

The Formidable Foreign LLC

The offshore trust has been the traditional protective entity. Now it is only one of several that you can use. For example, we frequently use a foreign LLC to protect our offshore clients. However, the offshore trust is still useful for clients who need offshore estate planning, or want to avoid the tax problems from transferring appreciated assets to other offshore entities. We also use it in other special circumstances. Oftentimes, we use both the offshore trust and a foreign LLC as its subsidiary.

The Nevis LLC is a powerful wealth protector. It may give you more protection than the OAPT - and at less cost.

Nevis, a small Caribbean British Commonwealth nation in the Leeward Islands, gained its international reputation for financial privacy and asset protection because of its progressive and debtor-friendly laws. The Nevis LLC demonstrates this tiny jurisdiction's innovation for wealth protection.

The U.S. and other foreign jurisdictions have limited liability companies, but the Nevis LLC is particularly good for protection because it has features that you won't find with other LLCs. The Nevis LLC uniquely combines the most protective features of the offshore trust, limited partnership, and Nevada corporation into one remarkably protective entity.

A Nevis LLC can be either member-directed or managed by a foreign director. For asset protection your LLC should be controlled by a foreign (Nevis) managing director. You contribute your assets to the LLC and become the LLC member. Your rights then compare to the rights of a member of a domestic LLC, corporate stockholder, or limited partner of a limited partnership. As a member you own, but do not manage, the LLC. Management rests with the director. This transfer of control protects the LLC assets from U.S. court orders.

As an LLC member you no longer directly own the contributed assets. These assets are instead owned by the LLC. A U.S. court cannot order you, as the LLC member, to repatriate the LLC assets because the manager, not you, controls the LLC assets. Moreover, a foreign managing director would be beyond U.S. court jurisdiction. Your creditor would be limited to a charging order against your LLC interest. This would give your creditor only the right to claim profits or liquidation distributions due you from the LLC. Your creditor cannot seize your membership interest. Nor can your creditor vote or exercise your other membership rights, such as the right to inspect books and records. Thus, the Nevis LLC compares to a U.S. limited partnership or LLC. A U.S. court order to transfer or seize your LLC interest would be ignored by the managing director who, under Nevis law, need only recognize a creditor's charging order which can only be obtained through the Nevis courts.

If you are a debtor-member who owns a substantial interest in the Nevis LLC. Your managing director would withhold profit distribution that could be seized by your charging order creditor. If you own a minority interest, and if withholding distributions would conflict with the interests of the other debtor-members, you can title your LLC interest to another self-owned Nevis LLC. This would then safely receive your distributed profits. As you have seen with an American LLC or LP, a debtor-member of a Nevis LLC can access funds other than distributions of profits. The charging order would not apply to salaries (e.g. as investment advisor), loans, etc. made to you from the Nevis LLC.

Under certain circumstances, Nevis law and IRS regulations impose U.S. income tax liability on a charging order creditor for LLC profits attributable to the debtor-member. Your charging order creditor can incur a tax liability even if your creditor recovered no distribution. You have seen this same poison pill feature with the U.S. limited partnerships and LLCs (but not other offshore entities). This is another protective feature of the Nevis LLC.

Your Nevis LLC would delegate important powers to your managing director who would ignore U.S. court repatriation orders. If your LLC has multiple members, (which we recommend), your operating agreement should require a unanimous vote to change the managing director. This would overcome a U.S. court order to compel a single debtor-member to replace the manager with a manager appointed by the court to repatriate the LLC assets. The Nevis LLC can be structured with similar protective duress provisions that you would find with the offshore trust – except that the debtor-member of an LLC retains a membership interest in the LLC and, derivatively, its assets.

A Nevis LLC is significantly more protective than the offshore trust if you now have creditors because a transfer of assets to your trust would be a fraudulent conveyance contestable in the trust jurisdiction.

If a Nevis LLC member has an existing creditor, the Nevis LLC ordinances allow the member to transfer his or her assets to the LLC without it constituting a fraudulent conveyance – if the debtor-member's interest is proportionate to the capital contributed. This transfer is then a fair value exchange and expressly exempt from the Nevis fraudulent transfer statutes. Interestingly, under Nevis law a mere promise of a future investment by an existing or future incoming LLC member can be used to measure this proportionality. A debtor-member can then own a small interest in the LLC subject to the charging order, although this member contributed all or most of the LLC's assets. This dilution strategy lets you further discourage a creditor from obtaining a charging order. This is one of several features unique to the Nevis LLC.

U.S. limited partnership and LLC laws remain unsettled on the question of whether your present creditor can recover assets that you transfer to a limited partnership or LLC, even when you receive in exchange for your contributed assets, a proportionate share in the limited partnership or LLC. (Some courts have ruled that impairing a creditor is sufficient for a transfer to be fraudulent.) However, you have no ambiguity or uncertainty under Nevis law. Whatever money you invest in your Nevis LLC will not be a fraudulent transfer, nor challengeable by an existing creditor.

For that reason, we suggest the Nevis LLC is more protective than a foreign trust or domestic limited partnership or LLC. You can legally and ethically invest in the Nevis LLC - regardless of your financial situation.

The Nevis LLC is also a more attractive option for the attorney whose clients have existing creditors and where the attorney or professional advisor has concerns about their own professional liability from a fraudulent transfer. And, as mentioned, in more serious cases, we can maximize your protection by establishing a Nevis LLC as a subsidiary to an offshore trust. Layered protection combines the strength of both type entities.

The Nevis LLC has several other benefits:

- The Nevis LLC has minimal IRS reporting requirements. You are not subject to U.S. foreign trust reporting requirements. If you are a U.S. member who owns 10% or more of an LLC interest, you must follow the IRS' foreign corporation ownership reporting requirements.
- The Nevis LLC is tax neutral. You can elect to have it taxed as a partnership or C corporation.
- Nevis imposes no taxes on their LLC's.
- You can structure your Nevis LLC so that its profits flow to its members in whatever proportions you specify in its operating agreement. This can differ from the actual ownership interest.
- You can appoint a protector to oversee the managing director, as you can with an OAPT.
- Your LLC agreement can include the same anti-creditor poison pills which you can adopt with a domestic LLC. For example, a member's interests can be assessed by the managing director - these same assessment rights would apply against a charging order creditor.
- Your LLC operating agreement can include a flight or Cuba clause so that your manager can expatriate threatened LLC assets to another protective entity in another OFC.
- The managing directors and members of the Nevis LLC are immune from company liabilities.
- Nevis LLCs do not require minute books, annual director or member meetings, or compliance with other customary corporate formalities.
- Your Nevis LLC can be owned by an offshore trust or combined with domestic entities – FLPs, LLCs, and irrevocable trusts. These multi-entity arrangements strengthen and coordinate your domestic and offshore estate planning and liability protection.
- A Nevis LLC is less costly to organize and maintain than an offshore asset protection trust.

While the Nevis LLC is rapidly gaining popularity, the offshore trust is still useful for select offshore wealth protection purposes such as estate planning, forced heirship avoidance, and other special purposes that can only be achieved with a trust. Unquestionably, the Nevis LLC is more protective than a foreign international business corporation (IBC). The IBC gives you considerably less safety and no corresponding advantages. The Cook Islands LLC is relatively new and is also one we are now using.

Other OFC's are developing new protective entities. For example, the Bahamas limited partnership parallels the Nevis LLC. Liechtenstein's and Panama's private foundations compare to the offshore trust. St. Vincent and the Isle of Man hybrid companies are often substituted for an offshore trust or Nevis LLC. Asset protection OFC's are always developing that better mousetrap.