Welcome to our Summer Edition of Early Returns, which as you may remember from earlier in the year is our Committee's new "light touch" publication issued between meetings and focuses on content for the upcoming Annual Meeting.

As you all know by now, this is the inaugural Virtual-only Annual Meeting and we have been working very hard to bring you a variety of quality content which will be delivered right to your screen. We will of course miss the usual human contact of seeing everyone in the room and at our Committee Dinner, but we all continue to live with the gravity of the current situation and understand we all need to make adjustments.

Notwithstanding the change in format, we are highly confident that you will get great value from the content of our Committee and Sub-Committee Meetings and of course the three CLEs we are hosting. Also, we do anticipate some virtual networking and a social element to the Meeting which are currently being finalized, so keep your eyes open for details.

This is a great opportunity to not only join remotely but to encourage your colleagues and contacts to join us – since the whole meeting is FREE for Members, there is no better time to join the ABA and the PEVC Committee. ABA membership pricing has changed this year and annual dues are now graduated against years of experience and fall below the usual cost to attend just one in-person meeting. We are really hoping this is a great opportunity for people around the country and around the world to come and join us.

Finally, it doesn't stop there. We have several stand-alone webinars over the next few months. Indeed we have an excellent program set for tomorrow, Friday August 14th. Details of upcoming webinars and information about listening to prior programs can be found on page 4. Please register and join us. We hope to continue our webinar program following the Annual Meeting, so if you have any ideas or would like to present, please contact our Programming Chairs, whose contact details are on the final page.

In the meantime, all the times, dates and details of all our September meetings are set out in the following pages. So see you soon at a computer near you!

Stay well!

Steve & Josh
With this year’s Annual Meeting moving to a virtual format, now is the perfect time to brush up on your video conference skills. Here are ten quick tips that will help you to put your best virtual foot forward whether you are presenting on a panel, attending a virtual meeting or taking part in an online social.

1. QUIET SURROUNDINGS – Sit in a quite space, preferably filled with soft furnishings, it will make for better acoustics and sound quality. An external microphone or headphones with built-in speakers are helpful as well, but be careful if your headphones are noise cancelling… they can have a tendency to make you YELL!

2. EYE CONTACT – In order to make it look like you’re speaking to your audience, or looking at the person you’re speaking with, look at your camera, not the centre of your screen. If you have trouble remembering to do this try minimizing your conference call platform screen as much as possible and positioning it at the top of your screen near your camera.

3. PICK YOUR LIGHTING – Natural light is best, if you can sit by a window, do so. Make sure your lighting, whether artificial or natural, comes from behind your camera rather than behind you so that you don’t appear as a back lit silhouette. Direct overhead lighting should also be avoided as it can create a glare and give you a halo effect

4. NEUTRALIZE YOUR BACKGROUND – Don’t let your background upstage you. A neutral wall is the preferred background, but sitting in front of a bookshelf or a piece of art can work well too. At the very least make sure to take a minute and hide your dirty dishes and laundry.

5. FOCUS! – Try not to multi-task, remember that all the participants can see you!

6. RAISE YOUR DEVICE – Even amateur photographers know that no one looks their best shot from below, and no one wants to look at your nostrils. Prop your device up on a few thick books to raise your camera to your eye level, the improved angle will make all the difference.

7. DRESS THE PART – We have all gotten comfortable working from home and dressing accordingly, but remember to dress in attire appropriate for a business event, at least from the waist up.

8. AM I ON MUTE? – The mute button can be your friend. Keeping your device on mute when you are not speaking is good call etiquette. It minimizes background noise, improves overall sound quality, and limits the chance of embarrassing interruptions. But don’t forget to check your microphone indicator and unmute before it’s your turn to speak.

9. SOUND CHECK – Take a minute to sign in early and ensure your technology is all working smoothly. It is significantly less stressful to check it ahead of time than when a virtual roomful of people is waiting on you.

10. VIRTUAL BACKGROUNDs – While these may seem like a great alternative, before you rely on a virtual background be aware that they come with a downside as well. You will need to be prepared to sit VERY still if you’re using a virtual background. Any movement can result in distracting pixilation, you can even seemingly disappear!

Understanding Strategic Acquisition-Related Rights
(ROFNs, ROFRs and Call Options, Oh My!)

Perhaps one of the more significant developments in recent memory for the venture capital and private equity landscapes has been the rise of strategic and corporate venture investors (“Strategics”). According to the Pitchbook-NVCA Venture Monitor, Strategics participated in over 23% of all completed venture capital transactions in the United States in 2019, and this year, through June 30, 2020, Strategics have participated in approximately 26% of all U.S. venture financings. The activity thus far in 2020 is “a new high,” per the Pitchbook-NVCA Venture Monitor.

As the private company market wrestles with the reality of COVID-19 and distressed situations become more commonplace, it is worth examining a series of contractual rights that Strategics sometime seek when negotiating the terms of their venture investments if a critical goal of Strategics is securing preferential positioning with respect to potential acquisitions of the companies in which the Strategics are intending to invest (“Portfolio Companies”). These provisions are commonly known as a “Right of First Negotiation” (“ROFN”), “Right of First Refusal” (“ROFR”) and “Call Option” or “Call Right” (“Call Option”).

Historically, these provisions have been considered terms that chill future bids for Portfolio Companies resulting in potentially depressed exit values when Portfolio Companies are subsequently sold. Nonetheless, there are situations where these provisions may make commercial sense for both Strategics and Portfolio Companies.

It is critically important that the Boards of Directors of Portfolio Companies carefully weigh the advantages and disadvantages of such provisions. Similarly, senior leadership of Portfolio Companies should preemptively scrutinize requests for ROFNs, ROFRs and Call Options with legal counsel.

ROFNs generally entitle Strategics to receive written notice from Portfolio Companies when the Portfolio Companies receive offers from potential buyers interested in pursuing potential acquisitions (a “Transaction Proposal”) or when Portfolio Companies intend to initiate a sale exploration process. Following delivery of a Transaction Proposal, the Portfolio Company is normally required to standstill with any third-party potential acquirer (up to several weeks) so that the Strategic has time to conduct diligence and formulate a competing acquisition offer (if they so choose).

The scope of the terms, information and timing to respond to the Transaction Proposal is normally negotiated between the Strategics and the Portfolio
Looking Ahead to the Annual Meeting

>What the Committee Has in Store

**ACADEMIC SUBCOMMITTEE MEETING**
Monday September 21, 2020
(11:00 AM - 12:00 PM CST)

This will be a two-part program. First, the subcommittee will discuss the recently published updates to the NVCA’s model legal documents. Second, the subcommittee will discuss “down round financings”, emphasizing important issues that officers, directors and investors should be aware of and considering alternative structures that investors may consider to protect downside risk and harness upside potential.

**PRIVATE EQUITY AND VENTURE CAPITAL COMMITTEE MEETING**
Monday September 21, 2020
(2:00 PM - 3:30 PM CST)

We will joined by Delaware Vice Chancellor McCormick, our Keynote Speaker and our Committee’s Judicial Liaison. The newly appointed Deputy Director of the Office of the Advocate for Small Business Capital Formation of the Securities and Exchange Commission, Sebastian Gomez will then present a Keynote Address. Robert Rosenberg and Youmna Salameh of Houlihan Lokey, a Committee Sponsor, will report on the state of the private equity and venture capital markets. The meeting will conclude with a discussion of certain recent trends and developments impacting Private Equity and Venture Capital.

**INTERNATIONAL VC & PE SUBCOMMITTEE MEETING**
Tuesday September 22, 2020
(9:00 AM - 10:00 AM CST)

The panel will cover two topics: (1) a Term Sheet analysis, and (2) state of the union on trends in PE transactions in various jurisdictions. The Term Sheet analysis: A panel from North America, Europe and Asia will discuss the Atlassian term sheet and its wider application, including (i) how Atlassian positioned their terms; (ii) a comparison against certain US market norms; (iii) how competitive Atlassian’s terms really would be for overseas deals, including what works and doesn’t (iv) deal structuring from a PE fund perspective and regulated sectors (such as life sciences). The panel will include views from a PE fund, with analysis by US and overseas attorneys.

**FINANCIAL SERVICES TECHNOLOGY JOINT SUBCOMMITTEE MEETING**
Tuesday September 22, 2020
(10:00 AM - 11:00 AM CST)

A panel on “Cross Border Corporate Venture Capital Investment in Fintech.” The panel will focus on legal and regulatory issues that arise in the context of cross-border corporate venture capital investment in fintech companies.

**PRIVATE EQUITY AND VENTURE CAPITAL JURISPRUDENCE SUBCOMMITTEE MEETING**
Wednesday September 23, 2020
(10:00 AM - 11:00 AM CST)

VC Investors are increasing finding themselves embroiled in litigation over their portfolio company investments. Recent case law also casts doubt on the utility of rights offerings as a means of cleansing down round financings. Several recent cases also provide guidance for drafting more effective preferred stock financing documents. Pamela L. Millard and Alyssa K. Ronan of Potter Anderson & Corroon LLP will join us to discuss these topics and more.

**JOINT SUBCOMMITTEE ON PRIVATE EQUITY AND M&A MEETING**
Wednesday September 23, 2020
(10:30 AM - 12:15 PM CST)

There will be three segments. First, a panel of private equity principals, investment bankers and consultants will hold a panel discussion entitled “Private Equity M&A in a post-Covid World,” during which they will address how the Private Equity M&A market has changed during 2020. Second, we will address what a private equity buyer needs to consider when buying a company with outstanding PPP or Main Street Loans. Finally, a panel of Private Equity deal lawyers will discuss “Changes in Negotiating Private Equity Deals Post-Covid” in which they will address how negotiating Private Equity deals has changed since the onset of the pandemic.

>> Continued on Page 4
This will be a two-part program featuring Scott Bleier, Morse Law and Danielle Naftulin, Cooley LLP. First, the subcommittee will discuss the recently published updates to the NVCA’s model legal documents. Second, the subcommittee will discuss “down round financings”, emphasizing important issues that officers, directors and investors should be aware of and considering alternative structures that investors may consider to protect downside risk and harness upside potential.

An Introduction to Private Equity Fund Formation, Part 2.

Topic: Planting the Seeds for Cannabis Clients - How to Engage Tactical and Practical ways that attorneys and law firm general counsels can approach cannabis as a practice, with particular focus on ethical malpractice, logistical and client perception concerns.

Additional CLEs from the PEVC Committee Before the Annual Meeting:

**Taxing Carried Interest - The Implications to US Fund Managers of Recently Issued Regulations**
September 8, 2020 at 1pm EDT - Brian Huber, Partner, Gunderson Dettmer; Emily Cummins, Associate, Proskauer Rose

Find Previous Webinars on the PEVC Committee Page under Webinars.
Stay up to date on CLEs, Webinars and everything the PEVC Committee has in store on our Linkedin.

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**The Rise of Foreign Direct Investment Regulations and How It Will Affect Private Equity/Venture Capital Transactions**

To protect domestic industries national governments have a general tendency to tighten the rules for control of foreign investments. In certain vital industries transactions will be subject to review by national authorities that may prohibit or restrict certain transactions. These additional constraints will considerably affect M&A transactions. In this program we review and compare the European Union Foreign Direct Investment Screening Regulation and the United States Committee on Foreign Investment in the United States (CFIUS) rules. Furthermore, national legislation and cases, such as the United Kingdom and Canada, restricting or prohibiting transactions will be discussed.

**Friday, August 14, 2020 at 11:00 am EDT**
60 min. CLE (Free for Section Members)

**PRESENTED BY:** Private Equity and Venture Capital Committee

**Speakers:**

- Charles Livingston
  Bridies LLP
- Richard Sofield
  Wiley
- Shawn Neylan
  Siegelman Edlin LLP
- William McIntosh
  Bridies LLP
- Katrina Vorlat
  Monard Law
  Moderator

**To register for this event visit:**
https://www.americanbar.org/events-cle/mtg/web/402568019/
Companies. Strategics generally seek to learn as much information as possible about the potential buyer and the terms of the potential acquisition. Both the Portfolio Company and the third-party potential acquirer normally want to limit information to enable a competitive sale process and avoid providing the Strategic an unfair advantage.

Agreeing to a ROFN at the outset of the relationship with the Strategic can be troubling for rapidly growing Portfolio Companies. Potential acquirers are normally quite hesitant to “tip-off” Strategics (which are often direct competitors of the potential acquirers) regarding their strategic directions. As noted above, doing so puts the potential acquirers at competitive disadvantages vis-à-vis the Strategics. The more details of an acquisition offer, the larger the advantage in favor of the Strategic. ROFNs are therefore sometimes known as “match rights”.

ROFRs generally entitle Strategics to acquire Portfolio Companies on the terms set forth in the Transaction Proposal. ROFRs are therefore sometimes more problematic for potential acquirers as potential acquirers are unlikely to spend the time and transaction expenses necessary to negotiate an acquisition only to have its deal terms matched by the Strategic. Transactions may include both a ROFN and a ROFR. Accordingly, if agreed upon, Portfolio Companies may negotiate for the ROFRs to sunset after some agreed-upon period of time, and then have the less onerous ROFNs (but still problematic) continue for an additional period of time.

Call Options grant Strategics the right, but not the obligation, to force a Portfolio Company to sell to the Strategic at a fixed price or predetermined financial multiple during a set time period and/or upon the achievement of certain milestones. Call Options are typically memorialized in a stand-alone agreement, the details of which can be subject to extensive negotiation (more so than ROFNs or ROFRs). When negotiating Call Options, Strategics and Portfolio Companies balance the need for deal certainty against the time and expense associated with negotiating a fully-realized acquisition in the context of a minority investment. Call Option agreements may attach the form of acquisition agreement that will ultimately be signed if the Call Option is exercised or, alternatively, set parameters on key acquisition deal terms, such as purchase price adjustments, indemnification and the scope of the representations and warranties.

However, the current macro-economic climate and the related overall slowdown in venture capital investments has triggered the reemergence of investor-favorable terms, especially for Portfolio Companies facing a cash crisis. In this milieu, requests by Strategics for ROFNs, ROFRs or Call Options may become more popular. For certain Strategics, Call Options, ROFN or ROFR provisions may be fundamental to the investment rationale for a given venture investment. Similarly, the need to receive investments from Strategics, perhaps because a Strategic is the lead investor and/or only investor in a financing round, or because the Strategic is a key customer or supplier, means the investment and any related Call Option, ROFR or ROFN, are also of fundamental importance to the Portfolio Companies.

In recent years, market-based conditions favored Portfolio Companies, which resulted in many Portfolio Companies successfully forestalling ROFRs, ROFNs and Call Options while negotiating venture investments with Strategics. While these rights should be viewed skeptically, they should also be understood as a potential value driver for both Strategics and Portfolio Companies, particularly in circumstances where their inclusion can unlock value for all sides.

In order to align the interests of the Portfolio Companies and the Strategics, Portfolio Companies seek to have the ROFN sunset after some agreed-upon period of time. Additionally, Portfolio Companies work to limit the timeframe during which Strategics may consider making an offer, the existence and duration of any exclusive negotiating period and information provided. ROFRs present the same challenges that apply to ROFNs but are more problematic for Portfolio Companies inasmuch as potential acquirers are unlikely to spend the time and transaction expenses necessary to negotiate an acquisition only to have its deal terms matched by the Strategic. Transactions may include both a ROFN and a ROFR. Accordingly, if agreed upon, Portfolio Companies may negotiate for the ROFRs to sunset after some agreed-upon period of time, and then have the less onerous ROFNs (but still problematic) continue for an additional period of time. Call Options grant Strategics the right, but not the obligation, to force a Portfolio Company to sell to the Strategic at a fixed price or predetermined financial multiple during a set time period and/or upon the achievement of certain milestones. Call Options are typically memorialized in a stand-alone agreement, the details of which can be subject to extensive negotiation (more so than ROFNs or ROFRs). When negotiating Call Options, Strategics and Portfolio Companies balance the need for deal certainty against the time and expense associated with negotiating a fully-realized acquisition in the context of a minority investment. Call Option agreements may attach the form of acquisition agreement that will ultimately be signed if the Call Option is exercised or, alternatively, set parameters on key acquisition deal terms, such as purchase price adjustments, indemnification and the scope of the representations and warranties.

To be sure, Call Options arguably present greater potential challenges to Portfolio Companies as compared to ROFNs or ROFRs because Call Options foreclose entirely the possibility of a sale to anyone other than the Strategic, at least for the duration of the Call Option. Simultaneously, Call Options provide Portfolio Companies with the opportunity to realize value in a potential sale that might not otherwise be available. For certain Strategics, Call Options, ROFN or ROFR provisions may be fundamental to the investment rationale for a given venture investment. Similarly, the need to receive investments from Strategics, perhaps because a Strategic is the lead investor and/or only investor in a financing round, or because the Strategic is a key customer or supplier, means the investment and any related Call Option, ROFR or ROFN, are also of fundamental importance to the Portfolio Companies.

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# Schedule of Events

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<tr>
<th>Time (CST)</th>
<th>Monday September 21, 2020</th>
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<tr>
<td></td>
<td>Academic Subcommittee Meeting</td>
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<td>Main Committee Meeting of the Private Equity and Venture Capital Committee</td>
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<tr>
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<td>International Private Equity and Venture Capital Subcommittee Meeting</td>
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<td>Financial Services Technology Joint Subcommittee Meeting of the Commercial Finance and Private Equity and Venture Capital Committees</td>
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<td>Sponsored CLE Program: Perspectives in Cutting-Edge Issues in Venture Capital and Private Equity</td>
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<td>Contractual Governance of Business Entities Joint Task Force Meeting</td>
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<td>Private Equity and Venture Capital Jurisprudence Subcommittee Meeting</td>
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<td>Joint Subcommittee on Private Equity and M&amp;A Meeting</td>
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<td>Venture Capital Financing Subcommittee Meeting</td>
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<td>Sponsored CLE Program: M&amp;A for the Venture Capital Backed Life Science Company</td>
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<td>Publications Subcommittee Meeting</td>
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<td>Angel Venture Capital Subcommittee Meeting</td>
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WE’RE SPONSORING 3 INFORMATIVE CLES AT THE ANNUAL MEETING

Perspectives on Cutting-Edge Issues in Venture Capital and Private Equity
Tuesday, September 22, 2020
2:00 PM – 3:30 PM CST

M&A for the Venture Capital Backed Life Science Company
Wednesday, September 23, 2020
2:00 PM – 3:30 PM CST

Special Considerations for Venture Capital Investments in Life Science Companies
Thursday, September 24, 2020
2:00 PM – 3:30 PM CST
The Committee is collecting articles for future newsletters which are circulated to our members worldwide. Please send your submissions to Brett Stewart at brett.stewart@mcmillan.ca. Articles should be 1500 words or less, and on any topic of interest to practitioners in the private equity and venture capital sectors. From short scholarly articles, to practice tips, reviews/summaries of a Section program, life in the trenches, interesting pro bono projects, humorous looks at life and the law, or even how you balance work and personal life. We appreciate your help in making this newsletter a success.

### Business Law Section Annual Meeting
**September 21-25, 2020**  
**Online**

### Articles & Authors Needed
The Committee is collecting articles for future newsletters which are circulated to our members worldwide. Please send your submissions to Brett Stewart at brett.stewart@mcmillan.ca. Articles should be 1500 words or less, and on any topic of interest to practitioners in the private equity and venture capital sectors. From short scholarly articles, to practice tips, reviews/summaries of a Section program, life in the trenches, interesting pro bono projects, humorous looks at life and the law, or even how you balance work and personal life. We appreciate your help in making this newsletter a success.

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