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Aiming to start off right: pre- and post-incorporation checklists

Once you've decided that you want to take the leap of faith and start your own company, what should you do? In other articles, we have provided some practical tips for founders in starting and operating a company (see our Top 10 Tips for Founders), but what are the nuts and bolts of getting incorporated, and what steps should a founder consider taking right after incorporation? In this article, we provide pre-incorporation and post-incorporation checklists that suggest steps to help you get your company off to the right start.

Pre-incorporation checklist

- **Decide where to incorporate**: Once you've decided that incorporation is the best option for your company, you need to decide where to incorporate. Most companies incorporate in Delaware. For an explanation of some of the considerations in deciding where to incorporate, please see our article. If you are still unsure if incorporation is the right step to take, please see our article discussing whether incorporation is right for your company.
- **Pick a name**: One of the first things you will need in order to incorporate is a name for the new corporation. Once your proposed name has passed the usual hurdle of a basic Google search, it is a good idea to check with the Secretary of State of the state where the company is going to be incorporated, as well as any other key states where the company plans to do business, to confirm that the chosen name is available. For example, if the company is going to be incorporated in Delaware but will have offices in California, the name should be checked for availability both in Delaware and in California. In most states, you can do a preliminary check on the state's Secretary of State website. Additionally, because the name of a company is often also used as a trademark, a preliminary trademark search is also recommended. See our article on the process and requirements for choosing a corporate name. Most companies also check the availability of a URL and social media handles before making a final decision on the company's name.
- **Determine how stock will be allocated among the founders**: For companies with more than one founder, the founders will need to decide how to allocate the company's stock among themselves. See our article about founder stock and vesting.
- **Identify the members of the board of directors**: Every company has a board of directors, and the number of directors is specified in the corporation's bylaws. If a company is incorporated in Delaware, it must have at least one director. California rules are different from Delaware's: before any shares are issued, a California corporation may have just one director; once shares are issued, a California corporation may have a number of directors equal to the number of shareholders but once there are three or more shareholders, there must be at least three directors. In some cases, you may find it makes sense to specify a range in the number of directors.
- **Identify the officers of the corporation**: The required officer positions for a corporation are President and/or Chief Executive Officer Treasurer and/or Chief Financial Officer, and Secretary. One person may serve all three positions. Although Delaware does not require that the company has a Treasurer or Chief Financial Officer, we typically recommend appointing one, since a Treasurer is required to be named on certain California filings. For more about initial officer roles, please see our article.

Post-incorporation checklist

- **Make sure you have all the legal documents filed and prepared**: While the actual process of incorporation is usually very fast and simple, typically involving the filing of a relatively short Certificate of Incorporation (or Articles of Incorporation, for companies incorporating in California), completing the formation process requires additional documentation. These documents typically include:
  - Action by Sole Incorporator (required)
  - Bylaws (required)
  - Unanimous Written Consent in Lieu of First Meeting of the Board of Directors (required)
  - Founder Stock Purchase Agreements (where vesting is involved, make sure that appropriate tax filings are made on time; for more about this please see our article on 83b elections)
  - Intellectual Property Assignment or Bill of Sale (if founders are assigning intellectual property or technology developments as payment for their shares)
  - Indemnification Agreements (to be signed by each director)
  - Written Consent of Stockholders (not applicable in all cases)
  - Stock Certificates for founders shares (required)
  - Applicable securities filings for stock issuances. (required)
  - Form SS4, Application for Employer Identification Number (required)
- **Make sure the company is qualified to do business**: Companies must qualify to do business in each state where the company has a "presence." The presence requirement may be met by opening an office or hiring employees. If there is a question about where you should qualify your company to do business, it makes sense to consult your legal counsel. The process of qualifying to do business usually involves filing specified forms with the Secretary of State of the relevant jurisdiction. In some cases, it may also require filing a fictitious business name statement.
- **Have appropriate forms for hiring employees and consultants**: Having a good form of offer letter and employee proprietary information and inventions assignment agreement is essential to establishing an effective onboarding process that preserves the company's intellectual property and confidential information. In the case of consultants, not having a form that includes enforceable intellectual property assignment language could lead to problems down the line for the company. Please see our articles about employee inventions and assignment agreements and consulting agreements.
- **Ensure that you classify your personnel appropriately**: Sometimes the distinction between an employee and a contractor is not always clear, especially when a startup is just getting started. However, if there is a misclassification, the consequences could be significant for the company. See our article about approaches to classifying personnel.
- **Set up a stock option plan**: For companies that plan to hire employees right away, it may make sense to adopt a stock option plan in the company's early stages. A stock option plan enables the company to offer equity as a hiring benefit to employees and contractors.
- **Website terms**: Today, most companies have a website and often that website includes content that the company considers proprietary. Additionally, many websites may collect personal data from visitors to the site. Does your company website include an appropriate website terms of use and privacy policy? See our articles about terms of use and privacy policies.
- **Appropriate commercial agreements**: The company should consider what agreements are needed to execute on its business model. For software companies, having an appropriate form of license agreement and distribution agreements is usually a good start. Those agreements may include just end user terms or beta, trial or evaluation terms. For SaaS companies, time should be dedicated to preparing an appropriate service or subscription agreement. For companies that are selling tangible products, sales terms and conditions may be needed. For yet other companies, there may be a combination of all of these agreements needed.
- **Have and use a form of non-disclosure agreement:** Having and using a protective form of non-disclosure agreement will go a long way to safeguarding your business ideas and intellectual property. Please see our article about

NDAs.

While the above is not intended to be an exclusive list of all the issues to be considered when launching a new company, it provides an overview of some of the key issues that most startup companies just getting started should think about.
