Startup Kit

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Startup Kit
for Emerging and High-Growth Companies

The Startup Kit is intended to provide your emerging growth company with an overview of some of the key issues to keep in mind as you start and grow your business. This will serve as a general roadmap to recognizing many of the obstacles you may encounter during the early stages of your company's lifecycle and will help you to navigate some of the more common challenges you may face as you build your company with the help of investors, lenders, strategic partners and other stakeholders.

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Getting Started: Formation

See comparison table on the next page

For more information on the tax implications of various entity types, visit: Choice of Entity: US Federal Income Tax Implications

One of the first decisions an entrepreneur must make is what type of entity to use in starting a business. There are a number of types of business entities from which to choose when organizing a business. Each entity is unique and offers certain advantages and drawbacks. You should carefully examine your business goals and needs to make sure you select the optimal entity type. The most common entities include:

The C-Corporation

In the startup world, the corporation, and specifically the C-corporation (C-Corp), is perhaps the most common type of entity used, particularly for businesses looking to attract venture capital investors. While most entity types offer their owners limited liability, many emerging companies establish C Corps in order to better appeal to investors, as institutional investors often prefer the tax rules and procedures applicable to an ownership stake in a C-Corp. In fact, in many cases, the governing agreements for investment funds limit their ability to invest in other types of entities.

The Limited Liability Company

A limited liability company (LLC), is also a very common entity choice for emerging companies, particularly in cases where attracting outside investment is not a short-term priority or where flexibility to restructure in the future may be desired. Owners of an LLC, called ***members***, enjoy the same personal liability protection as the owners of a C-Corp in many jurisdictions, but avoid the ***double-taxation*** issue that occurs in corporations, because all of the business's earnings or losses ***pass through*** to its owners.

Other Entities

While C-Corps and LLCs tend to be the most popular entities for high growth emerging companies, there are numerous other options available as well. These include:

- **Public Benefit Corporations (PBC)/B Corporation (B-Corp)**: A PBC is a relatively new entity type, available in most jurisdictions. It is a corporation designed for social entrepreneurs that is distinct from other corporations in that it elects to build social responsibility into its foundational and governing documents, pledging to benefit *all* stakeholders, not just its shareholders. A B-Corp requires a separate certification that a company meet certain standards of verified social and environmental performance, public transparency, and legal accountability to balance profit and purpose. The more stringent governance requirements of a PBC or a B-Corp carry additional compliance tasks which will require additional founder's time and capital, both of which are extremely valuable to a startup.

- **S-Corporation (S-Corp)**: S-Corps are business entities that have elected to be taxed in a specific manner prescribed by the IRS, which has elements of both C-Corp and LLC taxation. Similar to LLCs and C-Corps, S-Corp owners also benefit from limited liability; however, S-Corps face restrictions on ownership that C-Corps and LLCs do not. For example, an S-Corp can have a maximum of 100 shareholders, its shareholders cannot be other corporations, and they can only issue one class of stock. S-Corps often make sense for closely held owner-operated businesses that do not intend to raise money or grant equity to a large number of employees or consultants.

- **General Partnership**: A partnership has few governance obligations and functions similar to an LLC in many respects. For tax purposes, a partnership passes profits and/or losses through to its partners, similar to an LLC. However, a general partnership does not shield its partners from liability and, at some level, one or more partners must be personally liable for the obligations of the partnership.

- **Sole Proprietorship**: A sole proprietorship is the simplest vehicle for business formation. It is not an independent legal entity that is separate from its owner. The person who owns the business is personally liable for its obligations.

A Comparison – C-Corp vs. LLC

C-Corporation	LLC
• The owners of a C-Corp (i.e., its shareholders) have ***limited liability***. The C-Corp, an entity that is legally separate from its owners, is liable for company's obligations. Shareholders' personal assets are generally protected from the corporation and its creditors. • C-Corps can issue different classes of stock having different rights, preferences, and values (e.g., preferred stock). This allows maximum flexibility when growing a business. • C-Corps have somewhat more stringent governance requirements than LLCs. For example, they must adopt bylaws, issue stock, maintain shareholder records, record minutes of meetings of shareholders and the board of directors, file certain documents such as annual reports, and pay certain fees in the jurisdiction in which they were incorporated. • C-Corps subject shareholders to ***double taxation*** when making dividends, whereby the corporation pays tax on its income, and shareholders pay tax on whatever profits are ultimately distributed to them. • Originally issued C-Corp stock may be deemed ***Qualified Small Business Stock***, which can provide a significant tax savings to the holder of that stock. Qualified Small Business Stock can also be an attractive feature for early stage outside investors.	• The owners of an LLC (i.e., its members) have ***limited liability***. The LLC, an entity legally separate from its owners, is liable for the company's obligations. Members' personal assets are generally protected from the company and its creditors. • Venture capital firms and tax-exempt organizations are often hesitant to invest in LLCs due to certain tax and governance considerations, though there are ways to accept outside investment into an LLC. • LLCs offer flexibility in structuring the business. For example, the company can issue different classes of ***units*** that carry different rights, obligations, and privileges, and members can agree to different management rights or distribution preferences. • LLCs generally have less stringent management formalities to adhere to than a C-Corp from a state law compliance perspective, as there are fewer required filings and governance requirements, but the accounting may be more complex (particularly as the ownership and operations expand). • LLCs are ***pass-through entities*** that are not subject to a separate level of taxation for gains at the entity-level and allow members to offset other income with losses. • LLCs may have limited life, meaning they may be dissolved automatically under certain circumstances. • Conversion from an LLC to a C-Corp is typically an option, as some states have a streamlined process for LLCs to convert into C-Corps, allowing LLCs to restructure if and when needed (i.e., if the LLC seeks to raise capital from a venture capital firm).

Jurisdiction

What's the deal with Delaware?

Delaware is a popular jurisdiction for both emerging and well-established companies due to its well-developed business law and decades of court precedent addressing various facets of corporate governance. With established rules, standards and judicial precedent, there can be a greater sense of certainty that comes with establishing a company in Delaware. This is particularly important for emerging companies looking to attract venture capital funding or eventually go public due to investors' familiarity and comfort investing within the framework established by Delaware corporate law.

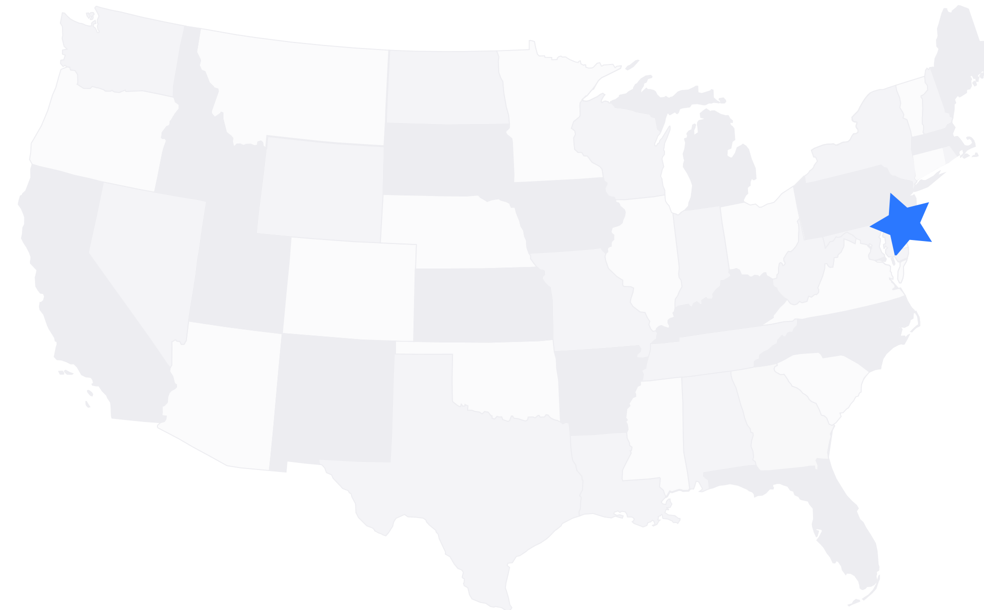
However, if your business will be primarily focused in one particular state, it may be preferable to avoid the additional cost and compliance requirements of setting up in Delaware. As your business grows and your needs and goals change, it's typically possible to change your company's home state and reestablish in Delaware.

Foreign Qualification

Regardless of where you set up your company, you may need to register as a ***foreign*** entity or ***qualify to do business*** in additional states. Whether and when to register outside of your home jurisdiction depends on a number of factors, including, among other things:

- Physical presence within a state (office space, employees, etc.)
- Payroll taxes paid
- Revenue derived from a particular state
- Sales activities directed at a particular state

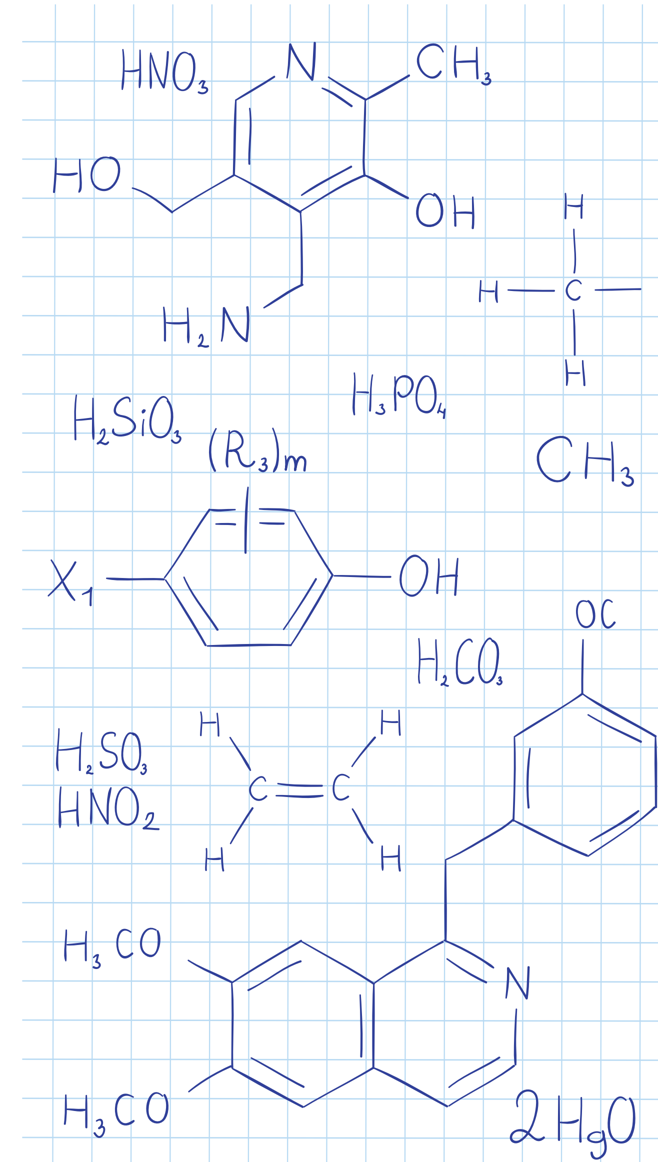
Requirements vary from state to state, so it is important to consult with legal counsel when making a decision whether or not to register or qualify in a given state.



Protecting Your Assets: Intellectual Property Considerations

Intellectual Property (IP) considerations are among the most important you will face when establishing a new company. Every emerging company, but especially those in the high tech or life sciences sectors, will face numerous IP issues relating to the development and launching of new products or product features, hiring employees (e.g., engineers, developers, scientists, etc.), raising capital, and more. Working with your legal advisors to establish and adhere to an IP strategy early can pay dividends down the road and avoid costly disputes or minor "foot faults" over ownership of the IP. One key diligence item for outside investors is often the entity's IP, so any deficiencies relating to an entities' ownership of key IP will come to light.

IP is often one of the most valuable assets a startup can possess and, in many cases, it is the most important. Protecting IP can be essential in lining up investors and obtaining financing to grow your company, as well as in creating a competitive advantage in the marketplace. Aligning a firm's IP strategy with its business strategy is a hallmark of success for all companies, including emerging companies. Strong IP protection comes down to two main areas of focus: *first*, deciding on which types of IP to develop and how many resources to invest in the development thereof, and *second*, having clearly defined foundational agreements in place (i.e., employment agreements, invention assignment agreements, third party development agreements, non-competition agreements, etc.). Startups must understand the basic available types of IP: patents, trademarks, copyrights, and trade secrets in order to protect their own IP as well as to avoid infringing on third party IP.



The Four Main Types of IP in the United States

Patents	Trademarks
Patents are typically regarded as the strongest form of protection and can be a cornerstone asset for startups. At its core, a patent is a social contract between an inventor and the government. To put it simply, a patent is a time-limited legal monopoly awarded to an inventor in exchange for disclosing their ***novel and non-obvious*** invention to the public. The inventor is provided a limited period of exclusivity before the invention enters the public domain and becomes available for all to practice and build upon. The holder of a patent has the ability to stop anyone from making, using, selling, offering to sell, or importing the claimed invention, no matter whether they brazenly copied the invention, independently developed the technology, or weren't even aware of it. There are three basic types of patents: ***utility, plant, and design***. Utility patents are the most common type of patent and are awarded for new and useful processes, machines, manufactures, formulas, compositions of matter, or improvements to any of these categories. Plant patents, as the name implies, are awarded for new and distinct plants. Design patents cover the ornamental design of a product rather than any functional aspects. Patents are an important factor for investors to consider when contemplating whether to make an investment in an emerging company, and their presence (or absence) may ultimately determine the success or failure of the company. To be entitled to a patent, an invention must be novel and non-obvious over the body of technical art preceding the invention. The right time to consider filing a patent is after you have either (i) reduced your invention to practice by creating a prototype or (ii) when you have sufficiently defined the technical aspects of how your invention will operate, such that you could create a prototype. Critically, you should be cognizant that outside disclosure of an invention can jeopardize your company's right to a patent, and it is important to consult a patent attorney before making any outside disclosures such as presentations, papers, or advertising about the invention. A skilled and experienced patent attorney can counsel a startup through the pitfalls of the patent lifecycle process—effective and competent patent counsel is something that should not be overlooked.	Trademarks protect a company's brand. A trademark can be a word, symbol, logo, slogan, product packaging or design that identifies the source of goods or services. A trademark prohibits others from using ***confusingly similar*** marks to promote their own goods and services. With this protection, a trademark owner will be able to build brand awareness and goodwill. Although a USPTO registration is not required to gain trademark rights and protections, registration provides valuable benefits at a relatively low cost, such as nationwide priority over others who might seek to adopt and use the registered mark. It is important to assess your trademark rights before investing significant resources in growing brand awareness for your company. It is also important to look at the defensive side of this issue and consider what trademarks are in use by others before picking your mark. An IP attorney can assist in performing trademark searches, advising on what marks are clear to use, and the filing of a trademark application.

The Four Main Types of IP in the United States

Copyrights	Trade Secrets
A copyright provides its owner with the exclusive right to reproduce, distribute, modify, publicly perform and publicly display works of expression. Examples of works that can be protected by copyright are literary works, musical works, architectural works, computer software, sound recordings and blog posts. A copyright does not need to be registered; it exists as soon as a work is written or recorded or otherwise made tangible. However, a copyright must be registered in the United States in order to file a lawsuit against an unauthorized user and to be entitled to statutory damages. Because of the broad nature of copyright protection, you should also be careful to avoid using third-party photos, music, writings, or other works without prior written permission or appropriate licenses. The scope of protection granted by copyrights is relatively narrow—copyright infringement requires actual copying. Copyrights can nonetheless provide protection that is strong and relatively inexpensive to obtain. Copyright protection lasts for a long time, and is generally enforceable for life of the author, plus an additional 70 years for an individual author; or, for a work made for hire, the copyright is enforceable for a term of 95 years from the year of first publication of the work or a term of 120 years from the year of the work's creation (whichever expires first).	To many companies and individuals, confidential know-how, algorithms, or data may provide a critical competitive advantage. This class of intellectual property can be protected as trade secrets. A trade secret is information that is not known outside of a particular business entity where its owner has taken reasonable steps to maintain such information in confidence. Examples of trade secrets include formulas, programs, techniques, processes, business plans, and customer lists. Trade secret protection is not only applicable to a wide range of subject matter but is also of potentially unlimited duration. Holders of trade secrets are protected against misappropriation but not independent creation or reverse engineering. No registration or disclosure is required for protection of trade secrets. Trade secret protection may be sought in lieu of, or in conjunction with, patent protection. Because patents require disclosure of the invention, while trade secrets require confidentiality, deciding whether to use trade secret or patent protection is an important decision that will depend on factors such as how easy it might be to reverse engineer the invention and whether the invention is likely to be patentable. The decision to keep something a trade secret carries with it a duty of ongoing vigilance against disclosure. In order to be able to enforce these trade secrets against future misappropriation, a company must catalog its trade secrets and be able to provide evidence that it took reasonable steps to keep them confidential. This often employs a mix of physical, electronic, and legal means. It is also important for a company to implement policies that promote awareness of trade secrets. For example, a company should periodically train its employees on the proper handling of trade secrets. Incoming employees should be interviewed to ensure that they do not unintentionally bring in trade secrets from a former employer and possibly expose the company to liability for trade secret misappropriation. Similarly, outgoing employees should be interviewed to ensure that they do not take trade secrets with them and to remind them of an ongoing duty to maintain the confidentiality of any trade secrets learned on the job. Owing to their wide scope of protectable subject matter and the potentially perpetual duration of protection, trade secrets, when properly used and implemented, can be a very important tool in the utility belt of IP protections.

For more information on Intellectual Property considerations, visit these links:

What Start-Ups Need to Know About Intellectual Property

Emerging Tech Companies: It's Not Your Uncle's Dot.Com Regulatory Environment Anymore for Privacy and Data Security

Foundational Agreements and Contractual Issues

Foundational agreements are core to solid IP protection in a startup and can help you clearly define your company's boundaries relative to its employees and any other parties with whom it may share sensitive, confidential information.

Clearly defined and well-drafted employee agreements, non-competition clauses, non-disclosure agreements, inventor-to-company patent assignments, and other key foundational agreements are crucial to avoiding problems downstream. For example, without appropriate contractual provisions in place, companies generally do not own or have a right to the intellectual property created by their employees. To secure such rights, all employees should sign an agreement, often referred to as an IP Assignment Agreement, which includes an express IP assignment clause to facilitate the transfer of IP ownership from the employee to the employer. It's critical to prepare such agreements and have them in place from the beginning of the employment relationship, so as to avoid any issues when an employee inevitably leaves the company. Investors will also want to see that the rights to IP rest with the corporate entity, and not its employees, which may be important when considering the procurement of additional funding or when enforcing IP against competitors. This dynamic applies equally to founders, who should also sign an IP assignment clause, whether in a separate agreement or the founders' agreement.

Similarly, when a startup engages a third party to develop IP on its behalf, it should ensure that the third party explicitly transfers any IP that the company intends to use to the company via an IP assignment clause. For example, the successfully executed transfer of IP ownership from a third party to the startup is important to avoid downstream issues relating to ***who owns what***, if or when it arises.

Startups will also often employ a non-disclosure agreement (NDA), to maintain certain information in confidence and prohibit disclosure by parties. Ideally, every outsider to which a startup discloses confidential information should be bound by an NDA. NDAs can be either unilateral or mutual depending on the arrangement between the parties. For example, a well-drafted and signed NDA can be useful to prevent any sensitive information leaks by a nascent science or technology startup.

Privacy and Cybersecurity

Startups should always have written privacy and cybersecurity policies and, just as critically, practice them. This is particularly true when startups begin interfacing with the public in conjunction with a formal ***launch***. There are numerous federal, state and international laws and regulations that govern the collection and protection of personally identifiable information and the reporting of data breaches. Failure to adhere to these laws can create serious liabilities for companies, so it is important to ensure compliance from the moment your company begins working with customers or users.

More broadly, for startups whose products or services are delivered by website, software platform, or app, it is important to set forth the basic rules of the road in a Terms of Service document. This often includes a firm's privacy policy and data security policy, but also sets forth other important contractual provisions between a company and its users or customers. These may include specifying how the platform is to be used, user obligations, and obtaining any licenses to user-generated content.

While it is easy to focus solely on developing a product and raising money during the early stages of a business, developing a diligent and intelligent IP strategy early on can be critically important to your business's growth and success. You should evaluate the types of IP that can impact your business and strategically consider pursuing patent, trademark and copyright protections, as appropriate.

Defensively, you should also assess the intellectual property landscape of your business in the context of its broader industry or sector. That awareness should include clearance efforts to ensure that your company will not infringe the intellectual property of others as you develop its products and services.

Running Your Company: Personnel Considerations

For more information on federal and state employee vs. independent contractor analysis, visit this link:

Wage and Hour Fundamentals "A Guide for Early Stage Companies"

As you grow your company, you should be mindful of the legal and business landscape that affects operating your business. Some key considerations are highlighted below:

Hiring Employees, Contractors, Advisors and Interns

Anyone hired or engaged to perform services for your company must be classified as either an employee or an independent contractor. For several key reasons, such as need, employee and workers' compensation benefits, employment law compliance and tax considerations, many emerging companies prefer to use independent contractors early on. Since classification is a complex analysis based on both federal and state law, and misclassifying employees as independent contractors can lead to serious consequences (including penalties and possible violation of federal and state employment laws), taking care to properly analyze, understand and document the relationship between your company and its service providers is critical. It is important to note that the classification between an employee and independent contractor is a fact-based analysis, so merely labeling an employee as an independent contractor will not be determinative. It is also important to note that employees will get paid for their efforts, so be wary of minimum wage laws.

Interns: Early on, it may be tempting to bring on young, energetic, low- or no-wage interns to help grow your company. While interns can certainly be valuable members of your team, you should be sure to structure the relationship in a way that does not trigger coverage under the wage and hour laws, otherwise the interns will have to be paid at least the applicable minimum wage and would be entitled to premium pay for overtime hours, among other statutory protections. In determining proper classification of an intern, courts look at several factors, including whether the intern or the employer is the ***primary beneficiary of the relationship*** and whether the intern is displacing an employee.

Advisors: While in its early stages of growth, your company may want to engage an advisor to provide services to the company and advice to its leadership. Advisors can provide a wide range of skills, advice and support depending on the needs of your company. An advisor is typically classified as an independent contractor, whose relationship is governed by the terms of an advisor agreement. Oftentimes, advisors make a minimal time commitment and are compensated with equity in the company through stock options or restricted stock.

Documenting the Relationship

Whether you are hiring an employee, independent contractor, intern, or advisor, putting appropriate documentation in place to cement the relationship is important. In addition to documenting the type of services to be provided and compensation provided in exchange for those services, your agreements with service providers should address, at a minimum, terms of confidentiality and non-use, as well as assignment of intellectual property. You may also consider requiring employees to sign onto non-competition and/or non-solicitation covenants, depending on what's enforceable in your jurisdiction.

Confidentiality: To protect your company's confidential information, each service provider with whom you discuss any sensitive information regarding your company should first be bound by terms of confidentiality and non-use. These terms can be incorporated into a signed offer letter or a formal employee, advisor or contractor agreement, an employee handbook, or a standalone non-disclosure agreement.

CAUTION Intellectual Property

As discussed above, the company should own any intellectual property created by any service provider during the course of their relationship with the company. An IP assignment facilitates the transfer of IP ownership from the service provider to the company. In the event that the company's relationship with a service provider terminates, the IP created during the course of their relationship with the company belongs to the company. These terms can be incorporated into a signed offer letter or a formal employee, advisor or contractor agreement, an employee handbook, or a standalone non-disclosure agreement.

3

Equity Compensation

Emerging companies often utilize equity compensation as an additional incentive for new hires and advisors.

The ***Option Pool***: Most emerging growth companies will keep a reserve of stock available for issuance to company hires. This is the Option Pool. The size of the Option Pool can vary significantly among companies based on a variety of factors, such as hiring needs, industry norms, and access to capital. While there are numerous ways to incentivize employees and advisors, the most typical forms of equity incentives include stock options, restricted stock and profit interests, each of which is broadly described on the following page.

Equity issuances to founders and early employees of a startup are typically subject to either a right of repurchase in favor of the company, or a forfeiture risk that is tied to their continued service (or sometimes to an event). This helps incentivize employees and founders to stay with the company when it may not have the capital to offer competitive market rate salary and wages. Particularly, in the case of founders, it protects the company and other founders from a disgruntled ex-founder retaining significant voting control after departing. As an equity grant vests, portions of the grant are released from a repurchase right in favor of the company or a risk of forfeiture back to the company.

A typical vesting schedule may be described as "48 month vesting" with a "one-year cliff." Simply put, this means the entire equity award will remain subject to the repurchase right or forfeiture risk until the one-year anniversary at which point 25% (i.e., the amount that would vest over the first 12 out of 48 months of vesting) will vest, and the remaining 75% will vest in even monthly increments over the next 36 months. This is not the only vesting arrangement possible, but is one of the more frequent iterations used, and one that will be familiar to investors.

Cap Table Management

As discussed earlier, since equity can be an important and significant component of overall compensation for an employee working at an emerging company, it is important that you to be able to maintain a clear picture of the company's overall ownership, or ***capitalization***. Whether managed via a spreadsheet or on a cap table platform, maintaining this information accurately and up to date is critical for exercising control over your growing company and demonstrating as much to investors as you seek capital.

Fair Market Value

Generally, equity compensation will be granted at fair market value to minimize tax implications. When offering equity incentives as compensation, a company can rely upon a valuation compliant with Internal Revenue Code (IRC) § 409A to establish the fair market value. Since the IRC generally requires your company to set the strike price of any stock options to be equal to the fair market value of your company's common stock on the date of grant, many emerging growth companies secure a 409A valuation as an independent third-party appraisal of the fair market value of their equity to guide their boards of directors in making the determination of its value. Once the 409A valuation is conducted, a safe harbor is established under the IRC. 409A valuations should be done at least annually and each time the company has a material event that might impact its valuation, like a new financing.

Options, Restricted Stock, and Profits Interests

Stock Options	A stock option is a contract between the optionholder and the company which grants the optionholder the right to buy stock in the future at a fixed price (almost always this fixed price must be no less than the fair market value on the date of grant). The option itself is not stock and the optionholder is not a stockholder. Options can be a strong employee retention tool for emerging companies. This is, in part, because of vesting provisions, which require an employee to continue employment in order to earn the full option grant, and the prospect of exponential growth in the value of the stock relative to the price it can be purchased for pursuant to the option. There are two types of stock options: non-qualified stock options (NSOs) and incentive stock options (ISOs), that offer different tax consequences for both your company and the option recipients.
Restricted Stock	Restricted stock is stock that is sold or granted, subject to vesting. During the vesting period, restricted stock is considered outstanding and the recipient can receive dividends and exercise voting rights. While restricted stock may provide more up-front value and downside protection than stock options, it may result in out of pocket tax liability to the recipient prior to the sale or other realization event with respect to the restricted stock.
Profits Interests	Profits interests are an equity incentive that are typically only available in an LLC. Prior to issuing a profits interest, the company will determine the fair market value of the company, and set a distribution threshold at or above the current fair market value. The holder of the profits interest would then share in any of the increase in the value of the company above the threshold and, in effect, share in the future growth of the company. Similar to restricted stock and stock options, a profits interest may be subject to vesting.
Others	Other forms of incentives such as restricted stock units, phantom equity and stock appreciation rights are possible as well, but options, restricted stock and profits interests continue to be most typical.

CAUTION The 83(b) Election

If the company makes an equity grant (other than a stock option) that is subject to vesting, the IRS's standard position is to tax the grant on each vesting date. This can be an administrative hassle for the company and a tax nightmare for the recipient of the grant. To fix this, the IRS permits the recipient to make an election under § 83(b) of the IRC, by which the recipient elects to have the entire equity grant taxed at the time of issuance as opposed to the later date when the equity vests. This allows the recipient of an equity grant to pay taxes on the grant upfront (i.e., when the grant is expected to have a lower value) rather than over time, as the grant vests and, hopefully, increases in value. It should be noted that the upfront taxes paid under an 83(b) election are **not** refundable in the event that the equity grant (or any portion thereof) fails to vest and is forfeited. To be effective, an 83(b) election **must** be filed with the IRS within thirty days following the grant of equity. For more information on making such an election, visit IRS Publication Number 525 which is available on the IRS Website.

Other Labor and Employment Considerations

Handbook and Policies

Emerging companies should take steps to ensure their employee handbook includes a prominent at-will disclaimer and provisions tracking the requirements of federal, state and local laws. Once in place, it is good practice to distribute the employee handbook and obtain an acknowledgment of receipt from each employee upon commencement of employment. Some important policies to consider for your company's handbook include: sexual and other forms of discriminatory harassment, anti-discrimination, leaves of absence, work rules, emergency preparedness, health and safety, discipline, pay equity, vacation and paid time off, and employee benefits (though the details will be spelled out in the plan documents and summary plan descriptions).

Other Employer Responsibilities

In addition to determining the appropriate classification for its workers, an emerging company has other compliance obligations once the employment relationship has been established, including compensating employees in accordance with federal, state, and sometimes local wage and hour regulations, paid sick leave, family and medical leave, and rules around the termination of employment relationships, all of which may vary from jurisdiction to jurisdiction. It is therefore important to consult with counsel when establishing and terminating employment relationships to ensure your company is protected and compliant.

Professional Employer Organizations

Emerging companies may opt to engage Professional Employer Organizations (PEOs) to facilitate the outsourcing of tasks that the company may not have the time or resources to perform itself. Some of these tasks may include benefits and human resources (HR) related tasks, payroll, determination of withholding taxes and other employer-related administrative functions. Companies typically engage PEOs via a co-employment relationship, whereby the company's employees are employed by two separate entities (i.e., the company itself and the PEO). While a PEO may relieve certain administrative burdens and offer access to competitive benefit packages and HR services, they can be somewhat costly for early stage companies and may result in a loss of certain internal controls.

Immigration: Employment Eligibility and Work Authorization Sponsorship

Emerging companies are required to verify the identity and employment authorization of individuals hired for (W-2) employment in the U.S., and to complete and retain a Form I-9 for every full-time and part-time employee, including all non-U.S. workers and U.S. workers (U.S. workers are U.S. citizens or permanent residents commonly known as ***green card*** holders). Emerging companies may choose to sponsor employment-based visas on behalf of individuals who are not citizens or permanent residents of the U.S. Employment-based visas authorize these non-U.S. workers to be employed by the company in specific positions in the U.S. When employment with the company ends, the benefit of the employment-based visa/visa sponsorship also ends.

Employment-based visas are tied to specific position-related details, such as title, duties, minimum requirements, rate of pay and/or location. If one or more of these details changes, the visa may be invalidated. Employment-based visas may be temporary (like an H-1B visa for a ***non-immigrant*** who intends to eventually leave the U.S.), or permanent (***green card applications*** to become an ***immigrant*** and stay in the U.S. as a permanent resident). Non-U.S. workers must be sponsored for a temporary employment-based visa to work and stay in the U.S. today, and then, at the company's discretion, they may be sponsored for a permanent green card to be obtained at some time in the future. There are many factors to consider in each specific sponsorship case, including government-mandated quotas and timelines. Planning at least six months in advance of target start dates is often necessary.

The Department of Labor (DOL) and the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) are both government agencies involved in employment-based visa processes. The DOL and USCIS have discretion over employment-based visa applications and application approval is never guaranteed. The DOL and USCIS may request a number of corporate structure/ownership, tax, payroll, financing, and other records from emerging companies to evidence viability and business existence as part of the employment-based visa sponsorship process. It is important for company stakeholders to understand that company records and visa sponsorship details may, therefore, become public records.

Emerging companies should consult with immigration counsel to represent their interests with respect to employment-based visa sponsorship, and be sure to coordinate corporate, tax, and immigration advisors to ensure all records-keeping and compliance practices align. Immigration counsel can advise on customized company strategy and business plan/evidence development to facilitate sponsorship as the emerging company grows, outline specific employment-based visa processes, and address I-9 compliance to address different work authorization types as well as global mobility options for U.S. workers.

Commonly used SHORT-TERM visa categories

- Student (F-1)
- Exchange Visitor (J-1)
- Professional (H-1B)
- Extraordinary Ability (O-1)
- Intra-company Transferee (L-1)
- Treaty Trader and Investor (E-1 & E-2)
- Other: H-3 Trainee, E-3 Australian, H-1B1 (Singapore & Chile), TN NAFTA
- B-1/B-2/ESTA Business Visitor (NOT A WORK VISA!)

Immigration Strategy

- Separate self from entity
- Focus on detailed Business Plan: funding, market analysis, and job creation
- Establish entity: physical location, FEIN, financials, and U.S. workers
- Gather and organize evidence
- Plan to invest hands-on time/ effort & money into immigration processes

Growing Your Company: Raising Capital

Most high-growth companies will seek to raise capital to fund growth and development. Here, we review some of the most common financing options employed by emerging companies and highlight key issues worth considering for each. As a company grows, it may have many options for financing, but at the earliest stages, fundraising costs, time and sources of available capital may limit your options.

Early Stage Financing via Convertible Instruments: *Pre-Seed* and *Seed* Rounds

(See below for Priced Equity Financings, which may also constitute ***Pre-Seed*** and ***Seed*** Financings)

Early on in your company's lifecycle, as you are trying to build an idea, assess the market and define your customer base, it can be nearly impossible to put a dollar value on your company. As such, many early-stage financing vehicles avoid establishing a valuation of the company and instead provide funding with an agreed-upon conversion mechanism at a later stage. At this stage, you will likely need to rely on ***angel*** investors or, potentially, friends, family or bootstrapping, for initial injections of capital. These agreements are often convertible instruments pursuant to which an investor gives cash to the company in exchange for a promise that the investor will be given a to-be-determined number of shares in connection with a future ***priced*** equity financing or an acquisition of the company. There are a few ways many start-ups approach fundraising at this stage, without issuing equity:

Contractual Convertible Instrument	Convertible Debt
The most prevalent contractual convertible instrument is the Simple Agreement for Future Equity (SAFE), which is a specific form document designed to be simple and produce quick, efficient transactions. Other forms exist as well, including the Keep it Simple Security (KISS). These contracts are generally not considered debt instruments, as the company is under no obligation to pay the money back, but instead the face value will convert into equity (typically, preferred equity) in a future financing where a fixed price per share is established. For founders, a major benefit of these instruments is that they are short, readily available, and are recognized in the market.	Similar to traditional debt financing, investors in convertible debt provide cash to the company that accrues interest and that has a maturity date for when the loan comes due. With convertible debt, however, the principal (and typically the interest) will convert into equity (typically, preferred equity) in a future equity financing where a fixed price per share is established.

CAUTION In both contractual convertible instruments and convertible debt, a company seeking to raise funds will frequently need to offer a ***discount*** to entice investors. Discounts are typically expressed as a percentage of the price per share the funds advanced to the company under a convertible instrument will convert into the next priced equity raise, but come in the form of ***valuation caps*** as well. For example, in the scenario with a company selling its shares at $10 per share with existing convertible securities carrying an 85% discount rate, those existing convertible securities will convert into equity at $8.50 per share. If you choose to raise capital using a convertible instrument, it's important to model how your cap table (i.e. company ownership) will be impacted by the issuance and ultimate conversion of these instruments in various scenarios.

Venture Capital Financing

As you get your company off the ground, you may want to approach venture capital investors to complete a ***priced*** fundraising round. This means that you'll work with one or more institutional investors to come up with a valuation for your company, and you'll then sell those investors a portion of your company for an agreed price. This would typically occur when your company can demonstrate a significant business opportunity for which it requires a more substantial amount of capital.

A priced fundraising round typically results in a larger investment from one or more investors in exchange for preferred stock of the company. In addition to receiving preferred stock in the company, venture capital investors also typically receive important corporate governance rights, such as a seat on the Board of Directors and approval rights on certain transactions or major corporate actions. Preferred stockholders often receive the right to get the cash value of their investment back (plus an additional return in some circumstances) before holders of common stock are paid upon the sale or liquidation of the company.

Crowdfunding

In 2016, Title III of the JOBS Act, also known as ***Regulation CF*** or Reg CF, went into effect, allowing private companies to raise up to $1,070,000 in any consecutive 12-month period from an unlimited number of U.S. citizens through what we've come to know as ***crowdfunding***. A Reg CF financing must occur entirely through a single SEC/FINRA registered broker-dealer or funding-portal and is subject to certain other requirements and restrictions.

Securities and "Blue Sky" Compliance

When issuing securities (i.e., equity and convertible instruments), emerging companies must be cognizant of both the federal and state laws regulating such securities. At the federal level, the Securities and Exchange Commissions (SEC) governs, while state level securities laws, referred to as ***Blue Sky Laws***, vary from state to state.

The SEC requires that all securities be registered with the SEC, unless such security fits within an exemption from registration. Since registration with the SEC is burdensome, expensive and time consuming, most emerging companies seek out an exemption. In cases where federal law does not preempt state level Blue Sky Laws, the securities will need to be registered with the state or qualify for a state level exemption.

Anatomy of a Priced VC Deal	
Pre-Raise	Before you begin approaching venture capital investors, you'll need to assemble a ***pitch deck*** that tells the story of your company and presents a compelling argument for why your company is poised for growth.
Term Sheet	After you've successfully found a major investor to ***lead*** the round of fundraising, you and the investor will agree upon a term sheet that sets forth the most important details of the financing, such as the valuation of your company or whether the investor will get a seat on the Board of Directors.
Diligence	Before ***closing*** a financing round, your investors and their attorneys will do due diligence on your company, meaning they'll perform a thorough review of its books, records, contracts, intellectual property and other important documents, so that they know what they're investing in. It's important to keep this step in mind from the very beginning, as the process will run more smoothly if you have kept accurate and complete corporate records from the beginning.
Definitive Agreements	Simultaneously with the diligence phase of the deal, your counsel and the investor's counsel will work to draft the definitive agreements. In a typical financing where the investor is purchasing preferred stock, it is common practice to use the model legal documents prepared by the National Venture Capital Association (NVCA) as a starting point. For many financings, using the NVCA model documents can increase efficiency and reduce transaction costs.
Closing	Once all the transaction documents have been negotiated and agreed upon, the company and investors will execute all of the documents, and the investor will wire funds into the company's account.

Path to an Exit, and Beyond!

Even at the very start of your new venture, it's important to keep certain long-term considerations in mind. Chief among these considerations: what do you want your exit to look like? Some founders hope to one day take their company public through an IPO. Others hope to eventually sell their company to an already-established player in the industry. Still others hope to grow and run the business as a private enterprise for the long term.

Regardless of what your goals are, having some idea of where you'd like your company to go in the long term will help you make smarter decisions in the short term with respect to all of the topics discussed in this Startup Kit.

Having reliable partners and advisors to guide you along the way will play an important part in your company's growth and success. No matter where you are on your startup journey, we're here to help, and always open to having a conversation. Find out more about wiggin(x)'s practice by visiting us at **wigginx.com**.

wiggin(x) Every Step of the Way

FORMATION

- Employment Law
- Enterprise Formation
- Governance
- Tax Structuring
- Patent Prosecution & Strategy
- Technology Licensing
- Trade Secrets
- Trademark & Copyright

CAPITAL RAISE

- Angel & Seed Financing
- Debt Financing
- Foreign Investment Controls (e.g. CFIUS)
- Private Equity Investments
- Private Placements
- Securities Law
- Venture Capital Financing

SCALING & OPERATIONS

- Antitrust & Consumer Protection
- Clinical Research Regulation & Compliance
- Cybersecurity & Privacy
- Employee Benefits & Executive Compensation
- Environmental Health & Safety
- General Counsel Services & Support
- Immigration & Nationality Law & Compliance
- International Trade Compliance/Export Controls
- Labor, Employment & Benefits
- Real Estate Transactions

See "Beyond" column at right

EXIT

- Complex Transaction Structuring
- Due Diligence Support
- Finance & Restructuring
- Licensing, Collaboration & Strategic Alliances
- Joint Ventures
- Mergers & Acquisitions
- Regulatory Clearance
- Transaction Financing

BEYOND

- Class Action Defense
- Commercial Litigation
- Intellectual Property Litigation
- Product Liability
- Securities & Capital Markets
- Securities Litigation
- White Collar Defense, Investigations & Corporate Compliance

See "Scaling & Operations" column at left

Resources

- Risk Considerations in Commercial Contracts with Customers
- Are You an Exporter? You Might Be. The Often Overlooked Controls on Software with Encryption Capacity
- Estate Planning for Founders
- You've Been Sued: How to Avoid Early Missteps
- Blinded by the Price: From Enterprise Value to Net Payment at Closing