Entity Set-Up Questionnaire

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Establishing an appropriate business entity is an important step for maple business owners. This document provides an opportunity for owners and partners to document key features of the business that will guide a legal professionals and owners to an appropriate entity selection.

Maple sap and syrup production is a capital intensive business that requires significant financial investment. The labor and management is varied and intensive at certain times. The production yield and sales potential can be variable in certain years. Finally, the commitment to business management and forest stewardship is generally long-term. These factors and many more exemplify the need for informed and formal agreements to meet business objectives and establish clarity on the risks, rewards and governing guidance of the operating business.

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I. Business Partners and Members

Add the contact information of all business partners and members

Last Name	First Name	Phone	Email	Street Address

[For use by your attorney] Discuss: Who is your client? Is joint representation appropriate? Name your client in your fee agreement or engagement letter.

Check one:

New Entity _____ New Partner/Member _____ Entity Conversion _____ Other _____

What name has been selected for the entity? Has a name registration (DBA) been filed with the Vermont Secretary of State's office?

Name ____ DBA filed: Yes _____ No _____

Conduct a business search with your Secretary of State's office to determine whether the farm has filed a "doing business as" registration or has otherwise reserved the farm's name. If no DBA has been filed, conduct a search to determine if someone else has already claimed the name or a similar name.

What is the address of the principal place of business?

Address ____

Town ____ State __________ Zipcode __________

II. Nature of the Business

What is the principal business activity?

Do you contemplate expanding into other activities in the future?

Do you want to restrict the rights of Partners/Members to engage in outside business activities that may compete with the entity?

The three question above relate to each member's duty of loyalty. Entity authorizing legislation in most states will impose upon members a duty of loyalty to the Company. The duty of loyalty requires members or partners to refrain from competing with the company in the conduct of the company's business. It also requires that the members or partners bring business opportunities to the company rather than seizing the opportunity for personal gain. <u>How you describe the business in both its articles of organization and in its foundational operating or other agreements will establish the extent of this duty.</u> Clients should understand the nature of this duty and you should craft a description of the "company's business" that reflects their expectations about outside business activities and opportunities.

Do you intend to seek outside investors to finance your business or to finance expansion?

This question relates to choice of entity. Some outside investors will prefer a corporate structure over a limited liability structure but this is changing.

How is the current operation taxed? Is it taxed as a partnership, a sole proprietorship or an S or C Corp?

____ What is your fiscal year? _______________

Most farm entities choose to be taxed as a partnership where income or losses flows through to the individual members or partners. And most have a calendar year fiscal year. If the formation of the entity will result in a change of taxation from a sole proprietorship to partnership taxation this question is an opportunity to explain the differences and to suggest that the operating or other foundational documents be reviewed by their accountant. They will also need to set up separate books for the new entity.

Tax provisions within an operating agreement typically recite verbatim IRS rules on partnership taxation and the maintenance of capital accounts. The operating agreement will also specify how the business is to be taxed.

Do any Partners/Members reside in a state other than Vermont? Yes _____ State _________________ No _____

Are all Partners/Members citizens of the United States? Yes _____ No _____

When members or partners reside outside the state of formation, some states will assert a right to tax that income and will require the business to withhold. Check your jurisdiction.

III. Duration of the Business

On what date will the business begin? ______________________

Accountants will prefer that the new entity begin on January 1 for a business taxed on a calendar year basis. The formation process will typically allow for prospective formation, though not retroactive formation. That is, articles filed in November can specify a formation date of January 1 of the following year.

Do you want the business to run for a particular term of years or until the Partners/Members decide to terminate the business?

____

Most farms utilizing a new entity to be used for farm transfer will opt for perpetual existence with termination occurring when and under what circumstances the business will be terminated as specified in the operating agreement. This is an opportunity to discuss how that provision should be drafted and how the decision should be made. Majority vote? Unanimous vote?

IV. Contributions of Partners/Members

A. What items of personal property will each Partners/Members contribute to the business? Alternatively, please provide me with a balance sheet for the business or for each prospective Partner/Member indicating property to be contributed.

	Name:		Name:	
	Market Value	**Cost Basis**	**Market Value**	**Cost Basis**
Sugarwoods—Property (Acres or # of potential taps)				
Tubing System				
Sap Collection: Tanks				
Sap Collection: Equipment, Pumps, etc.				
Syrup Processing Equipment				
Sugarhouse/Processing Facility				
Other				
Total				

The value of property contributed by each member forms the basis for their initial capital contribution. Most often clients will provide a balance sheet indicating assets to be transferred to the new entity rather than complete the table in the questionnaire. Cost basis documentation is important for calculating debt in excess of basis if/when those calculations are required.

A current balance sheet, equipment list, and depreciation schedule (excluding the farm real estate should be incorporated into the operating agreement or other foundational document as well as a schedule indicating the value of each member's contributions.

The reference to cost basis provides an opportunity to discuss the need to track their cost basis in these assets once converted to units in an LLC or a capital account or other interest in an entity.

If any personal property owned by a Partner/Member will be leased to the business, what are the terms of the lease? (Lease payment, lease period, maintenance/replacement, and insurance)

Asset	Lease Payment	Period	Terms for Maintenance and Insurance

Will any personal property contributed by a Partner/Member be subject to debt? Will the debt be assumed by the business?

Owner Name	Asset	Value ($)	Debt Amount ($)

Transfers of property to an LLC are most often tax free. The primary exception is when a member transfers property to an LLC subject to debt, the LLC assumes the debt and the liability exceeds transferor's basis in the new entity. This can easily happen when a member is transferring farm raised or other assets with a zero basis and the assets carry significant debt. Debt in excess of basis is considered a taxable cash distribution to the transferor. This is true even if the transferor retains personal liability on the debt. (See 26 U.S.C §357).

B. Real Property Contributions

1. Will any real property (real estate) owned by Partners/Members be used by the business? If so, please describe the property and provide an estimate of its value.

In most instances it will be best to exclude the land basis from the sugaring operation entity. The land base can remain in sole proprietorship or in another entity. This dual legal structure shields the land base from liabilities associated with the sugaring operation.

2. How will the Partner/Member be compensated for the use of the real property? What are the fixed costs for the property? Is there a lease? What are the terms of use?

3. Will the business make improvements to real property owned by a Partner/Member? Who will own the improvement at the termination of the business?

Farm real estate is most often "use property" of the entity meaning it is made available for the use of the business but is not property of the entity. This should be noted in the Operating Agreement. Tenure in the real property is most often handled through a lease between the entity and the land owner. A sample lease is provided in the Appendix. The lease will provide whether the landowner or the entity will be responsible for land costs, improvements, upkeep and maintenance.

C. Cash Contributions

1. What outright cash contributions will be made to the business and by whom?

[Cash contributions should be reflected in the balance sheet and in the capital contribution of the contributor.]

2. What cash loans will be made to the partnership by a Partners/Members? What are the terms of the loan?

3. Will any Partners/Members contribute primarily services to the business? If services will be contributed will there be a service agreement? How will it be valued?

Contribution of Services

All New England states except for Rhode Island allow the contribution of services and intangible property to an LLC as a capital contribution. Rhode Island's LLC statute provides that the contribution must be capital. R.I. Gen. Laws § 7-16-24

While the members or partners in these five New England states can treat a services contract as a capital contribution, the IRS will require the recognition of income to the service member equal to the capital interest. A contribution of tangible property to the LLC on the other hand is typically not a taxable transfer.

D. Future Capital Contributions

1. Can Partners/Members make additional capital contributions? Under what conditions?

2. May Partner-s/Members reinvest profits in the business? Must reinvestments be in the same proportion as the initial capital contributions? Or may capital accounts change to reflect the additional investment?

This question presents an opportunity to discuss with clients how capital share might change over time and how and whether that will affect management control and income distributions.

E. Withdrawals of Capital

1. Can Partners/Members withdraw capital contributions? Under what conditions?

A withdrawal of capital can have significant consequences for the viability of the business. Conditions for withdrawal should be discussed and included in the operating agreement.

V. Labor Contributions

Name of Member/Partner	Role in the Business and Percentage of Time Devoted to the Business

Will guaranteed payments be made to Partners? Will a salary be paid? Please describe the payment terms for each Partner/Member.

Will the entity be taxed as a partnership or as an S Corp?

VI. Distributions of Income

Under what conditions may additional funds be withdrawn during the year as a drawing account or advance on ordinary income?

How will the income of the business be allocated among Partners/Members? Will it be allocated on the basis of capital share, share of units or some other basis?

How will decisions about the distributions of income allocations be made? By mutual agreement? By majority vote of outstanding units? By majority of capital ownership?

X. Miscellaneous

Will the Partners/Members be covered under Worker's Compensation insurance?

Please list names, addresses and phone numbers of professionals providing tax, accounting, cash flow analysis or business planning assistance. For each professional, please indicate whether I may discuss with him or her, aspects of your case even if it requires sharing confidential information.

Last Name	First Name	Phone	Address	Permission to Contact

____

/s/ Partner/Member

____

/s/ Partner/Member

____

/s/ Partner/Member

____

/s/ Partner/Member

VII. Accounts and Records

Will records be kept on a cash or accrual basis? ____

Who will be responsible for keeping the books of the business?

____

Who will be responsible for the tax matters of the business?

____

Will the books be open for inspection by all members/partners? At what times? Are there types of information that should be withheld from Partners/Members?

Where will the funds of the business be deposited?

____

Who will have the authority to sign checks on the business account?

____

VIII. Management of the Business

Will any limitations be placed on a Partners/Member's authority to bind the business?

If partners/members are not to have an equal voice in management, how will management authority be divided?

How will decisions be settled? By mutual agreement? By majority vote? By arbitration? By majority of capital ownership? By one designated member?

How often will Partners/Members meet to discuss business progress or problems?

Should the management rights of those who receive an interest in the business as a result of divorce or bankruptcy be limited?

IX. Dissolution of the Business

In the event of premature death, disability or voluntary withdrawal of a partner/member, will there be an agreement on the part of the remaining members to buyout the withdrawing member's share?

Will the buyout be mandatory or voluntary? What will be the terms of the buyout agreement?

How will value be established? Will the business maintain life insurance to finance the buy-out?

Are there other events that should cause dissolution of the business?

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