MODEL JOINT VENTURE AGREEMENT

C H E C K L I S T

INTRODUCTION

- Joint ventures ("JV") may take a number of forms, but the basis on which they are formed is always a commercial collaboration in which two or more unrelated parties pool, exchange, or integrate some of their resources with a view to mutual gain, while at the same time remaining independent. This checklist provides a basis on which to consider the issues surrounding the formation of the JV and the ongoing legal rights and obligations between the parties.

- Much of this checklist relates to a limited liability company form of JV but many of the issues raised will be equally relevant to the corporate form. In addition, there are tax and regulatory issues that will impact the structure and operation of the JV and they are not addressed in any great detail here.

- As this is a generic checklist it does not take into account any specific national or state requirements. To the extent that the JV is international, local law may mandate additional considerations, as will industry specific issues particularly in the context of regulatory concerns.

- **Note also**: this checklist generally contemplates a two-party JV. Multi-party JV's are more complex, particularly with regard to corporate governance supermajority requirements, dilution and exit rights.

PLANNING

1. **Scope/Purpose of the Joint Venture ("JV")**

- Identify scope/purpose of the JV—consider implications of such scope in connection with:

  - what activities does the JV expressly intend to do or refrain from doing

  - corporate opportunity issues (i.e., what are the existing and potential future conflicts with each party's non-JV businesses)

  - this will lead to a conclusion on the scope of the non-compete covenants and the confidentiality obligations of each party

  - is there any core technology or other intellectual property ("IP") either to be transferred to the JV or to be granted by the parties to the JV

  - are there other intercorporate arrangements that either will be required for the JV to operate or that are required to make the investment in the JV

meet the business case

  - what due diligence must be completed before the JV is actually effective—in this case the level of due diligence is generally no less than that required for an acquisition, and in many cases may need to be more thorough to ensure a comfort level with, for example, the corporate culture of the co-venturer

2. **Form of Joint Venture**

- identify form of the JV:
  - jointly owned corporation or group of corporations
  - partnership—either general or limited
  - LLC
  - contractual (non-equity)—the contractual or non-equity JV can either be a co-ownership model or simply a contract between the parties whereby they retain all their own assets and agree as to their separate rights and obligations. Most "partnering" arrangements, strategic alliances and outsourcing services arrangements fall into this category. It is this category that also gives rise to structuring concerns to ensure that even though the parties wish the JV to be structured as a contractual JV, the actions of the parties do not result in it being, in fact, a partnership.
- issues affecting which form will be used include tax, limited liability, regulatory, banking, labor and employment, benefits, IP ownership, third party consents and exit strategies, among others

3. **Regulatory**

- identify current and any anticipated changes to regulatory issues (including industry specific regulatory issues and general foreign ownership, antitrust, export control issues, etc.) on:
  - ownership and control of the JV, its assets or the operation of its proposed business
  - dilution, exit and liquidation rights

4. **Implications of JV on Existing Operations and Reporting Requirements**

- review accounting treatment of investment in JV—will the investment be consolidated, and the implications of the accounting treatment on financial

statements. Consider impact that particular control mechanisms proposed for JV may have on desired accounting treatment

- review existing contractual obligations to ascertain what third party (bank and other) approvals will be required for the implementation and ongoing operation of the JV, including debt covenants and other non-compete or confidentiality obligations

- consider whether any restructuring of existing operations is required before entering into JV

5. **Tax Considerations**

- begin consideration of tax consequences of the proposed structures:

  - for example, is flow-through or consolidation required?

- this exercise should be started as soon as possible with the other party to ensure both parties' tax objectives are met

6. **Internal Preparation**

- identify all other subsidiaries in corporate group as well as internal divisions and departments that may have a material interest in any particular aspect of the JV transaction and put in place process to ensure appropriate flow of necessary information and ability to obtain required input in a timely fashion for negotiation and implementation of JV

- it is always preferable to agree on the business plan at the outset of the JV. Work should begin early on the appropriate financial modelling so that the parameters of the business plan are thought through before negotiations commence

7. **Confidentiality Agreement**

- consider whether confidentiality agreement needs to be signed and if so what else it will cover; non-solicitation? Will it remain stand-alone or be superseded by the binding letter of intent or the JV agreement?

8. **Letter of Intent/Term Sheet**

- binding or non-binding

- if binding

  - ensure all key provisions covered; may be difficult to introduce new business points after signing

- can be binding unless and until replaced by a definitive agreement agreed to by the parties within a specified time; no material changes without further Board approval. Same concern as above. See also conditions precedent below.

- consider use of arbitration if parties cannot agree on definitive agreement or if there is a dispute as to interpretation of letter of intent. **Risks:** Matter in dispute may not be proper subject of arbitration and risk of uncertainty of outcome

- consider whether to include covenant to negotiate in good faith definitive agreement. **Risks:** No clear guidance as to what that means—may already be some duty in the context of a binding letter of intent to negotiate in good faith. Also, some risk attached because should negotiations fail one party may assert lack of good faith negotiations in order to revoke the binding letter of intent

- ensure all appropriate approvals received before signing. This will include all approvals necessary to enter into a definitive agreement as this agreement will be binding regardless of whether or not a definitive agreement is entered into and would include such matters as board and stockholder approval, regulatory approval, third party contractual consents, etc. If approvals not obtained in advance, letter of intent could provide that it becomes effective once the necessary conditions precedent have been met.

- will it contain a no-shop provision? Consider whether to leave confidentiality agreement in place or replace it with confidentiality obligations in letter of intent. If latter will need to ensure that letter of intent is in fact binding and that confidentiality covenants survive termination of the letter of intent.

- will require disclosure in context of public company

• if not binding

  - can structure so that it becomes binding upon Board approval within a specified time and/or subject to signing a definitive agreement acceptable to both parties. In the context of the former approach note all the requirements set out in the preceding paragraph as regards approvals, etc.

  - will need to draft very carefully to ensure non-binding letter of intent or term sheet cannot subsequently be found to be binding. See ABA *Model Stock Purchase Agreement* or *Model Asset Purchase Agreement* discussion on letters of intent.

  - be aware of disclosure obligations in context of public company