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# US Flip-Ups

## Moving to the United States

A guide to the practical, corporate, tax, employee equity and immigration considerations for Australian businesses expanding into the United States.



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# Introduction

Australian companies, particularly startups, are increasingly looking to the United States for capital, customers and growth. For some businesses, that expansion includes a corporate restructure known as a US flip-up or flip.

A flip-up involves establishing a new US parent company, typically incorporated in Delaware, above the existing Australian company. The appropriate structure and timing will depend on the company's circumstances, so founders and investors should consider the key issues early.

This guide outlines the flip-up process at a high level and highlights some of the practical, corporate, tax, employee equity and immigration issues that may arise as an Australian business expands into the United States.



# Why do Australian companies flip to the United States?

| | |
|---|---|
| **Access to US investors** | US investors are often more familiar with US corporate vehicles and more comfortable investing in them, which can make it easier for an Australian business to access US capital. |
| **Operational expansion** | A US presence can help a company recruit US-based talent and build a US customer base. It can also make contracting easier where US counterparties prefer to deal with a US corporation. |
| **Exit opportunities** | A US corporate structure may make it easier to structure and market a future trade sale, particularly where potential buyers are based in the United States. |
| **Financial reporting** | Having a US parent company may change the group's financial reporting obligations, including how much financial information is publicly available. |
| **Corporate flexibility** | Australian and US corporate law take different approaches to matters such as shareholder numbers and capital raising. A Delaware structure can offer greater flexibility in some areas as a company grows. |

## When should a company consider a flip-up?

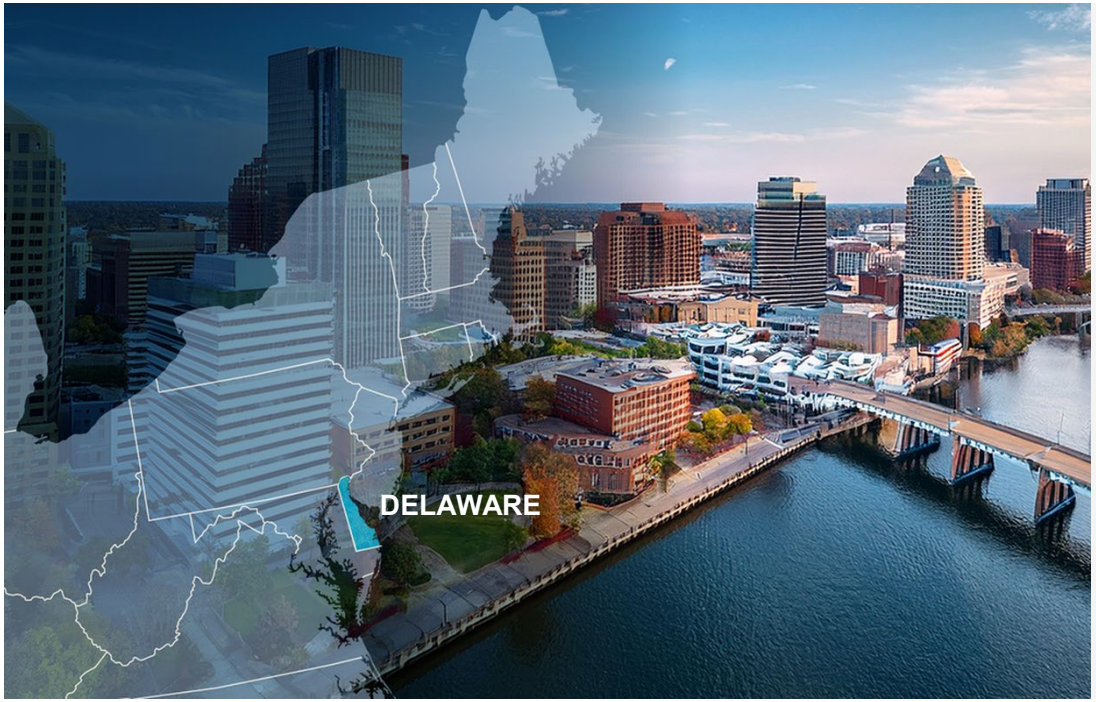
Companies often undertake a flip-up in the earlier stages of investment, before their capital structures and transaction documentation become more complex. As a company grows, more stakeholders and issues may need to be considered.

Flip-ups are also commonly undertaken alongside a capital raise and, in some cases, may be a condition of closing the financing. Coordinating the two processes may help manage restructuring costs.



# Why Delaware?

One of the first structural decisions is the US state in which the new parent company will be incorporated. Delaware remains the preferred choice for many venture-backed businesses, particularly those seeking third-party investment.




- Delaware entities are familiar to many US investors and lenders.
- Delaware has a long-established body of corporate law.
- Its judiciary is highly experienced in corporate matters, providing a greater degree of predictability.

Other states, including Texas and Nevada, have received increased attention as alternative jurisdictions. Their legal regimes can offer different approaches to board and controlling shareholder powers, but their case law is not as developed as Delaware's on many corporate issues.

# Who is involved?

A flip-up is a cross-border exercise and usually requires coordinated Australian and US advice. The core adviser group will typically include:

**Australian corporate lawyers**, to prepare transaction documents and advise on disclosure requirements and matters involving the Foreign Investment Review Board (FIRB), where applicable.

**US corporate lawyers**, to establish the new US parent, prepare corporate documents and advise on CFIUS (Committee on Foreign Investment in the United States) matters.

**Australian accountants and tax lawyers**, to advise on the Australian tax implications.

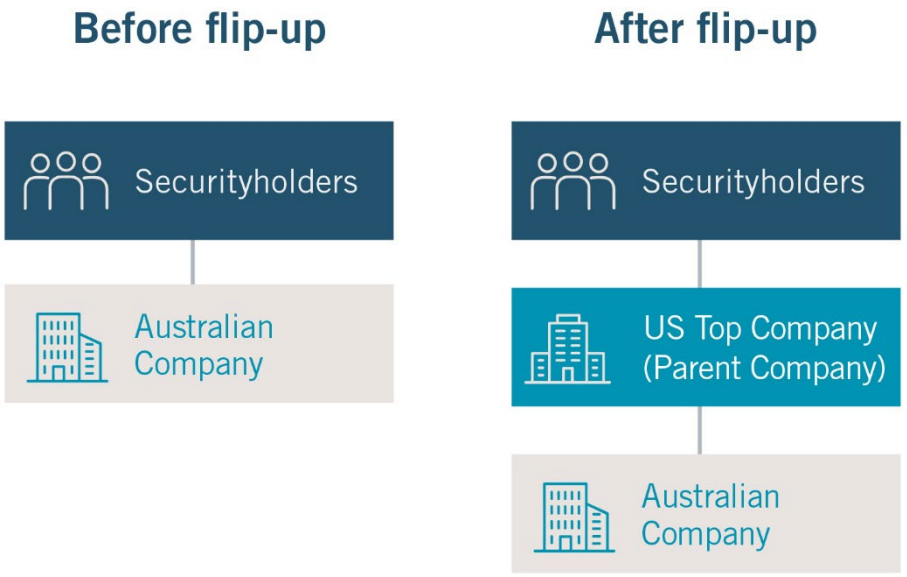
**US accountants and tax lawyers**, to advise on US federal and state tax implications.

Depending on the company's circumstances, employee equity, immigration and other specialist advisers may also need to be involved.



# How does a US flip-up work?

At a high level, the restructure inserts a new US parent company above the existing Australian company (AustCo).




## The key steps usually include:

- Registering a new US corporate entity (US TopCo).
- Existing securityholders transferring their interests in the Australian company so that US TopCo becomes the owner of AustCo.
- US TopCo issuing new securities to the existing AustCo securityholders.

The precise steps will depend on the company's capital structure and other arrangements, including any options, simple agreements for future equity (SAFEs), notes or overseas subsidiaries.

How each type of equity instrument is treated during the flip-up will depend largely on tax and regulatory considerations.

# Australia and the United States: Key Corporate Differences

Australian and US corporate law differ in a number of areas relevant to venture financings. For example, Delaware corporations use an authorised capital structure, which places a limit on the number of shares that may be issued unless the authorised amount is increased.

US venture capital transactions also commonly use National Venture Capital Association (NVCA) standard-form documents for Series A and later financings. These documents cover many of the same commercial concepts as the Australian Investment Council (AIC) model documents, although the relevant rights may be set out in different corporate and transaction documents.

| Provision | Typical Australian document | Typical Delaware / NVCA document |
|---|---|---|
| **Preference share terms** | Constitution | Certificate of Incorporation |
| **Board appointment rights** | Shareholders Agreement | Voting Agreement |
| **Information rights** | Shareholders Agreement | Investors' Rights Agreement |
| **Pro-rata rights for new financing rounds** | Shareholders Agreement | Investors' Rights Agreement |
| **Pro-rata rights for share transfers** | Shareholders Agreement | Right of First Refusal and Co-Sale Agreement |
| **Co-sale rights** | Shareholders Agreement | Right of First Refusal and Co-Sale Agreement |
| **Drag-along rights** | Shareholders Agreement | Voting Agreement |
| **Shareholder protective provisions** | Shareholders Agreement | Certificate of Incorporation |

# Tax Considerations

A flip-up raises both Australian and US tax considerations. Depending on the company's circumstances, it may be possible to undertake the restructure without triggering an immediate Australian or US tax liability. However, the potential tax implications should be carefully assessed before proceeding.

**From an Australian perspective, key matters may include:**

- Whether the exchange of existing AustCo shares for US TopCo stock can qualify for capital gains tax rollover treatment.
- Whether the AustCo cap table needs to be replicated in US TopCo for the relevant rollover.
- Additional complexity where AustCo has interests in Australian land, significant leasehold improvements or securities such as SAFEs.

**After the flip-up, ongoing issues can include:**

- Maintaining US TopCo as solely US tax resident.
- Transfer pricing between US TopCo and AustCo.
- Controlled foreign company rules.
- Withholding taxes on payments and distributions.
- The Australia–United States double tax agreement.
- Interest deductibility, thin capitalisation and relevant US reporting requirements.

# Employee share option plans and employee equity

Employee share schemes and option plans can add complexity to a flip-up because vesting, disposal restrictions and tax rules differ between Australia and the United States.



US TopCo will generally need to adopt a replacement employee equity plan.



It may be appropriate to maintain separate US and non-US employee equity plans to account for differences in legal and tax requirements.



Existing Australian options can often be exchanged for replacement options without an immediate Australian tax consequence, subject to the relevant conditions being met.



Australian startup concession options may retain their tax concessions, provided the replacement arrangements are structured appropriately.



US employee arrangements may involve different forms of equity, including incentive stock options, non-statutory options and, for later-stage companies, restricted stock units.

# Founders and US visas

For founders and key employees, the corporate restructure may be only one part of the US expansion process. If individuals intend to relocate to or work in the United States, immigration planning should begin early and be coordinated with the company's corporate, tax and operational arrangements.

**Issues to consider can include:**

- Who will need to spend time working in the United States and when.
- Where founders and key personnel will be based.
- The nature of each person's proposed role and activities in the United States.
- How the company's ownership and structure may affect available visa options.
- Whether the visa timetable aligns with the proposed flip-up, capital raise and wider US expansion plans.

## Preparing for a flip-up

- Early preparation can make the process more efficient. Before starting a flip-up, companies should make sure their corporate records and capital structure are accurate and up to date.
- Check the securityholder register, cap table, option register, noteholder register and SAFE holder register.
- Make sure ASIC filings and other public registrations are current.
- Keep complete and up-to-date copies of the company's constitution, shareholders agreement and other key corporate documents.
- Consider where the US business will operate and whether state-specific registration requirements apply.
- Consider how intellectual property will be developed and whether this may affect research and development tax concessions.
- Plan for international tax issues such as transfer pricing.
- Ensure US TopCo obtains an Employer Identification Number so it can complete key US administrative steps, including opening a bank account.
- Assess any applicable FIRB, CFIUS and corporate disclosure requirements.

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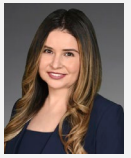
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# Seeking the right advice

A US flip-up can be an important part of an Australian company's US growth strategy. Seeking advice early can help determine whether a flip-up is appropriate and identify the key corporate, tax, employee equity and operational issues that need to be addressed.



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