*Syllabus*

UC BERKELEY SCHOOL OF LAW

**Venture Capital and IPO Law: Advising the Emerging Growth Company**

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SPRING SEMESTER, 2014

COURSE: 255 Sec. 1

LECTURER: HERB FOCKLER

*hfockler@wsgr.com*

650-320-4601

DAY & TIME: TUESDAY 6:25 P.M. TO 8:15 P.M.

LOCATION: ROOM 141

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Course Description: *This is a practice-oriented business law seminar designed to provide students with an understanding of the legal, business, financial and practical issues that arise in advising venture capital-backed and emerging growth companies through the typical stages of their development and the common transactions they engage in. The seminar will cover selected corporate, securities and tax issues in areas such as business entity formation, venture capital financings, acquisitions, initial public offerings, and corporate organization and governance, with an emphasis on practical solutions and business realities. The goal of the seminar is to provide students with a window into the daily life of a typical Silicon Valley-style corporate attorney*.

Key Dates & Holidays

First Day of Class: January 7

Spring Recess: March 24 – March 28

Last Day of Class: April 15

Review Session: April 23 – April 25

Final Exam (in class): April 28 – May 8

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| **April 2014** | | | | | | | | | | | | | | **May 2014** | | | | | | | | | | | | | |
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Summary Course Outline

# Introduction to the World of Venture Capital Companies (January 7, 2014)

# Starting a New Technology Venture (January 7 and 14, 2014)

# Venture Capital Financings (January 14, 21 and 28, 2014)

# Venture Capital Financing Termsheet Mock Negotiations (February 4, 2014)

# Venture Capital Funds (February 11, 2014)

# Stock Options and Equity Compensation (February 18, 2014)

# VCs Behaving Badly? (February 25, 2014)

# The Initial Public Offering (March 4 and 11, 2014)

# The Initial Public Offering -- The Underwriters’ Perspective (March 18, 2014)

# After the Initial Public Offering (April 1 and 8, 2014)

# The JOBS Act (April 15, 2014)

# Review Session (TBD: April 23 – April 25, 2014)

General Matters

**Classroom Matters**

I encourage all of you to participate actively in class. Many of the matters we will be discussing cannot be found in books or anywhere else. This area of practices almost always has to be learned by doing or, as in this case, by learning from someone else who does it. Our class is small and will be set up to foster interactions between professor and students and among the students themselves. I also believe that discussions will be much more interesting and educational than strict lectures for both class and professor.

Given the foregoing, class attendance is very important. I expect all students to make every attempt to attend every class, and I will be taking attendance. If you cannot make a class, please let me know in advance by email. I also expect all students to be prepared. Notwithstanding the previous paragraph, there are some basic legal matters presented in the readings that underlie what we will be discussing in class,. I will expect everyone to be familiar with these matters, so that I can refer to them in class with a minimum of backfilling explanation. If, because of an unusual circumstance, you are unable to prepare for a particular class, please let me know in person before the start of that class.

Laptops and tablets are permitted in class only for taking notes or reviewing electronic versions of the materials we are discussing. Using laptops for other purpose, including emailing, web-browsing, chatting, shopping, playing games, viewing blogs, etc., is not permitted. Cellphone use is not permitted at all. If, due to an emergency personal circumstance, you need to monitor your email or your cellphone during class, please let me know by email.

**Readings**

The list of Readings for the class is set forth later in this syllabus and on the course web page. Readings for the first month of the course are set and posted online already. Please let me know if anyone has any issues accessing or reading any of these materials. Readings for later sections of the class will be posted at least two weeks prior to the time I will cover them in class. It is likely that some of the Readings for the IPO and post-IPO sections of the course will change somewhat, but mostly replacing articles and other shorter pieces currently in the syllabus with more recent similar pieces.

The Readings are grouped based on the section of the course to which they relate, rather than by class session. Accordingly, as you near the end of the Readings in one section of the class, you will need to look ahead to see if I anticipate starting the next section during the same class session in which I finish the previous one. **For example, I anticipate covering the entire first section of the course in the first class session, plus portions of the second section. Accordingly, you should both read all the Readings for the first section and start the Readings for the second section before we meet for the first time.**

Some groups of Readings for particular sections of the class – as well as some of the Readings themselves -- are long. In each case, we will be discussing those larger Readings groups over multiple class sessions, so you do not need to have the entire group done before the first class session on that section. Within each group, the Readings are listed in rough order of when I anticipate discussing them, and I will try to give you guidance in the each class as to which Readings to focus on for the next class.

**Exhibits**

For some sections of the course, there are Exhibits in addition to the Readings. The Exhibits are examples of actual documents used in the transactions we will be discussing. You do not need to read them as you do the Readings. But you should skim through them before the classes to which they relate, as I will be referring to them in class. Please make sure you can access them during class sessions. Note also that a number of the Exhibits include annotations that cover many of the issues, both major and subtle, that we will discuss in class.

**Exercises**

At various points in the course, students will be asked to engage in small-group exercises to help them gain greater understanding of certain concepts through hands-on grappling with the materials and with each other. Some may be in-class, and some may be outside-of-class with in-class presentation of results. Note, also, that some of them will require the use of Excel, including the ability to create charts in Excel. If you do not have sufficient knowledge of Excel to feel comfortable, please let me know when I assign the groups, so that I can ensure that each group has a least one person with good knowledge of Excel.

**Examination**

Students will be evaluated based on a final examination. I will be providing details of the exam midway through the course and during the review session, but at this point students can anticipate that it will be a take-home exam with a time limit longer than a few hours and a page limit so that students don’t spend every one of those hours writing. The exam will be open-book, including all student notes and all readings from the course. Students may also use other resources, including the Internet, but will be required to list all sources they. To a great extent, the examine will be intended to have students write essays and summaries as if they were attorneys writing memos for clients or supervising attorneys. As such, drawing on any available source will be permitted, but, unlike in practice, direct, unattributed copying will not be permitted. Similarly, collaboration or consultation with other students will be strictly prohibited.

Detailed Course Outline and Readings

# Introduction to the World of Venture Capital Companies

(January 7, 2014)

Topics Include:

* Salient characteristics of Silicon Valley
* History
* The “Silicon Valley Model”
* Recent statistics

Readings:

## J. Fried, Materials on Venture Law and Finance (2013), Chapter 1 (pp. 1-11)

## C. Bagley and C. Dauchy, The Entrepreneur’s Guide to Business Law, 4th Edition (2011), Chapters 1 (pp. 1-11) and 2 (pp. 12-34)

## “Can Venture Capitalists Really Beat the Market?” The Wall Street Journal (October 2013)

# Starting a New Technology Venture

(January 7 and 14, 2014)

Topics Include:

* Pre-formation matters
  + Leaving a previous employer
  + The lawyer’s role
* Form of entity
  + State of incorporation
* Incorporation
  + Basic documents
* Initial equity matters
  + Capitalization
  + Consideration for founders’ stock
  + Vesting
* Who is the client?

Readings:

## R. Judge and A. Vasudevan, *et al*, The First Mile - Essentials of Entrepreneurship –What It Takes to Create Successful Enterprises (2003), Chapter 3 - Legal Matters, pp. 51-68, 68-75 (***Skim***), 79-88

## California Labor Code Section 2870-2872

## Zynga Inc. v. Alan Patmore and DOES 1 through 50, inclusive, October 2012 (***Skim***)

## L. Black, “Why Corporations Choose Delaware”

## Fried, Chapter 9, pp. 25-30

## Delaware Supreme Court Declares “Quasi-California Corporation” Statute Violates Internal Affairs Doctrine, Client Alert dated May 2005 of Wilson Sonsini Goodrich & Rosati; WSGR Client Alert, August 2012 “At Last, a California Court Acknowledges Delaware Supreme Court Decision Holding that the State’s “Quasi-California Corporation” Statute Violates Internal Affairs Doctrine.”

## “Vesting of Founders’ Stock: Beyond the Basics,” WSGR Memorandum

## A. Miller, “Startup Lawyers Rein in Control-Hungry Founders,” The Recorder (2012)

## California Rules of Professional Conduct: Rule 3-300

Exhibits[[1]](#footnote-1):

## Forms of basic incorporation documents:

## Incorporation Questionnaire

## Certificate of Incorporation,

## Action by Incorporator,

## Bylaws

## Action by Unanimous Written Consent of Board of Directors in Lieu of First Minutes

# Venture Capital Financings

(January 14, 21 and 28, 2014)

Topics Include:

* Sources of funding generally
  + Advantages/disadvantages of each
* Seeking VC funding
  + The VC mating dance
  + Business plans
  + Diligence – business and legal
* Mechanics
  + Overview and timeline
  + Documents
* Fundamental concepts
  + Dual class stock structure
  + Valuation
  + Capitalization
* Termsheets and major terms
  + Liquidation preferences
  + Anti-dilution
  + Voting and protective provisions
  + Registration rights
  + Founder stock matters
* Securities laws

Readings:

## Bagley & Dauchy, Chapter 7 (pp. 145-157)

## P. Delevett, “’A-Round Crunch’ Worries Silicon Valley Startups Looking for Funding to Grow Beyond Seed Stage,” S.J. Mercury News (January 2013)

## D. Panos, “Cozying Up to Goliath: The Pros and Cons of Taking on a Strategic Investor,” WSGR Entrepreneurs’’ Report, Summary 2009 (pp. 1, 8-9)

## “Strategic Investors in the Early Stage Company,” WSGR Memorandum

## Judge, pp. 93-110

## Bagley & Dauchy, Chapter 13 (pp. 458-515)

## Fried, Chapters 2 (pp. 1-20) and 3 (pp. 1-24)

## WSGR Entrepreneurs’ Report, Fall 2008 (pp. 2-4, 8-14) and Q3 2012 (pp. 1-7)

Exhibits:

Forms of basic venture financing documents:

* Series A Preferred Stock Purchase Agreement
* Restated Certificate of Incorporation
* Stockholder Rights Agreement
* Right of First Refusal and Co-sale Agreement
* Action by Unanimous Written Consent of Board of Directors
* Action by Written Consent of Stockholders
* Notice on Form D

# Venture Capital Financing Termsheet Mock Negotiations

(February 4, 2014)

Topics Include:

* Selected issues in negotiating venture capital financings;

Readings:

## Annotated Memorandum of Terms

## Fried, Chapter 4 (pp. 1-13, 31-40)

# Venture Capital Funds

(February 11, 2014)

Topics Include:

* Structure and objectives of venture capital funds;
* Current status of the venture capital business
* The role of lawyers in venture financings.

Guest Speaker: Venture Capitalist – Neil Wolff, VantagePoint Capital Partners

Readings:

## C. Ferguson, High Stakes, No Prisoners (1999) 171-180

## W. Draper III, How it Works (2011) 43-76

## (***Additional materials may be added.***)

# Stock Options and Equity Compensation

(February 18, 2014)

Topics Include:

* Forms of employee equity arrangements
* Tax matters
* Accounting matters
* Securities law matters

Guest Speaker: Employee Benefits Lawyer – Scott McCall, WSGR

Readings:

## Equity Compensation Overview, WSGR Memorandum

## IRC Sections 422 and 83

## SEC Rule 701

# VCs Behaving Badly?

(February 25, 2014)

Topics Include:

* Board fiduciary duties
* “Down round” financings
  + Pay-to-plays
  + Benchmark and WatchMark
* Downside exits
  + Trados

Readings:

## “Fiduciary Duties of the Board of Directors,” Practical Law Company

## J. Padilla, “What’s Wrong with a Washout?: Fiduciary Duties of the Venture Capitalist Investor in a Washout Financing,” 1 Hous, Bus and Tax L.J. 269

## M. Kendall and J. LeClaire, “The Benchmark Case and the Limits of Preferred Stock Protections,” Venture Capital Journal, November 2002

## J. LeClaire, M. Kendall, and K. Taft, “WatchMark Ruling Clarifies Pay-to-Play”

## Fried, Chapters 5 (pp. 1-21) and 6 (pp. 1-38 -- ***Focus especially on Trados***)

## *In re Trados Incorporated Shareholder Litigation* *(Del. Chan. Ct., August 16, 2013)*

# The Initial Public Offering

(March 4 and 11, 2014)

Topics Include:

* Reasons for going public and not
* Preparations for going public
  + Corporate governance
  + Financial processes
* The IPO process
  + Timeline and players
* Securities laws – the registration process
  + Gun-jumping
* Securities laws - liability
  + Due diligence
* The Registration Statement
  + Business
  + MD&A
  + Risk Factors
  + The “Back Half”

Readings:

## S. Bochner et al., Guide to the Initial Public Offering, 7th Edition (2010) (pp. 1-51)

## The Initial Public Offering, A Guidebook for Executives and Boards of Directors, 3rd Edition (2008), Chapter 7 (pp. 109-131)

## G. Brown, Soderquist on the Securities Laws, 5th Ed., Chapter 1

## “SEC Adopts Broad Securities Offering Reforms,” WSGR Memorandum

## “SEC Guidance re Corporate Websites,” WSGR Memorandum

## Dickens, *et al*., “Underwriter Due Diligence: Worldcom & Beyond,” INSIGHTS, Volume 19, Number 4, April 2005

## *Escott v. BarChris Construction Corp*., 283 F. Supp. 643 (S.D.N.Y 1968)

## SEC Form S-1 and Regulation S-K, Items 101, 303, 401, 404, 501-512 and 601(***Skim all).***

Exhibit

Sample IPO Registration Statement

# The Initial Public Offering -- The Underwriters’ Perspective

(March 18, 2014)

Topics Include:

* The IPO from the Investment Banker’s perspective
* The role of the underwriters.

Guest Speaker: Investment Banker – TBD

Exhibit:

## Sample IPO Prospectus

**SPRING RECESS: March 24-28, 2014**

# After the Initial Public Offering

(April 1 and 8, 2014)

Topics Include:

* Public company reporting and disclosure obligations;
  + Materiality and the duty to disclose;
  + Form 8-K and “real-time” disclosure requirements;
  + The role of securities analysts and Regulation FD.
* Corporate governance
  + Sarbanes-Oxley and corporate governance reform;
  + Struggles among boards, management and shareholders
* Post-IPO stock trading
  + Insider trading
  + Section 16
  + Rule 144
* The SEC’s 21st Century Disclosure Initiative
  + Forward-looking statements “safe harbor”
  + Evolving use of websites and technology

Readings:

## S. Bochner et al., (pp. 51-71)

## “Corporate Governance and Disclosure Practices of Venture-Backed Companies in U.S. Initial Public Offerings, July 2011 through June 2012,” WSGR Memorandum

## SEC Staff Accounting Bulletin No. 99 – Materiality (17 CFR Part 221)

## S. Davidoff, “In Netflix Case, a Chance to Re-examine Old Rules,” NY Times Dealbook (December 11, 2012)

## “*SEC v. Christopher A Black*: New Regulation FD Case Shows Importance of Company Compliance Programs,” WSGR Memorandum

## “Enforcement Action Shows SEC Will Not Tolerate Attempts to Circumvent Regulation FD,” WSGR Memorandum

## “SEC Brings Enforcement Action against Public Company for Confirming Guidance,” WSGR Memorandum

## “SEC Liberalizes Rules Regarding Resales of Securities: Amended Rule 144 and Regulation S,” WSGR Memorandum

## *Smith v. Van Gorkom*, Del.Supr., 488 A.2d 858 (1985)

## Sections 309 and 310 of the California Corporations Code

## “Critical Issues for Board of Directors: A Perspective from Wilson Sonsini Goodrich & Rosati,” WSGR Memorandum

## “SEC Adopts Final Rules for Say-On-Pay, Say-When-On-Pay, and Golden Parachute Arrangements,” WSGR Memorandum

# The JOBS Act

(April 15, 2014)

Topics Include:

* VC financing implications
  + General solicitation
  + “Bad boy” prohibition
  + Crowd-funding
  + “Back-door going public” relief
* IPO implications
  + IPO on-ramp
  + “Testing the waters”
  + Relaxation of corporate governance requirements

Readings:

## J. Rubin, “The JOBS Act: An Overview – What every Business Lawyer Should Know,” Business Law Today, (May 2012)

## “The JOBS Act,” Morrison Foerster News Bulletin, March 26, 2012 (pp. 7 – 12)

# Review Session

(TBD: April 23 – April 25, 2014)

**Final Examination:** TBD: April 28 – May 8, 2014

1. Exhibits are not to be read word-for-word, but they will be referred to and discussed in class frequently. [↑](#footnote-ref-1)