

Drafting Transfer Provisions in Joint Acquisition Vehicles: Preserving Flexibility, Avoiding Pitfalls

Tag-Along Rights, Drag-Along Rights, Rights of First Offer, and Rights of First Refusal

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Introduction/Opening Remarks

1. Transfer restrictions are the norm in any private investment vehicle
2. Common Types –
 - Drag
 - Tag
 - Rights of First Offer or Rights of First Refusal
3. Important to draft transfer restrictions clearly so there is certainty as to the “rules” surrounding future liquidity options
4. Overly cumbersome processes ends up causing implementation issues

Drag-Along and Tag-Along Rights

- **Overview** - A drag-along right is a right to require an equity owner to sell its interest in a company to a third party when one or more other equity owners (usually the majority) are selling their interests and they desire to deliver 100% of a company to a third party purchaser
- **Rationale** - From the perspective of a majority shareholder, drag-along provisions are intended to ensure that the majority shareholder will be able to sell the entire company at the price, terms, and conditions that it desires and deems most attractive

- **Percentage Trigger** - As a threshold matter, in negotiating and drafting drag-along rights, parties must determine when these rights can be invoked (e.g., when a majority equity owners can require a minority equity owners to participate in a sale of the company)
 - Exact percentage may vary depending upon the company's ownership mix and the negotiating strength of the owners
 - The minimum percentage ownership required is normally between 51% and 75%
- **Sale Structure** - Drag-along rights can be used to facilitate all types of sale transactions, such as mergers, sale of a company's assets or sale of the equity of the entity.

- **Benefit** - Small equity holders can realize favorable sales terms that otherwise may be unattainable
- **Minority Terms** - The majority equityholder doing the “dragging” should give assurances to the they minority equityholder that they will receive:
 - same price
 - same types of consideration
 - same payment timing
 - do they have to make all representations, including as to the company
 - Sharing of liability being several and not joint and limited to proceeds actually received
 - limitations on restrictive covenants (e.g. noncompetition agreements/non-solicitation)

- Drag along
 - Time period before can be triggered

 - Broad Scope of Applicability –
 - » Applying to all types of outstanding equity (current and future outstanding)
 - » Applying to all types of sale transactions
 - » Note – There is a possibility that a class of equity may be entitled to zero payment

 - Percentage of Equity Being Sold
 - » Can the transaction be for less than 100%?
 - » Permitting management roll-over

 - Notice period/process that is not too cumbersome and handles potential regulatory time frames

 - Process/Penalties to an uncooperative dragged owner

(a) Prior to the consummation of an Initial Public Offering, if the holders of more than a fifty percent (50%) of the outstanding Common Interests (the “Drag-Along Group”) determine to enter into one or a series of related transactions that would effect a Company Sale [for cash] (in the case of a Company Sale effectuated as a Transfer of equity interests, that would result in a Transfer of at least 100 percent (100%) of the Interests of the Company (excluding any Interests issued under the Management Incentive Plan that may be reinvested)) (a “Drag-Along Sale”), then upon twenty (20) Business Days’ prior written notice from the Drag-Along Group to the other Members (each a “Dragged Member”), which notice shall include a reasonably detailed summary of material terms of the proposed sale or exchange, including the proposed time and place of closing and the [form and] amount of consideration to be received by the Drag-Along Group (such notice being referred to as the “Sale Request”), each Dragged Member shall be obligated to participate in the Drag-Along Sale in accordance with this Section 15.

Subject to Section 15(b), if the Drag-Along Sale is structured as a Transfer of Interests, each Member shall Transfer and deliver, or cause to be Transferred and delivered, to the purchaser in the Drag-Along Sale, [all][that same proportion of such Member’s Interests] as is being Transferred by the Drag-Along Group in the same transaction at the closing thereof and shall (i) execute and deliver such agreements for the purchase of such Interests and other agreements, instruments and certificates furnished to them by the Drag-Along Group as the members of the Drag-Along Group shall execute and deliver in connection with such proposed transaction and (ii) deliver certificates and/or other instruments, if any, [all][representing such proportion of such Member’s Interests] to be transferred pursuant to this Section 15, together with other appropriate powers therefore duly executed, at the closing, free and clear of all liens other than liens imposed by applicable securities laws or this Agreement.

Each Member agrees that such Member shall vote its Interests in favor of any Drag-Along Sale effected in accordance with this Section 15 that is structured as a sale or exchange of securities of the Company or any merger, consolidation, recapitalization, reorganization or other business combination or any similar transaction, if, and to the extent that, approval of the Members is required in order to effect such transaction. To the extent applicable, each Member does hereby waive, and shall refrain from exercising any dissenters’ rights or rights of appraisal under applicable law with respect to any valid Drag-Along Sale.

(b) The obligations of the Dragged Members set forth in this Section 15 are subject to the satisfaction of the following conditions:

(i) with respect to any indemnification to be provided in connection with a Drag-Along Sale, each Dragged Member shall only be severally (and not jointly) obligated to join in such indemnification on a pro rata basis (based on such Dragged Member's pro rata share of the net proceeds to be paid by such purchaser), except for indemnification in connection with Owner Representations provided by such Dragged Member with respect to itself which will be provided solely by such Dragged Member;

(ii) no Dragged Member shall be obligated in connection with a Drag-Along Sale to agree to indemnify or hold harmless the purchaser with respect to an aggregate amount in excess of the total net cash proceeds paid to such Dragged Member in connection with such sale;

(iii) upon the consummation of the Drag-Along Sale, the Dragged Members will receive the same form and amount of consideration per one security of each type of Interest held in common by such Dragged Members and the Drag-Along Group and such consideration will be paid to each Member at the same time;

(iv) each Dragged Member will receive the portion of the aggregate consideration that each such Dragged Member would have received if such aggregate consideration had been distributed by the Company in a complete liquidation of the Company; provided, that Management Interests shall receive the portion of the aggregate consideration as determined by the Board of Directors based on the distribution allocation;

(v) if any Member is given an option as to the form and/or amount of consideration to be received, all Members shall be given the same option;

(vi) no Dragged Member shall be required to make any representations other than the Owner Representations with respect to itself which shall be made severally by each Dragged Member and not jointly; and

(viii) no Member shall be required to agree to a non-compete in connection with the transaction but any Member may be required to agree to a customary non-solicitation of senior employees of the Company and its Subsidiaries.

(c) Subject to Section 15(b) above, each Dragged Member shall execute and deliver to the Company at least two (2) Business Days prior to the proposed closing date referred to above, all documents previously furnished to such Dragged Member for execution in connection with the Drag-Along Sale.

If any Dragged Member fails to execute and deliver such documents to the Company, and such Drag-Along Sale is subsequently consummated (such Dragged Member, a “Defaulting Dragged Member”),

(i) the Company may establish an escrow account for the consideration that would otherwise be paid to the Defaulting Dragged Member and the Defaulting Dragged Member shall be deemed to have appointed any member of the Board of Directors as such Dragged Member’s agent to Transfer all of its Interests proposed to be included in the Drag-Along Sale;

(ii) the receipt by the escrow agent of the consideration for such Interests owned by such Defaulting Dragged Member shall be a good discharge to the purchaser of such Dragged Member’s Interest; and

(iii) the Defaulting Dragged Member shall be bound to deliver the items required by Section 15(b) above and on such delivery shall be entitled to receive the consideration therefor without interest.

[Without limiting the remedies available to any party hereto, if the Company or any Member (other than a Defaulting Dragged Member) brings an action against a Defaulting Dragged Member to enforce the foregoing provisions, and such Defaulting Dragged Member is found to have breached this Agreement, the Defaulting Dragged Member shall pay all reasonable legal fees and disbursements incurred by the party or parties that brought such action.]

(d) Each Member confirms that its agreement to participate in such Drag-Along Sale and vote in favor of any such transaction is given as a condition to its ownership of the Interests and as such is coupled with its interest and is irrevocable.

- A tag-along right is a right for owners (usually the minority) to require an equityholder that wishes to sell its interest in a company to a third party purchaser to procure that the third party purchaser also offers to acquire the minority shares
- Tag-along rights serve as protection for the minority shareholders in the event the majority shareholders choose not to exercise their drag right
- Under the concept, if the majority or in certain cases lower percentage owners sell their stake, the non-selling owners have the right to join the deal (or “tag along”) and to sell their equity at the same price, terms, and conditions as the majority
 - Tag-along rights offer minority shareholders the option to sell and do not mandate an obligation
 - These rights ensure greater liquidity for minority shareholders

- Tag along
 - Percentage being sold that trigger these rights (10% to majority)

 - Type of equity that can tag

 - Election –
 - » Notice Period to elect to participate and return signed documents
 - » Clarity that if no response, ability to participate is waived

 - Is the sale cancelled if Buyer won't buy the “tagged” equity or is there a proportional cut back?

 - Types of representations, indemnification and restrictive covenants that a tagging equityholder can be required to sign

(a) Tag-Along Notice.

Other than with respect to a Drag-Along Sale and a Permitted Transfer, in the event any Member or group of Members, acting together or otherwise pursuant to coordinated transactions (the “Transferor(s)”), intends to effect a Transfer of Common Interests representing in the aggregate twenty percent (20%) or more of the issued and outstanding Common Interests (“Transferor Interests”), whether in one transaction or a series of related transactions, to a Person [or group of Affiliates] (the “Proposed Purchaser”), such Transferor(s) shall deliver to the Company and the other Voting Members (the “Other Members”) a written notice (the “Tag-Along Notice”), at least twenty (25) Business Days prior to the consummation of such proposed Transfer stating:

- (ii) the number of Transferor Interests;
- (iii) the identity of the Proposed Purchaser;
- (iv) the cash price or, in reasonable detail, other consideration, per Common Interest (the “Offered Price”);
- (v) all other material terms and conditions of the proposed Transfer; and
- (vi) the expected date of consummation of the proposed Transfer.

[Upon the request of the Company or any Other Member, the Transferor(s) shall promptly furnish such additional information to the Company or requesting Other Member as may be reasonably requested to establish that the offer and proposed Transfer are to clarify the terms and conditions of the proposed Transfer.]

(b) Right of Tag-Along.

If the Transferor(s) are seeking to effect a sale of Transferor Interests (other than a Drag-Along Sale or a Permitted Transfer), [whether in one transaction or a series of related transactions], each Other Member (a “Tag-Along Offeree”) shall have the right (such right, a “Right of Tag-Along”) to elect to Transfer to the Proposed Purchaser identified in the Tag-Along Notice, at the same price or deemed price per Common Interest as the Offered Price and on the same terms and conditions (including without limitation time of payment and consideration) as applicable to the Transferor(s), a number of Common Interests (as to each Tag-Along Offeree exercising its Right of Tag-Along, the “Tag-Along Interests” and, as to all Tag-along Offerees exercising their Right of Tag-Along collectively, the “Additional Interests”) equal to the lesser of (i) the number of Common Interests specified by a Tag-Along Offeree in its Tag-Along Election Notice (as defined below) and (ii) the number of Common Interests, derived by multiplying the total number of Common Interests held by such Tag-Along Offeree by the Fractional Share;

provided, that in order to be entitled to exercise the Right of Tag-Along, a Tag-Along Offeree must agree to make the same representations, warranties, covenants and indemnities as the Transferor agrees to make in connection with the proposed Transfer (except that in the case of representations and warranties pertaining specifically to the Transferor(s), a Tag-Along Offeree shall make the comparable representations and warranties pertaining specifically to itself); provided, further, that all representations and warranties shall be made **severally and not jointly** by each such Tag-Along Offeree and that the liability of the Transferor(s) and the Tag-Along Offerees (whether pursuant to a representation, warranty, covenant, indemnification provision or agreement) for liabilities in respect of the Company shall be borne by each of them on a several and not joint basis in proportion to their share of the aggregate consideration to be paid by the Proposed Purchaser.

(b) [Continued] A Tag-Along Offeree shall exercise the Right of Tag-Along by giving written notice (the “Tag-Along Election Notice”) to the Transferor(s) by the tenth (10th) Business Day following the Tag-Along Offeree’s receipt of the Tag-Along Notice (the “Tag-Along Election Period”), specifying the number of Common Interests that the Tag-Along Offeree desires to Transfer (a “Tag-Along”) to the Proposed Purchaser.

A failure by a Tag-Along Offeree to deliver a Tag-Along Election Notice within the Tag-Along Election Period shall constitute an election by such Tag-Along Offeree not to exercise the Right of Tag-Along.

If the Transferor receives a timely Tag-Along Election Notice, then the Transferor shall use all commercially reasonable efforts to obtain the agreement of the Proposed Purchaser to purchase all, but not less than all, of the Tag-Along Interests and the Additional Interests on the terms set forth in the Tag-Along Notice.

In the event the Proposed Purchaser declines to purchase all of the Tag-Along Interests and the Additional Interests, the Transferor and each Tag-Along Offeree timely exercising its Right of Tag-Along (each such Tag-Along Offeree, an “Exercising Member”) shall be entitled to Transfer the number of Common Interests, derived by multiplying the number of Common Interests the Proposed Purchaser is willing to purchase on such terms by a fraction, the numerator of which (X) in the case of the Transferor, is the number of Transferor Interests and (Y) in the case of an Exercising Member, is the number of Tag-Along Interests of such Exercising Member, and the denominator of which is the sum of (1) the number of Transferor Interests, plus (2) the number of Additional Interests.

(c) Consummation of the Tag-Along Sale.

If any of the Tag-Along Offerees properly exercise their Right of Tag-Along, the closing (the “Tag-Along Closing”) of the purchase of the Common Interests with respect to which such rights have been exercised shall take place concurrently with the closing and sale of the Common Interests of the Transferor(s), and in any event no later than one hundred twenty (120) days after the expiration of the Tag-Along Notice Period.

If none of the Tag-Along Offerees properly exercise their Right of Tag-Along, then the Transferor(s) will have (x) forty-five (45) days after the expiration of the Tag Election Period to draft, execute and deliver definitive documentation to Transfer the securities on terms and conditions **no more favorable** to the Transferor(s) than those proposed in the Tag-Along Notice for such proposed Transfer and (y) if such documentation is so drafted, executed and delivered, ninety (90) days thereafter to consummate the Transfer of the Transferor Interests. Any such securities not so Transferred by the Transferor(s) during such one hundred twenty (120) day period will again be subject to the provisions of this Section 12 upon a subsequent Transfer. **No Transfer shall occur pursuant to this Section 12 unless the Proposed Purchaser shall execute and deliver to the Company a Joinder Agreement.**

Each Exercising Member shall deliver to the Transferor(s), at the Tag-Along Closing, a fully executed interest transfer power representing the number of Common Interests to be Transferred by the Exercising Member, or other appropriate powers therefor duly executed, free and clear of all liens other than those imposed by applicable securities law or this Agreement.

At the Tag-Along Closing, such instruments will be Transferred and delivered to the Proposed Purchaser in consummation of the Transfer of the Transferor Interests and Additional Interests pursuant to the terms and conditions specified in such notice, and the Transferor(s) will remit, or will cause to be remitted, to the Exercising Member [at][within two (2) Business Days after] such Tag-Along Closing that portion of the proceeds of the Transfer to which the Exercising Member is entitled by reason of the Exercising Member's participation in such Transfer pursuant to the Right of Tag-Along .

If the Proposed Purchaser fails to purchase securities from any Exercising Member that has properly exercised its Right of Tag-Along in an amount required by this Section, then the Transferor shall not be permitted to make the proposed Transfer, and any such attempted Transfer shall be void and of no effect.

- ROFR prohibits the grantor from accepting a third-party offer to enter into a covered transaction without first offering the terms of the third-party offer to the ROFR holder(s)
- Why is it used?
 - Used as a means to control ownership of the company while allowing for transfer of equity interests by co-investors
- Who is typically bound by the ROFR?
 - Can be all equityholders or a particular subset
- How are such rights triggered?
 - Transferring equityholder receives an offer for its shares
- Who holds such rights?
 - Typically held by the company/investment vehicle and if not exercised by the company/investment vehicle, key equityholders typically have a secondary right
- Effect on marketability of shares
 - May depress value of shares due to third-party buyer's reluctance to move forward with the transaction if it is aware of the ROFR
 - If the third party buyer is aware of the ROFR, it may demand reimbursement for legal and diligence costs if the transaction doesn't close due to a ROFR holder exercising its rights

- Drag-along should expressly supersede rights of first refusal (i.e., Notwithstanding anything to the contrary herein, including [Right of First Refusal]...)
- Selling equityholder does not want to go through the ROFR process only to be left with a fraction of its shares
 - “Notwithstanding the [ROFR], if the total number of shares of transfer stock that the company and secondary holders have agreed to purchase is less than the total number of shares transferor desires to sell, then the company and the secondary holders shall be deemed to have forfeited any right to purchase such shares and the transferor is free to sell such shares to the third party”
 - This provision would be valuable to a controlling equityholder who was only able to attract a purchaser by offering to sell the controlling interest to a party who would not be interested in purchasing a smaller interest
- Interplay with Tag Along
 - If the agreement contains a ROFR, and such rights are not exercised by the company or the secondary holders, a tag along gives the non-invoking equityholder the right to participate in the sale on a pro rata basis (and the number of shares the invoking equityholder can transfer are correspondingly reduced)
- Selling equityholder must balance soliciting third party offers while complying with confidentiality obligations

- Grant. Each [Key Holder] hereby unconditionally and irrevocably grants to the Company a Right of First Refusal to purchase all or any portion of Transfer Stock that such stockholder may propose to transfer in a Proposed Key Holder Transfer, at the same price and on the same terms and conditions as those offered to the Prospective Transferee.
- Notice. Each [Key Holder] proposing to make a Proposed Transfer must deliver a Proposed Transfer Notice to the Company and each [Investor] not later than [forty-five (45)] days prior to the consummation of such Proposed Transfer. Such Proposed Transfer Notice shall contain the material terms and conditions (including price and form of consideration) of the Proposed Key Holder Transfer, the identity of the Prospective Transferee and the intended date of the Proposed Transfer. To exercise its Right of First Refusal, the Company must deliver a Company Notice to the selling [Key Holder] and the [Investors] within fifteen (15) days after delivery of the Proposed Transfer Notice specifying the number of shares to be purchased by the Company.
- Grant of Secondary Refusal Right. Each [Key Holder] hereby unconditionally and irrevocably grants to the [Investors] a Secondary Refusal Right to purchase all or any portion of the Transfer Stock not purchased by the Company pursuant to the Right of First Refusal, as provided in this Section 2.1(c). If the Company does not provide the Company Notice exercising its Right of First Refusal with respect to all Transfer Stock subject to a Proposed Key Holder Transfer, the Company must deliver a Secondary Notice to the selling [Key Holder] and to each [Investor] to that effect no later than fifteen (15) days after the selling [Key Holder] delivers the Proposed Transfer Notice to the Company. To exercise its Secondary Refusal Right, an [Investor] must deliver an Investor Notice to the selling [Key Holder] and the Company within ten (10) days after the Company's deadline for its delivery of the Secondary Notice as provided in the preceding sentence.
- Forfeiture of Rights. Notwithstanding the foregoing, if the total number of shares of Transfer Stock that the Company and the [Investors] have agreed to purchase in the Company Notice, Investor Notices and Undersubscription Notices is less than the total number of shares of Transfer Stock, then the Company and the [Investors] shall be deemed to have forfeited any right to purchase such Transfer Stock, and the selling [Key Holder] shall be free to sell all, but not less than all, of the Transfer Stock to the Prospective Transferee on terms and conditions substantially similar to (and in no event more favorable than) the terms and conditions set forth in the Proposed Transfer Notice, it being understood and agreed that (i) any such sale or transfer shall be subject to the other terms and restrictions of this Agreement; and (ii) such sale shall be consummated within forty-five (45) days after receipt of the Proposed Transfer Notice by the Company and, if such sale is not consummated within such forty-five (45) day period, such sale shall again become subject to the Right of First Refusal and Secondary Refusal Right on the terms set forth herein.

- ROFO requires the selling equityholder to make an offer to the holder(s) before making an offer to or soliciting an offer from any third party
 - Alternatively, ROFO can be structured to require the selling equityholder to notify the holder(s) of its intention to sell its shares, and require the non-transferring holder(s) to make an offer for such shares
- If the offer is refused by the holder(s) of the right, only then may the selling equityholder solicit third-party offers on the same terms that were presented to the non-selling equityholder(s).
- Essentially a first negotiation right
- Different way of achieving the same objective as ROFR – allows the non-selling equityholder(s) to control ownership of the company if it desires while allowing for transfer of equity interests by co-investors
- Less common than ROFR
- Similar to the ROFR, the selling equityholder does not want to go through the ROFO process only to sell a portion of its shares

- Right of First Offer. At any time prior to the consummation of an Initial Public Offering, and subject to the terms and conditions specified in this Section 2.01, each Member shall have a right of first offer if any other Member (the "Offering Member"), proposes to sell any Equity Securities (the "Offered Units") owned by it to any Independent Third Party. Each time the Offering Member proposes to Transfer any Offered Units (other than Transfers permitted pursuant to Section [permitted transfers section and Transfers made pursuant to [drag-along section]), the Offering Member shall first make an offering of the Offered Units to the other Members in accordance with the following provisions of this Section 2.01.
- Offer Notice. The Offering Member shall give written notice (the "Offering Member Notice") to the Company and the other Members stating its bona fide intention to Transfer the Offered Units and specifying the number of Offered Units and the material terms and conditions, including the price, pursuant to which the Offering Member proposes to Transfer the Offered Units.
- Exercise of Right of First Offer. Upon receipt of the Offering Member Notice, each Member shall have until the end of the ROFO Notice Period to offer to purchase all (but not less than all) of the Offered Units by delivering a written notice (a "ROFO Offer Notice") to the Offering Member and the Company stating that it offers to purchase such Offered Units on the terms specified in the Offering Member Notice. Any ROFO Offer Notice so delivered shall be binding upon delivery and irrevocable by the applicable Member. If more than one Member delivers a ROFO Offer Notice, each such Member (the "Purchasing Member") shall be allocated its Pro Rata Portion of the Offered Units, unless otherwise agreed by such Members.

- Also known as “Shotgun” or “Russian Roulette” provision
- It provides for one party to make an offer to either buy the other parties' membership interests or sell its own membership interest to the other parties at a stated price, and then allows the receiving parties to decide whether to participate on the buy side or the sell side
- Cake cutting analogy
 - The host cuts a slice of cake and the guest decides whether to eat the slice or require the host to eat the slice – this incentivizes the host to cut a “fair” slice
- Purpose
 - A way to deal with deadlock
 - Negotiate up-front when interests are aligned
 - Some agreements do not have a specific trigger – can be exercised at any time for any reason
- Works best when there are two equityholders – multiple equityholders will complicate the process

- Buy-Sell Offer Notice. If an Investor Member at any time wishes to exercise the buy-sell right provided in this Agreement, such Investor Member (the "Initiating Member") shall deliver to each other Investor Member (each, a "Responding Member") written notice (the "Buy-Sell Offer Notice") of such election, which notice shall include the purchase price [per unit] (the "Buy-Sell Purchase Price"), which shall be payable exclusively in cash (unless otherwise agreed), at which the Initiating Member shall (a) purchase all but not less than all of the Membership Interests owned by each Responding Member or (b) sell all but not less than all of its Membership Interests to the Responding Members.
- Response Notice. Within thirty (30 days after the Buy-Sell Offer Notice is received (the "Buy-Sell Election Date"), each of the Responding Members shall deliver to the Initiating Member a written notice (each, a "Response Notice") stating whether it elects to (a) sell all of its Membership Interests to the Purchasing Members for the Buy-Sell Purchase Price, or (b) buy all of the Membership Interests owned by the Initiating Member and any other Selling Members for the Buy-Sell Purchase Price. The failure of any Responding Member to deliver the Response Notice by the Buy-Sell Election Date shall be deemed to be an election to sell all of its Membership Interests to the Purchasing Members at the Buy-Sell Purchase Price.

- Preemptive rights give equityholders the right to buy a pro rata portion of future equity issuances the company makes
- Serves as anti-dilution protection for investors
- Customary exclusions
 - Equity issuances for the following purposes typically excluded from preemptive rights: (a) grants to consultants, employees, officers pursuant to equity-based compensation plans or other compensation agreements; (b) the conversion or exchange of any securities of the Company into equity interests, or the exercise of any warrants or other rights to acquire equity interests; (c) securities issued in an IPO; (f) shares issued as part of a stock split, payment of distributions or any similar recapitalization; and (g) warrants issued to lenders
- Who holds the preemptive rights?
 - Typically held by a subset of larger investors to avoid complicating subsequent financing rounds
- The Board may elect to reserve only a portion of the round for existing investors, with the balance to be offered exclusively to new investors
- Pay attention to the denominator used for purposes of calculating pro rata participation (typically fully diluted stock of the company but could be limited to securities held by the group holding the right, making the right a preemptive right in favor of such group)
- “over allotment,” or “oversubscription” provision and allows investors to purchase shares not purchased by other investors entitled to purchase rights

- Issuance of Additional Equity Securities. The Company hereby grants to each Member (each, a "Pre-emptive Member") the right to purchase its Pro Rata Portion of any new Equity Securities (other than any Excluded Securities) (the "New Units") that the Company may from time to time propose to issue or sell to any party.
 - "Excluded Securities" means Equity Securities issued in connection with: (a) a grant to any existing or prospective consultants, employees, officers or Managers; (b) the conversion or exchange of any securities of the Company into Units, or the exercise of any warrants or other rights to acquire Units; (c) any acquisition by the Company of any equity interests, assets, properties or business of any Person; (d) any merger, consolidation or other business combination involving the Company; (e) the commencement of any IPO or any transaction or series of related transactions involving a Change of Control; (f) a split of Units, payment of distributions or any similar recapitalization; or (g) any private placement of warrants to purchase Membership Interests to lenders or other institutional investors (excluding the Members) in any arm's length transaction providing debt financing to the Company.
- Exercise of Pre-emptive Rights. Each Pre-emptive Member shall for a period of 15 days following the receipt of an Issuance Notice (the "Exercise Period") have the right to elect irrevocably to purchase its Pro Rata Portion of the New Units at the purchase price set forth in the Issuance Notice by delivering a written notice to the Company. The closing of any purchase by any Pre-emptive Member shall be consummated concurrently with the consummation of the issuance or sale described in the Issuance Notice; provided, however, that the closing of any purchase by any Pre-emptive Member may be extended beyond the closing of the transaction in the Issuance Notice to the extent necessary to (i) obtain required Government Approvals (and the Company and the Members shall use their respective commercially reasonable efforts to obtain such approvals) and (ii) permit the Pre-emptive Members to complete their internal capital call process following the Exercise Period; provided, that the extension pursuant to this clause (ii) shall not exceed 60 days.

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