§ 150:106. Business Counselor's Training Materials: Counseling the Finance Function

§1 Scope of finance activities

Financing is an essential element for establishing a new business, launching a new product or service, or expanding an existing business through internal growth or acquisition. For example, cash is necessary in order for a company to continue operations while awaiting payment from customers and anticipated increases in sales; expand the volume of sales of existing products through increased advertising and promotion; develop or acquire new technical skills and assets, including acquisitions of other firms; enter specified new markets, including new facilities and recruitment of personnel; create new products that address a specified market need, including research and development; replace or upgrade ageing or obsolete facilities or equipment; or comply with regulatory requirements, such as health standards or environmental laws.

It is likely that entrepreneurs and managers will, regardless of the size of their businesses, need to venture into the world of finance several times over the life cycle of the enterprise. In that world they will encounter a wide range of participants, including banks, venture capitalists, investment bankers, government agencies, and business advisors, each of which will provide unique resources and experience. Capital suppliers have become increasingly innovative in devising financing techniques that are tailored to their needs and the goals and objectives of the businesses they serve. However, before managers can begin the onerous process of securing funding, they must develop a careful plan for identifying the financial requirements of the business, the terms upon which the company hopes to secure the necessary funds, and the potential sources for the funding. Of course, this assumes that management has already developed a "plan" for the business, product, concept or service, and has developed an outline of all of the requirements for successfully completing the plan (i.e., capital resources, human resources, other assets, marketing strategies and tactics).

§2 Basic elements of the capital structure

While it is possible to launch a business using a legal entity other than a corporation the corporate form remains the most common type of entity and provides the best background for illustrating the basic elements of the capital structure for a business. Technically, the term "capital" includes the entire base of tangible and intangible assets of the company. However, the concern in this chapter is the cash that can be used to conduct the business, including acquisition of non-cash assets, and which can ultimately be available for distribution to the owners of the company. The cash element of the capital structure comes from several sources, including cash and assets contributed by shareholders in exchange for equity securities; cash received from investors in the form of loans in exchange for debt securities; debt financing received from non-investment sources, such as commercial lenders; and funds generated from the actual operations of the business and from appreciation in the value of the assets used as part of the business.

§3 Determination of capital requirements

Management has an obligation to determine how much capital the company will need in order to properly conduct its business operations. Presumably, the capital requirements of the business will be established at the time of formation; however, the initial estimates should be periodically reviewed in light of changes in the scope of the business activities and other unforeseen factors. Once a decision has been made regarding the amount of capital, and once again assuming that the corporate form is used, it is then necessary to allocate the financing burden among equity-based capital, which is raised through the sale of stock to existing and new investors and by the retention of corporate earnings otherwise available for distribution to shareholders; debt-based capital, which is raised through the issuance of debt securities and commercial borrowing activities; and various other financing techniques, including research and development financing and payment arrangements with suppliers and customers.

The financing requirements of the business, as well as the array of various resources for securing new capital, will vary depending upon the size of the enterprise and the particular line of business in which it is engaged. For example, closely-held corporations tend to rely upon equity capital furnished by the founders of the business, unsecured long-term loans from one or more of the existing shareholders and commercial loans and lines of credit supplied by a local bank and secured by accounts receivable and inventories. In contrast, large, well-capitalized corporations can use not only public offerings of common stock to raise capital, but also can take advantage of innovative investment instruments such as "straight" or convertible preferred stock, debentures and bonds and commercial paper, as well as bank financing and credit facilities from money-center institutions around the world. A capital-intensive business requires very little working capital, but will need access to long-term debt. In contrast, a retail business will need working capital provided by lines of credit rather than long-term debt.

Identifying the financing requirements for any business involves a number of discrete activities, all of which must be carried out in an organized and disciplined fashion. The company must formulate and articulate its long-term objectives, including the desired return on the equity capital invested in the business. Once these parameters have been established, a search begins for new and profitable uses of the funds which are available to the company. In order to evaluate each of the new investment projects, engineering, marketing and financial forecasts, budgets and estimates must be prepared, analyzed and compared. Finally, once the company has decided which projects to pursue (e.g., the development of a given line of products or a marketing campaign), procedures should be established to monitor the performance of the company in relation to the anticipated benefits of the project.

While there are a number of ways in which the long-term objectives of the company can be formulated, in most cases the managers of the company will be concerned with maximizing the value of the company's common stock, which is the residual interest in the company's assets after all senior claims have been satisfied. This means that other things being equal, management will usually seek the highest net dollar return on its capital investments which is compatible with the risks incurred in undertaking a particular project. Admittedly, some projects cannot be completely described or appreciated in terms of purely monetary costs and benefits (e.g., a new cafeteria for employees); however, even in those cases a systematic calculation of the profitability of alternative investments can provide a benchmark for evaluating the otherwise intangible benefits.

One of the main roles of the finance function is to develop a process for evaluating current uses of capital and sources of funds and planning for future financing requirements. In order for this to occur, management must design systems for compilation and reporting of accurate historical financial information and development of projections of future financial performance and must systematically analyze operational results and liquidity requirements on a regular basis. As companies grow and become subject to more rigorous accounting and financial reporting requirements they must invest in the infrastructure necessary for collecting all of the information necessary to satisfy regulators and members of the investment community.

§4 Development of a financing strategy

In addition to determining the company’s capital requirements, senior management must develop a comprehensive financing strategy to evaluate financing opportunities and collect the information required to attract funding sources. Important topics in this area include general business analysis, preparation of business plans and disclosure documents and preparation of financial information. Addressing each of these areas requires the attention of all members of the senior management team as well as outside advisors such as legal counsel and accountants. Experienced counsel can provide invaluable assistance to the company in all of its business financing activities. Of course, counsel must be familiar with all applicable laws, including corporate, tax, securities, and commercial laws, and be able to provide assistance to the company in preparing the necessary disclosure documents in a manner that complies with applicable laws and regulations. In addition, however, counsel should be a valued member of the team that continuously analyzes the company’s business and considers the advantages and disadvantages of the alternative methods of financing that might be available to the company at a given point in time. For emerging companies, attorneys can be an important resource in making introductions to financing sources such as venture capitalists and banks that specialize in providing capital to firms that depend on intangible assets as the basis for their business models.

In the early stages of a company’s activities one of the members of the founding group will be responsible for developing a financing strategy and this role may pass to the president if that role is eventually assumed by someone from outside the founder group. Eventually the Vice President of Finance, or Chief Financial Officer (“CFO”), will be responsible for the financing strategy and the related tasks and activities such as design, implementation and monitoring of accounting and financial reporting systems and communications with investors and lenders.

§6 Business plans and disclosure documents

The key presentation and disclosure document that is used in connection with capital raising activities, at least with private investors and commercial lenders, is the "business plan." A solid business plan can also be used to satisfy the company obligations under the full disclosure requirements imposed under the federal and state securities laws. Management needs to understand that the company is under a strict duty to disclose to prospective investors all material facts which they have in their possession regarding the securities which are the subject of the transaction. Although the requirements apply to any and all oral communications between parties bargaining face-to-face, it comes up most often in the preparation of the business plan and the associated offering documents.

As daunting as the disclosure requirements may appear to many managers, particularly when they are being explained by securities lawyers engaged to assist in preparing a registration statement for a public offering, it should not be forgotten that, as a general rule, the information that is to be disclosed is little different from that which would otherwise be of interest to the managers themselves as they seek to develop and refine their business strategies. Accordingly, it is recommended that some attempt be made to integrate the company's ongoing business planning processes with the fulfillment of any of its disclosure requirements under the securities laws. While no real standard format exists for a business plan, it is generally the case that such a document would include descriptions of the company's products and services; the company's technology and/or unique tangible assets or resources; the industries and markets in which the company is active; the management team; the company's manufacturing, distribution and marketing strategies; the facilities owned and/or leased by the company; and any risk factors associated with the business of the company. The business plan will also contain historical financial information about the company, as well as various projections of future financial performance.

Some entrepreneurs have difficulty with the disciplined process of putting together a business plan. There are persons and organizations that specialize in helping assemble the business plan, and often the management team, around a product, service, or idea. These helpers range from brokers who want a fee for selling the idea, to lawyers, business plan writers, and seed fund investors who will assist in the development of the plan, help with the actual organization of the company, and support the effort with their seed capital. In any case, it is important to remind the founders of the importance of the business plan in financing the company. Investors will rarely, if ever, advance large sums of money to a company based on an informal presentation. Once that is understood, the founders can generally be convinced to approach the process of preparing the business plan as an opportunity to define and sell their "vision" of the product or service which underlies the company's goals and objectives.

§7 Duties and responsibilities of the CFO

It is now commonplace for public companies to develop and publish detailed descriptions of the duties and responsibilities of the CFO. This trend recognizes that regulators and members of the investment community have come to view the CFO position as a co-partner of the CEO with respect to fostering ethical conduct and decision making and making sure that the company establishes and follows appropriate practices with respect to corporate governance. In addition, of course, the CFO is expected to fulfill specific duties (e.g., controllership and treasury) and provide effective strategic and financial leadership for the company include active participating in developing and implementing the company’s strategic plan and related annual operating plans. On a day-to-day basis the CFO is expected to supervise and manage the financial, tax and accounting affairs of the company in accordance with guidelines established by the board of directors. Finally, other specific duties and responsibilities of the CFO position include the following:

- Serving as an external spokesperson and liaison for the company in the communities in which the company operates, including effectively managing relations with the company’s external stakeholders, especially stakeholders in the financial and investment communities;
- Serving as the company’s governance liaison to financial rating agencies;
- Communicating in a timely fashion with the board of directors and, in particular, the audit committee of the board, regarding material financial and accounting matters relating to the company;
- With the CEO and other members of the management team, ensuring appropriate and timely disclosure of material information regarding the company;
- With the CEO, establishing and maintaining the company’s disclosure controls and procedures and internal controls over financial reporting;
- With the CEO, establishing and maintaining proper systems to identify and manage business risks in accordance with guidelines established by the board of directors.
- With the CEO, ensuring that the company has complied with all regulatory requirements for the company’s financial information, reporting, disclosure requirements and internal controls; and
- Ensuring that appropriate financial, risk management, accounting and auditing policies and procedures of the company are developed, maintained, approved and disclosed, as appropriate.

Obviously the scope of the activities listed above is quite broad and the demands on the CFO are well documented along with empirical information on how quickly a holder of that position can become overwhelmed to the point where CFO turnover has become quite high. It is highly recommended that the CFO take steps to organize his or her activities and identify and focus on those reporting relationships that are the most important for the finance function to be effective. In addition, the CFO should strive to expand his or her sphere of influence by regularly initiating communications with key business leaders throughout the company. These communications should be used as opportunities to get to know the concerns of other leaders and educate and remind those leaders about the role that the finance function can play in assisting them in developing and achieving their strategic targets.

§8 Finance function responsibilities and activities

The appropriate decisions regarding the management and organization of the finance function depend in large part upon the scope of the responsibilities and activities that have been placed under the control of the CFO. Commonly designated activity areas within the finance function include controllership, financial reporting, investor relations, financial planning and analysis ("FP&A"), treasury, tax, internal controls and audit, governance and compliance, risk management and corporate development ("M&A"); however, companies often opt to place some of these activities outside of the finance function into other spots in the overall organizational structure and rely on lateral processes to ensure that the finance team has sufficient input into the conduct of those activities. In addition, some companies, generally those in their earlier stages without resources to invest in a large management group, will place major functional activities such as information technology, human resources and/or law and compliance under the supervision of the CFO. As noted above, the CFO is also expected to play a role in the development and implementation of a financing strategy for the company. Finally, larger companies have invested in a "finance center of excellence" in an effort to improve the skills of finance personnel through training and tap the creativity of members of the finance team to design and implement internal procedures that enhance the effectiveness and quality of the processing of transactions and the generation and dissemination of financial reports.

§9 Sources of capital

Today even the smallest business can choose from among a wide array of potential sources of capital. In most cases, however, the selection is dictated by the stage of development of the company and the anticipated growth potential of the business in the future. Among the possible sources to consider are the bootstrap financing, government financing programs, commercial banks and finance companies, new business incubators and so-called "venture catalysts", private placement transactions, public offerings and strategic business partners. These traditional sources of funding will usually be supplemented by a number of alternative financing strategies designed to manage the company's capital expenditures and increase the efficiency of its cash flows, including internal financing sources, trade credits, cash management techniques and leasing. In some cases raising capital requires that companies incur certain costs associated with engaging financial intermediaries, such as investment bankers; however, it is now possible to reduce or eliminate these costs by conducting private placements and public offerings over the Internet.

While, in theory, almost all of the various financing alternatives discussed above are available to all businesses, regardless of size, as a practical matter the choices that make the most sense for a business will depend upon where the company is in its business lifecycle. A start-up company with no operating history can raise funds in the public market if the promoters have the funds to finance preparation of the disclosure documents and investors can be convinced that the proposed business model is viable. However, it is more likely that the company will look to the private placement market for capital to begin operations. In turn, a large public company can raise capital from a small group of private investors. But, it is more likely that a company of this size will look either to existing banking relationships or sell additional securities in the public market using streamlined registration procedures that rely on preexisting public information regarding the business and allow companies to raise capital quickly and efficiently. While the business lifecycle for a particular company will depend on a variety of factors, including the manner in which the business was born (e.g., developed from the ground up or acquired from another company) and the industry and markets in which the business competes, it is useful to compare financing strategies that might exist at the following stages: conceptual, organizational and ramp-up, expansion and mature.

All of the potential sources of financing are not necessarily available to all companies at a particular time or suited to a specific financing requirement. In general, however, a company will have several different options to choose from and should consider a variety of different selection factors including the degree of economic and management participation will be granted to the funding party, the costs associated with choosing a particular financing method, the duration of the financing vehicle and the degree of risk associated with the company's inability to meet the expectations of the funding party with respect to repayment and/or return on investment.

§10 Finance-related projects for new associates

As a new associate, you may be exposed to the finance function and finance-related activities in a variety of ways. For example, you may be involved with is the preparation of the company's business plan and the use of the information in the plan to prepare the presentations and disclosure documents used in connection with capital raising activities. Your role in this area would include advising the company about how to integrate the company's ongoing business planning processes with the fulfillment of any of its disclosure requirements under the securities laws. When presented to capital providers, the plan must describe the material risks and uncertainties associated with the business that may cause an investor or lender to be disappointed. Since the information in the business plan is often communicated to investors or lenders orally through formal presentations, you should also be prepared to advise the company about the content of any materials distributed at the presentations and the statements that are made to investors at such presentations.

You may also be asked to advise the company on the content of engagement letters with financial advisors that the company may select to assist in locating investors and bringing the financing to a successful conclusion. These financial advisors can provide assistance with respect to development capital, start up financing, acquisition finance, securing short-term funds for working capital, and finance for troubled companies. In many cases, the same firms can also be tapped for mergers and acquisitions and divestiture or liquidation of business assets. As a general rule, financial advisors will ask for a reasonable retainer fee to fund the work that is required during the capital-raising process, including the preparation of the company's business plan and arranging meetings with prospective investors. The advisor will also be entitled to a larger fee upon completion of the transaction, typically based on the amount of monies raised.

Another "rite of passage" for new associates is participating in "due diligence". Due diligence in the context of a financing transaction refers to the general process of investor review of the company's technical assets, financial condition and business prospects. The scope of the investigation will depend on the particular situation; however, it will generally be quite comprehensive and include questionnaires, reviews of major contracts and policies and interviews with executives, senior managers and other key personnel.

Finally, new associates interested in a business-related practice will eventually become quite adept at preparation of the documentation required for completion of a financing transaction. As noted below, the documentation for various types of financing transactions are actually very similar and typically include an agreement that sets out the essential economic terms of the financing; representations and warranties from the company and, in certain instances, the founders, covering the legal, technical, business and financial condition of the company; and covenants and restrictions relating to the use of funds and the conduct of the company's business (including the use of the company's assets, which may be pledged as security for the capital provider) following the closing.

§11 General capital raising activities

While the substance of negotiations with capital providers varies depending on the type of financing, there are certain generic activities that must be completed in every fund-raising situation. Management should develop what is, in effect, a capital-raising marketing plan designed to enhance the visibility of the business and its products and services and build the company's image around its perceived strategic advantages. For example, through advertising and other types of promotion, the company should develop name recognition amongst editors in the business press, industry analysts, brokers and various specialty publications. Management may also retain a professional financial public relations firm, attend trade shows, technical conferences and trade association meetings and develop a network for press releases and other pertinent information about the company. However, any marketing campaign should be designed in consultation with counsel to make sure that the activities do not violate applicable securities laws, and managers should not allow its enthusiasm to lead to claims or guarantees that are untrue.

§12 --Disclosure documents

Without exception, the company should always plan on preparing a business plan or offering circular for prospective funding sources that describes the business and the investment opportunity, as well as the proposed terms of the investment. Preparation of the business plan is an important exercise in and of itself since it forces the management team to describe the business and its strategic plans and develop a budget that can be used to compute the financing needs of the business. In addition, a disclosure document is a good opportunity to highlight all the material risks and uncertainties associated with the business that may cause an investor to be disappointed.

§13 --Financial advisors

Obviously, one of the biggest issues for any business, regardless of its size and stage of development, is locating potential funding sources and companies often engage a financial advisor to assist in locating investors and bringing the financing to a successful conclusion. These financial advisors can provide assistance with respect to development capital, start up financing, acquisition finance, securing short-term funds for working capital, and finance for troubled companies. In many cases, the same firms can also be tapped for mergers and acquisitions and divestiture or liquidation of business assets.

As a general rule, financial advisors will ask for a reasonable retainer fee to fund the work that is required during the capital-raising process, including the preparation of the company's business plan and arranging meetings with prospective investors. The advisor will also be entitled to a larger fee upon completion of the transaction, typically based on the amount of monies raised. In some cases, the "completion fee" may be reduced by the amount of any retainer paid prior to the closing of the transaction. Historically, financial advisors also bargained for equity compensation; however, this practice is somewhat out of fashion given the recent economic downturn and resulting inability of the advisors to obtain liquidity for their equity stakes in client companies.

§14 --Presentations to prospective investors

A major hurdle for management in the fund-raising process is the oral presentation to investors about the business and the investment opportunity. The presentation may be informal, as when the principals get together over a meal to discuss the business plan, or may include one or more formal presentations to a group of persons responsible for financing decisions at the investing body. Management should not forget that the manner in which the information regarding the company is presented to prospective investors is, in large part, a measure of the abilities of the managers themselves. The presentation should reflect a clear understanding of the business, including its strengths and weaknesses, a realistic appraisal of the company's potential, and a clear understanding of how the day-to-day operations are reflected in the historical financial performance of the company. In preparing for these presentations, management should be willing to seek specialized assistance from professionals (e.g. attorneys, accountants or investment bankers) and other people experienced in the area of finance. While much of the information in the presentation will be the same for each investor, management should always make an effort to understand the specific objectives of the particular investor and focus on those aspects of the business that might be of particular interest to that investor. Before making the presentation, management should carefully evaluate the investor's past and current portfolio of investments and should make an effort to speak with managers at other companies who may have worked with the investor. This should provide some insight into the types of questions that will be asked during the presentation meeting.

§15 --Due diligence

Due diligence refers to the general process of investor review of the company's technical assets, financial condition and business prospects. The scope of the investigation will depend on the particular situation; however, it will generally be quite comprehensive and include questionnaires, reviews of major contracts and policies and interviews with executives, senior managers and other key personnel. Due diligence in the US is often conducted by the partner within the funding source (e.g., a venture capital firm) with responsibility for the investment, often with the help of in-house analysts and outside counsel; however, due diligence in other countries such as the United Kingdom relies more heavily on external consultants. For example, outside experts may be brought in to appraise the company's technology and provide independent verification of the size and demands of the market described in the company's business plan. Investors may also rely heavily on the work of the company's independent accountants and may commission other written reports on issues such as the company's title to operating facilities and intellectual property rights, compliance with environmental laws and the status of active litigation or material threatened claims. Investors will also commission reference checks with suppliers, customers, bankers and previous employers of members of the management team. Interviews will often be conducted with existing bankers and other financial sources. While the due diligence process can be time-consuming, and often seems intrusive, it is a sign that the prospective investor is seriously interested in making a proposal to provide funding to the company.

§16 --Offer letters

It is customary for the results of preliminary negotiations with outside investors to be documented in the form of an offer letter, sometimes referred to as "Memorandum of Understanding," "Agreement in Principle," or "term sheet." While the offer letter is typically not binding on the investor, it does demonstrate a serious commitment to working with the company and, hopefully, reaching a consensus on the terms of the proposed funding and direction of the company's business plan after the deal is done. In addition to establishing the parameters of the proposed transaction, the use of an offer letter can serve as a mechanism for educating management about the expectations and requirements of the investors. Also, the offer letter facilitates getting a number of potentially sensitive issues "out on the table" before a good deal of time and effort has been expended by the parties. For example, the offer letter generally outlines any vesting restrictions the investors may wish to impose on shares held by the founders, as well as the composition of the board of directors after the financing has been completed. In addition, the offer letter will establish anticipated investor preferences with respect to dividends and liquidations. When funding is being obtained from a commercial lender, such as a bank, the comparable document is generally referred to as a “commitment letter,” although it will be worded in such a way as to avoid any binding obligation on the lender to close the financing until all of the specified conditions have been satisfied.

§17 --Investment documentation

Once the offer letter has been negotiated and approved, counsel for both parties will turn to the preparation of the documentation required for completion of the transaction. The central legal document in any investment financing transaction is the investment agreement, often referred to as the "stock purchase agreement" in the case of an equity investment and a "note purchase agreement" in the case of a debt investment. Not only does the investment agreement serve as the detailed record of the substantive understanding between the company and the investors, it also provides a means for the company to disclose all of the historical, business and financial information that may be relevant to the transaction. In addition, depending on the circumstances, the agreement serves as the vehicle for collecting the ongoing covenants that will continue to have effect after the financing is completed.

The investment agreement will always contain detailed and extensive representations and warranties on behalf of the company, including various exhibits and schedules of information. Although failure of the company to adhere to any representation may well create liability to the investors, the primary purpose of requiring representations is to compel disclosure of all of the material information necessary in order for the investors to be fully informed about the company's business and financial affairs. In fact, by the time that the company has prepared the representations and warranties and related schedules, the investors should have received the information during the due diligence investigation. The schedules provide an opportunity to supplement the representations and warranties included in the investment agreement, including creating a record of any exceptions to the language that is included in the main body of the agreement. For example, while the investment agreement may include a representation by the company that it is not a party to any litigation the schedules may modify that representation and disclose relevant information to the investors by explaining that “the company is not a party to any litigation except for . . . “ and then describing the litigation and the impact it is expected to have on the company’s business and financial condition. The schedules should be delivered to the investors for review prior to the proposed closing and any surprises in the schedules generally trigger a right for the investor to call off the transaction.

The content of the representations and warranties has become somewhat standardized, although variations will occur depending on the stage of the company's development. For example, in the case of a start-up company, the representations usually focus upon the right of the founders to invent, produce and distribute each of the products described in the company's business plan. On the other hand, public companies will generally base their representations on the accuracy of disclosures previously made in documents that are otherwise available to the public. In some cases, one or more of the company's founders will provide their own representations and warranties in the agreement. In those cases where the company is quite small and the affairs are clearly managed by the founders, they may be asked to warrant that the representations made by the company are true and correct. In addition, a founder may be required to represent that he is free to perform the anticipated services for the company, without any conflict with any agreement that might have been entered into with a former employer. Similarly, a founder may represent that he has assigned to the company all of his rights in any technology or business ideas described in the company's business plan. Warranties and indemnities from founders and other key shareholders create personal liability for such persons; however, the amount of liability may be limited by agreement with the investor. Note also that the disclosure letter provides an opportunity for the directors and shareholders to limit and control their potential liability for breaches of the warranties.

As part of the financing transaction, the company, as well as the founders and other major pre-existing shareholders, may agree to be bound by various covenants and restrictions. For example, it is common to include provisions that cover the right of investors to receive, on a regular basis, detailed business and financial information regarding the company; the right of investors to participate in future financing transactions, as well as the right to purchase securities that may be offered for sale by the founders and other major shareholders; restrictions on the ability of management to take certain actions without the consent of the investors, including expenditures in excess of specified amounts; procedures for electing members of the board of directors; and restrictions on the amount of shares allocated for employee incentive arrangements, as well as rules regarding the terms upon which such shares may be issued to employees (e.g. “vesting”). As appropriate, the covenants and restrictions may be set out in the investment agreement, the articles or certificate of incorporation, or in one or more separate shareholders’ agreements executed and delivered at the time the investment agreement is consummated.

The documentation for other types of financing transactions is actually very similar to an investment transaction although the names of the documents may differ and other documents may be needed due to the type of investment and the specific institutional requirements of the funding party. For example, a credit facility provided by a commercial lender will be documented using a credit agreement that includes representations and warranties, as well as covenants, similar to those found in an investment agreement and the lender will also require a promissory note that describes the terms of the loan and security agreements that describe the rights of the lender with respect to any assets of the company pledged as collateral for repayment of the loan.

§18 --Closing documents and procedures

The consummation of the purchase and sale of the securities will occur at a closing provided for in the investment agreement. Many investments will "close" simultaneously with the execution and delivery of the investment agreement. Accordingly, there is no technical need for a set of conditions designed to cover the time period between execution of the agreement and a subsequent closing. Nevertheless, it is usually the case that the agreement will contain various "conditions precedent to closing" for both the investors and the company. The conditions serve as a valuable checklist for insuring that all material business and legal conditions have been satisfied (e.g. completion of a loan agreement satisfactory to the investors), that all ancillary agreements have been executed, and that all required legal opinions and certificates are delivered.

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