The Incorporation Process

Minority Business Ownership

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Agenda

• First Steps

• Board of Directors, Shareholders, and Officers

• Question and Answer Session with Srini
First Steps
Choice of State of Incorporation

Delaware
• Delaware provides an unparalleled corporate environment
  • Delaware corporate law is:
    • Flexible
    • Consistently managed and updated

California
• California corporate law is not viewed as favorably
  • California corporate law has:
    • maintained shareholder protections and declined the adoption of a pro-management regime based on flexibility and simplicity.
Overview of Basic Incorporation Steps

- Preparing and filing the articles (certificate) of incorporation
- Conducting the organizational meeting of the initial board of directors
- Preparing and adopting bylaws
- Issuing shares
Modern corporate statutes will require the Charter to set forth the following items of information:

- The corporate name
- The purpose
- Service of process information
- Identification of the incorporator
- A description of the types and amount of shares that the corporation is authorized to issue
Optional Provisions

- Limitation of Director Liability
- Super-Majority Votes
- Denial of Right to Act by Written Consent
- Renouncement of Corporate Opportunity
- Staggered Boards
Amendments to the Charter

- The Charter can be amended after corporate existence begins by obtaining the requisite approval of both shareholders and directors.
- Most states today require approval by an absolute majority of shares.
Board of Directors, Shareholders, and Officers
Initial Board of Directors

- The process of organizing the corporation is undertaken by the initial directors of the corporation, if they are named in the Charter.
- If they are not named, the incorporators must hold a meeting to elect directors and often to adopt the bylaws.
- Thereafter, the initial directors must hold a meeting to appoint officers.
Preparing and Adopting Bylaws

Bylaw provisions typically include:

• How many officers the corporation will have
• The functions of each office
• The mechanics for calling and conducting shareholders’ and directors’ meetings
• The formalities of shareholder voting
• The qualifications of directors
• The formation of board committees
• Procedures for issuing and transferring shares
Capital Structure

- Number and Classes of Shares
- Consideration
- Par Value
- Issuance of Shares
- Voting Rights
- Dividend Rights
- Rights on Dissolution
- Redemptions and Repurchases
- Conversion Rights
- Preemptive Rights
Shareholder meetings

- The traditional view is that valid shareholder action requires a shareholder meeting with a modern statutory exception for action by written consent.
Election of Directors

• The number of directors to be elected is generally fixed in the Charter or bylaws.

• In the absence of a staggered board, the general rule is that all directors stand for election at each annual shareholders’ meeting.
Removal of Board Members

• Directors can be removed:
  • For cause
  • Without cause
Shareholders’ Rights of Inspection

- Under many states’ statutes:
  - certain records are available to shareholders as of right without regard to showing of proper cause.

- Other corporate records are generally available to shareholder inspection only on a showing of proper purpose.
Corporate Officers

- Chairman of the board or a President or both
- Secretary
- Chief Financial Officer
Fiduciary Duties

Directors:
• Both Delaware and California hold that directors owe fiduciary duties to the corporation and to its shareholders.

Officers:
• Under both California law and Delaware law a corporate officer with management powers is a fiduciary of a corporation.

Employees:
• Commentators have concluded that in California, “employees who are not officers or directors are generally not considered to be fiduciaries and thus owe no fiduciary duty to their employers.”
  • In Delaware, there is case law referring to a fiduciary duty of employees in certain contexts.
Q&A