

Shenzhen, ChinaRooms 1203-06, 12/F.
Di Wang Commercial Centre
5002 Shennan Road East
Luohu District, Shenzhen
T: +86 755 8268 4480**Shanghai, China**Room 603, 6/F., Tower B
Guangqi Culture Plaza
2899A Xietu Road
Xuhui District, Shanghai
T: +86 21 6439 4114**Beijing, China**Room 303, 3/F.
Interchina Commercial Bldg.
33 Dengshikou Street
Dongcheng District, Beijing
T: +86 10 6210 1890**Taipei, Taiwan**Room 303, 3/F.
142 Section 4
Chung Hsiao East Road
Daan District, Taipei
T: +886 2 2711 1324**Singapore**138 Cecil Street
#13-02 Cecil Court
Singapore 069538
T: +65 6438 0116**New York, USA**202 Canal Street
Suite 303, 3/F.
New York
NY 10013, USA
T: +1 646 850 5888

Guide to Starting a Corporation in Delaware

Unless otherwise mentioned, the corporation mentioned in this article specifically refers to the C Corporation registered in accordance with Section 102 of General Corporation Law of the State of Delaware.

Introduction

In Delaware, corporations and limited liability companies (LLCs) are the most prevalent business forms. Investors must consider each type of business form carefully because one business form may be an advantage to certain investors but not to others.

Delaware is one of the most popular options for both domestic and foreign investors. Investors can choose to establish a corporation or an LLC subsidiary in Delaware. A corporation offers limited liability to its shareholder and has centralized governance structures. An LLC has the similar characteristics. While the corporation is the first choice for foreign investors, the LLC is an acceptable alternative. Whatever type of business is chosen, investors should carefully consider the governance and tax aspects discussed below.

The main statutes governing Delaware corporations and LLCs are Delaware General Corporation Law (Title 8, Chapter 1, Delaware Code) and Delaware Limited Liability Company Act (Title 6, Chapter 18, Delaware Code). Both statutes are available online.

The Delaware Division of Corporations is the administrative agency, and is responsible for accepting and processing all required documents and application fees to register a business entity in Delaware.

1. Major Features of Delaware Corporation

(1) Name of Company

The name of a corporation must include one of these words: "company," "corporation," "club," "foundation," "fund," "incorporated," "institute," "society," "union," "syndicate" or "limited," or the abbreviation of one of these words.

In addition, the name of a corporation must be distinguishable from the names reserved or already registered with the office of the Secretary of State.

(2) Capital

Delaware does not have a minimum capital requirement to incorporate a corporation. However, the annual Delaware Franchise Tax amount will be determined based on the number of shares; therefore, whenever authorizing shares for a Delaware corporation, it is better to keep the number of shares low. A good rule of thumb is to authorize only what the corporation will need. Corporations with 5,000 or less authorized shares will pay the minimum Delaware Franchise Tax each year. Otherwise, the franchise tax amounts will be calculated with two different methods, and the method that results in the lesser tax will be applied for the further calculation. The detailed calculation methods will be explained later.

(3) Shareholders

There are no restrictions on the number of shareholders (equity holders) in a Delaware company. A corporation can have one or more stockholders. The shareholder can be a legal entity or natural person, without nationality limitation.

(4) Incorporators

An incorporator's primary role is to file the certificate of incorporation. The incorporators' names and addresses must be listed on the certificate. An incorporator may be a natural person or legal entity. The incorporator does not have to reside or be incorporated in Delaware.

(5) Directors

There are no general restrictions or requirements on the appointment of directors, except that they must be natural persons. Typically, the corporation's initial directors consist of one or more of its shareholders, but there is no statutory requirement that a director must be a stockholder. There is no requirement that the directors must reside in Delaware or in the US. There is also no requirement that any number of directors must be US citizens or permanent residents. Therefore, all directors can be foreign citizens.

(6) Registered Agent

All corporations registered in Delaware must have a registered agent on behalf of the corporations to receive legal documents. A registered agent may be an individual who resides in Delaware or a business entity that authorized to do business in Delaware, and the registered agent must have a physical address in Delaware. Kaizen can provide a registered agent for your corporation in Delaware.

(7) Certificate of Incorporation

Certificate of Incorporation is the official document received from Delaware state registration office after the registration is approved.

To register a corporation in Delaware, the incorporator needs to submit the application form to Delaware registration's office and pay the registration filing fee. The officer will review the document, and mail back the sealed Certificate of Incorporation with the filing date and filing number if approved. Kaizen offers a free Certificate of Incorporation template that you can use in Delaware or any state.

(8) Bylaws

Bylaws is a corporate's internal rules and operating procedure, it's not required to file with the Secretary of State. Bylaws may include internal organizational structure, responsibility of each position, and personnel appointment and removal, etc. Bylaws cannot include anything that is inconsistent with the Delaware law. The incorporators or directors must sign on the initial bylaws.

2. Corporation VS LLC

Similarities:

(1) Limited Liability

Both corporations and LLCs shield their owners from personal liability. The shareholders/the members take on limited liability of the corporations or LLCs up to their percentage of stocks/shares, but not personally liable for the debts, obligations and liabilities of the entity.

(2) Perpetual Existence

Delaware corporations and LLCs have a statutory right to exist perpetually.

Differences:

(1) Taxation

A corporation may subject to double taxation. Specifically, a corporation must file and pay corporate income tax during each taxable year, and the shareholders must pay taxes on any dividends or other distributions during the taxable year when they got them from the corporation. However, the corporation can choose to retain the earnings to finance growth and reasonable needs of the business up to USD 250,000 (USD 150,000 for personal service corporation) to avoid double taxation temporarily. However, if the retain earnings exceed USD250,000 (USD 150,000 for personal service corporation), Accumulated Earnings Tax with tax rate 20% will be added to regular income tax.

In contrast, an LLC with 2 or more members, is deemed as a pass-through entity. An LLC should file tax return, but not pay entity-level taxes on its tax return; instead, profits and losses should pass through to the members, then the members will add the apportioned profits on their own income tax returns with applicable tax rates, regardless of whether the income is distributed or not. Specifically, if the LLC is profitable but does not distribute any cash to the owners, the owners are still subject to tax on the income of the LLC. Similarly, the owners can take advantage of company losses on their own tax returns.

(2) Management

Corporations have comparably centralized management. The board of directors participate in daily operation, while the shareholders generally are not involved in the day-to-day affairs of the corporation. However, shareholders' approval is required for certain significant transactions such as mergers.

On the other hand, LLCs can be managed either by the members themselves or by managers appointed by the members.

3. Corporation Registration Procedures

(1) Choose a Corporate Name

Proposed corporation name cannot be similar to other names that already on file with Delaware Secretary of State. Kaizen can check the name availability for you. Also, you can reserve a name online through Delaware Secretary of State website.

(2) Prepare and File Certificate of Incorporation

To register your corporation in Delaware, the application form and the application fee should be submitted to Delaware Secretary of State by postal mail or online file.

The application form includes the corporation's name; the registered office name and street address in Delaware; the number of shares authorized to issue; the mailing address and the name of the incorporator.

(3) Appoint a Registered Agent

Every corporation in Delaware must have an agent for service of process in the state. This is an individual or corporation that agrees to accept legal papers on the corporation's behalf.

The agent may be an individual Delaware resident, or a business entity authorized to do business in Delaware. The registered agent must have a physical address in Delaware.

(4) Setup a Corporate Records Book

Set up a corporate records book in which you keep all your corporation's important papers, including stock certificates, list of shareholders, list of directors, shareholder transfer ledger, meeting minutes, etc. Keep your corporate records book at the principal office of your corporation.

(5) Prepare Corporate Bylaws

Bylaws is an internal corporate document that sets out the basic rules for operating your corporation. A corporation is not legally required to have bylaws; however, Kaizen advise you to prepare it in record. Because it specified the corporate's management practice and other aspects which should be followed to meet the compliance requirements.

(6) Appoint Initial Corporate Directors

The incorporator must appoint the initial corporate board of directors, while the board members who will serve for the next term are elected by the shareholders. The incorporator must fill an "Incorporator's Statement" showing the names and addresses of the initial directors. The statement should be placed in the corporate records book.

(7) Hold Your First Board of Directors Meeting

The first meeting of the initial board of directors should be held about appointing corporate officers, adopting bylaws, selecting a corporate bank, authorizing the issuance of shares of stock, setting the corporation's fiscal year, and adopting an official stock certificate form and corporate seal. All the directors' actions should be recorded the in minutes.

(8) Issue Stocks

Although most states do not have legal requirements, small corporations usually issue paper stock certificate, and record each shareholder's name and contact information in the corporation's stock transfer ledger.

4. Compliance Requirements

(1) Annual Report and Franchise Tax Requirements

All corporations incorporated in Delaware must file an annual report and pay franchise tax. The taxes and annual reports of corporations must be received by Delaware Division of Corporations no later than the following March 1st after the end of calendar year. Foreign corporations are required to file an annual report by no later than the following June 1st after the end of calendar year.

The annual report filing fee for domestic corporations is USD50 and franchise taxes due upon filing of the report. The filing fee for foreign corporations is USD125.

The minimum franchise tax is USD175 for corporations using the authorized shares method and a minimum tax of USD400 for corporations using the assumed par value capital method. The maximum franchise tax is USD200,000 for both methods, unless it has been identified as a large corporate filer then the tax will be USD250,000. Corporations owing franchise taxes USD5,000 or more pay estimated taxes in quarterly instalments with 40% due June 1, 20% due by September 1, 20% due by December 1, and the remainder due March 1. Consult with Kaizen consultants for more details on the Delaware Franchise Tax Calculation.

The corporation's penalty for not filing a completed annual report on or before March 1st is USD200. Interest at 1.5% per month is applied to any unpaid tax balance. Foreign corporations are assessed a penalty of USD125 if the annual report is not filed on time.

(2) Other Tax and Regulatory Requirements

(a) EIN

All the U.S. corporation must obtain a federal employer identification number (EIN). EIN can be obtained by completing an online application on the IRS website if the responsible person has SSN. Otherwise, EIN application can only be filed via postal mail or fax.

(b) S Corporation Filing

Only all the shareholders of the corporation who are tax residents can elect S corporation status for tax purposes. The corporate must submit Form 2553 which should be signed by all the shareholders. The election should be filed within two months and 15 days after the beginning of the tax year on which the election is to take effect, or at any time during the tax year preceding the tax year it is to take effect.

(c) Business Licenses

Depending on the type of business activities and the physical location, your corporation may need to obtain other state and local business licenses. Please consult with Kaizen consultants for more details.

5. Taxation

In Delaware, taxable business entities are only subject to Delaware income tax on Delaware source income, that is, the portion of their income allocated or apportioned to Delaware, but may be subject to state income tax to the state outside of Delaware. In addition, purchases in Delaware are not subject to sales tax, and Delaware has no value-added tax (VAT).

A Delaware corporation is subject to the following taxes:

(1) Corporate Income Tax

Every corporation doing business in Delaware that is not specifically exempt must file a Delaware corporate income tax return and must pay a Delaware corporate income tax before April 15.

Delaware state income tax rate is 8.7%.

(2) Gross Receipts Tax

A corporation doing business in Delaware and having Delaware source of income is subject to Delaware gross receipts tax at various rates (currently ranging between 0.945% and 0.7468%) depending on the nature of the business conducted in Delaware.

(3) Federal Income Tax

According to the Internal Revenue Service (IRS), all business entities, regardless of the taxable income, if any, must file an income tax return on or before the following April 15th of the tax year, or Oct 15th with extension, if calendar year is applied on tax purpose. However, the business entity must pay the tax due in full no later than the original due date for filing its tax return (not including extensions). Interest and penalty will be charged on taxes paid late even if an extension of time to file is granted.

6. Foreign Corporations Doing Business in Delaware

All corporations organized outside of Delaware must register with Delaware Secretary of State to do business in Delaware. Foreign corporations must appoint a registered agent for service of process physically located in Delaware. It should be noted that the Certificate of Existence dated within 6 months prior to the filing of the certificate is required from the foreign corporation's home state.



If you wish to obtain more information or assistance, please visit our official website at www.kaizencpa.com or contact us through the following means:

T: +852 2341 1444

M: +852 5616 4140, +86 152 1943 4614

WhatsApp/Line/WeChat: +852 5616 4140

Skype: kaizencpa

E: info@kaizencpa.com