



KEY INCORPORATION DOCUMENTS

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This article was created by [Elizabeth Resteghini](#) and [Monica Sax](#) from [Morse](#) for [Scroobious](#) founders.

Scroobious is increasing diversity in the startup ecosystem by providing the education, tools, and community founders need to create investor-compelling pitch material and a platform to help investors easily find them through data-driven curation. For startup founders who have a story to tell but need help telling it, [The Pitch it Plan™](#), or PiP, is a virtual platform that helps you get your compelling story into an investor-ready format. Unlike googling for hours or paying thousands for a pitch coach, PiP is affordable and approachable through online education and personalized feedback from a human who understands the investor mindset. Our framework has [been published](#), vetted by investors, and has helped founders score meetings, raise rounds, and get into prestigious accelerators. Founders can [sign up here](#) or [book an intro call](#) to chat.

Combining the best practices of traditional law firms with an inventive approach, Morse's founders created a solid basis for a more modern practice of law. We offer our clients responsive and reliable service, sound and insightful business advice, and reasonable fees. We're dedicated to developing real partnerships with our clients, addressing each client's specific challenges, and delivering effective results tailored to each client's needs. While we have long enjoyed a reputation for special competency in technology ventures, we represent clients of all sizes and industries in all stages of the business life cycle. Our clients include startups, emerging growth entities, established family businesses, and Fortune 1000 companies. Our exceptional business model affords clients access to highly experienced counsel in the areas of M&A, Venture Capital, IP, Employment, Taxation, Privacy, and Litigation.



Forming a company requires founders to make numerous decisions, such as choosing what type of entity would best suit their business and where to incorporate, as described further in this [article](#). Once you have decided upon the choice of entity and the jurisdiction to incorporate, the next step is ensuring that

you have the right documents in place to start your company. Because many companies hoping to receive venture backing choose to incorporate as a C-Corporation in Delaware, this article will provide an overview of key incorporation documents that a C-Corporation should consider having in place.

Conduct a Name Availability Search

One of the first things you (or your lawyer) should do is conduct a name availability search to see if the name you want for your business is available in the jurisdiction you want to form in and any states you know you want to foreign qualify in. To the extent you do not plan to incorporate right away, it may be advisable to reserve the name with such jurisdiction.

Businesses thinking about future trademarks might also want to consider running an initial search on the United States Patent and Trademark Office website to get an initial understanding of similar pre-existing trademarks, or work with a trademark attorney to register for a desired mark.

Certificate of Incorporation

The Certificate of Incorporation (often referred to as a “Charter”) is the document that will be filed with the Secretary of State’s office in order to officially form a company. In states other than Delaware, the Charter may be referred to by another name such as the Articles of Incorporation.

Among other things, the Charter establishes a company’s name, authorizes the number of shares of stock that can be issued, the type of shares that can be issued (such as common stock), and establishes the par value of the stock. Companies should be careful to not exceed issuing more than the authorized number of shares in the Charter.

All states require companies to have an in-state “registered agent” who can receive mail or legal documents if a lawsuit is filed against the company. If a company is being formed in a state where the principals do not live, companies can hire a third party to act as their in-state registered agent. This information should also be included in the Charter. The Charter should also include indemnification provisions to limit the liability of the Board of Directors and officers of a company.

As a company grows and has more investors, it may need to amend and restate the Charter to increase the number of authorized stock that can be issued, create more classes of stock (such as preferred stock), and to potentially include more complex terms such as liquidation preferences among different classes of stock.

By-Laws

This document sets forth the procedural rules and corporate governance matters for a company, such as the rules governing the meetings of the Board of Directors and stockholders, filling vacant director seats, as well as the roles of the officers of the company.

Incorporator's Consent

The Incorporator is the individual who signs the initial Certificate of Incorporation. In the Incorporator's Consent, the incorporator elects the initial members of the Board of Directors and approves a company's initial Charter and By-Laws.

Initial Consent of Board of Directors

In the initial consent of the Board of Directors (or in the initial meeting of the Board of Directors, which should be summarized in meeting minutes for the Company's records) key actions should be taken, such as appointing the initial officers of a company, including the President, Treasurer and Secretary, approving founder equity issuances and authorizing the officers to open corporate bank accounts.

Subscription Agreements and Stock Certificates

Subscription Agreements should be prepared for the initial stock issuances (which typically are to the founder(s) of the company). Subscription Agreements evidence the purchase of shares, the amount of money paid for the shares, if there is any previously developed intellectual property that is being assigned over to the company as part of the consideration for shares it will include a contribution and assignment provision, and if there is any restricted stock vesting provisions those can also be included in this agreement. Restricted stock means that shares of stock will be subject to vesting provisions which typically state that if a founder leaves the company prior to the completion of the vesting of the shares, that the company has the opportunity to repurchase the unvested shares. Sometimes companies with multiple founders find comfort in having these provisions in place because it creates an incentive for their co-founder to stay with the company during that period of time. As a company grows, investors may request founders to enter into restricted stock vesting provisions, if they have not already, for a portion of their shares to similarly help incentivize the founders to stay with the company. However, there may be some apprehension to enter into these terms if a founder has worked for the company for a number of years and feels they have already highly contributed to a company and earned the stock and do not want it subject to repurchase. An example of a typical vesting schedule is four-year vesting with a one-year cliff and monthly or quarterly vesting after the cliff, though this can vary depending on what is negotiated and may also include acceleration of vesting terms upon the occurrence of certain events. To the extent there are restricted stock vesting terms, an 83(b) election will need to be filed with the IRS within 30 days to preserve beneficial tax treatment of the shares.

Stockholders' Agreement

In cases where there is more than one founder, sometimes the parties will want to enter into a Stockholders Agreement. This Agreement can include a number of different terms, such as restrictions on stock transfers, pre-emptive rights to purchase future new

securities, agreements to vote shares in a particular manner to elect directors, and drag-along provisions. Sometimes, companies with multiple founders who know they plan to do a preferred stock financing in the near future will decide not to enter into a Stockholders' Agreement because the financing documents will typically cover related topics.

Confidentiality and Intellectual Property Assignment Agreement

This agreement can be referred to by many names (such as the Confidentiality and Intellectual Property Assignment Agreement, the Proprietary Information and Assignment of Inventions Agreement, or a Non-Disclosure Agreement) and covers key terms that each company should have all of their employees and independent contractors enter into, such as establishing what is confidential information and setting forth the rules for protection and non-disclosure of the same. It also should establish a company's ownership over work product and intellectual property and include an assignment provision in favor of the company. Sometimes these agreements also include a non-solicitation provision and in certain cases a non-compete (however, non-competes are difficult to enforce due to recent legislation, and if using one it should be drafted with the advice of legal counsel).

Form SS-4 or Online EIN Application

A federal Employer Identification Number (EIN) is something that should be applied for with the IRS. This can be obtained through the formal filing of a Form SS-4 with the IRS or by a founder going to the IRS website and applying for one online. Companies will need to use an EIN for various things, such as setting up a company bank account.

Foreign Qualification

Foreign qualifying in a state means to register with the Secretary of State of a state that your entity is not incorporated in. The need to foreign qualify in a state differs from state to state but is typically triggered by things like your entity conducting significant amount of business in that state, or if you have workers in an office there. If you incorporate in Delaware, you will also need to foreign qualify in the state in which you have your principal place of business, in addition to any other states where your business activities may necessitate qualification.

The above are the common key documents needed for incorporating a C-Corporation. As companies grow and depending on their needs, they may also want various other documents in place early on such as an equity incentive plan to grant stock options or indemnification agreements to further protect officers and directors. Other entity structures will require different or additional documents to be put in place, such as the filing of a 2553 election for S-Corporations. In addition, companies will need to file annual reports and pay certain taxes to states they register in.

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