The Continued Evolution of the NVCA Documents

A Summary of Major Changes

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Earlier this year, the National Venture Capital Association published the first major release of its model form venture capital documents since March, 2014. The new release of the documents was the culmination of a large group undertaking that included participation from many law firm and in-house venture capital lawyers from across the country. We are pleased to provide a **comprehensive summary of the changes**. The more significant changes include the following:

Life Science Transactions

For the first time, the documents now incorporate drafting options that are specific to the unique nature of life science transactions. This effort was driven out of recognition of the fact that certain business terms and other considerations in life science transactions are unique from other venture capital transactions. In particular, the Model Form Stock Purchase Agreement and the Model Form Certificate of Incorporation now include drafting options that are typically used in milestone based transactions in which investors make commitments for additional funding in one or more subsequent closings subject to the achievement of certain milestones. These changes include mechanisms to impose penalties that are triggered when investors breach their obligation to invest upon the achievement of milestones, and undersubscription provisions that allow the investor syndicate to raise sufficient capital for the company when investors breach their milestone closing obligations. In addition, given the heightened relevance of intellectual property in life science transactions and the likelihood that the foundation intellectual property was developed outside the company (e.g., in a government funded university or similar research institute setting), the new Model Form Stock Purchase Agreement includes drafting suggestions specific to intellectual property representations and warranties. In addition the Model Form Stock Purchase Agreement also includes representations and warranties directed at FDA and related compliance matters appropriate to the life stage of the company.

Delaware Rapid Arbitration Act

The Delaware Rapid Arbitration Act ("DRAA"), enacted in 2015, has created an alternative dispute resolution path that promises to allow for the more rapid and efficient resolution of certain types of disputes that arise under the Delaware General Corporate Laws, including those arising out of venture capital transactions. The revised model forms each provide a complete set of drafting options that allow practitioners to easily modify the dispute resolution provisions to take advantage of the DRAA. There are a significant number of explanatory footnotes that accompany these provisions and provide an excellent primer for practitioners interested in utilizing the DRAA.

Drag Along Rights

A number of changes have been made to the drag along provisions in the Model Form Voting Agreement in order to ensure that the drag along can be effectively implemented and to reduce the potential for a minority stockholder claim. In particular, the conditions to the drag have been modified in certain instances so that the rules are not as stringent in terms of what criteria the definitive acquisition agreement must satisfy in order for the drag along to be invoked. For

example, the requirement that the indemnity escrow be strictly pro rata has been removed to reflect the fact that this is frequently not in fact the case in M&A transactions even when the general understanding is that indemnification shall be pro rata. In addition, a drafting option has been inserted pursuant to which the parties would agree in advance to waive claims for breach of fiduciary duty in the event of a drag along transaction. This was introduced to reflect growing concern in the venture community about the risk of *Trados* type fiduciary duty claims brought by common stockholders and minority preferred stockholders.

Redemption Rights

The Model Form Certificate of Incorporation has been modified to provide for the accrual of a high rate of interest on the redemption price payable with respect to shares of stock that are subject to a redemption request that has been unfulfilled by the company. The proposed language has been added in light of the rulings of the Delaware Court of Chancery in cases such *Trading Screen*, *Thoughtworks* and *ODN Holding Corporation* as an economic inducement to the company to timely fulfill investor redemption requests.

Crypto-Currency/Blockchain Protective Provisions

A new protective blocking right has been added to Model Form Certificate of Incorporation to provide investors a veto over token, crypto-currency and block chain related offerings given that the pre-existing veto rights did not clearly apply to or cover these new types of offerings.

"Bad Actor" Updates

Changes have been made to the Model Form Stock Purchase Agreement and Model Form Investor Rights Agreement to reflect best practices that have emerged over time with respect to bad actor disqualification provisions for Rule 506 of Regulation D under the Securities Act of 1933 adopted in 2013.

Code of Conduct Covenant

A covenant has been added to the Model Form Investor Rights Agreement that requires the company to adopt and thereafter maintain a Code of Conduct governing appropriate workplace behavior and an Anti-Harassment and Discrimination Policy prohibiting discrimination and harassment at the company.

See a more complete summary of the changes to the NVCA Model Form Documents **here**. See a set of documents that show the actual changes made from the prior versions of the Model Form Documents **here**.

For more information, please contact **Jon Gworek** or **Scott Bleier**.