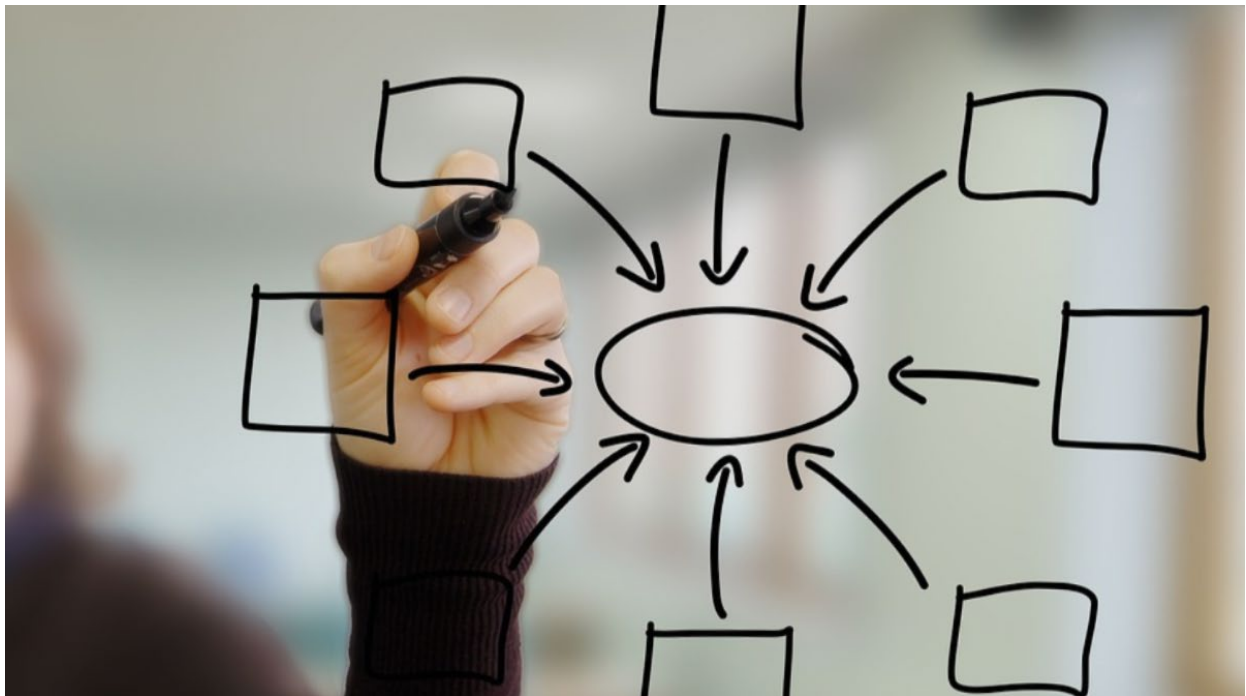


# MAJOR CHANGES TO THE DELAWARE SERIES LLC

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Many lawyers advise their clients to form or incorporate their companies in Delaware due to, among other reasons, Delaware's prestigious Court of Chancery that specializes in corporate law and resolving business disputes on an expedited basis without a jury. The high volume of cases in Delaware means a more predictable outcome for clients. In fact, many publicly traded companies and Fortune 500 companies have incorporated in Delaware regardless of their principal location.

Since 1996 the Delaware Limited Liability Company Act (the "Act") has allowed the formation of limited liability companies ("LLCs") with or without series, having characteristics like that of a separate LLC. Each separate series can have separate members, managers, classes of limited liability interests, assets, business purpose and investment objectives. Under the Act, each series

is treated as an entity separate from each other series of the same LLC and the LLC itself, which is often referred to as the “series LLC” or “master LLC.”

## **Series LLCs**

A series LLC is an alternative business structure to forming multiple, independent LLCs to segregate and protect a company’s proposed assets. This novel business structure is often useful when utilized by family offices with multiple investment strategies and classes of assets, real estate investors who own several properties or companies that own multiple brands or other intellectual property. However, many lawyers and business owners do not form series LLCs due to many issues and challenges with the alternative business structure. Prior to the Amendments (discussed below), individual series could not merge with other series of the same series LLC, obtain a Certificate of Good Standing from the Delaware Department of State and were not considered a “registered organization” under Article 9 of the Uniform Commercial Code (“UCC”), complicating a series LLC’s ability to secure financing and a lender’s ability to perfect security interests against a series LLC’s assets. However, on August 1, 2019, amendments to the Act relating to registered and protected series become effective (the “Amendments”). The Amendments completely revise the existing series provisions to address these issues and limitations that have arisen over the years for existing series.

## **Protected vs. Registered Series**

Pursuant to the Amendments, a “series” is defined as a designated series of members, managers, limited liability interests or assets, which may, but need not, be a protected series, registered series or neither. A “protected series” refers to a designated series of members, managers, limited liability company interests or assets that is established in accordance with Section 18-215(b) of the Act. A “registered series” refers to a series that was established after the Amendments took effect by the filing of a Certificate of Registered Series with the Delaware Department of State pursuant to Section 18-218 of the Act. Each registered series name must begin with the name of the master LLC. Protected and registered series of a series LLC will have the same attributes regarding the conditions that must be met to maintain their limited liability under the Act (i.e. the records maintained for the series must account for the assets associated with such series separately from the other assets of the series LLC, or any other series thereof, the series LLC’s Certificate of Formation must provide notice of the limitation on liabilities of the series, and the LLC agreement must permit the formation of series). A protected series also has the same rights and powers as a registered series, but it can convert to a registered series of the same master LLC if it wishes to obtain the additional entity characteristics afforded to registered series.

Only a registered series may obtain a Certificate of Good Standing from the Delaware Department of State if the master LLC is also in good standing. In addition, only a registered series may merge with another registered series of the same master LLC or convert to a protected series of the same master LLC. The conversion of a protected series to a registered series or the registration of a registered series comes at a price - a \$90.00 filing fee and a \$75.00 annual franchise tax fee. However, this annual franchise tax fee is less than the \$300 paid by the series LLC itself, still making a series LLC more affordable than multiple, independent LLCs. A protected series will

continue to avoid such annual franchise tax fee because its attributes remain unchanged under the Amendments.

The Amendments are mainly intended to facilitate the use of series in financing transactions by clarifying the applicability of Delaware's UCC law to series LLCs. By registering the series with the state of Delaware, a registered series will now satisfy the UCC's definition of a "registered organization," because it will have filed a "public organic record" (the Certificate of Registered Series) with its charter state. This will bring clarity for lenders and make it easier for a series to obtain financing from a lender due to a lender's ability to perfect a security interest against the series. Additionally, the issuance of a Certificate of Good Standing for a registered series may also encourage lending to series.

## **Conclusion**

Prior to the Amendments, a series was formed internally by the agreement of series members. Series members would document amongst themselves that the series was established and had certain features in the limited liability company operating agreement, or a separate agreement referred to by most lawyers as a Series Agreement or Certificate of Designation. This internal formation document was not filed with the Delaware Department of State. As of August 1, 2019, an internal contractual series that is neither "protected" or "registered" (as defined in the Act) does not have any inter-series liability protections and will be treated merely as a separate class of limited liability interests of the master LLC. Lawyers using or considering using Delaware series LLCs should take note of these material changes to the law.

Although the Amendments will solve many issues for Delaware series LLCs, some big issues will remain, as inter-series limited liability protections may not be respected by jurisdictions outside of Delaware and a series is still not considered a separate person under the Bankruptcy Code. This means that an individual series most likely cannot be put into bankruptcy without dragging the master LLC and other series of the same master LLC into bankruptcy. However, as the useful business structure becomes more popular, the inter-series liability will most likely be respected in other states and even in Bankruptcy courts. The Uniform Protected Series Act has been approved and is being considered by many states, possibly revealing that a solution is close.

## **About Handler Thayer, LLP**

Handler Thayer, LLP is dedicated to providing distinctive, technologically current and innovated professional services to affluent families, family offices and privately-held companies. Its practice is concentrated in the areas of State, Local, Federal & International Income Taxation; Business, Real Estate, Securities & Corporate Law; Financial & Estate Planning; and Sports & Entertainment Law. Visit [www.handlerthayer.com](http://www.handlerthayer.com) for more information or contact Lacey J. Wentworth, J.D., an Associate Attorney in the Commercial Practice Group at Handler Thayer, LLP, at [lwentworth@handlerthayer.com](mailto:lwentworth@handlerthayer.com).

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