

Where to Form My Opportunity Zone Fund, and What Type of Legal Entity Should it Be?

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While there are many Opportunity Zones across the country (the Treasury has certified 8,700 nationwide, 12% of U.S. census tracts), perhaps the best place to form an Opportunity Zone Fund is Delaware and the best form of entity is a limited liability company.

Why an LLC? The flexibility of an LLC in governance and economic rights is only limited by the imagination of the promoters (and what investors would be willing to purchase).



Why Delaware? Why an LLC? For the promoter, because the Delaware Limited Liability Company Act permits modification or elimination of the governing body's fiduciary duty of loyalty (to avoid conflicts and competing with the LLC) and the fiduciary duty of care (to be careful and thoughtful in making decisions on behalf of the LLC), something that cannot be done in a corporate setting.

When a limited liability company agreement (referred to in other jurisdictions as an operating agreement) clearly disclaims all statutory fiduciary duties of the governing body (often referred to as managers, and sometimes as directors), then the duties of the governing body are limited to (a) those expressly set forth in the agreement and (b) those that a court deems to arise under the implied covenant of good faith and fair dealing (which adheres to every contract and, by statute, cannot be waived or modified).

An LLC agreement will often include a provision to the effect that the governing body must "act in good faith," then define the term "good faith" in the agreement. The definition could be subjective, as whatever the managers believe to be the best interests of the LLC (which is satisfied so long as the manager actually had such belief). An objective (and more stringent) standard would be acting in a manner they reasonably believe to be in the best interests of the LLC (which is satisfied if the managers had a reasonable basis for the belief).

LLC agreements often include a disclaimer of fiduciary duties, a general standard of subjective good faith for the managers, exculpation for managers other than for acts taken in bad faith, a conclusive presumption of good faith for actions taken in reliance on experts (such as reliance on a fairness opinion), and safe harbor provisions (providing a conclusive presumption of good faith with respect to self-interested transactions if they have been approved by a conflicts committee).

When the court has found an LLC agreement to be unclear or ambiguous, it has most often been as a result of a lack of clarity with respect to the interrelationship among these various provisions relating to the directors' obligations, which is why it is important to engage

competent, thoughtful

and experienced counsel to help draft the applicable provisions of the limited liability company agreement. This is particularly true in the context of a Qualified Opportunity Zone Fund because of the potentially conflicting interests of “mixed fund” investments (a QOF having both tax-advantaged capital gains investments as well as investments of other funds) and in a Qualified Opportunity Zone Business for those investing capital gains through an Opportunity Zone Fund and those investing other than through an Opportunity Zone Fund.

Eckert Seamans has a multi-disciplinary group dedicated to providing the needed legal talent and resources to assist in setting up your Opportunity Zone Fund and Opportunity Zone Business, as well as addressing tax, real estate, corporate, securities laws and related legal and regulatory issues.