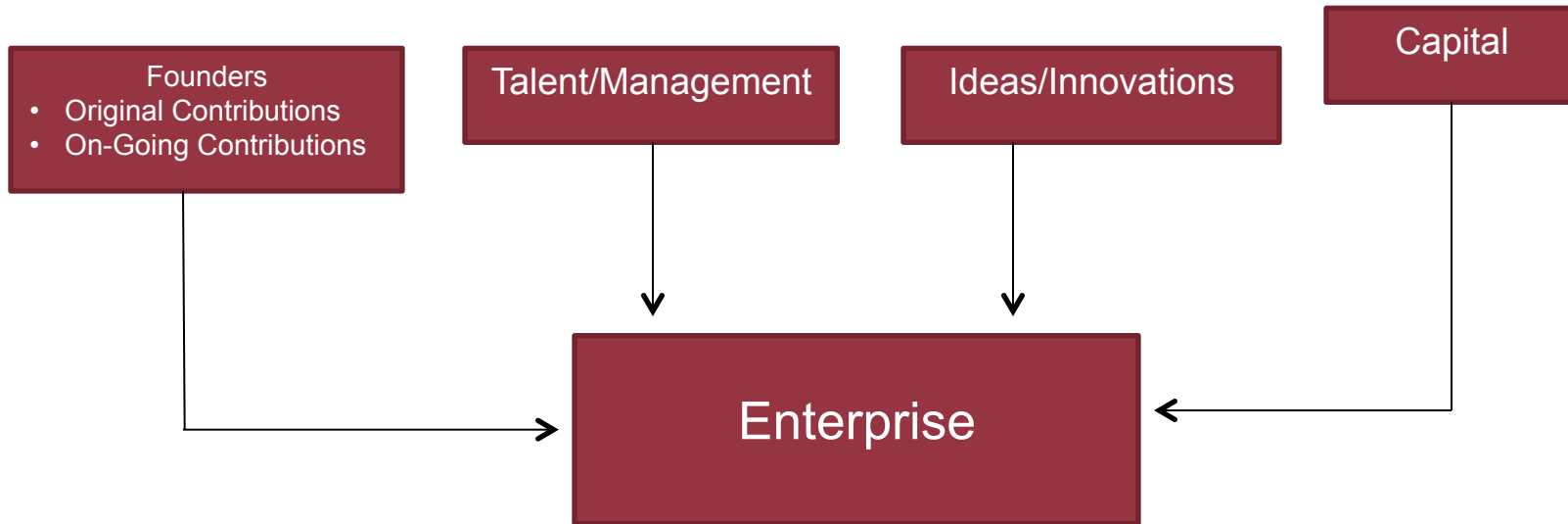


Agenda

- Introduction
- Applicable Laws (Including the JOBS Act)
- The Security
- Commonly Discussed Terms
- Top 10 (or so) Pitfalls
- Questions and Answers (But Don't Wait)

The Challenge – Balance Competing Interests



Alternative Sources of Capital

- Customers
- License Fees
- Public financing/grants
- Debt
- Bootstrap
- Crowdfunding

Funding Cycle

- Incubators (e.g., Project Olympus, Idea Foundry, Alpha Lab, Thrill Mill)
- Public or quasi-public funds (e.g., Innovation Works, Pittsburgh Life Sciences Greenhouse)
- **Friends and Family**
- Angels
 - **Early Stage**
 - Later Stage
- Venture Capital
 - **Early Stage**
 - Later Stage
- Strategic Investors
- Public Markets

Applicable Laws

- Securities Act of 1933
- Securities:
“Any note, stock, bond, debenture, evidence of indebtedness... investment contract...”
- Excludes short term note (typically less than 9 months)
- Securities Act – Registration

In general: Registration is required with the Securities and Exchange Commission for the sale of securities (e.g., an S-1)

- Registration is expensive and time-consuming
- Objective: Avoid registration

Exemptions from Registration

- Section 3(b) – Small Offering
- Section 4(a)(2) – Private Offering
- Effect of Exemption
 - Exemption from Registration Process
 - No Exemption from:
 - Notice Filing
 - Fraud provisions of the Securities Act

Safe Harbor: Regulation D

Rule 506(b) (under Section 4(a)(2)):

- Unlimited number of Accredited Investors
- Up to 35 Persons who are not Accredited Investors

For Unaccredited Investors, detailed information must be provided

- “Reasonable belief” regarding Accredited Investors

Rule 504 (under Section 3(b)):

- The aggregate offering price can not exceed \$1,000,000
- Unlimited Investors

Accredited Investors

- Natural person who, together with spouse, has a net worth of more than \$1,000,000 (excluding residence); or
- Natural person with individual income of at least \$200,000 (or joint income with spouse of \$300,000) in each of the two most recent years and has a reasonable expectation of the same income in the current year; or
- Corporation or partnership not formed for the specific purpose of investing with assets in excess of \$5,000,000; or
- Any director, executive officer or general partner of the issuer

Accredited Investors (cont.)

- Definition likely to change
- SEC required to review accredited investor status every 4 years
- With inflation
 - Income: \$500,000/\$740,000
 - Net Worth: \$2.5 Million
- Balancing competing interests (chilling v. protection)

Common Requirements for Exemption:

- No general solicitation or general advertising (advertisement, article or media broadcast (hint: no website ads)) [other than New Rule 506(c)]
- Reasonable belief that the purchaser is purchasing for purposes of investment and not resale (hint: get a representation)
- File a Form D (no later than 15 days after the first sale)

Blue Sky Laws (State Requirements)

- State-by-state regulation
- National Securities Markets Improvements Act of 1996
 - Preempts state regulation
 - 4(a)(2) exemption – Rule 506
 - Not Rule 504
 - Still requires notice and filing fees (concession to states)
- Check states – Example: NY

Jumpstart On Business Startups Act (JOBS Act)

- Enacted on April 5, 2012
- Rule 506 Regulations – July, 2013
- Intent: Minimize Regulations of Private Offering of Securities

New Rule 506(c)

- Eliminates prohibition on General Solicitation
- 2 Key requirements
 - Purchasers must all be Accredited Investors
 - Issuers must take “reasonable steps” to verify accredited investor status
- Issuers must choose between Rule 506(b) and Rule 506(c)

New Rule 506(c) – Verification Obligations

- Factors:
 - Nature of Purchaser (e.g., individual or institution)
 - Amount and type of information that the issuer has about the investor
 - The terms of the offering (particularly a minimum investment)
- Check the box is insufficient
 - Burden is on issuers

New Rule 506(c) – Non-Exclusive and Non-Mandatory Methods of Verification

- Income Basis
 - IRS Forms for two most recent years
 - Written representation from investor for current year
- Net Worth Test
 - Assets – Bank statement, brokerage statement, statements of securities holding
 - Liabilities – Consumer report from at least 1 national consumer reporting agency

506(c) – Non-Exclusive and Non-Mandatory Methods of Verification (cont.)

- Third Party
 - Written confirmation from professional that the professional has taken reasonable steps to verify that the investor is an accredited investor within the prior 3 months
 - Registered broker-dealer
 - Registered investment advisor
 - Attorney
 - CPA

Bottom Line

- Rely on 506(b) or 506(c) and limit to Accredited Investors; or
- Rely on 504 (under \$1,000,000) and find state exemption
- Decide between 506(b) and 506(c) early
- Don't advertise until decision is made
- Note: Potential impact of future change in definition of Accredited Investor

Disclosure

- Requirements
- Private Placement Memorandum
 - Protection for “fraud” claims under Securities Act
 - Material misrepresentation
 - Omit to state a material fact necessary to make the statements made not misleading
 - Professionalism

Key Elements of Private Placement Memorandum (or short form)

- Description of Issuer
- Business plan
- Risk factors
- Subscription procedures
- Conflicts of interest
- Financial statements
- Capitalization
- Exhibits (e.g., organizational documents)
- In general – “Material” information

Reason for Compliance

- Purchaser remedies – rescission
- Future potential investors/purchaser
- Insurance Policy

Crowdfunding (e.g., Kickstarter)

- Origins
- Sidesteps securities laws – not a sale of a “Security”
- Example – Prevail Travail – Interactive Restaurant (raised \$75,000)
 - Rewards
 - Fast Pass
 - Cooking class
 - Tickets for dinner
 - Tickets to opening party
 - 2014 Sexy Chef Calendar

Other Examples

- Lifeshel: Smartphone case that aims to prevent sexual assault and violent crimes
 - \$5 – Name on website plus a sticker
 - \$20 – Waterbottle and sticker
 - \$25 – T-Shirt
 - \$57 – Whistle case + 1 for “someone you love”
- \$40,000 of \$70,000 minimum

Other Examples (cont.)

- Schell Games: Puzzle Clubhouse – Crowd – designed games
 - \$1 – Founder clubhouse profile + desktop background
 - \$25 – 1 year membership
- \$11,403

Other Examples (cont.)

- Zubits: Magnetic shoe closures (in lieu of laces)
 - \$17 – Early Bird – 1 pair (150)
 - \$19 – Midday Early Bird – 1 pair (200)
 - \$20 – 1 pair (482)
- \$177,878 (20 days to go)

Potential Effect of JOBS Act - Securities

- A new exemption
- Regulations long overdue
- Sale to non-accredited investors through registered intermediaries
- Limited on amount: \$1,000,000
- Limited on investment: depends on net worth and income
 - Under \$100,000 annual income or net worth - greater of \$2,000 or 5% of annual income or net worth
 - \$100,000 + annual income or net worth - greater of 10% of annual income or net worth (maximum of \$100,000)

Potential Effect of JOBS Act (cont.)

- Intermediary must be registered
 - Broker
 - Funding Portal
- Each Intermediary (funding portal):
 - Register with SEC
 - Ensure that each investor:
 - Confirms that it understands the risk
 - Answer questions confirming that it understands the risk
 - Takes measures to reduce risk of fraud

Potential Effect of JOBS Act (cont.)

- Disclosure
 - SEC
 - Investor
 - Note:
 - If less than \$100,000: tax returns and internally-generated financial statements
 - If more than \$100,000: reviewed financial statements
 - If more than \$500,000: audited financial statements
 - Restrictions on Resale
 - No resale to unaccredited investor for 1 year
 - More to come
- “It’s not the SEC that killed crowdfunding – it was Congress”, Joan Hemingway - University of Tennessee

Potential Effect of JOBS Act (cont.)

- Crowdfunding
 - Step in right direction
 - Not in effect yet – no regulations (soon)
 - Public disclosure and requirements may be too burdensome
 - Stay tuned
 - Move to Georgia or Kansas (Alabama, Indiana, Michigan, Washington, Wisconsin). More to come!

Type of Security

Secured Debt

Unsecured Debt

Convertible Debt

Preferred Equity

Common Equity

Debt

- Benefits
 - Simple
 - Non-dilutive
 - No valuation
- Downside
 - Must be paid
 - Interest
 - Balance sheet implications

Debt from Investor Perspective

- Preference in payment
- Potentially secured
- Fixed date for return of investment
- No upside
- Interest taxable as ordinary income

Collateral

- Personal Guarantees
- Security Interest
 - Pledged Assets
 - Remedies

Common Equity

- Benefits
 - Simple
 - Less expensive
 - Aligns interests
- Downside
 - Requires valuation
 - Likely lower price

Common Equity – Investor Perspective

- Simple – Aligns interest
- Investor gets “Upside”
- No preference
- Highest risk capital
- No typical preferred protections
 - Price protection
 - Dividends
 - Approvals

(Light) Preferred

- Description
 - Liquidation Preference
 - Dividend (not your Disney-type dividend)
 - Fewer control features than typical preferred
- Benefits
 - Attracts investors
- Downside
 - Complexity
 - Separate class of stock (hidden rights)
 - Potential impact on future investors
 - Valuation
 - May not align interests

Liquidation Preferences – Downside Protection for Investors

- Definition of Liquidation
- **Participating Preferred:** Investor receives investment (plus accrued dividends) and participates on a pro rata basis
- **Non-Participating Preferred:** Investor receives the greater of (1) investment plus accrued dividends or (2) proceeds on a pro rata basis

Convertible Debt

- Description
 - Convertible to equity upon trigger events
 - Sometimes convertible into new security
 - Sometimes convertible into common stock
 - Mandatory vs. voluntary conversion
 - Discount to investment price (e.g., 20%)
 - Fancy conversion terms (avoid)
 - Base price in case of no additional investment
 - Cap on valuation/minimum valuation

Convertible Debt (cont.)

- Benefits
 - Common
 - Avoids the “valuation issue” (sort of...)
- Downside
 - Conversion price unknown
 - Usually accrues interest (can be additional dilution)
 - Debt holders can have interests that are not aligned with common

Factors In Valuation

- Availability of capital
- Amount of raise and dilution
- Type of investors
- Anticipated growth from investment
- Future plans for financing

Valuation

- Hard to value at this point
- Alpha Lab - \$25,000 for 5% common (\$500,000 post-money valuation)
- Alpha Gear - \$50,000 + incubator for 9% common (\$500,000 pre-money)
- Thrill Mill - 5% for incubator
- Caution of giving up over 10% of the Company for an angel round (so, if you are raising \$100,000, post-money of \$1M)

Example 1 (Priced Round) Initial

	<u>Shares</u>	<u>Percentage Ownership</u>
Founder	1,000,000	100%

Example 1 Employee Equity

	<u>Shares</u>	<u>Percentage</u>
Founder	1,000,000	85%
Employees	<u>176,471</u>	<u>15%</u>
Total	1,176,471	100%

Example 1 Friends and Family Round (Priced Round)

- \$250,000 Friends and Family
- \$1,000,000 Pre-Money Valuation

Founder	1,000,000	68%
Employees	176,471	12%
F&F (\$0.85 per share)	<u>294,118</u>	<u>20%</u>
Total	1,470,589	100%

Example 1 Series A Round

- \$2M Investment
- \$3M Pre-Money Valuation

Founder	1,000,000	41%
Employees	176,471	7%
F&F	294,118	12%
VC (\$2.04 per share)	<u>979,608</u>	<u>40%</u>
Total	2,450,197	100%

Note: VC will want employees' amount increased
Note Control

Example 2 Initial

	<u>Shares</u>	<u>Percentage</u>
Founder	1,000,000	85%
Employees	<u>176,401</u>	<u>15%</u>
Total	1,176,471	100%

Example 2 (Convertible Debt)

- \$250,000 Friends and Family; convertible debt-20% discount
- Series A – \$2M investment at \$3M pre-money valuation

Founder	1,000,000	46%
Employees	176,401	8%
F&F (\$1.82 per share)	136,791	6%
Series A (\$2.28 per share)	<u>875,461</u>	<u>40%</u>
Total	2,188,653	100%

Comparison of Priced Round v. Convertible Debt

	Example 1 <u>(Priced Round)</u>	Example 2 <u>(Convertible Debt)</u>
Founder	41%	46%
Employees	7%	8%
F&F	12%	6%
Series A	<u>40%</u>	<u>40%</u>
Total	100%	100%

Example 3

Too Much Convertible Debt

- \$1,000,000 Friends and Family; convertible debt (20% discount)
- Series A – \$2M investment at \$3M pre-money valuation

Founder	1,000,000	30%
Employees	176,401	5%
F&F	840,286	25%
Series A	<u>1,344,458</u>	<u>40%</u>
Total	3,361,145	100%

Comparison

	Example 1 (\$250,000 Priced Round)	Example 2 (\$250,000 Convertible Debt)	Example 3 (\$1M Convertible Debt)
Founder	41%	46%	30%
Employees	7%	8%	5%
F&F	12%	6%	25%
Series A	<u>40%</u>	<u>40%</u>	<u>40%</u>
Total	100%	100%	100%

Commonly Discussed Terms

- Maintenance Rights
 - End it
 - Require that they continue to be Accredited Investors
 - Quick Resolution
 - Waivable
 - Proper exclusions (including requirement of new investor or strategic investor)

Commonly Discussed Terms

- Board Representation
 - Board seat
 - Board control
 - Observer

Commonly Discussed Terms

- Three Layers of “Influence”
- Approval Rights (Board or investor)
 - Day-to-day
 - Fundamental transactions (sale of the company)
 - Future financings
 - Employee equity

Commonly Discussed Terms

- Shareholder Arrangements
 - Agreement to execute a Shareholder Agreement (for note holders)
 - Drag-along rights
 - Restrictions on transfer of stock

Commonly Discussed Terms

- Information Rights
- Subordination (Debt)
- Anti-Dilution Protection

Bottom Line

- Common or Convertible Debt
- Minimize the angel funding – it is likely to be expensive money
- Minimize control of investor
- Keep it simple

Top Ten (or so) Mistakes

- Over-Promise – Under-Deliver
- Disrespect Capital
- Target Old Ladies, Pensions and Thanksgiving dinner companions
- Poison the Company
 - Not enough stock for management
 - Give away veto rights, rights of first refusal or exclusivity
- Severely underestimate the cost and time
- Leave the numbers to somebody else
- Give up control (legally or mentally)

Top Ten (or so) Mistakes (cont.)

- Forget that you don't know what you don't know
- Over-capitalize
- Under-capitalize
- Ignore securities laws
- Don't align interests
- Engage a personal injury lawyer