



SECTION I – Overview of Delaware Corporate/LLC Formation

This memorandum sets forth the steps required to establish a U.S. subsidiary of a foreign parent company. Although the Limited Liability Company is briefly described below, this memorandum is primarily devoted to the formation of a Corporation, the most commonly used form of entity for U.S. subsidiaries of European companies.

General Considerations

There is no national corporate law in the United States governing privately held corporations. Each state has its own form of corporate law, which permits an entity to be formed that insulates the shareholders from liability for debts of that entity. There is no requirement that a corporation be formed in the state in the United States where the subsidiary has its headquarters.

Most of our corporate clients incorporate in the state of Delaware because of its well-developed corporate law, as well as cost and convenience factors (e.g., on an expedited basis it is possible to register a corporation in one day). In almost all instances, the total state and federal corporate income tax burdens do not materially differ depending on the state of incorporation. There is no need to have employees or set up any operations in Delaware. There are a number of corporate service companies, which regularly act as local statutory agent of Delaware corporations. It is, of course, possible to form a corporation in the state where the subsidiary's headquarters are to be located, but it is not unusual for there to be higher administrative costs and delays and sometimes unusual local statutory provisions which are not beneficial to shareholders.

Forms of Corporate Entities

Corporation

It permits unlimited classes of capital stock, profits are taxed at the corporate level, and shareholders pay taxes on dividends, unless wholly or partly exempt.

Limited Liability Company (LLC)

U.S. federal tax law (and most states) permits an LLC to elect partnership tax treatment while maintaining the limited liability of the owners. Very flexible structure and often used for joint ventures of two corporations.

Forming a Corporation (or LLC) in Delaware

Name

With very few limitations, a corporation's name can be any name that is not confusingly similar to another existing corporation's name or a registered trademark.

Capitalization

A corporation must have common shares and may have any number and type of preferred shares with different rights from the common shares. Generally, a 100% owned subsidiary has only common shares at the time of formation.

The certificate of incorporation of subsidiaries usually authorizes 5000 common shares, with minimal (often \$.01 per share) or no par value, per share. The number of shares issued to the shareholder will normally be much less, often 100 shares, the balance being held in reserve for future capital increases. Unlike many countries, there is no specific requirement of minimum capital. However, to avoid a creditor's claim that the corporation was thinly capitalized and that, as a consequence, its corporate status should be disregarded, to satisfy tax authorities, and most likely, a lending institution's loan covenants, once the corporation is organized, the debt/equity ratio should be reviewed, and, if necessary, a portion of funds advanced as a loan by the parent can be converted to capital by board of director's resolution.

Purpose

In general, no need to be specific in the Certificate of Incorporation as to industry or line of business. Certificate can state that the corporation is formed "for any lawful purpose". Only in a few areas, such as engineering and banking, do special provisions apply.

Other Provisions

It is not uncommon for a Certificate of Incorporation to have additional provisions limiting the personal liability of directors, as well as technical corporate matters that can simplify future reorganizations.

Filing

Usually the lawyer who drafts the Certificate of Incorporation signs it as the "Incorporator", and then arranges for the filing with the office of the Secretary of State in the state of incorporation.

Post-Incorporation Procedures

Incorporator

The Incorporator adopts by-laws and names the initial member(s) of the Board of Directors.

Board of Directors

A corporation is managed by a Board of Directors and Officers. Under Delaware law the Board may have as few as one member. At the Board's organizational meeting (or by unanimous written consent), the Board sets the price and number of shares to be sold to the parent company and, if applicable, other shareholders, appoints the officers, approves bank credit and loan agreements and the registration of the corporation for tax and jurisdictional purposes in other U.S. states where business is to be conducted.

Officers

At a minimum, a President and Secretary (often the corporation's outside lawyer is named Secretary in order to maintain the appropriate corporate formalities). Most corporations also have at least one Vice President and a Treasurer. Whether the President is also called the Chief Executive Officer (CEO) and if another officer (e.g. Vice-President-Finance or Treasurer) is also called a Chief Financial Officer (CFO) is usually determined by the By-Laws.

Tax Registration

An officer of the Corporation must file for an Employer Identification Number ("EIN") with the Internal Revenue Service prior to commencing business. In some instances, a Foreign Employer Identification Number may be acquired.

Are all officers, directors and shareholders listed in a public filing office?

The names of principal officers are filed in many states, including Delaware, on an annual basis. Except for certain regulated industries, the identity of shareholders of a privately held corporation are not a matter of public record.

Raising Additional Capital from Third Parties

The sale of securities (stock or debt) to officers, employees, or other third parties in the U.S., whether through an initial public offering (IPO) or otherwise is highly regulated by states and also by the Federal Government through the Securities and Exchange Commission (SEC). Specific exemptions apply, but each case should be separately reviewed to determine whether prospectus and/or registration is required.

Frequently Asked Questions (COSTS):

What are the costs of forming/maintaining a Delaware Corporation?

Delaware State Fees (2014)

Filing of Certificate of Incorporation- \$ 89.00

Annual Statement \$ 50.00

Annual Franchise Tax \$175.00 (minimum and if no more than 5000 authorized shares)

Corporate Agent Fees

\$50-\$500 depending on level of service.

LLC General Considerations

The DE LLC in terms for formation and related concerns is virtually identical to that of the corporation. However, certain key deliverables and drafting concerns are different. Namely the LLC has one major organizational document (the operating agreement) that carries most of the terms and addresses most of the considerations that a Corporation's suite of bylaws, resolutions, shareholder agreements, and certificate of incorporation do as a whole.

Frequently Asked Questions (COSTS):

What are the costs of forming/maintaining a Delaware LLC?

Delaware State Fees (2014)

Annual Tax: Although Limited Partnerships, Limited Liability Companies and General Partnerships formed in the State of Delaware do not file an Annual Report, they are required to pay an annual tax of \$250.00.

Filing of LLC Certificate of Formation- \$ 90.00

Corporate Agent Fees

\$50-\$500 depending on level of service.

Section II – Legal Deliverables (Corporation)

1. Planning and Structuring Consulting Services

- i. We will work closely with company management to ascertain its structure, its goals and its strengths/weaknesses in terms of foreign jurisdiction, foreign entity structuring, etc.
- ii. **We will evaluate strategies to minimize tax burden and maximize any benefits made available by virtue of the US/Belgium Tax Treaty.**
- iii. We will provide and devise documents, instruments and structure that best maximizes the above, while achieving the goals of management and allowing management to conduct operations in the US.

2. Filing of Corporation in Delaware State

- i. We will handle filing the certificate of incorporation.
- ii. We will assure the optimal number of shares and related charter items are properly reflected in the certificate, so as to assure the corporation may attach early stage consultants, founders, and/or employees through restricted stock awards raise company valuation.
- iii. Most law firms will provide only the bare bones basic certificate without addressing the right capitalization (number of shares) and proper par value to facilitate short to long term equity awards to critical personnel.

3. Corporate Resolutions

- i. We will provide all necessary corporate resolutions that attest to the formation of the corporation by our firm.
- ii. Such resolutions will properly attach the Belgian Corporation as the prime shareholder of record (if that is the desired approach).
- iii. Such resolutions will properly set out officer and director appointments.
- iv. Most law firms will only provide resolutions that make clear it formed the corporation and nothing else.

4. Corporate Bylaws

- i. We will provide sophisticated and venture capital ready bylaws.
- ii. Such bylaws will provide concrete mechanics on core corporate functions, such as director elections, shareholder meetings, protocol for meetings, etc.
- iii. Most law firms will provide only the bare bones bylaws that only lay out the most rudimentary of features and such bylaws will not be tailored for your specific needs.

5. Foreign Employer Identification Number

- i. All corporations operating in the United States require a federal tax identification (known as an “Employee Identification Number”). However, where there is a foreign national or entity that is the sole or founding shareholder, a Foreign Employee Identification Number (“FEIN”) is required
- ii. We will acquire the FEIN for your corporation, which is a more sophisticated and demanding process than acquiring a standard EIN.

6. Robust Venture Capital Facing Shareholder Agreement

- i. We will draft a shareholders agreement that contemplates venture financing.
- ii. It will assure the mechanics necessary to maintain continuity in share holdings and maintain corporate ownership as much possible over vested shares.

- iii. It will provide the corporation drag along rights to assure that if there is a company acquisition, minority shareholders will not be able to preclude the acquisition.
- iv. It will make the shareholders agree to recognize the various securities rules that they will have to comply with in order to acquire and/or sell their shares.

7. Robust Restricted Stock Award Agreements

- i. We will draft the agreements necessary to provide founders, consultants, or critical early stage employee's equity on a restricted and vesting award basis.
- ii. With these agreements you can feel confident that you are incentivizing founders, employees or consultants to deliver high quality work product, without having to give them a large chunk of equity up front.
- iii. The agreements are designed to provide the corporation the tools necessary to claw back the equity in the case the founder, employee or the consultant quits or is terminated.
- iv. We can provide these agreements for up to five founders/employees/consultants within the package quote above.

8. Robust Founder/Consultant Invention Agreements

- i. We will provide agreements that assure that all founders/consultants/employees that are generating intellectual property in connection with the corporation is obligated to assign all such IP to the corporation.
- ii. ***We can provide these agreements for up to five founders/employees/consultants within the package quote above.***

9. Robust Founder Employment/ Consultant Agreements

- i. We will provide contractor and/or employment agreements that make clear what the roles, rights, and duties of the various corporate personnel are.
- ii. These agreements will also clearly lay out mechanics for termination rights of the corporation, which are directly tied to the vesting schedules mentioned above.
- iii. ***We can provide these agreements for up to five founders/employees/consultants within the package quote above.***

10. Robust Confidentiality / NDA Agreements

- i. We will provide a comprehensive mutual Non-Disclosure Agreement for the company to engage in confidential discussions with third parties.

11. Formal Qualification to Do Business in New Jersey

- i. We will file any and all paperwork necessary to formally qualify your DE entity to conduct business in New Jersey. Doing so will assure that you can leverage NJ courts and benefit from your entity's limited liability protection in that state. Will require \$125 in NJ State filing fees.

Section II – Legal Deliverables (LLC)

1. Filing of LLC in Delaware State

- i. We will handle filing the certificate of formation.
- ii. We will assure the charter items are properly reflected in the certificate, so as to assure the LLC may attach early stage consultants, founders, and/or employees through restricted stock awards raise company valuation.
- iii. Most law firms will provide only the bare bones basic certificate without addressing the right circumscriptions of company liability and purpose.

2. Robust LLC Operating Agreement

- i. We will provide a robust company operating agreement that will achieve and address the following mission critical company concerns:
 - o Properly attaching the Belgian Corporation as the prime member of record (if that is the desired approach).
 - o Properly setting out officer and manager appointments, along with a robust board of manager framework.
 - o Assure the framework necessary to permit management to issue new equity towards venture financing.
 - o It will assure the mechanics necessary to maintain continuity in unit holdings and maintain

company ownership as much possible over vested units.

- o Provide drag along rights to assure that if there is a company acquisition, minority members will not be able to preclude the acquisition.
- o It will make the members agree to recognize the various securities rules that they will have to comply with in order to acquire and/or sell their shares.
- o Provide concrete mechanics on core corporate functions, such as manager elections, member meetings, protocol for meetings, etc.
- o Most law firms will provide only the bare bones terms that only lay out the most rudimentary of features and such operating agreements will not be tailored for your specific needs.

3. Foreign Employer Identification Number

- i. All corporations operating in the United States require a federal tax identification (known as an “Employee Identification Number”). However, where there is a foreign national or entity that is the sole or founding shareholder, a Foreign Employee Identification Number (“FEIN”) is required
- ii. We will acquire the FEIN for your corporation, which is a more sophisticated and demanding process than acquiring a standard EIN.

4. Robust Restricted Unit Award Agreements

- i. We will draft the agreements necessary to provide founders, consultants, or critical

- early stage employee's equity on a restricted and vesting award basis.
- ii. With these agreements you can feel confident that you are incentivizing founders, employees or consultants to deliver high quality work product, without having to give them a large chunk of equity up front.
 - iii. The agreements are designed to provide the corporation the tools necessary to claw back the equity in the case the founder, employee or the consultant quits or is terminated.
 - iv. ***We can provide these agreements for up to five founders/employees/consultants within the package quote above.***

5. Robust Founder Invention Agreements

- i. We will provide agreements that assure that all founders/consultants/employees that are generating intellectual property in connection with the corporation is obligated to assign all such IP to the corporation.
- ii. ***We can provide these agreements for up to five founders/employees/consultants within the package quote above.***

6. Robust Confidentiality / NDA Agreements

- iii. We will provide a comprehensive mutual Non-Disclosure Agreement for the company to engage in confidential discussions with third parties.

7. Formal Qualification to Do Business in New Jersey

- i. We will file any and all paperwork necessary to formally qualify your DE entity to conduct business in New Jersey. Doing so will assure that you can leverage NJ courts and benefit from your entity's limited liability protection in that state. Will require \$125 in NJ State filing fees.