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

Given the large number of changes in the October 2023 revision where some footnotes were merely moved, for convenience of review, we've flagged new footnotes and footnotes that were substantively revised (excluding cleanup changes) in the October 2023 revision and thereafter (with an attempt to further label the subsequent changes by month and year).

AMENDED AND RESTATED CERTIFICATE OF INCORPORATION

Preliminary Notes

General.

The Certificate of Incorporation is a key document produced in connection with a venture capital portfolio investment. Among other things, the Corporation's Certificate of Incorporation establishes the powers, preferences and special rights of each class and series of the Corporation's stock.

No Impairment Clause.

A "no impairment" clause is a broad and general provision that prohibits the Corporation from acting (or failing to act) in a way that would circumvent the express and specific provisions of the Certificate of Incorporation. Although Delaware courts narrowly construe "no impairment" clauses[1]*, such provisions can be dangerous, both to the Corporation and to the controlling investors, because they can give rise to claims of violation by disgruntled minority investors looking for some grounds on which to base a claim, in the absence of any specific protective provisions in the Certificate of Incorporation. In addition, in a transaction in which the terms of the outstanding Preferred Stock are to be amended, specifically the anti-dilution and conversion rights, certain law firms have taken the position that the existence of a "no impairment" clause in the Certificate of Incorporation requires their firm to express no opinion with regard to the stockholder action taken in connection with the subject transaction, and instead assume for purposes of their opinion that the Corporation has complied with the provisions of the "no impairment" clause. If appropriate attention is paid to the specific, substantive provisions of the Certificate of Incorporation, there is no need for a vague catchall, which may give rise to the problems described above. Accordingly, the drafters intentionally did not include a "no impairment" clause in this model charter.*

Pay-to-Play Provision.

This model charter includes a sample "pay-to-play" provision, pursuant to which Preferred Stock investors are penalized if they fail to invest to a specified extent in certain future rounds of financing. The provision included provides for conversion into Common Stock of some or all of the Preferred Stock held by non-participating investors.

Blank Check Preferred.

Blank check preferred is the term used when the Certificate of Incorporation authorizes shares of undesignated Preferred Stock and grants the Board of Directors the authority to create a new series of Preferred Stock and establish the powers, preferences, and special rights of such series. Without this express grant of authority to the Board of Directors, the Corporation would need to obtain stockholder approval to amend the Certificate of Incorporation to create a new series of Preferred Stock. The drafters

[1] See *Kumar v. Racing Corp. of Am.*, 1991 WL 67083 (Del. Ch. Apr. 26, 1991).

view the inclusion of blank check preferred in a Certificate of Incorporation for a venture backed company as unusual. Accordingly, this model charter assumes that blank check preferred will not be used and the drafters intentionally did not include a provision authorizing blank check preferred.

Choice of Jurisdiction.

This form is set up for a portfolio company incorporated in Delaware. Delaware is generally the preferred jurisdiction for incorporation of venture-backed companies for many reasons, including:

1. The Delaware General Corporation Law (the "DGCL") is a modern, current, and internationally recognized and copied corporation statute which is updated annually to take into account new business and court developments;

2. Delaware offers a well-developed body of case law interpreting the DGCL, which facilitates certainty in business planning;

3. The Delaware Court of Chancery is considered by many to be the nation's leading business court, where judges expert in business law matters deal with business issues in an impartial setting; and

4. Delaware offers an efficient and user-friendly Secretary of State's office permitting, among other things, prompt certification of filings of corporate documents.

Please note the following special considerations if the Corporation is located in California, even though incorporated in Delaware:

Considerations for Corporation with California Shareholders and Operations.

Section 2115 of the California Corporations Code provides that certain provisions of California corporate law are applicable to foreign corporations (e.g., one incorporated in Delaware), to the exclusion of the law of the state of incorporation, if more than half of the Corporation's shareholders and more than half its "business" (a defined formula based on property, payroll and sales) are located in California. As a result, some companies based in California may be subject to certain provisions of the California corporate law despite being incorporated in another state, such as Delaware (although, as noted below, it is not clear that courts will apply Section 2115 if the law of the jurisdiction of incorporation is inconsistent with the provisions of Section 2115). Section 2115 does not apply to public companies listed on the New York Stock Exchange, the NYSE MKT, the NASDAQ Global Market or the NASDAQ Capital Market.

One provision of the California Corporations Code that applies to such "quasi-California" corporations is Section 708, which requires that shareholders be permitted to cumulate votes in the election of directors. However, Section 2115 does not require corporations to set forth this right in their articles or bylaws, and most Silicon Valley companies that are subject to Section 2115 do not do so. Under Delaware law, a corporation must include a provision in its Certificate of Incorporation in order to allow cumulative voting (see Section 214 of the DGCL). Therefore, should a stockholder choose to exercise its right to cumulate votes under Sections 2115 and 708 of the California Corporations Code, the corporation may find itself forced to choose between violating those provisions if it denies cumulative voting, or violating Section 214 of the DGCL if it allows it. Current California case law enforces a shareholder's rights to cumulate votes in this situation, relying on the language of Section 2115 stating that the cited provisions of the California Code apply "to the exclusion of the law of the jurisdiction in which [the corporation] is incorporated." See Wilson v. Louisiana-Pac. Res., Inc., 187 Cal. Rptr. 852 (Ct. App. 1982). However, a Delaware case, VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108 (Del. 2005), held that the provisions of Section 2115 of the California Corporation Code, insofar as they purport to regulate what stockholder *vote is required to approve a corporate action, are inapplicable to a Delaware corporation, regardless of the Corporation's California contacts. In late May 2012, a California Court of Appeals case, Lidow v. Superior Ct., 141 Cal. Rptr. 3d 729 (Ct. App. 2012), for the first time signaled acceptance of the analysis in VantagePoint by a California court; however, this decision did not explicitly speak to Section 2115 and practitioners remain advised that it may be prudent for "quasi-California" corporations to comply with Section 2115 whenever possible.*

Another provision applicable to such "quasi-California" corporations is the restriction on distributions to shareholders under Section 500 of the California Corporations Code. California Corporations Code Section 166 defines "distributions to shareholders" to include all transfers of cash or property to shareholders without consideration, including dividends paid to shareholders (except stock dividends), and the redemptions or repurchases of stock by a corporation or its subsidiary (subject to certain exclusions, such as the repurchase of stock held by employees). The consequence of this broad definition is that dividends, stock repurchases, and stock redemptions are all subject to the same tests and restrictions. Unlike Delaware law, which generally permits companies to pay dividends or make redemptions as long as the Corporation is solvent following the transaction, California law prohibits such payments unless the Corporation meets certain mechanical tests (in particular, that either retained earnings equal or exceed the size of the proposed distribution or that assets equal or exceed current liabilities). Additionally, California requires quasi-California companies to take "preferential dividends" and "preferential rights" into account when making distributions. However, California does allow such companies to waive these preferred stock considerations. As a result of the restrictions in Section 500, quasi-California companies may be precluded by California law from making a required dividend or redemption payment, even though such a payment would be permissible under Delaware law. Under California Corporations Code Section 316(a)(1), also applicable to "quasi-California" corporations, directors are liable to the corporation for illegal distributions if they acted willfully or negligently with respect to such a distribution.

The limitations on director and officer indemnification under Section 317 of the California Corporations Code also purport to be applicable to a "quasi-California" corporation. As a result, counsel may want to tailor indemnification provisions for a "quasi-California" corporation to reflect California law so that all parties have consistent expectations with regard to indemnification of officers and directors.

Finally, Section 1001 and 1101, and Chapter 12 and 13 of the California Corporations Code also purport to apply to "quasi-California" corporations. These provisions deal with mergers, reorganizations, and asset sales, including voting rights and the application of California dissenters' rights. California may require class votes on sale transactions, so parties should consider whether additional voting agreements are appropriate to secure a possible Common Stock class vote in such a transaction. Additionally, in contrast to Delaware law, California law will grant dissenters' rights in connection with the sale of assets in exchange for stock of an acquiring corporation. Furthermore, California law will require a fairness opinion in connection with certain interested party transactions, so the parties should take particular care if a merger, reorganization or asset sale involves a potentially interested party.