Some Types of Acquirers and Investors in Corporations – Part 1

- **Venture Capital Funds:**
  - Usually a limited partnership
  - Investors pool large amounts of money into the partnership
  - Management of the VC Fund decide which businesses to invest in (usually, it will invest in the very early stages in the corporation)
  - After the company investment does well, the VC Fund will sell out and start anew

- **"Angel" Investors:**
  - People (with lots of money) who invest in companies in their early stages and who need money for early growth, in return for anticipated large returns later on

Some Types of Acquirers and Investors in Corporations – Part 1 (cont.)

- **Leveraged Buyout Funds**
  - This occurs when a firm or person wants to buyout a corporation without having access to a lot of money
  - The fund will buy a large number of shares to gain leverage in the corporate governance
  - The fund will then borrow money to acquire the outstanding shares, using the corporation assets themselves as collateral for borrowing the money necessary to do this
  - Eventually, the fund will buyout all the shareholders, take the company private, and reorganize, with the intent to go public again at a much higher value

QUIZ TIME!

Some Types of Acquirers and Investors in Corporations – Part 2

- *What is an "entrepreneur"?*

  An individual who is engaged in the process of creating a new company backed by new ideas. Entrepreneurs, the people who take the risks associated with starting the new firms, are generally people who are willing to place their personal assets and talents on the line in order to accomplish the creation of a new company. Entrepreneurism creates products and services that expand the scope of what is offered in the marketplace.

Some Types of Acquirers and Investors in Corporations – Part 2 (cont.)

- *What is "private equity"?*
  - “Private Equity” is a term that has shifted meaning in the course of its use in the legal and business world.
  - Initially, “private equity” referred to that class of investments known as Leveraged Buyout Transactions.
  - However, with time, private equity has come to refer to an entire “asset class”, or group of investment forms, that are characterized by high-risk / high-return investing.
  - This group of investment assets includes venture capital investments, leveraged buyout (“LBO”) investments and a variety of other investment forms such as hedge funds (financially sophisticated funds which trade on corporate risks) and “fund-of-funds” (investment companies that invest in other mutual funds, rather than directly investing in companies).

Example of an Entrepreneurial Venture – Part 1

Peg and Susan have invented a new system of sending data across telephone wires faster and cheaper than it is currently being done.

Their enthusiasm for the project is such that they decide to form a new company to help bring their idea to fruition.

They raise funds to form the company and start development of a product from their personal finances, from investments from friends and family, and from any other individual investors they can sell on the promise of their idea.

Ultimately, the company gets underway and is proceeding well towards rolling-out their first product.

However, Peg and Susan are inventors, not business people, and they realize that in order to see their idea succeed, they will need two things.

- First, they will need people to help them manage the company and to teach them how to sell their product.
- Secondly, they will need a lot of cash in order to mass produce, advertise, and sell their new product.

Given the situation, the two founders begin seeking professional help in the form of a venture capital investor.

Example of an Entrepreneurial Venture – Part 2

What is a portfolio?

- In the case of an individual investor, a "portfolio" refers to that group of stocks, bonds, and other assets that the person owns.
- In the case of a venture capital fund, a portfolio refers to that group of companies in which the fund has made investments.

What is diversification?

- An element of the thinking that leads to an individual choosing to balance her portfolio.
- The idea behind diversification is that owning a little bit of a lot of different investment types is the best way to minimize risk across a portfolio.
- Thus, an individual might choose to buy into a variety of different investments – known as "diversifying" one's portfolio – in order to balance the risks and returns of the various investments in the portfolio.

Example of an Entrepreneurial Venture – Part 2 (cont.)

What are founders?

- Founders are the individuals who first form and start an entrepreneurial firm.
- Typically, a founding group might include the inventor of the idea or product and possibly a business person who is brought in to begin the company’s operations.
- Over the company’s early life span, the founder group might also include the first few employees who are hired to start the company’s operations.

Investment Classes - Characteristics

In general, these investment classes are defined by two key characteristics.

I. High Risk:

Investors who choose to place money in venture capital ("VC") funds and "leveraged buyout" funds (LBO) are investing in situations that have a great deal of risk associated with that investment.

Venture Capital Funds:

- In the case of venture capital funds, the risk is typically an operational risk; the risk is that the company will founder and fail to perform as management and investors hope.

LBO Funds:

- In the case of LBO funds, the risk is one that the company will simply fail outright.

II. High Return

The reason that investors are willing to take the high levels of risk associated with alternative investing is the fact that these types of investments have the potential to payoff at rates equating to high multiples of the amounts of money invested.

Portfolio Investing

The Theory: An individual’s portfolio, there should be a wide mix of investments ranging from low-risk investments, such as municipal bonds and federal bonds, right up through extremely high risk investments such as those in the alternative investment class.

EXAMPLE: Roger has had a successful career throughout his life and invested his money in basic mutual funds and CD accounts with banks. After speaking to a financial advisor, he decides that the best course of action for him would be to diversify his portfolio such that he holds low risk investments, like slowly growing mutual funds, some mid-level investments with balanced risk / return potential – such as corporate stocks and bonds, and a small number of high risk investments in things such as VC and LBO funds.

Venture Capital Funds - Formation

Most venture capital funds are formed as general partnerships.

General Partner: Represents venture capital investors (sometimes referred to as "venture capitalists") who will identify, select, invest in, and help manage the companies that the fund will provide with cash.

Limited Partners: Provide cash for the fund's investments. Typically, investors in venture capital funds are wealthy individuals and institutions such as state pension funds, universities, large companies, and high net worth individuals.

Venture Capital Funds – Formation (cont.)

"Fund Raising Stage": During this stage, venture capitals determine that they would like to raise a fund and begin searching for investors.

- In the case of management teams that have demonstrated themselves as successful investors by previous experience, it is often not that difficult (assuming a fairly strong economy) for those individuals to raise a fund.
- However, for new funds or funds with unproved management, the fund raising process can take years before sufficient capital is raised to support the fund.

Typically, venture capital funds will focus their investments in a particular area – such as telecommunications or software products – in which the fund's general partners have some experience and knowledge about the industry. Other considerations include management, geography, money to be expended, and geography.

NOTE: SEC regulations for the forming of corporations and other funds also apply to venture capital funds. Thus, when forming such a fund, the founders must be aware of and must comply with the securities laws, mostly the SEC Acts.

Venture Capital Funds – Operations

Once a venture capital fund has determined that it will make an investment in a firm, the fund and the company will begin a negotiation process with the goal of establishing terms that will apply to the investment that the firm is going to receive.

An investment contract has several features.

- First, a typical venture capital investment firm will be given preferred stock that will have special rights regarding distributions from the firm.
- Also, a venture capitalist investment will normally take the form of a series of small cash infusions that will ultimately make up the total value of the investment.
- Such cash infusions, typically referred to as “tranches” are normally tied to specific milestones that the company and its management are required to meet in order to receive additional funds.
- If the milestone requirements are met, then the venture fund will continue placing funds in the company until the full amount of the investment is placed in the firm.

Venture Capital Funds - Management

Venture capital fund's managers are usually seasoned business professionals.

In most cases, the venture fund will designate one or two of its members to manage the investment, and in most cases, sit on the corporation's board.

In such a position, the fund's managers are in a prime place to help management reach the goals that the corporation has set for itself.

Companies may feel threatened by the prospect of outside investors (i.e., the members of the venture capital firm) being on their boards and worry that the fund is interested solely in its own interests, and not those of the company.

While this may be the case in a limited number of situations, it is not the standard, as venture capital firms create business largely on the basis of their reputation in the business community and would injure that reputation immensely if they created situations in which they fought with, rather than for, the company in which they invest.

Venture Capital Funds – The Numbers

Over the course of a venture capital fund's life, the fund will typically make between five and ten major investments, depending on the markets and the availability of fund managers to act as liaisons between the fund and the boards of the target companies.

Most venture capital funds are structured such that the limited partners make their investment in the fund for a period of about seven years.

Only about one in every five investments will garner a return, often through a sale of the company to an acquirer.

If the venture capital fund's managers are lucky, one or two of the fund's portfolio companies will actually reach the stage of an IPO or major sale that nets the fund a big return.

A History of Leveraged Buyouts

Leveraged buyout (LBO) funds arose as an investment vehicle in the 1980's because there was a high level of accessible capital in the markets.

Investors began to seek various alternative investments in the early stages of growth of various companies.

Financial professionals recognized that management was engaging in gross excess – wasting corporate assets for their own personal entertainment or benefit.

Small groups of investors began organizing pools of capital in much the same manner that was discussed previously in the section on venture capital funds.

Pension funds, state benefits plans, insurance companies, high-net worth individuals, etc., began to invest in these first LBO funds that promised extremely high returns.

LBO funds were able to take positions at such low valuations, and turn the companies around quickly for resale. Huge profits were made on investments that lasted for mere months.

LBO activity declined in the 1990s. In the modern economic climate, LBO funds have adjusted their operations, often entering into transactions that look more like venture capital investments or more standard corporate acquisitions.

Operation of an LBO Fund

Like venture capital funds, LBO funds operate as Limited Liability Partnerships.

First, the investment fund identifies a target for acquisition.

- Targets are companies that have weak management or management that has allowed the company's assets to dwindle at the shareholders' expense.
- Additionally, LBO managers look for situations where a company has a large cash account, readily saleable assets, and a large public float.

Operation of an LBO Fund (cont.)

After identifying a target company, the LBO fund will typically begin acquiring the company's stock up to near the level requiring a 13-D disclosure or up to near the level that would trigger the company's poison pill (if there is one).

- Once that point is reached, it is inevitable that the fund's goal to acquire the company will become public knowledge.
- If management is not amenable to the transaction, then the standard rules of engagement for a hostile takeover, which were discussed previously, are triggered.
- If management is agreeable, then the fund and the firm will begin structuring a deal.

Once the fund has control, two things happen.

- First, the remaining shareholders are bought out of the company; turning the once public company into a private, closely held firm.
- Secondly, reorganization takes place. Corporate assets are sold to reduce debt (leverage money). Operation procedures are streamlined and overhead reduced. Employees may be laid off.

- The ultimate goal of an LBO transaction is to either be able to sell the corporation at a rate much higher than its original investment, or to retake the corporation public at a raised valuation after it has improved the firm's economic state.

The Accountant's Role

Placing financial or accounting controls over the company's accounting processes: When accountants will monitor the way a company reports and processes its financial transactions in order to ensure honesty in the process.

Some duties of an accountant are as follows:

- keeping track of a firm's finances during its normal transaction of business, including keeping track of a company's intakes and outflows of cash. The "intakes" of cash are dollars that the firm receives either from the sale of goods or services or from the taking on of corporate loans, such as bank notes.

- preparation of the firm's financial statements.

  - In the case of a private entity, the annual (or semi-annual or even quarterly) production of financial statements is an informational process that provides data to the firm's management as to how their business deals are performing.

  - In the case of a public company, the preparation and dissemination of financial statements is a process that is heavily regulated by the FASB and the SEC. Accountants are required to compile financial data in compliance with the generally accepted accounting principles and to distribute that information to shareholders and investors in an organized fashion.

- preparation of the firm's taxes.
- structuring corporate transactions and deals.

Interactions between Lawyers and Accountants

Attorneys and accountants work together where a company is structuring a major investment or merger transaction.

Lawyers and attorneys will also consult when a firm has gotten itself into trouble – with the IRS, SEC, or shareholders – as a result of the false reporting or under-reporting of financial information to any of these groups.

Additionally, attorneys and accountants will be called upon to do "damage control" in situations where buyers and sellers of company assets have made deals that have turned out to be financially or legally unsound.

Investment Bankers

"Investment banking" is the wide range of services that large banks provide for companies.

The investment bank's function in an IPO is to

- find investors who are willing to buy the securities that the company intends to place on the open market
- assist the company in the preparation of a prospectus
- write the prospectus
- work with other constituent parties to ensure that the prospectus complies with the law
- contact its buyer clients to gauge interest in the securities and to identify an appropriate price for the securities
- sell the securities to the investors and manage the market for those securities

The investment bank's role in mergers and acquisitions includes

- securing loans for the acquiring firm
- floating bonds for public purchase

Some Investment Banking Terms

- **"Road Show":** the process that a bank and its client company engage in when trying to properly price and gauge the interest of the market for an IPO or other issuing. Typically, a "road show" will consist of corporate management and several bankers visiting key banking clients who have been known to purchase shares of the type being offered by the firm. At the meetings, management will present an overview of the operations of the firm, while the bankers will try to convince the potential buyers of the financial strength and potential for the firm's growth and success.

- **Merger Advisory:** a service provided by many investment banks that is intended to advise companies about potential merger and acquisition targets for their entire firm or business line. In addition, banks providing merger advisory services will also often include services to help companies finance and complete merger transactions that have already begun.

Interaction between Investment Banks and Attorneys

The bank will work with attorneys to ensure that the rules of the SEC are complied with as the firm begins to prepare its prospectus.

- To a limited extent, the interests of the bank and the interests of attorneys may conflict as banks are often interested in advertising the firm's prospects, while attorneys want to ensure that the prospectus does not "condition the market" or make false or misleading claims.

The investment banks also fulfill other functions, such as merger advisory services.

- In this capacity, the bank will often work to ensure adequate funding for a company's deals while the attorneys work to draft the requisite contracts and materials to properly ensure that the deal is consummated in a legally binding, and enforceable fashion.

Joint Venture – Information

Joint ventures provide businesses with an opportunity to form short-term, single-purpose partnerships, thus deriving many of the benefits of strategic partnership without many of the liabilities. Below is a general overview of the characteristics, advantages and disadvantages of using a joint venture to accomplish your business's goals.

To form the joint venture, the co-venturing partners contribute funds, goods or equipment at the outset. The proportion which each partner contributes can be 50% each, or it can be in unequal amounts, with one contributor providing a majority of the resources for the formation and initial operation of the venture. The instructions that follow this overview provide general information about formation and operation of a joint venture.

One of the benefits of a joint venture is its lack of permanency. As opposed to a partnership, which can create a number of responsibilities, duties and obligations on the part of each partner, a joint venture generally only obligates its partners to those specific duties and obligations set forth in the Joint Venture Agreement. Further, joint ventures frequently have short, defined durations. Many joint venture agreements provide for the venture to terminate and cease its existence after only a few years. Such time-limited joint ventures represent less of a commitment on the part of the partners than would a standard partnership.

Another benefit offered by joint ventures is that it allows companies to share expertise or relationships with other companies to penetrate new markets, or to develop new products or services, thus benefiting both parties. For example, smaller companies can join with larger more established companies to share expertise and develop new technologies, affording the larger company access to new research materials, while affording the smaller company additional clout and market presence. Further, such strategic relationships can combine to decrease competition in a particular market, making it easier for the partners involved to penetrate that market.

Joint Venture – Information (cont.)

Joint ventures are frequently used when a domestic company wishes to enter a foreign market. The joint venture structure allows the domestic company to seek a short-term, project-specific relationship with a company within that foreign country. The domestic company then can take advantage of the foreign companies local know-how and relationships, while the foreign company gains access to relationships and expertise it might not ordinarily be exposed to.

It is worth noting that an exit strategy employed by many joint venture partners is for one partner to acquire the other partner's interest in the venture. This approach can work well where one business has used the venture to experiment outside of its core business, developing a product or service with another company whose expertise lies closer to the business conducted by the joint venture.

Joint Venture Agreement – Page 1

This kit's sample Joint Venture Agreement includes a basic framework for such an agreement, setting forth in general terms the types of provisions necessary to establish a joint venture. Below is a set of basic instructions that should assist you in completing the sample form to draft your own joint venture agreement tailored specifically to the needs of your business.

Purpose

Joint ventures are generally formed to accomplish a specific purpose. Many are structured so that they are only authorized to perform a specific function, and are prohibited from taking any action outside of the course of performing that particular function. In the sample agreement below, specify in detail the purpose that the joint venture is being established to perform.

Contribution

At the outset of forming a joint venture, the venturing partners must determine what each of them will be contributing to the effort. The partners may contribute cash, equipment, or other goods necessary for the operation of the joint venture.

While many joint ventures are formed with all parties contributing equal amounts of cash, the parties may contribute to the venture in any proportion they choose. Determine what each partner will contribute to the venture, and describe in detail the items, amounts and overall percentage of total joint venture funds in the appropriate provision of the Joint Venture Agreement.

Distribution of Profits

Frequently, joint ventures assign profits based upon the proportion of each partner's original contribution to the venture. However, the distribution of profits can also be apportioned based on other considerations, i.e., the amount and/or types of services provided on behalf of the venture by each partner.

Joint Venture Agreement – Page 1 (cont.)

Management

A joint venture is generally managed through the delegation of authority by the venturing partners to a managing agent. There are many different options for how such a manager can be structured. Ultimately, it is important to clearly establish who will have direct responsibility for the day-to-day operations of the venture, to whom that person or entity will be directly accountable, and who will be authorized to bind the venture. A common solution to this issue is to establish a steering committee under the terms of the Joint Venture Agreement, with members being drawn from each partner (often in proportion to the partners' contribution to the venture, i.e., equal partners would each appoint 4 members to an 8-member committee). The Joint Venture Agreement might then set forth the terms under which the steering committee could appoint a general manager or CEO to operate the day to day operations of the venture. Another solution is to have the partners appoint a general manager directly, vesting decision-making and oversight into an individual.

No matter what kind of management structure you choose, be certain to specify clearly the person or entity that shall be authorized to bind the venture, and that shall be directly responsible for the day-to-day operations of the venture.

Term

While many joint ventures are limited in duration, others are established with an indefinite lifespan. The term of the agreement and of the venture itself should be discussed and agreed upon by the parties prior to executing the joint venture agreement.

Joint Venture Agreement – Page 2

JOINT VENTURE AGREEMENT

THIS AGREEMENT (the "Agreement) is made as of the ____________ day of _______________, 20___, by and between ____, a __________ *(entity type, if applicable, and state of incorporation/registration/formation, i.e., a Delaware corporation))* ___________________________ (the "First Party"), and ________ ____, a _____________ *(entity type, if applicable, and state of incorporation/ registration/formation)* ____________ (the "Second Party," and collectively, the "Parties").

WHEREAS the First Party is engaged in the business of ________________ *(briefly describe First Party's business)* ____ ____________________;

WHEREAS the Second Party is engaged in the business of ________________ *(briefly describe Second Party's business)* ____ ______________________________;

WHEREAS the Parties wish to join together in a joint venture for the purpose of _______ _________ *(briefly describe the purpose of the joint venture)* __________________________ ______________________________;

Joint Venture Agreement – Page 2 (cont.)

NOW THEREFORE BE IT RESOLVED, in consideration of the mutual covenants, promises, warranties and other good and valuable consideration set forth herein, the Parties agree as follows:

1. Formation. The joint venture formed pursuant to this Agreement (the "Joint Venture") shall do business under the name ____, and shall have its legal address at ____ ____ _________. The Joint Venture shall be considered in all respects a joint venture between the Parties, and nothing in this Agreement shall be construed to create a partnership or any other fiduciary relationship between the Parties.

2. Purpose. The Joint Venture shall be formed for the purpose of ________*(describe in detail the business that will be conducted by the Joint Venture)*________________________________ ____ ____ ____.

3. Contributions.

a. The Parties shall each make an initial contribution to the Joint Venture according to the following terms:

Joint Venture Agreement – Page 3

i. First Party's Contribution: ______*(State specifically the amount of First Party's financial contribution, as well as any equipment, goods or other value contributed by First Party. Include the % of total funds contributed by Second Party. Also include the date by which such contributions must be made.)*
____.

ii. Second Party's Contribution: ____*(State specifically the amount of Second Party's financial contribution, as well as any equipment, goods or other value contributed by First Party. Include the % of total funds contributed by Second Party. Also include the date by which such contributions must be made.)*____
______________________________.

b. A bank account at the bank of ________________________________ shall be established by __*(the managing party; see Section 5 below)*_________, into which the financial contributions of the Parties shall be deposited, for use in the set-up, operation, and administration of the Joint Venture.

c. In the event that the Joint Venture requires additional funds to be contributed to it by the Parties, such additional contributions shall be made in the following proportion: _______________*(state the proportion that each Party shall be responsible for contributing in the event additional funds are required)*___
____
____.

Joint Venture Agreement – Page 3 (cont.)

4. Distribution of Profits. Any and all net profits accruing to the Joint Venture shall be held and distributed to the Parties in the following proportion: ___________ *(State the proportion of profits to be received by First Party and Second Party)* ____
____
__________________.

5. Management. The Joint Venture shall be managed according to the following terms: *(Describe structure of management; procedures for appointing/selecting managers, including chief executive officer or general manager; fees/compensation for managers, if any (See instructions above for more details))* ________
____
____
____
____
__________________.

6. No Exclusivity. Neither Party shall be obligated to offer any business opportunities or to conduct business exclusively with the other Party by virtue of this Agreement.

7. Term. This Agreement shall remain in full force and effect, for a period of five years from the date of this Agreement (the "Initial Term"). Upon the expiration of the Initial Term, the Agreement shall be automatically renewed for successive periods of one year each (each, a "Renewal Term"), unless either Party gives written notice of termination to the other Party at least 30 days prior to (but in no case more than 60 days prior to) the

Joint Venture Agreement – Page 4

expiration of the Initial Term or of any Renewal Term. At any time, this Agreement may also be terminated by mutual written consent of the Parties. If this Agreement either expires or is terminated, the Joint Venture shall be terminated as well, and all Parties' obligations under this Agreement with respect to the operation and administration of the Joint Venture shall no longer have force or effect.

8. Confidentiality. Any information pertaining to either Party's business to which the other Party is exposed as a result of the relationship contemplated by this Agreement shall be considered to be "Confidential Information." Neither Party may disclose any Confidential Information to any person or entity, except as required by law, without the express written consent of the affected Party.

9. Further Actions. The Parties hereby agree to execute any further documents and to take any necessary actions to complete the formation of the Joint Venture.

10. Assignment. Neither Party may assign or transfer their respective rights or obligations under this Agreement without prior written consent from the other Party. Except that if the assignment or transfer is pursuant to a sale of all or substantially all of a Party's assets, or is pursuant to a sale of a Party's business, then no consent shall be required. In the event that an assignment or transfer is made pursuant to either a sale of all or substantially all of the Party's assets or pursuant to a sale of the business, then written notice must be given of such transfer within 10 days of such assignment or transfer.

Joint Venture Agreement – Page 4 (cont.)

11. Governing Law. This Agreement shall be construed in accordance with, and governed in all respects by, the laws of the State of ____________________, without regard to conflicts of law principles.

12. Counterparts. This Agreement may be executed in several counterparts, each of which shall constitute an original and all of which, when taken together, shall constitute one agreement.

13. Severability. If any part or parts of this Agreement shall be held unenforceable for any reason, the remainder of this Agreement shall continue in full force and effect. If any provision of this Agreement is deemed invalid or unenforceable by any court of competent jurisdiction, and if limiting such provision would make the provision valid, then such provision shall be deemed to be construed as so limited.

14. Notice. Any notice required or otherwise given pursuant to this Agreement shall be in writing and mailed certified return receipt requested, postage prepaid, or delivered by overnight delivery service, addressed as follows:

If to First Party: __________

____

Joint Venture Agreement – Page 5

____

____

If to Second Party: ___________________

____

____

If to Joint Venture: ___________________

____

____

15. Headings. The headings for section herein are for convenience only and shall not affect the meaning of the provisions of this Agreement.

16. Entire Agreement. This Agreement constitutes the entire agreement between First Party and Second Party, and supersedes any prior understanding or representation of any kind preceding the date of this Agreement. There are no other promises, conditions, understandings or other agreements, whether oral or written, relating to the subject matter of this Agreement.

Joint Venture Agreement – Page 6

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed the day and year first above written.

FIRST PARTY	**SECOND PARTY**
____ Signature	____ Signature
____ Print Name	____ Print Name
____ Title	____ Title