Chapter 2 (Incorporation) of the
MNCA Fourth Edition  December 13, 2019 Exposure Draft

compared with

MNCA Third Edition Chapters 2 (Incorporation), Chapter 4 (Name)
and Chapter 5 (Registered Office and Agent)\(^1\)

( with amendments adopted through those published at 70 Bus. Law 467 (Spring 2015) and also
includes amendments approved on second reading on April 18, 2015 but not published)

NOTE: The policy and contents of this document have not been
approved by the Board of Governors or the House of Delegates of the
American Bar Association, nor by any of its Taskforces, Sections,
Committees, or Subcommittees, and they do not necessarily represent
the views of the Board of Governors or the House of Delegates of the
ABA, any Section, Committee, or Subcommittee of the ABA, or the
Chair or Reporter of the Task Force to Revise the MNCA.

Additions in Exposure Draft shown in blue with double underline
Deletions from Third Edition shown in red with strikeout

[CHAPTER] 2
INCORPORATION

Subchapter
A. Incorporation Generally
B. Name
C. Registered Office and Agent)—These three chapters from the Third Edition are
combined in the Fourth Edition]

[Chapter Subchapter] 2A
INCORPORATION  GENERALLY

§ 2.01201. Incorporators.
§ 2.02202. Articles of incorporation.
§ 2.03203. Incorporation.
§ 2.04204. Liability for preincorporation transactions.
§ 2.05205. Organization of corporation.
§ 2.06206. Bylaws.

§ 2.04201. INCORPORATORS

\(^1\) Drafting Note: The MNCA Fourth Edition Exposure Draft combines MNCA Third
Edition Chapters 2 (incorporation), 4 (Name) and 5 (Registered Office and Agent) into one
chapter: Chapter 2 (Incorporation).
One or more persons may act as the incorporator or incorporators of a nonprofit corporation by delivering articles of incorporation to the secretary of state for filing.


CROSS-REFERENCES

Articles of incorporation, see § 2.02202.
“Deliver” defined, see § 1.40102.
Effective time and date of filing, see § 1.23163.
Filing fees, see § 1.22162.
Filing and signature requirements, see § 1.20160.
Organization of corporation by incorporators, see § 2.05205.
“Person” defined, see § 1.40102.

OFFICIAL COMMENT

The only functions of incorporators under the act are (1i) to sign the articles of incorporation, (2ii) to deliver them for filing with the secretary of state for filing, and (3iii) to complete the formation of the nonprofit corporation to the extent set forth in Section 2.05. One or more “persons” may serve as incorporator; “person” is defined in Section 1.40 to include both individuals and entities; “entity” is also defined in that section to include corporations, unincorporated entities, trusts, estates, and governments.

The act also simplifies the formalities of signature and filing. The requirement in some state statutes that articles be acknowledged or verified has been eliminated. Also, the requirement that “duplicate originals” (each being executed as an original document) be submitted has been eliminated. The secretary of state may require under Section 1.20 that a filing made on paper include the signed original and an “exact or conformed” copy. Submission of copies of filings made electronically is not required.

The act does not require that articles of incorporation be acknowledged or verified. See the Official Comment to Section 160 with respect to execution and filing requirements.

§ 2.02202. ARTICLES OF INCORPORATION

(a) The articles of incorporation must set forth:

(1) a name for the nonprofit corporation that satisfies the requirements of Section 4.01210 (corporate name);
(2) the street address of the corporation’s initial registered office and the name of its initial registered agent at that office;

(3) that the corporation is incorporated under this Act; and

(4) the name of each incorporator.

(b) The articles of incorporation may set forth:

(1) the names of the individuals who are to serve as the initial directors;

(2) provisions creating one or more designated bodies;

(3) the names of the initial members of a designated body;

(4) whether the corporation will have members;

(5) the names of the initial members, if any;

(6) provisions not inconsistent with law regarding:

(i) the purpose or purposes for which the nonprofit corporation is organized;

(ii) managing the business activities and regulating the affairs of the corporation;

(iii) defining, limiting, and regulating the powers of the corporation, its board of directors, any designated body, and the members, if any;

(iv) the characteristics, qualifications, rights, limitations, and obligations attaching to each or any class of members; or

(v) abolishing or limiting a member’s right to inspect and copy the records of the corporation under Section 402(b) (inspection rights of members); or

(vi) the distribution of assets on dissolution;

(7) any provision that this Act requires or permits to be set forth in the articles or bylaws;

(8) a provision permitting or making obligatory indemnification of a director for liability (as defined in Section 8.50(5850 ([Subchapter] definitions)) to any person for any action taken, or any failure to take any action, as a director, except liability for:

(i) receipt of a financial benefit to which the director is not entitled;
(ii) an intentional infliction of harm;

(iii) a violation of Section 8.33832 (directors’ liability for unlawful distributions); or

(iv) an intentional violation of criminal law; and

(9) provisions required if the corporation is to be exempt from taxation under federal, state, or local law; and

(10) a provision limiting or eliminating any duty of a director or any other person to offer the corporation the right to have or participate in any, or one or more classes or categories of, business opportunities, before the pursuit or taking of the opportunity by the director or other person; but the application of such a provision to an officer or affiliate of that officer:

(i) also requires approval of that application by the board of directors, subsequent to the effective date of the provision, by action of the disinterested directors; and

(ii) may be limited by the authorizing action of the board.

(c) The liability of a director of a nonprofit corporation that is not a charitable corporation may be eliminated or limited by a provision of the articles of incorporation that a director shall not be liable to the corporation or its members for money damages for any action taken, or any failure to take any action, as a director, except liability for:

(1) the amount of a financial benefit received by the director to which the director is not entitled;

(2) an intentional infliction of harm;

(3) a violation of Section 8.33832; or

(4) an intentional violation of criminal law.

(d) The articles of incorporation need not set forth any of the corporate powers enumerated in this [actAct].

(e) Provisions of the articles of incorporation may be made dependent upon facts objectively ascertainable outside the articles of incorporation in accordance with Section 4.20(e105 (extrinsic facts in filed record).

(f) See Sections 3.01301(a) (purposes), 8.31831(d) (standards of liability for directors) and 8.58858(c) (variation of indemnification).
CROSS-REFERENCES

Amendment of articles, see Ch. 109A.
Bylaws, see § 2.06206 and Ch. 109B.
Duration of corporate existence, see § 3.02302.
Filing fees, see § 1.22162.
Filing and signature requirements, see § 1.20160.
Incorporators, see § 2.01201.
Indemnification, see Subch. 8E.
Powers, see § 3.02302.
Purposes, see § 3.01301.
Restated articles, see § 10.07907.

OFFICIAL COMMENT

1. Introduction

Section 2.02(a) sets forth the minimum mandatory requirements for all articles of incorporation, while Section 2.02(b) describes optional provisions that may be included. A nonprofit corporation that is formed solely pursuant to the mandatory requirements will generally have the broadest powers and least restrictions on activities permitted by the act.

A nonprofit corporation will have perpetual duration unless a provision is included in its articles of incorporation providing for a shorter period. See Section 302. Similarly, a corporation with articles of incorporation which do not contain a purpose clause will have the purpose of engaging in any lawful business under Section 301(a). The option of providing a narrower purpose clause is also preserved in Sections 202(b)(2)(i) and 301, with the effect described in the Official Comment to Section 301.

No reference is made in Section 2.02(a) to the period of duration of the corporation. A corporation formed under these provisions will automatically have perpetual duration under Section 3.02 unless a special provision is included providing a shorter period.

2. Requirements

The only information required in the articles of incorporation to form a “standard” nonprofit corporation based on the default rules in the act is:

The nonprofit corporation’s initial registered office and agent must be included, and a mailing address alone, such as a post office box, is not sufficient because the registered office is the designated location for service of process. See Section 223.
(1) The name, which must meet the requirements of Chapter 4.

(2) The street address of the corporation’s initial registered office and the name of its initial registered agent. A mailing address consisting only of a post office box is not sufficient.

(3) A statement that the corporation is incorporated under the act.

(4) The name of each incorporator.

No reference need be made in these “standard” articles to a variety of other matters that are referred to in the statutes of some states. Generally, no substantive effect should be given to the absence of a specific reference to such matters in Section 2.02 since they are referred to in other sections of the act which usually provide an “opt in” privilege that permits a corporation to elect special treatment if so desired.

Charitable Nonprofit corporations may be required to comply with requirements outside the act. For example, charitable corporations must comply with additional requirements imposed by other provisions of law such as Section 501(c)(3) of the Internal Revenue Code, such as the requirement that the nonprofit corporation be organized for one or more of the purposes listed in that section and the requirement that there be limitations on the distributions of assets upon dissolution.


Section 2.02(b) describes specific options that may be elected by a nonprofit corporation and contains general authorization to include other provisions relevant to the authority of the corporation, its officers and board of directors, or to the management of the corporation’s internal affairs. These provisions include:

a A. Initial board of directors

Under Section 2.02(b)(1) an election may be made to have a nonprofit corporation organized by a person or persons other than the incorporators. See the Official Comment to Section 2.05. These persons, described as “initial directors,” may either remain in office or be replaced after the corporation is organized. It is unnecessary to set forth any corporate powers in the articles of incorporation in view of the broad grant of power in Section 302. This grant of power, however, may be overbroad for particular nonprofit corporations; if so, it may be qualified or narrowed by appropriate provisions in the articles of incorporation.

b B. Purpose clause

The articles of incorporation must include a statement that the nonprofit corporation is incorporated for a nonprofit purpose. No further detail regarding the purpose of the corporation is required and if only the required statement of a nonprofit purpose is included the corporation will automatically have the purpose of engaging in any lawful business under Section 3.01(a).
Under Section 2.02202(b)(6)(i), a nonprofit corporation may elect a limited purpose clause or provide for specific purposes without limiting the broad purposes provided in Section 3.01. Specific purposes may be needed, among other reasons, for qualification/registration in certain domestic and foreign jurisdictions, to obtain tax-exempt status, or to obtain licenses. The corporation may also wish to define its mission.

c. Duration

Under current practice nearly every nonprofit corporation is formed with perpetual duration, but a corporation may elect a shorter duration under Section 2.02(b)(7).

d. Corporate powers

Section 2.02(d) makes it unnecessary to set forth any corporate powers in the articles. Section 3.02 grants every nonprofit corporation essentially the same power that an individual possesses with respect to his or her affairs. This grant of power, however, may be considered overbroad for certain corporations; if so, it may be qualified or narrowed by appropriate provisions in the articles.

e. MANAGEMENT OF THE CORPORATION GENERALLY

Under Section 2.02202(b)(6)(ii) and (iii) a nonprofit corporation may include any provision not inconsistent with law for “managing the business and regulating the affairs of the corporation” and “defining, limiting, and regulating the powers of the corporation, its board of directors, any designated body, and the members.” This language is designed to allow the corporation to place in the articles any number of miscellaneous provisions that it considers sufficiently important to be of public record or, in the case of a membership corporation, subject to amendment only by the processes applicable to amendments of articles of incorporation which generally require member approval.

The responsibility of the board of directors to manage the affairs of a nonprofit corporation includes both a decision-making function and an oversight function. See Section 8.01. In recent years the oversight function of the board of directors has become increasingly prominent. References throughout the act to the management of the affairs of a corporation, such as in Section 2.02202(b)(6)(ii), include the oversight function of the board.

f. Self-dealing transactions

When subsidiaries or corporate joint ventures are being formed, special consideration should be given to the inclusion of provisions designed to limit or avoid the unexpected application of the doctrines of corporate opportunity and conflict of interest. While this type of clause will not provide total protection, it may be given limited effect, for example, by shifting the burden of proving unfairness or “exonerating” an arrangement from “adverse influences.”

Charitable corporations must carefully review joint ventures and similar transactions for compliance with the provisions of laws applicable to charitable corporations, including the Internal Revenue Code.

g. DIRECTOR LIABILITY

Section 2.02202(c) authorizes the inclusion of a provision in the articles of incorporation of a nonprofit corporation that is not a charitable corporation eliminating or limiting, with certain exceptions, the liability of the directors to the corporation or its members.
for money damages. This grant of authority to the members is consistent with the more general authorization of Section 2.02(b)(6)(ii) for the articles to include a wide range of provisions regulating various matters affecting the corporation, including allocating power between the directors and the members. Developments in the mid—and late 1980s highlighted the need to permit reasonable protection of directors from exposure to personal liability, in addition to indemnification, so that directors would not be discouraged from fully and freely carrying out their duties, including responsible entrepreneurial risk-taking. These developments included increased costs and reduced availability of director and officer liability insurance, the decision of the Delaware Supreme Court in Smith v. Van Gorkom, 488 A.2d 858 (1985), and the resulting reluctance of qualified individuals to serve as directors.

Section 202(c) is Section 2.02(c) only applies to nonprofit corporations that are not charitable corporations. Inclusion of the type of provision authorized by Section 2.02(c) in the articles of incorporation of a charitable corporation is not necessary because the same liability shield is provided for directors of a charitable corporation by Section 8.31(d). The prior act did not provide an automatic liability shield for directors of charitable corporations, and thus the articles of most charitable corporations incorporated under the prior act will have the type of provision authorized by Section 2.02(c). It is not necessary to delete such a provision. When this act takes effect in a state, the liability shield in Section 8.31(d) will become applicable to those charitable corporations incorporated under the prior act that did not include a liability shield in their articles. Encouraging individuals to serve as directors of charitable corporations by shielding them from liability for service in that capacity was considered appropriate as a matter of public policy, even if their corporation had not previously chosen to do so.

So long as any such liability-limitation provision does not extend to liability to third parties, members should be permitted—except when important societal values are at stake—to decide how to allocate the economic risk of the directors’ conduct between the nonprofit corporation and the directors. Because members of a corporation that is not a charitable corporation may have a financial interest in the corporation, members of one corporation may view the issue substantially differently than members of another corporation. Accordingly, Section 2.02(c) is optional rather than self-executing. In addition, it follows the path of virtually all the states that have adopted charter option statutes and is applicable only to money damages and and does not apply to equitable relief. Likewise, nothing in Section 2.02202(c) in any way affects the right of the members to remove directors under Section 8.08808(a), with or without cause.

The language “any action taken, or any failure to take any action, as a director” parallels Section 8.31(d). The phrase “as a director” emphasizes that Section 2.02202(c) applies to a director’s actions or failures to take action in his or her the director’s capacity as a director and not in any other capacity, such as officer, employee, or controlling member. However, it is not intended to exclude coverage of conduct by individuals, even though they are also officers, when employees, or controlling members, to the extent they are acting in their capacity as directors.

Because adoption of a liability limitation provision is left to the decision of the members, they are given considerable latitude in the extent to which they are permitted to limit directors’ liability. Accordingly, the exceptions to the statute are few and narrow. As important as validating the members’ right to determine for themselves the extent of the directors’ liability is stating the limits of this right in terms promoting a clear understanding of the conduct which is
and which is not included in the limitation of liability. Terms such as “duty of loyalty,” “good faith,” “bad faith,” and “recklessness” seem no more precise than (and therefore as potentially expansive as) “gross negligence.” All of these formulations are characterizations of conduct rather than definitions of it. Characterizations by nature tend to be more elastic than definitions.

Section 202(c) only applies to nonprofit corporations that are not charitable corporations. Inclusion of the type of provision authorized by Section 202(c) in the articles of incorporation of a charitable corporation is not necessary because the same liability shield is provided for directors of a charitable corporation by Section 831(d).

Directors should be afforded reasonable predictability; they are entitled to know whether a contemplated course of action will result in personal liability for money damages. Limits on their exculpation from liability are appropriate but should be expressed in terms that minimize the opportunity for after-the-fact second-guessing.

The statutory exceptions to permitted limitations of director liability are few and narrow and are discussed below.

The language of the exceptions to Section 2.02(c) is intended to express the parameters of the members’ right to limit the directors’ liability in terms that will promote predictability. First, some types of improper conduct are so clearly without any societal benefit that the law should not appear to endorse such conduct, especially in the case of a state-created entity such as a nonprofit corporation. Second, any liability limitation will be prospective and, therefore, by definition, the members will not be able to know in advance the exact nature or extent of any claims that they may be giving up. Third, the public has an interest in encouraging good corporate governance. While the exceptions to the members’ right to limit liability are few and narrow, they validate important standards of conduct. Finally, in many cases, there will be members who do not vote in favor of the liability limitation. For these members, there should be an irreducible core of protection, especially in view of the fact that, in some cases, the votes of the directors themselves as members may be sufficient to approve adoption of the provision.

Financial Benefit

If Section 2.01(c) (and by analogy Section 8.31(d)) were to permit limitation of the liability of a director for receipt of a financial benefit to which the director is not entitled that would validate conduct in which the director could realize a personal gain. Corporate law has long subjected transactions from which a director could benefit personally are subject to special scrutiny. The financial benefits exception under Section 202(c) is limited; however, to the amount of the benefit actually received. Thus, liability for punitive damages could be eliminated. However, punitive damages are not eliminated in either the exception for except in cases of intentional infliction of harm or for violation of criminal law and, thus, as described below, where, in a particular case (for example, theft), punitive damages may be available. The benefit must be financial rather than in less easily measurable forms, such as business goodwill, personal reputation, or social ingratiation. The phrase “received by a director” is not intended to be a “bright line.” As a director’s conduct moves toward the edge of what may be exculpated, the director should bear the risk of miscalculation. Depending upon the circumstances, a director may be deemed to have received a benefit that the director caused to be directed to another person, for example, a relative, friend, or affiliate. The conduct of directors of charitable corporations is subject to regulation under the
Internal Revenue Code and, possibly, other state laws. Such regulation may vary from the standards and restrictions specified in this act.

What constitutes a financial benefit “to which the director is not entitled” is left to judicial development. For example, a director may receive reasonable compensation for the performance of services; on the other hand, a director is not entitled to the profits from a corporate opportunity improperly taken by the director. See section 870 as to procedures for disclaiming the nonprofit corporation’s interest in a business opportunity by action of disinterested directors or members.

Intentional Infliction of Harm

There may be situations in which a director intentionally causes harm to the nonprofit corporation or its members even though the director does not receive any improper benefit. The use of the word “intentional,” rather than a less precise term such as “knowing,” is meant to refer to the specific intent to perform, or fail to perform, the acts with actual knowledge that the director’s action, or failure to act, will cause harm, rather than a general intent to perform the acts which cause the harm. No public policy should permit the members to eliminate or limit the liability of directors for conduct intended to cause harm to the corporation or its members.

Unlawful Distributions

Section 832(a) indicates a strong policy in favor of liability for unlawful distributions approved by directors who have not complied with the standards of conduct of Section 830. Accordingly, the exception in Section 202(c)(iii) prohibits the members and directors from eliminating or limiting the liability of directors for a violation of Section 832.

Intentional Violation of Criminal Law

Historically, the criminal law has represented society’s statement of the conduct that it most emphatically rejects. Accordingly, even though a director committing a crime may intend to benefit the nonprofit corporation, the members and directors should not be permitted to exculpate the director for any harm caused by the director’s crime, an intentional violation of criminal law, including, for example, fines and legal expenses of the corporation in defending a criminal prosecution. The use of the word “intentional,” rather than a less precise term such as “knowing,” is meant to refer to the specific intent to perform, or fail to perform, the acts with actual knowledge that the director’s action, or failure to act, constitutes a violation of criminal law.

In order to recover for conduct included within any of the exceptions, the plaintiff will continue to be required to establish causation, damages, and other elements imposed by applicable law.

An amendment authorized by Section 2.02(c) will become effective in the manner provided by Section 1.23 generally for amendments to the articles of incorporation. In addition, in accordance with Section 10.09, an amendment under Section 2.02(c) will not affect a cause of action existing in favor of the nonprofit corporation against any directors at the effective time of
Section 2.02(b)(8) permits a nonprofit corporation to include in its articles of incorporation a provision authorizing permissible or mandatory indemnification of a director in accordance with Section 8.51(a)(2). Section 2.02(b)(8) specifically excepts provisions for indemnification of director liability arising out of improper financial benefit received by a director, an intentional infliction of harm on the nonprofit corporation or the members, an unlawful distribution or an intentional violation of criminal law. These excepted liabilities parallel those a corporation is not permitted to limit or eliminate under Section 2.02(b)(5) because, as provided in Section 8.56, mandatory the expansion of indemnification of officers does not require a provision for directors that section permits must be set forth in the articles of incorporation. As required by Section 8.51(a)(2), Section 8.56 allows a similar expansion of indemnification for officers to be set forth also in the bylaws, an action of the board of directors or members, or contracts.

Unlike the liability shield provided automatically for directors of a charitable corporation by Section 8.31(d), the act does not automatically provide for indemnification of directors of a charitable corporation. Thus, the option of taking advantage of Section 2.02(b)(8) should be evaluated by both charitable corporations and other nonprofit corporations.

Section 202(b)(10) authorizes the inclusion of a provision in the articles of incorporation to limit or eliminate, in advance, the duty of a director or other person to bring a business opportunity to the nonprofit corporation. The limitation or elimination may be blanket in nature and apply to any business opportunities, or it may extend only to one or more specified classes or categories of business opportunities. The adoption of such a provision constitutes a curtailment of the duty of loyalty which includes the doctrine of corporate opportunity. If such a provision is included in the articles, taking advantage of a business opportunity covered by the provision of the articles without offering it to the corporation will not expose the director or other person to whom it is made applicable either to monetary damages or to equitable or any other relief in favor of the corporation upon compliance with the requirements of Section 202(b)(10).

Section 202(b)(10) also permits extension of the limitation or elimination of the duty to any other persons who might be deemed to have a duty to offer business opportunities to the nonprofit corporation. For example, courts have held that the corporate opportunity doctrine extends to officers of the corporation. Although officers may be included in a provision under this Section 202(b)(10), the limitation or elimination of corporate opportunity obligations of officers must be addressed by the board of directors in specific cases or by the directors’ authorizing provisions in employment agreements or other contractual arrangements with such officers. Accordingly, Section 202(b)(10) requires that the application of an advance limitation or elimination of the duty to offer a business opportunity to the corporation to any person who is an officer of the corporation or a related person of an officer also requires action by the board of directors acting through disinterested directors. This action must be taken subsequent to the
inclusion of the provision in the articles of incorporation and may limit the application. This means that if the advance limitation or elimination of the duty of an officer to offer business opportunities to the corporation is included in the articles by an amendment recommended by the directors and approved by the members, if any, that recommendation of the directors does not serve as the required authorization by disinterested directors; rather, separate authorization by disinterested directors after the amendment is included in the articles is necessary to apply the provision to a particular officer or any related person of that officer.

Whether a provision for advance limitation or elimination of duty in the articles of incorporation should be a broad “blanket” provision or one more tailored to specific categories or classes of transactions deserves careful consideration given the particular circumstances of the nonprofit corporation.

4. Provisions That May Be Elected Only in the Articles of Incorporation

Unlike the prior act, which followed the pattern of many business corporation laws and provided that provisions on certain subjects could be placed either in the articles of incorporation or bylaws while provisions on other subjects could be placed only in the articles, this act permits most subjects to be addressed in either the articles or bylaws of a nonprofit corporation. The only subjects that may be addressed only in the articles and not in the bylaws are limitations on the purposes or as follows:

- Limitation and elimination of liability of a director of nonprofit corporation that is not a charitable corporation. See Section 202(c).

- Limitations on the purposes of a nonprofit corporation. See Section 301.

- Limitations on the powers of a nonprofit corporation. See Sections 3.01 and 3.02.

- Relinquishment by a nonprofit corporation of its rights to business opportunities. See Section 870.

§ 2.03. INCORPORATION

(a) Unless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are filed.

(b) The filing of the articles of incorporation by the secretary of state is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the nonprofit corporation.

Source Note: Patterned after Model Business Nonprofit Corporation Act, 3rd Ed.
(2002-2008), § 2.03. Reenactment of Revised
Model Nonprofit/Cf Model Business Corporation Act
(1987-2016 Revision), § 2.03.

CROSS-REFERENCES

Duration, see § 3.02302.
Effective time and date of filing, see § 1.2163.
Filing fees, see § 1.22162.
Filing requirements, see § 1.20160.
Secretary of state’s filing duty, see § 1.25165.

OFFICIAL COMMENT

Section 2.03(a) provides that the existence of a nonprofit corporation begins when the
articles of incorporation are filed, unless a delayed effective date is specified under Section 1.23.
Chapter 1 contains detailed rules for the processing and effective dates of filings, all of which are
applicable to articles of incorporation and other filings. These filing rules simplify the process of
creating a corporation in several respects.

Section 1.25 provides that the secretary of state files the articles by marking them “filed”
and recording the date and time of receipt. The secretary of state does not issue a separate
certificate of incorporation, as was the older practice still followed in some states.

Section 2.03(b) ties the precise time of incorporation to the effective date and time of
the filed articles. Section 1.23 provides in turn that this
existence as the date and time the articles of incorporation are received filed by the secretary of
state; in other words, consistent with the practice of many secretaries of state, processing time is
ignored and the date and time of receipt of the articles are the date and time of incorporation.
The creators of the nonprofit corporation may, however, specify that the as provided in Section
163, unless the articles provide that the nonprofit corporation’s existence will begin at a time
later date than the date time of filing, and at a precise time on such a date, to the extent permitted
by Section 1.23163.

Under Section 2.03(b) the filing of the articles of incorporation is conclusive proof
that all conditions precedent to incorporation have been met, except in specified proceedings
brought by the state. Thus the filing of the articles of incorporation is conclusive as to the
existence of limited liability for persons who enter into transactions on behalf of the nonprofit
corporation. If articles of incorporation have not been filed, Section 2.04 generally imposes
personal liability on all persons who prematurely act as or on behalf of a “corporation” knowing
that articles have not been filed. Section 2.04 may protect some of these persons to a limited
extent, however; see the Official Comment to that section.

See Chapter 1, which contains rules for the filing and effective dates of documents, all of
which are applicable to articles of incorporation and other documents.

§ 2.04204. LIABILITY FOR PREINCORPORATION TRANSACTIONS
All persons purporting to act as or on behalf of a nonprofit corporation, knowing there was no incorporation under this [actAct], are jointly and severally liable for all liabilities created while so acting.


CROSS-REFERENCES

Incorporation, see § 2.03203.
“Person” defined, see § 1.40160.

OFFICIAL COMMENT

The statutes of some states provide that corporate existence begins only with the acceptance of articles of incorporation by the secretary of state. Some states also have statutes that provide expressly that those who prematurely act as or on behalf of a nonprofit corporation are personally liable on all transactions entered into or liabilities incurred before incorporation. A review of recent case law indicates, however, that even in states with such statutes courts have continued to rely on common law concepts of de facto corporations, de jure corporations, and corporations by estoppel that provide uncertain protection against liability for preincorporation transactions.

The filing of articles of incorporation establishes that a nonprofit corporation has been formed with its attendant liability protections.

Incorporation under modern statutes is so simple and inexpensive that a strong argument may be made that nothing short of filing articles of incorporation should create the privilege of limited liability. A number of situations have arisen, however, in which the protection of limited liability arguably should be recognized even though the simple incorporation process established by modern statutes has not been completed.

(1) The strongest factual pattern for immunizing participants from personal liability occurs in cases in which the participant honestly and reasonably but erroneously believed the articles had been filed. In Cranson v. International Business Machines Corp., 234 Md. 477, 200 A.2d 33 (1964), for example, the defendant had been shown executed articles of incorporation some months earlier before he invested in the corporation and became an officer and director. He was also told by the corporation’s attorney that the articles had been filed, but in fact they had not been filed because of a mix-up in the attorney’s office. The defendant was held not liable on the “corporate” obligation.

(2) Another class of cases, which is less compelling, but in which the participants sometimes have escaped personal liability, involves the defendant who mails in articles of incorporation and then enters into a transaction in the corporate name; the letter is either delayed or the secretary of state’s office refuses to file the articles after receiving them or returns them
for correction. E.g., Cantor v. Sunshine Greenery, Inc., 165 N.J. Super. 411, 398 A.2d 571 (1979). Many state filing agencies adopt the practice of treating the date of receipt as the date of filing even though the review process may result in the completion of the filing process sometime after original receipt of the filing. The finding of nonliability in cases of this second type can be considered an extension of this principal by treating the date of original receipt and filing as the date of incorporation.

(3) A third class of cases in which the participants sometimes have escaped personal liability involves situations where the third person has urged immediate execution of the contract in the corporate name even though the other party has not taken any steps toward incorporating. E.g., Quaker Hill, Inc. v. Parr, 148 Colo. 45, 364 P.2d 1056 (1961).

(4) In another class of cases the defendant has represented that a corporation exists and entered into a contract in the corporate name knowing that no corporation has been formed, either because no attempt has been made to file articles of incorporation or because the defendant already received rejected articles of incorporation from the filing agency. In these cases, the third person has dealt solely with the “corporation” and has not relied on the personal assets of the defendant. The imposition of personal liability in this class of case, it has sometimes been argued, gives the plaintiff more than originally bargained for. On the other hand, to recognize limited liability in this situation threatens to undermine the incorporation process, since one then may obtain limited liability by consistently conducting business in the corporate name. Most courts have imposed personal liability in this situation. E.g., Robertson v. Levy, 197 A.2d 443 (D.C. App. 1964).

After a review of these situations, it seemed appropriate to impose The act imposes liability only on persons who act as or on behalf of a nonprofit corporation “knowing” that no corporation exists. Analogous protection has long been accorded under the uniform limited partnership acts to limited partners who contribute capital to a partnership in the erroneous belief that a limited partnership certificate has been filed.

In addition, While no special provision is made in Section 2.04, the section does not foreclose the possibility that persons who urge defendants to execute contracts in the corporate name knowing that no steps to incorporate have been taken may be estopped to impose personal liability on individual defendants. This estoppel may be based on the inequity perceived when persons, unwilling or reluctant to enter into a commitment under their own name, are persuaded to use the name of a nonexistent nonprofit corporation, and then are sought to be held personally liable under Section 2.04 by the party advocating that form of execution. By contrast, persons who knowingly participate in a business under a corporate name are jointly and severally liable on “corporate” obligations under Section 2.04 and may not argue that plaintiffs are “estopped” from holding them personally liable because all transactions were conducted on a corporate basis execution in the name of the corporation.

By its terms, this section only applies when persons purport to act as or on behalf of a nonprofit corporation. Thus, this section will not affect the personal liability of persons purporting to act as or on behalf of some other form of entity, such as an unincorporated nonprofit association or limited liability company. Personal liability in those situations will be determined under other law applicable to the type of entity involved.

§ 2.05. ORGANIZATION OF CORPORATION
(a) After incorporation:

(1) if initial directors or members of a designated body are named in the articles of incorporation, those persons must hold an organizational meeting, as appropriate, at the call of a majority of them, to complete the organization of the nonprofit corporation by electing directors (when the organization of the corporation is to be completed by a designated body), appointing officers, adopting bylaws, and carrying on any other business brought before the meeting;

(2) if initial directors or members of a designated body are not named in the articles, the incorporator or incorporators must hold an organizational meeting at the call of a majority of the incorporators to:

(i) to elect directors and, when appropriate, a designated body, and complete the organization of the nonprofit corporation; or

(ii) to elect a board of directors and, when appropriate, a designated body, who shall complete the organization of the corporation.

(b) Action required or permitted by this act to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one or more consents in the form of a record describing the action taken and signed by each incorporator.

(c) An organizational meeting may be held in or out of this state.

Source Note: Patterned after Model Business Nonprofit Corporation Act, 3rd Ed. (2002-2008), § 2.05. Reenactment of Revised Model Nonprofit Corporation Act (1987-2016 Revision), § 2.05.

CROSS-REFERENCES

Articles of incorporation, see § 2.02202.
Bylaws, see § 2.06206.
Director action without meeting, see § 8.21821.
Incorporators, see § 2.01201.

OFFICIAL COMMENT

Following incorporation, the organization of a new nonprofit corporation must be completed so that it may engage in its activities. This usually requires adoption of bylaws, the appointment of officers and agents, and the election of a board of directors or, and, when appropriate, a designated body.
Earlier versions of the act required initial directors to be named in the articles and provided that they complete the organization of the nonprofit corporation. Many states followed this pattern, but others provided that the incorporators organize the corporation or meet to elect a board of directors to organize the corporation. The goal of all these provisions was usually to permit the completion of the organization of the corporation with minimum expense and formality, although in many cases it was felt necessary for substantive decisions to be made at an early stage by the persons with responsibility for operation of the corporation.

Section 2.05 simplifies the formation process by allowing alternative methods of completing the formation of the nonprofit corporation.

First, Section 2.05(a)(1) contemplates that if initial directors or members of a designated body are named in the articles of incorporation, the persons so named will organize the nonprofit corporation. It is expected that these persons will be named only if they will remain in office and there is no objection to the disclosure of their identity in the articles of incorporation.

Second, Section 2.05(a)(2) provides that the incorporators may themselves complete the organization, or they may simply meet to elect a board of directors and, when appropriate, a designated body who are then to complete the organization.

Sections 2.05(b) and (c) are limited to meetings of incorporators. Since Sections 8.21 and 8.22 permit the same organizational actions to be taken by the board of directors, if a meeting of members is necessary, Sections 7.01 and 7.04 give them the same flexibility that is given incorporators under Sections 2.05(b) and (c).

The provisions of Section 2.05(a)(2) also apply to a designated body under Section 8.12. Thus if neither directors nor members of a designated body are named in the articles of incorporation, Section 2.05(a)(2) will permit a designated body to hold an organizational meeting to complete whatever steps in the organization of the nonprofit corporation require action by the designated body.

An organizational action by the incorporators, the board of directors, or a designated body may be taken without a meeting, if the action taken is evidenced by one or more signed consents in the form of a record describing the action taken.

§ 2.06. BYLAWS

(a) The incorporator or incorporators or the board of directors of a nonprofit corporation may adopt initial bylaws for the corporation.

(b) The bylaws of a nonprofit corporation may contain any provision for managing the activities and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

Source Note: Patterned after Model Business Nonprofit Corporation Act, 3d Ed. (2002), § 2.06. Reenactment of Revised
Model Nonprofit Corporation Act (1987), § 2.07 regarding emergency bylaws omitted as unnecessary in light of § 3.03 and otherwise obsolete(a) and (b).

CROSS-REFERENCES

Amendment—see of bylaws, Subch. 109B. Organizing corporation, see § 2.05205.

OFFICIAL COMMENT

The responsibility for adopting the original bylaws is placed on the person or persons completing the organization of the nonprofit corporation. The powers of the board of directors under this section may be exercised by a designated body pursuant to Section 8.12812.

The power to amend or repeal bylaws, or adopt new bylaws after the formation of the nonprofit corporation is completed, is addressed in Subchapter 10B Sections 920, 921, and 922.

The responsibility of the board of directors to manage the affairs of a nonprofit corporation includes both a decision-making function and an oversight function. See Section 8.01. In recent years the oversight function of the board of directors has become increasingly prominent. References throughout the act to the management of the affairs of a corporation, such as in Section 2.06(b), include the oversight function of the board.

[CHAPTER Subchapter] 4B

NAME

§ 4.01210. Corporate name.

§ 4.02211. Reserved name.

§ 4.03212. Registered name.

§ 4.01210. CORPORATE NAME

(a) The name of a nonprofit corporation may not contain language stating or implying that the corporation is organized for a purpose other than that permitted by Section 3.01 and its articles of incorporation.

(b) Except as authorized by subsection (c) or (d), the name of a nonprofit corporation must be distinguishable upon the records of the secretary of state from:

(1) the name of a nonprofit or business corporation incorporated in this state that is not administratively dissolved;
(2) the name of a foreign nonprofit or business corporation under which it is registered to conduct activities in this state, or an alternate name adopted by a foreign nonprofit or business corporation registered in this state because its real name is unavailable;

(3) the name of a filing entity other than a nonprofit or business corporation organized under the law of this state that is not administratively dissolved;

(4) the name of a foreign entity other than a foreign nonprofit or business corporation under which it is registered to do business in this state, or an alternate name adopted by such a foreign filing entity registered to do business in this state because its real name is unavailable;

(5) a name reserved or registered under Section 4.02 or 4.03211 (reserved name) or 212 (registered name);

[(6) a name reserved or registered under [cite provisions of the state’s business corporation and other entity laws corresponding to Sections 4.02211 and 4.03212];]

[(7) the name of a limited liability partnership organized under the laws of this state;]

[(8) the name of a foreign limited liability partnership under which it is registered to do business in this state, or an alternate name adopted by a foreign limited liability partnership registered to do business in this state because its real name is unavailable; and]

[(9) a fictitious assumed name registered under [cite state’s fictitious assumed name law statute].]

(eb) A nonprofit corporation may apply for authorization to use a name that is not distinguishable upon the records of the secretary of state from one or more of the names described in subsection (b). The secretary of state shall permit authorize use of the name applied for if:

(1) the other entity consents to the use in writing and submits an undertaking in form satisfactory to the secretary of state to change its name to a name that is distinguishable upon the records of the secretary of state from the name of the applying corporation; or

(2) the applicant delivers to the secretary of state a certified copy of a final judgment of a court of competent jurisdiction establishing the applicant’s right to use the name applied for in this state.

(c) A name may not contain a word where the use of that word:

(1) requires the approval of an agency of this state, unless the approval of that agency has been obtained; or
is prohibited by the law of this state.

A name is distinguishable upon the records of the secretary of state only if the name differs from every other name of record in a way other than:

(1) use of punctuation marks;
(2) use of a definite or indefinite article; and
(3) use of any of the following terms, or an abbreviation thereof, in any language to designate the status of an entity: corporation, company, incorporated, limited, association, fund, syndicate, limited partnership, limited liability company, limited liability partnership, limited liability limited partnership, trust, statutory trust, or business trust.


CROSS-REFERENCES

Appeal from refusal of secretary of state to file a document, see § 1.26166.
“Deliver” defined, see § 1.40102.
Effective time and date of filing, see § 1.23163.
Filing fees, see § 1.22162.
Filing requirements, see § 1.20160.
Foreign corporations, see Ch. 1513.
Registered name, see § 4.03212.
Reserved name, see § 4.02211.
Statement of name in articles, see § 2.02202.

OFFICIAL COMMENT

1. No Required Indication of Corporate Status

While the Model Business Corporation Act requires business corporations to include in their names an indication that they are corporations, the Model Nonprofit Corporation Act has never included such a requirement. Imposition of such a requirement for nonprofit corporations would be contrary to the practice of nonprofit corporations, would not materially protect the public, and would entail considerable effort and cost. Hospitals, colleges, museums, trade associations, and other nonprofit institutions typically do not include in their names an indication
of corporate status. A nonprofit corporation, however, may include a corporate designator in its name if it so chooses.

2. Names That Are “Distinguishable upon the Records of the Secretary of State”

The provisions of Chapter 4 Subchapter 2B are based on the fundamental premise that the name provisions in the act should only ensure that each nonprofit corporation has a sufficiently distinctive name so that it may be distinguished from other entities upon the records of the secretary of state. A nonprofit corporation statute should not be a partial substitute for a general assumed name, unfair competition, or antifraud statute. As a result, the act does not restrict the power of a corporation to adopt or use an assumed or fictitious name with the same freedom as an individual. Principles of unfair competition, not entity organic laws, provide the limits on the competitive use of similar names.

The phrase “distinguishable upon the records of the secretary of state” has become the generally accepted standard used in entity organic laws for name availability. The principal justifications for requiring a distinguishable official name are (1) to prevent confusion within the secretary of state’s office and the tax office, and (2) to permit accuracy in naming and serving corporate defendants in litigation. In addition, having separate names will avoid confusion regarding the proper recipient of contributions, bequests, and deferred gifts. Thus, confusion in an absolute or linguistic sense is the appropriate test under the act, not the competitive relationship between the entities, which is the test for fraud or unfair competition.

Subsection Section 210(d) provides guidance for the secretary of state in applying the standard of “distinguishable upon the records.”

Rejection of the “deceptively similar” requirement that was used at one time in many state statutes is based on the fact that the secretary of state does not generally police the unfair competitive use of names and, indeed, usually does not have resources to do so.

3. Unavailable Names

Section 4.01(b) lists classes of “official names” that are not available. Where a foreign corporation or filing entity plans to register in a state and discovers that its name is not available in that state, it must adopt an assumed or fictitious name as its “official name” in the state, see Section 15.06. Such a fictitious or assumed name is thereafter an “official” name and is unavailable to the same extent as any other “official name” in use is unavailable.

If an entity is administratively dissolved under its organic law, its name becomes available for use by another entity. See Section 4.01(210(ba)(1) and (3). If another entity appropriates the name of a dissolved entity, upon reinstatement the dissolved entity must adopt a new name as required by Section 14.22142. If a dissolved entity is reinstated before its name has been appropriated by another entity, the dissolved entity resumes having the exclusive right to its name.

Under the laws of some states, registering as a limited liability partnership blocks the use of the partnership’s name by other entities. In states where that is the case, optional Section 4.01(210(ba)(7) and (8) should be used. Similarly, in some states registering a fictitious name
blocks its use by other entities and in states where that is the case, optional Section 4.01210(ba)(9) should be used.

4. Consent to Use

Section 4.01210(cb)(1) authorizes the secretary of state to accept a name that is indistinguishable from the name of another entity if that entity files an undertaking in a form satisfactory to the secretary of state that it will thereafter change its name to a name that is distinguishable upon the records of the secretary of state. This privilege may be important in acquisition transactions where a nonprofit corporation is to take over the business activities of an existing entity without a change in name. The secretary of state may require the undertaking to specify the new name that the corporation will adopt and the time period within which the change will be made. The requirements imposed on the undertaking should be consistent with the limited role of the secretary of state in the administration of Section 4.01210.

§ 4.02211. RESERVED NAME

(a) A person may reserve the exclusive use of a name, including a fictitious alternate name for a foreign nonprofit corporation whose name is not available, by delivering an application to the secretary of state for filing. The application must set forth the name and address of the applicant and the name proposed to be reserved. Upon finding that the name applied for is available, the secretary of state shall reserve the name for the exclusive use of the applicant for a nonrenewable period of 120 days.

(b) The owner of a reserved name may transfer the reservation to another person by delivering to the secretary of state a signed notice of the transfer that states the name and address of the transferee.


CROSS-REFERENCES

Appeal from refusal of secretary of state to file a document, see § 1.26166.
Availability of names, § 4.01210.
Consent to use corporate name, see § 4.01210.
“Deliver” defined, see § 1.40102.
Effective time and date of filing, see § 1.23163.
Filing fees, see § 1.22162.
Filing requirements, see § 1.20160.
Foreign corporation, see Ch. 1513.
“Person” defined, see § 1.40102.
Registered name, see § 4.03212.
The “reservation” of a corporate name is basically a device to simplify the formation of a new nonprofit corporation or the qualification of a foreign nonprofit corporation. By reserving a name, the persons considering such formation or qualification of the corporation can order stationery, prepare documents, etc., on the assumption that the reserved name will be available. Reference to a specific intent to form a new corporation is not required by the statute, however, since the secretary of state is not equipped and should not be asked to determine whether the requisite intent actually exists. For the same reason, “any person” is permitted to reserve a corporate name without reference to specific classes of persons who might wish to reserve a corporate name for various purposes. To use the name to register to do business under Section 1306 or incorporate, the name must comply with Section 210.

Under Section 4.02, an available name may be reserved, for example:

(1) By persons considering the formation of a new domestic corporation.

(2) By persons considering the formation of a corporation in another state and the immediate qualification of that new corporation in this state.

(3) By a foreign corporation planning or considering qualification in this state.

The name reserved may be the foreign corporation’s “official name” (if that name is available) or another name. The foreign corporation may thereafter use the reserved name as the name of a domestic subsidiary or, if its real name is unavailable, as a fictitious “official name” for its qualification under Section 15.06.

The foregoing examples are designed to suggest the scope and flexibility of Section 4.02, and not to exhaust the possible uses to which a reserved name may be put.

Consideration was given to whether reservation of a corporate name should be made renewable. The modern requirements for incorporation of a domestic nonprofit corporation or the qualification of a foreign nonprofit corporation are so simple that it is unlikely that more than 120 days could ever be realistically required to form or qualify a corporation. Also, it was believed to be undesirable to allow the reservation procedure to be used for other purposes, such as permanently setting aside a name by successive renewals. At the same time, it was recognized that circumstances might arise where a reservation period longer than 120 days might be useful.

To balance those concerns, this section authorizes reserving a name for 120 days. A name reservation is not renewable, but a new reservation may be filed upon the expiration of a reservation. When a reservation lapses, another party may file a reservation of the same name unless the party initially reserving the name is careful to file a new reservation immediately upon the lapse of the initial reservation. Nothing prevents the formation of an inactive corporation specifically to hold the desired name if a longer period of reservation is desired than the 120-day period specified by Section 4.02 and the reserving party does not wish to run the risk of another
§ 4.03212. REGISTERED NAME

(a) A nonqualified foreign corporation may register its name, or its name with any addition required by an alternate name adopted pursuant to Section 15.06 (noncomplying name of foreign corporation), if the name is distinguishable upon the records of the secretary of state from the names that are not available under Section 4.01210(b) (corporate name).

(b) A nonqualified foreign corporation registers its name, or its alternate name with any addition required by Section 15.06, by delivering to the secretary of state for filing an application:

(1) setting forth:

(1) its name, or its alternate name with any addition required by Section 15.06; and

(2) accompanied by a certificate of existence (or a document of similar import) from its state or other jurisdiction of incorporation.

(c) The name is registered for the exclusive use of the applicant upon the effective date of the application. The registration is effective through December 31 of the following year. Registration of a name under this section is effective for one year after the date of registration plus the remainder of the calendar year in which the registration expires.

(d) A nonqualified foreign corporation whose name registration is effective may renew it for successive one year periods by delivering to the secretary of state for filing a renewal application, which complies with the requirements of subsection (b), between October 1 and December 31 of the preceding year before the renewal year. The renewal application when filed renews the registration for the following calendar year.

(e) A nonqualified foreign corporation whose name registration is effective may thereafter become a qualified foreign corporation under the registered name or:

(1) register to conduct activities in this state as a foreign corporation under the registered name;

(2) consent in a record to the use of that name by a corporation thereafter incorporated under this [Act] or by the registered name by:

(i) a corporation thereafter incorporated under this [Act]; or

(ii) another foreign corporation thereafter authorized registered to conduct activities in this state. The registration terminates when the domestic corporation is
incorporated or the foreign corporation qualifies or consents to the qualification of another foreign corporation under the registered name.


CROSS-REFERENCES

Appeal from refusal of secretary of state to file a document, see § 1.26166.
Certificate of existence, see § 1.28168.
Consent to use corporate name, see § 4.04210.
“Deliver” defined, see § 1.40102.
Effective time and date of filing, see § 1.23163.
Filing fees, see § 1.22162.
Filing and signature requirements, see § 1.20160.
Foreign corporations, see Ch. 1513.
Reserved name, see § 4.02211.
“State” defined, see § 1.40102.

OFFICIAL COMMENT

The “registration” of a corporate name is basically a device by which a foreign nonprofit corporation, not qualified to conduct activities registered to do business in the state, can preserve the right to use its unique “real” corporate name if it decides later to qualify register in the state. In effect, registration ensures “real” corporate name availability in areas of potential future expansion.

It is believed desirable to limit Section 4.03212 is limited to this purpose and is not allow it to become an indirect device for the preservation of trademarks, trade names, or possible assumed names. For this reason, generally only “real” corporate names of foreign nonprofit corporations may be registered (with exceptions the exception described below). A broader approach would create issues better resolved under a trademark or similar statute, or by litigation under unfair competition principles, and might impose duties on secretaries of state that they are generally not equipped to handle, or could handle only at increased cost.

Confusion sometimes exists between “reservation” of names under Section 4.02 and section 211 and “registration” of names under Section 4.03 section 212. A foreign nonprofit corporation that is planning to qualify register as a foreign nonprofit corporation and finds that its name is available in the state may either register or reserve or register the name. Often a foreign nonprofit corporation will have to decide whether to qualify register in the state or to create a domestic subsidiary; this well. This may be decided after the exclusive right to use the corporate
name in the state is obtained either by reservation or by registration. If the foreign nonprofit corporation registers reserves its name, it will be kept indefinitely; if it reserves, it will be that name will be kept for 120 days and then become available again. If the foreign nonprofit corporation registers its name, that name will be kept for the remainder of the calendar year, unless renewed. That is the foreign nonprofit corporation’s choice. If a foreign nonprofit corporation registers its name and then elects to form a domestic or foreign subsidiary, the written consent procedure of Section 4.03212(e) allows the secretary of state to ascertain that the domestic subsidiary is related to the foreign nonprofit corporation and that use of the registered name by that subsidiary is acceptable to the foreign parent.

If a foreign nonprofit corporation’s “real” corporate name is unavailable, a foreign nonprofit corporation may reserve any available name—including one that is assumed or fictitious when compared with rather than the corporation’s “real” corporate name—for 120 days under Section 211, but it may not register this type of name in light of the policy against allowing the name provisions of the act to be used for purposes broader than the “unique name” issue. Nevertheless, a foreign nonprofit corporation that wishes to be certain that a particular fictitious or assumed name will be available in the future may create an inactive domestic subsidiary with the desired name to preserve its future availability. See also the Official Comment to Section 15.06.

Section 4.03(e) provides that the protection of the name provided by this section terminates when the name is used pursuant to this section by the foreign corporation or its domestic or foreign subsidiary.

[CHAPTER Subchapter] 5C
REGISTERED OFFICE AND AGENT

§ 5.01 Requirement of registered office and registered agent.
§ 5.02 Change of registered office or registered agent.
§ 5.03 Resignation of registered agent.
§ 5.04 Service on corporation domestic and foreign nonprofit corporations.

§ 5.01 REQUIREMENT OF REGISTERED OFFICE AND REGISTERED AGENT

Each domestic nonprofit corporation or registered foreign nonprofit corporation must continuously maintain in this state:

(1) a registered office, which may be the same as any of its places of business;

and

(2) a registered agent, which may be:

(i) an individual who resides in this state and whose business office is identical with the registered office; or

(ii) a domestic or foreign nonprofit corporation, domestic or foreign business
corporation, or filing domestic or foreign unincorporated entity whose business
office is identical with its registered office; or
and, in the case of (iii) a foreign nonprofit corporation, foreign
business corporation, or filing entity authorized to transact foreign unincorporated entity, is
registered to do business in this state whose business office is identical with the registered office.


**CROSS-REFERENCES**

- Annual report disclosure, see § 16.21421.
- Changing registered office or agent, see § 5.02221.
- “Domestic nonprofit corporation” defined, §102.
- Effect of dissolution of corporation, see § 14.051105.
- “Filing entity” defined, see § 1.40102.
- “Foreign nonprofit corporation” defined, §102.
- Foreign corporations, see Ch. 1513.
- Involuntary dissolution for failure to appoint and maintain registered agent and office, see § 14.201140.
- Naming registered agent and office in articles of incorporation, see § 2.02202.
- “Principal office”: defined, see §1.40102.
- designated in annual report, see § 16.21421.
- Resignation of registered agent, see § 5.03222.
- Service on corporation, see § 5.04223.

**OFFICIAL COMMENT**

The requirements that a nonprofit corporation incorporated under the act or a registered foreign nonprofit corporation continuously maintain a registered office and a registered agent at that office are based on the premises that at all times such a corporation should have an office where it may be found and a person registered agent at that office on whom to receive any notice or process required or permitted by law may be served. This covers not only service of process in connection with litigation but also tax notices and communications from the secretary of state and other governmental offices. The street addresses of the registered office must appear in the public records maintained by the secretary of state. A mailing address alone, such as a post office box, is not sufficient since the registered office is the designated location for service of process. See Section 202. The registered office may be a “legal” rather than a “business” office.

The act assumes that formal communications to a nonprofit corporation will normally be addressed to the registered agent at the registered office. If the communication itself deals with
the registered office or registered agent, however, copies must be sent to the principal office of
the corporation. Moreover, the act authorizes corporations to retain records at, or to provide
information to members through, offices other than the registered office. The act consistently
recognizes that the registered office may be a “legal” rather than a “business” office.

Many A domestic or registered foreign nonprofit corporations may designate their
registered office to be a business office of the corporation to be its registered office and a
corporate officer at that office to be the registered agent. Since Because most of the
communication to the registered agent at the registered office deals with
legal matters, however, corporations sometimes designate their regular legal counsel or
his the counsel’s nominee as their registered agent and the counsel’s office as the registered office
of the corporation. This practice may also encourage regular communication between the
corporation and its legal counsel.

The registered agent need not be an individual. Corporation service companies often provide, as a commercial service, registered offices and registered agents at the office of
the corporation service company.

The voluntary dissolution of the corporation does not of itself terminate the authority of
the registered agent to accept service of process or other communications on behalf of the
dissolved corporation. See Section 14.05.

§ 5.0221. CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT

(a) A domestic nonprofit corporation or registered foreign nonprofit corporation may
change its registered office or registered agent by delivering to the secretary of state for filing a
statement of change that sets forth:

(1) the name of the corporation;
(2) the street address of its current registered office;
(3) if the current registered office is to be changed, the street address of the
new registered office;
(4) the name of its current registered agent;
(5) if the current registered agent is to be changed, the name of the new
registered agent and the new agent’s signed consent in the form of a record (either as part of the
statement or accompanying it) to the appointment; and
(6) that after the change or changes are made, the street addresses of its
registered office and the business office of its registered agent will be identical.

(b) If the street address of a registered agent’s business office is changed, the agent
shall change the street address of the registered office of any corporation for which the agent is
the registered agent by notifying the domestic nonprofit corporation or registered foreign

28
nonprofit corporation in the form of a record of the change and signing and delivering to the
secretary of state for filing a statement that complies with the requirements of subsection (a) and
states that the corporation has been notified of the change.

Source Note: Patterned after Model Nonprofit
Corporation Act, 3rd Ed. (2008), § 5.02. Cf Model
Substantially a reenactment of Model Nonprofit
Corporation Act (1987) § 5.02. (2016 Revision), §
5.02.

CROSS-REFERENCES

Deletion of initial agent and office from articles of incorporation, see § 10.05903.
“Deliver” defined, see § 1.40102.
Effect of dissolution of corporation, see § 14.051105.
Effective time and date of filing, see § 1.23163.
Filing fees, see § 1.22162.
Filing requirements, see § 1.20160.
Involuntary dissolution for failure to file notice of change of registered agent or office,
see § 14.201140.
Notice, see § 1.41103.
Resignation of registered agent, see § 5.03222.

OFFICIAL COMMENT

Changes of registered office or registered agent are usually routine matters which do not
affect the rights of members. The purpose of this section Section 221 is to permit these changes
without an amendment of the articles of incorporation, without approval of the members,
and, indeed, even without formal or approval of the board of directors of the members.

Changes of registered office or registered agent are often of particular concern to
corporation service companies which routinely serve as registered agent and routinely provide a
registered office for literally thousands of corporations within many states.

Prior experience with the change of registered agent and registered office provisions in
the statutes of many states revealed several minor problems with these largely formal provisions
that are addressed in the act:

(1) Changes of registered office or registered agent need not be authorized by
the board of directors. Many changes (such as the name of a specific registered agent at a
registered office) are so routine that they should not require action by the board of
directors.

(2) In the case of a change of registered agent, the written consent of the new
registered agent is required. This is designed to prevent naming persons as registered
agents without their knowledge.

(3) The procedure by which a registered agent may change the street address
of the registered office applies to any location within the state and the agent is expressly
§ 5.03222. RESIGNATION OF REGISTERED AGENT

(a) A registered agent may resign as agent for a domestic nonprofit corporation or registered foreign nonprofit corporation by delivering to the secretary of state for filing a statement of resignation signed by the agent which states:

(1) the name of the corporation;  
(2) the name of the agent;  
(3) that the agent resigns from serving as registered agent for the corporation;  

and  
(4) the address of the corporation to which the agent will send deliver the notice required by subsection (c).

(b) A statement of resignation takes effect on the earlier of:

(1) 12:01 a.m. on the 31st day after the day on which it is filed by the secretary of state; or  
(2) the designation of a new registered agent for the domestic nonprofit corporation or registered foreign nonprofit corporation.

(c) A registered agent promptly shall furnish to the deliver to the domestic nonprofit corporation or registered foreign nonprofit corporation notice in a record of the date on which a statement of resignation was filed delivered to the secretary of state for filing.

(d) When a statement of resignation takes effect, the person that resigned ceases to have responsibility under this [act] for any matter thereafter tendered to it as agent for the domestic nonprofit corporation or registered foreign nonprofit corporation. The resignation does not affect any contractual rights the corporation has against the agent or that the agent has against the corporation.

(e) A registered agent may resign with respect to a domestic nonprofit corporation or registered foreign nonprofit corporation regardless of whether or not the corporation is in good standing.

Source Note: Patterned after Article 1 of the Uniform Business Organizations Code (2011) (Last Amended 2013) § 1-410. Substantially a
reenactment of Model Nonprofit Corporation Act

CROSS REFERENCES

Change of registered agent, see § 5.02.221.
“Deliver” defined, see § 1.40.102.
Filing fees, see § 1.22.162.
Filing requirements, see § 1.20.160.
Notice procedures, see § 5.04.

OFFICIAL COMMENT

Resignation under this section may be accomplished solely by action of the registered agent and does not require the cooperation or consent of the nonprofit corporation. Whether a resignation violates a contract between the registered agent and the corporation is beyond the scope of this act and subsection (d) preserves whatever claims a corporation may have against its registered agent for a wrongful termination. Even if a resignation were to violate such a contract, the resignation would still be effective if the provisions of this section are followed.

Section 222 permits the discontinuation of the registered office as well as the resignation of the agent and sets forth procedures for doing so.

Subsection (b) delays the effectiveness of a statement of resignation for 31 days to allow the notice of the resignation that must be sent under subsection (c) to reach the nonprofit corporation and to allow the corporation to arrange for a substitute registered agent.

The only obligation of a registered agent under subsection (c) is to send the required notice to the address set forth in the statement of resignation under subsection (a)(4).

Subsection (e) makes clear that a registered agent may resign with respect to a nonprofit corporation that is not in good standing and supersedes the contrary administrative practice in some states of refusing to accept any filings with respect to an entity that is not in good standing until the problem with the entity’s standing is cured.

§ 5.04.223. SERVICE ON CORPORATION DOMESTIC AND REGISTERED FOREIGN NONPROFIT CORPORATIONS

(a) The registered agent of a domestic nonprofit corporation or registered foreign nonprofit corporation is the corporation’s agent for service of process, notice, or demand required or permitted by law to be served on the corporation.

(b) If a domestic nonprofit corporation or registered foreign nonprofit corporation has no registered agent, or the agent cannot with reasonable diligence be served, the corporation may be served by delivery of the process in record form to the secretary of the corporation at its principal office.

The address of the principal office of the corporation must be as shown in the corporation’s most recent annual report filed by the secretary of state. Service is effected under this subsection as provided in Section 1.41(e) on the earliest of:
(1) the date the corporation receives the mail or delivery by the commercial delivery service;

(2) the date shown on the return receipt, if signed by the corporation; or

(3) five days after its deposit with the United States Postal Service or commercial delivery service, if correctly addressed and with sufficient postage or payment.

(c) If process, notice, or demand cannot be served on a domestic nonprofit corporation or registered foreign nonprofit corporation pursuant to subsection (a) or (b), service may be made by handing a copy to the individual in charge of any regular place of activity of the corporation if the individual served is not a plaintiff in the action.

(d) If process, notice, or demand cannot be served on a domestic nonprofit corporation or registered foreign nonprofit corporation pursuant to subsection (a), (b), or (c), the secretary of state shall be an agent of the corporation upon whom process, notice, or demand may be served. Service of any process, notice, or demand on the secretary of state as agent for a corporation may be made by delivering to the secretary of state duplicate copies of the process, notice, or demand. If process, notice, or demand is served on the secretary of state, the secretary of state shall forward one of the copies by registered or certified mail, return receipt requested, to the corporation at the last address shown in the records of the secretary of state. Service is effected under this subsection (c) at the earliest of:

(1) the date the corporation receives the process, notice, or demand;

(2) the date shown on the return receipt, if signed on behalf of the corporation; or

(3) five days after the process, notice, or demand is deposited with the United States Postal Service by the secretary of state.

(e) This section does not prescribe the only means, or necessarily the required means, of serving a domestic nonprofit corporation or registered foreign nonprofit corporation.


CROSS-REFERENCES

Foreign corporations, see-Ch. 1513. Notice, see § 1-41103.
“Principal office”:
defined, see § 1.40102.
designated in annual report, see § 16.21421.
Registered office and agent:
Designated in annual report, see § 16.21421.
Required, see §§ 2.02, 5.01, 202 and 15.0220.
“Secretary” defined, see § 1.40102.

OFFICIAL COMMENT

Section 223(b) offers three alternative methods for establishing the date service is
effected. Under Section 223(b)(1), service is effected on the date of receipt by the entity of the
mail or commercial delivery. Under Section 223(b)(2), service is effected on the date shown on
the return receipt, if signed on behalf of the entity. Under Section 223(b)(3), service is effected
five days after it is deposited with the Postal Service or with a commercial delivery service, if
correctly addressed and with correct postage or payment. Service is effected at the earliest of the
three listed circumstances. But for the party effecting service there are difficulties of proof under
the first two circumstances. Under Section 223(b)(1) the exact date of the receipt by the
nonprofit corporation of mail or commercial delivery is peculiarly within the knowledge of the
corporation. Under Section 223(b)(2) the return receipt must be signed on behalf of the
corporation. That requirement is designed to assure that the service is actually received by the
corporation. The problem is that the signature on the return receipt may not always show
unambiguously that the signer was acting for the corporation and was authorized to do so. As a
practical matter, therefore, parties effecting service under Section 223(b) may find it most
convenient to rely on Section 223(b)(3) and to maintain their own records so that the date of
deposit in the mails or with a commercial delivery service can easily be established.

Subsection Section 223(c) provides a means for serving process on a nonprofit
corporation that cannot be served under subsection Section 223(a) or (b). Subsection (d)
permits Some entity organic laws require that service of process to in that circumstance be made
on the secretary of state, but only if service cannot be made under subsection (a), (b), or (c)
because service on that leaves unanswered the question of what the secretary of state has the least
chance of actually being received by the corporation. Compare Fed. R. Civ. Proc. 4(h)(1)
which should do with the process. Section 223(c) permits service in that situation to be made on
an officer or managing or general agent of an entity the corporation.

Subsection (e) provides that this section does not prescribe the only, or necessarily the
required, means of serving a nonprofit corporation. Service may also be perfected under civil
practice statutes, under rules of civil procedure, or under statutes that provide special service
requirements applicable to certain types of corporations.

Section 5.04 simplifies the recordkeeping requirements of the secretary of state, who is
no longer required to keep records of service of process on domestic corporations.
<table>
<thead>
<tr>
<th><strong>Summary report:</strong></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Litera® Change-Pro for Word 10.2.0.10 Document comparison done on 12/30/2019 12:07:48 PM</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Style name:</strong> Default Style</td>
<td></td>
</tr>
<tr>
<td><strong>Intelligent Table Comparison:</strong> Active</td>
<td></td>
</tr>
<tr>
<td><strong>Original DMS:</strong> iw://imanage.blankrome.com/BRMATTERS/122418962/1</td>
<td></td>
</tr>
<tr>
<td><strong>Modified DMS:</strong> iw://imanage.blankrome.com/BRMATTERS/122417266/1</td>
<td></td>
</tr>
<tr>
<td><strong>Changes:</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Add</strong></td>
<td>520</td>
</tr>
<tr>
<td><strong>Delete</strong></td>
<td>614</td>
</tr>
<tr>
<td><strong>Move From</strong></td>
<td>0</td>
</tr>
<tr>
<td><strong>Move To</strong></td>
<td>0</td>
</tr>
<tr>
<td><strong>Table Insert</strong></td>
<td>0</td>
</tr>
<tr>
<td><strong>Table Delete</strong></td>
<td>0</td>
</tr>
<tr>
<td><strong>Table moves to</strong></td>
<td>0</td>
</tr>
<tr>
<td><strong>Table moves from</strong></td>
<td>0</td>
</tr>
<tr>
<td><strong>Embedded Graphics (Visio, ChemDraw, Images etc.)</strong></td>
<td>0</td>
</tr>
<tr>
<td><strong>Embedded Excel</strong></td>
<td>0</td>
</tr>
<tr>
<td><strong>Format changes</strong></td>
<td>0</td>
</tr>
<tr>
<td><strong>Total Changes:</strong></td>
<td>1134</td>
</tr>
</tbody>
</table>