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CORPORATE GOVERNANCE IN THE U.S. PRIVATE CAPITAL MARKETS: AN ANALYSIS OF THE CERTIFICATES OF INCORPORATION OF VENTURE-BACKED PRIVATELY HELD SOFTWARE COMPANIES¹

GOVERNANÇA CORPORATIVA NO MERCADO PRIVADO NOS ESTADOS UNIDOS: UMA ANÁLISE DOS ATOS CONSTITUTIVOS DE SOCIEDADES FECHADAS DE SOFTWARE INVESTIDAS POR FUNDOS DE VENTURE CAPITAL

*Zora Lyra**

Abstract: The corporate governance of any given company evolves over time and is affected by several factors, including its industry, place of incorporation, types of shareholders, whether it has gone public, and market standards. This paper aimed to identify patterns in the corporate governance of private software companies during the period in which they received investments from venture capitalists through a comparison of the content of their certificates of incorporation. The author also analyzed the clauses of a model certificate of incorporation provided by the National Venture Capital Association - NVCA and assessed whether a selected sample of companies followed the NVCA's model and recommendations in terms of best practices of corporate governance.

Keywords: Corporate Governance. Software Companies. Venture Capital. Private Companies. U.S. Market. Charters. Certificates Of Incorporation. NVCA. Sample Clauses.

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Resumo: A governança corporativa de uma empresa evolui ao longo do tempo e é afetada por diversos fatores, incluindo seu setor, local de incorporação, tipos de acionistas, se a empresa é de capital aberto e os padrões de mercado. Este trabalho teve como objetivo identificar padrões na governança corporativa de empresas privadas de software durante o período em que receberam investimentos de capitalistas de risco, por meio da comparação do conteúdo de seus certificados de incorporação. A autora também analisou as cláusulas de um modelo de certificado de incorporação fornecido pela National Venture Capital Association - NVCA e avaliou se uma amostra selecionada de empresas seguiu o modelo e as recomendações da NVCA em termos de melhores práticas de governança corporativa.

Palavras-chave: Governança Corporativa. Empresas de Software. Capital de Risco. Empresas Privadas. Mercado dos EUA. Estatutos. Certificados De Incorporação. NVCA. Cláusulas Amostrais.

Summary: Introduction. 1. Methodology. 2. The NVCA Model Charter. 2.1. Redemption. 2.2. Play-to-play. 2.3. No Impairment. 2.4. Jurisdiction. 3. Valuation. 4. Voting provisions. 5. Additional Governance Metrics. Conclusion.

Introduction

This research project derived from the studies held during the Fall 2019 course in private ownership taught by professors Eric Talley and James (Jim) Millstein, the “Private Capital Seminar”, in which the central features of the private equity and venture capital markets were analyzed through several readings, oral presentations, and in-class discussions, as well as additional original legal research from my own.

The course intended to cover both the perspective of investors and the one of their portfolio companies, examining the legal and regulatory framework to which they are subject to and comparing the incentives applicable to the public and private capital markets. Ac-

ording to the literature and empirical evidence, the market for public offerings has been facing a considerable decline over the past decade² with such gap been fulfilled by private placements (e.g. it was raised \$3.0 trillion during 2017).³

Over the last decades, venture capital (“VC”) has been an important source of financing for innovative companies such as Amazon, Apple, Facebook, Google, and Netflix, having an enormous impact in the U.S. (and even global) economy. According to scholars, “it seems to be an established fact that VC funds have an impact on the development of new companies, and that expertise of the fund matters for performance”.⁴

In this sense, the success of VC-backed companies is frequently related to VCs taking actions that are effective at generating value (e.g. pre-investment screening, sophisticated contracting, and post investment monitoring and advising) and to the fact that they tend to solve the principal-agent problem in market economies, “connecting entrepreneurs with good ideas (but no money) with investors who have money (but no ideas)”.⁵

In terms of corporate governance, there are many differences between both markets, being the private one marked by more discretion, creativity, and negotiable terms, as well as less regulation, disclosure, and standard practices. Essentially, American private compa-

2 DE FONTENAY, Elisabeth. The Deregulation of Private Capital and the Decline of the Public Company. *Hastings Law Journal*, v. 68, n. 445, April 2017. p. 454.

3 BAGULESS, Scott. *et al.* Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings. Division of Economic and Risk Analysis (DERA) U.S. *Securities and Exchange Commission*, August 2018. p. 01-02.

4 ACHARYA, Viral V. *et al.* Corporate Governance and Value Creation: Evidence from Private Equity. *European Corporate Governance Institute (ECGI) - Finance Working Paper*, n. 232/2009, 2011. p. 8.

5 GOMPERS, P. A.; GORNALL, W.; KAPLAN, S. N. *et al.* How do venture capitalists make decisions? *Journal of Financial Economics*, [S. l.], v. 135, Issue 1, January 2020. See, also, GOMPERS, Paul; LERNER, Josh. *The Venture Capital Revolution. Journal of Economic Perspectives*, v. 15, n. 2, May 2001.

nies' management can, not only amend their charters whenever they need, but set forth different rights to different shareholders, and fully adapt their governance in accordance with their early/late-stage and size.

In addition to that, they do not need to comply with all the SEC disclosure requirements nor with the stock exchanges rules applicable to listed companies. Since investment terms are also negotiated prior to the investment itself, the probability of shareholders' activist and associated legal actions is also diminished.

The present analysis aimed to identify eventual patterns, trends, and the most remarkable corporate governance practices prescribed in the certificate of incorporation (or charters) from a sample of private companies in the U.S. technology industry – precisely, software companies – as well as eventual curiosities in their governance structure. These companies are basically controlled by venture capitalists⁶ who made long-term equity investments with the expectation of high returns when exiting such investments.

While this research gives emphasis to the governance of private tech companies, it is important to note that, in the past years, some top valued unicorns in the industry went public and provided, in general, a considerable profitable exit for its investors. Thus, when applicable, some comparisons will be made with the corporate governance of such unicorns, despite their current listed status.

VC investments are subject to a significant number of contractual terms and conditions, which enable these investors to control a variety of matters considered important to them through consent/veto rights.⁷ Among other elements, the influence that an investor has in a

6 GOMPERS, P. A.; GORNALL, W.; KAPLAN, S. N. *et al.* How do venture capitalists make decisions? *Journal of Financial Economics*, [S. l.], v. 135, Issue 1, January 2020. Also, GOMPERS, Paul; LERNER, Josh. *The Venture Capital Revolution. Journal of Economic Perspectives*, v. 15, n. 2, May 2001.

7 For example, changes to governing documents or rights of shares, related party transactions, certain significant transactions, including IPO, borrowing above a threshold amount, large acquisitions or dispositions, changes to capital structure or board size, disproportionate divi-

company governance appears to be affected by the timing of his entrance (e.g. investment rounds), the company's stage of the development (e.g. depending on the involvement of the founders), its capital needs, and the legal advisors involved.

The role of attorneys in closing a deal seems to be key in the private setting since there is substantial space for investors to negotiate individual rights enforceable throughout their investment – whether in terms of control power, economic benefits, or exit rights – before agreeing to finance the growing company. This contractual aspect is, in fact, the main challenge encountered during this research since most of the governance arrangements set by venture capitalists cannot be found in public record, being spread in the company's by-laws, side-letters, voting agreements, investors' rights agreements, right of first refusal and co-sale agreements, and other confidential documents⁸ which set forth additional rights and legal obligations to the parties.

Therefore, the corporate governance found in the charters analyzed hereinafter is likely only part of the framework of rights, duties, waivers, and other legal obligations existent in such VC-backed companies. Even the charters of private companies – all of which must be on public record – are not easily accessible.

1. Methodology

Over the last decades, regardless of their place of business, the majority of American (new) companies have chosen to be incorpo-

dends, appointment or removal of senior management, approval of annual budget and business plan, change in line of business, settlement of material litigation. These rights can be given to all ownership levels or can require a more significant stake.

⁸ Other contracts are cited in the NVCA Model Charter (analyzed below) as well as in some of the companies analyzed during the preparation of this research paper. The NVCA sample, for instance, makes direct reference to the Investors' Rights Agreement (see p. 39).

rated in Delaware⁹. For that reason, the first source considered for the purpose of this research was the Division of Corporations of the Delaware Department of State (“DoS”). Surprisingly, the Secretary of State’s office is still full of bureaucracy, with the charters solicited unavailable in its digital form or within a reasonable time. Moreover, there is a frequent mismatch between the names effectively used by tech companies and the ones registered in the DoS, which made the research even more defying. For such reasons, the requests made to this governmental body could not be used in the present research.

As an alternative, this research was based on the chartering history of 28 software companies available in the VC Experts database¹⁰ (collectively, the “Macro Sample”).¹¹ In addition, for the specific purpose of analyzing their valuations over time (see Section 3 below), this author collected information from each of the investment rounds of the Unicorns and the companies in the Sample available at Bloomberg and Preqin databases.¹²

After an initial screening, it was decided that the present piece would focus on specific provisions of the most recent charters of the following 9 companies from the Macro Sample: (i) Apptio Inc.; (ii) Bazaarvoice, Inc.; (iii) Jive Software, Inc.; (iv) Lithium Technologies, Inc.; (v) Plaid Inc.; (vi) SS8 Networks Inc.; (vii) Tangoe, Inc.; (viii) Updater Inc.; and (ix) Xactly Corporation (collectively, the “Sample”). For the analysis of specific metrics, this research also considered the governance structure of 2 other groups of corporations that compose the Macro Sample.¹³

9 EISENBERGAND, Melvin A; COX, James D. *Business Organizations: Cases and Materials*, Eleventh Edition Unabridged: Foundation Press, 2014. p. 205-207.

10 See <https://www.vcxperts.com/>. Access on: January 9, 2020.

11 Initially, Blue Space Technologies, Inc. and Unitrends Inc. were also in the Macro Sample.

12 The data used for this part of the research was extracted and compiled by a team focused on data analytics. This, the following disclaimer must be made: this author is not responsible for eventual misinformation derived from such research.

13 The charters of these 19 companies were analyzed in detail in another research carried out

First, the top 10 valued unicorns in the industry were analyzed: (i) Uber Technologies, Inc.; (ii) Palantir Technologies Inc.; (iii) Dropbox Inc.; (iv) Pinterest, Inc.; (v) Coinbase Global, Inc.; (vi) Slack Technologies Inc.; (vii) Lyft, Inc.; (viii) Doordash, Inc.; (ix) Maplebear Inc.; and (x) RobinHood Markets, Inc. (together, “Unicorns”).

Second, specific provisions of the following 9 companies¹⁴ from the Macro Sample were also examined: (i) Barracuda Networks, Inc.; (ii) Broadsoft Inc.; (iii) Connecture Inc.; (iv) Fonality Inc.; (v) Imperva, Inc.; (vi) Molecular Imprints Inc.; (vii) Rocket Fuel Inc.; (viii) Trustwave Holdings Inc.; and (ix) Virtual Instruments Inc.¹⁵

Considering that only the latest charters of the companies listed above were studied at this time, it should be noted that it was not possible to track the companies’ governance evolution over time, which would demand analyzing all charters’ versions.

The National Venture Capital Association - NVCA Model Charters from March 2011 and January 2018 were also analyzed with two main purposes. First, to verify the evolution of the model over time and, second, to track whether the companies in the software industry follow the “best practices” suggested by the NVCA. The NVCA is one of the leading resources for venture capital data, practical education, peer-led initiatives, and networking. In particular, it provides to the public models of key documents used to close private rounds of fund

by other students attending the Private Capital Seminar.

14 Relatively randomly selected.

15 The company Talyst, Inc. was, at first, included in the Macro Sample. However, considering that such company was incorporated in the state of Washington while all the others were incorporated in Delaware, and the NVCA Model Charter serves as template for Delaware corporations, the author opted to exclude such private legal entity from the present analysis. Mindbody Inc. was also analyzed in other research but the references to this company were excluded since it is a California company which was merged with a Delaware company in 2015 and no charter was provided in the referred databases after that.

raising, including the referred model of a certificate of incorporation, aiming to reduce the costs of the deals and speed up their closing.¹⁶

A methodology for systematizing and coding the latest charters' provisions while comparing them to the NVCA Model Charter was developed. In sum, to enable a cross-examination of the companies' governance, the following governance metrics were defined as the most important ones:¹⁷ (i) series of preferred shares; (ii) redemption rights; (iii) pay-to-play; (iv) no impairment; (v) blank check preferred; (vi) limitation on directors' liability; (vii) corporate opportunity waiver, as well as voting provisions,¹⁸ such as (viii) voting rights to elect the board; and (ix) voting restrictions¹⁹ (together, "Governance Metrics").²⁰ Considering its connection to the Governance Metrics, the issue of choice of jurisdiction (and the applicable state laws) was also addressed.

Considering that the companies analyzed were in different stages when their latest charter was filed, varying significantly in terms of date of incorporation, valuation, size, investment rounds, and number/types of series of preferred stocks, this author opted to present some examples that illustrate the governance of specific companies analyzed but also to report the findings of this research in an aggregated manner.

With these objectives, the author first analyzed the structure and utility of the NVCA Model Charter, highlighting some of the im-

16 See <https://nvca.org>. Access on January 9, 2020.

17 Information about cumulative dividends (none of the companies in the Sample had them) and liquidation preference types were also collected during the research but not analyzed in this paper.

18 For the analysis of the voting provisions, it was necessary to gather information on the number of directors as well.

19 Such as preferred share level protective provisions (i.e. specific number or percentage of outstanding shares required to elect directors) and unequal voting rights.

20 Some of these components are recurrently found in listed companies as well, another interesting analysis.

portant insights that their drafters provided. Second, the general results obtained from the comparative analysis of the Governance Metrics found in the charters of the Macro Sample companies were gathered. Third, the Governance Metrics were also examined by comparing the NVCA sample clauses with the provisions found in the companies' charters. Finally, the author presented her conclusions about the research conducted in this paper.

2. The NVCA Model Charter

According to the NVCA, their Model Legal Documents “are intended to reflect current practices and customs” while avoiding “hidden legal traps”.²¹ In each document, the NVCA points out certain issues and problematic provisions that have become “market standard” terms, adding some explanatory language to the sample clauses in footnotes. In general, these documents aim to:

- Reflect and in a number of instances, guide and establish industry norms
- Be fair, avoid bias toward the VC or the company/entrepreneur
- Present a range of potential options, reflecting a variety of financing terms
- Include explanatory commentary where necessary or helpful
- Anticipate and eliminate traps for the unwary (e.g., unenforceable or unworkable provisions)
- Provide a comprehensive set of internally consistent financing documents
- Promote consistency among transactions
- Reduce transaction costs and time²²

21 See Model Legal Documents, NVCA. Available at: <https://nvca.org/model-legal-documents/>. Access on January 9, 2020.

22 *Ibidem*.

Besides its Model Charter, the NVCA provides sample documents of a voting agreement, term sheet, stock purchase agreement, co-sale agreement, investor rights agreement, as well as several other policies and codes. Considering the scope of this research, only the Certificate of Incorporation model will be analyzed herein.

The NVCA Model Charter provides sample clauses designed in accordance to: (i) Delaware General Corporation Law (“DGCL”), (ii) California Corporate Code (“CCC”), (iii) the evolution of Delaware and California case law, (iv) industry practices, (v) the interests of different stockholders,²³ and (vi) recent developments in the industry/corporate field.²⁴ The document was conceived to address the needs of and serve as a template to a company on the verge of receiving its first round of venture capital funds, only mentioning the existence of common stockholders and series A preferred stock.²⁵

23 The introductory part of the Model Charter states that the following clauses are a “statement of the designations and the powers, privileges and rights, and the qualifications, limitations or restrictions thereof in respect of each class [and series of class] of capital stock of the Corporation” (NVCA Model Document Certificate of Incorporation, 2018. p. 3. Available at: <https://nvca.org/model-legal-documents/>. Access on January 9, 2020).

24 In this regard, it should be noted the raise of tokens and Initial Coin Offerings - ICOs. The 2018 NVCA model charter has new protective provisions specifically related to them: “3.3. At any time when [shares of Series A Preferred Stock] [at least [____] shares of Series A Preferred Stock (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to the Series A Preferred Stock)] are outstanding, the Corporation shall not, either directly or indirectly by amendment, merger, consolidation or otherwise, do any of the following without (in addition to any other vote required by law or this Amended and Restated Certificate of Incorporation) the written consent or affirmative vote of the Requisite Holders given in writing or by vote at a meeting, consenting or voting (as the case may be) separately as a class, and any such act or transaction entered into without such consent or vote shall be null and void ab initio, and of no force or effect. 3.3.5 cause or permit any of its subsidiaries to, without approval of the [Board of Directors, including the Series A Director], sell, issue, sponsor, create or distribute any digital tokens, cryptocurrency or other blockchain-based assets (collectively, “Tokens”), including through a pre-sale, initial coin offering, token distribution event or crowdfunding, or through the issuance of any instrument convertible into or exchangeable for Tokens” (p. 16).

25 Distinctively, every company in the Sample has more than one Series of Preferred Stocks. Even Tangoe, Inc., corporation from which we only have its 2006 charter – 6 years after its

A comparison made between the models made available in March 2011²⁶ and January 2018²⁷ indicates that the core structure of the document²⁸ and most sample clauses remain the same,²⁹ although some language was introduced to reflect changes in the case law, as well as to define, clarify and complement certain concepts and topics.³⁰

2.1. Redemption

For instance, although there are redemption provisions in both versions of its Model Charter,³¹ the NVCA changed its comments about it. In the 2011 NVCA Model Charter there was a footnote³² saying that “[r]edemption provisions are more common in East Coast venture transactions than in West Coast venture transactions”, which was replaced by a more persuasive note suggesting its adoption:

incorporation in 2000 – has Series A, B, C, D, D1, and E preferred shares issued.

26 See NVCA Model Document Certificate of Incorporation, 2011. Available at: <https://nvca.org/model-legal-documents/>. Access on: January 9, 2020.

27 See NVCA (2018), *Op. Cit.*

28 The first part of the document has preliminary notes from its drafters and the second part has the model charter itself. There are footnotes in the sample clauses explaining the rationale for them, making references to applicable laws or precedents, or suggesting alternative clauses.

29 Therefore, it can be understood that, according to the NVCA, there were no significant changes in the industry best practices – or the ones to be avoided – over the years.

30 E.g. Deemed liquidation events; a sale of “all or substantially all” of the company’s assets (with the consideration of intellectual property); the determination of the fair market value of securities; the allocation of earn-out or performance-based consideration; indemnity escrows and holdbacks, among others.

31 Nowadays, the document has a redemption clause with additional language (e.g. payment of interest in case the relevant preferred shares are not redeemed in due time) and comments related to judicial holdings (see *The Frederick Hsu Living Trust v. ODN Holding Corporation*, Case No. C. A. 12108-VCL (Del. Ch. Ct. Apr. 14, 2017); *TCV VI, L.P. v. Trading Screen, Inc.*, Case No. C.A. 10164-VCN (Del Ch. Ct. Feb. 26, 2015, redacted March 27, 2015)).

32 NVCA (2011), *Op. Cit.*, footnote 70. p. 35.

In the wake of the Delaware Chancery Court's opinion in *re Trados Inc. S'holder Litigation*, Case No. C.A. 1512-CC (Del. Ch. Ct. 7/July 24/09, 2009), investors may be foregoing a substantial protection/benefit if they do not have the right to put their shares back to the company at a time when they may wish to seek the sale of the company.

This change in approach might reflect both the case law evolution but also the fact that this was still not a common practice in the industry in 2018. Chart A (see Appendix A) contains an analysis of the Macro Sample charters, which reveals that only 8 out of the 28 software companies studied provided redemption rights to their – usually preferred – stockholders in their charters.

Although one may infer that there is a correlation between the charters' date³³ and the inexistence of such provision, other factors shall be taken into consideration. For instance, it is possible that redemption rights were provided in other corporate documents, as the following provision found in the charter of SS8 Technology, Inc. suggests:

Except as may otherwise be provided in a written agreement between the Corporation and a holder of Preferred Stock or the Bylaws of the Corporation, neither this Corporation nor the holders of Preferred Stock shall have the unilateral right to call or redeem or cause to have called or redeemed any shares of the Preferred Stock.³⁴

33 The oldest charter analyzed was dated 2006 and the newest 2019. 5 charters were dated 2018 and 4 were dated 2019. Only 1 out of these 9 charters purportedly filed after the 2018 NVCA Model Charter was made available had redemption rights in it.

34 There was an equivalent provision for common stockholders: "Except as may otherwise be provided in a written agreement between This Corporation and a holder of Common Stock or the Bylaws of this Corporation, neither this Corporation nor the holders of Common Stock shall

2.2. Pay-to-play

The NVCA drafters provide the users of its sample charter with preliminary notes with important tips, disclaimers, and explanation about the meaning, purpose, risks, and mechanism of certain provisions, according to their view.

For instance, the document educates that a “pay-to-play” provision is a clause pursuant to which a preferred stock investor is penalized if s/he fails to invest, to a specified extent, in certain future investment rounds. It adds up suggesting that such clause may determine the conversion of the preferred stocks held by non-participating investors (specific series or all of them) into common stocks.

According to the drafters, this structure is generally preferable because:

(1) this is a harsher penalty; (2) under Delaware law, certain charter amendments may not be effected without the approval of the holders of a majority of the outstanding shares of the new shadow series of Preferred Stock; and (3) conversion to Common Stock avoids the complexities associated with the creation of the shadow series of Preferred Stock.³⁵

The drafters also inform users about the existence of an alternative structure that contemplates the conversion into a new series of preferred stocks instead of common stocks, highlighting some precautions that must be taken if one opts to use this type of pay-to-play clause:

have the unilateral right to call or redeem or cause to have called or redeemed any shares of Common Stock”. See Amended and Restated Certificate of Incorporation of SS8 Networks, Inc. State of Delaware, Secretary of State, Division of Corporations. Filed 8:13 AM 11/27/2013 – SRV 131356215 – 3326536 FILE. p. 6;15.

35 See NVCA, 2018. p. 32.

An alternative provision which provides for conversion of some or all of the Series A Preferred Stock held by non-participating investors into a new series of Preferred Stock (e.g., Series A-1 Preferred Stock) identical to the Series A Preferred Stock but with no anti-dilution protection and no further pay-to-play provision is also sometimes used. It is the drafters' view that this latter provision is not seen very frequently and therefore it has been intentionally omitted from this Amended and Restated Certificate of Incorporation. In the event such a provision is used, careful attention should be paid to the mechanics of implementing the creation of the additional series of Preferred Stock, which may include the authorization of blank check preferred (as described below).³⁶

Despite the NVCA recommendation, it is interesting to note that none of the companies in the Sample included in their charters a pay-to-play provision – referred to as a “special mandatory conversion” in the Chart Model. On the other hand, the certificates of incorporation analyzed prescribed other events as triggers for “optional” or “mandatory” conversions (i.e. an IPO event), both found in almost all charters in a standardized form.³⁷

³⁶ NVCA, 2018. p. 41.

³⁷ In this regard, the NVCA Model Charter has the following language: “Trigger Events. Upon either (a) the closing of the sale of shares of Common Stock to the public at a price of at least \$[_____] per share (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to the Common Stock), in a firm-commitment underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, resulting in at least \$[_____] of [gross] proceeds [, net of the underwriting discount and commissions,] to the Corporation and in connection with such offering the Common Stock is listed for trading on the Nasdaq Stock Market’s National Market, the New York Stock Exchange or another exchange or marketplace approved by the Board of Directors[, including the approval of [at least one] Series A Director] or (b) the date and time, or the occurrence of an event, specified by vote or written consent of the Requisite Holders*”

2.3. No Impairment

The document also refers to the so called “no impairment” clause. Although the drafters did not include this type of clause on the Model Charter, they explained their reasoning behind this decision. According to them:

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, 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 antidilution and conversion rights, certain law firms have taken the position that the existence of a “no impairment” clause in the Certificate of In-

(the time of such closing or the date and time specified or the time of the event specified in such vote or written consent is referred to herein as the “Mandatory Conversion Time”), then (i) all outstanding shares of Series A Preferred Stock shall automatically be converted into shares of Common Stock, at the then effective conversion rate as calculated pursuant to Subsection 4.1.1. and (ii) such shares may not be reissued by the Corporation” (pp. 30-31). See also the drafter comments about the existent caselaw: “See *Greenmont Capital Partners I, LP v. Mary’s Gone Crackers, Inc.*, Case No. C.A. 7265VCP (Del. Ch. Ct. Sept. 28, 2012) in which plaintiff, who did not have a blocking vote on mandatory conversion, unsuccessfully argued that its blocking vote on actions that would “alter or change” its rights under the Charter prevented the majority of Preferred holders from converting all Preferred to Common Stock. See also *Alta Berkeley VI C.V. v. Omeneon, Inc.*, Case No. 442,2011 (Del. Supreme Ct. March 5, 2012) in which plaintiff, who did not have a blocking vote on mandatory conversion, unsuccessfully argued that it was entitled to its liquidation preference (rather than its Common Stock payout) where its stock was converted to Common prior to a liquidation event” (NVCA, 2018).

corporation 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 Amended and Restated Certificate of Incorporation. (p. ‘i’)

Despite of these caveats, the drafters note that it is not uncommon to see counsels to the investors including such provision when drafting a certificate of incorporation. The Sample analysis illustrated in Chart B confirms that, since 4 out of 9 companies have “no impairment” clauses (see Appendix B).³⁸

For the purpose of a full comprehension of the drafters’ reasoning, the no impairment provisions found in, respectively, the charters of Bazaarvoice, Inc.,³⁹ Jive Software, Inc.,⁴⁰ Lithium Technologies, Inc.,⁴¹ and SS8 Network, Inc.,⁴² are transcribed below:

38 It should be noted that there is no substantial correlation with the charters’ date.

39 Amended and Restated Certificate of Incorporation of Bazaarvoice, Inc. State of Delaware, Secretary of State, Division of Corporations. Filed 10:15 AM 02/29/2012 – SRV 120249205 – 3975846 FILE. p. 12.

40 Amended and Restated Certificate of Incorporation of Jive Software, Inc. State of Delaware, Secretary of State, Division of Corporations. Filed 12:51 PM 07/19/2010 – SRV 100751714 – 3352643 FILE. p. 13.

41 Amended and Restated Certificate of Incorporation of Lithium Technologies, Inc. State of Delaware, Secretary of State, Division of Corporations. Filed 2:31 PM 04/16/2015 – SRV 150520821 – 3426469 FILE. p. 14.

42 Amended and Restated Certificate of Incorporation of SS8 Networks, Inc. State of Delaware, Secretary of State, Division of Corporations. Filed 8:13 AM 11/27/2013 – SRV 131356215 – 3326536 FILE. p. 11.

The Corporation will not, by amendment of its Certificate of incorporation or through any reorganization, recapitalization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed under the Restated Certificate. The Corporation will at all times and in good faith assist in the carrying out of all the provisions of this Section 4.3 and in the taking of all such action as may be necessary or appropriate in order to protect the conversion rights of the holders of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series E Preferred Stock set forth in this Section 4.3 against impairment. This provision shall not restrict the Corporation's right to amend its Certificate of incorporation with the requisite stockholder consent.

This corporation will not, without the appropriate vote of the stockholders under the General Corporation Law of the State of Delaware or Section 6 of this Article II(B), by amendment of its Third Amended and Restated Certificate of Incorporation or through any reorganization, recapitulation, transfer of assets, consolidation, merger, dissolution, issues or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by this corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 4 and in the taking of all such action as

may be necessary or appropriate in order to protect the Conversion Rights of the holders of the Preferred Stock against impairment.

The corporation will not, by amendment of this Restated Certificate or through any reorganization, recapitalization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 3 and in the taking of all such action as may be necessary or appropriate in order to protect the conversion rights of the holders of Preferred Stock against impairment: provided, however, that nothing in this paragraph shall prevent the Corporation from amending its certificate of incorporation upon the requisite approval of its stockholders.

This Corporation will not, unless with the prior written consent of the holders of a majority of the shares outstanding Preferred Stock, voting on an as converted basis, by amendment of this Certificate of Incorporation or through any reorganization, recapitalization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by this Corporation, under this Article IV.B.4, but

will at all times in good faith assist in the carrying out of all the provisions of this Article IV.B.4 and in the taking of all such action as may be necessary or appropriate in order to protect the Conversion Rights of the holders of Preferred Stock against impairment.

2.4. Jurisdiction

The initial part of the NVCA Chart Model also addresses the issue of the choice of jurisdiction, mentioning that the document was set up for a portfolio company incorporated in Delaware. The form points out some of the reasons behind the fact that Delaware is, generally, the preferred jurisdiction for incorporation of venture-backed companies, which include:

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.⁴³

43 See NVCA, 2018. p. ‘ii’ and ‘iii’.

While most U.S. corporations are incorporated in Delaware, many of them are located and have shareholders in other states such as California. A company's place of business and the number of Californian shareholders must be a matter of concern for founders, managers, directors, and investors since they can attract the applicability of the CCC.

In this regard, Section 2115 of the CCC establishes that if a private company has more than half of its shareholders and more than half of its "business"⁴⁴ located in California, regardless of its state of incorporation, certain provisions of California corporate law will be applicable to the corporation. It is interesting to note that two companies from the Sample expressly mention in their charters the non-application of the CCC to certain transactions,⁴⁵ probably trying to contractually avoid the referred legal provision.

The NVCA Model Charter highlights this particular situation of certain companies incorporated in Delaware, bringing important considerations for these "quasi-California" corporations. In this sense, the document mentions the purported applicability of the CCC's provisions on mergers, reorganizations, and asset sales (including voting and dissenters' rights) to these "quasi-California" corporations.⁴⁶

Another provision applicable to these "quasi-California" corporations is the CCC's restriction on distributions to shareholders, i.e. the payment of dividends and stock redemptions, unless certain criteria is fulfilled.⁴⁷ As mentioned in the drafters' notes, these companies

⁴⁴ There is a formula to be calculated that based on property, payroll, and sales.

⁴⁵ See Lithium Technologies, Inc. and Plaid, Inc.

⁴⁶ I.e., Section 1001 and 1101, and Chapter 12 and 13 of the CCC. For instance, it may be required a common stock class votes on sale transactions, so parties should consider whether voting agreements are appropriate in "quasi-California" companies. They also include a requirement of a fairness opinion in connection with certain interested party transactions.

⁴⁷ The document also indicates that the CCC establishes that directors will be liable to the corporation for illegal distributions if they acted willfully or negligently with respect to such distribution (Section 316(a)(1), CCC).

“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”.⁴⁸ In this regard, the document underlines the following:

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).⁴⁹

On the other hand, the NVCA’s drafters educate the readers about situations in which California corporate law is not applicable, some of which have evolved over the years according to the case law in both states. For instance, cumulative votes – i.e. whether shareholders are permitted to cumulate votes in the election of directors – are treated differently in both states.

The drafters indicate that, according to Section 214 of the DGCL, this right is only enforceable in Delaware if prescribed in the company’s certificates of incorporation. On the other hand, this requirement does not exist in California. Thus, this is a tricky situation for “quasi-California” corporations that, in principle, have to comply with the laws of both states⁵⁰. None of the companies in the Sample

48 See NVCA, 2018. p. ‘iii’ and ‘iv’.

49 Ibid. See references to Sections 500 and 166 of the CCC.

50 In its preliminary notes, the document brings some case law signaling that companies incorporated in Delaware are not subject to this specific provision of the CCC, “insofar as they purport to regulate what stockholder vote is required to approve a corporate action”. See *Lidow v. Superior Court*, 141 Cal. Rptr. 3d 729 (Cal. Ct. App. 2012); *VantagePoint Venture Partners 1996 v. Examen* (Del. 2005).

– all incorporated in Delaware – allows cumulative votes. It is interesting to note that while some of the charters simply do not address the topic, others expressly forbid cumulative voting.

3. Valuation

Bloomberg and Preqin keep track of some relevant numbers from the Sample and the Unicorns, compiled in Chart C below (Appendix C), which reveal the impact of the series of investments made in them in terms of valuation.⁵¹ According to the data obtained, these 19 companies were able to raise almost US\$30 billion privately since 2007.⁵²

The numbers in Chart C can also be seen as a strong indicative that companies are choosing to remain private in spite of their businesses late-stage of development and sophistication, since only few of the companies catalogued have gone public through an Initial Public Offering (Uber, Lyft, Pinterest) or Direct Public Offerings (Slack), and even these ones have remained private for a long time, with billionaire valuations.

The total amount invested in the relevant periods of time – years between the first and last charters filed – reveal a positive correlation between such number and the companies' valuation over the years, with the valuation surpassing the sum financed in every case.

Although Chart C does not show the valuation in each round precisely, further analysis revealed that each valuation made for the

51 Since a company's valuation is made prior to each investment round, it is possible to compare such valuations with the one made for subsequent rounds.

52 There is uncertainty about this exact number. Other sources suggest that some of the companies already had new investment rounds (i.e. had filed new restatements of their certificates of incorporation) and it may consider some IPO-related metrics.

purpose of a new investment round was higher than the one before, with one exception only.⁵³

Regarding the amounts contributed to each round, they vary significantly depending on the company, making it difficult to find a strong positive correlation between the stage of the company and its financial needs (see Chart C). Considering these elements and trusting in the valuations made privately,⁵⁴ it is possible to infer that an exit from such investments generated or would generate a high return to their investors.

For the purpose of the present research, it is important to note that each new investment round demands filing an amended and restated certificate of incorporation within the DoS, usually introducing a new series of shares with new economic and/or voting rights, as well as changing the total number of outstanding shares and thresholds associated with capital ownership.

Therefore, every round leads to a new and more complex governance structure, since the rights of each of the series of preferred shareholders, as well as common shareholders, must co-exist in a harmonized manner. Moreover, the insertion of new shareholders often changes the structure of the board of directors. Following this rationale, since focused on the latest charter filed by the companies in the Sample, this research analyzed the highest level of governance in these companies' lifetime.

4. Voting provisions.⁵⁵

53 This is the case of Xactly, Inc. in 2009. Furthermore, it is important to disclaim that two other companies (DoorDash, Inc. and Palantir, Inc.) had one investment round each (in 2016 and 2006, respectively) in which, in spite of the fact that their valuation increased, the new series of preferred stock were issued at a lower price.

54 There are many critiques regarding the reliability of private valuations in the literature.

55 Details about the analysis of Sample voting provisions can be found in Chart D (see Appendix D).

The governance of a corporation is intrinsically related to the voting rights given to each stockholder – in particular, the right to elect directors. According to the Sample analysis, in this industry and at their stage of development, except for two situations analyzed below, preferred stockholders usually have the same political rights of common stockholders – as they were a single class, on an as converted basis. Indeed, most of the companies in the Sample have in their charters language similar to the one found in the NVCA Model Charter, which goes as follows:

[...] Except as provided by law or by the other provisions of this Amended and Restated Certificate of Incorporation, holders of Series A Preferred Stock shall vote together with the holders of Common Stock as a single class and on an as converted to Common Stock basis.

As mentioned above, the NVCA model establishes that, as a general rule, the holders of series A preferred stocks should vote together with the holders of common stocks as a single class and on an as converted to common stock basis. However, there are two main exceptions to this rule, for which the NVCA Model Charter provides different sample clauses: (i) voting rights for the election of directors; and (ii) votes that affect (specific) preferred stockholders only,⁵⁶ including the election of certain directors.⁵⁷

56 In this case, some companies have express provisions excluding the participation of common stockholders or establishing consent rights in specific situations (see NVCA Model Charter and SS8 Networks, Inc.'s charter (Amended and Restated Certificate of Incorporation of SS8 Networks, Inc. State of Delaware, Secretary of State, Division of Corporations. Filed 8:13 AM 11/27/2013 – SRV 131356215 – 3326536 FILE).

57 The insights given by the drafters can play an important role when carrying the model to real life. In this topic, they comment the following: “[w]here a class or series is given the right to elect a director in the certificate of incorporation, Delaware law provides that the removal of that director other than for cause must be effected by the vote of the stockholders of the applicable class or series and not by the stockholders generally. Likewise, it is important to replace any such director by either (i) the vote of the stockholders of the applicable class or

The NVCA Model Chart provides a general sample clause to cover subject matters related to preferred shareholders only, which states that in these cases, common stockholders are not entitled to vote.⁵⁸

1. General. The voting, dividend and liquidation rights of the holders of the Common Stock are subject to and qualified by the rights, powers and preferences of the holders of the Preferred Stock set forth herein.

2. Voting. The holders of the Common Stock are entitled to one vote for each share of Common Stock held at all meetings of stockholders (and written actions in lieu of meetings); provided, however, that, except as otherwise required by law, holders of Common Stock, as such, shall not be entitled to vote on any amendment to this Amended and Restated Certificate of Incorporation that relates solely to the terms of one or more outstanding series of Preferred Stock if the holders of such affected series are entitled, either separately or together with the holders of one or more other such series, to vote thereon pursuant to this Amended and Restated Certificate of Incorporation or pursuant to the General Corporation Law]. [There shall be no cumulative voting.] [The number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares thereof then outstanding) by (in addition to any vote of the holders of one or more series of Preferred Stock that may be required by the terms of this Amended and Res-

series or (ii) if the class or series is given the right to elect multiple directors, the remaining director(s) elected by such class or series.” (NVCA, 2018)

58 NVCA, 2018. p. 03.

tated Certificate of Incorporation) the affirmative vote of the holders of shares of capital stock of the Corporation representing a majority of the votes represented by all outstanding shares of capital stock of the Corporation entitled to vote, irrespective of the provisions of Section 242(b)(2) of the General Corporation Law.]

The NVCA's suggestion for this type of protective provision is compatible with the concrete examples studied, as the clause extracted from the SS8 Networks, Inc.'s charter transcribed below indicates:⁵⁹

4. Voting Rights. The holder of each share of Common Stock shall have the right to one vote for each such share, and shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of this Corporation, and shall be entitled to vote upon such matters and in such manner as may be provided by law; provided that except as otherwise required by law, the holders of Common Stock, as such, shall not be entitled to vote on any amendment to this Certificate of incorporation (including any Certificate of Designation relating to any series of Preferred Stock) that relates solely to the terms of one or more outstanding series of Preferred Stock if the holders of such affected series are entitled, either separately or together with the holders of one or more other such series, to vote thereon pursuant to this Certificate of Incorporation (including any Certificate of Designation relating to any series of Preferred Stock) or pursuant to the DGCL.

59 Amended and Restated Certificate of Incorporation of SS8 Networks, Inc. State of Delaware, Secretary of State, Division of Corporations. Filed 8:13 AM 11/27/2013 – SRV 131356215 – 3326536 FILE.

Regarding the second exception, the NVCA Model Charter establishes that preferred stockholders would vote as separate classes, having the right to elect an exact number of directors (to be defined)⁶⁰. The voting power to elect designated preferred directors varies significantly among the Sample, taking different forms. In some companies, all or certain series of preferred shares vote together to elect a fixed number of directors (as a class or subclass), while in others each series has the right to elect a fixed number of members (usually one per series).

It is interesting to note that 4 companies only entitle such “individual” voting rights if the class or series keeps a minimum number of outstanding stocks, establishing a “preferred share level” provision (see Chart D).⁶¹

In addition to that, it is common to find provisions demanding that both common and preferred stockholders, voting together as they were a single class, elect the remaining directors – sometimes considered to be “independent directors”, as in the example below.⁶²

(v) The holders of shares of Common Stock and Preferred Stock shall be entitled, voting together as a single class, to elect the remaining directors (each an “independent Director”, and collectively, the “independent Directors”) of this Corporation at or pursuant to each meeting or consent of this Corporation’s stockholders for the election of directors, to remove from office such directors, to fill any vacancy caused by the resignation or death of such directors and to fill any vacancy (by unanimous consent if done in writing, or by ma-

60 See sample clause 3.2, NVCA, 2018, *Op. Cit.*, p. 13-14.

61 Apptio Inc; Plaid, Inc.; SS8 Networks, Inc., Updater Inc. See “Pref. Share Level (elect directors)” column, Appendix D.

62 See SS8 Network, Inc.’s charter. p. 14.

majority vote otherwise) caused by the removal of any such directors.

As indicated in Chart D, as a general rule, (i) the number of directors is set forth in the company bylaws not in their charters;⁶³ (ii) the number of designated preferred directors varies from 2 to 5 depending on the number of series of preferred stocks; and (iii) preferred stockholders have the right to elect the majority of the board.

Jive Software, Inc. is the only outlier regarding the attribution of power to elect board members.⁶⁴ According to clause 5.2 of its 2010's charter transcribed below, there is a balance between the powers attributed to common and preferred stocks, which have the right to elect the same number of directors:

5.2 Voting for the Election of Directors. The holders of a majority of the outstanding shares of Series A Preferred Stock and Series B Preferred Stock, voting together as a single class and not as separate series, and on an as converted to Common Stock basis, shall be entitled to elect one (1) member of the Board of Directors of this corporation at each annual (or special) election of directors. The holder of a majority of the outstanding shares of Series C Preferred Stock, voting as a separate class, shall be entitled to elect one (1) member of the Board of Directors of this corporation at each annual (or special) election of directors. The holders of a majority of the outstanding shares of Preferred Stock, voting together as single class and not as separate series, and on an

63 Except for SS8 Network, Inc. The data contained in Chart D on this topic was collected from other sources/research.

64 See Amended and Restated Certificate of Incorporation of Jive Software, Inc. State of Delaware, Secretary of State, Division of Corporations. Filed 12:51 PM 07/19/2010 – SRV 100751714 – 3352643 FILE.

as-converted to Common Stock basis, shall be entitled to elect one (1) member of the Board of Directors of this corporation at each annual (or special) election of directors. The holders of a majority of the outstanding shares of Common Stock shall be entitled to elect three (3) members of the Board of Directors of this corporation at each annual (or special) election of directors. The remaining members, of the Board of Directors of this corporation shall be elected by the vote of the holders of Preferred Stock and Common Stock (voting together as a single class and not as separate classes, and, with respect to the Preferred Stock, on an as-converted to Common Stock basis) at each annual (or special) election of directors.

Another interesting case is found in 2019's Plaid, Inc.'s charter,⁶⁵ which grants to directors who are founders of the company extra voting rights. Moreover, such company has a significant voting restriction to the holders of its Series B-1 Preferred stocks:

(b) Regulatory Voting Restriction. Notwithstanding the stated or statutory voting rights of holder, of shares of Series B-1 Preferred Stock, in no event shall a Regulated Holder (as defined below) and its Transferees (as defined below), collectively, be entitled to vote shares representing more than 4.99% of the voting power of all shares entitled to vote on any matter (including matters with respect to which such holders are entitled to provide their consent) including matters with respect to which:

(i) the Series B Preferred Stock and the Series B-1

⁶⁵ Amended and Restated Certificate of Incorporation of Plaid, Inc. State of Delaware, Secretary of State, Division of Corporations. Filed 04:47 PM 11/04/2019 – SR 20197898867 – File Number 5185168. p. 16.

Preferred Stock vote together as a single class;
(ii) the Preferred Stock votes together as a single class;

or

(iii) the Preferred Stock votes with shares of Common Stock as a single class on an as-converted basis (such voting rights to be allocated pro rata among the Regulated Holder and its Transferees based on the number of shares of Series B-1 Preferred Stock held by each such holder); provided however, that, if there are no shares of Series B Preferred Stock outstanding, the ownership of shares of Series B-1 Preferred Stock will not convey to the holder thereof any right to vote for matters on which shares of Series B Preferred Stock and Series B-1 Preferred Stock are entitled to vote as a single class, and in the event there are no shares of Preferred Stock outstanding other than the Series B-1 Preferred Stock, the ownership of shares of Series B-1 Preferred Stock will not convey to the holder thereof any right to vote for matters on which shares of Preferred Stock are entitled to vote as a single class; provided, further, that the Regulatory Voting Restriction shall not apply to matters requiring approval of the holders of shares of Series B-1 Preferred Stock pursuant to Section 7 below or as otherwise provided expressly herein. The restrictions described in this Section 5(b) are referred to herein as the “Regulatory Voting Restriction.”

Finally, it is important to highlight that one of the companies examined has a blank check preferred provision in its charter, Tangoe, Inc.⁶⁶ In other terms, its Board of Directors has the authority to create new series of Preferred Stock and establish the rights and pref-

⁶⁶ Amended and Restated Certificate of Incorporation of Tangoe, Inc. State of Delaware, Secretary of State, Division of Corporations. Filed 6:33 PM 08/11/2016 – SRV 060756727 – 3174109 FILE, p. 30.

erences of such series without the need to obtain stockholder approval to amend the certificate of incorporation. In the opposite direction of the NVCA recommendations and comments – the drafters indicate that it is unusual to include a blank check preferred clause in a certificate of incorporation – such corporation gives to its board full discretion in this regard, as follows:

Board of Directors from time to time to issue the Preferred Stock in one or more series, and in connection with the creation of any such series, by resolution or resolutions providing for the issue of the shares thereof, to determine and fix such voting powers, full or limited, or no voting powers, and such designations, preferences and relative participating, optional or other special rights, and qualifications, limitations or restrictions thereof, including without limitation thereof; dividend rights, special voting rights, conversion rights, redemption privileges and liquidation preference, as shall be stated and expressed in such resolutions, all to the full extent now or hereafter permitted by the DGCL. Without limiting the generality of the foregoing, the resolutions providing for issuance of any series of Preferred Stock may provide that such series shall be superior or rank equally or be junior to the Preferred Stock of any other series to the extent permitted by law. Except as otherwise specifically provided in this Certificate of Incorporation, as amended from time to time, no vote of the holders of the Preferred Stock or Common Stock shall be a prerequisite to the issuance of any shares of any series of the Preferred Stock authorized by and complying with the conditions of this Certificate of Incorporation, the right to have such vote being expressly waived by all present and future holders of the capital stock of the Corporation.

5. Additional Governance Metrics

Chart E shows the analysis of two additional governance features: a statutory directors' limitation of liability and a business opportunity clause (see Appendix E). The NVCA document suggests the inclusion of a statutory limitation of directors' liability for breach of duty of care⁶⁷ and indeed all companies in the Sample have this clause in their charters. Furthermore, the Model Chart recommends the use of a business opportunity clause, used to renounce a corporation's interest in specified business opportunities (the "excluded" opportunities).⁶⁸ The charters' analysis carried out found five companies with this clause in their certificates of incorporation.⁶⁹

67 "To the fullest extent permitted by law, a director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. If the General Corporation Law or any other law of the State of Delaware is amended after approval by the stockholders of this Article Ninth to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the General Corporation Law as so amended." (NVCA, 2018. p. 39).

68 "The Corporation renounces, to the fullest extent permitted by law, any interest or expectancy of the Corporation in, or in being offered an opportunity to participate in, any Excluded Opportunity. An "Excluded Opportunity" is any matter, transaction or interest that is presented to, or acquired, created or developed by, or which otherwise comes into the possession of (i) any director of the Corporation who is not an employee of the Corporation or any of its subsidiaries, or (ii) any holder of Series A Preferred Stock or any partner, member, director, stockholder, employee, affiliate or agent of any such holder, other than someone who is an employee of the Corporation or any of its subsidiaries (collectively, the persons referred to in clauses (i) and (ii) are "Covered Persons"), unless such matter, transaction or interest is presented to, or acquired, created or developed by, or otherwise comes into the possession of, a Covered Person expressly and solely in such Covered Person's capacity as a director of the Corporation while such Covered Person is performing services in such capacity. Any repeal or modification of this Article Eleventh will only be prospective and will not affect the rights under this Article Eleventh in effect at the time of the occurrence of any actions or omissions to act giving rise to liability. Notwithstanding anything to the contrary contained elsewhere in this Amended and Restated Certificate of Incorporation, the affirmative vote of the holders of at least [specify percentage] of the shares of Series A Preferred Stock the outstanding, will be required to amend or repeal, or to adopt any provisions inconsistent with this Article Eleventh." (*Ibidem*, p. 40)

69 These two possibilities are authorized by the DGCL (see Sections 102(b)(7) and 122(17) respectively) and explored in Delaware case law.

This final analysis indicates that besides the Governance Metrics related to voting rights analyzed in Section 4 above and the other Governance Metrics described throughout this paper, there are further governance practices that can be key when seeking an investment or for the conduction of the business itself. They are also prescribed in the NVCA Model Charter and followed by a great part of the Sample.

Conclusion

The present empirical research provided partial conclusions with regards to the corporate governance in privately held companies in the technology industry. The main challenges found during the research resulted from (i) the limited size of the sample; (ii) the fact that only charter provisions were analyzed (and not other corporate documents); (iii) the confidentiality that permeates the private market; and (iv) the multi-contractual terms' structure usually required by venture capitalists.

For this reason, it can be concluded that a methodology structured to track the corporate governance evolution of VC-backed companies in this industry shall not consider isolated elements such as date of incorporation, state of incorporation, and valuations. It must analyze the particularities of each investment round, including the rights and obligations of each and all stockholders. In this sense, it is important to highlight the relevance of enlarging the size of the research sample and the period under analysis, which can reveal new trends and expand the horizons of future research.

Interesting findings resulted from the present work, as demonstrated throughout the piece. This paper revealed an industry significantly diverse in terms of corporate governance and stage of development, with charters containing creative clauses while also following many industry standards found in the NVCA Model Charter.

In conclusion, it can be said that the analyzed charters follow a pattern with regards to the most common and relevant governance provisions, such as (i) voting rights for the board's election; (ii) conversion rights and obligations; (iii) directors' limitation of liability; and (iv) no cumulative voting. These provisions are all suggested by the NVCA.

On the other hand, it is interesting to note that there are provisions recommended by the NVCA which are not seen yet in the charters of the companies analyzed. This is the case of pay-to-play provisions (none of the companies in the Sample had it) and redemption rights, not seen in a large part of the Macro Sample, not even in the most recent charters, filed after the 2018 version of the model document (except for one company). New research on these particular metrics to check whether this will change would be desirable in the near future.

In addition to the standardized clauses mentioned above, the Sample shows the existence of tailor-made provisions in the charters of private tech companies, some of which do not follow the NVCA's recommendations. The specifics of these corporations might be attributed to different reasons, such as (i) the influence that founders have in the companies' early stage (e.g. founders request pay-to-play provisions); (ii) legal advice (e.g. lawyers advise the inclusion of no impairment clauses); or (iii) competition concerns (e.g. venture capital investors (do not) demand the inclusion of a business opportunity clause).

Finally, the analysis of the situation of "quasi California" corporations indicated the relevance of paying attention to the location of a company's shareholders and its place of business, since these factors can impact in the applicable laws and, as a result, in the corporate governance structure of a given company.

Although navigating in the venture capitalists' world from the outside turned out to be quite challenging, it is clearly a market that contemplates many possibilities for investors with appetite for high-risk, high returns investments and that congregates skilled investors, managers, and lawyers who – while adopting certain standard prac-

tices – tailor the charter provisions to the corporations’ peculiar features and put in writing the relevant stakeholders’ financial and business needs and expectations.

Appendix A – Chart A

Redemption Rights			
Macro Sample & NVCA Model Charter			
Company	Incorp.	Last Charter	Redemption
Pinterest, Inc.	2008	2019	Yes
Lyft Inc.	2007	2019	No
Doordash Inc.	2013	2019	No
Plaid Inc.	2012	2019	No
Uber Technologies, Inc.	2010	2018	No
Slack Technologies Inc.	2009	2018	No
Dropbox Inc.	2007	2018	No
Maplebear Inc.	2012	2018	No
Coinbase Global, Inc.	2014	2018	No
RobinHood Markets Inc.	2013	2017	No
Virtual Instruments Inc.	2008	2016	No
Palantir Technologies Inc.	2003	2015	No
Lithium Technologies, Inc.	2001	2015	No
Updater Inc.	2010	2014	No
Trustwave Holdings Inc.	2005	2014	Yes
Connecture Inc.	1999	2014	No
SS8 Networks, Inc.	2000	2013	No
Apptio Inc.	2007	2013	No
Rocket Fuel Inc.	2008	2012	No
Barracuda Networks	2004	2012	No
Bazaarvoice, Inc.	2005	2011	Yes
Jive Software, Inc.	2001	2010	Yes
Xactly Corporation	2005	2010	No
Imperva, Inc.	2002	2008	Yes
Molecular Imprints Inc.	2001	2008	No
Broadsoft Inc.	1998	2007	Yes
Fonality Inc.	2005	2007	Yes
Tangoe, Inc.	2000	2006	Yes
<i>NVCA Model</i>	<i>2011/2018</i>	<i>2011/2018</i>	<i>Yes</i>

Appendix B – Chart B

No Impairment		
Sample & NVCA Model		
Company	Charter	No Impairment
Plaid, Inc.	2019	No
Lithium Technologies, Inc.	2015	Yes
Updater Inc.	2014	No
SS8 Networks, Inc.	2013	Yes
Apptio Inc.	2013	No
Bazaarvoice, Inc.	2011	Yes
Jive Software, Inc.	2010	Yes
Xactly Corporation	2010	No
Tangoe, Inc.	2006	No
<i>NVCA Model</i>	<i>2011/2018</i>	<i>No</i>

Appendix C – Chart C

Valuation							
Unicorns & Sample							
	Company	Last valuation (US\$)	First valuation (US\$)	Increment (US\$)	Amount invested (US\$MM)	Period	Rounds ⁷⁰
1	Uber Technologies, Inc.	75.188.225.833	4.668.351	75.183.557.482	13.125	2010-2018	11
2	Palantir Technologies, Inc.	17.585.514.000	N/A	17.585.514.000	1.777	2005-2015	14
3	Lyft, Inc.	13.177.809.253	5.800.026	13.172.009.227	5.014	2010-2018	14
4	DoorDash, Inc.	12.127.400.769	65.398.383	12.062.002.386	1.977	2014-2019	7
5	Dropbox Inc.	10.641.168.869	30.059.200	10.611.109.669	625	2008-2014	5
6	Pinterest, Inc.	10.447.526.463	2.147.058	10.445.379.405	1.406	2009-2017	10
7	Robinhood Markets, Inc.	7.501.478.565	100.650.538	7.400.828.027	858	2014-2019	5
8	Coinbase Global, Inc.	7.238.385.243	21.400.427	7.216.984.816	525	2013-2018	6
9	Maplebear Inc.	7.199.389.971	23.033.591	7.176.356.380	1.893	2013-2018	7
10	Slack Technologies Inc.	7.016.353.539	22.043.704	6.994.309.835	1.393	2010-2018	10
11	Plaid, Inc.	2.392.726.660	12.141.336	2.380.585.324	308	2013-2018	5
12	Lithium Technologies, Inc.	914.130.800	24.870.074	889.260.726	220	2007-2014	6
13	AppTio Inc.	770.104.939	20.031.680	750.073.259	136	2007-2013	5
14	Jive Software, Inc.	352.328.477	N/A	N/A	32	2001-2010	3 ⁷¹
15	Bazaarvoice, Inc.	205.105.474	8.689.016	196.416.458	21	2005-2010	5

16	Xactly Corporation	162.719.868	52.554.992	110.164.876	64	2007-2010	5
17	SS8 Networks Inc.	94.967.270	94.967.270	N/A	10	2010-2013	2
18	Tangoe, Inc.	39.131.816	39.131.816	N/A	8	2006	1
19	Updater, Inc.	23.031.151	10.622.075	12.409.076	8	2012-2014	2

70 The number of investment rounds does not necessary reflect the number of series of shares issued.

71 The author only had access to the company's third charter. Jive Software, Inc. was first incorporated under the name "CoolServlets, Inc.", modification that is likely to have compromised the databases used to keep track of its chartering history. Thus, the amount invested indicated in the chart (32MM) is related to its third financing round.

Appendix D – Chart D

Voting Provisions						
Sample						
Company	Year of Incorp.	Latest Charter (Year)	Designated Preferred Directors	Directors (by series)	Pref. Share Level (elect directors)	Voting restrictions
Apptio Inc.	2007	2013	3	All Series	2M	No
Bazaarvoice, Inc.	2005	2011 (valuation 2010)	2	Series A+B: 1, Series C: 1	N/A	No
Jive Software, Inc.	2001	2010	3	Series A+B: 1, Series C: 1, Series A+B+C:1	N/A	No
Lithium Technologies, Inc.	2001	2015 (valuation 2014)	4	Series A+B+C+D+E: 3, Series F:1	N/A	No
Plaid, Inc.	2012	2019	3	Series A: 1, Series A-1: 1, Series C: 1	25%	Yes - Series B and B-1
SS8 Networks, Inc.	2000	2013	4	Series A: 3, Series B: 1	Series A: 5M, Series B: 5M	Yes - Common Stock
Tangoe, Inc.	2000	2006	5	Series A: 1, Series B: 1, Series C: 1, Series D and D1: 1, Series E: 1	N/A	No
Updater Inc.	2010	2014	2	Series A:1, Series A-1:1	Series A: 25%, Series A-1: 15%	No
Xactly Corp.	2005	2010	5	All Series	N/A	No

Appendix E – Chart E

Additional Governance Metrics		
Sample & NVCA Model		
Company	Directors' Limitation of Liability	Business Opportunity Clause
Apptio Inc.	Yes	No
Bazaarvoice, Inc.	Yes	No
Jive Software, Inc.	Yes	Yes
Lithium Technologies, Inc.	Yes	No
Plaid, Inc.	Yes	Yes
SS8 Networks, Inc.	Yes	Yes
Tangoe, Inc.	Yes	Yes
Updater Inc.	Yes	Yes
Xactly Corporation	Yes	No
<i>NVCA Model 2011/2018</i>	<i>Yes</i>	<i>Yes</i>