

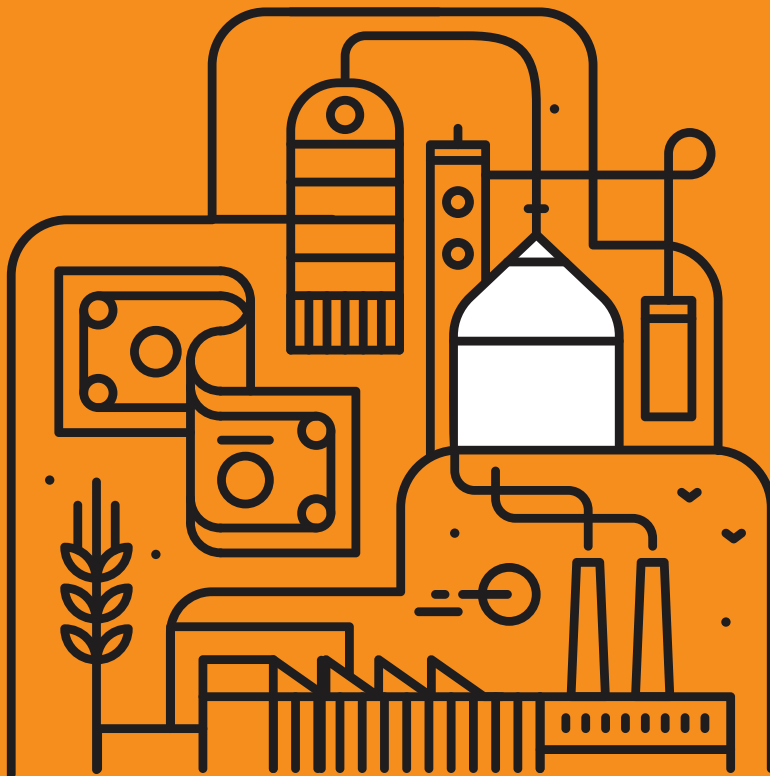
Moye|White

Equity Investment (or sale)  
Initial Legal ✓ Checklist for

# *Brewers & Distillers*

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A guide for brewers and distillers considering investment opportunities, covering matters up to, but not including, letters of intent and definitive agreements



CONSIDERATIONS	ITEMS
<i>Assemble your team</i>	
<ul style="list-style-type: none"> <li><input type="checkbox"/> Assess gaps in current advisors</li> <li><input type="checkbox"/> <b>Assess capabilities of existing advisors</b></li> <li><input type="checkbox"/> Confirm internal team</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Investment banker; Business broker</li> <li><input type="checkbox"/> Accountant</li> <li><input type="checkbox"/> Tax professional</li> <li><input type="checkbox"/> Valuation expert</li> <li><input type="checkbox"/> Lawyer</li> <li><input type="checkbox"/> Other: PR</li> </ul>

<i>Set goals and identify challenges</i>	
<ul style="list-style-type: none"> <li><input type="checkbox"/> Identify the minimum investment goal</li> <li><input type="checkbox"/> Identify any strategic or commercial goals (in addition to economic return) the investor may have in making the investment</li> <li><input type="checkbox"/> <b>Consider capacity for new partners</b></li> <li><input type="checkbox"/> Evaluate parties' relationships:               <ul style="list-style-type: none"> <li>● Identify stress points</li> <li>● Identify tensions or disagreements among the founders or prior investors in the cap table</li> <li>● Any disputes or other entanglements with the founders' prior employers</li> </ul> </li> <li><input type="checkbox"/> <b>Be honest about the sophistication and level of organization of management team</b></li> <li><input type="checkbox"/> Consider negotiating leverage</li> <li><input type="checkbox"/> <b>Consider resources available for deal</b></li> <li><input type="checkbox"/> Consider alternatives to investment (e.g. debt, sale, coops and collective forms of ownership; crowdfunding)</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Meet with constituents:               <ul style="list-style-type: none"> <li>● Principals</li> <li>● Founders</li> <li>● Employees</li> <li>● Valued partners</li> <li>● Family</li> </ul> </li> <li><input type="checkbox"/> Meet with internal team</li> <li><input type="checkbox"/> Assess stage of development of the business and business plan</li> </ul>

<i>Tax planning</i>	
<ul style="list-style-type: none"> <li><input type="checkbox"/> Identify any tax or accounting issues or sensitivities related to structuring the investment to obtain the investor's desired tax and accounting treatment</li> <li><input type="checkbox"/> Confirm brewery's/distillery's existing tax compliance system, including record-keeping, bonds (if applicable), and payment schedules</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Company and principal's tax returns (State and Federal)</li> <li><input type="checkbox"/> Tax sensitive items, elections and matters:               <ul style="list-style-type: none"> <li>● S-Corp election</li> <li>● Capital assets</li> </ul> </li> <li><input type="checkbox"/> Tax housekeeping               <ul style="list-style-type: none"> <li>● Summary of Federal, State, local and foreign income tax status, (i.e., Have all returns been filed? All taxes been paid? Any audits by taxing authorities?)</li> <li>● Federal excise tax compliance</li> <li>● Colorado excise tax compliance</li> </ul> </li> </ul>

CONSIDERATIONS	ITEMS
<p><i>Company housekeeping</i></p>	
<ul style="list-style-type: none"> <li><input type="checkbox"/> Confirm company's existence and good standing</li> <li><input type="checkbox"/> Confirm/review compliance with permits and licenses</li> <li><input type="checkbox"/> Confirm/review company and owner obligations with respect to equity</li> <li><input type="checkbox"/> Confirm compliance with leases, material contracts, distribution agreements</li> <li><input type="checkbox"/> Consider ratification of company action</li> <li><input type="checkbox"/> Ask advisors to <b>review complexity of the capital structure</b> and whether any prior investment documents, such as with friends and family or angel investors, are appropriately documented and/or standardized</li> <li><input type="checkbox"/> Confirm company records setting forth all issuances or grants of stock, options and warrants by the Company, listing the names of the issues or grantees, the amounts issued or granted, the dates of the issuances or grants, the number of shares presently exercisable (if applicable) and the consideration received (or to be received) by the Company in each case</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Articles of Incorporation (Corp.) (w/ amendments)</li> <li><input type="checkbox"/> Articles of Organization (LLC) (w/ amendments)</li> <li><input type="checkbox"/> Bylaws (Corp.)</li> <li><input type="checkbox"/> Operating Agreement (LLC)</li> <li><input type="checkbox"/> Stock Certificates; Stock Books (Corp.)</li> <li><input type="checkbox"/> Warrants, options, debentures and any other outstanding securities.</li> <li><input type="checkbox"/> Shareholder's Agreement(s), voting trusts, etc. (Corp.)</li> <li><input type="checkbox"/> Capitalization table and lists of all current shareholders, including addresses and numbers of shares owned.</li> <li><input type="checkbox"/> Resolutions; Minute Book (minutes of all meetings, copies of written notices, waivers of notice)</li> <li><input type="checkbox"/> Consents to action without a meeting</li> <li><input type="checkbox"/> Certificates of Good Standing</li> <li><input type="checkbox"/> Agreements relating to:               <ul style="list-style-type: none"> <li>● Registration rights</li> <li>● Preemptive rights</li> <li>● Convertible debt agreements</li> <li>● Stock purchase agreements</li> <li>● Stock options, phantom equity and similar plans</li> </ul> </li> <li><input type="checkbox"/> Employment agreements (including NDAs and invention assignment agreements)</li> </ul>

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<p><i>Collect documentation</i></p>	
<ul style="list-style-type: none"> <li><input type="checkbox"/> Identify relevant documentation</li> <li><input type="checkbox"/> Identify any gaps or defects in documentation</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Leases (real and personal property) or documents of title</li> <li><input type="checkbox"/> Loan agreements, bank lines of credit, renewal letters, notices, waivers, correspondences, etc. and related guaranties and other security agreements</li> <li><input type="checkbox"/> Bank statements</li> <li><input type="checkbox"/> Tax returns</li> <li><input type="checkbox"/> Permits and licenses</li> <li><input type="checkbox"/> Distribution agreements</li> <li><input type="checkbox"/> Material contracts</li> <li><input type="checkbox"/> Intellectual property</li> <li><input type="checkbox"/> Trademark registrations</li> <li><input type="checkbox"/> ERISA plan documentation (and ERISA non-compliance)</li> <li><input type="checkbox"/> Broker's agreements</li> <li><input type="checkbox"/> Employee agreements/key employees</li> <li><input type="checkbox"/> Employee NDAs/invention assignment agreements</li> </ul>

CONSIDERATIONS	ITEMS
<p><i>Collect documentation (cont'd)</i></p>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Bonus plans, retirement plans, pension plans, deferred compensation plans, profit sharing and management incentive agreements</li> <li><input type="checkbox"/> Equipment purchase, maintenance and repair agreements; warranties</li> <li><input type="checkbox"/> Applications for labeling approvals</li> <li><input type="checkbox"/> All press releases</li> <li><input type="checkbox"/> UCC searches</li> </ul>
<p><i>Identify additional, relevant information</i></p>	
<ul style="list-style-type: none"> <li><input type="checkbox"/> <b>Develop a narrative</b></li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> List of Distribution Agreements with summaries of key terms and territories</li> <li><input type="checkbox"/> Lists of states in which breweries, distilleries, tap room(s)/tasting room(s) and other operations are located</li> <li><input type="checkbox"/> Lists of personal property</li> <li><input type="checkbox"/> List of consents required</li> <li><input type="checkbox"/> List of all foreign and domestic patents and patent licenses</li> <li><input type="checkbox"/> List of any trademarks, trade names or service marks</li> <li><input type="checkbox"/> List of any copyrights</li> <li><input type="checkbox"/> Encumbrances</li> <li><input type="checkbox"/> List of legal proceedings and litigation, including TTB proceedings, state enforcement matters</li> <li><input type="checkbox"/> Legal Non-Compliance</li> <li><input type="checkbox"/> Environmental Matters</li> <li><input type="checkbox"/> Tax Matters</li> <li><input type="checkbox"/> Summary of all OSHA inquiries (if any)</li> <li><input type="checkbox"/> Summary of all EPA, EEO (etc.) inquiries (if any)</li> <li><input type="checkbox"/> Summary of all Department of Labor inquiries</li> <li><input type="checkbox"/> Schedule of hazardous materials stored, manufactured or located at any facility</li> <li><input type="checkbox"/> Schedule of chemicals, toxic substances or air contaminants which are regulated by OSHA present in any facility</li> </ul>

CONSIDERATIONS

*Securities law compliance*

- Every sale of a security must either be registered with the SEC and the applicable state securities regulators or be exempt from registration
- Confirm eligibility for exemption
- Registration is a **lengthy and expensive process** with extensive mandated disclosures and review by regulators = Return to “Set Goals and Identify Challenges”
- Crowdfunding?**

ITEMS

*Exemptions:*

- SEC Rule 506(b); most widely used exemption. No limit on the dollar amount that can be raised and allows for unlimited sales of securities to “**accredited investors**”; allows sales to a maximum of 35 non-accredited investors SEC Rule 506(c) allows limited general solicitation and advertising; requires all (100%) of investors to be accredited, and must verify accredited investor status
- States may further limit the number of non-accredited investors (excluding the value of their primary residence)
- Accredited investors = individuals with annual incomes greater than \$200,000 (or \$300,000 combined with a spouse) in past two years; or individuals with a joint net worth with their spouse that exceeds \$1 million
- Other exemptions include Rule 504, Rule 505 and Regulation A: limitations on offering size and/or require state registration
- Colorado (and other state Blue Sky Laws)
- Consider merits of a private placement memorandum

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*Evaluate your prospective investor*

- Evaluate capability to invest
  - Consider “fit”**
  - Consider any existing entanglements or complications (landlords); spousal issues
  - Consider tied house matters (ownership) and funding reporting compliance matters
  - Consider whether the investor anticipates making further investments in the startup or sees it as a potential acquisition target
- Meet with investor
  - Verify accredited investor status (Verification based on income; Verification based on net worth; Verification of a letter from a CPA, attorney, or broker)

**Contact us today**

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