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Setting Up a Nonprofit: State Law and Organizational Issues and Considerations

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Formation Documents – Building Blocks

Formation documents are the primary building blocks for any nonprofit

- **Certificate of Formation**
 - Also known as “Articles of Incorporation” or “Certificate of Formation”
 - The “birth certificate” – external document declaring that new legal entity was “born”
 - Public record that can be viewed by anyone with time and desire
- **Bylaws** (Generally not filed with the state)
 - The “rule book” – internal document that articulates general procedures regarding management and operations
- **Must meet state requirements** (Texas Business Organizations Code (TBOC))
 - Chapter 3 – formation and governance
 - Chapter 4 – filings
 - Chapter 22 – nonprofit corporations

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State Requirements – Formation Docs

REQUIREMENTS DEPEND ON JURISDICTION!

- E.g., TBOC Chapter 3 governs formation of nonprofits in Texas

Required Provisions for all entities (TBOC § 3.005)	Supplemental Required Provisions for nonprofits (TBOC § 3.009)
<ul style="list-style-type: none"> • Type of entity being formed • Purposes for which the entity is being formed • Period of duration, if not formed to exist perpetually • Registered agent and address • Mailing address of entity • Name and address of each organizer 	<ul style="list-style-type: none"> • Statements regarding members • Number, names & addresses of directors constituting the initial board of directors OR a statement that the management is vested solely in the nonprofit’s members • A statement that the nonprofit is to be authorized on its winding up to distribute the nonprofit’s assets in a manner other than as provided by the TBOC

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State Requirements – Governance



REQUIREMENTS DEPEND ON JURISDICTION!

- In addition to state requirements for formation documents, states may have additional requirements for nonprofit
- In absence of bylaws, these provisions govern procedures and operations of nonprofit
- E.g., TBOC Chapter 22 governs governance of nonprofits in Texas
 - Board and officers
 - Number of directors and officers (at least three directors, one president, and one secretary); same person cannot be both the president and secretary; must be natural persons, but may be known by other titles
 - Elections, appointments, authority, terms, etc.
 - Meetings requirements – at least an annual meeting
 - Corporate acts by vote or written approval
 - Fundamental business transactions
 - Winding up and dissolving nonprofit
 - Examination of books and records
 - Members have right to inspect
 - Certain nonprofits must make books and records available to public

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Form 202 – Easy to Do!

Texas Secretary of State promulgated Form 202 which is a form Certificate of Formation

- o Drafted to meet minimal statutory filing requirements.
- o Plug and play form with step-by-step instructions that easily creates a nonprofit organization
- o Often used by nonprofits that feel the need to “DIY” in an attempt to save on professional fees

Question: should nonprofits use this or too good to be true?

Form 202 (Revised 12/21)
 Submit in duplicate to:
 Secretary of State
 P.O. Box 13697
 Austin, TX 78711-3697
 512 463-5555

Certificate of Formation Nonprofit Corporation

Article 1 – Entity Name and Type
 The filing entity being formed is a nonprofit corporation. The name of the entity is:

Article 2 – Registered Agent and Registered Office
 (See instructions. Select and complete either A or B, or exempt C.)
 A. The initial registered agent is an organization (cannot be entity named above) by the name of:

 OR
 B. The initial registered agent is an individual resident of the state whose name is set forth below:
 First Name M.I. Last Name Suffix

 C. The business address of the registered agent and the registered office address is:
 TX
 Street Address City State Zip Code Country

Article 3 – Management
 The management of the affairs of the corporation is vested in the board of directors. The number of directors constituting the initial board of directors and the names and addresses of the persons who are to serve as directors until the first annual meeting of members or until their successors are elected and qualified are as follows:
 A minimum of three directors is required.

Director 1
 First Name M.I. Last Name Suffix
 Street or Mailing Address City State Zip Code Country

Director 2
 First Name M.I. Last Name Suffix
 Street or Mailing Address City State Zip Code Country

Director 3
 First Name M.I. Last Name Suffix
 Street or Mailing Address City State Zip Code Country

OR
 The management of the affairs of the corporation is to be vested in the nonprofit corporation's members.

Article 4 – Membership
 (See instructions. Do not select statement B if the corporation is to be managed by its members.)
 A. The nonprofit corporation shall have members.
 B. The nonprofit corporation will have no members.

Article 5 – Purpose
 (See instructions. This form does not contain language needed to obtain a tax-exempt status on the state or federal level.)
 The nonprofit corporation is organized for the following purpose or purposes:

 The following text area may be used to include any additional language or provisions that may be needed to obtain tax-exempt status.

Form 202 1 Form 202 2

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Form 202 – All is Not What It Seems

This easy form fails virtually all federal exemption requirements

- o Purpose requirements
- o Dissolution requirements
- o Political activity prohibitions
- o Private inurement prohibitions

RESULT: a Texas nonprofit corporation is formed that cannot qualify for federal exemption

NOTE: a filed and accepted Form 202 Certificate of Formation only creates a nonprofit corporation in Texas, not a tax-exempt organization.

Initial Mailing Address
 (Provide the mailing address to which state franchise tax correspondence should be sent.)
 Mailing Address City State Zip Code Country

Supplemental Provisions/Information
 (See instructions.)
 Text Area: [The attached addendum, if any, is incorporated herein by reference.]

Organizer
 The name and address of the organizer:
 Name
 Street or Mailing Address City State Zip Code Country

Effectiveness of Filing (Select either A, B, or C.)
 A. This document becomes effective when the document is filed by the secretary of state.
 B. This document becomes effective at a later date, which is not more than ninety (90) days from the date of signing. The delayed effective date is: _____
 C. This document takes effect upon the occurrence of a future event or fact, other than the passage of time. The 90th day after the date of signing is: _____
 The following event or fact will cause the document to take effect in the manner described below:

Execution
 The undersigned affirms that the person designated as registered agent has consented to the appointment. The undersigned also affirms that, to the best knowledge of the undersigned, the name provided as the name of the filing entity does not falsely imply an affiliation with a governmental entity. The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument and certifies under penalty of perjury that the undersigned is authorized to execute the filing instrument.
 Date: _____
 Signature of organizer
 Printed or typed name of organizer

Print Reset

Form 202 3

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