

IS A SERIES LLC RIGHT FOR YOU?

JUNE 2021

Beginning January 1, 2022, a limited liability company formed in Ohio can be organized as a series LLC. A series LLC is a limited liability company that includes one or more separate “series,” where each series can establish different members, management structures, purposes, objectives, assets, duties, powers, and rights from other series or the limited liability company as a whole. Importantly, in a series LLC the assets of one series are not at risk of claims resulting from the operations of a different series.

This type of structure has been available in certain other jurisdictions for some time, such as Delaware starting in 1996. A classic example of how a series LLC might be used is to establish different portfolios within an investment management business. A single LLC can have a series devoted to investment strategy A, one devoted to investment strategy B, and so on. This arrangement allows investors to enjoy the benefits of investment strategy A without being at risk that claims arising from investment strategy B could be pursued against strategy A’s assets, while allowing the investment firm to operate with only one LLC for administrative purposes such as Securities and Exchange Commission filings for a registered investment company. Similarly, claims arising from the operation of the LLC as a whole cannot be enforced against any separate series and vice versa.

This Client Advisory is part of a series highlighting different features of the Ohio LLC Act that goes into effect on January 1, 2022. For other content regarding the Act, click [here](#).

The new Ohio LLC Act will allow each series to engage in any activity that an Ohio LLC may engage in, whether for profit or not for profit. In doing so the series may sue or be sued; enter into contracts; convey title to assets of the series, including real property, personal property, and intangible property; and grant liens and security interests in assets of the series. The management of each series can have different personnel, structure, or duties depending on the management terms prescribed within the LLC’s operating agreement.

Basic Requirements. Operating in series form does have some basic requirements, which, if not followed properly, could cause the loss of the benefits intended for a series. The articles of organization of the LLC filed with the Ohio Secretary of State must include a statement that the LLC can have one or more series. The series, when formed, must have separate rights, powers, or duties with respect to specified property or obligations of the LLC or profits and losses associated with specified property or obligations of the LLC, or it must have a separate purpose or investment objective. Each series must have at least one member, but the members of different series may be partially or totally different. The operating agreement of the LLC must contain a statement to the effect of the limitations on the liabilities of the series (i.e., that the liabilities of a series are not enforceable against the assets of another series or the LLC as a whole and vice versa). The records maintained for that series must account for the assets of that series separately from the other assets of the LLC as a whole or any other series. This last requirement is met if the records of a series are maintained in a manner in which the assets of the series can be reasonably identified by specific listing, category, type, quantity, or computational or allocational formula or procedure, including a percentage or share of any assets, or by any other method in which the identity of the assets can be objectively determined.

Possible Uses. In addition to the investment fund example above, some commentators have suggested that a series LLC may make sense for the owner of multiple real estate properties to put each separate property into a separate series. It has also been suggested that the real estate used in an operating business be put into a series separate from the operating business. Anyone seeking to protect assets from claims may want to explore whether putting certain assets into different series might provide the desired protection.

Practical Considerations. Given the relatively new nature of the series LLC concept, potential users of the series LLC should be aware of some practical considerations when deciding whether to organize their business as a series LLC:

1. **General Legal Uncertainty:** Because the series concept is new in Ohio, we cannot be certain how the law will be applied. Until the courts have interpreted the statute in real-world cases, we cannot be fully confident that users of the series LLC will realize the outcomes they intend.
2. **Foreign Jurisdictions:** Not only is there uncertainty because of the untested nature of the new Ohio Act, but there is the question of how a series will be treated in other jurisdictions where an Ohio-formed series does business. Generally, state LLC statutes respect the limitations on liability under the law where an LLC is formed, but until we have experience with a particular state, the outcome is less certain for a series than for a separate LLC. For example, if a series conducts business in a state other than its state of formation and that particular state does not currently recognize the concept of a series LLC, will the courts of that state respect the series' limited liability as recognized by the series LLC's state of organization?
3. **Tax Implications:** The IRS intends to treat each series within an LLC as if it were a separately formed entity, regardless of whether state law treats the LLC and all of the series as one entity. Thus, a series will be treated: (a) as a partnership if it has two or more members; (b) as a disregarded entity if it has only one member; and (c) as an association taxable as a corporation if its members so elect. State tax treatment of series LLCs may or may not conform to federal treatment, so sponsors of a series should investigate the tax treatment of a series in each state in which they expect the series to conduct business.
4. **Bankruptcy:** Given that the main point of operating in series form is to isolate assets from claims, the treatment of a series under the Bankruptcy Code is an important consideration; however, there is no established body of law in the bankruptcy courts on the point. Indeed, even the extent to which a series is an entity eligible to file for bankruptcy remains the subject of considerable debate, and further, the extent to which non-series' assets are immune from reach by creditors in the bankruptcy of another series, or of the series LLC, is relatively untested.
5. **Organizational Cost:** On the flipside of the cost-benefit analysis is the fact that the costs and difficulties of forming and maintaining a separate LLC for each instance where one might have used a series are not terribly burdensome by comparison. This is especially true given the additional drafting challenges for the series structure and the need to establish and maintain separate administrative aspects, such as bank accounts and bookkeeping, even in the series structure.
6. **Third-Party Treatment:** Even if a potential operator of a series LLC is satisfied that the limitations on liability will work as desired, the attitudes of others could be a contrary factor. For example, some lawyers who routinely represent banks in commercial loans have expressed concerns that banks and their lawyers may not be comfortable relying on the separateness of a series in making a loan to that operation, at least not until the new statute has been tested in court.

Takeaways. The approaching availability of the series structure for an Ohio LLC is an interesting opportunity, but it has some uncertainty, and the advantages of operating with only one LLC do not necessarily justify the risks. Using separate LLCs is not particularly onerous and may provide more certainty for the foreseeable future. For some specific uses, such as the investment fund structure, the risks may be fewer because established practices have been developed in other jurisdictions. If you think a series LLC might be right for you, you should consult with legal counsel who is knowledgeable on the subject and perform your own cost-benefit analysis.

ADDITIONAL INFORMATION

For more information, please contact:

- [Glenn E. Morrical](mailto:glenn.morrical@tuckerellis.com) | 216.696.3431 | glenn.morrical@tuckerellis.com
- [Ludgy A. LaRochelle](mailto:ludgy.larochelle@tuckerellis.com) | 216.696.4732 | ludgy.larochelle@tuckerellis.com
- [Daniel L. Schiau II](mailto:daniel.schiau@tuckerellis.com) | 216.696.3892 | daniel.schiau@tuckerellis.com
- [Lauren E. Lipsyc](mailto:lauren.lipsyc@tuckerellis.com) | 216.696.3859 | lauren.lipsyc@tuckerellis.com
- [Thomas R. Fawkes](mailto:thomas.fawkes@tuckerellis.com) (*bankruptcy*) | 312.256.9425 | thomas.fawkes@tuckerellis.com
- [Peter A. Igel](mailto:peter.igel@tuckerellis.com) (*taxation*) | 216.696.5084 | peter.igel@tuckerellis.com
- [Thomas W. Ostrowski](mailto:thomas.ostrowski@tuckerellis.com) (*commercial finance*) | 216.696.5572 | thomas.ostrowski@tuckerellis.com

This Client Advisory has been prepared by Tucker Ellis LLP for the use of our clients. Although prepared by professionals, it should not be used as a substitute for legal counseling in specific situations. Readers should not act upon the information contained herein without professional guidance.

©2021 Tucker Ellis LLP. All rights reserved.