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# Choosing the initial board for a startup

One of the first things done when a company is formed is that the board of directors is formed. This article provides an overview of the board's role in a company, how directors on the board are elected and how the board changes as a company grows.

## What does a board do?

The board is responsible for the management of a company's business and affairs. Among other matters, the board is responsible for hiring and firing the company's CEO and approving major transactions, such as financings and a sale of the company. Subject to charter or contractual limitations,[1] the board acts by majority vote. All directors have an equal vote as a director, regardless of the percentage of the company's equity that they own. Accordingly, understanding at all times which stockholders have the right to elect a majority of the board is critically important.

## Who elects the board?

The board is elected by the stockholders of the company. Unless otherwise provided in the company's charter, by law or by contract, directors are elected by the holders of a majority of the company's outstanding shares. As a result, in the absence of special provisions, the holders of a majority of the outstanding shares have the right to elect all directors. Although directors cannot be "fired" in the sense of firing an employee, stockholders having the power to elect directors can directly or indirectly remove directors by electing a successor director. In their capacity as directors, all directors have a fiduciary duty to act in the best interests of the stockholders as a whole which may be in conflict with their individual interests.

## How many directors can be on the board?

Under Delaware law, there is no minimum number of directors.[2] For most startups, the board is initially composed of the founders of the company. Although not required, if there is only one or two founders, it is not unusual for an additional person to be added to the initial board, with such person typically being an advisor or seed investor.

## The board's role – at the beginning

In the early days, typically there is no need for formal board meetings as the founders are discussing the company's activities on an ongoing basis and if there is an advisor board member, such person is typically getting informal updates. At this stage, most actions that are required to be formally approved by the board are approved through a unanimous written consent signed by all board members.

In addition to making key decisions, one of the primary roles of the board is to act as a sounding board and provide advice and counsel to the CEO and senior management. This is particularly important for early stage companies with first time founders, but continues to be the case even with mature companies with very experienced CEOs. In the absence of non-founder board members who can provide experienced perspectives and/or in the absence of formal board meetings, it is critical for founders of early stage companies to obtain the same kind of advice that they would receive from an experienced board. In such situations, experienced legal and other advisors, although not board members, often provide assistance and advice regarding the decisions required of early-stage startups.

## The board's role – during growth

The board typically evolves as the company matures. If there were multiple founders on the board from inception, in connection with a company's first institutional venture financing, it is very common for the founder participation on the board to be limited to two persons (and often that is conditioned on one of the two being the CEO of the company). This evolution of the Board can be stressful for companies which have multiple founders, as there can be a natural conflict as to who continues on the board (at least beyond the CEO). It is important for all founders to understand this natural evolution to help reduce the stress when changes happen. The same principal applies to other early non-founder board members. All board members need to understand that board composition changes over time; regardless of their level of contribution during their service on the board, over time, most directors will be replaced.

As additional venture capital rounds are completed, additional board seats are typically added for the lead investor in the new round. One or two seats are also typically added for independent directors over time. These seats are generally elected by a majority of the common and preferred, either voting together or separately.

Once a company raises outside financing, regular board meetings are generally scheduled. Effectively managing board meetings is one of the CEO's most important tasks.

[1] In connection with venture capital and other financings, investors often negotiate provisions in the company's charter and/or other financing documents that require investor approval of certain matters as well as provide the right of investors to elect one or more directors by a separate vote from the holders of common stock.

[2] For California corporations, the authorized board must be no less than two if there are two shareholders and three if there are three or more shareholders.