SOME KEY THINGS ENTREPRENEURS NEED TO KNOW ABOUT THE LAW AND LAWYERS

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ABSTRACT

New business formation is a powerful economic engine that creates jobs. Diverse legal issues are encountered as a start-up entity approaches formation, initial capitalization and fundraising, arrangements with employees and independent contractors, and relationships with other third parties. The endeavors of a typical start-up in the United States will likely implicate many of the following areas of law: intellectual property; business organizations; tax laws; employment and labor laws; securities regulation; contracts and licensing agreements; commercial sales; debtor-creditor relations; real estate law; health and safety laws/codes; permits and licenses; environmental protection; industry specific regulatory laws and approval processes; tort/personal injury, products liability, and insurance laws; antitrust and other unfair competition laws; import/export laws;
immigration laws; laws related to the internet, privacy and e-commerce; and possibly many other federal, state and/or local laws, and, for many businesses these days, international laws. Company founders need to develop familiarity with the effects of such laws and need to access qualified legal talent to address legal issues in the planning and implementation of their venture. This article is designed to provide entrepreneurs with an overview of several areas of law that commonly arise in for-profit start-up ventures and offer them some important tips on working with lawyers.

Keywords: accounting, angel investor, business organizations, copyright, corporate finance, corporate governance, entrepreneurship, intellectual property, lawyers, leadership, legal issues, National Venture Capital Association (NVCA), patents, securities law, start-up, trademark, venture capital,

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SOME KEY THINGS U.S. ENTREPRENEURS NEED TO KNOW ABOUT
THE LAW AND LAWYERS

I. OVERVIEW

Stanford business school professor Edward P. Lazear observes that “The
entrepreneur is the single most important player in a modern economy.”1 Bruce R.
Barringer and R. Duane Ireland state that “An entrepreneur assembles and then integrates
all the resources needed – the money, the people, the business model, the strategy, and
the risk-bearing ability – to transform the invention into a viable business.”2 In addition,
“entrepreneurship” has been defined as “the process by which individuals pursue
opportunities without regard to resources they currently control.”3 Lazear has defined an
“entrepreneur” as “someone who responds affirmatively to the question ‘I am among
those who initially established the business.’” Such individuals, even if they leave the
business early, are usually responsible for the conception of the basic product, hiring the
initial team, and obtaining at least some early financing.”4

A business, regulatory and tax environment conducive to the creation and growth
of new businesses is the key to job growth. Small businesses are responsible for creation
of 60 to 80 percent of net new employment since the mid-1990s.5 The U.S. Small

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1 Edward P. Lazear, Entrepreneurship, IZA Discussion Paper No. 760 2 (2003), available at
2 Bruce R. Barringer & R. Duane Ireland, Entrepreneurship: Successfully Launching
New Ventures 5 (2d ed. 2008), citing P. Sharma & J.J. Chrisman, Toward a Reconciliation of
the Definitional Issues in the Field of Corporate Entrepreneurship, 23 Entrepreneurship
3 Id. at 6, citing H.H. Stevenson & J.C. Jarillo, A Paradigm for Entrepreneurship: Entrepreneurial
5 Vivek Wadhwa, Raj Aggarwal, Krizstina Holly & Alex Salkever, Making of A Successful
Business Administration “found that net job creation in the immediate years following
the 1990-1991 and 2001 recessions stemmed from employment generated by small firms
with fewer than 500 employees.”6 Thus, all in our society have a vested interest in the
nurturing and formation of new businesses. It is through this business formation process
that jobs at all levels are created.7

Every entrepreneur must find talent to perform the numerous functional areas
required for their enterprise to operate and thrive. Depending on the nature of the
business, these functional areas and related core skills necessary for any business to
become successful will likely include: a visionary, driven to succeed; an operations
manager (or “field marshal”); finance; accounting; legal; marketing; information
technology and social media; and industry specific expertise (e.g., petroleum engineer
skills for an oil and gas company, software engineering for a software company, or
medical training and expertise for a medical device company).

Every enterprise requires legal advice to successfully navigate the maze of
regulatory and business problems. Professor Robert C. Bird even goes so far as to
suggest that strategic legal resources can be employed as “sources of sustainable
competitive advantage.”8 Our purpose in writing this paper is to highlight some of the

6 Vivek Wadhwa, Raj Aggarwal, Krisztina Holly & Alex Salkever, Making of A Successful
U.S. Small Business Administration, Office of Advocacy, The Small Business Economy,
7 See Ana Campoy, Policy, Geography Boost Texas Job Growth, WALL ST. J., Aug. 22, 2011, at
A4.
8 See Robert C. Bird, Can Law Be a Source of Sustainable Competitive Advantage?, 1 (2007),
the Right Corporate Legal Strategy, MIT Sloan MGMT. REV. (Sept. 16, 2014), available at
http://sloanreview.mit.edu/article/finding-the-right-corporate-legal-strategy/ (last viewed Sept. 29,
2015).
more common and significant issues entrepreneurs need to know about regarding laws and working with lawyers. Typically, start-up ventures in the United States may implicate many diverse areas of law. Our intent is not to present an exhaustive and lengthy study, but rather a short and useful discussion that is of practical value to an entrepreneur looking to get an initial introduction to the role of laws and lawyers in planning and launching a start-up venture. We hope this will inspire the entrepreneur to then dig deeper into books and other resources that engage in more in-depth treatment of various legal issues in the context of enterprise planning.⁹

First, we present below an initial overview of commonly encountered start-up legal issues and considerations involved in finding the right lawyer(s) to help deal with them. Second, the strategic importance of information technology, social media, and intellectual property is explored. Third, choices of entity considerations are discussed. Fourth, laws pertaining to raising early-stage capital are addressed. Fifth, we examine sources of early-stage capital. Sixth, is a discussion of creditor rights and bankruptcy considerations. Seventh, we focus on legal issues raised by the employer-employee relationship. Next, we briefly discuss the importance of risk awareness and risk management. We then offer a few concluding thoughts regarding the efficient use of lawyers and the importance of an entrepreneur developing familiarity with legal issues and engaging legal counsel to address them as part of the planning and implementation of the business venture.

II. START-UP LEGAL ISSUES AND FINDING THE RIGHT LAWYER

All of us owe much to those individuals who (against the odds) risk their finite time and personal net worth in the attempt to create a successful business. To survive, all successful entrepreneurs of necessity have become skillful at optimizing efficiency at every opportunity. Entrepreneurs also need to deal with what may often seem to them an endless maze of laws and regulations, some of them presenting hurdles, and others opportunities. This requires that they become educated on spotting areas of law they will encounter and engaging qualified legal counsel to guide them—which, given the many specialty areas of law that now exist, may well and often does mean hiring more than one lawyer.

The Start-Up and Legal Considerations

A typical start-up venture in the United States will likely implicate many of the following areas of law: intellectual property; business organizations; tax laws; employment and labor laws; securities regulation; contracts and licensing agreements; commercial sales; debtor-creditor relations; real estate law; health and safety laws/codes; permits and licenses; environmental protection; industry specific regulatory laws and approval processes; tort/personal injury, products liability, insurance laws; antitrust and other unfair competition laws; import/export laws; immigration laws; laws related to the internet, privacy, e-commerce, and consumer protection laws; and possibly many other federal, state and/or local laws, and, for many businesses these days, international laws.

At the most basic level, all successful start-ups have the same fundamental requirements, regardless of specific industry. Building the foundation for any successful enterprise is analogous to constructing a structurally sound foundation for your house.
Careful preparation before work begins is essential. You can always go back and try to repair a faulty foundation after you’ve attempted to place a structure on top; but, such an effort will likely prove costly, disruptive and a waste of limited management team resources. A core set of skills is necessary for any business to become successful. Legal talent, either “in house” or outside the enterprise is required.

**When to Engage a Lawyer**

How does an entrepreneur know if and when he or she needs to engage a lawyer? This can be a very challenging question. Can the entrepreneur really afford to pay for legal advice before his or her business plan has reached a level of feasibility to justify that expense? At the same time, are there risks in waiting too long? The answer to the second question is most certainly “yes.” Not getting legal advice can cause a multitude of mistakes that can prove costly, and perhaps disastrous. For example, an entrepreneur might accidentally make disclosures that erode or preclude the ability to protect intellectual property; create ownership rights in other people or entities that the entrepreneur did not consider “partners;” cause unintended adverse tax consequences; or violate securities regulation laws in ways that lead to civil or criminal liability and inhibit the ability to raise capital going forward.

There is no simple answer as to exactly when to hire one or more lawyers to help avoid these or other legal problems. Common mistakes we’ve seen entrepreneurs make do allow us to suggest some scenarios that should trigger the need to get legal counsel. These include: (1) when any significant prospect of creating intellectual property arises; (2) whenever considering working with anyone else who might argue they have “a piece of the deal;” (3) whenever thinking about borrowing any money from anyone for the
venture or issuing or committing to issue anyone an ownership interest or option to acquire an ownership interest; and (4) when hiring any service provider, and especially one who may be an employee. Those are certainly not the only times when an entrepreneur needs legal advice, but they are indicative of some of the more commonly arising situations in which such advice is of critical importance.

Finding the Right Legal Talent

How likely is it that one lawyer is truly well versed in all of the areas of law potentially affecting a venture? Lawyers come with various degrees of relevant experience and training. The study of law requires both graduate study to earn a law degree and specific experience gained as a result of legal practice in the relevant areas of law (communications, employment law, entertainment, intellectual property, international business, oil and gas, tax, and securities law are all examples of areas that can require significant time for a lawyer to gain facility). For the first-time entrepreneur, a host of diverse legal issues will present themselves in areas such as entity choice and formation, initial capitalization and fundraising, taxation, employment law, contracts, and intellectual property considerations. Luppino observes:

[F]or a lawyer to be viewed by his or her client as an effective counselor, the client must first recognize and appreciate the value of having a good lawyer on the client’s team, and then decide that the lawyer in question is indeed a good one. Both of these assessments may require overcoming some stereotypes and determining what really counts and what the skill level, integrity and commitment of a particular lawyer really are.10

Finding the right lawyer is somewhat like the search to find an appropriate surgeon. Just as you wouldn’t want a foot specialist operating on your brain, it’s usually not a good idea to approach a “generalist” lawyer who specializes in family or criminal law to handle complex tax or securities law matters. Luppino cautions that:

Soon, the entrepreneur will recognize that chances are his or her lawyer will not be an expert in all of the areas of law that may touch a business venture. So, a lawyer who is a ‘networker’ may be desirable (or essential). The entrepreneur will also quickly be made aware that many of the laws to be addressed will restrict or preclude avenues that were—before the lawyers were brought in—viewed as viable paths toward success. In other words, the entrepreneur’s lawyers may often have to be messengers of bad news, and accordingly appear to be masters of ‘no, you can’t do that’—which is why many consumers of business law services are quite naturally inclined to hope to find… ‘can do’ lawyers.\(^{11}\)

Therefore, the goal of entrepreneurial lawyer identification and recruitment is to find those knowledgeable lawyers who “have also developed significant business savvy and creativity, and who use their training in seeing all sides of an argument to become extremely valuable sounding boards for their clients, sometimes participating in the design and engineering, and often at least quarterbacking, the negotiation of their key transactions.”\(^{12}\)

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\(^{11}\) Id. at 7. See also Bagley & Dauchy, supra note 9, at Ch. 3 (“Selecting and Working with an Attorney”).

Lawyers and Fees

What kinds of fees do lawyers typically charge? Are they negotiable? It is fairly common for business lawyers to use an hourly rate approach to fees for services related to organizing a business. The rates can vary greatly from lawyer to lawyer depending on a number of market conditions and levels of training and experience. Moreover, the bill is of course not based solely on the hourly rate; rather, it is based on that rate multiplied by the number of hours billed on the engagement. The client, especially if a first-time entrepreneur, is not in a particularly good position to estimate how many hours will actually be involved, thus making budgeting for legal expense a difficult and uncertain proposition. It is possible to ask for discounted rates, and to get a plan that will involve having attorneys at lower hourly rates perform services they can perform well and efficiently, bringing in more senior lawyers (with higher hourly rates) on only an “as needed” basis.

What about a fixed fee for a discrete piece of transactional work (such as forming a corporation or limited liability company), or an hourly rate fee but with a dollar amount maximum/cap? Fixed fees can be a matter of negotiation and do make budgeting easier. However, the entrepreneur should consider what might be in the head of the lawyer who has already (on an hourly basis equivalent) hit the max on the matter in terms of the dollar amount of time that can be billed to the client under the arrangement and has to decide how to prioritize his/her work on the matter with other clients’ work (which may be on the clock at hourly rates). The lawyer is of course subject to discipline under rules of attorney conduct and potential liability for malpractice should he or she neglect or otherwise fail to fulfill obligations to the client; but questions of prioritization in the
context of having multiple clients may make it difficult to draw clear lines of enforcement of the attorney’s duties in this type of situation.

How about an entrepreneur with limited cash at the early stage of a venture proposing to pay a lawyer with an equity interest in the venture in lieu of a cash fee? Despite the risk of conflicts of interest inherent in that type of arrangement, it is possible for a lawyer to ethically accept that kind of deal if done properly and in the right circumstances. The entrepreneur should of course consider whether that may be penny wise and pound foolish—might that equity interest turn out to be much more generous to the lawyer than the entrepreneur contemplated? In addition, issuing equity for services is within the ambit of the securities laws discussed later in this paper as an issue to be considered when issuing investment units for services, money or other property.

Is an entrepreneur better off hiring a big law firm or a solo, small or medium-sized law firm? Again, no easy answer to this. A large firm with multiple departments (intellectual property, tax, business law, employment law, etc.) can offer the advantage of relatively one-stop-shopping to cover a diverse set of legal needs. But a solo, small, or medium law firm may have less overhead, more affordable fees, and a good network to bring in outside “specialists” when needed. There is simply no perfect answer. The

14 See, e.g., Passante v. McWilliam et al., 53 Cal. App. 4th 1240 (Cal. App. 1997) (3% of stock promised to lawyer for “rookie baseball card company” turned out to be worth approximately $33 million; jury found for lawyer in suit to enforce that deal, but trial court and appellate court overturned that and held that the company did not have to make good on what was found to be just an unenforceable “moral” promise to make a gift to the attorney on the particular facts of that case).
15 We mean here “specialists” in the sense of substantial experience in particularly challenging areas of law. Lawyers are generally subject to restrictions as to when and how they may hold themselves out as specialists in a formal sense. See, e.g., ABA MRPC &.4(d) (“A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an
good news is that the entrepreneur can interview lawyers and negotiate a tailored deal if
the entrepreneur is willing to take the time to do that, preferably with some
recommendations by trusted mentors who have “been around the block” as consumers of
legal services.

Can one lawyer represent multiple owners in forming a business entity for the
venture? The American Bar Association’s Model Rules of Professional Conduct say
“yes” in limited circumstances.16 That approach may be cost efficient, but the
entrepreneurs involved still might think twice before going that route; there is a lot to be
said for having your own lawyer focused on your individual interests.

Do any lawyers help start-up entrepreneurs on a pro bono (i.e., no charge) basis?
In view of the key role entrepreneurship plays in job creation and economic growth it is
not surprising that there are indeed some avenues for start-up entrepreneurs, especially
entrepreneurs of limited financial means, to obtain some pro bono legal services in
launching their ventures. For example, several U.S. law schools have clinics that assist
entrepreneurs in their communities, 17 and the U.S. Patent & Trademark Office has been

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16 See ABA MRPC 1.7, Comment [28] (“Whether a conflict is consentable depends on the
circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose
interests are fundamentally antagonistic to each other, but common representation is permissible
where the clients are generally aligned in interest even though there is some difference in interest
among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an
amicable and mutually advantageous basis; for example, in helping to organize a business in
which two or more clients are entrepreneurs, working out the financial reorganization of an
enterprise in which two or more clients have an interest or arranging a property distribution in
settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the
parties’ mutual interests. Otherwise, each party might have to obtain separate representation, with
the possibility of incurring additional cost, complication or even litigation. Given these and other
relevant factors, the clients may prefer that the lawyer act for all of them.”).

17 See the state-by-state list of such law school clinics on the EshipLaw website at
http://www.entrepreneurship.org/Entrepreneurship-Law/Topic-Introductions/Transactional-
promoting the creation of pro bono initiatives by intellectual property lawyers to assist inventors.\textsuperscript{18} Entrepreneurs should consider those and other options for free legal assistance they may find if they do some research and explore possibilities with organizations supporting entrepreneurship and innovation in their regions.

III. INFORMATION TECHNOLOGY AND INTELLECTUAL PROPERTY

Information Technology and Social Media

Social media, the technological development that represents a global cultural sea change within recent years, dictates a must-have functional skill for almost every contemporary enterprise.\textsuperscript{19} Marketing channels have changed dramatically during the


past decade.\textsuperscript{20} The opportunities and pitfalls of such new technologies as Facebook,\textsuperscript{21} Google,\textsuperscript{22} GPS or location-based mobile services,\textsuperscript{23} IM,\textsuperscript{24} LinkedIn,\textsuperscript{25} mobile internet,\textsuperscript{26}


paid search, streaming media, and Twitter need to be understood and utilized. For most enterprises in this environment, if a company’s management and marketing strategy


is not focused on social media, some very powerful marketing channels are being overlooked.  

Few enterprise operational areas present as much inherent risk or prove as difficult to govern as Information Technology (“IT”). Even in mature companies, seasoned corporate directors are asking “How can I be expected to govern something I know so little about?”


32 See Lawrence J. Trautman & Kara Altenbaumer-Price, The Board’s Responsibility for Information Technology Governance, 28 JOHN MARSHALL J. OF COMP. & INFOR. LAW, 313 (2011), citing Peter Weill and Jeanne W. Ross depict Information Technology as one of the “six key assets for any enterprise” (the others being human, physical, financial, intellectual property and relationships). See PETER WEILL & JEANNE W. ROSS, IT GOVERNANCE: HOW TOP PERFORMERS MANAGE IT DECISIONS RIGHTS FOR SUPERIOR RESULTS 6 (Harv. Bus. Sch. Press) 2 (2004). Peter Weill, Director of the Center for Information Systems Research (“CISR”) and Senior Research Scientist at the Massachusetts Institute of Technology's Sloan School of Management led research...
every enterprise “IT is fundamental to support, sustain, and grow the business. Yet, in a recent survey of 5,500 business leaders worldwide, ‘58 percent of executives polled said they have lost sensitive personal information, and for nearly 60 percent of those who have had a breach, it was not an isolated event.’”

Moreover:

During recent years, IT risk has demonstrated the potential to cause catastrophic losses to the enterprise balance sheet, reputation, and even threaten its very existence . . . examples of the effects of an IT failure include: loss of sensitive customer private information; loss of sensitive product or financial data of the corporation; virus attacks by hackers on the company’s computer systems and those of its customers or vendors; business interruption losses due to IT downtime; as well as theft and use of client credit card or other sensitive data.

Each start-up possesses different levels of Information Technology experience and skills. For example, while an early-stage software or new social media company may be inundated with engineering and IT talent, expertise and understanding, an agricultural, fast food or oil and gas start-up may have few IT resources and little IT experience among its management team. These days, almost every start-up has a website, regardless of industry or mission. For those entrepreneurs engaged in any form of e-commerce, a tremendous amount of often unanticipated risk exposure may result. Elsewhere, one of your authors has presented relevant annual report risk disclosures from eBay (parent of PayPal), along

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34 Trautman & Altenbaumer-Price supra note 31 at 326 citing USI Insurance Services, Cyber Liability / Security and Privacy Insurance (2009) (on file with the authors). See also Bagley & Dauchy, supra note 9, at 516 and in Ch. 14 (“Intellectual Property and Cyberlaw”) generally.
with other eBay and PayPal documents to illustrate perceived legal risks in a major e-commerce enterprise engaged in receiving payments.  

Value of Intellectual Property

While intellectual property (“IP”) considerations may not be mission-critical for all start-ups, for many, IP protection will be essential. For many technology or pharmaceutical enterprises, their IP portfolios constitute their most significant assets. Examples of valuable intellectual property “intangible assets” include: advertising;

37 See generally Ed Silverman, Battling FDA to Fend Off Generic Rivals, WALL ST. J., Apr. 17, 2015 at B2 (observing that Abilify generated sales of $4.9 billion during 2014, but faces the loss of patent protection next week).  
brand identity;\textsuperscript{39} celebrity endorsements; copyrights;\textsuperscript{40} creative content; designs;\textsuperscript{41}
domain names;\textsuperscript{42} fragrance;\textsuperscript{43} logos; patents;\textsuperscript{44} servicemarks and trademarks;\textsuperscript{45} trade


names; and trade secrets (such as business practices, customer information, and marketing plans).46

Article 1, section 8 of the Constitution of the United States provides that “Congress shall have power… to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

Professors Peter Menell and Suzanne Scotchmer describe the two principal objectives of intellectual property law as: (1) promoting innovation and aesthetic creativity; and (2) protecting the integrity of the commercial IP marketplace.

As Professor Mark A. Lemley observes, “IP laws are deliberate government interventions in the market to try to shape how people participate in that market, encouraging new...

advisable to require nondisclosure agreements before making disclosures about key intellectual property assets for purposes of financing, key employee recruitment, business combinations or acquisitions, or other similar purposes. The three primary forms of intellectual property protection are copyright, patent, and trademark.

Copyright

The U.S. Copyright office defines copyright as “a form of protection grounded in the U.S. Constitution and granted by law for original works of authorship fixed in a tangible medium of expression. Copyright covers both published and unpublished works.” The law of copyright “protects original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture. Copyright does not protect facts, ideas, systems, or methods of operation, although it may protect the way these things are expressed.” Copyright differs from a trademark or patent in that:

Copyright protects original works of authorship, while a patent protects inventions or discoveries. Ideas and discoveries are not protected by the copyright law, although the way in which they are expressed may be. A trademark protects words, phrases, symbols, or designs identifying the source of the goods or services of one party and distinguishing them from those of others.


54 Id.

55 Id. See also Kevin J. Hickey, Reframing Similarity Analysis in Copyright, 93 WASH. U. L. REV. (2015).
Copyright protection is afforded “the moment it is created and fixed in a tangible form that it is perceptible either directly or with the aid of a machine or device… You will have to register, however, if you wish to bring a lawsuit for infringement of a U.S. work.” In addition, “Registered works may be eligible for statutory damages and attorney's fees in successful litigation. Finally, if registration occurs within five years of publication, it is considered *prima facie* evidence in a court of law.” The position of Register of Copyrights and the U.S. Copyright Office was “created by Congress in 1897 as a separate department of the Library of Congress.”

**Patent**

The Leahy-Smith America Invents Act (AIA), signed into law by President Barack Obama on September 16, 2011, “represents the most significant reform of the Patent Act since 1952… [intended to] give a boost to American companies and inventors who have suffered costly delays and unnecessary litigation, and let them focus instead on innovation and job creation.” The AIA is intended to help entrepreneurs, inventors and small business owners by immediately offering:

1. a fast track option for patent processing within 12 months;
2. reducing the current patent backlog;
3. reducing litigation;

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57 Id.
4. increasing patent quality; and
5. increasing the ability of American inventors to protect their IP abroad.  

Observing that “obtaining patent protection is vital for [many] startup companies,” Professor Patricia E. Campbell warns that certain provisions of the AIA “potentially [make] it more difficult for them to obtain patents and [cast] doubt on the validity of any patents they may receive.” Most significantly, the AIA provides that the United States changed, effective March 16, 2013, from a first-to-invent system to a first-to-file regime. Other significant challenges to inventors include, “the expanded definition of prior art and the uncertainty surrounding ‘disclosures’ and the multitude of new opportunities for third parties to challenge the issuance and validity of patents.”

The role of the United States Patent and Trademark Office (USPTO), an agency of the U.S. Department of Commerce, “is to grant patents for the protection of inventions and to register trademarks.” The patent confers “the right to exclude others from making, using, offering for sale, or selling’ the invention in the United States or

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61 Id.
64 Leahy-Smith America Invents Act § 3.
‘importing’ the invention into the United States.” Of significance, the actual right “granted is not the right to make, use, offer for sale, sell or import, but the right to exclude others from making, using, offering for sale, selling or importing the invention.” The USPTO describes the three types of patents as

1) **Utility patents** may be granted to anyone who invents or discovers any new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereof;

2) **Design patents** may be granted to anyone who invents a new, original, and ornamental design for an article of manufacture; and

3) **Plant patents** may be granted to anyone who invents or discovers and asexually reproduces any distinct and new variety of plant.

Of course obtaining a patent and enforcing it are two different things. The time and expense of both initial patent prosecution and subsequent litigating of claims of patent infringement can be quite large. Accordingly, an entrepreneur should discuss with qualified patent counsel a cost-benefit analysis of both the initial patenting costs and potential enforcement costs, taking into account other possible approaches (such as, for example, reliance on trade secrets).

**Patent Agents and Attorneys**

Intellectual property practice is a uniquely specialized area of the law. The USPTO warns that application preparation “for patent and the conducting of the proceedings in the [USPTO] to obtain the patent is an undertaking requiring the knowledge of patent law and rules and Office practice and procedures, as well as

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67 *Id.*

68 *Id.*

69 *Id.*

knowledge of the scientific or technical matters involved in the particular invention.”

Moreover:

Inventors may prepare their own applications and file them in the USPTO and conduct the proceedings themselves, but unless they are familiar with these matters or study them in detail, they may get into considerable difficulty. While a patent may be obtained in many cases by persons not skilled in this work, there would be no assurance that the patent obtained would adequately protect the particular invention.

Most inventors employ the services of registered patent attorneys or patent agents. The law gives the USPTO the power to make rules and regulations governing conduct and the recognition of patent attorneys and agents to practice before the USPTO. Persons who are not recognized by the USPTO for this practice are not permitted by law to represent inventors before the USPTO. The USPTO maintains a register of attorneys and agents. To be admitted to this register, a person must comply with the regulations prescribed by the Office, which require a showing that the person is of good moral character and of good repute and that he or she has the legal, scientific, and technical qualifications necessary to render applicants for patents a valuable service. Certain of these qualifications must be demonstrated by the passing of an examination. Those admitted to the examination must have a college degree in engineering or physical science or the equivalent of such a degree.

The USPTO registers both attorneys at law and persons who are not attorneys at law. The former persons are now referred to as “patent attorneys,” and the latter persons are referred to as “patent agents.” Both patent attorneys and patent agents are permitted to prepare an application for a patent and conduct the prosecution in the USPTO. Patent agents, however, cannot conduct patent litigation in the courts or perform various services that the local jurisdiction considers as practicing law. For example, a patent agent could not draw up a contract relating to a patent, such as an assignment or a license, if the state in which he or she resides considers drafting contracts as practicing law…

The USPTO cannot recommend any particular attorney or agent, or aid in the selection of an attorney or agent, as by stating, in response to inquiry that a named patent attorney, agent, or firm, is “reliable” or “capable.” The USPTO maintains a directory of registered patent attorneys and agents at http://des.uspto.gov/OEDCI…

In employing a patent attorney or agent, the inventor executes a power of attorney, which is filed in the USPTO and made of record in the application file. When a registered attorney or agent has been appointed, the Office does not communicate with the inventor directly but conducts

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the correspondence with the attorney or agent since he or she is acting for
the inventor thereafter although the inventor is free to contact the USPTO
concerning the status of his or her application. The inventor may remove
the attorney or agent by revoking the power of attorney.\footnote{Id.}

\section*{Trademark}

The USPTO describes a trademark as “a word, name, symbol, or device that is
used in trade with goods to indicate the source of the goods and to distinguish them from
the goods of others.”\footnote{Id. at 3.} Closely related, “a servicemark is the same as a trademark except
that it identifies and distinguishes the source of a service rather than a product. The terms
‘trademark’ and ‘mark’ are commonly used to refer to both trademarks and
servicemarks.”\footnote{Id.} The purpose of a trademark is to identify for consumers the source of
the product and perhaps provide some additional information about the product itself
based on prior experiences or reputation.\footnote{See J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §§2:3, 2:5 (4th ed.,
2015).}

Professor Jasmine Abdel-khalik observes that there are various types of
trademarks, including word marks, slogans, logos, “color, sound, and trade dress,” which
can include both the packaging and sometimes even the design of the
product.\footnote{Email from Jasmine C. Abdel-khalik, Associate Professor of Law at the UMKC School of
law (May 27, 2015, on file with authors) [hereinafter Abdel-khalik]. See,
e.g., McCarthy, supra note 75, at §§7:9, 7:19, 7:24, 7:26, 7:33,7:39,7:54, 7:106 – 7:108.}

However, just because something can be a trademark does not mean that it
will be one. There are a variety of limitations and prohibitions that can prevent a symbol
from functioning like a trademark,\footnote{See, e.g., McCarthy, supra note 75, at §§ 7:63, 12:1, 13:1, 14:1, 15:2, 19:75 (to name a
few: functionality, genericness, personal names, geographic terms, terms that need secondary
meaning, and statutory bars to federal registration).} and consulting with an attorney can help steer a
business through these limitations and prohibitions. In addition, there can be
complications a business has not considered. For example, although logos are a type of
trademark, they can also “have [tricky] copyright implications if you hire someone to
create / design it.”78

Unlike patent, a trademark or servicemark is created as soon as it is used to sell a
product, goods or services, but a business can apply for a federal registration (as long as
there is prior use or a bona fide intent to use the mark for the identified goods and/or
services) and receive some additional benefits.79 Because of the ease in creating a
trademark, businesses must be particularly careful when choosing marks to avoid
infringing the marks owned by others. A trademark-experienced attorney can provide a
trademark clearance report to assess the risk that any mark is unavailable based on
another’s use as well as assist with the registration process.

IV. PRINCIPAL CHOICE OF ENTITY CONSIDERATIONS

Choice of entity analysis can be generally separated into questions of: (1) liability
management, (2) agency authority, and (3) capital structure, including tax considerations.
Many law school graduates should be familiar with this multi-layered analysis from
courses in business associations/organizations and taxation of business enterprises. What
is commonly referred to as “choice of entity” essentially consists of three choices: what
basic form of entity is wanted?; under what jurisdiction’s laws should it be formed?; and
what tax classification is desired for it for federal and state tax purposes?80

78 Abdel-khalik, supra note 76.
79 Abdel-khalik, supra note 76; McCarthy, supra note 75, at §§ 16:1, 19:1.25.
80 While many states follow the federal tax classification of a business entity for income tax
purposes, some do not—so a state-by-state analysis is needed for a complete picture. See, e.g., C.
Andrew Lafond & Jeffrey J. Schrader, Multistate Tax Considerations for S Corporations, J.
Corporations and other entity types, such as the limited liability company (“LLC”) are generally creatures of state law. A corporation created under the laws of Delaware will be subject to different governance, case law regime, and regulatory schematic than a corporate entity organized under the laws of Florida or Texas. Because choice of entity is legally intensive, the issue should not be undertaken without the guidance of an experienced attorney, preferably one who practices in the jurisdiction where the start-up company will be domiciled and will conduct the bulk of its business. However, in some cases an entrepreneur may find, with advice of qualified counsel, that they want to form their company under the law of a state other than the venture’s principal business location. That approach is made possible by (i) the ability to form a company in a state and then register it to do business in the other states in which it will conduct business, and (ii) the “internal affairs” doctrine, which generally allows the law of the entity’s formation to govern matters pertaining to the internal relationships among the company and its owners and management, and matters regarding the statutory shielding of certain types of owners from personal liability for company obligations. 81

Each of the following types of business entity offers its own advantages and disadvantages (and some may not be available in all jurisdictions): sole proprietorship; general partnership; limited liability partnership; limited partnership; limited liability

limited partnership; limited liability company; certain business trusts (e.g. Real Estate Investment Trust, etc.); and corporation. 82

Liability Considerations

A primary goal of entity choice is to limit the personal liability of individuals involved in the enterprise. For example, a sole proprietor is personally liable for wrongful acts and contracts entered, as are partners in regular (sometimes called “general”) partnerships and general partners in limited partnerships—whereas shareholders of a corporation, limited partners in limited partnerships, all partners in limited liability partnership or limited liability limited partnership, and members of a limited liability company are generally not personally liable for obligations of the entity. 83 However, the “liability shield” generally available to owners in those latter categories are not without exception.

First, particular statutory provisions may impose personal liability on owners for some specific types of obligations. 84 Second, courts have developed the doctrine of


83 See, e.g., Gevirtz, supra note 81, at 51-53; Hamilton et al., supra note 81, at 3-5, 1115, 1177-1197, and 1199.

“piercing the corporate veil” (which has been applied to not just corporations, but also to unincorporated entities, such as limited liability companies) where the facts and circumstances indicate the company was formed or maintained in a flimsy or deceptive manner and one or more of the company owners should be held personally liable for company obligations. Third, even if the company is properly formed and well-maintained in a manner providing owners with a good shield from personally liability, a savvy lender, lessor or other would-be creditor of a company may insist on a personal guarantee from one or more of the owners as a conditions to making the loan, lease or other contract with the company. In addition, entrepreneurs looking to start a company need to understand that even if none of those exceptions applies, they can still be personally liable for their own wrongdoing—in other words the liability shields offered by various types of business entities are designed to relieve an owner from vicarious personal liability for company obligations, not for the owner’s own direct obligations.

Agency Authority

Entrepreneurs forming a business entity should be concerned with who in the organization may have authority to sign/bind the company to contracts. While a business entity can create “agents” to act for it by agreement, it is also the case that the type of entity formed may automatically create agents by statute under the applicable business organizations law. For example, all partners in a regular partnership are typically by statute agents with authority to bind the partnership to contracts in the usual course of

85 See generally Gevurtz, supra note 81, at 50; Hamilton et al. supra note 81, at 213-57 and 1250-57.
Moreover, each partner has “apparent authority” to conduct such ordinary business—meaning that, for example, even if the partners have agreed among themselves that no partner is to commit the partnership to a contract of a certain size or duration without the prior approval of other partners, a partner ignoring that restriction and signing such a contract without such approval on behalf of the partnership may well have bound the partnership to the contract. The third party creditor is generally able to enforce the contract unless either (i) the creditor knew of the approval restriction; or (ii) the contract is of a type outside of the usual course of the partnership’s business. If being forced to honor the contract causes damage to the partnership the other partners can sue the “loose cannon” who ignored the approval restriction. But what if that wrongdoer doesn’t have enough assets to cover the damages he or she caused by exercising their “apparent authority”?  

That kind of agency authority is generally granted by statute to every partner in a regular partnership or limited liability partnership, to every “general partner” in a limited partnership or limited liability limited partnership, to every member in a “member-managed” limited liability company, and to every “manager” in a manager-managed limited liability company. In contrast, state business organizations statutes generally do not grant such agency authority to limited partners, to members of a manager-managed limited liability company who are not designated “managers,” or to shareholders in a

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86 See Uniform Partnership Act (U.P.A.) (1914) at §9; Revised Uniform Partnership Act (R.U.P.A.) (1997) at §301.
87 Id.
88 See, e.g., MO. REV. STAT. §§358.090 (2015) (partners in regular partnerships and limited liability partnerships); 359.251.1 (general partners in limited partnerships and limited liability partnerships); and 347.065 (members in member-managed limited liability companies and managers in manager-managed limited liability companies).
corporation. So, once again, it is important for entrepreneurs forming a business entity to get qualified legal counsel to help them take this agency issue into account in the multi-factored choice of entity analysis.

**Capital Structure Tax Considerations**

In addition to liability and agency considerations, another primary goal of business entity selection will be to settle on a structure that minimizes tax liability, while providing a legal form most conducive to raising needed capital. Relevant considerations will include, but not be limited to (i) anticipated amount of capital needed and likely sources, (ii) number of individuals involved in managing the business, and (iii) number of individuals contributing capital and whether they are natural persons or non-natural persons.

Some investors may actually be motivated to invest in a start-up in anticipation of likely losses to be incurred during the early operating history of the enterprise. In that case, or for other tax reasons, they may be most interested in a “pass-through entity” for tax purposes at least in the early stages of their venture. That means a tax status under which the entity itself does not pay income tax; rather the owners pay tax on their shares of the entity’s income, and is allocated their shares of the entity’s tax deductions and tax credits. For many businesses that will involve determining whether “partnership” or “S corporation” tax status is desired, as opposed to a “C corporation” in which the

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89 Such as avoiding double taxation (i.e., at both the company and owner level) of earnings, or, if partnership taxation applies having the ability to, subject to certain exceptions make distributions of appreciated property (i.e., property with fair market value in excess of tax basis) on a tax-deferred basis. See generally Gevurtz, supra note 81, at 58-80; William S. Mckee et al., FEDERAL TAXATION OF PARTNERSHIPS AND PARTNERS (Thomson Reuters 2015) at Chapters 1 and 19.

90 See generally Hamilton et al. supra note 81, at 6-14.
corporation pays tax on its taxable income and shareholders generally pay tax on the dividends paid to them. Importantly, not all entities will be eligible for partnership or S corporation tax status, making it, again, important to get qualified legal counsel to explain the options and requirements, as well as the opportunities to change tax status later in the life of the venture (and the tax consequences of such changes).

A detailed comparison of partnership taxation to S corporation taxation is beyond the scope of this article, but a few key points merit mention here. First, the entrepreneur should understand that S corporations pose some pretty substantial capital structure limitations, in that they are limited to having no more than 100 shareholders, to (generally) not having any shareholders who are not human beings legally resident in the U.S. (so generally can’t have business entities as owners), and to not having more than one class of stock in terms of distribution rights (so, can’t have preferred and common equity). Also, the company founders need to realize that in a pass-through entity (partnership or S corporation) the owners pay tax on their shares of the entity’s taxable income whether or not that have received corresponding distributions. Further complexities include the effects of company liabilities on the ability of owners to claim tax losses generated by the entity.

In addition, there can be important tax consequences associated with how owners acquire their equity interests in the business entity. For example, partnership taxation has some important differences from S or C corporations when an owner is acquiring equity.

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91 Id.
92 See, e.g., Gevurtz, supra note 81, at 58-59, 74-76; Hamilton et al., supra note 81, at 6-14; Mckee et al., supra note 89, at Ch. 3.06.
93 I.R.C. §1361.
94 See Gevurtz, supra note 81, at 77-78; Mckee et al. supra note 89, at Ch. 7.02.
in exchange for a contribution of property with a fair market value in excess of the owner’s tax basis in the property, especially when the property has liabilities associated with it.\textsuperscript{95} It is critical that the entrepreneur understand the tax implications of such property transfers. Similarly, they need to understand the tax aspects of getting equity in exchange for services or promises associated with services. Many start-up entrepreneurs fall into the trap of not understanding the tax consequences of issuing equity interests in a venture to service providers.\textsuperscript{96} Included here is the potential importance of a timely “Section 83(b) election” with respect to non-vested equity issued in connection with the performance of services.\textsuperscript{97} Getting qualified tax counsel involved in capital structure planning before any offers or promises are made is clearly the best way to go.

V. RAISING CAPITAL IN COMPLIANCE WITH SECURITIES LAWS

A start-up is inherently a legal endeavor. Early dollars invested to obtain solid legal advice and planning are invaluable and can save future resources by reducing the likelihood of costly, time-consuming efforts required to correct oversights and inadvertent mistakes made during the organizational business planning phase. Even worse, a naïve well-meaning (but unlawful) solicitation or sale of securities not in compliance with federal and state securities laws may subject those involved to civil and criminal penalties.\textsuperscript{98}

\textsuperscript{95} See Gevirtz, supra note 81, at 336-37, 341-42, 351-52.
\textsuperscript{96} See Mc Kee et al. supra note 89, at Ch.5.
\textsuperscript{97} I.R.C. Section 83(b).
We will present below issues regarding the definition of a “security” for key federal securities laws purposes and briefly describe equity and debt offerings to set the stage for our discussion of various types of early stage capital. The definition of “security” is quite important because if an offering of securities is to occur then it must either be registered (an expensive and time-consuming process) or demonstrated to be exempt from registration under federal and state securities regulation purposes.\footnote{Securities Act of 1933 §5(a). See also Mo. Rev. Stat. §409.3-301.1 (2015), §517.07 Fla. Stat. (2015). For general information about state securities laws see \url{http://www.sec.gov/answers/statesecreg.htm} (last visited Sept. 24, 2015) and \url{http://www.nasaa.org/} (last visited May 31, 2015). There are many publications addressing the securities regulations context of raising capital from various sources for start-up businesses in the U.S. See, e.g., Bagley & Dauchy, supra note 9 at Ch. 7 (“Raising Money and Securities Regulation”); Drake, supra note 9, at 135-177.} Complicating matters, while there is generally substantial overlap in the definitions, some states define “security” somewhat differently than under federal securities law.\footnote{See generally Thomas Lee Hazen, Federal Securities Laws, 6 (3rd Ed. 2011). See also Cornell U. L. Sch., Blue Sky Law, available at \url{https://www.law.cornell.edu/wex/blue_sky_law} (last visited Sept. 24, 2015).} Again, in navigating all the requirements to avoid costly violations, skilled and experienced legal advice is not a luxury, but a necessity.

What Is an Equity Security?

certain characteristics that are a common feature of stock, those include: (1) the right to receive “dividends contingent upon an apportionment of profits”; (2) negotiable; (3) the ability to be pledged or hypothecated; (4) voting rights in proportion to the number of shares owned and (5) the ability to appreciate in value.102

The term investment contract is also included in the definition and is also considered a security.103 Investment contract is a broad term that has been used to analyze a variety of investment instruments, such as unincorporated entities like partnerships or limited liability companies, to determine whether or not those instruments are securities within the meaning of the Securities Act. The traditional test for an investment contract—the “Howey test”—is: (1) an investment of money; (2) in a “common enterprise”; (3) with an expectation that profits will be derived ‘solely’ through the efforts of others.104

Debt

Securities may come in the form of equity or debt. Notes and other forms of debt, can be considered securities.105 If a corporation, limited liability company, or other business entity proposes to use debt to raise capital, the registration (or establish exemption) requirements under the Securities Act will apply if the debt instrument

103 Securities Act of 1933 §2(a)(1).
104 SEC v. W.J. Howey Co., 328 U.S. 298 (1946) (In the 1946 case, the U.S. Supreme Court shed light on the definition of a “security.” In a case that involved land contracts for orange trees, the Court determined that a security included any scheme that involved an “an investment of money in a common enterprise with profits to come solely from the efforts of others.” When applied to unincorporated entities, the key issue is often whether profits are to be derived solely from the efforts of the investor or whether the investor passively invests in the business. The determination of whether the investor is passive will depend on the facts and circumstances of each situation). See also Miriam R. Albert, The Howey Test Turns 64: Are Courts Grading This Test on a Curve?, 2 WM. & MARY BUS. L. REV. 1 (2011).
105 Securities Act of 1933 §2(a)(1).
constitutes a security. The test, more commonly referred to as the “family resemblance test,” takes into consideration four factors: (1) the motivation of the parties; (2) plan of distribution; (3) expectations of the public; and (4) whether or not there is another applicable regulatory scheme that may reduce the risk of the investment. When the investments involve a return of both the principal and interest, the factors that evidence the motivation of the parties and the plan of distribution evidence that the note is a security. Public perception determines whether the third factor is satisfied. The final factor is whether there is another applicable regulatory scheme (such as banking laws under the Gramm Leach Bliley Act or the regulation of employee retirement income under ERISA) that may reduce the risk of the investment.

Again, the initial significance of finding that a security is being offered or sold means that the security will need to be registered on the federal level and also registered under state law in every state where an offer is made or the security is sold, unless particular exemptions from registration apply. Registration is a costly process and subjects the issuer to even more possible liability. In order to avoid registration many issuers will seek an exemption from registration; however, even if an exemption applies, there is still potential issuer liability for securities fraud.

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107 Id.
108 Id.
109 Id.
110 Id.
111 See note 99 supra and accompanying text.
112 See, e.g. preamble to the SEC’s Regulation D at 17 C.F.R. §230.500(a) (“Regulation D relates to transactions exempted from the registration requirements of section 5 of the Securities Act of 1933 (the Act) (15 U.S.C.77a et seq., as amended). Such transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws.”).
The Reg-D Offering

When the SEC adopted Regulation D (“Reg. D”), it provided a relatively clear and viable path to exempt small and private offerings from the federal registration requirement. Regulation D consists of three different “issuer” exemptions: Rule 504, Rule 505, and Rule 506. While the three exemptions are subject to some common requirements and restrictions, each has some unique limitations to its availability. Reliance on Regulation D alone neither obviates the need to comply with any applicable state laws that relate to the offer or sale of securities nor voids liability under the antifraud laws. While those who appropriately rely on and satisfy the condition of a Reg. D exemption do not have to register their securities, they must provide a notice filing to the SEC on “Form D” within 15 days of the first sale.

Rule 504:

Rule 504 provides an exemption from federal registration for offerings up to $1 million in a twelve month period. This includes all securities sold twelve months before the start of and during the targeted offering period. The issuer must take steps to ensure that the securities acquired are not resold. A Rule 504 offering neither limits the number of purchasers nor requires that purchasers have a certain net worth or possess a certain level

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115 17 C.F.R. §§ 230.500(b) and 17 C.F.R. §§ 230.504(b)(ii).

116 17 C.F.R. § 230.503.

117 17 C.F.R. § 230.504(b)(2).

118 17 C.F.R. § 230.504(b)(2).

119 17 C.F.R. § 230.502(d).
of business sophistication.\footnote{120} In addition, there are no federal-level disclosure requirements.\footnote{121} The issuer is prohibited from generally soliciting or advertising the offering,\footnote{122} except those solicitation and resale restrictions do not apply if the issuer, as part of state registration requirements, publicly files and delivers substantive disclosure documents to investors before the sale of securities.\footnote{123} Because the securities issued under Rule 504 are not “covered securities” under §18 of the 33 Act, exemption under Rule 504 does not preempt state regulation.\footnote{124}

Rule 505:

Rule 505 exempts offerings up to $5 million. Included in this limit is the sale of all securities sold twelve months before and during the offering period.\footnote{125} While an issuer may sell to an unlimited number of “accredited” investors, the number of non-accredited investors is limited to 35.\footnote{126} Even though the rule does not require non-accredited investors to be financially sophisticated, the issuer must disclose to all non-accredited investors investment information consisting of financial statements, certified by an independent public accountant, and other written information that is material to the offering.\footnote{127} General

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\textsuperscript{120} 17 C.F.R. § 230.504.
\footnotesize\textsuperscript{121} 17 C.F.R. § 230.504, 230.502(b)(1).
\footnotesize\textsuperscript{122} 17 C.F.R. §§230.504(b)(1) and 230.502(c).
\footnotesize\textsuperscript{123} 17 C.F.R. § 230.504(b)(i) and 17 C.F.R. § 504(b)(ii).
\footnotesize\textsuperscript{124} 17 C.F.R. § 230.500(b)(1). \textit{See also} Gevirtz, \textit{supra} note 81, at 654-55.
\footnotesize\textsuperscript{125} 17 C.F.R. § 230.505(b)(2)(i).
\footnotesize\textsuperscript{126} 17 C.F.R. § 230.505(b)(2)(ii). Accredited investors commonly tend to include an individual with an income in excess of $200,000 in each of the past two years or joint income with a spouse in excess of $300,000, (2) an individual with a net worth that exceed $1 million, excluding their primary residence (3) a business entity or trust not formed with the specific purpose of acquiring securities with total assets of $5 million. There are other criteria which one could meet to be considered an accredited investor, including for example individual who are directors, general partners or “executive officers” of the issuer. \textit{See} 17 C.F.R. § 230.501(a).
\footnotesize\textsuperscript{127} 17 C.F.R. § 230.502(b)(2)(B). The issuer is not required to make the Rule 502(b)(2) disclosures to “accredited” investors, but a note under 17 C.F.R. § 230.502(b) suggests that “it should consider providing such information to accredited investors as well, in view of the anti-fraud provisions of the federal securities laws.”
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solicitation and general advertising are also prohibited,\textsuperscript{128} and the issuer must take steps to prevent any public resale of the securities.\textsuperscript{129} If within the last 5 years, the issuer has been involved in any securities law violations, then that issuer is disqualified from the Rule 505 exemption.\textsuperscript{130} These provisions also apply to any director, officer or owner with 10\% or more of any class of security.\textsuperscript{131} This criteria highlights the importance of knowing and understanding the criminal and civil backgrounds of all the parties involved in the venture because it may impact the availability of some exemptions. Similar to Rule 504, state regulation is not preempted by Rule 505 exemption.\textsuperscript{132}

\textit{Rule 506:}

Under Rule 506, there is no limit on the dollar amount of the offering.\textsuperscript{133} An unlimited number of accredited investors is permitted, and up to 35 non-accredited investors. In addition, in a Rule 506 offering, each non-accredited investors must (themselves or through a qualified purchaser representative) have sufficient business knowledge so they are capable of evaluating the risks of a potential investment.\textsuperscript{134} As with Rule 505, specified disclosures must be made to each non-accredited investor,\textsuperscript{135} and the issuer must take steps to ensure the securities acquired are not immediately resold.\textsuperscript{136} The offering cannot be integrated with any other offers that are made within six months of the target offering.\textsuperscript{137} There are also prohibitions on directors, executive officers, or other

\textsuperscript{128} 17 C.F.R. § 230.505(b) and 17 C.F.R. § 230.502(c).
\textsuperscript{129} 17 C.F.R. § 230.505(b) and 17 C.F.R. § 230.502(d).
\textsuperscript{130} 17 C.F.R. § 230.505(b)(2)(iii) and 17 C.F.R. § 230.262.
\textsuperscript{131} Id. The SEC recently adopted similar provisions for Rule 506.
\textsuperscript{132} 17 C.F.R. § 230.500(b).
\textsuperscript{133} 17 C.F.R. § 230.506.
\textsuperscript{134} 17 C.F.R. § 230.506(b)(2)(ii) and 17 C.F.R. § 230.501(a).
\textsuperscript{135} 17 C.F.R. § 230.506(b)(1) and 230.502(b).
\textsuperscript{136} 17 C.F.R. § 230.506(b)(1) and 230.502(d).
\textsuperscript{137} 17 C.F.R. § 230.502(a).
participants with 20% or more beneficial ownership who have been convicted of a felony or misdemeanor within the last 10 years in connection with the purchase or sale of a security.\textsuperscript{138} There is a ban on general solicitation and general advertising,\textsuperscript{139} though the Jumpstart Our Business Startups (JOBS) Act of 2012 and subsequently issued SEC rules lifted the ban for otherwise qualifying Rule 506 offerings in which all purchasers are (or are reasonably believed to) accredited if the issuer takes reasonable steps to verify this fact.\textsuperscript{140} While that limited relief from the ban on general solicitation and advertising for Rule 506 offerings with only accredited investors is sometimes referred to as a type of “crowdfunding,” it is not the same as the yet-to-be implemented “crowdfunding exemption” for certain offerings up to $1 million discussed below.\textsuperscript{141}

Another reason Rule 506 is very important to entrepreneurs who seek to minimize expenses is because it is the only rule under Regulation D that also preempts state substantive securities regulation.\textsuperscript{142} Even though the issuer is exempt from blue sky registration requirements, nothing in the rule shields the issuer from subsequent litigation by a state regulatory agency for securities fraud, nor does it exempt the issuer from paying any required fees or making any required notice filings.\textsuperscript{143}

\textsuperscript{138} 17 C.F.R. § 230.506(d).
\textsuperscript{139} 17 C.F.R. §§230.506(b)(1) and 230.502(c).
\textsuperscript{140} Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Release No. 33-9415 (July 10, 2013).
\textsuperscript{141} See notes 190 infra and accompanying text.
\textsuperscript{142} See §18(b)(4)(E) of the Securities Act of 1933. See also, Rutherford B. Campbell, Jr., The Wreck of Regulation D: The Unintended (and Bad) Outcomes for the SEC’s Crown Jewel Exemptions, 7 Ohio St. Entrepreneurial Bus. L.J. 287 (2012).
\textsuperscript{143} Some states may continue to impose certain filing obligations. As a result, the issuer may be required to file a copy of its Form D with state regulators.
Other Exemptions from Registration: Regulation A and Intrastate Offerings

The intrastate exemption is reserved for issuers who offer or sell securities only in the state where the issuer is incorporated. There are three basic requirements to qualify for this exemption. The issuer must be incorporated or have its principal place of business in the state where it offers the securities, carry out a significant amount of its business in the target state, and make offers and sales only to residents of that state. Unfortunately, the restriction to a single state impacts any broad-based search for capital because it only takes one offer (even if it does not result in a sale) to nullify the exemption. Even though Section 3(a)(11) provides an exemption from federal regulation, state regulations may still apply.

In addition to the intrastate exemption, there is also Regulation A, for which the SEC recently adopted new rules. Issuers can avoid full registration by conducting a simplified mini-registration process, but the exemption has now been expanded into two tiers. Issuers may raise up to $20 million in a Tier 1 offerings and, with more extensive financial disclosure, up to $50 million in a Tier 2 offering. Under Regulation A, the SEC has evolved its position about solicitation, and allows the issuer to solicit interest in the offering prior to filing any offering statement. State registration is preempted for Tier 2 offerings, but still required for Tier 1 offerings. Prior to the JOBS Act, Regulation A

\[145\] Id.
\[147\] Id.
\[148\] Id.
\[149\] Id.
offerings were rarely used. Some attribute this to the impact of state blue sky laws,\textsuperscript{151} while others believe the $5 million offering limit was too low.\textsuperscript{152} It remains to be seen whether the new regulations adopted by the SEC on March 25, 2015 will increase the number of Regulation A offerings.

**Private Company vs. Public Platform**

Few seed-stage enterprises will achieve the success and gain the critical mass necessary to justify the expense of a registered public offering. However, planning for such an eventuality seems prudent, even at the embryo stage. Enterprises with more than 2,000 shareholders of record (or 500 that are not accredited investors) and assets of more than $10 million are subject to the periodic reporting requirements under the Exchange Act.\textsuperscript{153} With rare exceptions, all start-ups will begin life as private entities with just a few equity owners, and, if they are successful, usually spend at least a few years in a non-public mode (even if well funded from institutional venture sources).

The benefits of being a publicly traded company include access to securities markets to raise capital and a liquidity event for early-venture investors and key management. Disadvantages of public share ownership include the substantial expenses for legal, accounting, and regulatory compliance, additional corporate governance infrastructure expenses, including expenses associated with board committee oversight and the retention of necessary consultants and more transparency regarding corporate activities. The extra expenses can easily amount to hundreds of thousands of dollars

\textsuperscript{151} Campbell Exemptions, \textit{supra} note 142, at 305.
\textsuperscript{152} http://financialservices.house.gov/blog/?postid=301209 (last visited Sept. 24, 2015).
\textsuperscript{153} Securities Exchange Act of 1934 §12(g), as amended, and 17 C.F.R.240, Rules 12g-1 to 12g-2.
annually, and disproportionately will be a greater percentage of revenues for smaller enterprises.\footnote{154}{See generally Gevurtz, supra note 81, at 562–63; Daniel L. Goelzer, Remarks before the PCAOB Forum on Auditing in the Small Business Environment, Fort Lauderdale, Florida, Feb. 27, 2006.}

**Skilled, Experienced Legal and Accounting Advice is a Necessity**

We’ve already seen that raising start-up capital through the issuance of securities is a legally-intensive endeavor. Compliance with federal and state securities laws requires the skillful guidance of a lawyer familiar with this specific area of law. Not every attorney will be well versed in this niche area of practice.

Audited financial statements and guidance with respect to required financial statement disclosures will also require coordination with and retention of a public accounting firm that routinely deals in securities transaction matters. Like attorneys, the public accounting profession is often difficult for non-practitioners to understand. The Public Company Accounting Oversight Board (PCAOB) reports registering 1,600 accounting firms.\footnote{155}{See generally Daniel L. Goelzer, at Id.}

PCAOB board member Daniel L. Goelzer observed during 2006 that 1,600 “is a far higher number than we originally anticipated, and it reflects the breadth of the public company audit practice in this country. However, in terms of concentration, a very high percentage of the total public company market capitalization is audited by only a handful of firms.”\footnote{156}{Id. Moreover, “a 2004 GAO report found that just four firms audit nearly 99 percent of the revenues of all SEC registered companies.”\footnote{157}{Id. See also Robert A. Prentice, The Case for Educating Legally-Aware Accountants, 38 AM. BUS. L.J. 597 (2001).} Although an early-stage enterprise may not need to incur the expense of hiring one of the largest
accounting firms, just as in the case of finding appropriate legal guidance, not every local
accounting firm will be experienced or staffed to provide the services you need.

VI. SOURCES OF EARLY STAGE CAPITAL

Perhaps no activity is as legally-intensive as the effort by individuals or an
enterprise to raise capital. Professors William R. Kerr and Ramana Nanda observe that
“Financing constraints are one of the biggest concerns impacting potential
entrepreneurs…” Sources of capital for small companies will vary based on the stage
of development (seed stage, early stage before proof of concept, post-break-even, etc.)
and the relative attractiveness to investors of the particular industry sector (healthcare,
clean energy, biotech/pharmaceuticals, social media, etc.). Different sources will be
available based upon these and other criteria. In its most simplified form, these available
investors have been separated into the following categories: friends and family; angel
investors; traditional commercial banks and other sources of debt or collateralized
financing; Small Business Investment Companies; institutional venture sources;
investment banks; and franchising. Also discussed are the potential funding opportunities
available by crowdfunding efforts.

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http://ssrn.com/abstract=1447503. See also Ramana Nanda & Matthew Rhodes-Kropf, Financing
Friends and Family

Most start-ups are financed initially by the entrepreneur and funds from family and friends. Because of the high risk of failure of any new business, the cost to the enterprise of financing should decrease as the perceived risk of failure decreases. It’s at the very beginning, with little more than an idea, unproven concept or partial business plan that any business enterprise is most risky. Since data indicates that well over 90% of all new businesses will fail within five years, many aspiring entrepreneurs will have no choice but to fund their endeavor from personal funds, credit cards and personally secured loans.159

“Angel” Investors

An angel investor is typically an affluent individual investor who provides his or her own funds for a start-up. Capital from angel investors fills the gap between funds available from friends and family (usually much less and not more than a few hundred thousand dollars)160 and institutional venture firms which may have minimal thresholds of $1 to $3 million. During recent years, as increased institutional funds have flowed into venture capital firms, the minimum allocation to any one portfolio company has tended to


increase because these firms can’t otherwise justify the cost of monitoring and managing an investment that is immaterial to their portfolio’s performance.

An entrepreneur may likely find angel funding advantageous in terms of how control must be relinquished for this form of investor participation. In a study of 182 Series A preferred stock fundings, “derived from the electronic records of the [prestigious but] now defunct law firm Brobeck, Phleger & Harrison (Brobeck),” professors Hoberg, Goldfarb, Kirsch and Triantis find that “investor composition is strongly related to control rights, and deals with more angel investors have weaker control rights.” Moreover, the Hoberg et al. study confirms the findings of Aghion and Tirole, Cassamatta, and Hellmann 2002, in that the allocation of control rights go “to the party whose marginal contribution to the project is greatest. [Hoberg, et al.] hypothesize that angels and VCs primarily differ on their abilities and disposition to influence firm behavior and investment patience. Consistent with this notion, [Hoberg, et al.] find that angel investors generally obtain weaker control rights than do VCs.” The four central findings of the Hoberg, Goldfarb, Kirsch and Triantis study are as follows

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161 Hoberg, supra note 160 at 3.
162 Id. at 1.
165 Hoberg, supra note 160 at 2, citing T. Hellman, A Theory of Strategic Venture Investing, 64 J. FIN. ECON. 285 (2002), observing at 2 n2 (Hellman and Puri (2000, 2002) document variance in product market strategy and top management team professionalization of VC-backed and non-VC-backed firms. Kaplan and Stromberg (2004) analyze venture capital contracts and find that investor rights vary with the expected and actual investor effort contribution. Dessein (2005) provides an alternative theory of control rights, attributing investor right allocation to signaling. An alternative, and perhaps complementary, explanation is that angels are more patient than VCs (Jovanovic and Szentes 2007). They may relinquish control to mitigate the entrepreneur’s risk of premature liquidation especially when projects require longer time horizons (Lacetera 2008)).
1. When firms raise smaller amounts of capital, they do so from either angels alone, VCs alone, or from both angels and VCs. In contrast, when larger investments are needed, VC participation is generally necessary, suggesting that matching is constrained.

2. In Series A rounds, angels almost always take preferred shares. Nevertheless, the presence of angels, either investing alone or alongside VCs, is associated with weaker cash flow and control rights...

3. Among smaller deals, angel-only deals have the lowest incidence of failure, and a similar incidence of IPOs and acquisitions...

4. When deals are large, those financed by VCs alone are more successful than those in which angels participate.\(^\text{167}\)

Traditional Banking and Collateralized Debt Financing

Because many early stage start-up ventures are either too small or lack sufficient unsecured assets to qualify for traditional bank funding, with some exceptions, most commercial banks are not good candidates for unsecured funding. However, several studies illustrate the role of bank financing for entrepreneurial ventures.\(^\text{168}\) The uncertain economic environment following the 2008-2009 capital markets demise has resulted in commercial banks subsequently being slow to approve loan requests, often due to the deteriorating credit worthiness of potential borrowers. The other side of the same coin is that small borrowers have been reluctant to borrow given economic uncertainty.

\(^{167}\) Id.

Small Business Administration (SBA)

A wide variety of financial assistance programs for small businesses are offered by the SBA. A detailed discussion of the various SBA programs offered and their availability is beyond the scope of this article. However, some Small Business Administration programs may prove useful as the government "guarantee" often provides sufficient risk reduction to enable commercial banks to fund the small enterprise.

Small Business Investment Companies (SBICs)

Since 1959, Small Business Investment Companies (SBICs) have supplied equity capital, long-term loans and management assistance to qualifying small businesses. The SBIC Program is one of many financial assistance programs available through the U.S. Small Business Administration. The structure of the program is unique in that SBICs are privately owned and managed investment funds, licensed and regulated by SBA, that use their own capital plus funds borrowed with an SBA guarantee to make equity and debt investments in qualifying small businesses. Note that the U.S. Small Business Administration does not invest directly into small business through the SBIC Program. In addition, SBIC financing is not appropriate for all types of businesses and financing needs.

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Institutional Venture Capital (VC) Sources

Like most business phenomenon, the availability of venture capital sources will wax and wane based on various factors and a correlation to the overall economy that may not prove readily apparent to most. Factors that are prominent in aggregate availability of venture capital will include: a rising equity market that has provided investors with both the investible cash and confidence to make additional venture (highly illiquid) investments; actual and perceived likelihood of near term “new cash” from liquidity events (such as a robust initial public offering (IPO) market); the increase or decrease in portfolio allocation to venture capital as an asset class by major institutional investors (such as the California Public Employees Retirement System (CalPERS), Harvard Endowment, Texas State Teachers System, or the like).

Institutional venture firms serve as intermediaries for these funds, receiving an allocation from such sources as state employee retirement funds or college endowments and tend to be specialized in their focus and staffing expertise to enhance their investment returns.

Do the top Venture Capital firms provide more than just money to their entrepreneurs? “As has been shown by Sorensen (2004), Kaplan and Schoar (2005), Gompers, Kovner, Lerner and Scharfstein (2006), and Hochberg, Ljungqvist and Lu (2006), companies that are funded by more experienced (top-tier) venture capital firms

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are better able to identify high quality companies and entrepreneurs.” The Gompers study suggests that by helping start-ups recruit key management, refine strategy, and make important customer contacts – top-tier venture capital firms contribute considerable value in addition to funding. A survey of 549 successful entrepreneurs found that “Venture capital and private /angel investments play a relatively small role in the startups of first-time entrepreneurs. Only 11 percent received venture capital, and 9 percent received angel financing for their first startups.” John F. Coyle and Joseph M. Green report that “around 2005, investors in early-stage technology companies increasingly turned to much simplified versions of traditional convertible preferred stock documents to structure their investments.” Before 2005, individual investors “who invested in


early-stage technology companies would typically invest alongside the founder of the new venture by purchasing shares of common stock. Venture capital funds, which invested more substantial amounts of capital at later stages in a company’s development, would typically receive convertible preferred stock.”

The New Investment Banking Maze

The failure of Bear Stearns and Lehman Bros. during the 2008-2009 Wall Street melt-down has resulted in a much smaller universe of investment banking firms available to handle the funding needs of smaller enterprises. Major bracket firms such as Goldman Sachs or Credit Suisse may have venture capital units, but are simply not structured to deal with micro cap clients. Because less “public Wall Street” research tends to be available for very small publicly-traded companies, the universe of potential investment banking assistance will be limited to a relatively few firms.

Franchising Strategy

Franchising is recognized as an important form of organization. A franchising strategy can be both a source of financing and a strategy for increased business growth. Most states heavily regulate business franchises and require registration of extensive subjective risk perceptions of each party to the transaction by allocating control or trusting a party with decision-making rights).

175 Id. at 133.

offering memorandum for the sale of franchise units. Once again, this is a legal practice specialty.

Crowdfunding

The impact of small business growth on job creation and economic expansion continues to grow, but there is a downward trend in the willingness of venture capital firms to invest in seed-stage companies. Non-equity crowdfunding fills in this gap by providing much needed seed funding and spreading the risks broadly across the crowd so that the cost of failure to any one contributor is minimal. Non-equity crowdfunding has proven to be a great way to test out new ideas, finance micro-startups, and weed out bad business ideas at an early stage.\(^{177}\)

The music and film industry provided the genesis for crowdfunding by soliciting donations from supporters to fund music recording or cinema projects.\(^ {178}\) Artists often

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accept donations over the Internet or pre-sale CDs of music or films with a promise of sending the final product when it becomes available. Early movers in the crowdfunding space include Kickstarter and Indiegogo. Kickstarter, which focuses on creative projects, claims that since 2009 a total of more than $1.96 billion has been pledged to Kickstarter projects; 92,000 projects have been successfully funded by 9.4 million backers.

Contributions received through crowdfunding can be separated into the “gift” category or the “investment” category. Contributions that are considered gifts (donations, reward, or pre-purchases) are given to the fundraising entrepreneurs without any expectation of equity or other participation in future earnings. Contributions considered to be investments are those that have repayment terms and may involve a return. If the contribution can be classified as a security (whether an equity security or debt security) the “offering” involved in such crowdfunding must be registered or an exemption must be found under the rules described above. Under the donation model, contributors donate their money and receive nothing in return for their contribution.
Even though contributors under the reward and the pre-purchase model receive neither interest nor a portion of business earnings, contributors may receive a diverse range of rewards, from small tokens like key chains, to opportunities to pre-purchase items produced by the funded projects.

Contributions classified as gifts are presumably not subject to the securities laws. Even though the donation model involves the investment of money in a common enterprise, it does not satisfy the third element of the Howey test because profits are not expected. Contributors know in advance that they will not receive a return of any kind and gratuitous contributions are not securities. Contributors in both the reward and pre-purchase models do expect a return, but to classify as an investment contract under the Howey test, the reward must be of a financial nature, “such as capital appreciation or a participation in earnings or even a fixed rate of interest.” Accordingly, because the Howey test is not met for those contributions classified as gifts, capital raised through crowdfunding under the reward, pre-purchase or donation models do not fall under the definition of a security and thus, the federal securities laws Act do not apply.

The other basic model — the equity model — clearly involves investments with a return and profit motive. The equity model allows contributors a speculative right to return of capital and to have “an interest in the profits or a return of the business they are helping to fund.” Again, whether or not contributions made under these two models can be considered securities is relevant to determine if registration is required or an exemption must be sought.

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186 Id. at 33.
187 Id. at 33.
188 Id. 24.
For the reasons described above,\textsuperscript{189} for-profit stock is essentially always a security, and equity interests in unincorporated business entities are tested for “investment contract” (and thus “securities” status) under the Howey test. The application of the Howey test to investments made under the equity model is fairly straightforward. In the equity model of crowdfunding, all elements of the Howey test are extremely likely to be satisfied. There is clearly an investment of money, in a common enterprise, with an expectation of profits arising solely from the managerial efforts of others.

The JOBS Act of 2012, establishes a regulatory foundation to enable small businesses to access new capital using crowdfunding.\textsuperscript{190} Title III of the JOBS Act creates an exemption under the U.S. securities laws, allowing investors to raise $1 million in capital through the offer and sale of securities to the public through crowdfunding platforms.\textsuperscript{191} These crowdfunding provisions “include investment restrictions and new compliance requirements for both small businesses seeking to obtain funds through crowdfunding and the portals that will connect entrepreneurs and investors.”\textsuperscript{192} Congress intended to lower regulatory barriers in order to give small companies and start-ups a larger pool of investors from which to raise capital, but whether that objective has been accomplished remains to be seen. Congress tasked the SEC with adopting rules and regulations to implement the new law, but despite issuing proposed regulations, the SEC has stalled when it comes to adopting final regulations to implement the crowdfunding

\begin{footnotesize}
\begin{enumerate}
\item Notes 99-111 \textit{supra} and accompanying text.
\end{enumerate}
\end{footnotesize}
Meanwhile, some states have enacted crowdfunding exemptions for certain types of intrastate crowdfunded securities offerings.

VII. CREDITOR’S RIGHTS

If there is one sure thing you can count on in a start-up, it’s that things will go wrong. Studies show that about 25 percent of all entrepreneurial start-ups will fail within the first year and that by year five, less than half survive. As discussed more fully above in Section IV (“Principal Choice of Entity Considerations”), a primary goal in selecting the type of entity in which to conduct business concerns the ability to limit the personal liability of individuals involved in the entity. Often, it’s when things go wrong that the wisdom of having previously obtained good legal advice is appreciated. Unfortunately, several scenarios may place an entrepreneur in the unfortunate position of needing legal advice regarding debt collection, secured credit and bankruptcy.

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Debt Collection

As an entrepreneur, understanding your rights as a creditor will require experienced legal advice. Each business, whether serving consumers or other businesses, will want to make sure that payment is received from its customers, hopefully without prodding. To ensure its written contracts are optimal for achieving payment, an experienced commercial law attorney can advise a company about what the contract should say before execution. In doing so the company will maximize its chances of prevailing if judicial action must be taken for collection. Conversely, a company will want to have its attorney review any written contracts its vendors and supplies present for approval. This is especially recommended for the very one-sided contracts proffered by “predatory” vendors such as those offering credit card services/machines or cash incentives for long-term purchasing agreements (such as gasoline suppliers to convenience stores, for instance, which typically offer cash payments to entice business owners into signing).

Secured Credit

The entrepreneur who seeks a commercial lender will also want to have an attorney explain loan documents and their consequences, especially if the loan terms will require a personal guarantee of the business owner (even if the loan is made in the name of the entity). Often the lender will require some security, which can include: the land and buildings being purchased; inventories; receivables; or even the home of the business

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196 See generally Bagley & Dauchy, supra note 9, at Ch. 12 (Creditors’ Rights and Bankruptcy”).
owner or other personal assets. The borrower will want to fully understand the consequences, and explore alternatives if any are available.

**Bankruptcy**

Bankruptcy is another topic requiring specialized legal advice and much has been written on the subject. In one scenario, many entrepreneurs find themselves in the position of having to “sign personally” as parties responsible for the repayment of debt obligations if the enterprise should be unable to promptly repay. On the other hand, the entrepreneur may need legal advice regarding the collection of receivables or may need to collect on a note secured by collateral. Depending on the size of legal community in which the entrepreneur finds herself; or, the jurisdiction in which the adverse party resides or has its principal place of business – finding experienced legal representation may or may not prove difficult.

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As a creditor to someone else’s bankruptcy, an entrepreneur will want legal representation in filing a claim, foreclosing on secured property, and otherwise making sure its claim is recognized with proper lien priority in the distribution of any proceeds from the liquidation of the bankrupt’s non-exempt assets. The entrepreneur might also want to investigate the possibility that insurance coverage for debtor default in some industries may be available. As a debtor, early assistance from an attorney could mean negotiated forbearance from certain creditors which might avoid bankruptcy. If unavoidable, the business owner may need to choose between a company bankruptcy or a personal bankruptcy if he or she has given a personal guarantee. An experienced bankruptcy attorney will help advise the entrepreneur in any of those events.

VIII. LEGAL ISSUES WITH EMPLOYEES

Entrepreneurs also need to understand that a venture having one or more employees faces a wide array of legal issues and associated compliance obligations flowing from the employer-employee relationship. As a threshold matter a determination must be made as to whether workers are employees or independent contractors. Misclassifying a worker as an independent contractor when in fact the worker is an employee can create a host of problems for the employer—such as, for example, liability for failure to withhold and remit payroll taxes. Unfortunately, proper classification can be difficult because it involves a multi-factored analysis of the facts and circumstances essentially designed to determine if the employer controls the worker in a manner sufficient to result in employee status.\textsuperscript{199} Thus, entrepreneurs should seek legal counsel to

\textsuperscript{199} See, e.g., Bagley & Dauchy, supra note 9, at 198-203; Hamilton, et al. supra note 81, at 19-23; and the Internal Revenue Service’s discussion of this issue at
help with this analysis, and in unclear situations may want to ask for a governmental

If one or more employees will be hired, various federal and state laws specific to
the employer-employee relationship can come into play, including, among others: payroll
labor standards and collective bargaining laws; laws relating to pensions and health plans;
workplace safety laws; Affordable Care Act requirements; unemployment insurance
policies for foreign nationals,\textsuperscript{203} and workers’ compensation obligations.\textsuperscript{204} Compliance with many aspects of such employment laws can be a relatively straightforward matter, while other issues involved may be quite complex. Constant technological changes result in new legal issues between employers and employees. As just one example, Professor Jasmine Abdel-khalik points to recent controversies “about who owns LinkedIn accounts of executives when they leave the business… as valuable contacts can travel with someone when s/he leaves. Perhaps companies should consider starting to institute policies about ownership of LinkedIn accounts.”\textsuperscript{205} A business is well-served to engage


legal counsel well-versed in employment laws compliance planning as part of the overall planning of a business venture.\textsuperscript{206}

In addition to the need to engage legal counsel to assist with compliance issues, an entrepreneur should consider hiring a lawyer to advise on the negotiation of employment contracts with key employees. This can be especially true if the contract is to include “restrictive covenants”—such as confidentiality agreements, non-compete agreements and promise to not solicit the venture’s customers or other employees—which can have enforceability issues (which vary from state-to-state).\textsuperscript{207} Professors John


\textsuperscript{207} See generally Kyle B. Sill, Drafting Effective Noncompete Clauses and Other Restrictive Covenants: Considerations Across the United States, 14 FLA. COASTAL L. REV. 365 (2013); Margo E. K. Reder & Christine Neylon O’Brien, Managing the Risk of Trade Secret Loss Due to Job
F. Coyle and Gregg D. Polsky report that leading Silicon Valley technology companies such as Google and Facebook, “have been buying start-up companies at a brisk pace. In many of these transactions, the buyer has little interest in acquiring the startup’s projects or assets. Instead, the buyer’s primary motivation is to hire some or all of the startup’s software engineers.”

Referred to as “acqui-hires,” this increasingly common strategy allows technology companies to “satisfy their intense demand for engineering talent.”

IX. RISK AWARENESS AND MANAGEMENT

With the 2007-2008 global financial crisis, Massey Energy coal mining tragedy, BP Gulf of Mexico oil spill disasters during 2010, and growing epidemic of cybersecurity breaches, business enterprises everywhere have cast renewed focus on the topic of risk management. Many mature companies have created standing committees of the board

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209 Id. at 281.

to enhance enterprise risk management efforts. While this topic may appear at first glance to be well beyond the purview of early-stage enterprises, it seems that giving systematic thought to "the worse that can happen" may yield rewards and mean the difference between survival and failure. Bribery and corruption laws, such as the Foreign Corrupt Practices Act or U.K. Bribery Act of 2010 may prove to be an expensive trap for the unwary. While these types of issues may seem esoteric and not on the radar screen of most entrepreneurs, unfortunately they may have the ability to consume and destroy both scarce people and financial resources. Accordingly, sources of material risk should be seriously considered. A crisis environment may prove challenging even for those enterprises having strong, experienced management teams and abundant financial resources. Almost all start-ups, tending to have less of everything, will prove to be much more fragile during a crisis.


X. EFFICIENT USE OF LEGAL COUNSEL

How can an entrepreneur prepare to make efficient use of legal counsel? First, by doing some homework. It makes little sense to pay lawyers charging on an hourly basis to ask you, while “on the clock,” questions you could have asked yourself if you did some homework. The more the entrepreneur anticipates the information legal counsel will need before giving advice, the more time and money the entrepreneur can save by assembling that information in preparation for working with such counsel. The entrepreneur should engage legal counsel early-on in the venture planning process. Discovering legal issues after committing to a course of action often causes problems that cannot be easily unwound, and generally end up costing more to address than if the associated legal issues were spotted and dealt with early on.  

XI. CONCLUSION

New business formation is the economic engine that creates jobs. To survive, all successful entrepreneurs must become skillful at optimizing efficiency at every opportunity. In the United States, diverse legal issues such as intellectual property identification and protection, entity choice and formation, taxation, initial capitalization and fundraising (through various sources) in compliance with securities laws, debtor-creditor laws, and employment laws will require finding skilled legal talent.

It is critical to economic recovery and growth that entrepreneurs make the effort to become educated on legal issues their startups will encounter. Entrepreneurs must

\footnote{See generally Bagley & Dauchy, supra note 9, at 41-48; Thomas C. Brown & Anthony J. Luppino, How To Be Your Own Lawyer...Without Being a Fool: A Practical Guide for the Entrepreneur Who Wants to Save Time and Money through Informed Self-Help, Preparation and the Efficient Use of Legal Counsel, available online through \url{http://www.howtobeyourownlawyer.com/about/}.}
engage “can do” legal counsel to help navigate them through the various laws and regulations involved, because it is through the business formation process and allocation of capital to deserving enterprises that jobs at all levels are created. All of us owe much to those individuals who (against the odds) risk their finite time and personal net worth in the attempt to create a successful business.
APPENDIX A

Completed Kickstarter Funded Projects
(As of April 21, 2015)\textsuperscript{214}

<table>
<thead>
<tr>
<th>Category</th>
<th>Successfully Funded Projects</th>
<th>Less than $1,000 Raised</th>
<th>$1,000 to $9,999 Raised</th>
<th>$10,000 to $19,999 Raised</th>
<th>$20,000 to $99,999 Raised</th>
<th>$100,000 to $999,999 Raised</th>
<th>$1M Raised</th>
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<td>All</td>
<td>83,170</td>
<td>9,738</td>
<td>49,902</td>
<td>11,564</td>
<td>9,975</td>
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<td>Music</td>
<td>19,643</td>
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<td>14,299</td>
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<td>Film &amp; Video</td>
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