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United States
Joint Ventures

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This country-specific Q&A provides an overview of joint ventures laws and regulations applicable in United States.

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United States: Joint Ventures

1. In what industries or sectors are joint ventures most commonly used in your jurisdiction?

Joint Ventures ("**JVs**") are vehicles that can be used in a wide range of industries, as their structures lend themselves to adapt easily to any industry. Recently, the following industries have been active in the JV arena:

- Real Estate: JVs have been and remain crucial for real estate projects, where developers and operators frequently seek investors to fund their capital needs, although the current financing environment has introduced more friction into the deal making process. Recently, the formation of JVs for developing data centers has been particularly active.
- Healthcare: Many healthcare providers are pursing joint ventures through which resources and experience may be combined or shared, all while managing antitrust risk.
- Media: The changing media landscape has forced many media companies to look for strategic partnerships.
- Financial Services: Financing sources are entering into JVs to share risk relating to the explosion of private credit.
- Manufacturing: A growing number of JVs in automotive, defense and other types of manufacturing.

2. What are the main types of joint venture in your jurisdiction?

Each party to a JV (whether as a member of a limited liability company (an "**LLC**"), a partner of a general partnership, a limited or general partner of a limited partnership (an "**LP**"), a shareholder of a corporation or a party to a contractual JV), is referred to in this guide as a "**Venturer**." The following vehicles are frequently used by Venturers when forming a JV:

- LLCs: LLCs are the vehicle of choice for most JVs because, subject to certain exceptions, the members and managers of an LLC are not personally liable for the liabilities of the LLC. LLCs are flexible vehicles that allow wide latitude to the Venturers to define their relationship. There are no restrictions on the types of owners – they can be natural persons or any type of entity. In addition, governance, economics and risk sharing can be tailored to the Venturers' needs. Unless they elect to be taxed as a corporation, LLCs are pass-through entities taxed as partnerships for income tax purposes. This means the Venturers are allocated their shares of the income, gain or loss of the LLC with no tax at the LLC level, thus avoiding double taxation that is typical for corporations. In cross-border transactions, caution should be taken before using an LLC, as certain non-U.S. tax laws view LLCs as corporations subject to double taxation.
- Limited Partnerships: LPs are also commonly used for JVs for many of the same reasons that LLCs are favored. They provide limited liability to the limited partners, allow flexibility in defining the partners' relationship and, unless they elect to be taxed as corporations, have pass-through taxation. LPs often are used for non-U.S. tax purposes where non-U.S. Venturers are from jurisdictions that tax LLCs as corporations. LPs require at least one general partner (a "**GP**"), and each GP has unlimited personal liability for the obligations of the partnership. This concern is commonly addressed by (i) having a GP that is an LLC or a corporation with no assets, other than its interest in the LP and (ii) giving the GP no economic interest or a nominal economic interest (.1% to 1%) in the LP. Alternatively, in many jurisdictions, a LP may elect to be a limited liability limited partnership (an "**LLLP**").
    - LLLPs: In certain jurisdictions, including Delaware, an LP may file with the secretary of state or similar body (the "**Secretary of State**") to become an LLLP. This status provides the GP with the same protection against the liabilities of the LP that is afforded to its limited partners.
- General Partnerships: Although prevalent historically, general partnerships are now less common because each partner is a GP with joint and several unlimited personal liability for the liabilities of the partnership.
    - LLPs: While general partnerships do not register with any Secretary of State to be created, many states permit the partnership to register to become a limited liability partnership (an "**LLP**"), which limits the liability of each GP to that of a limited partner. Where there is shared management by the partners and an LLC cannot be used, an LLP may be a desirable form of JV entity, provided it is authorized in the jurisdiction of formation and recognized in each other jurisdiction in which the JV conducts business.
- Corporations: Corporations are less common types of

JVs due to double taxation (a corporation, other than a subchapter S corporation (an "**S-Corp**"), is subject to income tax on its income and its shareholders are taxed on distributions paid to them by the corporation). Certain corporate formalities must be followed in order to shield the shareholders from the liabilities of the corporation, including adopting bylaws, appointing directors and officers and holding and documenting annual shareholders' and directors' meetings. Corporations are also more rigid structures than LLCs with respect to capital calls and distributions. The officers and directors of a corporation owe a fiduciary duty to the corporation and its shareholders that cannot be waived or limited, as may be permitted by state laws for LLCs and partnerships.

- S-Corps: Unlike standard corporations ("C Corporations"), but similar to LLCs and partnerships, S-Corps generally have pass-through taxation. They lack the flexibility of an LLC or an LP because there can only be one class of stock, with each shareholder having the same economic rights to receive dividends that are proportional to its ownership interest. Unlike an LLC or a partnership, ownership of an S-Corp is limited to no more than 100 shareholders. In addition, each shareholder must be a citizen or legal resident of the United States and an individual or certain trusts and estates or tax-exempt entities. An S-Corp may be beneficial for a smaller simple JV where the type and number of owners meets S-Corp requirements and there are pro rata distributions or where self-employment tax minimalization is desired. Taxwise, an S-Corp also has less flexibility to restructure or recapitalize its investments.
- Contractual JVs: A contractual JV is a JV among two or more Venturers pursuant to a contractual arrangement without forming a separate entity. These arrangements often are effective when a specific strategic rationale drives the relationship. A contractual JV may be appropriate for certain industries (e.g., airlines), where the Venturers often are not making a capital investment into a common enterprise but rather are creating a strategic alliance in their operations and profit sharing. Typically, these arrangements are easier to exit as there's no sale of assets or dissolution of the JV entity. Instead, the Venturers part ways and terminate the alliance. Another common example of a contractual JV is a profit participation agreement. In this structure, the profit participant (e.g., the seller of real property) is provided the right to receive a negotiated portion of the profits or cash flow of the buyer entity that acquires the property. This structure is desirable to the owners of that entity because, except as negotiated in the profit participation agreement, the profit participant does not receive the statutory, common law and operating agreement protections that are afforded to an owner of a JV entity, including rights to inspect the books and records of the entity.

3. What types of corporate vehicle are most frequently used for equity joint ventures?

In most cases, an LLC will be the preferred choice for a JV unless there is a special need to have a different vehicle. See Question 2 above for a more detailed description of the reasoning behind choosing a certain type of vehicle.

4. What are the key factors which influence the structure of the joint venture and the choice of joint venture vehicle?

The primary drivers in choosing a type of vehicle or a contractual JV are typically the following:

- Limitation of liability to all of the Venturers
- Flexibility to determine and implement economic terms
- Tax structuring considerations and efficiency
- Governance structure
- Exit rights

See Question 2 above for a more detailed description of the reasoning behind choosing a certain type of vehicle.

5. What are the principal legal documents which set out the terms of a joint venture and how does the constitution of the joint venture vehicle interact with the joint venture agreement?

The Venturers of a JV that is an LP or LLC execute an operating agreement (a "**JV Agreement**") in the form of a limited partnership agreement ("**LPA**") or limited liability company agreement ("**LLCA**"), respectively. If the JV is a corporation, the JV files a certificate of incorporation and adopts bylaws, and the shareholders may enter into one or more shareholder agreements. The Ventures in a purely contractual JV enter into a joint venture, cooperation, strategic alliance or other similar agreement.

In certain cases, parties may negotiate a term sheet, letter of intent or memorandum of understanding (each, a "**Term Sheet**") prior to negotiating the JV Agreement. Using a Term Sheet to set the material terms of the JV will save substantial time and resources in negotiating and preparing the JV Agreement, as well as setting the parties' expectations. Most Term Sheets address equity ownership, capital funding requirements, distributions, governance, and transfer and exit provisions. Term Sheets usually are non-binding, except for certain provisions that are expressly legally binding: allocation of expenses to negotiate and prepare the transaction documents, confidentiality, governing law and, if applicable, an exclusivity period during which the prospective Venturers are obligated to negotiate exclusively with each other. The parties may also enter into a non-disclosure agreement (an "**NDA**"), which is critical if the parties are sharing confidential information and should be entered into prior to JV negotiations. An NDA will typically restrict each party and its representatives from disclosing the existence of the JV negotiations and the confidential information of the other party.

6. How long does it typically take to form a joint venture in your jurisdiction?

A JV entity is created by filing a formation document with the Secretary of State in its jurisdiction of formation. In addition, Venturers enter into a JV Agreement for such entity to govern their relationship. Filing a formation document is typically a simple process, and many states offer online filing and expedited options (proof of formation in as little as 30 minutes from the Secretary of the State). Negotiating a JV Agreement typically takes longer, and the timing is highly dependent on several factors, including, complexity of the JV, sophistication and experience of the parties and any required regulatory approvals.

7. Is using a corporate joint venture structure effective in shielding the joint venture parties from liabilities for the operations of the joint venture entity under local law?

As described above in Question 2, LLC, LP (with respect to the limited partners), LLP and corporate structures limit the personal liability of the Venturers. Typically, this liability is limited to each Venturer's investment in such entity. In rare cases, the courts may "pierce the corporate veil" where the court finds that an entity's owners are personally liable for the entity's debts and obligations because they abused their limited liability status (e.g., committed fraud). In a contractual JV, Venturers have no such entity-type protections limiting their liability.

8. Are there any legal considerations which apply to the financing of the joint venture or the contribution of assets to it?

JVs are frequently financed by equity capital contributed by the Venturers to the JV but may also incorporate debt from one or more Venturers or third parties.

- Capital Contributions – At JV formation, Venturers frequently fund capital to the JV for initial start-up activities. They may also contribute assets (e.g., real property, contracts, intellectual property). The Venturers need to determine and agree on the value of any contributed assets. If additional funding from the Venturers is required, the JV Agreement should specify the circumstances under which the Venturers will fund additional capital. Additional contributions to the JV may be mandatory or optional, or mandatory under certain circumstances (such as up to a specific capped amount). Mandatory capital contributions typically follow an approved budget/business plan or other specific circumstances described in the JV Agreement, such as to fund emergency expenses or non-discretionary expenses (e.g., debt service, taxes and other mandatory payments). Capital contributions are generally funded on a pro rata basis based on the Venturers' respective ownership percentages of the JV. A failure to fund required capital contributions could also result in contractual punitive remedies (see below).
- Funding Default – The JV Agreement will typically include punitive consequences for a Venturer's failure to fund mandatory capital contributions. These remedies may include punitive (non-pro rata) dilution (i.e., reduction in the defaulting Venturer's ownership interest), high interest default loans by the non-defaulting Venturer(s), the non-defaulting Venturer's right to buy the defaulting Venturer's interest at a discount, lost voting rights and/or, if applicable, the loss of management rights. Mandatory capital contributions also may be guaranteed by a creditworthy affiliate of a Venturer.
- Debt – JVs may also incur debt to fund the business. The JV Agreement will often specify the circumstances under which debt may be incurred by the JV or its subsidiaries, and the approval of the Venturers is frequently required to incur or make changes to any debt financing. One or more of the Venturers (or their affiliates) may need to provide guaranties to the lender, and the JV Agreement will need to address how liability is allocated among the Venturers if a guaranty is triggered. It may be necessary to put in place reimbursement or indemnity agreements in order to allow for a guarantor and/or the JV to be properly reimbursed for liabilities arising

under a guarantee. Lenders will also need to conduct KYC diligence on the Venturers and the JV Agreement may require the Venturers to provide information about themselves or their transferees to financing sources if necessary.

9. What protections under local law apply to minority shareholders and what additional or enhanced minority protection mechanisms are typically agreed between the joint venture parties?

Protections for minority Venturers are principally derived from either statutory rules or contractually negotiated rights. In general, the statute of the jurisdiction governing the specific type of JV entity will regulate that entity. LLC and LP statutes provide default rules for the relationship of the Venturers and the formation, governance, operation and dissolution of the entity that apply where the governing documents are silent on a specific topic. These default rules include fiduciary duties owed by the managers (including members in a member-managed LLC) of a JV to the Venturers and provide protections for minority Venturers under certain circumstances (e.g., a squeeze-out merger). While most jurisdictions will allow a JV Agreement to modify or waive the default rules and duties (including limiting and in some states such as Delaware totally eliminating fiduciary duties), many LLC and LP statutes provide for certain enumerated "non-waivable" provisions that cannot be varied by contract. The non-waivable provisions provide a baseline of statutory protection for minority Venturers. The scope of the non-waivable provisions varies from jurisdiction to jurisdiction, and, before entering into a JV, Venturers should understand the extent to which the default rules, including fiduciary duties, may be contractually waived in a JV Agreement.

Minority protections should also be set forth contractually in the JV Agreement. Typically, Venturers will negotiate the right approve certain significant actions by the JV. Minority Venturers may seek to obtain approval rights for fundamental decisions related to the JV, such as a merger or other business combination of the JV or a sale of all or substantially all of the assets of the JV. A minority Venturer will also frequently seek the power to approve conflicted transactions involving the JV and a manager, officer or Member of the JV. Minority shareholders can also structure the governance of the JV to provide them protection. For example, the JV can be structured to be managed by a board of managers and a minority Venturer could seek representation on the board or to the appointment of one or more independent managers to the board. Minority Venturers may also seek to obtain information rights related to the JV, such as information about the proceedings of board meeting, notice of significant events and financial information about the JV's operations. Lastly, minority Venturers may seek certain transfer rights, such as tag-along rights, that would allow them to participate in transactions where a majority Venturer is selling its equity. Ultimately, the range of protections afforded a minority Venturer will depend on the negotiating leverage of the Venturers and the size of a minority Venturer's ownership interest in the JV.

10. What are the duties of directors of an equity joint venture, including in relation to conflicts of interest?

In general, the statute of the jurisdiction governing the specific type of JV entity will regulate that entity. In the corporate context, a director will have fiduciary duties, comprised of a duty of loyalty and a duty of care. A duty of loyalty requires a director to act independently and in the best interest of the corporation and its stockholders. A director who has a conflict of interest must disclose that conflict of interest to the entire board and may need to recuse him or herself from the applicable decision in order to avoid potential liability or the invalidation of the corporate action. A duty of care requires a director to act on an informed based with respect to the corporation and using an appropriately deliberative process.

In the case of an LLC or LP, the managers of a JV (including the members of a member-managed LLC) will have fiduciary duties analogous to the fiduciary duties of a corporate director. However, unlike a corporation, Venturers forming an LLC or LP have the ability to agree in the JV Agreement to limit, modify or, in some states, eliminate a manager's fiduciary duties. JVs formed in certain states provide the Venturers greater latitude than other states to limit or eliminate fiduciary duties. For example, for most sophisticated JVs, Delaware generally is the jurisdiction of choice for formation. Delaware is one of a few states that permits the complete waiver of fiduciary duties (other than the implied contractual covenant of good faith and fair dealing discussed in Question 12 below). If fiduciary duties have been completely waived, then, unless the JV Agreement requires otherwise, a manager of a Delaware LLC or LP will have the right to consider only those interests it wishes to consider, even in the context of a conflict of interest, and the manager could act contrary to the interests of the other Venturers. However, the LLC and LP statutes of most other jurisdictions do not permit a complete waiver of fiduciary duties and provide the default rule that conflicts of interest must be approved by the non-conflicted Venturer(s).

The duties of the manager(s) of an LLC or LP and conflicts of interests should be carefully addressed in the JV Agreement. In some cases, the Ventures may elect to expressly require the manager(s) to act in the best interests of the JV or the Venturers or in accordance with another negotiated standard of care. In other cases, Venturers may elect to waive the fiduciary duty of loyalty so that each of the Venturers can make JV decisions in their own best interest. A JV Agreement will also frequently require that conflicts of interest must be approved by the non-conflicted Venturer(s) or require conflicted transactions to be on arms-length, market terms. The JV Agreement should provide that the rights of the JV under an affiliated agreement may be exercised solely by the non-affiliated Venturer. Otherwise, the affiliated Venturer could vote against the JV enforcing the agreement against it or its affiliate.

11. What is the typical structure of a joint venture's management body/board?

- Corporations: Unless it is a "close corporation" that elects otherwise, a JV that is a corporation must have a board of directors. The rights of the Venturers to elect or appoint board members would be subject to significant negotiation by the Venturers. Unless otherwise provided in the certificate of incorporation, each shareholder will have one vote per share and board members are elected by a majority of the votes. Different classes of stock, such as preferred vs common equity, may have different voting rights. Directors of a corporation may have different voting rights, but those rights need to be set forth in the certificate of incorporation in accordance with applicable statutes. Shareholders may enter into a shareholder or voting agreement that provide each shareholder's rights to appoint members to the board of directors or approve certain matters.
- LLCs or LPs: Because of the formalities that must be observed with respect to corporate entities, Venturers commonly elect to form a JV as an LLC or LP, which provide more contractual and governance flexibility. In the case of a LLC or LP, a JV's management structure may commonly be any of the following: (a) co-managed by the unanimous decision of the Ventures; (b) managed by a managing Venturer (or its affiliate), with the other Venturers having consent rights over certain major decisions; (c) by an executive committee or board of managers or directors appointed by the Venturers to collectively manage the JV; and/or (d) the appointment of officers of the JV. Decision making would depend on the management structure of the JV:
    - If a Venturer or its affiliate, such as a manager or managing member of an LLC or a general partner of an LP (a "**Manager**"), manages the JV, day-to-day decisions usually would be made by the Manager with certain major decisions requiring the approval of one or more non-managing Venturers.
    - A board comprised of individual representatives of each Venturer (or Manager if more than one), acting similar to a board of directors of a corporation, could be responsible for managing the JV or voting on major decisions, with day-to-day functions carried out by officers of the JV (if any) or delegated to a Manager or Venturer.
    - Officers of a JV can be appointed to manage the JV under the oversight of the board of managers/directors.

12. Does local law imply any fiduciary duties or duties of good faith between the parties to a joint venture?

As discussed in Questions 9 and 10 above, in the case of an LLC or LP, if one of the Venturers acts as the manager or general partner of the JV, then such Venturer may be subject to the default fiduciary duties of loyalty and care under the statutory laws of the jurisdiction where the JV is formed unless such fiduciary duties have been modified, limited or eliminated in the JV Agreement adopted by the Venturers (to the extent permitted by applicable law).

Venturers and their relationships with each other and the JV will also be subject to "the implied covenant of good faith and fair dealing." Courts universally apply this covenant (sometimes solely called "good faith") in every contract, including JV Agreements. It is codified in LLC and LP statutes in most states, including Delaware, and cannot be waived. However, unlike fiduciary duties, the protections provided to the Venturers by this covenant are very limited. The purpose of the covenant is to protect the parties' benefit of the bargain in entering into the contract. If a JV Agreement addresses a particular issue, courts will not apply the covenant. Rather, the convent will only be available as a remedy in narrow circumstances to prevent a party to a JV from taking an action that is egregious, arbitrary or unreasonable and would deprive another Venturer from receiving the fundamental benefits intended by the JV. However, since the covenant is only rarely applied as a remedy, Venturers should be careful to precisely define each party's obligations and duties in the JV Agreement.

13. Do any restrictions, such as foreign direct investment rules, apply to foreign joint venture parties?

JVs with foreign Venturers will need to consider a number of regulatory schemes that could potentially impact the formation and operations of the JV:

- CFIUS: The Committee on Foreign Investment in the United States ("**CFIUS**" or "**Committee**") allows the U.S. government to review non-U.S. investments in U.S. businesses due to national security concerns, and the president can block risky transactions. Its application is more common today across multiple industries, including most recently, sensitive personal data and emerging technologies, and a wider variety of transaction are coming under increased scrutiny. Certain transactions, investments, and real estate deals may trigger a mandatory CFIUS filing and approval before the transaction can close. Aside from transactions resulting in foreign control, a mandatory CFIUS filing is also required where the JV is involved in critical technology (no matter the percentage of foreign interest) or there is a significant foreign government investment into critical infrastructure and sensitive personal data businesses. In other circumstances, the Venturers may elect to make a voluntary CFIUS filing to protect its business investment against future CFIUS review. The Committee retains authority to unilaterally initiate a review of certain transactions at any time. No statute of limitations applies to CFIUS reviews, unless previously approved.
- Outbound Investment Screening ("Reverse CFIUS"): On Jan. 2, 2025, the U.S. Department of the Treasury ("**Treasury**") instituted a new outbound investment screening requirement affecting U.S. companies, including JVs. This new rule targets U.S. investment in Chinese or Chinese-owned companies involved in the semiconductors and microelectronics, quantum information technologies and artificial intelligence sectors. The new rule prohibits U.S. JVs from engaging in certain transactions and requires notification for other transactions, targeting a defined set of technologies and products that may contribute to the threat to U.S. national security. U.S. JVs are expected to comply through a reasonable and diligent transactional due diligence and compliance process.
- AML Rules and Sanctions: JVs with foreign Venturers should also consider the various anti-money laundering rules and regulations, including, among others, the Foreign Corrupt Practices Act of 1977, as amended, the USA Patriot Act, as amended, and various executive orders thereunder. Treasury's Office of Foreign Assets Control ("**OFAC**") administers the U.S. sanctions programs, which precludes JVs from doing business with certain blocked non-U.S. Venturers or Venturers from embargoed countries.
- State Laws: In addition to federal laws, many states also have regulations to address national security issues. For example, in May 2023, Florida enacted Chapter 692, Florida Statutes, which restricts, with limited exceptions, certain "foreign countries of concern" from directly or indirectly owning, having a controlling interest in or acquiring any interest in real property in Florida. Foreign countries of concern are the People's Republic of China, the Russian Federation, the Islamic Republic of Iran, the Democratic People's Republic of Korea, the Republic of Cuba, the Venezuelan regime of Nicolás Maduro or the Syrian Arab Republic. Similarly, Texas has passed the Lone Star Infrastructure Protection Act, which prohibits certain investments from countries of concern that would affect critical infrastructure. Other states are following Texas and Florida's lead and are in the process of restricting ownership of real property by China and other specified countries. The existing and proposed laws of each jurisdiction in which the JV conducts business must be analyzed where there are Chinese (or other specified non-U.S.) Venturers.

14. What competition law considerations apply to the set up and operation of a joint venture?

Venturers need to consider applicable U.S. antitrust regulations, which include the following:

- Sherman Act: prohibits certain anti-competitive practices, such as price-fixing, market allocation and customer allocation.
- The Clayton Act: regulates activities that lessen competition and lead to monopolies.
- The Federal Trade Commission Act: prohibits unfair competition and deceptive practices.
- Hart-Scott-Rodino Act: may require a filing with the FTC and DOJ before entering into certain JV formations and transactions.
- State Laws: most states have their own unfair competition laws and healthcare-related JV transactions may be subject to review and filing requirements under applicable state statutes.

In general, where antitrust challenges may be an issue, Venturers should analyze whether the JV has a legitimate pro-competitive purpose, such as the creation of a new product, a reduction in price for customers, and market efficiencies. This is measured against the extent to which the JV may give the Venturers market power that would not otherwise exist. Venturers need to be considerate in restricting the ability of the Venturers to compete outside of the JVs and other similar anti-competitive conduct, which can raise antitrust concerns and scrutiny.

15. Are there requirements to disclose the ultimate beneficial ownership of a joint venture entity?

Corporate Transparency Act ("**CTA**"). The highly controversial federal CTA became effective January 1, 2024. The CTA's beneficial ownership information (BOI) reporting provisions provides that, unless a domestic or foreign entity is outside of the scope of the CTA or meets one of the enumerated exceptions, each domestic entity that is created by a filing with the Secretary of State or a foreign entity that has registered to do business in the United States by the filing of a document with secretary of state is considered a "**Reporting Company**" and required to file a "**CTA Report**" with the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("**FinCEN**"). Reporting Companies include non-exempt JVs that are LLCs, LPs (including LLLPs) or corporations (each, a "**JV Reporting Company**") and excludes JVs that are general partnerships as they do not file with a state agency to come into existence. Issues relating to the CTA include the following:

- Whether any Exemptions apply: The CTA provides 23 specified exemptions from filing a CTA Report, which need to be analyzed to determine whether a JV structure is a JV Reporting Company and thus required to file a BOI Report.
- Who Files the BOI Report on behalf of the JV Reporting Company: Generally, the Venturer who manages the JV should perform this obligation on behalf of the JV. The Venturers in a co-managed JV need to agree on which Venturer is responsible for CTA reporting.
- Who is a Beneficial Owner: The CTA requires initial disclosure and, when applicable, subsequent updating of certain personal identification information to be provided to FinCEN for each individual (i) who owns or controls 25% or more of the ownership interests of the JV or (ii) exercises "substantial control" of the JV.
- Initial Timing for filing BOI Reports, subject to the injunction and litigation described below:
  - If formed *prior to* January 1, 2024, and prior to the below described litigation, an Initial Report was due no later than January 1, 2025.
  - If formed *in* 2024, an Initial Report was due *within 90 days* after formation/registration.
  - If formed *after* 2024, an Initial Report is due *within 30 days* after formation/registration.
  - An updated BOI Report must be filed *within 30 days* after any change in the information previously reported.
  - A corrected CTA Report must be filed *within 30 days* after becoming aware, or having a reason to know of, inaccuracies in an earlier CTA Report.

Injunction and Legal Challenges to the CTA. Since its enactment, approximately 14 cases have been filed in federal courts across the country questioning the constitutionality of the CTA. The district courts have differed regarding whether the CTA is constitutional, pending appeals to higher federal circuit courts. On *December 3, 2024, a* US District Court for the Eastern District of Texas in the *Texas Top Cop Shop* case issued a nationwide preliminary injunction against the CTA and the reporting requirements thereunder. Although a panel of the Fifth Circuit Court of Appeals stayed (i.e., lifted) the injunction, resulting in FinCEN extending certain filing deadlines, including the reporting deadline for pre-2024 Reporting Companies from January 1, 2025, to January 13, 2025, on December 26, 2024, another Fifth Circuit panel vacated the stay, leaving the preliminary injunction in place. Then, on December 31, 2024, the Department of Justice, on behalf of FinCEN, filed an application to the Supreme Court to stay the preliminary injunction. The Supreme Court soon will decide whether the preliminary injunction remains in place and ultimately will determine whether the CTA is constitutional, as Circuit Courts may issue differing decisions. Also, in January 2025, another case in the US District Court for the Eastern District of Texas, in *Smith v. Dep't of Treasury* stayed the CTA reporting requirements nationwide. The decisions of the courts may be moot, however, because of the possible legislative repeal of the CTA.

Repeal of the CTA? In 2024, Republican members of the House of Representatives introduced legislation to repeal the CTA, and two House members recently opined in the *Wall Street Journal* advocating repealing the CTA. With newly elected President Trump's stated goal of trimming government, the new administration and the Republican majority in Congress may support and effectuate the CTA's repeal before the courts determine its constitutionality. In the meantime, JV Reporting Companies currently are left wondering whether and when they may be required to file CTA Reports. While the injunction remains in place, JV Reporting Companies may voluntarily, but are not required to, file CTA Reports.

State Transparency Acts. States are also enacting beneficial ownership reporting laws. These state acts are less vulnerable to certain of the constitutional challenges to the CTA.

- The New York LLC Transparency Act, originally enacted on December 22, 2023, and amended on March 1, 2024, requires beneficial ownership reporting commencing January 1, 2026, is based on and incorporates provisions from the CTA but only applies to LLCs. Unlike the CTA, it requires a filing to claim an exemption. If the CTA is repealed or ultimately found unconstitutional by the Supreme Court, the effect on the New York Transparency Act is not clear.
- Other states, including California and Maryland, have been considering but have not yet adopted their own transparency legislation.

KYC Requirements. Banks require certain beneficial ownership disclosure (similar to the CTA) under federal Know Your Client (KYC) anti-money laundering/anti terrorism statutes which will apply if the JV obtains bank debt.

16. What issues relating to the ownership and licensing of intellectual property rights generally apply to the set up and termination of a joint venture?

- Each JV must have the right to use the IP it needs to conduct its business, which may include rights to use the names, marks or other IP owned by one of the Venturers. IP can either be contributed in kind to the JV via an IP assignment or licensed to the JV. If a Venturer is licensing the IP, the other Venturers will need the license to be available for so long as the JV operates and address what happens if the licensor leaves the JV. The licensing party will want to specifically set out applicable usage restrictions and fields of use that govern the JV's use of any licensed IP.
- The JV Agreement should also address the Venturers' rights with respect to any new IP that is developed, including who owns it and who has a right to use it. In general, if the JV develops new IP using its own employees or contractors, the JV will likely own such IP. The Ventures also need to address what happens to any licensed or newly developed IP upon the dissolution of the JV or if one of the Venturers leaves the JV. The JV Agreement should carefully delineate each Venturer's IP rights, including how the IP can be used by each Venturer, how it can be licensed to third parties and who is responsible for enforcing the JV's IP rights against third parties. It is common for each Venturer to have the exclusive right to use the IP within a specified field of use.
- The Venturers also need to consider how any IP newly developed by the JV will be owned and used upon termination of the JV. The Venturers could jointly own the IP with a separate written agreement outlining their respective fields of use. Alternatively, one Venturer could own the IP and license it to the other Venturer, subject to usage restrictions. If there are pending applications for IP (*g.*, patent applications), the Venturers will need to consider who controls and pays for its prosecution.
- Whether IP should be licensed or assigned depends on the circumstances. In general, if a Venturer has valuable IP it wants to retain, it would license the JV to use it for specific purposes. The licensing Venturer needs to balance the need to maintain ownership of valuable IP, while still granting the JV a license that is sufficient to enable it to independently operate. For instance, a short-term or terminable license may limit the JV's ability to grow long term and seek additional debt or equity financing. Also, the licensor should consider the JV's right to assign any license to a third party.
- An important issue with any license or assignment is protection of the IP. If a JV is only licensing IP material to its business, the license should contain terms ensuring the owner will take sufficient steps to stop third party infringers.
- A licensor of IP will also want to consider whether it will receive royalty payments for the license or whether the license will be royalty-free.
- Contributing ownership of IP to the JV through an assignment is less common because the assignor would cease to directly own the IP. One way to address this issue is for the JV to obtain ownership of the IP but then enter into a broad "license back" to the contributing Venturer.

17. What legal considerations apply when transferring employees into a joint venture?

It is common for one or more of the Venturers to cause certain of their employees to work for the JV. A fundamental question is whether the transferred employees are hired directly by the JV or whether the Venturer transferring the staff will remain the legal employer of the transferred employees while they work for the JV, which is known as a secondment.

The decision as to whether a JV directly employees or seconds its employees is dependent on multiple factors:

A JV often will second its staff when:

- The work is for a limited duration.

- The employees do not work full time for the JV and continue to perform duties to the transferring Venturer.
- The JV is of a short-term duration, and the employees need the assurance that they will remain employed by the transferring Venturer when the JV terminates.
- The JV does not desire or cannot offer the same level of employee benefits as the transferring Venturer.

Direct employment by the JV may be preferable when:

- The JV and the employment of the employees has a long-term duration.
- The employees will work full time for the JV.
- The JV desires clear and direct loyalty to the JV as opposed to conflicting loyalties to the JV and the transferring Venturer.
- The JV is in a regulated industry that does not permit secondment.

Where employees are seconded, they often face conflicts of interest between the JV they are working for and the transferring Venturer – their legal employer. This may raise issues relating to the fiduciary duty of loyalty that may be owed by the transferring Venturer and possibly the employee. If a secondment is utilized, each seconded employee should enter into a secondment agreement clearly setting forth the terms and condition of secondment arrangement.

Additional legal considerations relating to secondment include whether the transferring Venturer retains vicarious liability as the employer for the acts of the seconded employees while they are performing services for the JV. The transferring Venturer may desire to be indemnified by the JV for any such liability. Applicable employee benefit laws and the terms of the seconded employees' existing employee benefit plans also need to be reviewed to ensure that the secondment does not disqualify the transferred employees' right to continue under those plans during secondment. The JV may desire, subject to applicable state and federal law limitations, the seconded employees to enter into restrictive covenants to protect confidential information and the goodwill of the JV. And any existing restrictive covenants imposed by the transferring Venturer to which the seconded employees are bound need to be reviewed and possibly amended to permit the secondment. A JV that seconds employees from a Venturer that is under the jurisdiction of a different state or county than the JV's state of formation faces additional issues of differing and possibly conflicting employment-related laws applying to the transferring Venturer, the JV and the seconded employees.

18. Do any additional requirements apply to joint ventures when a joint venture party is a publicly listed company?

Certain rules governing public companies may require disclosure of the existence of a JV. A public company is required to prepare and disclose to the SEC its financial statements and when it has entered into a material agreement or transaction. Depending on the nature of the JV and its materiality to the public company, the joint venture and its terms may require disclosure. If the JV Agreement is a material agreement, it may need to be filed with the SEC and made available to the public.

19. What are the key tax considerations for both the joint venture parties and the joint venture vehicle itself?

Taxation of JVs in general. Under Treas. Reg. §301.7701, with certain exceptions, a JV (which by definition has two or more owners) is either taxed as a partnership or as a corporation. In general, a corporation is subject to double taxation – once at the corporate level and then at the shareholder level if the corporation makes a distribution to the shareholder. In contrast, a partnership is a pass-through entity, meaning that items of income, gain and loss realized by the JV are not taxed at the JV level; rather, they are passed through and taxed to the Venturers. A JV that elects to be taxed as a corporation and meets certain requirements may further elect to be taxed as an S-Corp and, subject to certain exceptions, will be taxed as a pass-through entity similar to a partnership. Unless the JV makes an election with the IRS to the contrary, the default rules provide that a JV will be taxed as partnership. The maximum income tax rate for C-corporations is 21% and for individuals is 37%.

The determination of whether it is better for a JV to be taxed as a partnership or a corporation is complex. In connection with this analysis, the following need to be considered:

- Under IRC §199A, Venturers, other than C-corporations, in a JV taxed as a partnership or S-Corp may deduct up to 20% of "qualified business income" that is passed through from the JV. .
- Whether any of the Venturers is contributing appreciated property to the JV. Generally, any gain realized on the contribution would not be taxable at the time of contribution if the JV were taxed as a partnership but would be taxed as if the property were sold to the JV if the JV is taxed as a corporation. If, however, the transferring Venturer receives a

distribution of cash within two years before or after the contribution of property, the IRS may deem the transactions to constitute a taxable "deemed sale" of the property.
- Whether the JV would qualify as an S-Corp. and, if so, whether an S-Corp is advantageous.
    - An S-Corp (as opposed to a partnership) is limited to 100 Venturers.
    - An S-Corp is prohibited from having any Venturer that is a partnership, corporation or non-resident alien.
    - An S-Corp may only have one class of stock. Accordingly, partnership taxation provides far greater flexibility for different Venturers to have different economic rights such as distributions.
    - An S-Corp is more likely to be audited by the IRS than a partnership.
    - Failure to strictly comply with the S-Corp rules can result in the disqualification of the S-Corp status, resulting in material tax liability.
    - Unlike under partnership taxation, a Venturer in a JV taxed as an S-Corp cannot include the debt of the Venture in the Venture's tax basis in its interest in the JV.
- Whether any of the Venturers is subject to material self-employment tax, which may be avoided or reduced when the JV is taxed as a corporation rather than a partnership.
- Whether any property will be distributed in kind to any of the Venturers. With certain exceptions, in a JV taxed as a partnership, the Venturer is not taxed on the distribution of property (other than money) until the Venturer sells or otherwise disposes of the property. If the JV is taxed as a C corporation, a Venturer pays tax on the fair market value of the distributed property it receives.
- A JV taxed as a partnership must appoint a Venturer or third party as the "partnership representative" with the authority to represent the JV and the Venturers in connection with audits by the IRS and, if the partnership representative is an Entity, an individual also must be designated.

20. Are there any legal restrictions on the distribution of profits by a joint venture entity?

The legal restrictions that may be applicable to the distribution of profits by a JV will depend upon a number of factors, such as the type of JV entity, the nature of the investment generating the distribution, the kind of distribution being made and its timing, the type of investor receiving the distribution and the investor's basis in its JV interest.

The Venturers in a JV structured or that elects to be tax as a C corporation will generally be subject to double taxation as described in Question 19 above.

A Venturer in a JV structured as a pass-through entity (i.,e., an LP, LLC or S Corp) will generally be taxed on its share of the JV's taxable income and gains and will not be subject to double taxation. However, a non-U.S. Venturer or a tax-exempt Venturer may be subject to additional taxes when they invest in a pass-through entity due to their status.

The nature of the JV's investments can also impact the distribution of profits by the JV. Investments that generate and distribute regular cash flow may alleviate the need for the JV to establish large reserves. Investments that execute a buy and hold strategy may not generate any regular cash flow, requiring the JV to retain large reserves to address post-closing obligations.

Although JVs typically make distributions in cash, a JV can distribute property or other assets to Venturers. For JVs taxed as partnerships, in-kind distributions may not be taxable and can result in the deferral of the recognition of gain for a Venturer. However, certain types of Venturers (e.g., a benefit plan investor) may be prohibited from receiving certain types of in-kind distributions for regulatory reasons.

In some cases, a JV may be required to withhold a portion of distributions to certain Venturers to satisfy certain tax withholding obligations. A non-U.S. Venturer may be subject to withholding on the distributions it receives from a JV that is structured as a pass-through entity.

Some JV Agreements will obligate the Venturers to recontribute distributions received from the JV to satisfy the JV's liabilities and indemnification obligations. A JV that has the ability to recall capital from the Venturers may reduce the need for the JV to establish reserves.

Finally, in certain jurisdictions such as Delaware, JVs that are LLCs or LPs are prohibited from making distributions if the JV's liabilities exceed the fair value of its assets. A Venturer who knowingly receives a distribution in violation of this provision could be liable to the JV for the amount of such distribution.

21. How are deadlocks in decision making usually dealt with in a joint venture agreement?

A variety of different structures can be utilized to govern and manage a JV. Common structures include (i) one Venturer having unilateral control of the JV, (ii) one

Venturer having day-to-day control of the JV, subject to the other Venturers' rights to approve certain major decisions (e.g., business plans, budgets, acquisitions, dispositions, financings), (iii) day-to-day management of the JV by one or more Venturers (e.g., one Venturer or one or more officers, managers) subject to the approval of certain major decisions by a management or executive committee or board of directors, and (iv) day-to-day management of the JV by one or more Venturers (e.g., one Venturer or one or more officers, managers) subject to the approval of certain major decisions by a majority of the ownership interests in the JV.

Deadlocks can be avoided in cases where control of the JV will be determined by one Venturer that has unilateral control, or by the votes of the majority of the representatives sitting on a management committee or board of directors, or by the votes of a majority of the ownership interests in the JV. However, deadlocks can often occur if the Venturers have equal approval or veto rights, equal representation on a management committee or board of directors, or equal ownership interests.

Common ways of resolving JV deadlocks include:

- Status quo prevails – It may be appropriate for certain deadlocked decisions to result in nothing happening at all if an action proposed by one Venturer is not approved by the other Venturer.
- Escalation to Senior Management – Both Venturers may agree on a process where the deadlocked issue is escalated to the upper management of each party to try to resolve the issue.
- Arbitration or Mediation –Binding arbitration or non-binding mediation may be utilized to resolve a deadlock, with the JV Agreement specifying which deadlocks can be mediated or arbitrated and the process that will be used to resolve the dispute.
- Buy/Sell or Forced Sale – See Question 22 below for details on these mechanisms
- Liquidation – The Venturers may agree upon a dissolution and liquidation mechanism whereby an initiating Venturer can force the JV to dissolve and liquidate its assets.

22. What exit or termination provisions are typically included in a joint venture agreement?

The Venturers should carefully consider at the outset when and how a JV may be terminated. Many JVs are formed for a specific purpose for a specific period of time. For example, a real estate development JV may be formed for the specific purpose of acquiring undeveloped land and then constructing and selling a building. Other JVs may be formed to own and operate a business without a specific planned termination date. Many JV Agreements provide that the JV will have a perpetual term, while others will provide for a specific date of termination.

For JVs that are LLCs or partnerships, the applicable law of the jurisdiction of its formation will set forth certain statutory dissolution events that will cause the termination of the JV. Customary dissolution events frequently include the disposition of substantially all of the assets of the JV, the election by the Venturers to dissolve the JV, and the expiration of the term of the JV. Some jurisdictions permit some or all of these statutory dissolution events to be modified or waived by the Venturers.

The assets of a JV will need to be dealt with when the JV is in dissolution. Typically, if a dissolution event occurs, the assets of the JV will be sold and the debts and liabilities of the JV will be paid, with net proceeds distributed to the Venturers. In some cases, remaining assets will be distributed to the Venturers in kind. In addition, state law may require the JV to establish reserves to pay for future known or contingent liabilities.

If the assets of the JV are not sufficient to satisfy the debts and liabilities of the JV, then the Venturers may be required under applicable law to return to the JV some or all of distributions they previously received or to contribute additional capital to the JV to satisfy such debts and liabilities.

In addition to the statutory dissolution provisions, JV Agreements typically provide one or more other ways for the Venturers to exit the JV including:

- Buy/Sell Rights – Allow an initiating Venturer to force the responding Venturer to either buy the initiating Venturer out of the JV or sell the responding Venturer's interest in the JV to the initiating Venturer.
- Forced Sale Rights – Allow an initiating Venturer to force the other Venturer to either buy the initiating Venturer out of the JV or permit the initiating Venturer to sell the JV's assets to one or more third parties.
- Put Rights –Allow an initiating Venturer to force the responding Venturer to buy the initiating Venturer out the JV.
- Call Rights – Allow an initiating Venturer to force the responding Venturer to sell the responding Venturer's interest in the JV to the initiating Venturer.
- Transfer Rights – Allow a Venturer to sell such Venturer's interest in the JV to a third party.
- Drag Along Rights – Allow a transferring Venturer that is selling such transferring Venturer's interest in the JV to a third party to force the other Venturer to sell

such other Venturer's interest in the JV to the same third party.

- Tag Along Rights – Allow one Venturer to force a transferring Venturer that is selling such transferring Venturer's interest in the JV to a third party to cause such third party to also acquire the other Venturer's interest in the JV as a condition to the sale of the transferring Venturer's interest in the JV.
- Registration Rights – Allow one or more Venturers to register and sell their ownership interests in the JV if the JV has an initial public offering of its equity interests.

23. What restrictions under local law apply when joint venture parties agree to restrictive covenants eg non-compete or non-solicitation obligations?

Because a JV entity can compete with other businesses and the Venturers can compete with each other, JVs give rise to a number of restrictive covenant concerns that need to be considered. In addition to federal laws that may limit the ability of certain Venturers to form and operate a JV and the ability of certain types of JVs to engage in certain types of transactions, the applicable law of the jurisdiction of JV's formation or operations may also limit the ability of the JV and the Venturers to utilize restrictive covenants.

While it is customary for a JV Agreement to contain restrictive covenants which limit the use and disclosure of confidential information, the solicitation of the employees of the Venturers, and the ability of the Venturers to compete with the JV and each other, some jurisdictions limit the use of such provisions. For example, some jurisdictions prohibit businesses from enforcing post-termination non-compete agreements with employees and independent contractors, except is certain limited exceptions, such as the sale or dissolution of a business.

A JV entity may be impacted by limitations on the use of employment related restrictive covenants even if the JV itself does not have any employees because applicable laws may limit the ability of the Venturers or their affiliates to directly or indirectly limit the employment relationships of their employees. Any provisions in a JV Agreement which prohibit a former employee or an independent contractor of the JV or the Venturers from working for a period of time in a particular business, in a particular area, or for a particular employer, may not be enforceable.

However, the provisions of a sale agreement which prohibit the seller of the business (or the business's owners) from engaging in a business similar to the business being sold may be enforceable for a reasonable period of time if limited to a reasonable geographic area. In addition, confidentiality agreements which protect the disclosure of confidential information or trade secrets, and non-solicitation agreements which protect customer information or client lists, are generally enforceable in most jurisdictions. Finally, most jurisdictions do permit businesses to restrict the activities of their employees during the period of the employee's employment.

24. What dispute resolution mechanisms usually apply to joint ventures and are there any legal restrictions on the parties' choice of governing law or choice of dispute resolution mechanism?

Because most JVs will exist for a period of years, there are many different types of disputes that can arise between the Venturers. Some disputes may relate to actions that need to be taken by the JV or decisions that need to be made by the JV. Other disputes can arise due to the failure of the JV to reach agreed upon milestones or due to a Venturer's breach of the JV Agreement. There are a number of different processes and mechanisms that venturers typically utilize to resolve disputes in a timely and cost-effective manner.

Disputes over operational actions or decisions that do not involve a breach of the JV Agreement are sometimes resolved through governance control mechanisms or expedited mediation or arbitration provisions. In JVs that involve a Venturer who contributes the majority of the JV's capital and an operator partner who manages the JV's day to day operations, it is not uncommon for the governance provisions to give the capital partner the final control over an operational action or decision.

In JVs between Venturers who have equal ownership or control, or that involve fundamental actions or decisions that will adversely impact one of the Venturers on a disproportionate basis, the Venturers may be unwilling to allow one Venturer to have sole control over an action or decision. Alleged breaches of the JV Agreement can present similar issues, especially if one Venturer has the right to remove the other Venturer from the day-to-day management of the JV. In these cases, the Venturers will often include in the JV Agreement a speedy process for the Venturers to resolve a disagreement without resorting to litigation.

A dispute resolution approach that is used is for the JV Agreement to provide for a "cooling off" period prior to utilizing other resolution mechanisms. When a cooling off process is used, the JV Agreement will typically require the Venturers to meet with each other to discuss potential ways to resolve the disagreement. In some cases, the senior management personnel of the Venturers may be required to participate in such a process.

If the JV Agreement does not contain a cooling off process or the cooling off process is not successful, the JV Agreement may require the Venturers to participate in an expedited non-binding mediation process facilitated by an independent third-party mediator. The goal of these types of provisions is to encourage the Venturers to find compromise solutions to operational disputes and avoid litigation. Additionally, the JV Agreement may require the Venturers to participate in an expedited binding arbitration process with an independent third-party arbitrator.

Some Venturers are unwilling to allow some operational actions or decisions to be resolved through an expedited binding arbitration. For example, a Venturer who contributes the majority of the JV's capital may be unwilling to agree to an arbitration process that could require the Venturer to contribute more capital to the JV than it is willing to contribute. In such cases, a dispute over an operational action or decision can result in a deadlock which can only be resolved by utilizing one of the deadlock resolution mechanisms noted above in Question 21.

Disputes over alleged breaches of the JV Agreement can sometimes only be resolved through a litigation process s. A JV Agreement will typically specify the governing law that will apply to the agreement and the jurisdiction and venue where the dispute will be litigated. Disputes that involve Venturers from different jurisdictions or assets or business operations located in multiple jurisdictions can sometimes result in litigation in multiple forums.

25. What are the key market trends affecting joint ventures in your jurisdiction and how do you see these changing over the next year?

With rising interest rates and tightening credit, JVs have become an important and more frequent source of financing for capital intensive businesses in multiple industries, including real estate and healthcare. Given the reduced access to capital, the Venturer who contributes the majority of the JV's capital will have more influence and negotiating leverage, often demanding more favorable economic and governance terms. Venturers are also seeking greater flexibility to exit or sunset a JV that is in a deadlock or is not performing up to expectations driven in large part by the current uncertain economic environment.

The overall regulatory environment has become more intense, and JVs are grappling with complex and increased regulatory considerations. The U.S. government's desire for greater transparency into the ownership of investments, reduced concentration in the ownership and control of key markets and products, and increased domestic ownership and control of critical industries has resulted in the recent adoption of the Corporate Transparency Act, increased antitrust enforcement by the Federal Trade Commission, and increased scrutiny of acquisition transactions involving foreign Venturers by the Committee on Foreign Investment in the United States.

The increase in U.S. interest rates and the reduced availability of debt has also led to the adoption of hybrid capitalization structures such as the use of JV preferred equity, co-investment JVs, and club JVs. Increased competition for investment opportunities and the need for speed, efficiency and cost effectiveness has resulted in the expanded use of programmatic JVs.

Preferred equity investments can be attractive because they create an opportunity to achieve a better risk adjusted return with greater governance controls than a typical debt investment and more security than a typical common equity investment. Preferred equity investments can also be attractive to operators because they permit greater leverage (and potentially higher returns) than might otherwise be available in today's economic environment while preserving more of the upside if the underlying investment is successful. Preferred equity investments made through a JV can be structured as an equity investment with features similar to a mezzanine loan, or an equity investment with features similar to a common equity investment, or somewhere in between.

Co-investment JVs typically involve one or two institutional co-Venturers that invest non-controlling equity in an investment opportunity alongside an operator. Co-investment JVs are often entered into when the operator needs additional equity to acquire or fund an attractive investment opportunity and are sometimes used to recapitalize investments in cases where one or more of the operator's existing co-Venturers needs exit liquidity.

Club JVs typically involve multiple institutional Venturers who invest together on a collective basis to acquire control of an investment opportunity that any one of them would not typically acquire on an individual basis. Club JVs are frequently used to acquire control of an attractive existing operating business or provide new equity capital to a talented existing management team to keep the management team together so that they can pursue new investment opportunities.

Programmatic JVs typically consist of either a JV formed for the purpose of making multiple underlying investments or a series of JVs formed by the same Venturers for the purpose of making a series of investments. Programmatic JVs have become increasingly attractive to Venturers because their structure provides an efficient and cost-effective way to deploy a large amount of capital in multiple investments.

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