



Monday, October 20
2:30 pm-4:00 pm

**202 The Tricks & Traps of Corporate
Intrapreneurship & Entrepreneurial
Investment: Getting the Most Out of a New
Business**

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Faculty Biographies

Liisa I. Nogelo

Liisa I. Nogelo is an associate general counsel of Biogen Idec, a biotechnology company and global leader in the discovery, development, manufacturing, and commercialization of innovative therapies in areas with high unmet medical needs. Ms. Nogelo currently focuses on structuring and negotiating licensing, collaboration, acquisition and investment transactions, research agreements, and a broad range of commercial contracts.

Prior to joining Biogen Idec, Ms. Nogelo was a counsel at Bingham McCutchen and a member of the firm's emerging growth companies, general corporate, life sciences, and mergers and acquisitions practice groups.

Ms. Nogelo received her JD from the UCLA School of Law and her BA, magna cum laude, from Wellesley College.

Peter Rosenblum

Peter M. Rosenblum is chairman of Foley Hoag's business department and a former co-managing partner. He specializes in corporate finance and law, mergers and acquisitions, venture capital/private equity, and other public and private offerings of securities. He provides comprehensive representation to companies in technology, energy, life sciences, investment management, consulting, and other industries concerning day-to-day operations, corporate governance, financing and other transactions, management compensation and succession and liquidity events. He advises investors and companies in connection with joint ventures, strategic alliances, recapitalizations, and buyouts involving complex applications of debt and equity securities. Mr. Rosenblum has particular expertise in developing transaction-specific offshore and cross-border structures and limited liability company and other pass-through vehicles and in counseling managements and corporate special committees involved in significant transactions. He represents numerous venture capital and private equity funds, hedge funds and other private investment funds, both in the United States and offshore, that invest in public and private securities, private equity transactions, forestry assets, and other alternative investments.

Mr. Rosenblum is listed in Chambers Global: The World's Leading Lawyers for Business for private equity - buyouts and venture capital investment, in Chambers USA: America's Leading Business Lawyers for private equity - buyouts and venture capital investment and corporate/mergers and acquisitions, and in IFLR's Guide To The World's Leading Private Equity Lawyers. He has also been listed in Best Lawyers in America.

Mr. Rosenblum received his JD, cum laude, from Harvard University, his MA from Yale University and his BA, summa cum laude, from Amherst College.

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Three Models of Intrapreneurship and Entrepreneurial Investment

Three basic models of activity by corporate sponsors are addressed here. In practice, the distinctions among the three may blur somewhat.

- Basic intrapreneurship venture. The sponsor develops a business, business concept or technology and establishes a venture to commercialize it. Formation of the venture may be through drop down, spin-off, sale of assets or other means. Third party financing may or may not be sought.

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Three Models of Intrapreneurship and Entrepreneurial Investment (cont.)

- Intrapreneurship involving joint venture. The venture is created with more than one sponsor. Each contributes to the venture. Contributions may vary widely. Typically, one sponsor is the true "intrapreneur", responsible for the idea.

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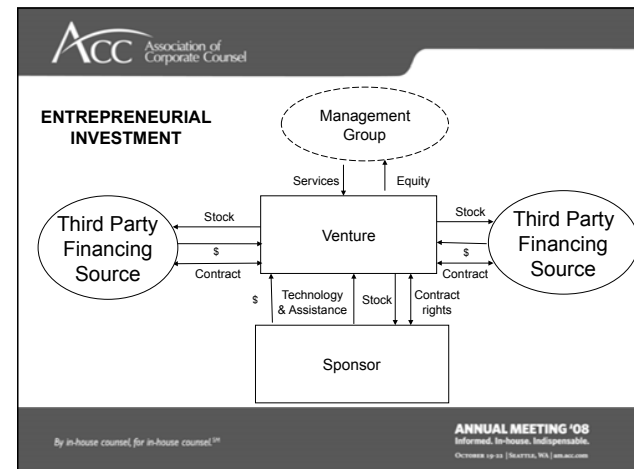
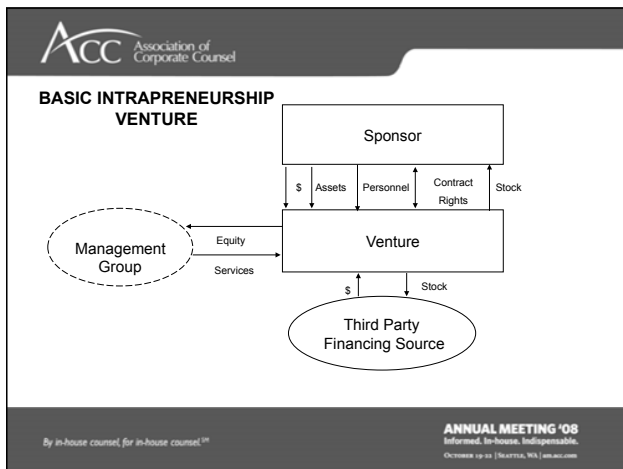
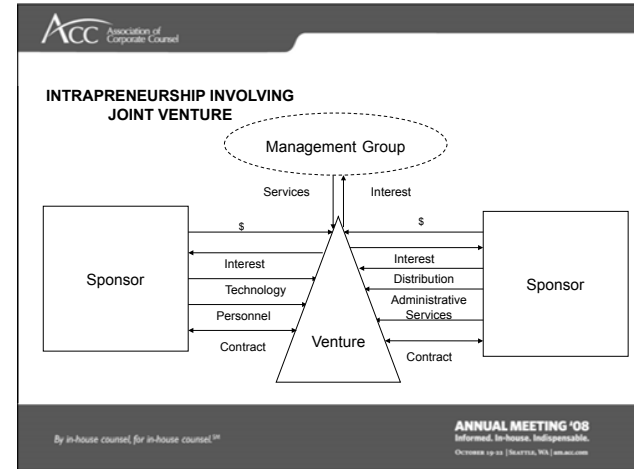
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Three Models of Intrapreneurship and Entrepreneurial Investment (cont.)

- Entrepreneurial investment. The sponsor invests in a venture founded and to be financed in part by third parties. Its "sponsorship" may be broadly based in business contributions or narrowly tied to a cash contribution. Typically, the sponsor seeks access to technology or business opportunities in addition to a cash return on investment. Basic diagrams of the three methods follow.

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Advance Planning

- A tight business plan is essential. It needs to cover all aspects of the venture.
- Goals. What does sponsor seek from the venture beyond cash return on investment? What will be the venture's relationship to sponsor? Why is this a good use of corporate time, resources and money? Rarely is participating in this type of venture "just" an investment.
 - Anticipated target return on investment. Should be a reasonable one for nature of business and level of risk. A surprising number of ventures are "sold" unrealistically to internal decision matters.
 - Access to technology
 - Access to markets
 - Ability to pursue promising venture outside core business
 - Often ability to pursue a business is without income statement effect for sponsor.
 - Can initial agreements be written to authorize/ratify goals and make them goals of venture?

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Advance Planning (cont.)

- Further financing needs. The first financing is seldom the last. How will sponsor react to further financings in predictable amounts and at predictable times? How will sponsor protect itself in further financings?
- What happens if other parties fail to provide additional financing? Is sponsor prepared to accept risk, reputational and otherwise, of failure?
- What will sponsor do if a venture is not successful in accordance with plan?

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Advance Planning (cont.)

- Always plan to anticipate change. New ventures seldom follow precise plans.
- Contributions. Focus on anticipated contributions. What is definitely required? What may be required in future? Can future demands be limited/pre-defined?
- How will venture be financed?
 - What will be financed?
 - Explicit commitments?
 - What is sponsor's commitment?
 - Milestones. Remember that they seldom are achieved precisely as written.

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Advance Planning (cont.)

- Tax planning
 - Choice of entity
 - Tax relationship to sponsor
 - Position, if any, in consolidation
 - Uses of debt and licensing for tax efficient distributions
 - Distribution strategy generally
 - Efficient reclamation of assets and benefits of venture
 - Transfer pricing of products and services - - particularly if cross-border

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Advance Planning (cont.)

- Compensation and benefits
- Accounting
 - Understand the accounting
 - Consolidation or not
 - Equity accounting
 - Other income statement and balance sheet consequences

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Advance Planning (cont.)

- Does the exit strategy permit sponsor to achieve its goals?
- Will sponsor's management accept implications of strategy -- which might include loss of control over "home grown" technology and personnel?

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Advance Planning (cont.)

- Personnel planning
 - Secondment
 - Transfers
 - Shared employees
 - Compensation and benefits
 - Severance
 - Employment agreements
- Exit Strategy
 - What is the sponsor's strategy or strategies for exit from the venture?

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Choice of Entity and Form

- Available choices vary by jurisdiction
- In United States, this usually involves a choice between a limited liability company and a C corporation.
- Primary analysis is tax based: pass through taxation versus venture level taxation
 - If there are net operating losses or credits, are they efficiently used?
 - Is there a desire for "consolidation" for tax purposes?

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Choice of Entity and Form (cont.)

- What effect does entity form have on available approaches to compensation and benefits?
- Also must do accounting analysis
 - For example, is there a desire for consolidation or a resistance to it?
- Other considerations also must be weighed: e.g., permanence, financeability, liability and salability.

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Pre-Deal Negotiation (cont.)

- Intrapreneurship leading to joint venture with another sponsor. Negotiation is among venturers and management. But there is also internal negotiation for each sponsor.
- Entrepreneurial investment. Negotiation is with other investors and founders.

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Pre-Deal Negotiation

- Is there a true negotiation? With whom? There will be different answers for each model. Yet, there is almost always a negotiation, and most often it is three (or more) cornered.
 - Intrapreneurship leading initially to sole-sponsored venture. Negotiation is with venture management and sponsor's internal resources. Each must be induced to participate wholeheartedly.

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Comprehensive Agreement

- Sponsor needs a comprehensive agreement describing relationships. This is not as likely in entrepreneurial investment but often it can be achieved in pieces.
- Why?
 - Agreement gives sponsor the ability to anticipate what will/may happen.
 - Keep in mind that sponsor and venture will be connected, particularly in the minds of the market participants and other constituencies.

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Comprehensive Agreement (cont.)

- Activities of venture can affect sponsor's reputation and position.
- Sponsor must have certain information for its own internal and external reporting.
- Sponsor should want benefits from the venture other than the value of the direct investment.
- Basic understandings and expectations should be explicit to avoid future misunderstandings.
- In many transactions, the "comprehensive agreement" is reflected in a series of ancillary agreements.

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What Should be in the Comprehensive Agreement? (cont.)

- Reporting and control covenants
 - Information to be provided: timing and specifications.
 - Right of inspection and review
 - Maintenance of internal controls
- Affirmative covenants
 - Provision of output
 - Rights in developments
 - Duty to provide budgets and plans for review and approval

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What Should be in the Comprehensive Agreement?

- Contents vary widely with situations. Categories of provisions can be suggested:
- Description of sponsor's contribution to venture and methods of payment for it.
 - Technology
 - Services and administrative support
 - Facilities
 - Personnel

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What Should be in the Comprehensive Agreement? (cont.)

- Requirement to comply with laws and pay taxes
- Consider requirement to adhere to sponsor code of ethics
- Requirements concerning compensation and benefits
- Requirements to use sponsor services
- Requirements concerning press releases: e.g., pre-review and comment or approval rights
- Negative covenants
 - Prohibition of "bad" acts that are against sponsor policy

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What Should be in the Comprehensive Agreement? (cont.)

- Prohibitions on major events such as mergers and acquisitions
- Prohibitions on employee raiding
- Prohibition on customer raiding
- Confidentiality
- Tax sharing. Is there a need for a tax sharing agreement?
 - If venture provides tax deductions or credits for sponsor, does venture receive compensation?

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What Should be in the Comprehensive Agreement? (cont.)

- Exit and termination. The agreement should contain understandings about what sponsor will receive on termination of venture and an indication of exit strategy:
 - Right of first offer
 - Right of first refusal
 - License of technology in field(s) of use
 - Rights to re-hire personnel
 - Tag along rights
 - Drag along rights
 - Registration rights (public exit)

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What Should be in the Comprehensive Agreement? (cont.)

- If sponsor pays tax on a proportion of venture's income, does venture reimburse sponsor?
- Who is responsible for filings and interactions with government authorities?
- Understandings about transferability of interests in venture.
 - When can interests be transferred?
 - It usually is important to choose co-participants in venture.
 - What exceptions should there be?

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External (Non-Sponsor) Financing

- In each intrapreneurship model, external financing may supplement contributions of sponsors. Entrepreneurial model assumes external financing.
 - Funding
 - Business development skills
 - Contacts
 - Access to technology and resources
- But there are costs with external participation
 - Loss of management/board control
 - Loss of control over strategic direction and outcomes

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External (Non-Sponsor) Financing (cont.)

- Loss of “closeness” of relationship with benefits that brings
- Potential external risks by association with third party and its business
- Inter-company transactions will become transactions with affiliates subject to review and approvals.
- Consequences for basic models of intrapreneurship
 - Usually lose the simple “classic” version of each
 - Participation of third party always causes change

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External (Non-Sponsor) Financing (cont.)

- External participation clearly causes most change in cases of entrepreneurial investment by sponsor because third parties may control the transaction.
 - Often, sponsor is joining other participants.
 - Sponsor documents may resemble standard investment models.

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External (Non-Sponsor) Financing (cont.)

- Often must conform to needs/approvals of new participant. For example:
 - Venture capitalist may want its form of documents.
 - Professional investor or non-United States participant may not accept entity that is a pass-through for tax purposes.
 - Many will want board representation. Some will insist on majority representation or tie-breaking neutrals.

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External (Non-Sponsor) Financing (cont.)

- Negotiation may focus on blocking rights and percentages to approve, amend and waive.
- But side agreements with sponsor to gain valuable access to technology, resources or markets will face considerable scrutiny and may be rejected or diluted.

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External (Non-Sponsor) Financing (cont.)

- Exit becomes complicated.
 - Simple dissolution or purchase by sponsor does not usually work.
 - External participants need to achieve full value.
 - Sponsor should seek right of first offer or right of first refusal. But may not obtain it.
 - Will external participants and management relinquish opportunity for public exit or unfettered trade sale?

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Choice of Professionals (cont.)

- Accountants
 - Probably most important: timely, accurate and consistent reporting
 - But can they share all of what they know?
- Attorneys
 - Representation: Who is the client? How do you know?

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Choice of Professionals

- This issue is significant enough to justify separate consideration.
- Management of venture desires independence but sponsor wants control and execution.
- Use of professionals of sponsor may provide cost advantages. Wholesale purchases.
- Different classes of professionals present different issues. For example:

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Choice of Professionals (cont.)

- Other service providers

* * *

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**ISSUES TO ADDRESS
IN STRUCTURING JOINT VENTURES FOR
INTRAPRENEURSHIP**

1. PLANNING THE VENTURE

A. Business Planning

1. What do venturers seek beyond cash return on investment?
2. How will goals be achieved?
3. How will divergent goals be reconciled?

B. Contributions

1. What will each venturer contribute?
2. What may be required in the future?

C. How will the venture be financed?

D. Tax planning. A "potential trap" for the unwary.

1. Choice of entity
2. Tax relationship to venturers
3. Position, if any, in consolidation
4. Uses of debt and licensing for tax efficient distributions
5. Possible uses of net operating losses and credits
6. Transfer pricing of products and services -- particularly if cross-border
7. Compensation and benefits
8. Reclamation of assets and benefits of venture

E. Accounting planning. Another potential trap. This may not be straightforward.

1. Consolidation or not
2. Equity accounting
3. Other income statement and balance sheet consequences

F. Exit strategy

2. PURPOSES OF THE VENTURE

- A. Define scope of venture very tightly
- B. Identify its proposed lines of business, territories, etc. In other words, what "business" is being moved from the sponsor(s) to the joint venture entity?
- C. Are there to be limits on its scope? If so, are they to be contractual?
- D. Choose co-venturer carefully to achieve goals.

3. NATURE OF THE VENTURE

A. Will there be a separate entity formed? If so:

1. What does each venturer add to it?
2. Conceptually, is it really a joint venture or a mutual investment/acquisition?
3. Is it a strategic alliance with a junior partner and a senior partner?

B. Is it a "virtual entity" using personnel and assets of the venturers?

1. The contractual approach to the joint venture is most flexible, but also most fragile and least permanent.
2. External difficulties in understanding the joint venture can be a problem if there is no entity.

C. Consider a joint venture hybrid

1. Entity formed and functions
2. But in part it relies on venturers for certain abilities and assets.

4. NAME OF VENTURE

A. Does the venture need its own name?

B. If so, how will it be chosen?

1. Is it intended that the joint venture's name acquire secondary meaning in the marketplace?

C. Will the venture's name incorporate a name from one of the participants?

1. Advantages in signaling, branding and sponsorship, rapid market recognition and acceptance
2. Disadvantages in potential market confusion, brand dilution and liability issues
3. Often senior management wants name identification with venture

5. CHOICE OF ENTITY

A. Limited liability company

1. Vehicle of choice for United States joint ventures
2. Highly flexible for internal structuring and customizing
3. Strong statutory liability protection and excellent modern statutes
4. Ease of tax "consolidation" and possible accounting consolidation

B. General partnership of corporate subsidiaries of each of venturers

1. Each retains control of its entity
2. Contract between subsidiaries defines joint venture
3. Can be quite flexible
4. There may be tax and structural advantages
5. More easily dissolved: both an advantage and a disadvantage
6. In practice, somewhat superseded by limited liability company format within the United States

C. Corporation

1. Somewhat inflexible
2. Ordinary corporation? Special purpose corporation?
3. Used in international joint ventures and often is what is meant internationally by a joint venture when term is used by business people

6. PERSONNEL AND MANAGEMENT

A. Who manages the venture on a day-to-day basis?

B. Who supplies personnel?

1. Key issue. May be different answer for different personnel.
 - a) Senior venture management
 - b) Operating personnel
 - c) "Just" sales personnel

2. Are they loaned by parties? Are they hired by the venture?

3. Is there independent management?

4. Will personnel be shared by joint venture and any venturer?

- a) May be desirable for both employees and companies
- b) Lack of clarity can be a difficulty

C. What is membership on Board of Managers/Board of Directors? See below.

D. What will be compensation and benefits?

1. Independent structure?
2. Borrowing structure and benefit plans from venturer?
 - a) If so, which?
 - b) Reimbursement for costs
3. Does venture carry its own overhead?
4. Are there employment contracts?

E. Names of officers and directors/other officers if a corporation or "corporate style" limited liability company

F. Will one venturer (or an affiliate) serve as a management company for the joint venture? If there is to be a management company, there are a variety of issues, such as:

1. Compensation
2. Expense reimbursement
3. Services required/personnel identified
4. Indemnity

G. Managers should clearly be subject to governing body, and required to adhere to budgets.

7. GOVERNANCE AND CONTROL ISSUES

A. Governing body: names vary with structure of venture.

1. Board of Managers (limited liability company)
2. Manager (limited liability company)
3. Management Committee (joint venture)
4. Board of Directors (corporate form)

B. What is the representation of the venturers, on the Board of Managers/Board of Directors? Equal representation is common. However, should this be done if there are levels of capital investment? What happens if percentages of ownership are significantly different?

C. Does governing body have an odd number of members with a requirement of unanimity on so-called major decisions?

D. Should there be independent (neutral) members to mediate or break ties?

E. What is the deadlock breaking mechanism on small issues?

F. Identify major decisions which require unanimity or a vote of venturers directly. These would include:

1. Approval of budgets and annual plans
2. Material deviations from budgets or plans
3. Issuance of equity
4. Incurrence of debt for borrowed money
5. Encumbrance of property
6. Employment contracts and amendments to them
7. Major capital investments - over a specified amount
8. Mergers and acquisitions
9. Major purchases and contracts
10. Introduction of new business lines

11. Amendment to any contract between the joint venture and either venturer: particularly supply and service contracts

12. Choice of accountants

G. Meetings of venturers/Board of Directors or Managers/Management Committees

1. Timing. Frequency may determine effectiveness
2. Location. Does location vary/rotate? Does it favor one venturer or another?
3. Agendas. Who sets them? Is there an ability to add items? Who does staff work to prepare?
4. Chairman. Is there a fixed Chair? Does it rotate? Does it vote? Does it have a tie-breaking vote?

H. Consider a comprehensive agreement between venture and joint venturers containing covenants, both affirmative and negative.

1. "Rules of the road" for venture
2. Matters which venturers need for their business
3. Reporting
4. Choice of professionals
 - a) There is a tension between the desire of venture management for independence and need of venturers for some level of control.
 - b) Accountants are particularly crucial.
 - c) Matters which venturers need to avoid in their business. Remember that venture can affect good will of joint venturers. For example:
 - (1) Press releases
 - (2) Unacceptable product line extensions
 - (3) Compliance with laws and customs

8. REPORTING AND INFORMATION

A. Venturers' need for information and reports. This is particularly acute when venturers are public entities. A failure by the joint venture to provide sufficient credible information can create serious difficulties. Venturers need legal basis to require information.

B. Reporting. Must be accurate and timely. Contract should define timeliness. Venturers will need information for audited and unaudited financial statements. They may need it for bank reporting.

1. Quarterly and annual reports. Detailed and extensive. Received in time for public reports.
2. Monthly management reports.
3. Should the venturer insist on use of its auditors to assure comparability? Whose?

C. Must the joint venture follow the reporting format of one venturer? Which one?

D. Maintenance of internal controls over financial disclosure

1. May be essential if public venturer
2. May be very expensive for smaller/new joint venture

E. Contractual rights of inspection, verification and audit. If not required contractually, how do venturers obtain them?

F. Cost. Who pays?

9. CAPITALIZATION; DISTRIBUTIONS

A. Capital commitments of the joint venturers

1. Initial capitalization
 - a) Specify uses and tie to business plan/budget
 - b) Include organization costs
2. Follow-on investment
 - a) Is there a commitment to additional investment?

B. Form of investment securities

1. Equity
 - a) Will there be preferences and classes of equity?
2. Debt
 - a) Need to avoid thin incorporation

3. Hybrid investment securities

C. What will be invested/contributed?

1. Cash
2. Services
3. Technology
4. Other assets such as an organization
5. Use of name
6. Credit support

D. Valuation of contributions

1. How will they be valued for purposes of ownership allocation?
2. Who values them?
 - a) Most frequently by agreement
3. Book value is seldom the right measure

E. Tax issues in non-cash contributions

F. Follow-on investments/financing. Most ventures require financing in addition to initial capitalization at some point in their existence. Parties should anticipate this need and plan for it.

1. Is there an advance commitment of the venturers to finance? Under what circumstances?
2. Who decides to call the financing?
3. What is the result if one venturer fails to contribute? Defaults and the "failure to ante up"
 - a) Is it a breach?
 - b) Priority investment by other venturers?
 - c) Termination
4. Are there milestones that must be achieved for a call? But is not capital most likely to be necessary when milestones are not achieved?

5. Problems caused by different size/financing capabilities of venturers

6. Can a venturer block financing?

G. External financing. Primary source of additional funding may be third party equity or debt,

1. What effect does this have on previous joint venture arrangements? Is the third party admitted as "another venturer"? If they are professional investors with a format of investment, how will they be accommodated? For example, will a limited liability company be transformed into a corporation in order to accommodate a third party?

2. Dilution, both current and in future

3. Debt financing may raise fewest issues. But will a credit support (e.g., guarantee) be required? How will a venturer be compensated for credit support provided?

H. Cash distributions. Distribution policy should be described, and agreed upon, at the outset.

1. Policies vary

a) Retention of cash flow for financing of venture can be primary aim.

b) Alternatively, venturers may seek rapid distribution to fund other operations.

c) Formula divisions of cash should be specified in documents. Does management share in distributions?

d) Mismatched cash needs of venturers can be quite troublesome.

e) Who decides to distribute cash? Is it a major decision?

f) Are there mandatory distributions (for example to cover taxes)?

g) What is optimum timing of distributions?

10. TRANSFER OF VENTURER'S INTEREST IN VENTURE

A. Free transferability is unusual.

1. Joint venturers want to choose the other participants in their ventures.

2. In a true joint venture, both parties must contribute more than cash and that contribution may be continuing.

3. However, as desired below, parties must have an exit strategy.

4. Moreover, there may be circumstances when one of the venturers must sell its interest. Should this be anticipated?

B. Transfer limitations short of absolute prohibition can be considered.

1. Limitation on transfer that expires after time period

2. Right of first refusal

3. Right of first offer

4. Right of venturer to reject transfer

a) May be a qualified right of rejection: for a particular reason or reasons (e.g., because prospective transferee is a competitor or fails to satisfy economic qualification tests)

5. Right to transfer economic rights but not "political" rights

6. "Tag along" rights: mandatory right to participate

7. Right to transform into sale of entire business

C. Change of control of venturer may effectively constitute transfer. Should there be a remedy?

11. CONTRACTUAL COMMITMENTS BETWEEN VENTURERS OR BETWEEN VENTURERS AND VENTURE

A. Contractual commitments may be critical to the success of the venture. Often they embody the business basis for the joint venture: parties contribute far more than cash to a well-crafted joint venture. Thus, the nature of the commitments will vary from venture to venture. Commitments to contributions alone seldom are the basis for the venture, and the venture's agreements should describe the other commitments. There may be a need for the venturers to be flexible as it often is not possible to anticipate all aspects of the venture's needs in advance.

B. Provision of services

a) Administrative services and operational support

b) Distribution

c) Warranty and repair services

d) Installation services

C. Provision of goods and products

- a) Full requirements contract
- b) Output contracts
- c) Volume purchase agreements
- d) Price protection agreements (may be part of the foregoing)
- e) Fixed price agreements
- f) Limited price escalation agreements
- g) Cost plus contracts
- h) Profit sharing agreements

D. Limitations on other business activities

- a) Confidentiality
- b) Non-competition
- c) Non-solicitation of customers and employees

E. Licenses of intellectual property

- a) Technology
- b) Trademarks

12. INTELLECTUAL PROPERTY OWNERSHIP AND COSTS

A. Trademarks

- 1. Name of the venture: who owns it?
- 2. Use of existing names
- 3. Development of secondary meaning in new names

B. Copyrights

C. Patents

D. Developments? Does either venturer have rights in those?

E. Over-all: which party will own licenses and registrations? Are these assets of the venture until termination or are they owned by the venturers?

F. Who pays for registrations and pursuit of infringers?

G. Confidentiality

H. Trade matters: ownership of customer lists and the like

13. DURATION OF THE VENTURE AND TERMINATION

A. Venture should ordinarily have a stated term. Duration of venture should reflect goals of parties and exit strategy. Joint ventures (particularly those in corporate form) occasionally have perpetual life, but parties should have implicit understanding of duration in any event.

B. Agreements should permit extension with consent of parties. Occasionally, extensions are automatic when milestones are reached.

C. Venturers should plan for termination or expiration. Parties often fail to do so and regret the failure. Business changes other than breach or deadlock may create a need to terminate.

1. Circumstances may change.

2. The parties' relationship may change.

3. Business goals may change.

D. Agreements should contain explicit termination provisions permitting or requiring termination short of stated duration.

1. Breach or default. Termination provisions may be punitive in these circumstances with breaching/defaulting parties losing rights or paying damages.

2. Deadlock. Some agreements anticipate continuation with no consequence in case of deadlock. These parties will likely negotiate a resolution. More commonly deadlock on major issue results in termination of joint venture.

3. Failure to achieve milestones.

E. Consequences of termination. These vary based on the reason for termination. Because the value of the joint venture may be highest as a going concern, many termination provisions focus on an end to "joint" ownership that maintains the going concern. Examples of approaches and different circumstances:

1. Expiration or deadlock

- a) Liquidation (through sale or otherwise and dissolution)
- b) Buy-out or cross buy-out
- c) Division by one venturer and choice of part by other
- d) "Texas shoot-out" procedure

2. Breach

- a) Rights to cure
- b) Loss of control over termination process by party in breach
- c) Right of non-breaching party to "cherry-pick" assets or make an offer for assets or breaching party's interest
- d) Right of non-breaching party to continue venture but with breaching party paying damages and/or losing voting or other rights
- e) In some joint ventures, breach will entitle non-breaching party to put its interest to breaching party.

3. Other events of concern. What "consequences do they have?"

- a) Insolvency or bank defaults of the venturers not directly involving the venture
- b) Events with serious impact on reputation of one venturer
- c) Change of control of a venturer

F. Pricing in buy-outs raises numerous issues

- 1. Formula value
- 2. Appraised value
- 3. Procedure (e.g., "Texas shoot-out") which allows one party to name a price and the other to choose to buy or sell at that price. Allows parties to select pricing and avoids disadvantages of other methods. As with many termination procedures, party with fewer liquid assets may be at a disadvantage in this process. Also, the question will remain as to which venturer chooses the price and which chooses to buy or sell.

G. What rights and obligations of venturers survive termination?

- 1. Rights in technology

- 2. Rights to receive or provide goods or services

- 3. Transition agreements for the venture

14. EXIT GOALS AND STRATEGIES

A. This is often the least analyzed part of the joint venture. Parties should assume that the joint venture will terminate or that they will want to sell their interest in the venture at some time.

- 1. How do they plan to make money in those circumstances?
- 2. What do they want to happen to the joint venture and to assets and personnel on termination?

B. Exit goals and strategies should be reflected in all other parts of the joint venture structure.

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