



2024

BUSINESS IN 2023

WEEKLY WEBINAR SERIES



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& KING ATTORNEYS

Your Host



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TODAY'S AGENDA

Gabe Oberfield – (12:00PM-12:05PM)

- Intros / Agenda

Kate Hajjar – (12:05PM-12:15PM)

- Hate crime reporting on college campuses

Ariyana DeWitz (with Mario Ayoub) – (12:15PM-12:25PM)

- Microsoft and FTC COPPA Violations

Sam Burgess – (12:25PM-12:35PM)

- The business planning checklist (including governing documents and succession planning)

Rayndel Valle – (12:35PM-12:45PM)

- Corporate structure considerations

G. Oberfield – (12:45PM)

- Questions / Wrap Up

Hate Crime Reporting on College Campuses



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Microsoft and FTC COPPA Violations



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Ariyana DeWitz

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(under the supervision of Mario Ayoub)

Buffalo, NY

What is Microsoft Xbox?



Xbox Series X – the latest console

- Gaming console that enable users to play video games – also have streaming services and online services
- Released in 2001
- Since 2001, Microsoft has released 4 additional video game consoles
 - Xbox 360, Xbox One, Xbox Series S & Xbox Series X
- As of December 2022, there are 120 million monthly active users

COPPA: Background

- 1998 – Congress enacted the Children’s Online Privacy Protection Act (COPPA) to protect safety and privacy of children
- Prohibits unauthorized or unnecessary collection of children’s personal information online
- 2000 – FTC promulgated the COPPA Rule: imposed requirements to maintain children’s safety on operators of online services with actual knowledge they are collecting personal information from children under 13 years old

Microsoft Xbox subject to COPPA Rule

- Promotions for Xbox Live and related products depicted children and tweens
- Advertised the use of Xbox Live to access child-oriented content
- From 2017-2021, approximately 218k users in the United States entered birthdates indicated they were children younger than 13 years old when creating a Microsoft account

FTC Allegations

- Defendant Failed to Provide Notice and Obtain Verifiable Parental Consent
 - COPPA Section 312.4(a): requires operators to provide notice and obtain verifiable consent before collecting, using, or disclosing personal information from children
- Defendant Retained Personal Information Collected from Children for Longer Than Reasonably Necessary
 - COPPA Section 312.10: operator must retain information for only as long as reasonable
 - 16 C.F.R § 312.5: if parental consent not obtained after a reasonable time from the date the information is collected, the operator must delete the information from its records

Privacy Violations

- To create an account, users are required to provide personal information such as name, email address and date of birth. At least until 2021, users were then prompted to enter their phone number and accept Microsoft's service agreement and privacy statement.
- FTC argues Microsoft should have obtained parental consent before requesting additional information – the child's phone number
- Regarding the notice requirement, FTC found Microsoft only provided notice after the parent's consented to their child's account creation
- Prior to April 2021, Microsoft's notice information was considered insufficient because it failed to inform parents of their information practices regarding children

Privacy Violations

- From 2015 until at least October 2020, Microsoft indefinitely retained children's personal information during account creation, even when the account process was not completed by a child
- FTC found approximately 10 million individuals, including children, had their personal information retained longer than necessary despite COPPA's mandate to delete the information

FTC Proposed Order

- Requires Microsoft to implement business practices to increase privacy protections for children under 13 years old – obtaining parental consent and providing notice
- Microsoft must retrospectively provide notice to adult Microsoft accounts that were not associated with a child account
- Microsoft must maintain a system to delete, within two weeks from collection, personal information collected from children where parental consent has not been obtained

Key Takeaways

This was FTC's 3rd COPPA action within weeks – organizations should evaluate their compliance with COPPA to avoid regulatory attention:

- Provide complete disclosures about information collection practices – specifically, how the information will be used as it pertains to children
- Obtain verifiable consent from parents & inform parents of their rights
- Establish and implement a system to delete personal information so it may not be stored longer than reasonably necessary

Business Planning Overview



Samuel P. Burgess

Member

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Governing Documents

- Corporation
 - Certificate of Incorporation
 - Bylaws
 - Shareholders' Agreement
- Limited Liability Company
 - Articles of Organization
 - Operating Agreement

Succession Planning Considerations

- Transferability/Buy-Sell Provisions
- Valuation
- Payment Terms
- Funding Mechanisms

Potential Pitfalls/Mistakes

- Lack of updated governing documents and records
- Failure to adequately discuss/address the future
- Reactive vs. proactive
- Stuck in a business with no clear exit strategy

Corporate Structure Considerations: A Federal Tax Perspective



Rayndel Valle

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Overview

- Forms of Business Organizations (State Law)
- Federal Tax Considerations and Compliance
- Nontax Considerations
- Example of Entity Structure to Accomplish Tax Goals

Forms of Business Organizations

- Sole Proprietorship
- Corporation
- Partnership
 - Limited Partnership (LP)
 - Limited Liability Partnership (LLP)
 - Limited Liability Limited Partnership (LLLLP)
 - Publicly Traded Partnership (PTP)
 - Joint Venture
- Limited Liability Company (LLC)

Tax Considerations - Operations

- Subchapter C
 - Double tax regime
 - 21% Flat Tax Rate under IRC Section 11(b)
 - Qualified Dividends taxed at Capital Gain rates
- Subchapter K
 - Passthrough Tax Regime (199A, Form 1065/K-1 Reporting, Complexity, Loss Limitations)
 - Flexibility
- Subchapter S
 - Tailored to small, closely held corporations
 - Single Class of Stock requirement = no flexibility
 - FICA Tax advantages
- Specialized Tax Regimes
 - Subchapter F (Tax-Exempt Orgs and Cooperatives)
 - Subchapter H (Banks)
 - Subchapter L (Insurance Companies)
 - Subchapter M (Mutual Funds and REITs)

Tax Considerations – Effective Rates

Comparison of Tax Rate on Different Entities

	C Corporation (with 3.8% tax)	Passthrough (without 199A; 3.8% Tax)	Passthrough (with 199A; 3.8% Tax)	Passthrough (with 199A; no 3.8% Tax)
Entity Level Tax Rate	21%	0%	0%	0%
Owner Level Tax Rate	23.8% (1 - .21)= 18.8%	37 + 3.8%	29.6% + 3.8%	29.6%
Combined Tax Rate	39.8% (36.8 if ignore NITT)	40.8%	33.4%	29.6%
Differential		+1%	-6.4	-10.2

Tax Considerations – Effective Rates

Consequences on Sale of Business

	C Corporation (Asset Sale)	C Corporation (Stock Sale)	C Corporation (QSBB) (Stock Sale) (no 1411)	Passthrough (equity interest or asset sale by active owner)	Passthrough (equity interest or asset sale by passive owner)
Entity Level Tax Rate	21%	0%	0%	0%	0%
Owner Level Tax Rate	23.8% (1 - .21)= 18.8%	23.8%	0%	20% (no §1411 tax)	20% + 3.8% (§ 1411 tax)
Combined Tax Rate	39.8%	23.8%	0%	20%	23.8%
After-Tax Amount	\$602,000 (\$1 million - \$380,000)	\$762,000 (\$1 million - \$238,000)	\$1 million	\$800,000 (\$1 million - \$200,000)	\$762,000 (\$1 million - \$238,000)

Tax Considerations – Check-the-Box Election

- Corporations for Federal Tax Purposes = Associations, Joint Stock Companies, and Insurance Companies
- Per Se Corporations cannot make the election
- “Eligible Entities” may “check-the-box” to be treated as an association (i.e., C Corp) or a partnership for tax purposes
- Election made on form 8832; effective no more than 75 days before filing date (or 12 months after filing date)
- Change in classification cannot be made again for 60 month period, unless majority of owners consent and permitted by IRS
- Default treatment → Disregarded Entity or Partnership

Tax Considerations – Converting an Existing C Corporation to Pass Through Entity

- C Corporation – For business ventures already operating as a C corporation, an S corporation election may be a good alternative for moving to a single-tax regime without immediate recognition of gain at either the corporate or shareholder level.
 - Converting a C corporation to a partnership or LLC requires complete liquidation, which is a taxable transaction to the corporation and its shareholders.
- S Corporation – Subchapter S, however, has rules that prevent the easy avoidance of the double tax on built-in gains attributable to the period when the business operated as a C corporation

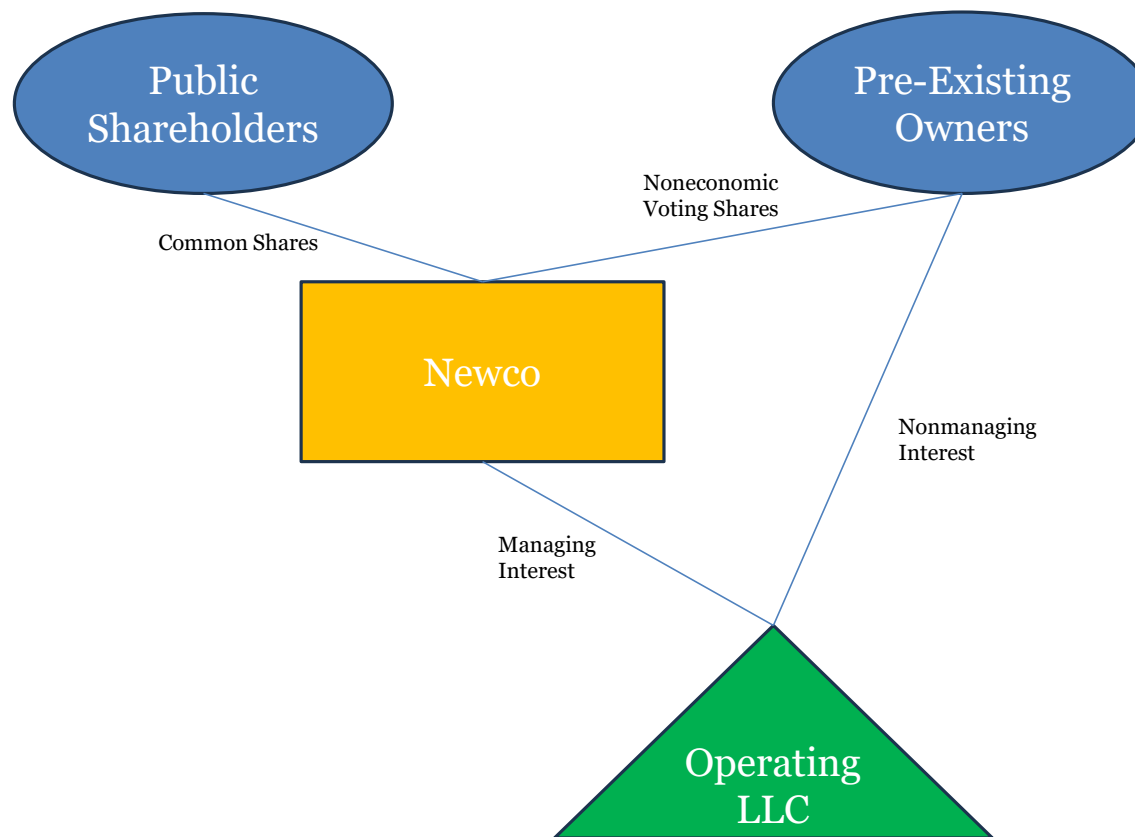
Tax Considerations – State Tax

- The choice among a limited partnership, LLC or S corporation may be influenced by state and local tax considerations, including whether the entity's resident state provides pass-through tax treatment.
- Other considerations are whether the state imposes an entity-level tax; the tax treatment of nonresident owners; and overall complexity, such as the need for investors to file nonresident returns in many different states.

Non-Tax Considerations

- *Business Control*
 - *Publicly traded businesses*
 - *Closely Held Businesses*
 - *Succession Planning*
- *Capitalization*
- *Nature of the Business*
- *Flexibility of Structure*
- *Asset Protection and Liability Exposure*
- *Ease and Cost of Formation*
- *Compensation Arrangements*

Combining Different Entities – Up REIT



Your Questions



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Microsoft and FTC COPPA Violations

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Ariyana Dewitz, summer law clerk under supervision of Mario Ayoub

Business Planning Overview

Sam Burgess, sburgess@bsk.com

Corporate Structure Considerations: A Federal Tax Perspective

Rayndel Valle, rvalle@bsk.com

New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar [here](#).

Non-NYS Bar Association Members can purchase through Amazon [here](#).

Thank You

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It is not to be considered as legal advice.
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