

~~This sample document is the work product of a national coalition of attorneys who specialize in venture capital financings, working under the auspices of the NVCA. This document is intended to serve as a starting point only, and should be tailored to meet your specific requirements. This document should not be construed as legal advice for any particular facts or circumstances. Note that this sample document presents an array of (often mutually exclusive) options with respect to particular deal provisions.~~

CVCA VENTURE CAPITAL MODEL TRANSACTION DOCUMENTS

MANAGEMENT RIGHTS LETTER

This document is based on the NVCA document of the same name. The CVCA gratefully acknowledges the NVCA for granting permission to use this document in Canada.

A blackline of this document to the NVCA document and a Conversion Guide describing the general drafting changes that have been made are also available from the CVCA website.

The Canadian version of this document was created by the CVCA Venture Capital Model Transaction Documents Working Group comprised of Gary Solway of Bennett Jones LLP (Chair), Sophia Maizel of HarbourVest (Vice Chair), Mireille Fontaine of BCF, Ed Vandenberg of Osler, Hoskin & Harcourt LLP, Pascal de Guise of Blake, Cassels & Graydon LLP, Brian Lenihan of Choate Hall & Stewart LLP, Jesslyn Maurier of Bennett Jones LLP and Julie Robinson of McInnes Cooper. The lead author on this document is Gary Solway (solwayg@bennettjones.com).

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Canadian Version

Last Updated July update: November 2020

Preliminary Notes

The assets of a pension plan subject to the Employee Retirement Security Act of 1974 (“ERISA”) must be held in trust. Moreover, the persons responsible for managing those assets have significant fiduciary duties under ERISA and cannot engage in certain transactions prohibited by ERISA. If a pension plan covered by ERISA (an “ERISA Plan”) invests in a venture fund, then all of the fund’s assets - such as its investments in portfolio companies - are treated as assets of the ERISA Plan, absent an exemption. As a result, the trust requirement applies, the managing partner of the fund is treated as an ERISA fiduciary, and the fund must comply with the rules regarding prohibited transactions.

The U.S. Department of Labor, which is charged with administering ERISA, has issued regulations that contain certain exemptions from the plan assets rules. Under one ~~(H)~~ exemption, a venture fund is not deemed to hold ERISA plan assets if it qualifies as a venture capital operating company (a “VCOC”). To qualify as a VCOC, the fund must have at least ~~fifty-percent~~ (50%) of its assets invested in venture capital investments. An investment in a portfolio company qualifies as a “venture capital investment” if the fund obtains certain management rights with respect to the portfolio company. “Management rights,” in turn, are defined as contractual rights running directly from the portfolio company to the fund that give the fund the right to participate substantially in, or substantially influence the conduct of, the management of the portfolio company. In addition to obtaining management rights, the fund is also required to actually exercise its management rights with respect to one ~~(H)~~ or more of its portfolio companies every year.

In order to build a case for an exemption from the ERISA Plan asset rules, a venture fund will generally ask each of its portfolio companies to sign a management rights letter in connection with the fund’s initial investment. An example of such a letter follows.

[PORTFOLIO ~~COMPANY~~CORPORATION LETTERHEAD]

[____], 20[]

[Investor ~~Name~~]
[Street Address]
[City], [State] [Zip]

Re: Management Rights

Ladies and Gentlemen:

This letter will confirm our agreement that pursuant to and effective as of your purchase of [____] shares of ~~Series~~Class [] Preferred Stock of [____] (the "~~Company~~Corporation"), [Investor Name] (the "**Investor**") shall be entitled to the following contractual management rights, in addition to any rights to non-public financial information, inspection rights, and other rights specifically provided to all investors in the current financing:

1. [If Investor is not represented on ~~Company~~Corporation's Board of Directors (the "Board"), Investor shall be entitled to consult with and advise management of the ~~Company~~Corporation on significant business issues, including management's proposed annual operating plans, and management will meet with Investor regularly during each year at the ~~Company~~Corporation's facilities at mutually agreeable times for such consultation and advice and to review progress in achieving said plans.][†]

2. [Investor may examine the books and records of the ~~Company~~Corporation and inspect its facilities and may request information at reasonable times and intervals concerning the

[†]~~For an investor that is a "foreign person" within the meaning of the regulations of the Committee on Foreign Investment in the United States ("CFIUS"), this provision may need to be removed if the parties intend to ensure that the foreign investor has no rights with respect to the Company that would subject their investment to CFIUS jurisdiction. Examples of such rights include (i) "control" of the Company as that term is broadly defined in the CFIUS regulations, (ii) access to "material nonpublic technical information" in the Company's possession, or (iii) "involvement" in "substantive decisionmaking" by the Company regarding certain matters as those terms are defined in the CFIUS regulations. Note, however, that the more provisions of this agreement that are removed, the less clear it will be that the VCOC exemption will be satisfied by this MRL. See also footnotes 2-4 below.~~

general status of the CompanyCorporation's financial condition and operations, provided that access to highly confidential proprietary information and facilities need not be provided.²

3. ~~[If Investor is not represented on the CompanyCorporation's Board of Directors, the CompanyCorporation shall, concurrently with delivery to the Board of Directors, give a representative of Investor copies of all notices, minutes, consents and other material that the CompanyCorporation provides to its directors, except that the representative may be excluded from access to any material or meeting or portion thereof if the Board of Directors determines in good faith, upon advice of counsel, that such exclusion is reasonably necessary to preserve the attorney-client privilege, to protect highly confidential proprietary information, or for other similar reasons. Upon reasonable notice and at a scheduled meeting of the Board or such other time, if any, as the Board may determine in its sole discretion, such representative may address the Board with respect to Investor's concerns regarding significant business issues facing the CompanyCorporation.]~~³

~~4. [Notwithstanding anything to the contrary in this letter agreement, solely by reason of becoming party to this letter agreement, Investor will not obtain with respect to the Company, and the Company will not provide to Investor, any of the following rights, as defined in Section 721 of the Defense Production Act, as amended, including its implementing regulations: (a) "control" of the Company, including the power to determine, direct or decide any important matters affecting the Company; (b) membership or observer rights on the Board of Directors or equivalent body of the Company, or the right to nominate an individual to a position on the Board of Directors or equivalent body of the Company; (c) access to any "material nonpublic technical information" in the possession of the Company [(provided, however, that such prohibited information shall not include financial information regarding the performance of the Company, and provided further that Investor may confer with the Company about such financial information)]; and (d) any "involvement" (other than through voting of shares) in "substantive decision making" of the Company regarding (i) the use, development, acquisition, safekeeping, or release of "sensitive personal data" of U.S. citizens maintained or collected by the Company, (ii) the use, development, acquisition, or release of "critical technologies," or (iii)~~

²—For the same reasons discussed in footnote 1 above, "foreign person" investors and the Company may wish limit this provision so that foreign investors only have the right to receive and examine records relating to "financial information" and similar data regarding the Company's performance. Extending the foreign investor's rights to include the more general inspection of facilities and other books and records (e.g., operating budgets, business plans, etc.) could implicate information that would trigger CFIUS jurisdiction. Because such limitations will be unappealing to foreign investors, restricting access to financial information alone will likely make sense only where a mandatory CFIUS filing could potentially be triggered if broader access is permitted or where the Company wants to take the strongest possible position against any potential CFIUS jurisdiction.

³—For the reasons discussed in footnotes 1 and 2, this provision may also need to be removed if the parties intend to ensure that a foreign investor has no rights that may subject the investment to CFIUS jurisdiction.

Last Updated July 2020

~~the management, operation, manufacture, or supply of “covered investment critical infrastructure.”⁴~~

Investor agrees that any confidential information provided to or learned by it in connection with its rights under this letter shall be subject to the confidentiality provisions set forth in that certain Investors’ Rights Agreement of even date herewith by and among the ~~Company~~Corporation, the Investor and other investors.⁵¹

The rights described herein shall terminate and be of no further force or effect upon (a) such time as no shares of the ~~Company’s stock~~Corporation are held by the Investor or its affiliates; (b) the consummation of the sale of the ~~Company~~Corporation’s securities ~~pursuant to a registration statement filed by the Company under the Securities Act of 1933, as amended~~, in connection with the firm commitment underwritten offering of its securities to the general public; or (c) the consummation of a ~~merger~~amalgamation or consolidation of the ~~Company~~Corporation [(x)] that is effected (i) for independent business reasons unrelated to extinguishing such rights; and (ii) for purposes other than (A) the reincorporation of the ~~Company~~Corporation in a different ~~state~~jurisdiction; or (B) the formation of a holding ~~company~~Corporation that will be owned exclusively by the ~~Company~~Corporation’s ~~stock~~shareholders and will hold all of the outstanding shares of ~~capital stock of the Company~~Corporation’s successor and [(y) in which the successor entity provides reasonably comparable rights to the Investor or the consideration payable to the Investor in such transaction consists solely of cash or securities of a class listed on a national exchange]. The confidentiality obligations referenced herein will survive any such termination.

{Signature Page Follows}

~~⁴ For an investor that is a “foreign person” within the meaning of the CFIUS regulations, this provision should be included to ensure that the parties are excluding the grant of any rights to that investor that may trigger CFIUS jurisdiction. The bracketed carve out to this exclusion language clarifies that Investor shall not be prohibited from receiving “financial information” regarding the Company’s performance, which is expressly permissible under the CFIUS regulations. Including the financial information carve out signals that at least limited management rights will be granted to Investor, though the broad limitations on Investor rights in this provision may create concerns with respect to the availability of the VCOC exemption for certain investment plans subject to ERISA, as discussed in the Preliminary Note, above.~~

~~Note: As an alternative to a narrow carve out regarding “financial information,” the parties could broaden the carve out to encompass customary information and inspection rights (e.g., the right to inspect all of the Company’s books, records, and facilities) or otherwise to participate in management related activities related solely to reviewing financial information or other administrative (e.g., non technical) questions. This alternative approach will limit the protections against CFIUS jurisdiction granted by the provision as a whole, but may present less of an issue with respect to the availability of the VCOC exemption. Because of the inherent tension between the CFIUS and ERISA regimes in this context, Foreign funds with known ERISA concerns should consult counsel before deciding what language to include and exclude in this agreement.~~

~~⁵¹ If for some reason the Investor is not a party to the Investors’ Rights Agreement, you will need to copy the confidentiality provisions from the Investors’ Rights Agreement ~~here~~should be copies to this document.~~

Very truly yours,

[INVESTOR]

By: _____
Name: _____
Title: _____

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Agreed and Accepted:

[~~COMPANY~~CORPORATION]

By: _____
Name: _____
Title: _____

Document comparison by Workshare 10.0 on Thursday, November 19, 2020
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