

WORLD COMPENDIUM
ON ASSET TRACING AND RECOVERY

REGISTRATION OF BUSINESSES
IN THE UNITED STATES

Prepared by:

Joseph J. Wielebinski
Munsch Hardt Kopf & Harr, P.C.
500 N. Akard Street, Suite 3800
Dallas, TX 75201-6659
jwielebinski@munsch.com
(214) 855-7561

and

Jonathan L. Howell
Munsch Hardt Kopf & Harr, P.C.
500 N. Akard Street, Suite 3800
Dallas, TX 75201-6659
jhowell@munsch.com
(214) 855-7501

PART II

March 30, 2009

Registration of Businesses in the United States

I. Introduction

It is very important for every professional that becomes involved in asset tracing and recovery in the United States (“U.S.”) to have a general familiarity with certain aspects of business registration, including: the various business entities that are recognized in the U.S.; the process for registering those business entities; the various governmental departments that keep corporate records; the process of how these files can be accessed; and the public disclosure of such records. This article therefore provides a brief overview of these aspects of business registration.

II. Classification and Types of Businesses

A. CORPORATION

A corporation (abbreviated as “Inc.” or “Corp.”) is an organization formed under the authority of a state within the U.S., which acts as an artificial person, carries on business (or other activities), can sue or be sued, and (unless it is non-profit) can issue shares of stock to raise capital. The primary benefit of forming a corporation is that it generally shields owners (in the form of shareholders), management, and employees from liability. An individual, a company, or a government may form a corporation. A corporation can take the form of a public, private (often termed a “closely held corporation”), charitable, or religious corporation. Each form of corporation has certain benefits exclusive to it.

B. PARTNERSHIP

A partnership is a business enterprise entered into for profit and is owned by more than one person, each of whom is a “partner.” It may be created by a formal written agreement, an oral agreement, or just a handshake. Each partner invests a certain amount of capital, establishes an agreed-upon percentage of ownership, is responsible for all its debts and contracts (even when

another partner created the debt or entered into the contract), shares in the management decisions, and shares in the profits and losses according to his percentage of the total investment or ownership.

C. LIMITED PARTNERSHIP

A limited partnership (abbreviated “L.P.” or “LP”) is a special type of partnership that is commonly used when people need funding for a business, or when they are putting together an investment in a real estate development. A limited partnership requires a written agreement between the business management, who is the general partner (or partners), and the investors who contribute capital to the business, known as the limited partners. Each limited partner makes an investment of funds into the partnership and is supposed to receive a pre-stated share of the profit, which is ordinarily greater than that of the general partner, and, thereafter, the limited partners will receive a lesser share than the general partner(s). The limited partners also will receive the tax benefit of a “pass through” loss (a personal income tax deduction for part of the loss suffered by the limited partnership) during the development stages of the partnership when the expenses typically exceed revenues. In terms of liability, a limited partner is liable only to the extent of his investment.

D. LIMITED LIABILITY PARTNERSHIP

A limited liability partnership (abbreviated “L.L.P.” or “LLP”) has elements of partnership and a corporation. In an LLP, all partners have a form of limited liability for each partner’s protection (not just the “limited partners”), similar to that of the shareholders of a corporation. However, unlike corporate shareholders, the partners have the right to manage the business directly, while still receiving the benefit of pass-through income taxation. As a result, the LLP is more suited for businesses where all investors wish to take an active role in management, such as a group of attorneys or accountants.

E. LIMITED LIABILITY COMPANY

A limited liability company (abbreviated “L.L.C.” or “LLC”) is a legal form of business offering limited liability to its owners. It is a hybrid business entity having characteristics of both a corporation and a partnership. It is often more flexible 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 corporate characteristic is limited liability while the primary partnership characteristic is the availability of pass-through income taxation.

III. Rules Governing Registration of Corporations

A. INCORPORATORS AND THEIR QUALIFICATIONS

Persons who register businesses in the U.S. are commonly referred to as “incorporators.” At one time, most states within the U.S. required incorporators to be U.S. citizens. Today, however, foreigners may also incorporate businesses, so long as the incorporator is not a citizen of a State considered hostile to U.S. interests. In most states, incorporators must be at least eighteen-years old. Only one state, Louisiana, expressly requires an incorporator to be legally competent. Usually, an incorporator is an individual. However, a business or government may also act as an incorporator. Finally, with respect to the number of incorporators, nearly all states allow for more than one incorporator to register a business.

B. OBJECTIVES AND PURPOSES OF INCORPORATION

When an incorporator registers a corporation, he must include the purpose of the business in the articles of incorporation (discussed in more detail below). Universal among all state legislation governing corporate registration, an incorporator cannot form a corporation for any purpose that is illegal or contrary to public policy. That said, states in the U.S. generally allow incorporators to form companies for any other purpose or object that an individual could pursue. Some states even allow an incorporator to form a corporation for more than one purpose.

C. POWER TO REGISTER COMPANIES

In the U.S., the right to create and register a corporate entity is not considered a natural or civil right; rather, it is dependent upon the consent of a particular sovereign state located within the U.S. The sovereign power to create and register a corporation is usually exercised by the state legislature. The state legislature may place as many regulations on the ability to create and register a corporation as it deems appropriate, subject to such regulations not violating any state or U.S. constitutional right. Most modern legislative statutes authorize the creation and registration of corporations after the occurrence of certain conditions, such as the delivery of the articles of incorporation to a specific state government office—e.g., the secretary of state’s office—or the issuance of the certificate of incorporation.

IV. Rules of Registration

A. COMPLIANCE WITH CONDITIONS OF REGISTRATION

As previously mentioned, most state statutes governing the creation and registration of companies will have certain conditions that must be met. Such conditions will vary depending on the type of business the incorporator is wishing to form. A general act of state legislation governing registration, for example, will require that the incorporator set forth the to be formed entity’s business purpose prior to submitting the articles of incorporation to the secretary of state’s office.

Such legislation will also require that certain conditions be met after the articles of incorporation are submitted and the newly created corporate entity is formed. These conditions include the adoption of corporate bylaws, the election of directors, and the issuance of stock for payment.

In terms of defects in meeting such conditions, minor defects or omissions may be waived and cured by the state, either expressly or impliedly by recognition. Furthermore, most

states have legislation allowing for the correction of defects or omissions. Nevertheless, serious errors and fraud will render corporate registration void.

B. ARTICLES OF INCORPORATION

Generally, no other document is required for the corporate existence of a business other than its articles of incorporation, and it is a prerequisite to the corporate existence in every state within the U.S. The contents of the articles of incorporation must include the name of the proposed corporation, the lawful purpose of the business, its office address, its registered agent's name, each incorporator's name and address, and its initial directors' names and addresses. While an official form will likely be available, use of such form is not mandatory. Usually, the articles of incorporation must be either typewritten or printed in English, and if the initial directors have not yet been selected, then it must be signed by each incorporator.

Thereafter, an incorporator must deliver duplicate originals of the articles of incorporation to a designated state office, usually the secretary of state's office, and pay all the necessary fees. In most states, a representative of the state will then stamp and file one of the duplicate originals of the articles and give the incorporator a receipt and a conformed copy of the articles, establishing that the articles have been filed in the form of the copy. In other states, a representative of the state will stamp "filed" and the date and time on each duplicate original, file one of the duplicate originals, and subsequently issue a certificate of incorporation. The filing of the articles of incorporation (or the issuance of a certificate, depending on the statutory requirements of the state) is a necessary condition for the formation and registration of a corporate entity.

C. COMPLETION OF INCORPORATION AND COMMENCEMENT OF EXISTENCE

As previously discussed, a corporation's legal existence commences when either the articles of incorporation are filed or the certificate of incorporation is issued. Therefore, it is not

a requirement that the business itself be operational. If an incorporator has committed a serious error during the process of registration, as discussed earlier, he may have a window of opportunity to correct that error, such that the corporation is not considered void *ab initio*. Note also that while an incorporator may have met all of the conditions necessary for a business to have a corporate legal existence, more conditions most likely need to be fulfilled before the corporation has the right to actually conduct business.

V. Public Company Filings

Once a corporation becomes a legally recognized entity, in order for it to become operational, it must, among other things, adopt corporate bylaws, elect directors, issue stock for payment, and pay franchise taxes. Moreover, throughout its corporate existence, it will continue to be required to file certain regulatory records on a periodic basis and pay taxes. On that note, most corporations will continue to file the vast majority of its records with a state regulatory agency. Corporations that choose to “go public,” however, must register and file additional records with the SEC.

A “public company” typically refers to a business that is permitted to sell its securities to the general public through a market exchange or over the counter. To do so, the business must first register its securities with the SEC. The SEC is a federal regulatory agency that monitors public companies and prosecutes fraud, insider trading, and violations of other securities laws. To achieve its goals, the SEC requires public companies to file detailed quarterly and annual financial reports, as well as other periodic reports.

VI. Access to Corporate Records but Not Shareholders

While corporate records are generally available in designated state and U.S. government offices, such as the secretary of state’s office and the offices of the U.S. Securities & Exchange Commission (commonly referred to as the “SEC”), the information contained therein is limited.

Private companies, for example, are not required to publicly disclose their financial and accounting records. Nor are they required to disclose the names of their shareholders, partners, or members.

Similarly, with respect to public companies, the information is also limited. Although federal laws require them to disclose certain financial and accounting records, they do not require public companies, which are limited to corporations, to make their lists of shareholders public. Moreover, for certain companies engaged in fraud or other illegal activities, the accuracy and reliability of these financial and accounting records may be in question.

VII. Conclusion

From the perspective of a professional engaged in tracing and recovering assets procured by fraud, a general understanding of the business registration process in the U.S. can be beneficial. It will allow a professional to identify, for example, the location of the government office where the company's registration records are located. From there, the professional can obtain registration records revealing the legal name and address of the company, its purported legal purpose, the name and address of the incorporator, and the names of directors or the general partner. If the company is public, then the professional can access corporate records filed with the SEC. Information filed with the SEC, while not revealing the names of shareholder, may be helpful in tracking a company's corporate history and significant transactions. Nevertheless, the information readily available from business registration requirements in the U.S. is limited in scope and not particularly helpful to asset recovery professionals. Its main benefit is its use in piecing together parts of the puzzle that will hopefully lead to better sources of needed information and ultimately, to viable sources of recovery.