

Schoenberg Finkel Newman & Rosenberg, LLC (312) 648-2300

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## SELECTING THE RIGHT BUSINESS STRUCTURE

### Special Interest Articles

#### SELECTING THE RIGHT BUSINESS STRUCTURE

By: Bruce E. Bell

#### YOUR TRADEMARK, POSSIBLY YOUR MOST VALUABLE ASSET

By: Gerald M. Newman

### About Our Law Firm

We are comprised of seasoned and dedicated professionals who familiarize themselves with our clients' industries as well as their legal issues. We strive to maintain long-term client relationships by keeping our clients fully informed and respecting their time and business resources.

#### LEGAL PRACTICE AREAS:

- *Corporate and Other Business Transactions*
- *Employee Benefits*
- *Employment Law*
- *Estate Planning, Probate and Trust Administration*
- *Health and Fitness Industry*
- *Independent Sales Representatives*
- *Intellectual Property Law*
- *Litigation and Alternative Dispute Resolution*
- *Mergers, Acquisitions and Business Sales*
- *Real Estate and Finance*
- *Real Estate Tax Reduction*
- *Securities, Futures and Derivatives*
- *Trade Associations*

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Persons going into business always start with the basic issue of which type of business entity to use. The myriad of factors that must be considered in choosing the proper business structure requires a careful evaluation of the available alternatives. In today's business environment, most closely-held businesses operate as conventional C corporations, S corporations or limited liability companies.

From a tax perspective, C corporations are treated as entities separate and apart from their owners. Income earned by a C corporation is taxed to the corporation while dividends paid by a C corporation are taxable to the shareholders. This can result in a dual layer of taxation – a tax at the corporate level on income and a tax at the shareholder level on dividends. The considerable flexibility in permitting multiple classes of stock and foreign ownership makes C corporations the optimal business structure for publicly-traded and other large corporations. The C corporation structure can also be advantageous for a smaller corporation with owners seeking to reinvest earnings in the business. The 21% flat federal income tax rate imposed on C corporations generally permits the accumulation of funds at a lesser tax cost than would result if earnings are taxed at the individual level and then reinvested in the business. C corporations can, however, be particularly burdensome when businesses are sold to third parties as most buyers prefer to buy the assets of a corporation rather than the corporation's stock, thereby triggering a potential double tax on the sale proceeds.

S corporations are generally not subject to income taxation because business income, gain and loss flow through to and are reported by the corporation's shareholders on their personal income tax returns. The absence of a tax at the corporate level is attractive, but it comes at a cost. Only individuals, other than non-resident aliens, estates and certain trusts, are permissible S corporation shareholders. S corporations can have only one class of stock, which restricts some of the financial flexibility other entities have by offering preferential rights to distributions to some owners but not others. An S corporation cannot have more than 100 shareholders, which prevents a corporation with a large number of shareholders from enjoying S corporation status. S corporations do,

however, offer payroll tax savings in that only the salaries paid to S corporation owners are subject to payroll taxes; any dividends or distributions S corporation shareholders receive in their capacity as shareholders are not subject to payroll taxes. While an S corporation can readily revoke its S corporation status and become a C corporation, a five-year period must lapse before a C corporation can re-elect S corporation status.

A limited liability company, or "LLC", like a corporation, is formed in accordance with a state statute, but can be treated as a partnership for federal income tax purposes. In many cases, LLCs offer the best of both worlds: the opportunity to avoid federal income tax imposed on C corporations and the freedom from statutory restrictions on S corporations. Because LLCs permit owners or members to share in company distributions without regard to each member's ownership interest in the company, differing distributions to members are commonplace in governing LLC documents which permit the holding of preferred and common interests. LLCs are permitted to have to a variety of owners. Corporations, partnerships and non-resident aliens are permitted owners of LLCs, as are individuals, estates and trusts. In cases where a business entity is borrowing funds from a third party, an LLC may be the entity of choice if losses are anticipated, as LLC members can deduct not only their share of company losses to the extent of their capital contributions, but also to the extent of their share of loans taken out by the company. In contrast, S corporation shareholders can only deduct losses to the extent of their capital contributions and any loans they have personally made to the corporation. One disadvantage of the LLC structure is that income from operations reportable by the members will be subject to payroll taxes.

While the specifics of each situation should be carefully analyzed by professional advisors who are familiar with the business, the vast majority of closely-held businesses are formed as S corporations or LLCs. Unless a business is in an expansionary phase where the owners intend to accumulate earnings for future use of the business or need to maintain a structure which is more widely recognized for institutional investors, the S corporation or LLC structure is often best suited for the needs of the owners.

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### Recent Recognitions

Our current *Leading Lawyers\** and *Emerging Lawyers\** have been recognized again for 2019. **Dan Beederman, Joan Berg, Norm Finkel, Adam Glazer, Rich Goldwasser** and **Ron Silbert** are all acknowledged as *Leading Lawyers*; and **Greg Mini** and **Matt Tyrrell** continue their status as *Emerging Lawyers*.

\*Service mark of the Law Bulletin Publishing Co.

### Speaking Engagement

On February 25 and 26, Firm attorneys Gerry Newman and Adam Glazer will be speaking at the 50<sup>th</sup> Anniversary Electronics Representatives Association (ERA) Conference in Austin, TX. A breakout session titled: "Standing Firm: Reps Deserve to Get Paid" will review the many approaches to recovering unpaid and underpaid commissions owed to sales representatives when the rep-principal relationship terminates.

### Notable Publications

In a January 29<sup>th</sup> *Crain's Chicago Business* article, Adam Glazer shared his views on the strong growth potential of the Firm's real estate tax practice in the aftermath of highly publicized federal investigations into other longtime players. The article recognized that businesses may now take a second look at their representation in seeking property tax reductions. "As a law firm versed in property tax law," Glazer told *Crain's*, "we are rededicating our efforts to standing out from the crowd, in connection with the services we offer and the integrity we provide."

### LinkedIn

If you have a LinkedIn account, please take a moment to follow our Firm page. We post new articles (not always included in our Firm newsletters), as well as Firm news and accolades.

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Your company name or logo and the image it conjures in the minds of those who see and use it, including your customers and suppliers, may be your company's single most important asset. Your trademark, be it a brand name or logo, can convey intellectual and emotional attributes and messages about you, your company and your company's reputation, along with its products and services.

The trademark acts as an "identifier" in denoting the source of origin and quality of products and services which you and your company have previously provided to customers. Trademarks, service marks, trade names, logos and even scents are all identifiers and part of the larger toolbox of intellectual property valued by many successful companies and zealously protected to avoid infringement or dilution.

One of the first decisions made by an owner of a new business is selecting a name or identifier. The decision is very important since the name will function as the company's personal representative to the public. Thus, great care must be exercised in selecting a name or mark.

Trademarks, service marks and similar identifiers are often selected with the help of the company's advertising counsel as well as legal counsel. Advertising counsel helps identify marks which are desirable from a business and communications standpoint. Legal counsel investigates the availability of desirable marks to ensure they do not infringe third party trademarks and are neither descriptive, confusingly non-descriptive or contain other attributes which may make the mark difficult or impossible to protect.

The best trademarks are those which are adaptable for sight and sound advertising and promotion and convey the proper message regarding the goods or services, without being descriptive. The best trademarks are those which are "meaningless" in the conventional sense. One example of this selection process is the well-known mark, "Exxon®" used by Amoco®. The mark was meaningless until Amoco developed it into a valuable brand and trademark identifier.

Before a final decision is made in selecting a mark, a comprehensive trademark search should be conducted to determine whether there are third parties using the proposed mark or if the mark is so similar to a third-party mark as to cause a likelihood of confusion, mistake or deception as to the source or origin of goods or services with which the mark is intended to be used. A formal search should be made by legal counsel since great care must be taken to avoid infringement of third-party marks.

After the selection of a new mark, the mark must then be used in a proper manner to preserve the company's proprietary rights. A trademark must

always be identified as a trademark. It must be distinguished from the mere name of the product or the services. Following three simple rules will, in most cases, assure proper use of the company's trademark and thus protect its trademark rights:

The first and most important rule is to use the generic name of the product or services in association with the trademark. In advertising, one should not merely refer to a product by its trademark "GIDET" but should refer to the product as a "GIDET computer."

The second rule is to make sure that the consuming public recognizes your trademark as a trademark. If the mark has been registered in the U.S. Trademark Office, recognition can be noted by using the symbol of the "R" enclosed within a circle or "®". Alternatively, you can use the legend "Reg. U.S. Trademark Off." This notation must only be used when the mark has actually been registered in the U.S. Trademark Office.

For those marks which have not been registered in the U.S. Trademark Office, the letters "TM" or "Trademark" can be used to indicate that the user considers the mark to be a trademark or service mark. When an application for registration of the mark has been filed but not issued, it is permissible to use the phrase "TM pending" or words to that effect.

Finally, in order to ensure that a mark will be recognizable as such everywhere it appears, it should be displayed with some special form of typographical treatment. At the very minimum, the mark should be capitalized, or it may appear in all uppercase letters, in quotation marks, in italics or in bold-face type.

Since trademarks and service marks are extremely valuable assets of your company, they should be protected from loss just as you would protect your inventory, trade secrets, and methods of doing business. Although the law protects your rights to your trademark without registration, additional protection may be obtained by federal or state registration of the mark. Federal registration requires use of the mark in connection with the sale of goods or services in interstate commerce, while state registration requires intrastate use. Registration is evidence on its face of the registrant's ownership of the mark, but it is not conclusive evidence as to either the ownership or the validity of the mark. Nevertheless, registration, particularly federal registration, reduces the risk of innocent use of the mark by others by placing the mark of record in a central registry where it will appear in searches conducted by potential competitors.

While this article covers some of the more important aspects and ramifications of the law of trademarks and business names, other problems – such as trademark infringement – may arise in the innocent use of trademarks which should be referred to competent trademark counsel.