

# Key Facts Companies

The Limited Liability Company (LLC) is a modern tax transparent legal entity which combines features of partnership and corporate law.

In the international context, the LLC offers advisors and their clients the opportunity to cost-effectively combine access to onshore legal systems with the confidentiality and tax neutrality that is available in recognised no-tax corporate domiciles.

LLC legislation exists in industrialized countries such as the United States, France, Switzerland, Italy and Belgium, and in jurisdictions such as the Bahamas, Barbados, the Cayman Islands, Cyprus, Isle of Man, Jersey, Nevis and Panama.

### The South Dakota Limited Liability Company

At present, the South Dakota LLC is recommended by international advisors because of South Dakota's adoption of the Revised Uniform Limited Liability Company Act (RULLCA), and South Dakota's long-standing history as one of the most business friendly jurisdictions in the United States.

In addition to South Dakota, Trident Trust also offers LLC services in a number of other jurisdictions. Information on these services is available on request. Instructions for South Dakota LLC formation can be given to any Trident Trust office.

### The LLC Concept

The Limited Liability Company has special features that distinguish it from ordinary companies. Like a corporation, an LLC has a legal existence separate and distinct from its owners. Like the Shareholders

and Directors of an ordinary company, the members and managers of an LLC are not personally liable for the LLC's debts and obligations. The principal attractions of the LLC for advisors and their clients are its operation and tax treatment.

- Operationally, the management of the LLC functions similarly to a partnership and is governed by a written agreement among the members of the LLC. This is different from the traditional corporate governance of companies where management is outlined in the Articles of Association (also known as Bylaws).

- A properly structured LLC will be treated by many tax regimes as a pass-through entity with tax being paid by the members and not at the LLC level.

### Uses for an LLC

The LLC structure is particularly attractive as an alternative to the use of general partnerships and limited partnerships, as the LLC provides all members with limited liability protection against claims of creditors. This protection benefits entrepreneurs and other start-ups.

- The pass-through tax character of the LLC means that for a single member, the LLC tax return preparation and reporting occurs only at the member level with resulting cost savings and administrative efficiencies for all businesses that can operate in an LLC structure.

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- Venture capital, real estate and other types of joint ventures can take advantage of the ability to use the LLC operating agreement to allocate profits and losses among participants in a manner which reflects the business agreements they have reached.
- The ability to limit the life of the LLC can also be used effectively in joint ventures, start-ups and other projects with a transactional purpose that is for a specified period of time.
- The LLC can be employed in the international context to achieve tax efficiencies where the income of an LLC is allocated among members from different tax regimes.
- The use of the LLC structure to hold foreign bank and financial accounts may not be recommended because of the requirement to report on an annual basis with the US Department of the Treasury any interest or signatory authority over a foreign account.

## The South Dakota LLC

Each of the 50 states of the United States is constitutionally an independent legal jurisdiction with the right to enact laws in many areas of activity. Each state has enacted its own LLC statute with most states doing so after 1988 when the US Internal Revenue Service commenced issuing rulings that an LLC would qualify for partnership tax treatment. Among the states, the State of South Dakota has emerged as one of the preferred LLC jurisdictions. In 2013, South Dakota adopted the RULLCA. It is one of 16 states to have done so. RULLCA was drafted by the National Conference of Commissioners on Uniform State Laws, a body made up of judges, practitioners, professors and legal experts, to provide clarity and stability to the law of LLCs. Through their deep experience in the legal field, these professionals were able to harmonize varying LLC laws from across the country

into one uniform act. RULLCA synthesizes the best LLC features from a patchwork of model acts. After South Dakota adopted RULLCA, it became easier for businesses and legal practitioners to understand and navigate the law. RULLCA embodies the future of LLC law, and it is a model template for other states looking to modernize their LLC laws.

An equally important factor for South Dakota's popularity as a corporate domicile is the pro-business role of the South Dakota government. Independent groups consistently rank South Dakota as one of the most business friendly states and South Dakota has also topped the US Chamber of Commerce's list for business climate. In 2016 the Tax Foundation, a tax think tank, ranked South Dakota number two for business tax climate. South Dakota does not have corporate income, personal income, personal property, inheritance or capital gains taxes.

## Foreign Ownership of a LLC

There are a number of important tax and corporate governance advantages to the ownership by non-US persons of a South Dakota LLC:

- No restrictions on foreign ownership or management of the LLC. Members may be individuals or business entities of any nationality or domicile. Single member LLCs are permitted.
- With the exception of a Registered Office and Registered Agent in South Dakota, no physical presence is required. The LLC operating agreement is not a matter of public record and can be in any language.
- Non-residents of the US who are members of an LLC and who are not otherwise subject to US federal income taxation pay no tax in the US if the LLC's income is from non-US sources and the LLC carries on no business in the US.

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- Foreign-owned LLCs are required to electronically file, on an annual basis, Form 90.22.1 "FBAR" with the US Department of the Treasury to report interest in or signatory authority over a foreign financial account.
- The LLC's corporate records may be maintained outside of the US.
- The ownership interests in an LLC of an individual non-resident of the US are subject to the US estate tax, but can be avoided if the ownership interest is held through a foreign company.

## Corporate Governance

A unique feature of the RULLCA legislation is that it allows members to define their business relationship in a written agreement which governs the operation and management of the entity. The policy of the drafters of RULLCA was to allow members of the LLC the maximum freedom of contract in the commercial context. As part of our LLC service we provide clients with a specimen LLC operating agreement for their use.

The members of the LLC may choose whether they wish to manage the entity or to appoint a member or a third party to be the manager. There is no requirement that members themselves be the managers of the LLC. A member acting as the manager or a third party acting as the manager is not liable for any debts or liabilities of the LLC solely by reason of that person being a member or acting as a manager.

The typical LLC operating agreement will address the following issues:

- Identifying the party responsible for managing the LLC
- Rights and duties of the manager and any limitations or restrictions on such authority
- The economic rights of members, including the making of contributions to the LLC, the right to receive allocations of profits and losses, and the timing of and restrictions on distributions by the LLC to its members
- Any special voting rights
- Any classes or groups of members or managers with different rights, powers and duties
- The issuance and transfer of interests in the LLC, the admission and withdrawal of members
- Mandatory and non-mandatory purchase of interests in the LLC on the occurrence of specified events such as death, disability, resignation or expulsion of a member
- Where the operating agreement is silent on a management issue, the default provisions of the RULLCA statute will apply

## Government Filings

- On formation, the LLC files Articles of Organization with the office of the South Dakota Secretary of State which lists:
  - The name of the company (The name of a limited liability company must contain, limited liability company, or limited company, or the abbreviation, L.L.C., LLC, L.C. or LC. Limited may be abbreviated as Ltd. and company may be abbreviated as Co.)
  - The address of the initial registered office (must be in South Dakota)
  - The name of the registered agent (must be in South Dakota)
  - The name and address of each organizer
  - The duration of the company if other than perpetual
  - If the company is to be manager-managed, the name and address for each initial manager

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- Whether one or more of the members of the company are to be liable for its debts and obligations
- The South Dakota LLC filing fee is \$150, among the lowest in the country.
- The Secretary of State will reserve an LLC name for 120 days. The fee is \$25.
- The Secretary of State's modern and efficient filing office will generally organize an LLC within 3-5 business days. The expedited filing fee is \$50.
- Filing the annual report costs \$50, and it is a simple update of names of members, managers and addresses. There are no corporate formalities.
- If the LLC has more than one member, it is required after establishment to apply for a Federal Tax Identification Number and on an annual basis to file an information return with the US Internal Revenue Service. Provided that there is no income earned from US sources that would be taxable by the US, the information return will reflect that the LLC had no taxable income for the relevant tax year. As part of our LLC management service we can apply for the LLC's Tax Identification Number and prepare and file the LLC's annual information return.
- If the LLC has only one member, its existence as a separate entity can be disregarded for US federal income tax purposes.

## Partnership Tax Treatment

Depending on the tax domicile of members, it may be possible to provide, through a written agreement of members, for allocations of income and/or deductions of an LLC treated as a partnership among members on amounts which differ from the members' economic interests in the LLC, as well as the ability to provide a tax basis to members for non-recourse debt. It also is permissible for the members to elect for an LLC to be treated as a corporate entity.

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