

FORMING A MINNESOTA BUSINESS CORPORATION

A corporation is a separate legal entity that is owned by one or more shareholders. The shareholders elect a board of directors which is responsible for the management and control of the corporation. As a separate legal entity, the corporation is responsible for the debts and obligations of the business. In most cases the shareholders are insulated from personal liability for claims against the corporation.

A corporation is formed according to the laws of the state in which it is organized. In Minnesota the business corporation statute is Minn. Stat. § 302A. The following material describes the process for incorporating a business in Minnesota and some of the post-incorporation issues faced by new corporations. The formation of a state bank or trust company with the Minnesota Department of Commerce is beyond the scope of this publication. Other issues are described in the sections of the Minnesota Small Business Assistance Office publication, *A Guide To Starting A Business In Minnesota*, on choosing the form of business organization, business taxes, and issues for employers.

ARTICLES OF INCORPORATION

A corporation is formed by one or more incorporators filing articles of incorporation with the Secretary of State and paying the filing fee. Incorporators must be at least 18 years of age. Minimum requirements are satisfied by an articles of incorporation form that is available from the Secretary of State's website at www.sos.state.mn.us/index.aspx?page=331, and is also available by mail from that office. Incorporators may, in the articles of incorporation, add to or modify many of the basic statutory provisions set forth in the Minnesota Business Corporation Act. If the incorporators choose to modify the statutory provisions, they must draft their own articles of incorporation; they cannot use the form provided by the Secretary of State. An attorney can assist in determining whether modifications are needed and in drafting articles of incorporation.

Corporate Name

Requirements for the corporate name are discussed in the section on naming the business entity, in the *Guide*.

Registered Office

A corporation must maintain a registered office located in the state of Minnesota. The address of a registered office must set forth the complete office address (**not a post-office box**). This address may be a street address, a rural route **and** rural route box or fire number, or directions from a landmark. If directions are given, a mailing address in the same town or in an adjacent area must also be given. All addresses **must** have a zip code.

Registered Agent

The corporation is not required to name a registered agent in the articles of incorporation, but if the corporation decides to name an agent, the articles must list the name of the agent and the agent must be located at the registered office.

Corporate Seal

The corporation is no longer required to have a corporate seal.

Number of Authorized Shares of Stock

A corporation may authorize any number of shares of stock. The articles of incorporation require only the total number of shares authorized. Neither a par value nor a stated value is required, although the articles may include par value if shares are to have a par value. Corporations that plan to do business in another state should consider including a provision specifically stating that shares have a par value of one cent per share for franchise fee purposes. This is a restatement of Minn. Stat. § 302A.401, subd. 2(c) and may enable the corporation to avoid paying excess franchise fees in other states.

Note: While the number of authorized shares is fixed in the articles, the decision to issue shares is up to the directors, who may reserve shares for later issuance. The board must approve each issuance and ensure that the corporation receives fair value for its shares.

Names, Addresses and Signatures of Incorporators

The articles must list the names and complete mailing addresses, including zip codes, of each of the incorporators. There must be at least one incorporator. Each incorporator must be a natural person of at least 18 years of age and must sign the articles.

Other Provisions

There is no publication (i.e., no “legal advertisement”) requirement for corporations incorporated under Minn. Stat. § 302A. There is also no statutory minimum capital requirement for these corporations.

There are a number of provisions of Minn. Stat. § 302A that may be altered or adopted in the articles of incorporation, but that need not appear in the articles in order to properly form a corporation. A brief description of each of these provisions appears in Minn. Stat. § 302A.111, subdivisions 2, 3 and 4. Some of these provisions include:

- The power to adopt, amend, or repeal the bylaws is vested in the board of directors (Minn. Stat. § 302A.181);
- Directors serve for an indefinite term that expires at the next regular meeting of shareholders (Minn. Stat. § 302A.207);
- A corporation must allow cumulative voting for directors (Minn. Stat. § 302A.215);
- Absent directors may be permitted to give written consent or opposition to a proposal (Minn. Stat. § 302A.233);
- A larger than majority vote may be required for board action (Minn. Stat. § 302A.237);
- The affirmative vote of a majority of directors present is required for an action of the board (Minn. Stat. § 302A.237);

- A written action by the board taken without a meeting must be signed by all directors (Minn. Stat. § 302A.239);
- All shares have equal rights and preferences in all matters not otherwise provided by the board (Minn. Stat. § 302A.401);
- A shareholder has certain preemptive rights, unless otherwise provided by the board (Minn. Stat. § 302A.413);
- The transfer or registration of transfer of securities may be restricted (Minn. Stat. § 302A.429);
- Regular meetings of shareholders need not be held, unless demanded by a shareholder under certain conditions (Minn. Stat. § 302A.431);
- Unless otherwise provided by law not less than ten days notice is required for a meeting of shareholders (Minn. Stat. § 302A.435, subd. 2);
- The affirmative vote of the holders of a majority of the voting power of the shares represented and voting at a duly held meeting is required for an action of the shareholders, except where this chapter requires the affirmative vote of a majority of the voting power of all voting shares (Minn. Stat. § 302A.437, subd. 1);
- A larger than majority vote may be required for shareholder action (Minn. Stat. § 302A.437);
- The number of shares required for a quorum at a shareholders meeting is a majority of the voting power of the shares entitled to vote (Minn. Stat. § 302A.443);
- A corporation may agree to submit a matter to its shareholders whether or not the board of directors determines, at any time after approving the matter, that the matter is no longer advisable and recommends that shareholders reject it (Minn. Stat. § 302A.439);
- Indemnification of certain persons is required (Minn. Stat. § 302A.521).

Amending the Articles of Incorporation

A corporation may amend its articles of incorporation to include or modify any provision that is required or permitted to appear in the articles or to omit any provision not required to be included in the articles. Amendments are required when any changes are made in the articles of incorporation. Common reasons for amending the articles include: changing the corporate name or registered address; increasing the number of authorized shares; and changing other provisions affecting the rights of shares and shareholders.

A corporation amends its articles of incorporation by submitting the amendment to the shareholders at a regular or special meeting called with proper notice and having the amendment approved by the required number of votes. Proper notice means the corporation mailed information on the meeting time and other agenda items and a brief description of the amendment to each shareholder entitled to vote at least ten days before the meeting, unless other laws or the articles or bylaws permit a shorter time for notice.

Electronic meetings and participation by electronic means are permitted in Minnesota. Consult your attorney for further information on how to properly set up a virtual meeting, do corporate business by electronic mail, or allow electronic participation in physical meetings.

The amendment may be approved by the holders of a majority of the voting power unless the articles require a larger majority or the amendment will either increase or reduce a majority already required in the articles or required by Minn. Stat. § 302A. In that case the amendment must receive the approval of the higher of the two, if the corporation is not publicly held. A publicly held company requires the approval of a simple majority.

The articles of amendment must include the name of the corporation (which must be identical to the name on file with the Secretary of State), the text of the amendment, and a statement that the amendment was adopted pursuant to Minn. Stat. § 302A. There is a filing fee. Amendment forms are available at the Secretary of State's website at www.sos.state.mn.us/index.aspx?page=331, and is also available by mail from that office.

A corporation may also restate its articles of incorporation in their entirety. In addition to stating the name of the corporation and reciting that the restatement was approved pursuant to Minn. Stat. § 302A, all articles are presented in the language as amended. In other words, all changes are combined in one document. A restatement that includes substantive amendments must be approved by the shareholders in the same way any other amendment is approved. If the purpose of the restatement is only to combine all previous changes into one document, only the board of directors need approve it.

Articles of amendment must also be signed by a person who has been authorized by the corporation to sign corporate documents.

Change of Registered Office or Registered Agent

The registered office or registered agent may be changed by amending the articles of incorporation that sets forth the registered office or registered agent. To do this, the corporation must follow the procedure for amending articles of incorporation.

Every time a corporation moves or changes its registered office or agent it must file a Statement of Change of Registered Office or Agent with the Secretary of State. The Statement of Change of Registered Office or Agent must state the name of the corporation; the new address of the registered office, if the registered office is being moved; the name of the new registered agent, if a new agent is being appointed; and that the change of office or agent was approved by the board of directors. Change of Registered Office or Agent forms are available at the Secretary of State's website at www.sos.state.mn.us/index.aspx?page=331, and is also available by mail from that office.

The statement must be signed by an authorized representative of the corporation. There is a filing fee.

POST-INCORPORATION ISSUES

General Considerations

When a corporation is formed, it becomes a legal entity that is separate from the owners or shareholders. The corporation can only act, however, through the individuals who are the incorporators, officers, directors, or shareholders. As part of the process of organizing the

corporation, those individuals address a number of organizational matters, such as planning the capitalization, choosing the state of incorporation, selecting and reserving the corporate name, and drafting articles of incorporation and bylaws. Once the corporation is formed, those individuals will need to start up and operate the corporation. Specific guidance may be obtained from the firm's legal and tax advisors. In general, start-up and maintenance tasks include:

- Obtaining federal and state tax identification numbers and an unemployment insurance employer account number for the corporation.
- Issuing shares of stock in conformity with the articles of incorporation; note also that federal and state securities laws apply to the issuance of corporate shares. Corporate shares may be represented by share certificates or may be "uncertificated." Uncertificated shares do not have certificates but are still reflected on the records of the corporation. As stated elsewhere in the *Guide*, these laws are complex, and the advice of knowledgeable professionals should be obtained before attempting to issue corporate securities.
- Setting up and maintaining corporate books and records, including books of account, shareholder records, and corporate minute books.
- Calling and conducting the initial meeting of the board of directors or shareholders in conformity with the articles of incorporation and applicable laws.
- Assuring that all actions taken and decisions made by the corporation through its directors, officers and shareholders conform with the articles of incorporation, bylaws, and applicable law. All actions and decisions should be recorded in the corporation's minute book.

Annual Registration

Minnesota corporations must file an annual corporate registration with the Secretary of State which will provide corporations with a reminder-to-file notice. Failure to file an annual registration for any calendar year will trigger an administrative dissolution of the corporation.

Business Activities Report

Every corporation that does business in Minnesota must annually file with the Department of Revenue a business activities report. Corporations are exempt from this requirement if they:

- File a Minnesota corporate income tax return on time;
- Possess a certificate of authority to do business in Minnesota;
- Are a tax-exempt corporation;
- Are engaged solely in secondary market activity in Minnesota; or
- Are financial institutions that annually conduct business with fewer than 20 persons, and have total assets and deposits of less than \$5 million.

A corporation that is required to file a business activities report and fails to do so is prohibited from prosecuting any cause of action upon which it may bring suit under Minnesota law. In addition, those corporations generally are barred from using Minnesota courts for contracts executed and causes of action arising during the violation period. The Commissioner of Revenue

may disclose to litigants whether a business activities report has been filed by a party to a lawsuit.

Copies of Form M-4R, the Business Activities Report, may be obtained from the Minnesota Department of Revenue, Forms Distribution Office at the address and telephone number listed in the *Guide*, Resource Directory section.

SUBSIDIARIES

When a corporation extends into a new product line or a new geographic area, it frequently establishes a “subsidiary” corporation. A subsidiary corporation is a separate legal entity which happens to be controlled by another corporation (its “parent”) that owns enough shares of the subsidiary’s stock to dictate policy. Some subsidiaries are wholly-owned, some are not. As a separate entity, separate records and management are required, although consolidated financial and tax reporting may be possible under certain circumstances. Subsidiaries may also serve to insulate the parent corporation from liability for the action of the subsidiary under certain circumstances.

FOREIGN CORPORATIONS DOING BUSINESS IN MINNESOTA

A corporation that is organized under the laws of a state other than Minnesota that transacts business in Minnesota must apply for a certificate of authority before doing business in Minnesota. The requirements for obtaining the certificate of authority are specified by Minn. Stat. § 303, and are set forth on a required form available from the Secretary of State’s website at www.sos.state.mn.us/index.aspx?page=331, and is also available by mail from that office. A recently-issued (within the past 90 days) certificate of existence from the state of incorporation must accompany the application.

The term “transacting business” is not clearly defined in statute, but the standard used in making the determination is the “minimum contacts” standard used in determining jurisdiction. Under this standard the facts are analyzed to determine whether the business or its local agents have conducted a continuous course of business in Minnesota or with Minnesotans sufficient to justify being governed by Minnesota law. This analysis will not be performed by the Secretary of State or any other state executive agency; each business is responsible for performing its own analysis on the topic.

Neither the Secretary of State nor any other state agency will make a determination as to whether a particular organization should register as a foreign corporation. As a general rule, doubts should be resolved in favor of registering the organization. Minn. Stat. § 303.03 establishes certain activities as exceptions to the registration requirement. Corporations organized outside Minnesota should consult with their legal counsel to determine whether any of the exceptions apply.

A foreign corporation also must file with the Secretary of State an annual registration and pay a \$135 fee. Annual registration forms are sent by the Secretary of State to the registered agent and office address of the corporation in Minnesota. The forms are also available at the Secretary of State’s website at www.sos.state.mn.us/index.aspx?page=331 and is also available by mail from that office. However, foreign nonprofit corporations are exempt from this requirement. Failure to file the annual registration in a calendar year will result in revocation.

In addition to obtaining the certificate of authority, a foreign corporation must obtain a Minnesota tax identification number from the Department of Revenue. If the corporation will have employees in Minnesota, it also must obtain a Minnesota employer withholding tax number and an unemployment insurance employer account number and arrange for workers' compensation insurance. The procedure for obtaining these numbers is described in the section of the *Guide* on business taxes and the Checklist for Hiring an Employee.

Foreign corporations also must obtain any state and local business licenses necessary to conduct business operations. Information on business license requirements may be obtained from the Minnesota Small Business Assistance Office at the address and telephone number provided in the Resource Directory section of the *Guide*.

Finally, the Minnesota Department of Revenue has the power to order the Secretary of State to revoke a foreign corporation's certificate of authority to do business in Minnesota if that corporation "fails to comply with any tax laws" administered by the Department of Revenue.