

THE ACCOUNTANTS STEP-BY-STEP GUIDE TO FORMING CORPORATIONS AND LLCs



DECISION MAKING TOOLS AND TIPS FOR
ACCOUNTANTS AND THEIR CLIENTS

A NOTE BEFORE WE BEGIN

“We know that your clients come to you for financial advice and the incorporation decision making process is based on financial information.”

You can help them evaluate the different types of entities, illustrate the facts and information you used to base your recommendation on and direct them to an easy and affordable online resource to file their documents.

- 95% of accountants discuss entity types with their clients
- Accountants are the #1 trusted source of entity advice, as many key decisions are financial, not legal
- Using a well-established third-party service to streamline the process, clients can get set-up correctly without worry about Unauthorized Practice of Law (UPL)
- Help your clients get started with confidence that it's being done right.

We have developed this booklet as a resource specifically for accountants and hope that you not only find it helpful and informative, but will also find it a tool you can share with your clients. We have designed the information into a step-by-step process that in general, applies to all 50 states, noting where you or they might need to gather or supply information.

As you know, incorporating a business may have a noticeable effect on asset management and protection as well as Federal tax liability. We offer this guide to facilitate understanding the different business structures available while gaining an overall understanding of the incorporation process and corporate compliance.

Please remember, there is NO SUBSTITUTE FOR LEGAL ADVICE. This guide cannot and should not serve as a substitute for legal counsel.

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SELECT A BUSINESS STRUCTURE

NOTE:

The different business structures will vary in formation costs and in the complexity of management.

The first step in starting a small business is researching and selecting the appropriate legal business structure that provides the most benefit for your particular needs.

The table below presents some of the most important features of the different business structures. We do recommend that an accountant or attorney assist with this decision and offer this chart which has been drafted based on the laws in the majority of states and is in a simplified form to illustrate general differences between the entities.

ACCOUNTANTS:

Initially setting up your clients with the correct entity type will pay off in time and tax savings down the road.

POPULAR BUSINESS STRUCTURES

- Sole Proprietorship
- General Partnership
- Joint Venture
- Limited Partnership
- Limited Liability Partnership (L.L.P.)
- Limited Liability Company (L.L.C.)
- Corporation
- S Corporation
- Not-for-Profit Corporation
- Professional Corporation

	Protection of Personal Assets	Tax Benefits	Ability to Raise Capital	Duration of Existence	Formalities Required
Sole Proprietorship	None	Few	Hard	Cancelation of death of owner	Few
General Partnership	None	Few	Complex	Dissolution/death/bankruptcy	Few
Joint Venture	None	Few	Complex	Dissolution/death/bankruptcy	Few
Limited Partnership	None	Some	Complex	Dissolution/death/bankruptcy	Some
Limited Liability Partnership	Max	Many	Simple	Dissolution/death/bankruptcy	Some
Limited Liability Company	Max	Many	Simple	Dissolution/death/bankruptcy	Some
Corporation	Max	Many	Simple	Perpetual Existence	Most
S Corporation	Max	Many	Simple	Perpetual Existence	Most
Not-for-Profit Corporation	Max	Max	Simple	Perpetual Existence	Most
Professional Corporation	Vary	Many	Simple	Perpetual Existence	Most

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IS INCORPORATING THE RIGHT CHOICE?

NOTE:

Lets take look at the common reasons for incorporation and the benefits.

Use the list of questions on this page to quickly help you determine if incorporation is right for you.

ACCOUNTANTS:

When advising clients about incorporation using an engagement letter that stresses your role as a financial, not legal advisor, can be helpful to define expectations.

COMMON REASONS FOR NOT INCORPORATING

While most recognize that there are many benefits to incorporating a business, costly legal fees, lengthy filing process, complexity of the incorporation process, and lack of information discourage many from incorporation.

WHO SHOULD INCORPORATE?

Thanks to technology and innovation, the process has been significantly simplified. Third party document filing services not only address UPL concerns but offer an easy and reliable method for preparing and filing corporate documents.

The questions below could help better determine whether incorporating may be a good choice.

- Is there real estate ownership involved?
- Is there a need to separate personal assets from business assets?
- Will the business have partners or other stakeholders?
- Are there concerns regarding one partner possibly binding anothers' personal assets without prior consent or knowledge?
- Would the owners benefit from tax benefits extended solely to corporations?
- Is the business going to hire employees in the next 12 months?
- Does the business need or plan to raise capital through the sale of stock?
- Is the business going to be seeking a government contract in a municipality that requires bidders be incorporated entities?
- Do the owners want the business to continue after their death or the death of a partner?

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CHOOSE A STATE OF FORMATION

NOTE:

Certain states are more popular for corporations and LLCs than others.

Many new business owners are surprised to learn that there are really no legal requirements to form their business in the state where they will conduct business...

ACCOUNTANTS:

If a business is formed in one state and does business in another, that business could be subject to taxation in both states. Many states will tax a corporation or LLC that exists in their state, even if it is not doing business there.

FILING FEES

An out-of-state corporation that will be conducting business in California generally must “qualify” to do business in California. This “qualifying” requires the corporation to pay filing fees to the California Secretary of State in addition to whatever filing fees were paid in the state of incorporation.

STATE TAXES

An out-of-state corporation/LLC doing business in California will have to pay franchise taxes to California. The corporation may also have to pay franchise taxes in its state of incorporation (even if the corporation is not conducting business in that state). Thus, the corporation is potentially exposed to taxing by more than one state.

SECURITIES LAWS

The California Corporate Securities Laws apply to any offer or sale of a security “in this state” regardless of the issuer’s state of incorporation.

CORPORATE RULES

Regardless of where the corporation is formed, many provisions of the California Corporation Law, for example, apply if the corporation has a sufficient “presence” in California.

A BUSINESS CAN FORM A CORP OR LLC IN ANY STATE

While states other than a company’s home state have been historically recognized as offering significant advantages to corporations/LLCs, some of these “advantages” may not apply to a corporation that maintains “significant business contacts” or “significant presence” within a particular state.

FOR EXAMPLE: Forming a California corporation for a small business located in California is usually the logical choice for the following reasons:

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NAME THE CORPORATION

NOTE:

Each state has its own rules for naming a business. Remember to check your state for specifics.

Naming a company is like naming a new baby. It's exciting and you want the new business name to be unique and creatively represent the product or services offered.

ACCOUNTANTS:

Some states may impose additional restrictions where the name implies certain activities that are regulated by state licensing boards. While these names are not prohibited from use, additional steps are required before they may be used in a corporate name. Such words may include: 'Bank', 'Insurance', 'Trust', 'Accounting', and 'Medical'.

MOST STATES REQUIRE THE NAME CONTAINS ONE OF THE FOLLOWING CORPORATE INDICATORS:

- Incorporated
- Inc
- Corporation
- Corp.
- LLC
- L.L.C
- Limited Liability Company

PROHIBITED WORDS AND PHRASES

Additionally, most states prohibit the use of a corporate name that is "substantially similar" to that of a corporate or LLC name already in existence or dissolved within the past 2 years. Also, the use of obscenities, profanity, or a name that may be considered "deceptive" is prohibited in most states.

PROTECTING THE CORPORATE NAME

Generally, incorporating a business under a specific name will only prevent another individual from forming a corporation with the same name in the same state. Thus, it is possible that an individual may incorporate with that corporate name in another state. In some states, it is also possible that an individual may form an LLC or sole proprietorship in the SAME state as the corporation you are naming.

SECURING A DOMAIN NAME

During the naming process it is important to make sure the names being considered are also available as a domain and register that domain as soon as possible. In addition, one should consider registering its similar variants and different extensions such as mycompany.com, mycompany.com, mycompany.net, mycompany.biz, etc. This critical step will help protect each company's online identity.

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DETERMINE THE TYPE OF ENTITY

NOTE:

Each entity type has its own strengths and weaknesses that should be taken into consideration.

Business formations come in many different shapes and sizes. A choice should be made depending on the client's needs, within their short and long-term goals.

MEDICAL/RETIREMENT BENEFITS BY ENTITY

First, let's take a look at the medical and retirement tax benefits accorded the different entities and how they are then treated by the participating parties.

ACCOUNTANTS:

Converting an existing company into a corporation can often be done tax-free, but the decision should be researched very carefully to avoid any unforeseen tax consequences that may occur due to differences in the way the entity is structured and taxed.

BUSINESS ENTITY FILING REQUIREMENTS

No Filing Required (no liability protection)

- Sole Proprietor
- General Partnership
- Limited Partnership

State/Federal Filing Required

- C-Corporation
- S-Corporation
- Limited Liability Company
- Professional Corporation
- Non-Profit Corporation

	Partnership/ LLC	S-Corp	C-Corp
Entity Treatment			
Medical Insurance	Deducted as a Guaranteed Payment	Deductible as W-2 wage not subject to FICA/Medicare	Deductible as operating expense in same manner as payments for non shareholder employees
Retirement Contributions	Distribution to partner/ member	Deductible as operating expense in the same manner as non- shareholder employees	Deductible as operating expense in same manner as payments for non shareholder employees
Partner/Member/Shareholder Treatment			
Medical Insurance	Deductible as an adjustment to income on page 1 of Form 1040	Income included in W-2 Box 1, explanation in Box 14; deduct on Form 1040 as SE medical insurance	Not income to employee/ shareholder; no entry on Form 1040
Retirement Contributions	Deductible as an adjustment to income on page 1 of Form 1040	No entry for 1040	No entry for 1040

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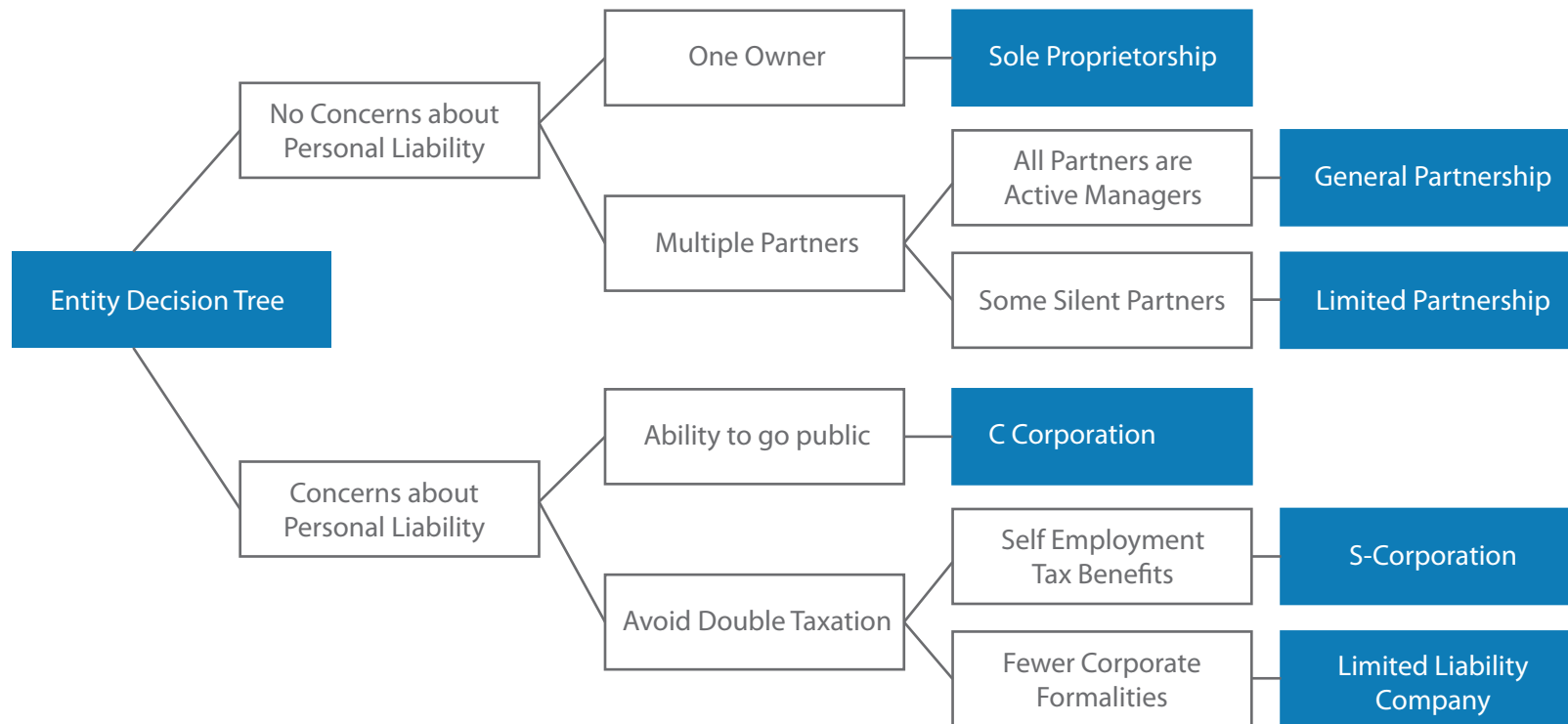
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DETERMINE THE TYPE OF ENTITY

A FEW SIMPLE QUESTIONS

We have developed this easy to use decision tree to illustrate the decision process of choosing the correct entity type. Discuss with your clients the pros and cons at each juncture and you will be well on your way to helping them choose the correct entity for their new business.



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Let us now take a look at the characteristics and legal factors/ requirements for the various business entities.

Sole Proprietorship

Characteristics

Business is operated by a single person.
The owner is not considered an employee (self employed)
The simplest form of business.
Comparatively easier & less expensive to maintain.
Separate business and personal books are kept.

Legal Requirements

Individuals can start up a sole proprietorship.
No legal formalities.
Business licenses or permits may be required.
All assets & liabilities of the company are passed to the individual.
Business income is reported on the individuals' Form 1040, Schedule C.

General Partnership

Characteristics

Business is operated by two or more people.
Partnership agreement should be prepared.
Partners are not considered employees of the company, but self-employed individuals.

Legal Requirements

Personal and partnership assets may be at risk.
Not required to pay separate business income taxes.
Must file an information return indicating amount of money earned or lost during the year by each partner.
Each partner is responsible for paying their share of personal income tax.
May be required to obtain business licenses or permits.
May be required to file a partnership certificate.

Limited Partnership

Characteristics

A partnership that is made up of one or more general partners and one or more limited partners.
The difference between a general partner and limited partner - the limited partner is not personally liable for debts of the partnership.
Limited partners can only lose the amount they paid as a capital contribution or received from the partnership.
A limited partner may not participate in management of the business.
If a limited partner does participate, he or she may incur personal liability with the same repercussions as a general partner.

Legal Requirements

Serves as a means to raise money from limited partners -without having to take in new partners as active members in the business or -engage in the complexities of starting a corporation and issuing stock.
Depending on the business type and location, may be required to obtain business licenses or permits.
May be required to file a partnership certificate with a public office.

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C - Corporation

Characteristics

Considered a separate entity from those who own or operate.
Limited personal liability & protection from being liable for debts (e.g., bills for supplies/equipment and injuries to persons involved in business activities that are not adequately covered by standard insurance)
One person may own all the stock.

Legal Requirements

Created under state law (by filing documents with the Secretary of State).
Tax must be paid on the income made by the corporation.
If income is distributed to shareholders as dividends, the shareholders must pay tax on amount received as dividends.

S-Corporation

Characteristics

Limited liability & protection from personal liability for debts. Owners pay personal income taxes.
Business losses may be offset against other income - could reduce or eliminate owner's tax burden.
Generally not subject to taxation at the federal level.
Shareholders are required to pay their share of income tax on the corporation's income, whether or not they received money.

Legal Requirements

Personal and partnership assets may be at risk.
Not required to pay separate business income taxes.
Must file an information return indicating amount of money earned or lost during the year by each partner.
Each partner is responsible for paying their share of personal income tax.
May be required to obtain business licenses or permits.
May be required to file a partnership certificate.

Limited Liability Company

Characteristics

Limited Liability Companies combine the limited liability advantages of corporations with the control and tax advantages of a partnership.
A Limited Liability Company is more complicated than a normal partnership in its formation.
Owners are generally not liable for the debts and obligations of the LLC.
Can elect how an LLC will be taxed.

Legal Requirements

The entity is taxed like a partnership - income and losses of the LLC are accounted for on the owner's individual tax returns.
Can be owned by non-U.S. citizen /resident aliens and other business entities.
Can have unlimited number of members - owners of an LLC are known as members
Less formal than a corporation.

Professional Corporations & PLLCs

Characteristics

Certain occupations may incorporate through a professional corporation only.
May incorporate as a professional corporation or as a regular corporation.
All shareholders must be licensed.

Legal Requirements

Created under state law.
Limited personal liability and protection from being personally liable for debts of other members.
Still liable for own malpractice.

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COMPARING S-CORPORATIONS AND LLCs

DIFFERENCES

Ownership – Owners of LLCs are called members and owners of S Corporations are called shareholders. There are significant differences in ownership rules. S-Corps may not have more than 100 shareholders; LLCs are unlimited. S-Corps are not allowed to have non-U.S. citizens as owners; LLCs can. S-Corps cannot be owned by other companies; LLCs can.

Formalities – S-Corps must adhere to certain formalities in order to retain their legal corporate status. LLCs do not have to follow such formalities.

Transfer of Ownership - Corporate shareholders may freely transfer their ownership shares. LLCs members usually need approval from the other members.

Management – S-Corps have centralized management. An LLC may be managed by its members, in which case it is similar to a partnership. Or it may be managed by appointed managers.

Allocation of Income – Income from an S-Corp must be allocated to its shareholders based on stock ownership. LLCs may specially allocate income and losses to its members irrespective of ownership percentage.

Self-Employment Tax - S-Corps are not subject to any self-employment tax on their share of income from the corporation. The law is not clear on this issue for LLC members.

SIMILARITIES

Formation – Both entities are separate legal entities created under state law by filing Articles of Incorporation/Organization with Secretary of State.

Liability – Both entities provide strong liability protection for owners, meaning the owners are generally not liable for the debt/liabilities of the business.

Taxation – Both entities are pass-through entities. The income or loss from the business is passed through to the individual owners who in turn pay any income tax due.

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DETERMINE THE COMPOSITION OF STOCK

NOTE:

The rights that are afforded to individual shareholders can vary greatly from state to state, from company to company.

When any of the individual shareholders purchases stock via cash or property, this represents equity in the company and does not require repayment.

ACCOUNTANTS:

The Board of Directors determines dividend payment of profits to the shareholders.

A NOTE ABOUT STOCK

While many advisors use a rule of thumb that says the stock issued should equal 3-6 months of a businesses operating expenses, this isn't necessarily the best for all start ups. Each corporation should look at their own situation and future needs for the stock, and if necessary get appropriate financial and/or legal input.

Where the corporation has fewer than 35 shareholders, a simple, inexpensive model for the structure of corporate stock may be most appropriate. Most small businesses and new corporations issue a single class of common stock in which all shares hold equal value. Each share allows the right to vote on important issues usually determined as one vote per share.

In addition, a savvy business owner will recognize that authorizing a number of shares that will qualify for the minimum annual state filing fee is often a wise, money-saving choice.

After the corporation begins to thrive and is then considering issuing shares to the public, modifying the stock structure can be accomplished by filing an amendment to the articles of incorporation with the state at any time.

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DESIGNATE CORPORATE DIRECTORS

NOTE:

LLCs are not required to elect this management group.

The Board of Directors is essentially the management body for the corporation. The board establishes all business policies and approves major contracts and undertakings.

ACCOUNTANTS:

Most states now permit single member boards, while others require a minimum of three members.

An odd number of members reduces the chance of deadlock on important decisions.

Directors must act collectively pursuant to a vote.

The Board of Directors must meet on a regular basis. Monthly or quarterly is acceptable, however, the meeting **MUST** occur at least once per year.

Board members must be trustworthy as they have a duty to act in the best interests of the corporation and cannot put their own interests ahead of corporate interests and concerns.

Board members must be prudent and not act negligently.

Meetings must observe corporate formalities.

CHOOSING THE MEMBERS OF THE BOARD

Ordinary business practices are carried out by the Officers and employees of the corporation under the directives and supervision of the Board of Directors.

When considering which individuals shall serve on your corporation's Board of Directors, please consider the following:

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DESIGNATE A REGISTERED AGENT

NOTE:

In most states you may act as your own registered agent.

A registered agent is an individual or entity that is designated to accept official tax and legal documents on behalf of your business.

ACCOUNTANTS:

Most states now permit single member boards, while others require a minimum of three members.

An odd number of members reduces the chance of deadlock on important decisions.

All states require your business to maintain a registered agent to accept legal and official documents on behalf of your business. Plus, a registered agent allows you a certain amount of protection between you and the public. Benefits include:

- Personal information stays private
- The Agents information becomes public
- Corporate Address can be changed with ease
- Compliance with Registered Agent statutes

PURPOSE OF A REGISTERED AGENT

A Registered Agent acts as the representative for accepting Service of Process served upon the company within the jurisdiction of any state where the company conducts business. Service of Process is broadly construed to include any legal proceeding, legal notice, or official government communication presented to the company while it is within the jurisdiction of a state.

FAILING TO DESIGNATE A REGISTERED AGENT

The failure, to register and designate a registered agent, may foreclose or hinder the company's ability to legally enter into contracts and gain access to the state courts. Moreover, it may subject the company to monetary, civil, and possibly criminal sanctions. Also, failure to maintain a registered agent may cause your company to fall out of "good standing" within the state. This will subject your license to do business within a state to forfeiture, with monetary penalties assessed to reinstate your company to a "good standing" again.

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FILE THE ARTICLES OF INCORPORATION

NOTE:

Be sure to file your all of your documents each with the correct offices. It varies from state to state.

Similar to a birth certificate, a corporation's comes into existence after the filing of a document entitled "Articles of Incorporation / Organization".

ACCOUNTANTS:

The Articles of Incorporation are public documents and for this reason many corporations minimize the amount of information in the Articles putting more sensitive items in the bylaws or minutes.

Once the Articles of Incorporation are filed with the appropriate state offices the corporation comes into existence. The level of complexity for a corporation's Articles of Incorporation can range from very simple to extremely complex.

WHAT INFORMATION IS REQUIRED?

Generally, most jurisdictions require Articles of Incorporation to contain, at a minimum, the following information:

- Corporate Name which must include the correct indicators and not include prohibited words which vary by state.
- Name and physical address of the
- Registered Agent.
- Name and address of each incorporator.
- The corporation's business address.
- The number of shares the corporation is authorized to issue and, in most states, the par value per share.

There could be other state specific requirements that must be included along with the Articles of Incorporation such as:

- Duration of the corporation
- Industrial Classifications
- Close corporation language if applicable

Be sure to check the forms from the individual state for the requirements.

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FIRST MEETING OF BOARD OF DIRECTORS

NOTE:

Note, in many states, this “Board” may be comprised of one person.

The first meeting of the Board of Directors establishes many of the company’s initial corporate policies and will set the tone for the company.

ACCOUNTANTS:

Meetings don’t always have to be formal. Since in many corporations individuals will wear many hats they will probably be working together daily.

Although the recorded minutes and decisions of the meeting generally do not need to be filed with state offices, it is important that the decisions made in this meeting be documented and kept with the company’s corporate records. Some small corporations skip the actual meeting, choosing instead to formalize actions through consent resolutions. It is important to consider the value in bringing all of your decision makers together at this key time.

WHAT SHOULD BE DISCUSSED?

During initial organizational meeting, the Board of Directors will discuss and resolve the following matters:

- Election of directors by the incorporator
- Appointment of officers by directors
- Adopt bylaws
- Approve stock forms and issue shares
- Adopt a corporate seal
- Designate a banking institution
- Authorization to prepare and submit any required tax election forms

Any additional items that relate to the start up activities of the company such as:

- Agreements to borrow money
- Agreements to lend money
- Significant start up expenditures
- Employment agreements
- Applying to do business in another state

This organizational meeting will also generally ratify and authorize any prior acts taken to get the company fully up and running.

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OPERATE YOUR CORPORATION

NOTE:

LLCs are not required to elect this management group.

ACCOUNTANTS:

Because a corporation is considered to be a separate, legal entity, separate and apart from its owners, directors, officers, and employees, certain formalities must be observed in order to maintain this Good Standing and thus retain a strong "Corporate Shield".

CORPORATE FORMALITIES CHECKLIST

Proper observance of corporate formalities and record keeping requirements is critical to the continued good standing of a corporation. The checklist below presents issues to consider when observing corporate formalities.

- ☐ Are meetings of the Board of Directors regularly scheduled and conducted?
- ☐ Are Shareholder meetings regularly scheduled and conducted?
- ☐ Do such meetings adequately cover the business that is being conducted in the corporation?
- ☐ Do meetings provide Shareholders and / or Directors with agendas and goals along with the necessary background information necessary to make an informed decision?
- ☐ Are these materials provided to the Shareholders and/or Directors in advance of the meeting?
- ☐ Do Directors have a reasonable opportunity to add items of concern to the meeting's agenda before the Directors meet?
- ☐ Are agenda items acted upon; or, rather, are they postponed and advanced to future meetings?
- ☐ Does the meeting provide adequate time for Board Members or Shareholders to discuss each agenda item?
- ☐ Is each Director and/or Shareholder afforded a reasonable opportunity to discuss each issue?
- ☐ Are Corporate Minutes of each meeting accurately recorded by the Secretary?
- ☐ Does the Board meet with and/or receive direct reports from legal counsel, accountants, or other outside advisors?
- ☐ Are these reports included with the Corporate Minutes?
- ☐ Are the Corporate Minutes of Board meetings reviewed at subsequent meetings?
- ☐ Are the Corporate Minutes amended or corrected for clarity and accuracy?
- ☐ Are the dissents to the Corporate Minutes duly recorded?
- ☐ Do Board Meetings adequately cover substantive policy issues involving the corporation, rather than only trivial or administrative detail?
- ☐ Is the Board Chairperson effective in conducting Board meetings?

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CORPORATE FORMALITIES CHECKLIST

The Model Business Corporation Act (MBCA) says that you must maintain the following records in an organized manner in a safe and secure location:

- Articles of Incorporation
- Articles of Amendment
- Bylaws of the corporation
- Board resolutions regarding stock
- Minutes of shareholder meeting and consent resolutions
- All written communications to corporate shareholders within (generally) the last three years.
- An alphabetical list of shareholders by class or series of shares
- A list of current board and officer names and addresses
- The most recent Annual Report or Statement of Information

Also a good business practice is keeping corporate accounting records in a readily available state. The IRS could request:

- Tax Returns
- Sales Records
- Detailed Financial Information
- Communications records
- Personnel records
- All contract and agreements

SOME FINAL THINGS TO CONSIDER

A "Corporate/LLC Kit" is a great way to get all of the official documents organized and to maintain them in a professional and presentable manner.

FEDERAL EIN

An EIN is a federal identification number issued by the IRS to identify a business entity. It is also known as a Tax ID number. Legally, you are required to identify your business with one of two numbers: either your social security number or an EIN.

BUSINESS LICENSES

Depending on your type of business and location, you may be required to obtain multiple business licenses in order to comply with governmental regulations. Failure to register appropriately can result in penalties and prevent you from operating your business.

DBA

DBA stands for "doing business as" and is an official registration of your business name. A DBA makes it easy to:

- Open a bank account and collect payments
- Start publishing and advertising
- Discourage others from using your name

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ABOUT MYCORPORATION

MYCORPORATION.COM

MyCorporation is a leading provider of online document filing services for clients who wish to form a corporation or limited liability company. For more than fifteen years, MyCorporation has helped small business clients and real estate investors incorporate their businesses in a reliable and affordable manner. In addition to offering document filing services for online incorporation, MyCorporation also offers trademark searches and applications, copyright registrations, DBA registrations, registered agent services and many more products that help customers protect and maintain the legitimacy of their businesses.

WHAT MAKES MYCORPORATION DIFFERENT?

Our staff of filing experts truly care about the success of your small business and are excited to help new businesses form and grow. At MyCorporation, we pride ourselves in being an active part of the community. We thank you for visiting our site, and look forward to the opportunity to assist you and your business whenever you need it.

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MyCorporation Business Services, Inc.®
23586 Calabasas Rd., Suite 102,
Calabasas, CA 91302