

Virginia's New Entity – the Series Limited Liability Company

Richard Howard-Smith | Attorney
Flora Pettit PC
530 E Main St | P.O. Box 2057
Charlottesville, VA 22902
Direct Dial: (434) 817-7975 | Fax: (434) 977-5109
E-mail: rh@fplegal.com | Website: www.fplegal.com

A. New Type of LLC in Virginia. A complex variant of the limited liability company form of entity is the relatively new "series" limited liability company ("SeLLC"), recently created by Virginia's enactment of its version of the Uniform Protected Series Act¹ in 2019.² SeLLCs began in Delaware over 20 years ago, but perhaps due to widescale non-adoption elsewhere (along with unfavorable cases involving foreign recognition), they still only exist in approximately 15 states to date. The main legal distinction of an SeLLC from a regular LLC is the presence of an internal liability shield that protects assets of the SeLLC and its various "series" from liabilities of each other and each other series (occasionally referred to as "horizontal" liability), as well as the protection of the members from liabilities of the entity and the entity from liabilities of its members as with a regular LLC. In this sense, the SeLLC is intended to emulate the effect of having a tiered LLC structure - a "master" or "parent" LLC that itself owns any number of single member LLCs or "children" LLCs (much like wholly-owned subsidiaries), the form of compound asset holding using different "buckets" that has heretofore been utilized. However, the SeLLC also can take this somewhat common design one step further than the parent-children structure by permitting different members of the different series, provided that all such members are members of the SeLLC.³ This unique aspect of the SeLLC distinguishes it from all other Virginia entities (except perhaps the Business Trust, which also has the concept of different series⁴), and also contributes to its relative complexity.

B. General Characteristics of an SeLLC. As defined by the UPSA,¹ the SeLLC is characterized by the following:

¹ The Virginia Uniform Protected Series Act is based on the Uniform Act promulgated in 2017 by the National Conference of Commissioners on Uniform State Laws (NCCUSL) (aka the Uniform Laws Commission - <https://www.uniformlaws.org>), and is effective as of July 1, 2020. See Va. Code § 13.1-1088 et seq.

² The provisions of the VUPSA, though enacted in 2019, have a delayed effective date of July 1, 2020.

³ Va. Code § 13.1-1099.3.A.

⁴ See Va. Code § 13.1-1219.B.1.

1. an identifiable set of assets segregated within a limited liability company (“a series limited liability company”);
2. the assets:
 - a. comprise a protected series, which is empowered to conduct activities in its own name;
 - b. must be identified by thorough recordkeeping that distinguishes them from assets of the series limited liability company and assets of any other protected series of the company;
 - c. are obligated solely to persons asserting claims pertaining to activities related to the segregated assets; and
 - d. are not available to persons asserting claims arising from the activities of the series limited liability company or any other protected series of the company;
3. one or more members of the series limited liability company may be associated with the protected series, but not necessarily; and
4. distributions arising from the assets and activities go to:
 - a. the members associated with the protected series, if any; or
 - b. if the series has no associated members, the series limited liability company.

C. Additional Characteristics and Limitations. The SeLLC concept can perhaps best be understood by looking at a prospective entity from the perspective of the assets, with those assets being separated in to different series and identified as such, both by the SeLLC's name and series name, and suffixed with either "protected series," "PS," or P.S." Each separate series of assets may, but need not, be effectively owned by different members associated with the assets of a protected series. Somewhat unique to Virginia, entities, recordkeeping for assets and members will need to be detailed and comprehensive, and maintained meticulously on a continuous basis, as much of the segregated liability protection afforded to the SeLLC and each of its separate protected series is based on the proper maintenance of such records. In short, if an asset is associated with SeLLC Series A, PS, and there is a creditor of that series or a particular asset of that series, and the proper identification and activity records are maintained, that creditor will not be able to pursue its claim against either SeLLC Series B, PS, the SeLLC, or any of their respective members.

1. *SeLLC Operating Agreement.* A detailed operating agreement will be absolutely critical to an SeLLC, and except as otherwise specifically provided by the VPSA, it will govern:

- a. The internal affairs of a protected series, including: relations among associated members, managers, assignees of the protected series and the protected series; rights and duties of any managers; governance decisions affecting and the conduct of the activities and affairs of the

protected series; and procedures and conditions for becoming an associated member or protected series assignee;

b. The relations among the protected series of a series limited liability company, the series limited liability company, and any other protected series of the series limited liability company; and

c. Relations between any of the protected series, its manager, any associated member or assignee of the protected series; and a person who is not an associated member, manager or assignee of the protected series, or an assignee of the series limited liability company.⁵

2. *Unique Limitations.* The SeLLC has more limitations for entity combinations than other Virginia entities, largely due to its unique multi-faceted nature.

a. A series limited liability company may not: convert to a different type of entity; domesticate as a foreign limited liability company; or be a party to or the surviving company of a merger (unless not created in the merger).⁶ However, a SeLLC may be party to a merger only if: each party to the merger is a limited liability company; and the surviving LLC is not created in the merger.⁷

b. For instance, although a protected series is generally regarded "as if" it were a separate LLC,⁸ it cannot: be a party to a merger; convert to a different type of entity; domesticate as a protected series under the laws of a foreign jurisdiction; or be a party to or be formed, organized, established, or created in a transaction substantially like a merger, interest exchange, conversion, or domestication.⁹

D. Taxation. The SeLLC will be subject to the same kinds of tax analysis as an LLC. It will be able to elect corporate tax treatment, or be classified under the default provisions depending on whether it has a sole owner or multiple owners.¹⁰ Each protected series of an SeLLC will be subject to a similar analysis, so an SeLLC could easily be treated as a partnership of partnerships (i.e., "tiered

⁵ Va. Code § 13.1-1092.

⁶ Va. Code § 13.1-1099.15.

⁷ Va. Code § 13.1-1099.16.

⁸ Va. Code § 13.1-1094.1.

⁹ Va. Code § 13.1-1099.14.

¹⁰ 26 CFR § 301.7701-2.

partnerships"). Thus, in complex SeLLCs, the tax treatment will be at least as complex as their organizational structures.

E. Observations. The SeLLC will be a useful form of Virginia entity for certain assets that merit tiered structures, such as a real estate investor that owns and manages multiple rental or investment properties. There likely will be a common perception of consolidation, simplification and economy in having one entity that has many component parts, but in matter of fact such thinking will be misguided. While some consolidation results from having a common registered agent¹¹ and the possibility of a common manager for the SeLLC and all of its protected series, each protected series will need to be registered with and pay annual fees to the Virginia SCC (as if a separate entity), and will need to be the subject of detailed provisions in the SeLLC's operating agreement (though there will likely be occasion for replication of similar provisions by extrapolation and cross-reference). Of course something can be said about having just one operating agreement despite it being more complex; it certainly should be able to be review and/or amended easier than multiple agreements of sibling LLCs, regardless of how similar they may be. Unless and until there is widespread adoption of the SeLLC across the United States to add more certainty to the issues caused by jurisdictions that do not recognize SeLLCs, SeLLCs will be best suited for assets and activities that are clearly subject only to Virginia law (or the laws of a sister UPSA state). As such, the SeLLC will likely only be used by advanced practitioners for specific subsets of types of aggregated asset structures.

¹¹ Va. Code § 13.1-1097.