



The Corporation (Inc.) in the USA

By Ray L. Vandenberg

Establishing a company in a foreign country can be challenging in terms of designing the legal structure and organising a streamlined and efficient incorporation process. Alliuris member firms provide corporate legal services, in particular for the formation of companies in their home country.

This article provides a brief overview of the legal form of a Corporation (Inc.) in the USA.

The corporation

The “corporation”, often referred to as “Inc.” has been the only available form of corporation in most individual states. Traditionally, it has been used for small one-man companies as well as large public companies such as IBM. Designations such as “closed” or “public” corporation do not imply independent legal forms; rather, they serve certain purposes, such as tax classification. In the international comparison, the corporation doesn’t correspond fully to a “limited liability corporation” nor to a “joint-stock company”. It is financed based on shares and has four core characteristics: continuity of existence independently of the death or retirement of the shareholders, unlimited transferability of shares, centralized management and, most importantly, no personal liability of the shareholders.

Choice of seat and place of incorporation

While in some countries a company must be incorporated where its main administrative activity takes place (so-called seat theory), the individual states of the USA follow the formation principle. This means that the seat of the company and the place of incorporation can be chosen separately. The state of Delaware is the most popular place of incorporation among foreign investors, thanks to the legal certainty provided by its reputable courts. The best business location depends on the purpose of the company and shall be considered case by case. Most states offer various incentives to investors,

such as tax advantages, assumption of training costs or purchase price reduction for the acquisition of real estate.

The following statements on the incorporation process may only be understood as a general description, since the applicable regulations vary depending on the chosen individual state.

Shareholders

The corporation may consist of one or more shareholders, who can generally be American or foreign natural persons or legal entities. Exceptions apply for S corporations. The shareholders of the corporation receive dividends from the company's profits. Normal shares with voting rights and no fixed guaranteed distribution rights are referred to as common stock. The articles of association may grant preferences with regard to guaranteed fixed dividends (preferred stock), usually without voting rights. In a close corporation, the transferability of the corporation's shares is restricted. In contrast, in a public corporation the shares are listed on a public stock exchange and can be transferred freely.

Management

Governance of the corporation is through the shareholders' meeting and the board of directors. While in the past a minimum of three directors was required, today the corporation may consist of a single shareholder, executive officer, and board member, or it may have a more complex structure. The main provisions of the corporation, which determines its organizational and structural features, are contained in the articles of association or bylaws.

Normally, the shareholders' meeting elects the members of the board of directors (directors) and votes on significant changes in the corporate form.

The corporation is represented by the board of directors by means of joint representation. The directors make the key decisions for the company's business policy and have a monitoring function. They meet only a few times during the financial year.

The daily business is handled by the officers (typically president or CEO, vice president, treasurer, and secretary). They are appointed by the organizers and confirmed by the board of directors. Usually, the officers have individual power of representation for certain thematic areas, while the CEO has individual power of representation for all day-to-day business operations.

Foreigners who are to be appointed as officers of a corporation will generally need a proper visa. While federal immigration law may allow the holder of a nonimmigrant visa (as a J or B visa) to serve as a director or an officer of a corporation, they are not allowed to receive a salary or be employed by the company.

Formation

The required time for the incorporation depends, among other things, on the state of incorporation. In general, the process takes approximately one day.

To incorporate a company, a document called “certificate of incorporation” must be filed with the competent state entity, usually the Secretary of State. This certificate names the organizers of the corporation, the address of a person who has legal authority to receive service of process and correspondence, and the name of the corporation plus the legal form suffix Inc., Corp., Co. or possibly Ltd. The effectiveness of the corporation usually arises upon receipt of the document by the authority. Some states, including New York and Pennsylvania, require an advertisement of the incorporation to be published in one or more newspapers operating in the county where the corporation is formed.

The main provisions of the corporation, which are typically contained in the articles of association or bylaws, do not need to be publicly filed.

It is usually not necessary to use a shelf corporation unless there is a tax reason for doing so. If convenience or speed is the motivation, creating a new entity is just as fast.

Share Capital

There are no minimum capital requirements. According to states’ law, the shareholders are not personally liable for the debts of the corporation, unless the separate existence of the corporation is disregarded.

Registration with Local Authorities

To hire employees or open a bank account, the employer identification number (EIN) must be applied for and obtained from the Internal Revenue Service of the Department of the Treasury.

A company incorporated in a single state is considered a “foreign corporation” by the other single states. The corporation must be registered in every state in which it “does business”. The process is slightly different from state to state, but it usually requires to file a “certificate of authority” or “application for authority” with the Secretary of State and to pay the registration fee. Most states require an annual report, containing the names of the officers and directors of the corporation, to be filed with the Secretary of State. Depending on the location and activity of the business, additional permits and licenses might be required.

Tax Registration

The employer identification number (EIN) must also be obtained for tax purposes. By default, a corporation is taxed at the corporate level, separately from the shareholders (C corporation). By filing the Internal Revenue Service Form 2553, a corporation with a single class of stock and less than 100 shareholders can be classified as an S corporation, which is regarded as a “pass through entity”. Shareholders of an S corporation are limited to individuals (U.S. citizens or permanent legal residents) and certain types of trusts, estates, and charitable organizations.

Anti-money laundering measures

As of January 1, 2021, companies generally must report the identity of the beneficial owners to the Financial Crimes Enforcement Network (FinCEN). A “*beneficial owner*” is an individual who directly or indirectly exercises “substantial control” over the reporting company or owns or controls a 25% or more ownership in the entity. Exceptions apply among others for publicly listed companies. The reported information is confidential.

Foreign Investment Control

The Committee on foreign investment reviews foreign investments to consider possible national security risks. The review regards primarily any transaction that results in the control of a U.S. business by a foreign person, investments in certain categories of business, such as business involving critical technologies, infrastructure, or sensitive personal data, and the purchase, lease or concession of real estate located next to a military installation or other sensitive facilities.

Customs (Export / Import)

The employer identification number (EIN) also serves as the importer number. A license, permit or certification may be required for the import or export of certain goods. It is advisable to check the requirements of the U.S. Customs and Border Protection (CBP) and to contact the port of entry to avoid problems. Even when an import license is not required, CBP entry forms must be filled out and the electronic export information (EEI) may be required. The CBP is piloting a “Simplified Entry” program.

Bank Account

A business bank account can be opened as soon as the EIN number is obtained. Some banks require a personal visit from a representative of the corporation.

Accounting

Both C corporations and S corporations must file annual tax returns with federal and state tax authorities (respectively, IRS Form 1120 and 1120-S). Filing in multiple states is required if the company has a “nexus” (a tax presence) in several states. For example, a nexus exists when the company maintains an office, employs workers, or stores products in a warehouse in another single state. Additionally, most states require an annual report and the payment of a small annual fee to keep the corporation in good standing. Both the accrual basis and the cash basis method can be used for the corporation’s accounting.

Incorporation Expenses

The incorporation costs include filing fees and publication fees if applicable and vary depending on the state. These costs amount to approximately \$100-150. Legal advice costs for the draft of the standard incorporation documents as well as the articles of association amount to approximately \$500. In the event that individual changes to the incorporation documents are necessary, costs are calculated on the basis of hourly rates.

Corporate Tax

C corporations are taxed at two levels. First, the corporation pays corporate taxes on its income. The federal corporate tax rate amounts currently to 23%. 44 single states and the District of Columbia impose a state corporate tax. Its amount varies from state to state, and it currently ranges from 1% to 9.9%. If the corporation distributes profits, the shareholders pay income taxes on the dividends. Federal personal income tax can range from 10% to 39.6%, while state income tax can vary considerably from one state to another. Some cities and counties, for example New York City, also collect local corporate and income taxes.

S corporations are “pass-through” entities that are treated like a partnership for tax purposes. The shareholders pay income taxes on the net income.

The tax classification of an American company abroad is independent of the classification elected in the USA. It is based on double taxation treaties and the domestic law of the foreign country. Since it depends on the comparison of legal types, it is influenced by the essential organizational and structural features of the entity, contained in the articles of association. Generally, both C corporations and S corporations are classified as corporations for tax purposes abroad.

Trade and Turnover Tax

In the U.S.A. there is not a general VAT at the federal level. Sales tax is collected only on the final customer, and its amount depends on the state and the local jurisdiction.

Staff

If necessary, we can also use our connections to recruit suitable employees or managers for your company.

Domiciliation Service

If the corporation does not have a physical address in the state where the corporation is registered, it must choose a registered agent who is responsible for receiving official notifications on behalf of the corporation and notify its address to the state. A local registered agent is also required to obtain a certificate of authority and do business in most states. We can provide the contact of local registered agents.

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