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The SAFE, the KISS, and the Note: A Survey of Startup Seed Financing Contracts

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The past decade, there has been an explosion in seed financing for early-stage technology startups. Increasingly, this seed financing is channeled to these companies via an entirely new form of investment contract — the deferred equity agreement. One version of this agreement — the Simple Agreement for Future Equity (SAFE) — made its debut in 2013. Another version — the Keep It Simple Security (KISS) — first appeared in 2014. While these instruments have attracted extensive attention in the startup blogosphere, there exists remarkably little information about the role they play in the real world. Nobody seems to know, for example, precisely who is using these new contracts. It is likewise unclear where exactly these agreements are being used. In a very real sense, the discussion about these new contractual forms is occurring in an empirical black hole.

This Essay aspires to bring light to the darkness. Drawing upon original lawyer survey data collected in the spring and summer of 2018, it offers a snapshot of the current landscape for startup seed financing contracts. This snapshot will be of interest to legal scholars and practitioners for several reasons. First, it constitutes the first systematic attempt to document the spread of an important contractual innovation — the deferred equity agreement — throughout the United States and Canada. Second, it shows that the traditional dichotomy between “West Coast” and “East Coast” venture financing deal terms is rapidly being replaced by a new dichotomy between startup lawyering "aficionados," who devote the majority of their practice to representing startup companies and their investors, and "dabblers," who spend only a small portion of their time working in the startup space.

In addition, this snapshot offers important insights into the existing legal literature that views contracts as products. We argue that the SAFE and the KISS — whatever their legal merits — bear more than a passing resemblance to the branded swag that is commonly given away by companies to build brand awareness. This is a significant finding with implications that go well beyond this particular area of the law. Finally, the snapshot of seed financing contracts is relevant to practicing lawyers, particularly as these attorneys seek to advise clients on the extent to which these newer deferred equity contracts are actually being used by similarly situated companies and investors.

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