



The Limited Liability Company in the USA

By Ray L. Vandenberg

Establishing a company in a foreign country can be challenging in terms of designing the legal structure and organising a streamlined and efficient incorporation process. Alliuris member firms provide corporate legal services, in particular for the formation of companies in their home country.

This article provides a brief overview of the legal form of a limited liability company in the USA.

The LLC

The limited liability company is a popular business structure that combines the tax advantages of a partnership and the liability protection of a corporation, while granting the owners (who are called members) the possibility of participating in the management of the company. While the nomenclature “LLC” corresponds to that of other “limited liability” companies worldwide, there can be considerable substantive differences.

Choice of seat and place of formation or incorporation

While in some countries a company must be formed where its main administrative activity takes place (so-called seat theory), the individual states of the USA follow the formation principle. This means that the seat of the company and the place of formation or incorporation can be chosen separately. The state of Delaware is the most popular place of incorporation among foreign investors, thanks to the legal certainty provided by its reputable courts. The best business location depends on the purpose of the company and shall be considered case by case. Most states offer various incentives to investors, such as tax advantages, assumption of training costs or purchase price reduction for the acquisition of real estate.

The following statements on the incorporation process may only be understood as a general description, since the applicable regulations vary depending on the chosen individual state.

Members

An LLC is commonly founded by two or more members. While a single-member LLC is also allowed, in many states, creditors of a single-member LLC can obtain a “charging order”, which is a lien on a member’s LLC interest. Generally, members can be American or foreign natural persons or legal entities. Exceptions apply if the LLC has an S corporation status for tax purposes.

Management

The LLC may be managed by one or more members, who can make unilateral decisions to bind the company, or decision-making may be delegated to a manager or a board of managers. The organizational structure of the LLC is regulated in the operating agreement, a binding contract between members. In it, basic conditions such as members' voting rights and decision-making process or the responsibilities of individual members is established. If management is delegated, the operating agreement should also specify the competence, roles, and responsibility of the managers. Foreigners who are to be appointed as managers of an LLC will generally need a proper visa. While federal immigration law may allow the holder of a nonimmigrant visa (as a J or B visa) to serve as manager of an LLC, they are not allowed to receive a salary or be employed by the company.

Formation

The required time for the formation of an LLC depends, among other things, on the statutes of the state in which the LLC is legally organized. In general, the process often may be accomplished in a day or two. Procedures such as publication of the formation in specified news media may delay the final approval, although the LLC may operate in the meantime.

In order to form an LLC, a document called “articles of organization „ or “certificate of formation” must be filed with the competent state entity. The name and content of the document vary from state to state, but generally it entails only general information, such as the name and general scope of the business, its address, and the names, addresses and ownership percentages of the members. The effectiveness of an LLC usually arises upon receipt of the document by the authority. Some states, including New York, require a statement of formation to be published in one or more newspapers operating in the county where the LLC is formed.

The main provisions of the LLC are usually set out in a separate contract (Operating Agreement), which does not need to be publicly filed.

Share Capital

There are no minimum capital requirements. According to states' law, the members are not personally liable for the debts of the LLC, unless specific contractual obligation are in place.

Registration with Local Authorities

To hire employees or open a bank account, the employer identification number (EIN) must be applied for and obtained from the Internal Revenue Service of the Department of the Treasury.

An LLC formed in a single state is considered a "Foreign LLC" by other states. The LLC must be registered in every state in which it "does business". The process is slightly different from state to state, but it usually requires to file a "certificate of authority" or "application for authority" with the Secretary of State and to pay the registration fee. Depending on the location and activity of the business, additional permits and licenses might be required.

Tax Registration

The employer identification number (EIN) must be obtained for tax purposes. By default, an LLC is treated as a disregarded entity or a partnership for tax purposes. Through a "check the box" election in the Internal Revenue Service Form 8832 (LLC Status Election Form), an LLC can be classified as a corporation for tax purposes.

Anti-money laundering measures

As of January 1, 2021, companies must generally report the identity of the beneficial owners to the Financial Crimes Enforcement Network (FinCEN). A "*beneficial owner*" is an individual who directly or indirectly exercises "substantial control" over the reporting company or owns or controls a 25% or more ownership in the entity. Exceptions apply among others for publicly listed companies. The reported information is confidential.

Foreign Investment Control

The Committee on foreign investment reviews foreign investments to consider possible national security risks. The review regards primarily any transaction that results in the control of a U.S. business by a foreign person, investments in certain categories of business, such as business involving critical technologies, infrastructure, or sensitive personal data, and the purchase, lease or concession of real estate located next to a military installation or other sensible facilities.

Customs (Export / Import)

The employer identification number (EIN) also serves as the importer number. A license, permit or certification may be required for the import or export of certain goods. It is advisable to check the requirements of the U.S. Customs and Border Protection (CBP) and to contact the port of entry to avoid problems. Even when an import license is not required, CBP entry forms must be filled out and the electronic export information (EEI) may be required. The CBP is piloting a “Simplified Entry” program.

Bank Account

A business bank account can be opened as soon as the EIN number is obtained. Some banks require a personal visit from a representative of the LLC.

Accounting

Many states require LLCs to file an annual report and pay an annual tax or fee. Depending on the elected classification for tax purposes, the proper IRS Form must be filed with federal and state tax authorities. Filing in multiple states is required if the company has a “nexus” (a tax presence) in several states. For example, a nexus exists when the company maintains an office, employs workers, or stores products in a warehouse in another single state.

Both the accrual basis and the cash basis method can be used for the LLC’s accounting.

Formation Expenses

The formation costs include filing fees and publication fees if applicable and vary depending on the state. These costs generally amount to less than \$300, except for possible publication costs. Legal advice costs for drafting standard formation documents as well as the operating agreement are generally nominal, unless a complex arrangement is anticipated, in which case hourly rates will apply. Most states have default operating agreements in their statutes, which take effect if an LLC does not have its own operating agreement, so simple LLCs can rely on those provisions in order to avoid legal fees.

Corporate Tax

By default, an LLC with one member is a “disregarded entity” for tax purposes and is taxed as a sole partnership through the owner’s personal tax return. An LLC with at least two members is normally considered a pass-through entity and is treated like a partnership. This means that an LLC is usually not taxed at the corporate level unless it chooses to be classified as a corporation or S-corporation. This option can be advisable for high-income individuals. Federal personal income tax can range from 10% to 39.6%, while state income tax can vary considerably from one state to another.

The tax classification of an American LLC in other countries is independent of the “check the box” election. Thus, an LLC with the tax status of a partnership in the USA can be considered a corporation by other countries, and vice versa. The classification is based on double taxation treaties and the domestic law of the foreign country. Since it depends on the comparison of legal types, it is influenced by the essential organizational and structural features of the entity, contained in the articles of association. To avoid pitfalls, tax aspects should be considered carefully in the selection of the legal form and the structural design of the company.

Trade and Turnover Tax

Most states require the payment of an annual LLC fee to keep the LLC in good standing. In average, this fee amounts to \$91 and must be paid in every state in which the LLC does business. In the U.S.A. there is not a general VAT at the federal level. Sales tax is collected only on the final customer, and its amount depends on the state and the local jurisdiction.

Staff

If necessary, we can also use our connections to recruit suitable employees or managers for your company.

Domiciliation Service

If the LLC does not have a physical address in the state where the LLC is registered, it must choose a registered agent who is responsible for receiving official notifications on behalf of the LLC and notify its address to the state. A local registered agent is also required to obtain a certificate of authority and do business in most states. There are many easily obtained service companies available in each state. One is Parasec Inc (www.parasec.com) which offers nationwide services.

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