

JOINT VENTURE ISSUES CHECKLIST

This is a checklist of issues involved in forming a joint venture. Joint ventures require very careful drafting to ensure that the parties' expectations are met and that appropriate provision are drafted to take into account key issues such as the scope of the joint venture, capital contributions, management considerations, non-competition, exit strategy, and more.

Scope/Purpose of Joint Venture

- ❖ What is the scope & purpose of the joint venture?
- ❖ What expansion possibilities are contemplated?
- ❖ Are there any prohibited purposes or activities for the venture?
- ❖ Is there a business plan setting forth the scope of the venture?

Form of Entity

- ❖ LLC, corporation or contractual joint venture?
- ❖ Tax considerations can drive the decision.
- ❖ Any local or foreign laws that have impact on the choice of entity?
- ❖ What is the best way to limit liability?

Management

- ❖ How will the joint venture be managed?
- ❖ Will there be a Board of Directors, and if so, what is the Board makeup?
- ❖ 50-50 management?
- ❖ How will officers be appointed?
- ❖ What powers do the officers have?
- ❖ How are deadlocks resolved? Options include the CEOs of the partners meeting to resolve the deadlock; exercise of a Buy-Sell option to buy out one partner; binding arbitration.

Matters Requiring Consent

What content requires all partners to approve? Examples:

- ❖ Approval of any agreements, documents or other arrangement between or involving the JV and any shareholder or affiliate thereof, as well as any amendment, consent or waiver with respect to such arrangement;
- ❖ Removal of directors other than by the party which designated the director to be removed;
- ❖ Approval of the appointment of the members of any committee established by the Board of Directors;
- ❖ Terms of any employment agreements with officers of the JV
- ❖ Approval of, and amendment to, any budgets, assessments, or financial plans;
- ❖ Approval of agreements providing for the payment or receipt in excess of a designated amount;
- ❖ All transactions regarding building and land, including the lease, purchase, sale and mortgage thereof;

- ❖ Individual plans and projects which are capital in nature and for which the anticipated expenditure will exceed a designated amount;
- ❖ Providing loans, guarantees, or other extension of credit other than in the ordinary course of business;
- ❖ Amendment of the JV documents;
- ❖ Merger into or with acquisition of all or part of the business of another person or entity;
- ❖ Sale, lease, transfer, or other disposition of the assets of the JV having a fair market value, sale price, or book value at time of disposition greater than a designated amount;
- ❖ Liquidation, dissolution, winding up or voluntary bankruptcy of the JV;
- ❖ Fixing compensation of officers, including bonuses;
- ❖ Change in the Business Plan;
- ❖ Declaration of dividends;
- ❖ Appointment, removal or change of any officer;
- ❖ Any material change in the business of JV,
- ❖ Issuance, purchase or redemption by the JV or any securities of the JV and any change, increase or reduction in the capitalization of the JV;
- ❖ The borrowing of funds by the JV in excess of a designated amount.

Contributions and Loans

- ❖ What cash will be contributed by the partners?
- ❖ What assets will be contributed?
- ❖ If assets are contributed, what liabilities are assumed?
- ❖ Will the parties be obligated to make additional contributions if needed? How much and in what proportions? Will it be deemed capital or a loan?
- ❖ If loans are being made to the JV, what is the maturity date, interest rate and other terms?
- ❖ What are the remedies for failure to make additional capital contributions?

Non-Competition

- ❖ Are the partners prohibited from competing with the JV?
- ❖ Are there geographic, country or product line prohibitions?
- ❖ How long do prohibitions last? What happens if one partner withdraws from the venture?
- ❖ Can partners enter new countries independent of the JV?

Special Legal Issues

- ❖ Are there anti-trust issues?
- ❖ Is a Hart-Scott-Rodino filing triggered?
- ❖ Are any special foreign investment laws triggered?
- ❖ What regulatory approval or filing will be necessary?
- ❖ What is the governing law applicable to the entity?
- ❖ How will disputes be resolved? —strong reasons for resolution to be pursuant to confidential binding arbitration.

Representations and Warranties

The parties will typically make a number of representation and warranties, including:

- ❖ Due incorporation, qualification, and authorization to enter into the joint venture, and
- ❖ Exclusive ownership of any assets being contributed to the JV
- ❖ Restrictions on transfer—right of first offer, right of first refusal, tag along rights, drag-along rights
- ❖ Transfer to competitors?
- ❖ What consequences of a change or control of one partner?
- ❖ How to end joint venture if not working out? Buyout by one partner? Dissolution and distribution of assets?
- ❖ Buy/sell options?
- ❖ What to do if tax, regulatory or other non-controllable events make joint venture unprofitable, burdensome or undesirable?
- ❖ What is the term of joint venture?
- ❖ What approval is necessary to sell the JV? To take it public?

Anticipated Documentation

- ❖ JV Agreement (setting forth the overall venture formation agreement among the parties, with accompanying exhibits such as asset contribution, licenses, etc.)
- ❖ Secretary of State charter documents (setting forth the Articles of Incorporation or LLC formation documents)
- ❖ Bylaws (in the event entity is a corporation)
- ❖ Shareholders Agreement (in the event the entity is a corporation)
- ❖ Contribution Agreements (providing for any contribution of assets to the JV with appropriate representations and warranties)
- ❖ Business Plan (setting forth the Business Plan for JV)
- ❖ Reimbursement Agreement (setting forth the services to be performed, personnel provided, use of a partner's facilities and other matters to be provided to the JV by a partner, and the amount to reimburse or compensate the partner therefor).
- ❖ Preferential Treatment Agreement (setting forth the terms of any preferential treatment and any license to be granted by the JV to a partner)
- ❖ Employment Agreements (providing for the terms of employment of key employees of the JV)
- ❖ Technology License Agreement (setting forth the terms of any technology licensing from a partner)
- ❖ Trademark License Agreement (setting forth the terms of any trademarks or service marks to be licensed to the JV)
- ❖ Distribution Agreement (setting forth the terms of any distribution or supply arrangement between the JV and one or more of the parties)
- ❖ Confidentiality and Invention Assignment Agreement (setting forth confidentiality and invention assignment obligations, to be signed by all employees of the JV)
- ❖ Opinion of Legal Counsel