

A GUIDE FOR FAST-GROWING COMPANIES

RAISING CAPITAL

LEGAL CONSIDERATIONS FOR:

PREPARATION | THE PROCESS | COMMON PITFALLS

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Most founders understand that capital raising is a core aspect for growing a business or expanding into new markets. The capital raise process, however, can seem exhausting and overwhelming.

This guide is designed to provide you with the basic tools you need for understanding how to approach the mechanics of the capital raise process, from preparation to post-closing, with confidence.

As a note, this guide applies to various corporate forms, including Corporations (INC) and Limited Liability Companies (LLC). However, the terminology used throughout is specific to Corporations.

CHAPTER ONE | 3 - 5 **HOW TO PREPARE**

Before seeking capital, there are a few crucial documents and components to be prepared, organized, and ready to initiate the process.

CHAPTER TWO | 6 - 7 **THE CAPITAL RAISE PROCESS**

Once the preparation is underway, gain a better understanding of the procedures and timelines involved.

CHAPTER THREE | 8 - 10 **AVOIDING COMMON PITFALLS**

Now that the foundations are in place learn of the common pitfalls of the Capital Raise process and how to avoid them.

IS YOUR COMPANY PREPARED?

What does it take to hit the ground running for raising capital? Proper preparation, documentation, and organization.

Heading into a capital raise under-prepared can impact the overall timeline, structure, and execution process. Additionally, no one enjoys wasting time and money on issues that could have been avoided altogether. That is why we have compiled a checklist of the critical items to have prepared before embarking on the capital raise journey.

1. FOUNDATIONAL MATTERS

- YES NO **a.** Is the company's governance documentation professionally explicitly prepared for the company?
- YES NO **b.** Has the company properly followed the mandates outlined in its certificate/articles of incorporation?
- YES NO **c.** Does the company have bylaws that properly reflect its governance structure?

 YES NO

d. Have the bylaws been appropriately followed?

 YES NO

e. Does the company have a shareholders agreement in place that properly reflects the relationship among the shareholders?

 YES NO

f. Does the company have the proper documentation for the ownership, leasing, or licensing of its assets?

 YES NO

g. Has the company conducted meetings of the directors and the shareholders in accordance with its governance documents and applicable law?

 YES NO

g (ii). Has the company duly recorded minutes of the meetings or written resolutions reflecting its key decisions?

2. AGREEMENTS WITH PERSONNEL

 YES NO

a. Does the company have appropriate and thorough employment agreements with its W2 employees?

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YES NO

b. Does the company have appropriate and thorough contractor agreements with its independent contractors?

YES NO

c. Does the company have appropriate and thorough advisor agreements with its strategic advisors?

YES NO

d. Do the agreements assign all past, present, and future intellectual property rights to the company?

YES NO

e. Do the agreements in place properly protect any company Confidential Information and Trade Secrets?

YES NO

d. Did the company provide proper information regarding IRS 83b elections to founders/sweat equity holders? Did the company receive documented proof of filing of the same?

YES NO

e. Does the company have duly executed investment agreements (or subscription agreements) with all existing investors? agreements) with all existing investors?

YES NO

f. Is all company stock subject to the appropriate restrictions on share transfers?

YES NO

g. Has the company taken steps to ensure that the stock issued meets Qualified Small Business Stock (QSBS) status?

YES NO

h. Has the company avoided making any unregistered public offerings of its securities?

3. CLEAR OWNERSHIP STRUCTURE

YES NO

a. Does the company have a clearly constructed capitalization table supported by proper documentation?

YES NO

b. Does the company have duly executed grant agreements with all founders/sweat equity holders?

YES NO

c. Does the company have appropriate vesting schedules for founders/sweat equity holders?

YES NO

a. Are company contracts with third parties comprehensively and professionally made?

4. VENDOR & CUSTOMER CONTRACTS

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YES NO

b. Are company contracts with third parties comprehensive and professionally done?

YES NO

c. Does the company have a consistent legal process in place for on-boarding and off-boarding customers?

YES NO

c (ii). Do all customers sign all required contracts every time?

YES NO

d. Did the company execute agreements with all of its key vendors/suppliers with appropriate terms to its business?

iii. Copyrights

iv. Trade Secrets

YES NO

d. If the company is utilizing any intellectual property that belongs to a third party, are there intellectual property licensing agreements in place sufficient to meet the company's business needs?

5. INTELLECTUAL PROPERTY

YES NO

a. Did the company isolate the intellectual property that is critical to its business?

YES NO

b. Did the company implement a plan to secure its intellectual property? Is the company following the plan?

c. Key pieces of intellectual property to consider may include:

i. Trademarks:
i.e., Names, Logos, Slogans

ii. Patents



We know what you need.

Our specialized attorneys can get your company up to speed on the key materials investors expect to see.

THE CAPITAL RAISE PROCESS

The exact timeline of raising capital can vary depending on the complexity of the transaction, company stage, size, and industry of the business.

i. Due Dilligence (DD)

4 TO 8 WEEKS

At this stage, investors will closely examine the company, its assets, documents, financial information, and all other aspects relevant to the proposed deal.

The Closing Process

1 TO 3 DAYS

The designated parties, typically attorneys, collect final signatures. An amended and restated certificate of incorporation is filed, and any other necessary filings are made. Once the documents are signed, the parties are notified, investors transfer the funds, and the closing binders are sent out to all parties. Congratulations - the deal is now closed!

Post-Closing & Final Cap Table

UP TO 3 MONTHS

The final capitalization table of the company is generated. Some companies may choose to implement cap table management software, and oftentimes this is an investor requirement. If necessary, federal and state-level securities filings are made. If the round allows additional investment after the initial closing, and if the company can secure such investment, subsequent closings are held on the same terms as the initial closing.

ii. Due Dilligence Data Room Access

1 DAY TO 1 WEEK

Finalize and provide investors with access to the secure, organized data room previously created as part of step one. Adjustments to the data room structure may be needed depending upon the investor's due diligence request list.

iii. Document Preparation and Negotiation

2 TO 6 WEEKS

This stage is the drafting, review, and negotiating of the documents (typically a combination of NVCA standard forms and custom documents) and economic terms to close the private financing rounds. The investors usually provide the main deal documents. The company usually provides ancillary documents and certain company documents necessary for the deal.



1 Company Preparation

3 TO 6 MONTHS

The company becomes capital raise ready by ensuring that its governing documents, agreements, and foundational matters are all properly addressed. Engage with the company's attorneys, accountants, and advisors throughout this process. If possible, create a Data Room containing all company information and records in an organized format.

2 Finding the Right Investors

HOURS TO YEARS

The company seeks out the right people to become investors. Investors are found in a variety of ways. Finding the right investor for the company can take a long time, depending, among other factors, on whether the company has personal connections to potential investors or whether the company is seeking investors in the broader community. The company's product or service offerings, industry, location, and the market at large can all be deciding factors.

3 Term Sheet Negotiations

2 WEEKS

This stage is where attorneys step in to help ensure that the terms and conditions of the deal and the requests made by the potential investors align with the company's needs and goals.

4 Document Preparation and Negotiation

2 TO 6 WEEKS

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COMMON PITFALLS

It is not uncommon to run into challenges during the capital raise process that impact the timeline and outcome of a deal. Consider the tips below to prepare and navigate through some of the common pitfalls of the Capital Raise Process.

1. NOT PREPARING YOUR COMPANY PRIOR TO THE DEAL

See “Chapter One: How to Prepare” to ensure that you have taken the necessary steps for a smooth process.

2. RUSHING INTO A TERM SHEET

Do not sign a term sheet without first considering the details or consulting an attorney. It is exciting to find investors interested in your company, but not all term sheets are created equally or in your best interest.

3. FAILING TO UNDERSTAND THE CONSEQUENCES OF CAPITAL RAISE YOU ARE CONSIDERING

Make sure you have a solid understanding of the implications associated with your method of raising funds, including tax, control of the company, and decision-making issues.

4. FAILING TO MAINTAIN QUALIFIED SMALL BUSINESS STOCKS (QSBS)

Company stock that qualifies for QSBS status under the U.S. Tax Code can offer substantial tax savings to founders and investors upon its sale. Often, investors rely on the QSBS status of a company’s stock to decide whether or not to invest. Before **any** company stock is redeemed or transferred, seek advice from the company’s attorneys and accountants to ensure that QSBS status is not impacted.

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5. GETTING IN BED WITH THE WRONG INVESTORS

Consider the following:

What is the purpose of your fundraising?

Do you need strategic investors to open doors?

Are the investors you are considering a good fit for your company?

Bringing on an investor to an early-stage company is akin to bringing on another partner. Therefore, make sure that the investor is someone you want to partner with.

6. USING THE WRONG INVESTMENT INSTRUMENT

Using a priced round instead of a convertible round (a per-share valuation instead of a convertible note) at too early of a stage can have major implications; including, outsized control for those early investors and possible impacts on the sizes of future rounds. Each investment instrument has its advantages and disadvantages, so consult with an advisor to make sure you're heading in the right direction.

7. TAKING LESS OR MORE MONEY THAN YOU NEED BEFORE YOUR NEXT PROJECTED RAISE

Consider the valuation of your company now versus the potential valuation of your company in the future.

Does selling a larger part now make sense?

Will you be spending the raised funds wisely?

What resources do you need access to, and will the funds raised cover all of those costs?

If your company takes on less money than it requires, then you may be faced with the need to seek additional funding at an inopportune time, possibly at a reduced valuation- “a down round.”

If your company takes on more money than it requires, then you have sold more equity than you should have. This may impact the size of future funding rounds and the level of control maintained by the founders.

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By understanding the process of raising capital and the common pitfalls to avoid, you are one step closer to a successful fundraising round to take your business to new heights. Take the time to prepare and organize properly, but feel confident knowing that we are ready to step in when you need us.

ONE FINAL CONSIDERATION:

8. NOT HIRING THE RIGHT LAWYER

We do not include this pitfall simply because we are lawyers. **Hiring the wrong lawyer can create unnecessary roadblocks for your deal.**

Raising funds is a significant event for any business. Ensure that you choose an attorney or firm who communicates effectively and efficiently, can provide your deal with the attention it needs, and understands your industry's unique challenges.

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