

Governing documents (Part 1)

By Daniel A. Cotter | August 4, 2016

You join a start-up legal department as either its only attorney or a small team and wonder how to become a valuable contributor to the business. A good first step is to review the corporate records and organizational documents.

In this series for lawyers in start-up or emerging company legal departments, we consider some major areas that should be addressed in order to establish an effective legal department. This first installment looks at governing documents, including choice of entity.

You join a start-up legal department as either its only attorney or as one in a small team. You might have been working in a government or private practice position, where you focused on a particular area of law such as litigation or real estate, or you moved to your current employer from an organization with a larger law department where you likely focused on a few areas.

You now have responsibility for, and must be conversant in, a wide range of subjects and issues. The new role can feel overwhelming, like drinking water from a fire hose.

You wonder how to get up to speed so you can become a valuable contributor to the business. A good first step is to review the corporate records and organizational documents.



Dan Cotter is a partner at Butler Rubin Saltarelli & Boyd LLP. Prior to joining Butler Rubin, Dan spent more than 16 years in-house at organizations with various sized legal departments. The article contains his opinions and is not to be attributed to anyone else.

ARTICLES

Depending on whether your employer is a limited liability company (“LLC”) or corporation (for purposes of this article, we will not discuss other forms of entities, such as limited liability partnerships, as most startups utilize the LLC or corporate form), it is required to have filed its Articles of Organization — in Illinois, the Articles are referred to as Articles of Organization. In Delaware, the filing is also known as the “Certificate of Formation.” — (for LLCs) or Articles of Incorporation (for corporations).

The Articles will provide you with very basic information about the entity:

1. State of formation
2. Name of the entity
3. Registered agent and the agent’s address
4. Date of formation
5. Purposes for which the entity is organized. (Generally, entities utilize the generic pre-inserted language, “The transaction of any lawful business for which [the entity] may be organized.”)
6. In the case of an LLC, whether the LLC is managed by manager(s) or member(s). If the entity is a corporation, you will also be able to determine the type of corporation. (Corporation types available vary by jurisdiction. In Delaware, for example, the following corporate forms are available: stock corporation; stock corporation-directors liability; public benefit corporation; non-stock corporation; exempt corporation (non-profit); and close corporation.)

After you locate and review the Articles, you should go onto the Secretary of State’s website for the state where the Articles were purportedly filed and search that site for your entity. If no results come back, you will need to make sure that your employer actually filed documentation with the state. If results do come back, check them to make sure that the status is “active” and that the Articles and date displayed match.

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Consider the type of entity formed and whether it makes sense, given the mission, purpose, and capital raising plans of the start-up. Also, if it is a corporation, have the owners considered utilizing an S corporation election by filing Form 2553 with the IRS? (An S corporation is a corporation that elects to pass income and losses through to its shareholders for federal tax purposes. If S corporation status is not elected, the income of the corporation will be taxed both at the corporate rates and also when received by the shareholders.)

You should assess whether such an election makes sense for your organization.

BYLAWS OR OPERATING AGREEMENT

The Articles provide very limited, basic information, and are the only organizing documents that must be filed with the appropriate Secretary of State. The bylaws or operating agreement (the “Governing Document”), which do not get filed, will provide you with a more detailed roadmap of the company founders’ intentions for the organization’s operations.

The Governing Document should have details on the executive structure of the organization, powers of the directors versus those of the officers, management of the day-to-day affairs, and identification of those with an ownership or profit sharing interest in the organization. You should read through the Governing Document and familiarize yourself with its contents. If no Governing Document can be found, you may need to draft them.

OTHER CORPORATE DOCUMENTS

If your start-up is a stock corporation, the corporate documents should also include stock certificates indicating who owns shares and how many shares each shareholder owns, as well as a stock register. Many start-ups before hiring their first lawyer have not formally evidenced stock ownership — if not, you will need to prepare the stock certificates.

Blank forms can be purchased inexpensively at an office supply store or online. Check the Governing Document for a reference to a corporate seal — again, many start-ups do not obtain one even if required by the Governing Document.

Finally, regardless of form of entity, corporate minutes should be maintained for any corporate action or meeting required by the Governing Document. If no minutes exist, you should prepare appropriate “catch up” minutes which should reflect ratification by the appropriate parties.

Reviewing the corporate documents, including the Articles and the Governing Document, will give you a better understanding of the start-up you joined as well as provide you with some knowledge to start addressing other legal issues that your start-up faces. The review may also present some questions that you will want to discuss with your management team. Next up: employment and labor issues to consider for your start-up.

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