

## FORMATION OF A LIMITED LIABILITY COMPANY IN DELAWARE

1. *Who can set up a limited liability company (LLC) in Delaware?*

An LLC may be formed by any person or other legal entity (e.g., corporations, partnerships, trusts, or foreign business entities).

**Side Note: Anonymity of Ownership.** The owners of Delaware LLCs are called “members.” An LLC may be formed by an agent who is not a member (e.g., a lawyer) on behalf of the members. This will generally allow the members of the LLC to remain anonymous; however, we expect regulations in the United States next year that require the private disclosure of the ultimate beneficial owners of the LLC to the Financial Crimes Enforcement Network. An ultimate beneficial owner is a natural person who, directly or indirectly, owns 25 percent or more of the LLC. The purpose of these expected regulations is to police money laundering.

2. *How to set up a limited liability company in Delaware?*

To form an LLC in Delaware, the organizer must file a Certificate of Formation with the Secretary of State of the State of Delaware. The Secretary of State maintains a simple form Certificate of Formation on its website. The filing can now also be submitted online. See <https://corp.delaware.gov/> for more details.

There are no minimum capital contribution requirements.

**Side Note: Pre-Filing Considerations.** Before filing for the LLC, it is necessary that the members determine (a) what to name the LLC and (b) who will serve as the registered agent.

As for determining the name of the LLC, the Secretary of State website has a searchable database of business entities that have already been filed. It is best to confirm that the proposed name does not conflict with any existing LLC or other business entity.

As for the registered agent, Delaware requires the company maintain an address in the state where the LLC will receive the service of lawsuits. This can be the physical address of the LLC if in Delaware. If there is no physical address in Delaware, the LLC must hire a registered agent. A registered agent is a service provider who will receive any lawsuits filed against the LLC for a yearly fee.

3. *Which documents are needed for the formation of a limited liability company?*

Only the Certificate of Formation is required to form the LLC.

**Side Note: LLC Agreements.** The Certificate of Formation only provides minimal information about the governance of the LLC. Often, members of an LLC need to also determine how the LLC will be taxed, how profits and losses will be allocated among members, who has authority to bind the LLC, and how the LLC

will be managed, among other things. To memorialize these agreements, the members typically enter into a Limited Liability Company Agreement (also known as an Operating Agreement). The Operating Agreement is not a public document, and it is the most important document with respect to operating the LLC.

4. *Further required actions.*

In addition to the Operating Agreement, most banks will require that the LLC have an Employer Identification Number assigned to it. This is a number assigned by the Internal Revenue Service for tax purposes.

5. *Formation timing and costs.*

The Delaware Secretary of State charges a filing fee of US \$90.00. The LLC is considered “formed” upon acceptance of the filing by the Secretary of State. It may take several weeks to receive evidence of filing, however, unless the LLC elects to expedite the filing. This is an additional US \$50 cost, but it typically results in acceptance of the filing within 24-hours and the receipt of evidence within a week. A lawyer may be able to obtain the evidence of acceptance on shorter notice.

The fees for registered agent vary between US \$100-\$450 per year.

In addition to the foregoing, Delaware charges a \$300 franchise tax, which is due every year on June 1.

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