

# Company Formation

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**April 18, 2019**

# When Should I Organize

- **When You are Creating Assets that are Difficult to Transfer**
  - Intellectual Property
  - License Agreements / Third Party Contracts
  - Business Opportunities – Accelerator Programs
  - Research Grants
- **When Unforeseen Business Results Can Lead to Large Damages**
  - Customer or Supply Contracts
  - Employees
  - Product Liability
  - Leasing or Owning Real Property
- **Multiple Owners**

# Choice of Entity

## Major considerations

- **Entity level taxation versus flow-thru taxation**
- **International and exempt investors**
- **Tax-free reorganizations/assets sales**
- **Venture capital investment**
- **Flexible economic arrangements**

# Delaware vs. Colorado

- **Colorado – advantages**
  - Easy to incorporate/modify
  - Low taxes and agent costs
- **Colorado – disadvantages**
  - Few legal precedents
  - Unsophisticated court system

# Delaware vs. Colorado

- **Delaware – advantages**
  - Robust corporate code
  - Extensive legal precedent
  - Corporate-only courts
- **Delaware – disadvantages**
  - Higher costs
  - Harder to modify incorporation documents
- **Other states do not provide significant advantages**
- **Offshore incorporation and maintenance are expensive**

# Subchapter “C” Corporations

- **Advantages**
  - **Typical public market and venture capital investment vehicle**
  - **No limitations on owners**
  - **More than one class of stock allowed**
  - **Allows companies to use net operating losses to shield future gain**
  - **Robust corporate code and legal precedents**
  - **All employees are W-2 employees**

# Subchapter “C” Corporations

- **Disadvantages**
  - **Corporate level tax and second level tax on distributions to shareholders**
  - **Limited flexibility on structure**
  - **Stocks grants are taxable**

# Subchapter “S” Corporations

- **Advantages**
  - Pass through taxation
- **Disadvantages**
  - Burdensome tax rules must be followed to maintain "S" corporation status
  - Limitations on owners
    - No more than 100 shareholders
    - Only one class of stock
    - Only U.S. citizens or resident aliens
    - No entities except certain qualified trusts, tax exempt organizations, employment plans and estates
    - Need for shareholder agreement



# Limited Liability Companies

- **Advantages**
  - **Pass-through taxation**
    - **Passive losses only helpful if investors have passive income**
    - **Losses limited to at risk amount and basis**
  - **No limit on type and number of members**
  - **Can have multiple classes of equity**
  - **Flexible management – fewer fiduciary duties**
  - **Flexible economic arrangements**
  - **Can issue profits interests to employees and service providers**
  - **Great for asset sales**

# Limited Liability Companies

- **Disadvantages**
  - **Operating agreement can be complex**
  - **Limited legal codes & legal precedents**
  - **Venture capital less likely to invest**
  - **Atypical public market vehicle**
  - **Less familiar than corporations**
  - **Dividends to foreign investors may be subject to withholding – foreign investors required to file US tax returns**
  - **Cannot use entity losses to offset gain**
  - **Members with small equity should be classified as K-1 employees**

# B Corporations

- **Characteristics of both for-profit and non-profit corporations.**
- **Directors can consider social impact (employee, community, environmental, etc.), in addition to profits and shareholder benefit, when making corporate decisions.**
- **Does not affect rights of creditors.**

# Thank you!

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