

FORMING AND OPERATING LEGAL ENTITIES IN THE U.S.

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Executive Summary

This article will try to provide you, the foreign investor, with a general overview of the organization of a new business in the United States. Please keep in mind that even though most of the states' business and corporate laws are similar, they are certainly not identical. Once you decide to go ahead and pick your principal place of business, we strongly urge you to consult with an attorney who is familiar with that state's laws and regulations.

Forming a Company

A non-U.S. investor can choose among a variety of entities to do business in the U.S. The main forms are: Corporation ("Inc" or "Corp"), Limited Liability Company ("LLC") and Partnership (general, limited, or limited liability partnership).

Forming a corporation or LLC is a relatively straight forward process. The first step is the preparation and filing with the state authority the entity's charter document. It is also necessary to prepare the operating documents for the entity as well as certain other ancillary documents and instruments, such as the By-Laws or operating agreement, share certificates and resolutions.

Although there is no minimum capitalization requirement in the United States, for a corporation or LLC to be adequately capitalized, it is necessary for the entity to have adequate funds to be able to cover its operating expenses.

Main Considerations in the Choice of Entity

The principal advantage of each business entity is that the liability of the equity owner will generally be limited to the extent of its investment, provided that the entity is adequately capitalized and separate and distinct books and records are maintained. Each entity requires a certain formalized management structure (which, generally, is not burdensome) and permits a variety of managerial and administrative structures, including the appointment of a managing director or board with the authority and responsibility as the equity owners determine from time to time.

An important consideration with respect to choosing the form of U.S. business entity is the effect of U.S. tax laws. The ownership structure that is recommended will depend upon the structure that is most tax efficient. Such analysis is fact sensitive and includes such factors as the type of business to be conducted, the timing of repatriation of income and the U.S. tax status of any partner or joint venturer in your U.S. entity.

Below is a short list of the issues that the clients consider when choosing the type of business entity for their line of business:



- 🔗 Cost issues
- 🔗 Limit on the personal liability of shareholders
- 🔗 Ability to accommodate planned operational mechanics

- 🔗 Appropriateness of entity for planned growth and financing of business
- 🔗 Transferability of interests and liquidity considerations

Statutory limitations on entity selection can be summed up by:

- 🔗 STATUTORY AUTHORITY FOR ENTITY
- 🔗 LIMITATION OF NUMBER OF OWNERS
- 🔗 LIMITATION ON TYPE OF OWNERS
- 🔗 CLASSES OF STOCK
- 🔗 PERMISSIBLE BUSINESSES

Comparison: Corporation or Limited Liability Company

Below is a brief overview of two most frequently used business entities that are available to non-U.S. investors.

	Corporation	LLC
Advantages	<ol style="list-style-type: none"> 1. Liability of owners is limited to the capital contribution used to purchase shares. 2. Perpetual existence (i.e.: death of shareholder does not terminate corporate existence). 3. Interest easily transferable. 4. Management centralized; can hire people with expertise which owners may not have. 5. Corporation can own property in own name. 6. Flexibility in form of capital contribution. 7. May obtain capital by selling additional shares. 	<ol style="list-style-type: none"> 1. Owners of limited liability companies have limited liability. They are not personally liable for debts and obligations of the limited liability company. 2. Avoids double taxation of corporate profits. 3. Flexible governance - can be centralized and formal or decentralized and informal. 4. Very flexible in structure.
Disadvantages	<ol style="list-style-type: none"> 1. Formation is costly and technical. 2. Operation is highly formalized. 3. Double taxation on profits. 	<ol style="list-style-type: none"> 1. Formation can be costly and technical. 2. Operation must be technically monitored so as to meet certain tax requirements to qualify for limited liability company treatment. 3. Format so new that there is little case law on “piercing the veil”; rights of minority owners; when limited liability company interest may be treated as securities. 4. Some states do not recognize the limited liability format and may not recognize the limited liability of members.
Typical Uses	This format is useful where the risk of the business is significant, the owners want to reduce the risk of personal liability and, also, where the owners seek additional capital without necessarily sharing management responsibilities.	This format is useful for owners who seek to reduce the risk of personal liability but seek to avoid the double taxation of corporations

Why Businesses Choose Delaware

There is not one answer but many. They include an advanced and flexible corporation statute and well-developed case law that facilitates business planning; the respected Court of Chancery to deal with complicated corporate law issues; an efficient Secretary of State’s Office; and a legislature that puts a high priority on corporate law matters.

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