

CHAPTER 1

Corporate Structure



After reading this chapter, you will be able to:

- Understand the various structures by which an enterprise can be formed
- Decide which is best for your situation

The obvious structures available for the enterprise traditionally have been:

- Proprietorships
- Partnerships
- Limited partnerships
- Limited liability companies
- Corporations (S and C)

Let us examine the features of each and the appropriateness for various enterprises.

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Proprietorships

The sole proprietorship is the oldest, most common, and simplest form of business organization. A sole proprietorship is a business entity owned and managed by one person. The sole proprietorship can be organized very informally, is not subject to much federal or state regulation, and is relatively simple to manage and control.



TIPS AND TECHNIQUES

The decision on which enterprise structure to use revolves around many factors, but the principal deciding factors involve:

- Willingness to assume risk
- Tax implications
- Need for capital
- Exit strategy

The prevalent characteristic of a sole proprietorship is that the owner is inseparable from the business. Because they are the same entity, the owner of a sole proprietorship has complete control over the business and its operations and is financially and legally responsible for all debts and legal actions against the business. Another aspect of the “same entity” situation is that taxes on a sole proprietorship are determined at the personal income tax rate of the owner. In other words, a sole proprietorship does not pay taxes separately from the owner.

A sole proprietorship is a good business organization for an individual starting a business that will remain small, does not have great

Proprietorships

exposure to liability, and does not justify the expenses of incorporating and ongoing corporate formalities.

Points to consider when considering a proprietorship include:

- It is the easiest type of business organization to establish. There are no formal requirements for starting a sole proprietorship.
- Decision making is in the direct hands of the owner.
- All profits and losses of the business are reported directly in the owner's income tax return.
- The start-up costs for a sole proprietorship are minimal.
- The owner has unlimited liability. Both the business and personal assets of the sole proprietor are subject to the claims of creditors.
- Because a sole proprietorship is not a separate legal entity, it usually terminates when the owner becomes disabled, retires, or dies. As a result, the sole proprietorship lacks continuity and does not have perpetual existence, as other business organizations do.
- It is difficult for a sole proprietorship to raise capital. Financial resources generally are limited to the owner's funds and any loans outsiders are willing to provide.
- An owner could spend an unlimited amount of time responding to business needs.



TIPS AND TECHNIQUES

In looking at a proprietorship form of entity, the very aspects that make it attractive also make it potentially unsuitable. If you are

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TIPS AND TECHNIQUES (CONTINUED)

attempting to limit your own risk or potentially have capital needs beyond your own resources, a proprietorship may not be the most suitable corporate structure.

Partnerships

From the proprietorship structure evolved the partnership entity. A partnership as a business component (oftentimes referred to as a general partnership) is defined broadly, and, because “persons” can include individuals, groups of individuals, companies, and corporations, partnerships are highly adaptable in form and vary in complexity. Each partner shares directly in the organization’s profits and shares control of the business operations. The consequence of this profit sharing is that partners are jointly and independently liable for the partnership’s debts and liabilities. Creation, organization, and dissolution of partnerships are governed by state law. Many states have adopted the Uniform Partnership Act. A partner relationship is generally the result of a contract (either express or implied) with no formal requirements (such as a signed document). To determine whether a partnership exists, courts look at five areas:

1. Intention of the parties
2. Sharing of profits and losses
3. Joint administration and control of business operations
4. Capital investment by each partner
5. Common ownership of property

Partnerships

Under state agency law, partners are personally liable for torts committed by the partnership and its agents. (This is not the case for a limited partnership, in which one or more general partners manage business operations and assume personal liability for partnership debts while other contributing/profit-sharing partners take no part in running the business and incur no liability beyond contribution obligations. See the next section in this chapter, “Limited Partnerships.” Limited partnerships are governed in many states by the Uniform Limited Partnership Act.) State property law also impacts partnerships by defining ownership in a partnership and determining how the death of a partner changes the partnership structure.

For state and federal tax purposes, a partnership is not a taxable entity. Partnership income is taxable to the partners in proportion to their share in the company’s profits.

A partnership is a type of business entity in which partners share with each other the profits or losses of the business undertaking in which all have invested. Partnerships often are favored over corporations for taxation purposes, as the partnership structure generally does not incur a tax on profits before profits are distributed to the partners (i.e., no dividend tax is levied, so the issue of double taxation does not exist). However, depending on the partnership structure and the jurisdiction in which it operates, owners of a partnership may be exposed to greater personal liability than they would as shareholders of a corporation.

Again, in evaluating whether a partnership format is an appropriate structure for the entity, you have to revisit the initial four factors governing this important decision. From a risk standpoint, risk is shared jointly and severally by each of the partners, so a partnership

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structure does not provide the partners with any shield from liabilities or exposure to other risks. From a taxation standpoint, profits and losses “flow through” the partnership to the partners’ individual tax returns. This eliminates the aspect of double taxation or provides a “shelter” against other taxable income if there is a taxable loss for the year. However, if the business is expected to be wildly profitable, it may not be advantageous to have that income included in partners’ tax returns. There may not be cash distributions available for the partners to pay these tax liabilities, because the capital may be needed for additional growth plans. Also, if a business is organized to lose money (other than a real estate or similar investment), why are you even going into business if your objective is not to make money?



TIPS AND TECHNIQUES

Because of liability and tax reasons, I generally discourage the use of a partnership structure for business ventures that will require capital and have a planned exit strategy.

Limited Partnerships

As the need to limit owner liability evolved and the need for investors grew, the limited partnership (LP) form of structure evolved, most notably in real estate ventures. In such ventures, the pass-through of the tax benefits was very attractive, as was the limitation of losses to the amount that each limited partner had invested.

Limited Partnerships

Three distinctions between LPs and general partnerships are:

- 1.** LPs are created by statute, not by intentions of the partners.
- 2.** LPs may be able to override the partnership agreement.
- 3.** There exists a difference in tax treatment: An LP normally has pass-through taxation, but must meet certain criteria to avoid being taxed as a corporation.

An LP consists of two or more persons, with at least one general partner and one limited partner. Although a general partner in an LP has unlimited personal liability, a limited partner's liability is limited to the amount of his or her investment in the company. LPs are creatures of statute; papers must be filed with the state in order to form an LP. Because of the limited liability of limited partnerships, they often are used as vehicles for raising capital. The LP is a separate entity and files taxes as a separate entity.

As in a general partnership (GP), the GPs have actual authority as agents of the firm to bind all the other partners in contracts with third parties that are in the ordinary course of the partnership's business. As with a GP, "An act of a general partner which is not apparently for carrying on in the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership binds the limited partnership only if the act was actually authorized by all the other partners" (U.S. Uniform Limited Partnership Act § 402(b)).

Unlike GPs, LPs have limited liability, meaning they are liable only for debts incurred by the firm to the extent of their registered investment, and they have no management authority. The GPs pay the LPs a return on their investment (similar to a dividend), the

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nature and extent of which is usually defined in the partnership agreement.

In the United States, the LP organization is most common in the film industry and real estate investment projects or in types of businesses that focus on a single or limited-term project. They are also useful in “labor-capital” partnerships, in which one (or more) financial backer prefers to contribute money or resources while the other partner performs the actual work. In such situations, liability is the driving concern behind the choice of LP status. The LP is also attractive to firms wishing to provide shares to many individuals without the additional tax liability of a corporation. Private equity companies almost exclusively use a combination of general and limited partners for their investment funds.

In some states, an LP can elect to become a limited liability partnership (LLP). In this arrangement, the general partners are liable only for the business debts of the company, not for acts of malpractice or other wrongdoing done by the other partners in the course of the partnership’s business.



TIPS AND TECHNIQUES

Limited partnerships may be an attractive vehicle for conducting a business that requires capital and has a defined exit strategy. As mentioned, LPs are widely used in real estate (or single-project ventures) and in investment funds. Keep LPs in mind as we explore several other corporate structures.

Limited Liability Companies

Limited Liability Companies

From the limited partnership structure evolved the limited liability company. A limited liability company (LLC) is a legal form of business company giving limited liability to its owners. Often incorrectly called a limited liability corporation (instead of company), it is a hybrid business entity having characteristics of both a corporation and a partnership. It is often more flexible than a corporation or partnership in that the owners have limited liability for the actions and debts of the company, and it is suitable for smaller companies with a single owner. The primary characteristic of a corporation is limited liability, and the primary characteristic of a partnership is the availability of pass-through income taxation.

Creation of an LLC requires several documents in addition to its formation documents. The most important of these is the operating agreement, which governs the manner in which the entity will be operated. Important terms in dealing with an LLC and their definitions follow.

Member

LLC members are the owners of the LLC, much as shareholders are the owners of a corporation or partners are the owners of a partnership. Like shareholders, a member's liability to repay the LLC's obligations is limited to his or her capital contribution. Members may be natural persons, corporations, partnerships, or other LLCs.

Membership Interest

A member's ownership interest in an LLC often is called a membership interest. Membership interests often are divided into

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standardized units, which, in turn, often are called shares or units. Unless otherwise provided for in the operating agreement, a member's right to receive distributions or exercise member rights over the LLC is proportionate to his or her membership interest. Membership interests and member rights are regulated by state law.

Manager

LLCs may be managed by their members in proportion to their membership interests. Many LLC operating agreements, however, provide for a manager or board of managers to oversee or run the day-to-day operations of the LLC. The managers are elected or appointed by members. If it is so provided in the operating agreement, they also may be removed by members. A member may be a manager, often called a managing member.

Articles of Organization

All LLCs must file evidence of their existence with the secretary of state (or some governmental office) of the state where they choose to be organized. The articles of organization serve this purpose.

Operating Agreement

The operating agreement of an LLC is the document most important to its success, because it determines, defines, and apportions the rights of the members and the managers, if any. The operating agreement generally is not filed with the secretary of state (or other

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governmental office). A sample limited liability company operating agreement can be found on www.wiley.com/go/capitalformation.

Management

LLCs may be either member managed or manager managed. A member-managed LLC may be governed by a single class of members (in which case it approximates a partnership) or multiple classes of members (in which case it approximates a limited partnership). Choosing manager management creates a two-tiered management structure that approximates corporate governance, with the managers typically holding powers similar to corporate officers and directors. The LLC's operating agreement (the LLC version of a partnership agreement or a corporation's bylaws) determines how the LLC is managed. C corporations, S corporations, limited liability partnerships, limited partnerships, limited liability limited partnerships, and LLCs lie along a spectrum of flexibility, with LLCs being the most flexible, and thus preferable, for many businesses.

Income Taxation

For U.S. federal income tax purposes, LLCs that are treated as partnerships use IRS Form 1065. LLCs are organized with a document called the articles of organization or the rules of organization specified publicly by the state; additionally, it is common to have an operating agreement privately specified by the members. The operating agreement is a contract among the members of an LLC and the LLC, governing the membership, management, operation, and distribution of income of the company.

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Under some circumstances, however, the members (the LLC version of shareholders or partners) may elect for the LLC to be taxed like a corporation (taxation of the entity's income prior to any dividends or distributions to the members and then taxation of the dividends or distributions once received as income by the members).

Operating as an LLC form of partnership does not mean that appropriate U.S. federal partnership tax forms are not necessary, or not complex. As a partnership, the entity's income and deductions attributed to each member are reported on that owner's tax return.

Advantages

Advantages of operating as an LLC include:

- Check-the-box taxation; an LLC can elect to be taxed as a sole proprietor, partnership, S corporation, or C corporation, providing much flexibility.
- Limited liability; the owners of the LLC, called members, are protected from liability for acts and debts of the LLC
- Much less administrative paperwork and recordkeeping than a corporation
- Pass-through taxation (i.e., no double taxation), unless the LLC elects to be taxed as a C corporation
- Using default tax classification, profits are taxed personally at the member level, not at the LLC level
- LLCs in most states are treated as entities separate from their members; in some jurisdictions, case law has developed deciding

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LLCs are not considered to have separate legal standing from their members

- LLCs in some states can be set up with just one natural person involved
- Membership interests of LLCs can be assigned, and the economic benefits of those interests can be separated and assigned, providing the assignee with the economic benefits of distributions of profits/losses (like a partnership), without transferring the title to the membership interest
- Unless the LLC has chosen to be taxed as a corporation, income of the LLC generally retains its character (e.g., as capital gains or as foreign-sourced income) in the hands of the members

Disadvantages

The disadvantages of the LLC structure include:

- Although there is no statutory requirement for an operating agreement in most states, members who operate without one may run into problems.
- It may be more difficult to raise financial capital for an LLC. Investors may be more comfortable investing funds in the better-understood corporate form, with a view toward an eventual initial public offering (IPO). One possible solution may be to form a new corporation and merge into it, dissolving the LLC and converting into a corporation.
- Many states, including Alabama, California, Kentucky, New York, Pennsylvania, Tennessee, and Texas, levy a franchise

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tax or capital values tax on LLCs. In essence, this franchise or business privilege tax is the “fee” the LLC pays the state for the benefit of limited liability. The franchise tax can be an amount based on revenue, on profits, or on the number of owners or the amount of capital employed in the state, or some combination of those factors, or simply a flat fee, as in Delaware. In most states, however, the fee is nominal. Only a handful charge a tax comparable to the tax imposed on corporations.

- Some creditors will require members of up-and-starting LLCs to personally guarantee the LLC’s loans, thus making the members personally liable for the debt of the LLC.
- The management structure of an LLC may be unfamiliar to many. Unlike corporations, LLCs are not required to have a board of directors or officers.
- The LLC form of organization is relatively new. For that reason, some states do not treat LLCs like corporations for liability purposes but instead treat them more as disregarded entities. In this case, an individual operating a business as an LLC may be treated as operating it as a sole proprietorship, or a group operating as an LLC may be treated as a general partnership, which defeats the purpose of establishing an LLC: to have limited liability. (A sole proprietor has unlimited liability for the business; in a partnership, the partners have joint and several liability, meaning any and all of the partners can be held liable for the business’s debts, no matter how small their investment or what their percentage of ownership is.)

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- The principals of LLCs use many different titles (e.g., member, manager, managing member, managing director, chief executive officer, president, and partner). As such, it can be difficult to determine who actually has the authority to enter into a contract on the LLC's behalf.



TIPS AND TECHNIQUES

Applying the four factors to evaluate structure—willingness to assume risk, need for capital, tax objectives, and exit strategy—should enable you to evaluate whether the LLC structure makes sense for your enterprise.

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Last, we come to the corporate form of structure. This is perceived to be the most common form, and depending on the various objectives, it actually may make the most sense.

A corporation is a legal entity separate from the persons that form it. It is a legal entity owned by individual stockholders. In American and, increasingly, international usage, the term “corporation” denotes a body corporate (i.e., an entity separate and apart from a natural person) formed to conduct business.

Corporations exist as a product of corporate law, and their rules balance the interests of the shareholders who invest their capital and the employees who contribute their labor. People work together in

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corporations to produce value and generate income. In modern times, corporations have become an increasingly dominant part of economic life. People rely on corporations for employment, for their goods and services, for the value of the pensions, and for economic growth and social development.

The defining feature of a corporation is its legal independence from the people who created it. If a corporation fails, shareholders normally stand to lose only their investment, and employees will lose their jobs, but neither will be further liable for debts that remain owing to the corporation's creditors unless they have personally guaranteed certain indebtedness (not recommended by the author) or taken some other actions. This limited liability is similar to limited partnerships and limited liability companies and is perhaps the most attractive feature of a corporation.

Despite not being natural persons, corporations are recognized by the law to have rights and responsibilities like actual people. Corporations can exercise human rights against real individuals and the state, and they may be responsible for human rights violations. Just as they are "born" into existence through their founders obtaining a certificate of incorporation, they can "die" when they lose money and become insolvent. Corporations can even be convicted of criminal offenses, such as fraud and manslaughter (topics that are not contemplated in this book).

Five common characteristics of the modern corporation include:

- 1.** Delegated management; in other words, control of the company is placed in the hands of a board of directors
- 2.** Limited liability of the shareholders

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- 3.** Investor ownership, or, more clearly, ownership by shareholders
- 4.** Separate legal personality of the corporation (the right to sue and be sued in its own name)
- 5.** Transferrable shares (sometimes on a listed exchange)

Ownership of a corporation is complicated by increasing social and economic interdependence, as different stakeholders compete to have a say in corporate affairs. Company boards have representatives of both shareholders and employees to “codetermine” company strategy. Calls for increasing corporate social responsibility are made by consumers and by environmental and human rights activists, and this has led to larger corporations drawing up codes of conduct. The existence of a corporation requires a special legal framework and body of law that specifically grants the corporation legal personality and typically views a corporation as a fictional person, a legal person, or a moral person (as opposed to a natural person). As such, corporate statutes typically give corporations the ability to own property, sign binding contracts, and pay taxes in a capacity that is separate from that of its shareholders.

The legal personality has two economic implications:

- 1.** It grants creditors priority over the corporate assets upon liquidation.
- 2.** Corporate assets cannot be withdrawn by its shareholders, nor can the assets of the firm be taken by personal creditors of its shareholders. This feature requires special legislation and a special legal framework, as it cannot be reproduced via standard contract law.

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See Exhibit 1.1 for a sample corporation article of incorporation and Exhibit 1.2 for an example of corporation bylaws.

EXHIBIT 1.1

Corporation Articles of Incorporation

CERTIFICATE OF INCORPORATION OF

[name of corporation]

1. The name of the Corporation is:

[name of corporation]

2. The address of its registered office in the State of Delaware is [1209 Orange Street, Wilmington, Delaware 19801, County of New Castle.] The name of its registered agent at such address is [The Corporation Trust Company].

3. The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware.

4. The Corporation is authorized to issue capital stock to the extent of:

a. _____ Million (___0,000,000) Shares Common Stock, Par Value \$.0001 per Share; and

b. _____ Million (___0,000,000) Shares Preferred Stock, Par Value \$.0001 Per Share (the "Preferred Stock").

The Board of Directors of the Corporation shall have the authority to issue shares of Preferred Stock in series or subseries and to fix by resolution the designations, powers, preferences, rights, and the qualifications, limitations, or restrictions in respect of any such series or subseries by filing a certificate pursuant to the applicable law of the State of Delaware.

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5. The Corporation is to have perpetual existence.

6. Directors.

a. Number. Except as otherwise fixed by or pursuant to provisions hereof relating to the rights of the holders of Preferred Stock to elect additional Directors under specified circumstances, the number of Directors of the Corporation shall be fixed from time to time by affirmative vote of a majority of the Directors then in office; provided, however, that the number of Directors shall not be reduced to shorten the term of any Director then in office.

b. Elections And Terms. The Board of Directors, other than those who may be elected by the holders of any series of Preferred Stock having a preference over the common stock as to dividends or upon liquidation, shall be classified, with respect to the time for which they severally hold office, into three classes, as nearly equal in number as possible, as shall be provided in the manner specified in the Bylaws of the Corporation, one class to be originally elected for a term expiring at the annual meeting of stockholders to be held in _____, another class to be originally elected for a term expiring at the annual meeting of stockholders to be held in _____, and another class to be originally elected for a term expiring at the annual meeting of the stockholders to be held in _____, with each class to hold office until its successors are elected and qualified. At each annual meeting of the stockholders of the Corporation after fiscal year _____, the successors of the class of Directors whose term expires at that meeting shall be elected to hold office for a term expiring at the annual meeting of stockholders held in the third year following the year of their election.

c. Newly Created Directorships And Vacancies. Except as otherwise fixed by or pursuant to provisions hereof

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relating to the rights of the holders of any series of Preferred Stock to elect additional Directors under specified circumstances, newly created directorships resulting from any increase in the number of directors and any vacancies on the Board of Directors resulting from death, resignation, disqualification, removal, or other cause shall be filled by the affirmative vote of a majority of the remaining Directors then in office, even though less than a quorum of the Board of Directors. Except as otherwise provided under Delaware law, newly created directorships and vacancies resulting from any cause may not be filled by any other person or persons. Any Director elected in accordance with this Paragraph 6(c) shall hold office for the remainder of the full term of the class of Directors in which the new directorship was created or the vacancy occurred and until such Director's successor shall have been elected and qualified.

- d. Removal. Except as otherwise fixed by or pursuant to provisions hereof relating to the rights of the holders of any class or series of Preferred Stock to elect additional Directors under specified circumstances, any Director may be removed from office only for cause and only by the affirmative vote of the holders of [two-thirds] of the outstanding shares of stock entitled to vote generally in the election of Directors.
7. A director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director for any act or omission except to the extent such exemption from liability or limitation thereof is not permitted under the General Corporation Law of the State of Delaware as the same exists or may hereafter be amended. Any amendment, repeal, or modification of this Paragraph by the stockholders of the Corporation shall be prospective only, and shall not adversely affect any

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limitation on the personal liability of a director of the Corporation in respect of any act or omission occurring prior to the time of such amendment, modification, or repeal.

8. Amendments to the Certificate of Incorporation of the Corporation shall require the affirmative vote of holders of [two-thirds] of the outstanding shares of stock entitled to vote on the proposed amendment to the Certificate of Incorporation. Notwithstanding the foregoing, in the event that a resolution to amend the Certificate of Incorporation of the Corporation is adopted by the affirmative vote of at least eighty percent (80%) of the members of the Board of Directors, approval of the amendment shall only require the affirmative vote of the holders of a majority of the outstanding shares of stock entitled to vote on the proposed amendment to the Certificate of Incorporation.
9. All of the powers of this Corporation, insofar as the same may be lawfully vested by this Certificate of Incorporation in the Board of Directors, are hereby conferred upon the Board of Directors of this Corporation. In furtherance and not in limitation of that power, the Board of Directors shall have the power to make, adopt, alter, amend, and repeal from time to time bylaws of this Corporation, subject to the right of the stockholders entitled to vote with respect thereto, to adopt, alter, amend, and repeal bylaws made by the Board of Directors; provided, however, that bylaws shall not be adopted, altered, amended, or repealed by the stockholders of the Corporation except by the affirmative vote of the holders of [two-thirds] of the outstanding shares of stock entitled to vote upon the election of directors.
10. No action required to be taken or which may be taken at any annual or special meeting of stockholders of the Corporation may be taken without a meeting, and the power of the stockholders to consent in writing, without a meeting, to the taking of any action is specifically denied.

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- 11. Special meetings of stockholders for any purpose or purposes may be called by the Board of Directors, or by a committee of the Board of Directors that has been designated by the Board of Directors and whose powers and authority, as expressly provided in a resolution of the Board of Directors, include the power to call such meetings, and shall be held at such time, date, and place, either within or without the state of Delaware, as shall be designated by resolution of the Board of Directors or such committee. Special meetings of stockholders may not be called by any other person or persons.
- 12. The Corporation hereby elects to be governed by Section 203 of the General Corporation Law of the State of Delaware.
- 13. Elections of directors need not be by written ballot except and to the extent provided in the bylaws of the Corporation.
- 14. The name and mailing address of the Sole Incorporator is as follows:

[provide]

I, [name], being the Sole Incorporator hereinbefore named, for the purpose of forming a corporation pursuant to the General Corporation Law of the State of Delaware, do make this certificate, hereby declaring and certifying and this is my act and deed and the facts herein stated are true, and accordingly have hereunto set my hand this _____ day of _____, _____.

 _____, Sole Incorporator

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EXHIBIT 1.2

Corporation Bylaws

BYLAWS

OF

[name]

(a Delaware corporation)

ARTICLE I

Meetings of Stockholders and Other Stockholder Matters

SECTION 1. Annual Meeting. An annual meeting of the stockholders of [name] (hereinafter, the "Corporation") shall be held for the election of directors and for the transaction of such other proper business at such time, date, and place, either within or without the State of Delaware, as shall be designated by resolution of the Board of Directors from time to time.

SECTION 2. Special Meetings. Special meetings of stockholders for any purpose or purposes may be called by the Board of Directors, or by a committee of the Board of Directors that has been designated by the Board of Directors and whose powers and authority, as expressly provided in a resolution of the Board of Directors, include the power to call such meetings, and shall be held at such time, date, and place, either within or without the state of Delaware, as shall be designated by resolution of the Board of Directors or such committee. The only business to be transacted at a special meeting of stockholders shall be that business set forth in the notice of meeting given pursuant to Section 3 of this Article I. Special meetings of stockholders may not be called by any other person or persons.

SECTION 3. Notice of Meetings. Written notice of each meeting of the stockholders, which shall state the time, date, and place of the meeting and, in the case of a special meeting, the purpose or

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purposes for which it is called, shall, unless otherwise provided by applicable law, the certificate of incorporation or these bylaws, be given not less than ten (10) nor more than sixty (60) days before the date of such meeting to each stockholder entitled to vote at such meeting, and, if mailed, it shall be deposited in the United States mail, postage prepaid, directed to the stockholder at such stockholder's address as it appears on the records of the Corporation. Whenever notice is required to be given, a written waiver thereof signed by the person entitled thereto, whether before or after the time stated therein, shall be deemed equivalent to notice. Neither the business to be transacted nor the purpose of any annual or special meeting of the stockholders need be specified in any written waiver of notice. Attendance of a person at a meeting shall constitute a waiver of notice of such meeting, except when the person attends a meeting for the express purpose of objecting, at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened.

SECTION 4. Adjournments. Any meeting of the stockholders may adjourn from time to time to reconvene at the same or some other place, and notice need not be given of any such adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken. At any such adjourned meeting at which a quorum may be present, the Corporation may transact any business which might have been transacted at the original meeting. If the adjournment is for more than thirty (30) days, or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting.

SECTION 5. Quorum. Except as otherwise provided by Delaware law, the certificate of incorporation or these bylaws, at any meeting of the stockholders the holders of a majority of the shares of stock, issued and outstanding and entitled to vote, shall be present in person or represented by proxy in order to constitute a quorum for the

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transaction of any business. In the absence of a quorum, the holders of a majority of the shares present in person or represented by proxy and entitled to vote may adjourn the meeting from time to time in the manner described in Section 4 of this Article I.

SECTION 6. Organization. At each meeting of the stockholders, the Chairman of the Board, or in his absence or inability to act, the Chief Executive Officer or, in his absence or inability to act, the President, or in his absence or inability to act, a Vice President or, in the absence or inability to act of such persons, any person designated by the Board of Directors, or in the absence of such designation, any person chosen by a majority of those stockholders present in person or represented by proxy, shall act as chairman of the meeting. The Secretary or, in his absence or inability to act, any person appointed by the chairman of the meeting, shall act as secretary of the meeting and keep the minutes thereof.

SECTION 7. Notice of Business. At any annual meeting of the stockholders of the Corporation, only such business shall be conducted as shall have been brought before the meeting. To be properly brought before an annual meeting, such business must be (i) specified in the notice of meeting (or any supplement thereto) given by or at the direction of the Board of Directors; (ii) otherwise properly brought before the meeting by or at the direction of the Board of Directors; or (iii) otherwise properly brought before the meeting by any stockholder of the Corporation who is a stockholder of record at the time of giving of the notice provided for in this Section 7, who shall be entitled to vote at such meeting and who complies with the notice procedures set forth in this Section 7. For business to be properly brought before an annual meeting of the stockholders by a stockholder, the stockholder shall have given timely notice thereof in writing to the Secretary of the Corporation. To be timely, a stockholder's notice shall be delivered to or mailed and received by the Secretary at the principal executive
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office of the Corporation not less than sixty (60) days nor more than ninety (90) days prior to the annual meeting; provided, however, that in the event that less than seventy (70) days' notice or prior public disclosure of the date of the annual meeting is given or made to stockholders, notice by the stockholder to be timely must be so received not later than the close of business on the tenth day following the day on which such notice of the date of the meeting was mailed or such public disclosure was made, whichever first occurs. Such stockholder's notice to the Secretary of the Corporation shall set forth as to each matter the stockholder proposes to bring before the annual meeting (a) a brief description of the business desired to be brought before the annual meeting, the reasons for conducting such business at the annual meeting and, in the event that such business includes a proposal to amend any document, including these bylaws, the language of the proposed amendment, (b) the name and address, as they appear on the Corporation's books, of the stockholder proposing such business, (c) the class and number of shares of capital stock of the Corporation which are beneficially owned by such stockholder and (d) any material interest of such stockholder in such business. Notwithstanding anything in these bylaws to the contrary, no business shall be conducted at any annual meeting of the stockholders except in accordance with the procedures set forth in this Section 7. The chairman of the annual meeting of the stockholders shall, if the facts warrant, determine and declare to the meeting that business was not properly brought before the meeting in accordance with the provisions of this Section 7, and if he should so determine, he shall so declare to the meeting and any such business not properly brought before the meeting shall not be transacted. Notwithstanding the foregoing provisions of this Section 7, a stockholder shall also comply with all applicable requirements of the Securities and Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder with respect to matters set forth in this Section 7.

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SECTION 8. Order of Business; Conduct of Meetings. The order of business at all meetings of the stockholders shall be as determined by the chairman of the meeting.

SECTION 9. Voting; Proxies. Unless otherwise provided by Delaware law or in the certificate of incorporation, each stockholder entitled to vote at any meeting of stockholders shall be entitled to one vote for each share of capital stock which has voting power upon the matter in question held by such stockholder either (i) on the date fixed pursuant to the provisions of Section 10 of Article I of these bylaws as the record date for the determination of the stockholders to be entitled to notice of or to vote at such meeting; or (ii) if no record date is fixed, then at the close of business on the day next preceding the day on which notice is given. Each stockholder entitled to vote at any meeting of the stockholders may authorize another person or persons to act for him by proxy. Any such proxy shall be delivered to the secretary of such meeting at or prior to the time designated in the order of business for so delivering such proxies. At all meetings of the stockholders for the election of directors, a plurality of the votes cast shall be sufficient to elect. On all other matters, except as otherwise required by Delaware law or the certificate of incorporation, a majority of the votes cast at a meeting of the stockholders shall be necessary to authorize any corporate action to be taken by vote of the stockholders. Unless required by Delaware law, or determined by the chairman of the meeting to be advisable, the vote on any question other than the election of directors need not be by written ballot. On a vote by written ballot, each written ballot shall be signed by the stockholder voting, or by his proxy if there be such proxy, and shall state the number of shares voted.

SECTION 10. Fixing of Record Date for Stockholder Meetings. In order that the Corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, the Board of Directors may fix a record date,
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which record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board of Directors, and which record date shall not be more than sixty (60) nor less than ten (10) days before the date of such meeting. If no record date is fixed by the Board of Directors, the record date for determining stockholders entitled to notice of or to vote at a meeting of stockholders shall be the close of business on the day next preceding the day on which notice is given or, if notice is waived, at the close of business on the day next preceding the day on which the meeting is held. A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the Board of Directors may fix a new record date for the adjourned meeting.

SECTION 11. Fixing a Record Date for Other Purposes. In order that the Corporation may determine the stockholders entitled to receive payment of any dividend or other distribution or allotment of any rights or the stockholders entitled to exercise any rights in respect of any change, conversion, or exchange of stock, or for the purposes of any other lawful action, the Board of Directors may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted, and which record date shall not be more than sixty (60) days prior to such action. If no record date is fixed, the record date for determining stockholders for any such purpose shall be at the close of business on the day on which the Board of Directors adopts the resolution relating thereto.

SECTION 12. List of Stockholders Entitled to Vote. The officer of the Corporation who has charge of the stock ledger of the Corporation shall prepare and make, at least ten (10) days before every meeting of the stockholders, a complete list of the stockholders entitled to vote at the meeting, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. Such list shall

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be open to the examination of any stockholder, for any purpose germane to the meeting, during ordinary business hours, for a period of at least ten (10) days prior to the meeting, either at a place within the city where the meeting is to be held, which place shall be specified in the notice of the meeting, or, if not so specified, at the place where the meeting is to be held. The list shall also be produced and kept at the time and place of the meeting during the whole time thereof, and may be inspected by any stockholder of the Corporation who is present.

SECTION 13. Inspectors. The Board of Directors may, in advance of any meeting of stockholders, appoint one or more inspectors to act at such meeting or any adjournment thereof. If the inspectors shall not be so appointed or if any of them shall fail to appear or act, the chairman of the meeting shall appoint inspectors. Each inspector, before entering upon the discharge of his or her duties, shall take and sign an oath faithfully to execute the duties of inspector at such meeting with strict impartiality and according to the best of his or her ability. The inspectors shall determine the number of shares outstanding and the voting power of each, the number of shares represented at the meeting, the existence of a quorum, and the validity and effect of proxies, and shall receive votes, ballots, or consents, hear and determine all challenges and questions arising in connection with the right to vote, count, and tabulate all votes, ballots, or consents, determine the result, and do such acts as are proper to conduct the election or vote with fairness to all stockholders. On request of the chairman of the meeting or any stockholder entitled to vote thereat, the inspectors shall make a report in writing of any challenge, question, or matter determined by them and shall execute a certificate of any fact found by them. No director or candidate for the office of director shall act as an inspector of an election of directors. Inspectors need not be stockholders.

SECTION 14. Stock Ledger. The stock ledger of the Corporation shall be the only evidence as to who are the stockholders entitled
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to examine the stock ledger, the list required by Section 12 of this Article I, the books of the Corporation, or to vote in person or by proxy at any meeting of the stockholders.

ARTICLE II

Board of Directors

SECTION 1. General Powers. The business and affairs of the Corporation shall be managed by or under the direction of a Board of Directors. The Board of Directors may exercise all such authority and powers of the Corporation and do all such lawful acts and things as are not, by Delaware law or the certificate of incorporation, directed or required to be exercised or done by the stockholders.

SECTION 2. Number, Qualification. Except as otherwise fixed by or pursuant to provisions of the certificate of incorporation relating to the rights of the holders of any class or series of stock having a preference over common stock as to dividends or upon liquidation to elect additional directors under specified circumstances, the number of directors of the Corporation shall be fixed from time to time by affirmative vote of a majority of the directors then in office; provided, however, that the numbers of directors constituting the whole Board of Directors shall be an odd number. Directors need not be stockholders.

SECTION 3. Elections And Terms. The Board of Directors, other than those who may be elected by the holders of any classes or series of stock having a preference over the common stock as to dividends or upon liquidation, shall be classified, with respect to the time for which they severally hold office, into three class, as nearly equal in number as possible, one class to be originally elected for a term expiring at the annual meeting of stockholders to be held in _____, another class to be originally elected for a term expiring at the annual meeting of stockholders to be held in _____, and another class to be originally elected for a term

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expiring at the annual meeting of the stockholders to be held in _____, with each class to hold office until its successors are elected and qualified. At each annual meeting of the stockholders of the Corporation after fiscal year _____, the successors of the class of directors whose term expires at that meeting shall be elected to hold office for a term expiring at the annual meeting of stockholders held in the third year following the year of their election.

SECTION 4. Newly Created Directorships And Vacancies.

Except as otherwise fixed by or pursuant to provisions of the certificate of incorporation relating to the rights of the holders of any class or series of stock having a preference over common stock as to dividends or upon liquidation to elect additional directors under specified circumstances, newly created directorships resulting from any increase in the number of directors and any vacancies on the Board of Directors resulting from death, resignation, disqualification, removal, or other cause shall be filled by the affirmative vote of a majority of the remaining directors then in office, even though less than a quorum of the Board of Directors. Except as otherwise provided under Delaware law, newly created directorships and vacancies resulting from any cause may not be filled by any other person or persons. Any director elected in accordance with the preceding sentence shall hold office for the remainder of the full term of the class of directors in which the new directorship was created or the vacancy occurred and until such director's successor shall have been elected and qualified. No decrease in the number of directors constituting the Board of Directors shall shorten the term of any director then in office.

SECTION 5. Removal and Resignation. Except as otherwise fixed by or pursuant to provisions of the certificate of incorporation relating to the rights of the holders of any class or series of stock having a preference over common stock as to dividends or upon liquidation to elect additional directors under specified

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circumstances, any director may be removed from office only for cause and only by the affirmative vote of the holders of [two-thirds] of the outstanding shares of stock entitled to vote generally in the election of directors. Any director may resign at any time upon written notice to the Corporation. Any such resignation shall take effect at the time specified therein or, if the time when it shall become effective shall not be specified therein, immediately upon its receipt; and, unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

SECTION 6. Nomination of Directors. Only persons who are nominated in accordance with the following procedures shall be eligible for election by the stockholders as directors of the Corporation. Nominations of persons for election as directors of the Corporation may be made at an annual meeting of stockholders (i) by or at the direction of the Board of Directors; (ii) by any nominating committee or persons appointed by the Board of Directors; or (iii) by any stockholder of the Corporation entitled to vote for the election of directors at the meeting who complies with the notice procedures set forth in this Section 6. Such nominations, other than those made by or at the direction of the Board of Directors, shall be made pursuant to timely notice in writing to the Secretary of the Corporation. To be timely, a stockholder's notice shall be delivered to or mailed and received at the principal executive office of the Corporation not less than sixty (60) days nor more than ninety (90) days prior to the annual meeting; provided, however, that in the event that less than seventy (70) days' notice or prior public disclosure of the date of the annual meeting is given or made to stockholders, notice by the stockholder to be timely must be so received not later than the close of business on the tenth day following the day on which such notice of the date of the meeting was mailed or such public disclosure was made, whichever first occurs. Such stockholder's notice to the Secretary of the Corporation shall set forth (a) as to

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each person whom the stockholder proposes to nominate for election or reelection as a director, (i) the name, age, business address, and residence address of the person, (ii) the principal occupation or employment of the person, (iii) the class and number of shares of capital stock of the Corporation which are beneficially owned by the person, and (iv) any other information relating to the person that is required to be disclosed in solicitations for proxies for election of directors pursuant to Regulation 14A under the Securities Exchange Act of 1934, as now or hereafter amended; and (b) as to the stockholder giving the notice, (i) the name and record address of such stockholder and (ii) the class and number of shares of capital stock of the Corporation which are beneficially owned by such stockholder. The Corporation may require any proposed nominee to furnish such other information as may reasonably be required by the Corporation to determine the eligibility of such proposed nominee to serve as a director of the Corporation. No person shall be eligible for election by the stockholders as a director of the Corporation unless nominated in accordance with the procedure set forth herein. The chairman of the annual meeting of the stockholders shall, if the facts warrant, determine and declare to the meeting that nomination was not made in accordance with the foregoing procedure, and if he should so determine, he shall so declare to the meeting and the defective nomination shall be disregarded.

SECTION 7. Regular Meetings. Regular meetings of the Board of Directors may be held at such places within or without the State of Delaware and at such times as the Board of Directors may from time to time determine. Notice of regular meetings of the Board of Directors need not be given except as otherwise required by Delaware law or these bylaws.

SECTION 8. Special Meetings. Special meetings of the Board of Directors may be held at any time or place within or without the State of Delaware whenever called by the Chairman of the Board

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of Directors, by the Chief Executive Officer, or by a majority of the whole Board of Directors.

SECTION 9. Notice of Meetings. Notice of each special meeting of the Board of Directors (and of each regular meeting for which notice shall be required) shall be given by the Secretary as hereinafter provided in this Section 9, in which notice shall be stated the time and place of the meeting. Except as otherwise required by Delaware law or these bylaws, such notice need not state the purpose (s) of such meeting. Notice of each such meeting shall be mailed, postage prepaid, to each director, addressed to such director at such director's residence or usual place of business, by registered mail, return receipt requested delivered at least two (2) days before the day on which such meeting is to be held, or shall be sent addressed to such director at such place by electronic mail, telegraph, telex, cable, or wireless, or be delivered to such director personally, by facsimile or by telephone, at least 24 hours before the time at which such meeting is to be held. A written waiver of notice, signed by the director entitled to notice, whether before or after the time stated therein, shall be deemed equivalent to notice. Notice of any such meeting need not be given to any director who shall, either before or after the meeting, submit a signed waiver of notice or who shall attend such meeting without protesting, prior to or at its commencement, the lack of notice to him. Neither the business to be transacted nor the purpose of any meeting of the Board of Directors need be specified in any written waiver of notice.

SECTION 10. Quorum and Manner of Acting. Except as hereinafter provided, a majority of the whole Board of Directors shall be present in person or by means of a conference telephone or similar communications equipment which allows all persons participating in the meeting to hear each other at the same time at any meeting of the Board of Directors in order to constitute a quorum for the transaction of business at such meeting; and, except as otherwise required by Delaware law, the certificate of incorporation or these

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bylaws, the act of a majority of the directors present at any meeting at which a quorum is present shall be the act of the Board of Directors. Once a quorum for the transaction of business has been established at any meeting of the Board of Directors in accordance with this Section 10 it may not be broken by the departure of any director or directors. In the absence of a quorum at any meeting of the Board of Directors, a majority of the directors present thereat may adjourn such meeting to another time and place. Notice of the time and place of any such adjourned meeting shall be given to the directors who were not present at the time of the adjournment and, unless such time and place were announced at the meeting at which the adjournment was taken, to the other directors. At any adjourned meeting at which a quorum is present, any business may be transacted which might have been transacted at the meeting as originally called. The directors shall act only as a Board and the individual directors shall have no power as such.

SECTION 11. Action Without a Meeting. Any action required or permitted to be taken at any meeting of the Board of Directors may be taken without a meeting if all members of the Board consent thereto in writing, and the writing or writings are filed with the minutes of the proceedings of the Board of Directors.

SECTION 12. Telephonic Participation. Members of the Board of Directors may participate in a meeting of the Board by means of a conference telephone or similar communications equipment allowing all persons participating in the meeting to hear each other at the same time. Participation in such a meeting shall constitute presence in person at such meeting.

SECTION 13. Organization. At each meeting of the Board, the Chairman of the Board or, in his absence or inability to act, the Chief Executive Officer or, in his absence or inability to act, another director chosen by a majority of the directors present shall act as chairman of the meeting and preside thereat. The Secretary or, in his absence or inability to act, any person appointed by the

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chairman shall act as secretary of the meeting and keep the minutes thereof.

SECTION 14. Compensation. The Board of Directors shall have authority to fix the compensation, including fees and reimbursement of expenses, of directors for services to the Corporation in any capacity.

ARTICLE III

Committees

SECTION 1. Committees. The Board of Directors may, by resolution passed by a majority of the whole Board of Directors, designate one or more committees, each committee to consist of two (2) or more of the directors of the Corporation. The Board of Directors may fill vacancies in, change the membership of, or dissolve any such committee. The Board of Directors may designate one or more directors as alternate members of any committee who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of the committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he or they constitute a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in place of such absent or disqualified member. Any such committee, to the extent provided by Delaware law and to the extent provided in the resolution of the Board of Directors, shall have and may exercise the powers of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation to be affixed to all papers which may require it. Each committee shall keep written minutes of its proceedings and shall report such minutes to the Board of Directors when required. All such proceedings shall be subject to revision or alteration by the Board of Directors; provided, however, that third parties shall not be prejudiced by such revision or alteration.

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SECTION 2. Committee Rules. Unless the Board of Directors otherwise provides, each committee designated by the Board of Directors may make, alter, and repeal rules for the conduct of its business. In the absence of such rules, each committee shall conduct its business in the same manner as the Board of Directors conducts its business pursuant to Article II of these bylaws.

SECTION 3. Standing Committees. Notwithstanding anything contained in this Article III to the contrary, the Board of Directors shall maintain two (2) standing committees consisting of (a) a Corporate Governance Committee; and (b) an Audit Committee. The Corporate Governance Committee shall consist of at least three (3) members of the Board of Directors who are "non-employee directors" within the meaning of Rule 16b-3 promulgated under the Securities Exchange Act of 1934, as amended, and who are "outside directors" within the meaning of Section 162(m) of the Internal Revenue Code of 1986, as amended. The Corporate Governance Committee shall have the power and authority to recommend general compensation policies to the full Board of Directors, oversee the Corporation's compensation plans, establish the compensation levels for the Corporation's Chief Executive Officer and other Executive Officers, and advise the full Board of Directors on general compensation policies for the Company's Executive Officers. The Audit Committee shall consist of at least three (3) members of the Board of Directors, none of which shall also serve as an Executive Officer of the Corporation. The Audit Committee shall have the power and authority to review and report to the full Board of Directors with respect to the selection, retention, termination, and terms of engagement of the Corporation's independent public accountants and maintain communications among the Board of Directors, the independent public accountants, and the Corporation's internal accounting staff with respect to accounting and audit procedures. The Audit Committee shall also have the power and authority to

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review the Corporation's processes, internal accounting and control procedures and policies, and related matters with the Corporation's management.

ARTICLE IV

Officers

SECTION 1. Number. The officers of the Corporation shall be elected by the Board of Directors and shall consist of a Chairman of the Board, a Chief Executive Officer, a President, one or more Vice Presidents, a Secretary, a Treasurer, and such other officers and assistant officers as may be deemed necessary or desirable by the Board of Directors. Any number of offices may be held by the same person. In its discretion, the Board of Directors may choose not to fill any office for any period that it may deem advisable unless otherwise required by Delaware law.

SECTION 2. Election and Term of Office. The officers of the Corporation shall be elected annually by the Board of Directors at its first meeting held after each annual meeting of stockholders or as soon thereafter as conveniently may be. The Chief Executive Officer shall appoint persons to other officers as he or she deems desirable, and such appointments, if any, shall serve at the pleasure of the Board of Directors. Each officer shall hold office until a successor is duly elected and qualified or until his or her earlier death, resignation or removal as hereinafter provided.

SECTION 3. Resignations. Any officer may resign at any time upon written notice to the Corporation. Any such resignation shall take effect at the time specified therein or, if the time when it shall become effective shall not be specified therein, immediately upon its receipt; and, unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

SECTION 4. Removal. Any officer or agent of the Corporation may be removed, either with or without cause, at any time, by the

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Board of Directors at any meeting of the Board of Directors or, except in the case of an officer or agent elected or appointed by the Board of Directors, by the Chief Executive Officer, but any such removal shall be without prejudice to the contract rights, if any, of the person so removed.

SECTION 5. Vacancies. Any vacancy occurring in any office of the Corporation by death, resignation, removal, or otherwise, may be filled for the unexpired portion of the term of the office which shall be vacant by the Board of Directors at any special or regular meeting.

SECTION 6. Powers and Duties of Executive Officers. The officers of the Corporation shall have such powers and duties in the management of the Corporation as may be prescribed in a resolution by the Board of Directors and, to the extent not so provided, as generally pertain to their respective offices, subject to the control of the Board of Directors. The Board of Directors may require any officer, agent, or employee to give security for the faithful performance of his or her duties.

SECTION 7. The Chairman of the Board. The Chairman of the Board shall be an officer of the Corporation for the purpose of executing agreements and other instruments on behalf of the Corporation but shall not be an employee of the Corporation. He shall, if present, preside at each meeting of the stockholders and of the Board of Directors and shall be an ex officio member of all committees of the Board of Directors. Such person shall perform all duties incident to the office of Chairman of the Board and such other duties as may from time to time be assigned to such person by the Board of Directors.

SECTION 8. The Chief Executive Officer. The Chief Executive Officer shall have the general and active supervision and direction over the business operations and affairs of the Corporation and over the other officers, agents, and employees and shall see that

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their duties are properly performed. At the request of the Chairman of the Board or in the case of his absence or inability to act, the Chief Executive Officer shall perform the duties of the Chairman of the Board and when so acting shall have all the powers of and be subject to all the restrictions upon the Chairman of the Board. Such person shall perform all duties incident to the office of Chief Executive Officer and such other duties as may from time to time be assigned to such person by the Board of Directors.

SECTION 9. The President. The President shall be the Chief Operating Officer of the Corporation and shall have general and active supervision and direction over the business operations and affairs of the Corporation and over its several officers, agents, and employees, subject, however, to the direction of the Chief Executive Officer and the control of the Board of Directors. In general, the President shall have such other powers and shall perform such other duties as usually pertain to the office of President or as from time to time may be assigned to him by the Board of Directors or the Chief Executive Officer.

SECTION 10. Vice Presidents. Each Vice President shall have such powers and perform such duties as from time to time may be assigned to him by the Board of Directors or the Chief Executive Officer.

SECTION 11. The Treasurer. The Treasurer shall (a) have charge and custody of, and be responsible for, all the funds and securities of the Corporation; (b) keep full and accurate accounts of receipts and disbursements in books belonging to the Corporation; (c) cause all monies and other valuables to be deposited to the credit of the Corporation in such depositories as may be designated by the Board; (d) receive, and give receipts for, monies due and payable to the Corporation from any source whatsoever; (e) disburse the funds of the Corporation and supervise the investment of its funds as ordered or authorized by the Board, taking

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proper vouchers therefor; and (f) in general, have all the powers and perform all the duties incident to the office of Treasurer and such other duties as from time to time may be assigned to him by the Board of Directors or the Chief Executive Officer.

SECTION 12. The Secretary. The Secretary shall (a) record the proceedings of the meetings of the stockholders and directors in a minute book to be kept for that purpose; (b) see that all notices are duly given in accordance with the provisions of these bylaws and as required by law; (c) be custodian of the records and the seal of the Corporation and affix and attest the seal to all stock certificates of the Corporation (unless the seal of the Corporation on such certificates shall be a facsimile, as hereinafter provided) and affix and attest the seal to all other documents to be executed on behalf of the Corporation under its seal; (d) see that the books, reports, statements, certificates, and other documents and records required by law to be kept and filed are properly kept and filed; and (e) in general, have all the powers and perform all the duties incident to the office of Secretary and such other duties as from time to time may be assigned to him by the Board of Directors or the Chief Executive Officer.

SECTION 13. Officers' Bonds or Other Security. The Board of Directors may secure the fidelity of any or all of its officers or agents by bond or otherwise, in such amount and with such surety or sureties as the Board of Directors may require.

SECTION 14. Compensation. The compensation of the officers of the Corporation for their services as such officers shall be fixed from time to time by the Board of Directors; provided, however, that the Board of Directors may delegate to the Chief Executive Officer or the President the power to fix the compensation of officers and agents appointed by the Chairman of the Board or the President, as the case may be. An officer of the Corporation shall not be prevented from receiving compensation by reason of the fact that such person is also a director of the Corporation.

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ARTICLE VShares of Stock

SECTION 1. Stock Certificates. Every holder of stock in the Corporation shall be entitled to have a certificate signed by or in the name of the Corporation by the Chairman of the Board or the Chief Executive Officer or the President or a Vice President, and by the Treasurer or an Assistant Treasurer, or the Secretary or an Assistant Secretary, certifying the number of shares owned by such holder in the Corporation. Any of or all the signatures on the certificate may be a facsimile. In case any officer, transfer agent, or registrar who has signed or whose facsimile signature has been placed upon such certificate shall have ceased to be such officer, transfer agent, or registrar before such certificate is issued, it may nevertheless be issued by the Corporation with the same effect as if he were such officer, transfer agent, or registrar at the date of issue.

SECTION 2. Books of Account and Record of Stockholders. The books and records of the Corporation may be kept at such places, within or without the State of Delaware, as the Board of Directors may from time to time determine. The stock record books and the blank stock certificate books shall be kept by the Secretary or by any other officer or agent designated by the Board of Directors.

SECTION 3. Transfer of Shares. Transfers of shares of stock of the Corporation shall be made on the stock records of the Corporation only upon authorization by the registered holder thereof, or by his attorney hereunto authorized by power of attorney duly executed and filed with the Secretary or with a transfer agent or transfer clerk, and on surrender of the certificate or certificates for such shares properly endorsed or accompanied by a duly executed stock transfer power and the payment of all taxes thereon. Except as otherwise provided by Delaware law, the Corporation shall be entitled to recognize the exclusive right of a person in whose name any share or shares stand on the record of stockholders as the owner of

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such share or shares for all purposes, including, without limitation, the rights to receive dividends or other distributions, and to vote as such owner, and the Corporation may hold any such stockholder of record liable for calls and assessments and the Corporation shall not be bound to recognize any equitable or legal claim to or interest in any such share or shares on the part of any other person whether or not it shall have express or other notice thereof. Whenever any transfers of shares shall be made for collateral security and not absolutely, and both the transferor and transferee request the Corporation to do so, such fact shall be stated in the entry of the transfer.

SECTION 4. Regulations. The Board of Directors may make such additional rules and regulations, not inconsistent with these bylaws, as it may deem expedient concerning the issue, transfer, and registration of certificates for shares of stock of the Corporation. It may appoint, or authorize any officer or officers to appoint, one or more transfer agents or one or more transfer clerks and one or more registrars and may require all certificates for shares of stock to bear the signature or signatures of any of them.

SECTION 5. Lost, Stolen or Destroyed Stock Certificates. The holder of any certificate representing shares of stock of the Corporation shall immediately notify the Corporation of any loss, destruction, or mutilation of such certificate, and the Corporation may issue a new certificate of stock in the place of any certificate theretofore issued by it, alleged to have been lost, stolen, or destroyed, and the Board of Directors may, in its discretion, require the owner of the lost, stolen, or destroyed certificate, or his legal representative, to give the Corporation a bond sufficient, as the Board in its absolute discretion shall determine, to indemnify the Corporation against any claim that may be made against it on account of the alleged loss, theft, or destruction of any such certificate or the issuance of such new certificate. Anything herein to the contrary notwithstanding, the Board of Directors, in its absolute discretion, may refuse to issue any such new certificate,
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except pursuant to judicial proceedings under the laws of the State of Delaware.

ARTICLE VI

Contracts, Checks, Drafts, Bank Accounts, Etc.

SECTION 1. Execution of Contracts. Except as otherwise required by statute, the certificate of incorporation or these bylaws, any contract or other instrument may be executed and delivered in the name and on behalf of the Corporation by such officer or officers (including any assistant officer) of the Corporation as the Board of Directors may from time to time direct. Such authority may be general or confined to specific instances as the Board of Directors may determine. Unless authorized by the Board of Directors or expressly permitted by these bylaws, no officer or agent or employee shall have any power or authority to bind the Corporation by any contract or engagement or to pledge its credit or to render it pecuniary liable for any purpose or to any amount.

SECTION 2. Loans. Unless the Board of Directors shall otherwise determine, the Chief Executive Officer, President, or any Vice President may effect loans and advances at any time for the Corporation from any bank, trust company, or other institution, or from any firm, corporation, or individual, and for such loans and advances may make, execute, and deliver promissory notes, bonds, or other certificates or evidences of indebtedness of the Corporation, but no officer or officers shall mortgage, pledge, hypothecate, or transfer any securities or other property of the Corporation other than in connection with the purchase of chattels for use in the Corporation's operations, except when authorized by the Board of Directors.

SECTION 3. Checks, Drafts, Bank Accounts, Etc. All checks, drafts, bills of exchange, or other orders for the payment of money out of the funds of the Corporation, and all notes or other evidence of indebtedness of the Corporation, shall be signed in the name and on behalf of the Corporation by such persons and in

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such manner as shall from time to time be authorized by the Board of Directors.

SECTION 4. Deposits. All funds of the Corporation not otherwise employed shall be deposited from time to time to the credit of the Corporation in such banks, trust companies, or other depositories as the Board of Directors may from time to time designate or as may be designated by any officer or officers of the Corporation to whom such power of designation may from time to time be delegated by the Board of Directors. For the purpose of deposit and for the purpose of collection for the account of the Corporation, checks, drafts, and other orders for the payment of money which are payable to the order of the Corporation may be endorsed, assigned, and delivered by any officer or agent of the Corporation.

SECTION 5. General and Special Bank Accounts. The Board of Directors may from time to time authorize the opening and keeping of general and special bank accounts with such banks, trust companies, or other depositories as the Board of Directors may designate or as may be designated by any officer or officers of the Corporation to whom such power of designation may from time to time be delegated by the Board of Directors. The Board of Directors may make such special rules and regulations with respect to such bank accounts, not inconsistent with the provisions of these bylaws, as it may deem expedient.

ARTICLE VII

Indemnification

SECTION 1. Right to Indemnification. The Corporation shall indemnify and hold harmless to the fullest extent permitted by applicable law as it presently exists or may hereafter be amended, any person who was or is a party or is threatened to be made a party or is otherwise involved in any threatened, pending, or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative, or by or in the right of the Corporation to procure a
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judgment in its favor (a "Proceeding"), by reason of the fact that such person is or was a director, officer, employee, or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, enterprise, or nonprofit entity, including serving with respect to employee benefit plans, against all liability and loss suffered and expenses (including attorneys' fees), judgments, fines, and amounts paid in settlement actually and reasonably incurred by such person in connection with such action, suit, or proceeding if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Corporation; provided, however, with respect to a Proceeding involving the right of the Corporation to procure judgment in its favor, such indemnification shall only cover expenses (including attorney fees) and shall only be made if such person acted in good faith and in a manner such person reasonably believed to be in the best interests of the Corporation and shall not be made with respect to any Proceeding as to which such person has been adjudged to be liable to the Corporation unless and only to the extent that the Court of Chancery of the State of Delaware or the court in which such Proceeding was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery of the State of Delaware or such other court shall deem proper. The Corporation shall be required to indemnify a person in connection with a Proceeding (or part thereof) initiated by such person only if the Proceeding (or part thereof) was authorized by the Board of Directors of the Corporation.

SECTION 2. Prepayment of Expenses. Expenses incurred in defending any Proceeding may be paid by the Corporation in advance of the final disposition of such action, suit, or proceeding as authorized by the Board of Directors in the specific case upon receipt of an undertaking by or on behalf of the director or officer to repay such amount if it should be ultimately determined that

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such person is not entitled to be indemnified by the Corporation as authorized in this Article VII or otherwise.

SECTION 3. Claims. If a claim for indemnification or payment of expenses under this Article VII is not paid in full within sixty (60) days after a written claim therefor has been received by the Corporation, the claimant may file suit to recover the unpaid amount of such claim and, if successful in whole or in part, shall be entitled to be paid the expense of prosecuting such claim. In any such action the Corporation shall have the burden of proving that the claimant was not entitled to the requested indemnification or payment of expenses under applicable Delaware law.

SECTION 4. Non-Exclusivity of Rights. The indemnification provided by this Article VII shall not be deemed exclusive of any other rights to which those seeking indemnification may be entitled under these bylaws or any agreement or vote of stockholders or disinterested directors or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a director, officer, employee, or agent and shall inure to the benefit of the heirs, executors, and administrators of such a person.

SECTION 5. Other Indemnification. The Corporation's obligation, if any, to indemnify any person who was or is serving at its request as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, enterprise, or nonprofit entity be reduced by any amount such person may collect as indemnification from such other corporation, partnership, joint venture, trust, enterprise, or nonprofit enterprise.

SECTION 6. Insurance. The Corporation may purchase and maintain insurance on behalf of any person who is or was a director, officer, employee, or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust,

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Corporate Structure

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or other enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the Corporation would have the power to indemnify such person against such liability under the provisions of Delaware law, the certificate of incorporation or of this Article VII.

SECTION 7. Amendment or Repeal. Any repeal or modification of the foregoing provisions of this Article VII shall not adversely effect any right or protection hereunder of any person respective of any act or omission occurring prior to the time of such repeal or modification.

ARTICLE VIII

General Provisions

SECTION 1. Registered Office. The registered office and registered agent of the Corporation will be as specified in the certificate of incorporation of the Corporation.

SECTION 2. Other Offices. The Corporation may also have such offices, both within or without the State of Delaware, as the Board of Directors may from time to time determine or the business of the Corporation may require.

SECTION 3. Fiscal Year. The fiscal year of the Corporation shall be so determined by the Board of Directors.

SECTION 4. Seal. The seal of the Corporation shall be circular in form, shall bear the name of the Corporation and shall include the words and numbers "Corporate Seal," "Delaware," and the year of incorporation.

SECTION 5. Voting Securities Owned By Corporation. Voting securities in any other corporation held by the Corporation shall be voted by the Chairman of the Board, unless the Board of Directors specifically confers authority to vote with respect thereto, which authority may be general or confined to specific instances, upon some other person or officer. Any person authorized to vote

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securities shall have the power to appoint proxies, with general power of substitution.

SECTION 6. Inspection of Books and Records. Any stockholder of record, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose the Corporation's stock ledger, a list of its stockholders, and its other books and records, and to make copies or extracts therefrom. A proper purpose shall mean any purpose reasonably related to such person's interest as a stockholder. In every instance where an attorney or other agent shall be the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of attorney or such other writing which authorizes the attorney or other agent to so act on behalf of the stockholder. The demand under oath shall be directed to the Corporation at its registered office in the State of Delaware or at its principal place of business.

SECTION 7. Section Headings. Section headings in these bylaws are for convenience of reference only and shall not be given any substantive effect in limiting or otherwise construing any provision herein.

SECTION 8. Inconsistent Provisions. In the event that any provision of these bylaws is or becomes inconsistent with any provision of the certificate of incorporation, the general corporation law of the State of Delaware or any other applicable law, the provision of these bylaws shall not be given any effect to the extent of such inconsistency but shall otherwise be given full force and effect.

ARTICLE X

Amendment

These bylaws may be adopted, amended, or repealed, and new bylaws made, by the Board of Directors of the Corporation, but the
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stockholders of the Corporation may make additional bylaws and may alter and repeal any bylaws, whether adopted by them or otherwise, by affirmative vote of the holders of [two-thirds] of the outstanding shares of stock entitled to vote upon the election of directors.

Some of the advantages of corporate structure are:

- **Limited liability.** Unlike in a partnership or sole proprietorship, shareholders of a modern business corporation have “limited” liability for the corporation’s debts and obligations. As a result, their potential losses cannot exceed the amount that they contributed to the corporation in payment for shares. Limited liability further allows corporations to raise much more funds for enterprises by combining funds from the stock owners. This in turn greatly reduces the individual risk for potential shareholders and increases both the number of willing shareholders and the amount they are likely to invest.
- **Perpetual lifetime.** Another favorable regulation is that the assets and structure of the corporation exist beyond the lifetime of any of its shareholders, bondholders, or employees. This allows for stability and accumulation of capital, which thus becomes available for investment in projects of a larger size and over a longer term than if the corporate assets remained subject to dissolution and distribution. It is important to note that the “perpetual lifetime” feature is an indication of the unbounded potential duration of the corporation’s existence and its accumulation of wealth and thus power.

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- **Ownership and control.** Persons and other legal entities composed of persons (such as trusts and other corporations) can have the right to vote or share in the profit of corporations. In the case of for-profit corporations, these voters hold shares of stock and are thus called shareholders or stockholders.

There are two principal types of corporations utilized, the S corporation and the C corporation.

An S corporation is taxed like a partnership; it pays no taxes as an entity, but its earnings or losses flow through to the owners' individual tax returns. Restrictions exist regarding how many stockholders there may be in an S corporation, as well as what kinds of stockholders may exist without jeopardizing the S election. S shareholders do enjoy limited liability. There are advantages to operating a business as an S corporation, in that income is taxed only once while enjoying limited liability. However, the consideration of an exit strategy may influence this type of structure; when an S election is terminated, there may be adverse tax consequences.

A C corporation is the most common form of corporation and affords its stockholders limited liability and the most flexibility in being able to operate and raise capital. While as an entity, the C corporation is subject to paying tax on its profits before shareholders receive a return (which then gets taxed again at the shareholder level), this is the predominant corporate structure for someone who is interested in:

- Minimizing personal risk
- Ignoring the minimum consequences of taxation at both a corporate and an individual level
- Raising necessary capital with which to grow the business

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- Having a clearly executable exit strategy with an organization structure that will facilitate its execution



TIPS AND TECHNIQUES

It is always the author's recommendation to form a C corporation to conduct meaningful business, especially when additional outside capital will be required. Such a structure facilitates the flexibility by which this capital can be sought and raised, as discussed in later chapters.

Summary

Various structures exist for the formation of a business. After considering the advantages and disadvantages of the various structures (and considering the title of this book and the author's built-in bias), you can logically decide that a corporation makes the most sense for a venture that is to be formed to protect the entrepreneur and raise capital.