

**Certificate of Formation for close corporation**

# PREVIEW

A close corporation is a domestic corporation.

The Texas Business Organizations Code permits the corporation to be managed as a partnership while enjoying the benefits of a corporation, for example, limited liability.

The principal advantage of a close corporation is that it allows the corporation to operate without required formalities such as notice of meetings, corporate resolutions, and board of director meetings. Shareholders of electing corporations thus have much more flexibility and are not shackled to prescribed forms. For instance, management of the business may be done with or without a board of directors.

Procedural Formalities. The Certificate of Formation must include the statement: "This is a close corporation."

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Close corporations may be managed by a board of directors in the same manner as an ordinary corporation or in the way stated in the Certificate of Formation, or as stated in a shareholder's agreement.

If the close corporation is not managed by a board of directors, then the names & addresses then the Certificate of Formation must set forth the names & addresses of the persons who will perform the functions of the initial board of directors. When the corporation commences business pursuant to a shareholder's agreement, it should file a statement of operation as a close corporation with the Secretary of State's office. This statement should be signed by an officer and contain:

# THIS DOCUMENT

- a. the name of the corporation,
  - b. a statement that it is being operated & its business is being conducted under the terms of a shareholder's agreement made pursuant to the Texas Close Corporation Law, and the date when the corporation commenced business. File the original and a copy of the statement along with the filing fee in the Secretary of State's office.
7. The initial capitalization of \$1000 has been eliminated in the statutes,
8. Statutes provide that electronic transmissions may be utilized to carry out corporate functions. This includes notice, voting, proxies and meetings. This is reflective of the expanded use of teleconferencing, internet conferencing communication, and facsimiles. This should be addressed in the Certificate of Formation for these areas by either including them as authorized options or not including them.

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When using electronic transmissions for notice, it must be with the approval of the shareholder and should two attempts to provide notice by electronic transmission fail, the sender must use a certified means of notice.

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When the corporation receives information by electronic transmission, as in voting and proxies, the corporation must require that (with or without) accompanying the electronic transmission there is information whereby the corporation can authenticate the identity of the sender.

The use of electronic transmission for meetings will still require that the minutes of the meetings can be reduced to written form.

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# PREVIEW

1. After selection of a corporate name, the next step in forming a corporation is to prepare the Certificate of Formation.
2. The Texas Business Corporation Code (BOC) sections 3.005 through 3.007 sets forth the minimal information that must be contained in the Certificate which must then be signed by the Organizers.
  - a. See titles 1 and 2 of the Texas Business Corporations Code (BOC) for general information about profit corporations; see Title 1 Chapter 3, subchapter A of the BOC for the required provisions for the Certificate of Formation. Note the form used to be called Articles of Incorporation; that term has been replaced with the passage of the BOC which became effective 1/1/06.
3. The document used to form a corporation in Texas is the Certificate of Formation formerly known as articles of incorporation.
  - a. If the corporation is a profit as opposed to a non profit corporation, the same is governed by titles 1 and 2 of the Texas Business Organizations Code (BOC).
  - b. See title 1, chapter 3, subchapter A, of the BOC; it sets forth the provisions required or permitted to be contained in the certificate of formation.
4. The Texas secretary of state's office does not require the corporation to list the corporation's business or street address in the Certificate of Formation, note that other states require the address in the articles of incorporation or certificate of formation.
  - a. If the address is listed in the certificate and the corporation changes its address, the corporation may have to amend its certificate to reflect the change of address.
5. Major decisions that must be made before the filing of Certificate of Formation are:
  - a. The name of the corporation. The attorney should check with the Secretary of State's office to ascertain if the desired corporate name is available.
  - b. The duration. A corporation may exist perpetually unless its duration is provided for otherwise in the certificate of formation, see BOC section 3.003.
  - c. The purpose clause unless there is some reason to the contrary, a clause authorizing the "transaction of any and all lawful business" is preferred. In addition, a specific purpose clause identifying the business proposed to be done is recommended. Not only does such a provision "customize" the Certificate but it also removes any question as to whether the named purpose is contemplated.
  - d. The authorized, aggregate number of shares and their par value. It is usually best to authorize more shares than will be initially issued to avoid the necessity of later amendments.

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Par value is usually a contrived concept. The Certificate of Formation must specify whether shares have a par value or are without a par value. If shares are to have a par value, the Certificate must specify the chosen value. Par value is the minimum price to be paid for shares purchased from the corporation.

To the extent the corporation does not actually receive the par value of each share issued, the "underpaid" shares are assessable for the difference by the corporation or its creditors. Shares without par value or with low (1 cent or 10 cent or \$1) par value are recommended, to allow the maximum flexibility in setting the offering price. Shares can be issued (and usually are) for more than par value. Where the issue price is above par value, the shares so issued are assessable until all of the issue price (not just the par value) has been received.

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The registered agent which may be an individual or an entity, such as a corporation or a foreign entity that is registered to do business in Texas. The registered agent cannot be the corporation being incorporated- the corporation cannot be its own registered agent.

f. The street address of the initial registered office, which must be the business office of the designated registered agent where service of process may be personally served on the entity's registered agent during normal business hours and the name of the initial registered agent.

The registered office is the official "address" at which a representative of the corporation, the registered agent, can be reached. The state generally sends all official communications (for example, franchise tax report forms) to the registered agent. The registered agent is also the person authorized to receive service of process upon the corporation. See section 5.201 of the BOC for statutory references. Do not use a post office box or other service where personal service cannot be obtained.

The registered office is not required to be the entity's principal place of business.

If the registered agent or office address changes, file a change of address with the secretary of state's office. File the change within 30 days of the new agent's appointment or move to then new address. Failure to maintain a registered agent and office may result in the involuntary termination of the corporation.

The penalty for the failure to timely file a statement of change of registered office or registered agent with the secretary of state is set forth in BOC section 11.802.

g. The number of initial directors and their respective names and addresses. There must be at least one director. A director must be a natural person and not a corporation or trust. The director does not have to be a Texas resident. The number of directors can be changed after incorporation in the manner provided in the bylaws.

h. The Certificate of Formation is signed by an organizer, formally called an incorporator. The organizer does not have to be a Texas resident. The organizer may be an

individual over 18 years of age or another corporation or entity. There must be at least one Organizer, and the Organizer must sign the Certificate. Usually the attorney for purposes of convenience acts as the Organizer. The Texas Business Corporation Code (BOC) section 3.004 sets forth requirements for the organizer.

i. A provision regarding preemptive rights. Effective September 1, 2003, Texas law defaults to a denial of pre-emptive rights, consequently the certificate of formation should state whether or not pre-emptive rights are given or denied.

Preemptive rights in effect grant existing shareholders of a corporation the right to purchase any additional shares issued by the corporation. The rights are equivalent to a "right-of-first-refusal." Without such rights, a shareholder may find his percentage of ownership involuntarily diluted by a majority of the board. In closely held corporations, preemptive rights are important in protecting minority shareholders. In large publicly held corporations, preemptive rights are impractical and are customarily denied.

Without a compelling reason to the contrary, most attorneys deny preemptive rights.

j. A provision granting or denying cumulative voting in the election of directors.

"Cumulative voting" makes minority representation on the board of directors more likely by allowing a minority shareholder to cast as many votes as the number of shares he or she owns multiplied by the number of positions to be filled, and to distribute his or her votes among as many (or as few) candidates as he or she wishes. With "straight" or "non-cumulative" voting, a majority of shares could elect all directors. Effective September 1, 2003, Texas law defaults to a denial of cumulative voting.

k. Tax considerations:

1. The corporation must comply with federal income tax laws, file income tax returns, etc and obtain a federal employer identification number EIN. Call 800.829.3676 or visit the IRS website at [www.irs.gov](http://www.irs.gov) for more information.

m. Texas corporations are subject to the Texas Franchise tax. Contact the Texas Comptroller of Public Accounts for questions or assistance with franchise tax issues. Call 800.252.1381.

n. A provision for indemnification of officers and directors and for insurance for such indemnification.

o. Provisions electing statutory "close corporation" status and shareholder management or any other provisions which may be regulated by shareholder agreement in a statutory close corporation.

The standard form of Certificate of Formation may be used for a simple corporation. It includes the name of the corporation, duration, purposes, capitalization, stock structure (common

stock only), preemptive rights, cumulative voting prohibition, issuance of stock, name and address of registered office and agent, number of directors, and name of the Organizer.

**PREVIEW**

6. The initial capitalization of \$1000 has been eliminated in the statutes.
7. The filing fee for forming a new corporation is \$300.
8. The form, if mailed must be submitted in duplicate along with the filing fee.
  - a. The form may be mailed to P.O. Box 13697, Austin, Texas 78711-3697; faxed to (512) 463-5709; or delivered in person to the James Earl Rudder Office Building, 1019 Brazos, Austin, Texas 78701.

If documents transmitted by fax, credit card information must accompany the transmission.

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- c. On filing the document, the secretary of state will return the appropriate evidence of filing to the submitter together with a file-stamped copy of the document, if a duplicate copy was provided as instructed.

9. The organizer must sign the certificate.

- a. A person commits an offense under section 4.008 of the BOC if the person signs or directs the filing of a filing instrument the person knows is materially false with the intent that the instrument be delivered to the secretary of state for filing. The offense is a Class A misdemeanor unless the person's intent is to harm or defraud another, in which case the offense is a state jail felony.

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- b. Certificate of Formation no longer require the Organizer's signature to be notarized.

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# PREVIEW

<p><b>CERTIFICATE OF FORMATION FOR -PROFIT CORPORATION</b></p> <p><b>CLOSE CORPORATION</b></p> <p><b>[CORPORATION'S NAME]</b></p>	<p>This space reserved for SOS office use</p>
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1. NAME

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1.1 The entity being formed is a for-profit corporation. The name of the corporation is [Corporation's Name]. The name must contain the one of the following: Company, Corporation, Incorporated or an abbreviation of the words i.e. Inc. or Co.].

## 2. DURATION

2.1 The period its duration is perpetual [or such other duration such as a stated number of years].

## 3. PURPOSES

3.1 The purpose or purposes for which the corporation is organized are for the transaction of any or all lawful business which corporations may engage in under the laws of Texas including but not limited to the following:

- a. To carry on any business or any other legal or lawful activity to that the Board of Directors may decide.
- b. To acquire, own, use, convey and otherwise dispose of and deal in real property or any interest therein.
- c. To manufacture, buy, sell and generally deal in goods, wares and merchandise of every class and description, both real and personal and tangible.
- d. To buy, rent, sell, manufacture, produce, assemble, distribute, repair and service any and all products or services in which the company desires to engage.
- e. To do such other things as are incidental to the foregoing or desirable in order to accomplish the purpose for which the corporation was formed.

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To have a complete and rights and powers that are now or may be after granted to a corporation by law.

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3.2 The foregoing shall be construed as objects, purposes and powers, and enumeration thereof shall not be held to limit or restrict in any manner the powers hereafter conferred on this corporation by the laws of the State of Texas.

3.3 The corporation may in its bylaws confer powers, not in conflict with law, upon its directors in addition to the foregoing and in addition to the powers and authorities expressly conferred upon them by statute.

#### 4. AUTHORIZED SHARES

4.1 The total number of shares which the corporation has authority to issue is [amount and par or no par, i.e. 100,000 shares at a par value of one dollar per share].

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5.1 The shareholders of this corporation shall [have or not have] the preemptive right to subscribe to any and all issues of shares and securities of this corporation.

#### 6. CUMULATIVE VOTING

6.1 The shareholders [shall or shall not] have the right of cumulative voting.

#### 7. CLOSE CORPORATION STATUS

7.1 This corporation is a close corporation as defined by the Texas Business Organizations Code.

a. No shares and no securities evidencing the right to acquire shares shall be issued by means of public offering, solicitation or advertisement.

b. All the corporation's shares and securities shall be subject to restrictions on transfer as permitted by the Texas Business Organizations Code.

c. Only employees of this corporation may acquire its shares.

d. All issued shares, excluding treasury shares, and all issued securities evidencing the right to acquire shares of the corporation shall be held of record by no more than [number of persons] persons in the aggregate.

e. Each holder of common stock of this corporation shall have the first right, subject to reasonable adjustments to avoid the issue of fractional shares, to purchase shares of common stock of this corporation that may hereafter from time to time be issued whether or not presently authorized, including treasury shares of the corporation, in the ratio that the number of shares of common stock he or she holds at the time of the issue bears to the total number of shares of common stock. This right shall be forfeited by any shareholder who does not exercise it and pay

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for the stock preempted within thirty (30) days from the mailing of a notice in writing from the corporation inviting him or her to exercise the right.

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## 8. MANAGEMENT

8.1 Subject to the corporation remaining a close corporation, the business and affairs of the corporation shall be managed by the shareholders of the corporation who shall also constitute its board of directors. The name(s) and address(es) of the person(s) who have subscribed for shares to be issued by the close corporation and who will perform the functions of the initial board of directors is (are): [specify].

## 9. AMENDMENTS & MERGERS

9.1 The corporation will not except upon receiving the affirmative vote or written consent of holders of at least two-thirds of its common shares:

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a. Amend the Certificate of Formation so as to (i) create, (ii) increase or decrease the authorized number of, or (iii) change the designations, preferences, qualifications, limitations, restrictions, or special or relative rights of the shares.

b. Merge or consolidate with or into any other corporation, or sell, lease or convey all or substantially all of its property and assets, or voluntarily dissolve, liquidate or wind up its affairs.

c. Amend its Certificate of Formation or its bylaws adopted by its board at the meeting of the board of directors.

d. Issue or sell shares including the authorized, but unissued or treasury shares to any one who is not an employee of the corporation.

**THIS DOCUMENT**

## 10. REGISTERED AGENT AND ADDRESS

10.1 The name of the corporation's initial Registered Agent is: [Name]. [If the registered agent is not an individual but is a corporation or other entity state the type of entity]

10.2 The address of the corporation's initial registered office is: [address. State a street, building or rural route. Do not use a post office box since that is not sufficient to satisfy the service of process requirements].

**THANK YOU**

## 11. INITIAL DIRECTORS

11.1 The number of directors constituting the initial board of directors is [Number of Directors] (\_\_\_\_\_) and the names and addresses of the persons who are to serve as initial directors until the first annual meeting of the shareholders or until their successors are elected and qualified are:

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[Names and Addresses of Directors, including the country]

# PREVIEW

## 12. INDEMNIFICATION

12.1 The corporation shall indemnify every director or officer, his or her heirs, executors and administrators, against expenses actually and reasonably incurred by him or her, as well as any amount paid upon a judgment, in connection with any action, suit or proceeding, civil or criminal, to which he or she may be made a party to by reason of having been a director or officer of the corporation.

12.2 This indemnification is being given since the directors will be requested to act by the corporation, for the corporation's benefit.

12.3 The indemnification shall not be exclusive of other rights to which the director may be entitled.

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## 13. SUPPLEMENTAL PROVISIONS

13.1 No contract or other transaction between the corporation and any other corporation shall be affected by the fact that one or more of the directors or officers of this corporation is interested in or is a director or officer of such other corporation.

## 14. DATE THE FILING IS EFFECTIVE

14.1 This document becomes effective when the document is filed by the secretary of state, at a later date, which is not more than ninety (90) days from the date of signing, the following date \_\_\_\_\_, upon the occurrence of a future event or fact, other than the passage of time or The following event or fact will cause the document to take effect in the manner described below:]

**THIS DOCUMENT**

## 15. ORGANIZER

15.1 The name and address of the Organizer is [name and address of Organizer].

For the purpose of forming a corporation under the laws of the State of Texas, I, the undersigned Organizer of this corporation have signed this Certificate of Formation subject to the penalties imposed by law for the submission of a material, false or fraudulent instrument on \_\_\_\_\_.

**THANK YOU**

\_\_\_\_\_  
Organizer

**Fax filing & original signatures**

# PREVIEW

1. The Secretary of State's office maintains a plain paper facsimile machine for the receipt of documents and messages.
2. The Secretary of State's fax number is (512) 463-5709.
3. If a document is to be submitted to the office by facsimile transmission, it requires either the simultaneous receipt of the filing fee, or the delivery of any applicable fees by the close of the same business day.
4. If the applicable fees are not received on the same date as the transmission, the document will be returned without filing.

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**Payment of filing fees**

**PREVIEW**

1. Filing fees are set forth in Section 402.002 of the Texas Business Organizations Code (BOC) Filing fees may be paid by personal check, firm check, a client's check, cashier's check, money order, credit card, or debit system account. When filing documents by facsimile transmission, fees may be paid by credit card so that the fees will be paid on the same date as the transmission. The Secretary of State's office does not accept cash.

2. Credit card charges. The Secretary of State's office accepts Visa and MasterCard credit cards. The fees are subject to a transaction charge of 2.7% of total fees incurred. The 2.7% processing cost fee is subject to change and should be verified on a regular basis to see if fee has increased.

3. The transaction charge is assessed for the credit card transaction. To make payments by credit card, a completed credit card payment form must be sent with the transmission, or submit the following information along in writing. This can be included in the facsimile transmission.:

- a. The credit card to be used
- b. The account number,
- c. The expiration date,
- d. The signature of the card holder,
- e. The total fees charged, and

f. Fees paid by credit card are subject to a statutorily authorized convenience fee of 2.7 percent of the total fees.

**THIS DOCUMENT**

When submitting a filing instrument by fax, credit card information must accompany the transmission

**Expedited Processing**

A cover letter or cover sheet should accompany the filing instrument or order request and provide a daytime phone number and contact name. The cover must specifically request expedited processing. The document/order request will be processed by close of business on the business day following the day of receipt. Expedited processing is not provided for trademark documents.

**THANK YOU**

Expedited Processing Fee per document	25.00
Expedited Processing Fee per certified copy/certificate of status or fact	10.00

4. To pay filing fees by debit system account, contact the Secretary of State's office at (512) 435-3604. Debit fees are paid through an automated clearing house, a debit

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system account established between the account applicant and the financial institution under contract with the Secretary of State's office.

**PREVIEW**

5. Texas Secretary of State SOS Direct

Online access to the business entity and UCC databases is available through SOS Direct . The fees associated with an SOS Direct account are the fees imposed for a document filing, for copies and certificates ordered, and inquiries submitted.

The cost of an inquiry is \$1.00 per name searched. The \$1.00 fee is not charged when the search is made when ordering copies/certificates or when making a document filing. There are no monthly subscription fees. For more information, call (512) 475-2755 or visit the SOS web site at [www.sos.state.tx.us](http://www.sos.state.tx.us)

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**Payment of filing fees and fax filing**

# **PREVIEW**

1. Facsimile filings are now accepted as well as payment of filing fees by credit cards. See the above sections for a discussion of the Secretary of State filing procedures, fees, and forms:
2. The following form may be used to pay fees by a credit card.

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**PREVIEW**  
FOR CREDIT CARD USE ONLY (PLEASE PRINT OR TYPE)

Cardholder Name:  
Address:

City : State: Zip:

Phone No.: ( ) Fax No.: ( )

TYPE DOCUMENT TO BE FILED: ENTITY NAME(s):

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SHIP TO ADDRESS: (if different than Address above) EXPEDITED HANDLING REQUESTED:  YES  NO  
(Additional charge of \$25 for expedited service)

SELECT PAYMENT TYPE AND PROVIDE REQUESTED INFORMATION

Charge to: Secretary of State Client ID No.: (if applicable)

Charge to:  VISA®  MasterCard®  Discover® Charge to:  LegalEase<sup>SM</sup>

\* Fees paid by credit card are subject to a convenience fee (currently 2.7%) on the total fees incurred. \* For information about LegalEase<sup>SM</sup>, call 1-800-253-5749

**THIS DOCUMENT**

Card No.: - - - Card No.: 5 0 0 6 7 9 - - -

Expiration Date: / (MO/YR) Client No.: Case No.:

Signature: Signature:

	AMOUNT	BATCH NUMBER:
FILING FEE		
EXPEDITED HANDLING FEE		
TOTAL AMOUNT	\$	

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**Filing letter to secretary of state**

**PREVIEW**

1. The filing letter accompanies the Certificate of Formation along with the required filing fee.
2. These are collectively sent to the Secretary of State's office. Filing fees for the Certificate of Formation must be paid at the time the Certificate are filed.
3. For an additional fee, the Secretary of State's office will afford the Certificate special handling which expedites the incorporation process.
4. The fee generally assures that the Certificate are filed the same day, that they are received by the Secretary of State's office and that the Secretary of State's office will call the attorney to advise the exact date of filing and charter number.

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Form: Filing letter to secretary of state

**PREVIEW**  
[Date]

Office of the Secretary of State of Texas  
Statutory Filings Division  
Corporations Section  
Special Handling  
P.O. Box 13697  
Austin, Texas 78711-3697

Dear Intake Division:

Enclose please find duplicate original of the Certificate of Information for the above-named corporation and a check for [amount of filing fee i.e. \$300] from the Organizer in the required amount for the filing fees.

[Add, if desired: I have also enclosed a check for \$25 to cover the costs for special handling.]

Your expeditious cooperation is appreciated. Thank you in advance for your assistance and cooperation.

Very truly yours

**THIS DOCUMENT**  
[Attorney Name]

**THANK YOU**

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