTECTED SERIES UNDER THE UNIFORM PROTECTED SERIES
ACT (2017)**

Revised Draft for Public Comment

October 5, 2020

Comments on this draft must be submitted by no later than December 4, 2020.

Comments may be submitted by email to UCCComments@ali.org

PREFACE TO PEB COMMENTARY

The Permanent Editorial Board for the Uniform Commercial Code acts under the authority of the American Law Institute and the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws). In March 1987, the Permanent Editorial Board resolved to issue from time to time supplementary commentary on the Uniform Commercial Code to be known as *PEB Commentary*. These *PEB Commentaries* seek to further the underlying policies of the Uniform Commercial Code by affording guidance in interpreting and resolving issues raised by the Uniform Commercial Code and/or the Official Comments. The Resolution states that:

A *PEB Commentary* should come within one or more of the following specific purposes, which should be made apparent at the inception of the Commentary: (1) to resolve an ambiguity in the Uniform Commercial Code by restating more clearly what the PEB considers to be the legal rule; (2) to state a preferred resolution of an issue on which judicial opinion or scholarly writing diverges; (3) to elaborate on the application of the Uniform Commercial Code where the statute and/or the Official Comment leaves doubt as to inclusion or exclusion of, or application to, particular circumstances or transactions; (4) consistent with U.C.C. § 1-102(2)(b),* to apply the principles of the Uniform Commercial Code to new or changed circumstances; (5) to clarify or elaborate upon the operation of the Uniform Commercial Code as it relates to other statutes (such as the Bankruptcy Code and various federal and state consumer protection statutes) and general principles of law and equity pursuant to U.C.C. § 1-103;† or (6) to otherwise improve the operation of the Uniform Commercial Code.

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* Current U.C.C. § 1-103(a)(2).

† Current U.C.C. § 1-103(b).

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PROTECTED SERIES UNDER THE UNIFORM PROTECTED SERIES ACT (2017)

INTRODUCTION

A number of states have enacted statutes that provide for protected series¹ within a limited liability company.² A protected series is generally empowered by such a statute to conduct its own activities under its own name, and it has the rights and duties provided in the statute. It is contemplated that the protected series will keep the assets associated with it separate from those of the limited liability company or another protected series of the limited liability company.³ Moreover, under such a statute, the protected series generally is obligated solely to creditors whose obligations arose from interaction with the protected series; the creditors of a protected series have no claim against the assets associated with the limited company or of another protected series of the limited liability company. A public filing indicating the creation or existence of any particular protected series may or may not be required under the relevant statute. In addition to the existing state enactments, the Uniform Law Commission promulgated in 2017 the Uniform Protected Series Act (“UPSA”) for states to consider in modifying existing statutes, or enacting new ones, to provide for protected series of limited liability companies organized under the laws of those states.

A protected series under the existing state statutes and under UPSA is not a subsidiary of the limited liability company. Rather, a protected series exists within a limited liability company, typically the company that established the protected series. However, UPSA and several other statutes expressly refer to a protected series as a “person,”⁴ and, under UPSA and most, if not all, other statutes, a protected series has the essential characteristics which, since at

¹ A protected series is sometimes referred to as a “series.” See Uniform Protected Series Act (2017), Prefatory Note, Part. 2. This Commentary refers to a series as a “protected series” to be consistent with the use of that term in the Uniform Protected Series Act (2017) and to avoid confusion with other so-called “series” in the marketplace, such as series of bonds or equity securities. Effective August 1, 2019, the Delaware Limited Liability Company Act refers to both a “protected series,” and a “registered series”. See DEL. CODE ANN. tit 6, §§ 18-215, -218 (2019). The former term is a new name for what the statute previously labeled as a “series.” The latter term refers to a series established through the filing of a “certificate of registered series” in the office of the Delaware Secretary of State. Thus, a “registered series” under Delaware act resembles a “protected series” under the UPSA.

² As of Aug. 6, 2019, the following statutes provide for protected series within a limited liability company. ALA. CODE §§ 10A-5A-11.01 to -.16 (2018); DEL. CODE ANN. tit. 6, §18-215 (2019); D.C. CODE § 29-802.06 (2013); 805 ILL. COMP. STAT. ANN. 180/37-40 (West 2010 & Supp. | 2019); IND. CODE ANN. §§ 23-18.1-1-1 to -7-4 (West 2011); IOWA CODE §§ 489.1201-1206 (2019); KAN. STAT. ANN. § 17-76, 143 (West 2008 & Supp. | 2015); MO. REV. STAT. § 347.186. (2016); MONTANA § 35-8-304 (2017); NEV. REV. STAT. § 86.296 (2018); OKLA. ST. ANN. tit. 18, §§ 2005(B), 2054.4 (West 2012); TENN. CODE ANN. § 48-249-309 (West 2010); TEX. BUS. ORGS. CODE ANN. §§101.601-622 (West 2012); UTAH CODE ANN. §§ 48-3a-1201 to 1209 (West 2014); P.R. LAWS ANN. tit. 14, § 3967 (2011).

³ Even with regard to tangible, fungible assets, the separation need not be physical. UPSA § 301(d) (stating that “[t]he records and recordkeeping” “separating the assets 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) (emphasis added).

⁴ In Delaware, the reference appears in the limited liability company statute’s definition of a person. DEL. CODE ANN. tit. 6, §18-101(14) (2019) (defining “person” to include a “limited liability company” and a range of other entities “or series thereof”). UPSA makes the reference in two places. UPSA § 102(7) (relying generally on the definition of “person” in the underlying LLC act while adding that “[p]erson’ includes a protected series”); 104 (stating that “[a] limited liability company is a person”).

least the early 19th century, are typically associated with the construct of a legal person.⁵ Nonetheless, as noted below, a protected series has a few atypical attributes. Moreover, as explained in the Prefatory Note to UPSA, “in some regulatory environments, [w]ith the approval of the relevant regulator, a series limited liability company makes one regulatory filing or holds a single license, and the various protected series of the company function under the aegis of that filing or license.”⁶

Because a protected series is expected to enter into transactions for itself and in its own name, a party might enter into a transaction within the scope of the Uniform Commercial Code (the “UCC”) with a protected series. For example, a lender might be asked to extend credit to a protected series in circumstances in which the payment of the extension of credit is to be secured by a security interest under Article 9 of the UCC in existing or after-acquired personal property assets associated with the protected series. Practitioners in such transactions have often struggled with determining whether the Article 9 debtor on the credit is the protected series or the limited liability company itself and, if the protected series is the Article 9 debtor, whether for purposes of determining the location of the debtor under Article 9 the debtor is a registered organization or an organization that is not a registered organization. These determinations are crucial for the lender to know how to draft and who must sign the security agreement, in which jurisdiction the secured party should search for and file a financing statement to perfect the security interest and obtain the requisite priority for the security interest, and how the secured party should complete the financing statement to provide debtor’s name.

Like determinations are necessary if the protected series is a seller of certain payment rights - accounts, chattel paper, payment intangibles or promissory notes - or is a consignee of goods under a consignment within the scope of Article 9.

DISCUSSION

This Commentary focuses on five issues in transactions with a protected series: (1) Is a protected series a “person” as defined in Article 1 of the UCC? (2) Who is the Article 9 debtor if a security interest within the scope of Article 9 is granted by a protected series to secure an obligation? (3) Who is the Article 9 debtor if the security interest within the scope of Article 9 is the sale by a protected series of accounts, chattel paper, payment intangibles or promissory notes? (4) Who is the Article 9 debtor if the security interest is a consignment within the scope

⁵ A “person” is “a subject of legal rights and duties” conferred by the sovereign. John Chipman Gray, The Nature and Sources of the Law 27 (Roland Gray rev., 2d ed., The MacMillan Company 1931) (“a ‘person’ is a subject of legal rights and duties”); John Salmond, Jurisprudence 318 (Glanville L. Williams ed., 10th ed. 1947) (a person is “capable of rights [and] duties”); Bryant Smith, Legal Personality, 37 Yale L. J. 283, 283 (1928) (a person is “the subject of rights and duties”); “Corporations - Right to Prefer Creditors,” 11 Harv. L. Rev. 550 (1898) (referring to the by-then well recognized “idea of a corporation as a legal person having powers similar to those of an individual”); *see generally, Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). For a more recent discussion of the meaning of “person,” *see* Elvia Arcelia Quintana Adriano, The Natural Person, Legal Entity or Juridical Person and Juridical Personality, 4 Penn State Journal of Law & International Affairs 363 (2015) (“A subject of law is any being capable to act as holder of powers, or liable with obligations in a juridical relationship”). For a more recent case supporting the same proposition, *see People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 998 N.Y.S.2d 248, 124 A.D.3d 148 (2014) (“... legal personhood has consistently been defined in terms of both rights *and* duties ...” (emphasis in original)).

⁶ UPSA, Prefatory Note, Part 4. .

of Article 9 to a protected series as consignee? (5) If the Article 9 debtor is a protected series, where is the debtor located for purposes of Article 9?

This Commentary addresses those issues by reference to UPSA, which was drafted with those issues in mind. This Commentary does not address other protected series statutes containing provisions that may vary from the relevant provisions of UPSA.⁷ Nevertheless, as a general matter, this Commentary does not preclude application of its analysis to an issue concerning a protected series of a limited liability company established under law other than UPSA, or a protected series of any other alternative business entity or organization statute, if the statute contains the substance of the provisions of UPSA relevant to the issue discussed. Accordingly, the analysis contained in this Commentary may be useful in resolving these issues under another protected series statute to the extent that the statute's relevant provisions are the same or substantially similar to those of UPSA.

(1) Is a protected series a "person" under the UCC?

This Commentary concludes that, under Article 1 of the UCC, a protected series established under UPSA is a "person."

Section 1-201(b)(27) defines the term "person" as follows:

"Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

Reasonable minds might differ as to which of the organizations specified in the definition best describes a protected series. A protected series might be considered to be an "association."⁸ Or a protected series might be considered to be some other, unspecified, type of "legal or commercial entity." Article 1 does not define the term "association." Nor does it further explain the phrase "other legal or commercial entity." However, that phrase is a residual category, what might be described as a "catch-all" term for other legal or commercial entities that have the attributes of a "person," as further discussed below.

This analysis proceeds by focusing on the "catch-all" term. If a protected series is an "association," then it is clearly a "person" under Section 1-201(b)(27). Absent a protected series being an association, the question becomes whether a protected series fits within the "catch-all" phrase of "other legal or commercial entity."

That a protected series may be either another "legal" entity or another "commercial" entity is consistent with both the historical formulation of the term "person" in the context of § 1-

⁷ For example, the discussion below on whether a protected series is a "registered organization" under Section 9-102(a)(71) will not be applicable if the relevant limited liability company statute does not provide for a protected series of the company to be established by a public filing.

⁸ Indeed, Delaware has declared that a "protected series" under its Limited Liability Company Act is an "association" not only under the act itself but also "[f]or all purposes of the laws of the State of Delaware." *See* DEL. CODE ANN. tit 6, §§ 18-215(b)(12) (2019).

201(b)(27) and the interpretative canon of *ejusdem generis*.⁹ Together, the history and the canon identify a set of characteristics associated with legal personhood, notwithstanding that every legal person might not necessarily possess each characteristic.

As early as 1989, the Uniform Law Commission's Committee on Style proposed a standardized definition of "person."¹⁰ As initially proposed, the definition read:

"Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision [sic] or agency, or any other legal or commercial entity."¹¹

An accompanying footnote references the emergence of a new construct - the limited liability company - which "of course, would be included in the *catchall* 'any other legal or commercial entity.'" (emphasis added)¹² Shortly thereafter, noting that the forthcoming Uniform Statutory Construction Act explicitly includes the term "limited liability company" within its definition of the term "person," it was suggested that the standardized definition should explicitly include it, notwithstanding its inclusion by the "catchall phrase 'any other legal or commercial entity.'"¹³

This historical formulation confirms that the phrase "or any other legal or commercial entity" was intended as a "catch-all" so that the definition of "person" not only includes individuals and the full range of then-recognized and emerging non-individuals that might enjoy the ability to hold assets or contract but also what its advocates described as a "catch-all" for any not-yet-recognized non-individuals that might enjoy the ability to hold assets or contract.

At the same time, the canon places limits on an overly broad interpretation of the term "person." According to the canon, "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words."¹⁴ *Ejusdem generis* "gives effect to both the general and specific terms by "treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words. In light of the specific terms, the general term is restricted to include only things of the same kind, class, character, or nature as those specifically enumerated."¹⁵

⁹ EJUSDEM GENERIS, Black's Law Dictionary (11th ed. 2019) ("A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.").

¹⁰ See Proposed Standardized Definitions for Consideration of Executive Committee, submitted by Eugene A. Burdick, Chairman, Committee on Style, dated 18 October 1989.

¹¹ *Id.*

¹² *Id.* fn. 3.

¹³ See Memorandum dated May 16, 1991, from Eugene A. Burdick, Chairman of the Committee on Style, and James C. McKay, Jr., Chairman of the Committee on Liaison with Legislative Drafting Agencies, to the Executive Committee of the Uniform Law Commission, fn. 1.

¹⁴ Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 372, 123 S. Ct. 1017, 1019, 154 L. Ed. 2d 972 (2003)

¹⁵ Huggett v. Dep't of Nat. Res., 464 Mich. 711, 718-19, 629 N.W.2d 915, 920 (2001) (citations and internal quotations omitted).

A protected series does have a few attributes not generally associated legal personhood. A protected exists under the aegis of the limited liability company that established the protected series and cannot exist on its own.¹⁶ Furthermore, as a general matter, a protected series necessarily ceases to exist when the limited liability company itself ceases to exist.¹⁷

However, a protected series under UPSA has many other attributes that strongly suggest that a protected series is a “person.”¹⁸ A protected series is distinct from its associated members, the limited liability company, and any other protected series of the limited liability company.¹⁹ A protected series generally possesses the same powers as the limited liability company including the power to own its own assets and to sue and be sued in its own name.²⁰ A protected series is not liable for the debts of the limited liability company or another protected series of the limited liability company merely because it is a protected series,²¹ nor are its assets generally available to creditors of the limited liability company or another protected series of the limited liability company, so long as its assets are “associated” with the protected series.²² A protected series has its own members²³ which are distinct from the protected series²⁴ and which are generally entitled to vertical liability shields for acts of the protected series.²⁵

Given the historical formulation of the term “person” with its “catch-all” phrase and even after giving effect to the canon, it would be anomalous for a protected series to have all of these attributes and yet fall outside of the definition of “person” under the UCC. This conclusion is further supported by the clear intent of UPSA’s drafters to establish the “personhood” of a protected series under UPSA by expressly including a protected series under UPSA’s own definition of “person”²⁶ and stating categorically that:

A protected series of a series limited liability company is a person distinct from: (1) the company, subject to Sections 104(c), 501(1), and 502(d); (2) another protected series of the company; (3) a member of the company, whether or not the member is an associated member of the protected series; (4) a protected-series transferee of a protected series of the company; and (5) a transferee of a transferable interest of the company.²⁷

¹⁶ UPSA § 103, cmt.; UPSA § 104, cmt. to subsection (c).

¹⁷ The one exception is in the case of the very limited form of merger permitted under the UPSA, UPSA § 104(c). *See also* UPSA § 607(1)(A) (permitting a protected series of a series limited liability company that does not survive a merger to be relocated to the series limited liability company that does survive).

¹⁸ *See, supra*, fn. 4.

¹⁹ UPSA § 103.

²⁰ UPSA § 104(a), (b).

²¹ UPSA § 401(b).

²² UPSA § 404; *see* UPSA § 301 for determining when an asset of a protected series is “associated” with the protected series.

²³ The members of a protected series are referred to as “associated members” under UPSA. UPSA § 102(3). An associated member must be a member of the limited liability company itself. UPSA § 302(a).

²⁴ UPSA § 103(3).

²⁵ UPSA § 401(a).

²⁶ UPSA § 102(7).

²⁷ UPSA § 103. The cited sections pertain to the characteristics note *supra* at note 17. UPSA itself leaves open the possibility that a protected series is a “commercial entity” if not a “legal” entity. UPSA § 102(7), cmt. UPSA is designed to work in conjunction with the enacting state’s limited liability company statute under a construct referred to as “extrapolation.” *See* UPSA, Prefatory Note, Part 6. Under that construct, UPSA uses terms defined by

Of course, ultimately whether a non-individual is a person under the UCC is determined according to the definition of the term “person” in the UCC itself, i.e., under Section 1-201(b)(27). However, UPSA’s denomination of a protected series as a “person” for purposes of UPSA is suggestive of the result under the UCC. More fundamentally, a protected series under UPSA has most of the attributes reflected in the specific organizations listed in Section 1-201(b)(27) and is consistent with the meaning of “person” as reflected in the historical formulation of the term in Section 1-201(b)(27).

In sum, a protected series, if not an “association” or other organization specifically mentioned in the definition of “person” in Section 1-201(b)(27), would fall within the intended contours of the “catch-all” phrase of “any other legal or commercial entity” in the definition.

(2) Who is the Article 9 debtor if the security interest secures an obligation?

If a protected series grants a security interest in collateral to secure an obligation, the Article 9 debtor is the protected series. Section 9-102(a)(28) defines the term “debtor” to include “a person having an interest, other than a security interest or lien, in the collateral...” (emphasis added).²⁸ If a protected series is a “person” as defined in § 1-201(b)(27), it follows that, if a protected series grants a security interest in collateral to secure an obligation, the protected series is the Article 9 debtor.

(3) Who is the Article 9 debtor if the security interest is a sale of accounts, chattel paper, payment intangibles or promissory notes?

Likewise, if the security interest granted by a protected series is a sale of accounts, chattel paper, payment intangibles or promissory notes,²⁹ the protected series is the Article 9 debtor. Section 9-102(a)(28) defines the term “debtor” to include “a seller of accounts, chattel paper, payment intangibles or promissory notes...”³⁰ Even though the definition of “debtor” does not use the term “person” when referring to a “seller,” Article 9 incorporates Article 2’s definition of “sale”³¹ (and the corresponding meaning of “seller”) from Article 2, which refers to a “person.”³²

(4) Who is the Article 9 debtor if the security interest is a consignment under Article 9?

reference in the limited liability company statute. See UPSA § 102, Legislative Note. That statute may be the Uniform Limited Liability Company Act (2006) (Last Amended 2013). *Id.* Section 102(15) of that Act, like U.C.C. § 1-201(b)(27), does define the term “person” to include an “other ...commercial entity.”

²⁸ U.C.C. § 9-102(a)(28)(A).

²⁹ See U.C.C. § 1-201(b)(35) defining the term “security interest” to include any interest of a buyer of accounts, chattel paper, payment intangibles or promissory notes in a transaction subject to Article 9.

³⁰ U.C.C. § 9-102(a)(28)(B).

³¹ U.C.C. § 9-102(b), providing a cross-reference” to the term “sale” as defined in U.C.C. § 2-106.

³² *Cf.* U.C.C. § 2-103(1)(d) defining a “seller” as “a person who sells goods or contracts to sell goods.” (emphasis added). It would be anomalous if a debtor that granted a security interest in collateral to secure an obligation must be a “person” but a seller of accounts, chattel paper, payment intangibles or promissory notes need not be a “person.”

For similar reasons, if a security interest granted by a protected series (as consignee) is a “consignment” within the scope of Article 9,³³ the protected series is the Article 9 debtor.³⁴ Section 9-102(a)(28) defines the term “debtor” to include “a consignee.” Even though the definition of “consignee” does not use the term “person” as such, nevertheless the definition does use the term “merchant.”³⁵ And the term “merchant” has the same meaning in Article 9 as it does in Article 2.³⁶ Under Article 2, a “merchant” is a “person.”³⁷ Accordingly, a consignee must be a “person” in order to be a consignee just as a seller must be a “person” in order to be a seller.

(5) Where is the Article 9 debtor located for purposes of Article 9?

Whether the security interest secures an obligation, is a sale of accounts, chattel paper, payment intangibles or promissory notes, or is a consignment within the scope of Article 9, the protected series is located for purposes of Article 9 in the state under whose laws it was organized.

This conclusion follows from the definitions of “organization” in § 1-201(b)(25) and “registered organization” in § 9-102(a)(71) and from the debtor location rules in § 9-307. Section 1-201(b)(25) defines the term “organization” to mean “a person other than an individual.” Because a protected series is a “person” as defined in § 1-201(b)(27) and is not an individual, a protected series must be an “organization.”

Section 9-102(a)(71) defines the term “registered organization” to include an organization organized solely under the law of a single State ... by the filing of a public organic record with... the State” The term “public organic record” is defined in § 9-102(a)(68) to include:

a record that is available to the public for inspection and is:

(A) a record consisting of the record initially filed with or issued by a State ... to form or organize an organization ...;

....

Under UPSA a protected series of a limited liability company is established when the limited liability company delivers to the Secretary of State of the state in which the limited liability company is organized a “protected series designation” signed by the company and providing the name of the protected series and the protected series designation takes effect.³⁸ The protected series designation, when filed, is available for public inspection so as to provide transparency to the public of the existence of the protected series.³⁹

³³ See U.C.C. § 9-102(a)(20) defining the term “consignment.”

³⁴ See U.C.C. § 9-102(a)(35) defining the term “security interest” to include any interest of a consignor in a transaction subject to Article 9.

³⁵ See U.C.C. § 9-102(a)(20) referring to a person delivering goods to a “merchant.”

³⁶ See U.C.C. § 9-102(b) providing a cross-reference” to the term “merchant” as defined in U.C.C. § 2-104.

³⁷ See U.C.C. § 2-104(1) defining “a merchant” as “a person who deals in goods...” (emphasis added).

³⁸ UPSA § 201(b)-(c).

³⁹ UPSA § 202, cmt. to subsection (b)(1).

It follows that, because under UPSA the protected series designation is filed with the Secretary of State to establish the protected series and is available to the public for inspection, the protected series designation is a “public organic record” as defined in § 9-102(a)(68). It also follows that, because the protected series is an organization formed under the law of a single state - the state of organization of the limited liability company - by the filing of the protected series designation, the protected series is a “registered organization” as defined in § 9-102(a)(71).

Pursuant to § 9-307(e), as a registered organization, a protected series of a limited liability company is located in the state in which it is organized.

AMENDMENTS TO OFFICIAL COMMENTS

With the discussion in this Commentary in mind, the Official Comments are amended as follow.

Official Comment 1.c to § 1-102 is amended by adding the following sentence at the end of the comment on the term “person” in clause 27:

A protected series formed under the Uniform Protected Series Act (2017) is a “person.” See PEB Commentary No. [], dated _____.

Official Comment 2.a to § 9-102 is amended to add the following new paragraph at the end of the comment:

If a security interest is granted by a protected series of a limited liability company formed under the Uniform Protected Series Act (2017), the debtor is the protected series and not the limited liability company or another protected series of the limited liability company. See PEB Commentary No. [], dated _____.

Official Comment 4 to § 9-307 is amended to add the following sentence at the end of the first paragraph of the comment:

A protected series formed under the Uniform Protected Series Act (2017) is a registered organization. See PEB Commentary No. [], dated _____.

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INTRODUCTION

A number of states have enacted statutes that provide for protected series¹ within a limited liability company.² A protected series is generally empowered by such a statute to conduct its own activities under its own name, and it has the rights and duties provided in the statute. It is contemplated that the protected series will keep the assets associated with it separate from those of the limited liability company or another protected series of the limited liability company.³ Moreover, under such a statute, the protected series generally is obligated solely to creditors whose obligations arose from interaction with the protected series; the creditors of a protected series have no claim against the assets associated with the limited company or of another protected series of the limited liability company. A public filing indicating the creation or existence of any particular protected series may or may not be required under the relevant statute. In addition to the existing state enactments, the Uniform Law Commission promulgated in 2017 the Uniform Protected Series Act (“UPSA”) for states to consider in modifying existing statutes, or enacting new ones, to provide for protected series of limited liability companies organized under the laws of those states.

A protected series under the existing state statutes and under UPSA is not a subsidiary of the limited liability company. Rather, a protected series exists within a limited liability company, typically the company that established the protected series. ~~A~~However, UPSA and several other statutes expressly refer to a protected series ~~has the essential characteristic of~~ as a legal

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³ ~~Some statutes provide alternatives, including the holding of assets associated with a protected series in the name of the series, in the name of the limited liability company, through a nominee, or otherwise. See, e.g., DEL. CODE ANN. tit. 6, §18-215(b).~~³ Even with regard to tangible, fungible assets, the separation need not be physical. UPSA § 301(d) (stating that “[t]he records and recordkeeping” “separating the assets 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) (emphasis added).

“person,”⁴ and ~~is designated as a “person” by,~~ under UPSA and ~~several~~most, if not all, other statutes, a protected series ~~statutes~~has the essential characteristics which, since at least the early 19th century, are typically associated with the construct of a legal person.⁵ Nonetheless, ~~as noted below, a protected series has a few atypical attributes. Moreover, as explained in the Prefatory Note to UPSA,~~ “in some regulatory environments, [w]ith the approval of the relevant regulator, a series limited liability company makes one regulatory filing or holds a single license, and ~~the~~ various protected series of the company function under the aegis of that filing or license.”⁶

Because a protected series is expected to enter into transactions for itself and in its own name, a party might enter into a transaction within the scope of the Uniform Commercial Code (the “UCC”) with a protected series. For example, a lender might be asked to extend credit to a protected series in circumstances in which the payment of the extension of credit is to be secured by a security interest under Article 9 of the UCC in ~~existing or after-acquired~~ personal property assets associated with ~~the protected series, whether existing or after acquired,~~ of the protected series. Practitioners in such transactions have often struggled with determining whether the Article 9 debtor on the credit is the protected series or the limited liability company itself and, if the protected series is the Article 9 debtor, whether for purposes of determining the location of the debtor under Article 9 the debtor is a registered organization or an organization that is not a registered organization. These determinations are crucial for the lender to know how to draft and who must sign the security agreement, in which jurisdiction the secured party should search for and file a financing statement to perfect the security interest and obtain the requisite priority for the security interest, and how the secured party should complete the financing statement to provide debtor’s name.

⁴ ~~A “person” is “a subject of legal rights and duties” conferred by the sovereign. John Chipman Gray, *The Nature and Sources of the Law* 27 (Roland Gray rev., 2d ed., The MacMillan Company 1931) (“a ‘person’ is a subject of legal rights and duties”); John Salmond, *Jurisprudence* 318 (Glanville L. Williams ed., 10th ed. 1947) (a person is “capable of rights [and] duties”); Bryant Smith, *Legal Personality*, 37 *Yale L. J.* 283, 283 (1928) (a person is “the subject of rights and duties”); *see generally, Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).~~⁴ In Delaware, the reference appears in the limited liability company statute’s definition of a person. DEL. CODE ANN. tit. 6, §18-101(14) (2019) (defining “person” to include a “limited liability company” and a range of other entities “or series thereof”). UPSA makes the reference in two places. UPSA § 102(7) (relying generally on the definition of “person” in the underlying LLC act while adding that “[p]erson” includes a protected series”); 104 (stating that “[a] limited liability company is a person”).

⁵ ~~UPSA § 102(7); *see, e.g.,* DELA “person” is “a subject of legal rights and duties” conferred by the sovereign. John Chipman Gray, *The Nature and Sources of the Law* 27 (Roland Gray rev., 2d ed., The MacMillan Company 1931) (“a ‘person’ is a subject of legal rights and duties”); John Salmond, *Jurisprudence* 318 (Glanville L. Williams ed., 10th ed. 1947) (a person is “capable of rights [and] duties”); Bryant Smith, *Legal Personality*, 37 *Yale L. J.* 283, 283 (1928) (a person is “the subject of rights and duties”); “Corporations - Right to Prefer Creditors,” 11 *Harv. L. Rev.* 550 (1898) (referring to the by-then well recognized “idea of a corporation as a legal person having powers similar to those of an individual”); *see generally, Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). For a more recent discussion of the meaning of “person,” *see* Elvia Arcelia Quintana Adriano, *The Natural Person, Legal Entity or Juridical Person and Juridical Personality*, 4 *Penn State Journal of Law & International Affairs* 363 (2015) (“A subject of law is any being capable to act as holder of powers, or liable with obligations in a juridical relationship”). For a more recent case supporting the same proposition, *see People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 998 N.Y.S.2d 248, 124 A.D.3d 148 (2014) (“... legal personhood has consistently been defined in terms of both rights and duties ...” (emphasis in original)).~~

⁶ UPSA, Prefatory Note, Part 4. ---

Like determinations are necessary if the protected series is a seller of certain payment rights - accounts, chattel paper, payment intangibles or promissory notes - or is a consignee of goods under a consignment within the scope of Article 9.

DISCUSSION

This Commentary focuses on five issues in transactions with a protected series: (1) Is a protected series a “person” as defined in Article 1 of the UCC? (2) Who is the Article 9 debtor if a security interest within the scope of Article 9 is granted by a protected series to secure an obligation? (3) Who is the Article 9 debtor if the security interest within the scope of Article 9 is the sale by a protected series of accounts, chattel paper, payment intangibles or promissory notes? (4) Who is the Article 9 debtor if the security interest is a consignment within the scope of Article 9 to a protected series as consignee? (5) If the Article 9 debtor is a protected series, where is the debtor located for purposes of Article 9?

This Commentary addresses those issues by reference to UPSA, which was drafted with those issues in mind. This Commentary does not address other protected series statutes containing provisions that may vary from the relevant provisions of UPSA.⁷ Nevertheless, as a general matter, this Commentary does not preclude application of its analysis to an issue concerning a protected series of a limited liability company established under law other than UPSA, or a protected series of any other alternative business entity or organization statute, if the statute contains the substance of the provisions of UPSA relevant to the issue ~~so that the statute confers on the protected series the characteristics of a “person” as discussed in this Commentary.~~ Accordingly, the analysis contained in this Commentary may be useful in resolving these issues under another protected series statute to the extent that the statute’s relevant provisions are the same or substantially similar to those ~~in~~^{of} UPSA.

(1) Is a protected series a “person” under the UCC?

~~Under This Commentary concludes that, under~~ Article 1 ~~and UPSA of the UCC,~~ a protected series ~~established under UPSA~~ is a “person.” ~~Article 1 in §~~

~~Section~~ 1-201(b)(27) defines the term “person” as follows:

“Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

~~— A protected series exists within the limited liability company itself. It cannot exist on its own⁸ and, except in the case of the very limited form of merger permitted under the UPSA, necessarily ceases to exist when the limited liability company itself ceases to exist.⁹ A protected~~

⁷ For example, the discussion below on whether a protected series is a “registered organization” under Section 9-102(a)(71) will not be applicable if the relevant limited liability company statute does not provide for a protected series of the company to be established by a public filing.

⁸ UPSA § 103, emt.; UPSA § 104, emt. to subsection (e).

⁹ UPSA § 104(e). ~~See also UPSA § 607(1)(A) (permitting a protected series of a series limited liability company that does not survive a merger to be relocated to the series limited liability company that does survive).~~

~~series under UPSA has other attributes that strongly suggest that a protected series is a “person.”¹⁰ A protected series is distinct from its associated members, the limited liability company, and any other protected series of the limited liability company.¹¹ A protected series generally possesses the same powers as the limited liability company including the power to own its own assets and to sue and be sued in its own name.¹² A protected series is not liable for the debts of the limited liability company or another protected series of the limited liability company merely because it is a protected series,¹³ nor are its assets generally available to creditors of the limited liability company or another protected series of the limited liability company, so long as its assets are “associated” with the protected series.¹⁴ A protected series has its own members¹⁵ which are distinct from the protected series¹⁶ and which are generally entitled to vertical liability shields for acts of the protected series.¹⁷~~

~~It would be anomalous for a protected series to have all of these attributes and yet fall outside of the definition of “person” under the UCC. This conclusion is further supported by the clear intent of UPSA’s drafters to establish the “personhood” of a protected series under UPSA by expressly including a protected series under UPSA’s own definition of “person.”¹⁸~~

~~In reaching the conclusion that a protected series under UPSA is a “person” under § 1-201(b)(37), it is recognized that reasonable~~

Reasonable minds might differ as to which of the organizations specified in the definition best describes the protected series. A protected series might be considered to be an “association,” ~~a term not defined in Article 1.~~¹⁹ Or a protected series might be considered to be another some other, unspecified, type of “legal or commercial entity.” Article 1 does not define the term “association.” Nor does it further explain the phrase “other legal or commercial entity.” However, that phrase is a residual category, what might be described as a “catch-all” term for other legal or commercial entities that have the attributes of a “person,” as further discussed below.

~~UPSA itself leaves open the possibility that a protected series is a “commercial entity” if not a “legal” entity.²⁰ UPSA is designed to work in conjunction with the enacting state’s limited liability company statute under a construct referred to as “extrapolation.”²¹ Under that construct,~~

¹⁰ ~~See, supra, fn. 4.~~

¹¹ ~~UPSA § 103.~~

¹² ~~UPSA § 104(a), (b).~~

¹³ ~~UPSA § 401(b).~~

¹⁴ ~~UPSA § 404; see UPSA § 301 for determining when an asset of a protected series is “associated” with the protected series.~~

¹⁵ ~~The members of a protected series are referred to as “associated members” under UPSA. UPSA § 102(3). An associated member must be a member of the limited liability company itself. UPSA § 302(a).~~

¹⁶ ~~UPSA § 103(3).~~

¹⁷ ~~UPSA § 401(a).~~

¹⁸ ~~UPSA § 102(7).~~

¹⁹ Indeed, Delaware has declared that a “protected series” under its Limited Liability Company Act is an “association” not only under the act itself but also “[f]or all purposes of the laws of the State of Delaware.” See DEL. CODE ANN. tit 6, §§ 18-215(b)(12) (2019).

²⁰ ~~UPSA § 102(7), emt.~~

²¹ ~~See UPSA, Prefatory Note, Part 6.~~

~~UPSA uses terms defined by reference in the limited liability company statute.²² That statute may be the Uniform Limited Liability Company Act (2006) (Last Amended 2013).²³ Section 102(15) of that Act, like § 1-201(b)(27), does define the term “person” to include an “other ...commercial entity.”~~

This analysis proceeds by focusing on the “catch-all” term. If a protected series is an “association,” then it is clearly a “person” under Section 1-201(b)(27). Absent a protected series being an association, the question becomes whether a protected series fits within the “catch-all” phrase of “other legal or commercial entity.”

That a protected series may be either another “legal” entity or another “commercial” entity is consistent with both the historical formulation of the term “person” in the context of § 1-201(b)(27).— and the interpretative canon of *ejusdem generis*.⁹ Together, the history and the canon identify a set of characteristics associated with legal personhood, notwithstanding that every legal person might not necessarily possess each characteristic.

As early as 1989, the Uniform Law Commission’s Committee on Style proposed a standardized definition of “person.”²⁴¹⁰ As initially proposed, the definition read:

“Person” means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision [sic] or agency, or any other legal or commercial entity.”²⁵¹¹

An accompanying footnote references the emergence of a new construct - the limited liability company - which “of course, would be included in the *catchall* ‘any other legal or commercial entity.’” (emphasis added)²⁶¹² Shortly thereafter, noting that the forthcoming Uniform Statutory Construction Act explicitly includes the term “limited liability company” within its definition of the term “person,” it was suggested that the standardized definition should explicitly include it, notwithstanding its inclusion by the “catchall phrase ‘any other legal or commercial entity.’”²⁷¹³

This historical formulation confirms that the phrase “or any other legal or commercial entity” was intended as a “catch-all.” ~~Theso that the~~ definition of “person” ~~was augmented in several respects before emerging in the form of current § 1-201(b)(27). It explicitly not only~~ includes individuals and the full range of then-recognized and emerging non-individuals that might enjoy the ability to hold assets or contract, ~~and but also~~ what its advocates described as a

²² ~~See UPSA § 102, Legislative Note.~~

²³ ~~Id.~~

⁹ EJUSDEM GENERIS, Black's Law Dictionary (11th ed. 2019) (“A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.”).

²⁴¹⁰ See Proposed Standardized Definitions for Consideration of Executive Committee, submitted by Eugene A. Burdick, Chairman, Committee on Style, dated 18 October 1989.

²⁵¹¹ Id.

²⁶¹² Id. fn. 3.

²⁷¹³ See Memorandum dated May 16, 1991, from Eugene A. Burdick, Chairman of the Committee on Style, and James C. McKay, Jr., Chairman of the Committee on Liaison with Legislative Drafting Agencies, to the Executive Committee of the Uniform Law Commission, fn. 1.

“catch-all” for any not-yet-recognized non-individuals that might enjoy the ability to hold assets or contract.

~~Given the attributes of a protected series as~~ At the same time, the canon places limits on an overly broad interpretation of the term “person.” According to the canon, “where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words.”¹⁴ *Ejusdem generis* “gives effect to both the general and specific terms by “treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words. In light of the specific terms, the general term is restricted to include only things of the same kind, class, character, or nature as those specifically enumerated.”¹⁵

A protected series does have a few attributes not generally associated legal personhood. A protected exists under the aegis of the limited liability company that established the protected series and cannot exist on its own.¹⁶ Furthermore, as a general matter, a protected series necessarily ceases to exist when the limited liability company itself ceases to exist.¹⁷

However, a protected series under UPSA has many other attributes that strongly suggest that a protected series is a “person.”¹⁸ A protected series is distinct from its associated members, the limited liability company, and any other protected series of the limited liability company.¹⁹ A protected series generally possesses the same powers as the limited liability company including the power to own its own assets and to sue and be sued in its own name.²⁰ A protected series is not liable for the debts of the limited liability company or another protected series of the limited liability company merely because it is a protected series,²¹ nor are its assets generally available to creditors of the limited liability company or another protected series of the limited liability company, so long as its assets are “associated” with the protected series.²² A protected series has its own members²³ which are distinct from the protected series²⁴ and which are generally entitled to vertical liability shields for acts of the protected series.²⁵

¹⁴ Washington State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 372, 123 S. Ct. 1017, 1019, 154 L. Ed. 2d 972 (2003)

¹⁵ Huggett v. Dep’t of Nat. Res., 464 Mich. 711, 718–19, 629 N.W.2d 915, 920 (2001) (citations and internal quotations omitted).

¹⁶ UPSA § 103, cmt.; UPSA § 104, cmt. to subsection (c).

¹⁷ The one exception is in the case of the very limited form of merger permitted under the UPSA, UPSA § 104(c). See also UPSA § 607(1)(A) (permitting a protected series of a series limited liability company that does not survive a merger to be relocated to the series limited liability company that does survive).

¹⁸ See, supra, fn. 4.

¹⁹ UPSA § 103.

²⁰ UPSA § 104(a), (b).

²¹ UPSA § 401(b).

²² UPSA § 404; see UPSA § 301 for determining when an asset of a protected series is “associated” with the protected series.

²³ The members of a protected series are referred to as “associated members” under UPSA. UPSA § 102(3). An associated member must be a member of the limited liability company itself. UPSA § 302(a).

²⁴ UPSA § 103(3).

²⁵ UPSA § 401(a).

Given the historical formulation of the term “person” with its “catch-all” phrase and even after giving effect to the canon, it would be anomalous for a protected series to have all of these attributes and yet fall outside of the definition of “person” under the UCC. This conclusion is further supported by the clear intent of UPSA’s drafters to establish the “personhood” of a protected series under UPSA by expressly including a protected series under UPSA’s own definition of “person”²⁶ and stating categorically that:

A protected series of a series limited liability company is a person distinct from: (1) the company, subject to Sections 104(c), 501(1), and 502(d); (2) another protected series of the company; (3) a member of the company, whether or not the member is an associated member of the protected series; (4) a protected-series transferee of a protected series of the company; and (5) a transferee of a transferable interest of the company.²⁷

Of course, ultimately whether a non-individual is a person under the UCC is determined according to the definition of the term “person” in the UCC itself, i.e., under Section 1-201(b)(27). However, UPSA’s denomination of a protected series as a “person” for purposes of UPSA is suggestive of the result under the UCC. More fundamentally, a protected series under UPSA has most of the attributes reflected in the specific organizations listed in Section 1-201(b)(27) and is consistent with the ~~long-held~~ meaning of “person,” ~~UPSA’s own establishment of “personhood” for a protected series, and~~ as reflected in the historical formulation of the term “person” in §Section 1-201(b)(27).

In sum, a protected series, if not an “association” or other organization specifically mentioned in the definition of “person” in §Section 1-201(b)(27), would fall within the intended contours of the “catch-all” phrase of “any other legal or commercial entity” in the definition.

(2) Who is the Article 9 debtor if the security interest secures an obligation?

If a protected series grants a security interest in collateral to secure an obligation, the Article 9 debtor is the protected series. Section 9-102(a)(28) defines the term “debtor” to include “a person having an interest, other than a security interest or lien, in the collateral...” (emphasis added).²⁸ If a protected series is a “person” as defined in § 1-201(b)(27), it follows that, if a protected series grants a security interest in collateral to secure an obligation, the protected series is the Article 9 debtor.

²⁶ UPSA § 102(7).

²⁷ UPSA § 103. The cited sections pertain to the characteristics note *supra* at note 17. UPSA itself leaves open the possibility that a protected series is a “commercial entity” if not a “legal” entity. UPSA § 102(7), cmt. UPSA is designed to work in conjunction with the enacting state’s limited liability company statute under a construct referred to as “extrapolation.” See UPSA, Prefatory Note, Part 6. Under that construct, UPSA uses terms defined by reference in the limited liability company statute. See UPSA § 102, Legislative Note. That statute may be the Uniform Limited Liability Company Act (2006) (Last Amended 2013). *Id.* Section 102(15) of that Act, like U.C.C. § 1-201(b)(27), does define the term “person” to include an “other ... commercial entity.”

²⁸ U.C.C. § 9-102(a)(28)(A).

(3) *Who is the Article 9 debtor if the security interest is a sale of accounts, chattel paper, payment intangibles or promissory notes?*

Likewise, if the security interest granted by a protected series is a sale of accounts, chattel paper, payment intangibles or promissory notes,²⁹ the protected series is the Article 9 debtor. Section 9-102(a)(28) defines the term “debtor” to include “a seller of accounts, chattel paper, payment intangibles or promissory notes....”³⁰ Even though the definition of “debtor” does not use the term “person” when referring to a “seller,” Article 9 incorporates Article 2’s definition of “sale”³¹ (and the corresponding meaning of “seller”) from Article 2, which refers to a “person.”³²

(4) *Who is the Article 9 debtor if the security interest is a consignment under Article 9?*

For similar reasons, if a security interest granted by a protected series (as consignee) is a “consignment” within the scope of Article 9,³³ the protected series is the Article 9 debtor.³⁴ Section 9-102(a)(28) defines the term “debtor” to include “a consignee.” Even though the definition of “consignee” does not use the term “person” as such, nevertheless the definition does use the term “merchant.”³⁵ And the term “merchant” has the same meaning in Article 9 as it does in Article 2.³⁶ Under Article 2, a “merchant” is a “person.”³⁷ Accordingly, a consignee must be a “person” in order to be a consignee just as a seller must be a “person” in order to be a seller.

(5) *Where is the Article 9 debtor located for purposes of Article 9?*

Whether the security interest secures an obligation, is a sale of accounts, chattel paper, payment intangibles or promissory notes, or is a consignment within the scope of Article 9, the protected series is located for purposes of Article 9 in the state under whose laws it was organized.

This conclusion follows from the definitions of “organization” in § 1-201(b)(25) and “registered organization” in § 9-102(a)(71) and from the debtor location rules in § 9-307. Section 1-201(b)(25) defines the term “organization” to mean “a person other than an individual.” Because a protected series is a “person” as defined in § 1-201(b)(27) and is not an individual, a protected series must be an “organization.”

²⁹ See U.C.C. § 1-201(b)(35) defining the term “security interest” to include any interest of a buyer of accounts, chattel paper, payment intangibles or promissory notes in a transaction subject to Article 9.

³⁰ U.C.C. § 9-102(a)(28)(B).

³¹ U.C.C. § 9-102(b), providing a cross-reference” to the term “sale” as defined in U.C.C. § 2-106.

³² Cf. U.C.C. § 2-103(1)(d) defining a “seller” as “a person who sells goods or contracts to sell goods.” (emphasis added). It would be anomalous if a debtor that granted a security interest in collateral to secure an obligation must be a “person” but a seller of accounts, chattel paper, payment intangibles or promissory notes need not be a “person.”

³³ See U.C.C. § 9-102(a)(20) defining the term “consignment.”

³⁴ See U.C.C. § 9-102(a)(35) defining the term “security interest” to include any interest of a consignor in a transaction subject to Article 9.

³⁵ See U.C.C. § 9-102(a)(20) referring to a person delivering goods to a “merchant.”

³⁶ See U.C.C. § 9-102(b) providing a cross-reference” to the term “merchant” as defined in U.C.C. § 2-104.

³⁷ See U.C.C. § 2-104(1) defining “a merchant” as “a person who deals in goods....” (emphasis added).

Section 9-102(a)(71) defines the term “registered organization” to include an organization organized solely under the law of a single State ... by the filing of a public organic record with... the State” The term “public organic record” is defined in § 9-102(a)(68) to include:

a record that is available to the public for inspection and is:

(A) a record consisting of the record initially filed with or issued by a State ... to form or organize an organization ...;

....

Under UPSA a protected series of a limited liability company is established when the limited liability company delivers to the Secretary of State of the state in which the limited liability company is organized a “protected series designation” signed by the company and providing the name of the protected series and the protected series designation takes effect.³⁸ The protected series designation, when filed, is available for public inspection so as to provide transparency to the public of the existence of the protected series.³⁹

It follows that, because under UPSA the protected series designation is filed with the Secretary of State to establish the protected series and is available to the public for inspection, the protected series designation is a “public organic record” as defined in § 9-102(a)(68). It also follows that, because the protected series is an organization formed under the law of a single state - the state of organization of the limited liability company - by the filing of the protected series designation, the protected series is a “registered organization” as defined in § 9-102(a)(71).

Pursuant to § 9-307(e), as a registered organization, a protected series of a limited liability company is located in the state in which it is organized.

AMENDMENTS TO OFFICIAL COMMENTS

With the discussion in this Commentary in mind, the Official Comments are amended as follow.

Official Comment 1.c to § 1-102 is amended by adding the following sentence at the end of the comment on the term “person” in clause 27:

A protected series formed under the Uniform Protected Series Act (2017) is a “person.” See PEB Commentary No. [], dated _____.

Official Comment 2.a to § 9-102 is amended to add the following new paragraph at the end of the comment:

If a security interest is granted by a protected series of a limited liability company formed under the Uniform Protected Series Act (2017), the debtor is the protected series and not the limited liability company or another protected series of the limited liability company. See PEB Commentary No. [], dated _____.

³⁸ UPSA § 201(b)-(c).

³⁹ UPSA § 202, cmt. to subsection (b)(1).

Official Comment 4 to § 9-307 is amended to add the following sentence at the end of the first paragraph of the comment:

A protected series formed under the Uniform Protected Series Act (2017) is a registered organization. See PEB Commentary No. [], dated _____.

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