

# SANDIA REPORT

SAND94-2581 • UC-900

Unlimited Release

Printed December 1994

## Partnering with Sandia National Laboratories through Alliances or Consortia

B. M. Winchell

Prepared by  
Sandia National Laboratories  
Albuquerque, New Mexico 87185 and Livermore, California 94550  
for the United States Department of Energy  
under Contract DE-AC04-94AL85000

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**SAND94-2581C**  
**External Distribution**  
**December 1994**

**Distribution**  
**Category UC-900**

## **PARTNERING WITH SANDIA NATIONAL LABORATORIES THROUGH ALLIANCES OR CONSORTIA**

**Bruce M. Winchell**  
**Technology Transfer Center**  
**Sandia National Laboratories/Livermore**

### **ABSTRACT**

To better facilitate working with industry, groups of industrial participants, and partners in alliances or consortia, Sandia National Laboratories presents information helpful to those outside groups as to the forms of arrangements that may be used to better facilitate partnering relationships between Sandia National Laboratories and consortia or alliances of outside parties. It is expected that these alliances and consortia will include both large and small for-profit industrial concerns, as well as not-for-profit entities such as universities, institutes, other research facilities, and other nonprofit institutions or consortia containing institutions. The intent of this report is to provide such outside groups with information that will facilitate rapid interactions with Sandia National Laboratories through some of these forms of business which will be discussed in this report. These are not the only approaches to facilitating business interactions with Sandia National Laboratories and it is not intended that this report be legal advice or required approaches to doing business with Sandia National Laboratories. The intent of this report is merely to suggest ways in which Sandia National Laboratories can work with outside parties in the most expeditious manner.

TABLE OF CONTENTS	Page
1.0 INTRODUCTION.....	1
1.1 BACKGROUND AND INTENT.....	1
1.2 ORGANIZATION.....	1
2.0 POSSIBLE CONFIGURATIONS.....	1
2.1 PARTNERSHIPS.....	2
2.2 CORPORATIONS.....	2
3.0 INTELLECTUAL PROPERTY ISSUES.....	3
4.0 PROGRAM MANAGEMENT.....	4
5.0 COOPERATIVE EFFORT ANTITRUST ISSUES.....	4
6.0 NEW ANTITRUST GUIDELINES FOR ACQUISITION AND	4
LICENSING OF INTELLECTUAL PROPERTY .....	4
7.0 NONPROFIT CORPORATIONS .....	5
7.1 NONPROFIT CORPORATION ARTICLES .....	5
7.2 NONPROFIT CORPORATION BYLAWS.....	6
8.0 FOR-PROFIT CORPORATIONS.....	8
9.0 CALIFORNIA CORPORATIONS .....	8
9.1 CALIFORNIA NONPROFIT CORPORATIONS .....	8
9.2 CALIFORNIA FOR-PROFIT CORPORATIONS .....	9
10.0 NEW MEXICO CORPORATIONS .....	9
10.1 NEW MEXICO NONPROFIT CORPORATIONS.....	9
10.2 NEW MEXICO FOR-PROFIT CORPORATIONS .....	9
11.0 CONCLUSIONS .....	10
 APPENDIX A - NONPROFIT CORPORATION ARTICLES .....	A-1
APPENDIX B - NONPROFIT CORPORATION BYLAWS.....	B-1
FOR CONSORTIA ARRANGEMENTS	
APPENDIX C - U.S. DEPARTMENT OF JUSTICE FILINGS.....	C-1
APPENDIX D - ANTITRUST GUIDELINES FOR ACQUISITION AND .....	D-1
LICENSING OF INTELLECTUAL PROPERTY	
APPENDIX E - CALIFORNIA FILING INSTRUCTIONS .....	E-1
APPENDIX F - NEW MEXICO FILING INSTRUCTIONS.....	F-1

# **PARTNERING WITH SANDIA NATIONAL LABORATORIES THROUGH ALLIANCES OR CONSORTIA**

## **1.0 INTRODUCTION**

### **1.1 Background and Intent**

Throughout the laboratories, technology transfer is becoming ingrained in the laboratory as a mission of the contract to transfer the technology developed at Sandia National Laboratories ("Sandia") to the private sector for commercial use. Sandia has found that many of the arrangements between the outside parties and the laboratories have become technically complex as well as more varied in the types of parties that desire to associate to engage in these projects. One particular aspect of this broadening of the types of arrangements includes the fact that in many cases a given project will require the skills and abilities of large corporations and small companies, not-for-profit organizations, universities, and other national laboratories, in association with Sandia. In an effort to find better ways to work together in a partnering arrangement and to more amply facilitate the efforts between these parties working on big projects, many types of arrangements with complex contracting arrangements have been tried to accomplish the aims and goals of the project. It is the intent of this report to provide the value of those experiences through a best practices approach to partnering with Sandia.

### **1.2 Organization**

This report will examine ways in which the outside parties may work together to form a consortia or alliances that form a corporate entity to then contract with Sandia in a fashion which is hoped will be significantly more efficient and cost effective in the arranging of these projects and completion of the contracting necessary to accomplish the funding and, finally, the actual completion of such projects. This report will focus on form as it affects the substance of such partnering through alliances or consortia.

## **2.0 POSSIBLE CONFIGURATIONS**

Many of the projects at Sandia require the skills of many outside groups in order to make a complementary set of skills necessary to accomplish the project. This has and can include groups such as universities, other federal laboratories, not-for-profit groups, large and small for-profit companies and corporations. Many times these groups form alliances or consortia as a basic building block, binding their skills and abilities together to form a cohesive unit that can task out the project and accomplish the aims and goals of the project. One area of complexity that has to be successfully resolved in every case is the legal contracting that is required with such consortia in order to establish the contractual commitments of money, manpower, and expertise

to accomplish the desired result that will allow both Sandia and outside partners or participants to accomplish their goals and leverage their R&D dollars.

These alliances or consortia have configured themselves in many different ways to accomplish these aims, including use of partnerships, limited partnerships, joint venture arrangements that include partnerships and corporations, including for-profit, and not-for-profit corporations.

## **2.1 Partnerships**

A partnership consortium seems to be popular with some small businesses as an arrangement that they feel comfortable with; probably because of the ease with which they may be formed in most states. It has been found, though, that some of the consortia arrangements in the form of partnerships have a very long induction period since it takes a significant period of time for these partnerships to be formed and for all of the parties to agree on the partnership arrangement; particularly, the liabilities associated therewith. Part of the problem of this is particularly with the arrangement where you have state universities and not-for-profit entities, along with the for-profit, small businesses and large businesses, all of which have very different cultures and ways of conducting their day to day business transactions.

The limited partnership arrangements have somewhat less of a problem in terms of their contractual relationships with Sandia. However, many of the limited partners feel too remote to the partnership, which is usually controlled by a sole partner or a small number of partners such that there is a concern whether or not this is a viable arrangement for the parties to effectively communicate, and work together on the project, as well as an effective administration of the project. There is concern over whether this form leaves all parties with a feeling that there is a true alliance in terms of equal control and partnership in the project.

In terms of ease of contracting with a federal laboratory such as Sandia, it has been found that the easiest form of contracting is between two corporations, especially when there are a large number of parties present on one side or the other. This can be accomplished either as a for-profit corporation or a not-for-profit corporation, but some type of corporate form is apparently the most direct and most cost-effective approach to obtaining the necessary legal entity binding arrangements necessary to these projects.

## **2.2 Corporations**

A corporate form of consortium or alliance can amply facilitate these arrangements since it does form an umbrella that can limit the legal liability. It also provides the structure through bylaws for the effective administration and management of the enterprise and the accomplishment of the project. It can be a viable legal entity with which Sandia can contract and thus assure the binding legal commitments between the corporate entity, consortium, and Sandia. Since the federal national laboratories, as well as some state institutions like university research centers, have some severe restrictions on the kinds of business entities that they can become a part of, it is thought that one approach to the mixed participant or partner consortium or alliance might well

choose a not-for-profit form of corporate structure so as to ameliorate these legal restrictions at the state and federal level with regard to membership and working with outside participants who may not be in a similar circumstance such as large and small businesses from the private sector.

### **3.0 INTELLECTUAL PROPERTY ISSUES**

The nonprofit corporation may well want to focus on some of the other issues of federal contracting with regard to bylaws and the kinds of things that go into the management arrangement the nonprofit will put together. Intellectual property rights, and the flow of those rights and licenses therefrom, can be a very important issue to consider at the beginning or entry of the consortia into the nonprofit corporate arrangement. For instance, a nonprofit corporation can obtain vital rights under federal acquisition contracts. Thus, keeping the intellectual property rights in the name of the nonprofit may be an advantage to the company; particularly where there is a mix of consortia members, both of nonprofit and for profit, as well as others involved. In some cases, however, if state entities are involved, the rules and restrictions with regard to the flow of intellectual property rights may dictate a different arrangement with regard to who owns the intellectual property rights. It may, in fact, require that each consortia member obtain title to the intellectual property rights invented or authored by its employees.

In the federal contracting sense, however, it is much easier for a federal entity to contract with one nonprofit corporation entity and to have the intellectual property rights be divided between the nonprofit corporate entity and the federal institution. This is particularly useful in circumstances where it is desirable to obtain commercialization of the resulting technology and to do so through flowing licenses from the nonprofit corporate entity to all those who might commercialize the resulting technology. This also assures that there is no difficulty in the arrangement with regard to interfering intellectual property rights or perhaps overlap of such rights and one party not having all the rights necessary to provide the manufacturing or services necessary to commercialize the technology.

The nonprofit corporation may well want to focus on some of the other issues of federal contracting with regard to the bylaws and the kinds of things that go into the management arrangement that the nonprofit will put together. Intellectual property rights, and the flow of those rights and licenses therefrom, can be a very important issue to consider at the beginning or entry of the consortia into the nonprofit corporate arrangement. For instance, a nonprofit corporation can obtain vital rights under federal acquisition contracts. Thus keeping the intellectual property rights in the name of the nonprofit may be an advantage to the company, particularly where there is a mix of consortia members, both nonprofit and for profit, as well as others involved. In some cases, however, if state entities are involved, the rules and restrictions with regard to the flow of intellectual property rights may dictate a different arrangement with regard to owns the intellectual property rights. It may, in fact, require that each consortia member obtain title to the intellectual property rights invented or authored by its employees.



## **4.0 PROGRAM MANAGEMENT**

These organizations can take on a more complicated structure, particularly with projects such as joint venture arrangements, alliances or consortia partnerships wherein the parties have a large project they must manage. In this case there may be a set of directors who are the lead management authority of the nonprofit and they may desire to have a technical liaison committee to manage the technical aspects of the project. A financial arrangement of managers to manage the funds and make sure that the nonprofit accounting system is in compliance with the federal regulations, particularly if federal contracts are involved, is also important. Marketing committees and project manager committees that may be involved in the overall management of the project to accomplish the aims and goals of the project as set forth in instrument with the national laboratories. If there is going to be contracting activity and money changing hands or funds flowed through the nonprofit corporation, it is wise to select a treasurer or designate a chief financial officer for the company so that you have someone who will have the financial background to manage the funds, and to put together an accounting system that will meet your contract requirements or commitments, particularly if there is a federal acquisition contract with this not-for-profit entity.

## **5.0 COOPERATIVE EFFORT ANTITRUST ISSUES**

Many times when a group of entities comes together because of common interests in a commercial project, the potential for antitrust issues will arise and the alliance or consortium must deal with these issues in advance to be effective. Recent amendments to the National Cooperative Research Act now permit industry groups to obtain exemption from the treble damages features of the various antitrust provisions of the statutes for both R&D activities and manufacturing activities of the group. To obtain the benefit of these exemptions the alliance or consortium must determine early on if they can qualify and proceed to the filings necessary to obtain the exemption. APPENDIX C to this report contains the latest U.S. Justice Department information on the methods of obtaining the exemption along with the addresses where the filings must be made.

Be sure to notice that the exemptions now apply to research and to manufacturing which many companies will find helpful. Also notice that these exemptions only exempt the consortium or alliance from the treble damages feature of the antitrust laws. This means that the antitrust laws still apply and that the other damages provisions still apply if there is a violation.

## **6.0 NEW ANTITRUST GUIDELINES FOR ACQUISITION AND LICENSING OF INTELLECTUAL PROPERTY**

On August 8, 1994, the U.S. Justice Department issued a draft for public comment on the new Guidelines for Acquisition and Licensing of Intellectual Property. These new guidelines may effect the way to structure a consortium or alliance depending on the proposed make-up of the group of partners. APPENDIX D contains the Justice Department publication that should be reviewed before the consortium or alliance agreements are completed. The likely effect is that if the partners are also competitors, such as an industry-wide consortium, then these guidelines will

subject the project to more antitrust scrutiny if the group represents 20 percent or more of the relevant market share. The guidelines become more stringent if there is exclusivity involved in the dividing of the intellectual property rights or if the consortium is used to acquire intellectual property rights on some kind of exclusive basis. Another area that might pose a problem is if the consortium is used to pool the intellectual property of a segment 20 percent or greater of the relevant market on some exclusive basis.

It would be wise to consider these guidelines at the point of the formation of the consortium or alliance to mitigate the effects upon the resulting business entity and to survive the scrutiny of the publications if the consortium files for exemption to the treble damages provisions of the antitrust statutes as set forth above and in APPENDIX C.

## **7.0 NONPROFIT CORPORATIONS**

In those arrangements where alliances or consortia are formed with entities that are not-for-profit, or state institutions such as institutional research facilities or university facilities, and federal institutions such as national laboratories may best utilize the nonprofit corporation approach since this provides the least amount of jeopardy to the various restraints that may be imposed by state law or federal law with regard particularly to state institutions or federal institutions. The required filings for a nonprofit corporation typically include Articles of Incorporation, a Statutory Agent form, and a set of bylaws. The bylaws do not have to be filed at the same time as the Articles of Incorporation, but within a short period thereafter. An example of a nonprofit corporation set of articles is included herein as APPENDIX A to this report.

### **7.1 Nonprofit Corporation Articles**

In the APPENDIX A sample articles of incorporation for a nonprofit corporation, you will see there is a first article that sets forth the name of the company, and a second article that sets forth the period of duration of the company, which usually is perpetual, but can be a period of years. The third article of incorporation is the purpose article, which must contain some of the language from the nonprofit corporation statute, to be a valid nonprofit corporation. A typical such purpose that would be suitable for consortia or alliances and that may be desirable is set forth in APPENDIX A, third article. Generally, these articles must be for the purpose of engaging in educational, charitable or benevolent activities such as those activities designed to enhance the economic competitiveness in the State, and to promote purposes that are generally recognized to be nonprofit, and in some cases, even tax-exempt.

If it is possible to include a tax-exempt statement in the purpose of the corporation, it is advisable to do so since this will aid in obtaining a 501(c) status for your corporation. Such a statement can be as follows: "This corporation shall be nonprofit organized under the Nonprofit Corporation Act of the State. The corporation is organized and will be operated exclusively for scientific or educational purposes, and will not carry on any activity not permitted to be carried on by, or which would jeopardize the tax-exempt status of an organization exempt under 26 USC, Section 501(c)(3) of the Internal Revenue Code of the United States, and its regulations as they

now or hereafter exist, or by an organization contributions to which are deductible under Section 170(c)(2) of the Internal Revenue Code of the United States of America, and its regulations. The corporation shall be non-stock, and no dividends or profits shall be declared or paid to the members thereof. No substantial part of the activities of the corporation will be the carrying on of propaganda or otherwise attempting to influence legislation, and the corporation will not participate in or intervene in (including the publication of statements), any political campaign on behalf of any candidate for public office." These statements make it much easier to obtain an IRS exemption for the nonprofit corporation if that is the desire of the parties.

An article stating how the dissolution of the corporation would occur must be placed in the articles and, generally speaking, to qualify as a nonprofit corporation it must be in accordance with the provisions of the Nonprofit Corporation Act. You must name an initial registered agent along with the street address and city of the initial registered agent within the confines of the state of incorporation in order to qualify. You will also need the names for a minimum of three directors who will serve as the initial directors, from whom you have permission to use their name in such articles and, additionally, at least one person who will act as the incorporator of the company.

## **7.2 Nonprofit Corporation Bylaws**

The area of corporate governance for a nonprofit corporation is generally the bylaws of such corporation, which can take a wide variety of forms that would be useful to the company in the operation of its business. Bylaws should be approved by the directors of the corporation and filed in the State Corporation Commission offices, and shall have been accompanied by a statement that the chief officer and the secretary are authorizing the filing of these documents. A typical set of bylaws for a consortia arrangement for a nonprofit corporation is set forth in APPENDIX B of this report.

With regard to the bylaws and the corporate governance of the corporation, it is wise to consider whether any of the members of the consortia or the alliance partners have a concern being members, and therefore having subsidiaries of their corporate entity involved in these activities. One way to resolve this issue is to state that the company shall have no members and that the powers of the corporation shall be vested in the initial directors of the company, who shall thereafter vote on a new board of directors on an annual basis. This could be used as a manner of providing a director from each consortia member without having a membership or ownership kind of interest in the corporation, particularly if large or small corporations have concerns about forming subsidiary corporations or governance problems in their corporate entity. If that is not a problem, however, a corporation of this type could state that anyone having an interest in these kinds of educational, scientific, charitable, and benevolent goals as set forth in the articles of the corporation, can and shall be members of the company. This is particularly helpful if you need the flexibility of allowing new members to enter into the company who will then have some kind of voting interest in the selection of the board of directors and in selection of officers of the company on an annual basis. This is a much more open arrangement that would allow for additional members to come in at will of the additional members. In the case where there are no members of the corporation, the initial board of directors would have control over any additional parties that

may be admitted to the company and that measure of control may be helpful in the formation of the project at hand with Sandia.

APPENDIX B has been done as the approach wherein there are no members of the corporation, and essentially the control of the corporation is vested in the initial board of directors that is set forth in the articles of incorporation. This means that the initial directors should be representative of all the parties of your consortia who are going to be a part of this nonprofit corporate entity, which will be the contracting entity with Sandia, as well as the project manager for the consortia or alliance which has been put together to work with Sandia.

The structure of the bylaws and, of course, the management of the nonprofit corporation can take almost any form, as long as it does not violate the nonprofit purpose for which it is formed under the nonprofit corporation act. In many cases both large corporations and small corporations will feel more comfortable with a traditional corporate approach to management since they are used to that for managing projects as well as for their own corporate governance. That includes having directors, officers, and managers within the nonprofit corporation to conduct its daily business. However, in many cases a consortia or the alliance partners may include nonprofit entities as well as state institutions or federal institutions, in which case a more open management structure may be called for. In those cases for consortia it seems to work well to have directors of the nonprofit corporation, the lead representatives for each one of the consortia members or alliance partners in the arrangement. That board can make up such an arrangement as an executive committee or a project management arrangement. From a New Mexico nonprofit corporation filing point of view the only officers that you really need to have are a chief executive officer and a secretary who must sign the bylaws that are filed with the State.

These organizations can take on a more complicated structure, particularly with projects such as joint venture arrangements, alliances or consortia partnerships wherein the parties have a large project they must manage. In this case there may be a set of directors who are the lead management authority of the nonprofit and they may desire to have a technical liaison committee to manage the technical aspects of the project, and a financial arrangement of managers to manage the funds and make sure that the nonprofit accounting system is in compliance with the federal regulations, particularly if federal contracts are involved, as well as marketing committees and project manager committees that may be involved in the overall management of the project to accomplish the aims and goals of the project as set forth in the instrument with the national laboratories. If there is going to be contracting activity and money changing hands or funds flowed through the nonprofit corporation, it is wise to select a treasurer or designate a chief financial officer for the company in order to have someone with the financial background to manage funds and to put together an accounting system that will meet contract requirements or commitments, particularly if there is a federal acquisition contract with this not-for-profit entity.

If there is already a consortia agreement prior to the formation of the nonprofit corporation, you may want to incorporate the minimal New Mexico State requirements into the consortia agreement by amendment thereto to make it the governing document. The disadvantage of this is that this document would then have to be filed with the State Corporation Commission which would make it a public record and may not be in your best interest. Another

way to handle this issue is to have only the minimal bylaws for the nonprofit corporation and have those bylaws authorize the directors to conduct the operations of the nonprofit corporation in accordance with the previously executed consortia agreement between the parties. As long as the bylaws give the directors all of the necessary authorities to conduct the operations of the nonprofit, the consortia agreement would not have to be filed with the State Corporation Commission and, thus, the detailed information about the consortia would not be made available to the public. You should declare a fiscal year for the company in accordance with the desires of the consortia members. It is advisable to use a fiscal year starting date the same as the project starting date or contract starting date in the event of a CRADA to allow for the most convenient method of operating and closing out a company at the end of the project.

## **8.0 FOR-PROFIT CORPORATIONS**

If none of the issues earlier set forth in this report are of concern to the consortia members or alliance partners, then perhaps a for-profit corporation can be formed in the traditional sense, that is a form of doing business that is very familiar to corporations in general. The consortia members, if all of whom happen to be corporations for-profit, will feel more at ease with a for-profit corporation arrangement as long as they do not have the problems or concerns about IRS exemptions, concern about corporate governance of subsidiary corporations of their company, and it is believed that the books of the company can be handled in such a manner as to minimize the tax liability of the corporation.

The advantages of using a for-profit corporation might be that if there is an alliance between two partners, both of whom are commercial firms, neither of which have all the capacities and capabilities necessary to commercialize the technology desire to form a joint venture to commercialize the technology that may result from a CRADA or a contract with a federal national laboratory, such as Sandia, a for-profit entity is a convenient method of operating a for-profit joint venture between two or more parties that may desire to bring together their skills and capabilities to commercialize the technology. Also, you do not need to worry about the not-for-profit statements that must be included in the nonprofit corporation articles and bylaws in order to have a valid nonprofit corporation under New Mexico law and perhaps to obtain the IRS exemption for that company if that is desired. Without these statements there is more flexibility in the operation of the company for-profit and it is a significantly more familiar form of operation to for-profit companies who may be the partners of this joint venture.

## **9.0 CALIFORNIA CORPORATIONS**

### **9.1 California Nonprofit Corporations**

California nonprofit, nonstock corporations can be organized under the California Nonprofit Corporation Law if your arrangement will fit one of three types allowed in California. The three basic types are: Nonprofit Public Benefit Corporations, Nonprofit Mutual Benefit Corporations, and Nonprofit Religious Corporations. More information is provided in the attached APPENDIX D from the Secretary of State's office. The filing fee is \$30.00 for the

articles and \$800.00 minimum franchise tax unless you file for and obtain an exemption using the form attached as APPENDIX D. The filing occurs in the California Secretary of State's Office located at 1230 J Street, Sacramento, California 95814. There are several telephone numbers for the office depending on your question as shown in the attached APPENDIX D.

## **9.2 California For-Profit Corporations**

The filing fee for For-Profit Corporations in California is \$100.00 for the articles and \$800.00 minimum franchise tax which can be filed as a single remittance of \$900.00 if you desire. You will find attached APPENDIX D from the Secretary of State's Office contains instructions and a single page Articles document for filing if you desire a short form filing. The filing occurs in the California Secretary of State's Office located at 1230 J Street, Sacramento, California 95814. There are several telephone numbers for the office depending on your question as shown in the attached APPENDIX D.

## **10.0 NEW MEXICO CORPORATIONS**

### **10.1 New Mexico Nonprofit Corporations**

In the State of New Mexico such filings can be accomplished relatively quickly through the State Corporation Commission located in Santa Fe, New Mexico. The filing fee for the articles for a nonprofit corporation is \$25.00, which includes the Statutory Agent filing, along with the articles. An additional fee of \$10.00 is necessary for the filing of the nonprofit bylaws, which are required to be filed in the State of New Mexico. These documents and the requirements for filing within the State of New Mexico are relatively brief and can be handled by filling in the forms, which can be obtained from the State Corporation Commission in Santa Fe. The address for filings at Santa Fe is: State of New Mexico, State Corporation Commission, P.O. Drawer 1269, Santa Fe, New Mexico 87504-1269. Additionally, telephone numbers are available for the State Corporation Commission if there are questions beyond that which is provided herein. The general assistance telephone number at the State Corporation Commission is: (505) 827-4511.

### **10.2 New Mexico For-Profit Corporations**

The corporate filing requirements in the State of New Mexico are very similar to the requirements for nonprofit corporations except it is \$100 filing fee to file the articles for a for-profit corporation. No bylaws need to be filed with the State Corporation Commission for for-profit corporations; thus, one additional document which would not be available to the public would be the corporate governance document of your corporation. A sample of the forms setting forth the minimum requirements for a New Mexico for-profit corporation can be found attached to this report as APPENDIX E. The address for the filing of these papers would be the same as for a nonprofit corporation and is: New Mexico State Corporation Commission, P.O. Drawer 1269, Santa Fe, New Mexico 87504-1269, or by calling the State Corporation Commission at (505) 827-4511.

## **11.0 CONCLUSIONS**

This report has given two approaches to forming corporate entities in the states of New Mexico and California that would be convenient ways to do business with Sandia. Sandia is not advocating either of these approaches, and these are certainly not the only approaches that can be utilized to contract with Sandia. However, these two forms are convenient methods of doing business with Sandia and thus it is hoped that this report will provide prospective consortia members or alliance partners a quick and easy way to obtain the necessary contracting entity to do business with Sandia. Sandia neither intends nor desires to provide any legal advice to any outside party and it is certainly not the intent of this report to do so. All of the forms and particularly the appendices to this report can be obtained from the Secretary of State's office of the various states.

## **APPENDIX A - Nonprofit Corporation Articles**

### **ARTICLES OF INCORPORATION**

**OF**

### **CONSORTIUM, INCORPORATED**

The undersigned, acting as incorporator of a corporation under the New Mexico Nonprofit Corporation Act 53-8-1 to 53-8-99 NMSA 1978, adopts the following Articles of Incorporation for such corporation:

**FIRST:** The corporate name of the corporation is **CONSORTIUM, INCORPORATED**.

**SECOND:** The period of its duration is perpetual.

**THIRD:** The purposes for which the corporation is organized are: to engage in educational, charitable and benevolent activities designed to enhance economic competitiveness of industry in the nation; to promote, coordinate, and integrate industrial access to the advanced materials, advanced processes and advanced technology collectively resident in the region's federal laboratories and research universities; to facilitate the delivery of cost effective integrated solutions by its members to meet U.S. industry's material and manufacturing process needs by coordinating technical assistance and encouraging research on technology problems of importance to industry; to enhance scientific, professional, commercial and industrial developments; and to engage in any and all activities and pursuits necessary or proper in connection therewith or reasonably related thereto.

**FOURTH:** Any dissolution shall be in accordance with the provisions of the New Mexico Nonprofit Corporation Act then in effect.

**FIFTH:** The name of its initial registered agent and the street address and city of the initial registered office in the State of New Mexico are:

Person's Name  
Address  
Albuquerque, New Mexico

**SIXTH:** The number of directors constituting the initial board of directors is three (3), and the names and addresses of the persons who have consented to serve as the initial directors are:

**NOTICE: YOU WILL NEED THE NAMES AND ADDRESSES FOR TWO MORE DIRECTORS.**



SEVENTH: The name and address of each incorporator:

DATED: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Incorporator*

(FILE DUPLICATE ORIGINALS)

## **APPENDIX B - NONPROFIT CORPORATION BYLAWS FOR CONSORTIA ARRANGEMENTS**

### **ARTICLE I--NAME AND OBJECTIVES**

#### **1.1    Name**

The name of this corporation is Consortium, Incorporated.

#### **1.2    Objectives**

The objectives of Consortium, Incorporated are to advance state-of-the-art advanced technologies in the United States by providing a forum for providing resources, which are beyond the scope of the resources at any one company; to work on technical problems that are of common interest; facilitating the industrial application of laboratory and resource results; providing educational and informational opportunities for individuals and corporations engaged in advanced technologies and related fields; advising academic organizations and other research oriented groups of the needs and interests of Members; and encouraging and fostering technical collaboration between domestic producers and users.

#### **1.3    Nonprofit Status**

Consortium, Incorporated is organized as a nonprofit corporate entity.

### **ARTICLE II--MEMBERSHIP**

#### **2.1    Eligibility**

Membership is limited to entities domiciled in the United States who are engaged in advanced technologies and whose manufacturing operations are substantially located in the United States.

#### **2.2    Subscription**

Until (   Date   ), any eligible entity may become a Member by executing a Membership Agreement and paying the specified annual Research and Development Funding (R&D) fee. No eligible entity may join after (     Date     ), except by 3/4 vote of the Membership. Membership shall continue so long as the Member complies with the terms and provisions hereto and continues to pay its share of fees as provided for herein.

### 2.3 Annual R&D Fees

Members shall pay an annual R&D fee in accordance with the executed membership agreement. This fee shall not be adjusted except by a vote of 3/4 of the Board of Directors. Annual R&D fees shall be used only as directed by a majority vote of the Board of Directors and in accordance with the Articles and Bylaws of Consortium, Incorporated.

### 2.4 Non-Transferability

Full Membership may only be transferred to the parent company or another subsidiary or division of the same corporate entity, or to a successor of substantially all of the business activities related to advanced technologies of a Member, provided that such entity meets the eligibility requirements of 2.1, above.

### 2.5 Corporate Affiliates

A Member that is part of a corporate entity is free to discuss all activities, information and findings of Consortium, Incorporated with other companies within that corporate entity that meet the eligibility of 2.1 above, provided a nondisclosure agreement acceptable to Consortium, Incorporated has been executed by each company receiving such information.

## ARTICLE III--ORGANIZATION

### 3.1 Board of Directors

Each Member shall appoint one Director to the Board of Directors by written notification to Consortium, Incorporated.

### 3.2 Board of Directors Responsibilities

The Board of Directors shall fill vacancies; elect by majority vote the officers at least annually; review, select, and approve research programs; approve the annual budget and conduct other necessary business of Consortium, Incorporated.

### 3.3 Officers

The officers shall consist of a President, Vice-President, Secretary, Treasurer and General Counsel.

#### 3.3.1 President Responsibilities

The President shall preside at and conduct meetings of the Organization and appoint project management teams or other special committees as deemed necessary and advisable to carry out the purposes and objectives of Consortium,

Incorporated. The President may appoint individuals to such project management teams or committees as deemed appropriate, and may invite members to furnish individuals to serve on such project management teams and committees. The President shall also perform all duties incident to the office of President and such other duties as the board of Directors may assign.

3.3.2 Vice-President Responsibilities

The Vice-President shall act in the absence of the President and shall succeed to the Presidency in the event of a vacancy in the office of the President. The Vice President shall also perform all duties incident to the office of Vice-President and such duties as the President or the Board of Directors may assign.

3.3.3 Secretary Responsibilities

The Secretary shall give notices as required, keep company documents, and maintain the minutes, records, and files of the Organization. The Secretary shall also perform all duties incident to the office of Secretary and such duties as the President may assign.

3.3.4 Treasurer Responsibilities

The Treasurer shall keep the financial books, records and accounts. A Treasurer's report shall be made at every Board of Directors meeting to the Directors.

3.3.5 General Counsel Responsibilities

The General Counsel shall keep the Corporate Secretary's records, attend to the Corporate legal matters, counsel the Directors and Officers on matters of law and best practices, obtain U.S. Department of Justice approvals for exemption from treble damage provisions of the antitrust laws and counsel the Company in such legal matters as the President may assign.

3.3.6 Term of Office

Terms shall begin upon conclusion of the annual meeting and shall continue until the conclusion of the next annual meeting. No individual may serve in the same office for more than two (2) consecutive terms.

## ARTICLE V--FUNDING

### 4.1 Sources

Funds may be derived from the following sources:

- 4.1.1 Annual R&D fees paid by Members.
- 4.1.2 Support from government entities.
- 4.1.3 Support from private and public organizations.
- 4.1.4 Voluntary contributions from Members.
- 4.1.5 Income from licensing Consortium, Incorporated intellectual property.
- 4.1.6 Assessments required to obtain, maintain and defend patents.

### 4.2 Use of Funds

Funds shall not be used to reimburse personal expenses for Officers, Directors and Members of Consortium, Incorporated.

### 4.3 Budget

Under no circumstances shall Consortium, Incorporated adopt a budget that provides for expenditures for research activities in excess of the sum of cash on hand at the beginning of the fiscal year plus revenues anticipated from annual R&D fees for that fiscal year.

## ARTICLE V--MEETINGS

### 5.1 Frequency

The Board of Directors shall meet as often as deemed necessary by the President to carry out the purposes and objectives of the Company. A meeting may also be called, through the Secretary, by request of 1/3 of the Board of Directors. No less than one (1) meeting shall be held in any fiscal year, to be considered the annual meeting. Written notice of any meeting will be given to the Directors at least thirty (30) days prior to such meetings unless 3/4 of the Directors waives this right. All notices shall contain the reason for the meeting, the date, the place, the time it is to be held, and an agenda of the items to be considered. Decisions made at a meeting shall be limited to agenda items and decisions on non-agenda items. Decisions on non-agenda items shall be made by mail ballot or at the next Board meeting.

5.2 Annual Meeting

The annual meeting shall be held on the third Tuesday of October of each year unless otherwise arranged. At this meeting, officers shall be elected and a written report shall be presented covering the prior fiscal year's research activities and financial status of Consortium, Incorporated.

5.3 Quorum

A quorum of at least 50 percent of the Directors must be present to conduct business at a duly called or held meeting. Each Director present shall be entitled to one (1) vote.

5.4 Proxy

At any time a Member may identify in writing a temporary or a permanent replacement for its designated Director, who shall exercise all of the power and fulfill all of the responsibilities of Director to Consortium, Incorporated.

5.5 Majority

Except as otherwise specifically provided herein, all matters coming before the Board of Directors, shall be decided by the vote of a majority of the total voting Directors present.

5.6 Mail and Telecommunications

Special meetings may be conducted by mail or telecommunication but requests for such meetings must be accompanied by as much notice and supporting information as time and circumstances reasonably permit. If 3/4 of all the Directors approve any matter by vote taken by mail or telecommunications, the matter shall be considered as approved the same as if voted on in a meeting of the Organization. The Secretary shall promptly advise the Directors of the results of all mail or telecommunications votes and any action taken pursuing thereto.

5.7 Additional Member Attendees

Meetings may be attended by (i) non-voting representatives of Members or by (ii) non-voting representatives of companies in the same corporate entity as a Member, provided such companies meet the requirements of 2.1 above.

5.8 Additional Non-Member Attendees

Non-Members can attend meetings if invited by the President, provided that not less than 30 days prior written notice is provided to all Directors. However, their presence can be vetoed by any Member for reasonable cause. Any non-Member attending shall be required to execute an appropriate nondisclosure agreement.

## ARTICLE VI--CONDUCT OF BUSINESS

### 6.1 Fiscal Year

The fiscal year of Consortium, Incorporated shall run from October 1 to September 30 of each calendar year.

### 6.2 Contracts with Other Entities

Consortium, Incorporated may conduct research activities in conjunction with other corporations, universities, research institutions and the Federal Government.

### 6.3 Extended Research Activities

All contracts for research activities conducted on behalf of Consortium, Incorporated whose duration extends beyond the end of the current fiscal year shall include a provision for orderly transition at the end of that fiscal year. This includes reviewing for funding approval based on progress.

## ARTICLE VII--CONDUCT OF RESEARCH ACTIVITIES

### 7.1 Review and Approval

Consortium, Incorporated may identify areas of common technological interest and shall solicit proposals for research activities pertaining thereto. Consortium, Incorporated shall review and consider such proposals. In addition, Consortium, Incorporated shall review and consider for adoption uninvited written proposals for research activities that may be submitted by Members, Sandia Corporation, universities, and public or private research facilities. Any such proposal, whether solicited by Consortium, Incorporated or not, may be adopted by a majority of those Directors voting at an annual meeting or a special meeting. Note that the provisions of Article 5.6 regarding mail and telecommunication meetings shall apply.

### 7.2 Execution of Agreements

After adoption of a proposal under the provisions of Article 7.1 by the Board of Directors, the President shall negotiate an appropriate written Agreement with the appropriate party on behalf of Consortium, Incorporated to implement the decision of the Board of Directors. The President shall have the Board of Directors approve it by a majority vote before executing the agreement.

## ARTICLE VIII--RIGHTS OF MEMBERS

### 8.1 Individual Action

The right of each Member of Consortium, Incorporated to act individually and independently, or with any other Member, concerning any matter within the scope of Consortium, Incorporated's activities shall not be impaired or restricted by the action of Consortium, Incorporated. Each individual Member shall have the right to take such action as it deems advisable, whether or not such action conflicts with the action of Consortium, Incorporated. Such individual action shall not purport to represent action of Consortium, Incorporated. The Members shall not discuss or plan any activities through Consortium, Incorporated that would, in the opinion of Counsel, violate any laws or regulations, especially antitrust laws.

### 8.2 Disclosures of Data

No Member has an obligation to disclose data to Consortium, Incorporated. If such data is disclosed, it shall be subject to the proprietary information provisions of the membership agreement.

### 8.3 Organization Records

At reasonable times upon reasonable notice, each Director shall have access to and the right to inspect for any proper purpose the books and records of Consortium, Incorporated and to make copies or extracts thereof.

### 8.4 Intellectual Property

Members shall be entitled to rights in Consortium, Incorporated intellectual property as provided in the Membership Agreement for the period of their membership.

## ARTICLE IX--PATENTS

### 9.1 Consortium, Incorporated Intellectual Property Rights

9.1.1 The Board of Directors shall have the right to decide, by a majority vote of the Directors, whether Consortium, Incorporated should seek United States and/or foreign intellectual property rights on any invention development under Consortium, Incorporated research activities. The Board of Directors shall also have the right to expend Consortium, Incorporated funds and to assess Members for those funds necessary to prepare and prosecute patent applications in United States and foreign countries to obtain intellectual property rights on such developments. The amount of such assessments shall be decided by a majority vote of the Board of Directors.



9.1.2 In the event one or more Members determines it necessary to defend a patent obtained pursuant to 9.1.1 above, such Members shall immediately advise Consortium, Incorporated. Consortium, Incorporated shall prosecute any such defense. All Members shall be given the option to elect to fund such defense at their expense. In the event such expense is successful, any recovery by Consortium, Incorporated for an infringement shall be divided among those Members who funded the defense, on a pro rata basis.

## 9.2 Option to Pursue Patent

In the event that the Board of Directors chooses not to seek intellectual property rights, whether in the United States or a foreign country, on any development, any Member or combination of Members shall have the option to require Consortium, Incorporated to seek such intellectual property rights and maintain and defend such at their expense. In this event, those Members not contributing to the expense of prosecuting, maintaining and defending such intellectual property rights shall not have any rights under such rights thus obtained.

## ARTICLE X--WITHDRAWAL

### 10.1 Withdrawals

Any Member may withdraw from Consortium, Incorporated by providing written notice thereof to the Secretary no later than September 1 of the then current fiscal year. Such notice may not become effective prior to the end of that fiscal year. Any withdrawing Member remains obligated to pay the full annual R&D fee for that fiscal year plus any assessment of Members by the Board of Directors prior to receipt of such notice.

### 10.2 Rights of Withdrawing Members

A withdrawing Member shall retain a nonexclusive, paid-up license to any Consortium, Incorporated intellectual property rights developed during its term of Membership.

## ARTICLE XI--INDEMNIFICATION OF OFFICERS AND DIRECTORS

### 11.1 Directors and Officers

- (a) Each Member agrees that the liability of Consortium, Incorporated's Directors and Officers to Consortium, Incorporated or its Members shall be eliminated to the fullest extent permitted by Corporation Laws, as amended from time to time.
- (b) Consortium, Incorporated, and each Member of Consortium, Incorporated to the extent of its pro rata share, shall indemnify to the fullest extent permitted by Corporation Laws, as amended from time to time, each person that such laws grant Consortium, Incorporated the power to indemnify.

## ARTICLE XII--AMENDMENTS

### 12.1 Amendment

These Bylaws may be amended by a 3/4 vote of the Directors. However, prior written notice of at least 30 days shall be provided to each Director prior to any such vote on amendment.

## ARTICLE XIII--DISSOLUTION

### 13.1 Required Vote

Consortium, Incorporated may be dissolved upon the affirmative vote of at least 3/4 of all the Directors.

### 13.2 Disposing of Assets

Upon the dissolution of Consortium, Incorporated, the Board of Directors shall, after paying or making provision for the payment of all the liabilities of Consortium, Incorporated, dispose of all of the assets of Consortium, Incorporated, as directed by a majority vote of all the Directors and as is consistent with the Nonprofit Corporation laws of the State as are effective at the time of such dissolution.

**CONSORTIUM, INCORPORATED**  
**MEMBERSHIP AGREEMENT**

This Agreement, entered into this \_\_\_\_ day of \_\_\_\_\_, 1994, having an office at \_\_\_\_\_, hereinafter referred to as "Member" and Consortium, Incorporated, a nonprofit corporation, having its registered office at \_\_\_\_\_.

**WITNESSETH:**

WHEREAS, Consortium, Incorporated is a nonprofit corporation organized to provide a forum for advancement of advanced technologies; and

WHEREAS, Member desires to become a member of Consortium, Incorporated, and intends to provide funding through membership for, and to participate in, a joint research and development venture in compliance with all applicable laws and regulations, including but not limited to, antitrust laws; and

WHEREAS, Consortium, Incorporated will take the necessary steps to comply with and file under the National Cooperative Research and Development and Act in order to receive the protections provided thereunder.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1.     Membership

Member shall become a member of Consortium, Incorporated immediately upon payment of the \$ \_\_\_\_\_ annual Research and Development funding (R&D) Fee for the fiscal year beginning October 1, 199\_\_, which R&D fee shall become due and payable as of the effective date of this Agreement. Annual R&D Fees of \$ \_\_\_\_\_ shall be due on October 1 of each year of continued membership.

2.     Certificate and Bylaws

Member acknowledges receipt of, and agrees to accept and be bound by all of the provisions of, the Certificate of Incorporation and the bylaws of Consortium, Incorporated, a copy of which is attached hereto as proposed Exhibit A and incorporated herein by reference.

### 3. Intellectual Property Rights

Member understands that Consortium, Incorporated may become the owner or licensee of certain intellectual property rights. Except as limited by Section 10.2 of the Consortium, Incorporated Bylaws relating to withdrawing Members:

3.1 Member shall automatically receive a world-wide, irrevocable, nonexclusive, royalty-free license or sublicense, as the case may be, (i) to make, have made, and use any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code ("Patented Technology"), which was conceived or first actually reduced to practice as part of the course of R&D during the time Member was a member of Consortium, Incorporated; and (ii) to sell products manufactured by Member for sale to a nonmember of Consortium, Incorporated, such sale shall be prohibited for a period of five years from the date the relevant patent issues and shall require a royalty payment to Consortium, Incorporated as may be established by the Board of directors;

3.2 Member shall have unlimited rights in Technical Data developed as part of R&D during the time the Member was a member of Consortium, Incorporated, except the right to claim copyright in such irrevocable, nonexclusive, royalty-free license or sublicense, as the case may be, in copyrighted Technical Data to use, to release to others, reproduce, distribute or publish such Technical Data provided Member acknowledges the copyright owner of such Technical Data; and

3.3 The licenses and sublicenses granted to Member, above, shall not include the right to grant sublicenses to any party, including but not limited to Member's parent and affiliated parties.

### 4. Proprietary Information

(a) Consortium, Incorporated and Members may from time to time provide PROPRIETARY INFORMATION to Consortium, Incorporated and other Members for the sole purpose of working together on projects for the business of Consortium, Incorporated, pursuant to the following terms and conditions.

(b) "PROPRIETARY INFORMATION" shall mean any information or materials which are disclosed hereunder in writing or other physical form and designated as being disclosing party PROPRIETARY INFORMATION or, if verbally disclosed, designated as PROPRIETARY INFORMATION at the time of such verbal disclosure, and confirmed in writing within thirty (30) days as being disclosing party PROPRIETARY INFORMATION.

(c) The recipient agrees to use the disclosing party's PROPRIETARY INFORMATION solely for benefit of the disclosing party and only for the purposes of performance of Consortium, Incorporated business as set forth above. The recipient agrees to return or destroy all copies or derivations of PROPRIETARY INFORMATION upon the request of the disclosing party.

(d) The recipient agrees not to disclose PROPRIETARY INFORMATION of the other party to anyone other than recipient's employees who have a need to know said PROPRIETARY INFORMATION for the purposes of this Agreement and who have a written agreement with the recipient to protect the PROPRIETARY INFORMATION of the disclosing party from further use and/or disclosure.

(e) The obligations of the recipient shall extend for seven (7) years from the date of receipt of the PROPRIETARY INFORMATION in written or other physical form, from the disclosing party.

(f) The obligations of the recipient shall terminate earlier if and when, but only to the extent that such PROPRIETARY INFORMATION: (i) is or shall become part of public domain through no fault of the recipient; (ii) was known by recipient prior to receipt of said PROPRIETARY INFORMATION from the disclosing party; (iii) is disclosed to the recipient by a third party who is not under any obligation of confidentiality to the disclosing party with respect to such PROPRIETARY INFORMATION; or, (iv) is independently developed by employees of the recipient who did not have access to the PROPRIETARY INFORMATION of the disclosing party.

(g) Recipient acknowledges that it may not be permitted to export or disclose to any non-resident foreign person or entity, any technical data without complying with U.S. Government export control laws and regulations such as the International Traffic in Arms Regulations and the Export Administration Regulations, including requirements for obtaining export licenses, regardless of whether the transfer occurs within the United States or abroad.

(h) Nothing herein shall be construed to grant any rights or licenses of any kind whatsoever other than as set forth above to accomplish the purposes of Consortium, Incorporated business, nor shall this Agreement in any way obligate either party to enter into a further agreement.

#### 5. Indemnification of Officers and Directors

(a) Member agrees that the liability of Consortium, Incorporated's Directors and Officers to Consortium, Incorporated or Member shall be eliminated to the fullest extent permitted by the Corporation Laws of the State, as amended from time to time.

(b) Consortium, Incorporated and each member of Consortium, Incorporated to the extent of its pro rata share, shall indemnify to the fullest extent permitted by the Corporation Laws of the State, as amended from time to time, each person that such Corporation Laws grant Consortium, Incorporated the power to indemnify.

#### 6. Expenses of the Members

Except as otherwise agreed to from time to time, Member shall bear all expenses incidental to its membership in Consortium, Incorporated.

7. Notice

Written notice shall be sent by certified mail or courier and shall be deemed to be duly served if addressed to Consortium, Incorporated at its registered offices with a copy to the then current President of Consortium, Incorporated at the President's address or to Member at its address stated at the beginning of this Agreement or to such other address as the addressee shall have given notice to the other party in a like manner.

8. Assignment

This Agreement shall constitute a personal contract of Member. Member shall not transfer, pledge or assign the same, or any part thereof, without first obtaining in each instance the prior written consent of Consortium, Incorporated and any attempt to so transfer, pledge or assign the same, or any part thereof, shall be null and void.

9. Similar Agreements

Consortium, Incorporated intends to enter into identical Membership Agreements with all entities which join Consortium, Incorporated. If, however, Consortium, Incorporated enters into a Membership Agreement with another entity which contains provisions which differ from, or are additional to, the provisions of this Agreement, shall promptly notify Member and make such different provisions available to Member if the Board of Directors accepts such changes by a majority vote of the Board.

10. Effective Date

The parties agree that this Agreement shall become effective upon execution of this Agreement on behalf of Consortium, Incorporated as approved by the Board of Directors.

11. Entire Agreement

This Agreement sets forth the entire understanding and agreement of the parties hereto with respect to Member's membership in Consortium, Incorporated and supersedes any previous communications, negotiations, representations or agreements, either verbal or written, with respect to the subject matter hereof unless amended by written agreement executed by the parties hereto.

IN WITNESS HEREOF, the parties have executed this Agreement as of the date first above written.

**CONSORTIUM, INCORPORATED**

By: \_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Type or print name of signatory*

Title: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Type or print name of signatory*

Title: President

Date: \_\_\_\_\_

## **APPENDIX C - U.S. DEPARTMENT OF JUSTICE FILINGS**



# United States Department of Justice

## Antitrust Division

Main Justice Building  
10th & Constitution, NW  
Washington, DC 20530



The information contained in this facsimile is government privileged and confidential information intended only for the use of the addressee(s) listed on this coversheet. If the reader of this message is not the intended recipient(s), you are hereby notified that any dissemination, distribution or copying of the telecopy is strictly prohibited. If you have received this facsimile in error, please immediately notify the sender at the telephone number listed on this coversheet and the original facsimile must be returned via the United States Postal Service to the address above. Thank you.

## Office of Operations

### FACSIMILE TRANSMISSION COVER SHEET

June 17, 1994

TO: BRUCE WINCHELL

OF: Sandia National Laboratory (DOE)

FAX NUMBER: 510- 294- 2158

FROM: DOUGLAS MACDONALD

PHONE: 202- 514- 2558

Number of pages (including this page): 16

Message: PER OUR CONVERSATION PLEASE FIND INFORMATION OUTLINING THE NATIONAL COOPERATIVE RESEARCH AND PRODUCTION ACT OF 1994, (FORMERLY THE NATIONAL COOPERATIVE RESEARCH ACT OF 1984). PLEASE FEEL FREE TO CONTACT ME AT THE NUMBER ABOVE IF YOU HAVE ANY GENERAL QUESTIONS/PROBLEMS OR OUR LEGAL POLICY SECTION AT, 202-514-2513, IF YOU HAVE QUESTIONS INVOLVING INTERPRETATION OR LEGAL ISSUES.



## Department of Justice

FOR IMMEDIATE RELEASE  
TUESDAY, DECEMBER 11, 1984

AT  
202-633-2016

The Department of Justice released today a statement by J. Paul McGrath, Assistant Attorney General in charge of the Antitrust Division, regarding the Department's implementation of the notification and Federal Register notice provisions of the National Cooperative Research Act of 1984.

Under the Act, parties to joint research and development ventures may limit their possible antitrust damage exposure to actual, as opposed to treble, damages by filing a notification with the Department of Justice and the Federal Trade Commission.

Assistant Attorney General McGrath's statement, concurred in by the FTC, identifies the offices to which notifications should be delivered, and advises parties on how to facilitate the publication by the Department of Justice of the Federal Register notice required by the Act. The complete text of McGrath's statement follows:

"On October 11, 1984, President Reagan signed into law S. 1841, the National Cooperative Research Act of 1984 (P.L. 98-462). Cooperative research and development efforts may improve productivity, bring better products to consumers sooner and at lower cost, and enable American business and industry to keep pace with foreign competitors in a world increasingly dependent

(MORE)

- 2 -

on technological innovation. By significantly improving the legal climate, the National Cooperative Research Act should stimulate innovative research and development by the private sector. The legislation clarifies the application of the antitrust rule of reason to joint R&D ventures and establishes special attorneys' fee rules in antitrust cases challenging such ventures. It also provides parties to such ventures with the opportunity to limit any possible monetary relief that might be sought from them in actions brought under the antitrust laws to actual--as opposed to treble--damages.

"The new rule-of-reason and attorneys' fee provisions automatically cover all joint R&D ventures as defined in the Act. However, the Act's damage protection depends on the filing of a notification with the antitrust enforcement agencies. In order to obtain damage protection, any party to a joint research and development venture may, not later than 90 days after entering into a written agreement to form the venture, or not later than 90 days after the date of enactment of the Act, whichever is later, file simultaneously with the Attorney General and the Federal Trade Commission a written notification disclosing the identities of the parties to the venture and its nature and objectives. The manner and extent of this disclosure is left to the parties; they are to exercise their own discretion in determining the quantity and form of the material required to describe the nature and objectives of their venture. Parties should be aware, however, that the detrebling protection of the

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- 3 -

Act is based on the contents of their notification. Such additional notifications as are appropriate to extend the Act's protection to new or different activities undertaken by a venture also may be filed. In order to maintain the protection of the Act, a joint R&D venture must file a notification disclosing any change in its membership within 90 days of the change.

"The responsibilities of the Attorney General under the Act have been delegated to the Assistant Attorney General in charge of the Antitrust Division. Written notifications filed pursuant to the Act should be delivered to each of the following offices:

Evaluation Office  
Bureau of Competition  
Room 392  
Federal Trade Commission  
Washington, D.C. 20580

and

Director of Operations  
Antitrust Division  
Room 3214  
Department of Justice  
Washington, D.C. 20530

"The Act further provides that the Attorney General or the Commission shall, not later than 30 days after receiving notification of a joint research and development venture, publish in the Federal Register a notice that identifies the parties to the venture and describes in general terms its area of planned activity. Prior to publication, the notice must be made available to the parties. Any person who files a notification

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- 4 -

may withdraw it before notice is published in the Federal Register, but notification so withdrawn will not confer the Act's protection on the parties to the joint R&D venture involved. The Department of Justice will publish all Federal Register notices under the Act. Submission of the following along with a notification will facilitate most prompt publication of a notice under the Act:

- "1. A draft Federal Register notice.
  - "2. Evidence that the party filing the notification has been authorized by each party to the joint R&D venture to review on its behalf the notice that is to be published in the Federal Register, or, alternatively, the names and addresses of other persons to whom the notice should be made available prior to publication.
  - "3. An extra copy of the notification materials to the Antitrust Division.
- "The Federal Trade Commission concurs in this statement."

# # # #



# Department of Justice

*Copy* COPY FOR YOUR  
INFORMATION

FOR IMMEDIATE RELEASE  
MONDAY, JUNE 28, 1993

AT  
(202) 514-2007  
TDD (202) 514-1888

JUSTICE DEPARTMENT IMPLEMENTS NEW NOTICE PROVISIONS OF  
THE NATIONAL COOPERATIVE PRODUCTION AMENDMENTS OF 1993

WASHINGTON, D.C. -- The Department of Justice today released a statement by Anne K. Bingaman, Assistant Attorney General in charge of the Antitrust Division, regarding amendments that extend the provisions of the National Cooperative Research Act of 1984 to include joint ventures for production and redesignate the NCRA as the National Cooperative Research and Production Act of 1993 (NCRPA).

The NCRPA permitted parties participating in joint research and development ventures to limit their possible antitrust damage exposure to actual--as opposed to treble--damages if they filed notifications with the Attorney General and the Federal Trade Commission (FTC).

Under the NCRPA, parties to a joint venture for production also will be entitled to obtain the same protection by filing a notification with the Attorney General and the Commission.

Bingaman's statement, in which the FTC concurs, identifies the offices to which notifications should be delivered, and

(MORE)

- 2 -

advises parties on how to facilitate publication by the Department of the Federal Register notice the act requires.

The complete text of Bingaman's statement follows:

"On June 10, 1993, President Clinton signed into law H.R. 1313, the National Cooperative Production Amendments of 1993 (Pub. L. No. 103-42). These amendments extend the provisions of the National Cooperative Research Act of 1984 (NCRA), which afford certain antitrust protections to joint research and development ventures, to joint ventures for production as well, and redesignate the NCRA as the National Cooperative Research and Production Act of 1993 (NCRPA). By improving the legal climate surrounding cooperative production activities, the NCRPA is intended to facilitate innovative and efficient joint ventures for production, as did the NCRA with respect to joint research and development ventures.

"The NCRPA clarifies the application of the antitrust rule of reason to research, development, and production joint ventures and provides special attorneys' fee rules in any antitrust case challenging such a joint venture. The act also provides parties to such ventures the opportunity to limit any possible monetary damages that might be sought from them in actions brought under the antitrust laws to actual--as opposed to treble--damages. However, under new Section 7 of the act, the damage limitation provision does not apply to a joint venture's production of a product, process, or service unless (1) the principal facilities

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- 3 -

for such production are located in the United States or its territories, and (2) each person who controls any party to such venture (including such party itself) is a United States person or a foreign person from a country whose law accords antitrust treatment no less favorable to United States persons than to such country's domestic persons with respect to participation in joint ventures for production.

"The legislative history of H.R. 1313 indicates that the phrase 'whose law' in Section 7(2) is intended to include 'not only a country's domestic antitrust law but also all international agreements and other binding obligations to which that country and the United States are parties. Accordingly, a country that is a party to an international agreement with the United States that provides national treatment satisfies the requirements of section 7(2). This would include treaties of Friendship, Commerce and Navigation (FCNs); Bilateral Investment Treaties (BITs); Free Trade Agreements; and various OECD instruments.' H.R. Rep. No. 103-94, 103rd Cong., 1st Sess. 20 (1993).

"The rule-of-reason and attorneys' fee provisions of the act automatically apply to all joint ventures covered by the act. However, the act's damage protection depends on the filing of a notification with the federal antitrust enforcement agencies. In order to obtain damage protection, any party to a joint venture covered by the act may, not later than 90 days after entering

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- 4 -

into a written agreement to form the venture, file simultaneously with the Attorney General and the Federal Trade Commission a written notification disclosing the identities of all parties to the venture and the nature and objectives of the venture. In the case of a joint venture one of whose purposes is the production of a product, process, or service, the notification must contain additional information: the nationality of all parties and the identity and nationality of all persons who control any party to the venture whether separately or with one or more other persons acting as a group for the purpose of controlling such party.

"All notifications filed under the act should make clear the identity of all parties to the venture. The legislative history of the NCRA indicates that the list of parties should include 'the real parties in interest,' see Joint Explanatory Statement of the Committee of Conference on S. 1841, H.R. Rep. No. 98-1044, 98th Cong., 2d Sess. 19 (1984). All notifications should also include a description of the nature and objectives of the venture, including a concise statement of its purposes.

"Parties filing notifications of joint ventures for production should state clearly that a purpose of their venture is production. They should also provide the nationality of all parties and the identity and nationality of all persons controlling such parties. The meaning of 'control' of any party is not defined by the act. The legislative history of the act indicates that 'control' is intended to mean having the power to

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- 5 -

direct the management or policies of a person. This controlling influence may be exercised either directly or indirectly and the means used can vary. For example, it may be exercised through the ownership of voting securities, through a contractual right, or through participation on the board of directors. See H.R. Rep. No. 103-94, supra, at 19; S. Rep. No. 103-51, 103rd Cong., 1st Sess. 11 (1993).

"In the case of a corporation, parties should provide the name, place of incorporation and location of principal executive offices. In the case of an unincorporated firm, comparable identifying information should be provided. See S. Rep. No. 103-51, supra, at 13.

"In general, the manner and extent of the notification is left to the parties; they are to exercise their own discretion in determining the quantity and form of the information required adequately to describe the nature and objectives of their venture, see H.R. Rep. No. 98-1044, supra, at 18-19. Parties should be aware, however, that the damage protection of the act is dependent on the adequacy of their notification. Such additional notifications as are appropriate to extend the act's protection to new or different activities undertaken by a joint venture also may be filed. In order to maintain the protection of the act, a joint venture must file a notification disclosing any change in its membership within 90 days of the change.

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- 6 -

"Written notifications filed pursuant to the act should be delivered to each of the following offices:

Evaluation Office  
Bureau of Competition  
Room 392  
Federal Trade Commission  
Washington, D.C. 20580

and

Director of Operations  
Antitrust Division  
Room 3214  
Department of Justice  
Washington, D.C. 20530

"The act further provides that the Attorney General or the Commission shall, not later than 30 days after receiving notification of a joint venture, publish in the Federal Register a notice that identifies the parties to the venture and describes in general terms its area of planned activity. Prior to publication, the notice must be made available to the parties. Any person who files a notification may withdraw it before notice is published in the Federal Register, but a notification so withdrawn will not confer the act's protection on the parties to the joint venture involved. The Department of Justice will publish all Federal Register notices under the act. Submission of the following, along with a notification, will facilitate prompt publication of a notice under the act:

"1. A draft Federal Register notice that identifies the parties to the venture and that describes in general terms the area of planned activity of the venture.

(MORE)

- 7 -

"2. Evidence that the party filing the notification has been authorized by each party to the joint venture to review on its behalf the notice that is to be published in the Federal Register, or, alternatively, the names and addresses of other persons to whom the notice should be made available prior to publication.

"3. An extra copy of the notification materials to the Antitrust Division.

"The Federal Trade Commission concurs in this statement."

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93- 177

NEW FILING FORMAT (INITIAL) ATTACHMENT A

FEDERAL REGISTER NOTICEU.S. Department of Justice  
Antitrust DivisionNOTICE PURSUANT TO THE NATIONAL COOPERATIVE  
RESEARCH ACT OF 1984 -- (NAME OF VENTURE/CONSORTIUM)

Notice is hereby given that, on (insert date notice received in Operations), pursuant to Section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. § 4301 et seq. ("the Act"), \_\_\_\_\_ has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to Section 6(b) of the Act, the identity(ies) of the party(ies) and its general area(s) of planned activity are (list party(ies) in one continuous paragraph, separating each with a semicolon, and describe general area of planned activity).

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Joseph H. Widmar  
Director of Operations  
Antitrust Division

3544 WP+OPS/ATR

REVISED AUGUST 13, 1992

## SUPPLEMENTAL FILING FORMAT

## ATTACHMENT B

FEDERAL REGISTER NOTICE

U.S. Department of Justice  
Antitrust Division

NOTICE PURSUANT TO THE NATIONAL COOPERATIVE  
RESEARCH ACT OF 1984 -- (NAME OF VENTURE/CONSORTIUM)

Notice is hereby given that, on (insert date notice received in Operations), pursuant to Section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. § 4301 et seq. ("the Act"), \_\_\_\_\_ has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership/project status. (Identify change.) The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, (state the changes; list party(ies) in one continuous paragraph, separating each with a semicolon, and describe general area of planned activity).

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and (identify party) intends to file additional written notification disclosing all changes in membership.

On (date), (identify party) filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the Federal Register pursuant to Section 6(b) of the Act on (date), (Federal Register cite, using FR or Fed. Reg. to abbreviate Federal Register in the cite).

The last notification was filed with the Department on (date). A notice was published in the Federal Register pursuant to Section 6(b) of the Act on (date), (FR cite).

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Joseph H. Widmar  
Director of Operations  
Antitrust Division

3544 WP+OPS/ATR

REVISED AUGUST 13, 1992

**COPY FOR YOUR INFORMATION**

Federal Register / Vol. 58, No. 76 / Thursday, April 22, 1993 / Notices

21597

Resources Centre Inc. ("SRCI") simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties are Bellcore, Livingston, NJ; and SRCI, Ottawa, Ontario CANADA.

Bellcore and Bell Canada entered into an agreement (hereinafter "Agreement") effective as of January 27, 1992, under which Bell Canada would participate in various Bellcore projects which Bellcore was currently undertaking for its owner companies and would collaborate with Bellcore on research, all directed to understanding telecommunications network architecture, concepts and service capabilities in support of exchange and exchange access telecommunications services. This would include exploration of such technologies as Integrated Services Digital Network ("ISDN"), screen-based telephony, common channel signaling and the Advance Intelligent Network.

On April 10, 1992, Bellcore filed its original notification of the Agreement pursuant to section 6(a) of the Act. The Department of Justice published a notice in the Federal Register pursuant to section 6(b) of the Act on May 20, 1992 (57 FR 21433).

Bellcore, Bell Canada and SRCI have now entered into an Amendment to the Agreement effective as of January 1, 1993, whereby Bell Canada has agreed to assign all of its right, title and interest in and to the Agreement between Bellcore and Bell Canada to SRCI and whereby SRCI has agreed to assume the benefits and the obligations of the Agreement.

Joseph H. Widmar,  
Director of Operations, Antitrust Division.  
[FR Doc. 93-9341 Filed 4-21-93; 8:45 am]  
BILLING CODE 4410-01-M

Identities of the parties and (2) the nature and objectives of the venture. The notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties are Bellcore, Livingston, NJ; and Motorola, Schaumburg, IL. Bellcore and Motorola entered into an agreement effective as of December 18, 1992 to engage in cooperative research directed to prototype electrical technology relating to thin film fuel cells and other electrical storage devices, to grant licenses to such technology, and, to the extent permitted, to demonstrate the feasibility of constructing experimental prototype fuel cells using such technology.

Joseph H. Widmar,  
Director of Operations, Antitrust Division.  
[FR Doc. 93-9340 Filed 4-21-93; 8:45 am]  
BILLING CODE 4410-01-M

**SUPPLEMENTAL**  
**CAD Framework Initiative, Inc.; Notice Pursuant to the National Cooperative Research Act of 1984**

Notice is hereby given that, on March 23, 1993, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 et seq. ("the Act"), CAD Framework Initiative, Inc. ("CFI") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing certain changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, the purpose of these additional notifications is to disclose the following information: (1) The addition of the following Associate Members: Mayo Foundation, Rochester, MN; Raytheon Company, Tewksbury, MA; (2) Corporate Members, Honeywell, Inc., Minneapolis, MN, and Microelectronics and Computer Technology Company, Austin, TX, have not renewed their membership in CFI.

On December 30, 1988, CFI filed its original notification pursuant to section 6(a) of the Act. That filing was amended on February 7, 1989. The Department of Justice published a notice concerning the amended filing in the Federal Register pursuant to section 6(b) of the Act on March 13, 1989 (54 FR 10456). A correction notice was published on April 20, 1989 (54 FR 16013).

The last notification was filed with the Department on January 26, 1993. A notice was published in the Federal

Register pursuant to section 6(b) of the Act on March 15, 1993 (58 FR 13802).

Joseph H. Widmar,  
Director of Operations, Antitrust Division.  
[FR Doc. 93-9339 Filed 4-21-93; 8:45 am]  
BILLING CODE 4410-01-M

**Notice Pursuant to the National Cooperative Research Act of 1984; The Frame Relay Forum**

Notice is hereby given that, on April 2, 1993, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 et seq. ("the Act"), The Frame Relay Forum ("FRF") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership.

The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, the identities of the additional members of FRF are: BULL, Les Clayes Sur Bois, FRANCE; Convex Computer Corporation, Richardson, TX; Loral Data Systems, Sarasota, FL; NTT Corporation, Tokyo, JAPAN; Primary Rate, Hudson, NH; Stentor Resource Center, Inc., Ottawa, Ontario, CANADA; Toshiba America, Inc., Irvine, CA; and Unitel Communications, Toronto, Ontario, CANADA.

TIL Systems, Ltd., a member of the FRF, has changed its name to Kastin Chase Applied Research. LIR Corporation is no longer a member of the FRF.

No other changes have been made in either the membership or planned activity of the group research project. Membership in FRF remains open, and FRF intends to file additional written notifications disclosing all changes in membership.

On April 10, 1992, FRF filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the Federal Register pursuant to section 6(b) of the Act on July 2, 1992 (57 FR 29537).

The last notification was filed with the Department on January 4, 1993. A notice was published in the Federal Register pursuant to section 6(b) of the Act on February 3, 1993 (58 FR 6986).

Joseph H. Widmar,  
Director of Operations, Antitrust Division.  
[FR Doc. 93-9439 Filed 4-21-93; 8:45 am]  
BILLING CODE 4410-01-M

NEW

**Bellcore Ventures, Inc.; Notice Pursuant to the National Cooperative Research Act of 1984**

Notice is hereby given that, on March 24, 1993, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 et seq. ("the Act"), Bellcore Ventures, Inc. ("Bellcore") filed a written notification on behalf of Bellcore and Motorola Core Ventures, Inc. ("Motorola") simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the



**APPENDIX D - ANTITRUST GUIDELINES FOR ACQUISITION AND  
LICENSING OF INTELLECTUAL PROPERTY**

# DRAFT

## U.S. Department of Justice Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property<sup>1</sup>

### 1. Intellectual property protection and the antitrust laws

These Guidelines state the antitrust enforcement policy of the U.S. Department of Justice with respect to the licensing and acquisition of intellectual property protected by patent, copyright, and trade secret law.<sup>2</sup> By stating its general policy, the Department hopes to assist those who need to predict whether the Department will challenge a practice as anticompetitive. However, these Guidelines cannot remove judgment and discretion in antitrust law enforcement. Moreover, the standards set forth in these Guidelines must be applied in unforeseeable circumstances. Each case will be evaluated in light of its own facts, and these Guidelines will be applied reasonably and flexibly.

In the United States, patents confer rights to exclude others from making, using, or selling in the United States the invention claimed by the patent for a period of seventeen years from the date of issue.<sup>3</sup> To gain patent protection, an invention (which may be a product, process, machine, or composition of matter) must be novel, nonobvious, and useful. Copyright protection applies to original works of authorship embodied in a tangible medium of expression.<sup>4</sup> A copyright protects only the expression, not the underlying ideas. Unlike a patent, which protects an invention not only from copying but also from independent creation, a copyright does not preclude others from independently creating similar expression. Trade secret protection applies to information whose economic value depends on its not being generally known. Trade secret protection is conditioned upon efforts to maintain secrecy and

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<sup>1</sup> These Guidelines supersede section 3.6 in Part I, "Intellectual Property Licensing Arrangements," and cases 6, 10, 11, and 12 in Part II of the U.S. Department of Justice 1988 Antitrust Enforcement Guidelines for International Operations.

<sup>2</sup> These Guidelines do not cover the antitrust treatment of trademarks. Although the same general antitrust principles that apply to other forms of intellectual property apply to trademarks as well, these Guidelines deal with innovation-related issues that typically arise with respect to patents, copyrights, and trade secrets, rather than with product-differentiation issues that typically arise with respect to trademarks.

<sup>3</sup> See 35 U.S.C. § 154 (1988). In the case of process patents, the protection extends to importation of goods made by a patented process. See 19 U.S.C. § 1337 (1988 & Supp. V 1993); 35 U.S.C. § 271(g) (1988).

<sup>4</sup> See 17 U.S.C. § 102 (1988 & Supp. V 1993). Copyright protection lasts for the author's life plus 50 years, or 75 years from first publication (or 100 years from creation, whichever expires first) for works made for hire. See 17 U.S.C. § 302 (1988).

has no fixed term. As with copyright protection, trade secret protection does not preclude independent creation by others.<sup>5</sup>

Although there are clear and important differences in the purpose, extent, and duration of protection provided under the intellectual property regimes of patent, copyright, and trade secret, the governing antitrust principles are the same. Antitrust analysis takes differences among these forms of intellectual property into account in evaluating the specific market circumstances in which transactions occur, just as it does with other particular market circumstances.

The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare.<sup>6</sup> The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. In the absence of intellectual property rights, imitators could more rapidly exploit the efforts of innovators and investors without compensation, thereby reducing the commercial value of innovation and eroding the incentives to invest. The antitrust laws promote innovation and consumer welfare by prohibiting certain actions by firms that deter those firms and others from competing with respect to either existing or new ways of serving consumers.

## 2. General principles

2.0 These Guidelines embody three general principles: (a) for the purpose of antitrust analysis, the Department regards intellectual property as being essentially comparable to any other form of property; (b) the Department does not presume that intellectual property creates market power in the antitrust context; and (c) the Department recognizes that intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive.

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<sup>5</sup> The principles stated in these Guidelines also apply to protection of mask works fixed in a semiconductor chip product (*see* 17 U.S.C. § 901 *et seq.* (1988)), which is analogous to copyright protection for works of authorship. These principles also generally apply to licensing of know-how and other collections of information which may not be protected by intellectual property rights, but which may nonetheless have value to a licensee or transferee because of the form into which they are assembled.

<sup>6</sup> "[T]he aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition." *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990).

## 2.1 Standard antitrust analysis applies to intellectual property

The Department applies the same general antitrust principles to conduct involving intellectual property that it applies to conduct involving any other form of tangible or intangible property. That is not to say that intellectual property is in all respects the same as any other form of property. Intellectual property has important characteristics that distinguish it from many other forms of property. These characteristics can be taken into account by standard antitrust analysis, however, and do not require the application of fundamentally different principles.

Intellectual property law bestows on the owners of intellectual property certain rights to exclude others. These rights help the owners to profit from the use of their property. An intellectual property owner's rights to exclude are similar to the rights enjoyed by owners of other forms of private property. As with other forms of private property, certain acquisitions of intellectual property, and certain types of agreements with respect to such property, may have anticompetitive effects against which the antitrust laws can and do protect. Intellectual property is thus neither particularly free from scrutiny under the antitrust laws, nor particularly suspect under them.

## 2.2 Intellectual property and market power

Market power is the ability profitably to maintain prices above, or output below, competitive levels for a significant period of time.<sup>7</sup> The Department will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner. Although the intellectual property right confers the power to exclude with respect to the *specific* product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power.<sup>8</sup> If a patent or other form of intellectual property does confer market power, that market power does not by itself offend the antitrust laws. As with any other tangible or intangible asset that enables its

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<sup>7</sup> Market power can be exercised in other economic dimensions, such as quality, service and innovation. It is assumed in this definition that all competitive dimensions are held constant except the ones in which power is being exercised; it would not, of course, be indicative of market power that a seller is able to charge higher prices for a higher-quality product. The definition in text is stated in terms of a seller with market power; a buyer could also exercise market power (e.g., by maintaining the price below the competitive level, thereby depressing output).

<sup>8</sup> The Department notes that the law is unclear on this issue. Compare *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 16 (1984) (expressing the view in dictum that if a product is protected by a patent, "it is fair to presume that the inability to buy the product elsewhere gives the seller market power") with *id.* at 37 n.7 (O'Connor, J., concurring) ("[A] patent holder has no market power in any relevant sense if there are close substitutes for the patented product."). Compare also *Abbott Laboratories v. Brennan*, 952 F.2d 1346, 1354-55 (Fed. Cir. 1991) (no presumption of market power from intellectual property right) with *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1341-42 (9th Cir. 1984) (requisite economic power is presumed from copyright), cert. denied, 473 U.S. 908 (1985).

owner to obtain significant supracompetitive profits, market power (or even a monopoly) that is solely "a consequence of a superior product, business acumen, or historical accident" does not violate the antitrust laws.<sup>9</sup> Nor does such market power impose on the intellectual property owner an obligation to license that technology to others. *See, e.g., SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982). As in other antitrust contexts, however, market power could be illegally acquired or maintained, or, even if lawfully acquired and maintained, would be relevant to the ability of an intellectual property owner to harm competition through unreasonable conduct in connection with such property.

### 2.3 Procompetitive benefits of licensing

Intellectual property typically is one component among many in a production process and derives value from its combination with complementary factors. Complementary components of production include manufacturing and distribution facilities, workforces, and other items of intellectual property. The owner of intellectual property has to arrange for its combination with other necessary inputs to realize its commercial value. Often, the owner finds it most efficient to contract with others for these inputs, to sell rights to the intellectual property, or to enter into a joint venture arrangement for its development, rather than supplying these complementary inputs itself.

Licensing, cross-licensing, or otherwise transferring intellectual property (hereinafter "licensing") can facilitate its integration with complementary factors of production. This integration can lead to more efficient exploitation of the intellectual property, benefiting consumers through the reduction of costs and the introduction of new products. Such arrangements increase the value of intellectual property to consumers and to the developers of the technology. By potentially increasing the expected returns from intellectual property, licensing also can increase the incentive for its creation and thus promote greater investment in research and development.

Sometimes the use of one item of intellectual property requires access to another. An item of intellectual property "blocks" another when the second cannot be practiced without using the first. For example, an improvement on a patented machine can be blocked by the patent on the machine. Licensing promotes the coordinated development of technologies that are in a blocking relationship.

Field-of-use, territorial, and other limitations on intellectual property licenses may serve procompetitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible. These various forms of exclusivity can be used to give a licensee an incentive to invest in the commercialization and distribution of products embodying the licensed intellectual property and to develop additional applications for the licensed property.

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<sup>9</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *see also United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) (Sherman Act is not violated by the attainment of market power solely through "superior skill, foresight and industry").

The restrictions may do so, for example, by protecting the licensee against free-riding on the licensee's investments by other licensees or by the licensor. They may also promote the licensor's incentive to license, by protecting the licensor from competition in the licensor's own technology in a market niche that it prefers to keep to itself. These benefits of licensing restrictions apply to patent, copyright, and trade secret licenses.

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**Example 1<sup>10</sup>**

*Situation:* Delta, Inc. develops a new software program for inventory management. The program has wide application in the health field. Delta licenses the program in an arrangement that imposes both field of use and territorial limitations. Some of Delta's licenses permit use only in hospitals; others permit use only in group medical practices. Delta charges different royalties for the different uses. All of Delta's licenses permit use only in specified geographic areas. The license contains no provisions that would prevent or discourage licensees from developing, using, or selling any other program. None of the licensees are actual competitors of Delta in the sale of inventory management programs.

*Discussion:* The key competitive issue raised by the licensing arrangement is whether it harms competition that would likely have taken place in its absence. (See section 3.) Such harm could occur if the licenses foreclose access to competing technologies (in this case, most likely competing computer programs), prevent licensees from developing their own competing technologies (again, in this case most likely computer programs), structure royalties to impose an effective requirements contract upon licensees, or facilitate market allocation or price-fixing for any product or service supplied by the licensees. If the license agreements contained such provisions, the Department would analyze their competitive effects as described in sections 3-5 of these Guidelines. In this hypothetical, there are no such provisions, and there is no apparent harm to competition. The arrangement appears to do no more than increase the value of the licensed technology by subdividing it among different fields of use and territories and charging royalties that differ among licensees. The Department therefore would be unlikely to object to this arrangement. The result would be the same whether the technology was protected by copyright, patent, or trade secret. The Department's conclusion as to competitive effects could differ if, for example, the license barred licensees from using any other inventory management program.

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### 3. Antitrust concerns and modes of analysis

#### 3.1 Nature of the concerns

While intellectual property licensing arrangements are typically welfare-enhancing and procompetitive, antitrust concerns may arise when licensing arrangements impede competition that likely would have taken place in the absence of the license. Licensing arrangements that may raise antitrust concerns include restrictions on goods or technologies other than the

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<sup>10</sup> The examples in these Guidelines are hypothetical and do not represent judgments about the actual market circumstances of the named industries.

licensed technology, contractual provisions that penalize licensees for dealing with suppliers of substitute technologies, and acquisitions of intellectual property that lessen competition in a relevant antitrust market.

For example, a licensing agreement that transfers little or no useful intellectual property, but imposes restraints upon entities that otherwise would compete using alternative technologies, might have significant adverse effects in downstream goods markets or in other markets. (See, e.g., Example 5.) An arrangement that effectively merges the research and development activities of two of only a few entities that could plausibly engage in research and development in the relevant field might harm competition for development of new intellectual property. (See section 3.2.3, "Innovation Markets.")

Intellectual property licensing between actual or likely potential competitors<sup>11</sup> may raise antitrust concerns by reducing or eliminating competition in the market(s) in which they compete or are likely to compete. In addition, license restrictions with respect to one market may reduce competition in another market by, for example, foreclosing access to or raising the price of an important input (other than as a natural consequence of the licensee acquiring a licensed technology for its own use).

## **3.2 Markets affected by licensing arrangements**

A licensing arrangement may affect competition in a variety of markets. In general, for goods markets and technology markets affected by a licensing arrangement, the Department will approach the delineation of relevant market and the measurement of market share in the intellectual property area in the same way that it treats such questions under section 1 of the 1992 Horizontal Merger Guidelines. In addition, the Department may define an innovation market to aid in assessing whether a licensing arrangement would be likely substantially to reduce investment in research and development.

### **3.2.1 Technology markets**

Technology markets consist of the intellectual property that is licensed, transferred, or acquired and the technologies that are close substitutes for it. The owner of a process for producing a particular good may be constrained in its conduct with respect to that process not only by other processes for making that good, but also by other goods that compete with the downstream good and by the processes used to produce those other goods.

In many cases, particularly in the case of a product patent, there may be little to be gained by analyzing competitive effects in a separate technology market in addition to analyzing effects in the associated goods market. Moreover, there may be practical problems

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<sup>11</sup> A firm will be treated as a likely potential competitor if its entry is likely under the standards of section 3.3 of the U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (April 2, 1992), or if there is evidence of likely actual entry by that firm. Competitive concerns are more likely to arise when the number of actual and likely potential competitors is not large.

in gathering appropriate data to determine "prices" for the technology and its substitute processes. For example, the technology may be licensed royalty-free in exchange for the right to use other technology, or it may be licensed as part of a package license. When complicating factors preclude delineating a relevant market in which the licensed technology competes, the Department may focus its attention on effects in the associated goods markets.

To estimate the market share of a participant using new technology, the Department generally will forecast market acceptance over a two-year period using the best available information. For technologies not yet commercialized, the two-year period will begin with commercial introduction. When market shares or other indicia of market power are not readily available, and it appears that competing technologies are all equally efficient,<sup>12</sup> the Department's analysis will treat each participant in the technology market as having an equal market share.

### 3.2.2 Goods markets

A number of different goods markets may be relevant to evaluating the effects of a licensing arrangement. A restraint in a licensing arrangement may have competitive effects in markets for final or intermediate goods made using the intellectual property, or it may have effects upstream, in markets for goods that are used as inputs, along with the intellectual property, to the production of other goods.

### 3.2.3 Innovation markets

Firms compete in research and development that may result in new or improved products or processes. If the capacity for research and development activity that likely will produce innovation in technology is scarce and can be associated with identifiable specialized assets or characteristics of specific firms (which may or may not currently participate in the relevant technology or goods markets), it may be appropriate to consider separately the impact of the conduct in question on competition in research and development among those firms. The firms identified as possessing these specialized assets or characteristics can be thought of as competing in a separate innovation market. See Complaint, *United States v. General Motors Corp.*, Civ. No. 93-530 (D. Del., filed Nov. 16, 1993). Alternatively, innovation markets may be used to assist with the identification of competitive effects in relevant goods and technology markets. See, e.g., Complaint, *United States v. Flow International Corp.*, Civ. No. 94-71320 (E.D. Mich., filed Apr. 4, 1994).

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<sup>12</sup> In this analysis, the Department will regard two technologies as being "equally efficient" if they can be used to produce, at the same cost, goods perceived by consumers to be close substitutes.



## Example 2

*Situation:* Two companies agree to cross-license future patents relating to the development of a new component for aircraft jet turbines. Innovation in the development of the component requires the capability to work with very high tensile strength materials. Aspects of the licensing arrangement raise the possibility that competition in research and development of this and related components will be lessened. The Department is considering whether to define an innovation market in which to evaluate the competitive effects of the arrangement.

*Discussion:* If the firms that have the capability to work with very high tensile strength materials can be reasonably identified, the Department will consider defining a relevant innovation market for development of the new component. If the number of firms with the required capability is small, the Department may employ the concept of an innovation market to analyze the competitive effects of the arrangement in that market, or as an aid in analyzing competitive effects in technology or goods markets. In this analysis, the Department would take into account the specific nature of the restraint, the likelihood that other firms may in the future acquire the requisite capability, other competitive factors, and any efficiency justifications for the licensing arrangement.

If the number of firms with the required capability is very large (either because there are a large number of such firms in the jet turbine industry, or because there are many firms in other industries with the required capability), then the Department will conclude that the innovation market is competitive. Under these circumstances, it is unlikely that any single firm or plausible aggregation of firms could acquire a large enough share of the assets necessary for innovation to have an adverse impact on competition.

If the Department cannot reasonably identify the firms with the required capability, it will not attempt to define an innovation market.

Just as goods markets are improperly defined if the firms in the market, were they to coordinate their decisions, would not profitably increase price above competitive levels, so too innovation markets are improperly defined if hypothetical coordination among the firms in the candidate market would not profitably retard or restrict innovation in the technology.

When a relevant innovation market has been defined, the Department may assess the competitive significance of each participant based on shares of those identifiable assets or characteristics upon which innovation depends, on shares of research and development expenditures, on shares of the related product, or on equal shares assigned to reflect the equal likelihood of innovating, depending on the facts of each case. Cf. 1992 Horizontal Merger Guidelines § 1.41 & n.15. In evaluating competitive effects, the Department would also take into account other factors such as competitive harms from the elimination of alternative research paths and efficiency benefits from the integration of complementary research and development programs.

### 3.3 Horizontal and vertical relationships

As with other property transfers, antitrust analysis of intellectual property licensing arrangements examines whether the relationship of the parties to the arrangement is primarily horizontal or vertical in nature, or whether it has substantial aspects of both.

A licensing arrangement has a horizontal component with respect to a technology market if it involves the acquisition of rights to technologies that are economic substitutes for technologies that the licensee owns or controls. For analytical purposes, the Department ordinarily will treat a relationship between a licensor and its licensees as horizontal with respect to a particular goods market when the licensor and its licensees would be actual or likely potential competitors in that market absent the license.

An arrangement has a vertical component when it affects activities that are in a complementary relationship, as is typically the case in a licensing arrangement. Such a relationship exists when the licensor and its licensees stand in a seller-buyer relationship, or operate at different levels of the chain of production and distribution. For example, the licensor's primary line of business may be in research and development, and the licensees, as manufacturers, may be buying the rights to use technology developed by the licensor. Alternatively, the licensor may be a component manufacturer owning intellectual property rights in a product that the licensee manufactures by combining the component with other inputs, or the licensor may manufacture the product, and the licensees may operate primarily in distribution and marketing. Although licensing arrangements typically have a vertical component, the licensor and its licensees may also have a horizontal relationship in the market containing the technology being licensed or in other markets in which they are actual or likely potential competitors.

The existence of a horizontal relationship between a licensor and its licensees is not inherently suspect. Identification of such relationships is merely an aid in determining whether there may be anticompetitive effects arising from a licensing arrangement. Such a relationship need not give rise to an anticompetitive effect, nor does a purely vertical relationship assure that there are no anticompetitive effects.

The following examples illustrate different competitive relationships among a licensor and its licensees.

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**Example 3**

*Situation:* Alpha, a manufacturer of farm equipment, develops a new emission control technology for its tractor engines and licenses it to Beta, another farm equipment manufacturer. Alpha's emission control technology is far superior to the technology currently owned and used by Beta, so much so that Beta's technology does not discipline the prices that Alpha could charge for its technology. Beta has no likelihood of developing an improved emissions control technology on its own.

*Discussion:* Alpha's and Beta's emission control technologies are not economic substitutes for each other. Beta is a consumer of Alpha's technology and is not an actual or likely potential competitor of Alpha in the relevant market for technologically superior emission control devices of the kind licensed by Alpha. This means that the relationship between Alpha and Beta with regard to the supply and use of emissions control technology is vertical. Assuming that Alpha and Beta sell farm equipment products that are economic substitutes for each other, their relationship is horizontal in the relevant markets for farm equipment.

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**Example 4**

*Situation:* Beta develops a new valve technology for its engines and enters into a cross-licensing arrangement with Alpha, whereby Alpha licenses its emission control technology to Beta and Beta licenses its valve technology to Alpha. Alpha already owns an alternative valve technology that is an economic substitute for Beta's valve technology. Before adopting Beta's technology, Alpha was using its own valve technology in its production of engines and was licensing (and continues to license) that technology for use by others. As in Example 3, Beta does not own or control an emission control technology that is an economic substitute for the technology licensed from Alpha.

*Discussion:* Beta is a consumer and not a competitor of Alpha's emission control technology. As in Example 3, their relationship is vertical with regard to this technology. The relationship between Alpha and Beta in the relevant market that includes engine valve technology is vertical in part and horizontal in part. It is vertical in part because Alpha and Beta stand in a complementary relationship, in which Alpha is a consumer of a technology supplied by Beta. However, the relationship between Alpha and Beta in the relevant market that includes engine valve technology is also horizontal in part, because both firms own valve technologies that are economic substitutes for each other. Whether the firms license their valve technologies to others is not important for the conclusion that the firms have a horizontal relationship in this relevant market. Even if Alpha's use of its valve technology were solely captive to its own production, the fact that the two valve technologies are economic substitutes means that the two firms have a horizontal relationship. For the firms to be in a horizontal relationship, it is also not necessary that Alpha actually uses its valve technology prior to licensing technology from Beta, provided that Alpha's technology is an economic alternative to Beta's.

As in Example 3, the relationship between Alpha and Beta is horizontal in the relevant markets for farm equipment.

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### 3.4 The rule of reason and per se rules

In the vast majority of cases, restraints in intellectual property licensing arrangements are evaluated under the rule of reason (*see* section 4). In some cases, however, the courts conclude that a restraint's "nature and necessary effect are so plainly anticompetitive" that it should be treated as unlawful per se, without an elaborate inquiry into the restraint's purpose and effect. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). Among the restraints that have been held per se unlawful are naked price-fixing, output restraints, and market division among horizontal competitors, as well as certain group boycotts and resale price maintenance. *per se*

To determine whether a particular restraint in a licensing arrangement is given per se or rule of reason treatment, the Department will first determine whether the restraint in question can be expected to contribute to an efficiency-producing integration of economic activity. In general, licensing arrangements promote such integration because they facilitate the combination of the licensor's intellectual property with complementary factors of production owned by the licensee. A restraint in a licensing arrangement may further such integration by, for example, aligning the incentives of the licensor and the licensees to promote the development and marketing of the licensed technology, or by substantially reducing transactions costs.

In assessing whether a particular restraint contributes to an efficiency-producing integration, the Department briefly will review, *inter alia*, the business of the parties to the license, the markets in question, and the purpose and effect of the particular restraint. If there is no efficiency-producing integration of economic activity and if the type of restraint is one that otherwise is appropriately accorded per se treatment, the Department will challenge the restraint under the per se rule. Otherwise, the Department will apply a rule of reason analysis.

Because licensing arrangements typically involve vertical relationships that create significant integrative efficiencies, restraints associated with those arrangements usually will have sufficient relationship to an efficiency-producing integration to merit analysis under the rule of reason. An ordinarily suspect restraint incorporated in a licensing agreement will not escape per se treatment, however, if the putative integration itself is a sham or if there is an insufficient relationship between the restraint and an efficiency-producing integration.

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**Example 5**

*Situation:* Gamma, which manufactures Product X using its patented process, offers a license for its process technology to every other manufacturer of Product X. The process technology does not represent an economic improvement over the available existing technologies. Indeed, although several manufacturers accept licenses from Gamma, none of the licensees actually uses the licensed technology. The licenses provide that each manufacturer has an exclusive right to sell Product X manufactured using the licensed technology in a designated geographic area and that no manufacturer may sell Product X, however manufactured, outside the designated territory.

*Discussion:* The manufacturers of Product X are in a horizontal relationship in the goods market for Product X. Those that are licensees of Gamma's process technology would also be in a vertical relationship with Gamma if they actually used Gamma's technology, although in this example, that is not the case. Any manufacturers of Product X that control technologies that are economic substitutes for Gamma's process are also horizontal competitors of Gamma in the relevant technology market.

The licensing arrangement restricts competition in the relevant goods market among manufacturers of Product X. The restriction applies both to Product X that is manufactured with the licensed technology and to Product X manufactured with any other technology. The latter restriction is the key competitive concern because it harms competition that would have taken place in the absence of the licensing agreement. Such a restriction could conceivably benefit competition by promoting the adoption of Gamma's technology (see Example 6). In this example, however, the technology is not being used despite being licensed. If further investigation shows that there is no likelihood that the manufacturers of Product X will use Gamma's technology, the Department is likely to conclude that there are no conceivable benefits from the license restrictions.

If the Department concludes that the restraint does not contribute to an efficiency-producing integration of economic activity, the Department would be likely to challenge the arrangement under the per se rule as a horizontal territorial market allocation scheme and to view the intellectual property aspects of the arrangement as a sham intended to cloak its true nature. Since such a restraint is per se unlawful, the Department likely would challenge the arrangement even absent proof of substantial market power by the licensor and the licensees.

The competitive implications do not generally depend on whether the licensed technology is protected by patent, is a trade secret or other know-how, or is a computer program protected by copyright. Nor do the competitive implications generally depend on whether the allocation of markets is territorial, as in this example, or functional, based on fields of use.

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### Example 6

*Situation:* As in Example 5, Gamma offers a license to every other manufacturer of Product X for the patented process that it uses to manufacture Product X. The license provides that each manufacturer has an exclusive right to sell Product X manufactured using the licensed technology in a designated geographic area, and that no manufacturer may sell Product X, however manufactured, outside its designated territory. As in Example 5, several manufacturers accept licenses. In this example, however, the licensed process is an advance over their previously used process. Furthermore, Gamma's licensed process is the sole technology used by the licensees.

*Discussion:* The competitive relationships of the firms in this example are the same as in Example 5 and the licensing restraint has a similar effect on competition among the manufacturers of Product X. This example is distinguished from the previous example in that the licensed technology is useful, and, indeed, is used extensively by the licensees. As a consequence, the vertical dimension of the licensing agreement, and the benefits of the licensing restrictions in promoting the adoption of the technology, assume greater importance.

Again, the key competitive issue is the effect of the territorial restraint in the licensing arrangement on competition in the goods market that includes Product X. The restraint applies to all sales of Product X, without regard to whether it was made using the licensed technology. Such a restraint could have a benefit in promoting manufacturing and marketing efforts on behalf of the licensed technology, in part by making it easier for Gamma to monitor use of its licensed technology. The benefits come at the cost of restricting competition that would have taken place in the absence of the licensing arrangement. If the restraint contributes to an efficiency-enhancing integration of economic activity, the Department would evaluate this arrangement under the rule of reason. It would take into account such factors as the share of the licensor and the licensees in the relevant markets affected by the licensing arrangement, the level of concentration and difficulty of entry in these markets, and the promotional benefits to be gained by focusing manufacturing and marketing efforts on the licensed technology.

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## 4. General principles concerning the Department's evaluation of licensing arrangements under the rule of reason

### 4.1 Antitrust "safety zone"

Absent extraordinary circumstances, the Department will not challenge a restraint in a licensing arrangement if (1) the restraint is not of a type that normally warrants condemnation under the per se rule and (2) the licensor and its licensees collectively account for no more

than twenty percent of each relevant market affected by the restraint.<sup>13</sup> This "safety zone" is designed to provide owners of intellectual property with a degree of certainty, so as to encourage procompetitive licensing arrangements. It is not intended to discourage parties falling outside the safety zone from adopting restrictions in their license arrangements that are reasonably necessary to achieve an efficiency-producing integration of economic activity. The Department will analyze arrangements falling outside the "safety zone" based on the considerations outlined in this section.

This "safety zone" does not apply to transactions that amount to mergers or acquisitions, which are governed by the 1992 Horizontal Merger Guidelines.

The Department will include innovation market shares in its evaluation of whether a licensing arrangement falls within the safety zone only if the assets required to compete in research and development are specialized and identifiable. If not, the Department will confine its analysis to the goods and technology markets affected by the licensing arrangement.

#### 4.2 General statement of the rule of reason

In analyzing a restraint in a licensing arrangement under the rule of reason, the Department first inquires whether the restraint has an anticompetitive effect. If so, the Department next inquires whether the restraint is reasonably necessary to achieve procompetitive benefits that outweigh those anticompetitive effects. See *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984); see also 7 Phillip A. Areeda, *Antitrust Law*, § 1502 (1986). In pursuing these inquiries, the Department will be guided by several general principles. These principles apply to both vertical and horizontal licensing restraints that are analyzed under the rule of reason.

#### 4.3 Analysis of anticompetitive effects

The existence of anticompetitive effects resulting from a restraint in a licensing arrangement may be evaluated on the basis of a variety of factors taken together, including the following.

##### 4.3.1 Market structure, coordination, and foreclosure

When a licensor and its licensees compete in technology or goods markets, a restraint in a licensing arrangement may increase the risk of coordinated pricing, output restrictions, or the acquisition or maintenance of monopoly power. The potential for competitive harm generally increases with the degree of concentration in, the difficulty of entry into, and the

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<sup>13</sup> As stated in section 1.41 of the 1992 Horizontal Merger Guidelines, market shares for goods markets "can be expressed either in dollar terms through sales, shipments, or production, or in physical terms through measurement of sales, shipments, production, capacity, or reserves." Special considerations affect the measurement of market shares in some technology markets. The measurement of market shares in that context is discussed in section 3.2.1.

inelasticities of supply and demand in markets in which the licensor and licensees are in a horizontal relationship. Cf. 1992 Horizontal Merger Guidelines, §§ 1.5, 3.

When the licensor and licensees are in a vertical relationship, harm to competition from a restraint may occur if it forecloses access to, or increases competitors' costs of obtaining, important inputs (other than as a natural consequence of the licensee acquiring a licensed technology for its own use). An example is a licensing arrangement with most of the established manufacturers in an industry preventing those manufacturers from using any other technology. The risk of foreclosing access or increasing competitors' costs is related to the fraction of the markets affected by the licensing restraint and to other characteristics of the input and output markets, such as concentration, difficulty of entry, and elasticities of supply and demand.

Harm to competition from a restraint in a vertical licensing arrangement also may occur if a licensing restraint facilitates coordination to raise prices or reduce output in markets in which one of the parties participates. For example, if owners of competing technologies impose similar restraints on their licensees, the licensors may find it easier to coordinate their pricing. Similarly, licensees that are horizontal competitors may find it easier to coordinate their pricing if they are subject to common license restraints imposed either by a common licensor or by competing licensors. The risk of anticompetitive coordination is increased when the relevant markets are concentrated and difficult to enter.

#### 4.3.2 Licensing arrangements involving exclusivity

A licensing arrangement may involve exclusivity in two distinct respects. First, the licensor may grant one or more *exclusive licenses*, which restrict the right of the licensor to license others and possibly also to practice the technology itself. Generally, such a grant of exclusivity may raise antitrust concerns only if the licensees themselves, or the licensor and its licensees, are actual or potential competitors in a relevant technology or goods market in the absence of the licensing arrangement. Examples of exclusive licenses with possible competitive consequences include cross-licensing by parties collectively possessing market power (see section 5.5), grantbacks (see section 5.6), and acquisitions of intellectual property rights (see section 5.7).

A second form of exclusivity, *exclusive dealing*, arises when a license prevents or restrains the licensee from using competing technologies. Such restraints can have the effect of denying rivals sufficient outlets for exploiting their technologies and thus be anticompetitive. Exclusivity may be required by the licensor, as in an explicit exclusive dealing arrangement (see section 5.4), or induced through economic incentives. For example, a royalty arrangement based on total sales of a licensee's product, regardless of whether it is made using the licensed technology, may increase the cost to a licensee of substituting alternative technologies, and thus may have effects similar to an exclusive dealing arrangement. See Complaint, *United States v. Microsoft, Inc.*, Civ. No. 94-1564 (D.D.C., filed July 15, 1994); Competitive Impact Statement, *id.* (filed July 27, 1994). Whether a restraint



of this kind has anticompetitive effects depends, *inter alia*, on the availability of other outlets for competitively viable exploitation of rival technologies.

Restraints that impose or encourage exclusive dealing may have procompetitive effects. For example, a licensing arrangement that prevents the licensee from dealing in other technologies may encourage the licensee to develop and market the licensed technology or specialized applications of that technology. *See, e.g.*, Example 7. The Department will take into account such procompetitive effects in evaluating the reasonableness of the arrangement. *See* section 4.4.

The Department will focus on the actual practice and its effects, not on the formal terms of the arrangement. A license denominated as non-exclusive (either in the sense of exclusive licensing or in the sense of exclusive dealing) may nonetheless give rise to the same concerns posed by formal exclusivity. A non-exclusive license may have the effect of exclusive licensing if it is structured so that the licensor is unlikely to license others or to practice the technology itself. A license that does not explicitly require exclusive dealing may have the effect of exclusive dealing if it is structured to make it costly for licensees to use competing technologies. However, a licensing arrangement will not automatically raise these concerns merely because a party chooses to deal with a single licensee or licensor, or confines his activity to a single field of use or location, or because only a single licensee has chosen to take a license.

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**Example 7**

*Situation:* Eta, the inventor of a new flat panel display technology, lacking the capability to bring a flat panel display product to market, grants Rho an exclusive license to make and sell a product embodying Eta's technology. Rho does not currently sell a product that would compete with the product embodying the new technology or control rights to another display technology. Several firms offer competing displays, the relevant markets for manufacturing and distribution of such displays are unconcentrated, and entry into these markets is relatively easy. Demand for the new technology is uncertain and successful market penetration will require considerable promotional effort. The license contains an exclusive dealing restriction preventing Rho from selling products that compete with the product embodying the licensed technology.

*Discussion:* This example illustrates both types of exclusivity in a licensing arrangement. The license is exclusive in that it restricts the right of the licensor to grant other licenses. In addition, the license has an exclusive dealing component in that it restricts the licensee from selling competing products.

The inventor of the display technology and its licensee are in a vertical relationship and do not compete in the manufacture or sale of display products or in the sale of technology. Hence, the grant of an exclusive license does not affect competition between the licensor and the licensee. The exclusive license may promote competition by encouraging Rho to develop and promote the new product in the face of uncertain demand by rewarding Rho for its efforts if they lead to large sales. Although the license bars the licensee from selling competing products, this exclusive dealing aspect is unlikely in this example to harm competition by foreclosing access or facilitating anticompetitive pricing because several firms offer competing products, the relevant manufacturing and distribution markets are unconcentrated, and entry is easy. On these facts, the Department would be unlikely to challenge the arrangement.

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**4.3.3 Benefits to the parties from reduction of competition**

In some cases, the benefits of a restraint in a licensing arrangement to the licensor or its licensees may derive primarily from reductions in competition that likely would have occurred absent the license rather than from the restraint's relationship to efficiency-producing objectives of the arrangement. In determining whether to challenge a particular restraint in a licensing arrangement, the Department will assess evidence indicating which of these possibilities better describes the purpose and effect of the restraint.

**4.3.4 Other factors**

Factors such as a history of rivalry and a rapid pace of innovation are also relevant to an analysis of the potential for harm to competition. The presence of these factors may indicate that licensors and licensees are less likely successfully to engage in coordinated behavior to raise prices or restrict output, and their absence may signal a greater likelihood of such behavior.

#### 4.4 Efficiencies and justifications

If the Department finds that a restraint in a licensing arrangement has an anticompetitive effect, the Department will consider whether the restraint produces offsetting procompetitive effects, such as by facilitating the efficient development and exploitation of intellectual property. If offsetting benefits are established, the Department will determine whether the restraint is reasonably necessary to achieve the efficiencies. If the restraint is reasonably necessary, and if the efficiencies outweigh the anticompetitive effect, the Department will not challenge the licensing arrangement.

The Department's comparison of anticompetitive harms and procompetitive efficiencies is necessarily a qualitative one. The risk of anticompetitive effects in a particular case may be insignificant compared to the expected benefits, or vice versa. As the expected anticompetitive effects in a particular licensing arrangement increase, the Department will look for evidence establishing with greater certainty that the arrangement achieves net benefits.

The existence of practical and significantly less restrictive alternatives is relevant to a determination of whether a restraint is reasonably necessary. If it is clear that the parties could have achieved similar efficiencies by means that are significantly less restrictive, then the Department will not give weight to the parties' efficiency claim. In making this assessment, however, the Department will not engage in a search for a theoretically least restrictive alternative that might be easier to construct in hindsight than in the practical prospective business situation faced by the parties.

When a restraint has an anticompetitive effect, the duration of that restraint can be an important factor in determining whether it is reasonably necessary to achieve the putative procompetitive effect. The effective duration of a restraint may be dependent on a number of factors, including the option of the affected party to terminate the arrangement unilaterally and the presence of contract terms (e.g., unpaid balances on minimum purchase commitments) that encourage the licensee to renew a license arrangement. Consistent with its approach to less restrictive alternative analysis generally, the Department will not attempt to draw fine distinctions regarding duration; rather, its focus will be on situations in which the duration clearly exceeds the period needed to achieve the procompetitive effect.

The evaluation of procompetitive efficiencies, of the reasonable necessity of a restraint to achieve them, and of the duration of the restraint may depend on the market context. A restraint that may be justified by the needs of a new entrant, for example, may not have a procompetitive efficiency justification in different market circumstances. Cf. *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

#### 4.5 Restraints subject to a quick-look analysis

A rule of reason analysis may require no more than a "quick look" at the anticompetitive effects of a particular restraint and the extent to which the restraint is reasonably necessary to achieve an efficiency-producing integration. When the restraint is one that ordinarily warrants per se treatment, and a quick look at the claimed efficiencies reveals that the restraint is not reasonably necessary to achieve procompetitive efficiencies, the Department will likely challenge the restraint without further analysis. See *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459-60 (1986); *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 109-10 & n.39 (1984).

### 5. Application of general principles

This section illustrates the application of these principles to particular licensing restraints and to arrangements that involve the cross-licensing, pooling, or acquisition of intellectual property. The restraints and arrangements identified are typical of those that are likely to encounter antitrust scrutiny; however, they are not intended as an exhaustive list of practices that could raise competitive concerns.

#### 5.1 Horizontal restraints

While licensing arrangements among horizontal competitors, like joint ventures, often promote rather than hinder competition, there are a number of circumstances in which antitrust scrutiny is warranted. Generally speaking, the licensor and the licensee are deemed to be horizontal competitors only if they own or control technologies that are economic substitutes for each other or if they are competitors in a goods market other than through the use by the licensee of the licensed technology. See section 3.3. Consistent with the principles set forth in section 3.4, the Department will challenge certain types of horizontal restraints as per se unlawful in appropriate cases. Horizontal restraints in licensing arrangements that constitute price fixing, allocation of markets or customers, agreements to reduce output, and certain group boycotts may merit per se treatment. In other cases, the restraints will be evaluated under the rule of reason, following the general principles set forth in section 4.

## Example 8

**Situation:** Two of the leading manufacturers of a consumer electronic product hold patents that cover alternative circuit designs for the product. None of the patents is blocking; that is, each of the patents can be practiced without infringing a patent owned by the other firm. The different circuit designs are economic substitutes. Each permits the manufacture at similar cost of products that consumers consider to be interchangeable. The manufacturers assign their patents to a separate corporation wholly owned by the two firms. That corporation licenses the right to use the circuit designs to other consumer product manufacturers and establishes the license royalties.

**Discussion:** In this example, the manufacturers are horizontal competitors in the goods market for the consumer product and in the related technology markets. The competitive issue with regard to a joint assignment of patent rights is whether the assignment has an adverse impact on competition in technology and goods markets that is not outweighed by procompetitive benefits in the use or dissemination of the technology. Each of the patent owners has a right to exclude others from practicing its patent. That right does not extend, however, to the agreement to assign rights jointly. To the extent that the patent rights cover technologies that are substitutes, the joint determination of royalties may result in higher royalties and higher goods prices than the owners would have charged on their own. In the absence of evidence establishing efficiencies from the joint assignment of patent rights, the Department may conclude that the joint marketing of competing patent rights constitutes horizontal price fixing and could be challenged as a per se unlawful horizontal restraint of trade. If there are plausible efficiency justifications for the joint marketing arrangement, the Department would evaluate the arrangement under the rule of reason. However, the Department may conclude that the anticompetitive effects are sufficiently apparent, and the proposed integrative efficiencies are sufficiently weak or unrelated to the restraints, to require only a "quick look" rule of reason analysis (see section 4.5).

## 5.2 Resale price maintenance

Resale price maintenance is illegal when "commodities have passed into the channels of trade and are owned by dealers." *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). It has been held per se illegal for a licensor of an intellectual property right in a product to fix a licensee's resale price of that product. *United States v. Univis Lens Co.*, 316 U.S. 241, 243-45, 249-51 (1942); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 446-48, 452, 457 (1940).<sup>14</sup> Consistent with the principles set forth in section 3.4, the

<sup>14</sup> But cf. *United States v. General Electric Co.*, 272 U.S. 476 (1926) (holding that an owner of a product patent may condition a license to manufacture the product on the fixing of the first sale price of the patented product). Subsequent lower court decisions have distinguished the *GE* decision in various contexts. See, e.g., *Royal Indus. v. St. Regis Paper Co.*, 420 F.2d 449, 452 (9th Cir. 1969) (observing that *GE* involved a restriction by a patentee who also manufactured the patented product and leaving open the question whether a nonmanufacturing patentee may fix the price of the patented product); *Newburgh Moire Co. v. Superior Moire Co.*, 237 F.2d 283, 293-94 (3rd Cir. 1956) (grant of multiple licenses each containing price restrictions does not come within the *GE* doctrine); *Cummer-Graham Co. v. Straight Side Basket Corp.*, 142 F.2d 646, 647 (5th Cir.)

Department will enforce the per se rule against resale price maintenance in the intellectual property context.

### 5.3 Tying Arrangements

A transaction is said to involve tying if: (1) there are two separate products, and (2) the sale of one product is conditioned on the purchase of the other. Thus, conditioning the ability of a customer to license one or more items of intellectual property on the customer's purchase of another item of intellectual property or a good or service has been held to constitute illegal tying. See, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156-58 (1948) (copyrights); *International Salt Co. v. United States*, 332 U.S. 392 (1947) (patents). Tying can, however, be efficiency-enhancing under some circumstances. See, e.g., *Jerrold Electronics Corp. v. Westcoast Broadcasting Co.*, 341 F.2d 653 (9th Cir.), cert. denied, 382 U.S. 817 (1965). The Department would be likely to challenge a tying arrangement if: (1) the seller has sufficient economic power in the market for the tying product to enable it to restrain trade in the market for the tied product, (2) the arrangement has an adverse effect on competition in the relevant market for the tied product, and (3) efficiency justifications for the arrangement do not outweigh the anticompetitive effect.<sup>15</sup> The Department will not presume market power solely from the existence of a patent or other intellectual property right.<sup>16</sup>

Package licensing—the licensing of multiple items of intellectual property in a single license or in a group of related licenses—may be a form of tying arrangement, but only if the items licensed constitute “separate products” and the licensing of one product is used to force the acceptance of a license of another. Such practices can be efficiency enhancing under some circumstances. When multiple licenses are needed to practice any single item of intellectual property, for example, a package license may present such efficiencies. If a package license constitutes a tying arrangement, the Department will evaluate its competitive effects under the same principles it applies to other tying arrangements.

### 5.4 Exclusive dealing

In the intellectual property context, exclusive dealing occurs when a license prevents the licensee from licensing, selling, distributing, or using a competing technology. Although such

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(owner of an intellectual property right in a process to manufacture an unpatented product may not fix the sale price of that product), cert. denied, 323 U.S. 726 (1944); *Barber-Colman Co. v. National Tool Co.*, 136 F.2d 339, 343-44 (6th Cir. 1943) (same).

<sup>15</sup> As is true throughout these Guidelines, the factors listed are those that guide the Department's internal analysis in exercising its prosecutorial discretion. They are not intended to circumscribe how the Department will conduct the litigation of cases that it decides to bring, nor to opine on how the courts should resolve questions that are currently unsettled in the case law.

<sup>16</sup> See section 2.2. This policy is consistent with the requirement that market power be demonstrated to establish patent misuse based on tying. 35 U.S.C. § 271(d) (1988) (as amended by Pub. L. No. 100-703, 201 Stat. 4676 (1988)).

restraints can be procompetitive in some circumstances, in other situations they can deny rivals sufficient outlets for competitively viable exploitation of their technologies and thus can be anticompetitive. See section 4.3.2.

## 5.5 Cross-licensing and pooling arrangements

Cross-licensing and pooling arrangements are agreements of two or more owners of different items of intellectual property to license one another or third parties. These arrangements may promote economic welfare by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation. By promoting the dissemination of technology, cross-licensing and pooling arrangements are often procompetitive.

Cross-licensing and pooling arrangements can have anticompetitive effects in certain circumstances. When these arrangements are a mechanism to accomplish price fixing, or market or customer allocation, they can lead to a significant lessening of competition. See *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952) (price fixing); *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948) (customer allocation). The joint marketing of pooled intellectual property rights, with collective price setting or coordinated output restrictions, may violate section 1 of the Sherman Act. Compare *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) (output restriction on college football broadcasting held unlawful because it was not reasonably related to any purported justification) with *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) (blanket license for music copyrights upheld because the cooperative price was found necessary to the creation of a new product).

Settlements involving the cross-licensing of intellectual property rights can be an efficient means to avoid litigation over infringement and interference proceedings, and, in general, courts favor such settlements. When such cross-licensing involves horizontal competitors, however, the Department will consider whether the effect of the settlement is to diminish rivalry that would otherwise have occurred. In the absence of offsetting efficiencies, such settlements may be challenged as unlawful restraints of trade. Cf. *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963) (cross-license agreement was part of broader combination to exclude competitors).

Pooling arrangements and the like generally need not be open to all who would like to join. Cross-licensing and pooling arrangements among parties that collectively possess market power may, under some circumstances, harm competition by significantly disadvantaging competitors. Cf. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) (exclusion of a competitor from a purchasing cooperative not unlawful absent a showing of market power).

Another possible anticompetitive effect of pooling arrangements may occur when participation in the arrangement deters or discourages participants from engaging in research and development, thus retarding innovation. A pooling arrangement in which members grant licenses to each other for current and future technology at minimal cost may encourage free-

riding and reduce the incentives of its members to compete in their research and development efforts. See generally *United States v. Automobile Manufacturers Association*, 307 F. Supp. 617 (C.D. Cal. 1969), modified sub nom. *United States v. Motor Vehicle Manufacturers Association*, 1982-83 Trade Cas. (CCH) ¶ 65,088 (C.D. Cal. 1982); *United States v. Manufacturers Aircraft Association*, 1976-1 Trade Cas. (CCH) ¶ 60,810 (S.D.N.Y. 1975). Such an arrangement is more likely to cause competitive problems where the arrangement includes a large fraction of the potential participants in research and development.

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#### Example 9

**Situation:** As in Example 8, two of the leading manufacturers of a consumer electronic product hold patents that cover alternative circuit designs for the product. The manufacturers assign several of their patents to a separate corporation wholly owned by the two firms. That corporation licenses the right to use the circuit designs to other consumer product manufacturers and establishes the license royalties. In this example, however, the manufacturers assign to the separate corporation only patents that are blocking. None of the patents assigned to the corporation can be practiced without infringing a patent owned by the other firm.

**Discussion:** Unlike the previous example, the joint assignment of patent rights to the wholly owned corporation in this example can have procompetitive benefits in the use or dissemination of the technology. Because the manufacturers' patents are blocking, the manufacturers are not in a horizontal relationship with respect to those patents. Neither patent can be practiced without the right to a patent owned by the other firm, so the patents are not economic substitutes. (The pooling of patents also would not raise competitive problems in the relevant technology market if the pool involved complementary patents and enabled licensing of a package whose value exceeded the sum of its component patents.)

As in Example 8, the firms are horizontal competitors in the relevant goods market. In the absence of evidence suggesting that the joint assignment of patent rights is also contributing to coordinated pricing of the firms' final products, the Department would be unlikely to challenge this arrangement.

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### 5.6 Grantbacks

A grantback is an arrangement under which a licensee agrees to extend to the licensor of intellectual property the right to use the licensee's improvements to the licensed technology. Grantbacks can have procompetitive effects, such as providing a means for the licensee and the licensor to share risks and rewarding the licensor for making possible further innovation based on or informed by the licensed technology. Such arrangements can both promote innovation in the first place and promote the subsequent licensing of the results of the innovation.

Grantbacks may adversely affect competition, however, if they substantially reduce the licensee's incentives to engage in research and development and limit rivalry in innovation



markets. In deciding whether to challenge a grantback, the Department will consider the extent to which, as compared with no license at all, the license with the grantback provision may diminish total research and development investment or lessen competition in innovation or technology markets.

#### 5.7 Acquisition of intellectual property rights

The legality of transactions resulting in an actual or effective acquisition of intellectual property rights is analyzed under section 7 of the Clayton Act and sections 1 and 2 of the Sherman Act. *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1210 (2d Cir. 1981) (patents); *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 183 (S.D.N.Y. 1960) (copyrights). The Department will analyze such transactions as acquisitions of assets just as it does other asset acquisitions. When a license is non-exclusive, the exclusivity is temporary, or the acquisition is otherwise structured to allow the parties freedom to compete independently in related products, the Department will take these aspects of the arrangement into account, as it does in the case of other asset acquisitions and joint ventures.

With respect to horizontal acquisitions, the Department will apply the analysis contained in the 1992 Horizontal Merger Guidelines. The Department will evaluate the effects of an acquisition of intellectual property in affected technology, innovation, and goods markets. As described in section 4 of the 1992 Horizontal Merger Guidelines, the Department takes into account integrative efficiencies that could not reasonably be achieved without the acquisition as well as any anticompetitive effects of the acquisition from the lessening of competition among existing technologies or goods or from the lessening of competition to develop new technologies.

### Example 10

*Situation:* Omega develops a new, patented pharmaceutical for the treatment of a particular disease. The only drug on the market approved for the treatment of this disease is sold by Zeta, which has invested large sums in advertising to achieve brand name recognition. Omega's patented drug has almost completed regulatory approval by the Food and Drug Administration. Omega has invested considerable sums in testing market acceptance for its new drug. However, rather than enter the market as a direct competitor of Zeta, Omega licenses to Zeta the exclusive right to manufacture and sell Omega's patented drug.

*Discussion:* Assuming that Zeta would manufacture and sell Omega's patented drug, the relationship of Omega and Zeta is in part vertical, because Zeta would be a customer of Omega in the technology market. However, their relationship is also horizontal in part, because Omega is a likely potential competitor of Zeta in the relevant goods market as well as in the relevant technology market. Although the vertical aspects of this arrangement pose no threat to competition in this example, the horizontal aspects would require further analysis. The Department would evaluate Zeta's acquisition of Omega's patent rights as an acquisition of the assets of a likely potential competitor, using the methodology described in the Department's merger guidelines. The Department would consider the impact of the acquisition on market concentration, other factors that affect the likelihood that competition would be affected by the acquisition, and possible efficiency defenses. In this example, Zeta's market position prior to the acquisition as the only seller of a drug for treatment of this disease makes it more likely that the acquisition would have anticompetitive effects.

## 6. Enforcement of invalid intellectual property rights

The Department may challenge the enforcement of invalid intellectual property rights as antitrust violations. The Supreme Court has held that enforcement of a patent obtained by fraud on the Patent and Trademark Office can violate section 2 of the Sherman Act if all the elements otherwise necessary to establish a section 2 monopolization charge are proved. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). Enforcement of a patent obtained by mere inequitable conduct before the Patent and Trademark Office, however, cannot be the basis of a section 2 claim, because inequitable conduct does not involve knowing and willful patent fraud. *Argus Chemical Corp. v. Fibre Glass-Evercoat Co.*, 812 F.2d 1381 (Fed. Cir. 1987). An objectively baseless infringement action, brought in bad faith, when the complainant knows the intellectual property right to be invalid, may violate section 2 of the Sherman Act. See *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 113 S. Ct. 1920, 1928 (1993); *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1288-89 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985) (patents); *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 992-96 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) (patents); *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842 (1st Cir. 1985) (trade secrets).

## **APPENDIX E - CALIFORNIA FILING INSTRUCTIONS**



Secretary of State

1230 J Street  
Sacramento, California 95814

CORPORATE DIVISION

Legal Review	(916) 445-0620
Certification	(916) 445-1430
Status	(916) 445-2900
Name Availability	(916) 322-2387
Statement of Officers	(916) 445-2020

## ORGANIZATION OF CALIFORNIA NONPROFIT, NONSTOCK CORPORATIONS

California nonprofit, nonstock corporations, for religious, charitable, social, educational, recreational or similar purposes, are organized under the Nonprofit Corporation Law as embodied in the California Corporations Code beginning at Section 5000.

Nonprofit corporations are of three types, namely, religious, public benefit or mutual benefit, depending on the purpose.

- A. A corporation organized to operate a church or to be otherwise structured for primarily religious purposes is a nonprofit religious corporation.
- B. A corporation organized primarily for charitable purposes and which plans to obtain state tax exempt status under Section 2370ld of the Revenue and Taxation Code and/or federal tax exempt status under Section 501(c)(3) of the Internal Revenue Code or organized to act as a civic league or a social welfare organization and which plans to obtain state tax exempt status under Section 2370lf of the Revenue and Taxation Code and/or federal tax exempt status under Section 501(c)(4) of the Internal Revenue Code is a nonprofit public benefit corporation.
- C. A corporation for other than religious, charitable, civic league or social welfare purposes and planning to obtain tax exempt status under provisions other than Sections 2370ld, 2370lf, 501(c)(3) or 501(c)(4) or not planning to be tax exempt at all is a nonprofit mutual benefit corporation.

We have included samples of Articles of Incorporation. Using the correct model, based on the above explanation, type your Articles of Incorporation.

The designated agent for service of process must agree to accept process on behalf of the corporate entity.

THE SECRETARY OF STATE'S FEE FOR FILING NONPROFIT ARTICLES OF INCORPORATION IS \$30.00.

The proposed corporation must either pay the \$800.00 minimum franchise tax or apply for, and obtain, exemption from payment of the tax before the articles may be filed. If a claim for exemption from payment of the tax is to be made, then the Application for Exemption from Tax (form enclosed) must be completed and submitted to this office along with the original articles and all required attachments thereto (see "INSTRUCTION" with application form), at least 4 copies thereof and the required Franchise Tax Board application fee of \$25.00 (in addition to the \$30.00 Secretary of State filing fee).

The Secretary of State will certify two copies of the filed Articles of Incorporation, without charge, provided that the copies are submitted to the Secretary of State along with the original to be filed.

If you wish any additional copies certified, submitted along with the original, the cost will be \$8.00 for each copy requested.

NOTE: A \$15.00 special handling fee is applicable for expedited processing of documents delivered in person, "over-the-counter" for each submittal. The \$15.00 special handling fee will be retained-DOCUMENTS REJECTED OR FILED.



# ARTICLES OF INCORPORATION

I

The name of this corporation is \_\_\_\_\_.

II

A. This corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Public Benefit Corporation Law for charitable purposes.

B. The specific purpose of this corporation is to \_\_\_\_\_.

III

The name and address in the State of California of this corporation's initial agent for service of process is:

Name \_\_\_\_\_

STREET Address \_\_\_\_\_

City \_\_\_\_\_ State CALIFORNIA Zip \_\_\_\_\_

IV

A. This corporation is organized and operated exclusively for charitable purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

B. No substantial part of the activities of this corporation shall consist of carrying on propaganda, or otherwise attempting to influence legislation, and the corporation shall not participate or intervene in any political campaign (including the publishing or distribution of statements) on behalf of any candidate for public office.

V

The property of this corporation is irrevocably dedicated to charitable purposes and no part of the net income or assets of this corporation shall ever inure to the benefit of any director, officer or member thereof or to the benefit of any private person. Upon the dissolution or winding up of the corporation, its assets remaining after payment, or provision for payment, of all debts and liabilities of this corporation shall be distributed to a nonprofit fund, foundation or corporation which is organized and operated exclusively for charitable purposes and which has established its tax exempt status under Section 501(c)(3) of the Internal Revenue Code.

(Signature of Incorporator)  
(Typed Name of Incorporator)

# ARTICLES OF INCORPORATION

I

The name of this corporation is \_\_\_\_\_.

II

A. This corporation is a nonprofit mutual benefit corporation organized under the Nonprofit Mutual Benefit Corporation Law. The purpose of this corporation is to engage in any lawful act or activity for which a corporation may be organized under such law.

B. The specific purpose of this corporation is to \_\_\_\_\_.

III

The name and address in the State of California of this corporation's initial agent for service of process is:

Name \_\_\_\_\_

STREET Address \_\_\_\_\_

City \_\_\_\_\_

State CALIFORNIA Zip \_\_\_\_\_

IV

Notwithstanding any of the above statements of purposes and powers, this corporation shall not, except to an insubstantial degree, engage in any activities or exercise any powers that are not in furtherance of the specific purposes of this corporation.

(Signature of Incorporator)

(Typed Name of Incorporator)

# ARTICLES OF INCORPORATION

I

The name of this corporation is \_\_\_\_\_.

II

A. This corporation is a religious corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Religious Corporation Law exclusively for religious purposes.

B. The specific purpose of this corporation is to \_\_\_\_\_.

III

The name and address in the State of California of this corporation's initial agent for service of process is:

Name \_\_\_\_\_

STREET Address \_\_\_\_\_

City \_\_\_\_\_ State CALIFORNIA Zip \_\_\_\_\_

IV

A. This corporation is organized and operated exclusively for religious purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

B. No substantial part of the activities of this corporation shall consist of carrying on propaganda, or otherwise attempting to influence legislation, and the corporation shall not participate or intervene in any political campaign (including the publishing or distribution of statements) on behalf of any candidate for public office.

V

The property of this corporation is irrevocably dedicated to religious purposes and no part of the net income or assets of this corporation shall ever inure to the benefit of any director, officer or member thereof or to the benefit of any private person. Upon the dissolution or winding up of the corporation, its assets remaining after payment, or provision for payment, of all debts and liabilities of this corporation shall be distributed to a nonprofit fund, foundation or corporation which is organized and operated exclusively for religious purposes and which has established its tax exempt status under Section 501(c)(3) of the Internal Revenue Code.

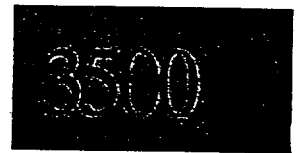
(Signature of Incorporator)  
(Typed Name of Incorporator)



# California

Exemption Application Booklet

# FTB



Forms & Instructions

**This booklet contains:**

FTB 3500, Exemption Application

Use form FTB 3500 to obtain exemption from  
California income or franchise taxes.



State of California  
Franchise Tax Board



# Procedural Checklist

## Make sure your application is complete.

---

If you do not complete all applicable parts of form FTB 3500, Exemption Application, or do not provide all required attachments, additional correspondence will be necessary in order to complete the review of your application. This will delay processing and may delay the effective date of your exemption or result in denial of the application.

## Have you ...

---

- ☐ completed Side 1, including lines 1a through 6g?
- ☐ included the \$25 application fee?
- ☐ signed the application?  
(The application must be signed by an authorized representative of the organization, and the signature must be original, not a copy.)
- ☐ included the information and documents requested on Side 2, lines 7a through 7j?
- ☐ completed the appropriate line for your organization on Sides 2 through 4, lines 8 through 23?
- ☐ placed a copy of the completed form FTB 3500 and all attachments in the organization's permanent records?

Serial number

Amount paid

**Exemption Application****3500**

Every organization filing an application for exemption from California corporation franchise or income tax must furnish the information and data specified and pay the required \$25 application fee. If the organization fails to comply with these requirements, the application will be denied. Revenue and Taxation Code Section 26451.3 provides that this application, together with any supporting documents, shall be open to public inspection if the exemption is granted. Upon request of the organization, public disclosure of such documents may be withheld if such disclosure would adversely affect the organization or national defense.

Name of organization as shown in your organization's articles or declaration of trust		Federal employer identification number
Address (number and street)		Daytime telephone number ( )
City	State	ZIP code
Name of representative to be contacted regarding additional requirements or information		Daytime telephone number ( )
Representative's mailing address		
City	State	ZIP code

**ALL applicants must complete items 1 through 6 and furnish the information requested on Sides 2, 3 and 4 as applicable.**

Attach check or money order here.	1 a	Enter the California Revenue and Taxation Code Section under which exemption is claimed. See General Instruction C.	
	b	Primary activity of organization:	
	2 a	What is the form of the organization? <input type="checkbox"/> Incorporated <input type="checkbox"/> Currently being incorporated <input type="checkbox"/> Unincorporated association <input type="checkbox"/> Trust	
	(1)	Date organized	
	b	If incorporated, furnish the following information:	
	(1)	Date incorporated	(2) California corporation number
	(3)	If incorporated in another state, identify the state	
	3 a	Has this organization or its predecessor previously applied for exemption? <input type="checkbox"/> Yes <input type="checkbox"/> No	
	b	If "yes," check the appropriate box(es) and enter either "Granted" or "Denied" and also enter the date the exemption was "Granted" or "Denied" after the box(es) checked: <input type="checkbox"/> California Date <input type="checkbox"/> Federal Date <input type="checkbox"/> Other State Date	
	c	Provide the number under which the organization previously filed with the Franchise Tax Board. Furnish copies of any determination letters received.	
4 a	Has the organization filed federal income tax returns? <input type="checkbox"/> Yes <input type="checkbox"/> No		
b	If "yes," state type of returns and years filed.		
5	Annual accounting period (must end on last day of the month).		
6 a	Is this a new organization? If "no," attach a statement indicating the name of the predecessor(s), the period during which it was in existence, the reasons for its termination and the number under which it previously filed with the Franchise Tax Board . . . .	Yes No	
b	Is this a membership organization? If "yes," attach a statement which fully explains the qualifications for members, the different classes of membership, the number of members in each class and the voting rights and privileges accorded each class . . . .		
c	Has the organization made, or are there plans to make, any distribution of its property or surplus to officers or members? If "yes," attach a detailed statement . . . .		
d	Will any of the incorporators share any facilities with the organization? If "yes," attach a detailed explanation . . . .		
e	Will any property be rented, purchased or transferred in any way from any of the incorporators? If "yes," attach a detailed explanation . . . .		
f	Will any promoter, incorporator, founder or member be employed by the organization? If "yes," furnish complete details, including duties, responsibilities, qualifications and compensation . . . .		
g	Will any member of the board of directors be compensated for services other than services performed as a board member, e.g. officer, and/or employee? If "yes," furnish the name(s) of the director(s), and the amount(s) of compensation for each. Also list the names of the other directors, indicating their blood or marriage relationship, if any, to the compensated director(s) . . . .		

Be sure to include the \$25 application fee. Do not send cash. Allow 60 working days for processing.

Under penalties of perjury, I declare that I have examined this application, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct and complete.

DATE

SIGNATURE OF OFFICER OR REPRESENTATIVE

TITLE

PLACE SIGNED

[Versions of this form prior to 1987 are obsolete and should not be used. Please destroy.]

- 7 To insure that the Franchise Tax Board will process your exemption application, attach the following information to your application.
- If the organization is incorporated, a copy of the endorsed articles of incorporation and all subsequent amendments (if it is currently being incorporated, submit proposed articles to the Secretary of State with the application); if it is not incorporated, a copy of the constitution, articles of association, declaration of trust or other document setting forth the aims and purposes of the organization and signed by the principal officers or trustees.
  - A copy of the bylaws, proposed bylaws or other code of regulations.
  - Complete statements of receipts and expenditures, assets and liabilities for each accounting period that the organization was in existence and for which exemption is requested (do not send bank statements or monthly reports). Organizations that have not commenced operations or have been operating less than one year, see item "7d" below.
  - A proposed budget showing the sources of income and areas of expenditures for the first year of operation of a newly formed organization or one commencing operations (the budget is required before the Franchise Tax Board will process the application and should be based upon the most reasonable expectations).
  - A statement describing the specific purposes for which the organization was formed (do not quote the articles of incorporation or bylaws for this purpose).
  - A statement describing in detail the programs and activities that the organization presently conducts or will conduct and how it will accomplish its specific purposes.
  - A statement describing in detail each fund-raising activity and each business enterprise the organization has engaged in or plans to engage in with other parties (accompanied by copies of all agreements, if any, for the conduct of each fund-raising activity or business enterprise).
  - A statement that fully explains any discontinued specific activities that the organization has engaged in or sponsored (give dates of commencement and termination and the reasons for discontinuance).
  - A copy of each lease, if any, in which the organization is the lessee or lessor of property (real, personal, gas, oil or mineral), or in which an interest is owned under such lease, together with copies of all agreements with other parties for development of the property.
  - Samples of any literature that the organization sells or distributes and samples of any organizational advertising.

Each item listed below refers to a separate Revenue and Taxation Code (R&TC) section. Select the appropriate section under which your organization claims exemption and provide the requested information.

- 8 **R&TC Section 23701a – Labor, agricultural or horticultural organization:** Submit an explanation of any services to be performed for members. Cooperative organizations applying for exemption under R&TC Section 23701a must submit a copy of the federal exemption letter showing exemption under IRC Section 501(c)(5).
- 9 **R&TC Section 23701b – Fraternal beneficiary society, etc.; R&TC Section 23701I – fraternal society:**
- State whether the organization operates, or plans to operate, under the lodge system or for the exclusive benefit of the members of an organization so operating. Operating under the lodge system means carrying on activities under a form of organization that comprises local branches, called lodges, chapters or the like, which are largely self-governing and chartered by a parent organization.
  - If the organization is a subordinate or local lodge, etc., attach a certificate signed by the secretary of the parent organization, under the seal of that organization, certifying that the subordinate lodge is a duly constituted body operating under the jurisdiction of the parent body.
  - If the organization is a parent or grand lodge, attach a statement showing the number of subordinate lodges in active operation and whether periodic meetings are actually held.
  - For R&TC Section 23701b organizations only, attach a statement describing the types of benefits (life, sick, accident or other benefits) paid, or to be paid, to members.
- 10 **R&TC Section 23701c – Cemetery company or corporation chartered solely for burial purposes:**
- Attach these statements and/or documents.
    - Complete copy of the sales contract or other document involved in acquisition of cemetery property by the organization.
    - Complete copy of any contract the organization has that designates an agent to sell the cemetery lots.
    - Name(s) of officer(s) and director(s) of your organization from the date of incorporation to the present date and the period for which each held office.
    - Appraised value of cemetery property as of the date acquired (the appraisal should be obtained from sources other than the parties in interest).
  - Does the organization have or plan to have a perpetual care fund? ☐ Yes ☐ No  
If "yes," furnish a copy of the federal exemption letter, a copy of the fund agreement and a statement explaining the nature of such fund (cash, securities, unsold land, etc.). Also attach a statement that fully explains the manner in which the fund is or will be administered, the specific purposes for which the fund is to be used, and the name(s) of the person(s) administering the fund.
  - Does the organization operate a crematorium? ☐ Yes ☐ No
- 11 **R&TC Section 23701d – Religious, charitable, scientific, literary or educational organization:** Attach a statement explaining all "yes" answers in lines 11a through 11d.
- Has the organization received, or does it expect to receive, 10 percent or more of its assets from any organization or group of affiliated organizations (affiliated through stockholding, common ownership or otherwise), any individual, or members of a family group (brother or sister whether whole or half blood, spouse, ancestor or lineal descendant)?
  - Is the organization now, has it ever been, or does it plan to be engaged in carrying on propaganda, or otherwise advocating or opposing pending or proposed legislation (this includes dissemination of such information to the general public while representing the organization)?
  - Has the organization participated in or does it plan to participate or intervene in any political campaign (including the publishing or distributing of statements) on behalf of, or in opposition to, any candidate for public office?
  - Does the organization hold, or plan to hold, 10 percent or more of any class of stock or 10 percent or more of the total combined voting power of stock in any corporation?

Yes	No

- e If claiming exemption as a church, attach a statement including the information requested in items (1) through (8):
- (1) Has a permanent place of worship been established? At what address? Who is the legal owner of this property? Describe the physical characteristics of your church buildings. Explain to what extent these buildings are used for purposes other than religious worship.
  - (2) Does the organization have a regular congregation or conduct religious services on a regular basis? How many usually attend the regular worship services? Attach samples of worship service programs and newspaper announcements of your activities. Where and how often are religious services held?
  - (3) Furnish information regarding the religious background and formal religious training of the religious leaders. Furnish a copy of the religious leader's certificate of ordination.
  - (4) What amount of the annual gross income will be received from incorporators, ministers, officers, directors or their families?
  - (5) What amount of the organization's proposed expenditures will be used for the personal living expenses of the individuals mentioned in item (4) above?
  - (6) How many hours per week will the religious or spiritual leader(s) devote to organizational activities? Will this person engage in employment unrelated to the activities of the organization? If so, indicate the number of hours per week and describe the employment activity.
  - (7) List all the officers, directors, trustees, etc., of the organization and describe their qualifications for such office. Are any of the officers or directors related by blood or marriage? If "yes," explain.
  - (8) Will any founder, member or officer:
    - (a) Take a vow of poverty?
    - (b) Transfer personal assets to this organization, like a home, automobile, furnishings, business or recreational assets, etc., that will be made available for the personal use of the donor(s)?
    - (c) Assign or donate income to the organization which will be used in part or whole to pay the donor(s) as salary, stipend or living allowance (such as food, medical expenses, clothing, insurance, etc.)?
- 12 R&TC Section 23701e – Business league, chamber of commerce, etc:** State whether the organization has performed, or plans to perform, particular services for members, shareholders or others, such as furnishing credit reports or collection accounts, inspecting products, conducting advertising, purchasing merchandise or other similar undertakings. ☐ Yes ☐ No If "yes," attach a detailed statement, including income realized and expenses incurred in such activities. If engaged in advertising, attach samples of material.
- 13 R&TC Section 23701f – Local association of employees:** Attach a statement giving names and addresses of employers whose employees are eligible for membership in the association. If employees of more than one plant or office of the same employer are eligible for membership, give the address of each such plant or office.
- 14 R&TC Section 23701g – Social and recreational organization:**
- |   | Yes | No |
|---|-----|----|
| a |     |    |
| b |     |    |
| c |     |    |
| d |     |    |
- a Has the organization solicited, or does it plan to solicit, public patronage of the facilities by advertisement or otherwise? If "yes," attach sample copies of such advertisements or other solicitations . . . . .
  - b Are nonmembers, other than bona fide guests of members, permitted, or will they be permitted, to use the club facilities, or participate in or attend any functions or activities conducted by the organization? If "yes," attach a statement describing the functions or activities in which nonmembers have participated or will participate, or to which they have been or will be admitted. If nonmembers have participated in or been admitted to any functions or activities, state the amount received from nonmembers. Provide a schedule in the statement detailing the expenses attributable to such nonmembers, the expenses attributable to such functions and the disposition made of net profits, if any, derived from the functions . . . . .
  - c Has the organization rented or leased, or does it plan to rent or lease, any part of the club's property to others? If "yes," attach a statement indicating the reason for such action, or proposed action, and the amount received, or to be received. Also attach copies of the rental agreements or leases . . . . .
  - d Has the organization derived or will it derive any income from nonmembers not explained above? If "yes," explain in detail . . . . .
  - e Furnish a statement separating the member and nonmember income for the past three years and a proposed budget separating member and nonmember income for the next period of operation.
  - f State the total number of club members. If there are different classes of membership, explain the dues and privileges of each class. \_\_\_\_\_
  - g Provide copies of:
    - house rules;
    - all other documents used in considering or granting memberships, including agreements or contracts, if any; and
    - copies of corporate resolutions demonstrating adoption of policy or change of policy regarding membership or use of facilities.
- 15 R&TC Section 23701h – Title holding corporation:**
- a Attach a statement giving the complete names and addresses of organizations for which title to property is held, the number of shares of capital stock held and whether shares of stock have ever been held by persons other than such organizations. If stock was so held, include the years held and the total number of shares of each class of stock.
  - b State whether the annual income (less expenses) is, or will be, turned over to the organization for which title to property is held. Explain what disposition will be made of income which will not be turned over to the organization.
  - c Attach a copy of an exemption letter (federal or California) for each organization for which property will be held. If property will be held for organization(s) located in California, you must furnish a California exemption letter.
- 16 R&TC Section 23701i – Voluntary employees' beneficiary organization:** Furnish a copy of the federal determination letter showing exemption under IRC Section 501(c)(9).
- 17 R&TC Section 23701n – Supplemental unemployment compensation trust:** Attach a copy of the supplemental unemployment benefit plan and pertinent agreements and a copy of the federal determination letter.
- 18 R&TC Section 23701q – Group legal services plan:** Furnish a copy of the federal determination letter showing exemption under IRC Section 501(c)(20).

**19 R&TC Section 23701t Homeowners' association:**

- a Furnish a copy of the Declaration of Covenants, Conditions and Restrictions.
- b Will any of the individual units/lots owned by the organization or its members be occupied for other than personal residential purposes?  
☐ Yes ☐ No If "yes":  
(1) What percentage of the units/lots will be used for nonresidential purposes? \_\_\_\_\_  
(2) If the organization claims exemption as a condominium management association, indicate square footage of all units and square footage devoted to residential purposes. All units \_\_\_\_\_ Residential \_\_\_\_\_  
(3) What percentage of the organization's total gross income will be derived from dues, fees or assessments from nonresidential members? \_\_\_\_\_
- c Will this organization own, maintain or operate a mutual water company, well, electrical generating facility or other utility? ☐ Yes ☐ No  
If "yes," describe in detail and answer these questions:  
(1) Are the members/shareholders the actual users of the utility, or simply investors?  
(2) Is this organization furnishing utilities to residential homes, commercial businesses (including agricultural enterprises) or both? \_\_\_\_\_  
If both, indicate what percent of this organization's total income will be derived from sale of utilities for nonresidential usage. \_\_\_\_\_  
(3) How are members/shareholders assessed for utilities usage? Are they assessed equally, according to square footage/acreage, metered, etc.?
- d Will any of the units/lots be rented by a person, or series of persons, for periods of less than 30 days that, when added together, equal more than half of the association's taxable year? ☐ Yes ☐ No If "yes," what percentage of the units/lots are rented in this manner? \_\_\_\_\_
- e What date did the association become active? Provide details of these activities. \_\_\_\_\_
- f What date was the first unit sold, or when will the first unit be available for sale? \_\_\_\_\_

**20 R&TC Section 23701u - Public facility financial corporation:**

- a Attach samples of all certificates of participation or other securities to be issued.
- b Attach copies of all leases, contracts, trust agreements or other agreements that have been, or will be, entered into by this corporation.

**21 R&TC Section 23701v - Mobile home park acquisition association:**

- a Are all members of the organization owners of manufactured homes or mobile home tenants of the mobile home park? ☐ Yes ☐ No  
If "no," explain the circumstances under which other individuals can become members of the organization.
- b Describe the mobile home park in which owner/tenant members reside.
- c Are all lots within the park rented or leased to mobile home or manufactured home owners? ☐ Yes ☐ No If "no," explain.
- d Does the rent paid by each owner include rental for the lot occupied by the mobile home or manufactured home? ☐ Yes ☐ No If "no," explain.
- e Will the organization carry on activities other than purchasing or preparing to purchase the mobile home park in which members reside? ☐ Yes ☐ No If "yes," describe in detail the other activities and indicate the percentage of total operations represented by such activities.

**22 R&TC Section 23701w - War veteran's organization:**

To be completed by a post or organization of past or present members of the Armed Forces of the United States.

- a What is the total membership of your post or organization? \_\_\_\_\_
- b How many of your members are present or former members of the Armed Forces of the United States? \_\_\_\_\_
- c How many members are cadets (include students in college, university or armed services academies)? \_\_\_\_\_ How many are spouses, widows or widowers of cadets or past or present members of the Armed Forces of the United States? \_\_\_\_\_
- d Do you have a membership category other than the ones set out above? ☐ Yes ☐ No If "yes," please explain in detail and enter the number of members in this category. \_\_\_\_\_

To be completed by an auxiliary unit or society of a post or organization of past or present members of the Armed Forces of the United States.

- e Are you affiliated with and organized according to the bylaws and regulations formulated by such an exempt post or organization? ☐ Yes ☐ No
- f How many members do you have?
- g How many are past or present members of the Armed Forces of the United States themselves, their spouses or persons related to them within two degrees of blood relationship (grandparents, brothers, sisters and grandchildren are the most distant relationships allowable)? \_\_\_\_\_
- h Are all of the members themselves members of a post or organization, past or present members of the Armed Forces of the United States, or spouses of members of such a post or organization or related to members of such a post or organization within two degrees of blood relationship? ☐ Yes ☐ No If "yes," explain in detail.

**23 R&TC Section 23701x - Title holding organization:**

- a Attach a statement giving the complete names and addresses of organizations or trusts for which title to property is being held, and the number of shares of capital stock held by each entity.
- b State whether the annual income (less expenses) is, or will be, turned over to the organizations for which title to property is held. Explain what disposition will be made of the income that is not or will not be turned over to the organizations.
- c Furnish a copy of a federal determination letter for each organization or trust for which property is or will be held.
- d For those organizations of trust for which property is or will be held and which do not have a federal determination letter, provide detailed information to show that each shareholder is:  
(1) A governmental plan described in IRC Section 414(d); or  
(2) The United States, any state or political subdivision thereof, or any agency or instrumentality of the foregoing.
- e State the total number of stockholders or beneficiaries.
- f Describe in detail each class of stock or beneficial interest.

Serial number

Amount paid

**Exemption Application****3500**

Every organization filing an application for exemption from California corporation franchise or income tax must furnish the information and data specified and pay the required \$25 application fee. If the organization fails to comply with these requirements, the application will be denied. Revenue and Taxation Code Section 26451.3 provides that this application, together with any supporting documents, shall be open to public inspection if the exemption is granted. Upon request of the organization, public disclosure of such documents may be withheld if such disclosure would adversely affect the organization or national defense.

Name of organization as shown in your organization's articles or declaration of trust		Federal employer identification number
Address (number and street)		Daytime telephone number ( )
City	State	ZIP code
Name of representative to be contacted regarding additional requirements or information		Daytime telephone number ( )
Representative's mailing address		
City	State	ZIP code

ALL applicants must complete items 1 through 6 and furnish the information requested on Sides 2, 3 and 4 as applicable.

Attach check or money order here.	1 a	Enter the California Revenue and Taxation Code Section under which exemption is claimed. See General Instruction C.	
	b	Primary activity of organization:	
	2 a	What is the form of the organization? <input type="checkbox"/> Incorporated <input type="checkbox"/> Currently being incorporated <input type="checkbox"/> Unincorporated association <input type="checkbox"/> Trust	
	(1)	Date organized	
	b	If incorporated, furnish the following information:	
	(1)	Date incorporated	(2) California corporation number
	(3)	If incorporated in another state, identify the state	
	3 a	Has this organization or its predecessor previously applied for exemption? <input type="checkbox"/> Yes <input type="checkbox"/> No	
	b	If "yes," check the appropriate box(es) and enter either "Granted" or "Denied" and also enter the date the exemption was "Granted" or "Denied" after the box(es) checked: <input type="checkbox"/> California Date <input type="checkbox"/> Federal Date <input type="checkbox"/> Other State Date	
	c	Provide the number under which the organization previously filed with the Franchise Tax Board. Furnish copies of any determination letters received.	
	4 a	Has the organization filed federal income tax returns? <input type="checkbox"/> Yes <input type="checkbox"/> No	
	b	If "yes," state type of returns and years filed.	
	5	Annual accounting period (must end on last day of the month).	
	6 a	Is this a new organization? If "no," attach a statement indicating the name of the predecessor(s), the period during which it was in existence, the reasons for its termination and the number under which it previously filed with the Franchise Tax Board . . . .	Yes No
	b	Is this a membership organization? If "yes," attach a statement which fully explains the qualifications for members, the different classes of membership, the number of members in each class and the voting rights and privileges accorded each class . . . .	
	c	Has the organization made, or are there plans to make, any distribution of its property or surplus to officers or members? If "yes," attach a detailed statement . . . .	
	d	Will any of the incorporators share any facilities with the organization? If "yes," attach a detailed explanation . . . .	
	e	Will any property be rented, purchased or transferred in any way from any of the incorporators? If "yes," attach a detailed explanation . . . .	
	f	Will any promoter, incorporator, founder or member be employed by the organization? If "yes," furnish complete details, including duties, responsibilities, qualifications and compensation . . . .	
	g	Will any member of the board of directors be compensated for services other than services performed as a board member, e.g. officer, and/or employee? If "yes," furnish the name(s) of the director(s), and the amount(s) of compensation for each. Also list the names of the other directors, indicating their blood or marriage relationship, if any, to the compensated director(s) . . . .	

Be sure to include the \$25 application fee. Do not send cash. Allow 60 working days for processing.

Under penalties of perjury, I declare that I have examined this application, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct and complete.

DATE

SIGNATURE OF OFFICER OR REPRESENTATIVE

TITLE

PLACE SIGNED

[Versions of this form prior to 1987 are obsolete and should not be used. Please destroy.]

- 7 To insure that the Franchise Tax Board will process your exemption application, attach the following information to your application.
- If the organization is incorporated, a copy of the endorsed articles of incorporation and all subsequent amendments (if it is currently being incorporated, submit proposed articles to the Secretary of State with the application); if it is not incorporated, a copy of the constitution, articles of association, declaration of trust or other document setting forth the aims and purposes of the organization and signed by the principal officers or trustees.
  - A copy of the bylaws, proposed bylaws or other code of regulations.
  - Complete statements of receipts and expenditures, assets and liabilities for each accounting period that the organization was in existence and for which exemption is requested (do not send bank statements or monthly reports). Organizations that have not commenced operations or have been operating less than one year, see item "7d" below.
  - A proposed budget showing the sources of income and areas of expenditures for the first year of operation of a newly formed organization or one commencing operations (the budget is required before the Franchise Tax Board will process the application and should be based upon the most reasonable expectations).
  - A statement describing the specific purposes for which the organization was formed (do not quote the articles of incorporation or bylaws for this purpose).
  - A statement describing in detail the programs and activities that the organization presently conducts or will conduct and how it will accomplish its specific purposes.
  - A statement describing in detail each fund-raising activity and each business enterprise the organization has engaged in or plans to engage in with other parties (accompanied by copies of all agreements, if any, for the conduct of each fund-raising activity or business enterprise).
  - A statement that fully explains any discontinued specific activities that the organization has engaged in or sponsored (give dates of commencement and termination and the reasons for discontinuance).
  - A copy of each lease, if any, in which the organization is the lessee or lessor of property (real, personal, gas, oil or mineral), or in which an interest is owned under such lease, together with copies of all agreements with other parties for development of the property.
  - Samples of any literature that the organization sells or distributes and samples of any organizational advertising.

Each item listed below refers to a separate Revenue and Taxation Code (R&TC) section. Select the appropriate section under which your organization claims exemption and provide the requested information.

- 8 **R&TC Section 23701a – Labor, agricultural or horticultural organization:** Submit an explanation of any services to be performed for members. Cooperative organizations applying for exemption under R&TC Section 23701a must submit a copy of the federal exemption letter showing exemption under IRC Section 501(c)(5).
- 9 **R&TC Section 23701b – Fraternal beneficiary society, etc.; R&TC Section 23701i – fraternal society:**
- State whether the organization operates, or plans to operate, under the lodge system or for the exclusive benefit of the members of an organization so operating. Operating under the lodge system means carrying on activities under a form of organization that comprises local branches, called lodges, chapters or the like, which are largely self-governing and chartered by a parent organization.
  - If the organization is a subordinate or local lodge, etc., attach a certificate signed by the secretary of the parent organization, under the seal of that organization, certifying that the subordinate lodge is a duly constituted body operating under the jurisdiction of the parent body.
  - If the organization is a parent or grand lodge, attach a statement showing the number of subordinate lodges in active operation and whether periodic meetings are actually held.
  - For R&TC Section 23701b organizations only, attach a statement describing the types of benefits (life, sick, accident or other benefits) paid, or to be paid, to members.
- 10 **R&TC Section 23701c – Cemetery company or corporation chartered solely for burial purposes:**
- Attach these statements and/or documents.
    - Complete copy of the sales contract or other document involved in acquisition of cemetery property by the organization.
    - Complete copy of any contract the organization has that designates an agent to sell the cemetery lots.
    - Name(s) of officer(s) and director(s) of your organization from the date of incorporation to the present date and the period for which each held office.
    - Appraised value of cemetery property as of the date acquired (the appraisal should be obtained from sources other than the parties in interest).
  - Does the organization have or plan to have a perpetual care fund? ☐ Yes ☐ No  
If "yes," furnish a copy of the federal exemption letter, a copy of the fund agreement and a statement explaining the nature of such fund (cash, securities, unsold land, etc.). Also attach a statement that fully explains the manner in which the fund is or will be administered, the specific purposes for which the fund is to be used, and the name(s) of the person(s) administering the fund.
  - Does the organization operate a crematorium? ☐ Yes ☐ No
- 11 **R&TC Section 23701d – Religious, charitable, scientific, literary or educational organization:** Attach a statement explaining all "yes" answers in lines 11a through 11d.
- Has the organization received, or does it expect to receive, 10 percent or more of its assets from any organization or group of affiliated organizations (affiliated through stockholding, common ownership or otherwise), any individual, or members of a family group (brother or sister whether whole or half blood, spouse, ancestor or lineal descendant)?
  - Is the organization now, has it ever been, or does it plan to be engaged in carrying on propaganda, or otherwise advocating or opposing pending or proposed legislation (this includes dissemination of such information to the general public while representing the organization)?
  - Has the organization participated in or does it plan to participate or intervene in any political campaign (including the publishing or distributing of statements) on behalf of, or in opposition to, any candidate for public office?
  - Does the organization hold, or plan to hold, 10 percent or more of any class of stock or 10 percent or more of the total combined voting power of stock in any corporation?

Yes	No

- e If claiming exemption as a church, attach a statement including the information requested in items (1) through (8):
- (1) Has a permanent place of worship been established? At what address? Who is the legal owner of this property? Describe the physical characteristics of your church buildings. Explain to what extent these buildings are used for purposes other than religious worship.
  - (2) Does the organization have a regular congregation or conduct religious services on a regular basis? How many usually attend the regular worship services? Attach samples of worship service programs and newspaper announcements of your activities. Where and how often are religious services held?
  - (3) Furnish information regarding the religious background and formal religious training of the religious leaders. Furnish a copy of the religious leader's certificate of ordination.
  - (4) What amount of the annual gross income will be received from incorporators, ministers, officers, directors or their families?
  - (5) What amount of the organization's proposed expenditures will be used for the personal living expenses of the individuals mentioned in item (4) above?
  - (6) How many hours per week will the religious or spiritual leader(s) devote to organizational activities? Will this person engage in employment unrelated to the activities of the organization? If so, indicate the number of hours per week and describe the employment activity.
  - (7) List all the officers, directors, trustees, etc., of the organization and describe their qualifications for such office. Are any of the officers or directors related by blood or marriage? If "yes," explain.
  - (8) Will any founder, member or officer:
    - (a) Take a vow of poverty?
    - (b) Transfer personal assets to this organization, like a home, automobile, furnishings, business or recreational assets, etc., that will be made available for the personal use of the donor(s)?
    - (c) Assign or donate income to the organization which will be used in part or whole to pay the donor(s) as salary, stipend or living allowance (such as food, medical expenses, clothing, insurance, etc.)?

**12 R&TC Section 23701e – Business league, chamber of commerce, etc:** State whether the organization has performed, or plans to perform, particular services for members, shareholders or others, such as furnishing credit reports or collection accounts, inspecting products, conducting advertising, purchasing merchandise or other similar undertakings. ☐ Yes ☐ No If "yes," attach a detailed statement, including income realized and expenses incurred in such activities. If engaged in advertising, attach samples of material.

**13 R&TC Section 23701f – Local association of employees:** Attach a statement giving names and addresses of employers whose employees are eligible for membership in the association. If employees of more than one plant or office of the same employer are eligible for membership, give the address of each such plant or office.

**14 R&TC Section 23701g – Social and recreational organization:**

- a Has the organization solicited, or does it plan to solicit, public patronage of the facilities by advertisement or otherwise? If "yes," attach sample copies of such advertisements or other solicitations. ....
- b Are nonmembers, other than bona fide guests of members, permitted, or will they be permitted, to use the club facilities, or participate in or attend any functions or activities conducted by the organization? If "yes," attach a statement describing the functions or activities in which nonmembers have participated or will participate, or to which they have been or will be admitted. If nonmembers have participated in or been admitted to any functions or activities, state the amount received from nonmembers. Provide a schedule in the statement detailing the expenses attributable to such nonmembers, the expenses attributable to such functions and the disposition made of net profits, if any, derived from the functions. ....
- c Has the organization rented or leased, or does it plan to rent or lease, any part of the club's property to others? If "yes," attach a statement indicating the reason for such action, or proposed action, and the amount received, or to be received. Also attach copies of the rental agreements or leases. ....
- d Has the organization derived or will it derive any income from nonmembers not explained above? If "yes," explain in detail. ....
- e Furnish a statement separating the member and nonmember income for the past three years and a proposed budget separating member and nonmember income for the next period of operation.
- f State the total number of club members. If there are different classes of membership, explain the dues and privileges of each class. ....
- g Provide copies of:
  - house rules;
  - all other documents used in considering or granting memberships, including agreements or contracts, if any; and
  - copies of corporate resolutions demonstrating adoption of policy or change of policy regarding membership or use of facilities.

Yes	No

**15 R&TC Section 23701h – Title holding corporation:**

- a Attach a statement giving the complete names and addresses of organizations for which title to property is held, the number of shares of capital stock held and whether shares of stock have ever been held by persons other than such organizations. If stock was so held, include the years held and the total number of shares of each class of stock.
- b State whether the annual income (less expenses) is, or will be, turned over to the organization for which title to property is held. Explain what disposition will be made of income which will not be turned over to the organization.
- c Attach a copy of an exemption letter (federal or California) for each organization for which property will be held. If property will be held for organization(s) located in California, you must furnish a California exemption letter.

**16 R&TC Section 23701i – Voluntary employees' beneficiary organization:** Furnish a copy of the federal determination letter showing exemption under IRC Section 501(c)(9).

**17 R&TC Section 23701n – Supplemental unemployment compensation trust:** Attach a copy of the supplemental unemployment benefit plan and pertinent agreements and a copy of the federal determination letter.

**18 R&TC Section 23701q – Group legal services plan:** Furnish a copy of the federal determination letter showing exemption under IRC Section 501(c)(20).



**19 R&TC Section 23701t Homeowners' association:**

- a Furnish a copy of the Declaration of Covenants, Conditions and Restrictions.
- b Will any of the individual units/lots owned by the organization or its members be occupied for other than personal residential purposes?  
☐ Yes ☐ No If "yes":
  - (1) What percentage of the units/lots will be used for nonresidential purposes? \_\_\_\_\_
  - (2) If the organization claims exemption as a condominium management association, indicate square footage of all units and square footage devoted to residential purposes. All units \_\_\_\_\_ Residential \_\_\_\_\_
  - (3) What percentage of the organization's total gross income will be derived from dues, fees or assessments from nonresidential members? \_\_\_\_\_
- c Will this organization own, maintain or operate a mutual water company, well, electrical generating facility or other utility? ☐ Yes ☐ No  
If "yes," describe in detail and answer these questions:
  - (1) Are the members/shareholders the actual users of the utility, or simply investors?
  - (2) Is this organization furnishing utilities to residential homes, commercial businesses (including agricultural enterprises) or both? \_\_\_\_\_  
If both, indicate what percent of this organization's total income will be derived from sale of utilities for nonresidential usage. \_\_\_\_\_
  - (3) How are members/shareholders assessed for utilities usage? Are they assessed equally, according to square footage/acreage, metered, etc.?
- d Will any of the units/lots be rented by a person, or series of persons, for periods of less than 30 days that, when added together, equal more than half of the association's taxable year? ☐ Yes ☐ No If "yes," what percentage of the units/lots are rented in this manner? \_\_\_\_\_
- e What date did the association become active? Provide details of these activities: \_\_\_\_\_
- f What date was the first unit sold, or when will the first unit be available for sale? \_\_\_\_\_

**20 R&TC Section 23701u - Public facility financial corporation:**

- a Attach samples of all certificates of participation or other securities to be issued.
- b Attach copies of all leases, contracts, trust agreements or other agreements that have been, or will be, entered into by this corporation.

**21 R&TC Section 23701v - Mobile home park acquisition association:**

- a Are all members of the organization owners of manufactured homes or mobile home tenants of the mobile home park? ☐ Yes ☐ No  
If "no," explain the circumstances under which other individuals can become members of the organization.
- b Describe the mobile home park in which owner/tenant members reside.
- c Are all lots within the park rented or leased to mobile home or manufactured home owners? ☐ Yes ☐ No If "no," explain.
- d Does the rent paid by each owner include rental for the lot occupied by the mobile home or manufactured home? ☐ Yes ☐ No If "no," explain.
- e Will the organization carry on activities other than purchasing or preparing to purchase the mobile home park in which members reside? ☐ Yes ☐ No If "yes," describe in detail the other activities and indicate the percentage of total operations represented by such activities.

**22 R&TC Section 23701w - War veteran's organization:**

To be completed by a post or organization of past or present members of the Armed Forces of the United States.

- a What is the total membership of your post or organization? \_\_\_\_\_
- b How many of your members are present or former members of the Armed Forces of the United States? \_\_\_\_\_
- c How many members are cadets (include students in college, university or armed services academies)? \_\_\_\_\_ How many are spouses, widows or widowers of cadets or past or present members of the Armed Forces of the United States? \_\_\_\_\_
- d Do you have a membership category other than the ones set out above? ☐ Yes ☐ No If "yes," please explain in detail and enter the number of members in this category. \_\_\_\_\_

To be completed by an auxiliary unit or society of a post or organization of past or present members of the Armed Forces of the United States.

- e Are you affiliated with and organized according to the bylaws and regulations formulated by such an exempt post or organization? ☐ Yes ☐ No
- f How many members do you have?
- g How many are past or present members of the Armed Forces of the United States themselves, their spouses or persons related to them within two degrees of blood relationship (grandparents, brothers, sisters and grandchildren are the most distant relationships allowable)? \_\_\_\_\_
- h Are all of the members themselves members of a post or organization, past or present members of the Armed Forces of the United States, or spouses of members of such a post or organization or related to members of such a post or organization within two degrees of blood relationship? ☐ Yes ☐ No If "yes," explain in detail.

**23 R&TC Section 23701x - Title holding organization:**

- a Attach a statement giving the complete names and addresses of organizations or trusts for which title to property is being held, and the number of shares of capital stock held by each entity.
- b State whether the annual income (less expenses) is, or will be, turned over to the organizations for which title to property is held. Explain what disposition will be made of the income that is not or will not be turned over to the organizations.
- c Furnish a copy of a federal determination letter for each organization or trust for which property is or will be held.
- d For those organizations of trust for which property is or will be held and which do not have a federal determination letter, provide detailed information to show that each shareholder is:
  - (1) A governmental plan described in IRC Section 414(d); or
  - (2) The United States, any state or political subdivision thereof, or any agency or instrumentality of the foregoing.
- e State the total number of stockholders or beneficiaries.
- f Describe in detail each class of stock or beneficial interest.

# Instructions for Form FTB 3500

## Exemption Application

References in these instructions are to the Internal Revenue Code (IRC) as of January 1, 1992, and to the California Revenue and Taxation Code (R&TC).

### General Information

Organizations that incorporate as nonprofit organizations are not automatically exempt from tax. The organization must apply separately for tax exempt status.

Because California and federal laws are generally the same in this area, it is recommended that you obtain federal application forms and draft articles for both the state and federal application forms at the same time.

If you have already obtained a federal exemption, furnish a copy of the federal determination letter with this application.

The fact that an organization is exempt from federal income tax does not automatically exempt it from California tax. It must apply separately for exemption from California tax.

Trusts must furnish a copy of the federal determination letter before state exemption will be granted. If the trust has not applied for a federal exemption, it should do so. Attach a statement to form FTB 3500 stating that the federal application was submitted.

Trusts organized and operated for purposes described in R&TC Section 23701d are treated as nonprofit organizations for exemption purposes.

The state application is held initially for six months pending receipt of a copy of the federal exemption determination letter.

#### Political Organizations

A political organization meeting the requirements of R&TC Section 23701r is not required to file form FTB 3500 with the Franchise Tax Board. However, a political organization desiring to incorporate, or which has previously incorporated and wants to avoid the prepayment of the minimum franchise tax, must obtain a letter from the Franchise Tax Board certifying exemption.

To obtain a letter certifying exemption, the political organization must submit a written request to the Franchise Tax Board, Exempt Unit. This request must include a description of the political organization's activities. Mail your request to:

Franchise Tax Board  
Exempt Unit  
P.O. Box 942857  
Sacramento, CA 94257-4041

### A Purpose of Form

All corporations and unincorporated associations, even if organized on a nonprofit basis, are subject to California corporation franchise or income tax.

To be exempt from tax, an organization must file form FTB 3500 and be granted exempt status by the Franchise Tax Board.

An unincorporated association that has exempt status must reapply for exemption if it incorporates.

### B When and What to File

To allow adequate time for processing, submit the application at least 60 days before exemption is needed.

The exemption package you submit must include:

- Form FTB 3500, signed by an authorized individual, such as:
  - an elected officer;
  - a director;
  - an authorized representative; or
  - a trustee (if your organization is a trust).
- Application fee of \$25 (make the check or money order payable to Franchise Tax Board).
- Financial statements that are:
  - as current as possible; and
  - itemized, showing income and expenses (no lump sums).
- Proposed budget, if a new organization.
- Articles of incorporation.
  - If you are already incorporated, the copy of the articles must bear the Secretary of State's endorsement stamp.
  - If you are just now incorporating through the Secretary of State, read carefully Instruction D, Item B, "Delayed Incorporation," on page 12 of these instructions.
- Bylaws or constitution.
- Trust instrument (if organized in the form of a trust).
- Supporting documents, such as:
  - detailed description of activities; and
  - samples of literature and publications.
- Accounting period elected.

### C Comparable State and Federal Code Sections

To qualify for exemption, an organization must be organized and operated for purposes described in one of these R&TC Sections (23701a - 23701x):

R&TC	IRC	Purpose
23701a	501(c)(5)	Labor, Agricultural or Horticultural
23701b	501(c)(8)	Fraternal Beneficiary Societies
23701c	501(c)(13)	Cemeteries, Crematoriums
23701d	501(c)(3)	Religious, Charitable, Scientific, Literary or Educational
23701e	501(c)(6)	Business Leagues, Chambers of Commerce, etc.

R&TC	IRC	Purpose
23701f	501(c)(4)	Civic Leagues or Social Welfare and Local Assoc. of Employees
23701g	501(c)(7)	Social Clubs
23701h	501(c)(2)	Title Holding Corp.
23701i	501(c)(9)	Voluntary Employees' Beneficiary Associations
23701j	501(c)(11)	Teachers' Retirement Funds
23701k	501(d)	Apostolic Organizations
23701l	501(c)(10)	Fraternal Societies
23701n	501(c)(17)	Supplemental Unemployment Compensation Trusts
23701q	501(c)(20)	Group Legal Services Plans
23701t	528	Homeowners' Assoc.
23701u	None	Public Facility Financial Corporations
23701v	None	Mobile Home Park Associations
23701w	501(c)(19)	War Veteran's Organizations
23701x	501(c)(25)	Title Holding Organizations

### D Incorporating in California

There are two methods by which nonprofit organizations may incorporate in California:

- immediate incorporation; or
- delayed incorporation.

#### A. Immediate Incorporation

- Mail the items listed below directly to:

Office of the Secretary of State  
1230 J Street  
Sacramento, CA 95814-2974

- the original plus four copies of the articles of incorporation; and
- a check payable to the Secretary of State for the minimum franchise tax plus the appropriate Secretary of State fees for filing the articles of incorporation.

Do not send form FTB 3500 to the Office of the Secretary of State.

- If the proposed articles satisfy the requirements of the California Nonprofit Corporation Law, the Secretary of State will file the original, endorse any remaining copies of the articles of incorporation and return endorsed copies to you.

After you receive the endorsed articles of incorporation, mail the items listed below directly to:

Franchise Tax Board  
Exempt Unit  
P.O. Box 942857  
Sacramento, CA 94257-4041

- a signed form FTB 3500 (original signature required);
- the \$25 application fee, payable to the Franchise Tax Board;
- one copy of the endorsed articles of incorporation;
- one copy of proposed bylaws; and
- any other required information and supporting documents.

If the articles of incorporation need to be amended, or if more information is required, the Franchise Tax Board will contact the officer or representative designated on form FTB 3500.

If the organization qualifies for exemption, the Franchise Tax Board will mail you a state exemption determination letter.

## B. Delayed Incorporation

1. To avoid paying the minimum franchise tax, you may delay incorporation and secure exemption prior to the filing of the articles of incorporation by mailing the items listed below directly to the Office of the Secretary of State:
  - the original and at least four copies of the proposed articles of incorporation;
  - a check payable to the Secretary of State for the filing fee;
  - a signed form FTB 3500 (original signature required);
  - one copy of the proposed by-laws;
  - all the required information and supporting data; and
  - the \$25 application fee, payable to the Franchise Tax Board.
2. If the proposed articles satisfy the requirements of the Nonprofit Corporation Law, the Secretary of State will notify you by letter and forward to the Franchise Tax Board one copy of the proposed articles, form FTB 3500, all supporting documents and application fee.

If more information is needed, or if the articles need to be revised, the Franchise Tax Board will contact the officer or representative designated on the application form.

If the organization qualifies for exemption, the Franchise Tax Board will mail a state exemption determination letter to you and the Office of the Secretary of State. The Secretary of State will then file (endorse) the articles.

## C. Previous Incorporation

If the organization is already incorporated, follow the instructions for immediate incorporation (Instruction D (A)(2)).

## E Qualifying in California

If the organization is incorporated in another state or country, it is considered to be a "foreign corporation."

To qualify the foreign nonprofit, nonstock corporation for exemption in California, you must

comply with the Secretary of State's qualification procedures and the Franchise Tax Board's requirements for exemption.

There are two methods by which nonprofit, nonstock foreign corporations may qualify in California:

- immediate qualification; or
- delayed qualification.

The instructions for immediate or delayed qualification are the same as those for the immediate or delayed incorporation of organizations incorporating in California, except for the documents required.

## A. Immediate Qualification

1. Follow the instructions for immediate incorporation (Instruction D(A)), but include the following documents, in lieu of the articles of incorporation, in your mailing to the Office of the Secretary of State:
  - a certificate of good standing from the state or country having custody of the original articles (the certificate must indicate that the corporation is a nonprofit, nonstock corporation); and
  - a completed Statement and Designation by Foreign Corporation (a form available on request from the Office of the Secretary of State).

If the Secretary of State is satisfied that the organization meets the requirements of the California Corporation Code, the Secretary of State will file the original Statement and Designation, endorse any extra copies and issue a Certificate of Qualification to you.

2. In addition to the documents referred to in Instruction D(A)(2), you must include the following documents in your mailing to the Franchise Tax Board:
  - an endorsed copy of the Statement and Designation by Foreign Corporation;
  - a copy of the federal exemption determination letter; and
  - copies of the federal information returns for the last three years of operation. This will satisfy the financial data requirements.

If the organization qualifies for exemption, the Franchise Tax Board will mail you a state exemption determination letter.

## B. Delayed Qualification

1. Follow the instructions for delayed incorporation (Instruction D(B)), but include the following documents, in lieu of the articles of incorporation, in your mailing to the Office of the Secretary of State:
  - a certificate of good standing as described in Instruction E(A)(1);
  - a completed Statement and Designation by Foreign Corporation

(available on request from the Office of the Secretary of State);

- a copy of the federal exemption determination letter; and
- copies of the federal information returns for the last three years of operation.

2. The Secretary of State will review these documents for compliance. If they are acceptable, the Secretary of State will forward the application and applicable attachments to the Franchise Tax Board.

If the organization qualifies for exemption, the Franchise Tax Board will mail a state exemption determination letter to you with a copy to the Office of the Secretary of State, which will file the Statement and Designation by Foreign Corporation, endorse any extra copies and issue a Certificate of Qualification to you.

## C. Previous Qualification

If you had previously qualified through the Secretary of State before applying for exemption, follow the instructions for immediate qualification (Instruction E(A)(2)).

## F Group Exemption Application

A parent organization desiring group exemption for its California unincorporated subordinates must first establish its own exempt status.

It must file a separate form FTB 3500 for a group exemption with a cover letter stating that the subordinates are affiliated and are subject to the parent's general supervision and control.

The parent must also furnish this additional information with form FTB 3500:

- a sample copy of a uniform charter;
- an affirmation that the subordinates are operating in accordance with their stated purposes;
- a statement that the subordinates have furnished written authorization to be included with the group exemption application; and
- a list of California subordinates, their organization numbers and current addresses.

## G Unincorporated Associations or Trusts

For unincorporated associations or trusts, mail the items listed below directly to:

Franchise Tax Board  
Exempt Unit  
P.O. Box 942857  
Sacramento, CA 94257-4041

- a signed form FTB 3500 (original signature required);
- one copy of the proposed bylaws and/or constitution, articles of association or trust instrument;

- all required information and supporting documents; and
- the \$25 application fee, payable to Franchise Tax Board.

## H Retroactive Exempt Status

The Franchise Tax Board may grant exempt status retroactively for periods in which the organization substantiates that it was organized and operated for exempt purposes.

## I Sample Articles and Instructions

The sample articles of incorporation on page 14 are structured to meet the Secretary of State's requirements for incorporating and the requirements necessary for exemption. Organizations incorporating as nonprofit must do so under one of the three sections of the Nonprofit Corporation Law (see Corporation Code Sections 5110, 7110 and 9110).

If an unincorporated association is being incorporated, an article (like the following) must be added: "The name of the existing unincorporated association now being incorporated by the filing of the articles is (state name of your association)." Attach an affidavit of subscribing persons to the articles. See Corporation Code Sections 5121, 7121 and 9121.

The details of the internal operations of the organization should be covered in the bylaws.

### Organizations described in R&TC Section 23701d

- Exclusively religious organizations described in R&TC Section 23701d should format their articles after Sample Articles A.
- Other organizations described in R&TC Section 23701d (other than exclusively religious organizations) should structure their articles after Sample Articles B.

**Article III** - Complete the sentence by describing the specific and primary purpose of the organization. Limit it to those activities permitted by the R&TC section under which the exemption is desired.

**Article V, A** - Complete the blank spaces provided in Sample Articles B to describe the specific and primary purposes permitted by the applicable R&TC section (i.e., charitable, educational, scientific, etc.).

**Article VI** - Do not alter the language in Article VI of Sample Articles A.

Fill in the two blank spaces provided in Sample Articles B with the organization's purpose and the type of organization to which its assets will be distributed upon dissolution.

Organizations described in R&TC Section 23701d wishing to distribute their assets to a specific organization must provide for an alternate distributee, in case that organization is not in existence or is not exempt under IRC Section 501(c)(3) at the time of distribution. The exception to this rule is where the assets are to be distributed to federal, state, county or city government for public purposes.

Where designation of a specific distributee is desired and the welfare exemption from property taxation will be claimed, you may use this sample dedication/dissolution clause to replace the second sentence in Article V:

"Upon the dissolution or winding up of this corporation, its assets remaining after the payment of, or provision for the payment of, all debts and liabilities of this corporation, shall be distributed to XYZ corporation if it is then in existence and organized and operated exclusively for charitable and/or religious purposes and exempt under Section 501(c)(3) of the Internal Revenue Code, but if not then in existence or so organized and operated or exempt, to another organization which is organized and operated exclusively for charitable and/or religious purposes and which has established its tax exempt status under Section 501(c)(3) of the Internal Revenue Code."

Organizations described in R&TC Section 23701f that are exclusively for the promotion of social welfare (IRC Section 501(c)(4)) should format their articles after Sample Articles B with these substitutions:

Article II: - change "charitable" to:	Public
Article V, A: - fill in blank space with: - change 501(c)(3) to:	Social Welfare 501(c)(4)
Article V, B:	Omit
Article VI: - fill in blank spaces with: - change 501(c)(3) to:	Social Welfare 501(c)(4)

**Article VI** - R&TC Section 23701f contains a requirement that the assets of the organizations must be dedicated to exempt purposes.

The sample dedication/dissolution clause for Article VI under the section "Organizations Described in R&TC Section 23701d" may be used for this purpose, but should be limited to "charitable" or "social welfare" as shown in the decision table above.

Organizations described in R&TC Section 23701u, public facility financing corporations, use Sample Articles B with these changes:

Article II: - change "charitable" to:	Public
Article V, A: - change 501(c)(3) to:	501(c)(4)
Article V, B:	Omit
Article VI: - fill in blank spaces with: - change 501(c)(3) to:	Public R&TC Section 23701d, 23701f or 23701u or IRC Section 501(c)(3) or 501(c)(4)

All other organizations applying for exemption under R&TC Sections other than 23701d, 23701f or 23701u should structure their articles after Sample Articles C.

**Article III** - Enter in the blank space the specific and primary purpose of the organization. Limit it to those activities permitted by the

R&TC section under which the exemption is desired.

**Note:** These articles are not required to have a clause dedicating assets to charitable purposes. However, any organization may elect to distribute its assets to charitable organizations upon dissolution without restricting the assets to such use during the organization's existence.

Veterans' organizations are entitled to the welfare (property tax) exemption, but must dedicate their assets to "charitable" purposes.

**Exception** - Organizations applying for exemption under R&TC Section 23701g as social or recreation clubs must be operated for the enjoyment of members and supported primarily by dues, fees and assessments paid by members.

Any income from nonmember sources may be taxable as unrelated business income and, if substantial, the club may lose its exempt status.

A social club may have a fund-raising event for a charitable organization and pay over the net proceeds to the charity without losing its exempt status. Social clubs contemplating fund-raising drives should include this clause:

"If this organization holds any event(s) to which the general public are invited to observe or participate in for a fee, the income from the general public, less a proportional share of the expenses which will not benefit members, will be paid over to an organization, which is exempt from income tax under Section 501(c)(3) of the Internal Revenue Code, on an annual basis."

### Unincorporated association creating document

An unincorporated association must have a creating document that meets certain minimum requirements. The document must contain:

- the name of the organization;
- the specific and primary purpose of the organization; and
- a statement indicating that the organization is organized for nonprofit purposes and that the individual members will not derive profit from the organization.

The sample unincorporated association creating documents on page 15 are structured to meet these requirements.

Qualification for exemption under R&TC Section 23701d requires a political limitation clause and a dedication/dissolution clause. See Sample A on page 15.

**Note:** Only R&TC Section 23701d organizations require a political limitation clause.

Qualification for exemption under R&TC Section 23701f requires a dedication/dissolution clause. See Sample B on page 15.

**Sample Articles A**  
(nonprofit **RELIGIOUS** corporation)  
**ARTICLES OF INCORPORATION OF**  
(CORPORATION NAME)

I

The name of this corporation is \_\_\_\_\_

II

This corporation is a religious corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Religious Corporation Law exclusively for religious purposes.

III

The specific purpose of this corporation is to \_\_\_\_\_

IV

The name and address in the State of California of this corporation's initial agent for service of process is: \_\_\_\_\_

V

A. This corporation is organized and operated exclusively for religious purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

B. No substantial part of the activities of this corporation shall consist of carrying on propaganda, or otherwise attempting to influence legislation, and the corporation shall not participate or intervene in any political campaign (including the publishing or distribution of statements) on behalf of any candidate for public office.

VI

The property of this corporation is irrevocably dedicated to religious purposes and no part of the net income or assets of this corporation shall ever inure to the benefit of any director, officer or member thereof or to the benefit of any private person. Upon the dissolution or winding up of the corporation, its assets remaining after payment, or provision for payment, of all debts and liabilities of this corporation shall be distributed to a nonprofit fund, foundation or corporation which is organized and operated exclusively for religious purposes and which has established its tax exempt status under Section 501(c)(3) of the Internal Revenue Code.

DATE \_\_\_\_\_

\_\_\_\_\_  
(Signature of Incorporator)

\_\_\_\_\_  
(Type name of Incorporator)

I hereby declare that I am the person who executed the foregoing Articles of Incorporation, which execution is my act and deed.

\_\_\_\_\_  
(Signature of Incorporator)

**Sample Articles B**  
(nonprofit **PUBLIC BENEFIT** corporation)  
**ARTICLES OF INCORPORATION OF**  
(CORPORATION NAME)

I

The name of this corporation is \_\_\_\_\_

II

This corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Public Benefit Corporation Law for charitable purposes.

III

The specific purpose of this corporation is to \_\_\_\_\_

IV

The name and address in the State of California of this corporation's initial agent for service of process is: \_\_\_\_\_

**Sample Articles B (continued)**

V

A. This corporation is organized and operated exclusively for \_\_\_\_\_ purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

B. No substantial part of the activities of this corporation shall consist of carrying on propaganda, or otherwise attempting to influence legislation, and the corporation shall not participate or intervene in any political campaign (including the publishing or distribution of statements) on behalf of any candidate for public office.

VI

The property of this corporation is irrevocably dedicated to \_\_\_\_\_ purposes and no part of the net income or assets of this corporation shall ever inure to the benefit of any director, officer or member thereof or to the benefit of any private person. Upon the dissolution or winding up of the corporation, its assets remaining after payment, or provision for payment, of all debts and liabilities of this corporation shall be distributed to a nonprofit fund, foundation or corporation which is organized and operated exclusively for \_\_\_\_\_ purposes and which has established its tax exempt status under Section 501(c)(3) of the Internal Revenue Code.

DATE \_\_\_\_\_

\_\_\_\_\_  
(Signature of Incorporator)

\_\_\_\_\_  
(Type name of Incorporator)

I hereby declare that I am the person who executed the foregoing Articles of Incorporation, which execution is my act and deed.

\_\_\_\_\_  
(Signature of Incorporator)

**Sample Articles C**  
(nonprofit **MUTUAL BENEFIT** corporation)  
**ARTICLES OF INCORPORATION OF**  
(CORPORATION NAME)

I

The name of this corporation is \_\_\_\_\_

II

This corporation is a nonprofit mutual benefit corporation organized under the Nonprofit Mutual Benefit Corporation Law. The purpose of this corporation is to engage in any lawful act or activity for which a corporation may be organized under such law.

III

The specific purpose of this corporation is to \_\_\_\_\_

IV

The name and address in the State of California of this corporation's initial agent for service of process is: \_\_\_\_\_

V

Notwithstanding any of the above statements of purposes and powers, this corporation shall not, except to an insubstantial degree, engage in any activities or exercise any powers that are not in furtherance of the specific purpose of this corporation.

DATE \_\_\_\_\_

\_\_\_\_\_  
(Signature of Incorporator)

\_\_\_\_\_  
(Type name of Incorporator)

I hereby declare that I am the person who executed the foregoing Articles of Incorporation, which execution is my act and deed.

\_\_\_\_\_  
(Signature of Incorporator)

Sample A  
Unincorporated Association  
Creating Document  
23701d

The creating document must contain:

1. The name of the organization.
2. The specific and primary purpose of the organization.
3. A statement indicating the organization is organized for nonprofit purposes and that the individual members will not derive profit therefrom.
4. A political limitation clause. The following is acceptable:  
No substantial part of the activities of this organization shall consist of carrying on propaganda, or otherwise attempting to influence legislation, and the organization shall not participate or intervene in any political campaign (including the publishing or distribution of statements) on behalf of any candidate for public office.

5. A dedication/dissolution clause. The following is acceptable:

The property of this organization is irrevocably dedicated to charitable purposes and no part of the net income or assets of this organization shall ever inure to the benefit of any director, officer or to the benefit of any private person.

Upon the dissolution or winding up of the organization, its assets remaining after payment, or provision for payment, of all debts and liabilities of this organization shall be distributed to a nonprofit fund, foundation or corporation which is organized and operated exclusively for charitable purposes and which has established its tax exempt status under Section 501(c)(3) of the Internal Revenue Code.

Sample B  
Unincorporated Association  
Creating Document  
23701f

The creating document must contain:

1. The name of the organization.
2. The specific and primary purpose of the organization.
3. A statement indicating the organization is organized for nonprofit purposes and that the individual members will not derive profit therefrom.
4. A dedication/dissolution clause. The following is acceptable:

The property of this organization is irrevocably dedicated to social welfare purposes and no part of the net income or assets of this organization shall ever inure to the benefit of any director, officer or to the benefit of any private person.

Upon the dissolution or winding up of the organization, its assets remaining after payment, or provision for payment, of all debts and liabilities of this organization shall be distributed to a nonprofit fund, foundation or corporation which is organized and operated exclusively for social welfare purposes and which has established its tax exempt status under Section 501(c)(4) of the Internal Revenue Code.

Sample C  
Unincorporated Association  
Creating Document  
All Others

The creating document must contain:

1. The name of the organization.
2. The specific and primary purpose of the organization.
3. A statement indicating the organization is organized for nonprofit purposes and that the individual members will not derive profit from the organization. The following is suggested:

The organization does not contemplate pecuniary gain or profit to the members thereof and is organized for nonprofit purposes.

# How to Get California Tax Information

(Keep this page for future use.)

## F.A.S.T. Toll-Free Phone Service

Fast Answers about State Taxes is the F.A.S.T. toll-free phone service you can use to get recorded answers to many of your questions about California taxes. You can also order California tax forms by calling the F.A.S.T. number. You must have a push-button tone phone to use F.A.S.T. If you have a rotary dial or other non-tone phone, see the "Regular Toll-Free Phone Service" information.

### When Is F.A.S.T. Available?

To answer your questions, F.A.S.T. is available 24 hours a day, seven days a week. To order forms or to find out about your tax refund, F.A.S.T. is available:

January 2 -  
June 30, 1993 . . . . . 6:00 a.m. to 10:00 p.m.  
Monday - Saturday  
July 1 -  
December 31, 1993 . . . . . 6:00 a.m. to 10:00 p.m.  
Monday - Friday

### How To Use F.A.S.T.

1. Have paper and pencil handy to take notes.
2. Call the F.A.S.T. toll-free number:  
From within the  
United States . . . . . 1-800-338-0505  
From outside the United States  
(not toll-free) . . . . . 1-916-854-6600
3. Follow the recorded instructions.

**To Get Information** — If you need an answer to any of the following questions, enter the correct code after you reach the F.A.S.T. number:

#### Code - Prefiling Assistance

- 715 - If my actual tax is less than the minimum franchise tax, what figure do I put on line 22 of Form 100?
- 717 - What are the tax rates for corporations?
- 718 - How do I get an extension of time to file?
- 722 - When do I have to file a short-period return?
- 730 - May I claim net operating losses in the first year?
- 731 - Are corporations allowed to use MACRS/ACRS or Section 179 expensing?
- 733 - Can the prepayment to the Secretary of State be applied to my last year of business?
- 734 - What is the difference between franchise tax and income tax?  
**S Corporations**
- 704 - Is an S corporation subject to the minimum franchise tax?
- 705 - Are S corporations required to file estimate payments?
- 706 - What forms do S corporations file?
- 707 - The tax for my S corporation is less than the minimum franchise tax. What figure do I put on line 21 of Form 100S?
- 708 - Where do S corporations make the state tax adjustment on Schedule K-1(100S)?  
**Exempt Organizations**
- 709 - How do I get tax exempt status?
- 710 - Does an exempt organization have to file Form 199?
- 735 - How can an exempt organization incorporate without paying corporation fees and costs?
- 736 - I have exempt status. Do I need to file Form 100 or Form 109 in addition to Form 199?

#### Minimum Tax and Estimate Tax

- 711 - Why can't I claim my prepayment tax as a credit or estimate payment on my return?
- 712 - What is the minimum franchise tax?
- 714 - I'm not doing business; do I have to pay the minimum franchise tax?
- 716 - When are my estimate payments due?  
**Billings and Miscellaneous Notices**
- 713 - Why do I have an additional \$200 adjustment on my corporation return?
- 723 - I received a bill for \$250. What is this for?
- 728 - Why was my corporation suspended?
- 729 - Why is my subsidiary getting a request for a return when we file a combined report?  
**Tax Clearance**
- 724 - How do I dissolve my corporation?
- 725 - What do I have to do to get a tax clearance?
- 726 - How long will it take to get a tax clearance certificate?
- 727 - My corporation was suspended/forfeited. Can I still get a tax clearance?  
**Miscellaneous**
- 700 - Who do I need to contact to start a business?
- 701 - I need a state ID number for my business. Who do I contact?
- 702 - Can you send me an employer's tax guide?
- 703 - How do I incorporate?
- 719 - How do I properly identify my corporation when dealing with the Franchise Tax Board?
- 720 - How do I change my corporation name?
- 721 - How do I change my accounting period?
- 732 - What is the Water's-Edge Election?
- 737 - Where do I send my payment to?
- 738 - What is electronic funds transfer?

## Regular Toll-Free Phone Service

Our regular toll-free phone service is available 7:00 a.m. to 8:00 p.m. Monday- Friday beginning January 4, 1993. The best time to call is before 10:00 a.m. and between 6:00 p.m. and 8:00 p.m. Our service is also available on Saturday, April 3 and April 10 from 8:00 a.m. to 5:00 p.m. After April 15 service is available between 8:00 a.m. and 5:00 p.m.

From within the United States,  
call . . . . . 1-800-852-5711  
From outside the United States,  
call (not toll-free) . . . . . 1-916-854-6500  
For federal tax questions, call the IRS.

### Hearing Impaired

Toll-free phone service is provided for the hearing impaired with a Telecommunications Device (TDD). Call 1-800-822-6268. The Franchise Tax Board will also accept calls for, and relay messages to, any California state agency.

## Tax Forms

**In person** — You can get California tax forms at the Franchise Tax Board district offices listed to the right. Many libraries and some quick print businesses have forms for you to photocopy (you may have to pay a nominal fee). Note that employees at libraries and quick print businesses cannot provide tax information or assistance.

**By phone** — Call our toll-free phone number listed under "Regular Toll-Free Phone Service" to get the California tax forms you need.

**By mail** — We will send you two copies of each tax form and one copy of each set of instructions

you order. Please allow two weeks to receive your order.

Address your envelope to:

Franchise Tax Board  
Tax Forms Request Unit  
P.O. Box 307  
Rancho Cordova, CA 95741-0307

## In Person

Addresses of Franchise Tax Board district offices are shown below. You can get information, California tax forms, and you can resolve problems on your account. Our district offices are open Monday through Friday from 8:00 a.m. to 5:00 p.m.

### California Offices

Bakersfield . . . . .	1430 Truxtun Avenue
Fresno . . . . .	2550 Mariposa Street
Long Beach . . . . .	245 West Broadway
Los Angeles . . . . .	300 South Spring Street
Oakland . . . . .	1970 Broadway
Sacramento . . . . .	Office to be relocated*
San Bernardino . . . . .	215 North D Street
San Diego . . . . .	5353 Mission Center Road
San Francisco . . . . .	345 Larkin Street
San Jose . . . . .	96 North Third Street
Santa Ana . . . . .	600 West Santa Ana Boulevard
Santa Barbara . . . . .	360 South Hope Avenue
Santa Rosa . . . . .	50 D Street
Stockton . . . . .	31 East Channel Street
Van Nuys . . . . .	6150 Van Nuys Boulevard
West Covina . . . . .	100 North Barranca Street

\*For address information call our F.A.S.T. toll-free phone number at 1-800-338-0505 (enter code 214 after you reach the number).

### Out of State Offices

Chicago, Illinois . . . . .	150 North Wacker Drive
Houston, Texas . . . . .	1415 Louisiana, Suite 1515
Manhasset, New York . . . . .	1129 Northern Blvd.
New York, NY . . . . .	1212 Avenue of the Americas

## Letters

We can serve you quickly if you call us or visit a district office for information to complete your California tax return. However, you may want to write to us if you are replying to a notice we sent you, or to get a reply in writing.

If you write to us, be sure to include the California corporation number or FEIN and your daytime and evening telephone numbers in your letter. Send your letter to:

Franchise Tax Board  
P.O. Box 942857  
Sacramento, CA 94257-0540.

We will acknowledge your letter within six to eight weeks. In some cases we may need to call you for additional information.

## Your Rights As A Taxpayer

Our goal at the Franchise Tax Board is to make certain that your rights are protected, so that you will have the highest confidence in the integrity, efficiency and fairness of our state tax system. FTB Pub. 4058, California Taxpayers' Bill of Rights, includes information on your rights as a California taxpayer, the Taxpayers' Rights Advocate Program and how you can request written advice from the Franchise Tax Board on whether a particular transaction is taxable. You can order FTB Pub. 4058 by writing or calling the Franchise Tax Board using the address or telephone numbers listed on this page.



Secretary of State

1230 J Street  
Sacramento, California 95814

CORPORATE DIVISION

Legal Review	(916) 445-0620
Certification	(916) 445-1430
Status	(916) 445-2900
Name Availability	(916) 322-2387
Statement of Officers	(916) 445-2020

## ORGANIZATION OF CALIFORNIA STOCK CORPORATIONS

Business corporations authorized to issue stock, but not including such special types as cooperatives, credit unions, etc., are organized under the General Corporation Law, and particularly Title 1, Division 1, Chapter 2, California Corporations Code.

Sections 200-202, Corporations Code, outline the minimum requirements as to the contents of the Articles of Incorporation.

This office does not have nor prescribe any particular forms for Articles of Incorporation, nor does it have copies of the above-mentioned law for distribution. A model of Articles of Incorporation meeting minimum statutory requirements is printed on the reverse side of this information sheet and may be used as a guide for typing Articles of Incorporation.

The designated agent for service of process must agree to accept process on behalf of the corporate entity.

THE SECRETARY OF STATE'S FEE FOR FILING STOCK ARTICLES OF INCORPORATION IS \$100.00.

In addition to the above filing fee, the \$800.00 minimum franchise tax must be sent to this office with the Articles of Incorporation, and may be included with the filing fee in a single remittance in the amount of \$900.00, made payable to this office.

The Secretary of State will certify two copies of the filed Articles of Incorporation, without charge, provided that the copies are submitted to the Secretary of State along with the original to be filed.

If you wish any additional copies certified, submitted along with the original, the cost will be \$8.00 for each copy requested.

No shares of stock may be sold or issued until the corporation has complied with the Corporate Securities Law, which law is administered by the Commissioner of Corporations.

NOTE: A \$15.00 special handling fee is applicable for expedited processing of documents delivered in person, "over-the-counter" for each submittal. The \$15.00 special handling fee is retained-DOCUMENTS REJECTED OR FILED.

(OVER FOR SAMPLE)



ARTICLES OF INCORPORATION

I

The name of this corporation is \_\_\_\_\_

II

The purpose of the corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of California other than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the California Corporations Code.

III

The name and address in the State of California of this corporation's initial agent for service of process is:

Name \_\_\_\_\_

STREET Address \_\_\_\_\_

City \_\_\_\_\_

State CALIFORNIA Zip \_\_\_\_\_

IV

This corporation is authorized to issue only one class of shares of stock; and the total number of shares which this corporation is authorized to issue is \_\_\_\_\_.

(Signature of Incorporator)

(Typed Name of Incorporator)

(OVER FOR INFORMATION)

## **APPENDIX F - NEW MEXICO FILING INSTRUCTIONS**

DOMESTIC NONPROFIT INCORPORATION

DOMESTIC NONPROFIT INCORPORATION

STATE CORPORATION COMMISSION  
CORPORATION DEPARTMENT  
P.O. DRAWER 1269  
SANTA FE, NEW MEXICO 87504-1269  
(505) 827-4511

REQUIREMENTS FOR INCORPORATING A NEW MEXICO CORPORATION FOR NONPROFIT

The following is a schedule of the fees and requirements as per the New Mexico Nonprofit Corporation Act (53-8-1 to 53-8-99):

53-8-85. Schedule of fees. Payable to the State Corporation Commission

Articles of Incorporation.....\$25.00  
By-Laws (if any)..... 10.00  
Certified Copies (if requested)..... 10.00  
(Reproduction copies if provided by the commission  
to be certified add \$1.00 per page reproduced,  
minimum \$5.00)

53-2-10. Private Remedy.

- A. Any person who suffers any loss of money or property as a result of being designated a director of a corporation without giving his consent may bring an action against the designating corporation to recover actual damages or one thousand dollars (\$1,000) whichever is greater.
- B. The court may award attorneys' fees and costs to the party injured as a result of the director designation if he prevails. The court may award attorneys' fees to the corporation charged if the court finds that the action brought against the corporation was groundless.
- C. The relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state.

53-8-18. Number and Election of Directors.

The number of directors of a domestic nonprofit corporation shall be not less than three.

53-8-30. Incorporators.

One (1) or more persons, including profit and nonprofit corporations, may incorporate a corporation by signing and delivering articles of incorporation in duplicate to the corporation commission.

## 53-8-31. Articles of Incorporation.

## A. The Articles of Incorporation shall set forth:

1. the name of the corporation;
  2. the period of duration, which may be perpetual;
  3. the purpose or purposes for which the corporation is organized;
  4. any provisions, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation for the regulation of the internal affairs of the corporation, including any provision for distribution of assets on dissolution or final liquidation; (Note 1)
  5. the address of its initial registered office, and the name of its initial registered agent as such address; (Notes 2 and 3)
  6. the number of directors constituting the initial board of directors and names and addresses of the persons who are to serve as the initial directors who have consented to serve as a director; and (Note 2)
  7. the name and address of each incorporator. (Notes 2 and 4)
- B. It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in the Nonprofit Corporation Act (this article).
- C. Unless the articles of incorporation provide that a change in the number of directors shall be made only by amendment to the articles of incorporation, a change in the number of directors made by amendment to the bylaws shall be controlling. In all other cases, whenever a provision of the articles of incorporation shall be controlling.

## 53-8-32. Filing of Articles of Incorporation.

Duplicate Originals of the Articles of Incorporation and an Affidavit executed by the designated registered agent in which he acknowledges his acceptance of the appointment by the filing corporation as its registered agent, if the agent is an individual, or an affidavit executed by the president or vice-president of a corporation which is the designated registered agent in which the officer acknowledges the corporation's acceptance of the appointment by the filing corporation as its registered agent, if the agent is a corporation shall be delivered to the corporation commission.

## Notes:

1. Article Fourth shall set forth any provisions, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation for the regulation of the internal affairs of the corporation, including any provision for distribution of assets on dissolution and final liquidation.
2. Address means a recitation of the mailing address or post office box number and the street address, if within a municipality, or a description of the geographical location if outside a municipality.
3. Each corporation shall have and continuously maintain in this state:
  - A. a registered agent, which agent may be, but need not be, the same as its place of business; and
  - B. a registered agent, which agent may be either an individual resident in this state whose business office is identical with the registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this state, having a business office identical with the registered office (the corporation cannot be its own agent).

4. Duplicate original means a document which is signed or executed in duplicate by the incorporators.
5. 53-8-12. Bylaws.
  - A. The initial bylaws of a corporation shall be adopted by its board of directors. The power to alter, amend or repeal the bylaws or adopt new bylaws shall be vested in the board of directors unless otherwise provided in the articles of incorporation or the bylaws. The bylaws may contain any provisions for the regulation and management of the affairs of a corporation not inconsistent with law or the articles of incorporation.
  - B. The initial bylaws and any subsequent bylaws whether by amendment, repeal or new adoption shall be executed by the corporation's chief officer and by its secretary or assistant secretary and filed with the commission. Such bylaws shall be void until filed with the commission.
6. 53-8-34. Organization meetings.
  - A. An organization meeting of the board of directors named in the articles of incorporation shall be held, either within or without New Mexico, at the call of majority of the incorporators, for the purpose of adopting bylaws, electing officers and the transaction of such other business as may come before the meeting. The incorporators calling the meeting shall give at least three days' notice thereof by mail to each director so named. The notice shall state the time and place of the meeting. The notice shall be deemed to be delivered when deposited in the United States mail addressed to the director at his address as it appears on the records of the corporation, with postage thereon prepaid.
  - B. A first meeting of the members may be held at the call of the directors, or a majority of them, upon at least three days' notice, for the purposes stated in the notice of the meeting.
7. DOCUMENTS SHALL BE TYPEWRITTEN OR PRINTED WITH BLACK PRINT ON 8-1/2" X 11" SIZE WHITE PAPER AND MUST BE LEGIBLE FOR MICROFILMING.
8. "DUPLICATE ORIGINAL" MEANS A DOCUMENT WHICH IS SIGNED OR EXECUTED IN DUPLICATE (TWO SETS WITH ORIGINAL SIGNATURES).
9. ATTACHMENTS SHALL MAKE REFERENCE TO THE SPECIFIC ARTICLE(S) SET FORTH WITHIN THE ARTICLES OF INCORPORATION.
10. REGULATIONS REQUIRE PAYMENT BY CHECK OR CASHIER'S CHECK, CHECK MUST BE MADE PAYABLE TO THE STATE CORPORATION COMMISSION.
11. THE CORPORATE NAME IS NOT APPROVED UNTIL THE DOCUMENTS HAVE BEEN APPROVED FOR STATUTORY COMPLIANCE. A VERBAL INQUIRY DOES NOT GUARANTEE NAME AVAILABILITY.
12. AS PROVIDED IN SECTION 53-8-91 OF THE NONPROFIT CORPORATION ACT, THIS COMMISSION HAS 15 WORKING DAYS FROM RECEIPT OF DOCUMENTS TO DISAPPROVE ANY DOCUMENT(S) FILED.
13. CONTACT THIS COMMISSION ON ANY CHANGE AFFECTING YOUR CORPORATE STATUS WITH THIS COMMISSION.

ARTICLES OF INCORPORATION  
OF

---

The undersigned, acting as incorporator(s) of a corporation under the New Mexico Nonprofit Corporation Act 53-8-1 to 53-8-99 NMSA 1978), adopt(s) the following Articles of Incorporation for such corporation:

FIRST: The corporate name of the corporation is \_\_\_\_\_

SECOND: The period of its duration is \_\_\_\_\_

THIRD: The purpose or purposes for which the corporation is organized are:

FOURTH: (If dissolution provision is not set forth within these Articles of Incorporation, then powers enumerated under the Nonprofit Corporation Act will prevail. Attach schedule, if needed.)

FIFTH: The name of its initial registered agent and the street address and city of the initial registered office in New Mexico are:

NAME

ADDRESS

(Post office box unacceptable, unless  
geographical location is given)

SIXTH: The number of directors constituting the initial board of directors is \_\_\_\_\_, and the names and addresses of the persons who have consent to serve as the initial directors are:  
(ATTACH SCHEDULE, IF NEEDED)

SEVENTH: The name and address of each incorporator:  
(ATTACH SCHEDULE, IF NEEDED)

NAME

ADDRESS

DATED: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
(Signature of Incorporator(s))

(FILE DUPLICATE ORIGINALS)

**ARTICLES OF INCORPORATION  
OF**

---

The undersigned, acting as incorporator(s) of a corporation under the New Mexico Nonprofit Corporation Act 53-8-1 to 53-8-99 NMSA 1978), adopt(s) the following Articles of Incorporation for such corporation:

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FOURTH: (If dissolution provision is not set forth within these Articles of Incorporation, then powers enumerated under the Nonprofit Corporation Act will prevail. Attach schedule, if needed.)



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ADDRESS

(Post office box unacceptable, unless  
geographical location is given)

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(ATTACH SCHEDULE, IF NEEDED)

SEVENTH: The name and address of each incorporator:  
(ATTACH SCHEDULE, IF NEEDED)

NAME

ADDRESS

DATED: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
(Signature of Incorporator(s))

(FILE DUPLICATE ORIGINALS)

ARTICLES OF INCORPORATION  
OF

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The undersigned, acting as incorporator(s) of a corporation under the New Mexico Nonprofit Corporation Act 53-8-1 to 53-8-99 NMSA 1978), adopt(s) the following Articles of Incorporation for such corporation:

FIRST: The corporate name of the corporation is \_\_\_\_\_

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FOURTH: (If dissolution provision is not set forth within these Articles of Incorporation, then powers enumerated under the Nonprofit Corporation Act will prevail. Attach schedule, if needed.)

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(Post office box unacceptable, unless  
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(ATTACH SCHEDULE, IF NEEDED)

SEVENTH: The name and address of each incorporator:  
(ATTACH SCHEDULE, IF NEEDED)

NAME

ADDRESS

DATED: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
(Signature of Incorporator(s))

(FILE DUPLICATE ORIGINALS)

**AFFIDAVIT OF ACCEPTANCE OF APPOINTMENT  
BY DESIGNATED INITIAL REGISTERED AGENT**

TO THE STATE CORPORATION COMMISSION  
STATE OF NEW MEXICO

STATE OF \_\_\_\_\_)

COUNTY OF \_\_\_\_\_)

On this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, before me a Notary Public  
in and for the State and County aforesaid, personally appeared \_\_\_\_\_  
\_\_\_\_\_, who is to me known to be the person and who, being by me duly  
sworn, acknowledged to me that he/she does hereby accept his/her appointment  
as the Initial Registered Agent of \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

the corporation which is named in the annexed Articles of Incorporation, and  
which is applying for a Certificate of Incorporation pursuant to the  
provisions of the Nonprofit Corporation Act of the State of New Mexico.

\_\_\_\_\_  
Registered Agent's Signature (Individual)

OR

\_\_\_\_\_  
Registered Agent's Name (Corporation)

By \_\_\_\_\_  
Signature of Agent's President/Vice-President

SUBSCRIBED AND SWORN to before me on \_\_\_\_\_ by \_\_\_\_\_  
\_\_\_\_\_ to me known to be the person described in and who executed the  
foregoing instrument and acknowledged that he/she executed the same as his/her  
free act and deed.

\_\_\_\_\_  
NOTARY PUBLIC

MY COMMISSION EXPIRES: \_\_\_\_\_

(NOTARY SEAL)

**AFFIDAVIT OF ACCEPTANCE OF APPOINTMENT  
BY DESIGNATED INITIAL REGISTERED AGENT**

TO THE STATE CORPORATION COMMISSION  
STATE OF NEW MEXICO

STATE OF \_\_\_\_\_)

COUNTY OF \_\_\_\_\_)

On this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, before me a Notary Public  
in and for the State and County aforesaid, personally appeared \_\_\_\_\_  
\_\_\_\_\_, who is to me known to be the person and who, being by me duly  
sworn, acknowledged to me that he/she does hereby accept his/her appointment  
as the Initial Registered Agent of \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

the corporation which is named in the annexed Articles of Incorporation, and  
which is applying for a Certificate of Incorporation pursuant to the  
provisions of the Nonprofit Corporation Act of the State of New Mexico.

\_\_\_\_\_  
Registered Agent's Signature (Individual)

OR

\_\_\_\_\_  
Registered Agent's Name (Corporation)

By \_\_\_\_\_  
Signature of Agent's President/Vice-President

SUBSCRIBED AND SWORN to before me on \_\_\_\_\_ by \_\_\_\_\_  
\_\_\_\_\_ to me known to be the person described in and who executed the  
foregoing instrument and acknowledged that he/she executed the same as his/her  
free act and deed.

\_\_\_\_\_  
NOTARY PUBLIC

MY COMMISSION EXPIRES: \_\_\_\_\_

(NOTARY SEAL)

AFFIDAVIT OF ACCEPTANCE OF APPOINTMENT  
BY DESIGNATED INITIAL REGISTERED AGENT

TO THE STATE CORPORATION COMMISSION  
STATE OF NEW MEXICO

STATE OF \_\_\_\_\_)

COUNTY OF \_\_\_\_\_)

On this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, before me a Notary Public  
in and for the State and County aforesaid, personally appeared \_\_\_\_\_  
\_\_\_\_\_, who is to me known to be the person and who, being by me duly  
sworn, acknowledged to me that he/she does hereby accept his/her appointment  
as the Initial Registered Agent of \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

the corporation which is named in the annexed Articles of Incorporation, and  
which is applying for a Certificate of Incorporation pursuant to the  
provisions of the Nonprofit Corporation Act of the State of New Mexico.

\_\_\_\_\_  
Registered Agent's Signature (Individual)

OR

\_\_\_\_\_  
Registered Agent's Name (Corporation)

By \_\_\_\_\_  
Signature of Agent's President/Vice-President

SUBSCRIBED AND SWORN to before me on \_\_\_\_\_ by \_\_\_\_\_  
\_\_\_\_\_ to me known to be the person described in and who executed the  
foregoing instrument and acknowledged that he/she executed the same as his/her  
free act and deed.

\_\_\_\_\_  
NOTARY PUBLIC

MY COMMISSION EXPIRES: \_\_\_\_\_

(NOTARY SEAL)

DOMESTIC PROFIT INCORPORATION

DOMESTIC PROFIT INCORPORATION

STATE CORPORATION COMMISSION  
CORPORATION DEPARTMENT  
P.O. DRAWER 1269  
SANTA FE, NEW MEXICO 87504-1269  
(505) 827-4511

REQUIREMENTS FOR INCORPORATING A NEW MEXICO CORPORATION FOR PROFIT

The following is a schedule of the fees and requirements as per the New Mexico Business Corporation Act. (53-11-1 to 53-18-12, NMSA 1978):

53-2-1 Schedule of fees. (CHECK PAYABLE TO STATE CORPORATION COMMISSION)

ARTICLES OF INCORPORATION.....One dollar (\$1.00) for each ONE THOUSAND SHARES of the total amount of authorized shares but in no case less than \$100.00 or more than \$5,000.

CERTIFIED COPY, if requested, fee of \$1.00 per page certified, minimum \$10.00. (Reproduction copies, if reproduced by the commission, to be certified add \$1.00 per page to be reproduced.) In addition a fee of \$25 for certification if the commission provides the documents to be certified. Normal processing for certification will be a complete set unless requested differently by requesting party.

53-2-10. Private Remedy.

- A. Any person who suffers any loss of money or property as a result of being designated a director of a corporation without giving his consent may bring an action against the designating corporation to recover actual damages or one thousand dollars (\$1,000) whichever is greater.
- B. The court may award attorneys' fees and costs to the party injured as a result of the director designation if he prevails. The court may award attorneys' fees to the corporation charged if the court finds that the action brought against the corporation is groundless.
- C. The relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state.

53-11-7. Corporate Name.

Requires that the corporate name shall contain the separate word "corporation", "company", "incorporated", or "limited" or shall contain a separate abbreviation of one of these words.

53-11-36. Number and Election of Directors.

Requires that the number of directors of a domestic profit corporation shall be one or more members.

53-12-1. Incorporators.

One or more persons, or a domestic or foreign corporation, may act as incorporator or incorporators of a corporation by signing and delivering in duplicate to the Commission Articles of Incorporation for the corporation.

NMSCC-CD  
DPR-NC  
(REV 6/93)

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53-12-2. Articles of Incorporation.

A. The Articles of Incorporation shall set forth:

- (1) the name of the corporation; (Note 6)
- (2) the period of duration, if other than perpetual;
- (3) the purpose or purposes for which the corporation is organized, which may include the transaction of any lawful business for which corporations may be incorporated under the Business Corporation Act; (Note 1)
- (4) the aggregate number of shares which the corporation shall have authority to issue and, if the shares are to be divided into classes, the number of shares of each class; (Note 2)
- (5) if the shares are to be divided into classes, the designation of each class;
- (6) if the corporation is to issue the shares of any preferred or special class in series, then the designation of each series and a statement of the variations in the relative rights and preferences as between series insofar as they are to be fixed in the articles of incorporation, and a statement of any authority to be vested in the board of directors to establish series and fix and determine the variations in the relative rights and preferences as between series;
- (7) any provisions limiting or denying to shareholders the pre-emptive right to acquire unissued shares of securities convertible into such shares or carrying a right to subscribe to or acquire shares;
- (8) the address of its initial registered office, and the name of its initial registered agent at the address; (Notes 3 and 5)
- (9) the number of directors constituting the initial board of directors and the names and addresses of the persons who are to serve as directors until the first annual meeting of shareholders or until their successors are elected and qualify; and (Note 3)
- (10) the name and address of each incorporator. (Note 3)

B. In addition to provisions required therein, the articles of incorporation may also contain provisions not inconsistent with the law regarding:

- (1) the direction of the management of the business and the regulation of the affairs of the corporation;
- (2) the definition, limitation and regulation of the powers of the corporation, the directors and the shareholders, or any class of the shareholders, including restrictions on the transfer of shares;
- (3) the minimum consideration for any authorized shares or class of shares; and
- (4) any provision which under the Business Corporation Act (53-11-1 to 53-18-12 NMSA 1978) is required or permitted to be set forth in the bylaws.

C. It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in the Business Corporation Act.

D. The articles of incorporation may set forth any provision which the incorporators elect to set forth for the regulation of the internal affairs of the corporation.



E. The articles of incorporation may provide that a director shall not be personally liable to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director unless:

- (1) the director has breached or failed to perform the duties of the director's office in compliance with Subsection B of Section 53-11-35 NMSA 1978; and (Note 8)
- (2) the breach or failure to perform constitutes:
  - (a) negligence, willful misconduct or recklessness in the case of a director who has either an ownership interest in the corporation or receives in his capacity as a director or as an employee of the corporation compensation of more than two thousand dollars (\$2,000) from the corporation in any calendar year; or
  - (b) willfull misconduct or recklessness in the case of a director who does not have an ownership interest in the corporation and does not receive in his capacity as director or as an employee of the corporation compensation of more than two thousand dollars (\$2,000) from the corporation in any calendar year. Such a provision in the articles of incorporation shall, however, only eliminate the liability of a director for action taken as a director or any failure to take action as a director at meetings of the board of directors or of a committee of the board of directors, or by virtue of action of the directors without a meeting pursuant to Section 53-11-43 NMSA 1978, on or after the date when such provision in the articles of incorporation becomes effective. (Note 9)

#### 53-12-3. Filing of Articles of Incorporation.

- A. Duplicate originals of the articles of incorporation and an affidavit executed by the designated registered agent in which he acknowledges his acceptance of the appointment by the filing corporation as its registered agent, if agent is an individual, or an affidavit executed by the president or vice president of a corporation which is the designated registered agent in which the officer acknowledges the corporation's acceptance of the appointment by the filing corporation as its registered agent, if the agent is a corporation shall be delivered to the commission.

#### NOTES:

1. One specific purpose must be stated in the purpose article.
2. Shares may be assigned par or no par value, into classes, series, preferences, etc., if any.
3. Address means a recitation of the mailing address or post office box number and the street address, if within a municipality, or a description of the geographical location, if outside a municipality.
4. Duplicate original means a document which is signed or executed in duplicate.
5. Each corporation shall have and continuously maintain in this state:
  - A. a registered office which may be, but need not be, the same as its place of business; and
  - B. a registered agent, which agent may be either an individual resident in this state whose business office is identical with the registered office, or a domestic corporation, or a foreign corporation authorized

to transact business in this state, having a business office identical with the registered office.

6. The Business Corporation Act applies to professional corporations. If the provisions of the Business Corporation Act conflicts with the provisions of the Professional Corporation Act (53-6-1 to 53-6-13 NMSA 1978) the provisions of the Professional Corporation Act shall prevail. The corporate name of a professional corporation shall contain the words "limited", "chartered", "professional association" or "professional corporation" or shall contain a separate abbreviation of one of these words; otherwise the corporate name shall contain the separate word "corporation", "company", "incorporated", or "limited" or shall contain a separate abbreviation of one of these words.

NOTES:

7. 53-11-35. Board of Directors.
  - A. All corporate powers shall be exercised by or under authority of, and the business and affairs of a corporation shall be managed under the direction of, a board of directors except as may be otherwise provided in the Business Corporation Act (53-11-13-18-12 NMSA 1978) or the articles of incorporation. If any such provision is made in the articles of incorporation, the powers and duties conferred or imposed upon the board of directors by the Business Corporation Act shall be exercised or performed to such extent and by such person or persons as provided in the articles of incorporation. Directors need not be residents of this state or shareholders of the corporation unless the articles of incorporation or bylaws so require. The articles of incorporation or bylaws may prescribe other qualifications for directors. The board of directors may fix compensation of directors unless otherwise provided in the articles of incorporation.
  - B. A director shall perform his duties as a director, including his duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner the director believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person would use under similar circumstances in a like position. In performing such duties, a director shall be entitled to rely on factual information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by:
    - (1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
    - (2) counsel, public accountants or other persons as to matters which the director reasonably believes to be within such person's professional or expert competence; or
    - (3) a committee of the board upon which the director does not serve, duly designated in accordance with a provisions of the articles of incorporation or the bylaws, as to matters within its designated authority, which committed the director reasonably believes to merit confidence, but the director shall not be considered to be acting in good faith if the director has knowledge concerning the matter in question that would cause such reliance to be unwarranted. A person who so performs such duties shall have no liability by reason of being or having been a director of the corporation.

- C. A director of a corporation who is present at a meeting of its board of directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless the director's dissent shall be entered in the minutes of the meeting or unless the director shall file written dissent to such action with the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the secretary of the corporation immediately after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action.

**NOTES:**

- D. For purposes of Subsection B of this section, a director, in determining what he reasonably believes to be in or not opposed to the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in his discretion, may consider any of the following:

- (1) the interests of the corporation's employees, suppliers, creditors and customers;
- (2) the economy of the state and nation;
- (3) the impact of any action upon the communities in or near which the corporation's facilities or operations are located; and
- (4) the long-term interests of the corporation and its shareholders, including the possibility that those interests may be best served by the continued independence of the corporation.

8. 53-11-43. Action by directors without a meeting.

Unless otherwise provided by the articles of incorporation or bylaws, any action required by the Business Corporation Act (53-11-1 to 53-18-12 MMSA 1978) to be taken at a meeting of the directors of a corporation, or any action which may be taken at a meeting of the directors or of a committee, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the directors, or all of the members of the committee, as the case may be. The consent shall have the same effect as a unanimous vote.

9. 53-12-5. Organization meeting of directors.

After the issuance of the certificate of incorporation, an organization meeting of the board of directors named in the articles of incorporation shall be held, either within or without this state, at the call of a majority of the directors named in the articles of incorporation, for the purpose of adopting bylaws, electing officers and the transaction of other business as may come before the meeting. The directors calling the meeting shall give at least three days' notice thereof by mailing to each director so named, stating the time and place of the meeting.

10. DOCUMENTS SHALL BE TYPEWRITTEN OR PRINTED WITH BLACK PRINT ON 8-1/2" X 11" SIZE WHITE PAPER AND MUST BE LEGIBLE FOR MICROFILMING.
11. "DUPLICATE ORIGINAL" MEANS A DOCUMENT WHICH IS SIGNED OR EXECUTED IN DUPLICATE (TWO SETS WITH ORIGINAL SIGNATURES).
12. ATTACHMENTS SHALL MAKE REFERENCE TO THE SPECIFIC ARTICLE(S) SET FORTH WITHIN THE ARTICLES OF INCORPORATION.

(6)

13. REGULATIONS REQUIRE PAYMENT BY CHECK OR CASHIER'S CHECK, CHECK MUST BE MADE PAYABLE TO THE STATE CORPORATION COMMISSION.
14. THE CORPORATE NAME IS NOT APPROVED UNTIL THE DOCUMENTS HAVE BEEN APPROVED FOR STATUTORY COMPLIANCE. A VERBAL INQUIRY DOES NOT GUARANTEE NAME AVAILABILITY.
15. AS APPROVED IN SECTION 53-18-2 OF THE BUSINESS CORPORATION ACT, THIS COMMISSION HAS 15 WORKING DAYS FROM RECEIPT OF DOCUMENTS TO DISAPPROVE ANY DOCUMENT(S) FILED.
16. CONTACT THIS COMMISSION ON ANY CHANGE AFFECTING YOUR CORPORATE STATUS WITH THIS COMMISSION.

TYPE OR PRINT LEGIBLY

ARTICLES OF INCORPORATION  
OF

\_\_\_\_\_  
(NAME OF CORPORATION)

The undersigned acting as incorporator(s) to form a corporation under the New Mexico Business Corporation Act (53-11-1 to 53-18-12 NMSA 1978), adopts the following Articles of Incorporation for such corporation:

FIRST: The corporate name of the corporation is \_\_\_\_\_.

\_\_\_\_\_  
SECOND: The period its duration is \_\_\_\_\_.

THIRD: The purpose or purposes for which the corporation is organized are:

FOURTH: The aggregate number of shares which the corporation shall have authority to issue is:

NUMBER

FIFTH: Any provision limiting or denying to shareholders the preemptive right to acquire unissued or treasury shares, or securities convertible into such shares or carrying a right to subscribe to or to acquire shares is:

SIXTH: The name of its initial registered agent and the street address and city of the initial registered office in New Mexico are:

NAME

ADDRESS

(P.O. Box unacceptable unless geographical location is given)

SEVENTH: The number of directors constituting the initial board of directors is \_\_\_\_\_ and the names and addresses of the persons who have consented to serve as directors until the first annual meeting of shareholders or until their successors are elected and qualify are:

NAME

ADDRESS

EIGHTH: The name and address of each incorporator is:

NAME

ADDRESS

Dated: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Signature of Incorporator(s)

(File Duplicate Originals)

TYPE OR PRINT LEGIBLY

ARTICLES OF INCORPORATION  
OF

\_\_\_\_\_  
(NAME OF CORPORATION)

The undersigned acting as incorporator(s) to form a corporation under the New Mexico Business Corporation Act (53-11-1 to 53-18-12 NMSA 1978), adopts the following Articles of Incorporation for such corporation:

FIRST: The corporate name of the corporation is \_\_\_\_\_.

\_\_\_\_\_  
SECOND: The period its duration is \_\_\_\_\_.

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FOURTH: The aggregate number of shares which the corporation shall have authority to issue is:

NUMBER

FIFTH: Any provision limiting or denying to shareholders the preemptive right to acquire unissued or treasury shares, or securities convertible into such shares or carrying a right to subscribe to or to acquire shares is:

SIXTH: The name of its initial registered agent and the street address and city of the initial registered office in New Mexico are:

NAME

ADDRESS

(P.O. Box unacceptable unless geographical location is given)

SEVENTH: The number of directors constituting the initial board of directors is \_\_\_\_\_ and the names and addresses of the persons who have consented to serve as directors until the first annual meeting of shareholders or until their successors are elected and qualify are:

NAME

ADDRESS

EIGHTH: The name and address of each incorporator is:

NAME

ADDRESS

Dated: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Signature of Incorporator(s)

(File Duplicate Originals)



TYPE OR PRINT LEGIBLY

ARTICLES OF INCORPORATION  
OF

\_\_\_\_\_  
(NAME OF CORPORATION)

The undersigned acting as incorporator(s) to form a corporation under the New Mexico Business Corporation Act (53-11-1 to 53-18-12 NMSA 1978), adopts the following Articles of Incorporation for such corporation:

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\_\_\_\_\_  
SECOND: The period its duration is \_\_\_\_\_.

THIRD: The purpose or purposes for which the corporation is organized are:

FOURTH: The aggregate number of shares which the corporation shall have authority to issue is:

NUMBER

FIFTH: Any provision limiting or denying to shareholders the preemptive right to acquire unissued or treasury shares, or securities convertible into such shares or carrying a right to subscribe to or to acquire shares is:

SIXTH: The name of its initial registered agent and the street address and city of the initial registered office in New Mexico are:

NAME

ADDRESS

(P.O. Box unacceptable unless geographical location is given)

SEVENTH: The number of directors constituting the initial board of directors is \_\_\_\_\_ and the names and addresses of the persons who have consented to serve as directors until the first annual meeting of shareholders or until their successors are elected and qualify are:

NAME

ADDRESS

EIGHTH: The name and address of each incorporator is:

NAME

ADDRESS

Dated: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Signature of Incorporator(s)

(File Duplicate Originals)

AFFIDAVIT OF ACCEPTANCE OF APPOINTMENT  
BY DESIGNATED INITIAL REGISTERED AGENT

TO THE STATE CORPORATION COMMISSION  
STATE OF NEW MEXICO

STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ ) SS.:

On this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, before me a Notary Public in and  
for the State and County aforesaid, personally appeared \_\_\_\_\_  
\_\_\_\_\_, who is to me known to be the person and who, being by me duly sworn,  
acknowledged to me that he does hereby accept his appointment as the Initial  
Registered Agent of \_\_\_\_\_

\_\_\_\_\_

the corporation which is named in the annexed Articles of Incorporation, and  
which is applying for a Certificate of Incorporation pursuant to the  
provisions of the Business Corporation Act of the State of New Mexico.

\_\_\_\_\_  
Registered Agent's Signature (Individual)

OR

\_\_\_\_\_  
Registered Agent's Name (Corporation)

By \_\_\_\_\_  
Signature of Agent's President/Vice-President

\_\_\_\_\_  
NOTARY PUBLIC

MY COMMISSION EXPIRES: \_\_\_\_\_

(NOTARY SEAL)

AFFIDAVIT OF ACCEPTANCE OF APPOINTMENT  
BY DESIGNATED INITIAL REGISTERED AGENT

TO THE STATE CORPORATION COMMISSION  
STATE OF NEW MEXICO

STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ ) SS.:

On this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, before me a Notary Public in and  
for the State and County aforesaid, personally appeared \_\_\_\_\_  
\_\_\_\_\_, who is to me known to be the person and who, being by me duly sworn,  
acknowledged to me that he does hereby accept his appointment as the Initial  
Registered Agent of \_\_\_\_\_

\_\_\_\_\_

the corporation which is named in the annexed Articles of Incorporation, and  
which is applying for a Certificate of Incorporation pursuant to the  
provisions of the Business Corporation Act of the State of New Mexico.

\_\_\_\_\_  
Registered Agent's Signature (Individual)

OR

\_\_\_\_\_  
Registered Agent's Name (Corporation)

By \_\_\_\_\_  
Signature of Agent's President/Vice-President

\_\_\_\_\_  
NOTARY PUBLIC

MY COMMISSION EXPIRES: \_\_\_\_\_

(NOTARY SEAL)

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which is applying for a Certificate of Incorporation pursuant to the  
provisions of the Business Corporation Act of the State of New Mexico.

\_\_\_\_\_  
Registered Agent's Signature (Individual)

OR

\_\_\_\_\_  
Registered Agent's Name (Corporation)

By \_\_\_\_\_  
Signature of Agent's President/Vice-President

\_\_\_\_\_  
NOTARY PUBLIC

MY COMMISSION EXPIRES: \_\_\_\_\_

(NOTARY SEAL)

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