

Pillar Legal Tech Law Blog¹

Where should I incorporate my U.S. tech startup?

Delaware. Why? Because everyone else does, and when approaching investors, it's best to look like everyone else, at least with respect to incorporation jurisdiction. Your pitch deck can look different, of course.

Nevertheless, some have questioned whether Delaware should be the standard. For example, not long ago, Elon Musk posted on X (formerly Twitter), "Never incorporate your company in the state of Delaware," after receiving an adverse ruling from the Delaware Court of Chancery regarding his Tesla compensation package.²

There are, however, sound reasons why Delaware remains the home of corporate America, including its courts, statutes, and case law. Delaware's unrivaled popularity also means that corporate lawyers across the country are familiar with Delaware law, and many standard form legal documents are designed for Delaware corporations – both of which make it easier to set up and receive investment in the first state of the nation.

Why does it matter where I incorporate my company?

The state of incorporation determines the corporate laws that govern the company, the courts that have jurisdiction over the company, the secretary of state that will process the company's filings and the state (or at least one of them) where the company pays annual franchise taxes.

Can I incorporate in Delaware even though I won't have an office or employees in the state?

Yes. At the end of 2023, over 2 million entities were then incorporated in Delaware, far exceeding Delaware's population of approximately one million.³

How common is it to incorporate in Delaware?

Very. In 2023, Delaware was the state of incorporation for nearly 68% of Fortune 500 companies and approximately 80% of all companies completing U.S. initial public offerings that year. Thus, Delaware is the dominant choice for incorporation, although even among the largest corporations, a significant number choose to incorporate in states other than Delaware.

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² Randall Chase, [Elon Musk cannot keep Tesla pay package worth more than \\$55 billion, judge rules](#), AP News (January 31, 2024).

³ [Delaware Division of Corporations: 2023 Annual Report](#).

Why is Delaware so popular?

Delaware became, and remains, popular for corporate formation because of several unique characteristics of Delaware's corporate law regime:

- Specialized Courts.
 - Delaware. Delaware has a non-jury trial court, the Court of Chancery, that only hears corporate matters, trusts, estates, and other fiduciary matters, disputes involving the purchase and sale of land, questions of title to real estate, and commercial and contractual matters in general. As a result, the seven judges at this court are very experienced with corporate law. Since they're appointed by the governor rather than elected, they're known for their impartiality, which has helped build their strong reputation. They also act fast, often resolving cases in months rather than years.⁴
 - California. The situation is very different in other states. In California, for example, the Superior Courts are the only state trial courts, which means that judges and juries hear both civil and criminal cases – so one day a murder trial, the next a question of corporate fiduciary duties. Unlike Delaware, California's state trial judges are elected. They're also not as quick, although they aim to resolve most civil cases within two years.⁵
 - Competition. In recent decades, however, the number of states that have adopted specialized business courts has climbed to over two dozen, including New York (1993), Illinois (1993), Massachusetts (2000), Nevada (2000), Wyoming (2021), Georgia (2020) and Texas (2024).
- Refined Statute. Each year, the Delaware State Bar Association's Corporation Law Council reviews the Delaware General Corporation Law (the "DGCL") to recommend necessary or advisable updates based on practice developments and Delaware case law. These proposed amendments may then be adopted by the Delaware legislature and signed into law by the Delaware governor. In other words, corporate lawyers reviewing and revising the DGCL on a continual basis, ensuring it evolves alongside developments in the field.
- Abundance of Case Law. The Court of Chancery has developed 200 years of legal precedent from handling high volumes of corporate disputes.⁶ The deep well of case law has garnered the Court of Chancery a reputation for predictable, equitable outcomes. For

⁴ Matthew Jennejohn, *How Does Delaware Do It? Judges Alone Don't Explain Chancery's Speed*, CLS Blue Sky Blog (July 28, 2022), <https://clsbluesky.law.columbia.edu/2022/07/28/how-does-delaware-do-it-judges-alone-dont-explain-chancerys-speed/>.

⁵ Superior Courts of California, [2024 California Rules of Court](#).

⁶ Amy Simmerman, William B. Chandler III, and David Berger, *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, Harvard Law School Forum on Corporate Governance (May 8, 2024), <https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations/#20>.

the aspiring competitors with specialized business courts, this Delaware advantage is difficult to replicate.

- Everybody Knows Delaware. Since Delaware is the most popular state for company formation, corporate lawyers across the country are well-versed in Delaware law, which makes it easier to find qualified lawyers for Delaware companies. In addition, many legal resources and standard templates, such as the National Venture Capital Association Series A financing documents, are specifically designed for Delaware corporations.⁷

What else should I consider when deciding whether to incorporate in Delaware?

While Delaware is, for many tech startups, the best option for formation, there are some things to keep in mind about incorporating in Delaware:

- Franchise Taxes. In Delaware, franchise taxes are calculated one of two ways: (i) the authorized share method, predictably based on the company's number of authorized shares; and (ii) the assumed par value capital method, based on the company's issued shares and total gross assets.⁸ California calculates franchise taxes based on a company's income, which is more straightforward, but often less favorable for larger businesses. California also imposes a minimum franchise tax of US\$800 on all corporations, including inactive or newly formed corporations, making it a more significant cost for smaller or emerging companies compared to the minimum franchise tax of US\$175 in Delaware.
- Out-of-State Registration. When Delaware companies operate, hire employees, sell products or services, or open offices in other states, they need to register there, which adds to their costs. They also must pay taxes in each state where they have a presence, regardless of where they're incorporated.

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⁷ National Venture Capital Association, [Model Legal Documents](#) (last updated October 2024).

⁸ Delaware Division of Corporations, [How to Calculate Franchise Taxes](#).