

THE DELAWARE SERIES LLC
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This is a short overview of the form of Delaware entity known as a “Series LLC” and is intended for those viewing the website of Delaware Business Incorporators and its affiliated entities. Though the topic can be the subject of a lengthier technical analysis, this is intended as a brief and basic overview and should not be considered as legal advice.

The form of entity known as a Limited Liability Company [LLC], has been adopted in all states within the past 15 years or so, but a variation of the LLC, called a Series LLC, has only been adopted in Delaware (as of the writing of this article in February 2005). The Series LLC allows for multiple assets to be owned by one LLC, but permits those assets to be separated into multiple “series” which can be described as separate “baskets” into which different assets of the LLC can be deposited. Each of those baskets will be separate in terms of liability and the liability of one of those baskets or series will not encroach upon or subject the other baskets to liability. The Series LLC is of interest to those companies or persons who own multiple real estate properties or multiple businesses and who may want the convenience of having one LLC, but also want the benefit of separate liability for each asset. When properly established, the liability of one asset in a Series LLC will not subject the asset held in a different series to liability even though both assets are in the same Series LLC.

In essence, with a properly formed Series LLC, one receives the same protection as if each asset were held in a separate LLC, but also the convenience and cost-savings of only maintaining one entity, with a separate “series” or “basket” of the Series LLC holding different assets under the umbrella of one LLC.

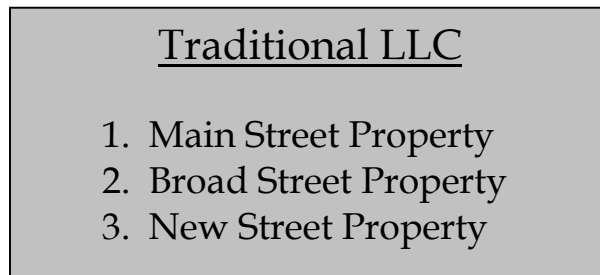
Among the conveniences of a Series LLC are the following: (1) a new series may be added by amendment of the LLC Agreement and a series may be eliminated by amendment of the LLC Agreement without the need for additional filings with the state; (2) a series may be dissolved without affecting other series under the “umbrella” LLC; (3) a Series LLC reduces the legal fees, accounting fees and administrative fees that would otherwise be incurred for multiple LLC’s that would hold separate assets in separate entities.

In order to enjoy the benefits of a Series LLC, the following requirements are required by statute: (1) notice of limitation on liabilities of each series must be set forth in the Certificate of Formation of the LLC that is initially filed with the Secretary of State in Delaware. (In the event of an existing LLC, a Certificate of Amendment of the Certificate of Formation may be filed.); (2) an LLC Agreement or “Operating Agreement” must be customized to the individual facts of the Series LLC and signed by

the LLC members; (3) separate and distinct records must be maintained for each series; (4) the assets of each series must be separately held and separately accounted for distinct from the other assets of the LLC; (5) the LLC Agreement must provide that the liabilities of each of the series will be separate, and held and accounted for separately.

All states permit creation of a “conventional” LLC. The benefit of an LLC in general is that it offers the managerial flexibility of a partnership and at the same time limits the personal liability of members similar to a traditional corporation. The advantage of an LLC is that it offers considerably more structural and administrative flexibility than other forms of corporate organization. Importantly, the LLC offers this flexibility while still preserving one of the traditionally important foundations of a corporation, i.e., shielding owners from personal, civil liability for corporate activity.

The problem with both a corporate structure and a traditional LLC is that all of the assets of those entities are potentially subject to the claims of all of their respective creditors. For example, imagine that you own an LLC. The LLC owns three rental properties.



One of the rental properties burns down and gives rise to significant or excess liability. In this scenario, all of the LLC assets, including the two rental properties not involved in the fire, would be imperiled by the fire liability because potentially all of the LLC property could be used to satisfy the fire liability claims. While you might take some comfort in the fact that your personal assets are shielded from the fire claims, in the end, the LLC may lose all of the rental properties. There is little comfort in this result.

To avoid this result assets were placed into separate or multiple LLC's. Following the above example, instead of creating one LLC and dumping everything into that LLC, each rental property was placed into it's own LLC as shown below:



In the fire example used above, the two rental properties that were not involved in the fire, should not be available to satisfy the fire liability claims. The problem with this approach is that it is complex, expensive, time consuming and administratively burdensome. Understand that the magnitude of complexity, expense and time grows almost exponentially as the number of assets and LLC's increase.

A Series LLC resolves many of these problems. First enacted in Delaware in 1996, a Series LLC permits that an LLC agreement may provide for the establishment of designated series of specified property or operations with separate business purposes or investment objectives, such that the debts, liabilities and obligations relating to a particular series would be enforceable only against the assets of that series and not against the assets of the LLC generally or the assets of any other series. Each series in a Series LLC can operate independently of the LLC in general and independently of any other series. In doing so the series can thereby avoid the liabilities of other series and the LLC. Each series may have separate business purposes.

In the above example, a Series LLC would look as follows:

Series LLC				
Series A: Main Street	Series B: Broad Street	Series C: New Street	Series D: Old Street	Series E: Baker Street
Series F: South Street	Series G: East Street	Series H: West Street	Series I: Easy Street	Series J: Bank Street

A single LLC Agreement can be created that provides for the creation of separate series. Each series can hold separate, specific assets, have separate business purposes and have different ownership interests. Each series can bear the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular series. Those liabilities can be enforceable only against the assets of that series. Further, series liability cannot be asserted against the assets of the LLC generally or any other series, unless provided for in the LLC Agreement. Likewise, none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the LLC generally or any other series can be enforceable against the assets of such series. There is no limit on the number of series or new series that can be created, at any time. All of which can be created without the need to create a new LLC. Another unique feature of a Series LLC is that a series may be terminated and its affairs wound up without causing the dissolution of the LLC. This would allow members of a Series to terminate the series and potentially liquidate their assets without meaningful

impact on members of an unrelated series. Under appropriate circumstances, ownership interests may be transferred among different series owners, without tax liability.

To continue with the fire example, using a Series LLC, only those assets specifically associated with a specific series would be subject to the fire liability. So if the “Series B: Broad Street” property burned down, then relying upon an appropriately structured Series LLC, neither the assets of any other series, nor the assets of the LLC itself, would be available to satisfy the fire liability claims.

In sum, the Series LLC offers the structural and administrative flexibility of an LLC, while shielding owners from personal, civil liability, it protects individual assets from liability incurred with other assets and reduces complexity, expenses, time and administrative burdens.

As with the traditional LLC, Delaware law permits that only the name of the registered agent needs to be identified. This allows series owners to operate with privacy and in complete anonymity.

Two fundamental differences exist between the traditional LLC and a Delaware Series LLC.

- (1) The certificate of formation must provide notice that the LLC is a Series LLC. A certification of formation is filed when the LLC is created. An existing LLC can be converted to a Series LLC by filing a restated certificate of formation. To take full advantage of the Series LLC, of course, requires that the existing LLC Agreement likewise be revised to take full advantage of the statutory protections offered by Delaware law. For those who may have formed a conventional LLC without executing an LLC Agreement, you need one now.
- (2) Each series within the Series LLC must scrupulously maintain separate and distinct records for any and every series and for the assets associated with the series. There is no clear authority on what satisfies the “separate and distinct records” under Delaware law. As such, good practice dictates that caution at a minimum, including an LLC Agreement or “Operating Agreement” that address the necessary issues.

Other statutory elements of the Series LLC are ordinarily fleshed out in the LLC Agreement including: segregating assets, limitations on liability as to LLC assets and maintaining separate records of series assets.

In order to comply with this creative Delaware statute, a strict observance of statutory formalities must be maintained. In addition, this form of entity is not for the fainthearted. If assets are owned or business conducted in states other than Delaware through a Series LLC, there is at least the hypothetical risk that the courts of those states might not honor the Delaware statute in those states that do not have a Series LLC statute.

Despite the undeniable benefits offered by a Series LLC, there are significant unanswered issues that should be considered before establishing a Series LLC. Notably, Series LLC's are relatively new. As a consequence there is little guidance from courts or taxing authorities on the legal and tax issues raised by the Series LLC form of organization. For example, no court has, to date, considered or defined what constitutes separate and distinct records in the context of a Series LLC. Nor has any court, to date, determined whether an asset may be used by two series within the same Series LLC without running afoul of the separate and distinct records requirement. While it is likely that the federal government and states other than Delaware will recognize the limitations on liability that a Delaware Series LLC provides, to date, no court has been called upon to do so. As of February 2005, not even a Delaware court has interpreted the Series LLC statute per se. Hence, this and other issues are still open for debate.

There are potentially significant tax issues arising from Series LLC's. Many of those issues arise within the context of multiple member interests within single or multiple series. Transfers between series may, or may not, be exempt from real property transfer taxes imposed by state and local governments. Likewise, changes in membership in a series may give rise to similar tax liability. Finally, there are potential tax treatment issues, within the context of series ownership interests that arise when diverse ownership interests exist between members such that a series may be said to be a separate partnership distinct from other series within the LLC.

The bottom line: proceed with caution, be conservative to a fault and secure legal and tax guidance for your specific situation. The Series LLC is designed to combine comprehensive legal protection with administrative convenience for your business and personal assets. It is an option that should be considered when analyzing the form of entity that best suits one's needs.