



AgEcon SEARCH
RESEARCH IN AGRICULTURAL & APPLIED ECONOMICS

The World's Largest Open Access Agricultural & Applied Economics Digital Library

This document is discoverable and free to researchers across the globe due to the work of AgEcon Search.

Help ensure our sustainability.

Give to AgEcon Search

AgEcon Search

<http://ageconsearch.umn.edu>

aesearch@umn.edu

*Papers downloaded from **AgEcon Search** may be used for non-commercial purposes and personal study only. No other use, including posting to another Internet site, is permitted without permission from the copyright owner (not AgEcon Search), or as allowed under the provisions of Fair Use, U.S. Copyright Act, Title 17 U.S.C.*

Revised September 2005

E. B. 2004-07

DOING BUSINESS IN NEW YORK STATE: STRUCTURES AND STRATEGIES



by

**Bruce L. Anderson
Brian M. Henehan
Charles J. Sullivan**

**Department of Applied Economics and Management
College of Agriculture and Life Sciences
Cornell University, Ithaca, NY 14953-7801**

The NY Ag. Innovation Center
provided support for this publication



It is the Policy of Cornell University actively to support equality of educational and employment opportunity. No person shall be denied admission to any educational program or activity or be denied employment on the basis of any legally prohibited discrimination involving, but not limited to, such factors as race, color, creed, religion, national or ethnic origin, sex, age or handicap. The University is committed to the maintenance of affirmative action programs which will assure the continuation of such equality of opportunity.

Abstract

This publication reviews the legal and business structure alternatives available to those forming business structures in New York State. A framework is developed for assessing various business structural options. Six business organizational forms are discussed, including: 1) sole proprietorships, 2) business corporations, 3) general partnerships, 4) limited partnerships, 5) cooperative corporations, and 6) limited liability companies.

Various organizational features of these forms of business are reviewed including: personal stakeholder liability, means of formation, duration of business structure, system of governance, taxation, property interests, securities registration, and anti-trust limitations.

A review of the role of advisors is presented as well as suggestions for selecting qualified advisors. The information contained in this article is intended as a general discussion of New York and federal law related to the decision making process concerning (1) whether to form a business entity, and (2) which form of business structure to select. Nothing in this publication is intended as legal or financial advice. Readers should consult with their own legal or financial advisors to insure that the organizational choices they make best fit their individual or group needs.

A list of online educational and informational resources is provided in an appendix. Resources include web sites for educational programs, professional associations, state and federal government agencies supporting business development, and references for New York State Laws applying to various forms of businesses.

Keywords: New York State, business structure, limited liability company, cooperative, proprietorship, partnership, business corporation.

Acknowledgments

The authors want to acknowledge the contributions made by certain individuals who helped develop this publication. Our thanks to our colleagues in the Department of Applied Economics and Management, Prof. Gerald White and Prof. James Hagen who reviewed an earlier draft of this publication and offered useful comments and suggestions. Any errors remain the sole responsibility of the authors. We also want to recognize the assistance of Carol Thomson, an administrative assistant in the Department of Applied Economics and Management who provided key support in word processing. Cover artwork was created by Lisa Cowden, LC Designs, Trumansburg, New York.

The New York Agricultural Innovation Center (AIC) provided support for the printing and distribution of this bulletin. AIC is aimed at building a more innovative NY agriculture and received funding through a grant from USDA Rural Development, Rural Business - Cooperative Services. More information about the Center can be found on the following website: <http://agviability.cornell.edu/>

About the Authors

Bruce L. Anderson is a professor emeritus of business management. He taught in the areas of business management and marketing, with a concentration on agribusiness, food, and cooperative firms. He also taught courses in strategic management, corporate finance, cooperative management, and global agribusiness management.

He is currently a private consultant working with cooperative and food/agribusiness companies on management, financial and marketing strategies. He has taught executive development programs in Sweden, Denmark, Australia, Ireland, the United Kingdom, India, Hungary, and Slovakia.

Brian M. Henehan is a Senior Extension Associate with the Department of Applied Economics and Management in the College of Agriculture and Life Sciences at Cornell University, where he serves as program leader for the Cooperative Enterprise Program. He is responsible for developing and delivering an educational program for senior management, directors, members, and staff of cooperative businesses as well as conducting applied research on cooperative organizational behavior, marketing and decision making.

He earned a Master's degree in Agricultural Economics from the Department of Agricultural and Resource Economics at the University of Vermont where he conducted research on the factors for success in emerging cooperatives. He received his undergraduate degree from Boston College. He serves as Executive Secretary of the Northeast Cooperative Council, a non-profit organization serving rural cooperatives in New York and New England. More information including a list of publications can be obtained on the following web page: www.aem.cornell.edu/profiles/henehan.html

Charles J. Sullivan is a member of the law firm of Bond, Schoeneck & King, PLLC (“BS&K”). Prior to graduating from high school, he worked daily on his family’s dairy farm located in Northern New York. Mr. Sullivan is a graduate of St. Lawrence University (B.A., *Cum Laude*), the University at Buffalo School of Law (J.D., *Magna Cum Laude*) and the Graduate Program of Agricultural Law at the University of Arkansas, Fayetteville (LL.M.). He is admitted to practice in New York and the U.S. District Courts for the Northern and Western Districts of New York. Mr. Sullivan is a member of the American Bar Association, the American Agricultural Law Association, the New York State Bar Association and the Onondaga County Bar Association. He is an associate member of the Northeast Cooperative Council and a delegate to the Legal, Tax and Accounting Committee of the National Council of Farmer Cooperatives.

He is a member of BS&K’s Agribusiness Client Group. BS&K’s agribusiness clients include producers, regional and national cooperatives, agricultural suppliers, agricultural lenders, food processors and other agribusinesses.

Mr. Sullivan has lectured at continuing legal education seminars sponsored by the American Agricultural Law Association and the New York State Bar Association. His lectures have addressed a variety of topics relating to the organization, governance and taxation of farm cooperatives, business structures and tax-exempt organizations. He also has lectured to various non-lawyer groups about business law issues. More information about Mr. Sullivan and BS&K can be obtained on the following web page: www.bsk.com

TABLE OF CONTENTS

PREFACE

Abstract	i
Acknowledgments	ii
About the Authors	ii
Table of Contents	iv

INTRODUCTION	1
Background	1
Scope of Article	2

ROLE OF ADVISORS	2
Assessing the Need for Advisors	2
Selecting Advisors	4

BUSINESS STRUCTURES - GENERAL OVERVIEW	5
Definition of “Business Structure” and “Stakeholder”	5
Framework for the Analysis	6
Allocation of Property Interests in the Enterprise Among Participants	6
System of Governance	7
Defining Relationships with Outside Parties	7

INTRODUCTION TO THE BUSINESS STRUCTURE FORMS	8
Sole Proprietorship	8
Business Corporation	9
General Partnership	10
Limited Partnership	11
Cooperative	12
Limited Liability Company	14

CHOOSING A BUSINESS STRUCTURE	15
Formation Factors	15
i. <u>Personal Stakeholder Liability</u>	15
ii. <u>Means of Formation</u>	16
iii. <u>Duration of Business Structure</u>	17
iv. <u>System of Governance</u>	17
v. <u>Taxation</u>	17
vi. <u>Securities Registration</u>	18
vii. <u>Antitrust Limitations</u>	18
Sole Proprietorship	19
Business Corporation	20
General Partnership/Limited Partnership	23
Cooperative	27

Limited Liability Company	30
SUMMARY	32
APPENDIX: ONLINE RESOURCES	36

INTRODUCTION

The authors have worked on a number of projects over the years which have involved forming or restructuring business organizations serving the food and agriculture industry in New York State. These projects have included a wide range of types and varying scale of businesses from new start-ups with sales of under \$1 million to restructuring operations generating revenues over several billion dollars. The authors also have observed that the people who currently drive emerging business enterprises, including agricultural and non-agricultural, need an educational resource which offers guidance in selecting business structures. This bulletin is aimed at responding to that need, although it is not intended as professional advice nor to be an exhaustive guide to all of the issues associated with launching a business enterprise.

Background

There is an increased interest in developing new or restructuring existing businesses in New York State, particularly in rural areas where a declining farm economy is causing entrepreneurs to look for new economic opportunities. Rural communities are observing an emergence of new industries and a realignment of production agriculture in ways which are more consumer oriented and profitable. In rural areas, the pace of economic change is accelerating and the scope of that change is increasing. The driving forces affecting change have been analyzed and summarized by many researchers and industry analysts. This publication will be a useful tool for the many players who are involved in all levels of the industry that are re-evaluating their current business structures, relationships, and exploring new options to better position themselves in this competitive environment, and new players who are reviewing their choices for structuring their start-up businesses.

Scope of Article

This article is intended as a general tool which may be used by individuals, groups of related persons or groups of unrelated persons who seek to structure legal relationships among themselves and others for developing profitable business frameworks. While the information contained in this article is not intended as legal advice, it does contain a general discussion of New York and federal law related to the decision making process concerning (1) whether to form a business structure, and (2) which form of business structure to select. Readers should consult with their own legal or financial advisors to insure that the organizational choices they make best fit their individual or group needs.

ROLE OF ADVISORS

Assessing the Need for Advisors

Specialized help is necessary throughout the various stages of forming and structuring a new business. Leaders need professionals familiar with the new business formation process to work with them step by step concerning organizational, legal, economic, business feasibility and financial matters. Specialists with an understanding of the food and agriculture industry can be difficult to find.

Attorneys familiar with legal organizational options and state and federal laws should be retained to review and draw up the organizational documents, help develop capitalization plans and prepare agreements. Legal counsel typically is needed on a continuing basis after the business is operating, to ensure that it is conforming to applicable laws. References for such attorneys or other advisors may be obtained through the supporting organizations listed in the appendix.

In addition, organizers should seek financial counsel from an individual or firm familiar with appropriate accounting and finance matters, and who is conversant with options for debt and equity financing. It can be useful to consult a financial institution familiar with the target industry in order to anticipate capital needs and alternative methods of financing. These institutions may provide valuable input into the design of the feasibility study in order to meet requirements of a lender, and they may have staff members who are specialists in food and agriculture industry finance and accounting matters.

New businesses also should employ an independent accounting firm with relevant accounting experience prior to issuing any stock or collecting funds from potential investors. The new business typically will need an accountant to assist in setting up the bookkeeping system, organizing records for tax purposes, and designing equity plans. An outside accounting firm should be retained by managers and/or directors to conduct annual financial audits on an ongoing basis.

Finally, a variety of technical advisors may be needed, depending on the type of organization and business. For example, advice from an individual or firm with experience in marketing or market research would be important for producers organizing a marketing business. New cooperatives should seek advice from professionals who are experienced with their unique structural and financing characteristics. Organizations investing in property or other assets as well as entering industries affected by government regulations typically need expert advice on property valuation or meeting regulatory requirements. Other appropriate consultants might include engineers, architects, environmental specialists or plant designers. Typically the work of

all of the needed consultants and advisors should be detailed in the relevant sections of the business plan and/or prospectus for the new business.

Selecting Advisors

The level of professionalism and competence can vary greatly among those involved in advising any start-up business. Attorneys and accountants may be fully qualified to work with various types of firms but have little or no knowledge about start-up business organizations. The high level of risk associated with starting a new enterprise demands that decisions be based on the best information obtainable. New business organizations need to select the best advisors possible. Although many groups are typically in a rush to make the decision to form a business, adequate time should be taken to generate adequate funding to secure the most knowledgeable advisors available.

Criteria used for selecting advisors should include their level of experience with new organizations, ability to work with an assorted team of people, understanding of issues related to start-up organizations, ability to insure confidentiality, and professional objectivity. Advisors should be aware of both the potential advantages of selecting a given business structure as well as the potential disadvantages. The ability to work with groups possessing a variety of skills ranks high on the list of criteria, in that the organizing committee can include a wide range of people, some with limited experience with new business development. A comfortable working relationship with the steering committee is important for many reasons. Objectivity is of the utmost importance. For example, it would not be advisable to hire a firm that has a potential conflict of interest such as being a potential major supplier or equipment manufacturer to conduct a feasibility study.

Seeking the advice of other groups who have formed similar organizations can be very helpful for both getting referrals for good advisors as well as gaining a better understanding of what some of the pitfalls might be in starting a new business or restructuring an existing one. If a consulting firm is to be hired, identify at least three finalists, seek references from each of them and contact each reference. Request proposals from prospective firms detailing such information as experience, work with similar businesses, work with potential competitors, plan for back-up personnel support and fee schedule. Be sure you know who will be assigned to do the actual work.

There are also numerous sources of low-cost assistance and informational resources available. The appendix lists a number of resources available over the Internet.

BUSINESS STRUCTURES - GENERAL OVERVIEW

Definition of “Business Structure” and “Stakeholder”

The term “business structure”, when used in this article refers to a legal organization within which one person or multiple people may carry on an income-producing enterprise. The term includes, for example, business corporations, general partnerships, limited partnerships, cooperatives and limited liability companies.

Business structure owners, or those persons who hold equity interests in business structures (e.g. shareholders, partners or members) are referred to in this article as “stakeholders.” Stakeholders typically have an “at risk” investment in the business structure, meaning that the value of a stakeholder’s investment is tied to the success or failure of the business structure. In the event of dissolution of a business structure, stakeholders will receive a

return of their investment only if all other parties in interest, such as creditors, are first paid in full.¹

In most cases, a business structure is a separate legal organization which exists apart from its individual stakeholders. A business structure may involve a simple or complex organizational structure.

Framework for the Analysis

When evaluating whether a business structure should be formed and selecting the appropriate type of business structure, organizers should keep in mind the organizational purposes which the business structure must serve, such as: allocation of property rights, system of governance, relationships with outside parties, and distribution of net income.

Allocation of Property Interests in the Enterprise Among Participants

It is axiomatic that multiple individuals pooling their resources can accomplish more than those who refuse to work collectively. A business structure provides a legal framework within which stakeholders may pool capital to acquire assets necessary to produce income or to collectivize efforts. Specifically, group activity through a business structure is often the most efficient means to provide for joint marketing of products, providing of services or purchasing of inputs.

A business structure may also provide a means for multiple people to maintain fractional ownership interests in income producing assets, through indirect ownership of equity interests in

¹ See, e.g., NEW YORK BUSINESS CORPORATION LAW, § 1005(a)(3) (McKinney 2003 and Supp. 2005) (hereinafter “BCL”); see also NEW YORK COOPERATIVE CORPORATIONS LAW § 17 (McKinney 1999 and Supp. 2005) (hereinafter “CCL”).

a business structure. Additionally, a business structure permits the transfer of fractional interests in capital assets among existing or prospective stakeholders.

Similarly, a business structure provides a mechanism for the distribution of income and losses to stakeholders.

System of Governance

One of the most significant purposes behind formation of a business structure is to create a system of governance and a mechanism for decision making among stakeholders. According to state and federal statutes governing the operation of most business structures, decision making is carried out through a democratic process which may employ a variety of different voting formats, depending upon the form of business structure. In addition, the organizational documents of a business structure typically define the legal relationship among the stakeholders.

Defining Relationships with Outside Parties

Another objective behind forming a business structure is to shield the stakeholders from the legal consequences of doing business with third parties. Many business structures shield the personal assets of stakeholders from liability.² In addition, the legal relationship among

² For example, shareholders in a business corporation generally do not bear personal liability for the debts and obligations of the business corporation. BCL at § 628(c).

participants in a business structure will determine whether any one individual may bind the other participants as agent in connection with transactions involving third parties.³

Unfortunately, there is no rule of thumb which may serve as a general guide on the questions of whether to form a business structure and which structure to choose. Rather, the selection of an appropriate business structure depends upon a balancing of various factors to determine which type is best suited for a particular enterprise.

INTRODUCTION TO THE BUSINESS STRUCTURE FORMS

The following is a brief discussion which identifies the various business structure choices which are most likely to be used in an agricultural business enterprise⁴: sole proprietorship, business corporation, general partnership, limited partnership, cooperative and limited liability company.

Sole Proprietorship

No separate business structure is formed under state or federal law when a person carries on business as a sole proprietor. For this reason, the law does not distinguish between the sole proprietor in his or her business and personal capacities.

³ A partner's actions, if undertaken in furtherance of the partnership, generally are binding upon the remaining partners, even if their consent to the action was not first obtained. See NEW YORK PARTNERSHIP LAW § 20, (McKinney 1988 and Supp. 2005) (hereinafter "PL"). Similar authority to bind the organization is not generally held by a shareholder in a business corporation, members in a cooperative or members in a limited liability company.

⁴ It is important to note that this list is not exhaustive; it is intended to identify only the most suitable and likely business structure forms. Other types of entities which could own and operate agricultural business enterprises include, for example, not-for-profit corporations and certain trusts. Because the use of these entities would be limited to unique circumstances, this article does not address their use.

Because no structure need be formed to create a sole proprietorship, there are no costs directly associated with formation or maintenance of a business entity.⁵ Because there is no organizational structure for a sole proprietorship (and, because, only one business participant may be involved), there is no structure of governance associated with the sole proprietorship form. While sole proprietorships are easy and inexpensive for form, a sole proprietor's personal liability is not limited in any way. The unlimited personal liability of a sole proprietorship is a significant disadvantage to carrying on business in this form.

Business Corporation

A business corporation is a business structure separate from its stakeholders that is formed under the authority of a state incorporation statute.⁶ A business corporation is formed in New York State by filing a document entitled "Certificate of Incorporation" in a prescribed form with the New York Department of State in Albany.⁷ Governance and operation of a business corporation is as set forth in the state incorporation statute under which it is formed, as well as the business corporation's bylaws.

⁵ Many sole proprietors, however, choose to designate an assumed name for their businesses. For example, Pat Jones may decide to hold herself out to the world as "Pat Jones d/b/a Lazy Acres Farm." Ms. Jones would reserve the name "Lazy Acres Farm" by filing a Certificate of Assumed Name with the clerk of each county in which she conducts business pursuant to § 130 of the New York General Business Law. In practice, many people mistakenly believe that the filing of a Certificate of Assumed Name creates a business structure which is separate from its owner. However, that belief is incorrect. In the above example, there is no legal distinction between the individual "Pat Jones" and "Pat Jones d/b/a Lazy Acres Farm."

⁶ See, e.g. BCL at Article 4.

⁷ BCL at §§ 402-403.

Generally speaking, a business corporation may be formed in New York to carry on any lawful business activities.⁸ A business corporation has the power to do anything which a natural person may do, including, for example, owning property and entering into contracts with third parties.

The stakeholders of a business corporation are referred to as “shareholders” and the ownership interests held by shareholders in a business corporation are referred to as shares of stock.⁹ Under the BCL and the bylaws, shareholders of a business corporation vote to elect a board of directors for the business corporation.¹⁰ The board of directors, in turn, elects or appoints officers of the business corporation, which may include a president, vice president, secretary and treasurer.¹¹ The directors of a business corporation are responsible for the oversight and management of all corporate affairs.¹² The Business corporation acts through its board of directors, officers and employees.

In portions of this paper, the authors distinguish between two types of business corporations: “C corporations” and “S corporations.” This distinction relates solely to the status of a business corporation for purposes of income taxation. In the case of a C corporation, the corporation will be taxed on its earnings and its shareholders also will be taxed on distributions from the corporation. However, certain corporations may file an election with the Internal

⁸ Certain business activities may not be carried on by a business corporation formed under the BCL. Examples include the provision of professional services by licensed professionals such as doctors and accountants. See, e.g., NEW YORK EDUCATION LAW at § 6500 (McKinney 2001 and Supp. 2005).

⁹ See BCL at Article 6.

¹⁰ BCL at § 614.

¹¹ BCL at § 715.

¹² BCL at § 701.

Revenue Service to be taxed under Subchapter S of the Internal Revenue Code (“IRC”).¹³ As discussed in greater detail under “General Considerations in the Choice of Business Entity: Tax Considerations”, an S corporation generally is not subject to corporate income tax; instead its shareholders will reflect its taxable earnings and losses in their individual returns.

General Partnership

A general partnership is a business structure among at least two people, not organized as a corporation. A partnership may be formed under New York law by drafting and executing a written partnership agreement. A partnership’s stakeholders are referred to as “partners.” A partnership agreement defines the ownership interests and voting control of the partners. However, even if no written partnership agreement exists, two or more persons carrying on business as a unit may be deemed partners under New York law.¹⁴ One partner in a partnership has the authority to bind the partnership without the express written consent of all partners. As with a sole proprietorship, individual partners may be liable for the debts and obligations of the general partnership.

Section 130 of the New York General Business Law does require partners carrying on business as a partnership to file a certificate with the county clerk in each county in which the

¹³ The term “S Corporation” refers to a corporation that has filed an election to be treated as a small business corporation under the IRC. However, only a corporation that has the following characteristics may file an election as an S Corporation: (a) has seventy-five (75) or fewer shareholders; (b) with limited exceptions, has only natural persons as shareholders; (c) has no non-resident alien shareholder; (d) has only one class of stock; or (e) fits within certain defined types of corporation that are ineligible for treatment as an S Corporation. IRC §1361.

¹⁴ See PL at § 11. *Id.* Generally speaking, a partnership may be deemed to exist from the conduct of two or more people who carry on business together, including any conduct which evidences an intent to form a partnership, such as sharing joint control or management of the business, sharing of profits and losses and combining property, skill or knowledge. See, e.g. Cleland v. Thirion, 268 A.D. 2d 842 (3d Dept. 2000).

partnership will be doing business.¹⁵ However, the failure to file a certificate does not affect the rights of any third persons, and does not limit the liability of any partners under the provisions of the New York Partnership Law.¹⁶

Limited Partnership

A limited partnership is a business structure formed under the New York Partnership Law that includes at least one general partner and one limited partner.¹⁷ The primary distinction between a limited partnership and a general partnership is that one or more stakeholders of a limited partnership are identified as “limited partners.” Limited partners in a limited partnership do not have unlimited personal liability for the debts and obligations of the partnership and must not participate in the management of the limited partnership.¹⁸

Cooperative

A cooperative is an association of multiple people organized¹⁹ to carry on business on a cooperative basis. Cooperative stakeholders are called “members.”²⁰ Generally, cooperatives are not organized for profit as such, but are organized for the mutual benefit of their members. In most cases, cooperatives are formed so that members may procure goods or services on a collective basis or market their products through group activity.

¹⁵ New York General Business Law §130 (McKinney 1996 and Supp. 2005).

¹⁶ Id. at §130(7).

¹⁷ See PL at Article 8-A, Revised Limited Partnership Act, § 121 - 101(h).

¹⁸ PL at § 121 - 303.

¹⁹ Under the CCL, a cooperative may be organized only if five or more people serve as its organizers. CCL at § 11.

²⁰ CCL at § 40. Under the CCL, cooperatives may be formed either with or without capital stock. CCL at § 11(8). However, in either case, stakeholders are known as members.

Although many classifications of cooperatives exist under state and federal law, cooperatives are typically either agricultural or non-agricultural.²¹ The purposes for which cooperative corporations may be formed are, in most cases, more limited than business corporations. For example, agricultural cooperatives may be formed for purposes of “marketing, processing, manufacture, sale or other dispositions of agricultural products, agricultural waste product, or agricultural compost, . . . or the purchase of supplies for producers of agricultural products.”²²

The structure of cooperatives is analogous to that of business corporations. In fact, many aspects of the governance and operation of cooperatives formed under New York law are guided by the rules which are applicable to business corporations.²³ However, certain key distinctions from business corporations define the cooperative type of business entity, as set forth below:

- Cooperatives are owned by “members” rather than “shareholders.”²⁴ While cooperatives may be formed either with or without capital stock, the principal motivation for members to invest in cooperatives is to obtain access to markets (or services) through collective effort. Members generally are not investing to seek a return on their investment. Members may only receive returns on their investment within limits imposed by law.²⁵
- Cooperatives are democratically controlled. Under New York law, cooperatives must either employ a “one-member, one-vote” system of governance or a proportional voting

²¹ Examples of non-agricultural cooperatives formed under New York law include: worker cooperatives (see CCL at Article 5-A), rural electric cooperatives [see NEW YORK RURAL ELECTRIC COOPERATIVE LAW (McKinney 1948 and Supp. 2005) at Article 2], cooperative condominium associations or general cooperatives (see CCL at Article 2).

²² CCL at § 15.

²³ Section 5 of the CCL provides that “the Business Corporation Law applies to every corporation heretofore or hereafter formed under [the Cooperative Corporations Law].” CCL at § 5.

²⁴ CCL at Article 3.

²⁵ Under New York law, dividends and interest payable to members of a cooperative are limited. See CCL at § 72. In addition, certain federal statutes place limitations on the dividends payable by cooperatives. See, e.g. the Capper-Volstead Act (7 U.S.C. §§ 291-292), § 521 of the IRC (26 U.S.C. § 521), and the 1934 Securities Exchange Act (15 U.S.C § 781(g)(2)(E)).

system based upon the member's patronage with the cooperative. Most cooperatives utilize a "one-member, one-vote" system.²⁶

As with business corporations, cooperatives are formed under the authority of state law. However, because the defining characteristics of a cooperative are not tied directly to a cooperative corporation statute, it is possible to form a cooperative business structure under various state statutes, including the CCL, the BCL or the New York Not-for-Profit Corporations Law.²⁷

The governance of a cooperative is analogous to that of a business corporation. Its management and affairs are controlled by a board of directors elected by the members, and the leadership of the board of directors is elected by the board in the form of officers which may include president, vice president, secretary and treasurer.²⁸

Limited Liability Companies

Limited liability companies are the newest form of business structure in New York.²⁹ A limited liability company ("LLC") is a business structure organized under the LLCL and having one or more members as its stakeholders. LLCs offer personal protection from liability for their stakeholders and pass-through tax treatment (meaning no separate tax on the business structure

²⁶ CCL at §§ 44-46. In addition, both IRC § 521 and subchapter T require that cooperatives must be operated "on a cooperative basis" which has been construed to mean, generally, one vote per member or weighted voting based only upon patronage. See Cooperative Grain Supply Co. v. Commissioner, 407 F.2d 1158 (8th Cir. 1969).

²⁷ Although it is possible to form a New York Not-for-Profit Corporation which will qualify for purposes of federal income taxation as a cooperative, there are significant limitations on this business form which make it a less appealing entity choice. The most notable limitation arises from the fact that Not-for-Profit Corporations are not authorized to issue capital stock. Therefore, a cooperative organized under the Not-for-Profit Corporation Law would be severely restricted in its ability to raise equity capital.

²⁸ CCL at § Article 4.

²⁹ The New York Limited Liability Company Law (hereinafter the "LLCL"), under which limited liability companies are formed, became effective in 1994.

itself). Depending upon the organizational form chosen, an LLC may be managed directly by its members or by one or more managers.³⁰ An LLC is formed by filing its “Articles of Organization” in a prescribed form with the New York Department of State.³¹ Other organizational formalities include the drafting and executing by all members of a written operating agreement³² and publishing notice of formation of the LLC.³³ Since their introduction in New York in 1994, LLCs have become a popular form of business structure for small or medium sized businesses.

CHOOSING A BUSINESS STRUCTURE

Formation Factors

A number of factors are identified below which should be evaluated by organizers of any business structure in New York State before investing time, expense and effort in forming a business structure. Those factors include (i) personal stakeholder liability, (ii) means of formation, (iii) duration of business structure, (iv) system of governance, (v) taxation, (vi) securities registration and (vii) antitrust limitations (the “Formation Factors”). The discussion that follows identifies the Formation Factors, and applies the Formation Factors to each form of business structure.

Following this discussion about the various forms of business structures in light of key legal and organizational factors, a summary Table is presented (see pp. 33-34) that provides an

³⁰ LLCL at Article 4.

³¹ LLCL at § 209.

³² LLCL at § 417(c).

³³ LLCL at § 206.

overview of how various forms compare. The Table summarizes the general considerations in selecting the appropriate business structure.

i. Personal Stakeholder Liability. One of the most important considerations in choosing to form a business structure and in selecting the appropriate type of business structure is avoidance of personal liability by the stakeholders. When considering this factor, one must draw a distinction between those assets of a stakeholder which have been designated for a business purpose and those assets owned by stakeholders which have no connection to the business (for example, a personal residence). Assets which are committed for use in the business or are contributed to a business structure by a stakeholder always are subject to the claims of third parties. However, with certain types of business entities, the personal assets of stakeholders may be shielded from creditor claims.

It is also important to understand the types of liability to third parties which may arise. The first general category includes contractual obligations of the business, such as a promissory note evidencing indebtedness of the business to a lender.³⁴ The second general category of liability to third parties involves tort claims. Tort claims are claims for damage to property or personal injury as a result of the negligent or intentional conduct of a person, business structure

³⁴ In many cases, lenders of funds to businesses may require that the indebtedness be secured by property of the borrower. Real property and personal property (both tangible and intangible) may be pledged by a borrower to secure a loan. A mortgage is the instrument whereby a lien may be perfected against real property. Under Article 9 of the Uniform Commercial Code (the "UCC"), creditors may take a security interest in personal property by obtaining a security agreement authenticated by the debtor (see UCC at § 9-203) and perfecting the security interest as provided in Article 9, Part 3 of the UCC.

or its employees and agents. Formation of a proper business structure may shield stakeholders from personal liability for both contract obligations³⁵ and tort claims.

ii. Means of Formation. Each one of the business structures discussed in this paper has a unique means of being formed. Some, like a sole proprietorship, have few or no steps required to be formed. Others, such as business corporations and cooperatives, may require drafting complex organizational documents which in some cases must be filed with a public office such as the New York Secretary of State. Generally speaking, the more complex the means of formation, the more expense will be incurred as a result of fees for attorneys or other professionals, as well as filing fees and costs for recording.

iii. Duration of Business Structure. The organizers of a business structure must also decide whether the business structure is intended to outlive any stakeholder in the enterprise. Some business structures, such as a partnership, are deemed under law to expire upon the death or withdrawal of a stakeholder, while others, such as a corporation, have a perpetual existence without regard to the status of their stakeholders.

iv. System of Governance. Groups of stakeholders also select business structures to achieve a system of governance and decision-making for the business enterprise. Effective and responsive governance systems are critical to the success of any business enterprise. While most systems of governance are democratic, certain business structures, such as partnerships and LLCs, permit stakeholders great flexibility to agree upon varying governance systems.

³⁵ It is important to note that in many cases involving commercial lending, lenders may require, as a condition to lending, that stakeholders execute written guarantees relating to the obligations of their business entity. Guarantees provide for direct contractual recourse against stakeholders, thereby circumventing the liability shield offered by many business entities.

v. Taxation. Formation of a new business structure may trigger tax consequences for its stakeholders who contribute property at the time of, or following formation. Additionally, forming a new business structure may mean that a new taxpayer is created that will be required under federal and state law to pay income taxes. This may mean that the entire business enterprise, including the business structure and its stakeholders, incur a “double tax” as in the case of a C Corporation (described below). On the other hand, formation of other types of business structures, such as partnerships and LLCs, may result in the business structure itself paying no separate income tax.

Certain business structure choices may result in the stakeholder incurring “self-employment tax.” “Self-employment tax” is a federal tax consisting of two components, as follows (a) old-age, survivor and disability insurance, and (b) medicare hospital insurance.³⁶ Generally speaking, a sole proprietor, a general partner in a general or limited partnership, and a member having management authority on behalf of an LLC each may be subject to self-employment tax.

vi. Securities Registration. Generally speaking, an ownership interest issued by a business structure, whether considered stock, membership interest, partnership interest or some other form of interest, may be classified as a “security” under federal and state securities laws (the “Securities Laws”). If the interest is a security, then it may not be sold to any person unless (1) the interest is registered with the appropriate securities agencies, or (2) the interest or the transaction in which it is acquired is exempt from the Securities Laws. The process of causing a

³⁶ See IRC 1401. For 2004, the old age, survivor, and disability insurance tax rate was 12.4% on the first \$87,900 earned, and the medicare hospital insurance rate was 2.9% on all earnings.

security to become registered is very costly, and not practicable for most small or medium sized business structures. Therefore, it is unlikely that a sale of an interest will proceed unless there is an applicable exemption from registration.

vii. Antitrust Limitations. The antitrust laws prohibit certain practices which tend to hinder competition in the marketplace. Stated simply, competitors in the marketplace may not enter into agreements among themselves to set prices for their products or services. In addition, a person may not engage in certain unlawful practices to gain or maintain a monopoly position in the marketplace. These restrictions apply equally to individuals (including a sole proprietor), business corporations, partnerships, limited liability companies and other structures. However, as discussed in greater detail below, agricultural cooperatives have limited immunity from the antitrust laws, which is of particular importance in a rural or agricultural enterprise where the focus of the business is marketing its stakeholder's products.

Sole Proprietorship

Many people choose to carry on business as sole proprietors because doing so is inexpensive and simple. The only organizational step which may be required is the filing of a certificate of assumed name, and this step is only necessary if the sole proprietor uses a trade name other than his or her own name.³⁷

However, because a sole proprietorship is not a business structure separate from its owner, the sole proprietor enjoys no shield protecting him from the obligations of his or her business enterprise; both his or her business assets and personal assets are exposed to the claims of business creditors. This, obviously, represents a significant disadvantage of this entity form.

³⁷

See infra note 5.

A sole proprietorship does not exist perpetually, but instead ceases to exist when the sole proprietor dies. This form of doing business also lacks any formal system of governance, because the sole proprietor is free to implement all decisions he may make concerning his or her business without formal input from others.

There are, however, significant tax benefits associated with the sole proprietorship form of doing business. First, an individual may commence business as a sole proprietor without incurring any income tax as a result of segregating property associated with the business. Second, because no separate business structure is formed, there is no separate entity whose income is taxed; the sole proprietor merely reports income and losses from the business enterprise on his or her personal return. However, a sole proprietor will be subject to self-employment tax.

Because no separate business structure is created in the case of a sole proprietorship, there are no equity or other interests to be issued to stakeholders. Therefore, no Securities Laws considerations are present. While not being required to comply with State or Federal securities laws reduces the burden upon a sole proprietorship, lacking the means to issue stock means that there are few or no means for a sole proprietorship to raise equity capital for the business enterprise.

Finally, a sole proprietor will be bound by all antitrust restrictions, as described above.

Business Corporation

Although property actually invested in, or contributed to a business corporation is exposed to the claims of creditors, shareholders in a business corporation generally do not bear personal liability for the obligations of the corporation. As a practical matter, however,

shareholders may be required to provide their personal guarantees with respect to the repayment of any loan made to the business corporation. Moreover, under certain circumstances, courts may disregard the existence of the business corporation and hold the shareholders personally liable for the corporation's debts.³⁸

As described above, a business corporation is formed in New York by the filing of a certificate of incorporation with the Secretary of State, and by drafting and adopting bylaws. In addition, in many small business corporations, the shareholders may enter into complex shareholder agreements which, among other things, address transferability of interests and voting control among shareholders. These steps require, in most cases, the assistance of counsel in advising the corporation, drafting documents and filing same (where applicable) with the Secretary of State. Corporations can be expensive to form and maintain, and such expenses may include, for example: (1) incorporation costs, including those associated with drafting a certificate of incorporation and bylaws, filing fees, costs of preparing for and conducting an organizational meeting of incorporators; (2) annual franchise taxes; and (3) the expense and formality of qualifying to do business in each state in which the business corporation does or intends to do business.

Business corporations have perpetual existence, except that the certificate of incorporation may provide otherwise. This represents a significant advantage to this form of

³⁸ Generally, such circumstances would be limited to situations where (1) direct liability of the shareholders is mandated by statute; or (2) the shareholders have disregarded the separate existence of the business corporation. An example of the former is BCL § 630, which provides that the ten largest shareholders of a closely held corporation may be liable under certain circumstances for unpaid wages and salaries of the corporation's employees. The latter situation may be implicated when, for example, shareholders continue to carry on the corporation's business while refusing to conduct regular shareholder or board of director meetings.

business structure because the business enterprise will “live on,” notwithstanding the death or withdrawal of a shareholder.

The BCL provides that the business and affairs of a business corporation shall be managed under the direction of a board of directors.³⁹ The directors are democratically elected by the shareholders.⁴⁰ A corporation’s board of directors may also elect or appoint one or more officers, including a president, one or more vice presidents, a secretary and a treasurer, and such other officers as it may choose, or as may be provided in the bylaws.⁴¹ Officers of a corporation generally have the power to oversee, subject to the control of the board of directors, the day to day business operations of the corporation.

Upon formation of a corporation, unless the requirements of § 351 of the IRC are met, shareholders may recognize an income tax gain or loss as a result of contributing property to the corporation. For example, if a shareholder contributes to the corporation in exchange for stock property which has appreciated in value while owned by the shareholder, the shareholder may be forced to recognize a gain for purposes of income taxation. However, shareholders may avoid recognizing gain or loss if, immediately following the contribution, the business corporation is controlled by the shareholders contributing property.⁴² Shareholders will be deemed to control the business corporation if they, in the aggregate, hold 80% of (1) the votes of all classes of stock that have voting rights, and (2) the total of all other classes or stock.⁴³

³⁹ BCL at §701.

⁴⁰ BCL at §703(a).

⁴¹ BCL at §715(a).

⁴² IRC at §351(a).

⁴³ IRC §§ 351(a) and 368(c). See also Rev. Rule. 59-259, 1959-2 C.B. 115.

A potential disadvantage of the corporation form of business structure is that the corporation is a separate taxpayer which may be liable for income tax, in addition to any tax liability on the part of its shareholders (i.e.: a double tax). Specifically, income will be taxed to the corporation, and shareholders will be taxed on income that is distributed to shareholders. However, in the case of an S corporation, profits and losses of the business enterprise are merely reflected on the individual shareholder's return.⁴⁴ Therefore, an S corporation generally will not incur an entity level tax, but will instead pass-through income and losses to its shareholders.

Many closely-held C corporations effectively avoid the double tax on corporate earnings by paying sizeable salaries to shareholders who are also employees. Provided that the level of wages are reasonable, tax is thereby avoided at the corporate level, because the salaries give rise to a deduction for the corporation.

With respect to self-employment tax, dividends payable to shareholders in a business corporation are excluded in calculating the tax payable. In addition, shareholder/employees who receive salaries from a business corporation, are responsible for only the employee portion of the old age, survivor and disability insurance, and medicare hospital insurance.

Business corporations issue stock and other forms of property interests to their shareholders. Generally speaking, an interest in a business corporation (such as common stock) will be classified as a security under the Securities Laws. Therefore, issuers of such securities must determine whether an exemption applies in order to avoid a violation of the Securities Laws by offering or selling the interest to members of the public. The Securities Laws contain a number of potential exemptions which may be available to issuers, such as in the cases of private

⁴⁴ See infra note 13.

placements, limited offerings or small offerings. However, such exemptions generally will be available only if the number of investors is limited and the amount of capital to be raised is small.

Finally, with respect to the antitrust laws, as discussed above, business corporations enjoy no special immunity from, and are therefore bound by, the antitrust laws.

General Partnership/Limited Partnership

The general partnership form of business structure is favored by many because of its relative ease of formation and because it offers a fair degree of flexibility. However, a general partnership does not offer protection to the personal assets of its partners. Under New York law, to the extent that the assets of a general partnership are insufficient to satisfy claims against, or obligations of, the partnership, the creditor may reach beyond the partnership to the personal assets of the individual partner to seek satisfaction of the claim or obligations.⁴⁵ Moreover, a general partner may be subject to claims arising from the acts of his or her partner, provided that such acts were taken in furtherance of the general partnership.

In the case of a limited partnership, which includes one or more general partners and one or more limited partners, the personal liability of a general partner is the same as in a general partnership. Limited partners in a limited partnership are shielded from liability, but that protection comes at a cost.⁴⁶ The limited partner must not participate in the management or control of the limited partnership, or he will cause personal liability to attach.⁴⁷

⁴⁵ PL at §26(a).

⁴⁶ PL at §121-303(a).

⁴⁷ Id.

Limited partnerships can be expensive (because of legal fees, filing costs and related expenses) and complicated to form, and require the ongoing adherence to operational restrictions, including the avoidance of control by limited partners. As discussed above, to form a limited partnership, the stakeholders are required to draft and file with the New York Secretary of State a certificate of limited partnership.⁴⁸ In addition, the terms of an appropriate written agreement of limited partnership must be negotiated and drafted.⁴⁹

A general partnership is deemed to be dissolved upon the death, bankruptcy or withdrawal of one of the partners; however, this result can be avoided by including an express term in a written partnership agreement providing that the general partnership will continue in existence.⁵⁰ Similarly, a limited partnership is deemed to be dissolved if a general partner withdraws, unless at the time the general partner withdraws (i) there is at least one other general partner and the agreement of limited partnership permits the business of the limited partnership to be carried on by the remaining general partner(s), or (ii) the limited partners agree in writing within ninety (90) days after the withdrawal to continue the business of the limited partnership and to appoint one or more general partners.⁵¹

Governance of either a general or limited partnership shall be as provided in the partnership agreement. With a general partnership, partners have flexibility to define the mechanism for control of the partnership through a written partnership agreement. However,

⁴⁸ PL at §§ 121-201 and 121-206.

⁴⁹ PL at §121-110.

⁵⁰ PL at §62.

⁵¹ PL at §121-801.

under New York law, unless otherwise agreed in writing, control of a general partnership will be exercised by the vote of a majority of the partners. Governance of a limited partnership is similar to that of a general partnership, except that limited partners may not vote or otherwise exercise control with respect to the business of the limited partnership.⁵²

General partnerships and limited partnerships are treated similarly for purposes of income taxation; therefore, the following discussion is intended to apply to both business structures. Section 721 of the IRC provides, generally, that for purposes of federal income taxation, neither the partnership nor any of its partners will recognize any gain or loss when property is contributed to a partnership in exchange for a partnership interest.⁵³ This rule applies, generally, without regard to whether the contribution is made at the time the partnership is formed, or at a later time. Moreover, there is no need for the partners to demonstrate control over the partnership immediately following the transfer, as with a business corporation. However, certain exceptions to this general rule exist, including: (1) recognition of gain if liabilities of the contributing partner are assumed in connection with the transfer, (2) the transfer must be of an interest in property, not services, (3) the partnership must not be an “investment company”, (4) the contribution must not constitute a disguised sale, and (5) circumstances in which “boot” is received by the contributing partner.

⁵² See infra note 47.

⁵³ See IRC at §721(a).

A general partner's distributive share of income from a general or limited partnership generally will be subject to self-employment tax.⁵⁴ However, in a limited partnership, a limited partner's distributive share will not be subject to self-employment tax.

In addition, the partnership business structure enjoys a preferred status, because partnerships, generally, do not pay federal income tax. Instead, each individual partner reports gain or loss from the business enterprise on his or her individual return.⁵⁵

Securities law considerations are also important with respect to the partnership business structure. Generally speaking, the treatment of partnership interests will be consistent with those discussed above with respect to business corporations.

Finally, partnerships, as with sole proprietorships and corporations, enjoy no special immunity from the antitrust laws, and therefore must comply with same.

Cooperative

The members of a cooperative generally are afforded the same limited liability protection as is afforded to shareholders of a business corporation.⁵⁶ However, depending upon the statute under which the cooperative is organized, the application of this general rule may vary.

Typically, the expenses and formalities associated with forming a cooperative are analogous to those of forming a business corporation. In addition, if a cooperative intends to seek recognition as an agricultural cooperative which is exempt from federal income taxation

⁵⁴ See IRC § 1402(a).

⁵⁵ See IRC at §701.

⁵⁶ In one instance, the personal liability of members and directors of a cooperative is potentially more expansive than with a business corporation. Under § 47 of the CCL, all members and directors of a cooperative are liable for the unpaid wages and salaries of its employees. For a business corporation, only its ten largest shareholders may face such liability. See BCL at § 630.

under § 521 of the Internal Revenue Code (see discussion below), the cooperative and its legal and tax advisors must complete and file a Form 1028 Application for Recognition of Exempt Status immediately following formation. This process can be lengthy and time consuming.

Additionally, a cooperative enjoys perpetual existence unless otherwise specified in its certificate of incorporation. As with a business corporation, governance of the business structure is the responsibility of the cooperative's board of directors, and the board of directors has the authority to elect officers, including a president, vice president, secretary and treasurer.⁵⁷

Business structures taxed as cooperatives under the IRC must operate on a cooperative basis. An organization will be deemed operating on a cooperative basis if it is democratically controlled by members and, if its earnings are distributed to its patrons proportionate to their use of the business or the amount of their patronage with the organization. Cooperatives fall into two classes for purposes of income taxation: exempt and non-exempt. In the case of an exempt cooperative, most of the net earnings of the entity are not subject to federal income taxation.⁵⁸ The net earnings of a non-exempt cooperative, also referred to as a "Subchapter T" cooperative, is taxable, but qualifies for offsetting deductions to the extent such net earnings are derived from business done with or for patrons ("Patronage-Sourced Income").⁵⁹

The choice of whether to be treated for tax purposes as an exempt or non-exempt cooperative will be influenced by a number of organizational and operational considerations.

⁵⁷ See CCL at § 64.

⁵⁸ See IRC § 521. Generally, most of the net earnings of any cooperative are derived from patronage with members ("Patronage-Sourced Income"). In the case of an exempt cooperative, Patronage-Sourced Income, as well as net earnings derived from other sources such as business with a government entity, is not subject to taxation.

⁵⁹ See Subchapter T of the IRC (IRC § 1382 et. seq)

Generally speaking, each type of cooperative can avoid paying income tax on its earnings derived from business carried on with or for patrons. Exempt cooperatives enjoy certain advantages not shared by non-exempt cooperatives, including (1) the ability to avoid taxation on earnings which are not Patronage- Sourced Income, and (2) exemption from the registration requirements of the federal securities laws. However, exempt cooperatives are burdened with certain organizational and operational restrictions. Therefore, IRC restrictions may not make exempt cooperatives practical in all circumstances.

As mentioned above, a cooperative which seeks to be recognized as exempt from taxation under § 521 of the IRC must complete and file a Form 1028 application for exempt status. The IRS will scrutinize closely any Form 1028 to determine whether the applicant meets the organizational and operational restrictions imposed upon exempt cooperatives. Included among the restrictions, the cooperative must show that all of its voting members are “producers” of agricultural products.⁶⁰ An exempt cooperative cannot market the products of non-producers, and must limit to no more than 15% of its total business its sale of supplies to non-producers. An exempt cooperative’s business done with or for members must comprise at least 50% of its total. Also, if organized with capital stock, the rate of dividends payable on such stock must be fixed at the no more than the greater of the legal rate of interest in the cooperative’s state of incorporation or eight percent.

Many cooperatives today are classified for tax purposes as non-exempt. It is not necessary for a non-exempt cooperative to seek recognition from the IRS of its taxable status. However, it is necessary for a non-exempt cooperative to distribute all of its Patronage-Sourced

⁶⁰ See IRC § 521(b)(1).

Income to patrons in order to qualify for subchapter T deductions. Specifically, Patronage-Sourced Income will be taxable to a non-exempt cooperative unless such Patronage-Sourced Income is distributed to patrons in proportion to their patronage with the cooperative in cash or qualified written notices of allocation.⁶¹

Exempt cooperatives enjoy a unique status under the Securities Laws. Pursuant to section 3(a)(5) of the federal Securities Act of 1933 (the “1933 Act”), any security issued by a cooperative which is recognized as exempt from taxation under § 521 of the IRC is exempt automatically from registration under the 1933 Act. Such exemption applies without regard to the number of investors purchasing interests in the cooperative or the total amount paid to the cooperative for the interests. Therefore, it may be advantageous for a cooperative seeking to issue securities to seek exemption under IRC § 521. However, organizers will need to balance the necessity of the exemption against the formidable operating and structural restrictions placed upon exempt cooperatives.

Two federal statutes, the Capper-Volstead Act⁶² and Section 6 of the Clayton Act, grant cooperatives limited immunity from the antitrust laws. By their nature, cooperatives involve the agreement among members to fix prices at which products or services will be sold or purchased. Therefore, without an exemption from the antitrust laws, cooperatives would be prohibited from fulfilling their purposes of achieving unity of effort and the voluntary elimination of competition among their members.

⁶¹ See IRC § 1382(b)(1).

⁶² 7 U.S.C. § 291 (hereinafter the “Capper-Volstead Act”).

Under the Capper-Volstead Act, agricultural producers may act together in associations to collectively market products or procure supplies and may make the necessary contracts and agreements to carry out such activities.⁶³ Although cooperatives are permitted to engage in activity which could constitute unlawful price fixing if carried out by other types of business structures, various prohibitions in the antitrust laws are equally applicable to cooperatives. For example, cooperatives may not engage in predatory practices to gain monopoly positions. Producers and their cooperatives are also forbidden from entering into price-fixing agreements or business combinations with non-producers and non-cooperatives.

Limited Liability Company

Limited liability companies are desired by business organizers because they combine one of the best features of a business corporation (limited stakeholder liability) with one of the best features of a partnership (no entity-level tax). Specifically, members in a limited liability company are shielded from personal liability much in the same way that shareholders in a business corporation are. Additionally, both multiple-member and single member LLCs are pass-through tax business structures, as discussed below.

Although there are many advantages to the LLC form of business structure, the expense of forming an LLC may be considerable. In New York, an organizer of an LLC must file with the Secretary of State the LLC's articles of organization,⁶⁴ and must adopt a written operating agreement within ninety (90) days of filing the Articles of Organization with the Secretary of

⁶³ See Capper-Volstead Act at § 1.

⁶⁴ LLCL at § 203.

State.⁶⁵ Finally, an organizer of an LLC must publish, for six (6) successive weeks, notice of formation of the LLC in two newspapers circulating in the county in which the LLC's principal office is located.⁶⁶ An LLC exists until such time as its articles of organizations are cancelled.⁶⁷

There is great flexibility in structuring an LLC's system of governance. The members of an LLC may select whether the LLC will be governed by its members, or by one or more "managers." In either case, the form of management structure should be reflected in the LLC's articles of organization.⁶⁸ In addition, an LLC may designate one or more officers, as may be provided in the operating agreement of the LLC.

The IRC generally treats LLCs as either sole proprietorships, in the case of single member LLCs, or partnerships, in the case of multiple member LLCs. Therefore, a single member LLC may be organized with no federal income tax consequences. The profits and losses of a multiple member LLC will be deemed distributed to its members as with a partnership. In both cases, the entity pays no tax.

LLCs also are treated as partnerships, generally, with respect to the question of imposition of self-employment tax. However, the law is unsettled at this point with respect to whether members of an LLC who are not active in management are subject to self-employment tax. Generally, non-management members may be treated as limited partners in a limited partnership, and therefore not be subject to self-employment tax.

⁶⁵ LLCL at § 417.

⁶⁶ LLCL at §206.

⁶⁷ LLCL at §203(d).

⁶⁸ LLCL at § 203(e)(7).

For an LLC organized in New York, its memberships interests will be subject to the same Securities Laws considerations as stock issued by a business corporation. LLCs also enjoy no special immunity from the antitrust laws.

SUMMARY

The following table summarizes the various characteristics of the business structures that have been reviewed in this publication. Individuals or groups considering the formation of a new business structure in New York State must decide for themselves what the most appropriate structure will be for their businesses. We hope this publication helps shed light on how to best make that decision.

TABLE 1. FACTORS IN THE CHOICE OF BUSINESS STRUCTURE

<u>Factor</u>	<u>Sole Proprietorship</u>	<u>Business Corporation</u>	<u>Partnerships</u>	<u>Cooperative</u>	<u>Limited Liability Company</u>
Personal stakeholder liability	No shield against personal liability.	Shareholders generally do not have personal liability.	Personal liability of partners in a general partnership is not limited. Limited partnerships can provide protection to limited partners.	Members are typically afforded same limited liability protection afforded to shareholders in general business corporation.	Similar to general business corporation in that investors are shielded from personal liability.
Means of formation	Because there is no entity to form, a sole proprietorship is easy and inexpensive to initiate.	Expenses can include: incorporation costs, filing fees, annual franchise taxes and filing documents to qualify to do business in identified states.	Minimal expense and formality. Usually a written agreement is utilized.	Typically, expense and formality similar to forming a business corporation. Additional expenses and formality required to be recognized under Sec. 521 of Internal Revenue Code.	Organization may be expensive and complex. Filing articles of organization with the Secretary of State, developing written operating agreement and publication of notice of formation.
Duration of Business Structure	A sole proprietorship will cease to exist upon the death or bankruptcy of the sole proprietor.	Unless the certificate of incorporation specifies an expiration date, a corporation will have perpetual existence.	Unless otherwise specified, death, withdrawal, or bankruptcy of a partner will result in termination.	Unless the certificate of incorporation specifies an expiration date, a cooperative will have perpetual existence.	Exists until such time when articles of organization are canceled. Once formed, exists indefinitely.
System of governance	Sole proprietor has total control.	Management is by a Board of Directors. Control is exercised by shareholders who vote for directors.	Management is carried out as provided in the partnership agreement. Unless otherwise provided in the partnership agreement, majority vote of partners governs.	Management is by a Board of Directors. Control is exercised by members who vote for directors.	LLC members can either designate "managers" or assume management responsibility themselves.
Securities registration	Does not involve issuance of securities.	If securities are issued, entity may be required to register under provisions of state and federal securities law. Entity may qualify for exemption for such cases as: private placements, limited offerings or small offerings.	If securities are issued, entity may be required to register under provisions of state and federal securities law. Entity may qualify for exemption for such cases as: private placements, limited offerings or small offerings.	Exempt cooperatives enjoy a unique status under the securities laws and are exempt from registering securities regardless of the number of investors or amount if investment.	If securities are issued, entity may be required to register under provisions of state and federal securities law. Entity may qualify for exemption for such cases as: private placements, limited offerings or small offerings.

<u>Factor</u>	<u>Sole Proprietorship</u>	<u>Business Corporation</u>	<u>Partnerships</u>	<u>Cooperative</u>	<u>Limited Liability Company</u>
Antitrust limitations	No immunity from anti-trust laws.	No immunity from anti-trust laws.	No immunity from anti-trust laws.	Under the Capper-Volstead Act and Clayton Act, agricultural producers may act together to collectively market products and enjoy limited immunity from anti-trust laws.	No immunity from anti-trust laws unless structured as an agricultural producer cooperative.
Property interests	A sole proprietor has a direct ownership interest in business assets.	A shareholder owns shares of stock in a business corporation, which is an intangible form of property interest. The shareholder therefore has an indirect interest in business assets. Agreements among shareholders may place transfer restrictions upon shares.	Partners own a partnership interest in the partnership, which is an intangible form of property interest. The partner therefore has an indirect ownership interest in business assets. Agreements among partners may place transfer restrictions upon partnership interests.	Members own either shares of stock or a membership interest in the cooperative, depending upon whether the cooperative is organized with or without capital stock. The cooperative may also issue different types of equity interests to its members, depending upon the patronage capital system employed by the cooperative. Such interests are intangible, and represent an indirect ownership interest in business assets. The cooperative's charter documents, applicable law, and agreements among members may place transfer restrictions upon such interests.	Members own a membership interest in the limited liability company, which is an intangible form of property interest. The member therefore has an indirect ownership interest in business assets. Agreements among members may place transfer restrictions upon membership interests.
Earnings distribution	Earnings are received directly by the sole proprietor.	Earnings distributed to shareholders based on ownership interest.	Earnings distributed to partners based the partnership agreement.	Earnings distributed to members on basis of patronage.	Earnings distributed to members based on operating agreement.

<u>Factor</u>	<u>Sole Proprietorship</u>	<u>Business Corporation</u>	<u>Partnerships</u>	<u>Cooperative</u>	<u>Limited Liability Company</u>
Taxation and New York State Fees	All tax consequences are the responsibility of sole proprietor.	In general, "C" corporations incur double taxation; tax charged on income at the corporate level as well as at the shareholder level. Corporations pay New York State Franchise taxes. In the case of an "S" corporation, income is passed through to shareholders and taxed at their level.	Not subject to income taxation. Partners are subject to income taxation for their share of the partnership's profits or losses. Partners who are New York State residents pay NYS income taxes.	Cooperatives fall into two categories: 1. Exempt - where most of the net earnings are not subject to federal income taxation. 2. Non-exempt - where net earnings are taxable but qualifies for offsetting deductions on earnings derived from business done with patrons Cooperatives formed in New York State pay an annual fee in lieu of state franchise tax.	Single member LLC's are treated as sole proprietorship. Multiple member LLC's are treated as Partnerships. In both cases, the entity pays no taxes with losses or income passed through to member(s). LLCs formed in New York pay an annual fee.

APPENDIX: ONLINE RESOURCES

Cornell Agricultural Innovation Center

<http://agviability.cornell.edu>

- Business Planning and structure resources

Cornell Cooperative Enterprise Program

<http://cooperatives.aem.cornell.edu>

- “Considering Cooperation: A Guide for New Cooperative Development”

Cornell Entrepreneurship and Personal Enterprise Program

<http://epe.cornell.edu>

- Educational resources, internships

Empire State Development

<http://www.empire.state.ny.us/>

- Economic development services and programs

Governor’s Office of Regulatory Reform

<http://www.gorr.state.ny.us/gorr/>

- Information on licenses and permits that may be required to do business in New York State

New York Attorney General’s Office

<http://www.oag.state.ny.us/>

- Information concerning issuance of securities

New York Department of State

<http://www.dos.state.ny.us/corp/>

- “Forming a Corporation in New York”
- Filing Information, Fees, and Publications
- “Forming a Limited Liability Company in New York State”

NY ! Small Business

<http://www.nylovesmallbiz.com>

- Information on Starting Small Businesses in New York State

New York State Bar Association

<http://www.nysba.org>

- Lawyer Referral and Information Services

New York State Consolidated Laws:

- Business Corporations
<http://assembly.state.ny.us/leg/?cl=13/>
- Partnerships
<http://assembly.state.ny.us/leg/?cl=81/>
- Limited Liability Companies

- <http://assembly.state.ny.us/leg/?cl=57/>
- Cooperative Corporations
- <http://assembly.state.ny.us/leg/?cl=21/>
- Economic Development
- <http://assembly.state.ny.us/leg/?cl=1/>

New York State Business Development Corporation

<http://www.nybdc.com>

- Innovative financing to small businesses across New York State

New York State Department of Taxation and Finance

<http://www.tax.state.ny.us/sbc/>

- Business Tax information on various types of business entities, forms and instructions
- “New York State Tax Guide for New Businesses”, 44 pp. publication covers range of topics related to new business start-up

New York State Regional Small Business Development Centers

<http://www.smallbiz.suny.edu/centers/>

- collection of regional sites supporting small business development

New York State Small Business Development Center

<http://www.nyssbdc.org>

- Regional links for small businesses

U.S. Department of Agriculture, Rural Business-Cooperative Service

<http://www.rurdev.usda.gov/rbs/>

- Programs and services for rural businesses
- Special initiatives on energy and cooperative business

U.S. Department of Commerce, International Trade Administration, Export Trading Company Affairs

<http://www.ita.doc.gov//td/oetca/>

- Export Trading Company formation
- Trade information

U.S. Securities and Exchange Commission

<http://www.sec.gov/>

- Information concerning issuance of securities

U.S. Small Business Administration

<http://www.sba.gov>

- Customer oriented programs and information for small businesses

<http://www.score.org>

- Service Corps of Retired Executives