

## Series LLCs

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A Practice Note providing an overview of Series LLCs formed under Delaware law, highlighting the pros and cons of using this unique form of entity.

In 1996, Delaware became the first state to permit the formation of limited liability companies (LLCs) that have multiple series with separate members, managers, LLC interests, or assets (Series LLCs) and other states have followed suit.

Although most commonly used for mutual funds and investment funds, a Series LLC could potentially be used for any type of business when it is desirable to divide the overall business into units with segregated assets and liabilities. Each series of a Series LLC may have characteristics of a separate LLC, such as separate rights, powers, or duties with respect to specified property or obligations. Each series may also have its own business purpose or investment objective.

Further, if a Series LLC complies with certain additional requirements of applicable state law, an individual series of the Series LLC is not liable for the debts, liabilities, and obligations of the Series LLC generally or any other series of the group. This type of Series LLC is referred to in this Note as a “Protected Series” LLC. In addition, Delaware permits a Series LLC to create a type of series known as a “Registered Series,” which has many of the same characteristics as a Protected Series in addition to others that could be helpful in secured lending transactions where a series is a borrower and for other reasons discussed in this Note.

This Note provides an overview of Series LLCs, focusing on the:

- Flexibility in structuring and organizing a Series LLC.
- Requirements to form a Series LLC and qualify a series as a Protected Series or a Registered Series.
- Membership, management, distributions, and dissolution of an individual series of a Series LLC.

- Primary uses and benefits of Series LLCs.
- Issues and uncertainties surrounding Series LLCs.

This Note is based on Delaware law.

### Business Structure Flexibility

The Series LLC, like an LLC generally, is a flexible entity which drafters can largely structure and organize as they choose under an LLC agreement. For example:

- A Series LLC may have managers, assets, and members associated with a particular series that are separate from the managers, assets, and members associated with the Series LLC generally and the other individual series.
- A Series LLC may be structured so that each series is managed by the same managers, but the assets and members associated with each series remain separate from those of the Series LLC generally and the other individual series.
- The profits and losses of a particular series may be attributed only to the members associated with that series or to the Series LLC generally.

In certain states, including Delaware, the series form is also available for limited partnerships and statutory or business trusts with characteristics similar to those of Series LLCs (for example, see 6 Del. C. §§ 17-218 and 17-221).

### Formation and Qualification

To form a Series LLC, a certificate of formation must be filed with the Delaware Secretary of State (SOS). However, the individual series do not have to exist

at the time of formation. Under Section 18-215 of the Delaware Limited Liability Company Act (LLC Act) (6 Del. C. § 18-215), the LLC agreement of the Series LLC may establish one or more series of members, managers, LLC interests, or assets of the Series LLC. As is the case with LLCs generally, it is best practice to have a written LLC agreement for a Series LLC, although this is not required in Delaware. Any series is bound by its LLC agreement whether or not the series executes the LLC agreement (6 Del. C. § 18-101(9)).

Consider the applicability of reporting requirements under the Corporate Transparency Act (CTA) in connection with or as a result of forming a Series LLC. For more information on the CTA, see [Practice Note, Corporate Transparency Act \(CTA\) Beneficial Ownership Reporting, Corporate Transparency Act \(CTA\) Rules and Publications Tracker](#), and [Corporate Transparency Act \(CTA\) Toolkit](#).

### Protected Series

To form a Protected Series LLC in Delaware, the following three requirements must also be met:

- **Limitation on liability.** The LLC agreement must provide for the limitation on liability. If the Series LLC will have assets or liabilities that will be shared by all series of the Series LLC (for example, certain administrative or management costs), the LLC agreement should explicitly set out the manner in which these assets and liabilities will be allocated among the different series of the Series LLC.
- **Notice.** Notice of the limited liability of each series must be set out in the certificate of formation of the Series LLC. In Delaware (and in many, but not all, states that permit Series LLCs), a general notice is typically used, stating that:
  - the LLC has or may form series;
  - the liabilities of each series will be enforceable against the assets of that series only and not against the assets of the Series LLC generally or any other series; and
  - unless otherwise provided in the LLC agreement, none of the liabilities existing with respect to the Series LLC generally or any other series will be enforceable against the assets of that series.
- **Separate records.** On an ongoing basis, the records for any series must account for the assets of that series separately from the assets of the Series LLC itself and any other series of the group. This requirement is deemed satisfied

if the records of a series “reasonably identify” its assets. Records reasonably identify the assets of a series if the assets are identified by “specific listing, category, type, quantity, computational, or allocational formula or procedure (including a percentage or share of any asset or assets) or by any other method where the identity of such assets is objectively determinable.”

If these requirements are satisfied, the debts, liabilities, obligations, and expenses of a series will be enforceable against the assets of that particular series only and not against the assets of the Series LLC itself or any other series of the group, unless otherwise provided in the LLC agreement. (6 Del. C. § 18-215(b).)

### Registered Series

The LLC Act also provides for another type of Protected Series referred to as a “Registered Series.” The provisions of Section 18-218 of the LLC Act, which govern the formation of a Series LLC that will have Registered Series, track many of the provisions set out in Section 18-215 of the LLC Act. Therefore, a Registered Series has essentially the same characteristics as a Protected Series except that, importantly, a “certificate of registered series” must be filed with the Office of the SOS in order to form a Registered Series of a Series LLC. Other important differences between a Registered Series and a Protected Series include:

- **Name.** The name of a Registered Series must begin with the name of the LLC of which it forms a part (6 Del. C. § 18-218(e)(1)).
- **Merger.** A Registered Series is expressly permitted under the LLC Act to merge with and into any other Registered Series of the same LLC (6 Del. C. § 18-221).
- **Good Standing.** A certificate of good standing may be issued by the Office of the SOS with respect to a Registered Series.
- **Franchise Tax.** An annual franchise tax will be owed in the amount of \$75 per Registered Series (6 Del. C. § 18-1107(b)).
- **Secured Lending.** Because of the differentiating characteristics of a Registered Series relative to other Protected Series, secured lenders should have more certainty regarding perfecting a security interest where a Registered Series is the debtor (see Security Interests).

A Protected Series may convert to a Registered Series and a Registered Series may convert to a Protected Series of the same LLC (6 Del. C. §§ 18-219 and 18-220).

### Membership, Management, Distributions, and Dissolution

A person forming a Series LLC has the same flexibility in structuring membership and management rights and powers associated with each series as they do for separate LLCs. Distributions may also be made to members on a series-by-series basis. In addition, an individual series may be terminated without dissolving the Series LLC itself.

#### Members of a Series

Each series of a Series LLC may have different members or one or more of the same members associated with it. The LLC agreement can set out the rights, powers, and duties of the members. The LLC agreement can also provide for separate classes or groups of members associated with any particular series with different voting, distribution, or other rights. (6 Del. C. §§ 18-215(b) and 18-218(c).)

For example, investment funds that establish separate mutual funds as individual series may have separate classes of interests offering different fee structures or otherwise varying certain rights and obligations of the investors. Therefore, one class may require a front-end fee whereas another class may not have a front-end fee but may require a larger minimum investment. Alternatively, a class may be established solely to invest funds from 401(k) plans. Each class, however, would be part of the same series and therefore invest in the same portfolio of securities.

#### Managers of a Series

Similar to the options in structuring membership, each series of a Series LLC may have different managers or one or more of the same managers. The managers may be divided into separate classes or groups and may have separate rights, powers, and duties as provided in the LLC agreement. (6 Del. C. §§ 18-215(b) and 18-218(c).)

For example, in the mutual fund context, it may be the case that a single board of managers manages all of the series within the Series LLC, although they may appoint separate officers to manage the day-to-day affairs of each series. In Delaware (and the other jurisdictions that have adopted a similar Series

LLC statute), if the LLC agreement of a Series LLC does not indicate how the series will be managed, by default each series will be managed by the members of the Series LLC associated with the particular series (6 Del. C. §§ 18-215(b)(5) and 18-218(c)(5)).

#### Distributions to Members

Distributions may be made to members of a Series LLC on a series-by-series basis. In the case of a Protected Series LLC or Registered Series LLC, the members that are associated with one series may receive distributions from that series whether or not distributions are being (or can be) paid with respect to any other series of the group. (6 Del. C. §§ 18-215(b)(7) and 18-218(c)(7)). Distributions are generally governed by the LLC agreement of a Series LLC. The LLC agreement may provide for distributions with respect to any series at specific times or grant the authority to make determinations regarding distributions to any managers or members associated with the applicable series.

However, the LLC Act prohibits a Protected Series LLC or Registered Series LLC from making distributions to members associated with a particular series if, after giving effect to the distribution, the liabilities of the series (other than liabilities to members on account of their LLC interests in that series and liabilities for which the recourse of creditors is limited to specified property of that series) exceed the fair value of the assets associated with the series. The fair value of property of the series that is subject to a liability for which the recourse of creditors is limited is included in the assets associated with that series only to the extent that the fair value of that property exceeds that liability. (6 Del. C. §§ 18-215(b)(7) and 18-218(c)(7).)

This test is applied on a series-by-series basis. Therefore, certain series may be able to make distributions while others cannot. It appears to permit a distribution that would render a Protected Series LLC or Registered Series LLC insolvent on a consolidated basis so long as the specific series making the distribution would not be rendered insolvent by the distribution. (6 Del. C. §§ 18-215(b)(7) and 18-218(c)(7).)

#### Dissolution or Termination of a Series

A Protected Series may be terminated and its affairs wound up, and a Registered Series may be dissolved and its affairs wound up, in any of the following ways:

- As provided in the LLC agreement.

- By a judicial decree.
- By the vote or consent of members associated with the series who own more than two-thirds of the interests in the profits of the particular series, unless otherwise provided in the LLC agreement.

A Protected Series is also terminated and a Registered Series is also dissolved upon the dissolution of the Series LLC of which it is a part. However, unless otherwise provided in the LLC agreement, the occurrence of any event causing a member to cease to be associated with a series does not cause the termination or dissolution of the series, even if that member is the last remaining member of the series. In addition, subject to Section 18-801 of the LLC Act (6 Del. C. § 18-801), the termination or dissolution of a series of a Series LLC does not cause the Series LLC to dissolve, unless otherwise provided in the LLC agreement. (6 Del. C. §§18-215(b)(8)-(9) and 18-218(c)(8)-(9).)

Regarding a Registered Series, a certificate of Registered Series is cancelled upon either:

- The cancellation of the certificate of formation of the Series LLC of which it forms a part.
- The effectiveness of the certificate of cancellation of the certificate of registered series that was filed for the Registered Series.

(6 Del. C. §18-218(d)(7).)

The LLC Act also provides that the termination of a Protected Series or dissolution of a Registered Series does not affect the limitation on liabilities of the terminated series. As is the case for the dissolution and liquidation of an LLC generally, the persons winding up the affairs of a series are required to distribute the assets to creditors of the series or make reasonable provision for the distribution to creditors before the assets may be distributed to the members associated with the series (6 Del. C. §§18-215(b)(9)-(10) and 18-218(c)(9)-(10)).

### Revocation

The termination of a Protected Series or dissolution of a Registered Series may be revoked by:

- **The terms of the LLC agreement.** If the LLC agreement provides a manner for revocation, the termination or dissolution may be revoked in the manner provided in the LLC agreement.
- **Continuation of the series.** Unless the LLC has dissolved (without the dissolution being revoked) or the LLC agreement prohibits revocation of

termination or dissolution, the termination or dissolution may be revoked if prior to completion of the winding up of the Protected Series (or in the case of a Registered Series, if prior to the filing of a certificate of cancellation of the certificate of the Registered Series) that Protected Series or Registered Series, as applicable, is continued:

- in the case of a termination of the Protected Series or dissolution of the Registered Series effected by vote or consent (or other persons whose approval is required for such termination pursuant to the LLC agreement), by such vote or consent, plus any other approvals required by the LLC agreement to revoke the termination or dissolution; or
- in the case of a termination of the Protected Series or dissolution of the Registered Series triggered at a specified time or on the happening of a specified event as set out in the LLC agreement (other than by vote or consent ) (or other persons whose approval is required for such termination pursuant to the LLC agreement)), by the vote or consent required under the LLC agreement to amend those provisions effecting the termination or dissolution, plus any other approvals required by the LLC agreement to revoke the termination or dissolution.

- **Revocation of the LLC's dissolution.** If a Protected Series is terminated or a Registered Series is dissolved by the dissolution of the LLC, the termination of the Protected Series or dissolution of the Registered Series is automatically revoked upon revocation of the LLC's dissolution, unless either:

- the winding up of the Protected Series has been completed (or in the case of a Registered Series a certificate of cancellation of the certificate of Registered Series has been filed); or
- the LLC agreement prohibits revocation of termination or dissolution.

(6 Del. C. §§18-215(d) and 18-218(f).)

### Revival

The revival of any Series LLC whose certificate of formation had been cancelled will also revive:

- Any Registered Series whose certificate had been cancelled as a result of the cancellation of the Series LLC.
- Each Protected Series of the Series LLC that had not been terminated or wound up.

(6 Del. C. §18-1109.)

### Uses and Benefits

The Series LLC form has frequently been used by investment funds, including mutual funds. For example, the sponsor of an investment company may form a Series LLC with each series being a separate mutual fund. In addition, the Series LLC form can be used for captive insurance companies. This use of a Protected Series LLC is similar to establishing protected cells for separate assets that may be protected from the liabilities of other protected cells or of the sponsored captive insurance company generally under state insurance laws and regulations.

One of the primary benefits of a Series LLC is that it permits the operation of multiple separate business activities within a single legal entity. Therefore, under applicable securities laws, a Series LLC may be the sole registrant, but may register interests in all the series of the Series LLC. This can reduce the costs and burdens of filing multiple registration statements.

A Series LLC may also permit the reduction of other administrative burdens and costs compared to the alternative of forming multiple LLCs. For example, in Delaware, the state fees to form a Series LLC and the annual tax payable by a Series LLC are the same as those imposed on a non-Series LLC. Therefore, the formation of a single Series LLC can be more cost-efficient than forming and operating multiple LLCs. The exception to this is that each Registered Series owes an annual franchise tax in the amount of \$75 and must pay a fee to file a certificate of registered series (6 Del. C. §§ 18-1105(a)(3) and 18-1107(b)).

However, in determining whether or not to use a Series LLC form, the benefits should be weighed against the limitations and uncertainties associated with Series LLCs. For example, if limiting the liabilities among multiple series is a critical aspect of a proposed transaction, the cost savings obtained by using a Protected Series LLC rather than forming multiple LLCs may not outweigh the risk that a bankruptcy court may not recognize the limitation on liabilities among separate series (see *Bankruptcy Proceedings*).

### Issues and Uncertainties

Although the number of Series LLCs being formed in Delaware has steadily increased, the Series LLC remains a relatively novel entity. There is still

significant uncertainty surrounding Series LLCs, in particular relating to:

- The lack of case law.
- Federal and state tax treatment.
- Interstate recognition.
- Bankruptcy proceedings.
- Perfection of security interests.

### Limited Court Review

The Series LLC form has not yet been fully tested by the courts. There is one case that considered issues relating to a series entity, although it was a Delaware statutory trust. In *Hartsel v The Vanguard Grp., Inc.*, the Delaware Court of Chancery acknowledged the independent nature of a series and held that owners of an equity interest in one series did not have standing to bring claims on behalf of all other series (2011 WL 2421003, at \*18 (Del. Ch. June 15, 2011)).

On the other hand, in *GxG Mgmt. LLC v Young Brothers and Co., Inc.*, which involved a Delaware Series LLC, the US District Court for the District of Maine held that the relationship between a Series LLC and its series “does not create a truly separate legal entity capable of independently pursuing its own legal claims” (2007 WL 1702872, at \*1 (D. Me. June 11, 2007) and 2007 WL 551761, at \*7 (D. Me. Feb. 21, 2007)). In its findings, the district court observed that the Delaware LLC Act did not indicate what capacity a series of a Series LLC had to pursue litigation on its own behalf.

In the same year the *GxG Management* case was decided, the Delaware LLC Act was amended to provide specifically that a series of a Protected Series LLC has the power and capacity to, in its own name, sue and be sued, unless limited by its LLC agreement (6 Del. C. §§18-215(b)(1) and 18-218(c)(1)). This language or similar language appears in the LLC Acts of several states, but is not yet included in the LLC Acts of all states that have enacted Series LLC provisions. Therefore, the issues raised by the court in *GxG Mgmt.* may still affect Series LLCs formed under the laws of those states.

There is also now a split in the federal courts on whether a Series LLC can sue on behalf of its individual series. Some federal courts have found that a series entity is similar to a corporation with



subsidiaries, and just as a corporation does not have standing to sue on behalf of its subsidiaries, a Series LLC does not have standing to sue on behalf of its series. Other federal courts, however, had interpreted Section 18-215(b) to mean that a Series LLC can sue on behalf of its series if the LLC agreement specifically provides for it. (*MSP Recovery Claims, Series LLC v AIG Prop. Cas. Co.*, 2021 WL 1164091, at \*10-11 (S.D.N.Y. March 26, 2021); *MSP Recovery Claims, Series LLC v Hereford Ins. Co.*, 2022 WL 118387, at \*2-9 (S.D.N.Y. Jan. 11, 2022) (both assuming a Series LLC can sue on behalf of its series if the LLC agreement provides for it, but acknowledging the court split).)

### Tax Treatment

The federal and state tax treatment of Series LLCs is complex and evolving. Because a series of a Series LLC is not considered a separate legal entity under most state laws and the Internal Revenue Code of 1986, as amended, does not address Series LLCs, there has been some uncertainty concerning their treatment for tax purposes.

The Internal Revenue Service (IRS) provided some guidance through a private letter ruling in which it found that series of a Series LLC would be treated as separate entities for federal taxation purposes (Priv. Ltr. Rul. 2008-03-004). In September 2010, the IRS issued proposed regulations for the treatment of Series LLCs that are consistent with the private letter ruling.

The proposed regulations provide that a series of a Series LLC will be treated for federal income tax purposes as a separate entity formed under local law (with some exceptions, such as employment tax), as long as the local law explicitly permits:

- The members or participants (for example, officers and directors) of a series to have separate rights, powers, or duties with respect to that series.
- A series to have separate rights, powers, or duties with respect to specified property or obligations.
- The segregation of assets and liabilities so that none of the debts and liabilities of a Series LLC (other than liabilities to the state in which the Series LLC was formed or relating to the operation of the Series LLC, such as franchise fees) or of any other series of that Series LLC are enforceable against the assets of a particular series of the Series LLC.

(75 Fed. Reg. 55699-01 (Sept. 14, 2010).)

Assuming that state law permits a series of a Series LLC to have these attributes, then generally a series is treated as a separate legal entity and determines its tax classification under the “check-the-box” rules (Treas. Reg. § 301.7701-3(a)). This generally results in a series being treated as a disregarded entity if there is only one member of a Series LLC associated with that series, or a partnership if there are two or more members associated with that series, unless the series elects to be taxed as a corporation.

### General and Interstate Recognition

Because the Protected Series LLC form has not been tested by the courts and many states do not permit the formation of Series LLCs, there is a risk that a series would not be recognized and therefore not be protected from the liabilities of the Series LLC itself or other series of the group. In addition, even if the Protected Series LLC form were recognized, in making a determination as to whether a creditor of one series or of the Series LLC itself could reach the assets of another series, a court could apply veil-piercing principles similar to those applied to find a parent or sister company liable for the liabilities of a subsidiary of the parent (for more information, see [Practice Note, Piercing the Corporate Veil](#)).

When compared to a parent-subsidiary structure, veil piercing could pose a greater risk to a series of a Series LLC in light of the close relationship among series and the Series LLC. To reduce this risk, a person forming or managing a Protected Series LLC should comply with the applicable state statute and follow the appropriate corporate formalities for each series. Examples of corporate formalities include, but are not limited to:

- Having separate bank accounts for each series or keeping detailed records of funds in an account that is attributable to a particular series.
- Indicating in contracts that a particular series is the party to those contracts and not the Series LLC itself or any other series of the group.
- Maintaining minutes and resolutions of the governing members or managers, as applicable, for each series.
- Accounting for the assets and liabilities of each series of the Series LLC separately from the Series LLC itself and any other series of the group.

There is a basis under the Full Faith and Credit Clause of the US Constitution for the recognition of the Series LLC form in states that neither have statutes permitting the formation of Series LLCs nor show any indication that they will recognize the form. However, it is advisable to engage local counsel in a state in which a Series LLC seeks to transact business for guidance concerning whether the state recognizes Series LLCs and whether there are any filings or other requirements to obtain recognition of the Series LLC. For example, in Delaware, a foreign Series LLC that is filing an application for registration must state, in addition to other information, whether liabilities of a particular series are enforceable against the assets of that series only and not against the assets of the Series LLC itself or any other series (6 Del. C. § 18-215(c).)

### Bankruptcy Proceedings

The Protected Series LLC form is relatively untested in the context of a bankruptcy proceeding. In particular, it is unclear whether a series of a Protected Series LLC may file for bankruptcy in its individual capacity or whether the Series LLC would need to file with all of the other series on behalf of the series seeking to file for bankruptcy.

If a series of a Protected Series LLC is able to file for bankruptcy in its individual capacity, the assets of the other series of the Series LLC would presumably be protected from creditors of the series that filed. If it is not, the assets of the other series of the Series LLC may be subject to the bankruptcy proceeding. This risk may be lower in states where the series of a Protected Series LLC are considered separate legal entities for state law purposes. However, this also has not been tested.

In addition, there is concern in the bankruptcy context that the liability protection generally afforded to a series of a Protected Series LLC may be avoided through the equitable doctrine of **substantive consolidation**. Under that equitable doctrine, a bankruptcy court may ignore the separateness of a series and treat the Series LLC and each series as a single entity.

To help protect against these risks, as in a parent-subsidiary organizational structure, a person forming or managing a Series LLC should comply with the applicable state statute and follow appropriate corporate formalities for each series (see General and Interstate Recognition).

### Security Interests

There may be significant issues when using a series in secured transactions. It may be unclear whether the debtor is the individual series or the Series LLC. This may turn, at least in part, on whether the Series LLC is formed in a jurisdiction that expressly authorizes a series to hold title to assets and grant liens and security interests. Whether the assets associated with an individual series are actually held in the name of that series or in the name of the Series LLC may be another important factor.

The Uniform Commercial Code (UCC) contains choice of law rules to determine where a financing statement should be filed to perfect a security interest in assets. These UCC rules depend on the type and location of the debtor. If the assets in question are held by the Series LLC on behalf of its series, then it would seem that the Series LLC would be the debtor. Because an LLC is a “registered organization” under Article 9 of the UCC, the rules governing perfection of security interests granted by a registered organization would presumably apply.

However, if the individual series is the debtor, the analysis becomes more complicated. In some of the states in which a Series LLC may be formed, no filing must be made or maintained showing that the series has been organized. Therefore, at least in these states, a series would likely not be considered a registered organization. If this is the case, then the proper place to file a financing statement is not the state of formation of the Series LLC, but rather depends on the location of the place of business of the series or, if it has more than one place of business, then its chief executive office. The rules on filing financing statements against organizations that are not registered organizations can introduce uncertainty as to the proper place to file. Delaware amended the LLC Act to permit Registered Series as an attempt to address this uncertainty (see Registered Series).

In addition, if a court were to conclude that the individual series is not the actual debtor, despite the provisions of the applicable LLC Act, the LLC agreement, and the security documents, it is possible that the court could find that only a filing in the jurisdiction of formation of the Series LLC would be effective to perfect a security interest in assets that can be perfected by filing.

Therefore, when taking a security interest in property associated with a series of a Series LLC, the secured party should take all steps necessary to perfect its security interest both as if the Series LLC were the debtor as a registered organization and as if the individual series were the debtor as an organization that is not a registered organization. Although filing in this manner should be effective since it contemplates both scenarios, it illustrates the uncertainties involved in using the Series LLC structure in a secured transaction.

Delaware sought to address the issue of perfecting a security interest in collateral owned by a series of a Series LLC by creating the Registered Series. The LLC Act expressly identifies a Registered Series as

an “association,” which is intended to clarify that a Registered Series constitutes a “person” that could be a “debtor” under the UCC (6 Del. C. §§ 1-201(b)(27), 9-102(a)(28), and 18-218(c)(12)). In addition, because a filing is required to be made with the Office of the SOS in order to create a Registered Series, a Registered Series should also constitute a “registered organization” under the UCC (6 Del. C. § 9-102(a)(71)). As a result, a secured lender would file a UCC-1 financing statement in the State of Delaware to perfect its security interest against a Registered Series in collateral as to which a security interest can be perfected by filing in the state in which the borrower is organized (6 Del. C. § 9-307(e)).