

EMERGING COMPANY CHECKLIST

I. Formation

A. Choice of Entity

1. C-Corporation
2. S-Corporation
3. Limited Liability Company
4. Partnership

B. Choice of Jurisdiction of Incorporation/Formation

1. Delaware
2. State in which the operations of the Company will be headquartered.
3. Offshore

C. Name Selection and Protection

1. Confirm availability of corporate name and reserve with Secretary of State of jurisdiction of incorporation and all states in which the company will conduct business.
2. Trademark/Tradenname availability
  - a. quick search online with <http://www.uspto.gov>
  - b. In-depth search with Thompson & Thompson (3 to 5 days at approx. \$400)
3. Internet Domain Name
  - a. search on-line Domain Names with <http://www.whois.org>
  - b. register Domain Names with on-line <http://www.register.com> (also domain names with different extensions (.net, .bus, etc.), misspelling and derogatory terms).

D. Incorporation/Formation

1. Corporation
  - a. Certificate of Incorporation
    - (i) Capitalization
    - (ii) “*Blank Check*” Preferred provision
    - (iii) Indemnification
  - b. Action by Incorporator
    - (i) Approval of Bylaws
    - (ii) Appoint Directors
    - (iii) Resignation of Incorporator

- c. Bylaws
    - (i) Meeting of Stockholders
    - (ii) Election of Directors
    - (iii) Election of Officers
    - (iv) Types of stock issued
    - (v) Notices to parties
    - (vi) Indemnification provisions
    - (vii) Amendments
    - (viii) Miscellaneous corporate/general provisions
  - d. Organizational Minutes of Board of Directors (Initial Board of Directors)
    - (i) Directors and Officers
    - (ii) Bank Accounts
    - (iii) Registered Agent
    - (iv) Acceptance of Subscriptions
    - (v) Committees
    - (vi) Fiscal year
    - (vii) Establish Policies (e.g., sexual harassment, securities trading, etc.)
  - e. Initial Shareholders Consent
  - f. Obtain taxpayer identification number (IRS form SS-4)
  - g. Subchapter S Election (if applicable)
  - h. Qualification of Foreign Corporation (required if the company is “doing business” in states other than the state of incorporation)
  - i. Stock Transfer Ledger
  - j. Form of Stock Certificate
2. Limited Liability Company
- a. Certificate of Formation
    - (i) Publication requirement (applicable in New York)
  - b. Operating Agreement
    - (i) Capital contribution schedule
3. Partnership (General Partnership)
- a. Certificate of Limited Partnership (No state filing required for general partnership.)
  - b. Partnership Agreement (oral or written)
  - c. Qualification of Foreign LLC (required if the company is “doing business” in states other than the state of formation)
    - (i) Publication requirement for foreign LLC doing business in New York.

E. Initial Equity Issuance

1. Founders' Subscription Agreement
  - a. Tax-free contribution of appreciated property (particularly technology)
  - b. Section 83(b) Election (*critical*)
  - c. Subscription is conditioned upon delivery of:
    - (i) Stock Repurchase Agreement
    - (ii) Nondisclosure Agreement.
2. Promissory Note (to evidence any loans made by Founders to the Company)
3. Stock Repurchase Agreement
  - a. Vesting (consider acceleration of vesting in certain events, such as change of control and, possibly, involuntary termination)
  - b. Purchase right in favor of Company to purchase unvested stock upon termination of employment (consider good guy/bad guy scenarios in deciding upon purchase price and vesting)
4. Issuance of Stock Certificates
  - a. Appropriate Legends
  - b. Receipts to be signed by recipients of certificates to be delivered
  - c. Escrow of shares issued to founder that are subject to company's repurchase restrictions.

F. Stock Option Plan

1. Qualified, Non-Qualified or Combination
2. Types of Grantees
3. Vesting Schedules
4. Exercise Price
5. Size of Plan
6. Board Approval (and Shareholder approval in the case of Qualified Options)
7. Form of Stock Option Agreement

G. Initial Employer Issues

1. Nondisclosure provisions
2. Intellectual Property ownership
3. Employee nonsolicitation
4. Noncompetition provisions

H. Protection of Intellectual Property with Third Parties

1. Technology Assignment Agreement (if company intellectual property is owned by founders, employees or consultants)
2. Proprietary Information and Inventions Agreement
3. One-way Nondisclosure Agreement
4. Mutual Nondisclosure Agreement
5. Consulting Agreement
6. Scientific Advisor Agreement

II. Seed/Angel Financing

A. Determine terms of investment

1. Aggregate Proceeds
2. Pre-money valuation
3. Percentage to be purchased
4. Conversion (and automatic conversion)
5. Anti-dilution Protection (weighted average, full ratchet, splits, combinations, restructurings)
6. Priority on Liquidation
7. Dividends
8. Protective Provisions
9. Board/Observer Rights
10. Redemption Rights
11. Tag-Along Rights
12. Drag-Along Rights
13. Preemptive Rights
14. Forced Sale Rights
15. Right of First Refusal

B. Private Placement Memorandum

1. Business Description
2. Risk Factors
3. Management Description

C. Subscription Materials

1. Investor Questionnaires (Individual, Corporation, Partnership, Trust, IRA)

D. Compliance with Due Diligence Requests

1. Organize materials and prepare index of materials.

E. Board Approval

1. Creation of Preferred Stock – low par value vs. no par value
2. Reservation of shares to be issued upon conversion
3. Form of Stock Certificate
4. Form of Subscription Agreement
5. Form of Shareholders' Agreement
6. Form of Escrow Agreement

F. Creation of New Securities

1. *Corporation*: Restated Certificate of Incorporation or Certificate of Designations (if “blank check” preferred is authorized)
  - a. File with Secretary of State of State of Incorporation
2. *Limited Liability Company*: Restated LLC Operating Agreement
3. *Partnership*: Restated Partnership Agreement

G. Shareholders' Agreement

1. Board/Observer Rights
2. Drag Along Rights
3. Tag Along Rights
4. Rights of First Refusal
5. Preemptive Rights
6. Forced Sale
7. Protective Provisions (if applicable). May include some of the following:
  - a. Liquidate, dissolve, re-capitalize, reorganize, merge, consolidate or enter into any agreement to merge or consolidate or effect a share exchange;
  - b. Declare dividends or distribution;
  - c. Materially change the nature of the business;
  - d. Approve affiliated transactions;
  - e. Sell, lease or exchange of substantially all property or effect any transaction in which more than fifty percent (50%) of the voting power is disposed of;
  - f. Commence bankruptcy proceeding, liquidation, reorganization, dissolution, conservation, delinquency or receivership proceeding;
  - g. Amend certificate of incorporation or by-laws;
  - h. Grant exclusive IP rights or exclusive distribution rights;
  - i. Create subsidiaries;
  - j. Incur any indebtedness in excess of a certain amount;
  - k. Enter into agreement creating obligation to pay in excess of a certain amount;
  - l. Change the size of Board;
  - m. Redeem, purchase or otherwise acquire share of capital stock; or

- n. Authorize, issue or create any additional security or class of stock or other instrument convertible or exchangeable into a security or class of stock.

H. Registration Rights Agreement (if applicable)

1. Demand Rights (S-1)
2. Shelf Registration (S-3)
3. Piggy Back Registration
4. Cut-back provisions
5. Ability to delay exercise of rights
6. Indemnification

I. Escrow Arrangements

1. Designate escrow agent
2. Negotiate escrow agreement

J. Securities Law Compliance

1. Securities Laws Compliance
  - a. Federal
    - (i) Determination of securities law exemption
    - (ii) Form D (if applicable)
    - (iii) Additional information to be disclosed to investors
  - b. States determine locations of company and founders/employees who will hold equity
    - (i) Compliance with pre-offering “Blue Sky” law requirements (i.e. New York)
    - (ii) Compliance with post-offering “Blue Sky” law requirements (filing of Form D or state-specific filings)

K. Issue Stock

1. Update Stock Transfer Ledger
2. Prepare Stock Certificates with appropriate legends (including reference to restrictions in shareholders’ agreements)
3. Receipts to be signed by recipients