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# Forming a Joint Venture Checklist

A Checklist of issues to consider when structuring and forming a joint venture (JV). This Checklist highlights, among others, issues relating to the JV parties, preliminary documents that may be entered into before negotiations, structuring the JV (including choice of entity, equity structure and financing, and contributions to the JV by the JV parties), governance and minority protections, restrictive covenants, deadlocks, exits and terminations, and service and support arrangements with the JV parties or their affiliates.

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## Other Negotiating and Structuring Considerations

Before forming a **joint venture** (JV), certain threshold questions should be considered and answered. Use this Checklist as a guide through the preliminary stages of structuring a US JV. For a checklist of tax-related considerations, see Joint Venture Formation Tax Checklist. For a more detailed list of issues to consider when drafting an **LLC agreement** for a JV carried out through a **limited liability company** (LLC), see Drafting a Joint Venture Agreement Checklist. For more information on joint ventures generally, see Practice Note, Joint Ventures: Overview and Joint Ventures Toolkit.

## Parties

- Identify the parties (JV parties) to the joint venture (JV).
- Consider whether any of the JV parties wish to hold their interest in the JV through a newly created entity, such as for liability protection purposes. For more information, see Practice Note, Piercing the Corporate Veil.
- If any of the JV parties are **subsidiaries** or holding companies of larger, more creditworthy entities, determine whether the deeper pocketed entities should:

- be **jointly** or **jointly and severally liable** for the smaller affiliated JV party's obligations; or
- provide a **guaranty** or other credit support (see Equity Structure and Financing).

- Consider whether affiliated entities of the JV parties should be bound by any provisions of the primary JV agreement or other documents, such as a **non-compete** or other **restrictive covenants** (see Purpose and Scope; Business Opportunities and Restrictive Covenants).
- If any of the JV parties are non-US persons or owned or controlled by non-US persons, consult with specialty counsel and tax advisors regarding foreign or US federal or state laws or tax obligations that should be taken into account. For example:

- certain investments by non-US persons in US businesses are subject to review by the **Committee on Foreign Investment in the United States** (CFIUS) (for more information, see Practice Note, CFIUS Review of Acquisitions and Investments);
- the **Office of Foreign Assets Control** (OFAC), an agency within the US Department of the Treasury that administers and enforces US economic and trade sanctions based on US foreign policy and national security goals, prohibits the conduct of business with certain prohibited persons (see Practice Note, OFAC Due Diligence in Securities

Offerings); and

- if the JV will be an LLC taxed as a partnership, it must withhold US federal income tax on certain JV income allocable by the JV to non-US JV parties (IRC §§ 1441 and 1446).

## Preliminary Documents

- Confirm that a confidentiality agreement has been entered into before disclosing any confidential information to the other prospective JV party. For a form of mutual confidentiality agreement drafted for use in connection with a prospective JV, see Standard Document, Confidentiality Agreement: Joint Venture.
- Consider entering into a letter of intent or **term sheet** to confirm the JV parties' agreement on material terms before investing too much time or resources into the potential transaction. For forms of letters of intent drafted for use in connection with a JV, with two JV parties owning equal JV interests and majority/minority interests, respectively, see Standard Documents, Letter of Intent: 50/50 Joint Venture and Letter of Intent: Majority/Minority Joint Venture.
- If exclusivity is not addressed in a letter of intent or other preliminary document regarding the JV, consider whether to enter into an **exclusivity agreement** providing for a period of exclusive negotiation. For information on exclusivity agreements, see Practice Note, Exclusivity Agreements. For a sample exclusivity agreement, see Standard Document, Exclusivity Agreement.
- If a prospective JV party is a **public company**, consider the need for a **standstill agreement** in which the other JV party agrees to certain limitations on purchasing the public company's stock. For additional information about standstill agreements, see Practice Note, Standstill Agreements in Public M&A Deals.
- The JV parties should consider developing a business plan (including budgets and **cash flow** projections for the JV extending out for a sufficient time period) before detailed negotiations on the terms of the JV agreements (for additional considerations, see Standard Document, LLC Agreement (50/50 Joint Venture, Board-Managed): Drafting Note: Initial Business Plan and Budget; see also Equity Structure and Financing and Shared Assets and JV Party Support).

## Due Diligence, Consents, and Approvals

- Consider what **due diligence** should be done. In addition to legal and business due diligence regarding the JV and its purpose or business plan, because of the long duration of many JVs and need for the JV parties to sustain a working relationship over the JV's term, the due diligence should generally consider the prospective JV parties' cultural fit. For information on due diligence, see Practice Note, Due Diligence Considerations in Joint Ventures and Joint Venture Due Diligence Checklist.
- Consider whether to engage a feasibility study or other market research or due diligence regarding the JV's intended purpose or business plan and its viability (see Preliminary Documents and Advisors and Working Group).
- Each prospective JV party should be aware of any corporate (or other entity), equityholder, lender, or other consents or approvals that may be required for it to enter into the JV and the timing and process for obtaining them. For additional considerations, see Practice Note, Due Diligence Considerations in Joint Ventures: Conducting an Internal Review.
- Identify any necessary antitrust, CFIUS, or other US or foreign regulatory or industry-specific actions, notifications, or filings (see Parties). For information on antitrust issues to consider when forming a JV, see Practice Note, Joint Ventures: Overview: Box, Antitrust Issues Raised by Joint Ventures and Joint Venture Antitrust Compliance Checklist. For information about determining whether the formation of a JV entity is reportable under the **Hart-Scott-Rodino Antitrust Improvements Act of 1976**, see Practice Note, Determining HSR Reportability of an Entity Formation. For information about antitrust law compliance when engaging in a JV with a competitor, see Practice Note, Competitor

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Collaborations in the US.

- Identify and plan for any public disclosures or announcements of the JV transaction, particularly if any JV parties are public companies, whether under applicable securities laws or otherwise, and the timing of these announcements.

## Purpose and Scope; Business Opportunities

- Consider the JV's purpose and:

- how narrowly or broadly it should be defined; and

- whether any activities or geographic areas should be excluded from its scope.

- For additional considerations on this topic, see Standard Document, LLC Agreement (Majority/Minority Joint Venture, Board-Managed): Drafting Note: Purpose; Powers.

- Anticipate the extent to which:

- the JV's initially defined purpose or business may need to be expanded or modified over the JV's term (as the JV develops); and

- JV party or other approvals or limitations should be imposed on any expansion or other modification of the JV's initially agreed purpose (see Minority Protections).

- In defining the JV's purpose, consider whether the JV parties or their affiliates will be obligated to present relevant **business opportunities** (within the scope of the JV's purpose) that they become aware of to the JV and, if so:

- the framework for how the JV will decide whether to pursue an opportunity that is presented; and

- whether to impose any restrictions on a presenting JV party's pursuit of an opportunity that the JV does not elect to pursue (see Restrictive Covenants).

- For more information, see Standard Clause, LLC Agreement: Business Opportunity Waiver (DE).

## Structuring the Joint Venture

- Consider the intended term of the JV and, depending on the JV's purpose, whether it will be of fixed or indeterminate duration (see Drafting a Joint Venture Agreement Checklist: Term). If it will be of fixed duration, consider whether:

- there will be any provision for renewal at the end of the initial term (for example, an auto-renewal if a JV party does not provide notice of termination); or

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- the parties must mutually agree to any extension of the initial term (see Default; Exits and Termination).

- Determine whether to carry out the JV through a separate entity or a direct contractual relationship between the JV parties. Depending on factors like the complexity and breadth of the JV's purpose, the likelihood of expansion of the JV's purpose or business plan over its term (see Purpose and Scope; Business Opportunities), and the anticipated duration of the JV, consider whether a separate JV entity is necessary. For additional considerations regarding whether to carry out the JV through a separate entity, see Practice Note, Joint Ventures: Overview: Structure of the Joint Venture: Separate Entity Versus Contractual.
- If the JV will be carried out through a contract between the JV parties (without forming a separate JV entity), consider what type of contractual arrangement is suitable, such as:

- a collaboration agreement for joint marketing, joint research, or the development and manufacture of goods to a particular design;
- an agreement for continuing supply or provision of goods or services;
- a **licensing** or franchise agreement;
- a strategic alliance agreement; or
- a distribution or agency agreement.

- For more information on these types of agreements, see Practice Note, Joint Development Agreements. For a checklist of issues to consider when entering into a joint development agreement, see Joint Development Agreement Checklist. For a sample form of contractual JV agreement, see Standard Document, Alliance Agreement.
- If the JV will be carried out through a separate entity, consider:

- whether it will be an existing entity (for example, an existing subsidiary of one of the JV parties) or newly created;
- the form of JV entity. LLCs are the most commonly used form of JV entity, but the JV could also be a corporation or **limited partnership**. Alternatively and less commonly, a JV may be a **partnership**;
- the state of formation of the JV. Delaware is widely used in all entity structures, but particularly in the case of an LLC JV due to the contractual freedom afforded to the parties in structuring the LLC agreement (6 Del. C. § 18-1101(b));
- whether the JV entity will be a reporting company under the **Corporate Transparency Act** (see Additional Entity Formation and Administrative Matters);
- whether the JV parties have any tax or accounting sensitivities or preferences that must be considered in choosing the form of entity and determining the extent of their control over the JV (see Governance and Management and Minority Protections). For example, a JV party may prefer to invest in (or not to invest in) a pass-through entity for

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tax purposes or it may expect to have sufficient control over the JV to be able to consolidate the JV into its financial statements (rather than using equity accounting); and

- any formalities required to set up the relevant JV entity structure, including relevant registration and licensing requirements and approvals, how long these processes are likely to take, and related costs and ongoing maintenance obligations.

- For more information on choosing the appropriate entity, see Choosing an Entity Comparison Chart (DE) and Practice Note, Choice of Entity: Tax Issues.
- For information on forming an LLC or corporation, see Practice Note, Forming and Organizing an LLC (DE), Forming an LLC Checklist, Practice Note, Forming and Organizing a Corporation, and Forming a Corporation Checklist.
- If it is possible to do so, such as in the case of a Delaware **alternative entity**, consider whether to modify, limit, or eliminate default **fiduciary duties**. For more information, see Practice Note, Fiduciary Duties in LLCs and LPs: Elimination of Default Fiduciary Duties.
- Depending on JV-specific factors such as its term and purpose, consider whether the parties expect to have flexibility to transfer their JV interest (without having to obtain the consent of the other JV party or parties) or to otherwise exit the JV during its term and, if so, how that should inform the JV's structure (see Default; Exits and Termination and Transfer Restrictions). For more information, see Practice Note, Exiting a Joint Venture.
- If there will be a separate JV entity and the JV interests are securities (regarding when JV interests may be securities under the federal securities laws, see Practice Note, Security Defined), confirm that the equity interests in the JV are issued in accordance with federal and state securities laws. For more information on issuing the equity in a **private placement**, see Practice Notes, Unregistered Offerings: Overview and Conducting an Unregistered Offering: Overview.
- If the JV will require third-party debt financing, consider any preferences the lender or lenders may have regarding the form of the JV entity or other key JV terms (see Equity Structure and Financing).
- If a cross-border JV, consider whether any foreign law requirements or US laws applicable to entities conducting business overseas will affect the choice of structure or jurisdiction of formation (see also Parties). For additional cross-border issues to consider, see Box, Cross-Border Joint Ventures and Practice Note, Cross-Border Joint Ventures.
- Consider whether the JV's shares will be traded on a stock exchange or on a **secondary market**, or whether the JV may become a public company in the foreseeable future, and if so, related securities laws, stock exchange, and other requirements and preparations. For additional information, see Practice Notes, Preparing a Company for an Initial Public Offering and Registration Process: Overview.

## Equity Structure and Financing

- Determine the proportions in which the JV parties will provide any necessary initial contributions or funding (see Contributions).
- If there will be a separate JV entity, consider:

- its capital structure;

- the percentage ownership interest of each of the JV parties, typically pro rata to their contributions (see Contributions);
- its capital structure, including regarding whether more than one class of equity will be issued or whether all JV parties will own the same class of equity;
- if there will be more than one class of equity, **allocation, distribution, and liquidation preferences**, and whether any class will be entitled to a dividend accrual or interest on invested capital, and other terms of any preferred class (for information on preferred stock, see Practice Note, Preferred Stock: Overview);
- whether a separate class of non-voting or other equity should be authorized (for example, to accommodate the issuance of non-voting or incentive equity in the JV to employees or other service providers). For additional information about **profits interests**, see Practice Notes, Profits Interests and Structuring Waterfall Provisions: Profits Interests in Joint Ventures; and
- any advantages (tax or otherwise) in funding through debt rather than equity, or vice versa. For more information, see Standard Document, LLC Agreement (Majority/Minority Joint Venture, Board-Managed): Drafting Note: Alternative Approach: Member Loans.

- For a more detailed checklist of considerations, see Drafting a Joint Venture Agreement Checklist: Equity Structure.
- Depending on the JV's business plan and anticipated longer-term funding needs, consider the extent to which the JV will require additional funding over its term, including as may be required to fund its:

- working capital requirements;
- operating losses; or
- development and expansion costs.

- If the parties contemplate that new third-party investments will be made in the JV over its term, consider whether any superior rights that may need to be granted to those investors to attract their investment (for example, board representation, anti-dilution protection, special voting rights, liquidation preference) should inform the initial structuring of the JV.
- If the JV will need debt or other financing funded by third parties, confirm:

- that it is available on satisfactory terms; and
- whether the lenders will require any **collateral** or recourse to or credit support from the JV parties or their affiliates, such as a JV party's or its affiliate's guaranty of a loan to the JV.

- If there will not be a separate JV entity, consider the basis and procedure for distributing any revenues or profits to the

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JV parties. If using a profits-based formula, determine what expense items should be deducted in determining profits and how any non-arm's length **related party payments** will be determined and monitored or adjusted in the future.

- Consider how payments or distributions to the JV parties (for example, dividends, interest, payments under services agreements, or **intellectual property** (IP) royalties) will be taxed (see Shared Assets and JV Party Support and Ancillary Documents). For more information on the taxation of distributions, see Practice Note, Joint Ventures: Tax Issues.

## Contributions

- Identify what contributions the JV parties will make to the JV and whether these contributions will be in cash, non-cash assets, or services (see Intellectual Property, Shared Assets and JV Party Support, and Ancillary Documents). For sample contribution agreements, see Standard Documents, Contribution Agreement (Joint Venture, Long Form) and Contribution Agreement (Joint Venture, Short Form).
- In addition to their initial **capital contributions**, consider whether one or more of the JV parties will have a binding commitment to fund additional capital contributions to the JV over its term, and if so, the funding terms and consequences of a failure to fund, and any cure rights (see Default; Exits and Termination). For additional information regarding structuring an additional capital contribution provision in the context of an LLC, see Practice Note, LLC Agreement Commentary: Considerations When Drafting Provisions for Additional Capital Contributions.
- In the case of contributions of property:

- gather sufficient descriptions of the assets to avoid ambiguity over what will be contributed and to properly document the transfers;
- confirm that the contributing JV party has good title to its contributed assets free and clear of **liens**;
- consider whether the contributing JV party or its affiliate will retain any rights, such as a right of use, in the contributed assets and, if so, on what terms and subject to what limitations (see Shared Assets and JV Party Support);
- consider how the contributed assets will be valued, and whether to engage any third party valuations or appraisals of the assets (see Preliminary Documents, Equity Structure and Financing, and Advisors and Working Group);
- depending on the risks associated with the contributed assets or any liabilities that are to be assumed by the JV, consider whether the contributing JV party should make **representations and warranties** regarding the contributed assets and, if so, the extent to which the JV or the non-contributing JV parties should have indemnification claims against the contributing JV party in the case of a breach (for a sample indemnification provision in a long-form contribution agreement, see Standard Document, Contribution Agreement (Joint Venture, Long Form): Article VII);
- if an operating business will be contributed to the JV, consider whether any post-contribution working capital or other **purchase price adjustment** or true-up mechanism should be incorporated into the contribution agreement to adjust the amount of equity in the JV issued to the contributing party (based on any difference between the estimated and actual values of the contributed assets);
- consider whether a contributing JV party will have any rights to repurchase or other rights in a contributed asset, such



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as on termination of the JV, and as applicable, at what purchase price or valuation (see Default; Exits and Termination); and

- consider the method and mechanics of transfer of assets to the JV, including any tax benefits to structuring the asset transfer as something other than a contribution (such as an asset purchase by the JV). For more information on the taxation of contributions, see Practice Note, Joint Ventures: Tax Issues.

- Consider whether any liabilities or contractual obligations will be assumed by the JV and, if so, how these liabilities will be valued or allocated between the JV parties. Consider responsibility for any future or contingent liabilities. See Standard Document, Contribution Agreement (Joint Venture, Long Form): Drafting Note: Assumed Liabilities.
- Consider whether the conveyance of all contributed assets (including non-cash assets) will be made to the JV simultaneously with the JV's formation, bearing in mind any regulatory approvals or consents from third parties (such as lessors, licensors, or lenders) that may be required and when the contributed assets are actually needed for use by the JV. If not simultaneous, consider whether the contribution of any particular assets should be a condition precedent to forming the JV entity or to one or more future contributions or funding obligations (for a form of JV formation agreement that contemplates a separate signing and closing, see Standard Document, Joint Venture Formation Agreement).

For additional considerations regarding contributions of IP and services, see Intellectual Property, Shared Assets and JV Party Support, and Ancillary Documents.

## Intellectual Property

- Identify and value any IP rights to be contributed or transferred to the JV in exchange for JV equity or other consideration. For a sample assignment agreement, see Standard Document, Intellectual Property Assignment Agreement (Contribution to Joint Venture, Short Form).
- If IP will be licensed to the JV, consider:

- any limits on the **field of use** or geographic territory;
- whether the IP license will be exclusive (and, if so, any limits on exclusivity) or non-exclusive;
- any royalty or other payment obligations;
- whether the license can be terminated and, if so, under what circumstances, including following an exit of a licensing JV party from the JV or sale of the JV;
- indemnification obligations, including in the case of any third party infringement or product liability claims, and any cap or other limits on the indemnification;
- IP maintenance obligations;
- ownership rights in improvements, enhancements, or derivative works derived from the licensed IP, whether developed by the licensing JV party or the JV; and

- whether the JV has a right to sub-license, and if so, limitations on the field of use and ownership of any improvements or developments by sub-licensees.

- Determine ownership of IP rights developed by the JV, and whether the JV parties or their affiliates will have any license, and if so, on what payment and other terms.
- Consider who may undertake exploitation of the JV's IP, including both production and distribution, and any compensation for these services if provided by a JV party (see Shared Assets and JV Party Support).
- Review the extent to which the JV parties may have access to, or rights over, confidential information, know-how, and other IP rights concerning or accruing or belonging to the JV, and if so, what policies or contractual protections are needed.
- As applicable, consider how to deal with the JV's IP (or jointly developed IP) following a JV party's transfer of its JV interest or other exit from the JV, and on termination of the JV. Consider whether the JV parties' IP rights should differ depending, for example, on:

- in the case of a JV party's exit from the JV, the circumstances of the exit (see Default; Exits and Termination); or
- in the case of a JV termination, whether the JV is terminated because of a **dissolution** and **winding up** of the JV entity or a sale of the JV to a third party.

- For more information, see Practice Notes, Ancillary Agreements in Joint Ventures: Transfer of JV Party's Interest and Exiting a Joint Venture: Box, Post-Exit Considerations.

For additional information on IP rights and related considerations, see Practice Notes, Intellectual Property: Overview and Intellectual Property Rights: The Key Issues.

## Governance and Management

- Determine how the JV will be managed (for more information regarding management of a JV entity formed as a Delaware LLC, see Practice Note, Structuring Management of a Joint Venture Entity).
- If there will be a separate JV entity that is board-managed (whether by a **board of directors** or a board of **managers**, in the case of a manager-managed LLC) (referred to as the board in this Checklist), issues to consider include:

- the board's size and composition;
- the number of board members each JV party will have the right to appoint and whether there will be any independent or at-large board members (for considerations regarding appointing board members, see Practice Note, Appointing a Board Member of a Joint Venture);
- frequency of meeting, notice, **quorum**, and voting requirements (see Practice Note, Structuring Management of a Joint Venture Entity: Board of Managers);

- whether there will be any board committees and, if so, their composition and authority;
- whether there will be circumstances, such as a default by a JV party or a **dilution** of its ownership percentage below a stated minimum percentage, that will result in a loss or reduction of its board appointment rights or its board appointees' voting rights (see Default; Exits and Termination); and
- if there will be a risk of **deadlock** at the board level, whether to include dispute resolution provisions to deal with the deadlock (see Dispute Resolution and Deadlock).

- For additional considerations on JV board-related matters, see Drafting a Joint Venture Agreement Checklist: Governance and Management. For sample forms of LLC agreements that incorporate a board management structure, see Standard Documents, LLC Agreement (Majority/Minority Joint Venture, Board-Managed): Article VII and LLC Agreement (50/50 Joint Venture, Board-Managed): Article VII.

- If the JV is an LLC and there will not be a board of managers, consider whether the LLC will be managed by:

- a **managing member** (or other manager or managers); or
- the members.

- For additional considerations regarding management by a managing member, see Practice Note, Structuring Management of a Joint Venture Entity: JV Management Structures. For an LLC agreement with a managing-member management structure, see Standard Document, LLC Agreement (Two Member, Managing Member-Managed).
- Consider whether, in addition to board or managing member approval, any matters should also require approval of or notice to the JV parties in their capacities as equityholders (see Standard Document, LLC Agreement (Majority/Minority Joint Venture, Board-Managed): Drafting Note: Member Approval Rights).
- If the JV will have officers, consider their titles, to whom they will report, and authority. For additional considerations, see Drafting a Joint Venture Agreement Checklist: Governance and Management.
- In addition to any board committees if the JV is to be board-managed, consider whether any technical, advisory, or other committees will be appointed and, if so:

- the scope of the committees' role and authority (regarding any binding versus advisory role) and composition (for example, see Practice Note, Structuring Management of a Joint Venture Entity: Operating Member as Managing Member Subject to Committee Approval of Major Decisions);
- rights to appoint the committee members; and
- as applicable, frequency of meeting, notice, quorum, and voting requirements.

- Determine the process for adopting the JV's annual budget or authorizing changes to, or deviations from, an existing JV budget, including:

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- who will have responsibility to prepare the budget and by what date;
  - the required vote or approval for adopting the budget (see Minority Protections); and
  - the procedure that should apply if the JV parties (or other relevant decision makers) fail to agree on a budget (see Dispute Resolution and Deadlock).

- (See Preliminary Documents.)
- Consider whether any managing member, board members, committee members, or possibly **board observers** or advisors will be entitled to any fees or expense reimbursement payable by the JV (as opposed to fees or expenses payable by a JV party to its own appointed representatives to a JV board) and, if so, the terms and amounts of the permitted payments (see Ancillary Documents).
- Consider the JV's dividend or distribution policy, including how much cash flow is expected to be distributed to the JV parties, on what frequency, and how distribution decisions regarding discretionary distributions will be made (for more information in the context of an LLC JV, see Standard Document, LLC Agreement (Majority/Minority Joint Venture, Board-Managed): Drafting Note: Distributions of Cash Flow and Capital Proceeds).
- Consider the scope of the JV's indemnification and advancement obligations to its directors, managers, officers, or other relevant parties, as applicable (for more information in the context of a Delaware LLC, see Drafting a Joint Venture Agreement Checklist: Exculpation; Indemnification and Advancement; for a sample indemnification agreement for a director of a Delaware corporation, see Standard Document, Indemnification Agreement (DE Private Corporation)).
- While outside the scope of this Checklist, if the JV is a public company or anticipates becoming a public company, ensure that appropriate public company governance arrangements are provided for.

## Minority Protections

- If any JV parties will hold a minority or non-controlling interest in the JV, consider whether they will have any veto or blocking rights, and if so:

- the list of actions subject to minority JV party approval; and
- the voting percentages or other requisite approval thresholds.

- (See Dispute Resolution and Deadlock.)
- Any list of items over which a minority JV party has approval rights varies from deal to deal (depending on the minority party's ownership percentage and relative leverage when negotiating the JV terms), but examples of items that could be subject to minority JV party approval include:

- approval of budgets or material deviations from an approved budget (see Governance and Management);

- contracts, transactions, or investments outside the ordinary course of business that are not contemplated in the JV's budget (possibly only if in excess of a stated amount);
- raising additional capital from the existing JV parties or others (see Equity Structure and Financing);
- adoption of amendments or waivers to the JV's governing documents or other material agreements;
- engaging in a public offering;
- mergers, acquisitions, or sale of the JV's assets;
- incurring debt, possibly subject to pre-defined exceptions;
- entering into, terminating, or modifying agreements with the JV's controllers or their affiliates or other related parties (see Shared Assets and JV Party Support and Ancillary Documents);
- creating new subsidiaries or making investments in third parties;
- granting exclusive licenses of the JV's IP (see Intellectual Property);
- changing the purpose or scope of the JV's business (see Purpose and Scope; Business Opportunities);
- initiating or settling material litigation;
- appointing or terminating key executives of the JV; or
- JV dissolution or voluntary **insolvency** filings (see Default; Exits and Termination).

- For a more comprehensive list, see Practice Note, Minority Protections in Joint Ventures: Consent Rights.
- Depending on the type of JV entity, relevant entity laws in the state of formation, number of JV parties, and extent to which they are represented on any JV board or otherwise active in the JV's management, consider whether there will be regular meetings of the JV parties (in their capacities as equityholders of the JV) and, if so, the frequency of these regular JV party meetings, procedures for calling special meetings, quorum, and voting requirements, etc. (see Governance and Management regarding any board meetings, if the JV is board-managed).
- For any equity or debt financing that may be required in the future, but not subject to a binding funding commitment, determine whether a non-controller JV party will have a **preemptive right** to subscribe for and purchase its proportionate share.

For additional considerations on minority JV party rights, see Practice Note, Minority Protections in Joint Ventures.

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## Restrictive Covenants

- Decide whether the parties will be subject to any non-competition, **non-solicitation** (employee or customer), or other restrictive covenants and, if so, for what time periods (including, if applicable, following a JV party's exit from the JV, or a termination or sale of the JV) and on what geographic and other terms (see also Purpose and Scope; Business Opportunities).
- Determine whether any restrictive covenants will apply to the JV parties' affiliates, and if so, which affiliates (see Standard Document, LLC Agreement (Majority/Minority Joint Venture, Board-Managed): Drafting Note: Effect on Affiliates).
- Consider the need for any restrictions on the JV's entry into arrangements with competitors of a JV party or its affiliates.
- Consider the need for restrictions on the JV's use of the JV parties' or their affiliates' names and **trademarks** (and vice versa, if applicable), including after a JV party's exit from the JV or JV termination (see Default; Exits and Termination).
- Consider relevant legal constraints, including enforceability and antitrust issues, in structuring these covenants (see Practice Note, Joint Ventures: Overview: Box, Antitrust Issues Raised by Joint Ventures).

For additional restrictive covenant structuring and drafting considerations, see Drafting a Joint Venture Agreement Checklist: Restrictive Covenants.

## Dispute Resolution and Deadlock

- Consider how disputes between the JV parties will be resolved. Among the approaches to consider are:
  - be silent in the primary JV agreement and resolve disputes through litigation, if necessary;
  - reference to an external expert or neutral third party;
  - third-party mediation; or
  - third-party arbitration (possibly limited to only certain categories or types of disputes that are to be resolved through arbitration).
- For an additional list of considerations, see Drafting a Joint Venture Agreement Checklist: Deadlock and Dispute Resolution.
- In a 50/50-owned or other JV with potential for deadlock (see Governance and Management and Minority Protections), consider whether there will be a stated mechanism to deal with deadlocks, such as one or more of:
  - reference to independent directors or managers, if any;

- reference to an external expert, mediator, or arbitrator;
- reference to senior level executives of the JV parties or their controllers (see Standard Clause, LLC Agreement: Deadlock Escalation Clause);
- a right of a JV party to unilaterally force the termination (or winding up) of the JV or to initiate an **auction** process to sell the JV to a third party (see Default; Exits and Termination);
- a JV party **put option** or **call option**; or
- a buy-sell right requiring the JV parties to buy or sell their equity interests from or to each other (for more information on and examples of buy-sell provisions, see Standard Document, Buy-Sell Agreement (Russian Roulette): LLCs and Practice Note, Joint Ventures: Exits and Terminations: Box, Buy-Sell Mechanisms).

- If a deadlock provision or remedy is included, determine what deadlocks (or categories of deadlocks) may trigger the deadlock remedy. For example, in the case of a buy-sell remedy in a two-party JV agreement, the parties may decide that only disputes over certain fundamental issues (and not all disputes) may trigger a party's right to invoke the buy-sell remedy.
- Evaluate the governing law, **venue**, forum, or other relevant considerations regarding dispute resolution.

For additional considerations and information about buy-sell provisions, see Drafting a Joint Venture Agreement Checklist: Deadlock and Dispute Resolution and Practice Note, Joint Ventures: Exits and Terminations.

## Default; Exits and Termination

- Determine whether, and if so to what extent, specific remedies will be negotiated and included in the primary JV agreement to apply following a JV party's default or breach. Among the default remedies to consider are:

- a call right allowing the JV or non-defaulting JV party to require the defaulting party to sell its JV interest to the JV or the non-defaulting JV party, possibly at a discount to fair value;
- a put right allowing a non-defaulting JV party to force a defaulting JV party to buy its JV interest (assuming the defaulting JV party has the financial capacity to do so) at fair value or another specified value, possibly greater than fair value;
- loss (or suspension during the default period) of the defaulting JV party's board appointment or voting rights, veto rights, commercial, or other rights;
- suspension of distributions to the defaulting JV party during the default period;
- dilution of the defaulting JV party's JV interest; or

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- a dissolution of the JV.

- Some of these remedies may also be determined to apply following a no-fault event such as a **change of control**, bankruptcy, or a stated type of **material adverse change** involving a JV party or its controller.
- For additional considerations, see Drafting a Joint Venture Agreement Checklist: Default and Standard Document, LLC Agreement (Majority/Minority Joint Venture, Board-Managed): Drafting Note: Definition: Defaulting Member.
- Depending on the nature and consequences of any potential breaches or defaults, issues to consider may include:

- the notice that is to be required before a default remedy may be exercised;
- any cure rights that are to be available to a defaulting party; and
- as applicable, who has the authority to declare a default, exercise a default remedy, or assert a claim for breach (for example, see Standard Document, LLC Agreement (50/50 Joint Venture, Board-Managed): Drafting Note: Claims Under JV Agreements).

- In addition to a deadlock or JV party default scenario, consider whether any other events, such as a fixed outside date or the JV's failure to achieve a revenue or operational target by a certain date should:

- trigger a mandatory termination of the JV (see Practice Note, Joint Ventures: Exits and Terminations: Mandatory Dissolution Provisions);
- permit a non-defaulting JV party to unilaterally require a JV termination or dissolution (see Practice Note, Dissolving and Winding Up a Joint Venture Entity); or
- trigger a JV party's right or option to purchase (or call) the JV interest of the other JV party or a JV party's right to sell (or put) its JV interest to another JV party and, if so, how the purchase price will be determined, timing, and other terms of sale (see Practice Note, Exiting a Joint Venture: Put and Call Rights).

- Consider what rights or obligations or both of a JV party, including under any service agreements, IP licenses, or restrictive covenants, should survive a transfer of its JV interest, or a JV termination (see Practice Note, Exiting a Joint Venture: Box, Ancillary JV Agreements).
- Consider whether any of the JV parties will require a license of any of the JV's IP following termination of the JV and, if so, on what terms (see Intellectual Property).
- Depending in part on the type of JV entity and state law requirements, consider the need to adopt specific procedures to apply on a dissolution and winding up of the JV entity (such as regarding the disposition of the JV's assets, a possible right of first refusal of a JV party over any specific JV assets, survival of restrictive covenants (see Restrictive Covenants), allocation of IP rights (both inbound and outbound from the JV) (see Intellectual Property), and post-dissolution retention of and access to JV books and records). For a more comprehensive list of issues to consider, see Drafting a Joint Venture Agreement Checklist: Dissolution and Liquidation and Dissolving and Winding Up a Joint Venture Checklist.



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- Be aware of any regulatory requirements that may affect the contemplated exit or termination provisions (for example, the need to comply with any industry-specific laws or regulations, antitrust, or foreign investment, ownership and control regulations).

For more information about exit and termination provisions and more detailed drafting considerations, see Practice Note, Joint Ventures: Exits and Terminations. For information on dissolving and winding up a JV entity, see Practice Note, Dissolving and Winding Up a Joint Venture Entity.

## Transfer Restrictions

- Consider what rights, if any, the JV parties want to have to transfer their JV interests, and as a corollary, restrictions on the other JV parties' right to transfer their JV interests (see Practice Note, Exiting a Joint Venture: Transfer Restrictions Generally). Even if transfers are generally restricted without the consent of the other JV party (as is usually the case in a two-party strategic or commercial JV), consider whether certain transfers, such as transfers by a JV party to its affiliated entities, will be permitted (see Practice Note, Exiting a Joint Venture: Permitted Transferees).
- If the JV parties may transfer their JV interests to third parties, consider whether to:

- prohibit transfers of a JV party's interest to certain types of transferees, such as competitors of the JV; or
- provide for a **right of first offer** or **right of first refusal**.

- Consider whether any financial investor in the JV or other JV party will have a right to redeem its equity interest in the JV or require the return of its invested capital at any point (for example, see Standard Clause, LLC Agreement: Member Put Right).
- Consider whether to include a **drag-along right**, **tag-along right**, or **registration rights** if an **initial public offering** (IPO) of shares in the JV is anticipated. For additional considerations, see Practice Note, Exiting a Joint Venture.
- Determine whether the JV parties will be allowed to **pledge** their interest in the JV to lenders as collateral for their own debt obligations, keeping in mind the consequences of a foreclosure by the lender.

For additional considerations, see Intellectual Property, Default; Exits and Termination, Shared Assets and JV Party Support, and Drafting a Joint Venture Agreement Checklist: Transfer of Interest.

## Financial Reporting

- Determine what **financial statement**, tax, or other reports the JV will be required to provide to the JV parties, on what frequency, and subject to what confidentiality or other limitations.
- Consider how the JV parties' ownership percentages or control rights affect how their JV interest may be treated on their own financial statements (for example, consolidation versus equity accounting).
- Consider what accounting policies are to be adopted by the JV, and how those JV accounting policies may affect the JV parties' financial reporting and accounting.
- Consider whether **audited** financial statements will be required and, if so, who to engage as the JV's auditor.

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- Determine the JV's **fiscal year**.

For additional considerations, see Drafting a Joint Venture Agreement Checklist: Reporting and Access to Information.

## Shared Assets and JV Party Support

- Consider whether any JV parties or their affiliates will or must provide services or other support to the JV (or vice versa regarding any services or support to be provided by the JV to a JV party or its affiliate), and if so, on what terms. The types of agreements and terms vary depending on the nature of the services provided and how crucial the service is to the JV's operation (or to a JV party or its affiliate) (see Practice Note, Ancillary Agreements in Joint Ventures: Types of Agreements). Issues to consider include:

- whether to document these arrangements in a separate agreement (see Ancillary Documents);
- fees or other compensation and expense reimbursement;
- the term of the obligation and any rights of early termination or renewal;
- liability and standard of care;
- indemnification and limits on liability;
- ownership or other rights in any IP, other deliverables, or records developed as part of the services provided (see Intellectual Property);
- audit or inspection rights, such as in the case of a billing dispute; and
- insurance (see Additional Entity Formation and Administrative Matters).

- For a more detailed checklist of considerations, see Ancillary Joint Venture Agreement Checklist.
- If any assets will be comingled, or used by both the JV and one or more JV parties, consider:

- restrictions on, or specific requirements regarding, permitted use of the asset;
- whether the party using the asset has any maximum use or minimum payment or spend requirements;
- responsibility for maintenance and repair of the asset;

- any requirements to upgrade the asset;
- responsibility for loss and any limits;
- indemnification, and if so, any caps or other limitations; and
- depending on the nature of the asset, whether a party will have a right to purchase the asset, such as following a default by or change of control of the owner.

- If any purchase or supply commitments or agreements will be in place between the JV and one or more JV parties or their affiliates, consider:

- the terms, including whether or not the agreements will be **exclusive**;
- any minimum purchase obligations; and
- the consequences of any breach.

- Review whether the JV will occupy any of the JV parties' premises and, if so, on what terms, including time period, and any payments, insurance, and other occupancy or lease terms.
- Consider the consequences of a default or failure to perform required services or other commitments, including whether there will be a cross-default to any remedies under the primary JV agreement (so that default of a JV party's or its affiliate's obligations under any ancillary JV agreements triggers any default remedies under the primary JV agreement or vice versa) (see Default; Exits and Termination and Practice Note, Ancillary Agreements in Joint Ventures: Default Remedies).
- Consider what will happen if a service provider transfers its interest or otherwise exits the JV and, depending on the cause and circumstances of the exit, whether it should have an obligation to continue to provide services following its exit and, if so, on what terms (see Transfer Restrictions and Practice Note, Exiting a Joint Venture: Box, Post-Exit Considerations).

## Employees

- Review whether the JV will need employees and, if so, from where they will be sourced. If any employees will be transferred from an existing business of a JV party, consider whether any changes to the terms of their employment will be required.
- Consider whether one of the JV parties or the JV will be the primary employer of any required employees and whether any of the JV parties or the JV may be considered a joint employer of the employees. For more information, see Practice Note, Joint Employment: Overview.
- Consider whether any employees of the JV parties will be shared with or **seconded** to the JV and, if so, on what terms. For information on seconding employees within the US, see Standard Documents, Secondment Agreement (Domestic) and Secondment Letter to Employee for Domestic Transfer. For resources to assist a party in transferring or seconding employees overseas, see:

- Practice Note, Best Practices for Transferring US Employees Overseas;
- Practice Note, Secondment Agreements for Expatriates;
- Secondment Agreements for Expatriates Checklist; and
- Standard Document, Expatriate Secondment Letter of Assignment.

- Consider how any liabilities relating to any seconded employees will be apportioned.
- If the JV is the employer, consider the steps the JV must take to comply with applicable federal labor and employment laws (for more information, see Employer Coverage Under Major Federal Labor and Employment Laws Chart). Determine whether the JV must comply with any state or local labor and employment laws, for example, if the JV must obtain workers' compensation and unemployment insurance coverage under applicable state law before hiring any employees (see Local Employment Law Resources Toolkit). For more information, see Practice Note, Workers' Compensation: Common Questions and Practice Area Essentials: Labor & Employment.
- Consider whether any employees will be covered under one of the JV parties' existing **employee benefit plans** or, if not, what plans the JV must put in place.
- Consider whether any employees will be required to enter into any employee confidentiality and proprietary rights agreements or restrictive covenants, such as a confidentiality, non-compete, or non-solicit agreement, with the JV or the JV parties. For more information, see Restrictive Covenants Toolkit.
- Consider any need for equity incentive or bonus plans for the JV's management or other service providers. If there will be equity based incentive plans, review whether a separate class of equity, such as a class of non-voting equity or profits interests, should be authorized (see Equity Structure and Financing). For information on equity incentive plans, see Equity Incentive Plan Toolkit.
- Decide whether the JV, one of the JV parties, or a third-party service provider will administer the human resources function (such as payroll and benefits administration) for any employees of the JV.
- Review whether any JV parties will have to terminate employees resulting from the creation of the JV. If so, consider who will be responsible for any **severance** or other termination liabilities and any applicable issues under the **WARN Act** or state mini-WARN laws.
- For guidance on minimizing risk in an employee termination, see Practice Note, Employee Termination: Best Practices and Departing Employee Toolkit.
- For resources on WARN Act obligations and other legal requirements when implementing a **reduction in force**, including plant closings and mass layoffs, see Reductions in Force Toolkit.

For more information on employment issues in cross-border joint ventures, see Practice Note, Employees (Joint Ventures): Cross-Border.

## Additional Entity Formation and Administrative Matters

- If the JV will be a separate entity, consider whether it will be or may in the future become a reporting company under the

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Corporate Transparency Act (CTA) that must report beneficial ownership information (BOI) and certain other information about the JV to the US Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) (see Practice Note, Corporate Transparency Act (CTA) Beneficial Ownership Reporting: Which Entities Must Report). For more information and additional resources regarding the CTA, see Corporate Transparency Act (CTA) Toolkit.

- As applicable:

- confirm the desired name of the JV and that the name is available for use in all relevant jurisdictions. Consider whether any trademark, **domain name**, or other searches will be required to identify any potential issues or conflicts with the desired JV name;
- determine where the JV's **registered office** and primary office will be located;
- consider where the JV will be required to **qualify** to conduct business, and any necessary actions or state filings to qualify (see Structuring the Joint Venture); and
- confirm or allocate responsibility for maintaining the JV's books and records.

- Consider whether the JV will have a website and, if so:

- to what extent the names or trademarks of the JV parties will be referenced or linked (including any related name use issues or restrictions); and
- any other website development issues to be addressed, such as drafting a privacy policy and terms of use (see Ancillary Documents).

- Consider the JV's cash management procedures or policies. If the JV will have bank accounts, consider where the accounts will be located and who will have signing authority and access to the accounts.

- Regarding tax matters, as applicable:

- allocate responsibility for obtaining a **Taxpayer ID Number** for the JV;
- determine responsibility for preparing and filing the JV's tax returns, who will be appointed as the **partnership representative** (if the JV is a pass-through entity for tax purposes), and related tax matters (see Joint Venture Formation Tax Checklist: Determine Obligations for Tax Filings and Tax Audits); and
- if it is a pass-through for tax purposes, consider whether tax distributions will be made to the JV parties. For more information on tax distributions, see Practice Note, LLC Agreement Commentary: Tax Distributions.

- For more information about tax considerations, see Practice Note, Joint Ventures: Tax Issues.

- Review whether the JV is required by law, contractual obligation, or otherwise to obtain any insurance policies and

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determine if there any other insurance-related issues, such as whether to name the JV parties as **additional insureds** on any policies. Alternatively, consider whether the JV should be named as an additional insured on any of the JV parties' insurance policies. For more information on insurance policies and coverage, see Insurance Policies and Coverage Toolkit.

- Determine whether the JV should be required to obtain (and possibly thereafter maintain) **directors and officers insurance** and, in the case of a board-managed JV, how any coverage may interact or overlap with any insurance the JV parties have covering their board appointees. For information about D&O insurance generally, see Practice Note, Directors and Officers Insurance Policies.

For other actions that may be required, including under the antitrust laws, see Parties, Preliminary Documents, and Due Diligence, Consents, and Approvals.

## Ancillary Documents

- Determine whether ancillary agreements may be required to document agreements and matters not addressed in the primary JV agreement, such as for contributions, services, asset sharing, licensing, or financing (see Contributions, Intellectual Property, and Shared Assets and JV Party Support). For considerations regarding whether to document these arrangements in one or more separate agreements, see Practice Note, Ancillary Agreements in Joint Ventures: Standalone Agreements.
- Ensure that the relevant terms of any ancillary agreements are synchronized (and not inconsistent) with the other JV agreements, including the primary JV agreement (see Practice Note, Ancillary Agreements in Joint Ventures: Synchronizing Multiple JV Agreements).
- If applicable, consider the terms of any required agreements with independent directors or managers of the JV, advisors, or other JV service providers, such as those for incentive equity, compensation, or indemnification (see Governance and Management).
- Consider whether to adopt any board (in the case of a board-managed JV) or other JV policies (for example, to deal with conflicts of interest, confidential information disclosed to the JV parties or board members, or from an antitrust perspective if any of the JV parties or their affiliates are competitors). See Practice Notes, Appointing a Board Member of a Joint Venture: Clarify Obligations Regarding Confidential Information and Competitor Collaborations in the US: Information Exchanges.

For other ancillary agreements that may be required (depending on the JV's business plan), see Intellectual Property, Shared Assets and JV Party Support, and Employees.

## Advisors and Working Group

- Obtain contact information for the JV parties, their counsel, and other key advisors.
- As necessary, each prospective JV party should:

- engage relevant subject matter experts (for example, tax, antitrust, IP, labor and employment, employee benefits, or creditors' rights) to advise on relevant issues relating to structuring the JV and the JV agreements (see Parties and Due Diligence, Consents, and Approvals); and

- consider whether to engage any investment bankers, valuation, or other outside experts or advisors to advise on

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valuing the assets that are to be contributed to the JV or for developing the JV's business plan (see Preliminary Documents and Contributions).

- Consider whether to engage separate counsel to represent the JV (in addition to the JV parties' counsel), including foreign, local, or regulatory counsel (depending on the industry in which the JV will operate and scope of any foreign operations).
- Allocate responsibility for preparing the JV documents.

## Cross-Border Joint Ventures

If the JV is a cross-border transaction, some additional issues and questions to consider include:

- How the laws governing the contractual arrangements between the JV parties and those governing formation of the JV interact, and whether the foreign jurisdictions are common law or civil law jurisdictions.
- Any additional regulatory filings, approvals, or licenses required for the formation and operation of the JV, such as with CFIUS or under foreign antitrust laws (see **Parties and Due Diligence, Consents, and Approvals**).
- Any applicable laws governing foreign ownership or investment.
- Any applicable stock exchange controls.
- Whether the JV structure will provide the most efficient tax treatment for the JV itself, and each of the JV parties, regarding:
  - any taxes or duties payable on financing, either through debt or equity;
  - any taxes or duties payable on the transfer of any assets into the JV;
  - the tax treatment of any dividends or interest paid by the JV;
  - the availability of group or consolidated relief for any losses, or whether there is another way of planning for losses;
  - transfer taxes; and
  - value added tax (known as VAT) or turnover tax.
- Whether any tax clearances will be required in connection with the setup, continuing operation, or both, of the JV.
- What accounting policies will be adopted by the JV and the effect of these policies on the accounting treatment of the JV parties' interests in the JV.

- How the accounting policies of the JV affect reporting by the JV parties.
- Any additional conditions precedent necessary to setup and operate the JV and any cut-off dates by which they must be met.
- What US or local employment laws apply, especially if the JV parties are seconding or transferring employees overseas to the JV (see **Employees**).

For additional resources discussing key legal, commercial, and negotiating issues in cross-border joint ventures, see **Article, International Joint Ventures**.

## Other Negotiating and Structuring Considerations

A JV's success often depends on the JV parties' ability to sustain their collaboration over the JV's (often long) term. In many cases, prospective JV parties can anticipate incompatibilities that may become sources of tension or misalign their interests over the JV's term. The parties may be able to negotiate for terms or protections that mitigate these potential tensions. For example:

- Consider how any disparity in the financial strength or liquidity of the JV parties should inform their negotiating strategies. A smaller or less creditworthy JV party may be concerned that a larger, deeper-pocketed JV party could take advantage of its relative financial strength in a buy-sell process following a deadlock or in a protracted dispute resolution process (see **Dispute Resolution and Deadlock**). On the other hand, a larger JV party may be concerned that a smaller or less creditworthy JV party may:
  - assume that the larger party will provide any financial support that the JV may require over its term, and therefore favor current distributions of JV profits to the JV parties over reinvesting capital to fund investments in the JV's business or favor taking risks that the larger party views as imprudent; or
  - be unable to fund its share of an unexpected JV capital shortfall or credit support that may be required by a lender to the JV.
- If the JV is a commercial JV, consider whether the JV's purpose is more crucial to one of the party's primary businesses (such as if the JV will supply the JV party with a critical product necessary to operate its primary business). If the JV's purpose is more incidental or speculative in nature to the other JV party, it may be able to exploit this disparity in any buy-sell or dispute resolution process if it knows that another JV party cannot afford to lose its JV interest.
- Consider how any payments for services provided by a JV party to the JV (or vice versa) affect profits available for distribution to the JV parties as equity distributions (see **Shared Assets and JV Party Support**). Do any fees or compensation paid to a JV party for services result in an unintended re-allocation of the JV's profits to one JV party or another? For more information, see **Practice Note, Related-Party Transactions in Joint Ventures: Conflicting Interests of the Joint Venture Parties**.

For additional considerations, see **Practice Note, Structuring Management of a Joint Venture Entity: Factors to Consider in Structuring JV Management**.



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